

Wisconsin Coalition Against Sexual Assault Legal Advocacy Manual

This booklet was made possible by the Office on Violence Against Women State Coalitions Grants Program FY 2012, GMS #2012-SW-AX-0029. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the Violence Against Women Office.

The information contained in this manual is current only up to its date of publication. To verify the accuracy of the information, please call WCASA at (608) 257-1516.

TABLE OF CONTENTS

Acknowledgements

Part I. Introduction

- Chapter 1 Sexual violence and the law: a historical perspective
- Chapter 2 Introduction to the legal system

Part II. The Criminal Justice System in Wisconsin

- Chapter 3 Sexual assault laws
- Chapter 4 Medical advocacy
- Chapter 5 Reporting
- Chapter 6 Child forensic interviewing
- Chapter 7 Arresting and charging the perpetrator
- Chapter 8 Court procedures
- Chapter 9 Trial
- Chapter 10 Sentencing
- Chapter 11 Appeal in criminal matters
- Chapter 12 Juvenile justice system
- Chapter 13 Crime victims' rights
- Chapter 14 Department of Corrections

Part III. The Civil Justice System in Wisconsin

Materials Coming Soon

Part IV. Additional Legal Issues

Materials Coming Soon

Acknowledgements

This manual represents the hard work of many people. The first legal advocacy manual published by the Wisconsin Coalition Against Sexual Assault, Inc. (WCASA) was written by Tess Meuer and Machaela Hoctor with the assistance of the Social Action Committee for the Wisconsin Coalition Against Sexual Assault. It was published in December 1994. A second version of the Legal Manual was released in 2003, and was co-authored by Jennifer Senick-Celmer and Eva Shiffrin. This version of the Legal Manual is built on the foundation of the 2003 version, and would not have been possible without the hard work and dedication of the authors and countless individuals who made the manual possible.

The 2013 Legal Manual was revised and updated by Ian Henderson, Director of Legal and Systems Services at the Wisconsin Coalition Against Sexual Assault. The work of several summer legal interns was instrumental in the release of the updated manual, in particular Roxanne Rewolinski, Rachel Miller, and Camille Crary all contributed long hours writing and updating this manual. The staff at WCASA also provided ongoing support and assistance. Kathleen Brandenburg, the WCASA Office Manager, handled Legal Manual details with aplomb.

PART I

INTRODUCTION

This resource was written with community-based sexual assault advocates in mind as the primary audience. These agencies are referred to as sexual assault service providers (SASPs) by WCASA. However, this manual could also be a valuable resource to any individual or agency with an interest in improving legal responses to sexual assault in Wisconsin.

It's important to note that no portion of this manual constitutes legal advice. Only an attorney can provide legal advice. This manual contains legal information only. It is designed to give advocates general information needed in the course of providing services to victims. Advocates who wish to adopt policies and procedures in this manual should check with the relevant decision-makers in their agencies, such as the executive director or the board of directors.

The information in this manual is current only as to its date of publication. WCASA will work to keep advocates updated and send out new information as soon as possible, but this may not always occur before the law changes. Advocates should consider contacting WCASA periodically to verify the status of the law.

The book concludes with a glossary of terms. Each term in the glossary is bolded the first time it appears. A glossary of legislative terms is included in Chapter 25, "The Legislative Process."

What is legal advocacy?

Sexual assault advocacy is about assisting and supporting victims and working within a community to effect change that will benefit victims. This could involve personal and individual support such as a crisis line, support groups, and/or individual sessions. It could also include education and outreach to schools, other community professionals, the public, and more. Legal advocacy frequently involves the same types of advocacy described above, but it usually occurs where the victim must interact or interface with the criminal and/or civil legal systems. Legal advocacy can also involve working to effect change on the policy or legislative level. Legal advocacy could, therefore involve but is not limited to doing the following:

- Answer a victim's questions about how law enforcement investigates sexual assaults in a community.
- Inform a victim what may occur during a law enforcement interview.
- Work with law enforcement by providing trainings on victim-sensitive interviewing techniques.
- Help a victim prepare emotionally for testifying at trial.

- Provide a victim with information about legal issues that may arise at trial (such as the rape shield law) and about court procedures in general.
- Furnish information about statutes of limitation.
- Provide referrals to attorneys when necessary.
- Work with victim/witness specialists to improve sensitivity to victims. For example, establish waiting areas in courthouses or streamline victim notification processes.
- Answer questions about probation and parole when a victim is afraid that an offender will be released back into the victim's community.
- Work with a victim as s/he decides whether to pursue a civil suit.
- Work with probation and parole agents to establish supervision requirements specific to sexual assault.
- Provide information about the divorce and custody process to victims.
- Give information to **guardian ad litem**s in child sexual abuse cases to debunk myths that children fabricate sexual assault allegations at the encouragement of a custodial parent, often utilizing a theory called parental alienation syndrome.
- Serve on a sexual assault coordinated community response team (CCR) to highlight barriers to justice in the legal system for sexual assault victims.
- Assist a victim with a restraining order.

Individual and System advocacy

Legal advocacy can be individual in nature, institutional in nature, or both. Individual advocacy involves working with a particular victim to help her/him resolve issues specific to that victim. Courtroom or medical accompaniment would be examples of individual advocacy. Institutional advocacy involves intervening in a specific system to improve that system and thereby effect change for all sexual assault victims. Developing a policy of accompaniment for victims of sexual assault by advocates during an investigation by law enforcement would be an example of institutional advocacy.

Role of the advocate

Some advocacy tips deserve mention at the outset of the manual. These tips apply to advocacy in general. As mentioned before, the role of the advocate (in any situation) includes the following; provide information that can enable survivors to make informed choices, ensure that the interests and needs of survivors are presented and

met to the best of the ability of available agencies and resources, and be supportive throughout any processes survivors encounter, regardless of the choices they make.

General tasks and duties of the advocate

- Believe the victim and her/his account of the assault, unconditionally.
- Empathize with victims and support them, to the extent they request, without judgment.
- Act as a buffer, not a barrier, to other systems.
- Advocate for the privacy of victims and the confidentiality of communications between the advocate and the victim.
- Support all decisions made by the victim, regardless of whether the advocate agrees with the decision.
- Provide information on the various systems (medical and legal) and the services that they provide. This information is not limited to criminal justice systems but also includes civil justice systems, including family court.
- Remember that information is empowerment. Even if the advocate can't "fix" something, enabling the victim to make informed choices can be empowering and liberating.
- Use whatever language the victim uses. If the victim is not ready to call the assault rape, respect this and use her/his language.

The provision of these services helps ensure the following:

- The victim knows what to expect and is therefore minimally re-traumatized.
- Victims understand the options available so that they can exercise those options
- Victims' rights are not violated.

A legal advocate may have more information about the continuum of services available to a victim than individuals working in one specific system. The ultimate intent of legal advocacy is to empower the victim within the relevant legal system so that her/his concerns, safety, etc. are considered when decisions are made. A victim's experience within the legal system can impact her/his overall response to the sexual assault. The more empowered a victim feels within and by the criminal justice system, the more empowered s/he may feel in other aspects of her/his life.

Victim Response

Victims react to sexual assault based on a variety of factors including, but not limited to: prior victimization, support or lack of support, existing coping mechanisms, spousal/partner response, personality, and life experiences. This means that there are an infinite variety of responses that victims might exhibit. While there is no typical response, there are general categories that can characterize the response of many victims:

Expressive: This person will be feeling and expressing intense emotions. S/he may be crying or laughing uncontrollably, trembling, wringing her/his hands and rocking back and forth, or storming angrily around the room shouting or cursing.

Controlled: This person has tight control over her/his emotions and may have a calm, controlling, matter-of-fact attitude. Teenagers often adopt an attitude of “It’s no big deal” as a way of getting themselves through the crisis experience.

Combination expressive and controlled: This person will appear dazed or stunned, may be experiencing mental confusion, and will have difficulty answering questions and understanding what is happening to her/him. It is not uncommon to see a combination of reactions, such as periods of calm interrupted by crying or outbursts of anger.

It is important to remember that regardless of the coping style used, most victims are in a crisis state following a sexual assault. No matter how they may act, they are likely to be experiencing the “cognitive breakdown” typical of people in crisis, characterized by an inability to plan, make decisions, or absorb information. Increased dependency and helplessness are also common signs of a cognitive breakdown, along with an increased susceptibility to the suggestions and attitudes of others.

Crisis response

- Allow the victim to make choices about personal space. Ask her/him if s/he would like to be touched in any way (hand holding, hugging, etc.) An advocate should not assume that a victim would find a particular kind of touch comforting.
- Respect the coping styles used by the victim and allow the victim to set the tone of the conversation.
- An advocate should not try to sugar coat the situation to make the victim feel better. Phrases like “It will all be OK” or “You are safe now” may not be true and may lead to broken expectations.

- It can be helpful to explain the trauma response to the victim so s/he will understand that any response is OK and that a wide variety of emotions is normal.
- Advocates should not answer questions if they're unsure of the answers but, rather, could explain what can be done to find the correct information.

Please note

Sexual assault is an issue that impacts people from all conceivable communities. Regardless of gender, sexual orientation, socio-economic status, race, culture, nationality, age, mental health, geography, or ability level, sexual assault is prevalent and it should be of concern to everyone within every community. The Wisconsin Coalition Against Sexual Assault (WCASA) has made every effort to incorporate considerations related to these attributes into the language used in this manual, as well as to address how survivors of sexual assault are specifically impacted by the legal system based on their circumstances.

- The terms “victim” and “survivor” are often used interchangeably. Since this resource is a legal manual, the term “victim” will be used to reflect language within the legal system.
- The legal terms used to describe individuals who have or may have committed sexual assault or harassment varies, depending on the legal venue or the stage of proceedings involved. For example, before charges are issued, an accused perpetrator is called a suspect. During trial, the term defendant is used. After conviction, the term offender is used. Other terms used are sexual predator, the accused, alleged perpetrator, the custodial parent, the abuser, the respondent, and more.
- The term “elder at risk/individual at risk” may be used within this manual to describe older adults and adults with disabilities. WCASA understands that not all individuals are comfortable with this term, but it is consistent with Wisconsin statutes.
- Most victims are female, but not all. Therefore, language throughout this manual reflects male and female gender references.
- Most perpetrators are male, but not all. Again, references to sex offenders are gender-neutral.
- Not all victims are heterosexual. Therefore, the term spouse/partner is used to refer to an intimate partner.
- The term “alleged” is applied to either the victim or the perpetrator in certain places within this manual. This reflects language used by the criminal justice

system, and should not be interpreted by readers as a judgment by WCASA about the validity of sexual assault assertions.

WCASA also recognizes that it is an impossible task to comprehensively address how every individual community is impacted by sexual assault and the responses of the legal systems. WCASA is committed to working with and within every community to determine how our state can best respond to sexual assault victims.

CHAPTER 1

SEXUAL VIOLENCE AND THE LAW: A HISTORICAL PERSPECTIVE

The American legal system was initially founded with two primary goals: to maintain order and, more important, protect the property interests of the individual. Property rights, in turn, propelled the expansion of the United States as it moved westward claiming land, power, and wealth. At this time, and well into the 20th century, the legal treatment of women was governed by their inclusion in the category of property.

In this context, early conceptions of rape were largely believed to be crimes committed by males against males. While victims of rape were primarily women, the issue was one of property: one man taking another man's property. In addition, early definitions of rape and sexual violence didn't acknowledge child victims, except that males could be the victims of rape in the actual sense, or acknowledge same-sex violence.

In early legal terms, rape was defined as the "illicit carnal knowledge of a female by force and against her will." This definition explicitly excludes many victims of sexual violence. According to these terms:

1. Only women can be sexually violated.
2. It is only rape if the vagina is penetrated by the penis.
3. It is only rape if physical force is used.

A comparison of these early laws and cultural beliefs against those existing today reminds anti-sexual violence advocates how many strides have been made, many in the past 40 years. Before the 1970s, victims of sexual violence expecting justice through the legal system found themselves in the traumatic position of having to prove their innocence by producing the following:

- corroborating physical evidence of the sexual assault
- evidence that they resisted their attackers with counter-force
- evidence that they were sexually "innocent," with little history of consenting to sex.

In the 1960s, the anti-sexual violence movement grew out of (and benefited from) the broader struggle for the equality of all Americans. And while many would agree that the women's movement is the parent of anti-rape work, the struggle to ensure safety and justice for all victims of sexual violence has meant acknowledging that rape is not only a women's issue.

Early work in the movement largely concentrated on helping survivors of sexual violence. Rape crisis centers sprang up around the country, staffed primarily by volunteers who were themselves survivors. As they became more organized, these volunteers began to reform the legal system and to advocate for the rights of victims in criminal proceedings.

In 1968, Massachusetts became the first state to remove the requirement that forced women to provide physical evidence of their rape for conviction. In 1978, the United States Congress enacted “rape shield” protections, which restrict the situations in which a defendant is allowed to bring the victim’s sexual history to the jury’s attention. In 1984, the Victims of Crime Act authorized federal grants to assist and compensate crime victims. With each of these achievements, the legal system was acknowledging the victim’s innocence and the system’s responsibility to prove the crime, rather than putting that burden on the victim.

Attempts to move society closer to recognizing the pervasiveness of sexual violence and the range of victims in terms of gender, age, ability, sexual orientation, and socioeconomic status were harder to come by. Not until 1993 did Congress pass a law making marital rape a crime in all 50 states. In Wisconsin, laws allowing for special prosecution of child sexual abuse were enacted in 1987. The current Wisconsin sexual violence statutes that allow that any gender could be the victim or perpetrator of rape were enacted in 1975.

The relationship between the law and the greater culture is complex and undeniable. Often, changing cultural beliefs lead to legislative change. Other times, legislative action leads to changing cultural beliefs. Regardless, the intersection of legal and cultural beliefs becomes obvious when juries are brought into the courtroom. Although advocates working within the system may feel helpless against the seemingly constant negative and harmful stereotypes that surround sexual assault, change has occurred. More sexual assault prosecutions have been brought in the last 20 years than in the prior 200.

CHAPTER 2

INTRODUCTION TO THE LEGAL SYSTEM

The legal system provides citizens with a place to resolve disputes and fairly determine guilt or innocence for those accused of crimes. Courts provide a forum for determining whether parties have complied with federal, state, or local regulations and rules. Courts may also resolve legal disputes regarding the interpretation of statutes and regulations. Courts can be federal, state, or municipal. Some courts hear trials and conduct hearings, while others are reserved for appeals.

State, federal, and tribal courts

The court system is divided into tribal, state and federal courts. Each is subdivided into trial level courts, intermediate appellate courts, and courts of last resort or Supreme Courts.

Federal courts oversee violations of federal laws, including violations of the United States Constitution, federal criminal laws, and federal government regulations. State courts oversee violations of the state constitution, state criminal laws, and state regulations. Most crimes against the person, including sexual assault, are punishable by state criminal law and not federal criminal law. An exception is when the crime is committed across state lines. Tribes also establish court systems. The place the crime or act occurs often determines which laws apply: federal, tribal, or state.

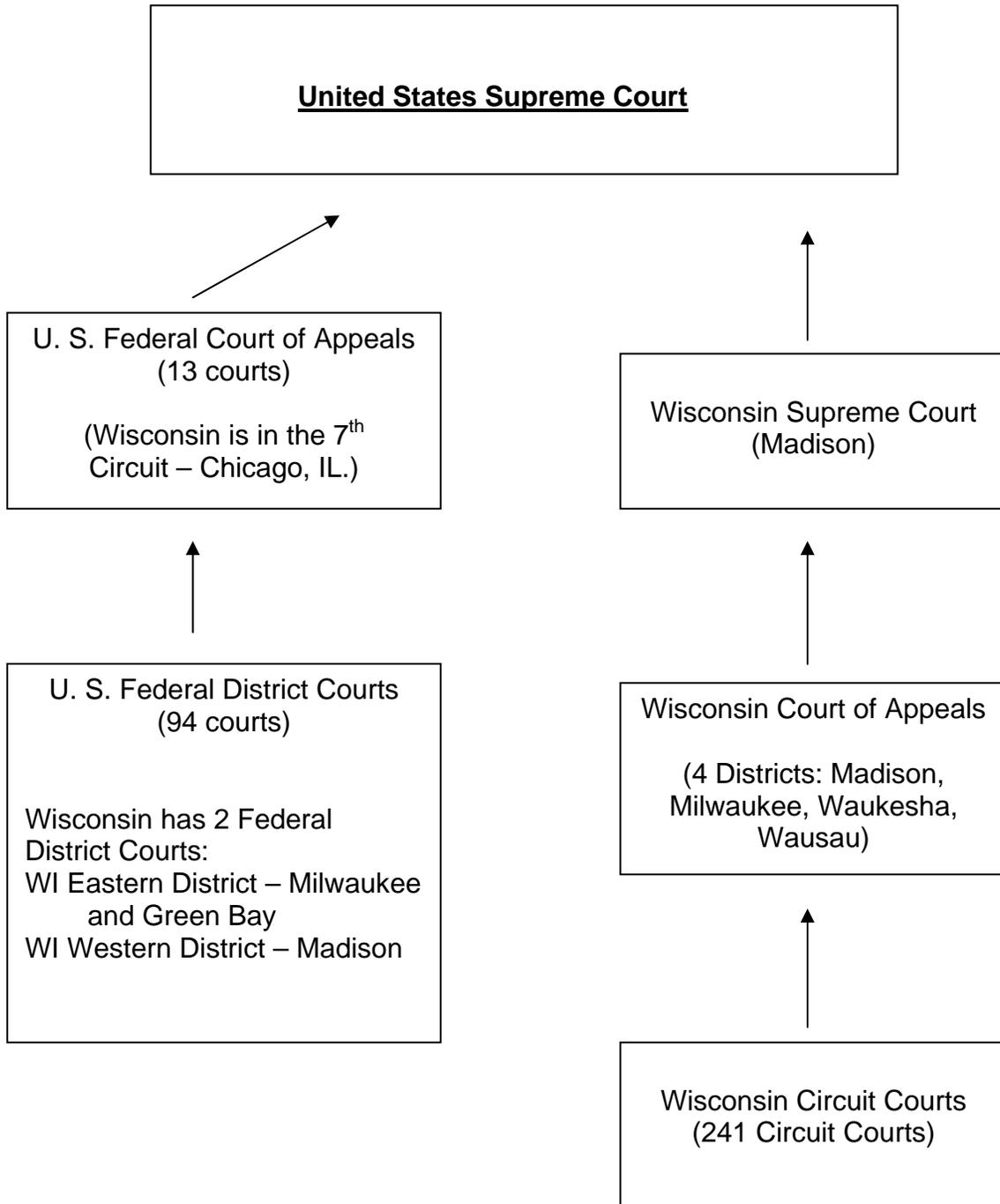
As a general rule, federal courts may hear cases involving federal law, state courts can only hear cases that involve state law, and tribal courts can only hear cases that involve tribal law. A whole subset of law determines which court hears a case involving both federal and state issues. The term **jurisdiction** describes those cases a court has the authority to hear.

Federal courts

The federal court system is divided into 94 districts. Wisconsin has two trial or district courts: the eastern located in Milwaukee and the western located in Madison. Appeals from judgments of the district courts are made to the federal appellate level court, the United States Court of Appeals. There are 12 regional Courts of Appeal. Wisconsin is a part of the 7th Circuit, headquartered in Chicago, Illinois. The court of last resort in the federal system is the United States Supreme Court, located in Washington, D.C.

Wisconsin's courts: trial & appellate

Wisconsin's courts are also divided into trial courts, intermediate appellate courts, and the Wisconsin Supreme Court. See diagram on page 2.



Trial courts

Wisconsin trial courts have “original jurisdiction” for all state criminal and civil matters. This means that a case generally must be brought to a trial court before an appellate court may hear the matter. Trial courts are located in each county, with the exception that six (6) smaller counties in Wisconsin share a trial judge with another county. Large counties may have multiple trial level judges. For more detailed information, please see the website <http://www.courts.state.wi.us/circuit/>.

The trial court hears the case and issues a ruling. If the losing party believes that the trial court’s final ruling was reached in error, that party may appeal to the Court of Appeals. Every losing party is entitled to an appeal, called an “appeal by right.” Victims in criminal cases may not appeal, as they are not parties to the case.

Court of appeals

The Wisconsin Court of Appeals is divided into four (4) districts with sixteen (16) judges. The Court of Appeals reviews decisions of the trial court and issues written decisions. The role of an appellate court is limited. It does not re-try the case nor does it independently review the evidence in the case. It merely checks to make sure that the trial court’s rulings have a reasonable basis in fact, and reviews trial court’s application of the law to the facts of the case for propriety.

If the Court of Appeals feels that a new or important decision was reached, it will publish its decision in a legal periodical. Published decisions are binding on all lower courts and become legal precedent. A published court decision is also known as an “opinion,” and published precedent is often referred to as **case law**. After the Court of Appeals decides the case, an unsatisfied party may ask the Supreme Court to consider the case.

The Supreme Court

The Supreme Court of Wisconsin sits in Madison, Wisconsin. It consists of seven justices. The Supreme Court is not required to hear all cases appealed from the Court of Appeals. Rather, it makes decisions on a case-by-case basis. Vacancies on the Supreme Court are filled by the governor. The spring following the appointment, the Justice must run for the position in the spring election.

When the Supreme Court takes a case, it asks the parties to submit written arguments, called “briefs” and then hears an oral argument at which each party speaks. The Supreme Court then issues written decisions or opinions, which are published in legal periodicals and become binding case law. Supreme Court oral arguments are open to the public. Oral arguments may be heard on the internet and are available at the link below:

<http://www.wicourts.gov/opinions/soralarguments.htm>

Wisconsin tribal courts

Each tribe establishes its own rules and regulations that govern the operation of its court system. Please see appendix for information regarding tribal courts in Wisconsin. Also, please see the Chapter on Tribal Law.

Sources of law

The courts described above interpret sources of law. The following list gives a brief description of state law, federal law, constitutions, statutes, administrative rules and regulations, case law, local rules, and attorney general opinions, along with a gauge of the weight of each source's authority.

State versus Federal Laws: In general, federal law is supreme to state law. This means that a state may not deprive a citizen of a right, privilege, or status granted by the federal government. States may, however, grant rights in addition to those granted by the federal government. Further, any area not specifically regulated by the federal government is left to regulation by the states.

The Constitution: The United States Constitution is the primary law of the land. It sets forth the basic parameters for its government and grants citizens numerous rights. No state constitution or law may deprive a citizen of these rights. No federal or state law may be written that contradicts the rights granted in the Constitution. Wisconsin has a state Constitution establishing its governmental structure and the basic rights of its citizens. The Wisconsin Constitution is the law of the land for Wisconsin and may not be abridged by any state law. Finally, many tribes also have tribal constitutions.

Statutes: The first place most people look for law is the statutes. Statutes are what most people think of as laws. The legislature writes laws. Both the federal and state governments have a law-making branch. Both the United States and Wisconsin has two bodies to its legislature. The federal legislature includes both the Senate and the House of Representatives. In Wisconsin, the legislature includes the Senate and the Assembly. The legislature writes laws and publishes them. All citizens and entities in Wisconsin are bound by these statutes. A statute may not rewrite the constitution, but a statute may change or alter other types of laws, such as case law (see below). In other words, if the legislature does not like the way a court interpreted a law in a particular case, it may change that interpretation by writing a new law.

Administrative rules and regulations: Sometimes, the Wisconsin Statutes specifically direct a governmental agency to establish rules and procedures needed to carry out a legislative directive. For example, the legislature wrote several laws protecting victims' rights and establishing a complaint system for violating these rights. Instead of writing an extensive law describing the complaint process, the legislature instead directed an agency, the Wisconsin Department of Justice, to write regulations and administer the complaint process.

Case law: Sometimes the law is not clear. Either the words of the law itself are ambiguous or undefined, or the application of the law to a particular fact pattern is unclear. In these cases, it is up to the courts to interpret the law, resolve any ambiguity, and determine whether a law applies to a particular set of facts. When an appellate court or the Supreme Court publishes an opinion in a legal periodical, this becomes the law and must be followed unless the legislature or a higher court overturns the decision. Reading this law can be complicated by the fact that only the “holding” of the case is binding. Any part of an opinion that is not a part of the holding is called “dicta” and, although persuasive, is not binding. Also keep in mind that cases, like laws, are specific to location. In other words, a Minnesota case will not be binding on Wisconsin courts.

Local rules: Local courts are granted the authority to establish rules of process and procedure. These rules must be followed by all parties in that court. Important rights may be lost by failing to follow these rules. For example, courts may establish procedures for the use of cameras in the courtroom, the manner in which facsimile transmissions may be sent to the court, rules governing any “pleadings” or documents submitted to the court, and many others. Failure to comply with these rules may result in the waiver of that right completely or, in some circumstances, the dismissal of a case. Many of these rules may be obtained on the Internet or from the county clerk of courts.

Attorney general opinions: The attorney general may issue opinions on questions of law posed by the legislature or the head of any department. The public may ask for guidance regarding public records law. While not binding, these opinions are considered very persuasive and may be cited to courts as authority.

CIVIL V. CRIMINAL CASES

As a general rule, in criminal cases, the government punishes individuals for violating social codes of conduct called criminal laws. In civil cases, courts provide private parties a forum in which to resolve disputes where one party has violated a duty owed to the other which resulted in some sort of harm or damage. The duty may be a legally imposed duty written in a statute or law, or may be a duty recognized by society and recognized in case law, or “judge-made law.”

CRIMINAL	CIVIL
<u>Purpose:</u> To punish defendants for committing crimes, to deter further criminal activity, to protect society, and to rehabilitate the defendant.	<u>Purpose:</u> To settle disputes between individuals and to compensate for injury or damage to that individual.
<u>Laws:</u> Criminal codes of conduct based on societal norms and expectations regarding acceptable behavior.	<u>Laws:</u> Based on duties owed by one citizen to another, the violation of which results in harm or damage. Duties may be recognized by statute, or solely by judges in case law, often called “common law.”
<u>Parties:</u> The state pursues violations of its laws through district attorneys or prosecutors. The victim is not in control of the decisions. Defendant is entitled to legal counsel.	<u>Parties:</u> The plaintiff directs the litigation. The plaintiff must hire an attorney or proceed without one (pro se). The defendant (or respondent) may also hire a lawyer.
<u>Consequences:</u> Defendant may be deprived of basic rights. Defendant may be imprisoned, supervised, or monitored. Defendant may also be required to pay fines, fees, and restitution. Defendant’s behavior may be regulated.	<u>Consequences:</u> Defendant may be required to pay money damages to the plaintiff or petitioner. Court may order defendant to desist from certain acts. Court may not deprive defendant of basic liberties.
<u>Proof:</u> The State must prove that a violation of law occurred “beyond a reasonable doubt.” This means that a reasonable juror would have not doubt that the state had proved its case. This is a much higher burden.	<u>Proof:</u> The plaintiff must prove that the violation occurred by a “preponderance of the evidence.” This means that a reasonable juror must be convinced that it is more likely than not that the violation occurred.

Remember that one act may constitute both a violation of criminal law and civil law. A person may report a crime to law enforcement and pursue a criminal action at the same time, although there may be reasons to pursue one action before the other.

Criminal cases: In criminal cases, defendants are punished for committing acts that violate state and federal criminal laws. These laws represent community norms regarding appropriate behavior. The goal of criminal law is to punish and rehabilitate the offender and preserve citizens' health and safety. The government is charged with the duty to investigate and prosecute individuals who violate these laws.

An attorney for the government, called a prosecutor, brings the criminal action against the defendant. The burden (sometimes called the burden of proof) is on the government to show that the individual committed the crime **beyond a reasonable doubt**. The punishment in these cases may deprive the defendant of certain fundamental rights including life, liberty, or property.

Because the government brings the action, the victim is not in control of the proceedings. Once the government is made aware of a crime, it is up to the government to decide how to handle the case. Increasingly, victims are afforded rights in criminal proceedings, including the right to be notified regarding proceedings, the right to a speedy trial, and other rights discussed later in this manual. The victim cannot, however, halt a criminal investigation already underway if the government wishes to continue.

Civil cases: One big difference between criminal and civil actions is that private citizens may bring actions in civil court. Civil actions address wrongs done by one person against another and often focus on violations of duties owed by one citizen to another. These duties can be codified in the statutes, and the government can authorize the use of its civil court system for the resolution of these complaints and establish procedures and parameters for bringing these claims. The goal of the lawsuit is to receive compensation for losses or to obtain a court order restricting a party from engaging in particular actions or requiring a party to engage in certain actions. The consequences are therefore primarily monetary.

Because liberties and other rights are not at stake, the evidentiary burden of proof is lower in civil than in criminal cases. The party bringing the action, called the petitioner or the plaintiff, must show that the other party, called the defendant or respondent, violated a duty owed to the petitioner. This in most cases must be proven by a **preponderance of the evidence**. A preponderance of the evidence means that it is more likely than not that the violation occurred. However, other burdens of proof may be used in civil actions depending on the type of relief being sought. Most sexual assaults constitute violations of civil law called **torts**. Unlike criminal cases, a petitioner in a civil case may withdraw a case at any time.

A sexual assault can be both a crime and a tort at the same time. A victim can pursue a civil action even if a criminal action has been started. A criminal action may be commenced even if a civil action has been started. It may be better under some circumstances to begin one action before another or to wait until one action is completed before commencing another. This depends on the circumstances of each case. Different people have different opinions on what is the best course of action in a particular case.

PART II

THE CRIMINAL JUSTICE SYSTEM IN WISCONSIN

This portion of the manual contains information about Wisconsin's criminal justice system. It will introduce the reader to Wisconsin's sexual assault laws and provide information regarding the investigation and prosecution of violations of these laws. In addition, this section contains information about the choices a victim faces after a sexual assault, such as whether to report the assault to law enforcement.

Wisconsin's sexual assault laws are primarily contained in two places: Chapter 940 of the Wisconsin Statutes, Crimes Against Life and Bodily Security, and Chapter 948, Crimes Against Children. Reading these laws and understanding them may be difficult or confusing. Few people have a comprehensive knowledge of the criminal code. Therefore, it may be hard to figure out what acts constitute what crimes. This chapter will explain how law enforcement, district attorneys, and judges analyze criminal acts and sexual assault laws. See the next page for selected excerpts from Wisconsin statutes.

Wisconsin laws are structured in the following manner:

- First, broad categories of laws are organized under chapter headings. For example, Crimes Against Life and Bodily Security are found in Chapter 940. All of the crimes described in a given chapter start with the same number. See A on the statute excerpt.
- Chapters are broken down into sections that describe a particular type of crime. For example, Sexual Assault is the title of Wisconsin Statute Section 940.225. See B on the statute excerpt.
- Next, the statute is broken down into smaller subsections that describe all of those acts that constitute a violation of that crime. They are categorized according to severity of punishment. A particular subsection can contain one act or multiple acts. Sexual Assault is broken down into First Degree Sexual Assault, Second Degree Sexual Assault, Third Degree Sexual Assault, and Fourth Degree Sexual Assault. Each section is divided into a variety of subsections. For example, Second Degree Sexual Assault describes ten (10) acts in nine (9) subsections, all of which carry the same penalty, while Fourth Degree Sexual Assault has only one subsection. See C on the statute excerpt.
- The next step in determining whether a crime occurred and/or what crime occurred is to break each criminal act into **elements**. The prosecution must establish the existence of each element of the crime beyond a reasonable doubt in order to obtain a conviction. In other words, each piece of the criminal act described must be established. The words of the statute itself must be carefully

analyzed, and sometimes it is unclear which portions of a statute constitute a single “element.” Furthermore, the definition of a word or phrase may become an element of the crime or even more than one element. Definitions are not always found in the same section or subsection as the crime. Definitions may be found at the beginning of a chapter, at the beginning of a section or subsection, or the statute itself may reference a definition found elsewhere. See D on the statute excerpt. These definitions indicate how the word should be used in the context of that statute.

The meaning of some words or phrases is not clear. Some definitions don’t adequately define a word or phrase when it is applied to a particular set of facts. In these cases, courts are left to interpret these words or phrases and decide how they apply to the facts of a case. If a Court of Appeals or Supreme Court has decided this issue previously in a published opinion, this is binding case law. Because this case law is binding, it must also be considered when determining whether a crime has occurred. A term as defined by case law therefore becomes an element of a crime. To find out how courts will break down crimes into elements, it may be helpful to look at **jury instructions**. Jury instructions are read to the jury to help them organize their thoughts when they decide whether a crime has occurred. Wisconsin has model jury instructions for most sexual assault crimes. These jury instructions, available at most law libraries, break down laws into their elements. Wisconsin’s sexual assault laws are also broken down into elements on the following pages. See the chapter excerpt for the jury instructions for second degree sexual assault by use of threat or violence Wis. Stat. sec. 940.225 (2)(a).

Criminal penalties

Each separate crime carries a particular penalty. Penalties may differ depending on the way a crime is classified. Crimes may be either **felonies** or **misdemeanors**. Felonies and misdemeanors are further subdivided. The following are the penalty ranges that may be imposed for different crimes. On February 1, 2003, phase II of Wisconsin’s new penalty classification system, called “truth in sentencing II,” went into place. This classification system established nine (9) different possible felony classifications for crimes. For more information about sentencing in general and about truth in sentencing, please see Chapter 10. Current felony classifications are as follows:

<u>Felony Class</u>	<u>Maximum penalty</u>
Class A	Life
Class B	60 years
Class C	40 years and/or a \$100,000 fine
Class D	25 years and/or a \$100,000 fine

Class E	15 years and/or a \$50,000 fine
Class F	12.5 years and/or a \$25,000 fine
Class G	10 years and/or a \$25,000 fine
Class H	6 years and/or a \$10,000 fine
Class I	3.5 years and/or a \$10,000 fine

Wis. Stat. Sec. 939.50

Criminal statute of limitations

The **statute of limitations (SOL)** is the amount of time in which the State must commence prosecution for a crime or be barred from doing so. The intent of criminal SOLs is to protect individuals from being unjustly accused and convicted of crimes.

Different crimes can carry different SOLs, and each state has its own SOLs. The SOL clock typically starts ticking when a crime occurs, and prosecution must be commenced within a specified period of time after the clock starts ticking. Wis. Stat. sec. 939.74(1).

However, the SOL can stop ticking during any time that the defendant is not a resident of this state. A prosecution commences “when a warrant or summons is issued, an indictment is found, or information has been filed.” Wis. Stat. sec. 939.74(1).

The following information on SOLs will be broken down into crimes under Wisconsin Statutes Chapter 940 (Crimes Against Life and Bodily Security which includes First, Second, Third, and Fourth Degree Sexual Assault, for example) and crimes under Wisconsin Statutes Chapter 948, Crimes Against Children. For information on *civil* SOLs, see Chapter 15 of this legal manual.

SOLs for crimes under Wisconsin Chapter 940

The SOL for a felony is different from the SOL for a misdemeanor. The SOL for misdemeanors generally is three (3) years from commission of the crime. The SOL for felonies, including felonies described in Wisconsin Statutes Chapter 940, is generally six (6) years from commission of the crime. The SOL clock stops ticking (or is tolled) for that portion of time that the perpetrator is not publicly a resident of Wisconsin. Wis. Stat. sec. 939.74(3).

SOLs for crimes under Wisconsin Chapter 948

The SOLs for child sexual abuse crimes different from the SOLs for most other crimes in the Wisconsin Statutes. This differential treatment recognizes that child victims have a difficult time recounting and reporting sexual assault and pursuing justice. The specialized SOLs give district attorneys an extended period of time within

which to commence prosecution. Over the past twenty years, the State of Wisconsin has lengthened the time in which prosecution must be commenced numerous times. In addition, several new crimes against children and their respective SOLs have been added to the statutes over time.

Specialized SOLs were first established for some crimes against children on July 1, 1989. These SOLs allowed prosecution until the victim reached the age of 21 or six years had passed since the crime, whichever occurred later. The legislature further extended the SOL to allow prosecution until victims reached the age of 26 on April 22, 1994, until victims reached the age of 31 on June 16, 1998, and until victims reached the age of 45 on May 1, 2004. However, these changes did not extend SOLs for all of these crimes each time.

Since 1989, extensions applied to all crimes for which the SOL had not expired when the new SOL went into effect. In other words, if you were a victim of a child sex crime after July 1, 1989, and the law changed to extend SOLs, that extension would apply to your situation if, on the day the extension went into effect, the SOL did not bar prosecution for the crime against you.

The application of these changes to individual factual scenarios has been inconsistent throughout the state. As a result, it is best in most cases for advocates to refer victims of past child sexual assault to the district attorney for a determination of whether the SOL has expired. Many district attorneys are finding creative ways to extend the SOLs in cases, particularly if strong evidence exists that would allow the prosecution of an old claim. Even if it seems at first blush that a claim may not be viable, an advocate should never inform a victim that his or her claim is barred by the SOL.

If a district attorney feels that the claim is barred, the victim may want to discuss the basis for this decision with the district attorney. Advocates are also encouraged to call WCASA's staff attorney and legal specialist to discuss these decisions. WCASA may know about the creative methods other district attorneys around the state have used to keep claims viable for a longer period of time.

District attorneys may also decline to prosecute a case even when it is not barred by the SOL. Lack of evidence and a long passage of time could lead a district attorney to believe that a crime could not be proven beyond a reasonable doubt.

Some victims may want to report even when it appears that the SOL has expired. It may be valuable for the law enforcement officer to take a report even if s/he believes the SOL has expired. Such reports may increase the chances of conviction in future cases if other victims later report assaults by the same perpetrator. Some victims also feel a sense of relief just from reporting an assault.

Effective May 1, 2004, the Wisconsin Legislature extended the SOL for many sex crimes against children until the victim reaches age forty-five (45) and eliminated the SOL for 1st degree sexual assault of a child and repeated acts of several offenses against a child. The following chart details the SOLs currently in place.

CURRENT STATUTE OF LIMITATIONS IN *CRIMINAL* CASES UNDER CHAPTER 940

<u>Type of Crime</u>	<u>Statute Number</u>	<u>Felony (F) / Misdemeanor (M)</u>	<u>Statute of Limitations</u>
1 st Degree Sexual Assault	s. 940.225 (1)	F	No SOL
2 nd Degree Sexual Assault	s. 940.225 (2)	F	6 years
3 rd Degree Sexual Assault	s. 940. 225 (3)	F	6 years
4 th Degree Sexual Assault	s. 940.225 (3m)	M	3 years
Sexual Exploitation by a Therapist	s. 940.22(2)	F	6 years, but "the time during which an alleged victim. . . is unable to seek the issuance of a complaint. . . due to the effects of the sexual contact or due to any threats, instructions or statements from the therapist shall not be included" in this 6 years.

THE STATUTE OF LIMITATIONS IN *CRIMINAL CHILD* SEXUAL ABUSE CASES

<u>Type of Crime</u>	<u>Statute Number</u>	<u>Felony (F) or Misdemeanor (M)</u>	<u>Statute of Limitations</u>
1 st Degree Sexual Assault of a child	s. 948.02 (1)	F	No SOL
2 nd Degree Sexual Assault of a child	s. 948.02 (2)	F	Before victim reaches age 45
Engaging in Repeated acts of Sexual Assault of the same child for 948.025(1)(a),(b).(c), or (d)	s. 948.025 (1)	F	NO SOL
Engaging in Repeated acts of Sexual Assault of the same child for 948.025(1)(b)	s. 948.025(1)	F	Before victim reaches age 45
Sexual exploitation of a child	s. 948.05	F	Before victim reaches age 45
Causing a child to view or listen to sexual activity	s. 948.055	F	6 years
Incest with a child	s. 948.06	F	Before victim reaches age 45

THE STATUTE OF LIMITATIONS IN CRIMINAL CHILD SEXUAL ABUSE CASES (cont.)

<u>Type of Crime</u>	Statute Number	Felony (F) or Misdemeanor (M)	Statute of Limitations
Child enticement --sexual contact or sexual intercourse with child --causing child to engage in prostitution --exposing sex organ to child --taking picture or making audio recording of the child engaging in sexually explicit conduct	s. 948.07 (1), (2), (3), (4)	F	Before victim reaches age 45
Use of a computer to facilitate a sex crime	s. 948.075	F	Before victim reaches age 45
Soliciting a child for prostitution	s. 948.08	F	Before victim reaches age 45
Sexual intercourse with a child age 16 or older	s. 948.09	M	3 years
Sexual assault of a student by school staff	s. 948.095	F	Before victim reaches age 45
Sexual assault of a child placed in substitute care	948.085	F	Before victim reaches age 45
Exposing genitals or pubic area (when perpetrator is an adult)	s. 948.10 (1)(a)	F	6 years
Exposing genitals or pubic area (when perpetrator is a child when exposure occurs, or has not yet reached the age of 19 and is less than four years older than the child)	s. 948.10 (1)(b)	M	3 years
Trafficking of a child	s. 948.051	F	Before victim reaches age 45

Misdemeanors

Misdemeanor crimes against children, such as sexual intercourse with a child age sixteen (16) or older (Wis. Stat. sec. 948.09) have the same SOL as other misdemeanors, which is three (3) years from the commencement of the crime.

DNA Evidence

Under Wis. Stat. sec. 939.74 (2d), the statute of limitations for certain crimes may be extended when:

- the State obtains a DNA sample within the applicable SOL
- and*
- the State, within this SOL, attempts to obtain and is unable to obtain a match or “hit” after comparing the profile to existing DNA databases.

If the State does all the above before the SOL for that crime has expired, and a DNA sample is later matched to a known person, the State may commence prosecution of that identified person for the original violation within the following timeframes:

- if the state obtains a DNA sample for 1st degree sexual assault before the SOL has expired and later obtains a match, prosecution of the identified person may be commenced *at any time* after DNA identification.
- for all other crimes specified in this chapter (sexual assault and crimes against children) and any other felony under Wis. Stat. Chs. 940 or 948, the State may commence prosecution of the identified person within 12 months of the identification *or* within the applicable SOL, whichever is latest.

CHAPTER 3

SEXUAL ASSAULT LAWS

Broadly stated, sexual assault is **sexual intercourse** or **sexual contact** with a victim without consent or with a victim incapable of giving consent.

Sexual Assault Laws frequently change. New sexual assault laws are added to the statutes. The meaning of terms in these laws can change as well. This chapter reflects the law in effect at the date this manual was updated. The date of the crime determines which law will apply. The law in effect at the date the crime occurred will apply.

Definitions

Sexual assault laws frequently use the following terms. Understanding their legal definitions is important to understanding sexual assault laws.

Consent

Most sexual assault crimes contain some element of consent. **Consent** is defined by Wisconsin Statute sec. 940.225(4) to mean “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.” Some victims are presumed incapable of giving consent. Case law clarifies that non-resistance is *not* consent. In other words, the failure to physically resist an assailant does not mean that the victim consented to the act.

Compliance
does not equal
consent.

Consent is a complicated issue. Consent may be withdrawn at any time. Consent may be given to some sexual activity but not other sexual activity. Unfortunately, these and other concepts may be misunderstood by jurors, law enforcement, and the public. Media and entertainment are also rife with examples of “no means yes.” Advocates often feel frustrated because misperceptions, rape myths, and victim-blaming can lead to a successful “consent defense” and a finding of not guilty.

A lack of consent can be established by the victim’s testimony. The defense may then attempt to show that the victim did consent. The defense can do this through the presentation of other evidence, other witnesses, by cross-examining the victim, or by the defendant’s testimony.

Sexual intercourse

Sexual intercourse includes “**vulvar penetration, cunnilingus, fellatio**, or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.” Wis. Stat.

sec. 940.225(5)(c). This means that the insertion of fingers or any object such as a bottle into the vagina is sexual intercourse.

Sexual contact

The definition of sexual contact changed on June 6, 2006. Sexual contact is currently defined as:

- Any of the following types of intentional touching, whether direct or through clothing, ...for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):
 - “Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts;”
 - “Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person”.
 - “Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.”
 - “For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.”

Wis. Stat. sec. 940.225(5)(b). See also Wis. Stat. sec. 948.01(5).

Dangerous weapon

A **dangerous weapon** is “any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrument used on the throat, neck, nose, or mouth...to impede, partially or completely, breathing or circulation of blood; any electric weapon, or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.” Wis. Stat. sec. 939.22(10). Case law indicates that this definition is broad: Anything that can be used to cause death or great bodily harm that is actually used or intended to cause this harm can be a dangerous weapon. Therefore, a dog can be a dangerous weapon if it is used, intended to be used, or threatened to be used to cause death or great bodily harm, and it is shown that the perpetrator supervised, directed, or controlled the dog. However, body parts are not dangerous weapons. *State v. Frey*, 178 Wis. 2d 729 (Wis. Ct. App. 1993)

It is important to note that in the crime of first degree sexual assault, the use of an article fashioned to make the victim reasonably believe that there is a dangerous weapon satisfies the element of using a dangerous weapon. For example, if the perpetrator has sexual intercourse with the victim without the consent of that victim, by holding out a coat hanger under his or her shirt and leading the victim to believe it is a gun, the perpetrator will be guilty of first degree sexual assault even though the coat hanger is not capable of the same damaging impact as a gun.

Great bodily harm

Great bodily harm means “bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.” Wis. Stat. sec. 939.22(14).

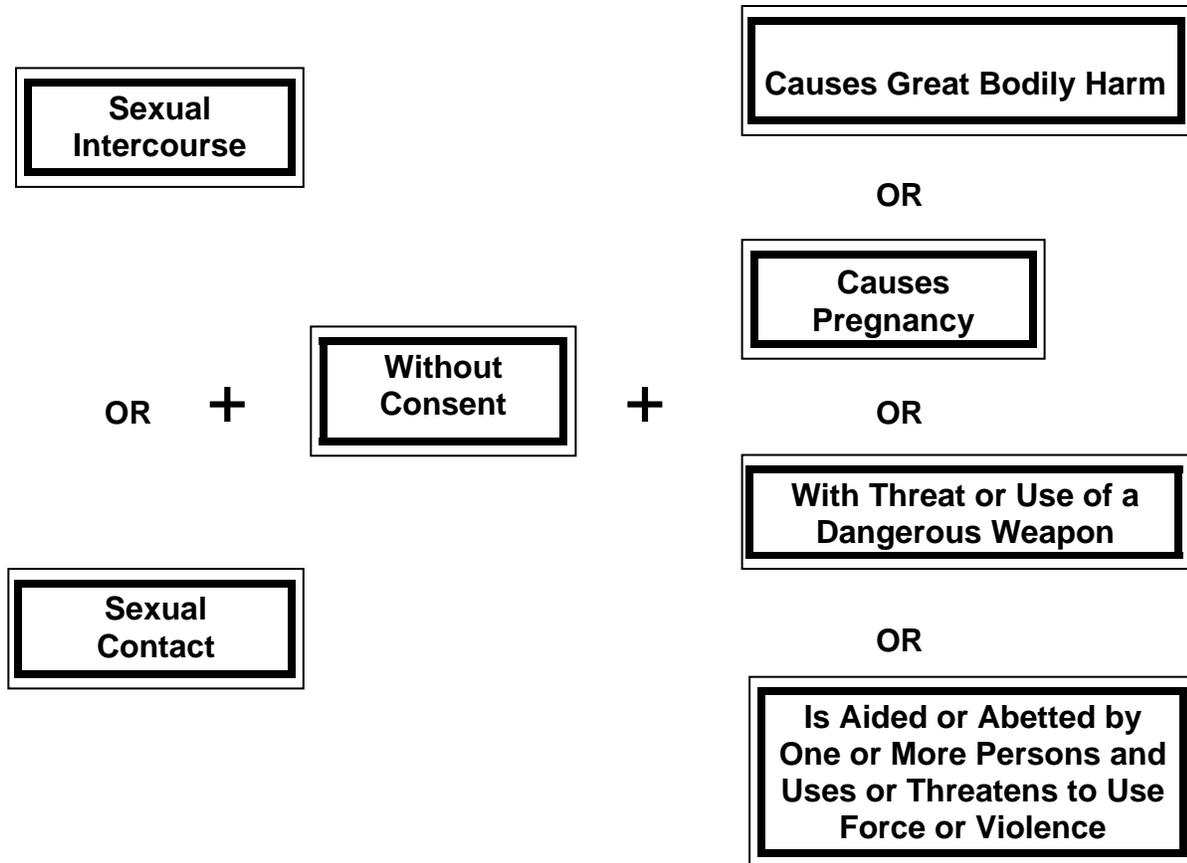
Sexual assault laws

First degree sexual assault: Whoever does any of the following is guilty of a Class B felony:

- Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person. Wis. Stat. sec. 940.225(1)(a).
- Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon. Wis. Stat. sec. 940.225(1)(b).
- Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence. Wis. Stat. sec. 940.225(1)(c).

See the diagram on page 4, which breaks the above acts into elements.

First Degree Sexual Assault Elements: Wis. Stat. sec. 940.225(1)



This sheet was updated by the Wisconsin Coalition Against Sexual Assault, Inc. in June 2012. The information provided was adapted from the [Sexual Assault Legal Advocate Manual](#), which was originally published and distributed by the Wisconsin Coalition Against Sexual Assault in 1994. The information provided should be considered legal information not legal advice. For additional information about this sheet or other sexual assault topics please contact the Wisconsin Coalition Against Sexual Assault at 600 Williamson St. Ste., N2, Madison, WI 53703. Phone/TTY: 608/257-1516. Fax: 608/257-2150

Second degree sexual assault: Whoever does any of the following is guilty of a Class C felony:

- Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence. Wis. Stat. sec. 940.225(2)(a).
- Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim. Wis. Stat. sec. 940.225(2)(b).
- Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition. Wis. Stat. sec. 940.225(2)(c).
- Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.. Wis. Stat. sec. 940.225(2)(cm).

[This subsection may now be used to charge in situations where alcohol is used to facilitate an assault because the definition of intoxicant now includes alcohol.]

- Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious. Wis. Stat. sec. 940.225(2)(d).

[Case law clarifies that for this crime, unconscious includes the state of being asleep or having a loss of awareness.]

- Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without the consent of that person. Wis. Stat. sec. 940.225(2)(f).
- Is an employee of an adult family home, a community based residential facility, an inpatient health care facility, or a state treatment facility and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program. Wis. Stat. sec. 940.225(2)(g).
- Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this subsection. Wis. Stat. sec. 940.225(2)(h).

[Wis. Stat. secs. 940.225(2)(g) and (h) presume lack of consent. In these situations, the presumption may not be overcome. Essentially, this bars any employee of these facilities who engages in sexual intercourse or sexual contact with a patient or resident of the facility from raising a consent defense.]

- Has sexual contact or sexual intercourse with an individual who is on probation, parole, or extended supervision if the actor is a probation, parole, or extended supervision agent who:
 - supervises the individual, either directly or through a subordinate, in his or her capacity as a probation, parole, or extended supervision agent or
 - has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

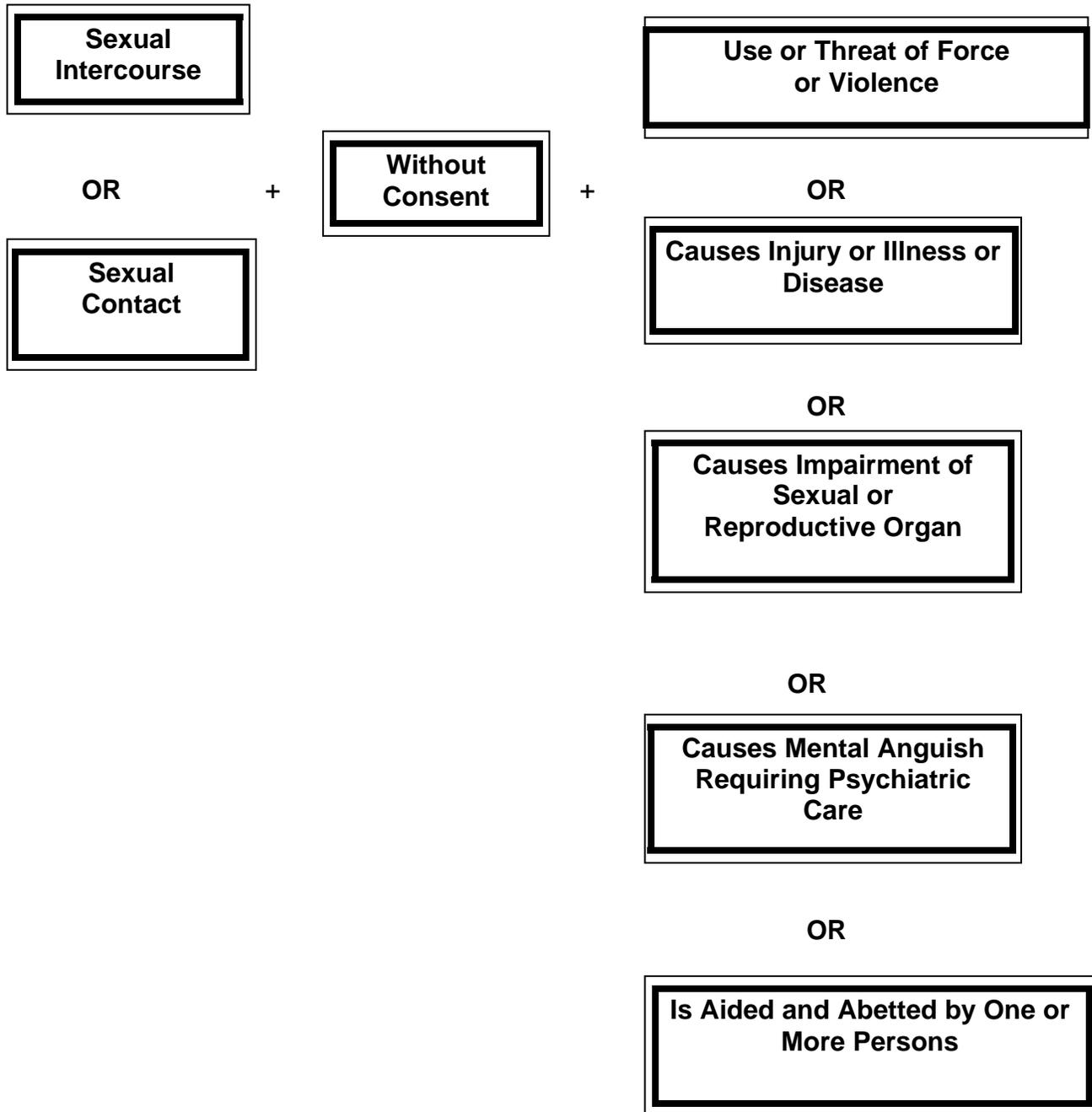
[This subsection of the statutes does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section. Wis. Stat. sec. 940.225(2)(i).]

According to Wisconsin Statute 940.225(4), "...consent is not an issue in alleged violations of sub. (2) (c), (cm), (d), (g), (h), and (i)." The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

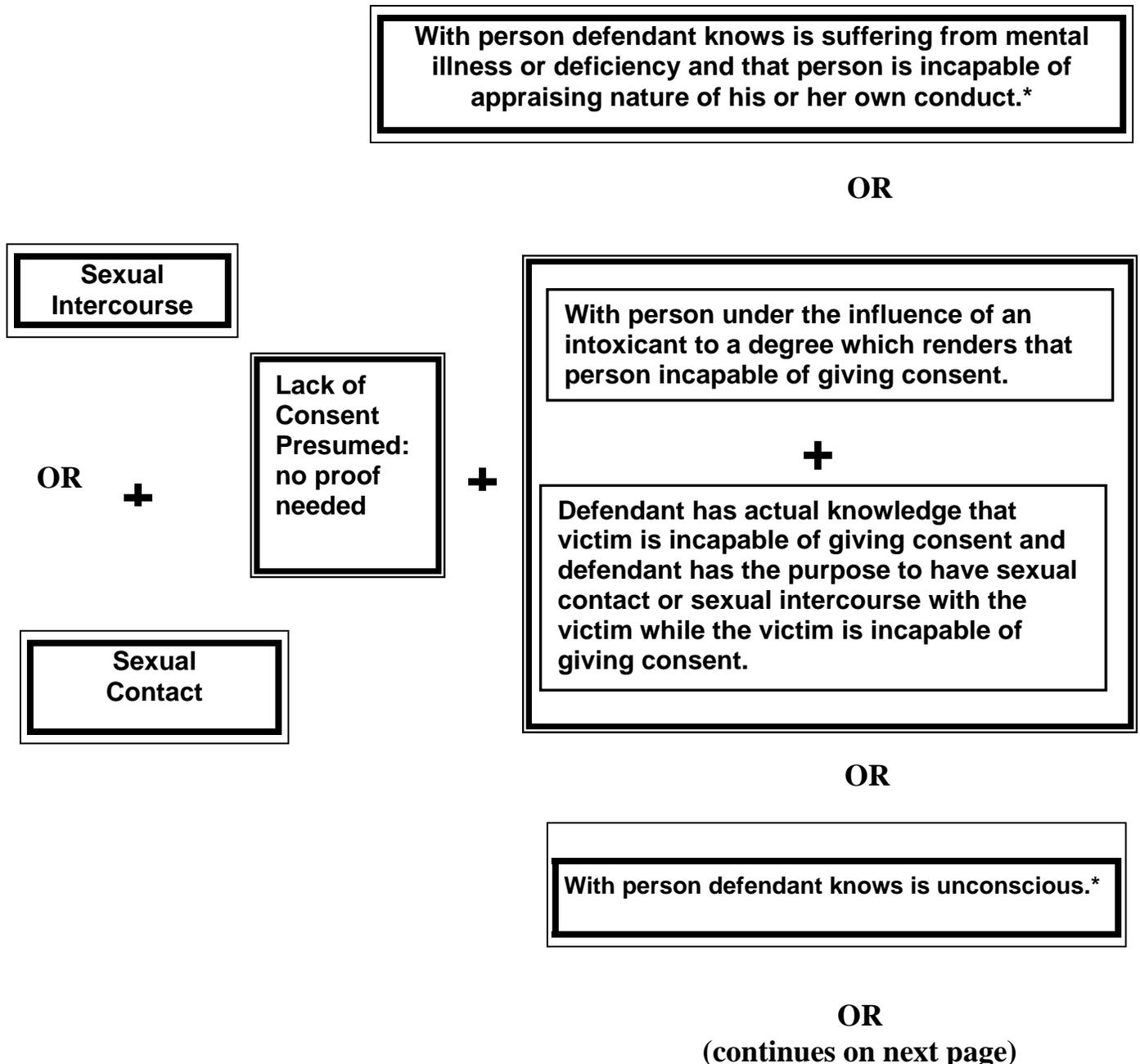
To see this crime broken down into elements, see the diagrams on pages 7 and 8.

Second Degree Sexual Assault Elements: Wis. Stat. Secs. 940.225(2)(a),(b) & (f)



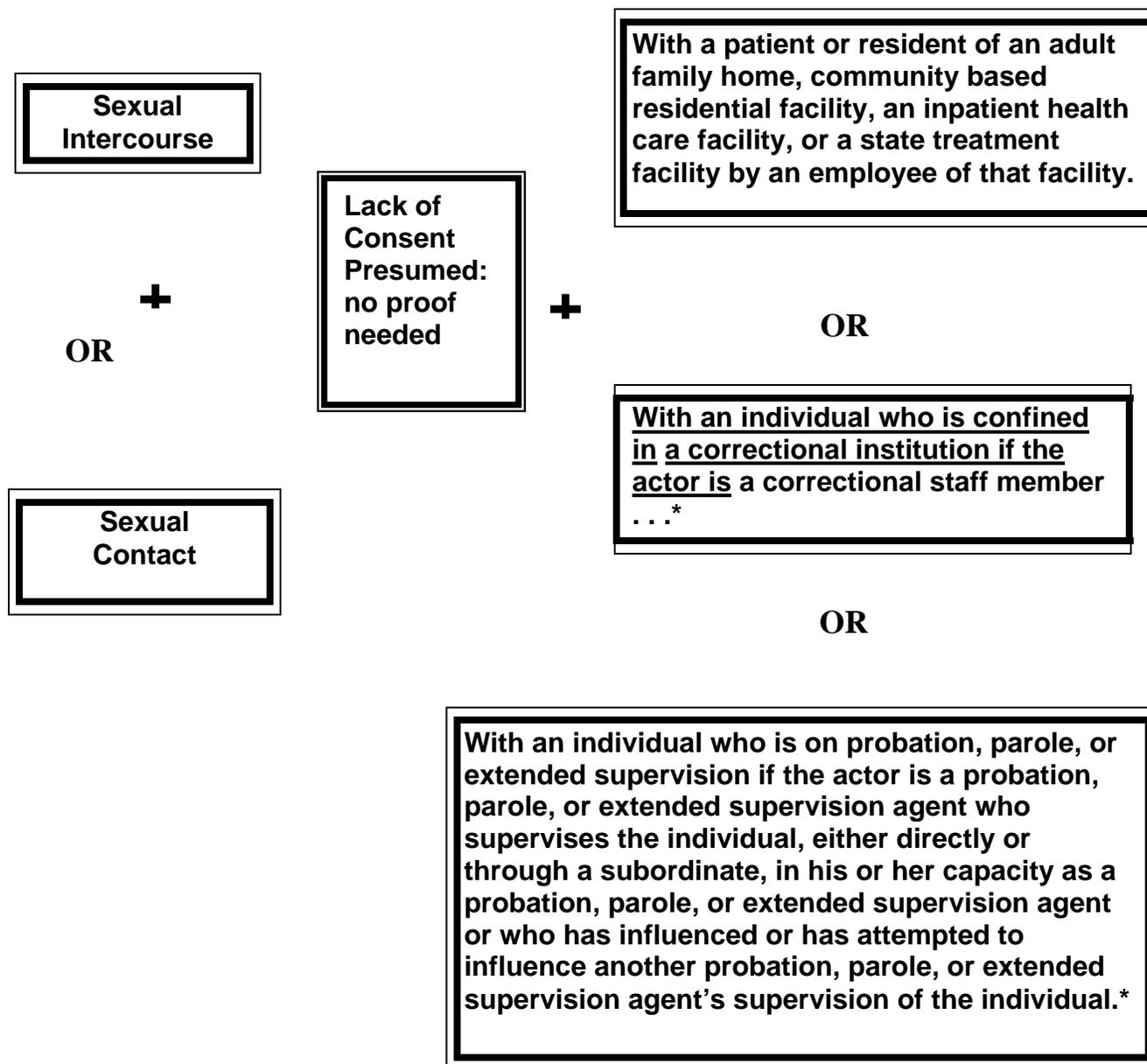
This sheet was updated by the Wisconsin Coalition Against Sexual Assault, Inc. in June 2012. The information provided was adapted from the Sexual Assault Legal Advocate Manual, which was originally published and distributed by the Wisconsin Coalition Against Sexual Assault in 1994. The information provided should be considered legal information not legal advice. For additional information about this sheet or other sexual assault topics please contact the Wisconsin Coalition Against Sexual Assault at 600 Williamson St. Ste., N2, Madison, WI 53703. Phone/TTY: 608/257-1516. Fax: 608/257-2150.

Second Degree Sexual Assault Elements: Wis. Stat. secs. 940.225(2)(c), (cm), (d), (g), (h), & (i)



* **Although** the inability to consent is presumed with these offenses, the statute states that the presumption may be rebutted (or overcome) by presenting competent evidence for the following individuals: “[a] person suffering from a mental illness or defect which impairs capacity to appraise personal conduct,” and “[a] person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.” Wis. Stat. Sec. 940.225(4)(b)&(c).

Second Degree Sexual Assault Elements: Wis. Stat. secs. 940.225(2)(c), (cm), (d), (g), (h), & (i) continued...



*This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse for sexual assault.

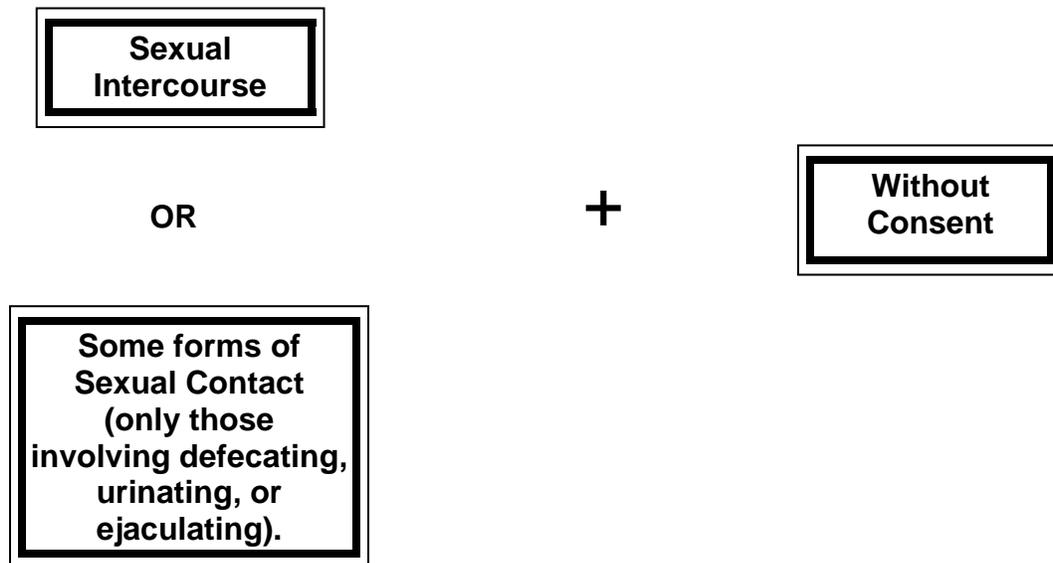
Third degree sexual assault: Third degree sexual assault carries a Class G penalty. The following acts constitute third degree sexual assault:

- sexual intercourse with a person without the consent of that person
- sexual contact with another by the “intentional ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant”
- sexual contact “by intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant’s body, clothed or unclothed, for the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant”

Wis. Stat. sec. 940.225(3) and 940.225(5)(b).

A graphic presentation of the elements of this crime are presented in the diagram below.

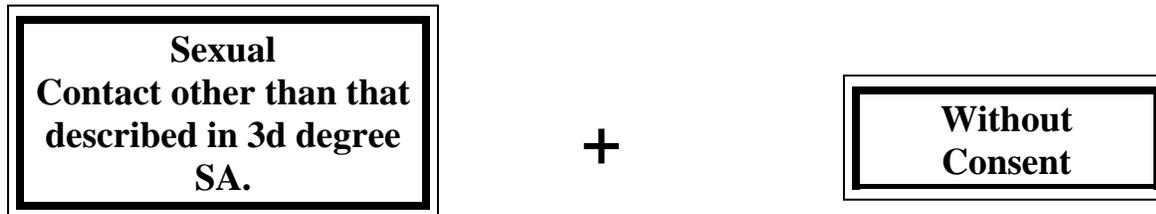
Third Degree Sexual Assault Elements: Wis. Stat. sec. 940.225(3)



Fourth degree sexual assault: Fourth degree sexual assault is a Class A misdemeanor. Whoever has sexual contact (under provisions that do not involve urinating, defecating, or ejaculating) with a person without her or his consent is guilty of fourth degree sexual assault. Wis. Stat. sec. 940.225(3m).

The diagram below provides a visual representation of the elements of this crime.

Fourth Degree Sexual Assault Elements: Wis. Stat. sec. 940.225(3m)



This sheet was updated by the Wisconsin Coalition Against Sexual Assault, Inc. in June 2012. The information provided was adapted from the [Sexual Assault Legal Advocate Manual](#), which was originally published and distributed by the Wisconsin Coalition Against Sexual Assault in 1994. The information provided should be considered legal information not legal advice. For additional information about this sheet or other sexual assault topics please contact the Wisconsin Coalition Against Sexual Assault at 600 Williamson St. Ste., N2, Madison, WI 53703. Phone/TTY: 608/257-1516. Fax: 608/257-2150.

Wisconsin has fairly comprehensive sexual assault laws:

- In Wisconsin, marriage does not bar a sexual assault prosecution.
- In Wisconsin, laws are not gender-specific. Wisconsin law therefore recognizes same-sex sexual assault and sexual assault by women against men in addition to sexual assault against women by men.
- These laws apply even if the victim is dead at the time of the assault.

Related laws

The above laws include only Wisconsin's sexual assault laws. Numerous other crimes could be charged along with or in place of a sexual assault charge. These include, but aren't limited to:

- kidnapping
- false imprisonment
- disorderly conduct
- battery

- stalking
- criminal harassment
- invasion of privacy (peeping tom)
- strangulation

Further, the Wisconsin statutes criminalize other sexually based conduct. The following are two examples of sex crimes not included in the sexual assault laws:

Example 1. Representations depicting nudity
(Wis. Stat. sec. 942.09)

Whoever does any of the following is guilty of a Class I felony:

- Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation. Wis. Stat. sec. 942.09(1)(a).
- Makes a reproduction of a representation that the person knows or has reason to know was captured in violation of par. (a) and that depicts the nudity depicted in the representation captured in violation of par. (a), if the person depicted nude in the reproduction did not consent to the making of the reproduction. Wis. Stat. sec. 942.09(1)(b).
- Possesses, distributes, or exhibits a representation that was captured in violation of par. (a) or a reproduction made in violation of par. (b), if the person knows or has reason to know that the representation was captured in violation of par. (a) or the reproduction was made in violation of par. (b), and if the person who is depicted nude in the representation or reproduction did not consent to the possession, distribution, or exhibition. Wis. Stat. sec. 942.09(1)(c).

Notwithstanding sub. (2) (a), (b), and (c), if the person depicted nude in a representation or reproduction is a child and the capture, possession, exhibition, or distribution of the representation, or making, possessing, exhibiting, or distributing the reproduction, doesn't violate secs. 948.05 or 948.12, the child's parent, guardian, or legal custodian may do any of the following:

- Capture and possess the representation or make and possess the reproduction depicting the child. Wis. Stat. sec. 942.09(3)(a).
- Distribute or exhibit a representation captured or possessed under par. (a), or distribute or exhibit a reproduction made or possessed under par. (a), if the

distribution or exhibition is not for commercial purposes. Wis. Stat. sec. 942.09(3)(b).

Wis. Stat. sec. 942.09(4) does not apply to a person who receives a representation or reproduction depicting a child from a parent, guardian, or legal custodian of the child under sub. (3)(b), if the possession, exhibition, or distribution is not for commercial purposes.

Captures a representation means:

- takes a photograph
- makes a motion picture, videotape, or other visual representation, or
- records or stores in any medium data that represents a visual image. Wis. Stat. sec. 942.09(1)(a).

Nudity means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state. Wis. Stat. sec. 948.11(1)(d)

Representation means:

- a photograph
- exposed film
- motion picture
- videotape
- other visual representation, or
- data that represents a visual image.

Wis. Stat. sec. 942.09(1)(c)

Example 2. Exploitation by a therapist
(Wis. Stat. sec. 940.22)

Sexual contact prohibited: Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview, or examination, is guilty of a Class

F felony. Consent is not an issue in an action under this subsection. Wis. Stat. sec. 940.22(2).

If a therapist has reasonable cause to suspect that a patient or client he or she has seen in the course of professional duties is a victim of sexual contact by another therapist or a person who holds himself or herself out to be a therapist in violation of sub. (2), as soon thereafter as practicable the therapist shall ask the patient or client if he or she wants the therapist to make a report under this subsection. Wis. Stat. sec. 940.22(3)(a).

The therapist shall explain that the report need not identify the patient or client as the victim. If the patient or client wants the therapist to make the report, the patient or client shall provide the therapist with a written consent to the report and shall specify whether the patient's or client's identity will be included in the report. Wis. Stat. sec. 940.22(3)(c).

Definitions under 940.22(1):

Department means the department of regulation and licensing.

Physician means an individual possessing the degree of doctor of medicine or doctor of osteopathy or an equivalent degree as determined by the medical examining board, and holding a license granted by the medical examining board. Wis. Stat. sec. 448.01(5)

Psychologist means a person who practices psychology, as described in sec. 455.01 (5). "Practice of psychology" means rendering to any person for a fee a psychological service that applies the methods and procedures of:

- understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, thinking, emotions and interpersonal relationships
- interviewing, counseling, psychotherapy, psychoanalysis, and biofeedback, and
- constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotion, and motivation.

The application of these principles and methods includes, but is not restricted to, all of the following:

- psychological diagnosis, prevention, and treatment of problems in behavioral, vocational, educational, emotional, sexual, neuropsychological, and mental disorders. Wis. Stat. sec. 455.01(5)(a).
- treatment for alcohol and other substance abuse, disorders of habit and conduct, and the psychological and behavioral aspects of physical illness, accident, or other disabilities. Wis. Stat. sec. 455.01(5)(b).

- any other activity authorized by statute or by rules promulgated by the examining board. Wis. Stat. sec. 455.01(5)(c).

Psychotherapy means the use of learning, conditioning methods, and emotional reactions in a professional relationship to assist persons to modify feelings, attitudes, and behaviors which are intellectually, socially, or emotionally maladjustive or ineffectual. Wis. Stat. sec); 455.01(6).

Record means any document relating to the investigation, assessment, and disposition of a report under this section.

Sexual contact has the meaning designated in sec. 940.225 (5)(b). (See above)

Subject means the therapist named in a report or record as being suspected of having sexual contact with a patient or client or who has been determined to have engaged in sexual contact with a patient or client.

Child sexual assault laws

Chapter 948 of the Wisconsin Statutes, Crimes Against Children, contains Wisconsin's child sexual assault laws. Child sexual assault laws in Wisconsin don't include consent as an element of the crime, because minors under the age of 18 cannot legally consent to sexual activity. Most child sexual assault laws simply state that if a particular act occurred and the victim was under a particular age, the elements of the crime have been met.

However, depending on the circumstances surrounding the crime, the crime may be chargeable under Chapter 940, Crimes Against Life and Bodily Security, the chapter that includes all of the sexual assault crimes described above. If the elements for crimes under Chapter 940 have been met, the perpetrator may be charged regardless of the victim's age. This may be a good strategy when the penalty for the crime under Chapter 940 is greater than the penalty for the crime under Chapter 948.

Age

In Wisconsin, mistake or ignorance as to the victim's age isn't a defense to prosecution. Wisconsin Statutes state that "[a] mistake as to the age of a minor or to existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense." Wis. Stat. sec. 939.43(2)

Further, "criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question." Wis. Stat. sec. 939.23(6). Therefore, even if a child lies about her or his age, the defendant may be charged with sexual assault of a child. Additionally, if the perpetrator believed that a child was under the age limit described in a particular statute, s/he can be charged with an attempted crime against a child, even if the victim or intended victim was actually older than the age stated in that statute. State v. Grimm, 258 Wis.2d 166 (2002).

First degree sexual assault of a child
(Wis. Stat. 948.02)

- Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony.
- Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.
- Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.
- Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.
- Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony. Wis. Stat. 948.02(1)

Additionally, mandatory minimum sentences are imposed for certain child sex offenses. Generally, violations of first degree sexual assault or repeated acts of sexual assault of a child carry a minimum sentence of 25 years of confinement in prison (with some exceptions). For more information, see Wis. Stat. sec. 939.616.

Second degree sexual assault of a child:
(Wis. Stat. 948.02)

Whoever has sexual contact or sexual intercourse with a person who has not attained the age of sixteen (16) years is guilty of a Class C felony. Wis. Stat. sec. 948.02(2).

Marriage not a bar to prosecution:

A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant. Wis. Stat. sec. 948.02(4).

Death of victim:

This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse. Wis. Stat. sec. 948.02(5).

Failure to act: A person responsible for the welfare of a child who has not attained the age of sixteen (16) years is guilty of a Class F felony if that person:

- Has knowledge that another person intends to have, is having, or has had sexual intercourse or sexual contact with the child,
- Is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated,

- Fails to take that action *and*
- The failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person. Wis. Stat. sec. 948.02(3).

Person responsible for the child's welfare includes:

- the child's parent
- the child's stepparent
- the child's guardian
- the child's foster parent
- the child's treatment foster parent
- an employee of a public or private residential home, institution, or agency
- a person legally responsible for the child's welfare in a residential setting
- a person employed by someone legally responsible for the child's welfare who has temporary control or care of the child. Wis. Stat. sec. 948.01(3).

Case law indicates that this definition is meant to be broad. Anyone used as a caretaker by the person responsible for the child's welfare can fall under this definition. This person could include an "unpaid babysitter" such as a live-in boyfriend or a neighbor. State v. Sostre, 198 Wis 2d 409, 542 N.W. 2d 774 (1996).

Engaging in repeated acts of sexual assault of the same child:

(Wis. Stat. 948.025)

This crime penalizes perpetrators who commit three (3) or more violations of a child sexual assault crime within a specified period of time involving the same child. Penalties range from a Class A to Class C Felony and vary depending on which crime was violated. See Wis. Stat. sec. 948.025.

The constitutionality of Wisconsin Statute section 948.025 was challenged and upheld. The defendant argued that the statute deprived him of his right to have all of the issues in his case tried by a jury because the statute requires only that the jury agree that the defendant engaged in three (3) acts of sexual assault, but the jury does not have to come to a unanimous agreement regarding which of the multiple acts form the basis for the verdict. The Wisconsin Supreme Court held that each of the assaults are not separate elements of the crime. Rather, the course of conduct is the element that must be proven. The course of conduct must include three (3) acts, but the jury

doesn't have to agree on which three acts constitute the basis for the offense. State v. Johnson, 2001 WI 52, 243 Wis.2d 365, 627 N.W.2d 455.

Sexual intercourse with a child age sixteen (16) or older:
(Wis. Stat. 948.09)

Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of sixteen (16) years is guilty of a Class A misdemeanor. Wis. Stat. sec. 948.09

Other crimes against children

Sexual exploitation of a child:
(Wis. Stat. sec. 948.05)

Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child is guilty of a Class C felony (if the actor is over the age of 18) or a Class F felony (if the actor is under the age of 18):

- Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.
- Records or displays in any way a child engaged in sexually explicit conduct.
Note: It is an affirmative defense to prosecution for violation of the above 2 offenses if the defendant had reasonable cause to believe that the child had attained the age of eighteen (18) years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.
- Produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct is guilty of a felony if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of eighteen (18) years.
- Knowingly permits, allows, or encourages the child to engage in sexually explicit conduct for a purpose proscribed in any of the above if the person is responsible for the child's welfare

Trafficking of a child:
(Wis. Stat. sec. 948.051)

- Whoever knowingly recruits, entices, provides, obtains, or harbors, or knowingly attempts to recruit, entice, provide, obtain, or harbor, any child for the purpose of commercial sex acts or sexually explicit performance is guilty of a Class C felony.
- Whoever benefits in any manner from the above is guilty of a Class C felony if the person knows that the benefits come from an act described above.

Causing a child to view or listen to sexual activity:
(Wis. Stat. sec. 948.055)

Whoever intentionally causes a child who has not attained eighteen (18) years of age, or an individual who the actor believes or has reason to believe has not attained 18 years of age, to view or listen to sexually explicit conduct if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child or individual, is guilty of a:

- Class F felony if the child has not attained the age of thirteen (13) years or the actor believes or has reason to believe that the victim is a child who has not reached 13 years of age. Wis. Stat. sec. 948.055(2)(a).
- Class H felony if the child has attained the age of thirteen (13) years but has not attained the age of eighteen (18) years or the actor believes or has reason to believe that the victim has attained the age of thirteen (13) but has not attained the age of eighteen (18) years. Wis. Stat. sec. 948.055(2)(b).

Incest with a child
(Wis. Stat. sec. 948.06)

Whoever does any of the following is guilty of a Class C felony:

- Marries or has sexual intercourse or sexual contact with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin *or*
- Has sexual contact or sexual intercourse with a child if the actor is the child's stepparent, *or*
- Is a person responsible for the child's welfare *and*
 - Has knowledge that another person related to the child by blood or adoption in a degree of kinship closer than second cousin or who is the child's stepparent has had or intends to have sexual intercourse or sexual contact with the child

- Is physically and emotionally capable of taking action that will prevent the intercourse or contact from occurring or being repeated
- Fails to take that action *and*
- The failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

Child enticement

(Wis. Stat. sec. 948.07)

Whoever causes or attempts to cause any child who has not attained the age of eighteen (18) years to go into any vehicle, building, room or secluded place, with intent to commit any of the following acts, is guilty of a Class D felony:

- Having sexual contact or sexual intercourse with the child in violation of secs. 948.02, 948.085 or 948.095.
- Causing the child to engage in prostitution.
- Exposing a sex organ to the child or causing the child to expose a sex organ in violation of sec. 948.10.
- Recording the child engaging in sexually explicit conduct.
- Causing bodily or mental harm to the child.
- Giving or selling to the child a controlled substance or controlled substance analog in violation of Chapter 961.

Use of a computer to facilitate a child sex crime

(Wis. Stat. sec. 948.075)

- Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of sixteen (16) years with intent [to] have sexual contact or sexual intercourse with the individual in violation of secs. 948.02 (1) or (2) is guilty of a Class C felony.
- This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than twenty-four (24) months less than the age of the actor.

- Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actor's intent under sub. (1) shall be necessary to prove that intent.

Soliciting a child for prostitution

(Wis. Stat. sec. 948.08)

Whoever intentionally solicits or causes any child to practice prostitution or establishes any child in a place of prostitution is guilty of a Class D felony.

Sexual Assault of a Child Placed in Substitute Care

(Wis. Stat. Sec. 948.085)

It is a Class C felony for a person to have “sexual contact or sexual intercourse with a child for whom the actor is a foster parent” or have “sexual contact or sexual intercourse with a child placed at any of the following facilities if the actor works or volunteers at the facility or is directly or indirectly responsible for managing it:

1. A licensed shelter care facility
2. A licensed group home licensed
3. A facility described in 940.295(2)(m).”

Sexual assault of a child by a school staff person or a person who works or volunteers with children.

(Wis. Stat. sec. 948.095)

School means a public or private elementary or secondary school. Wis. Stat. sec. 948.095(1)(a)

School staff means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract. Wis. Stat. sec. 948.095(1)(b)

A person who has attained the age of 21 years and who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children may not have sexual contact or sexual intercourse with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

Whoever has sexual contact or sexual intercourse with a child who has attained the age of sixteen (16) years and who is not the defendant's spouse is guilty of a Class H felony if both of the following apply:

- The child is enrolled as a student in a school or a school district. Wis. Stat. sec. 948.095(2)(a).

- The defendant is a member of the school staff or school district in which the child is enrolled as a student. Wis. Stat. sec. 948.095(2)(b).

Whoever violates this law is guilty of a Class H felony.

Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact directly with children: teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation, or school bus driving.

Exposing genitals or pubic area
(Wis. Stat. sec. 948.10)

Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic area to a child is guilty of a Class I felony. However, if the actor is a child when the violation occurs or has not reached nineteen (19) years of age and is less than four (4) years older than the victim, the actor is guilty of a Class A misdemeanor. Wis. Stat. sec. 948.10(1).

This subsection doesn't apply under either of the following circumstances:

- The child is the defendant's spouse.
- A mother is breast-feeding her child.

Exposing a child to harmful material or harmful descriptions or narrations (Wis. Stat. sec. 948.11)

In this section, the following definitions apply:

Harmful description or narrative account means any explicit and detailed description or narrative account of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality that, taken as a whole, is harmful to children. Wis. Stat. sec. 948.11(ag).

Harmful material (Wis. Stat. sec. 948.11(1)(ar)) means:

- Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body that depicts nudity, sexually explicit conduct, sadomasochistic abuse, physical torture, or brutality and that is harmful to children, or
- Any book, pamphlet, magazine, printed matter however reproduced or recording that contains any matter enumerated in subd. 1, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexually explicit conduct,

sadomasochistic abuse, physical torture or brutality and that, taken as a whole, is harmful to children.

Harmful to children means that quality of any description, narrative account, or representation, in whatever form, of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality, when it:

- predominantly appeals to the prurient, shameful, or morbid interest of children;
 - is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for children; and
 - lacks serious literary, artistic, political, scientific or educational value for children, when taken as a whole.
- Wis. Stat. sec. 948.11(b)

Nudity means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state. Wis. Stat. sec. 948.11(1)(d).

Person means any individual, partnership, firm, association, corporation, or other legal entity. Wis. Stat. sec. 948.11(1)(e) Sexual excitement means the condition of human male or female genitals when in a state of sexual stimulation or arousal. Wis. Stat. sec. 948.11(1)(f).

Criminal penalties
(Wis. Stat. sec. 948.11(2))

Whoever, with knowledge of the character and content of the material, sells, rents, exhibits, plays, distributes, or loans to a child any harmful material, with or without monetary consideration, is guilty of a Class I felony if either of the following applies:

- The person knows or reasonably should know that the child has not attained the age of eighteen (18) years.
- The person has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.

Any person who has attained the age of seventeen (17) and who, with knowledge of the character and content of the description or narrative account, communicates, by any means, a harmful description or narrative account to a child, with or without monetary consideration, is guilty of a Class I felony if either of the following applies:

- The person knows or reasonably should know that the child has not attained the age of eighteen (18) years. Wis. Stat. sec. 948.11(2)(am)1.
- The person has face-to-face contact with the child before or during the communication. Wis. Stat. sec. 948.11(2)(am)2.

Whoever, with knowledge of the character and content of the material, possesses harmful material with the intent to sell, rent, exhibit, play, distribute, or loan the material to a child is guilty of a Class A misdemeanor if any of the following applies:

- The person knows or reasonably should know that the child has not attained the age of eighteen (18) years. Wis. Stat. sec. 948.11(2)(b)1.
- The person has face-to-face contact with the child. Wis. Stat. sec. 948.11(2)(b)2.

It is an affirmative defense to a prosecution for a violation of pars. (a) 2, (am) 2, and (b) 2 if the defendant had reasonable cause to believe that the child had attained the age of eighteen (18) years, and the child exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that the child had attained the age of eighteen (18) years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence. Wis. Stat. sec. 948.11(2)(c).

Possession of child pornography
(Wis. Stat. sec. 948.12)

Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances is guilty of a Class D felony unless the defendant is under 18, in which case it is a Class I felony::

- The person knows that he or she possesses the material.

The person knows or reasonably should know that the material that is possessed or accessed contains depictions of sexually explicit conduct.

- The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years.

Whoever exhibits or plays a recording of a child engaged in sexually explicit conduct, if all of the following apply is guilty of a Class D felony unless the defendant is under 18, in which case it is a Class I felony:

- The person knows that he or she has exhibited or played the recording. Before the person exhibited or played the recording, he or she knew the character and content of the sexually explicit conduct.

- Before the person exhibited or played the recording, he or she knew or reasonably should have known that the child engaged in sexually explicit conduct had not attained the age of 18 years.

Child sex offender working with children

(Wis. Stat. sec. 948.13)

Serious child sex offense in this section means any of the following:

- A crime under secs. 940.22(2) or 940.225(2)(c) or (cm), if the victim is under eighteen (18) years of age at the time of the offense; 940.302(2) if (2)(a)1. b. applies; or a crime under secs. 948.02(1) or (2), 948.025(1), 948.05(1) or (1m), 948.06, 948.07(1), (2), (3), or (4), or 948.075, or 948.085.
- A crime under federal law or the law of any other state or, prior to May 7, 1996, under the law of this state that is comparable to a crime specified above.

With some exceptions, whoever has been convicted of a serious child sex offense and subsequently engages in an occupation or participates in a volunteer position that requires him or her to work or interact primarily and directly with children under sixteen (16) years of age is guilty of a Class F felony. Wis. Stat. sec. 948.13(2)(a).

Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact primarily and directly with children under sixteen (16) years of age:

- teaching children
- working in the child care field
- counseling youth
- working with a youth organization
- coaching children
- working in the field of parks or playground recreation or
- driving a school bus.

Wis. Stat. sec. 948.13(3)

There are several circumstances in which a person previously convicted of a sexual offense against a child may be exempt from this section. For more information, see Wis. Stat. sec. 948.13(b) and (c).

A person who has been convicted of second degree sexual assault of a child, sexual assault of a child placed in substitute care, or repeated acts of sexual assault against the same child may petition the court in which he or she was convicted to order that the person be exempt from 948.13(2)(a). That person may then also be permitted to engage in an occupation or participate in a volunteer position that requires the person to work or interact primarily and directly with children under sixteen (16) years of age. Multiple criteria must be met for this exemption order, including that the person was under 19 years of age at the time of the commission sexual assault crime. For more detailed information on the requirements, filing instructions, and other court procedures for exemption, see Wis. Stat. sec. 948.13(2m).

Female Genital Mutilation Prohibited
(Wis. Stat. Sec. 146.35)

It is a class H felony for a person to “circumcise, excise or infibulate the labia majora, labia minora or clitoris of a female minor.”

Note: This prohibition contains an exception that allows physicians to perform this work for the health of the minor or to correct an abnormality.

PENALTIES:

- A felony = life imprisonment
- B felony = imprisonment not to exceed 60 yrs.
- C felony = fine not to exceed \$100,000 or imprisonment not to exceed 40 yrs, or both.
- D felony = fine not to exceed \$100,000 or imprisonment not to exceed 25 yrs, or both.
- F felony = fine not to exceed \$25,000 or imprisonment not to exceed 12 yrs. 6 mos, or both.
- H felony = fine not to exceed \$10,000 or imprisonment not to exceed 6 yrs, or both.
- A misdemeanor = fine not to exceed \$10,000 or imprisonment not to exceed 9 mos, or both.

CHAPTER 4

MEDICAL ADVOCACY AND SANE RESPONSE

Materials coming soon

Please see the following resources for more information about this topic:

Wisconsin Adult Sexual Assault Response Team Protocol available at:
http://www.wcasa.org/file_open.php?id=203

A National Protocol for Sexual Assault Medical Forensic Examinations available
at: <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>

CHAPTER 5

REPORTING TO LAW ENFORCEMENT

For many victims, deciding whether to report a sexual assault to law enforcement is extremely difficult. This chapter will discuss:

- The factors that affect a victim's decision to report
- law enforcement's response to a report
- the procedures used by law enforcement to investigate the report
- the standards used by law enforcement to determine whether a crime occurred
- the relationships between law enforcement officers, advocates, and victims of sexual assault.

Sexual assault is the most under-reported crime in the United States. Approximately two thirds (2/3) of all sexual assaults are never reported. This is a result of the loss of control victims experience during and after a sexual assault, which is often compounded by fears about the perpetrator and the criminal justice system. A sexual assault advocate can be a tremendous source of knowledge and support to a victim deciding whether to report. The advocate's main job at this stage is to:

- discuss the advantages and disadvantages of reporting
- provide general knowledge about the process
- support and respect the victim's final decision

For more information on the law enforcement response and the role of the advocate please see the Wisconsin Adult Sexual Assault Response Team (SART) Protocol available at: http://www.wcasa.org/file_open.php?id=203

The decision to report

Victims are reluctant to report for many reasons. Some experience embarrassment and shame and blame themselves for the assault. Some cannot stop thinking about the circumstances of the assault and experience guilt about their own behaviors, behaviors they fear may have contributed to the assault. For example, a victim may make statements like: "I shouldn't have had so much to drink" or "I never should have stayed out past curfew." Some worry about the anticipated responses of partners, spouses, family, and friends. As most victims know their assailants, some victims experience guilt at the thought of reporting or worry about retaliation if the assault is reported. Some worry that others will have sympathy for the assailant and not

the victim. Many fear public scrutiny and worry that societal myths about sexual assault will create further shame and embarrassment.

The victim may also have specific fears about the response of the system after a report. These may include fear of a medical/forensic exam, the fear of being disbelieved, the fear of testifying in court, the fear that the accused may be found not guilty, and/or more generalized fears about reporting such an intimate crime. Some victims feel that society, the criminal justice system, or a jury will have little sympathy for them because of their race, lifestyle, gender, sexual orientation, circumstances surrounding the assault, or socio-economic status.

In general, victims tend to be more reluctant to report when:

- They know the assailant.
- No weapon or physical force was used.
- No witnesses were present.
- The assault resulted in no visible injuries.

In fact, these characteristics are present in the majority of sexual assaults reported in Wisconsin and nationally.

These fears and concerns are due in part to the historical failure of the criminal justice system and society to respond to sexual assaults in a victim-centered manner. Societal and cultural messages about sexual assault impact what an individual thinks about “typical” victims, perpetrators, and sexual assaults. Law enforcement, victims, the public, and even advocates can be influenced by these messages.

An advocate can be a valuable support to the victim during the reporting process. The advocate is the only person whose sole concern is the victim’s well being and who has no obligation to any other individual, agency, or system.

By providing information, advocates can empower the victim to make informed choices and help restore some of the control a victim lost in the assault. The more the advocate understands a victim’s fears and hesitations regarding reporting, the more sensitive the advocate can be.

Advantages to reporting

- The suspect may be held accountable for her/his actions.
- Reporting can bring closure and help put the event in the past.
- Reporting is a condition for the receipt of crime victim compensation. (The crime must be reported within five (5) days in most instances.)

- *Note:* If a victim decides not to report, she or he may still be reimbursed for a sexual assault forensic examination through SAFE funds. See chapter 13 for more information on compensation.
- Reporting may help protect others from this perpetrator (although there is no guarantee).
- Even if the suspect is not convicted, the arrest itself may prevent the commission of future assaults (again, there are no guarantees).
- A crime must be charged within a certain period of time. For more information on statutes of limitation, see Part II of this manual.
- The victim can have support throughout the process. Most counties have victim/witness specialists who are trained on victim issues and work with the district attorney to assist victims and witnesses throughout the process.

Disadvantages to reporting

- There is no guarantee that the suspect will be charged and convicted.
- If there is a conviction, the victim may not feel the sentence is appropriate.
- Even if suspects are charged and convicted, there is no guarantee they won't re-offend.
- There is no guarantee of privacy; the victim's name may be published by the media, as the media has access to police reports.
- Once the report is made, the victim loses some decision-making authority. A crime is treated as a crime against the state and the state may or may not proceed regardless of the victim's wishes.
- The criminal justice system experience can be traumatic. Some victims feel that the criminal justice process forces them to re-live the experience. Cross-examination by the defendant's attorney can be particularly difficult.

The decision to report does not have to be made right away. However, if the victim is considering reporting, prompt reporting and subsequent evidence collection increase the likelihood of a successful prosecution and reimbursement through Crime Victim Compensation.

The criminal investigation

If the victim decides to report, s/he should call law enforcement as soon as possible. S/he should not change clothes, bathe, shower, douche, or touch anything connected with the assault---for example, bedclothes or articles the assailant may have touched. If possible, s/he should not urinate until urine samples are taken by a trained medical examiner. If the victim was assaulted orally s/he should not eat, drink or smoke. (Note that these are recommendations for the best preservation of evidence; doing or not doing any of the above does not mean that helpful evidence can no longer be collected).

Once the report is made, a vast and complex system swings into action. Victim/witness coordinators, law enforcement, prosecutors, medical/forensic professionals, mental health professionals, and advocates may become involved. Law enforcement will investigate to determine whether a crime occurred and whether to charge the suspect. The stages of the investigation could involve:

- an initial interview
- evidence collection from the scene
- the collection of forensic evidence from the victim and/or the suspect
- one or more follow-up interviews
- the subject's arrest
- further interviews.

Societal biases may affect law enforcement's response to sexual assaults. Some traditional law enforcement investigation techniques are inapplicable or insensitive after a sexual assault but the use of these techniques doesn't necessarily indicate a lack of sensitivity by law enforcement officers. It could indicate a lack of training or information about victim-sensitive interviewing techniques or a lack of practice using those techniques. Unfortunately, not all law enforcement officers have been trained to work with sexual assault victims, and not all law enforcement will interview victims in a sensitive manner.

The dynamics of sexual assault and trauma may cause a victim to exhibit what are viewed as "red flags" in other types of criminal investigations. These responses include, but are not limited to:

- inconsistent statements
- delayed reports
- recantations

- memory gaps
- lack of “affect” (the showing of emotion)
- misinformation on the victim’s part

For other types of crimes, law enforcement officers see these red flags as indications that the victim is not credible. In sexual assault situations, however, these red flags are common, natural reactions to sexual assault and don’t indicate a less than honest victim.

Law enforcement will ask questions of the victim to try to establish the elements of the crime. To a person in crisis, these questions can seem insulting, embarrassing, or irrelevant. For example, because lack of consent is an element in many sexual assaults, a law enforcement officer may ask the victim if s/he consented. The victim might be astounded that the officer would ask such a question and feel that the officer doesn’t believe her or him. The officer, on the other hand, may not understand the impact the question has on the victim.

An advocate, if present, can help by informing the victim *before the interview* that the officer may be asking hard questions and why the officer has to ask them. An advocate may also work with the officer to clarify the effects certain questions can have on victims. The officer might learn that explaining the need to ask certain questions will make the victim more comfortable and minimize the victim’s feeling that s/he is on trial.

The initial call

The initial call to law enforcement requires a minimum of information, which could include:

- the victim’s name and contact information
- the suspect’s name (if known) or a description of the suspect
- location of the assault
- current location of the victim
- presence of injuries
- whether the suspect is on the scene.

The initial interview

In response to the initial call, one or more uniformed officers will be dispatched. Law enforcement response may vary depending on the location at which the crime occurred – depending on jurisdiction. For example, if the crime occurred within city limits, the city police department may be charged with investigating the crime. If it

occurred on county property, the county sheriff would investigate the crime. When a crime occurs in multiple jurisdictions, multiple agencies can become involved, but one agency is usually designated as the lead agency in the investigation.

The location of the initial interview will depend on where the initial call originated. Sometimes this location will be the scene of the assault. At other times, the victim will call law enforcement from the hospital, and the initial interview will take place there.

The victim may ask for an officer of a specific gender, if s/he feels that will make the reporting process easier. Some victims may want to speak to an individual of the same gender or to someone who is not the same gender as the suspect. However, depending on the law enforcement agency, an officer of a specific gender may not be available. Further, the gender of the law enforcement officer is not always a good measure of her or his sensitivity.

Generally, at this point in the investigation, the officer will gather only enough information to establish the elements of the offense. In some circumstances, however, officers will ask for a more detailed account of the events. For example, it may be crucial to quickly apprehend the suspect. In this situation, the initial interview will first focus on the suspect's identity and location. The interviewing style may also depend on the victim. Some victims are extremely emotional. Others are angry, and others are in a state of near shock. Officers respond differently in different situations.

Information that an officer might gather during the initial interview includes:

- the relationship between the victim and the suspect
- the factual circumstances of the assault
- the words spoken before and after the assault
- the victim's responses to the assault
- the timing of the assault
- the existence of a weapon
- the most recent consensual sexual intercourse of the victim, if the assault involved vaginal, oral, or anal penetration

Ideally, the advocate should be allowed to accompany the victim to law enforcement interviews. Some law enforcement agencies don't inform the victim that advocates are available in the community. Others don't allow the advocate to support the victim during interviews. There is no way to force law enforcement to allow an advocate to talk to a victim. If this issue arises, it is best handled outside the context of a specific case. The advocate can address this issue through a task force, coordinated community response team, or memorandum of understanding between the program and the law enforcement agency. See Chapter 30, "Systems Advocacy," for more information.

- the location of the perpetrator
- people to whom the victim may have spoken after the assault, who may have witnessed the assault or the events leading up to the assault, or anyone who might corroborate the victim's story.

Sometimes the officer will collect evidence during the initial interview. If the interview takes place at the scene of the assault, the officer may collect clothing, sheets, and other personal property. If the assault took place in a car, the officer may want to take evidence from the car or have it examined for evidence. The officer may also collect evidence from the victim her/himself. For example, the officer may gather clothes worn by the victim during the assault. If the interview is not at a hospital, the officer may recommend going to the hospital to have forensic evidence collected. Depending on the extent of evidence and the circumstances of the assault, the initial interview could vary in length from under an hour to several hours.

Further investigation

After the initial interview, law enforcement officers will conduct an investigation. They will interview witnesses, if necessary, and interview the perpetrator, if apprehended. They will be interested not only in witnesses who saw the assault but also witnesses who can corroborate other aspects of the crime or the events leading to up to and after the crime.

Depending on agency policy an investigator or detective may continue the investigation. Further interviews are much more extensive and in-depth than the initial interview, and the victim should be prepared to go through the circumstances of the assault in detail. Often, the investigator will ask the victim to go through the entire twenty-four (24) hour period leading up to the assault. The victim may request that a support person be present. The victim should feel free to ask questions and request breaks if needed. The more the advocate can prepare the victim ahead of time, the better the interview will go. It is important that the advocate remain distant from the interview itself. This is an investigatory interview, and the less the advocate is involved, the better.

The victim will be asked the same questions that s/he was asked in the initial interview. This information helps officers understand the assault and establish the elements of the crime. It also helps officers assess the victim and his/her statements. This assessment is not limited to sexual assault victims, though there may be officers who doubt the truthfulness of reported sexual assaults. It is important that law enforcement and the advocate encourage the victim to be as honest as s/he can. While the victim may have been engaging in activities that others may judge inappropriate, immoral, risky, or illegal, lying or leaving out information can be detrimental to an investigation and

Familiarize yourself with local practice regarding underage drinking tickets and other illegal activities of victims. Most law enforcement officers and prosecutors will not charge the victim of a sexual assault with a crime for engaging in an illegal activity when the assault occurred.

jeopardize the chance of a future criminal prosecution.

The victim will also be asked about the acts that made up the assault and the timing of each of these acts. Such questions can be quite specific, and can include:

Officers are trained to establish the timeline of a crime. This includes the time before, during and after the assault. The credibility of many victims is measured by their ability to provide this timeline. Unfortunately, trauma can impede a victim's ability to tell a linear story. A victim may vividly recall the texture of the perpetrator's shirt, but not remember if he was wearing a hat. This is the way trauma works. A good officer will understand this and structure an investigation accordingly.

- any statements made by the suspect
- whether the victim made any statements
- if/how the victim resisted
- specific mechanics of the assault (what body part was where when)
- whether the suspect ejaculated (if male)
- what the suspect was wearing
- Whether the victim was using alcohol, prescription medications, or street drugs. This information could be asked to determine whether the victim has an impaired ability to recall events.

- the order in which clothing was removed.

At some point, the victim may be asked if s/he would be willing to sign a written statement against the perpetrator. Some officers may also ask a victim what they would like to happen. Both of these techniques are used as indicators of the victim's willingness to proceed.

Follow-up interviews serve a variety of purposes:

- They can clear up potential inconsistencies
- They can further explore aspects of the case that were not explored during the initial interview. The victim is often more lucid and can think more clearly in a follow-up interview than in the initial interview.
- They can clear up questions raised by the district attorney.
- They provide an opportunity to photograph injuries several days after the fact. Some bruises show up more clearly later than immediately after an assault.
- They can identify additional areas that can be corroborated by further investigation.

Other factors that may affect an investigation include the victim's age, mental state, language, culture, and disability. Specially trained investigators or interpreters might be necessary depending on the situation.

The following investigative techniques may be used in addition to interviews:

Line-ups: The victim is asked to identify a suspect from a group of people. In a photographic line-up, the victim tries to identify a suspect's photograph placed with other photographs. In an in-person line-up, the victim is in a room apart from the suspect and others. S/he can see the people in the line-up, but cannot be seen by them.

One party consent phone calls: In Wisconsin, law enforcement may work with a victim to place a phone call to the suspect in the hope that the suspect will confess, admit to some or all elements of a crime, or make a damaging statement. The suspect need not be told that the call is set up or being recorded; only the victim's consent is needed to make the call.

Locating the crime scene: The victim may be asked to ride along with police to locate the crime scene.

Composite portrait: The victim may be asked to work with a police artist to develop a sketch of the assailant, which can be generated by hand, or sometimes with a computer.

Polygraphs and voice stress test analysis: As of April 27, 2004, Wisconsin law prohibits law enforcement from using a polygraph of the victim of a sexual assault (or any lie detection device) as a screening tool for an investigation. Specifically, this portion of the statutes reads:

If a person reports to a law enforcement officer that he or she was the victim of an offense under s. 940.22 (2), 940.225, 948.02 (1) or (2) or 948.085, no law enforcement officer may in connection with the report order, request, or suggest that the person submit to a test using a lie detector or provide the person information regarding tests using lie detectors unless the person requests information regarding tests using lie detectors. Wis. Stat. 968.265(2).

A lie detector is defined as "a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or other similar device, whether mechanical or electrical, that is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual." Wis. Stat. sec. 111.37 (1)(b).

Voice stress test analysis: Voice stress test analysis is a lie detection device increasingly used for the same purpose as polygraph tests---to screen out false reports. Some consider voice stress tests less reliable than polygraph exams. In fact, both the American Polygraph Association and the American Association of Police Polygraphists recommend against its use as a lie detection device.

Photographs: Sometimes, law enforcement will photograph injuries. This can occur immediately following the interview or at some later point.

Confessions: Sometimes, a suspect admits to all or part of the crime. The victim may be informed by law enforcement that the suspect confessed. A confession is not a guilty plea, and an assailant who confesses may still plead “not guilty.” If the assailant pleads “not guilty,” the judge will determine whether the confession can be used as evidence against her/him by analyzing the circumstances surrounding the confession.

Investigators for the defense: The defense will conduct its own investigation. Alert the victim to the possibility of being contacted by a defense attorney or by an investigator hired by the defense. An advocate can explain to the victim that people working for or with the defense may not clearly identify themselves as such, but may say something to the effect that they are “investigating a case against (defendant’s name),” implying a connection with law enforcement and/or the district attorney’s office. They may also say they “work for the state,” which is true if the person is hired by the state public defender’s office.

An advocate can tell the victim that s/he is not required to talk to anyone representing or working for the defendant and that anything s/he tells them can and probably will be used to discredit the victim in court. If any unfamiliar individual contacts the victim, the victim should ask whether s/he is associated with the prosecutorial team or the defense team. Victims should feel free to contact law enforcement or the district attorney’s office to confirm this relationship. It is also a good idea for the victim to inform her/his family, roommates, friends, or anyone else from whom the defense may attempt to elicit information that they may be contacted. No person is under any obligation to talk to defense representatives unless court-ordered, and doing so could potentially damage the criminal case.

The role of the district attorney in the investigation:

Sometime the district attorney will get involved in the investigation. This can occur if law enforcement consults with the district attorney during the investigation and the district attorney believes more information is necessary. This can also occur if law enforcement forwards a case to the district attorney, but the district attorney needs more information. Some district attorney’s offices have their own investigators. In a sexual assault case, however, district attorneys may not “[o]rder that the person submit to a test using a lie detector,” or “[s]uggest or request that the person submit to a test using a lie detector without first providing the person with notice and an explanation of his or her right not to submit to such a test.” WI. Stat. sec. 968.265(3).

The role of the advocate:

The role of the advocate in a law enforcement investigation is to provide support to the victim. Just as an advocate would not appreciate a law enforcement officer telling her/him how to do her/his job, a law enforcement officer might resent an advocate's input about his or her job. This could be particularly disruptive during a law enforcement interview or during evidence collection. It could also be dangerous for an advocate to provide advice on the direction of an investigation. An advocate who gets too involved in an investigation could compromise confidentiality for the victim. However, there are many situations in which advocates see law enforcement officers act insensitively - some law enforcement officers lack training or sensitivity, others have had one bad experience which colors their perception of investigating sexual assault. In addition it is important to recognize that sexual assault is a difficult issue for most people and law enforcement officers are not immune.

Advocating during the police investigation

It is best practice for law enforcement agencies to allow victim advocates to be present during most portions of the law enforcement process. The relationship between law enforcement and the advocate is further discussed in Chapter 30. Advocates and law enforcement within a given community have the potential to respond to the same individual sexual assault situations due to their mutual crisis/emergency response roles. This stage of the criminal justice process can involve and/or create a lot of emotions within victims as well as agencies involved in investigating the crime and supporting victims. These two aspects of the nature of interactions between Law Enforcement and Sexual Assault Service Providers can contribute to a unique relationship between the two.. Conflicting interests most commonly come up during law enforcement interviews. Thus, it may often be helpful for the advocate to be present, if possible, during these interviews. However, this requires a balancing between law enforcement and advocate interests and practices. Advocates should also be aware that the actions of an individual officer could be dictated by departmental policy and should consider this to avoid potential conflicts in the relationship.

Victim concerns about investigation

A victim can take several routes to address any concerns s/he has about an officer. This section will briefly discuss some of those routes; for concerns about Crime Victims Rights violations see Chapter 13 in this manual. Before taking any action, WCASA strongly encourages advocates to review all the victim's options with them. Regardless of what action might be taken, it can be helpful for victims to keep some kind of record of any treatment or behavior by an officer and department policies or procedures that cause concern. Information to record could include:

- Statements or actions made by the officer.
- Impact on victim
- Dates
- Witnesses

- Responses of the officer or anyone else on the department to previous attempts by the victim or advocate to address or correct the complaint
- Desired outcome

Direct Approach

Addressing the concern directly with the individual officer can be an efficient and empowering approach, but it can also be intimidating and overwhelming. There are several types of approaches that could be considered “direct”. The most direct approach would involve a meeting between the victim and the officer. It may be preferable to have an advocate and another officer present, possibly the officer’s supervisor. When arranging this type of meeting it is helpful to make clear to the law enforcement officer and/or agency the purpose of the meeting and potentially the desired outcome. If the victim is not up to meeting with the officer in person it is also possible to compose a letter outlining the victims concerns and possible remedies. Be aware that this approach may be part of an agency’s internal grievance procedure. Grievance policies are specifically addressed next.

Grievance policies

Most law enforcement agencies have grievance policies. A copy of this policy should be made available to the public upon request. Policies will differ slightly from community to community.

Things to consider:

- Impact on Victim. The impact can range from feelings of empowerment to causing additional trauma.
- When to make the complaint. It can be made concurrent with or following the conclusion of the criminal case.
- Desired outcome. This is important to consider throughout the process. If the victim’s desire is to change the ultimate outcome of the case, they may find this process unsatisfactory. If however s/he would like to ensure that the local LE treats sexual assault victims more sensitively, this process may encourage the agency to increase training opportunities for law enforcement on victimology.

CHAPTER 6

Interviewing Children and Child Advocacy

The intent of this chapter is to provide an *overview* of child interviewing techniques and associated issues. The intent is to enable a sexual assault legal advocate to effectively advocate for child victims of sexual assault. It is *not* intended to be a training tool on child forensic interviewing. Individuals who interview children require advanced training that goes well beyond the scope of this chapter. This chapter does not fully discuss mandatory reporting, Child Protective Services (CPS) investigation procedures, or pediatric SANE examination. For more information on these topics, please see Chapters 22, 23, and 4, respectively.

Though child sexual abuse is an all-too-common occurrence, the criminal justice system (CJS) was not designed with children in mind. Therefore, it has taken a great amount of time for the CJS to begin to respond effectively to child sexual assault victims.

Child victims encounter (many of the same CJS barriers experienced by adult victims). The believability of the victim is an issue in all sexual assault cases but especially when the victim is a child. Societal biases about what kind of person abuses children and who become child sexual assault victims often impact those serving the criminal justice system. As with adult sexual assault victims, a child sexual assault victim is usually the primary scene and the primary witness. Advances in collecting and analyzing viable physical evidence have increased the CJS's ability to hold child sexual abusers accountable. Because physical evidence isn't always available, however, the case often rests on the child's statement and how that statement was obtained.

This chapter will outline interviewing techniques used in Wisconsin. While recent advances have improved our state's response to sexually abused children, there is still work to be done. Not all of Wisconsin's sexual assault service providers work directly with children who are abused; however, every sexual assault advocate plays an important role when working with local child protective services (CPS), law enforcement (LE), victim/witness (V/W) specialists, and district attorneys (DAs). A general knowledge of appropriate interviewing approaches may enable the advocate to help her/his local system improve its response.

In the 1980s, there was a plethora of high-profile child sexual abuse cases that were later considered problematic. Concerns raised by these cases centered on the apparent suggestibility of the children, multiple interviews eliciting inconsistent statements, and evidence of interviewers "leading" child witnesses. Challenges in other cases include:

- lack of coordination between the various agencies involved
- multi-jurisdictional challenges
- lack of available training on child development
- medical personnel unwilling to testify

- a lack of understanding of physical evidence and DNA
- cultural ignorance.

The concerns raised by these cases resulted in a backlash against child sexual assault victims, who were then considered to be an unreliable group. This attitude has still not completely dissipated, and studies focusing on the memories and suggestibility of children continue to be conducted. What is most distressing about such concerns is that none of them are in the control of the children, though the children have to suffer the consequences. Solutions rest in the hands of the individuals conducting the investigations and interviews.

Child advocacy centers

The child advocacy center is a fairly recent development that is growing in popularity in Wisconsin. The concept was originated and developed by a district attorney in Huntsville, Alabama, in 1985. The goals of child advocacy centers include:

- Provide a child-friendly and sensitive environment in which children can tell their stories.
- Minimize the trauma that children experience when interacting with the criminal justice system.
- Meet the child's needs.
- Enhance investigative and prosecutorial efforts.

Like SASPs, not all child advocacy centers provide the same services, but in general they attempt to reach their goals by using a multi-disciplinary, coordinated, and community-based approach.

It is important that sexual assault advocates who provide service to areas containing a child advocacy center develop a relationship with that center in an appropriate and respectful manner. As when working with other parts of the criminal justice system, it is important that clear roles and boundaries are established and that all those agreeing to collaborate understand those parameters.

A child advocacy center is primarily an investigative entity. Therefore, advocates can work with it much as they work with other systems such as law enforcement officers and prosecutors. The individuals who work at child advocacy centers are specifically trained to interview children. Interviews of a child victim may be conducted at a child advocacy center, and the centers may videotape interviews for use by law enforcement as evidence. Some officers are trained in this technique as well. Advocates can strongly encourage the use of child advocacy centers when a child sexual abuse case arises. Sometimes, a child's allegation is disbelieved because it is made in the context of a family disagreement, such as a divorce. In any case where the credibility of the child could be doubted, the involvement of a child advocacy center can be invaluable.

Some advocacy agencies have had success working with law enforcement and child protective services to develop protocols for the investigation of child abuse cases, including sexual abuse. Other agencies have had success volunteering to provide input as law enforcement and child protective services develop memoranda of understanding about how to collaborate on child abuse cases. An advocate can ask law enforcement and/or child protective services for a copy of any memoranda or written policies that describe policies already in place.

Wisconsin currently has over 15 child advocacy centers. For more information about centers that are affiliated with the National Children's Alliance, please see <http://www.nationalchildrensalliance.org/index.php?s=58&state=Wisconsin>

Counties without CACs employ a variety of techniques to investigate CSA cases. Some have a joint protocol for Child Protective Services (CPS) and law enforcement when investigating these cases. Some have one or more investigators from either CPS or law enforcement trained in one of the two major forensic interviewing protocols. Some videotape these interviews. Some have established a special room in which these interviews and/or video recordings take place.

Interviewing children

The following information will focus on the interviewing component of the CJS response to child sexual assault, including:

- things to consider when interviewing children
- various interviewing protocols
- the do's and don'ts of investigating.

An individual sexual assault agency's ability to impact the local situation may differ, but every agency should be able to impact it in some beneficial way.

Interviewing children requires highly skilled interviewers who are ideally part of a coordinated, multi-disciplinary response team. This team could, for example, be composed of:

- law enforcement
- child protective services
- the prosecutor
- child or sexual assault advocate
- other appropriate professionals.

Parents, grandparents, other concerned family members, and friends shouldn't be in the room when the child victim is interviewed. Such people can have an impact

on any disclosure that might occur, and their presence might have a negative influence on any subsequent prosecution efforts.

Children often disclose their abuse in pieces over time; this type of disclosure doesn't necessarily indicate inconsistencies. If the abuse is chronic, different aspects will come at various times as it may be difficult for the child to process, categorize, and express information from multiple assaults.

Delay in disclosure is the norm for child sexual assault victims, as it is for most adult sexual assault victims. The risk of recantation may be higher if:

- there is a non-supportive caregiver.
- the disclosure causes large structural changes in the family.
- the offender is a loved one who is imprisoned.
- there are threats from the family and/or perpetrator.

Younger children tend to disclose accidentally. Often, sexualized behaviors are the initial indicators of sexual assault. Older children tend to be more purposeful in their disclosures. Imminent exposure can be a motivating factor in these disclosures.

The interviewer should make every effort to make the child interviewee as comfortable as possible. The environment of the interview should be neutral so that the child is not distracted or over stimulated, but comfortable. For example, the room might have appropriate child-sized furniture and lighting that's not too bright or dim.

The interviewer should assess the child's competence as a witness. This "Assessment" is based on a number of criteria, including, but not limited to:

- cultural considerations
- the child's developmental abilities
- the child's communication style.

Up to 75% of abused children initially deny the abuse. Therefore, it is important that children feel comfortable with the interviewer (*Child Welfare*, "How Children Tell: The Process of Disclosure in Child Sexual Abuse," Sorenson, T., and Snow, B., Vol. LXX No. 1, Jan/Feb, 1991).

Working to make the child interviewee feel as comfortable as possible begins during the rapport stage. Common approaches include:

- getting to the child's level
- telling the child that the interviewer interviews lots of children
- using appropriate voice tones that are neither patronizing or overbearing

- using appropriate body position and dress to decrease the look of “authority.” (“Child Maltreatment, Domestic Violence and Cognitive Graphic Interview,” Ann Ahlquist (1998), 11975 45th Avenue North, Minneapolis, Minnesota 55442, 612-559-1115).

In Wisconsin, the law requires interviewers to establish that the child knows:

- the difference between the truth and a lie
- the importance of telling the truth.

Questions should be as open-ended as possible until the appropriate place in the interview when it may be necessary to “funnel” the interview toward more specific questions.

The interview needs to be well documented and include the necessary elements to be used in court. Videotaping the interview seems to be the preferred method *if it can be done well*; however, practices among various jurisdictions in Wisconsin seem to be fairly inconsistent in this aspect. Some dislike videotaping, as it can be problematic if the interview is not done well. In addition, opponents to the practice of videotaping interviews argue that videotaping requires a lot of time and training. Furthermore, some Wisconsin counties simply lack the resources necessary to videotape interviews. In such counties, audio recordings are commonly made.

Interviewers will typically gather the following information:

- the child’s vital statistics, such as date of birth, height, weight, home address, school, and grade
- the child’s physical appearance at the time the abuse occurred
- if the child has any known physical or mental disabilities
- what name the child uses for the offender
- the dynamics of the child’s family
- the offender’s relationship to the child (such as family member, friend, stranger)
- a physical description of the offender
- a time frame as to when the abuse or assault occurred, which could include asking how often abuse took place (in order to help the child recall a time frame, the detective may ask if the assault or abuse is associated with any important event in the child’s life, such as a birthday, holiday, new pet, etc.)
- the child’s age at the time of the first and last incident

- when the first incident occurred
- when the most recent or last incident occurred, what time of day it was, and how long it lasted
- the details of each incident, including the location(s) of the assault(s) or abuse
- if there were any witnesses
- any corroborative details of the assault(s), which could include descriptions of furniture, clothing, other items, people who live nearby, television shows that were on at the time, or games that were being played.

An advocate will also want to keep in mind the following considerations:

- The younger the child (and in the case of a child with special needs), the greater the urgency to interview the child immediately. The “window of disclosure,” the period of time when the child can best recall the incident, is generally shorter for younger children (and those with special needs).
- It is best practice for the child to be interviewed separately from the parents and/or caregivers. This prevents the likelihood of a contaminated or seemingly contaminated interview, as the presence of a parent or guardian can affect the statements of the child.
- The officer or group may want to audio or videotape the interview. This practice varies widely from county to county. Some district attorneys require those conducting child interviews to tape every child interview. Others never use tapes. Advocates can ask the district attorney what practice s/he recommends in a particular county.

Cognitive graphic interviewing (CGI)

Cognitive graphic interviewing (CGI) is an approach designed by Ann Ahlquist that uses graphics drawn by the child to identify whether abuse has occurred. Proponents of this approach feel that “[u]sing graphics facilitates communication and enhances memory, inviting children’s knowledge and credibility (that which has a reasonable degree of certainty). The cognitive graphic method is likely to increase the ability and willingness of people to communicate accurately about themselves.” (“Child Maltreatment, Domestic Violence and Cognitive Graphic Interview,” Ann Ahlquist (1998) 11975 45th Avenue North, Minneapolis, Minnesota 55442, 612-559-1115.)

Step-wise interview protocol

Dr. John C. Yuille, a leading researcher in children's memory and suggestibility (among other psychiatric fields) developed a technique of child forensic interviewing called step-wise interview protocol. This technique seems to be more commonly used in Wisconsin than the CGI approach. Step-wise interview protocol is mainly based on dialogue between the interviewer and the child, though it may incorporate the use of a body diagram and/or anatomically correct dolls.

Tips for advocates

It may be helpful for a sexual assault advocate to find out how local child sexual assault investigations and interviews are generally conducted, outside the context of a specific case. Although it's not the advocate's role to be involved in the investigation of the crime, advocates may provide needed support for the child and family during the investigation and interviews.

Non-offending parents as well as children themselves often call anonymous crisis lines to find out what will happen if they report a child sexual assault. Non-offending parents are often in a state of trauma after discovering that their child has been sexually abused. This is especially true right after disclosure. Sometimes parents react to the disclosure in a way that effectively prevents the child from disclosing to others. Sometimes parents question the child in a way that would taint future interviews. The effects of such reactions, which are not unnatural parental responses, are seldom done with the intent to harm the child or the investigation. A sexual assault advocate can be instrumental in preventing such reactions from harming the child or damaging the integrity of the case. Advocates can also encourage parents to vent their emotions in an appropriate manner, which will allow them to better support their child.

Because trauma reactions vary, especially if the child was previously assaulted and/or either or both of the parents were sexually abused as a child, it is common for parents to access crisis lines and advocacy services at any point during child sexual assault investigations. The more accurate and specific the information the advocate can convey to the victim and/or parents, the more empowered and less traumatized they may feel.

Tips for Prosecutors

Additional information for prosecutors on working with child victims of sexual assault can be found in the "Wisconsin Prosecutor's Sexual Assault Reference Book" in chapter III, sections E and F.

Prosecutors must take into consideration a child or teen's cognitive and developmental abilities when interviewing minor victims. Some child interviewing tips for prosecutors include:

- think creatively to come up with ways to aid the child in telling his or her story (use of dolls, drawings)
- do not assume a child has the same cognitive and developmental abilities as other children of the same age

- use easy words; use words the child uses
- have the child clarify important words; they might mean something different than an adult's definition of the same word
- have conversations with children to practice speaking on their level

CHAPTER 7

ARRESTING AND CHARGING THE PERPETRATOR

Definitions

An **arrest** occurs when a law enforcement officer takes a suspect into custody and that suspect is not free to leave.

A **criminal complaint** is a formal legal document detailing the criminal charges against a defendant.

A **warrant** is a legal document that does the following:

- represents the court's finding that probable cause exists that a crime occurred,
- represents the court's finding that a particular defendant committed that crime, and
- orders law enforcement to take that defendant into custody.

The process

A suspect can be brought before the court after being arrested (with or without a warrant) and/or in accordance with a criminal complaint. The process by which a perpetrator is arrested and charged can vary from case to case. Here are three possibilities:

1. Officers may arrest a suspect immediately after the crime is reported.
2. Officers may conduct an investigation and forward **founded**, or prosecutable, cases to the district attorney (DA). The DA then decides whether to issue a criminal complaint. If a criminal complaint is issued, the defendant may be brought to answer those charges in accordance with either an arrest warrant or a summons. A summons asks the suspect to appear in court to answer charges. A summons may be more appropriate than an arrest in some instances and, in some cases, may be required.
3. Law enforcement may decide not to forward the case to the district attorney. Or, after they forward the case, the DA may decline to issue charges.

This chapter will discuss each of these possibilities.

Arrest without a warrant

A law enforcement officer may arrest a suspect if “[t]here are reasonable grounds to believe that the person is committing or has committed a crime.” Wis. Stat. sec. 968.07(1)(d). This means that a law enforcement officer could arrest a suspect immediately after an interview with the victim. Different counties report different practices regarding the extent to which arrests are made before a criminal complaint is issued and without an arrest warrant. Advocates may want to familiarize themselves with local practices.

Reasons to apprehend a suspect immediately include:

- a danger that the suspect will flee,
- the need to collect physical evidence from the suspect,
- the existence of an ongoing danger to the victim necessitating custody, or
- mandatory arrest when the sexual assault is part of a domestic abuse incident.

Some advocates believe that immediate arrests should occur with greater frequency and that the failure to immediately arrest indicates the tendency to doubt sexual assault victims’ credibility. Some law enforcement officers believe that an immediate arrest can impede an investigation and that waiting to arrest is best practice in some situations. For example, many officers believe that suspects in custody are more likely to put up their guard, resist questioning, resist evidence collection, and request a lawyer than a suspect who hasn’t been arrested. A suspect who is arrested and taken into custody is afforded more extensive legal protections than a suspect under investigation.

A suspect taken into custody without a warrant may be detained up to forty-eight (48) hours without a hearing. At this hearing, sometimes called an “initial appearance,” the court must determine whether probable cause exists that the defendant committed a crime. If not, the defendant is released. If the court decides probable cause does exist, the court may impose bail and conditions of bail. Bail conditions can be important to some victims for safety planning. Where this concern is tantamount, an immediate arrest may be best practice. In such cases, the district attorney is asked to “issue a complaint forthwith.”

The district attorney may ask the court for a week or two to file a complaint after the initial appearance. Some district attorneys find it difficult to finish an investigation and issue a complaint within two weeks---another reason DAs may encourage law enforcement officers not to make immediate arrests. If the suspect is released from custody because probable cause cannot be established, this does not prevent the district attorney from issuing charges at a later date.

Charging the defendant

If the suspect isn't arrested and taken into custody immediately, the suspect is usually charged in a criminal complaint after an investigation is completed. Cases with enough evidence are forwarded to the DA for a charging decision.

A case may not be prosecuted for a variety of reasons. The investigation may not have turned up enough evidence to show that a crime was committed, or the accounts of witnesses may not match that of the victim. For example, conflicting accounts could arise in a family situation or an acquaintance rape situation where witnesses are friends or relatives of the perpetrator. The terms unfounded or unsubstantiated are often used to describe cases that aren't being prosecuted. A case may also be unfounded because the victim's truthfulness is being questioned or the evidence fails to establish one of the elements of the crime. This might occur in a case of unwanted sexual contact where the actions of the accused appear to be accidental rather than intentional.

For a victim, an "unfounded" or unsubstantiated label can be extremely difficult; thus, it is an important time for the advocate to stress that she/he believes the victim. It may or may not be possible to challenge the decision not to forward a case to the district attorney. Victims can request a meeting with the officer making the decision and discuss the decision not to charge. At that meeting, the victim can present concrete reasons to continue with the case.

A second step - which would be taken only in extreme cases, and only if the advocate and victim are truly convinced of a severe error in judgment or willful prejudice on the part of the detective - would be to meet with the supervisor of the person who made the decision not to forward the case. The advocate can accompany the victim to this meeting. If the advocate and victim take this step, be aware that a law enforcement officer who concludes that a case is unfounded has almost always done so following consultation with her or his superior officer. It is important to listen without bias to the reasons a case is unfounded. See Chapter 30, "Systems Advocacy," for more information about how to handle situations in which seemingly prosecutable cases are routinely categorized as unfounded.

If the officer forwards the case, a district attorney (DA) will review the evidence. The DA will read the reports and possibly meet with the detective to discuss the case. In some cases, the DA might instruct the investigator to gather more information. In other cases, the DA might want to interview the victim.

The Supreme Court in its ethical rules states that a DA should only charge when there is evidence to support the charge. SCR 20:3.8, "Special responsibilities of a prosecutor." District attorneys will analyze the case from the standpoint of whether they can prove the case beyond a reasonable doubt. The decision-making authority granted to DAs is called **prosecutorial discretion**. This authority is broad and hard to challenge.

Wisconsin law contains a provision that allows citizens who have reason to believe a crime has been committed to bring the evidence for review before a judge in the appropriate jurisdiction. Wisconsin Statute 968.26 provides a procedure for district attorneys who lack the requisite evidence to provide probable cause and also for citizens who feel that the prosecutor is failing to charge a legitimate crime. While this procedure will ensure that a judge will, at minimum, review the citizen's petition, it is not

a guarantee that a judge will initiate a John Doe proceeding or issue a criminal complaint. Wis. Stat. 968.26 (2)(d).

Prosecutorial discretion means that many DAs won't pursue a case they don't think they can win. The "winnability" of a case may be based on considerations beyond the evidence of the crime, such as:

- the credibility of the victim,
- the victim's ability to testify, and
- the credibility and persuasiveness of witnesses.

The district attorney owes a duty to protect the public, and this also can be a factor in the decision to charge.

Victims may ask the DA to keep them informed about their case. Wis. Stat. sec. 971.095(2)-(6). DAs are required to:

- inform the victim if they decide not to charge a suspect after an arrest is made,
- inform the victim if a case is dismissed,
- confer with the victim regarding plea bargains, sentences, and other matters in the case, and
- inform the victim of the disposition of the case (this obligation is satisfied by any representative of the district attorney, including the victim/witness coordinator).

Many district attorneys, however, make it a practice to confer with the victim even when no arrest occurs or no charges ensue.

In rare cases, the decision not to charge is conditioned on the participation of the offender in certain treatment groups or programs. This is called a **deferred prosecution** program. In Dane County, such a program exists for statutory offenses involving a minor where the sexual activity was consensual and between two individuals of relatively close age and the activity was not forced or coerced.

The complaint

If the district attorney decides to proceed, s/he will issue a criminal complaint. A complaint is "a written statement of the essential facts constituting the offense charged." Wis. Stat. sec. 968.01(2). A complaint is filed with a court, which will then issue a summons or arrest warrant or will dismiss for a lack of **probable cause**. Wis. Stat. sec. 968.02(2).

Summons and arrest warrants

A suspect may be brought before the court to answer charges by an arrest warrant or a summons. A summons asks the suspect to appear voluntarily before the court, while an arrest warrant asks law enforcement to take a suspect into custody and bring him or her before the court to answer charges. Advocates should inform victims that an arrest warrant may not be issued in every situation, particularly if the defendant is known to the victim and the possibility of flight or ongoing danger to the community is perceived as low by the district attorney and/or court.

Both the warrant and summons represent the court's finding that the complaint, on its face, shows probable cause that a crime occurred. Wis. Stat. sec. 968.04(1). Sometimes complaints are accompanied by affidavits. An **affidavit** is a document in which an individual swears to certain facts under penalty of perjury. Affidavits may be necessary to obtain a warrant or summons. In the affidavit, the officer swears to the facts suggesting that a crime occurred and that a particular suspect committed the crime.

A warrant allows the law enforcement officer to take a suspect into custody. Wis. Stat. sec. 968.04(1). A summons, on the other hand, simply orders the suspect to appear in court. Wis. Stat. sec. 968.04(3)(b)1. A summons is usually used for all misdemeanor cases that carry a penalty of no more than six (6) months of imprisonment unless the issuing judge has reason to believe that the suspect will not respond to a summons. Wis. Stat. sec. 968.04(2)(b).

An arrest warrant must be issued by a court. A summons may be issued by the court, but a district attorney may also issue a summons without prior approval by the court.

Once the suspect is charged in the criminal complaint, s/he is usually referred to as the defendant. A defendant in custody pursuant to an arrest warrant must be brought before the court within forty-eight (48) hours to answer the charges against her/him. This is called the **initial appearance**. A defendant appearing due to a summons will answer charges against her/him at the date of the appearance. This is also called the initial appearance.

CHAPTER 8

COURT PROCEDURES

After an arrest is made or the defendant is summoned, courtroom proceedings will begin. These proceedings differ depending on whether the crime charged is a misdemeanor or a felony. While felonies and misdemeanors share some similarities, differences do exist. Felonies are considered to be more serious or severe crimes, and the felony case process is thus more complex than misdemeanor cases.

Advocates can play a meaningful role in both felony and misdemeanor cases. Advocates are important in misdemeanor cases because law enforcement and district attorneys tend to minimize the seriousness of misdemeanor crimes. The victims of misdemeanors may not get the same attention as victims of felonies. It is crucial for the advocate to take an active role in tracking cases and keeping the victim informed in both felony and misdemeanor cases.

This chapter outlines both misdemeanor and felony court procedures. As an advocate, remember that the criminal justice system is a vast and complex maze that is often difficult to understand. The advocate's job as interpreter is vital to the victim's understanding of what is happening. Victims need the advocate's attention and support, especially when other actors in the system aren't sensitive to their needs and concerns.

Courtroom Demeanor

The advocate's demeanor in the courtroom is extremely important. Judges, attorneys, clerks, and bailiffs all see the advocate's behavior. They may base their opinions---and possibly their support of the advocate's organization and the victim---on their observations of the advocate's conduct. The goodwill of judges, clerks, bailiffs, and district attorneys is crucial to the advocate's ability to perform effective advocacy for sexual assault victims. In addition, advocates accompanying clients through jury trials are visible to jurors who often form opinions about the victim based on the victim's association with other people. Here is advice for advocates:

- When seated in the courtroom, don't gesture, gasp, change facial expressions, or noticeably react in any manner in response to anything said by witnesses or attorneys, regardless of the reactions of others in the courtroom. Your demeanor should be composed and your behavior noncommittal, both verbally and through body language.
- If you must communicate with someone seated next to you, whisper or unobtrusively write notes.

A **felony** is a crime with a potential confinement of one year or more. A **misdemeanor** is a crime with a potential confinement of less than one year.

- Don't draw attention to yourself, especially in the jury's presence. Be careful not to nod or shake your head in response to answers given by the victim on the witness stand, because the defense could accuse you of "coaching the witness" and have you removed from the courtroom. Take extra effort to control your reactions because you can sometimes react involuntarily.

Felony versus misdemeanor

A felony is a crime punishable by confinement for one year or more in a state prison. Wis. Stat. sec. 939.60. A misdemeanor is punishable by less than one year in a county jail. Wis. Stat. sec. 939.60.

A sentence for a felony or misdemeanor may include extended supervision, restitution, counseling, fines, and court costs. In a felony case, an arrest or summons is issued, and the defendant has an initial appearance, a preliminary hearing, an arraignment, and a trial. A misdemeanor does not require a preliminary hearing.

Initial appearance

The initial appearance (also called the initial hearing) will occur within a "reasonable time" after an arrest or summons. Wis. Stat. sec. 970.01. A "reasonable time" usually means on the first court date after an arrest occurred or on the date of the summons. Some counties schedule initial appearances at the same time each day. The purpose of the initial hearing is to:

- Set bail
- Assign the case to one of the circuit court branches
- Establish the sufficiency of the complaint for probable cause if not already done
- Set a date for the preliminary hearing (for felonies)

At the initial appearance, the judge will inform the defendant of the charges, the penalties for the charge, the defendant's right to a lawyer, and the defendant's right to a preliminary examination. The judge will also provide a copy of the complaint. Wis. Stat. sec. 970.02

The initial hearing is public and is usually short, lasting only about five minutes. The victim may attend the hearing, but the victim's presence isn't required. The advocate may go to this hearing, with or without the victim, to find out the conditions of bail and gather other information.

Bail and release

At the initial hearing, bail will be set. Bail is the amount of money or property the defendant must pledge or turn over to the court to ensure that s/he will appear at all required court proceedings. Bail is required as a condition of release. Wis. Stat. sec.

969.01. The failure to appear can result in the forfeiture of this money or property. Both the district attorney and defense attorney will be asked for bail recommendations.

Bail will be imposed only if the court finds it necessary to assure the defendant's appearance in court. If the court believes that the defendant will appear, s/he will be released on her or his own recognizance. The amount set for bail may only be that amount necessary to guarantee the presence of the defendant.

It is important to inform the victim ahead of time that the defendant will probably be released. However, even if the defendant is released, the judge can impose bail conditions in addition to setting the amount of bail. **Bail conditions** are designed to protect the public, witnesses, and the victim from intimidation and harm. The district attorney should always suggest that one condition should prohibit the defendant from contacting the victim or her/his family. Other conditions of bail could include:

Some courts release defendants without requiring bail. They are either released on their own recognizance (sometimes called a **recognizance bond**) or they are released on a **signature bond**, wherein the defendant is released without posting a cash bail, but the court sets a dollar amount to be assessed if bond conditions are broken. Sometimes these terms are used interchangeably.

- a prohibition on the possession of firearms or other dangerous weapons
- a release specifically into the custody of a particular person
- a limitation on the hours a defendant may leave his or her home
- restrictions on travel
- a prohibition on the use of alcohol or other drugs

Violation of the conditions of release or bail bond is grounds for an increase in the amount of bail or alteration of the conditions of release. If the alleged violation is commission of a crime, release/bail may be revoked. Wis. Stat. sec. 969.08.

In certain limited circumstances, the district attorney may ask that release be denied for a defendant who is charged with first degree sexual assault, first and second degree sexual assault of a child, sexual assault of a child placed in substitute care, or multiple acts of sexual assault of the same child. Wis. Stat. sec. 969.035(2)(a). The district attorney may also ask that release be denied for a defendant who commits a violent crime and has a previous conviction involving a violent crime. Wis. Stat. sec. 969.035(2)(b). The district attorney must make this request in advance of the bail hearing and must show that other bail conditions are not enough to prevent the risk of serious bodily harm to the community or to prevent the intimidation of a witness. Wis. Stat. sec. 969.035(3)(c).

Preliminary hearing

The purpose of the preliminary hearing (also called the preliminary examination) is to determine whether probable cause exists that a felony was committed and that the defendant is the one who committed it. Wis. Stat. sec. 970.03(1). Probable cause is a legal term that means there is a reasonable inference that the accused person probably committed a crime.

The preliminary examination must take place within twenty (20) days of the initial appearance if the defendant is out on bail, or within ten (10) days if the defendant is still in custody and bail has been set in excess of \$500. Wis. Stat. sec. 970.03(2). These timelines may be extended. Id.

Establishing probable cause that a crime occurred is a lower evidentiary burden than establishing that it occurred beyond a reasonable doubt. As of 2011, Wisconsin allows hearsay in preliminary examinations. Wis. Stat. 970.038 provides that the court can base its finding of probable cause in whole or in part on the hearsay admitted during the preliminary hearing. This change is significant because it means that a victim's testimony may not be necessary at a preliminary examination, relieving the victim of the additional stress of describing the assault at this stage of the prosecution. For purposes of the preliminary hearing, if differing factual inferences may be drawn from the evidence, these must be drawn in favor of the prosecution and the defendant must be bound over for trial so that the jury can find the facts; the preliminary examination is not a fact-finding hearing.

The defendant rarely testifies at these hearings, and the defense rarely calls witnesses. Many preliminary hearings on multiple cases can be scheduled within the same time period. Therefore, the courtroom can seem chaotic, and the victim may have to wait before her or his case is called. The advocate, victim/witness coordinator, or district attorney can request that a sexual assault case be heard before less sensitive crimes to alleviate the stress of waiting for the victim. Further, advocates can work with the victim/witness staff to make sure the victim is able to wait in a location away from the defendant before his or her case is called. The defendant, if s/he is not in custody, may be waiting in the hall for the case to be called, and the victim may want to avoid the defendant. An advocate can stand between the victim and defendant if necessary to create a barrier between the two.

At the hearing, the prosecution will call the victim to the stand, and s/he will be sworn in and required to testify about the assault. This can be traumatic for some victims. This may be the first time that the victim has spoken publicly about the assault. The victim will also be cross-examined by the defense attorney. Sometime, the cross-examination can be grueling and difficult for the victim. The defense attorney may use this cross-examination to see how well the victim will hold up in court and try to find any weaknesses in the case. The defense attorney may ask the victim questions that weren't anticipated, attempt to ask the victim questions about irrelevant issues, or attempt to get the victim to answer questions about information protected by the rape shield law. Sometimes, however, the defense attorney will not be aggressive in the cross-examination because s/he does not want to tip the prosecution to the defense at this point in the proceedings.

Tips for advocates during the hearing

- Make sure the victim feels safe. Ask if there is a separate waiting area for victims. Think about where the defendant will be sitting and ask the victim how s/he would like to enter the room. If possible, arrange a meeting place with the victim before the victim even enters the building.
- Talk to the victim about his/her specific fears and triggers about seeing the defendant. Ask if there is anything that can be done to help with those fears. For example, it might help for a victim to hold something in her hand.
- Make sure the victim knows s/he can ask for breaks if s/he gets emotional or feels that a break would allow her or him to continue. If s/he does ask for a break, stand up and walk into the aisle where the victim can walk beside you out of the courtroom, either to the waiting area set aside for victims, the restroom, or somewhere the victim feels comfortable. Make sure the victim returns to the courtroom in time to check in with the DA (district attorney) or ADA (assistant district attorney) before resuming her or his testimony.
- Be careful with discussions in the restroom and other public places. A member of the defense team could be present anywhere public within the courthouse.
- When the victim's testimony is complete, s/he may take a seat beside you, or s/he may leave the courtroom. If s/he leaves, go with her or him and wait for the DA, either near the courtroom, in her or his office, or somewhere else. It is a good idea to arrange a meeting place before the hearing to reduce the chance that the victim will come in contact with the defendant.
- A victim who understands what will occur at a preliminary hearing may find the hearing less traumatic.
- Make sure to schedule enough time with the victim after the preliminary hearing to allow him/her to process what happened.
- Tell the victim that it is normal to feel elated and/or relieved right after the testimony and that it is also normal for negative feelings to return.

The defense almost always moves to dismiss the case on grounds that probable cause was not shown. If the judge decides that probable cause was not established, the judge will dismiss the charge(s). If the judge decides that probable cause was established, s/he will "bind the case over" for further proceedings. This means that the defendant is required to face charges. Bail is continued, increased, or decreased. The district attorney can ask that additional conditions of bail be imposed at this time.

Occasionally, the defendant will waive the right to a preliminary hearing. Wis. Stat. sec. 970.02(4). When this occurs, the case is automatically bound over for further proceedings. Id. The victim may be notified in advance that s/he need not appear.

However, if the defendant waives the hearing at the last minute, it may be too late to contact the victim.

Arraignment

After the preliminary hearing in a felony case, the defendant will appear in court to enter a plea. Wis. Stat. sec. 971.05. The victim doesn't have to appear. In misdemeanors, the plea can be entered at the initial appearance or after the initial appearance. Entering a plea is called the arraignment.

The arraignment is usually short. It can occur immediately after the preliminary hearing or several weeks later. The defendant can enter a plea of "guilty," "not guilty," "not guilty by reason of mental disease or defect," or no contest (sometimes known as nolo contendere). Wis. Stat. sec. 971.08. A plea of no contest means that while the defendant doesn't admit guilt, s/he accepts the charges against her/him and the penalties they bring. Most defendants plead not guilty at this stage in the proceedings.

Plea agreements

At any point after a preliminary hearing in a felony case, or the initial appearance in a misdemeanor case, the defense attorney and the DA or ADA may begin discussing a **plea agreement**. These discussions may take place informally as well as at the scheduled pre-trial conference(s).

In a plea agreement, the defendant agrees to plead guilty to:

- the same charge(s)
- fewer charges (one or more charges being dismissed)
- a less serious charge, or
- charges other than the one(s) with which s/he was originally charged.

The attorneys may also agree on recommendations for sentencing. An example of a plea agreement follows:

A defendant is originally charged with one count of first degree sexual assault and two counts of second degree sexual assault, and agrees to plead guilty to the first degree sexual assault in exchange for the dismissal of the second degree charges and agreement by the DA or ADA not to recommend more than ten (10) years in prison.

In the event of a plea agreement, there is no trial---only a hearing before the judge, who can accept or reject the agreement. See Wis. Stat. sec. 971.08 for more information about acceptance of a guilty plea by a judge. If the judge rejects the plea agreement, either another plea agreement is worked out or, if the defendant maintains a not guilty plea, the case goes to trial. The judge may accept the plea to the charge but reject the recommendations for sentencing and impose a sentence of her or his own

choosing. The victim and/or advocate may attend the plea hearing, but their presence is not required.

If a plea is entered and the case moves to sentencing, the victim should have the opportunity to provide input to the court at the sentencing. This could sometimes require that a sentencing hearing be set sometime after the plea is accepted. Unfortunately, however, sometimes the court will proceed to sentencing without waiting for the input of the victim. For more information about this topic, see the chapters on Crime Victim Rights and Sentencing.

If the DA is considering a plea agreement, s/he should discuss it with the victim. The DA should take the victim's feelings and opinions into account, but that doesn't necessarily mean that the DA will follow the victim's wishes. Remember that plea agreements may be advantageous to the victim, especially in cases that would be difficult to prove or in cases in which the victim is especially reluctant to testify.

District attorneys frequently like to move fast when plea agreements are accepted so the defendant won't change his or her mind. To make sure victims are kept in the loop regarding plea agreements, ask the victim/witness coordinator how plea agreements, victim input, and notification are handled in each county. Further, make sure victims communicate their wishes concerning the plea agreement to the victim/witness coordinator.

Pre-trial motions and conferences

The district attorney, assistant district attorney, and defense attorney can bring motions to the court's attention before trial. A motion is a document in which a party asks the court to enter an order. Wis. Stat. sec. 971.30.

The purpose of most motions is to ask the court to exclude or admit evidence during trial. The evidence may include such things as:

- confessions
- articles found during a search of the suspect, the suspect's vehicle, or the suspect's residence
- additional charges against the defendant.

The rules governing court procedures state that any motion that can be resolved prior to trial may be brought before trial. Wis. Stat. sec. 971.31. Further, some motions *must* be brought before trial or the right to bring them is lost. In many cases, the admissibility of evidence will be resolved before trial through a motion and perhaps one or more motion hearings. Some victims wish to attend these motion hearings, but other victims report that the motion hearings are emotionally draining and they prefer not to attend.

Two common pre-trial motions unrelated to evidence are:

1. Change of Venue

In most cases, the trial is held where the crime was committed. Wis. Stat. sec. 971.19. If multiple crimes were committed in multiple counties, or a crime was committed extremely close to one or more other counties, the trial may be held in any one of these counties. If an act causing death occurs in one county, but the death occurs in another, the defendant may be tried in either county. Wis. Stat. sec. 971.195. If the offense is the failure to comply with sex offender registration requirements, the defendant will be tried in the county of residence at the time the complaint is filed. A defendant can request that the trial be moved if it is shown that an impartial jury cannot be had in the county. Wis. Stat. sec. 971.19. Alternately, a jury from another county may be requested. Wis. Stat. sec. 971.225.

2. Substitution of judge

Occasionally, a defendant might motion for a substitution of judge. A defendant is entitled to one substitution of judge. Wis. Stat. sec. 971.20.

Discovery

The discovery process is designed to allow each party to obtain the knowledge necessary to present a case in court. According to the rules of discovery in criminal cases, a district attorney must supply certain information to the defendant, such as:

- the defendant's written or recorded statements regarding the crime
- evidence the district attorney plans to use at trial
- a summary of the defendant's oral statements to be used at trial and the names of witnesses to those statements
- a copy of the defendant's criminal record
- a list of material witnesses
- physical evidence to be used at trial
- the criminal records of any witnesses the district attorney plans to call if the district attorney knows of such records
- any exculpatory evidence (evidence tending to cast doubt on the defendant's guilt). See Wis. Stat. sec. 971.23.

The defense attorney must provide to the DA:

- a list of material witnesses
- any physical evidence to be used at trial
- the criminal record of any defense witnesses if the defense attorney knows about such record.

Victims have additional protections in the discovery and trial phases:

- The defendant or his or her attorney may not compel a victim of a crime to submit to a pretrial interview or deposition. Wis. Stat. sec. 971.23(6c) Sometimes, victims will be subpoenaed for this purpose. If this occurs, the victim should contact the district attorney.
- In a prosecution of sexual assault, sexual assault of a child, repeated acts of sexual assault of a child, or of any other crime if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01 (5), the court may *not* order any witness or victim, as a condition of allowing testimony, to submit to a psychiatric or psychological examination to assess his or her credibility.

For more information on victim's rights, please see Chapter 13 in this manual.

HIV/STI testing

HIV testing may be required of a defendant charged with any of the following:

- sexual assault
- child sexual assault
- multiple sexual assaults of the same child
- sexual assault of a child placed in substitute care
- sexual assault of a child by a school staff person or a person who works or volunteers with children
- incest. See Wis. Stat. sec. 968.38.

If the prosecutor has probable cause to believe that the defendant significantly exposed the victim to HIV or another sexually transmitted infection and the victim and/or his or her guardian requests the testing, the district attorney must petition the circuit court to test the defendant. Wis. Stat. sec. 968.28(2)(a). The advocate should inform the victim that s/he may ask the district attorney to pursue the testing if s/he believes that probable cause exists to show exposure to HIV. Sexually transmitted infections

include gonorrhea, syphilis, chlamydia, chancroid, genital herpes infection, and sexually transmitted pelvic inflammatory disease. Wis. Stat. sec. 252.11(1).

The timelines within which a victim must ask for testing are limited. If the defendant has a preliminary hearing, the district attorney can ask for the test any time after the initial appearance and before the end of the preliminary hearing. Wis. Stat. sec. 968.38(3). If the defendant has no preliminary hearing, the district attorney may request testing at any time after the court binds the defendant over for trial and before a verdict is rendered. Id. Finally, the request may be made after a conviction. Id.

Court proceedings and children

Court proceedings may be difficult for children. The advocate can work with the district attorney or the victim/witness coordinator to encourage practices that prepare the child for this difficult process. For example:

- Arrange for the DA to take the child on a “field trip” of the courtroom to familiarize the child with the environment.
- Provide information for the child to take home regarding getting ready for court.
- Encourage support people to accompany the child to the courtroom.
- Let the child choose the size of the chair to sit in while testifying.
- Use a less formalized setting in the courtroom.
- Explain to the child the roles of the bailiffs and the judge.

Sometimes, the child may benefit from the safeguards and the formality of the courtroom, because the child may feel more secure.

Protections for children testifying

As a general rule, children cannot be completely shielded from testifying. Videotaped statements and depositions, testifying by closed circuit TV and the use of a screen may be possible in some situations to reduce the impact of testifying on the child.

Audiovisual recordings of statements of children

Wis. Stat. sec. 908.08 states that “in any criminal trial or hearing, juvenile fact-finding hearing or revocation hearing, the court or hearing examiner *may* admit into evidence the audiovisual recording of an oral statement of a child who is available to testify” if certain requirements are met. Initially, the party offering the videotaped statement to the court as evidence must file information about the statement with the court or hearing officer and provide notice to the opposing party within 10 days before

the trial or hearing. The court may permit a different time requirement. The opposing party must also be given a reasonable opportunity to view the statement before the hearing.

“Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner must conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part...” Wis. Stat. sec. 908.08(2)(b).

The court or hearing examiner *shall* admit the recording upon finding *all* of the following:

- that the trial/hearing will commence either
 - before the child's 12th birthday *or*
 - before the child's 16th birthday and the interests of justice warrant the statement's admission
- that the child's statement was made upon oath or affirmation or... upon the child's understanding that false statements are punishable and of the importance of telling the truth.
- that the time, content and circumstances of the statement provide indicia of its trustworthiness.
- that admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

However, even if the court admits a child's videotaped statements, the party who offered the statement may still call the child to testify at trial. If that party does not call the child to testify, the court *may* order that the child be cross-examined on the stand if any other party requests it. If the statement was shown at a *preliminary* hearing and the offering party does not call the child to testify, then the court cannot order cross-examination of the child at that preliminary hearing (but may still allow for cross-examination at trial). If the child is called to testify or submit to cross-examination, other protections may still be available, such as closed-circuit testimony.

CHAPTER 9

TRIAL

The trial begins after the pre-trial motions are resolved. The court will set the trial date, but postponement is common. Trial dates may be postponed several times. In most counties, the majority of cases are resolved within a year. However, some cases may take as long as two (2) years or even longer.

The defendant has the choice of being tried before a judge or a jury. Wis. Stat. sec. 972.02. Most defendants choose a trial by jury, as it is more difficult for the prosecution to convince twelve (12) people of a defendant's guilt than to convince one (1) person. In a criminal case, the jury verdict must be unanimous, and the **burden of proof** on the prosecutor is very heavy. The burden of proof in a criminal case is **beyond a reasonable doubt**. This means that the jury must unanimously agree that all of the relevant facts of the case have been proven beyond a reasonable doubt.

The trial takes place in the following order: jury selection, opening statements, prosecutor's case, defense's case, rebuttal, closing arguments, **jury instruction**, jury deliberations, and **verdict**. Sometimes the jury instructions are given before closing arguments and final instructions are given after closing arguments. After the verdict is rendered, if the defendant is acquitted, s/he will be released from custody. If the defendant is not acquitted, the sentencing process begins. See Wis. Stat. sec. 972.01. This chapter will discuss many issues that commonly arise during a criminal trial. It will also discuss several types of evidence that may be introduced or excluded in a sexual assault trial. Keep in mind that many decisions regarding the admission or exclusion of this evidence must be resolved in pre-trial proceedings. Trials are extremely complicated and this chapter cannot describe all of the complications that may arise. Advocates with questions should feel free to call WCASA with questions about the trial process.

Trial publicity

Wisconsin's constitution and laws grant the public and media the right to attend trials. However, the trial judge has the right to control the courtroom proceedings. Therefore, the Wisconsin Supreme Court has developed guidelines that balance these sometimes-competing policies. The media are charged with providing the court with at least three (3) days' notice if they intend to use electronic recording devices at trial, although this requirement may be waived.

In general, the media may have:

- three (3) television cameras
- two (2) still photographers, each with no more than two (2) cameras.

It is within the power of the judge to limit or expand these numbers. A participant may also ask a trial judge to prohibit the audio or visual recording of a participant. For victims of sex crimes, these requests are “presumptively valid,” meaning that anyone who opposes the prohibition on recording carries the burden to show that the request is invalid. Trial judges are given broad authority to limit recording. See SCR ch. 61.

Jury selection

Jury selection is public, and the victim and/or advocate may attend. Initially, a pool of potential jurors is brought to the courtroom. Jurors are asked questions that bear on their ability to impartially review the evidence in the case and reach a verdict. See Wis. Stat. sec. 805.08(1). This questioning process is called **voir dire**.

For most sexual assault cases, each side may strike four (4) jurors for no reason (although the strike cannot be based on race or gender). If the maximum term of imprisonment is life, however, each side may strike six (6) jurors for no reason. Striking a juror for no reason is called a **peremptory strike**. Wis. Stat. sec. 972.03.

Further, each side may ask the judge to dismiss any juror for cause. See Wis. Stat. secs. 805.08(1), 972.03. Cause to dismiss might be:

- a conflict of interest due to a juror’s relationship with the defendant or his or her family,
- a business relationship between the juror and the defendant,
- the fact that a similar crime happened to the juror or someone close to the juror, or
- a juror’s relationship with the victim, a witness, law enforcement officers, or the attorneys to the case.

After the jurors are chosen, the jury is **impaneled**. The judge swears them in and in most cases instructs them on their duties in the case, called **preliminary instructions**. Wis. Stat. sec. 972.10. These instructions give the jurors basic information about juror conduct and what to expect in the case. If the judge gives preliminary instructions, both parties have a chance to review those instructions and either propose additional instructions or ask that the proposed instructions be changed or removed. Id.

Typically, preliminary instructions describe juror conduct, evidence, the burden of proof, the credibility of witnesses, and theories of the defense. Most of these instructions are written as standard jury instructions that are available in any law library.

A trial judge *may* order the jury to be **sequestered**, but sequestration is not required. Wis. Stat. sec. 972.12. The jury may also be sequestered during deliberations. Wis. Stat. sec. 972.12. Sequestration is a “custodial isolation of a trial jury to prevent tampering and exposure to publicity, or of witnesses to prevent them from hearing the testimony of others.” See Black’s Law Dictionary (8th ed. 2004).

Jurors may take notes, but the judge may prohibit note taking. Wis. Stat. sec. 972.10. Judges may allow jurors to submit questions for witnesses or for the court in writing.

Objections

Throughout the trial, victims may hear a variety of **objections** raised by either side's attorney. Either side may object to the introduction of certain evidence or the way in which the attorneys elicit information from witnesses. Wis. Stat. sec. 901.03. In fact, in order to challenge the admissibility of evidence on appeal in most cases, the attorneys must object to its introduction at trial. Id. Attorneys must also state the grounds for their objection. Id. Common objections include the following: relevancy, leading question, asked and answered, hearsay, and cumulative.

Witnesses

In many instances, witness testimony makes up a large part of the evidence in a case. In Wisconsin, witnesses are presumed to be generally competent and can be compelled to testify unless a particular statute alters the circumstances under which the witness can testify. Wis. Stat. sec. 907.01. Most people, including children, are generally considered competent to testify. In Wisconsin, an attorney can attempt to raise any evidence that is relevant to the case or that makes a witness seem more or less believable.

Witnesses are compelled to appear in court by **subpoena**, and the failure to appear can result in a contempt finding, which can carry a fine or even jail time. Witnesses take an oath to tell the truth in court. Lying under oath in court is called **perjury**. Perjury is a felony in Wisconsin. Wis. Stat. sec. 946.3.

Witnesses may be excluded from the courtroom upon the request of either party, or the court may exclude witnesses upon its own motion. Wis. Stat. sec. 906.15. However, a victim who is a witness may not be excluded from the courtroom unless it is "necessary for a fair proceeding." The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact finding hearing for the juvenile. Wis. Stat. sec. 906.15(2)(d).

Attorneys routinely challenge witnesses while on the stand. It is typical for the other side's attorney to attempt to undermine, or impeach, a witness. The rules of evidence provide limits on attorneys trying to impeach witnesses; however, the rules specifically allow impeachment for specific purposes. Wis. Stat. secs. 906.07-906.10. For example, attorneys may impeach witnesses by showing that the witness has a character for untruthfulness through the introduction of opinion evidence establishing the witness's character for untruthfulness. Wis. Stat. sec. 906.08.

Each side determines the order of the witnesses it will call. Each witness is first questioned by the party who called that witness. This questioning is called **direct examination**. After direct examination, the opposing party may question the witness in what is called **cross-examination**. Sometimes, the defense will not present evidence, but instead argue that the State simply failed to make its case.

It is important to note that prior to the trial, Wis. Stat. sec. 971.23(6c) states that, except as provided in s. 967.04, the *defense* may not compel a *victim* of a crime to submit to a *pretrial* interview or deposition. This is an additional protection available for victims' privacy leading up to a trial.

The standard for witness testimony changed in 2011. Wisconsin now follows the *Daubert* standard (from *Daubert v. Merrel Dow Pharmaceuticals*), also used in federal courts. Under the *Daubert* standard all witness are separated into two categories: Lay/Fact witnesses and Expert witnesses. Lay witnesses testify primarily to their first hand observations while expert witnesses testify primarily about their opinions based specialized knowledge.

Lay Witnesses

Lay witnesses can testify about anything a person could observe. Wisconsin statute 907.01 states: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:

- Rationally based on the perception of the witness
- Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue
- Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1)."

In other words, a lay witness could state her observation, but could not provide testimony in the form of an opinion if that opinion is based upon specialized knowledge. For example, s/he could say s/he saw the man fall over. If the lay witness thought it reminded her/him of something else s/he could say what s/he thought. For example: I saw him stumble and fall over, and he was slurring his words; I thought he was drunk.

Expert Witnesses

Expert evidence is admissible whenever the information sought from the expert helps the jury understand the issues in the case. Wisconsin statute 907.02 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, if

- the testimony is based upon sufficient facts or data,
- the testimony is the product of reliable principles and methods, and
- the witness has applied the principles and methods reliably to the facts of the case.

An expert witness may testify using specialized knowledge to relevant opinions based on that knowledge. Anytime a witness testifies using any specialized knowledge, the lawyer must first qualify that witness as an expert in court. An expert witness is qualified based upon knowledge, skill, experience, training, or education. For example, if a SANE nurse would like to talk about the type of bruising s/he saw on a victim, then that nurse must first get qualified as an expert because it involves a type of specialized

knowledge. If an advocate would like to testify to patterns of victim behavior, that advocate must first be qualified as an expert witness in court because s/he is using specialized knowledge. Specialized knowledge is anything more than basic observations that any person would likely know. Unlike a lay witness, an expert cannot talk about basic observations unless those observations are being used to support an opinion.

Expert testimony may be particularly helpful to explain victim behaviors if the defense attempts to undermine the credibility of a recanting victim or a victim who engages in behavior that might seem unreasonable to a person who does not understand typical victim behaviors or varying impacts and effects of trauma on the victim. For example, a defendant may point to a victim's lack of emotional affect as evidence that the victim is lying. Expert testimony may be necessary to show that a lack of affect is one of many coping mechanisms of rape victim.

Wisconsin courts have held that in many cases it would be unfair to let the prosecution present the testimony of an examining expert without allowing the defendant to present the testimony of an examining expert because a jury is more likely to believe an expert who has personally examined the victim than one who has not. However, the request may not always be granted. The court will consider multiple factors when deciding whether to accept this request, including:

- the child's age,
- the nature and intrusiveness of the examination,
- the emotional and psychological effects of the examination on the victim,
- the remoteness in time between the act and the exam, and
- the evidence already available to the defendant.

To avoid this situation, the prosecutor may use an examining psychologist to testify only as to facts and use a non-examining witness as an expert on typical victim behaviors. See State v. Rizzo, 250 Wis. 2d 407,(2002); State v. Maday, 179 Wis. 2d 346 (1993); and State v. Jensen, 147 Wis. 2d 240 (1988).

Advocates as experts

If an advocate is working directly on a case, it is probably not a good idea to testify in that case as an expert on victim dynamics. The advocate might be seen as an "examining expert," giving the defense grounds to ask that another expert examine the victim. An advocate asked to serve as an expert should inform the victim of the potential consequences and encourage the victim to discuss this issue with the prosecutor in the case. See Chapter 24, "Protecting Confidentiality," for more information about informed consent to waive confidentiality.

Profile evidence of the defendant

Defendants sometimes want expert psychologists to testify that the defendant does not have the character or propensity to commit pedophilia or other types of sexual assaults. Recently, the Wisconsin Supreme Court determined that in some cases, a defendant may be entitled to this testimony, although in limited circumstances. Of course, the court must feel that the expert testimony will be helpful to the trier of fact, as with all expert testimony. A defendant's expert may testify that the defendant does not exhibit characteristics typical of pedophiles or typical of those who commit the crime charged. The expert can also testify that the defendant, due to the profile, is less likely to have committed the act alleged in the case at hand. If the expert testifies both as to the profile of the defendant and also to the likelihood that the defendant committed the act in the case at hand, this opens up the possibility that the State can have its own psychologist interview the defendant and present its own profile evidence and opinions regarding the probability that the act. State v. Richard A.P., 223 Wis. 2d 777 (Ct. App. 1998).

Exhibits

In addition to the testimony of witnesses, exhibits may also be entered as evidence. An exhibit is a piece of physical evidence and may include:

- an actual object associated with a crime
- a piece of demonstrative evidence such as a chart or a diagram
- documents such as medical records or counseling records.

Complications with psychological testing of victims

A prosecutor may use expert psychological testimony to explain to the jury how a victim's behaviors are consistent with behaviors exhibited by sexual assault victims. For example, an expert could testify that delayed or progressive reporting is common among children, particularly when the perpetrator is a family member. This type of evidence is called "Jensen evidence," and the person who provides it is referred to as an "examining expert." Jensen evidence is admissible because it may be "useful for disabusing the jury of common misconceptions about the behavior of sexual assault victims." State v. Jensen, 147 Wis. 2d. 240, 251 (1988).

If a prosecutorial witness testifies both factually and as an expert on victim dynamics, however, the defense can make a motion to have its expert psychologist personally examine the victim. As stated by the Wisconsin Supreme Court, "[a] defendant who is prevented from presenting testimony from an examining expert when the state is able to present such testimony is deprived of a level playing field." State v. Maday, 179 Wis. 2d 346, 357 (1993).

Psychiatric testing of victims or witnesses

As of 2009, Wis. Stat. 971.23(5c) added a privacy protection for victims and witnesses in prosecutions of sexual assault of an adult or child, engaging in repeated acts of sexual assault of a child, or of *any other crime* if the court determines that the underlying conduct was *sexually motivated*. In these cases, the court may *not* order any witness or victim to submit to a psychiatric or psychological examination to assess his or her credibility as a condition of allowing testimony.

“Sexually motivated” means that one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim. Wis. Stat. sec. 980.01 (5).

Hearsay

In general, a witness may not testify as to statements other people have made to that witness. Doing so is called **hearsay**. The legal definition of hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Wis. Stat. sec. 908.01(3). Hearsay rules are based on the philosophy that receiving information from a witness second-hand is less reliable than receiving the information directly from the person who uttered the statement. The prohibition against hearsay has over twenty (20) exceptions, however, and the exceptions themselves have exceptions. Wis. Stat. sec. 908.03-908.05.

A few hearsay exceptions come up frequently in sexual assault cases. One exception is a statement to medical personnel. Such a statement is considered more reliable because people are likely to report information to medical personnel accurately in order to receive appropriate treatment. Wis. Stat. sec. 908.03(4).

Another important hearsay exception is the **excited utterance**. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Wis. Stat. sec. 908.03(2). Such a statement is considered more reliable because it is made spontaneously and without rehearsal.

It is important to note that hearsay evidence is now admissible in preliminary examinations. For more information, please consult Chapter 8.

Child witnesses

Children may be called upon to testify. Certain protections may be put in place to reduce trauma to the child. Although the defendant has a right to confront witnesses, a child confronted by an abuser can be extremely traumatized. Therefore, videotaped statements of children are admissible at trial. Wis. Stat. sec. 908.08. Videotaped testimony is admissible if the child is under twelve (12) and the video is free from excision, alteration, and distortion. Some videotaped statements of children between twelve (12) and sixteen (16) may be admitted. Wis. Stat. sec. 908.08(3). When a child is over twelve (12), a court must balance a variety of factors to reach its decision. Advocates can encourage children and parents of children who would like to testify to

do so by videotape. Some prosecutors believe that a child who testifies live is more likely to be believed than a child who testifies through other means.

Privileged testimony

Some testimony cannot be compelled by either party. Some types of relationships are believed to be so beneficial to society as a whole and to a victim specifically that communications between these individuals are confidential, and testimony about these communications may not be compelled in a court of law.

Recognized **privileges** include:

- doctor-patient privilege
- nurse-patient privilege
- social worker-client privilege
- chiropractor-patient privilege
- counselor-patient privilege
- attorney-client privilege
- domestic violence and sexual assault advocate-victim privilege,
- husband-wife privilege
- communications to members of clergy.

See Wisconsin Statutes Chapter 905.

In sexual assault cases, the victim holds the privilege and only the victim can waive the privilege. It is extremely important that advocates institute procedures to maintain the confidential nature of communications between the victim and the advocate. An advocate cannot waive the privilege on behalf of the victim, but if confidential information is shared with others the advocate has breached confidentiality and the security of that information has been jeopardized. For more information on this topic, see Chapter 24, "Protecting Confidentiality."

Rape shield laws

Rape shield laws are designed to protect rape victims against the introduction, during a criminal prosecution, of irrelevant evidence regarding their past sexual behaviors. These laws are necessary because historically victims were often blamed

for their rape based on their irrelevant past conduct. The goals of rape shield laws are to do the following:

- Encourage the reporting of sexual assaults by shielding a victim's privacy.
- Ensure that defendants are either convicted or acquitted based on relevant evidence and not on prejudice.
- Prevent harassment of the victim by the defendant.

Wisconsin's rape shield law is contained in Wis. Stat. sec. 972.11. This statute states that if the defendant is accused of sexual assault, sexual assault of a child, engaging in repeated acts of sexual assault of the same child, incest with a child, sexual assault of a student by a school instructional staff person, sexual exploitation of a child, child enticement, soliciting a child for prostitution, sexual intercourse with a child 16 or over, or sexual assault of a child placed in substitute care, any evidence concerning the complaining witness's prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, unless such prior sexual conduct provides:

- evidence of the complaining witness's past conduct with defendant
- evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy, or disease, for use in determining the degree of sexual assault or the extent of injury suffered *or*
- evidence of prior untruthful allegations of sexual assault made by the complaining witness.

Wisconsin courts have found that in some instances, evidence excluded under the rape shield law may be admitted in spite of the rape shield law. The Wisconsin Supreme Court has found that a defendant's federal constitutional rights may override a victim's right to claim protection under Wisconsin's rape shield law. In these instances, the rape shield law may impermissibly conflict with a defendant's Sixth Amendment right to present her/his defense. Under State v. Pulizzano, the defendant may ask the court to admit evidence that would otherwise be barred by the rape shield law if s/he can establish the following:

- The prior act clearly occurred.
- The act closely resembles that in the present case.
- The prior act is clearly relevant to a material issue in the case.
- The evidence is necessary to the defendant's case. *And*

- The probative value outweighs the prejudicial effect.

State v. Pulizzano, 155 Wis. 2d 633, 656 (1990).

The rationale that the rape shield law does not adequately protect a defendant's constitutional rights is particularly significant when the sexual assault victim is a child. The Wisconsin Supreme Court has stated that due to the "normal presumption...that a child does not have a sexual history," evidence of a child victim's sexual acts or abuse prior to the assault in question may, in some cases, be used to rebut the contention that the child could only have learned sexual behaviors from the alleged perpetrator. Thus, the possibility of using past sexual experience to provide an alternate source of a child's sexual knowledge or a child's injury might be relevant to a defendant's case. State v. Dunlap, 250 Wis. 2d 466, 480 (2002). This alternative source of a victim's knowledge could satisfy the relevancy requirements of the Pulizzano test.

Defendants must also satisfy a procedural requirement in order to introduce evidence falling within rape shield law protections. The defendant must bring a motion to introduce rape shield evidence before trial in order to use such evidence during the trial. Even if a motion to introduce rape shield evidence is timely brought by the defendant, such evidence will only be admitted if it is "material to a fact at issue in the case and [is] of sufficient probative value so as to outweigh its inflammatory and prejudicial nature." Wis. Stat. sec. 971.31(11). Therefore, even if some evidence of the complainant's prior conduct or abuse could be admissible, the court can still reject it if its probative value is outweighed by its inflammatory and prejudicial nature.

In general, Wisconsin courts have excluded evidence of a victim's prior sexual conduct or abuse; however, the exclusion of such evidence is not absolute. Federal courts have overturned Wisconsin's exclusion of rape shield evidence rulings in some cases.

In 2009 Wisconsin enacted the Victim Privacy Act, which created a similar rape shield law for victims pursuing civil actions involving damages for injuries resulting from sexual misconduct. Please see Chapters 15 and 24 for more information on this Act and the Civil Rape Shield Law.

Other acts evidence

Sometimes, evidence that a defendant engaged in prior similar acts may be introduced into evidence, although it may not be introduced solely to prove the character of the defendant. "Character evidence" is generally prohibited by the Wisconsin rules of evidence. "Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." Wis. Stat. sec. 904.04(1).

Evidence of other crimes, wrongs, or acts may be introduced to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. sec. 904.04(2)(a). In these situations, the evidence bears directly on the likelihood that the defendant committed the crime. Some courts are

cautious about the use of other acts evidence, explaining that, "the exclusion of other acts evidence is based on the fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." State v. Sullivan, 216 Wis. 2d 768, 783 (1998).

Courts have enunciated the following standard to guide rulings on the admission of other acts evidence. The following factors are balanced:

- Is the other-acts evidence offered for an acceptable purpose?
- Is it relevant?
- Does it relate to a fact of consequence to the prosecution?
- Does it have probative value: Does it show that it is more likely that a fact of consequence occurred?
- Is the probative value outweighed by the danger of unfair prejudice, or is it cumulative?

See State v. Sullivan, 216 Wis.2d 768 (1998); Wis. Stat. secs. 904.01, 904.04(2).

The probative value of a prior act is measured by the similarity between the acts complained of and the prior acts. The more similar the acts, the more probative they will be in the current case. For example, sometimes victims are aware that the person who assaulted them has a history of similar assaults. A pattern of similar assaults *may* be admissible as evidence.

Defendant's rights

A defendant is granted a number of rights under Wisconsin and federal constitution and laws. These rights are designed to ensure that a defendant is innocent until proven guilty and that each defendant receives due process of law. Criminal defendants have the right to:

- View any exculpatory evidence held by the prosecutor.
- Testify on his or her own behalf at trial.
- Not be compelled to testify against his or her own interest.
- Confront witnesses.
- Have a speedy trial.
- Have a public trial.

- Have an attorney. If the defendant can't afford an attorney, the court will appoint one to represent the defendant.

Closing arguments

After the attorneys have presented the evidence, both parties have an opportunity to make a closing argument. The prosecutor goes first. The defense attorney goes next. The prosecution reserves the right to make a final argument.

Final jury instructions

After closing arguments, the court instructs the jury. Both parties have the opportunity to review and submit proposed changes to the jury instructions. Wis. Stat. sec. 972.10(5). Many judges use standard jury instructions. The exact jury instructions used will depend on the issues that arose in the case, but will most likely include:

- the crime
- elements of the crime
- the purposes for which pieces of evidence may be used
- the unanimity of the plea
- the definition of reasonable doubt.

The judge then sends the jurors to a private room for deliberations. The jurors select a jury foreperson to lead the deliberations. Once the verdict is reached, the jury returns to the courtroom to read the verdict in open court. Jury deliberations can take anywhere from a few minutes to days.

Verdicts

The jury can return a number of verdicts, including:

- guilty
- not guilty by reason of mental disease or defect
- not guilty. Wis. Stat. sec. 971.06.

The jury verdict must be unanimous. Occasionally, the jury can't come to a unanimous verdict. When this occurs, trial judges may send the jury back to engage in further deliberations. If this does not help, it is possible that a **mistrial** will be declared, which could result in a new trial. After the verdict, if the defendant is not acquitted, the sentencing process begins.

Helping the victim prepare for the trial

Preparing for a criminal trial can be a very difficult experience for anyone. This is especially true for victims of sexual assault. Victims may re-live the trauma of the assault repeatedly throughout a trial. A victim supported before, throughout, and after the trial is less likely to be re-traumatized regardless of the verdict.

Tips for advocates

Before the trial: The time before the trial begins can be stressful for victims. Here are some ways advocates can help:

- Educate the victim about the trial process. Remember that, due to trauma, it can be hard for victims to process and retain information, especially about a complicated and often foreign process.
- Explain courtroom set-up. It may be helpful to take the victim to the courthouse for a walk through. Explain where everyone sits including the prosecution, the defense attorney, the defendant, the judge, the jury, the advocate, the victim witness coordinator, and support persons. Explain where the oath is taken and testimony is given. Point out locations of bathrooms and smoking areas.
- Make sure victims understand their rights (see Chapter 13, "Crime Victims' Rights.")
- Remind the victim of rules that limit witnesses from being in the courtroom during court proceedings.
- Before trial, address any special needs of the victim, including accommodations for wheelchairs.
- Find out if the judge has special rules regarding the courtroom.
- Inform the victim of these rules, and follow them as an advocate.
- Discuss proper attire for the courtroom. This can be a difficult issue. What victims wear should be up to them so that they can be as comfortable as possible. Appearance should have no impact on the legal process, but unfortunately it might. This can be especially true for sexual assault cases, where myths about victims may already exist and/or the defense is making this an issue of the case. Also, advocates should be aware that some victims may not have appropriate clothes available to them. Offer assistance with sensitivity and respect.
- Ensure that the victim has reliable transportation to and from the courthouse.

- Address childcare issues. If possible, arrange for someone other than the victim to assist with the children, out of the courtroom if possible. A victim may be too distracted to focus on the children. S/he may also want to prevent her/his children from hearing the details of the assault and/or comments that the defense may make about the victim.
- Be sure the victim knows the correct date and time of the proceeding and location of the courthouse.
- Stress the importance of being on time. Encourage the victim to allow extra time to find parking, locate the courtroom, and prepare for trial.
- Go over proper courtroom demeanor with the victim and his/her support persons.
- Explain that the trial process is often long, and suggest bringing supplies like cards, gum, aspirin, and snacks.
- Encourage the victim to eat something before the trial or bring something to eat to the courthouse.
- Explain that victims should turn off cell phones and pagers.
- Explain that the defendant, and possibly those offering support to the defendant, will be in the courtroom. It is extremely important that the victim and those supporting the victim not interact with the defendant or her/his support group. If the victim is concerned for her/his safety, discuss the issue with the DA and/or victim/witness specialist so that a safety plan can be developed. A special waiting area should be available for victims and witnesses during trial and while waiting for the verdict.
- Inform the victim that the media may be present, especially in a highly publicized case, but s/he does not have to speak to them. In fact, speaking with the media may damage the case. The advocate can help by running interference for the victim and informing the press that s/he is not willing to speak with them. After the trial, the victim may speak with the media, if s/he feels it would be helpful, but s/he should understand that anything s/he says, even if it is "off the record" can be printed and that sometimes reporters misinterpret information when they print it.

- Be realistic and honest about possible verdicts. Be prepared, and have a plan for a guilty verdict, a not-guilty verdict, or in rare circumstances, a "hung jury," which occurs when the jury is unable to reach a verdict. Warn the victim that in a hung jury situation, it is possible that a mistrial will be declared and a second trial may ensue. After a not-guilty verdict, the defendant will be released from custody. Reassure the victim that an advocate will remain with her/him no matter what.

Testifying during the trial: This is not intended to be an exhaustive list of issues regarding testifying, nor is this intended to replace a consultation with the district attorney. Rather, it focuses on the things an advocate can do to support a testifying victim.

- Tell victims that the prosecutor will meet with them to discuss testifying. However, the prosecutor is unable to provide specific guidance regarding how to answer particular questions. This is because prosecutors must be careful to avoid the appearance of "coaching" a witness. Defense attorneys frequently ask victims whether they went over their testimony with the prosecutor. Some prosecutors are conscientious about contacting and meeting with victims, but others are not. If necessary, the advocate may need to help arrange this meeting.
- Some victims ask whether they will be able to use notes while they are testifying. The use of notes to refresh memories is governed by rules of evidence. A victim who would like to explore the possibility of using notes should discuss this with the district attorney. Any item used to refresh recollection will be a part of the record and available to the defendant. Further, the use of notes might cause the jury to think that the victim's memory is unreliable. On the other hand, the use of notes can be reassuring to the victim.
- Remind the victim not to chew gum or candy while testifying.
- Inform the victim that s/he will most likely be asked to identify the defendant in the courtroom during his/her testimony.
- The advocate can help the victim identify a way to alleviate the stress of testifying. The victim could focus on a particular person in the courtroom, for example, or could hold on to a small item while testifying.
- Explain to the victim that it is usually okay to ask the judge for a brief recess if s/he feels it is necessary. Judges tend to be sensitive to crime victims and generally grant this request. Ask the DA and/or the victim/witness coordinator about this issue before trial.
- The prosecutor will explain to the victim that s/he is only permitted to answer questions posed by the prosecutor, the defense attorney, or the judge.

Sometimes attorneys disagree about questions posed to witnesses. Inform the victim that before answering any question, s/he should pause momentarily to see if anyone objects and, if so, wait for the judge to rule on whether s/he can answer the question.

- The prosecutor should inform the victim that s/he should not answer questions s/he does not understand and can ask the questioner to restate the question. In fact, attorneys sometimes attempt to confuse witnesses by asking questions in a convoluted manner, or by re-asking a question that was previously answered by the witness in order to illicit a different answer and hurt the witness's credibility.
- Inform the DA and/or the victim/witness coordinator that either the advocate and/or the victim would like to be informed when the jury reaches a decision.
- The victim may prefer to leave the courthouse while the jury deliberates. If that is the case, encourage the victim to stay fairly close to the courthouse if s/he would like to be present when the verdict is rendered. While court personnel may make an effort to inform the victim and/or the advocate when a decision is reached, court personnel are under no obligation to do so. Have a plan to reach the victim.

After the verdict is rendered: Victims experience strong emotions upon hearing any verdict. Be respectful of whatever reactions the victim experiences after a trial. Work with the victim to minimize inappropriate courtroom demeanor after a verdict. The advocate and victim should not approach, make comments to, or gesture at the defendant, the defense attorney, or the judge. While small responses (hugs, gasps, tears, etc.) will most likely be acceptable, encourage victims and their families to express themselves outside of the courtroom. Here are some ways advocates can help victims after the trial:

- Help the victim exit the courtroom without contact with the defendant or the defendant's support system.
- Work out a plan with the victim for follow-up counseling and support, regardless of the verdict.
- Address any post-trial safety concerns of the victim. Guilty verdicts may elicit fear of reprisal from the offender or defendant's support system. Not-guilty verdicts often elicit strong concerns.

If the verdict is "guilty":

- Explain that the offender may be taken immediately into custody, or s/he could be free on bond pending sentencing.

- Inform the victim that the convicted offender still has the opportunity to appeal. Exercise discretion about when to inform the victim of this possibility.
- In some instances, sentencing might directly follow the verdict. Other times, a sentencing hearing will be set. If the judge orders a pre-sentence investigation, warn victims that an agent from the Department of Corrections may contact them. See Chapter 10, "Sentencing," and Chapter 14, "Department of Corrections."

If the verdict is "not guilty":

- Be prepared for a variety of responses from the victim and the victim's family including: anger, rage, despair, and shock. If the victim chooses, find a private and quiet place for her/him to process the information and be supported.
- Enable the victim to meet with the prosecutor and/or victim/witness staff to discuss the verdict and any concerns s/he may have.
- Explain that "beyond a reasonable doubt" is a high burden to meet, and while jurors may have believed the victim, they may not have been able to reconcile that belief with a guilty determination.
- Be sure the victim has a safe method of transportation. Most likely, s/he should not drive or be alone.
- Respond to any safety concerns the victim may have and devise a plan that will provide at least some security. The victim may choose to arrange to stay with someone. The victim should keep important contact information immediately available in case it is needed.

CHAPTER 10

SENTENCING

Sentencing begins after a conviction. Sentencing practices vary from county to county and even judge to judge. Sentencing can take place on the day of conviction or it can take place many months after the verdict is rendered. As an advocate, it is important to work with the victim and with the victim/witness program to find out the sentencing practices in a given county.

At sentencing, the judge will look at a variety of factors and impose a sentence within a range set by the statutes. The judge will weigh those factors that point toward a lighter sentence (called **mitigating circumstances**) and those that point toward a heavier sentence (called **aggravating circumstances**).

The judge will look at the types of services needed by the defendant and the best place available for the defendant to receive those services. The judge will also consider the danger the defendant poses to the community.

Ultimately, the judge will either place the defendant on **probation** or sentence the defendant to a term of confinement followed by a term of supervision. Sometimes, a defendant is convicted of more than one crime. In this situation, the judge may sentence the defendant to **concurrent sentences** (sentences that run at the same time) or **consecutive sentences** (the second sentence begins to run after the first one has ended).

How long does sentencing for misdemeanors take?

For misdemeanors or plea agreements, the sentencing may take place the day of conviction or acceptance of the plea. Keep in mind that most misdemeanors settle in a plea agreement. In these situations, the victim should be prepared ahead of time with a **victim impact statement**. If the victim hasn't had an opportunity to write a victim impact statement before the misdemeanor conviction, it's always appropriate to ask the district attorney to request a postponement of sentencing to give the victim time to write one. The district attorney may warn the victim that the court does not like delays, but if this is important to the victim, it should be requested. Misdemeanor sentences carry a maximum penalty of nine (9) months or a fine of up to \$10,000. Any penalty of one (1) year or less (the penalty for most misdemeanors) will be served in a county jail or house of corrections.

How long does sentencing for felonies take?

For felonies, sentencing can take anywhere from one (1) to two (2) months and in some instances, more. Courts can order the Department of Corrections to complete a **pre-sentence investigation** for felonies. Wis. Stat. sec. 972.15. The court will typically order the completion of the pre-sentence investigation by a particular date. Sometimes, however, the defendant's attorney will request additional time to refute the contents of the Department's pre-sentence investigation. For example, some defense attorneys request a psychological examination of the defendant to show that s/he would not pose

a danger to the community if placed on probation. These practices can delay sentencing.

The court will typically hold a sentencing hearing within one to two months after a felony conviction. The court will determine the sentence and read it in open court. Most sentences consist of a **term of confinement** followed by a **term of supervision**. A term of confinement of more than one (1) year will be served in a state prison. A term of confinement of one (1) year or less will be served in a jail or house of corrections. Inform the victim that probation is sometimes ordered, even in sexual assault cases, particularly if the perpetrator is a first time offender.

Victims should understand that although they may be present and may submit a victim impact statement, they won't be able to object to the sentence handed down by the judge. Victims should also know that the perpetrator will be able to see the victim impact statement.

Victim impact statement

The right to present a victim impact statement (VIS) is contained in Wisconsin's Crime Victim Rights Law. Wis. Stat. secs. 972.14(3)(a) and 950.04(1v)(m). The VIS is the victim's opportunity to tell the court about the economic, physical, and psychological impact of the crime before sentencing an offender. VISs give victims a chance to voice their feelings about the crime, actively participate in the criminal justice process, and provide information about the crime that was not presented as evidence during the trial. VISs also affect future supervision and treatment decisions. The victim impact statement becomes a permanent part of the record.

According to Wis. Stat. sec. 972.14(3)(a), the court must, at the time of sentencing, determine whether the victim wants to make a statement to the court. If the victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court.

On its face, this statute makes no distinction between felonies and misdemeanors. However, in practice, some advocates report that the victim impact statement process runs more smoothly in felony cases than in misdemeanor cases. Occasionally this results in victims not being afforded the opportunity to present victim impact statements in misdemeanor cases.

The court can allow any other person to submit or make a statement to the court, so long as it is relevant to sentencing. Wis. Stat. sec. 972.14(3)(a). Different counties handle victim impact statements in different ways. Some counties have allowed sexual assault service providers to submit **community impact statements** to the court, while others have not. Sexual assault service providers should also think carefully about the content of a community impact statement, particularly when the advocacy agency has worked with the victim. The statement should be written in such a way that it doesn't compromise the confidentiality of the communications between the victim and service provider.

Advocates should encourage victims to begin working on their victim impact statements before a verdict is rendered. Victims may also change or add to their victim impact statements as the case progresses.

Advocates can find out the procedures that each county uses in regard to the

submission of victim impact statements. Even if the victim impact statement won't be accepted before sentencing, advocates can start working on it far in advance.

It is extremely common for victim impact statements to change over time. This is especially true if the victim has to testify and if the offender attempts to have or has contact with the victim during the court process. The trial itself might affect the way the victim feels.

A victim impact statement might include the following:

- a description of the crime and an explanation of how the offense affected the victim
- a description of the emotional impact of the crime on the victim
- information about the impact of the crime on the victim's family or others important to the victim
- the financial impact of the crime (include documentation)
- any concerns about safety and security
- the victim's desired outcome, even if the victim agrees with the plea agreement, the district attorney's recommendations, or the Department of Correction's recommendations
- the types of community service the victim would like to see the offender perform, if community service is recommended
- any other information the victim would like to share with the court.

Victims sometimes want to include information in the victim impact statement that is unrelated to sentencing or the emotional, physical, or financial impact of the crime. While it is appropriate for the victim to include any information s/he wants, some types of statements might be more effective than others in terms of sentencing. Some victims want to use the victim impact statement to share feelings about the court, the judge, the prosecutor, the defense attorney, or the process. These responses are completely appropriate, but they may be best expressed outside of a victim impact statement. Advocates might want to work with victims to create "alternative" victim impact statements that are expressive but might not be submitted to the court. This process could help the victim express her or his feelings without potentially alienating the court.

Many victim/witness coordinators routinely assist victims with victim impact statements. However, some victims prefer to work with an advocate because of the relationship they have developed. Other victims will need more time to work on a victim impact statement than a victim/witness coordinator can provide.

The advocate should be familiar with alternative means by which a victim can submit a statement about the impact of the crime. For example, children may or may not

be able to write or say how they were impacted. Many county offices have alternatives for:

- children
- people with cognitive, physical or sensory disabilities
- people for whom English is not their primary language

Restitution and fines

In addition to prison, jail, probation, or supervision, the court may also order fines and **restitution**. Wis. Stat. sec. 973.20. Restitution is designed to compensate a crime victim for money damages he or she incurred or will incur as a result of the crime.

In general, victims may seek compensation for all direct financial losses that resulted from the crime. Victims are not able to receive restitution for pain and suffering or other non-pecuniary losses. A victim may also request compensation for lost income and reasonable expenses incurred as a result of reporting the crime and participating in the prosecution. If the crime resulted in bodily injury to the victim, the law directs the court to specifically consider the cost of medical and psychological services, physical and occupational therapy, lost income, and, if the victim was a homemaker, the cost of such services until the victim has recovered. The statute provides special consideration for victims of sexual assault who have not sustained bodily injuries. If the sexual assault is being considered at sentencing, these victims may receive up to \$10,000 for psychiatric and psychological care and treatment. Victims must make their claims by referencing specific services, dollar amounts and the time periods during which these expenditures were or will be made.

At the sentencing hearing, the court is required to ask the district attorney what amount of restitution, if any, the victim claims. Likewise, the district attorney must attempt to obtain information from the victim regarding the amount of financial loss he or she has suffered. Once presented with a claim, the court is required to order full or partial restitution or state its reasons for not doing so. When making this determination the court is to consider the amount of loss to the victim, the financial resources of the defendant, including his or her future earning capacity, the financial need of the defendant's dependants and any other appropriate factors. The victim has the burden of showing by a preponderance of the evidence that he or she has sustained the financial loss as result of the crime. The defendant has the burden of demonstrating his or her financial resources, earning capacity and obligation to dependants.

If the defendant chooses to dispute the restitution, the court may invoke one of several procedures. The court may make a determination at the sentencing hearing, if it can do so fairly. If not, the court will adjourn the sentencing hearing for up to 60 days, pending a special hearing by the court, a mutually agreed upon arbiter, or a court commissioner. District attorneys and public defenders are not required to provide representation at these hearings. However, a layperson may find the task of representing him or herself at a restitution hearing manageable as the rules of evidence

and pleading requirements usually do not apply. Discovery is not available except upon a showing of good cause.

The defendant may be required to pay restitution in a lump sum or through a payment schedule. If the defendant is imprisoned, restitution can be drawn from any prison earnings, or if the defendant is on probation or extended supervision, payment is often imposed as a condition of these sentences. A victim can ask a court to modify or newly impose a restitution order up until the period of probation has expired. If the defendant is no longer under Department of Corrections supervision the restitution order is treated as civil judgment against the defendant.

An award of restitution does not preclude or limit a victim from seeking separate civil damages. The fact that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action. Any restitution made is to be set off against civil damages awarded to the victim if the same facts were the basis for restitution and civil damages. The court trying the civil action must hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant in this case. Wis. Stat. sec. 973.20(8). Thus, victims may also pursue civil claims for damages in State or Federal court. For more information, see Chapter 15: Civil Actions for Sexual Assault.

Length of sentences

The Wisconsin Statutes describe a penalty range for each crime. The court decides the exact penalty within this range.

In 1997, Wisconsin moved away from a sentencing structure called “indeterminate sentencing” and toward a determinate sentencing structure called **truth in sentencing (TIS)**. Under indeterminate sentencing, a person convicted of a crime and sentenced could reduce his or her term of confinement considerably by good time and other credits and could also request parole after serving a particular amount of time in prison. Each sentence also carried a “mandatory release date” set at 2/3 of the prison sentence. This was very confusing and created a great deal of uncertainty regarding the actual release date of an offender. Truth in sentencing was designed to bring more consistency and certainty to the sentencing process by:

- creating new penalty classifications for crimes
- creating a sentencing commission to oversee sentencing in Wisconsin
- providing for fixed periods of imprisonment and supervision
- eliminating parole

The first phase of truth in sentencing was effective in 1999. The second phase was instituted on February 1, 2003, and created nine (9) new felony classifications, each of which describes a narrower range of punishments than the previous classifications. Wis. Stat. sec. 939.50.

Under truth in sentencing, most felons will be sentenced to a fixed term of imprisonment followed by a fixed term of supervision, called a **bifurcated sentence**. Wis. Stat. sec. 973.01(1). Although a judge may still impose either probation or a combination of confinement and supervision, the amount of time an offender will serve in prison and on supervision will be fixed, subject to potential extensions and reductions of confinement and/or supervision. (See “sentence adjustments” below).

The statutory guidelines recommend that all felony sentences carry a prison term of no less than one (1) year. Wis. Stat. sec. 973.01(2)(b). If a term of confinement is imposed, no more than 75% of the maximum statutory penalty may be served in confinement. In no instance may the combined prison and supervision term extend beyond the maximum length described by statute. Id. Truth in sentencing also requires that at least 25% of any term of confinement imposed be served as extended supervision. Wis. Stat. sec. 973.01(2)(d).

The fact that some of these provisions went into effect in 1999, and some in 2003 can be confusing. The provisions that went into effect in 1999 did not change any felony classifications. They simply required the use of bifurcated sentences as described above if a period of confinement was imposed. This applied to sentences imposed after December 31, 1999. The new felony classifications became effective on February 1, 2003.

In 2009, Wisconsin Act 28 reformed sentencing provisions once more, creating additional sentencing modifications. These provisions affect sentences handed down for crimes committed after December 31, 1999. For more information, please see “sentence adjustments” below and Wis. Stat. Chs. 302 and 304.

Felony sentences

- 1 For a Class A felony, the term of confinement in prison is life.
- 2 For a Class B felony
 - the total sentence may not to exceed sixty (60) years
 - the maximum term of confinement may not exceed forty (40) years
 - extended supervision may not exceed twenty (20) years.
- 3 For a Class C felony:
 - a fine may not exceed \$100,000
 - the total sentence may not exceed forty (40) years
 - the maximum term of confinement may not exceed twenty-five (25) years
 - extended supervision may not exceed fifteen (15) years.
- 4 For a Class D felony:
 - a fine may not exceed \$100,000
 - the total sentence may not exceed twenty-five (25) years
 - the maximum term of confinement may not exceed fifteen (15) years
 - extended supervision may not exceed ten (10) years.

- 5 For a Class E felony:
 - a fine may not exceed \$50,000
 - the total sentence may not exceed fifteen (15) years
 - the maximum term of confinement may not exceed ten (10) years
 - extended supervision may not exceed five (5) years.

- 6 For a Class F felony:
 - a fine may not exceed \$25,000
 - the total sentence may not exceed twelve (12) years and six (6) months
 - extended supervision may not exceed seven (7) years and six (6) months
 - extended supervision may not exceed five (5) years.

- 7 For a Class G felony:
 - a fine may not exceed \$25,000
 - the total sentence may not exceed ten (10) years
 - the maximum term of confinement may not exceed five (5) years
 - extended supervision may not exceed five (5) years.

- 8 For a Class H felony:
 - a fine may not exceed \$10,000
 - the total sentence may not exceed six (6) years
 - the maximum confinement may not exceed three (3) years
 - extended supervision may not exceed three (3) years.

- 9 For a Class I felony:
 - a fine may not exceed \$10,000
 - the total sentence may not exceed three (3) years and six (6) months
 - the maximum confinement may not exceed one (1) year and six (6) months
 - extended supervision may not exceed two (2) years.

See Wisconsin Statutes Chapter 939, Wis. Stat. sec. 973.01(2).

Mandatory minimum sentences

Additionally, certain offenses carry *mandatory* minimum sentences. The following list includes year minimums, which refer to the minimum period of confinement *in prison* and may be part of a bifurcated sentence. The minimums do not apply to juvenile offenders.

Child sex offenses subject to mandatory minimum sentences include:

- First degree sexual assault of a child
 - having sexual contact or intercourse with a person under 13 years causing great bodily harm (25 years)
 - having sexual intercourse with a person under 12 years (25 years)

- having sexual intercourse with a person under 16 years by use or threat of force or violence (25 years)
- having sexual contact with a person who under 16 years by use or threat of force or violence if the actor is at least 18 years of age (5 years)
- Engaging in repeated acts of sexual assault of the same child
 - Repeated acts of the above offenses may be subject to a 25 or 5 year minimum sentence

*The above section does not apply if the actor is a persistent repeater and is subject to life in prison under Wis. Stat. sec. 939.62(2m)(c)

- Use of a computer to facilitate a child sex crime (5 years)
- Sexual exploitation of a child (5 years) Possession of child pornography (3 years)

*Courts may impose a sentence less than the mandatory minimum in cases of **Sexual exploitation of a child (948.05)** and **Possession of child pornography (948.12)** IF the offender is less than 48 months (four years) older than the child victim AND the court finds that the community's best interests will be served, the public will not be harmed, and the court states its reasoning in writing.

- Repeat "serious" sex crimes
 - If a person has one or more prior convictions for first or second degree sexual assault (under Wis. stat. sec. 940.225), the term of confinement must be at least 3 years and 6 months.
 - Other penalties may apply, including penalty enhancers
 - If the prior and subsequent convictions are for first degree sexual assault, the *maximum* sentence is life imprisonment without the possibility of parole

Misdemeanor sentences

- 1 For a Class A misdemeanor, a fine not to exceed \$10,000, or imprisonment not to exceed (nine) 9 months, or both.
- 2 For a Class B misdemeanor, a fine not to exceed \$1,000, or imprisonment not to exceed ninety (90) days, or both.
- 3 For a Class C misdemeanor, a fine not to exceed \$500, or imprisonment not to exceed thirty (30) days, or both.

Misdemeanor sentences are largely unaffected by truth in sentencing provisions. Wis. Stat. sec. 939.51(3).

Sentence extensions

Sentences under truth in sentencing may be extended for conduct violations incurred while in prison. Wis. Stat. sec. 973.01(4). Further, maximum sentences can be extended if the commission of the crime involves a **penalty enhancer**.

Penalty enhancers

Truth in sentencing provisions eliminated many penalty enhancers, but some remain. A penalty enhancer increases the sentence for some crimes up to a statutory maximum. Current penalty enhancers include:

- committing certain domestic violence offenses. Wis. Stat. sec. 939.621
- committing a violent crime in a school zone. Wis. Stat. sec. 939.632
- committing hate crimes. Wis. Stat. sec. 939.645
- committing certain crimes against children while serving as a child care provider. Wis. Stat. sec. 939.635,
- distribution of a controlled substance to minors. Wis. Stat. sec. 961.46
- distribution/delivery or intent to distribute/deliver controlled substances on or near certain places like schools, public housing, and jails. Wis. Stat. sec. 961.49
- using a dangerous weapon to commit a crime. Wis. Stat. sec. 939.63
- qualifying as a repeat serious felon, as described in Wis. Stat. sec. 939.62(1), and committing a subsequent serious offense, Wis. Stat. sec. 961.48.

Most penalty enhancers under the old sentencing structure may still be used in the new sentencing structure. Some will now be considered as aggravating factors rather than penalty enhancers.

Pardons

Truth in sentencing does not remove the power of the governor to pardon inmates.

Mitigating and aggravating factors in sentencing

Truth in sentencing provisions encourage a court to consider many factors when imposing a sentence. In general, the primary sentencing factors should balance:

- the protection of the public
- the gravity of the offense
- the rehabilitative needs of the defendant

See Wis. Stat. sec. 973.017(2)(a).

Aggravating factors:

- The person committed the crime while her or his usual appearance was concealed, disguised, or altered, with the intent to make it less likely that s/he would be identified with the crime.
- The person committed the crime for the benefit of, at the direction of, or in association with any criminal gang, with specific intent to promote, further, or assist in any criminal conduct by criminal gang members.
- The person committed the felony while wearing a vest or other garment designed, redesigned, or adapted to prevent bullets from penetrating the garment.
- The person committed the felony with the intent to influence the policy of a governmental unit or to punish a governmental unit for a prior policy decision, if any of the following circumstances also applies to the felony committed by the person:
 - The person caused bodily harm, great bodily harm, or death to another.
 - The person caused damage to the property of another, and the total property damaged is reduced in value by \$25,000 or more. For the purposes of subd. 1.b, property is reduced in value by the amount that it would cost either to repair or to replace it, whichever is less.
 - The person used force or violence or the threat of force or violence. Wis. Stat. sec. 973.017(3).
- The commission of the crime exposed the victim to HIV or other statutorily identified sexually transmitted infections. Wis. Stat. sec. 973.017(4).
- The crime was committed against someone over age sixty-two (62), even if the defendant didn't believe the victim had attained age sixty-two (62). Wis. Stat. sec. 973.017(5).
- The person sexually assaulted or physically harmed a child for whom s/he was responsible. Wis. Stat. sec. 973.017(6).
- The actor commits an act of domestic violence in a manner that is observable or audible to a child, if the actor knew or reasonably should have known that the act was committed where it was observable or audible to a child. 973.17 (6m)(b).

Mitigating factors: No mitigating factors are specifically enumerated in the Wisconsin Statutes.

How does the judge determine the final sentence?

Sentencing decisions are discretionary functions of the court. In determining a sentence, the court must consider: the protection of the public; the gravity of the offense; the rehabilitative needs of the defendant; and any applicable aggravating or mitigating factors. Wis. Stat. sec. 973.017(2). Because the Wisconsin Sentencing Commission is now defunct, guidelines worksheets are no longer used. However, the court must consider all relevant factors and state its reasons for the sentencing decision in open court and *on the record*, or, if not in the defendant's presence, in a written statement included in the record. Wis. Stat. sec. 973.017(10m); *State v. Kaprelian*, 2008 Wisc. App. LEXIS 829. .

Lifetime supervision of sex offenders: If a person is convicted of a serious sex crime, the prosecutor may ask that the person be placed on lifetime supervision. Wis. Stat. sec. 939.615. Serious sex crimes include:

- sexual exploitation by a therapist,
- first, second, or third degree sexual assault,
- first or second degree sexual assault of a child,
- repeatedly sexually assaulting the same child,
- child exploitation,
- trafficking of a child,
- causing a child to view or listen to sexual activity,
- incest with a child,
- child enticement,
- using a computer to facilitate a sex crime against a child,
- soliciting a child for prostitution,
- sexual assault of a child placed in substitute care,
- exposing a child to harmful materials or harmful descriptions or narrations,
- possession of child pornography,
- child sex offenders working with children, and

- human trafficking if for the purpose of a commercial sex act.

Habitual criminality: If an individual is charged with a crime and within the past five (5) years was convicted of committing another felony, the current sentence may be extended. Further, if an individual is charged with a crime and within the past three (3) years has committed at least three (3) misdemeanors, the current sentence may be extended. Depending on whether the current and/or prior crime was a felony or a misdemeanor, the sentence could be extended up to six (6) years. Wis. Stat. sec. 939.62(2).

Two strikes and persistent repeaters: If an offender was previously convicted of a serious child sex offense, the term of confinement is life without parole. Wis. Stat. sec. 939.62(2m)(c). The Wisconsin Supreme Court upheld the constitutionality of this “two-strikes” law. State v. Radke, 2003 WI 7, 259 Wis.2d 13, 657 N.W.2d 66. If the convicted offender previously committed two (2) serious felonies and the crime currently charged is another serious felony, the term of confinement is life without parole. Wis. Stat. sec. 939.62(2m)(c).

- Wis. Stat. 939.62 (2m)(c) provides the list of 12 statutory violations classified as “Serious Child Sex Offenses.”
- Serious felonies include serious sex crimes against children and in addition include:
 - homicides
 - some partial-birth abortions
 - serious batteries
 - first and second degree sexual assaults
 - taking hostages
 - causing death by tampering with household products
 - arson
 - certain burglaries
 - carjacking with a weapon
 - certain robberies
 - assaulting or battering prison employees. Wis. Stat. sec. 939.62(2m)(a)2m.b.

DNA testing

The court must order all convicted felons to submit a DNA sample for DNA typing. Wis. Stat. sec. 973.047.

Sentence adjustments

Inmate petition for sentence adjustment

Truth in sentencing provisions allow any individual convicted of a felony other than an A or B felony to petition the sentencing court for a sentence adjustment. Wis. Stat. sec. 973.195. The perpetrator may ask for the adjustment when he or she has completed 85% of a C, D, or E term of confinement, or 75% of the term of confinement for a lesser felony. Wis. Stat. sec. 973.195(1g).

An inmate may request sentence adjustment based on any of the following grounds:

- The inmate has evidenced good conduct, progress in rehabilitation, or participation in educational, treatment, or other correctional programs.
- There has been a change in law or procedure related to sentencing or revocation of extended supervision that took effect after the inmate was sentenced and would have resulted in a shorter term of confinement if applicable when the inmate was originally sentenced.
- The inmate is subject to a sentence of confinement in another state.
- The inmate is in the United States illegally, and the sentence adjustment will facilitate deportation.
- The sentence adjustment is otherwise in the interests of justice. Wis. Stat. sec. 973.195(1r)(b).

The sentencing court may reject the petition outright. If not, the prosecutor must be notified and may also oppose the petition. For most felonies other than Classes A and B, if the DA objects to the adjustment within 45 days, the court shall deny the inmate's petition. Wis. Stat. sec. 973.195(1r)(c). For certain sex crimes including second or third degree sexual assault, second degree sexual assault of a child, soliciting for prostitution and sexual assault of a child placed in substitute care, if the DA objects within ten (10) days after notice of the petition, the petition is rejected. If the DA does not object within ten (10) days, the DA must notify the victim of the petition, and if the victim objects within 45 days, the petition is similarly dismissed. Wis. Stat. secs. 973.195(1r)(d)-(f). This process can be hard on victims. It's easy to imagine situations where a victim could feel manipulated or re-victimized by this process. It is also quite a burden to place on a victim, as some of these notices will be sent out many years after the original conviction is obtained.

Wisconsin Act 28 sentence modifications and Repeal

2009 Wisconsin Act 28 created several sentence modification options that were repealed by 2011 Wisconsin Act 38. Almost every Act 28 modification has been completely repealed, and the sentencing structure has largely been restored to its pre-2009 form. However, some minor provisions were not repealed. For example, Act 28 transferred the decision of whether an offender violated a condition of his Extended Supervision from the sentencing court to the Department of Corrections or an administrative law judge. **It is important to note that some repealed provisions are still available, in a limited capacity, to those offenders who served sentences during the life of Act 28. For more detailed information regarding the impact of 2009 Wisconsin Act 28 and 2011 Wisconsin Act 38, please see “Notice on Governor’s Signing and Effective Date of 2011 Act 38” on the Wisconsin Department of Corrections website. The following link contains a PDF form of this document.:**

http://www.wi-doc.com/PDF_Files/Act%2038%20English.pdf

Sentencing before truth in sentencing

Those who committed crimes or were convicted of crimes before the truth in sentencing provisions went into effect will be sentenced under the provisions that existed at the time they committed their crimes. Before truth in sentencing, felons could go before the parole board before serving their entire term of confinement and ask for early release. Wis. Stat. sec. 973.014. Parole eligibility began at 25% of a felon’s term of confinement with a mandatory release date set at 2/3 of the sentence. Wis. Stat. secs. 304.06(1)(b) and 973.013(2)(b).

Advocates may see some victims who were sexually assaulted prior to TIS provisions resulting in sentences calculated under the old sentencing provisions. These victims may be concerned about parole hearings.

Can a defendant ever serve the statutory maximum sentence in prison?

Yes. Although a court may sentence a defendant to a term of confinement that is shorter than the total sentence length, if the defendant violates the terms of supervision, s/he can be returned to confinement to serve out the remainder of the sentence.

What happens when a defendant is found *not guilty by reason of mental disease or defect*?

A defendant found not guilty by reason of mental disease or defect is not imprisoned in the state prison, but may be placed in a facility to receive institutional care. The court may also grant the defendant conditional release.

The court will consider:

- the nature and circumstances of the crime
- the defendant's mental history and present mental condition
- where the defendant will live
- how the defendant will support her/himself
- what arrangements are available to ensure that the defendant takes medication
- what treatment is available to the defendant in the community

If releasing the defendant would pose a significant risk of bodily harm to the defendant or others or if it is likely that the defendant would cause serious damage to property, the court must order institutionalization. Wis. Stat. sec. 971.17(3). If not, the court must order conditional release. Lifetime supervision may also be ordered for any sex offender found not guilty by reason of mental disease or mental defect. Wis. Stat. sec. 979.17(1j). Further, sex offenders found not guilty by reason of mental disease or mental defect or those who commit sexually motivated crimes may be required to register as sex offenders. Wis. Stat. sec. 971.17(1m)(a).

In Wisconsin, such defendants are committed to either the Winnebago or the Mendota Mental Health Institute. If the defendant is placed on conditional release, the Department of Health Services, through the Department of Corrections, works with the county to prepare a plan that identifies treatment services the defendant will receive. If the defendant violates these conditions, the defendant's conditional release status may be revoked and the defendant will be committed to an institution. Wis. Stat. secs. 971.17(3)(d)-(e).

Sex offender registration

The Department of Corrections (DOC) oversees the sex offender registry. Courts often require, as part of the sentencing order that offenders comply with registration requirements. Offenders convicted of certain offenses are required by law to comply with registration requirements (mandatory registration). Offenders convicted of certain other offenses can be required to comply with registration requirements (discretionary registration). Only a court can order discretionary registration. If a court doesn't order discretionary registration, it may not be possible to require registration later.

Information regarding sex offender registration isn't part of the information a victim must receive according to the crime victim rights provisions of the Wisconsin Statutes. If a victim wants the court to require the offender to comply with registration requirements, a victim could include this in his or her victim impact statement and/or communicate this desire to a DOC agent completing a pre-sentence investigation.

Please see Chapter 14, “Department of Corrections,” for more information on the sex offender registry and a list of mandatory and discretionary registration offenses.

CHAPTER 11

APPEAL IN CRIMINAL MATTERS

A victim should be prepared for a defendant to make any number of attacks against his or her conviction or sentence. Defendants can:

- make motions to the trial court to reconsider the original conviction or sentence or for a new trial based on a variety of errors,
- make motions to introduce new evidence, or
- appeal a case to the Court of Appeals.

All of the appeal rights of the defendant must occur within strict time guidelines. Furthermore, not everything can be appealed, and not every argument a defendant makes will be successful on appeal. However, the victim could feel victimized again if the defendant pursues post-conviction proceedings.

A victim is not a party to a case and therefore cannot appeal either the conviction or the sentence. The remedies available to a victim in a criminal case may therefore not result in a change to the actual case at hand. If the victim feels that his or her victim rights were violated, the victim can:

- file a crime victim rights complaint (see Chapter 13 for more information on crime victim rights) or
- file a judicial conduct complaint with the Judicial Commission (note, however, that the commission only investigates ethical violations; the number for the Judicial Commission is 608-266-7637
- www.courts.state.wi.us/about/committees/judicialcommission/index.htm

CHAPTER 12

JUVENILE JUSTICE SYSTEM

When the perpetrator of a sex crime is a child, different procedures apply. For instance, juvenile proceedings are confidential. In addition, the terminology is different from that used in adult cases. Here is some of the terminology used to describe the juvenile court process:

- Rather than drawing up a complaint including charges, the district attorney files a juvenile petition to commence court proceedings.
- Rather than being found guilty, a juvenile will be found **delinquent**.
- Rather than having a trial, a **juvenile adjudication** is called a **fact-finding hearing**.
- Rather than having a sentencing hearing, a juvenile has a **dispositional hearing**.

Before passage of the juvenile justice code, the procedures that applied to children who committed crimes were all contained in Chapter 48 of the Children's Code. In 1995, Wisconsin passed its juvenile justice code. This code provides that any child between ten (10) and seventeen (17) years old may be found delinquent under the juvenile justice code. Wis. Stat. sec. 938.12(1).

Although seventeen (17) year olds are defined in many places as children, for purposes of the criminal code, the Wisconsin Statutes provide that any individual who has reached his or her seventeenth (17th) birthday is to be investigated and prosecuted as an adult. Wis. Stat. sec. 938.02(1).

Further, the Wisconsin Statutes include provisions to try some juveniles under age seventeen (17) as adults. Wis. Stat. secs. 938.18, 938.183. Children under ten (10) will be evaluated under the "child in need of protective services" portions of the statutes to determine what services are necessary for that child. Wisconsin's philosophy is that children under ten (10) should receive services rather than being penalized for committing a crime.

One of the primary players in the juvenile justice system is the **intake worker**. The intake worker makes multiple recommendations regarding custody, initial assessment, and disposition of a case. Although these decisions can be overturned by district attorneys and/or juvenile court judges, the intake worker is in many ways a "gatekeeper" for the system. The role of the intake worker will be discussed in greater detail later.

Taking a child into custody

A juvenile accused of committing a crime, including a sex crime, may be taken into custody pursuant to:

- a court order
- a warrant
- a *capias* (a document ordering an officer to arrest someone) issued by a judge
- a law enforcement officer who has a reasonable belief that a warrant or *capias* has been issued or that the juvenile is a runaway, is suffering from an illness or injury, is truant, or has committed a crime. Wis. Stat. sec. 938.19.

When a juvenile is taken into physical custody, the person taking the child will immediately attempt to notify the child's parent, guardian, and legal custodian (if there is a parent, guardian, and legal custodian). Wis. Stat. sec. 938.19(2). The person taking the child into custody must continue to attempt to reach these people until they are notified or until the child is delivered to an intake worker, whichever occurs first. See Wis. Stat. sec. 938.19(2). The person taking the child into custody shall arrange for the juvenile to be interviewed by an intake worker to determine what other actions may be taken. If the child is delivered to the intake worker before the parent, guardian, and legal custodian are notified, the intake worker (or someone designated by the intake worker) shall continue to try to contact the parent, guardian, and legal custodian.

Release from custody

Juveniles taken into custody shall be released as soon as is reasonably possible. According to Wisconsin Statute sec. 938.20, every effort is to be made to release the child to the child's parent, guardian, or legal custodian. If these people are unavailable or unable to provide supervision for the child, the child may be released to a responsible adult. If the child is fifteen (15) years of age or older, the child may be released without adult supervision.

In most instances when the child is released to a non-parent, the person who releases the child shall inform the parents in writing of the circumstances surrounding release and provide a copy of this document to the juvenile. If the intake worker did not make the decision to release, the worker will also receive a copy of this document. Id.

Wisconsin laws also specify that children suffering from serious mental conditions should be transported to a physician or hospital. Children shall be evaluated for potential commitments and/or other protective services if:

- they are believed to be mentally ill, drug dependent, or developmentally disabled, and
- their actions indicate a substantial probability of physical harm to themselves or others. Wis. Stat. secs. 938.20 (4) and (5).

Keeping a child in physical custody

If the child is not released under Wis. Stat. sec. 938.205, the child can remain in custody if there is a reasonable suspicion that any of the following is true:

- The child is a danger to others.
- The responsible adult is unable or unwilling to provide the services the juvenile needs.
- The juvenile will flee to avoid juvenile proceedings.

A juvenile may be held in any of the following:

- the home of his or her parent or guardian
- the home of a relative
- a licensed foster home
- a group home
- a licensed non-secure facility
- a shelter
- a children's home

A juvenile may be held in secure detention if the intake worker believes that any of the following is true:

- 1 The juvenile poses a significant risk to him/herself or others.
- 2 The juvenile would flee to avoid court proceedings.
- 3 The delinquent act is a "serious crime." Serious crimes include:
 - homicide
 - most batteries
 - first degree sexual assault
 - some types of criminal harassment
 - first or second degree child sexual assault
 - multiple sexual assaults of the same child
 - physical abuse of a child.

In some limited circumstances, the juvenile may be held in the county jail. Finally, the juvenile may be held with the juvenile's consent. See Wis. Stat. sec. 938.205.

Custody hearing

Juveniles not released are entitled to a hearing to determine whether ongoing custody is appropriate. This hearing is to be held within twenty-four (24) hours of the end of the day the decision was made to continue to hold the child in custody (excluding weekends and holidays). At this hearing, the filing of a juvenile petition is highly encouraged by the statutes. However, under certain circumstances, the judge may order up to an additional forty-eight (48) hours of detention without a petition. A juvenile who is held in non-secure custody may waive this hearing. Wis. Stat. sec. 938.21.

Duties of the intake worker

Any child alleged to have committed a delinquent act will be referred to an intake worker. The intake worker may do the following:

- Conduct an inquiry. Wis. Stat. sec. 948.24(1).
- Determine if the court has jurisdiction by looking at the facts alleged.
- Decide if there is a prima facie case to proceed (essentially a determination of whether the facts establish probable cause).
- Ascertain what is in the best interests of this child and the public with regard to any action taken. Wis. Stat. sec. 938.24(1).
- Provide crisis counseling if necessary.

The review conducted by the intake worker need not involve an interview with the child or the child's parent, guardian, or legal custodian. The law specifies that the intake worker conduct an inquiry only to determine if the court has jurisdiction and if there is a prima facie case to proceed. In many counties, the intake worker conducts the investigation primarily by reviewing the police report.

If the intake worker decides to proceed, the next step is to confer with the parents. Before talking to the juvenile or the juvenile's parents, the intake worker must personally inform the juvenile of the following:

- that the referral may result in a petition to the court
- what allegations could be in the petition
- the nature and probable consequences of the proceedings
- consider silence adversely

- that the juvenile has the right to confront and cross-examine those appearing against him or her
- that the juvenile has the right to counsel
- that the juvenile has the right to present and subpoena witnesses
- that the juvenile has the right to have the petition's allegation proved beyond a reasonable doubt
- Under Wisconsin law, if the juvenile allegedly committed an act resulting in injury or damage to property, the intake worker must inform the child's parents in writing that:
 - the child's identity and police reports could be disclosed if a civil suit is filed against the child
 - the parents are potentially liable for the acts of their children. See Wis. Stat. sec. 938.243 (1m).

Although this statute is generally applied to cases of vandalism, it is possible that a sexual crime committed by a child could also result in the loss of property to the victim---for example, if the assault also involved a theft. Further, it is quite possible that the child caused personal injury to the victim. However, be aware that the allegation or adjudication of delinquency for a sexual crime is not in and of itself considered a personal injury.

Each court must establish written policies governing the intake process. These policies must include provisions regarding victim notice and the right of victims to attend hearings.

The intake worker determines whether:

- the case should be referred to the district attorney to proceed with a petition
- the juvenile should partake in a deferred prosecution agreement, or
- the case should be closed.

The worker has up to forty (40) days to make these decisions. The worker must notify the court and the district attorney of any decision to close a case or enter into a deferred prosecution agreement. The district attorney is not bound by the decision, however, and has twenty (20) days after receiving notice from the intake worker within which to file a petition or decline to file a petition. Wis. Stat. sec. 938.24(5).

Decision to proceed with a deferred prosecution agreement

An intake worker may decide that a deferred prosecution agreement is appropriate. In a deferred prosecution agreement, the juvenile agrees to terms set by the worker. If the terms are met, no prosecution is undertaken. If not, the juvenile may be prosecuted. The intake worker must:

- notify the victim about the deferred prosecution agreement
- give the victim an opportunity to confer with the worker about the agreement.

Section 938.245 Wis. Stat. describes the many options the intake worker can incorporate into a deferred prosecution agreement, often called an informal disposition. These options include:

- counseling for the family or any individual in the family
- curfew
- AODA services
- restitution in the form of money or services to the victim if the delinquent act caused property damage or physical injury (but only upon a finding that the juvenile is financially or physically capable of restitution)
- parental restitution on behalf of the child
- supervised work program or community service.

No child under fourteen (14) can be required to make restitution of more than \$250.00 or forty (40) hours of service.

A juvenile or parent may terminate the deferred prosecution agreement at any time, but if this occurs, the intake worker can recommend that the district attorney file a juvenile petition. Wis. Stat. sec. 938.24(5). Further, if a prosecutor within twenty (20) days of receiving the deferred prosecution agreement files a juvenile petition, the agreement is terminated. Wis. Stat. sec. 948.245(6). Finally, the intake worker may also terminate the agreement if he or she feels that the obligations stated in the agreement are not being met. Wis. Stat. sec. 938.245(7)(a). Within ten (10) days of the cancellation of the informal disposition, the intake worker shall notify the district attorney and recommend whether a formal juvenile petition should be filed.

Charging a child offender: when a juvenile petition is recommended

As noted above, the intake worker has forty (40) days within which to make a recommendation concerning what is in the best interest of a juvenile accused of committing a sexual crime. Wis. Stat. sec. 938.24(5). The district attorney then has

twenty (20) days in which to decide whether to accept or reject the recommendation. Wis. Stat. sec. 938.25(2)(a). If the district attorney does not do anything within those twenty (20) days, and if the intake worker has closed the case or entered into an informal disposition, the intake worker will either proceed with the recommendation to close the case or engage in an informal disposition. Id.

If the intake worker recommended that the district attorney file a formal petition and the district attorney fails to act within twenty (20) days, the district attorney can ask for an extension, the case can be dismissed without prejudice, or the case can be closed.

The juvenile petition

A juvenile delinquency petition is a legal document stating the facts and requesting the court to take some action. It must be signed by a person who "has knowledge of the facts alleged in the petition or who is informed of the facts and believes these facts to be true" and must be filed by the district attorney. Wis. Stat. sec. 938.25(1). A district attorney who decides not to file a petition should make a reasonable attempt to notify the victims regarding this decision. Wis. Stat. sec. 938.25(2m). If the district attorney refuses to file a petition, any person may request the judge to order a petition to be filed and a hearing to be held on the request. Wis. Stat. sec. 938.25(3). The judge may order the filing of the petition on his or her own motion.

Court proceedings for a juvenile offender

The court proceedings used when the offender is a child are similar to those followed when the offender is an adult. However, different language is used to describe the procedures, and a juvenile in a delinquency action has no right to a trial by jury. Wis. Stat. sec. 938.31(2).

If the district attorney decides to file a juvenile petition (the equivalent of charging the case in the adult system), three separate hearings may be held:

- a plea hearing
- a fact finding hearing
- a dispositional hearing.

As in the adult system, the number of hearings is dependent on what happens at each hearing. Sometimes, two of these procedures will be covered in the same hearing.

Trial attendance

In general, the public is excluded from juvenile hearings. In some situations, a juvenile may demand a hearing, but if the juvenile is accused of an act of sexual assault, the victim can object and the court must exclude the public. Wis. Stat. sec. 938.299(1)(a). The parties, their counsels, the victim, and witnesses may be present. However, witnesses in juvenile proceedings, as in adult proceedings, may be excluded at the request of either party or the judge, according to the same rules used to determine when witnesses can be excluded at adult proceedings. Id.

The court may approve others to be present at the hearing if they have a “proper interest” in attending. These people may include foster parents, treatment foster parents, or other physical custodians. However, these individuals can be excluded if the judge finds that exclusion would be in the best interests of the juvenile. Wis. Stat. sec. 938.299(1)(g).

The victim of a juvenile’s act may attend the hearing, but the judge may exclude a victim from any portion of a hearing that deals with sensitive personal matter relating to the victim’s family which does not directly relate to the act or alleged act committed against the victim. Wis. Stat. sec. 938.299(1)(am). A member of the victim's family and, at the request of the victim, a representative of an organization providing support services to the victim, may attend the hearing under this subsection. Id.

Representatives of the media may be present, but may only report news without revealing the identity of the juvenile involved. Any person who divulges any information which would identify the juvenile or the family involved in any juvenile proceeding is subject to sanctions, with a few limited instances where releasing the information is authorized. Wis. Stat. sec. 938.299(1)(b).

Rules of evidence

At many juvenile court hearings, the rules of evidence applicable in adult cases do not apply. Wis. Stat. sec. 938.299(4)(b). However, the rules of privilege do apply. Id. Rulings on the admissibility of evidence in juvenile proceedings are governed generally by principles of relevancy, and the court “shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under Wis. Stat. sec. 901.05.” Wis. Stat. sec. 938.299(4)(b). Hearsay is admissible if it has demonstrable circumstantial guarantees of trustworthiness. Attorneys can object, and objections are included in the record. Id.

Identity to be kept confidential

Wisconsin law states that the identity of the juvenile and the juvenile’s family are to be kept confidential. Section 938.299(1)(b) of the Wisconsin Statutes says that any person who divulges any information that would identify the juvenile or the juvenile’s family is subject to Chapter 785. Chapter 785 states that a court may hold a person in contempt of court, including imposing sanctions, which might include fines and/or imprisonment.

The confidentiality of juvenile records is stressed throughout the statutes. See Wis. Stat. sec. 938.396. The public is generally not allowed access to these records. Certain people are allowed access but prohibited from further disclosing the information or using the information outside of a specific purpose. The following, for example, have access to law enforcement and court records:

- a juvenile age fourteen (14) or older
- the juvenile's parent or guardian
- the juvenile's counsel
- the juvenile's guardian ad litem (GAL)

The GAL and counsel for any party may inspect any documents relevant to the case and shall be granted at least forty-eight (48) hours to review the documents. A victim/witness coordinator shall have access but only to the extent that these records are necessary for the provision of victim services. The victim or the victim's parents may obtain any information relating to the injury, loss, or damage suffered by the victim, including the name and address of the juvenile and the juvenile's parents, but this information may only be used for a civil suit based on the assault. Access to records by school administrators is also regulated by statute. The statutes that govern access to juvenile records span pages and may be affected by internal agency policies regarding the release of records.

Plea hearing

The first hearing is a plea hearing, the equivalent to an initial appearance in the adult system. Wisconsin Statute sec. 938.30 outlines the requirements of a plea hearing. The first requirement states that a juvenile must be given a plea hearing within a reasonable time. A reasonable time is within thirty (30) days of the filing of the petition if the juvenile is not being held in custody and within ten (10) days of the filing of the petition if the juvenile is being held in custody. Wis. Stat. sec. 938.30(1).

At the start of the hearing, the juvenile and the parent, guardian, or legal custodian shall be advised of their rights. Non-petitioning parties, including the juvenile, shall be granted a continuance of the plea hearing if they wish to consult an attorney about a substitution of judge. Wis. Stat. sec. 938.30(2).

At the plea hearing, the juvenile can make one of four pleas:

1. Admit some or all of the facts in the petition; such a plea is an admission of commission of the acts and does not constitute an admission of delinquency.
2. Deny the facts alleged in the petition; if the juvenile says nothing or refuses to plead, the court shall direct that a denial of the facts be entered into the record on

behalf of the juvenile. A denial of the facts is the same as pleading not guilty in the adult system.

3. Plead no contest to the allegations subject to the approval of the court.
4. State that he or she is not responsible for the acts alleged in the petition by reason of mental disease or defect. This plea shall be joined with one of the three other pleas.

See Wis. Stat. sec. 938.30(4).

If the juvenile admits to the facts in the petition, the matter is set for a dispositional hearing (the equivalent of a sentencing hearing in the adult system. Before accepting an admission or a plea of no contest, the court shall make the following three inquiries:

1. Inquire of the parties present, including the juvenile, whether the plea or admission is offered voluntarily, with an understanding of the nature of the acts alleged and with knowledge of the potential dispositions.
2. Inquire whether any threats or promises were made to elicit the plea from the juvenile (and alert unrepresented parties that a lawyer might be able to help.)
3. Make inquiries to satisfactorily establish that there is a factual basis for the juvenile's plea.

See Wis. Stat. sec. 938.30(4m).

If a court commissioner conducts the hearing and accepts an admission of the alleged facts, the judge shall review the admission at the beginning of the dispositional hearing by making the three inquiries listed above. The court may permit any party to participate in the hearings by telephone or live audio-visual means except a juvenile who intends to admit the facts of a delinquency petition.

If necessary, a fact finding hearing is scheduled. This hearing must be held within twenty (20) days if the juvenile is in custody and within thirty (30) days if the juvenile is not in custody.

The court at the plea hearing will also ask the district attorney whether he or she complied with the victim's rights requirements imposed upon district attorneys.

Fact finding hearing

A fact finding hearing is used to determine whether the allegations of the juvenile petition are supported beyond a reasonable doubt. The fact finding hearing is equivalent to a trial in the adult system. There is no right to a jury during a fact finding delinquency hearing.

Wis. Stat. sec. 906.15 states: "At the request of a party the judge or court

commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the judge or court commissioner may make the order of his or her own motion . . . The judge or court commissioner may direct that all such excluded and non-excluded witnesses be kept separate until they have been examined or the hearing is ended."

The same laws, including rape shield laws, apply to the juvenile's fact finding hearing as would apply at an adult trial. If the hearing involves a child witness or child victim, the court may allow the use of a videotaped deposition. See Wis. Stat. sec. 938.31(2).

At the conclusion of the fact finding hearing, the court makes a determination of the facts. The court will dismiss the petition with prejudice in either of the following cases:

1. The juvenile isn't within the court's jurisdiction.
2. The facts alleged in the petition haven't been proved.

Dismissing the petition with prejudice means that the action is now conclusively settled, just as if the action had been prosecuted to a conclusion adverse to the party making the claim. Wis. Stat. sec. 938.31(2).

If, at the end of the hearing, the court finds that the facts in the petition have been proved, the court sets a date for the dispositional hearing. While the court is to allow enough time for the parties to prepare, the dispositional hearing may be no more than ten (10) days from the fact finding hearing for a child in custody and no more than thirty (30) days for a child not held in secure custody. If all parties consent, the court may immediately proceed with a dispositional hearing. If it looks like the disposition will require the juvenile be placed outside the home, the court will order the parents of the juvenile to provide information regarding their assets and income to determine what portion of the costs associated with the custody will be the parents' responsibility.

Dispositional hearing

The dispositional hearing is equivalent to a sentencing hearing in the adult system. The dispositional hearing must be held by a judge, not a juvenile court commissioner.

At the dispositional hearing, any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations. On the request of any party, the court may admit testimony on the record by telephone or live audio-visual means unless good cause to the contrary is shown. Both the request and the showing of good cause may be made by telephone.

Changes made to Wisconsin's laws late in 1993 state that victims have a right to attend juvenile dispositional hearings. The law states that the court must notify victims of both the time and place of the dispositional hearing. Wis. Stat. sec. 938.335. A member of the victim's family (and, at the victim's request, a representative of an organization providing support services to the victim) may also attend the hearing.

However, the judge may exclude a victim from any portion of the hearing which deals with sensitive personal matters of the juvenile or the juvenile's family and which doesn't directly relate to the alleged act committed by the juvenile. See Wis. Stat. sec. 938.299

At the conclusion of the dispositional hearing, the court makes a dispositional order. Before imposing a disposition, the court will allow the victim or the victim's family member to make a statement to the court or submit a written statement to be read to the court. Wis. Stat. sec. 938.335. The court may also allow any other person to make a statement, although any statement which is made must be relevant to the disposition.

The judge will also consider a court report. Wis. Stat. sec. 938.33(1). The report must include a detailed social history of the juvenile and a detailed disposition recommendation. The report must include specific recommendations. For example:

- If the recommendation is for secured detention, the report will indicate why this is the least restrictive means available.
- If the juvenile is to be placed out of the home, the report must include additional information.
- If the juvenile is eligible for specialized serious juvenile offender treatment, the report must include specific information about that treatment. See Wis. Stat. sec. 938.33.

According to Wisconsin law (Wis. Stat. sec. 938.355), the judge will decide the juvenile's placement and treatment based on evidence submitted to the judge. The dispositional order must be in writing and, like the court report, must extensively explain the disposition, identify the specific services needed by the juvenile, and identify who will provide those services. To the greatest extent possible, the disposition will accomplish the following:

- Maintain and protect the juvenile's well-being.
- Assure the treatment or rehabilitation of the juvenile and the family consistent with the protection of the public.
- Divert the juvenile from the criminal justice system.
- Tailor the treatment to the juvenile's needs.

Unlike adult sentences, juvenile dispositions don't require a certain amount of detention followed by a length of supervision. Section 938.34 of the Juvenile Justice Code outlines the many different dispositions a court might order when a juvenile is judged to be delinquent. These include:

- placing the child in a home under supervision

- teen court programs
- intensive supervision
- electronic monitoring
- educational programs
- vocational programs
- community service
- restitution.

When the child commits an offense that would subject an adult who committed that act to more than six (6) months of imprisonment, and the judge deems the juvenile to be a danger to the public, requiring detention, the judge can order the juvenile be sent to certain secured detention facilities. Most sexual assaults would fall into this category. Serious juvenile offender programs will be ordered if the juvenile is over fourteen (14) and committed one or more acts classified as serious juvenile offenses. These include first degree sexual assault, first degree sexual assault of a child, and repeated acts of sexual assault of the same child.

Expiration of orders

Juvenile orders are generally in place for one (1) year, even if the juvenile attains the age of majority before the year has expired. There are numerous exceptions that require or allow an extended order, in some instances up to five (5) years. Wis. Stat. sec. 938.355(4)(a).

Waiver into adult court

Juveniles who commit certain crimes *must* be tried in adult court. This "original" adult court jurisdiction is required for juveniles who have attempted or committed most types of homicide on or after the juvenile's fifteenth (15th) birthday. Wis. Stat. sec. 938.183(1). This original jurisdiction also applies if the juvenile has previously been convicted in adult court. Id. A procedure does exist to remove a case from adult court into juvenile court.

In other cases, a juvenile *may* be waived into adult court. When a juvenile, on or after his or her fourteenth (14th) birthday, commits felony murder, second degree reckless homicide, armed robbery, first or second degree sexual assault, or some types of kidnapping, either the juvenile, the district attorney or the judge may request that the case be waived into adult court. Wis. Stat. sec. 938.18(1). After the child's fifteenth (15th) birthday, any child accused of violating a state law may be waived into adult court.

Id. The district attorney, the juvenile, or the judge may petition for a waiver. An initiating judge must disqualify herself or himself from any future proceedings in the case.

A juvenile court judge in most cases will preside over a hearing to determine whether a waiver is appropriate. If the petition is granted, the case against the child is transferred to adult court. If this happens, the criminal proceedings are identical to those followed when the offender is an adult. In addition, the district attorney in adult court is not bound by the delinquency petition and may decide whether and with what to charge the child.

If a child is waived into adult court, the alleged offender is now treated as an adult and doesn't have the protection of the juvenile justice code, which mandates that juvenile proceedings are confidential. In addition, the philosophies of the juvenile justice code won't be considered in an adult proceeding.

HIV and STD testing of juvenile offenders

The standards governing HIV and STD testing of juvenile offenders are very similar to the standards governing HIV and STD testing of adult offenders. The district attorney must ask the court to order HIV testing if the victim requests testing, the district attorney believes that probable cause exists that the victim was exposed, and where the action would constitute a violation of secs. 940.225, 948.02, 948.05, 948.06. The order may be requested at or after the plea hearing and before the dispositional order is entered, and any time after the juvenile is found delinquent. See Wis. Stat. sec. 938.296.

Disclosure of test results

The court will require the health care professional who performs the test or series of tests to refrain from making the test results part of the child's permanent medical record. The health care professional may disclose the test results to any of the following:

- the parent, guardian, or legal custodian of the child
- the victim or alleged victim, if the alleged victim is an adult
- the parent, guardian, or legal custodian of the victim or alleged victim, if the victim or alleged victim is a child
- the health care professional that provides care for the child, upon request by the parent, guardian, or legal custodian of the child
- the health care professional that provides care for the victim or alleged victim, upon request by the victim or alleged victim, or, if the victim or alleged victim is a

child, upon request by the parent, guardian, or legal custodian of the victim or alleged victim. Wis. Stat. sec. 938.296(4).

Test results not admissible

By law, neither the fact that a person has been ordered to take a test or series of tests, nor the results of the tests or series of tests, are admissible during the course of a civil or criminal action or proceeding nor in an administrative proceeding. Wis. Stat. sec. 936.296(4).

CHAPTER 13

CRIME VICTIMS' RIGHTS

The devastating effects of crime on victims are increasingly reflected in law and policy on both a national and state level. To a greater extent than ever before, the public and those who work with crime victims understand the emotional, psychological, physical, and financial impact of crime. Further, they now understand that the impact of crime is felt not only by the individual victim but also her/his family and the community.

The crime victims' rights movement and the women's movement share an overlapping history. The women's movement is one of four movements "that strategically opened the way for the victims' rights discipline" (Walker, Steven and Kilpatrick, Dean. *2000 National Victim Assistance Academy Text*, Office For Victims of Crime, Office of Justice Programs, U.S. Department of Justice, Chapter 1, page 12.) Crime victims' rights grew naturally out of the women's movement, as many crimes involve violence against women. These women found themselves asking for the same recognition, respect, and remedies that other crime victim rights' advocates were seeking.

This chapter describes crime victims' rights for sexual assault victims in Wisconsin. This chapter is in no way intended to present the entire breadth of the crime victim rights movement. Furthermore, this chapter does not constitute legal advice and is intended to provide information only. This section will address:

- Wisconsin's Constitutional Amendment and Victim Bill of Rights
- Crime Victim Compensation and Sexual Assault Forensic Exam fund
- Restitution
- Wisconsin's victim/witness programs.

Wisconsin's Constitutional Amendment and Victim Bill of Rights

In 1980, Wisconsin passed the Crime Victim Bill of Rights for Victims and Witnesses of Crime, the first of its kind in the country. In 1993, Wisconsin's voters elevated victims' rights through passage of the Victim's Rights Amendment of the Wisconsin Constitution. It reads:

Victims of crime: Sec. 9m. [As created April 1993] This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the

accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused, which may be provided by law. Id.

As directed by the Constitutional amendment and through the passage of WI Act 181, Wisconsin incorporated expanded crime victims' rights into state law in 1997. Within the framework of the Wisconsin crime victims' rights law, certain rights apply automatically while others must be requested. For example, once the victim chooses to contact law enforcement, law enforcement *must* make a reasonable attempt to give the victim a written form explaining certain rights within 24 hours after the contact. Wis. Stat. secs. 950.04(1v)(t), 950.08(2)(g).

Other times, the victim will need to request certain information or services. For example, if the district attorney charges a defendant with a crime, the district attorney must offer the victim the opportunity to confer with its office concerning the case, possible outcomes to the case, plea bargains, and sentencing recommendations, but only if the victim requested this opportunity. Wis. Stat. secs. 950.04(1v)(j), 971.095(2). The process by which victims are notified of the rights that are automatic and those that must be requested is discussed later in this chapter.

Points for advocates to keep in mind

- An advocate who knows which rights are automatic and which must be requested can best explain this to the victim and guide the victim through the process, thereby ensuring that the victim has every opportunity to exercise his/her rights.
- An advocate can help the victim by answering questions and explaining the written information distributed to victims about the criminal justice process.
- Crime victim rights can empower the victim to make choices. A victim may not be able to control the outcome of the criminal justice process. However, crime victim rights help to guarantee that a crime victim is given a chance to be heard by the criminal justice system. For many victims, the opportunity to be heard is very important. For others, declining to participate or receiving information in the criminal justice system is equally as empowering.

Law enforcement

Generally, the first contact a victim makes with the criminal justice system is with law enforcement. The crime victims' rights law provides a very clear mandate to law enforcement about its responsibilities to crime victims. Law enforcement must make a reasonable attempt to provide the following written information to all victims no later

than 24 hours after initial contact with a victim. Wis. Stat. secs. 950.04(1v)(t), 950.08(2g). The term “reasonable attempt” comes directly from the statute and is not defined. The “reasonable attempt” requirement could be satisfied when law enforcement provides the victim a brochure about her/his rights. The following information must be provided:

- a list of rights as outlined in Wis. Stat. Ch. 950(1v); 950.08(2g)(a).
- information about crime victim compensation. Wis. Stat. sec. 950.08(2g)(b). See Chapter 949 of the Wisconsin Statutes entitled Awards for Victims of Crime. (More information about crime victim compensation is provided later in this chapter.)
- address and phone number of the intake worker, district attorney, or corporation counsel. A victim may call these people to obtain information about rights and notice of hearings and to request the opportunity to confer. Wis. Stat. sec. 950.08(2g)(c).
- address and phone number of the custodial agency (the agency to contact for information about whether the suspect is being held in custody, as well as about arrest and release). Wis. Stat. sec. 950.08(2g)(d).
- suggested procedures to follow if the victim is threatened or intimidated because of his/her decision to report to law enforcement. Wis. Stat. sec. 950.08(2g)(f).
- addresses and phone numbers for victim assistance, including medical services. Wis. Stat. sec. 950.08(2g)(g).

District Attorney (DA)

Crime victim rights law also requires the involvement of district attorneys in certain situations. Wis. Stat. secs. 950.04(1v)(j), 971.095.

If a case is not charged: If an arrest is made but the DA decides not to charge a case, the DA’s office must make a reasonable attempt to inform the victim of this decision. Wis. Stat. sec. 971.095(4).

If a case is charged but later dismissed: If the DA initially decides to charge a case but later dismisses the charge(s), the DA’s office must make a reasonable attempt to inform the victim of this decision. Wis. Stat. sec. 971.095(5).

If charges are filed and/or if a case goes to trial: If the DA files charges, the DA’s office will inform the victims of his/her rights and options. Wis. Stat. sec. 950.08(2r). The victim shouldn’t be afraid to ask questions. This part of the process frequently involves a victim/witness specialist.

Automatic rights

Within 10 days after the initial appearance or 24 hours before the preliminary examination (whichever is earlier) the DA (or his or her representative) must inform all victims in writing of the following general information:

- the procedure for prosecution. This information could include:
 - the types of court proceedings that might occur
 - which proceedings require the victim's presence
 - which proceedings the victim has the option to attend. Wis. Stat. sec. 950.08(2r)(a).
- list of rights and how to exercise them. Wis. Stat. sec. 950.08(2r)(b).
- who to contact if the victim changes address or phone numbers, in case s/he wishes to continue to receive notices about hearings, services, etc. Wis. Stat. sec. 950.08(2r)(c).
- crime victim compensation (CVC) information. Wis. Stat. sec. 950.08(2r)(d). (CVC is discussed more fully later in this chapter.)
- the individual in the DA's office to contact for further information about the case. Wis. Stat. sec. 950.08(2r)(e).
- victim impact statement (VIS) information. The DA must make a reasonable attempt to inform the victim of the right to make a statement about how s/he was affected by the crime. Wis. Stat. Sec. 950.04(1v)(L). (See Chapter 10, "Sentencing," for more information about victim impact statements.)

Opportunities granted upon request

- Opportunity to confer. The district attorney must offer victims an opportunity to confer with a representative of the DA's office to discuss the case and its possible outcomes of prosecution, potential plea agreements, and sentencing recommendations. The victim should call the DA's office and ask to schedule an appointment with the DA to confer. A one-time meeting between the DA (or his/her representative) can be enough to satisfy the right to confer requirement. However, in some situations, multiple meetings may be appropriate, particularly when matters evolve or circumstances change. In these instances, the victim should call the DA's office to schedule additional meetings. While the victim has the right to express his or her feelings and desires, the DA is not required to follow the wishes of the victim. See Wis. Stat. sec. 950.04(1v)(j).
- Hearing information. Upon the victim's request, a reasonable attempt should be made to notify a victim of the date, time, and place of scheduled court proceedings and any changes. This does not apply to proceedings held prior to

the initial hearing to set conditions of release. Wis. Stat. sec. 950.04(1v)(g). DA's offices often provide the victim with a form that must be completed and returned in order to receive hearing information.

- Disposition information. The victim of a crime has the right to request information from the district attorney about the disposition, or outcome, of a case involving that crime. Wis. Stat. sec. 950.04(1v)(zm).

After a conviction and during sentencing

The district attorney must inform the victim of the right to make a statement to the court during sentencing. 950.04(1v)(L). The district attorney must inform the victim of the time and date of the sentencing hearing if the victim requested notice of hearings. 971.095(3).

After sentencing

If the DA does not reject a petition for sentence adjustment made in cases of second and third degree sexual assault, second degree child sexual assault, and soliciting a child for prostitution, the DA must make a reasonable attempt to notify the victim of the petition. Wis. Stat. sec. 950.04(1v)(gm). (Please see Chapter 10, "Sentencing.")

Court process

Under the crime victims' rights law, the judge acts as a "check" to assure that the district attorney's office has complied with its responsibilities under the law.

Dismissed charges

Charges can be dismissed at any time during the criminal justice process. Before dismissal, the court must ask the DA if the victim requested a chance to confer about the dismissal, and if so, if the victim was given that opportunity. Wis. Stat. sec. 971.315.

Plea hearing

Before the court accepts a plea of guilty or no contest, the court must ask the DA if the DA gave the opportunity to confer about the plea to any victim who requested. Wis. Stat. sec. 971.08(1)(d).

Hearings and trial

The court may not exclude the victim from hearing testimony in a criminal or delinquency proceeding unless the court finds exclusion necessary to provide for a fair trial or fact finding hearing. Mere presence of the victim does not deprive the defendant

of a fair trial. Wis. Stat. sec. 906.15(2)(d).

If available and practicable, a separate waiting area for the victim and witnesses that is apart from the area used by the defendant, his/her relatives, or their witnesses shall be provided. If not, a means to minimize contact should be provided for any court proceeding, including the trial. Wis. Stat. sec. 967.10(2).

After conviction and during sentencing process

Before pronouncing a sentence, the court is required to ask if the DA informed the victim of the victim's right to make an oral or written statement at sentencing and if the DA complied with a victim request to be notified of the time, date, and location of the sentencing hearing. Wis. Stat. sec. 972.14(3)(b)

The court must determine whether the victim wants to make a statement to the court and allow the victim to make a statement to the court or provide a written statement to be read in court. The court must allow any information relevant to sentencing. Wis. Stat. sec. 972.14(3)(a).

The court may also allow others to submit statements if they are relevant to sentencing. Wis. Stat. sec. 972.14(3)(a).

The victim has the right to provide the court with information pertaining to the economic, physical, and psychological effect of the crime upon the victim and to have that information considered by the court. Wis. Stat. sec. 950.04(1v)(pm).

If the victim requests, the victim has the right to:

- attend a hearing on a petition for modification of a bifurcated sentence (available in some situations for terminally ill offenders or offenders over age 60) and provide a statement concerning modification of the bifurcated sentence. Wis. Stat. sec. 950.04(1v)(nt). (See Chapter 10, "Sentencing.")

The person preparing the pre-sentence investigation report shall make a reasonable attempt to contact the victim to determine the economic, physical, and psychological effect of the crime on the victim. Wis. Stat. sec. 950.04(1v)(p).

Additional rights of crime victims

Crime victims have the right to:

- Be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies while preserving the right or duty of a public official or employee to conduct his or her official duties reasonably and in good faith. Wis. Stat. 950.04 (1v)(ag).
- Be accompanied by a service representative, as provided under s. 895.73. Wis. Stat. sec. 950.04(1v)(c). "Service representative" means a member of an organization or victim assistance program who provides counseling or support services to complainants or petitioners and charges no fee for services provided to a complainant. Wis. Stat. sec. 895.73(1)(c).
- Receive restitution. Wis. Stat. sec. 950.04(1v)(q). See the sections on restitution

and crime victim compensation later in this chapter.

- To *not* be the subject of a law enforcement officer's or district attorney's order, request, or suggestion that he or she submit to a test using a lie detector if he or she claims to have been the victim of sexual assault, sexual contact by a therapist, or sexual assault of a child. Wis. Stat. sec. 950.04(1v)(dL). A DA may suggest or request that a victim take a lie detector test but must provide notice and inform the victim that he/she may *refuse* to submit to the test.
- To *not* be compelled to submit to a pretrial interview or deposition by a defendant or his or her attorney as provided under s. 971.23 (6c).
- To *not* have his or her name, social security number, telephone number, street address, post-office box number, 9-digit extended zip code, or electronic mail address (email address) used or disclosed by a public official, employee, or agency for a purpose that is unrelated to the official responsibilities of the official, employee, or agency. Wis. Stat. 950.04 (1v)(dr).
- Have stolen or other property returned by law enforcement when it is no longer needed as evidence. This does not include weapons, currency, contraband, and other property needed for evidentiary analysis. Wis. Stat. sec. 950.04(1v)(s).
- Have the parole commission make a reasonable attempt to notify the victim of applications for parole. Wis. Stat. sec. 950.04(1v)(f).
- Have the governor's office make a reasonable attempt to notify the victim in cases of an application to pardon the offender. Wis. Stat. sec. 950.04 (1v)(ym). The Office of the Pardon Counsel in the governor's office facilitates this process.
- Make a written statement concerning pardon applications. Wis. Stat. sec. 950.04(1v)(z).
- Have direct input into the parole decision-making process. Wis. Stat. sec. 950.04(1v)(n).
- Attend parole interviews or hearings and make statements. Wis. Stat. sec. 950.04(1v)(nn).
- Request an order for, and to be given the results of, testing to determine the presence of a communicable disease, under certain circumstances. Wis. Stat. sec. 950.04(1v)(d).
- Be provided with appropriate intercession services to ensure that victims' employers will cooperate with the criminal justice process and the juvenile justice process to minimize an employee's loss of pay and other benefits resulting from court appearances. Wis. Stat. sec. 950.04(1v)(bm).

- Make a complaint to the Department of Justice concerning the treatment of crime victims and to request that the crime victims' board review that complaint. (This process is discussed later in this chapter.) Wis. Stat. sec. 950.04(1v)(zx).
- Be notified of re-confinement hearings after revocation of extended supervision. According to truth in sentencing provisions, the original sentencing court must impose a re-confinement sentence after extended supervision has been revoked. Victim witness coordinators report that they are providing victims who request notification of court proceedings and hearings with notice of the re-confinement proceedings.

The following rights are facilitated through the Wisconsin Department of Corrections (DOC), Office of Victim Services and Programs, and county victim/witness specialists, by enrolling victims for victim notification. Under this program, a victim has the right to:

- Have the DOC make a reasonable attempt to notify the victim regarding the following:
 - releases
 - escape
 - placement in the intensive sanction program and the community residential confinement program
 - the requirement to comply with the sex offender registry program
 - release or escape of a juvenile from correctional custody. Wis. Stat. sec. 950.04(1v)(v).
 - leave granted to qualified inmates. Wis. Stat. sec. 950.04(1v)(w).

Juvenile justice issues

Rights of victims of juvenile offenders are similar in many ways, but there are differences due to the fact that most juvenile offenders go through juvenile court. For information on crime victims' rights in juvenile court, please see the end of this chapter.

Remedies

Wisconsin Chapter 950 provides a process victims can access if they feel that their crime victim rights have been violated. The Office of Crime Victim Services (OCVS) located in the State of Wisconsin's Department of Justice (DOJ) administers the process. There is both an informal and formal aspect to the remedy process. While advocates can help by pointing the victim in the right direction and supporting her/him through the process, it is preferable for the victim to contact the Victim Resource Center directly. In addition to empowering the victim (understanding that not all experiences will be positive), such direct contact ensures that no miscommunication occurs.

As of 2012, crime victims now have the ability to enforce their rights in the circuit court. Also called *standing*, this is an important advancement in crime victim rights in

Wisconsin as it allows victims to directly assert their rights in a court in the county in which the violation occurred. Wis. Stat. sec. 950.105. Crime victims may also assert their rights through the process described below.

The informal process

The first step in a crime victim's rights complaint is an informal disposition. In this process, the Victim Resource Center (VRC) receives complaints and acts as a liaison between crime victims and public agencies and officials to resolve alleged rights violations and crime victim right complaints. The Wisconsin Victim Resource Center is located within the Office of Crime Victim Services of the Department of Justice.

The process is usually simple. The Victim Resource Center staff will help the victim identify the problem and may provide explanations for the actions taken by the governmental agency. The Victim Resource staff may suggest strategies the crime victim can undertake to resolve the issue at the local level. If deemed appropriate and necessary on a case-by-case basis, the VRC staff may intervene and advocate on behalf of a crime victim directly with the agency. Sometimes, the VRC may attempt to facilitate a conversation between the crime victim and the agency to determine what can or cannot be accomplished informally. The ultimate goal of informal complaint resolution is to improve or correct the treatment of crime victims in the criminal justice system, while providing communities a confidential way to solve problems at the local level.

When the VRC feels it has exhausted its ability to progress with informal resolution of the complaint, its staff will inform the victim of the efforts made to address the complaint. If the issue is not resolved, the victim can proceed with a formal complaint process to the Crime Victim Rights Board.

The formal process

Following the decision by the victim to pursue a formal complaint, the Victim Resource Center will provide the victim with a complaint form. The completed form will then be forwarded to the Crime Victim Rights Board (CVRB) for review and investigation. The CVRB will consider a claim only if the informal process has been exhausted and if the complaint involves a violation of a crime victim right enumerated in the Crime Victim Bill of Rights in Chapter 950.

Unfortunately, not all crime victim complaints will fall within the scope of the Chapter 950 rights. For example, issues that can't be addressed by the CVRB include dissatisfaction with:

- the outcome of a case
- the sentence imposed in a particular case
- the decision to charge or to issue particular charges
- the decision to enter into a plea agreement

- the quality and scope of an investigation.

The Board analyzes the complaint to determine whether probable cause exists that a violation of the crime victim's rights did occur. (Probable cause has the same definition in this setting as it does in court---whether it is "more likely than not" that the crime occurred.) Information concerning a complaint is confidential until probable cause is found.

If no probable cause is found, the Board may still issue a "Report and Recommendation" regarding the specifics of the case, or it may simply close the case. If probable cause is found, the Board may open an investigation and any party to the case or the Board can request a hearing into the matter. If a violation is found, the Board may do one of several things:

- It can issue private and public reprimands of the public employees or agencies involved in the complaint.
- It can seek appropriate equitable relief on behalf of a crime victim, which means seeking a court order to prevent or correct a victims' rights violation.
- It can decide to go to a circuit court in order to impose a civil forfeiture of up to \$1,000 on the offending party.
- It can issue reports and recommendations regarding victims' rights and services, which may assist agencies in correcting the problem that the victim has experienced.

Crime victim compensation (CVC)

This section contains information about Wisconsin's crime victim compensation (CVC) program. The authors of the *Wisconsin Coalition Against Sexual Assault Legal Advocacy Manual* have included information about crime victim compensation that is most relevant to the work of sexual assault service providers. This section does not contain comprehensive information about every type of crime victim compensation available. Sexual assault service providers are encouraged to contact the Department of Justice, their local district attorney's office, or WCASA for more information on CVC.

Crime victim compensation is a program intended to compensate innocent victims of crime in Wisconsin for expenses incurred as a result of a crime. It is regulated and outlined under Chapter 949 of the Wisconsin Statutes. This statute sets forth eligibility requirements and compensable expenses. Although information about CVC may be provided by other agencies, advocates can benefit from a working knowledge of CVC. Often, victims are overwhelmed by the legal process and forget information provided to them. Victims may also feel that CVC is unnecessary until they incur unanticipated costs. It is also possible that those who are the most knowledgeable about the program, primarily victim/witness coordinators and staff, may not come into contact with the victim, specifically when charges are not referred to the

prosecutor's office.

CVC application confidentiality

If a victim applies for CVC for compensation resulting from a crime or attempted crime, including: sexual assault; sexual assault by a therapist; sexual assault of a child (and repeated acts); trafficking of a child; sexual assault of a child in substitute care or by a school staff person/volunteer; or a crime or an act otherwise compensable that was sexually motivated; any personally identifiable information provided on the application form is not subject to inspection or copying under s. 19.35 (1). Wis. Stat. sec. 949.04(2)(a).

CVC requirements

To be eligible for CVC, victims must:

- Suffer “personal injury” (Wis. Stat. sec. 949.01(5)) or death:
 - as a victim of a crime.
 - while attempting to prevent a crime.
 - while attempting to apprehend a criminal.
 - while attempting to aid a crime victim.
 - while attempting to aid a police officer.Wis. Stat. sec. 949.03(1)(a).
- Be the victim of a crime compensable under Chapter 949. Wis. Stat. sec. 949.03(1)(b).
- Be innocent in the commission of the crime. This means that compensation is not available to victims injured while committing a crime or engaging in conduct substantially contributing to the injuries or death. Each claim is evaluated individually. If a claim is denied, the reason for denial will be provided in a certified denial letter sent to the applicant, along with appeal rights. If victims have questions, the advocate can encourage them to call the claims specialist. Wis. Stat. sec. 949.08(2) *Note:* While sexual assault victims are often blamed for their assaults, particularly when alcohol and/or other drugs are involved, CVC does not view the use of alcohol/drugs, in and of itself, as contributory conduct.
- Have exhausted all other sources of assistance. These other sources of assistance include court ordered restitution, insurance, worker's compensation, and medical assistance. Wis. Stat. sec. 949.06(3). This means that a victim must bill his or her insurance or other available sources of payment, and then the CVC award is reduced by those payments.
- File an application within one year of the crime, although this requirement may be adjusted “in the interest of justice”. Wis. Stat. sec. 949.08(1). This flexibility recognizes that some individuals, particularly incest victims and child victims of

sexual assault, may be unable to submit an application within one year.

- Report the crime to a law enforcement agency within five days of the date of the crime or within five days of when the crime could reasonably have been reported. Wis. Stat. sec. 948.08(1). If the victim does not satisfy this requirement, it may be a good idea for the victim to include information as to the reasons for delayed reporting. This information will be considered when determining if the victim “could reasonably have reported.” Reasons for delay include:
 - The victim did not understand the action was a crime.
 - The victim was fearful that the perpetrator would retaliate.
 - The victim was a child.
 - The victim was unable to report due to a permanent or temporary disability.
- Determinations are made on a case-by-case basis. None of the above reasons guarantees that the 5-day requirement will be waived. If waiver is not allowed and the victim incurred expenses related to forensic evidence collection, the application may be forwarded to the Sexual Assault Forensic Evidence (SAFE) fund. (Information on the SAFE fund is included in this chapter.)
- Cooperate with appropriate law enforcement agencies and personnel, including district attorneys, in their investigation of the crime. Wis. Stat. sec. 949.08(2)(d).
- Cooperate with DOJ personnel in processing the application. Wis. Stat. sec. 949.08(2)(f).

Miscellaneous provisions affecting CVC eligibility

- To be eligible for CVC, a victim cannot be listed on the statewide lien docket as owing child support payments, unless a payment agreement is in place. Wis. Stat. sec. 949.08(2)(g).
- An award may be made whether or not any person is prosecuted or convicted of any offense arising out of such act or omission. Wis. Stat. sec. 949.06(4)(a). An applicant may apply even in the absence of an arrest, charge, or conviction.
- The crime victim does not have to be a resident of Wisconsin as long as the crime was committed in Wisconsin. If the victim is a Wisconsin resident, the crime was committed out of state, and the other state does not have a compensation program, Wisconsin’s CVC may be able to provide reimbursement. DOJ can also assist victims applying to out of state CVC programs.
- The victim’s immigration status does not impact their ability to receive compensation as long as the crime was committed in Wisconsin.

- DOJ will contact the involved law enforcement agencies and district attorney offices to obtain information to assess eligibility.
- DOJ may make payments directly to service providers
- Applications for minors may be made on the minor's behalf by her/his parent or guardian. Wis. Stat. sec. 949.04(1)(a).
- Applications by an individual who is incompetent may be made by a guardian or other person authorized to administer the incompetent person's estate. Wis. Stat. sec. 949.04(1)(b).

What will crime victim compensation pay?

The department can pay a maximum of \$40,000.00 for any one injury or death and resulting eligible expenses. Wis. Stat. sec. 949.06(2). Eligible expenses include:

- medical expenses
- lost wages
- loss of support
- funeral and burial expenses up to \$2,000.00 (in addition to the maximum allowable \$40,000.00)
- replacement costs of clothing and bedding held as evidence, up to \$300.00
- reasonable replacement of property rendered unusable by crime lab testing, up to \$200.00
- reasonable costs for securing and cleaning the crime scene, up to \$1000.000
- replacement of homemaker expenses

Any award under CVC shall be reduced by the amount of any payment received or to be received as a result of the injury or death. Wis. Stat. sec. 949.06(3). Other payments received may include those that are:

- from/on behalf of the offender
- from insurance or programs including worker's compensation and unemployment
- from public funds
- an emergency award under s. 949.10
- from third parties held liable for the offender's acts
- a SAFE award (see below)

Regardless of whether the victim has incurred expenses or whether s/he will

qualify, victims are encouraged to apply for crime victim compensation. In some instances, victims don't apply because they don't want to be contacted by DOJ. Some victims are hesitant to apply for crime victim compensation because of concerns about exhausting insurance and other safety, privacy, or confidentiality concerns. In some cases, CVC will work with victims to allow them to receive information at a place that's safe for them. Compensation has even been awarded years after a crime when unforeseen consequences of a crime caused the victim to incur expenses. If the program rejects a victim's claim, s/he will be notified by mail. Included in this mailed packet will be appeal information.

SAFE program

Due to federal and state laws applicable to crime victim compensation programs, many claims for reimbursement for sexual assault forensic exams are denied. The problem requirements are:

Reporting of the crime in five (5) days: As commonly understood by those familiar with the dynamics of sexual assault, most survivors never report being sexually assaulted. Therefore, the timeline to report the assault to law enforcement can pose a significant barrier to recovery under the crime victim compensation program. Under the SAFE program, health care providers have one year from the exam date to request reimbursement for sexual assault forensic examination costs.

Cooperation with the investigation: Sexual assault trauma can also cause victims to drop out of the criminal justice process due to fear, stress, exhaustion, shame, and embarrassment. Criminal justice professionals may interpret this behavior as non-cooperation. Some law enforcement officers and district attorneys believe that a victim is making a false allegation because of a misinterpretation of natural reactions to trauma. This too can be considered a lack of cooperation. The SAFE program does *not* require a report/cooperation with law enforcement to provide reimbursement for examination costs.

The required use of all other collateral sources of funding before CVC will reimburse: The collateral source of payment most often available to victims is health insurance. Many victims don't feel comfortable submitting claims to health insurance, for reasons of confidentiality (because a parent or spouse might find out), or because they are afraid the sexual assault might become part of their insurance record and impact their coverage. The SAFE program does *not* require that other sources of funding be used. If the victim does not want to bill his or her insurance or does not have insurance, SAFE may compensate for examination costs.

The Federal Violence Against Women Act (VAWA) of 2013 mandates that States must incur the full out of pocket costs of the forensic exam. . Because CVC does not cover all sexual assault victims, the SAFE Compensation Program (Wis. Stat. 949.20) was enacted in 2007. SAFE is intended to ensure coverage for the cost of sexual assault exams regardless of whether or not the victim chooses to authorize billing of his

or her insurance or to report/cooperate with law enforcement. For more information, please contact WCASA or the Wisconsin Department of Justice Office of Crime Victim Services.

SAFE eligibility and requirements

Applications must be made within one year of the examination date. This requirement may be waived “in the interest of justice.”

A health care provider who conducts an examination to gather evidence regarding a sex offense may be reimbursed for examination costs under the following conditions:

- When health insurance billing is *not* authorized, whether or not the victim reports to law enforcement
- When health insurance billing *is* authorized and the victim *does not* report to law enforcement.

The SAFE Program does *not* pay for exam costs if the victim chooses to authorize billing of his or her insurance *and* cooperates with law enforcement through an investigation. In this case, the victim should seek compensation from CVC and will need to meet its eligibility requirements as outlined above.

What expenses will SAFE cover?

SAFE may compensate for all “examination costs” incurred from examination of a victim of a sex offense. Examination costs covered include:

- Costs of an examination that is done to gather evidence regarding a sex offense
- Any procedure during that examination process that tests for or prevents a sexually transmitted infection
- Any medication provided or prescribed, during that examination process, that prevents or treats a sexually transmitted infection that the examiner believes could be a consequence of the sex offense.

SAFE does *not* cover:

- Any processing or administrative costs, attorney fees, or other expenses.
- Emergency Contraception (EC)

Reimbursement is reduced by any insurance payments if insurance was billed with authorization. (949.20(3) (2009))

SAFE application and procedures

One significant difference between SAFE and CVC is the application procedure. The SAFE application is generally made by the health care provider that conducts the sexual assault examination (rather than the victim). The examiner/health care provider must fill out a payment request form and send it, along with an itemized bill, to the WI Department of Justice. The health care provider must make a request for reimbursement within one year of the date of examination. This requirement may be waived "in the interest of justice."

It is important for advocates and sexual assault victims to be aware of SAFE funding and procedures to ensure that the health care provider fills out the correct application form and does not bill the patient directly. Often, hospital billing and/or registration is the first to contact the victim at a hospital. If the victim does *not* want his or her insurance billed, she or he should *not* authorize insurance billing. The victim may simply not give insurance information or may tell the billing/registration representative that he or she does not wish to authorize insurance. The victim may also speak to the health care provider/nurse/doctor and make his or her wishes to bill SAFE known.

SAFE will directly reimburse the provider most of the time. If an advocate or victim has any questions about submitting an application or payment for a forensic exam, it can be helpful to contact the appropriate person or agency to ensure that the necessary information is provided. Any questions about CVC or the SAFE program can be directed to a local victim/witness specialist or the OCVS. OCVS's number is 608-264-9497 or 1-800-446-6564.

Restitution

If the defendant is found guilty, the court may order him/her to pay for financial losses the victim suffered as a result of the crime. This is referred to as **restitution**. If restitution is requested, the judge may order a restitution hearing, in which case the victim must demonstrate out of pocket expenses incurred as a result of the crime. For more information, please see Chapter 10.

If the offender is under supervision by the Department of Corrections (see Chapter 14, "Department of Corrections"), the offender will give restitution to his or her supervising agent. The agent will forward the payment to the Wisconsin Department of Corrections cashier's office, which will send the payment to the victim. Offenders not under supervision are ordered to make payments to the local clerk of court or district attorney's office. Those departments will then forward the payment to the victim.

Victim/witness (V/W) programs

Wisconsin was one of the first states to develop programs operating within or in partnership with the office of the district attorney to assist victims and witnesses of crime. These programs, known as victim/witness (VW) programs, are designed to assist victims and witnesses as they proceed through the criminal justice system. As of January 2007, 70 of Wisconsin's 72 counties have a state-approved victim and witness assistance program operating in their county. .

The primary role of victim/witness programs is to carry out the crime victim rights of the district attorney's office under the Crime Victim Rights Bill in Chapter 950 of the Wisconsin Statutes. A program that provides these services can receive reimbursement from the state for the provision of these services. If a victim/witness program does not provide crime victim rights services, other members of the district attorney's office are still obligated to provide these services. Chapter 950 of the Wisconsin Statutes and Chapter 12 of the Department of Justice Administrative Regulations identify the minimum services that must be provided by the program in order for the county to receive reimbursement by the state, although programs are not prohibited from going above and beyond these requirements. County victim/witness programs typically provide the following services:

Notification

This service provides notifications of important case proceedings to victims and witnesses who desire them, including notification of

- case status
- plea negotiations
- subpoena cancellation
- any known significant developments in the case
- sentencing recommendations
- final disposition of the case.

Orientation to crime victim compensation benefits

This service provides information to eligible victims of crime about benefits available through the crime victim compensation program and may assist the victim in applying for these benefits.

Information and referrals

This service provides information about and referrals to other community services, including counseling, mental health services, medical care, shelter, sexual assault or domestic violence assistance, and other social services.

Witness fee assistance

This service provides witnesses in a criminal justice proceeding with information on how to apply for and receive any witness fee to which they're entitled. These fees

and methods for payment are provided by state law.

Court Escort

This service arranges for accompaniment of victims and witnesses to and from court appearances. If requested, a person from V/W assistance may also stay with the victim or witness during proceedings to provide information and support.

Transportation

This service will inform victims and witnesses of the location of the courthouse, where parking is available, and what community transportation services are available.

Employer and School Assistance

This service provides assistance by talking to school or employment officials so that victims and witnesses do not jeopardize their status in school or employment, including any loss of wages, as a result of appearing in court.

=A victim or witness must request such notification, and program staff must determine that it's feasible.

Property return

This service provides assistance with returning stolen or other personal property to victims when it is no longer needed as evidence.

Victim and Witness Protection

This service informs victims and witnesses of protection available, the level of protection available, and who to contact if they are threatened or harassed. This program can act as a go-between for the victim and the police and alert the appropriate law enforcement agencies and prosecutor when informed of threats or harassment. The Milwaukee County Sheriff's Department also has a special witness protection unit.

Child care

This service makes referrals to child care assistance in the community, if needed, when a victim or witness is to appear in court.

Waiting facilities and reception

This service provides safe, comfortable, and convenient facilities for victims and witnesses to wait upon their arrival to appear in court. Programs may provide a separate waiting room for victims and witnesses while awaiting court appearances.

Restitution

This service provides assistance to help the victim regain any financial losses suffered as a result of the crime. This help might involve answering questions or

helping determine the amount of loss. Some counties have an employee that specializes in restitution claims.

Liaison with the court

This service provides assistance as a go-between for the victim or witness with the court, such as:

- helping to complete a victim impact statement
- keeping the victim informed of the court's decisions, including plea bargains.

Notification

This service provides cards for and information about the Parole Eligibility Notification System (PENS), Victim Information and Notification Everyday (VINE) system and VOICE (Visual Offender Information Center) system. These systems are operated through the Department of Corrections (DOC). V/W programs also provide juvenile release information, which is available through the Department of Health and Family Services (DHFS).

Locating witnesses

This service provides assistance by working with police personnel to locate witnesses for court proceedings who have moved or are hard to find for other reasons.

Orientation to the criminal justice system

This service provides assistance by preparing victims and witnesses for what to expect when appearing at a court proceeding.

Child victims and witnesses

This service provides information and referrals specially suited to children's needs, taking into consideration each child's level of development, language skills, ability to understand, and the sensitivity of the crime. Programs may provide advice to the court concerning the child's ability to understand the legal proceedings and the questions being asked, under specific circumstances.

Public information

This service furnishes to the general public and agencies that have contact with crime victims and witnesses information describing V/W services and how to avail themselves of those services. Programs may hold educational sessions with criminal and other related agencies in their jurisdictions in order to:

- enhance understanding and cooperation among agencies
- inform agencies of the rights and needs of victims and witnesses
- describe the services provided through the program.

Answering service

Some counties provide assistance by having a recorded message which the victim or witness can check during off-hours to find out about court cancellations and case schedules. Victims and witnesses can check this message any time to learn the status of a next-day trial.

As noted earlier, one county provides none of these services while others provide all of them. It is important for advocates to:

- be aware of whether there is a V/W program in the specific service area
- become familiar with the services offered by any existing program
- work closely with the staff of the program to determine who can provide what services during the time the victim is involved in court proceedings.

Perhaps the biggest problem faced by a victim when s/he becomes involved in the criminal justice system is lack of knowledge. The victim often has many more needs than one person has the time or energy to provide. It is also important to remember that V/W personnel are working with victims of all crimes. It is ideal when the sexual assault advocate works closely with the V/W program to address the victim's needs.

CHAPTER 14

DEPARTMENT OF CORRECTIONS

This section includes information adapted from the State of Wisconsin Department of Corrections website, www.wi-doc.com, the State of Wisconsin Department of Corrections Division of Community Corrections *Supervision of Sex Offenders: A Handbook for Agents*, Second Edition June 2002, and the *Wisconsin Coalition Against Domestic Violence Legal Advocacy Manual*, Chapter 4, Section V, 2002 Edition.

The relationship between victim service providers and offender service providers can range from rewarding to frustrating. It is impossible to serve either population without knowledge of the other. Advocates can improve their services to victims if they have a working knowledge of offenders. Professionals who supervise and treat offenders can increase their effectiveness if they understand sexual victimization.

The Wisconsin Department of Corrections (DOC), the agency that oversees convicted offenders, both in correctional facilities and under supervision, is particularly sensitive to issues facing victims. As of 2010, every existing and incoming agent has received training on sexual assault victim issues. In addition, every intermediate and advanced training for sex offender supervisors includes victim dynamics training.

This chapter outlines some of the programs that operate under the umbrella of the Wisconsin Department of Corrections, the services they provide, and how their work affects sexual assault advocates and the communities they serve.

Department Of Corrections in general

The mission statement of the Department of Corrections reads: “The Department of Corrections will protect the public through the constructive management of offenders placed in its charge.” The DOC accomplishes its mission in a variety of ways, including, but not limited to the following:

- Provide levels of supervision and control consistent with the risk posed by the offender.
- Assure that DOC staff members function professionally, honestly, and with integrity.
- Be responsive and sensitive to victims, victims’ families, and a diverse community.
- Provide opportunities for the development of constructive offender skills and the modification of thought processes related to criminal behavior and victimization.
- Provide and manage resources to promote successful offender integration within the community.

- Develop individualized correctional strategies based on the uniqueness of each offender.

The vision statement reads: “The Department of Corrections will reduce criminal behavior and restore a sense of safety to victims and the community. To achieve this vision, we will build on our mission statement in the following ways:

- Share ownership for justice through partnerships with the criminal justice system and the community.
- Learn from the community and promote opportunities for the community to learn from us.
- Hold offenders accountable by requiring them to contribute to the recovery of victims and the community.
- Work with the community to engage offenders and prevent them from becoming anonymous.
- Promote the integration of offenders into the community so that they become valued and contributing members.
- Create a sense of community and mutual responsibility in the workplace.”

Overview of the DOC

The DOC is divided into several divisions, each of which administers programs important to victims. The three primary divisions are:

- Division of Adult Institutions (DAI), which oversees adult correctional institutions throughout the State of Wisconsin
- Division of Community Corrections (DCC), which oversees the supervision of offenders on **parole, probation, or extended supervision**, and the sex offender registry
- Division of Juvenile Corrections (DJC), which oversees juvenile facilities and the supervision of juvenile offenders.

The DOC also administers the following:

- Office for Victim Services and Programs (OVSP)
- Parole Commission.
- Sex Offender Registry

The DOC is an agency that is constantly evolving in order to meet its mission and vision. As these changes will most likely continue to take place after the publication of this manual, please contact WCASA or the OVSP to stay abreast of how these changes affect victims.

Office of Victim Services and Programs (OVSP)

The Office of Victim Services and Programs (OVSP) is committed to mitigating the effects of crime and advancing the principles and philosophies of restorative justice by providing services to crime victims and families. The Office of Victim Services and Programs assists in the reparation of the harm created by crime through:

- supporting the recovery of victims of crime by providing information and opportunities to participate in the correctional system
- being responsive and sensitive to victims, victims' families, and a diverse community
- educating the public on OVSP services
- promoting relationships, credibility, understanding, and involvement with the community
- holding offenders accountable through encouraging sanctions, restitution, and restoration.

In order to accomplish this mission, the Office of Victim Services and Programs will:

- Provide comprehensive information, assistance, advocacy, and support to those harmed by crime, including victims, their families, and communities.
- Integrate victims' rights and services in program planning throughout the Department of Corrections.
- Develop community partnerships to advance the principles of victim services/issues and restorative justice.
- Develop and maintain a resource center dedicated to victim services/issues and restorative justice.

Here is a rundown of the services provided by OVSP:

Information, advocacy, & referral includes:

- providing information to crime victims on the correctional system or a specific offender

- working closely with parole commissioners, probation/parole agents, etc. on the victim's behalf
- making referrals for other services and assistance.

Notification includes communication with victims and their families regarding changes in the offender's status. This could include notification of parole interviews and decisions, release, escape and apprehension, discharge to supervision, etc.

Restitution includes assistance with questions and concerns related to restitution payments. If the victim hasn't received any restitution payments but believes that s/he is owed restitution from an offender who is or has been under the supervision of the Wisconsin Department of Corrections, the victim can submit an unclaimed restitution inquiry to OVSP.

Victim impact statements allow victims to provide a statement to the parole commissioner for review prior to parole consideration.

Input in the parole process gives victims the chance to provide information to the Parole Commission at the time the offender is considered for parole.

Victim/offender conferencing allows victims, if they choose, to speak to the offender in a safe setting with a neutral third party and discuss the impact and circumstances of the crime. At this time, victims can ask questions and directly express to the offender how the crime has affected them and their families. Sensitive crimes like sexual assault, domestic violence, and stalking are handled in very controlled situations and will only take place if the victim initiates the conferencing request. For more information contact WCASA or OVSP.

Victim/offender speaking at impact panel/meetings allows victims to share information with correctional staff and/or offenders about the impact of crime. Victims and victims' families who have chosen to participate in this way have found this to be a healing experience.

Education & training includes instruction for corrections staff, communities, and others on such issues as victims' rights, restorative justice, and the impact of crime.

Restorative justice/victim services resource library includes reference materials that are available for review or loan.

VOICE stands for "Visual Offender Information Center." VOICE offers enrolled victims access to offender information via the Internet and allows electronic communication.

VOICE also offers routine notification to enrolled victims regarding certain changes in the offender's status.

VINE stands for "Victim Information Notification Everyday." An enrolled victim may access information over the telephone at 1-800-398-2403. VINE is the original automated phone system that victims may continue to use to receive information about offenders.

A victim may choose whether to enroll with OVSP for notification regarding the offender after a conviction. The county victim/witness specialist can provide victims with the enrollment form. Once the victim returns the form, it takes about ten (10) days for activation. (The victim can elect to receive notification by a variety of methods, and once enrolled, the victim can change notification preferences and update contact information on-line.)

Once enrolled, a victim may access offender information by phone through VINE or via the Internet through VOICE at wivictimsvoice.org. If the victim elects notification and submits an enrollment form to the OVSP, s/he will receive a ten-digit victim identification number to access VINE and VOICE. A victim may also choose to be notified whenever the sex offender changes residence. A victim already enrolled to receive VINE information will be able to use the same ten-digit number to access VOICE. The victim will be able to find out the following information:

- location of the offender, if incarcerated
- parole eligibility date
- mandatory release date
- length left on sentence (maximum discharge date)
- supervision status: incarcerated or supervised in the community on parole
- home address, employment, or school information (if the offender is required to register with the sex offender registry)
- date the home address was verified
- status of compliance with sex offender registry requirements.

Notices a victim *may* receive from the OVSP regarding offenders include:

- written notification of upcoming parole/presumptive mandatory release interviews and the opportunity to submit a statement to the Parole Commission or to participate further
- notification of offender release

- notification of offender death
- notification of offender escape/apprehension
- notification of change in home address if requested and if the offender is required to register with the sex offender registry.

For information about community access to offender information, please see the section about sex offender registration and community notification later in this chapter.

Parole Commission

The Parole Commission is the final authority for granting discretionary paroles or early release from prison. The Commission conducts interviews with eligible (offenders sentenced after the enactment of truth in sentencing are not eligible for parole) inmates sentenced to the custody of the Wisconsin Department of Corrections. A commissioner meets with an inmate individually and makes an independent decision on the possibility of a parole grant. The governor appoints the Commission's chairperson with the advice and consent of the Senate for a two-year term. The Wisconsin Parole Commission (WPC) is attached to the DOC for administrative purposes, but it implements its statutory responsibilities independently.

How does an offender receive parole in Wisconsin?

Under the sentencing law in existence before truth in sentencing, an inmate becomes eligible for parole consideration after serving one-quarter of his or her sentence (or six months, whichever is greater). The parole commissioner meets with the offender and gathers information to determine if the offender will be granted parole. Interviews are conducted at the institution where the offender is incarcerated. There are no "courtrooms" at institutions, so the rooms chosen for these hearings are usually offices or small conference rooms. An offender granted parole will be released to a parole plan approved by the DOC and won't need another parole interview.

If the parole commissioner doesn't grant parole, he or she will determine when the offender may be eligible for parole again. This process is called a **defer**. For example, an offender may be given a "twelve-month defer" or a "twenty-four-month defer," and his/her parole eligibility date (P.E.D) will change accordingly. This means that the offender won't be eligible for parole again until that amount of time has passed.

Other than the first interview (which occurs one month before the P.E.D), all other parole interviews will occur approximately two months before the new P.E.D. In some cases, offenders will be released to parole on their presumptive **mandatory release date** (2/3 of a sentence imposed before the truth in sentencing provisions went into effect). However, a parole commissioner may deny mandatory release if necessary for the protection of the public or if the offender did not comply with certain conditions of confinement. See Wis. Stat. sec. 302.11.

In cases where a judge has stipulated that an offender is not eligible for parole, the offender will serve the entire sentence, without any consideration for parole. Those

serving a life sentence may or may not be parole eligible depending upon the date of the commission of their crime.

Parole Commission members consider a number of factors when making a parole determination. Some factors include: offense(s) committed, previous convictions, time served and time remaining on the sentence, letters from victims/witnesses or concerned parties, program participation, and any reports of misconduct while incarcerated.

Criteria for parole: The following criteria affect parole consideration:

- The offender has reached the P.E.D. in his/her sentence.
- The offender has served sufficient time for punishment of her/his crime(s).
- The offender has shown positive changes in behavior as well as documented progress in programming, treatment, and/or education achievement.
- A viable parole plan has been worked out, offering the offender realistic opportunities for a stable residence, employment, and programming if needed.
- There is an acceptably reduced level of risk to the public. (The criteria for determining risk include past criminal and incarceration record, probation and parole violations, security classification, and any unmet treatment or program needs.)

Once paroled, an offender is supervised by a community corrections agent through the Division of Community Corrections, is subject to rules of supervision, and can have the parole revoked for violating the rules. More information on these processes is included in the following section.

Division of Community Corrections

The Division of Community Corrections supervises people released on parole or extended supervision or placed on probation. Advocates are likely to have the most contact with community corrections agents, often called probation and parole agents. Goals of community-based supervision include:

- increase the stability of the offender's family/living situation (where appropriate)
- promote lawful behavior
- complete programming specific to personal issues which may have contributed to the offender's criminal behavior.

The DOC uses extreme caution when considering the family/living situation of sex offenders, especially incest offenders. Probation and parole agents hold offenders

accountable for their behavior, provide direct services, and refer offenders to community service agencies. They also provide investigation services to the courts, the Division of Adult Institutions, and the Parole Commission to aid in sentencing, institutional programming, and probation, parole, and extended supervision planning. In some cases, agents supervise juveniles released to aftercare programs as well as people conditionally released from mental health facilities.

What are the differences between probation, parole, and extended supervision?

Probation is a disposition to a conviction whereby a judge orders community supervision rather than a sentence directly to jail or prison. The judge can sentence the offender and then stay the sentence pending satisfactory completion of probation, or place the person on probation and withhold sentencing. If the sentence is withheld, it will only be imposed if the offender violates the conditions of probation.

While on probation, the convicted offender is allowed to live in the community for a specified period of time under the supervision of a probation agent. Usually, as part of probation, the court orders conditions tailored to the crime. Conditions may include paying restitution, attending educational or treatment groups, or doing community service. The probation agent may impose additional rules as appropriate. Examples of possible rules include restricting or prohibiting contact with the victim, prohibiting consumption of alcohol, or prohibiting certain types of employment.

If an offender violates the conditions or rules of probation, the probation agent imposes consequences which, depending on the seriousness of the violation, may include:

- counseling/warning the offender
- reducing the offender's activities further
- placing the offender in jail temporarily
- recommending **revocation** of probation. (Revocation is discussed in more detail later in this chapter.)

Parole is the early release of inmates who have served part of their prison sentence or reached their mandatory release date. The inmate is allowed to return to the community under the conditions of parole and supervision of a parole agent. Rules and conditions of parole are similar to those for probation as described above. Violation of these conditions or DOC imposed rules can result in revocation of parole and re-imprisonment for the offender. The decision to grant parole is the responsibility of the Parole Commission.

Extended supervision is the type of community supervision imposed under truth in sentencing (TIS) laws. According to these laws, any person who commits a felony offense on or after December 31, 1999, and is sentenced to at least one (1) year of confinement in prison **will not be eligible for parole**. Instead, s/he is required to serve the entire period of confinement imposed by the court followed by a period of

supervision in the community called extended supervision. An offender on extended supervision is subject to any conditions of supervision imposed by the sentencing court and any rules imposed by the community supervision agent. If an extended supervisee violates any conditions or rules of supervision, s/he can be revoked and could go before the sentencing court for a re-confinement hearing. The revocation process is described later in this chapter.

Though truth in sentencing eliminated parole in Wisconsin, 2009 Wisconsin Act 28 created a temporary variation from Truth in Sentencing for budgetary reasons. While nearly all of these variations were repealed by 2011 Wisconsin Act 38, some offenders serving sentences between 2009 and 2011 may still be eligible for "Positive-Adjustment Credit." For more information on the impact of Acts 28 and 38, please visit http://www.wi-doc.com/PDF_Files/Act%2038%20English.pdf.

Pre-sentence investigations (PSIs)

In most felony cases, the first interaction a victim may have with a probation and parole agent is *after* the offender has been convicted and *before* the sentencing hearing for the purpose of completing a **pre-sentence investigation (PSI)**. The PSI provides the sentencing court with detailed information about the present offense, the offender, and the impact of the offense on the victim and the community. The PSI report includes a summary of information gathered by the agent through the completion of a thorough and objective investigation. The investigation involves a review of all pertinent documents as well as interviews with the offender and others who have knowledge about the offense and the offender.

Based on the information gathered, the agent provides a recommendation either for probation, which may include specific conditions, or for incarceration with conditions for extended supervision. In addition, the agent provides an anticipated supervision plan. The anticipated supervision plan should support the recommendation and provide clear, concise justification for the agent's conclusions.

The PSI is also important as a source of information for the Department of Corrections staff at the correctional institution. The report provides a historic record of the offender's offense and social history, which is useful when an offender is released on community supervision. The PSI is also considered during Chapter 980 evaluations (discussed later in this chapter) to determine whether the offender should be committed as a sexually violent person.

The PSI itself is confidential, and the information may not be released to individuals or agencies outside the DOC (including victims and those conducting the Chapter 980 evaluations) unless a court order allows for its release.

In gathering information for the PSI report, the agent will obtain information from a variety of sources, which may include the following:

- the offender
- the victim

- offense reports (such as the criminal complaint, police report, victim statements, witness statements, etc.)
- record of the offender's criminal history
- collateral sources (such as the offender's family members, present and past partners, employers, military, and treatment providers as well as the victim's family members).

The agent may consider reviewing a variety of confidential sources of information, such as the offender's counseling and treatment records. The agent may also ask to see any counseling and treatment records of victims if they relate to the impact of the crime.

As an advocate, it is important to be aware of the potential request for the victim's treatment records, since the victim could feel re-victimized simply as a result of this request. Inform the victim that the agent can't gain access to these records without a release of information or a court order. Advocates should also be aware that the offender will be able to review the PSI prior to sentencing.

In general, agents consider the victim's perspective critical in completing a thorough and objective PSI. The scope of the interview with the victim, nature of questions asked, individuals present, and location chosen will vary depending on the nature of the crime. As with guardian ad litem, agents rarely meet directly with child victims. They tend to utilize parents/guardians, victim/witness coordinators, and other individuals who can provide important information regarding victim impact. Agents may also interview the investigating officer and/or the child protective services worker, particularly in cases of intra-family abuse. In extremely rare situations the child would be interviewed directly, but this can't be done without the permission of a non-offending parent or guardian.

Agents are directed to make every effort to contact and interview adult victims. However, a victim may choose not to be interviewed. In this case, the agent must respect the victim's decision and rely on information from collateral sources. In general, victim interviews are conducted for the following reasons:

- to give the victim a chance to provide input throughout the PSI process and at sentencing
- to determine the level of involvement/information the victim desires relative to the offender's experience in the correctional system
- to corroborate the information provided in criminal complaints, police reports, and the offender's version of the crime---to offer the opportunity to provide additional information without requiring that the victim restate all the details of the offense
- to assess the impact of the crime on the victim and the victim's family, ensuring that this information is available to the court

- to request authorization for release of information from medical/treatment records or providers that may give insight into the offense, offender, and impact of the offense on the victim
- to obtain information about the offense which reveals the offender's points of denial/minimization.

The format agents use to present their summary to the court is as follows:

- Present Offense
 - Description of Offense
 - Offender's Version
 - Co-Defendant's Statement (if there is one)
 - Victim Statement---In this statement, the agent includes the victim's description of the offense, summary of the impact of the offense, and recommendations and comments of the victim relative to sentencing and conditions of supervision. If victims choose not to communicate with the agent, the agent should not focus on the victims' lack of response or any fruitless attempts to contact them. Nor should the agent describe them as uncooperative.
- Prior Record
 - Juvenile/Adult Record (including those from other states or countries)
 - Pending Charges
 - Correctional Experience
 - Offender's Explanation of Record
- Family Background
 - Identifying Information
 - Stability and Values
 - Family Attitudes
 - Personal History
- Academic/Vocational Skills
- Employment
- Financial Management
- Marital/Alternate Family Relationships
- Companions
- Emotional Health
- Physical Health
- Mental Ability
- Chemical Usage
- Sexual Behavior
- Military
- Religion
- Leisure Activities

- Residential History
- Summary and Conclusions
- Agent Assessment and Impressions
- Restitution
- Challenge Incarceration Program (CIP) Eligibility (This intensive program, sometimes known as “boot camp,” is not available to most sex offenders, but the eligibility must be addressed in the PSI for offenses committed on or after December 31, 1999. As some offenders are convicted of crimes that are not sexual assaults, but were sexually motivated, agents have been trained to assess that issue and discuss it with CIP staff.)
- Agent’s Recommendation
- Anticipated Supervision Plan

Some advocates feel that their role in pre-sentence investigations is limited because victim/witness coordinators fulfill this advocacy function. However, it is important for advocates to take an active part in PSIs. Doing so will help them understand what victims experience at all stages of the criminal justice system.

Supervision of sex offenders

The intent of this section is to provide a very general overview of the supervision of adult sex offenders. For more specific information, please contact appropriate resources such as WCASA, DOC-OVSP, sex offender registry staff, or local/regional probation and parole staff.

Public safety is the primary objective of sex offender supervision. The offender’s potential for re-offense must remain paramount in the minds of staff responsible for the supervision of sex offenders. The implications of re-offense and further victimization are extremely serious given the nature of these types of offenses.

Goals of supervision in general:

- Reduce offender risk for re-offense.
- Implement risk management strategies, and maximize offender accountability.
- Prevent further victimization.
- Reduce recidivism (a falling back into prior criminal habits).
- Provide effective treatment for sex offenders.
- Provide opportunities for successful reintegration of the offender into the community and family as appropriate.
- Provide education to the public.

- Provide restitution for the victim

Goals of supervision of sex offenders:

- Address offender risk.
- Hold the offender accountable.
- Provide appropriate treatment.
- Prevent relapse.
- Coordinate collateral community resources through intradepartmental and interagency teamwork.

Principles of sex offender supervision:

- Supervision of sex offenders must be specialized because sex offenders differ in significant ways from other offender populations.
- Supervision must be directly related to the risk the sex offender poses to others.
- The agent can make a reduction in the level of supervision only after monitoring offender compliance, progress in programming/treatment, and positive behavioral change. The assumption is that sex offenders will be supervised more closely during the entire period of probation or parole.
- Personal, community, and professional supervision networks must be used to help monitor and control the offender's behavior. Offenders shouldn't be allowed to remain anonymous.
- Early intervention is important to control risk.

Strategies for sex offender supervision:

- Impose rules and conditions which
 - reduce offender access to potential victims
 - provide the means to closely monitor offender activities
 - give offenders opportunities to learn to manage and control sexually deviant behavior.
- Maintain on-going contact with the offender's partner/spouse, family members, employers, etc., in order to:
 - monitor the offender's behavior and compliance
 - assess the offender's stability and quality of relationships with others.

- Maintain regular contacts with the treatment provider.
- Review offender relapse prevention plans on a regular basis, and include them as part of the case file.
- Thoroughly investigate all unusual/suspicious events or activities rather than simply relying on the offender's explanation.
- Consider all violations as serious.
- When possible, interview, in person, adult victims of any violations.
- Interview parents of child victims rather than interviewing child victims.
- Use technology such as electronic surveillance and polygraph.

The DOC sex offender supervision program is called the Sex Offender Specialized Supervision Program (SO-SSP). For the purposes of Wisconsin DOC supervision, a sex offender is defined as a person whose history includes:

- a sexual assault conviction, commitment, or **read-in**
- any offense, commitment, or juvenile adjudication, or read-in which involved behaviors that were sexually motivated or deviant.

Under this program, sex offenders:

- undergo extensive intake and assessment procedures
- are classified at an intensive level of supervision for a certain period of time
- are subject to specialized supervision criteria while classified as high risk offenders.

Intensive sex offender (INT-SO):

All sex offenders are classified as INT-SO for a minimum of sixty (60) days. INT-SO offenders are regulated according to INT-SO supervision standards. These standards apply to all sex offenders on probation, parole, extended supervision, lifetime supervision, supervised release, and conditional release.

After sixty (60) days, the classification of the sex offender is subject to review by the agent and supervisor and may be:

- maintained at INT-SO or

- reduced based on specific criteria used to evaluate positive behavioral change and reduction in risk.

Reduction in the level of supervision from INT-SO to standard supervision levels is based on specific criteria used to evaluate positive behavioral changes that demonstrate a reduction in risk presented by the offender. Supervisory approval is required for all reductions in supervision to a lower level of supervision, and that justification must be documented.

Rules of supervision

Supervision rules must be related to community protection or the rehabilitation of the offender. When imposing rules, the agent must consider the following:

- ability to detect violation of the rule
- willingness and ability to hold offender accountable for violation of the rule
- documentation and assurance that the rule was reviewed and clearly explained to the offender.

At intake, a standard set of rules will be imposed for all sex offenders placed on supervision. Other special rules may be added as appropriate based on the criteria listed above. These rules will remain in effect during the sixty-day intake and assessment process. After this sixty-day period, as reduction from the INT-SO classification is considered, these rules will also be reviewed. At this time, rules may be maintained or modified based on the facts and circumstances of the case. Rules and conditions may be further modified as appropriate throughout the term of supervision. These additional supervision rules often fall into the following categories:

- drugs/alcohol
- conduct
- contraband
- relationships
- residence
- travel
- employment

Most agents are willing to consider rules of supervision that victims believe are necessary for their protection, although the conditions may not be imposed if they don't meet the criteria listed above.

Rule violations

It may be more difficult to assess the risk of re-offense for sex offenders than for other types of offenders. For sex offenders, stable employment, financial stability,

compliance with rules, and an apparent pro-social lifestyle may not indicate a reduced level of risk. Behavioral precursors to re-offense for sex offenders are often subtle and seemingly unrelated to sexual deviance. This makes supervising sex offenders a challenge for the individual agent and the DOC as a whole. If appropriate, victim input can provide valuable information for the agent about risk factors for a particular offender. The extent to which an advocate will be involved in such a process will vary from situation to situation.

Prompt response to all violations, even “minor” violations, is an essential element of supervision. Regardless of the nature of the alleged violation, in most cases sex offenders are placed in custody while a thorough investigation is undertaken. Sex offenders must be taken into custody if they are involved in any allegedly assaultive or threatening behavior. Violation investigations include the following steps:

- Interview the offender and, if possible, obtain a written statement. If the offender refuses to provide a statement, the offender is informed that refusal is a violation that could result in revocation. A statement provided in regard to the violation can't be used in any future criminal proceedings.
- Interview the victim and witnesses. To remain as sensitive as possible, the agent may contact the county victim/witness coordinator as a means of gathering information. This type of coordination can prevent repeat interviews involving sensitive, emotionally painful details. The agent may request a detailed written statement from the victim and witnesses. In the case where the victim/witness is a child, the agent will coordinate interviews with any non-offending parent and/or support agencies providing services to the child and family. Any indication or allegation of child abuse will be reported to CPS.
- Interview law enforcement personnel, and obtain copies of any and all reports relating to the violation.
- Determine if charges are pending with the DA's office.
- Contact other agencies that have information about the violation.
- Examine and preserve all physical evidence.

After the investigation, the agent has several options available. These formal and informal options include revocation, new supervision rules, and alternatives to revocation (ATRs). Agents who decide to try to revoke an individual must have approval from their supervisor.

Revocation process

Revocation occurs after an offender on probation, parole, or extended supervision has violated the rules and regulations of supervision. As a result of

revocation, the offender is removed from the community and placed in jail or a correctional facility to serve part or all of the remaining sentence.

The revocation process may extend over several weeks but will usually not exceed sixty (60) days. Before a final revocation decision is made, the offender has a right to a hearing and representation by an attorney. The offender may also have the right to a preliminary hearing to establish probable cause that a violation of the conditions and rules of supervision occurred. In some situations, preliminary hearings aren't necessary---for example, when probable cause has already been established due to another court hearing or a signed statement by the offender admitting to the violation.

If a preliminary hearing is held, the agent must present evidence demonstrating probable cause. This hearing is conducted by a hearing magistrate who is a DOC staff member---usually an agent or field supervisor.

Rarely is it necessary for victims to appear at the preliminary hearing. Usually, facts are sufficient to support probable cause based on the testimony of the investigating agent. If probable cause is found during the preliminary hearing, the process moves forward to the final hearing. In most cases, the offender is held in custody awaiting the final hearing. However, in some cases, the offender is released with special conditions pending the outcome of the final hearing. Victims (including the victim of the crime in the original conviction and any victims of the violation that led to the revocation) shall be notified of the outcome of the hearing (preliminary and final) and, if applicable, any conditions of release. (This information comes from the Wisconsin Department of Corrections, Division of Community Corrections, Administrative Directive # 99-11.)

An administrative law judge (ALJ) conducts the final revocation hearing. The ALJ is not employed by DOC but, rather, by the State of Wisconsin Division of Hearings and Appeals.

During the final hearing, the agent must be prepared to prove all of the following:

- The offender committed the alleged violation(s).
- The conduct constitutes a violation of rules or conditions of supervision.
- The violation is serious enough to warrant revocation.

The agent will present evidence, which often includes victims' and witnesses' testimony. Agents are encouraged to prepare the victim and witnesses by reviewing their testimony, answering any questions they may have, and describing the revocation process.

Ideally, the agent and advocate should work together to prepare the victim for the hearing. Victims have the right to be accompanied by a service representative at these hearings. Wis. Stat. sec. 895.73 and 950.04. A request for such accompaniment, along with any other accommodation requests (larger room, accessibility concerns, alternatives to traditional direct testimony for child victims and witnesses, etc.) must be approved in advance by the Division of Hearings and Appeals.

The ALJ will enter a written order, which will be furnished to the offender's attorney and the agent within ten (10) working days. A decision not to revoke will result in continued supervision in the community with the probability of additional rules/conditions. If an offender is revoked, what happens next depends on the status of the offender at the time of the revocation.

- If the offender was on probation, and the sentence s/he received was stayed, s/he will be sent to jail or prison for the entire stayed portion. For example, if the offender received a five (5) year stayed sentence, if revoked, s/he would go to prison for five (5) years.
- If the offender was on probation, sentenced before truth in sentencing (TIS), and the sentence was withheld, s/he will return to the original court of conviction for sentencing.
- If the offender was on extended supervision, s/he will be sentenced by the original sentencing court at a **re-confinement hearing**.
- If the offender was on parole or was mandatorily released, the sentencing authority will decide whether the offender should continue on parole or return to jail or prison for the remainder or a portion of the sentence.
- A DOC staff member, usually the regional chief or deputy regional chief, sentences offenders if they waived their right to a final hearing. If they did not waive that right, the ALJ sentences them.

During the term that an offender is released into the community, it is extremely important that the victim keep the agent informed of any rule violations. Although an advocate cannot guarantee the outcome of any rule violation report, advocates can encourage victims to report and document any violations. The victim should document the facts and circumstances of the violation, efforts by the victim to notify others (LE, PnP, etc.), and the response(s) received. This information will be useful to the agent when conducting the violation investigation. If revocation is initiated, this information may also be used later in the revocation hearing. Victims should be informed that the agent will be relying on them for complete, accurate information and cooperation in the process. The victim can expect to work closely with the agent during the violation investigation and revocation process.

Juvenile Corrections

Mission statement

The mission of the Division of Juvenile Corrections (DJC) is to promote a juvenile justice system that balances protection of the community, youth accountability, and competency building for responsible and productive community living.

Vision statement

The Division of Juvenile Corrections (DJC) will reduce delinquent behavior and restore a sense of safety to victims and the community. To achieve this vision, they will build on their mission statement in the following ways:

- Share ownership for justice through partnerships with the juvenile justice system and the community.
- Learn from the community and promote opportunities for the community to learn from DJC.
- Hold youth accountable by requiring them to contribute to the recovery of victims and the community.
- Work with the community to help youth become productive members of the community.
- Create a sense of community and mutual responsibility in the workplace.

Guiding principles

- Promote prevention and early intervention efforts at the community level.
- Provide individualized and culturally responsive programming.
- Implement the concepts of restorative justice in DJC programs.
- Affirm that staff are key to successful program operation and positive treatment outcomes.
- Treat a diverse workforce as valued partners by fostering staff development and effectiveness.
- Strive to assure that staff and youth are free from victimization.
- Promote wellness for staff and youth.
- Conduct program evaluation to identify and support high quality and cost effective programs.
- Provide and manage resources to promote successful community reintegration.
- Work in partnership with families, counties, and other community agencies to build positive youth competencies.
- Develop and implement individualized case plans, based on the uniqueness of

each youth.

Goals

- Promote community safety through effective, humane custody and supervision of youth.
- Promote positive lifestyle changes and law-abiding behaviors through youth participation in treatment programs, education, and job skill development.
- Develop meaningful evaluation and accountability processes for effective management of resources.
- Assist in the recovery of victims.
- Build, maintain, and empower a diverse, competent, and professional workforce.
- Research, develop, and utilize technological innovations to insure effective and efficient decision-making by DJC.
- Build partnerships with counties, law enforcement, schools, public and private community based agencies, courts, and elected officials.
- Provide leadership in DOC and the juvenile justice community.

Sex offender registration and community notification

Wisconsin Act 440, the Sex Offender Registration and Community Notification law, became effective on June 1, 1997. This act was Wisconsin's response to a federal law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Act, which outlines minimum standards that states must adopt in any sex offender registry and community notification laws. Wisconsin's sex offender registry and community notification laws are contained in Wis. Stat. sec. 301.45 and 301.46. The registry is intended to do the following:

- Help law enforcement agencies track sex offenders.
- Alert victims to the location of the offender who committed against them.
- Inform the general public regarding safety risks in their communities.
- Promote public safety, and help detect and prevent crime.

The Department of Corrections maintains this database at www.widocoffenders.org.

Provisions of the law

- Establishes a database of offenders required to register, including approximately twenty-four (24) categories of sex offenses as defined by Wisconsin statutes.
- Establishes statewide linkage between registry and local law enforcement, providing immediate on-line access to be used as a tool in crime prevention, criminal investigation, and community protection.
- Establishes a special bulletin notification (SBN) process for a selected category of high risk offenders. Through this process, law enforcement officers receive detailed information from the Department of Corrections on specific offenders scheduled for release within their geographic area.
- Creates a process for access of information by victims, targeted community groups, and the general public to certain types of information contained in the registry.
- Provides a penalty for anyone who misuses registry information. This provision is designed to reduce the potential for vigilantism or harassment against registrants and their families.
- Provides immunity from liability to protect public officials from possible civil liability suits based on their decisions to notify the public.

Who must register?

Anyone convicted of a sex offense after December 25, 1993. A sex offense specifically includes:

Wis. Stat. sec. 940.225(1)	First Degree Sexual Assault
Wis. Stat. sec. 940.225(2)	Second Degree Sexual Assault
Wis. Stat. sec. 940.225(3)	Third Degree Sexual Assault
Wis. Stat. sec. 940.22(2)	Sexual Exploitation by Therapist
Wis. Stat. sec. 940.30	False Imprisonment*
Wis. Stat. sec. 940.31	Kidnapping*
Wis. Stat. sec. 944.01	Rape (old statute)
Wis. Stat. sec. 944.06	Incest
Wis. Stat. sec. 944.10	Sexual Intercourse with a Child (old statute)
Wis. Stat. sec. 944.11	Indecent Behavior with a Child (old statute)
Wis. Stat. sec. 944.12	Enticing Child for Immoral Purposes (old statute)
Wis. Stat. sec. 948.02(1)	First Degree Sexual Assault of a Child
Wis. Stat. sec. 948.02(2)	Second Degree Sexual Assault of a Child
Wis. Stat. sec. 948.025	Engaging In Repeated Acts of Sexual Assault of the Same Child
Wis. Stat. sec. 948.05	Sexual Exploitation of a Child

Wis. Stat. sec. 948.055	Causing a Child to View or Listen to Sexual Activity
Wis. Stat. sec. 948.06	Incest with a Child
Wis. Stat. sec. 948.07	Child Enticement
Wis. Stat. sec. 948.075	Use of a Computer to Facilitate a Child Sex Crime
Wis. Stat. sec. 948.08	Soliciting a Child for Prostitution
Wis. Stat. sec. 948.095	Sexual Assault of a Student by School Instructional Staff Person
Wis. Stat. sec. 948.11(2) (a) or (am)	Exposing a Child to Harmful Materials or Harmful Narrations (Felony portions only)
Wis. Stat. sec. 948.12	Possession of Child Pornography
Wis. Stat. sec. 948.13	Child Sex Offender Working with Children
Wis. Stat. sec. 948.30	Abduction of Another's Child; Constructive Custody
Wis. Stat. sec. 971.17	Not Guilty by Reason of Mental Disease (for cases originally charged as one of the above offenses)
Wis. Stat. sec. 975.06	Sex Crimes Law Commitment
Wis. Stat. sec. 980.01	Sexually Violent Person Commitment

*Registration requirements for persons convicted of these crimes apply only if the victim was under 18 years of age and the offender was *not* the victim's parent.

Individuals convicted under older versions of these crimes may also have to register, as do individuals who move to Wisconsin from other states where they committed an equivalent sex offense.

In addition, a court may require registration for the following crimes if they were sexually motivated and the court determines that registration is in the best interest of public safety:

- Crimes Against Life and Bodily Security, Wis. Stat. sec. 948
- Crimes Against Sexual Morality, Wis. Stat. sec. 944
- Crimes Against Children, Wis. Stat. sec. 948
- Not Guilty by Reason of Mental Disease or Defect, Wis. Stat. sec. 971.17
- Certain Crimes Against Property, Wis. Stat. sec. 943.01- 943.15
- Invasion of Privacy, Wis. Stat. sec. 942.08 and Representations Depicting Nudity, Wis. Stat. sec. 942.09 (subject to some restrictions in juvenile cases).

Additionally, the following offenders are required to register in Wisconsin beginning December 1, 2000, *unless* the person was released from confinement or placed on supervision for the offense more than ten (10) years before entering Wisconsin:

- any sex offender convicted in any military, tribal, or federal court
- any sex offender who is required to register in another state
- any offender residing, working, or attending school in Wisconsin who has been convicted in another state of an offense comparable to the above list

- any juvenile who has been adjudicated delinquent in another state based on a sex offense and who is under supervision in Wisconsin under the Interstate Compact for the placement of juveniles

Exemptions from registration requirement

At the discretion of the court, the law provides for possible exemption from registration for offenders convicted/committed for certain offenses if, at the time of the violation, all of the following conditions applied:

- The offender had not attained the age of nineteen (19).
- The offender was not more than four (4) years older or more than four (4) years younger than the child victim.
- The victim was not under the age of twelve (12).
- The act of sexual intercourse did not involve force or threat of force/violence.

Possible exemption to registration, as determined by the court, is applicable for the following offenses:

Sec. 948.02(1)	First Degree Sexual Assault of a Child
Sec. 948.02(2)	Second Degree Sexual Assault of a Child
Sec. 948.025	Repeated Acts of Sexual Assault Against the Same Child

Information contained on the sex offender registry (*note: not all this information is available to the public*)

Descriptive information:

- registrant name and aliases
- date of birth
- gender
- race
- height, weight
- hair and eye color
- markings (tattoos, scars, etc.)

Offense information:

- conviction statute(s) requiring registration
- date of conviction or commitment
- county/counties of conviction
- date placed on supervision
- date released from confinement
- date entered into state, if applicable
- date ordered to comply with registry

- discharge from sentence or commitment date

Location Information:

- registrant's home address
- name and address of registrant's employer
- name and address of the school in which the registrant is enrolled, if applicable
- make, model, and license number of vehicle(s)
- date information was last updated

Removal from the registry

An offender may be removed from the registry if:

- Fifteen (15) years have passed and the offender was not required to register for life.
- The offender can show that his or her conviction has been reversed, set aside, or vacated.

Death of a registrant will be verified by the registration specialist. Upon verification, these records will be made "inactive" in the registry.

How long is the offender registered in the database?

Most sex offenders must register upon conviction and remain registered for the duration of their entire sentence (prison, institutionalization, parole, probation, or extended supervision are the most common components of a sentence) and an additional 15 years after their sentence ends. For a few crimes, the offender must register for life. An offender must register for life if she/he committed: first degree sexual assault, second degree sexual assault, first degree sexual assault of a child, second degree sexual assault of a child, repeated acts of sexual assault of a child, and a commitment as a sexually violent person. Further, an individual convicted of two separate sex offenses must register for life, but not if one or both of the offenses was committed as a juvenile, the offense is a "read-in," or the conviction has been vacated or set aside.

How is this information used?

Registry information is available to three groups of people:

- law enforcement
- certain "interested" organizations such as day care organizations
- the public

Law enforcement is granted the broadest access to the information in the sex offender registry, while interested organizations and the public have more limited access.

Law enforcement can view almost all of the information in the database, including places of employment, juvenile sex offenses, juvenile convictions of adult sex offenders, and all other information contained in the registry. Law enforcement is not provided addresses from the sex offender registry database.

Certain interested organizations can access limited registry information. Members of the general public can also access registry information if the department believes that answering a request for information is necessary for the protection of the public. Both can request information about a specific sex offender. Statutorily identified organizations can also ask for information about sex offenders that reside within an applicable geographic area. The department must answer both types of requests by providing the name of the registered person and any aliases, the date of the conviction, and the last time the information was updated. The department may also give the general public any other information it deems "appropriate." Neither group can obtain information regarding juvenile sex offenses or juvenile offenses of adult sex offenders. However, if a child was waived into adult court and convicted, this conviction is accessible after the offender turns eighteen (18).

The sex offender registry is accessible via the Internet at:

<http://widocoffenders.org>.

Community notification

In May of 1996, federal legislation known as Megan's Law was passed. Megan's Law requires states to develop mechanisms to alert the public of the presence of sex offenders in communities when protection of the public makes such notice necessary. The 1994 rape and murder of eight-year-old Megan Kanka by a previously convicted sex offender prompted creation of the law.

Under Wisconsin's community notification provisions, law enforcement may alert the public of a sex offender's presence in a community if the agency determines that such notification is necessary for public protection. The DOC is required to send a special bulletin to law enforcement agencies whenever an offender is scheduled to be released if any of the following conditions exist:

- The offender has committed two (2) or more sex offenses under the "two strikes" law.
- The offender has undergone civil commitment as a sexually violent person.
- The DOC deems that notification is necessary for public protection.

Law enforcement can classify the threat to the public as a Level one, Level two, or Level three:

Level one requires notification of law enforcement only. This level can be used if the threat to the community is low or if notification would be hard on the victim---for example, if the offender was convicted for incest.

Level two indicates a moderate threat. This might occur when the offender targets a particular segment of the community. In this case, a targeted notification would be made only to that segment of the community.

Level three is a community-wide notification. A level three threat occurs when the safety of all segments of the community is at risk. The notification in this case could be through the media or through door-to-door flyers, for example.

Each county conducts its notification slightly differently. Law enforcement agencies differ in the type of information provided in the notification itself. Further, the way in which the notice is communicated within the community may differ between counties. Some communities notify the entire community through media announcements in the local newspapers each time they receive a special bulletin. Other communities use targeted notification more frequently. Still other communities hold community notification meetings. If advocates are concerned about the way notifications are conducted in their community, they can contact local law enforcement to discuss such concerns.

Commitment of the sexually violent person – Chapter 980

The Wisconsin Sexually Violent Person Law (Chapter 980 of the Wisconsin Statutes) became effective June 2, 1994. The law creates a process for the indefinite *civil* commitment, for treatment purposes, of people previously convicted, adjudicated, or committed for certain sexually violent or sexually motivated offenses. The law applies to adults and juveniles convicted or committed under the applicable statutes. The commitment process requires the cooperation of the DOC, DHFS, DOJ, county DAs, and the courts. Offenders convicted of the following may be committed under Chapter 980:

- First Degree Sexual Assault – Wis. Stat. sec. 940.225(1)
- Second Degree Sexual Assault – Wis. Stat. sec. 940.225(2)
- Rape (old statute) – Wis. Stat. sec. 944.01
- Incest – Wis. Stat. sec. 944.06
- Sexual Intercourse with a Child (old statute) – Wis. Stat. sec. 944.10
- Indecent Behavior with a Child (old statute) – Wis. Stat. sec. 944.11
- Enticing a Child for Immoral Purposes (old statute) – Wis. Stat. sec. 944.12
- First Degree Sexual Assault of a Child – Wis. Stat. sec. 948.02(1)
- Second Degree Sexual Assault of a Child – Wis. Stat. sec. 948.02(2)
- Repeated Acts of Sexual Assault of the Same Child – Wis. Stat. sec. 948.025
- Incest with a Child – Wis. Stat. sec. 948.06
- Child Enticement – Wis. Stat. sec. 948.07

- Not Guilty by Reason of Mental Disease or Defect (NGI) – Wis. Stat. sec. 971.17, coupled with original charge to one of the above offenses
- Old Sex Crimes Law – Wis. Stat. sec. 975.06

Offenders convicted of the following may be committed under Chapter 980 if the offenses were sexually motivated:

- First Degree Intentional Homicide – Wis. Stat. sec. 940.01
- First Degree Reckless Homicide – Wis. Stat. sec. 940.02
- Second Degree Intentional Homicide – Wis. Stat. sec. 940.05
- Second Degree Reckless Homicide – Wis. Stat. sec. 940.06
- Battery, Aggravated Battery – Wis. Stat. sec. 940.19(4)or(5)
- Battery to an Unborn Child; Substantial Battery to an Unborn Child; Aggravated Battery to an Unborn Child – Wis. Stat. sec.940.195(4)or(5)
- False Imprisonment – Wis. Stat. sec. 940.30
- Taking Hostages – Wis. Stat. sec. 940.305
- Kidnapping – Wis. Stat. sec. 940.31
- Burglary – Wis. Stat. sec. 943.10

Commitment under this civil process requires that the state demonstrate beyond a reasonable doubt that *all* of the following three criteria apply:

1. The person has been convicted (or committed under 971.17) of a sexual violent or sexually motivated offense.
2. The person has a mental disorder that predisposes him/her to engage in acts of sexual violence.
3. The mental disorder creates a substantial probability that s/he will engage in future acts of sexual violence.

See the flow chart on the next page for the commitment process under 980 .

The Chapter 980 Review and Commitment Process

Individuals being release from sentence or commitment for sex crime

Step 1	Evaluation by End of Confinement Review Board
Step 2	Special Purpose Evaluation
Step 3	Case Forwarded to DOJ or DA
Step 4	Probable Cause Findings by Court
Step 5	Person Evaluated by SRSTC Psychologist with Report to the Court
Step 6	Commitment Trial
Ongoing:	Committed individual able to petition for supervised release after 18 months, and every six months thereafter.

Probation and parole advocacy

The advocate's role includes the following:

- Provide information about the role and responsibilities of probation and parole agents.
- Facilitate communication between the victim and the offender's agent or supervisor, especially concerning the safety of the victim and community.
- Provide accompaniment and support during interviews with probation and parole agents.
- Provide accompaniment and support during any hearings concerning probation and parole, including revocation hearings and 980 commitment proceedings.

Victim advocates, as well as probation and parole agents, may be a part of the victim's life. A victim-centered approach involving collaboration and respect among involved parties can play a pivotal role for victims.