



# Courtroom Evidence: A Resource for the Prosecution of Domestic Violence Cases

Pennsylvania Coalition Against Domestic Violence  
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## I. Resource Summary and Goals

The prosecution of domestic violence cases presents unique discovery and evidence issues. This resource provides prosecutors with the legal basis for strategies to overcome these evidentiary challenges and to more effectively prosecute domestic violence perpetrators. In addition to providing an overview of evidentiary rules, this resource summarizes and analyzes relevant statutory and case law as they relate to domestic violence prosecutions.

This resource concludes with substantive information about domestic violence, including information about the dynamics of coercive control, separation violence, and the possible use of expert testimony to explain victim behavior. More than many other crimes, it is important for prosecutors to understand the dynamics of domestic violence-related crimes to ensure victim safety and secure a successful prosecution.

A deeper understanding of the issues facing victims of domestic violence, perpetrator behavior, and enhanced strategies for the admission of evidence, will enable the prosecutor to paint an accurate picture of the perpetrator's behavior and the circumstances surrounding the case, allowing the judge or jury to make a more informed decision.

## II. Domestic Violence and Prosecution

Domestic violence cases present unique obstacles for prosecutors. Unlike most crimes, domestic violence involves a perpetrator and victim who are intimately connected. These individuals share a life together and – at the end of the prosecution – some will return to a home together. Whether separated or not, many victims and perpetrators must raise children together. This continuing connection adds a level of complexity to domestic violence prosecutions because, even when the prosecution is over, victims are often still subject to the coercive control, harassment, and violence of their perpetrator. Thus, in domestic violence cases, prosecutors face the added challenge of knowing that the work they do may put a victim at further risk of harm. The purpose of this resource is to give you some additional tools to effectively prosecute domestic violence crimes while maintaining high levels of safety for victims of domestic violence.

**It is important that the prosecutor continue to remind perpetrators, victim witness advocates/personnel, and other professionals who support the criminal justice process, that it is the state that prosecutes crimes.**

**At no time does the decision to prosecute rest with the victim. The victim cannot “press charges” against the perpetrator.**

**Ensuring the perpetrator and victim understand that the victim's role is to serve as a witness, and not the driving force behind the prosecution, is essential to the safety of the victim.**

Many working within the criminal justice system ask why a victim doesn't leave and start a new life without the perpetrator. There are substantial and compelling reasons why victims feel they have no option but to stay with their perpetrator: economic and financial stability, child custody, religious or cultural beliefs, immigration status, hope for reconciliation, or fear of retaliation, stalking, or further victimization. Understanding the underlying forces influencing the victim's decisions is extremely important. It is common that the primary goal of a victim is to merely stop the abuse.

Physical and sexual assault are the most apparent forms of domestic violence, and are often the only abusive tactics that outsiders can see. However, perpetrators use an array of tactics that, when reinforced by physical violence, sexual assault, or threats of physical violence, creates a more complex system of abuse. For instance, perpetrators often isolate the victim from family and friends, control their actions (who they see, where they go, what they read, where they work), and use jealousy, love, and concern to justify their actions. Perpetrators often couple isolation with emotional and economic abuse, designed to break down the victim's self-sufficiency and self-worth. This further reinforces the victim's dependency and reliance on the perpetrator, making it very difficult for a victim to successfully sever the relationship.

Even if a victim is able to overcome the complex tangle of control, the fact remains that the risk of physical violence and lethality increases exponentially upon separation.<sup>1</sup> It takes a victim an average of seven attempts to leave before they are successful. Each attempt allows the victim to gather more information and resources to successfully establish independence from the perpetrator. Prosecutors play an important role in assisting victims to establish independence from the perpetrator by assisting the victims in their understanding of available criminal justice intervention and civil relief, connecting the victim to available advocacy resources and – perhaps most importantly – holding the perpetrator accountable for the abuse. By holding a perpetrator responsible for their actions, prosecutors send a clear message that abuse is not tolerated in our society and that the victim is entitled to live free from violence.

### **III. Preliminary and Pre-Trial Issues**

#### **A. Protecting Privileged Communications**

Communications between a prosecutor and their victim witness is privileged and confidential. Likewise, communications between a victim and a domestic violence program advocate are legally privileged and not subject to discovery or disclosure.<sup>2</sup> A similar privilege applies to communications between a victim and a sexual assault counselor.<sup>3</sup>

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<sup>1</sup> PATRICIA TJADEN & NANCY THOENNES, NAT'L INSTITUTE OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, RESEARCH IN BRIEF: PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, (1998) *available at* <https://www.ncjrs.gov/pdffiles/172837.pdf>.

<sup>2</sup> 23 PA. C.S. § 6116; *see also* V.B.T. v. Family Services of Western Pa., 705 A.2d 1325 (Pa. Super. 1998), *aff'd*, 728 A.2d 953 (Pa. 1999) (domestic violence counselor privilege absolute). The privilege also extends to co-participants who are present during counseling and advocacy. 23 PA. C.S. § 6116.

<sup>3</sup> 42 PA. C.S. § 5945.1; *see also* Commonwealth v. Wilson, 602 A.2d 1290 (Pa. Super. 1992).

However, there are certain circumstances when privilege may be waived due to the presence of a third party. The witness must be cautioned that by including third parties in their conversations with a prosecutor or a domestic violence (or sexual assault) advocate, there is no expectation of confidentiality, and any communications while the third party is present may not be privileged.

Unfortunately, even though prosecutors and advocates have independent privilege, there is no clear guidance on whether an advocate and prosecutor have cumulative privilege.<sup>4</sup> So, the presence of an advocate in an interview with a prosecutor may negate the expectation of confidentiality with the advocate, and vice versa.

It is a best practice for prosecutors and advocates to explain to the victim that privilege may be waived if both the prosecutor and advocate are in the room, and allow the victim to decide who they would like to be present during an interview. If the victim chooses to have both present in the room, the prosecutor and advocate should take steps to ensure that, in the event their privilege is later challenged, the damage is minimized. Advocates and prosecutors should obtain an informed, written, time-limited release from the victim to acknowledge that the victim intends for the information to remain confidential and, in the event privilege is deemed to be waived by the court, it is only waived for the limited purpose of the interview. While the release will not resolve the issue of whether there is a cumulative privilege, it will serve as evidence that the conversations were intended to be confidential.

## **B. Address Confidentiality**

In an attempt to preserve safety, a victim may wish to keep her or his current location a secret. In response to victim safety concerns, Pennsylvania's General Assembly enacted address confidentiality provisions as part of the Protection From Abuse (PFA) Act. Section 6112 of the PFA Act provides that upon receiving a plaintiff's request for nondisclosure of her or his telephone number and whereabouts, and upon concluding that the defendant poses a threat of continued danger to the plaintiff, the court shall direct law enforcement, human service agencies, and school districts not to disclose the presence of the plaintiff or child in the jurisdiction or school district. Section 6112 also provides for confidentiality of domestic violence programs and shelters: "The court shall in no event direct disclosure of the address of a domestic violence program."<sup>5</sup>

**Communications between a victim and a domestic violence program advocate are legally privileged and not subject to discovery or disclosure.**

<sup>4</sup> See *Young v. Presbyterian Homes, Inc.*, 50 Pa. D & C.4th 190 (Pa. C.C.P. Lehigh Jan. 16, 2001) (applying the common interest rule to protect information shared in the presence of two defense attorneys, each representing different defendants).

<sup>5</sup> 23 Pa. C.S. § 6112.

### C. Intimidation of a Victim Witness

Due to the intimate nature of the relationship between the victim and the perpetrator, domestic violence crimes are fertile ground for witness intimidation. The effectiveness of this behavior by the defendant can be minimized by open communications between the prosecutor, police, victim advocates, and the victim witness and by an understanding of the patterns of domestic violence. *See section XV: Understanding the Dynamics of an Abusive Relationship.*

An abuser's method for intimidation will vary from case to case. However, there are some common tactics that an abuser may use to intimidate the victim into withdrawing or not appearing for court scheduled events, thereby thwarting the prosecution. For instance, the defendant may request medical or psychiatric records in an effort to intimidate the victim witness; postpone court-scheduled events to complicate childcare, increase absences at the victim's employment, and frustrate the victim; threaten to have the children removed from the victim's custody; or threaten future physical abuse to the victim, the victim's family, or the children. Prosecutors should watch for these tactics, and employ necessary protective measures to ensure the victim's safety before, during, and after the case.

**For more information about victim intimidation, and the tactics a prosecutor could employ to circumscribe the impact of victim intimidation, see section XI.A., Evidence-Based Prosecution in Domestic Violence Cases, and section XX, Emerging Practices: Understanding Reluctant/Unwilling Victims.**

## IV. Relevance

### A. Pennsylvania Rules of Evidence – Relevance

#### Rule 401 – Definition of Relevant Evidence

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>6</sup>

### B. Relevance – General Rule

All relevant evidence is admissible, except as otherwise provided by law.<sup>7</sup> However, there are limitations to admissibility of relevant evidence – “although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>8</sup>

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<sup>6</sup> PA. R. EVID. 401.

<sup>7</sup> PA. R. EVID. 402.

<sup>8</sup> PA. R. EVID. 403.

### C. Evidence of Abuse Relevant Despite Remote in Time

#### i. Abuse occurring three years earlier

PFA orders granted within three years prior to a murder are relevant and admissible. In *Commonwealth v. Drumheller*, 808 A.2d 893 (Pa. 2002), a capital murder case arising from the stabbing murder of defendant's former girlfriend, the Pennsylvania Supreme Court held that evidence of three PFA orders in the 34 months prior to the murder was relevant and admissible.

#### ii. Abuse occurring 17 months earlier

Abuse occurring 17 months prior to the victim's death is relevant and admissible. In *Commonwealth v. Ulatoski*, 371 A.2d 185 (Pa. 1976), the trial court admitted the testimony of three witnesses regarding bruises they observed on the defendant's wife as long as 17 months before her death.

The district attorney introduced evidence of defendant's prior acts to show that the death of the victim wife was more likely intentional than accidental. The defendant argued that the evidence of bruising was too remote in time. The Pennsylvania Supreme Court rejected defendant's argument, concluding that while some testimony may involve events so remote from the date of the crime that it has no probative value, "no rigid rule can be formulated for determining when such evidence is no longer relevant."<sup>9</sup>

In so holding, the Supreme Court referred to its earlier decision in *Commonwealth v. Petrakovich*, 329 A.2d 844 (Pa. 1974), where the Court held "it is generally true that remoteness of the prior instances of hostility and strained relations affects the weight of that evidence, but not its admissibility."<sup>10</sup>

**The remoteness of prior instances of abuse affects the weight of the evidence, but not its admissibility.**

### D. Relevance and Prior Abuse

The Pennsylvania Rule of Evidence Rule 404(b), which addresses character evidence, also is at issue in domestic violence cases. Generally, under 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity with the previous bad acts. However, evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>11</sup>

<sup>9</sup> *Commonwealth v. Ulatoski*, 371 A.2d 186, 191 (Pa. 1976).

<sup>10</sup> *Commonwealth v. Petrakovich*, 329 A.2d 844, 850 (Pa. 1974).

<sup>11</sup> PA. R. EVID. 404(b)(3).

**i. Prior abuse as motive**

Prior criminal charges against the defendant that were dropped at the victim's request are admissible. In *Commonwealth v. Reid*, 811 A.2d 530 (Pa. 2002), *cert. denied Reid v. Pennsylvania*, 540 U.S. 850 (2003), defendant killed his estranged wife and 14-year-old stepdaughter while charges of sexually assaulting the stepdaughter were pending against him. Criminal charges had previously been filed against defendant for terroristic threats, assault, and harassment as a result of earlier incidents of defendant's spousal abuse. These charges had been dropped at defendant's wife's request. Evidence regarding these earlier dropped charges was admitted during the murder trial over defendant's objection. On appeal, defendant claimed this admission was erroneous.

Observing that a trial court may exclude relevant evidence if its prejudicial impact outweighs the probative value, the Supreme Court nonetheless upheld the trial court's admission into evidence of the assault, terroristic threats, and harassment charges, which were filed and withdrawn. This evidence was relevant to defendant's motive for killing the victims because they refused to withdraw the sexual assault charges.<sup>12</sup>

**ii. Prior abuse showing accident unlikely**

In *Commonwealth v. Boczkowski*, 846 A.2d 75 (Pa. 2004), the trial court admitted evidence showing defendant murdered his first wife four years earlier under circumstances extremely similar to the death of his second wife. The Pennsylvania Superior and Supreme Courts sustained this evidentiary admission. In this case, defendant's second wife was found dead in the parties' hot tub. The autopsy revealed she died as a result of asphyxiation caused by blunt force trauma to her neck. Her blood alcohol level at the time of her death was .22 percent. A physical examination of the defendant showed fresh scratch marks on his arms, sides, and hands. The victim's friends testified that in the months before her death, the defendant tried to portray the victim as an alcoholic when, in fact, they had rarely seen the victim intoxicated.

Trial evidence also established that four years earlier, defendant's first wife had been found dead in her bathtub in another state. The factual similarities of the two deaths were startling. Both women died in a tub, were in their thirties, and were in good health. In both instances, the defendant reported that the victim had been drinking prior to entering the tub. In both instances the defendant had fresh scratch marks on his arms, hands, and torso. In both instances the defendant told police he'd had a minor argument with the victim on the day before her death. Additionally, the autopsies of both victims revealed they had died from asphyxiation, not drowning.<sup>13</sup>

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<sup>12</sup> *Commonwealth v. Reid*, 811 A.2d 530, 550-51 (Pa. 2002).

<sup>13</sup> *Commonwealth v. Boczkowski*, 846 A.2d 75 (Pa. 2004).

The Supreme Court held that evidence is admissible if it is relevant; in other words, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact. Moreover, the Court explained that the probative value of admissible evidence must outweigh the likelihood of unfair prejudice.<sup>14</sup> The court observed that defendant's description of circumstances surrounding the victim's death (i.e., defendant's claim that she had been drinking) suggested an accident and, therefore, evidence regarding circumstances surrounding defendant's first wife's death was admissible.<sup>15</sup>

### iii. Prior abuse explaining the *res gestae* of the case

In *Commonwealth v. Dillon*, 925 A.2d 131 (Pa. 2007), the Pennsylvania Supreme Court held that, in order to explain a child's lengthy delay in reporting sexual abuse, the prosecution may introduce evidence of defendant's violence and abuse towards the child's mother and brother as a *res gestae* exception as part of its case in chief. A *res gestae* exception to Rule 404(b) allows admission of evidence of other crimes when relevant to furnish the context or complete story of the events surrounding a crime.

The Supreme Court reasoned that a jury may consider evidence of a lack of prompt complaint in cases involving sexual offenses, and the *res gestae* declaration is relevant and admissible to explain why a victim may delay in reporting. In *Dillon*, a young woman who had been sexually assaulted almost daily by the defendant from age nine to twelve first disclosed the assaults when she was fifteen. She disclosed the assaults after the defendant was convicted of aggravated assault and incarcerated for breaking her brother's arm.

The Supreme Court found that there was "no doubt" that the evidence of the defendant's physical abuse of the victim's mother and brother, including the aggravated assault conviction, was relevant for purposes other than to show his bad character and criminal propensity. The evidence was probative of the reasons for the victim's delay in reporting – her experiences with the defendant, and those of her family members, caused her to fear making a prompt report. In addition, the prior bad acts evidence was relevant for *res gestae* purposes, i.e., to explain the events surrounding the sexual assaults, so that the case presented to the jury did not appear in a vacuum.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

**iv. Pattern of abuse showing natural development of the case**

*Commonwealth v. Jackson*, 900 A.2d 936 (Pa. Super. 2006), is a case involving domestic violence that stretched over a period of 10 years and involved frequent police calls to the home, repeated violations of numerous PFA orders and culminated in the perpetrator's murder of his long-time girlfriend. Several police officers testified about the defendant's pattern of abuse against the victim and repeated violations of PFA orders that continued for a period of 10 years. The defendant claimed that this testimony was unduly prejudicial, because the defendant admitted that he killed the victim.

The Superior Court found that the testimony of the various officers demonstrated that the defendant's abuse of the victim continued to escalate until the defendant ultimately murdered the victim. It found that the challenged evidence showed the chain of events that formed the history of the case and was part of its natural development.

**v. Prior abuse indicating malice, sequence of events**

Evidence regarding prior bad acts can be admitted to show a chain or sequence of events and to show malice, motive, intent, and ill will. Thus in *Commonwealth v. Drumheller*, 808 A.2d 893 (Pa. 2002), discussed above, evidence of prior PFA petitions filed by the victim against the defendant in the three years preceding the victim's murder were admissible to show sequence of events and to show defendant's malice toward victim. The evidence suggested that defendant's abuse of the victim continued during the entire three-year period.<sup>16</sup>

**vi. Prior abuse demonstrating nature of the relationship**

In *Commonwealth v. Powell*, 956 A.2d 406 (Pa. 2008), a capital case involving the beating murder of the defendant's six-year-old son, evidence that the defendant threw a glass of water in his son's face was admitted to show intent, malice and the nature of the relationship with his son. According to the Supreme Court, admission of this evidence provided insight into the relationship, which was characterized by the defendant's quick temper, anger and impatience with the characteristics and the developmental level of a small child. The evidence helped establish this perpetrator's motive for killing his son: impatience with and dislike of the child.

**vii. Prior abuse to establish family environment**

In *Commonwealth v. Powell*, 956 A.2d 406 (Pa. 2008), discussed above, the perpetrator of abuse obtained custody of his six-year-old son when the child's mother was in a residential drug and alcohol treatment program. Within six months, the perpetrator had isolated his son and abused him repeatedly, until one particularly violent, lengthy and brutal beating resulted in the child's death. The perpetrator admitted during the trial that he had killed the boy and objected to testimony from the child's mother that he had abused her during their relationship.

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<sup>16</sup> *Drumheller*, 808 A.2d at 904-905.

On appeal, the Supreme Court found that the testimony was useful for the jury in understanding how the perpetrator was able to isolate the child and keep him away from his mother, the other adult most likely to notice the abuse and protect him. The perpetrator's prior abuse of the child's mother provided context for her testimony that she took little action when the perpetrator refused to allow her access to her son or let her speak with him alone.

**viii. Prior bad acts admissible to rebut claim of accident**

In *Commonwealth v. Constant*, 925 A.2d 810 (Pa. Super. 2007), admission of prior bad acts was upheld. Police responding to a domestic violence call encountered an angry and verbally abusive man. After an altercation at the front door of his home involving his wife, the man stepped back into the home, retrieved a firearm, and shot at the police officers. One officer was shot directly in the chest and wounded. At trial, the defendant claimed that the shooting was an accident. His prior encounters with police were introduced to rebut his claim that the shooting was an accident, and to show his motive and thought processes at the time. On appeal, the Superior Court upheld the trial court's admission of the prior incidents.

**ix. Evidence of abuse admissible to show reason for delay in reporting assault**

In *Commonwealth v. Page*, 965 A.2d 1212 (Pa. Super. 2009), a sexual abuse prosecution where the perpetrator was accused of repeatedly assaulting his stepdaughter over a period of several years, the victim testified that she did not report the abuse earlier because she was afraid of the perpetrator. The trial court allowed her to testify that the perpetrator frequently hit her mother and threatened her and her mother. On appeal, the Superior Court found that this prior bad acts testimony was relevant to show the reason for the victim's delay in reporting the abuse, as well as to support the victim's testimony that she feared the perpetrator and believed he would carry out threats made to her mother and her.

**x. Error for court to bar testimony re: past abuse that led to PFA consent order**

In *Buchalter v. Buchalter*, 959 A.2d 1260 (Pa. Super. 2008), the plaintiff claimed that the defendant threatened to "beat the crap out of her" during a conversation about custody arrangements for their younger children. She testified that she believed the defendant had broken into her cell phone and accessed her phone messages. She also testified that defendant's wife's sister grabbed her, threw her into a fence, grabbed the back of her hair and pushed her face in the dirt during her older child's baseball game, after she had asked defendant, his brother and his wife and wife's sister to leave the game. After the physical assault by defendant's sister-in-law, plaintiff claimed that defendant commented, "Next time you'll learn to keep your mouth shut." Plaintiff claimed that, after this incident, defendant threatened to get his sister-in-law to assault plaintiff again.

To help explain why the plaintiff feared the defendant as a result of his current threats, plaintiff offered testimony regarding the defendant's prior abuse which had led to plaintiff filing for, and defendant consenting to, a previous PFA order. The trial court barred the plaintiff from testifying about the prior abuse, reasoning that the court could not consider evidence of prior abuse that led to the consent PFA order in the current PFA case.

The trial court denied the plaintiff's request for a PFA order, and the plaintiff appealed. On appeal, the Superior Court reasoned that, in order to assess whether the plaintiff was in reasonable fear of imminent serious bodily injury from the defendant, the facts surrounding the prior PFA consent order were relevant to understanding the reasonableness of the plaintiff's fear. The Superior Court vacated the trial court's order and remanded the case back to the trial court for further proceedings.

## V. Witness Competency

### A. General Rule – Pennsylvania Rule of Evidence 601(a)

The general rule for competency provides that “every person is competent to be a witness” except as provided by statute or by the rules of evidence.<sup>17</sup> In other words, “competency of a witness is presumed, and the burden falls on the objecting party to demonstrate incompetency,” either by rule or by statute.<sup>18</sup>

An example of an individual who is statutorily incompetent to testify is the domestic violence advocate.<sup>19</sup>

### B. Incompetency – Immaturity

Questions regarding witness competence may arise when children are victims or witnesses of domestic violence and must testify to their experiences. Pursuant to Pennsylvania Rule of Evidence Rule 601(b):

A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:

- (1) is or was, at any relevant time, incapable of perceiving accurately;
- (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
- (3) has an impaired memory; or
- (4) does not sufficiently understand the duty to tell the truth.<sup>20</sup>

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<sup>17</sup> PA. R. EVID. 601(a).

<sup>18</sup> Commonwealth v. McMaster, 666 A.2d 724, 727 (Pa. Super. 1995) (internal citations omitted).

<sup>19</sup> 23 PA. C.S. § 6116. This section states, in pertinent part: “Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim.”  
*Id.*

### C. Factual Analysis for Incompetency – Immaturity

The application of 601(b) raises a factual question to be resolved by the trial court. Expert testimony may be used when competency under this standard is at issue.<sup>21</sup>

In *Commonwealth v. D.J.A.*, 800 A.2d 965 (Pa. Super. 2002), during a taped interview, a five-year-old sexual assault victim told the county child protective services worker that her father put his private area in her mouth. She also later alleged other sexual assaults by her father. At trial three years later, father challenged the child's competency. Father's expert witness testified that the child protective service worker's interview techniques tainted the child's recollection. The trial court reviewed the child's taped interview and found that the child was incompetent to testify.

**When taint is alleged, the party alleging taint bears the burden of presenting some evidence of taint and overcoming the child's presumption of competency.**

On appeal, the Superior Court reversed, finding that the trial court committed an abuse of discretion when it determined the child protective services worker's interview techniques tainted the victim's recollection of the acts her father performed on her.<sup>22</sup> While the Superior Court agreed that a determination of competency necessarily required an inquiry into the child's competency at the time of the incident and the time of trial, it found that the child in this case was competent at all relevant times.

### D. "Taint" in Child Sexual Abuse Allegations

"Taint" is the implantation of false memories or the distortion of actual memories through improper and suggestive interview techniques.<sup>23</sup> When a child accuses a family member of sexually abusing him or her, the defendant often claims that the child's testimony was tainted by another person's influence.<sup>24</sup> Until the defendant raises a question of competency, or taint, a child – like every witness – is presumed competent.<sup>25</sup>

<sup>20</sup> PA. R. EVID. 601(b); *see also* *Commonwealth v. D.J.A.*, 800 A.2d 965, 969-70 (Pa. Super. 2002).

<sup>21</sup> *Commonwealth v. Baker*, 353 A.2d 454 (Pa. 1976).

<sup>22</sup> *D.J.A.*, 800 A.2d at 975.

<sup>23</sup> *Commonwealth v. Delbridge (Delbridge I)*, 855 A.2d 27, 30 (Pa. 2003).

<sup>24</sup> *See, e.g., Commonwealth v. Hunzer*, 868 A.2d 498 (Pa. Super. 2005); *Commonwealth v. Alston*, 864 A.2d 539 (Pa. Super. 2004).

<sup>25</sup> *See Commonwealth v. Pena*, 31 A.3d 704 (Pa. Super. 2011) (citing PA. R. EVID. 601(a)) (holding that every witness, including children, is presumed competent and admonishing the trial court for determining, *sua sponte*, that a 14-year-old witness was incompetent based on her mental health problems).

**i. Burden of proof is on the defendant**

In *Commonwealth v. Delbridge*, 771 A.2d 1 (Pa. Super. 2001), *appeal granted* 783 A.2d 764 (Pa. 2001), *remanded by* 855 A.2d 27 (Pa. 2003), *appeal after remand* 859 A.2d 1254 (Pa. 2004), the Pennsylvania Supreme Court reviewed defendant's challenge to his conviction for indecent assault and other charges arising from defendant's sexual abuse of his minor children. The children were ages four and six when they reported his abuse, and defendant argued that their statements alleging his abuse were tainted.

After the Superior Court affirmed the trial court's judgment of sentence, the Pennsylvania Supreme Court granted *allocatur* and determined that an allegation of "taint" raises a legitimate question of witness competency in cases involving sex abuse allegations by young children. Accordingly, the court held that taint is a subject to be explored during a hearing testing the competency of a child witness in a sex abuse case.<sup>26</sup>

When taint is alleged, the party alleging taint bears the burden of (1) presenting some evidence of taint at the competency hearing before exploration of taint is considered, and (2) overcoming the child's presumption of competency by clear and convincing evidence.<sup>27</sup>

The Supreme Court remanded the case to the trial court for an additional competency hearing where the defendant could present evidence of taint. On remand, the trial court again found the children to be competent. The trial court found that the defendant failed to demonstrate the presence of taint and accordingly failed to meet his burden of proving his children's allegations were compromised by taint.<sup>28</sup>

**ii. When is taint appropriately raised?**

The Superior Court has definitively held that taint and other competency challenges become less appropriate with age, and are "totally irrelevant as a matter of law by age fourteen."<sup>29</sup> Taint is "only 'a legitimate question for examination in cases involving complaints of sexual abuse made by *young children*.'"<sup>30</sup> In most instances, the ability of a child to recall events is a question of credibility, not taint.<sup>31</sup>

In *Commonwealth v. Pena*, 31 A.3d 704 (Pa. Super. 2011), defendant was charged with repeatedly sexually assaulting two minors, ages 14 and 15, who were living in his house at the time of the assaults. The girls were previously assaulted by two of their uncles, and both were diagnosed with mental health and behavioral problems as a result of the prior abuse.

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<sup>26</sup> *Commonwealth v. Delbridge (Delbridge II)*, 859 A.2d 1254, 1256 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> *Delbridge II*, 859 A. 2d at 1259.

<sup>29</sup> *Commonwealth v. Pena*, 31 A.3d 704 (Pa. Super. 2011).

<sup>30</sup> *Id.* (quoting *Delbridge I*, 855 A.2d at 39) (emphasis in original).

<sup>31</sup> *Id.* (citing *Commonwealth v. Judd*, 897 A.2d 1224 (Pa. Super. 2006); *Commonwealth v. Moore*, 980 A.2d 647 (Pa. Super. 2009)).

Defendant filed a motion to preclude the girls from testifying. After a hearing, the trial court declared the girls incompetent to testify based on taint. On review, the Superior Court reversed, finding that taint, which challenges the ability of a minor witness to “observe an event and accurately recall that observation,” is only appropriate in cases involving “young children.”<sup>32</sup> The Court expressly held that “[w]hen a witness is at least fourteen years old, he or she is entitled to the same presumption of competence as an adult witness.”<sup>33</sup> Credibility, not taint, was the proper evidentiary function allowing the court to weigh the ability of the child to testify truthfully.

Moreover, the Superior Court addressed the trial court’s additional finding that one of the girls was incompetent to testify based on her mental health problem. The Superior Court explained that a trial court could not act as a party’s advocate and, because defendant did not raise competency in this manner, it was an abuse of discretion for the trial court to make such a finding *sua sponte*. The trial court was further admonished for making such a decision, explaining that “the record [was] devoid of objective medical evidence such as information about the psychotropic medication and its effect on memory, or medical testimony regarding ... [the child’s] condition.”<sup>34</sup>

## VI. Spousal Testimony: Spousal Incompetency and the Spousal Communications Privilege

### A. General Rule

There are two separate doctrines in Pennsylvania that, under certain circumstances, protect or prevent one spouse from testifying against the other spouse: *spousal incompetency*<sup>35</sup> and the *spousal communications privilege*.<sup>36</sup>

The two spousal testimony doctrines are now statutory, but originated in common law. The origins can be traced to medieval jurisprudence, where the concept that “‘husband and wife were one’ and married women had no recognized separate legal existence” originated.<sup>37</sup> However, *exceptions to spousal privilege in cases involving domestic violence have long been a part of common law*. As the Pennsylvania Supreme Court explained, “‘even at common law the [spousal] privilege was withheld from the husband in criminal prosecutions against him for wrongs directly against the person of the wife.’”<sup>38</sup>

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<sup>32</sup> *Pena*, 31 A.3d at 704.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 42 Pa. C.S. § 5913 (criminal); 42 Pa. C.S. § 5924 (civil).

<sup>36</sup> 42 Pa. C.S. § 5914.

<sup>37</sup> *Commonwealth v. Kirkner*, 805 A.2d 514, 516 (Pa. 2002) (quoting *Trammel v. United States*, 445 U.S. 40 (1980)).

<sup>38</sup> *Id.* (quoting McCormick, *Evidence* § 66 at 162 (3d ed. 1984); 1 Blackstone, *Commentaries* 443 (1765); 8 Wigmore, *Evidence* § 2239 (McNaughton rev. 1961)).

## B. Spousal Incompetency

Whether a spouse may testify against another spouse is a matter of competency. Generally, in both criminal and civil proceedings, a spouse is not competent to testify against his or her lawful spouse. 42 Pa. C.S. § 5913 (criminal); 42 Pa. C.S. § 5924 (civil). **Spousal incompetency is limited to those who are married at the time of trial**<sup>39</sup> and it ends when the marriage ends, either by death or divorce.<sup>40</sup> In other words, a spouse is *competent* to testify against his or her spouse upon divorce or when either spouse dies.

### i. Spousal Incompetency Waiver

*The testifying spouse controls the spousal competency privilege and may waive the privilege and opt to testify against his or her spouse.*<sup>41</sup>

### ii. Statutory Exceptions to Spousal Incompetency

The spousal incompetency statute provides that a spouse is competent to testify, despite the spouse's unwillingness, when their testimony is in regard to the following acts:

- (1) desertion and maintenance;
- (2) **acts of violence, including injury, attempted violence, or threats,** against spouse or minor child;<sup>42</sup>
- (3) bigamy;
- (4) murder, involuntary deviate sexual intercourse, or rape.<sup>43</sup>

**The testifying spouse controls the spousal competency privilege and may waive the privilege and opt to testify against his or her spouse.**

These exceptions are not subject to judicial discretion. Rather, the District Attorney is vested with “the obligation of determining the merits of any prosecution, and the responsibility of requiring appropriate witnesses to testify.”<sup>44</sup> Thus, the District Attorney is the only person with the discretion to decide whether to require a spouse to testify in cases where the spousal competency privilege does not apply.

<sup>39</sup> Commonwealth v. Clark, 500 A.2d 440 (Pa. Super. 1985) (spousal incompetency disappears on death or divorce).

<sup>40</sup> See *id.*

<sup>41</sup> 42 Pa. C.S. § 5913.

<sup>42</sup> This exemption explicitly provides that a spouse is competent to testify “in any criminal proceeding against either [spouse] for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them.” 42 Pa. C.S. § 5913(2); see also Commonwealth v. Kirkner, 805 A.2d 514 (Pa. 2002) (motion to quash subpoena compelling wife’s testimony against husband in domestic violence case was inappropriate because the statute clearly provides an exception for spousal incompetency in cases involving bodily injury, attempted violence or threatened violence against the testifying spouse).

<sup>43</sup> 42 Pa. C.S. § 5913. Spousal incompetency exemptions in civil proceedings include divorce, support, child custody, and protection from abuse proceedings. 42 Pa. C.S. § 5924.

<sup>44</sup> *Kirkner*, 805 A.2d at 516.

### iii. Acts of Violence Against Spouse or Children Exception

*Neither spouse may rely on the spousal incompetency doctrine in cases involving violence or attempted violence against a spouse, minor children of either spouse, or minor children who are under the care and supervision of either spouse.* Section 5913 explicitly provides that a spouse is competent to testify “in any criminal proceeding against either [spouse] for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them.” 42 Pa. C.S. § 5913(2).

In *Commonwealth v. Kirkner*, defendant husband choked his wife, struck her in the face, and shoved her to the ground. Wife’s injuries and bruising were photographed and she submitted a two-page statement to the police about the incident. Defendant was charged with simple assault and harassment. At the preliminary hearing, wife did not appear, but the evidence was sufficient to hold defendant for trial. The Commonwealth issued a subpoena for wife to appear at trial, and wife’s attorney moved to quash.

The trial court granted wife’s motion to quash, finding that wife’s decision was not coerced and that she did not fear for her safety, was not financially dependent on her husband, was educated and trained in law, and was motivated by her desire to preserve her marriage. The motion was upheld on review by the Superior Court, which found that, pursuant to *Commonwealth v. Hatfield*,<sup>45</sup> “whether to force the unwilling spouse to give evidence [is] a matter for the trial court’s discretion.”

The Supreme Court reversed, reinstating the subpoena compelling wife’s testimony and explicitly overturning the Superior Court’s decision in *Hatfield*. Pursuant to 42 Pa. C.S. § 5913, the exceptions to the spousal competency privilege are mandatory and, as such, **the court does not have discretion to set aside a spouse’s subpoena in cases involving domestic violence.**

In *Commonwealth v. John*, 596 A.2d 834 (Pa. Super. 1993), the defendant husband set fire to a building in which his wife was playing bingo and pulled a knife on one of the parties’ children as the wife and children were walking home from the blaze. In defendant’s criminal trial, the wife sought to avoid testifying, claiming spousal privilege. After an *in camera* hearing, in which the wife testified that she was in the building when defendant set fire to it, the trial court held that the act of violence exception applied and directed wife to testify. Evidence showed that defendant was angry because his wife had chosen to go to bingo instead of spending the evening drinking with him. Evidence also indicated that pursuant to the parties’ PFA agreement, defendant was prohibited from coming to the wife’s home. The Superior Court affirmed the trial court’s decision that defendant’s fire setting was an act of violence directed at wife, eliminating the privilege against adverse spousal testimony.

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<sup>45</sup> *Commonwealth v. Hatfield*, 593 A.2d 1275 (Pa. Super. 1991), *overruled by* *Commonwealth v. Kirkner*, 805 A.2d 514 (Pa. 2002).

### C. The Spousal Communications Privilege

The spousal communications privilege provides that certain confidential communications between spouses are privileged. **The spousal communications privilege does not excuse a spouse from having to testify. It only excuses a spouse from testifying about confidential communications between the spouses.** This privilege is based on a public policy desire to preserve the peace, harmony, and confidence in the spousal relationship. It is found at 42 Pa. C.S. § 5914, which states:

Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.

**Unlike spousal incompetency, the spousal communications privilege is controlled by the nontestifying spouse, who has the sole power to waive the privilege.**

#### i. Defining Confidential Spousal Communications

Whether a communication is to be considered confidential depends on the circumstances and character of the communication, as well as the relationship of the parties. For a communication to be privileged, it must be made in confidence with the intention that it must not be divulged.<sup>46</sup> Communications are not confidential when they are made in the presence of a third party or written where it is known that the communication will be read by a third party; however, if the spouses use a code, or communicate in a manner that has meaning only known to the spouses, the communication may be confidential.<sup>47</sup>

#### ii. Exception: Where Communication Creates Disharmony

There are instances when the spousal confidential communications privilege does not apply. Where the interspousal communications are intended to create or further disharmony in the marriage, the communications are not subject to the privilege.<sup>48</sup>

In *Commonwealth v. Spetzer*, 813 A.2d 707 (Pa. 2002), the defendant husband, who battered his wife throughout the marriage, tried to prevent his wife from testifying to the following communications: (1) defendant admitted to his wife that he raped her 12-year-old daughter and boasted about how he threatened the daughter with a knife; (2) defendant repeatedly threatened and attempted to intimidate wife and daughter into recanting their accounts to the police and district attorney; (3) defendant repeatedly attempted to force wife to

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<sup>46</sup> *Commonwealth v. Spetzer*, 813 A.2d 707, 712-13, 719 (Pa. 2002) (citing *Seitz v. Seitz*, 32 A.2d 578 (Pa. 1895)).

<sup>47</sup> *Id.* at 712-13.

<sup>48</sup> *Spetzer*, 813 A.2d at 719. The facts of this case are helpful for someone seeking to understand the types of controlling behaviors perpetrators use. The defendant engaged in a broad range of physical, sexual, emotional, and financial abuse in his efforts to dominate his wife and her children. *Id.* at 708-714.

bring her two daughters to a motel room where defendant could rape them. The Pennsylvania Supreme Court held that wife's testimony regarding these communications would not be privileged. The Court evaluated the policy basis behind the confidential spousal communications privilege and held that the defendant husband's statements were not protected:

Certainly, the persistent and sadistic statements at issue here, concerning husband's actual and contemplated crimes against his wife and her children cannot rationally be excluded on the pretext that 'considerations of domestic peace forbid their disclosure.'<sup>49</sup>

#### D. Spousal Testimony Doctrines Coexist

Even if a spouse is deemed competent to testify based on the exemptions in 42 Pa. C.S. § 5913 or waives her or his competency privilege, the spousal confidential communications privilege found at 42 Pa. C.S. § 5914 may still prohibit that spouse from testifying about certain confidential communications; the two privileges co-exist.

#### E. Prosecutorial Discretion – Subpoenaed Spousal Testimony

When an exemption to the spousal incompetency privilege applies, prosecutors have the discretion to issue a subpoena compelling a spouse to testify against the other spouse.<sup>50</sup>

For instance, in a criminal case where the defendant husband was charged with assaulting and harassing wife, the trial court does not have discretion to quash a prosecution subpoena seeking to compel a victim wife's testimony. See *Commonwealth v. Kirkner*, 805 A.2d 514 (Pa. 2002), discussed earlier in section VI.B.ii – Acts of Violence Against Spouse or Children Exception. In this case, the Pennsylvania Supreme Court commented that the discretion rests with the prosecution regarding whether to subpoena a domestic violence victim to testify about assaults committed by her or his spouse.

**It is important for prosecutors to be careful when using discretion to issue a subpoena for a victim of domestic violence to testify. Requiring a victim to testify may put her at greater risk of harm.**

<sup>49</sup> *Id.* at 721.

<sup>50</sup> See *Commonwealth v. Kirkner*, 805 A.2d 514 (Pa. 2002). The Pennsylvania Supreme Court in *Kirkner* explained that the District Attorney "has the obligation of determining the merits of any prosecution, and the responsibility of requiring appropriate witnesses to testify." *Id.* As such, the District Attorney, not the court, has the discretion to issue a subpoena in any case where a statutory privilege does not apply. *Id.*

As a practical matter, issuing a subpoena compelling a victim of domestic violence to testify against her or his perpetrator may place the victim at greater risk of harm. This is particularly true if the perpetrating spouse faces only minor sentencing for his act. In order to protect against further violence from an abusive spouse, a victim who is subpoenaed to testify against her or his spouse may be hostile or uncooperative on the stand, which would work against the prosecution's case. It is important for a prosecutor to talk with the victim and carefully consider any negative, unintended consequences to the victim before issuing a subpoena to compel a victim to testify.

**See section II: Domestic Violence and Prosecution, section XV: Understanding the Dynamics of an Abusive Relationship, and section XX: Emerging Practice: Understanding Reluctant/Unwilling Victims, for more information about the reasons a victim may be reluctant to testify against her or his perpetrator.**

#### **F. Spousal Privilege and Child Abuse**

In addition to the exception to the spousal incompetency privilege for attempts, threats, or actual bodily injury of either spouse's minor child or a minor child in the care of either spouse,<sup>51</sup> **the Child Protective Services Law provides an explicit exception to both spousal privileges in cases involving child abuse, 23 Pa. C.S. § 6381(c):**

(c) Privileged communications.—Except for privileged communications between a lawyer and a client and between a minister and a penitent, a privilege of confidential communication between husband and wife or between any professional person, including, but not limited to, physicians, psychologists, counselors, employees of hospitals, clinics, day-care centers and schools and their patients or clients shall not constitute grounds for excluding evidence regarding child abuse or the cause of child abuse.

The Pennsylvania Supreme Court discussed the relationship between this provision and the privilege for confidential communications between spouses in *Commonwealth v. Spetzer*.<sup>52</sup> The Court's discussion indicates that spousal privilege would be waived in instances involving child abuse.

#### **VII. Contents of Writings, Recordings – Best Evidence**

Original recordings may be unnecessary under the Best Evidence rule if the content of the recording does not provide evidence of the substantial components

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<sup>51</sup> 42 Pa. C.S. § 5913(2). See above, section E2, for more information about the spousal competency privilege and the exemption for child abuse against either spouse's minor child or a minor child under either spouse's care or supervision.

<sup>52</sup> *Commonwealth v. Spetzer*, 813 A.2d 707, 719 (Pa. 2002).

of the crime. In *Commonwealth v. Fisher*, 764 A.2d 82 (Pa. Super. 2000), the abuser was convicted of assault, child endangerment, and possession of an instrument of a crime. The jury heard testimony from the child victim and heard tapes made by the victim's mother of voice mail messages she received from defendant, her former boyfriend, after the victim's mother and defendant had separated.<sup>53</sup> On appeal, the defendant alleged that the tape recordings made by the victim's mother of his voice mail messages violated the "best evidence" rule. Defendant's voice mail messages expressed sorrow at the termination of victim's mother's relationship with the defendant and anger over the charges pending against defendant. In the taped messages, the defendant claimed no one would believe the victim's mother or her "nut-ball" son.<sup>54</sup> Because the tape recordings did not provide evidence of the substantial components of the offenses for which defendant was convicted, the original voice mail system recordings were unnecessary.<sup>55</sup>

## VIII. Hearsay

### A. Hearsay, Generally

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>56</sup> Hearsay is generally inadmissible at trial, unless an exception applies.

Hearsay is a common issue in domestic violence cases. Domestic violence is a very personal crime, with few outside witnesses. Thus, prosecutors often need to rely on the victim's prior, out-of-court statements to friends, family, or police about the abuse. But a victim's prior, out-of-court statement is hearsay, so to introduce the victim's statements a hearsay exception must apply.

### B. Hearsay Exceptions – Declarant's Availability Immaterial

Certain hearsay exceptions, codified in the Pennsylvania Rules of Evidence, may apply to testimony in domestic violence cases – regardless of the declarant's availability to testify at trial. While the declarant's availability to testify at trial is "immaterial" for these hearsay exceptions, use of the following exceptions may raise Confrontation Clause issues if the declarant is unavailable to testify: because the defendant does not have an opportunity to confront the declarant.<sup>57</sup> The Confrontation Clause does not act as a complete bar to the admission of the following types of hearsay statements, even if the declarant is unavailable, but it does add a layer of complication that must be sorted out before the evidence is admissible at trial.

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<sup>53</sup> *Commonwealth v. Fisher*, 764 A.2d 82, 87-88 (Pa. Super. 2000).

<sup>54</sup> *Fisher*, 764 A.2d. at 88-89.

<sup>55</sup> *Id.*; see also PA. R. EVID. 1003, 1004(4).

<sup>56</sup> PA. R. EVID. 801(c).

<sup>57</sup> See section IX, **Confrontation: Admissibility of Hearsay Statements by Unavailable Witness, for more information about the admissibility of hearsay statements when the victim is unavailable.**

The following exceptions are often applicable in cases involving domestic violence, as they look to the declarant's state of mind when making the statement.

- **Rule 803(1) – Present Sense Impression**

A statement describing an event or condition made while the declarant perceived the event or condition, or immediately thereafter.<sup>58</sup>

Domestic violence perpetrators often isolate their victims using coercive and controlling tactics, so victims are often reluctant to reveal or disclose the abuse to friends, family, or other trusted individuals. However, a victim in distress may call for help and describe the abusive event as it is happening. *Statements describing the abuse – as it is happening* – would fall under the present sense impression exception.

- **Rule 803(2) – Excited Utterance**

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.<sup>59</sup>

Excited utterance is an often-used exception in domestic violence cases for the same reasons noted above for present sense impressions. *Statements made immediately after abuse* would fall within this statement.

- **Rule 803(3) – Then-Existing Mental, Emotional, or Physical Condition**

A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health.<sup>60</sup>

Statements under this exception are not limited to statements made to physicians.

This exception is not often used, but may be helpful in domestic violence cases. A victim's statement to a friend about plans to leave the abuser, for instance, may be admissible under this exception. Or, if the victim is experiencing pain from a recent attack, comments about the physical pain may also be admissible under this exception.

In *Commonwealth v. Chandler*, a murder victim's statements about her marriage and abuse by her husband were admissible as statements of her then-existing state of mind because the victim's opinion of her assailant/husband "went to the presence of ill will, malice, or motive for the killing."<sup>61</sup>

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<sup>58</sup> PA. R. EVID. 803(1).

<sup>59</sup> PA. R. EVID. 803(2).

<sup>60</sup> PA. R. EVID. 803(3).

<sup>61</sup> *Commonwealth v. Chandler*, 721 A.2d 1040 (Pa. 1998).

In *Commonwealth v. Sneeringer*,<sup>62</sup> a murder victim's statements to family and friends that she planned to end her relationship with her abuser were admissible as proof of her intent and was probative of defendant's motive.

In *Commonwealth v. Newman*,<sup>63</sup> a victim's statements to her mother that she planned to return home was admissible as proof of her state of mind and intent and was probative to show that her boyfriend, the defendant, knew she was returning home.

- **Rule 803(6) – Records of Regularly Conducted Activity (Business Records)**

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate a lack of trustworthiness.<sup>64</sup>

The business record exception is often useful in domestic violence prosecutions. For instance, building entry logs or phone records would fall under this exception and could be very useful in showing a defendant's course of conduct in a stalking case.

### C. Hearsay Exceptions – Declarant Available to Testify

The Pennsylvania Rules of Evidence provide for several hearsay exceptions that apply only when the declarant is available for cross-examination.<sup>65</sup> The Confrontation Clause is not an issue when these exceptions apply because the defendant is able to confront the declarant on cross-examination.

- **Rule 803.1(1) – Prior Inconsistent Statement**

A statement that is inconsistent with a declarant's testimony is admissible if the declarant testifies at trial. The prior statement must have been given under oath and subject to perjury, in a signed writing adopted by the declarant, or a verbatim recording of an oral statement.

This exception may be useful in cases where a victim is uncooperative. Victims of domestic violence are often reluctant to cooperate in the prosecution of their perpetrators because they fear harsh retaliation.

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<sup>62</sup> *Commonwealth v. Sneeringer*, 668 A.2d 1167 (Pa. Super. 1995).

<sup>63</sup> *Commonwealth v. Newman*, 555 A.2d 151, 160 (Pa. Super. 1989).

<sup>64</sup> PA. R. EVID. 803(5).

<sup>65</sup> PA. R. EVID. 803.1.

**For more information about a victim’s reluctance to participate in prosecution, see section II: Domestic Violence and Prosecution and section XX: Understanding a Victim’s Reluctance or Unwillingness to Testify.**

**For an illustration of how this exception applies in a domestic violence case, see below, section VIII.E.i.**

- **Rule 803.1(2) – Statement of Identification**

Identification by a witness prior to trial is admissible, provided the witness testifies at trial about the identification.

**D. Hearsay Exceptions – Declarant Unavailable to Testify**

The Pennsylvania Rules of Evidence provide for several hearsay exceptions that apply only when the declarant is unavailable to testify at the hearing.<sup>66</sup> A witness is “unavailable” if they are exempt from testifying based on privilege, refuse to comply with a court order to testify, lack sufficient memory of the subject matter, are deceased or have an existing physical or mental illness, or are unable to be located or procured by reasonable means to testify.<sup>67</sup>

Confrontation issues may arise when using these hearsay exceptions. **See section IX, Confrontation: Admissibility of Hearsay Statements by Unavailable Witness, for more information about the admissibility of hearsay statements when the victim is unavailable in light of defendant’s right to confrontation.**

The following hearsay exceptions may be applicable in domestic violence cases:

- **Rule 804(b)(1) – Former Testimony**

Testimony given by a witness at a previous proceeding or during a deposition is admissible if the witness is unavailable to testify at trial. However, the prior testimony must have been offered against the same defendant or, in a civil trial, against a predecessor in interest. The defendant or predecessor in interest must have had adequate opportunity and a similar motive to develop the testimony through direct, cross, or redirect examination.

- **Rule 804(b)(2) – Statement Under Belief of Impending Death**

Statements uttered when a declarant believes that death is imminent are admissible, provided the statements concern the circumstances of what the declarant believes will be his or her impending death. The declarant does not actually have to die for this exception to apply.

- **Rule 804(b)(6) – Forfeiture by Wrongdoing**

When a party engages in or agrees to wrongdoing intended to make a witness unavailable to testify, the witness’ statements are admissible.

**For more information about admission of statements by an unavailable declarant, and the attendant Confrontation Clause issues, see section IX.**

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<sup>66</sup> PA. R. EVID. 804.

<sup>67</sup> PA. R. EVID. 804(a).

**For information about best practices for working with victims who are reluctant and/or unwilling to testify, see section XX: Emerging Practices: Understanding Reluctant/Unwilling Victims.**

#### **E. Hearsay Exceptions – Selected Case Illustrations**

##### **i. Prior inconsistent statements, victim available for cross examination**

Where the witness is available for cross-examination, the witness' prior inconsistent statement may be used.<sup>68</sup> In *Commonwealth v. Carmody*, 799 A.2d 143 (Pa. Super. 2002), a victim of domestic violence appeared at the police station at 2:00 a.m. to report that the defendant had just assaulted her. The officer observed physical evidence of assault. The police officer asked the victim to go in the back room and write out her statement of events. The victim's written statement described the assault and added that the defendant had threatened to kill her while holding a knife to her throat.

At the preliminary hearing, the victim recanted, claiming that the defendant had not hit or threatened her and testifying instead that she had been drinking that night and had a blackout. As a result, she could not remember any of the events that occurred that night. The officer testified regarding his observations of the victim and produced the victim's written statement.<sup>69</sup> Although the defendant was bound over for trial, he successfully sought *habeas corpus* as to the terroristic threats charge. The defendant claimed that the victim's written statement was inadmissible hearsay and the only evidence against him. The Commonwealth appealed.

On appeal, the Superior Court held that the victim's written statement to the police officer was not an excited utterance because there was a lapse in time and some intervening events had occurred prior to the victim's writing of her statement. However, the Superior Court held that the written statement constituted victim's prior inconsistent statement and was admissible as an exception to the hearsay rule.

A witness' prior inconsistent statement may be admitted for impeachment purposes, but may also be admitted as substantive evidence if it meets the additional requirements of reliability.<sup>70</sup> The two additional requirements are: (1) whether the statement is given under reliable circumstances, and (2) whether the declarant is available for cross-examination. A statement reduced to writing and signed and adopted by the witness meets the reliable circumstances test.<sup>71</sup>

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<sup>68</sup> PA. R. EVID. 803.1(1).

<sup>69</sup> *Commonwealth v. Carmody*, 799 A.2d 143, 145-46 (2002).

<sup>70</sup> *Id.* at 148.

<sup>71</sup> *Id.*

The question in *Carmody* was whether the victim was available for cross-examination. The victim's claim that she wrote the statement during a blackout did not render her unavailable for cross-examination. The Superior Court reversed the *habeas corpus* and remanded.<sup>72</sup>

**ii. Present sense impression – 911 tapes**

Emergency response 911 tapes are evaluated for admissibility based on a balancing test, which requires judges to balance the relevancy of the evidence with the possible prejudicial effect it may have on the jury.<sup>73</sup>

Emergency response 911 tapes are often admitted as a present sense impression exception under the hearsay rules, provided the prejudicial value does not outweigh their probative benefit.<sup>74</sup>

**For more information on the admissibility of statements to a 911 operator or emergency responder, see section IX.D.v.2: Applying the Testimonial Standard to Hearsay Exceptions, Excited Utterances.**

**iii. Present sense impression – victim call to mother**

Present sense impression was the basis for admission of hearsay telephone statements made by the victim to her mother shortly prior to the victim's murder. In *Commonwealth v. Coleman*, 326 A.2d 387 (Pa. 1974), a woman called her mother, told her that the defendant, her boyfriend, would not let her leave the apartment, that he was going to hang up the telephone and kill her. The phone connection ended, and the mother called the police. The police arrived at the daughter's apartment 10 minutes later, and found the defendant on a street nearby. The police subsequently found the daughter murdered in her apartment.

The trial court admitted the daughter's statements as an excited utterance. On appeal, the Pennsylvania Supreme Court held that the statement was not an excited utterance but a statement of present sense impression admissible as a hearsay exception.<sup>75</sup>

**iv. Police reports as business records**

A police report may be admitted pursuant to the Uniform Business Records and Evidence Act, 42 Pa. C.S. § 6108, provided the custodian or other qualified witness testifies to its identity and mode of preparation. Without such authentication at trial, the police report is inadmissible.<sup>76</sup> However, admission of a police report or business record may raise constitutional concerns in criminal cases where the declarant is unavailable to testify.

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<sup>72</sup> *Id.* at 148-49.

<sup>73</sup> *Commonwealth v. Groff*, 514 A.2d 1382 (Pa. Super. 1986) (holding that a 911 tape was prejudicial in nature and should not have been admitted, but that admission was harmless error).

<sup>74</sup> *Commonwealth v. Cunningham*, 805 A.2d 566 (Pa. Super. 2002).

<sup>75</sup> *Commonwealth v. Coleman*, 326 A.2d 387, 389 (Pa. 1974).

<sup>76</sup> *Coda v. Coda*, 666 A.2d 741 (Pa. Super. 1995).

## IX. Confrontation: Admissibility of Hearsay Statements by Unavailable Witness

Even if an out-of-court statement is admissible under a hearsay exception, the Confrontation Clause may bar admission of the statement in a criminal case, depending on the “primary purpose” for which the statement was made.

Confrontation poses a particularly difficult obstacle in domestic violence prosecutions. Prosecutors must often rely on a victim’s hearsay statements to friends, family, law enforcement, or emergency responders. However, the victim is often unavailable or unwilling to cooperate with the prosecution because she or he fears retaliation by the abuser. **See section XX: Emerging Practices: Understanding Reluctant / Unwilling Victims, for more information about why a victim may be reluctant to testify against an abuser.**

While prosecutors generally have an easy time overcoming the hearsay hurdle (see section VII), it is much harder to navigate around the Confrontation issue when the victim is unavailable to testify in court. However, such a task is not impossible. The sections below provide a comprehensive overview of Confrontation jurisprudence.

Below, subsections A – C provide a background to Confrontation Clause jurisprudence. Subsection D provides a step-by-step Confrontation analysis, and subsection E provides a breakdown of relevant exceptions. Subsection F addresses particular challenges with child witnesses and Confrontation.

For further analysis, see section XI: Hearsay, Confrontation, and Domestic Violence, which provides in-depth analysis of Confrontation and hearsay issues in domestic violence prosecutions.

### A. Confrontation Defined

#### i. United States Constitution

The Sixth Amendment of the United States Constitution provides: “[I]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”<sup>77</sup>

#### ii. Pennsylvania Constitution

The Pennsylvania Constitution mirrors the United States Constitution’s Confrontation Clause, and provides defendants with the same protection as the Sixth Amendment Confrontation Clause contained in the United States Constitution.<sup>78</sup>

The Pennsylvania electorate passed a constitutional amendment to the right to confrontation in 2003. The original language of Article I, Section 9, provided that the accused had the right to “meet the witnesses face-to-face.” This language was struck and replaced with the right “to be confronted with the witnesses against him.”

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<sup>77</sup> U.S. CONST. amend VI.

<sup>78</sup> PA. CONST. art. I, § 9 (“In all criminal prosecutions the accused hath a right ... to be confronted with the witnesses against him.”); *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009) (citing *Commonwealth v. Geiger*, 944 A.2d 85, 97 n.6 (Pa. Super. 2008), *appeal denied* 964 A.2d 1 (Pa. 2009)).

The amendment was upheld in *Bergdoll v. Commonwealth*,<sup>79</sup> which held that Pennsylvania’s constitutional amendment did not run afoul of the United States Constitution by removing the “face-to-face” language.

## B. Confrontation and Hearsay

### i. Purpose of confrontation and hearsay

Confrontation and hearsay share common themes. Both require direct testimony of a declarant (an individual who makes a statement out of court), with limited exceptions. These safeguards are designed to ensure that statements admitted into evidence are trustworthy. But the right to confrontation goes a step further to ensure that defendants in a criminal proceeding are able to elicit the truth through cross-examination of their accusers.

**Face-to-face cross-examination is not required, but it is preferred.**

**Face-to-face cross-examination is not required, but it is preferred.** Face-to-face cross-examination “must occasionally give way to considerations of public policy and the necessities of the case.”<sup>80</sup> Courts have allowed closed-circuit, videotaped, or tape-recorded testimony where the victim or witness is particularly vulnerable, too ill to travel, or located outside the United States.<sup>81</sup> However, courts do not generally allow the use of alternative methods for testimony for the purposes of saving resources or judicial efficiency.<sup>82</sup>

This distinction is particularly important in domestic violence prosecutions, as it allows the court to shield particularly vulnerable victims and children from testifying in open court against their abusers.

**For more information on alternatives to face-to-face testimony, see section IX.E and X.F, discussing various alternatives for child witnesses and recognized exceptions to the Confrontation Clause.**

<sup>79</sup> *Bergdoll v. Commonwealth*, 858 A.2d 185 (Pa. Commw. Ct. 2004) (en banc), *aff’d* 874 A.2d 1148 (Pa. 2005).

<sup>80</sup> *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009) (quoting *Maryland v. Craig*, 497 U.S. 836, 840 (1990) (permitting a six-year-old victim of sexual assault and battery to testify via one-way, closed-circuit television)).

<sup>81</sup> *See, e.g.*, *Commonwealth v. Geiger*, 944 A.2d 85 (Pa. Super. 2008) (upholding the admission of prerecorded testimony of a 10-year-old and six-year-old victim of severe child abuse after making a finding that face-to-face testimony in front of defendant would cause the children severe emotional distress); *see also* *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007); *Bush v. Wyoming*, 193 P.3d 203 (Wy. 2008); *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

<sup>82</sup> *Atkinson*, 987 A.2d at 743 (overturning the admission of testimony via video-conferencing by an alleged co-conspirator who was incarcerated in state prison. The prosecution’s interest in “convenience and cost-saving” were not sufficiently compelling reasons to substitute face-to-face confrontation).

### C. Objecting to Out-of-Court Statements – Hearsay and Confrontation

It is important to remember that even if a statement is admissible under the hearsay rules, additional analysis is needed to be sure the statement does not unlawfully prevent a criminal defendant from confronting his or her accuser. Essentially, when hearsay is offered in a criminal case, a defendant may raise three objections: (1) violation of the hearsay rules in the federal or Pennsylvania Rules of Evidence; (2) violation of the Sixth Amendment right to confrontation in the United States Constitution; or (3) violation of the Article 1, Section 9 right to confrontation in the Pennsylvania Constitution.<sup>83</sup>

### D. When Does The Confrontation Clause Apply?

*The Confrontation Clause applies only in criminal cases where the prosecution seeks to admit a testimonial statement of an unavailable witness and the defendant did not have a prior opportunity to cross-examine the witness.*

#### i. Is this a Criminal Case?

The right to confrontation attaches in *criminal* proceedings. It guarantees the right of criminal defendants to confront all witnesses against them. When an individual makes an out-of-court, **testimonial** statement, but is unavailable to testify at a criminal trial, the right to confrontation will bar admission of that statement unless a limited exception applies.

**The Confrontation Clause applies only in *criminal* cases where prosecution seeks to admit a *testimonial* statement of an *unavailable* witness, whom *defendant did not have prior opportunity to cross-examine.***

Confrontation rights apply at all “critical stages” of a criminal proceeding. “A critical stage is a point in the proceeding at which substantive rights may be preserved or lost.”<sup>84</sup> For instance, preliminary and suppression hearings are both critical stages that affect a defendant’s substantive rights and, therefore, confrontation applies.<sup>85</sup>

The right to confrontation does not attach in civil cases.<sup>86</sup> This means that the right of confrontation does not apply in PFA, custody, or divorce proceedings. When an individual makes an out-of-court statement in one of these types of proceedings, but is unavailable to testify at the hearing, the statement is admissible if it fits within a hearsay exception. Confrontation rights do apply to indirect criminal contempt proceedings for violations of a PFA order.

<sup>83</sup> PA. CODE Art. VIII (Hearsay), Introductory Comment.

<sup>84</sup> See, e.g., Commonwealth v. Atkinson, 987 A.2d 743, 747 (Pa. Super. 2009) (citing Commonwealth v. Holzer, 389 A.2d 101, 105 (Pa. 1978)).

<sup>85</sup> See *id.*

<sup>86</sup> United States v. Zucker, 161 U.S. 475, 481 (1896) (“The sixth amendment relates to a prosecution of an accused person which is technically criminal in nature. ... The [confrontation] clause has no reference to any proceeding ... which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed.”).

## ii. Is the Witness Unavailable?

The right to confrontation is only violated when an individual makes an out-of-court statement, but does not testify at trial. If an individual makes an out-of-court statement and testifies at a criminal trial, the right to confrontation is not violated.

The Pennsylvania Rules of Evidence define unavailability in Rule 804(a). Unavailability is limited to the following situations:

- (1) exemption based on privilege;
- (2) refusal, in spite of a court order;
- (3) lack of memory;
- (4) death, injury, or physical/mental illness; or
- (5) inability to subpoena or otherwise reasonably procure attendance.<sup>87</sup>

Spousal incompetency and the spousal communications privilege does not typically shield or prevent a spouse from testifying in cases involving domestic violence.<sup>88</sup> However, victims may be unavailable for the purpose of Rule 804(a) based on subsection (2), refusal to testify in spite of a court order. This refusal to testify may be based on many reasons, but is most often attributable to the victim's fear of retaliation by their abuser. **See section VI: Spousal Testimony: Spousal Incompetency and the Spousal Communications Privilege.**

**Defendant's  
opportunity to cross-  
examine the witness  
must be "full and fair"  
to be admissible.**

## iii. Did the Defendant Have a Prior Opportunity to Cross-Examine the Declarant?

Hearsay statements of an unavailable witness are inadmissible unless the defendant had a "full and fair opportunity to cross-examine" the witness.<sup>89</sup>

Even if the defendant had an opportunity to cross-examine the witness at a preliminary hearing or other phase in a criminal proceeding, that opportunity may not have been "full and fair." A defendant lacks a "full and fair" opportunity for cross-examination "where the defense has been denied access to vital impeachment evidence either at or before the time of the prior proceeding at which that witness testified."<sup>90</sup>

<sup>87</sup> PA. R. EVID. 804(a); *see also* FED. R. EVID. 804(a).

<sup>88</sup> *See* section VI, Spousal Testimony: Spousal Incompetency and the Spousal Communications Privilege.

<sup>89</sup> *See, e.g.,* Commonwealth v. Leak, 22 A.3d 1036, 1044 (Pa. Super. 2011) (citing Commonwealth v. Bazemore, 614 A.2d 684, 688 (Pa. 1992) ("Whether prior testimony was given at trial or at any other proceeding, where, as here, admission of that prior testimony is being sought as substantive evidence against the accused, we conclude that the standard to be applied is that of full and fair opportunity to cross-examine.")).

<sup>90</sup> *See, e.g.,* Leak, 22 A.3d at 1043-46. (citing Bazemore, 614 A.2d at 688).

### 1. Confrontation at Preliminary Hearing:

In *Commonwealth v. Leak*, 22 A.3d 1036 (Pa. Super. 2011), the defendant was not deprived of his right to confrontation when videotaped testimony from the preliminary hearing was admitted at trial.<sup>91</sup> The court explained that the defendant was “on notice” that the witness was terminally ill at the time of the preliminary hearing and, therefore, “had every reason to prepare as if the preliminary hearing would be his only opportunity to cross-examine.” The fact that defense counsel did not have a medical report prior to the preliminary hearing was of no moment because defense counsel did not show that he was denied access or was prevented from subpoenaing the records on his own.

Likewise, in *Commonwealth v. Wholaver*, 989 A.2d 883 (Pa. 2010), the defendant was not deprived of his right to confrontation when prior unsworn statements and statements made at the preliminary hearing were admitted at trial.<sup>92</sup> The defendant was charged with sexually assaulting his two girls. The defendant’s two daughters and wife provided testimony at a preliminary hearing on the sexual offense charges. Trial on the defendant’s sexual assault charges was scheduled for January 13, 2003. Shortly before midnight on December 24, 2002, the defendant fatally shot his wife and daughters. At the defendant’s murder trial, the court admitted the victims’ preliminary hearing testimony. The doctrine of forfeiture by wrongdoing was also raised as grounds to admit the statements, but the court saved that issue for another day, holding instead that confrontation did not apply because the defendant was already given the opportunity to cross-examine the victims’ statements.

Looking to the United States Supreme Court for guidance, the Court explained that **in cases where the purpose of cross-examination is met at a preliminary hearing by “probing into areas such as bias and testing the veracity of the testimony,” the Confrontation requirements in the United States Constitution are met.** The Court noted that Wholaver’s attorney was able to explore bias, motive, inconsistency, outside influence, and veracity in the preliminary hearing and, as such, the defendant was afforded the right to confront witnesses against him.

### 2. Confrontation and Videotaped Deposition:<sup>93</sup>

In *Commonwealth v. McClendon*, 874 A.2d 1223 (Pa. Super. 2005), a videotaped deposition was admissible.<sup>94</sup> Confrontation was not an issue because defendant and defendant’s current attorney were present at the deposition and were given ample opportunity to cross-examine. Further, defendant’s new attorney had ample opportunity to impeach the videotaped deposition with prior sworn statements.

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<sup>91</sup> *Commonwealth v. Leak*, 22 A.3d 1036 (Pa. Super. 2011).

<sup>92</sup> *Commonwealth v. Wholaver*, 989 A.2d 883 (Pa. 2010), *cert. denied*, 131 S. Ct. 332 (2010).

<sup>93</sup> Depositions may be used in criminal proceedings.

<sup>94</sup> 874 A.2d 1223 (Pa. Super. 2005).

### 3. Full and Fair Opportunity to Cross-Examine:

In *Commonwealth v. Kemmerer*, 33 A.3d 39 (Pa. Super. 2011), the court upheld the admission of a child’s statements to a social worker about sexual abuse by the defendant, applying the Tender Years exception.<sup>95</sup> Defendant claimed that he was denied “full and meaningful” cross-examination because “counsel for the defendant never had an opportunity to question the victim in regards to the statement allegedly made to [the social worker] because the victim never testified to the facts contained [in that statement].” The court found that the defendant’s counsel had a full and fair opportunity to cross-examine the child at two stages of the proceeding, at a Tender Years hearing and at the trial, where child testified via closed-circuit television. The court explained that the defendant knew of the social worker’s statement, and knew that it would be admissible at trial. Therefore, the defendant had ample opportunity to question the child about the statement.

***Nontestimonial statements by an unavailable witness are admissible, when the statement falls within an appropriate hearsay exception and meets applicable evidentiary rules.***

Admission of a videotaped deposition of an unavailable witness was upheld in *Commonwealth v. McClendon*, 874 A.2d 1223 (Pa. Super. 2005), in spite of the fact that defendant had a different attorney at trial.<sup>96</sup> The court found that the new attorney “was unable to specify to any meaningful degree how her questions would have differed.” The court further explained that counsel could have impeached the deposition with any prior sworn statements.

#### iv. When the statement is testimonial

Generally, testimonial statements by an unavailable witness are not admissible. Nontestimonial statements by an unavailable witness are generally admissible provided the statement falls within an appropriate hearsay exception and meets other applicable evidentiary rules.

##### 1. Testimonial Statements

Testimonial statements are statements that are “objectively”<sup>97</sup> made for the “primary purpose” of “establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.”<sup>98</sup> Other out-of-court statements are considered nontestimonial and are admissible, subject to any applicable rules of evidence.<sup>99</sup>

<sup>95</sup> 33 A.3d 39 (Pa. Super. 2011).

<sup>96</sup> 874 A.2d 1223 (Pa. Super. 2005).

<sup>97</sup> *Michigan v. Bryant*, 562 U.S. ---, 131 S. Ct. 1143, 1154 (2011) (providing further clarity for the primary purpose test enumerated in *Davis v. Washington*, 547 U.S. 813, 822 (2006)). In *Bryant*, police officers responded to a report that an individual had been shot. The officers found the victim on the ground next to his vehicle, bleeding from the bullet wound. The officers asked the victim who shot him, and the victim identified

## 2. Objective, Primary Purpose Test

To make a determination on the admissibility of a statement, courts must examine the totality of the circumstances surrounding the statement.

Relevant factors include:

- The presence of an ongoing emergency to an individual, first responders, or the public<sup>100</sup>
- The individual's medical condition<sup>101</sup>
- The type of weapon involved
- The objective perspective of the declarant, accounting for the declarant's age and experience at the time the statement was made<sup>102</sup>
- The objective perspective of the interrogator
- Whether the statement fits within a hearsay exception<sup>103</sup>
- Other relevant circumstances.

While some factors – such as the existence of an ongoing emergency – may have additional weight, no one factor is dispositive.<sup>104</sup>

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the defendant and explained that he had driven 6 blocks to the gas station from the house where he was shot. This led police to the defendant's house, where they found traces of the victim's blood and a bullet. The Court found that the victim's statements to police were nontestimonial because, when accounting for all facts and circumstances, the objective purpose of the police interrogation and the victim's statements was to respond to an ongoing emergency. The *Bryant* Court explained that the primary purpose inquiry is objective, explaining:

The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

*Id.* at 1156.

<sup>98</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also Bryant*, 562 U.S. at ---, 131 S. Ct. at 1142.

<sup>99</sup> *Whorton v. Bockting*, 549 U.S. 406 (2007). *Whorton v. Bockting* eliminated any confusion over the vitality of *Ohio v. Roberts*, which required all hearsay statements by an unavailable witness to have an indicia of reliability. *Id.* at 420. The *Whorton* Court definitively stated, "the Confrontation Clause has no application to [nontestimonial] statements." *Id.*

<sup>100</sup> "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Michigan v. Bryant*, 562 U.S. ---, 131 S.Ct. 1143, 1148 (2011).

<sup>101</sup> *Id.* at 1148 ("A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.").

<sup>102</sup> *Commonwealth v. Allshouse*, No. 55 WAP 2008, at 25 (Pa. Jan. 20, 2012) (explaining that, while age is not "determinative," it is a factor that "should be evaluated under the primary purpose test.").

<sup>103</sup> *Bryant*, 131 S.Ct. at n.9 ("Many other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for the purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions."); *Bullcoming v. New Mexico*, 564 U.S. ---, n.1 (2011) (Sotomayor, J., concurring) ("Bryant deemed reliability, as reflected in the hearsay rules, to be 'relevant', [but] not 'essential'").

<sup>104</sup> *Allshouse*, No. 55 WAP 2008, at 17 ("Although the existence – actual or perceived – of an ongoing emergency is one of the most important factors, this factor is not dispositive because there may be other

### 3. Objective Standard Is Case-Specific

When examining whether the declarant reasonably believed that their statement would be used for later prosecution, **one must examine the declarant's belief from the declarant's position at the time the statement was made.**<sup>105</sup> Adopting the Colorado Supreme Court's analysis, the Pennsylvania Supreme Court explained:

An assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant.<sup>106</sup>

#### v. Applying the "Testimonial" Standard to Select Hearsay Exceptions

Applying the objective, primary purpose test does not necessarily lead to a clear answer to whether Confrontation rights will apply. The courts have examined whether several types of hearsay statements are, by their very nature, testimonial or nontestimonial. The following offers a breakdown of the leading cases that provide guidance for whether a particular statement is testimonial or nontestimonial. While some of the following hearsay exceptions are not necessarily applicable in domestic violence prosecutions, the rationale from these cases may foreshadow how the court will rule on statements that are relevant in domestic violence prosecutions.

##### 1. Dying Declarations

"[D]ying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause."<sup>107</sup> The Supreme Court has not directly addressed whether this exception will defeat all Confrontation Clause objections, but several opinions have alluded to the fact that dying declarations are still a recognized exception.<sup>108</sup> Justice Ginsburg elaborated on the possible exception in her dissenting opinion in *Michigan v. Bryant*:

The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception ... applied to statements made by a person about to die and aware that death was imminent.<sup>109</sup>

Recently, state courts have begun to recognize dying declarations as an exception to the Confrontation Clause.<sup>110</sup>

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circumstances, outside of an ongoing emergency, where a statement is obtained for the purpose other than for later use in criminal proceedings.").

<sup>105</sup> *Id.* at 25-26 (quoting *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006)).

<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *Bryant*, 131 S. Ct. at n.1 (citing *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *Giles v. California*, 554 U.S. 353, 358-59 (2008)).

<sup>108</sup> See *Crawford*, 541 U.S. at 56; *Giles*, 554 U.S. at 358-59; *Bryant*, 131 S. Ct. at n.1.

<sup>109</sup> *Bryant*, 131 S. Ct. at 1176-77 (Ginsburg, J., dissenting) (internal citations omitted).

<sup>110</sup> See, e.g., *Cobb v. State*, 16 So.3d 207 (Fla. Dist. Ct. App. 2009) ("[A] dying declaration is an exception to the Sixth Amendment's Confrontation Clause."); *State v. Beauchamp*, 796 N.W.2d 780 (Wi. 2011); *Satterwhite v. Virginia*, 695 S.E.2d 555 (Va. Ct. App. 2010).

## 2. Excited Utterances

When a hearsay statement is admissible under the excited utterance exception, it may be admissible if the circumstances indicate that the individual making the statement did not anticipate that the statement would be used for future prosecution at the time the statement was made.

In *Davis v. Washington*, 547 U.S. 813 (2006), a victim's statements to a 911 operator were nontestimonial because the statements were made in the context of an ongoing emergency.<sup>111</sup> At the time of the call, the victim – the defendant's ex-girlfriend – did not know where the defendant was, so the danger of another assault was ongoing. The defendant had fled after breaking into his ex-girlfriend's apartment and assaulting her. The *Davis* Court explained that the victim was describing events as they were occurring while facing an ongoing emergency, rather than describing past events.

In *Hammon v. Indiana*, 547 U.S. 813 (2006), a victim's statements to police about an attack were testimonial.<sup>112</sup> There, the victim's husband broke the glass door on their wood furnace, flames were coming out of the furnace, and husband threw his wife on the ground into the broken furnace glass. The Court explained that, at the time the statements were made, police had diffused the argument and separated the parties into different rooms, so the emergency was no longer "ongoing."

\*Note: The Supreme Court mentioned this case in *Bryant*, explaining that the outcome would have been different if the defendant had a firearm or other weapon because the threat to the victim – in spite of the physical separation between the victim and defendant – would have been ongoing.<sup>113</sup>

In *United States v. Hinton*, 423 F.3d 355 (3d Cir. 2005), statements made to a 911 operator to report that the defendant threatened the caller with a firearm were nontestimonial. Recognizing that some 911 calls are made with the motive to "bear testimony," such circumstances were absent from this case. The court found that the "most likely reason for a 911 call is for health or safety" and, thus, the call was nontestimonial.

The court held that statements to police identifying defendant, while declarant was in the police cruiser looking for his assailant, were testimonial and improperly admitted at trial.

In *Commonwealth v. Gray*, 867 A.2d 560 (3d Cir. 2005), statements made to police at a crime scene were nontestimonial.<sup>114</sup> The declarant, a young pregnant woman, was attacked by her mother's boyfriend shortly before the statements were made, and the statements were made to get help. The boyfriend was still in the process of attacking declarant's mother, stabbing her in the arm, face, and head with a knife and a screwdriver.

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<sup>111</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>112</sup> *Id.* (companion case, decided in conjunction with *Davis v. Washington*).

<sup>113</sup> *Bryant*, 131 S. Ct. at 1148.

<sup>114</sup> *Commonwealth v. Gray*, 867 A.2d 560, 577 (Pa. Super. 2005).

The court explained that the young woman was not subject to “formal, structured police interrogation” and volunteered the information in an attempt to diffuse an emergency. The court found that it was unreasonable to conclude that an objective witness in this situation would have known that their statements would be used for future prosecution.

In *Commonwealth v. Abrue*, 11 A.3d 484 (Pa. Super. 2010), a police officer’s statements to a fellow officer immediately after an altercation with the defendant, a prisoner, were testimonial. The court explained that the officer’s description of the events to his fellow officer was “precisely what a witness does on direct examination” and, as a result, was a “weaker substitute for live testimony.”

### **3. Statements for the Purpose of Medical Treatment**

Statements to medical personnel are nontestimonial when the statement is made for the primary purpose of obtaining medical treatment. However, when a statement to medical personnel is elicited for the primary purpose of future litigation or at the direction of police, the statement may be considered testimonial.<sup>115</sup>

**For information on statements by children to medical personnel, see section IX.F.v. Child Witness Statements, Child Statements to Medical Personnel.**

In *Green v. Maryland*, 22 A.3d 941 (Md. Ct. App. 2011), the victim of sexual assault was treated at a hospital. After her release, the police sent her to a sexual assault specialist for a second examination. The *Green* court found that a medical report from the sexual assault specialist, and the statements contained therein, was inadmissible testimonial evidence because the report was conducted at the request of police and was not “for treatment purposes.” The report of her initial treatment was admitted with limited redaction. The second report was not for the purpose of health assessment. To the contrary, the second report was prepared with the objective intent of gathering evidence for future prosecution, so the second report was deemed testimonial and was inadmissible at trial.

### **4. Reports - Forensic Reporting**

Forensic laboratory reports are testimonial. Therefore, to properly admit a forensic laboratory report, the preparer of the report must testify in court or must have been subject to cross-examination by the defendant before trial. “Surrogate testimony ... does not meet the constitutional requirement.

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<sup>115</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009); *Bryant*, 131 S. Ct. at n.2; *Giles*, 554 U.S. at 376 (“[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”).

The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."<sup>116</sup>

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009), signed certificates from the state laboratory that identified a white powdery substance as cocaine and connected the cocaine to defendant were inadmissible, in violation of the Confrontation Clause. Absent testimony by the analysts who certified the certificate, the evidence could not be admitted. The Court explained that the certificates are affidavits and, therefore, fall within a "core class of testimonial statements."<sup>117</sup>

In *Bullcoming v. New Mexico*, 564 U.S. ---, 131 S. Ct. 2705 (2011), the defendant was convicted of an aggravated driving-while-intoxicated charge based on a forensic lab report that indicated the defendant's blood alcohol level was .21 grams per hundred milliliters, "an *inordinately* high level." The analyst who certified the report was unavailable to testify at the hearing because he was placed on unpaid leave for an undisclosed reason prior to the hearing. The prosecution presented testimony from an alternative analyst, who was a qualified expert in the type of technology used to measure the defendant's blood alcohol level.

The Supreme Court reversed and remanded the decision for a new hearing, finding that the forensic laboratory report was testimonial. In doing so, the *Bullcoming* Court reasoned:

[S]urrogate testimony of the kind [the testifying witness] was equipped to give could not convey what [the certifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part.<sup>118</sup>

The Court dismissed the claim that the original analyst was a "mere scrivener" because the report contained "more than a machine generated number." The analyst certified that he received an intact blood sample, followed appropriate procedures, and did not encounter circumstances or conditions that would affect the validity of the results. The Court further explained that if the original analyst were to have testified, the defense counsel could have inquired into the analyst's proficiency, veracity, and attention to detail. Additionally, defense counsel could have inquired into the reason for the analyst's unpaid leave.

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<sup>116</sup> *Bullcoming v. New Mexico*, 569 U.S. ---, 131 S. Ct. 2705, 2707 (2011); *see also Melendez-Diaz*, 557 U.S. 305.

<sup>117</sup> *Melendez-Diaz*, 557 U.S. 305.

<sup>118</sup> *Id.* at 2715.

The Court also dismissed the argument that the substitute analyst's statement was admissible because it was "sworn," while the original analyst's certification was "unsworn." The Court explained that the original certification was "formalized" in a signed document and, thus, the lack of notarization did not remove it from the Confrontation Clause analysis.

In *Williams v. Illinois*, 567 U.S. ---, 132 S. Ct. 2221 (June 18, 2012), the United States Supreme Court issued a splintered decision on the issue of whether an expert could testify to the contents of a forensic report that he or she did not prepare in order to explain the basis of the expert's opinion. The prosecutor argued that using the report in this manner was not to prove the truth of the matter asserted" and, therefore, was not barred by Confrontation.

Five justices ultimately upheld admission of the report. However, only four justices joined in the plurality's rationale, which agreed with the prosecutor that the report was not offered for its truth and, therefore, did not violate the Confrontation Clause. The plurality added that the report in question was nontestimonial because there was no suspect identified at the time the report was issued. Justice Thomas, who concurred in the result, disagreed with both rationales. He explained in his concurring opinion that his sole reason for concurring in the result was his belief that the report was not testimonial because it lacked "formality and solemnity." The dissent took issue with both the plurality and the concurring opinions.

The only rationale that was joined by a majority of justices was a portion of the dissenting opinion. The dissenters, joined by Justice Thomas, rejected the assertion that the report was not used to prove the truth of the matter asserted. Rather, they argued that there was no distinction between this case and the decisions in *Bullcoming* and *Melendez-Diaz*. Based on this single unified rationale, it is reasonable to conclude the court will reject future cases that rely on the technical distinction between the use of a report to prove the truth of the matter asserted and use of a report to explain the basis of an expert's opinion.

The Pennsylvania Superior Court held in *Commonwealth v. Barton-Martin*, 5 A.3d 363 (Pa. Super. 2010), that, pursuant to *Melendez-Diaz*, "a mere custodian of records, otherwise unconnected to the performance of the analysis of the blood sample at issue, does not satisfy the confrontation clause."<sup>119</sup> The Court explained that, as in *Bullcoming*, a substitute analyst could not testify in lieu of the analyst who performed the test unless the prosecution showed that the analyst who performed the test was subject to prior cross-examination by the defendant.

In *Commonwealth v. Yohe*, 39 A.3d 381 (Pa. Super. 2011), the prosecution introduced a blood alcohol report through the testimony of a toxicologist who reviewed and certified the data, but who did not actually perform the toxicology tests. The Pennsylvania Superior Court upheld the introduction of the report and distinguished *Bullcoming* and *Barton-Martin*, which found the

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<sup>119</sup> *Barton-Martin*, 5 A.3d at 368-69.

testimony of a surrogate analyst insufficient to meet Confrontation requirements. It explained that the testifying witness in the case at hand certified the results and authored the report and, therefore, the fact that the testifying witness did not perform the actual test “may be an issue relevant to the weight of the certification, but it is not a confrontation issue.”<sup>120</sup>

### **5. Reports – Nontestimonial Use of Reports**

A defendant is not entitled to confront the preparer of a report when the report is not testimonial. In other words, when a report is created under circumstances that reasonably indicate that the report preparer did not create the report to be used in later prosecution, the report is admissible notwithstanding confrontation of the report’s preparer.

### **6. Reports – Machine-generated**

Purely machine-generated reports are likely nontestimonial, but there is little case law addressing this issue to date.

The Supreme Court found, in *Bullcoming*, that the analyst’s report was barred by the Confrontation Clause based on the analyst’s characterization of the blood alcohol content level as “inordinately high.” In her concurring opinion, Justice Sotomayor wrote to distinguish the case from a purely machine-generated report, “such as a printout from a chromatograph” that is used to measure blood alcohol level. She explained that a purely machine-generated report is more likely to be admissible.

### **7. Reports – Chain of Custody / Accuracy of Machine**

In *Commonwealth v. Dyarman*, 33 A.3d 104 (Pa. Super. 2011), the Pennsylvania Superior Court held that calibration logs admitted to establish a chain of custody and to verify the accuracy of equipment were not testimonial. The logs were not used to establish an element of a crime for a particular prosecution and, therefore, admission of the logs did not violate Confrontation Clause requirements. The *Dyarman* court pointed to dicta from *Melendez-Diaz* to support its decision:

While ... it is an obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called.<sup>121</sup>

### **8. Medical reports**

Medical reports that are created for the primary purpose of medical treatment are nontestimonial.<sup>122</sup> However, when a medical report is created by direction of police, the report may be considered testimonial.

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<sup>120</sup> *Yohe*, 39 A.3d at 390.

<sup>121</sup> *Dyarman*, at 105 (quoting *Melendez-Diaz*, 129 S. Ct. 2532 n.1).

<sup>122</sup> *Melendez-Diaz*, 129 S. Ct. 2527; *Bryant*, 131 S. Ct. at n.2; *Giles*, 554 U.S. at 376 (“[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”).

**For information on the admissibility of a declarant’s statements to medical personnel contained in medical reports, see section IX.D.v.3: Statements for the Purpose of Medical Treatment.**

**9. Records**

Business and public records are generally considered *nontestimonial* because business and public records are “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.”<sup>123</sup>

**10. Certificate of Non-Record**

A certificate attesting to the absence of a record is a violation of the Confrontation Clause in the Second, Third, Fifth, Ninth, and D.C. Circuits<sup>124</sup> because a certificate of non-record is exclusively prepared for trial. For example in those jurisdictions, a record showing who accessed a secure building cannot be introduced to show that a particular individual never accessed that building unless the person who created the record testifies at trial.

**E. Confrontation Exceptions – When Are Testimonial Statements Admissible?**

**i. Prior Opportunity to Cross-Examine**

Testimonial statements are admissible when the defendant had a prior opportunity to cross-examine. See **Section IX.D. - When Does The Confrontation Clause Apply?**

**ii. Statements Offered to Prove Something Other Than the Truth**

Testimonial statements are generally admissible when they are offered to prove something other than the truth of the matter asserted.<sup>125</sup> In *Commonwealth v. Detsch*, 2011 Pa. D. & C.5<sup>th</sup> 118 (Pa. C.P. Berks July 14, 2010), *aff’d* 24 A.3d 455 (Pa. Super. 2011), *cert. denied* 29 A.3d 795 (Pa. 2011), a letter from Brazilian law enforcement that connected pictures found in defendant’s computer files to a series of child pornography photos was admissible. This letter was clearly testimonial because it was prepared by law enforcement to assist in a criminal investigation, but the letter was nonetheless admissible. The trial court expressly limited admission of the letter to explain the actions of a detective in the investigation, and not to prove whether the photos, in fact, met the definition of child pornography. Confrontation was no longer an issue because the letter was not admitted to prove the truth of the matter asserted.

<sup>123</sup> *Melendez-Diaz*, 129 S. Ct. at 2539.

<sup>124</sup> *United States v. Madarikan*, 356 Fed.Appx. 532 (2d Cir. 2009); *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010); *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010); *Tabaka v. District of Columbia*, 976 A.2d 173 (D.C. Cir. 2009); *see also* *Gov’t of the Virgin Islands v. Gumbs*, 2011 U.S. App. LEXIS 9322 (3d Cir. May 4, 2011) (non-precedential opinion).

<sup>125</sup> *Cf. Williams v. Illinois*, 132 S. Ct. 2221 (June 18, 2012). In *Williams*, the Court examined whether an expert who did not prepare a report could testify to a report’s contents to explain the basis of their opinion. A majority of justices affirmed use of the report in this case, but the rationale for this holding was not joined by a majority of the justices. The dissent, which was in relevant part joined by Justice Thomas, rejected the notion that the expert’s testimony concerning the report was not offered for its truth, reasoning that the report would otherwise have no relevance to the case or the expert’s opinion. See section IX.D.v.4 for additional discussion of the holding and rationale in *Williams*.

### iii. Forfeiture by Wrongdoing

Testimonial statements are admissible when the defendant *intentionally* caused the witness' unavailability. As with all evidentiary rulings, the defendant's intent to make the witness unavailable must be shown by a preponderance of the evidence.<sup>126</sup> However, **the nature of the substantive proof necessary to meet the intent requirement is the subject of considerable disagreement. It is unclear whether general proof of a defendant's history of isolation and control over a victim is sufficient to prove intent to make the witness unavailable, or whether more specific evidence of intentional witness tampering is required.**

In *Giles v. California*, 554 U.S. 353 (2008), the defendant was on trial for the murder of his ex-girlfriend, Avie. At trial, the prosecutor admitted testimony from a police officer who had responded to a domestic violence call three weeks earlier. The police officer testified that Avie was crying and told the officer that Giles assaulted her, choked her, punched her in the face and head, and threatened her with a knife, saying "If I catch you fucking around I'll kill you."<sup>127</sup>

The United States Supreme Court upheld the validity of the forfeiture doctrine, but found that the defendant must have "engaged in conduct *designed* to prevent the witness from testifying."<sup>128</sup> The Court remanded to the lower court for further findings on the defendant's specific intent to make Avie unavailable to testify.

On remand, the appellate court found that the prosecutor failed to present sufficient evidence that the defendant killed Avie with intent to prevent her from testifying or cooperating with prosecution.<sup>129</sup> However, the Court left the door open for the prosecutor to present evidence of the defendant's intent in a retrial.

#### ***Intent to Cause Unavailability: Applying Giles to Domestic Violence Cases –***

Careful examination of the various opinions filed in *Giles* provides some guidance about the level of proof necessary to meet the intent requirement for the forfeiture doctrine. Five justices – including Justices Souter, Ginsburg, Breyer, Kennedy, and Stevens – agreed that evidence of a history of domestic violence, "which is meant to isolate the victim from outside help," is sufficient to meet the intent requirement for the forfeiture doctrine to apply.<sup>130</sup>

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<sup>126</sup> PA. R. EVID. 104; *Davis*, 547 U.S. at 833 (observing that the "preponderance of the evidence" standard is the standard used for making these sorts of evidentiary decisions); *see also* *Ridgeway v. Conway*, 2011 U.S. Dist. LEXIS 92228 (W.D.N.Y. Aug. 18, 2011).

<sup>127</sup> *People v. Giles*, 2d Crim. No. B166937 (Ca. Ct. App. Feb. 25, 2009) (unpublished opinion).

<sup>128</sup> *Giles*, 554 U.S. at 359-60 (emphasis in original).

<sup>129</sup> *People v. Giles*, 2d Crim. No. B166937 (Ca. Ct. App. Feb. 25, 2009) (unpublished opinion).

<sup>130</sup> *Giles*, 553 U.S. at 380 (Souter, J. & Ginsburg, J. concurring).

Justice Scalia also honed in on the unique nature of a domestic violence relationship, explaining that “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”<sup>131</sup> Scalia then concluded that “[e]arlier abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help would be highly relevant to this inquiry.”<sup>132</sup>

#### iv. Tape-Recorded Testimony and Video-Conferencing

The use of tape-recorded testimony or video-conferencing as a substitute for face-to-face testimony is appropriate in some cases where the use of such technology is necessary to serve a compelling state interest. Before allowing the use of such technology, the court must “have . . . an evidentiary hearing to determine if video testimony [is] warranted based on the specific facts relating to an individual witness.”<sup>133</sup> So, notice must be given prior to trial that this type of alternative technology will be requested.

##### 1. Two-Way Video Testimony

At the initial hearing in *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009), the trial court allowed an alleged co-conspirator to testify via two-way, video-conferencing technology. At the time, the co-conspirator was incarcerated in state prison. On appeal, the Superior Court found that the use of video-conferencing was not supported by a compelling state interest and, therefore, was unconstitutional. But, because the testimony was cumulative, the error was harmless and the trial court’s ultimate decision was upheld. In finding the testimony unconstitutional, the Superior Court explained that “convenience and cost-saving are not sufficient reasons to deny constitutional rights.”

In reaching its decision, the court drew from *Maryland v. Craig*,<sup>134</sup> where the United States Supreme Court allowed for a “necessity-based exception for face-to-face, in-courtroom confrontation where the witness’ inability to testify invokes the state’s interest in protecting the witness – from trauma in child sexual abuse or . . . from physical danger or suffering.”<sup>135</sup> The *Atkinson* court articulated a test from *Craig*, finding that the right to face-to-face courtroom confrontation gives way when there is both sufficiently compelling public policy and where the testimony has indicia of reliability.

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<sup>131</sup> *Id.* at 377 (Scalia, J. majority).

<sup>132</sup> *Id.*

<sup>133</sup> *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009).

<sup>134</sup> *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>135</sup> *Atkinson*, 987 A.2d 743 (quoting *Horn v. Quarterman*, 508 F.3d 305 (5th Cir. 2007)) (citing *Maryland v. Craig*, 497 U.S. 836 (1990)).

## 2. Closed-Circuit, One-Way Video Testimony

In *Commonwealth v. Geiger*, 987 A.2d 743 (Pa. Super. 2008), the defendant was convicted of third degree murder, criminal conspiracy, and endangering the welfare of children for her role in the death of her niece and the severe neglect and abuse of three other nieces.<sup>136</sup> At her trial, the three surviving nieces testified via closed-circuit, one-way video. In accordance with the Pennsylvania statute regarding recorded testimony, 42 Pa. C.S. § 5984.1, the defendant was able to hear and observe the testimony, but the children were not able to see or hear the defendant. The prosecutor, counsel for the defendant, the court reporter, the children's psychiatric counselor, and the children's foster parents were in the room with the children. The court also allowed the defendant to cross-examine the children through her counsel by notifying the court that she had a question. And, before allowing the closed-circuit testimony, the court heard testimony from a child psychologist that "face-to-face confrontation ... would cause [the children] 'severe emotional distress.'" The court accepted this conclusion, finding that subjecting the children to testifying in front of the defendant "would cause the girls serious emotional distress, and would impair their ability to testify accurately and honestly."

The use of closed-circuit, one-way video testimony was upheld on appeal. The Superior Court relied on the United States Supreme Court's decision in *Maryland v. Craig*,<sup>137</sup> which "recognized the difficulties that child victims may experience when they are asked to confront their abusers face-to-face." The *Craig* Court upheld the use of testimony by children via one-way, closed-circuit video, explaining that the "right to face-to-face confrontation is not absolute and the state may infringe upon this right to protect a compelling state interest." The Court explained that protecting "the mental and physical well-being of a child" is sufficiently compelling to warrant infringement on the constitutional right to face-to-face confrontation.

In *Kemmerer*, 2011 PA Super 220 (Oct. 14, 2011), a child's testimony via closed-circuit testimony was sufficient to meet the Confrontation Clause requirements.<sup>138</sup> And, because the child testified via closed-circuit television, other statements by the child were able to come in without raising Confrontation concerns.

**For more information on the use of one-way, closed-circuit testimony for children, see XI.F.ii: Child Witness Statements, Child Testimony via Contemporaneous Alternative Method.**

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<sup>136</sup> See also *Commonwealth v. Kemmerer*, 2011 PA Super 220 (Oct. 14, 2011). **For a discussion on *Kemmerer*, see footnote 95 and accompanying text.**

<sup>137</sup> *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>138</sup> *Id.*; see also 42 Pa. C.S. § 5985.

## F. Child Witness Statements

There are a variety of ways to introduce child witness statements without requiring face-to-face cross-examination of the child. Even though *Bryant* expands the court's inquiry to look at the objective primary purpose of the declarant and the objective intent of the interrogator, the following legal conventions and case law indicate that child witness statements can still be introduced without requiring the child to testify in open court.

### i. Tender Years Exception

The Tender Years exception<sup>139</sup> allows a child victim's out-of-court statements to be admitted at trial when the statements are relevant and possess indicia of reliability, as determined by the circumstances at the time the statements were made. This exception only applies to statements made when the child was 12 years of age or younger.<sup>140</sup>

It is important to note that prosecutors must provide the adverse party with notice of their intent to invoke the Tender Years exception and "the particulars of the statement."<sup>141</sup> Such notice must be "sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement."<sup>142</sup>

Applying the objective, primary purpose test to statements that fit within the Tender Years exception requires a case-by-case analysis of the underlying facts of the case.

Pursuant to the objective, primary purpose test enumerated in *Bryant*, courts must examine all of the attendant circumstances to determine whether the child's statements were testimonial, including the objective intent of both the child and the interrogator, the age and experience of the child, whether there is an ongoing emergency, and any other relevant factor.<sup>143</sup>

**For more information about the factors and applicable standards for the objective primary purpose test, see sections IX.D.iv-v.**

As a result of the nature of child interrogation, the crux of this inquiry will often rest on the balance between the child and the interrogator's objective intent. For instance, a child of tender years is unlikely to objectively believe that his or her statements to a social worker or a doctor will be used in a criminal trial.

However, a social worker or a doctor likely sets out to gather information from the child for that very purpose.

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<sup>139</sup> Tender Years Hearsay Act, 42 PA. C.S. § 5985.1(a).

<sup>140</sup> *Id.*

<sup>141</sup> 42 PA. C.S. § 5985.1(b).

<sup>142</sup> *Id.*

<sup>143</sup> Commonwealth v. Allshouse, No. 55 WAP 2008, at 25 (Pa. Jan. 20, 2012). It is important to note that the objective intent of the declarant is determined by looking to the expectations of a reasonable person in the position of the declarant. "Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis." *Id.* (quoting *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006)).

**ii. Child testimony via contemporaneous alternative method**

In Pennsylvania, any prosecution involving a child victim or child material witness “may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method.”<sup>144</sup> The attorney for the defendant, along with the Commonwealth, the judge, the court reporter, and other necessary persons are allowed in the room, but the court “shall ensure that the child cannot hear or see the defendant.”<sup>145</sup>

Before allowing the use of a contemporaneous method of testimony, the court is required to determine whether testifying in open court will cause the child to suffer “serious emotional distress that would substantially impair the child victim’s or material witness’ ability to reasonably communicate.”<sup>146</sup>

**For more information on the use of Contemporaneous Alternative Testimony by a Child, see below – section XI.E.iv: Testimonial Statements Admissible in Certain Situations, Tape-Recorded Testimony and Video-Conferencing.**

**iii. Child statements to family members and other civilians**

In *New Jersey v. Coder*, 968 A.2d 1175 (N.J. 2009), statements by a three-year-old to her mother about a sexual assault by defendant, the apartment superintendent, were nontestimonial and, therefore, admissible in court despite Confrontation Clause objections by the defendant. The court explained that the statements “lack[ed] any indicia that they resulted from law enforcement efforts ‘to establish or prove past events potentially relevant to later criminal prosecution.’”

**iv. Child statements to social workers**

In *Commonwealth v. Allshouse* (*Allshouse I & II*), 985 A.2d 847 (Pa. 2009), the Pennsylvania Supreme Court found that a four-year-old child’s statements to a social worker about how her father twisted and dislocated her infant brother’s arm were not testimonial.<sup>147</sup> The court applied the initial primary purpose test established in *Davis*, which looked to whether there was an ongoing emergency and whether the primary purpose of the interrogation was to establish past events. The court found that there was an ongoing emergency, even though the child was questioned seven days after the incident, and had been relocated to her grandparents’ house. The court explained that there was sufficient question about whether the child was subject to ongoing abuse, so the emergency was ongoing.

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<sup>144</sup> 42 PA. C.S. § 5985.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Commonwealth v. Allshouse* (*Allshouse I*), 985 A.2d 847 (Pa. 2009), *vacated & remanded* *Allshouse v. Pennsylvania*, --- U.S. ---, 131 S. Ct. 1597 (2011), *affirmed* *Commonwealth v. Allshouse* (*Allshouse II*), No. 55 WAP 2008 (Pa. Jan. 21, 2012).

The court also explained that the primary purpose of the child should be examined objectively, based on what a child that age and of average maturity and intellect would believe. The court noted that the social worker did not wear a badge, and that the social worker was charged with ensuring the child's safety, which meant that the purpose of the social worker's inquiry was only partially investigatory. But ultimately, the court found that there was an ongoing emergency, and concluded that the statement was nontestimonial without looking to the primary purpose of the interrogation.

Finally, the court explained that even if the statement was testimonial, the statement was duplicative and, therefore, admission of the child's statements to the social worker was harmless error. The child also made statements to her mother, which the court found to be nontestimonial and, therefore, admissible under the Tender Years exception without raising Confrontation issues.

The decision in *Allshouse I* was appealed to the United States Supreme Court, which remanded the case to the Pennsylvania Supreme Court for a decision consistent with the United States Supreme Court's holding in *Michigan v. Bryant*.<sup>148</sup> On its second review of the case, the Pennsylvania Supreme Court in *Commonwealth v. Allshouse (Allshouse II)*, No. 55 WAP 2008 (Pa. Jan. 20, 2012), affirmed the holding in *Allshouse I*, finding that the child's statements were nontestimonial and admissible under the Tender Years exception.

In relevant part, the court in *Allshouse II* found that, pursuant to the objective primary purpose test enumerated in *Bryant*, the child's statement was not for future prosecution. The court looked to whether the emergency was ongoing and to the formality of the inquiry, in light of the age and capacity of the child.

### **1. Ongoing emergency:**

The court first addressed whether there was an ongoing emergency in the case, and explained that it was an important part of the inquiry, but was not dispositive.<sup>149</sup> The court found that this factor was met because father had alleged that the 4-year-old child was responsible for the infant's broken arm. The court found that, even though the children were removed from the defendant's home, the infant's safety was still at issue.

In a concurring opinion, Justice Castille explained "investigative efforts undertaken by county agencies responsible for child protection services" should typically be considered nontestimonial, given the fact that the statutory purpose of Children and Youth Services is to "provid[e] protective services to prevent further abuses to children."<sup>150</sup>

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<sup>148</sup> *Allshouse v. Pennsylvania*, --- U.S. ---, 131 S. Ct. 1597 (2011).

<sup>149</sup> *Allshouse II*, No. 55 WAP 2008, at 15-16 ("[T]he existence of an emergency is not the end of the inquiry.")

<sup>150</sup> *Id.* (Castille, J., concurring) (quoting 23 Pa. C.S. § 6362) ("[M]y best prediction of the High Court's response to Pennsylvania child protection services investigations by county agencies, in terms of the new Confrontation Clause regime, is that it will afford substantial weight to the legislative design defining the agencies' purposes in terms of the provision of essential services.")

## 2. Formality of the investigation:

The court next found that the lack of formality in the interview was significant, and supported the conclusion that the primary purpose of the interview was not to obtain testimony. The interviewer was dressed in jeans, and he sat on the porch. Moreover, the interview was “cut short” when the child’s brother interrupted. The court explained that it was necessary to view these circumstances in the context of the child’s age, capacity, and experience, as these factors contributed to totality of the circumstances.

In total, these factors allowed the court in *Allshouse II* to conclude that the statements were nontestimonial and, therefore, admissible pursuant to the Tender Years exception.

In contrast, the court in *Allshouse II* explained that statements to a physician who interviewed the child a week after the Children and Youth Services worker at the physician’s office may have been testimonial based on the formality and potential lack of ongoing emergency.<sup>151</sup> However, the court declined to opine on the admissibility of the statements because it found that any error was harmless error because the statements were cumulative.

Consistent with Justice Castille’s conclusion that statements made to child protective services investigators are nontestimonial, and therefore admissible as a matter of course, is the decision by the New Jersey Supreme Court in *New Jersey v. Buda*, 949 A.2d 761 (N.J. 2008). In *Buda*, the court held that a child victim’s statement to a social worker was nontestimonial. The court explained that the social worker’s role in “responding to a life-threatening emergency is no different in kind than the function being performed by the 911 officer in *Davis*; she was seeking information from a victim to determine how best to remove the very real threat of continued bodily harm and even death from this three-year-old child.”

**Children who are victims of, or witnesses to, violent acts may receive special treatment concerning statements they made regarding their abuse.**

### v. Child statements to medical personnel

In *Colorado v. Vigil*, 127 P.3d 916, 923 (Colo. 2006), the Colorado Supreme Court upheld the admission of statements by a seven-year-old regarding a sexual assault by the father’s co-worker. Child’s father had interrupted the assault, called 911, and a doctor from the child protection team later performed an examination. In response to the doctor’s question, “Did anyone hurt you?,” the child responded affirmatively. The court admitted the child’s response, even though the doctor was a member of a child protection team, because it found that the doctor’s question was necessary to understand the nature of the child’s injuries and the best course of treatment.

<sup>151</sup> *Id.* at 27 (“We would have difficulty concluding that [the child’s] statement to [the physician] was given during an ongoing emergency, as the ... interview ... took place ... nearly two weeks after” defendant alleged that child was responsible for the infant’s broken arm).

## X. Child Hearsay Statements

### A. Child Victim and Witness Act

Children who are victims of, or witnesses to, violent crimes may receive special treatment concerning statements they have made to others regarding the abuse. The Child Victim and Witness Act, 42 Pa. C.S. § 5981 *et seq.*, was enacted to provide child victims and child witnesses with procedures to protect them during their involvement with the justice system.

#### i. Out-of-Court Statement

The provisions of the Act apply to civil and criminal proceedings. Pursuant to the Act, out-of-court statements describing homicide, assault, kidnapping, sexual offenses, burglary, or robbery made by a child victim or witness who, at the time of the statement was age 12 or younger, are admissible in evidence, provided certain conditions are met. These conditions require that the court find that the evidence is relevant; that the statement's time, content, and circumstances provide sufficient indicia of reliability; and the child must either testify at the proceeding or be unavailable as a witness.<sup>152</sup>

The prior iteration of the Tender Years exception did not include child witnesses; it required that the defendant commit the offense “with or on the child.”<sup>153</sup> The Pennsylvania Supreme Court recently found that application of the new version of the law, which extends the Tender Years exception to child witnesses as well as child victims, does not constitute an *ex post facto* application. The court reasoned that the Tender Years exception is not a “sufficiency of the evidence” rule, and did not alter the evidence required for the prosecution to meet its burden.<sup>154</sup>

#### ii. Determination Regarding Child's Unavailability

Before the court may make a determination that the child is unavailable as a witness, the court must determine, based on available evidence, that if the child were to testify the child would suffer such serious emotional distress that it would impair the child's ability to reasonably communicate.<sup>155</sup> In order to make this determination, the court may do either, or both, of the following:

- (1) Observe and question the child either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person... who has dealt with the child in a therapeutic or medical setting.<sup>156</sup>

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<sup>152</sup> 42 PA. C.S. § 5985.1(a).

<sup>153</sup> 42 PA. C.S. § 5985.1(a) (2000) (amended 2004).

<sup>154</sup> Commonwealth v. Allshouse, No. 55 WAP 2008, at 37-38 (Pa. Jan. 20, 2012).

<sup>155</sup> *Id.* at § 5985.1(a.1).

<sup>156</sup> *Id.*

### iii. Who May be Present

If the court observes or questions the child to make this determination, the defendant may not be present. If the court hears testimony from other individuals to make this determination, the court must permit the defendant, the defendant's attorney, the district attorney (for criminal cases), and the plaintiff's attorney (for civil cases) to be present.<sup>157</sup>

### iv. Notice of Statement to Defendant

Sufficient notice must be given to the defendant by the opposing party regarding the particulars of the child's statement and the proponent's intention to offer the statement so that the defendant may have fair opportunity to "prepare to meet" the statement.<sup>158</sup>

Notice is an essential requirement for the application of this Act. Actual notice to the defendant is required, and the notice must be given sufficiently in advance. The Superior Court in *Commonwealth v. Crossley*, 711 A.2d 1025 (Pa. Super. 1998), stated "the defendant is entitled to a type of notice that is direct and specific in order to provide a meaningful opportunity to challenge the hearsay." The notice provisions of this rule "are strict and must be strictly observed."<sup>159</sup> Failure to provide notice results in the inadmissibility of the hearsay evidence.<sup>160</sup>

## B. Other Child Hearsay Exceptions

Even if a child's statements do not meet the criteria of the Child Victim and Witness Act, the statements may be admissible under other hearsay exceptions. For example, the admission of a child witness' excited utterance was upheld in the *Commonwealth v. Boczkowski* murder case.<sup>161</sup>

In *Boczkowski*, defendant's five-year-old son stated to a neighbor that his "mommy was screaming so loud last night that I had to put my hands up over my ears. She wouldn't stop screaming, and I saw her in the bathroom holding her hands up, and daddy told me to get out."<sup>162</sup> Defendant challenged the admission of the neighbor's testimony regarding the boy's hearsay statements, claiming that the statements were too remote in time to constitute an excited utterance.

The Supreme Court reviewed the circumstances surrounding the boy's statement and the law regarding the excited utterance exception to the hearsay rule. For a statement to be considered an excited utterance, it must be made spontaneously and without opportunity for reflection.

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<sup>157</sup> *Id.* at § 5985.1(a.2).

<sup>158</sup> *Id.* at § 5985.1(b).

<sup>159</sup> *Commonwealth v. Crossley*, 711 A.2d 1025 (Pa. Super. 1998).

<sup>160</sup> 42 PA. C.S. § 5985.1(b).

<sup>161</sup> *Commonwealth v. Boczkowski*, 846 A.2d 75 (Pa. 2004).

<sup>162</sup> *Boczkowski*, 846 A.2d at 95.

It must be shown that the declarant witnessed an event so sufficiently startling and close in point of time as to render thought processes inoperable and that the declarations were a spontaneous reaction to the event. There is no clear-cut rule regarding time sequence; each fact-specific determination must be made on a case-by-case basis.<sup>163</sup>

Turning to the facts, the court observed that the boy saw the event, was sent to bed, and was awakened by his father in the middle of the night and taken to the neighbors where he returned to sleep. The statement was made the next morning without prompting to the neighbor while she was feeding the boy breakfast.<sup>164</sup> The Supreme Court concluded that given the time the boy spent sleeping, it is unlikely that his statement was affected by reflection or any outside influences, and upheld the admission of the neighbor's testimony regarding his excited utterance.<sup>165</sup>

**A chart comparing admissibility of child hearsay statements in various types of proceedings is attached as Appendix A.**

## XI. Hearsay, Confrontation, and Domestic Violence

### A. Evidence-Based Prosecution in Domestic Violence Cases

The *Crawford* line of cases presents a distinct problem for prosecuting domestic violence cases. Victims of domestic violence are often unwilling to testify against their perpetrators because they fear retaliation, hope for reunification or rehabilitation, or feel pressure from social or cultural influences. As a

result, victims of domestic violence are often unavailable to testify against their perpetrators. But a victim's statements to police or other emergency responders after an assault are often essential to the prosecution's case because domestic violence is a hidden crime and "seldom occurs in the presence of adult witnesses."<sup>166</sup> After *Crawford*, victim statements that once formed the basis for prosecution were inadmissible in many courts, which were scrambling to make sense of the new "testimonial" requirement. Many courts interpreted *Crawford* to exclude any and all statements made to a police officer, neighbor, or other individual regarding a prior incident of abuse, making it difficult – if not impossible – to prove the assault or attack without the victim's testimony.

**Several post-*Crawford* decisions provide significant room for prosecutors to successfully argue for the admission of testimonial statements by victims of domestic violence who are unavailable to testify.**

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 95-96.

<sup>165</sup> *Id.*

<sup>166</sup> Deborah Tuerkheimer, Symposium, *The Confrontation Clause: Forfeiture After Giles: The Relevance of "Domestic Violence Context"*, 13 LEWIS & CLARK L. REV. 711 (2009).

“Prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past.”<sup>167</sup>

Several post-*Crawford* decisions provide significant room for prosecutors to successfully argue for the admission of testimonial statements by victims of domestic violence who are unavailable to testify.

**i. Applying the Objective, Primary Purpose Test in Domestic Violence Cases**

Nearly three in 10 women and one in 10 men have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.<sup>168</sup> In spite of the overwhelming prevalence of intimate partner violence, victims are reluctant to report their victimization to authorities. Empirical data shows victims of domestic violence are at a greater risk of physical violence after reporting abuse,<sup>169</sup> which explains why the National Institute of Justice reports that approximately 75% of women victimized by their intimate partner never report abuse.<sup>170</sup> Victims are regularly threatened with physical violence or death for reaching out to police: “If you call the police, I will kill you” or “If you tell anyone, you’ll be sorry.”

It often appears to an outside observer that, once police respond, there is no longer an “ongoing emergency.” However, the statistics highlighted above regarding the escalation of violence after separation or in retaliation for justice system involvement paint a much different picture.

In the *Davis / Hammon* companion case, the United States Supreme Court drew a line of distinction, explaining that there is an ongoing emergency when the defendant is at large (*Davis*), but the emergency is no longer “ongoing” after the defendant is physically separated from the victim by police (*Hammon*).<sup>171</sup> In *Hammon*, police responded to a home where the husband threw his wife into the glass fireplace, shattering the glass and injuring his wife. The police questioned the husband and wife in separate rooms.

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<sup>167</sup> “[D]ays—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past. For example, during the summer of 2004, half of the domestic violence cases set for trial in Dallas County, Texas, were dismissed because of evidentiary problems under *Crawford*.” Isley Markman, *The Admission of Hearsay Testimony Under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts*, 6 CRIM. L. BRIEF 9 (2011) (citing Tom Lininger, *Prosecution of Batterers After Crawford*, 91 VA. L. REV. 747, 769-70 (2005)).

<sup>168</sup> CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2011), available at <http://www.cdc.gov/violenceprevention/nisvs/>.

<sup>169</sup> PATRICIA TJADEN & NANCY THOENNES, NAT’L INSTITUTE OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, RESEARCH IN BRIEF: PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, (1998) available at <https://www.ncjrs.gov/pdffiles/172837.pdf>

<sup>170</sup> AM. PSYCH. ASS’N, NAT’L INST. JUST., PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 12 (1996).

<sup>171</sup> *Davis v. Washington*, 547 U.S. 813 (2006) (*Hammon v. Indiana* is the companion case to *Davis v. Washington*, and is discussed in the same decision).

However, the wife did not testify at trial, so her statements were inadmissible based on the lack of confrontation. The Court explained that there was no ongoing emergency because police had separated the parties in different rooms when her statement was made, so the threat was no longer imminent.<sup>172</sup>

*Davis* opened the door to the introduction of more victim statements that were initially excluded under *Crawford*. But, given the distinction made in *Hammon*, many statements integral to the prosecution of domestic violence cases were still excluded.

In 2011, the United States Supreme Court articulated the appropriate test for testimonial statements. The decision in *Michigan v. Bryant* made it clear that courts must consider all relevant factors to determine the objective, primary purpose of the declarant in making the statement.<sup>173</sup> Included in this “objective evaluation”<sup>174</sup> is an exploration into the *perspective of the declarant in that particular circumstance*.<sup>175</sup> The *Bryant* Court also clarified the *Davis/Hammon* “ongoing emergency” distinction, explaining that the *Hammon* case would have had a different outcome if there was reason to believe husband was armed – in spite of the physical separation between husband and wife – because the threat to the victim would have been ongoing.<sup>176</sup>

In analyzing the *Bryant* decision, the Pennsylvania Supreme Court in *Allshouse* further explained how to correctly apply an objective, primary purpose test.<sup>177</sup> The *Allshouse* Court explained that the appropriate inquiry is “highly context-dependent” and the “existence of an emergency is not the end of the inquiry.”<sup>178</sup> Rather, the presence of an ongoing emergency is “ ‘simply one factor’ ” of many.<sup>179</sup>

When prosecutors handle a case where the victim is unavailable, statements made to police may be admissible under the objective, primary purpose test enunciated and clarified by *Bryant* and *Allshouse*. Prosecutors may be able to introduce evidence of the victim’s perspective regarding the presence of an ongoing emergency or continued risk of harm. Use of a qualified professional in the field of domestic violence as an expert witness may help the court to understand the perception of the victim that the risk of harm was ongoing at

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<sup>172</sup> Cf. *Michigan v. Bryant*, 562 U.S. ---, 131 S. Ct. 1143, 1148 (2011) (explaining *Hammon* would have been differently decided if there was reason to believe defendant had a weapon because the threat would have been ongoing).

<sup>173</sup> *Michigan v. Bryant*, 562 U.S. ---, 131 S. Ct. 1143, 1156 (2011) (explaining that the analysis requires courts to objectively evaluate “the circumstances in which the encounter occurs and the statements and actions of the parties.”).

<sup>174</sup> *Commonwealth v. Allshouse*, No. 55 WAP 2008, at 14 (Pa. Jan. 20, 2012).

<sup>175</sup> *Michigan v. Bryant*, 562 U.S. ---, 131 S. Ct. 1143, 1148 (2011).

<sup>176</sup> *Id.* at 1148.

<sup>177</sup> *Commonwealth v. Allshouse*, No. 55 WAP 2008, at 14-15 (Pa. Jan. 20, 2012).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

the time their statement was made.<sup>180</sup> While an expert may not be used to bolster the credibility of a victim, witness, or defendant, expert testimony may be acceptable to explain victim, witness, or defendant behavior, which would go to the reasonableness of their behavior. *The parameters for using an expert witness in domestic violence cases to explain victim, witness, or defendant behavior is discussed in depth in section XIII.E: Experts and Scientific Evidence, Expert Testimony and Victim Behavior*

**For more information about the objective, primary purpose test, see section IX.D.**

**To read more about the unavailability of victims of domestic violence, and the risk of harm they face when stepping forward in a criminal prosecution, see section V.**

**ii. Applying Forfeiture by Wrongdoing in Domestic Violence Cases**

Forfeiture by wrongdoing is a doctrine that suspends a defendant's right to confrontation and allows testimonial statements to be admitted when the defendant acted to intentionally cause a victim's unavailability.<sup>181</sup> The United States Supreme Court recently ruled in *Giles v. California* that the forfeiture doctrine overcomes a defendant's right to confrontation if the prosecution can show that the defendant acted with the *specific intent* to make the victim unavailable for trial.

There is significant disagreement over the amount of proof necessary to show a defendant acted with the specific intent to cause a witnesses' unavailability. A close analysis of the various opinions filed in *Giles* shows that the case did not limit the forfeiture doctrine to witness tampering cases. Five justices, including Justices Souter, Ginsburg, Breyer, Kennedy, and Stevens, agreed that evidence of a history of domestic violence, "which is meant to isolate the victim from outside help," is sufficient to meet the intent requirement for the forfeiture doctrine to apply. Justice Scalia also honed in on the unique nature of a domestic violence relationship, explaining that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." Scalia then concluded that "[e]arlier abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help would be highly relevant to this inquiry."

To date, there is no case law further elaborating on the necessary proof. But applying the logic of a majority of justices in *Giles*, it is likely sufficient for the prosecution to provide proof, **by a preponderance of the evidence**,<sup>182</sup> that the

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<sup>180</sup> See section XIII.E for more information about the use of expert witnesses in criminal proceedings to educate the court about victim behavior.

<sup>181</sup> Forfeiture by wrongdoing is a hearsay exception recognized in Pennsylvania. PA. R. EVID. 804(b)(6).

<sup>182</sup> Even though the standard in criminal trials is beyond a reasonable doubt, evidentiary rulings are held to the lesser standard of preponderance of the evidence.

defendant and the unavailable witness were in an abusive relationship that exhibited classic signs of abuse and control.

Proof of such a relationship would allow out-of-court, testimonial statements by an unavailable witness to be admitted into evidence under the doctrine of forfeiture by wrongdoing.

**See above, section IX.E.iii: Forfeiture by Wrongdoing, for more information about the forfeiture doctrine.**

## B. Child Witness

Children are often the only witness to domestic violence because, as explained above, domestic violence is a hidden crime and “seldom occurs in the presence of adult witnesses.”<sup>183</sup> However, concerns over the child’s wellbeing often prevent the child from testifying in open court, in front of the perpetrator. Pennsylvania law attempts to balance the need for child testimony with the need to protect a child from extreme hardship by providing two viable alternatives to face-to-face testimony. First, prosecutors may use closed-circuit, one-way video recording to minimize the damage to a child’s wellbeing. And second, when a child is “unavailable” to testify, even through alternative means, the child’s statements may be admitted if the court takes a thoughtful and careful approach to applying the objective, primary purpose test articulated in *Michigan v. Bryant* and *Commonwealth v. Allshouse*.<sup>184</sup>

**Use of one-way, closed circuit testimony for child witnesses does not violate the Confrontation Clause.**

### i. Using One-Way, Closed Circuit Testimony for Child Witnesses

The use of one-way, closed circuit testimony for child witnesses was approved by Pennsylvania’s high court. In *Commonwealth v. Geiger*, the Superior Court explained – and the Pennsylvania Supreme Court confirmed – that the right to live, face-to-face confrontation gives way to a state’s compelling interest.<sup>185</sup> Protecting a child’s emotional wellbeing was held to be sufficiently compelling.<sup>186</sup>

**For more information about the use of alternative methods for testimony that will protect the child, see sections IX.F: Child Witness Statements.**

<sup>183</sup> Deborah Tuerkheimer, Symposium, *The Confrontation Clause: Forfeiture After Giles: The Relevance of “Domestic Violence Context”*, 13 LEWIS & CLARK L. REV. 711 (2009).

<sup>184</sup> See *Commonwealth v. Allshouse (Allshouse II)*, No. 55 WAP 2008, at 20-21 (Pa. Jan. 21, 2012).

<sup>185</sup> *Commonwealth v. Geiger*, 944 A.2d 85 (Pa. Super. 2008), *appeal denied* *Commonwealth v. Geiger*, 2009 Pa. LEXIS 117 (Pa. Jan. 14, 2009).

<sup>186</sup> *Id.*

## ii. Applying the Objective, Primary Purpose Test for a Child Witness

The objective perspective of the child and the objective perspective of the interrogator are often polar opposites, which complicate the application of the objective primary purpose test in cases involving child witness statements.

An investigator is most often interrogating the child with the specific intent to draw out facts to include in a report that the interrogator is aware will be used in later litigation. But the child – depending on his or her age and maturity – is often unaware of the interrogator’s purpose.

The decision in *Allshouse v. Commonwealth* resolved some of the ambiguity in applying the objective primary purpose test. In *Allshouse*, the Pennsylvania Supreme Court applied the objective, primary purpose test to determine whether the statements of a 4-year-old child would be admitted into evidence through the testimony of a Children and Youth Services (CYS) caseworker. The CYS case worker had interviewed the child approximately one week after the child’s father twisted and broke the child’s infant brother’s arm. To determine the admissibility of the child’s statements, the *Allshouse* court examined the totality of the circumstances surrounding the interview and found that the child’s statements were not testimonial and, therefore, were admissible under the Tender Years exception.

In reaching this conclusion, the *Allshouse* court applied the logic from *Michigan v. Bryant*, which established the objective, primary purpose test, and the made the following conclusions:

- The CYS caseworker’s interrogation of the child was in the context of an ongoing emergency, even though the interview took place a week after the incident and the children were removed from the home, the perpetrator was not identified with certainty. At the time of the investigation, Father maintained that the child was the one who broke the infant’s arm, so the caseworker was still responding as though the threat to the child or the child’s siblings was ongoing.<sup>187</sup>
- The CYS case worker’s intent in conducting the interview was to ensure the safety of the child and her siblings – not to gather evidence for future litigation – even though the case worker knew his report would be relayed to his supervisor and eventually could be used in a criminal prosecution.<sup>188</sup>
- The child did not reasonably contemplate that her statements might be later used against her father in a criminal proceeding.<sup>189</sup> The court explained that the assessment of the declarant is from the perspective of “**a reasonable person in the position of the declarant**” – and, therefore, all relevant factors – including age, state of mind, and experiences – must be considered.

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<sup>187</sup> *Commonwealth v. Allshouse (Allshouse II)*, No. 55 WAP 2008, at 20-21 (Pa. Jan. 21, 2012).

<sup>188</sup> *Id.* at 22-23.

<sup>189</sup> *Id.* at 24-26.

The court's considerations give great insight into the potential admissibility of statements by children to CYS and other social service agencies in the future. First, the court concluded that the CYS worker's interview – conducted a week after the incident – was still within the context of an ongoing emergency. So, **as long as a *potential threat remains, the court is likely to find an ongoing emergency.***

Also, the court's analysis of the CYS worker's intent indicates that a similar analysis is likely in future cases. Justice Saylor gave some clarity about how the court will, in the future, determine a caseworker's intent in conducting an investigation. In his concurring opinion, Justice Saylor explains:

[M]y best prediction of the High Court's response to Pennsylvania child protection services investigations by county agencies, in terms of the new Confrontation Clause regime, is that it will afford substantial weight to the legislative design defining the agencies' purposes in terms of the provision of the essential services.<sup>190</sup>

Finally, the court's analysis of the child's perspective has the potential to broaden the analysis of the declarant's perspective in other cases as well. The court definitively stated that, when considering the perspective of the declarant, the court must assess "whether or not *a reasonable person in the position of the declarant* would believe a statement would be available for use at a later trial."<sup>191</sup> The court went on to explain that "Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic."<sup>192</sup>

This broad approach to consideration of the declarant's perspective may help prosecutors to admit other victim statements, as it allows prosecutors to set forth the wide array of circumstances in which the statement was made. While the court does not go on to give other relevant circumstances for determining the declarant's perspective, it does provide an avenue to introduce evidence related to the victim's state of mind. **Rather than having to meet a static reasonable person standard, the court in *Allshouse* has now introduced a standard that considers the perspective of a reasonable person standing in the shoes of the victim or witness.** All other attendant circumstances are also considered.

**Child witness exceptions are outlined in greater detail in section X: Child Hearsay Statements.**

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<sup>190</sup> *Id.* at 2 (Saylor, J., concurring),

<sup>191</sup> *Id.* at 25-26.

<sup>192</sup> *Id.*

## **XII. Authentication of Evidence**

Authentication is a particularly important Rule of Evidence in domestic violence prosecutions. Perpetrators often use technology to maintain control over victims. In particular, abusers regularly use social media and GPS to monitor and track their victims, either during the relationship or when the relationship ends. So, evidence of technology abuse can be key to successful prosecution. But authenticating electronic evidence is complicated because such evidence is easily falsified or altered, which has resulted in unclear guidance for authentication standards. In fact, in some cases the defendant has manufactured electronic and social media evidence to make it appear as though the victim is lying or is otherwise not credible. Thus, prosecutors in domestic violence cases should be ready to address the issue of authentication from both sides: as a proponent of the evidence and in opposition to the evidence.

For more information about the use of social media and technology in domestic violence prosecutions, see **section XVI: Emerging Practices: Social Media in Domestic Violence Prosecutions**.

### **A. General Rule - Pennsylvania Rule of Evidence 901(a)**

Pennsylvania Rule of Evidence 901(a) states:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.

Rule 901(b) illustrates various methods by which authentication may be accomplished. The main method to be discussed in this chapter involves 901(b)(4), “Authentication by Distinctive Characterizations and the Like.” Appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances may be sufficient to prove what a proponent claims it to be.

### **B. Electronic Communications and Authentication of Evidence**

Electronic communications, such as email and instant messages, are evaluated on a case-by-case basis as any other document to determine whether there has been adequate foundational showing of its relevance and authenticity.<sup>193</sup>

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<sup>193</sup> *In re F.P.*, 878 A. 2d 91 (Pa. Super. 2005).

**i. Instant messages**

In *In re F.P.*, 878 A. 2d 91 (Pa. Super. 2005), the Superior Court first established that instant and text messages were to be authenticated in the same way that other writings were authenticated: on a case-by-case basis. In this case, threats delivered by instant message were properly authenticated, even though the messages were sent under the sender's screen name. The circumstances showed that the sender referred to himself by his first name, repeatedly accused the victim of stealing from him, and noted that the victim talked to school personnel about the threatening instant messages. All of this evidence was corroborated by testimony that the defendant was upset with the victim for allegedly stealing from him.

**ii. Text messages**

In *Commonwealth v. Koch*, 2011 PA Super 201 (Sept. 16, 2011), defendant appealed her conviction for drug offenses, claiming that text messages about drug sales that were found on her cell phone were not properly authenticated and were inadmissible hearsay. Koch resided with her paramour, and her brother was also present when the police found drugs and drug paraphernalia in the residence. The police also seized two cell phones, one of which belonged to Koch. The messages found on Koch's cell phone were transcribed and admitted at trial, despite Koch's objections that they were hearsay and lacked authentication. Some of the transcribed messages were drug-related, but others were not, and Koch clearly had not written some of the messages.

On appeal, Koch claimed that due to the lack of authentication for the text messages, the admission of the messages and their use in proving the Commonwealth's case against her amounted to reversible error. The Superior Court observed that authentication is required prior to admission of evidence. Text messages are defined as "writings or other data transmitted electronically by cellular telephones" for purposes of Pennsylvania's Wiretap Act. In order to determine what is required to authenticate text messages, the Superior Court looked to the treatment accorded other electronic communications. It observed that it had earlier rejected an argument that emails or text messages are inherently unreliable due to their relative anonymity and the difficulty in connecting them to their author. The electronic communications and instant messages should be evaluated on a case-by-case basis as to whether an adequate foundation demonstrates authenticity. Authentication may include factual information or references to the involved parties or other circumstantial evidence identifying the sender.

Authentication is a prerequisite for admission, and requires more than mere confirmation that a number or address belonged to a particular person. Circumstantial evidence demonstrating the identity of the sender is necessary; the court could not admit the evidence for the reason that doubts regarding the identity of the sender went to the weight of the evidence rather than its authenticity. The person to whom the number is assigned does not always exclusively use the cell phone.

Therefore the circumstantial evidence corroborating the identity of the sender is necessary. In this case, no evidence was offered to show that Koch wrote the drug-related messages, nor were there any contextual clues that would tend to reveal the identity of the sender. The fact that the cell phone was found on a table in close proximity to Koch was not sufficient to authenticate the messages. Because the messages constituted hearsay, and the evidentiary value of the messages depended entirely on the truth of their content, and because no hearsay exception applied, the Superior Court reversed Koch's conviction and remanded for a new trial.

### C. Email Messages

In *Hood-O'Hara v. Wills*, 873 A.2d 757 (Pa. Super. 2005), a PFA case, the defendant offered copies of emails that were purportedly sent from the plaintiff's mother's email account. Plaintiff's mother denied sending the emails, which accused plaintiff of drinking alcohol excessively, and further stated that in the past an unauthorized person had accessed her email account. The trial court excluded the emails as inadmissible hearsay because the emails were not authenticated as having been sent by the plaintiff's mother. On appeal, the Superior Court found that the emails were properly excluded.

## XIII. Experts and Scientific Evidence

### A. Generally

- **Rule 702. Testimony by Experts**

If scientific, technical or other specialized knowledge beyond that possessed by a layperson 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.

### B. Expert Qualifications

To qualify as an expert, an individual must have specialized knowledge beyond that of the average layperson in an area or field that will assist the trier of fact in determining an issue in the case.<sup>194</sup> The specialized knowledge must be based on the expert's educational background or practical experience. If the issue involves a matter of common knowledge, expert testimony is inadmissible.<sup>195</sup> Whether the expert meets the requisite level of expertise is a finding of fact to be made by the trial court.

### C. Expert Testimony

An expert may testify as to their opinion if it will help the trier of fact to understand the evidence or determine a fact at issue. Experts are, however, *precluded from offering an opinion about credibility*. "It is an encroachment upon

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<sup>194</sup> PA. R. EVID. 702.

<sup>195</sup> Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977).

the province of the jury to permit admission of expert testimony on the issue of a witness' credibility."<sup>196</sup> There is often a fine line between opining about credibility and opining about a fact at issue. Expert testimony regarding victim behavior, for instance, is largely excluded in Pennsylvania because the effect of such testimony tends to bolster credibility of the witness.<sup>197</sup>

***The admissibility of expert testimony to explain victim behavior is discussed below; section XIII.E: Expert Testimony and Victim Behavior.***

#### **D. The Basis of an Expert's Opinion**

When offering an opinion, an expert must explain the basis for that opinion. Generally, the basis for the expert's opinion must be derived from testimony or facts on the record; however, the expert may base her or his opinion – in part – on hearsay or otherwise inadmissible evidence,<sup>198</sup> such as scholarly articles or texts or victim statements, provided the expert is not being used as a “*mere vehicle*” for hearsay and facts that are not of record.<sup>199</sup> In other words, an expert may not simply repeat another's opinion, data, or findings without demonstrating reliance on his or her own expertise and judgment.

##### **i. *Frye* Test: An Expert's Reliance on Scientific Evidence**

The admissibility of expert scientific evidence that has formed the basis of an expert opinion depends upon the general acceptance of the evidence by the relevant scientific community. In 1977, Pennsylvania adopted the *Frye* test<sup>200</sup> for the admissibility of novel expert testimony in ***Commonwealth v. Topa***. The *Frye* test, together with Pennsylvania Rule of Evidence 702, provides that novel scientific evidence is “admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community.”<sup>201</sup> Since the *Topa* case, the Pennsylvania Supreme Court affirmed that *Frye* will continue to be controlling law on the admissibility of scientific evidence and clarified its application in ***Grady v. Frito-Lay, Inc.***<sup>202</sup>

<sup>196</sup> See *Commonwealth v. Balodis*, 560 A.2d 341 (Pa. 2000) (holding that an expert's testimony regarding the reluctance of child sex abuse victims to disclose incidents was inadmissible); see also *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986) (quoting *Commonwealth v. O'Searo*, 352 A.2d 30, 32 (Pa. 1976) (holding that it is error to admit expert testimony that young children do not usually fabricate stories of sexual abuse because it was a direct attempt to bolster the victim's credibility).

<sup>197</sup> See 42 PA. C.S. § 5920 (allowing expert testimony to explain victim behavior in sexual assault proceedings).

<sup>198</sup> PA. R. EVID. 702.

<sup>199</sup> See *Commonwealth v. Thomas*, 282 A.2d 693 (Pa. 1971) (establishing the hearsay exception); *Boucher v. Pa. Hosp.* 831 A.2d 623 (Pa. Super. 2003).

<sup>200</sup> PA. R. EVID. 702.

<sup>201</sup> *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003).

<sup>202</sup> *Id.*

To properly apply the *Frye* test, the *Grady* Court set forth the following requirements:

- The proponent of expert scientific evidence bears the burden of establishing all the elements for its admission under Rule 702, which includes showing that the *Frye* rule is satisfied.<sup>203</sup>
- In applying the *Frye* rule, the proponent of the evidence must prove that the methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial. This does not mean, however, that the proponent must prove that the scientific community has also generally accepted the expert's conclusion.<sup>204</sup>
- Under Rule 702, the *Frye* requirement is only one of several criteria. Rule 702 also mandates that scientific testimony be given by a “witness who is qualified as an expert by knowledge, skill, experience, training or education. . . .” Whether a witness is qualified to render opinions and whether his testimony passes the *Frye* test are two distinct inquiries that must be raised and developed separately by the parties, and ruled upon separately by the trial courts.<sup>205</sup>
- The standard of appellate review that applies to a *Frye* issue is abuse of discretion.<sup>206</sup>

Following the *Grady v. Frito-Lay, Inc.* decision, a number of Superior Court cases have dealt with the admissibility of scientific evidence.<sup>207</sup> These cases emphasize the Superior Court's view that the *Frye* test only applies when a party wishes to introduce **novel** scientific evidence obtained from the conclusions of an expert witness.<sup>208</sup>

### E. Expert Testimony and Victim Behavior

An expert may not offer an opinion to bolster the credibility of a witness.<sup>209</sup> Pennsylvania courts have used this exclusion to bar prosecutors from introducing expert testimony to explain counterintuitive victim behavior in domestic violence and sexual assault cases.<sup>210</sup>

<sup>203</sup> *Id.* at 1044-45.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 839 A.2d at 1045-46.

<sup>206</sup> *Id.*

<sup>207</sup> See *Haney v. Pagnanelli*, 830 A.2d 978 (Pa. Super. 2003); *Trach v. Fellin*, 830 A.2d 978 (Pa. Super. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. 2003); *M.C.M. v. Milton Hershey Med. Ctr.*, 834 A.2d 1155 (Pa. Super. 2003); *Tucker v. Community Med. Ctr.*, 833 A.2d 217 (Pa. Super. 2003); *Cummins v. Rosa*, 846 A.2d 148 (Pa. Super. 2004).

<sup>208</sup> *Reading Radio, Inc.*, 833 A.2d 199.

<sup>209</sup> See *Commonwealth v. Balodis*, 560 A.2d 341 (Pa. 2000) (holding that an expert's testimony regarding the reluctance of child sex abuse victims to disclose incidents was inadmissible).

<sup>210</sup> See *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986) (holding that it is error to admit expert testimony that young children do not usually fabricate stories of sexual abuse because it was a direct attempt to bolster

In June 2012, the Pennsylvania General Assembly unanimously passed HB 1264, which allows expert testimony in cases involving victims of sexual assault.<sup>211</sup> Governor Corbett signed the bill into law shortly thereafter and the bill took effect in August 2012.<sup>212</sup> Until the bill was signed into law, Pennsylvania was the only remaining jurisdiction that did not allow such evidence.<sup>213</sup> In Minnesota, the second-to-last holdout state, the State Supreme Court changed course to allow expert testimony in sexual assault cases when it was presented with highly qualified experts and extensive “social science research regarding juror attitudes, rape myth acceptance and the potential harmful impact of these mistaken beliefs on jurors and verdicts.”<sup>214</sup>

The sexual assault expert law only applies in cases involving sexual offenses and is not designed to extend to cases involving domestic violence.<sup>215</sup> However, in the right case, prosecutors in Pennsylvania should consider challenging the bar on expert testimony regarding victim behavior in domestic violence cases. What is known now about the manifestation of domestic violence is much different from what was known when experts were first excluded. Scientifically valid studies on the issues of domestic violence are now widely accepted in the field, and are relied on to explain counterintuitive behavior by trauma survivors, particularly victims of domestic violence. Accordingly, it may be time for prosecutors to try again to demonstrate to courts why understanding domestic violence victim behavior is an essential component to achieving justice through prosecution.

**What is known now about the manifestation of domestic violence is much different from what was known when experts were first excluded.**

#### XIV. Special Evidentiary Issues in Stalking Prosecutions

Recent statistics released by the Centers for Disease Control and Prevention report that one in 6 women and one in 19 men experience stalking in their lifetime.<sup>216</sup> Perpetrators of stalking are most often identified as a former intimate partner.<sup>217</sup> Moreover, a statewide study of stalking conducted in Rhode Island revealed that

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the victim’s credibility); *see also* Commonwealth v. Garcia, 588 A.2d 951 (Pa. Super. 1991); Commonwealth v. Dunkle, 561 A.2d 5 (Pa. Super. 1989).

<sup>211</sup> 42 PA. C.S. § 5920 (H.B. 1264).

<sup>212</sup> *Id.*

<sup>213</sup> Christopher Mallios, AEquitas, *And Then There Was One: Recent Minnesota Supreme Court Decision Has Left Pennsylvania as the Only State that Disallows Expert Testimony to Explain Victim Behavior*, 1 Strategies (Aug. 2011), [http://www.aequitasresource.org/And\\_Then\\_There\\_Was\\_One\\_Issue\\_1.pdf](http://www.aequitasresource.org/And_Then_There_Was_One_Issue_1.pdf) (discussing Minnesota v. Obeta, 796 N.W. 2d 282 (Minn. 2011)).

<sup>214</sup> *Id.*

<sup>215</sup> 42 Pa. C.S. § 5920 (H.B. 1264).

<sup>216</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, FACT SHEET (2011), *available at* [http://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_FactSheet-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_FactSheet-a.pdf).

<sup>217</sup> U.S. Dep’t of Justice, No. NCJ224517, National Crime Survey: Stalking Victimization in the United States (2009).

stalking by an intimate partner is more dangerous. Intimate partner offenders are more likely to use weapons and physical violence, are more likely to reoffend<sup>218</sup> (92% to 56%), and are more likely to escalate in frequency and intensity.<sup>219</sup>

In spite of its overwhelming prevalence and alarming severity, stalking is often an overlooked offense in cases of domestic violence. Understanding the types of behavior associated with stalking may increase the number of successful stalking prosecutions, which in turn will help victims to achieve safety.

#### A. Recognizing Stalking Behavior

Intimate partner stalking behaviors fall into the same categories of tactics used to establish and maintain power and control over a victim. Stalkers use a combination of emotional abuse, isolation, minimization and blame, manipulation of children, economic abuse, coercion, threats, and physical violence to control their victims.

##### *Emotional Abuse*

- Making repeated phone calls
- Sending repeated text messages or emails
- Following the victim
- Trespassing
- Showing up at work / home / school

##### *Isolation*

- Contacting family and friends
- Sabotaging new relationships
- Showing up where the victim is and making a scene

##### *Using Children*

- Threatening to take children
- Kidnapping / threatening to kidnap the children

##### *Economic Abuse*

- Sabotaging employment
- Damaging property
- Destroying victim's credit

##### *Coercion / Threats*

- Threatening violence toward victim, family, friends (direct or implied)
- Threatening suicide / homicide

##### *Intimidation*

- Using repeated legal maneuvers, such as filing for custody
- Contesting divorce
- Filing artificial charges
- Petitioning for unjustified PFAs against the victim

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<sup>218</sup> 92% of intimate partner stalkers reoffend, versus 56% of non-intimate partner stalkers. ANDREW KLEIN ET AL., NAT'L INST. OF JUSTICE, NO. 228354, A STATEWIDE STUDY OF STALKING AND ITS CRIMINAL JUSTICE RESPONSE (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228354.pdf>.

<sup>219</sup> *Id.*

## **B. Evidence of Course of Conduct / Communication**

In order get a stalking conviction, a prosecutor must prove that a victim was in reasonable fear of bodily injury or subject to substantial emotional distress because defendant either:

- (1) engaged in “a pattern of actions composed of more than one act over a period of time, however short” or
- (2) repeatedly communicated with the other person.<sup>220</sup>

Prosecutors face a distinct evidentiary problem in stalking cases because, unfortunately, evidence of the types of actions listed above is often complicated to obtain and admit.<sup>221</sup>

Common evidence in stalking cases includes phone records, text messages, social media websites, victim-created records of stalking behavior, and hearsay accounts of the perpetrator’s actions. Suggestions for how to approach this evidence is found throughout this publication.

**For guidance on the admission of social media, text messages, and other technology-based records, see section XII: Authentication of Evidence, and section XVI.D: Emerging Practices: Social Media in Domestic Violence Prosecutions, Authentication of Social Media Evidence.**

**For information about admission of hearsay evidence, such as reports and records created by the victim or by a third party, and the Confrontation Clause issues attendant to admission of hearsay evidence, see section VIII: Hearsay, and section IX: Confrontation: Admissibility of Hearsay Statements by Unavailable Witnesses.**

## **XV. Understanding the Dynamics of an Abusive Relationship**

### **A. Link Between Emotional Abuse and Physical Violence**

Violence perpetrated against women by intimates is typically accompanied by emotionally abusive and controlling behavior. According to the National Violence Against Women Survey,<sup>222</sup> women whose partners were jealous, controlling, or verbally abusive were significantly more likely to report being raped, physically assaulted, and/or stalked by their partners.

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<sup>220</sup> 18 Pa. C.S. § 2709.1.

<sup>221</sup> There are five Pennsylvania State Police specialized computer crimes task force groups across the Commonwealth. These task force groups are a great source for information about retrieving evidence of stalking facilitated by technology. Contact the Pennsylvania State Police for more information.

<sup>222</sup> PATRICIA TJADEN & NANCY THOENNES, NAT’L INSTITUTE OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (July 2000). The National Institute of Justice and the Centers for Disease Control and Prevention cosponsored this survey through a grant to the Center for Policy Research. The Center conducted telephone interviews with a representative sample of 8,000 U.S. women and 8,000 U.S. men about their experiences as victims of various forms of violence, including intimate partner violence.

According to the survey report authors, the strong statistical link between violence and emotionally abusive and controlling behavior in intimate relationships supports the theory that much of the violence perpetrated against women by male partners is part of a systematic pattern of dominance and control.<sup>223</sup>

### **B. Battering Tends to be a Pattern of Violence**

Battering tends to be a pattern of violence rather than a one-time occurrence. The National Intimate Partner and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention (CDC) and released in December 2011, reports that “violent acts ... are frequently experienced in the context of other violence committed by the same perpetrator.”<sup>224</sup>

It is estimated that up to 60% of perpetrators abuse their intimate partner again within four months to two years.<sup>225</sup> Over a longer period of time, reabuse rates can be even higher: In Colorado, between 1994 and 2005, nearly 60% of domestic violence offenders were arrested more than once.<sup>226</sup>

### **C. Separation Assault – Danger Increases At Separation**

Separation is often the most dangerous time for domestic violence victims. Research confirms that abusers often use escalated and more injurious violence at and after the time that the victim separates from the abuser and when the victim seeks assistance from law enforcement or the court.<sup>227</sup>

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<sup>223</sup> *Id.* at 34.

<sup>224</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT, at 39 (2011), *available at* [http://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_Report2010-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf).

<sup>225</sup> ANDREW R. KLEIN, U.S. DEP’T OF JUSTICE, DOC. NO. 222321, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: PART III, JUDGES, at 25 (2008), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/222321.pdf>; see also ANDREW R. KLEIN, U.S. DEP’T OF JUSTICE, DOC. NO. 222320, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: PART II, PROSECUTION (2008), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/222320.pdf> (“Depending upon how reabuse is measured, over what period of time, and what countermeasures either the victim (e.g. getting protective order, going into hiding) or the criminal justice system (arresting, locking up the abuser) take, a hard core of a third of abusers will reabuse in the short run and more will reabuse in the longer run.”).

<sup>226</sup> *Id.* at 26.

<sup>227</sup> PATRICIA TJADEN & NANCY THOENNES, NAT’L INSTITUTE OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, RESEARCH IN BRIEF: PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, (1998) *available at* <https://www.ncjrs.gov/pdffiles/172837.pdf>

## **XVI. Emerging Practices: Social Media in Domestic Violence Prosecutions**

For many people, especially in younger generations, social media is a primary form of communication. People share intimate details about their private life on social media, from their mundane daily activities to major life events. Pictures, comments, video – it is all right there for the person’s friends – and often even the public – to see. As a result, social media has a wealth of information that can be used as evidence in criminal and civil cases.

### **A. Social Media and Domestic Violence**

In domestic violence cases, the use of social media is often key to the prosecution. Perpetrators regularly use social media as a means to control, threaten, stalk, and harass their victims. Even if the victim blocks the perpetrator from the victim’s personal pages, the perpetrator is often able to continue to monitor and harass the victim because the perpetrator and victim typically share the same online networks of friends and family.

While courts may be hesitant to accept evidence from social media sites, case law is evolving quickly to embrace the introduction of this type of evidence.

### **B. Gathering and Preserving Social Media Evidence**

A prosecutor must be able to gain authorized access to social media information before using it as evidence. If the victim is able to cooperate in the prosecution’s investigation, access may be easier. A victim could view the perpetrator’s social media page, either because the victim and perpetrator are in each other’s network of friends or because the perpetrator has a publically available page. However, obtaining social media evidence is more complicated when the information is deleted or when the victim is not able to view the perpetrator’s social media page.

**In domestic violence cases, social media is often key to the prosecution.**

Most social networking sites have simplified their subpoena policy to allow prosecutors and law enforcement to obtain a user’s content for the purpose of a criminal investigation. Facebook, for instance, will preserve user account information for 90 days after receipt of formal legal process.<sup>228</sup> After the request to preserve is received, Facebook will respond to requests for data provided the request is not overly broad or vague.<sup>229</sup> Other social media sites, such as Twitter, Foursquare, Myspace, and LinkedIn, also have data retention and subpoena policies. If you need information from one of these sites, you can contact the site directly, or call PCADV for technical assistance.

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<sup>228</sup> Facebook, Information for Law Enforcement Authorities, <https://www.facebook.com/safety/groups/law/guidelines>.

<sup>229</sup> *Id.*

### C. Fraudulent Social Media Evidence

The biggest evidentiary hurdle facing the introduction of social media evidence is authentication.<sup>230</sup> And this is for good reason. Fraudulent social media use is very common – especially in domestic violence cases.<sup>231</sup>

Domestic violence is a personal crime, committed by someone who knows very intimate details about their victim. Thus, it is common for perpetrators to have access to their victim’s account either because they demand access or use fraudulent means to obtain access. For instance, perpetrators often use spyware, which can be remotely installed on a victim’s phone or computer, to record the victim’s online activities. Spyware keeps a real-time log of everything a user enters on the monitored computer or phone – including passwords, bank account information, and correspondence.

There have been many cases where a perpetrator will log in to a victim’s account and post information to make it appear as though it has come from the victim. There have also been many cases where a perpetrator creates a fake page in the victim’s name. With access to the victim’s page, a perpetrator can make it appear that the victim is harassing them or is committing other crimes. If a victim denies authoring comments on social media, it is important to challenge the authentication of social media evidence, especially when the evidence is designed to make it appear as though the victim is not credible. This type of challenge is particularly important in domestic violence cases, where the victim’s credibility is often the center of the prosecution’s case.

**See Appendix B for a sample motion in limine that you can use prior to the proceeding to challenge this type of evidence.**

### D. Authentication of Social Media Evidence

Authentication requires sufficient corroborating evidence to connect the user to the statement. The determination is made on a “case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.”<sup>232</sup> The Pennsylvania Superior Court in *In re F.P.*, for example, admitted evidence from an online chat in which the defendant referred to himself by name, used conforming speech patterns, and corroborated details of an event in question.<sup>233</sup> But, in *Commonwealth v. Koch*, the superior court held that there was insufficient evidence to authenticate a text message on the defendant’s phone because there was no evidence to show that Koch wrote the drug-related messages, nor were there any contextual clues that would tend to reveal the identity of the sender.<sup>234</sup>

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<sup>230</sup> See section XII.B. for information about the authentication of electronic evidence and accompanying case law.

<sup>231</sup> See Laurie Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators* 19 WIDENER L.J. 933, 953-63 (2010).

<sup>232</sup> *In re F.P.*, 878 A.2d 91 (Pa. Super. 2005).

<sup>233</sup> *Id.*

<sup>234</sup> *Commonwealth v. Koch*, 2011 PA Super 201 (Sept. 16, 2011).

The ultimate standard for authentication is fairly low – it requires presentation of “evidence sufficient to support a finding that the matter in question is what the proponent claims.”<sup>235</sup> However, even if the defendant is able to introduce “corroborating” evidence like that introduced in *In re F.P.*, questioning the veracity of social media evidence may ultimately detract from the weight that the trier of fact places on such evidence. The Rules of Evidence provide: “Even though the court has decided that evidence is admissible, this does not preclude a party from offering evidence relevant to the weight or credibility of that evidence.”<sup>236</sup>

There are several ways to attack the authenticity of social media evidence. Lack of contextual clues that would reveal the user’s identity is one way, and is perhaps the easiest. However, even if the fraudulent post is done in a fashion that identifies the victim as the sender or cleverly disguises the speech pattern to match the victim’s, the prosecution can still prove that the evidence was manufactured.

Records kept by the social media sites reveal a unique IP address for each computer from which a comment or data is posted on the site. A prosecutor who is able to match the IP address of the perpetrator’s computer with the post can show that the perpetrator – not the victim – created the post.

**\*See also section XII: Authentication of Evidence for more information about authentication of different types of technology evidence, such as text messages, emails, and other proof of technology abuse.**

For more information about the ways perpetrators misuse social media or about how to obtain information to prove fraud, see *Laurie Baughman, Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators* 19 WIDENER L.J. 933, 953-63 (2010) (explaining how to cope with fraud in social media).

## **XVII. Emerging Practices: The Use of Expert Testimony in Criminal Cases**

Victim behavior is often counterintuitive and confusing to those who are unfamiliar with the complexity of interpersonal violence. The general public often looks to a victim’s behavior after an incident to determine whether it is consistent with how they believe a victim would behave. But, given what we know about trauma, a victim’s behavior after an incident is often counterintuitive and inconsistent, which can frustrate juries, judges, and prosecutors. Defense attorneys seize on these common myths and misunderstandings to “prove” that the incident must not have happened. Use of an expert to explain victim behavior may be helpful to overcome this unfortunate reality.

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<sup>235</sup> PA. R. EVID. 901.

<sup>236</sup> PA. R. EVID. 104(e).

Currently, Pennsylvania common law precludes experts from offering testimony to explain victim behavior because it is perceived as an attempt to bolster a witness' credibility.<sup>237</sup> Pennsylvania is, in fact, the last state in the nation that does not allow experts to explain domestic violence victim behavior.<sup>238</sup> However, with careful preparation in the right case, a prosecutor could mount a successful challenge to this exclusion here in Pennsylvania.

**Expert testimony regarding the effects of battering is admissible as it relates to a theory of self-defense.**

**For more information about the use of expert testimony in criminal cases, see section XIII: Experts and Scientific Evidence.**

### **XVIII. Emerging Practices: Battered Woman's Syndrome**

Battered Woman's Syndrome is most easily understood as a way to explain battering by looking at a set of symptoms believed to be exhibited in women who were victims of domestic violence.<sup>239</sup> This theory of battering is an attempt to explain domestic violence from a psychological perspective, and has not been adopted in Pennsylvania as a formally recognized affirmative defense. Expert testimony, however, regarding the effects of battering is admissible as it relates to a theory of self-defense.<sup>240</sup>

In Pennsylvania, defenses available to a domestic violence victim accused of a crime may include justification, including the use of force for self-protection or to protect others.<sup>241</sup> Generally, the use of force toward another person is justifiable when:

- the person using force reasonably believes that such force is immediately necessary to protect himself or herself against unlawful force by another person at the time.<sup>242</sup>
- the person using force reasonably believes that such force is necessary to protect himself/herself against death, serious bodily injury, kidnapping, or forced sexual intercourse.<sup>243</sup>

<sup>237</sup> See *Commonwealth v. Balodis*, 560 A.2d 341 (Pa. 2000) (holding that an expert's testimony regarding the reluctance of child sex abuse victims to disclose incidents was inadmissible); see also *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986) (quoting *Commonwealth v. O'Searo*, 352 A.2d 30, 32 (Pa. 1976) (holding that it is error to admit expert testimony that young children do not usually fabricate stories of sexual abuse because it was a direct attempt to bolster the victim's credibility).

<sup>238</sup> Mallios, *supra* note 219.

<sup>239</sup> ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 23-24 (2000).

<sup>240</sup> *Commonwealth v. Miller*, 634 A.2d 614 (Pa. Super. 1993).

<sup>241</sup> 18 PA. C.S. §§ 501, 505, 506.

<sup>242</sup> 18 PA. C.S. § 505(a).

<sup>243</sup> 18 PA. C.S. § 505(b)(2).

Expert testimony on battering and its effects is admissible to aid a jury in understanding a criminal defendant's state of mind relevant to a claim of self-defense.<sup>244</sup> The Superior Court held in *Commonwealth v. Miller* that expert testimony regarding battered woman's syndrome is:

... admissible as probative evidence of the defendant's state of mind as it relates to a theory of self-defense. The syndrome does not represent a defense to homicide in and of itself, but rather, is a type of evidence which may be introduced on the question of the reasonable belief requirement of self-defense in cases which involve a history of abuse between the victim and the defendant.<sup>245</sup>

This type of expert evidence may not be introduced to improperly bolster the credibility of the defendant, but rather to aid the jury in evaluating the defendant's behavior and state of mind, given the abusive environment that existed.<sup>246</sup>

When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt.<sup>247</sup> While there is no burden on a defendant to prove the claim before the defense is properly at issue at trial, there must be some evidence, from whatever source, to justify a finding of self-defense.<sup>248</sup> If there is any evidence that will support the claim, the issue is properly before the fact finder.<sup>249</sup>

**Where self-defense is claimed, prosecutors should carefully assess the history of the relationship to identify the predominant aggressor.**

## **XIX. Emerging Practices: Expansion of the Castle Doctrine**

Recent changes to the law eliminated the individual's duty to retreat when the individual is in his or her own home, has a legal right to be at the residence, or is in his or her place of employment. The law now provides that "the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be."<sup>250</sup>

<sup>244</sup> *Miller*, 634 A.2d 614.

<sup>245</sup> *Id.* at 622.

<sup>246</sup> *Id.*

<sup>247</sup> *Commonwealth v. Samuel*, 590 A.2d 1245, 1247 (Pa. 1991)

<sup>248</sup> *Commonwealth v. Black*, 376 A.2d 627, 630 (Pa. 1977).

<sup>249</sup> *Commonwealth v. May*, 585 A.2d 1069, 1071 (Pa. Super. 1991); *see also* *Commonwealth v. Torres*, 766 A.2d 342, 345 (Pa. 2001).

<sup>250</sup> 18 Pa. C.S. § 505(b)(2)(ii).

But, as with the prior law, *self defense does not protect an individual who “provoked the use of force against himself in the same encounter.”*<sup>251</sup>

Continued and/or escalated abuse may lead a victim to reasonably believe the victim needs to defend himself or herself against imminent serious bodily injury or death. But, given the recent elimination of the duty to retreat in one’s home, prosecutors should proceed with caution in cases where self-defense is claimed. Prosecutors should carefully assess the history of the relationship to identify the predominant aggressor.<sup>252</sup> Expert testimony and other information regarding the cumulative effects of physical and psychological abuse help assess the reasonableness of a battered person’s fear of imminent death or serious bodily harm with respect to a self-defense claim, and should help prosecutors to determine which party was the predominant aggressor.<sup>253</sup>

## **XX. Emerging Practices: Understanding a Victim’s Reluctance or Unwillingness to Testify**

Judges and prosecutors often encounter victims of domestic violence who recant their testimony or refuse to testify against an abuser. While this may be frustrating for some professionals, it is important to understand the reasons why a victim may recant or refuse to testify. A victim of domestic violence may refuse to testify against the abuser for myriad reasons, including fear of retaliation or a desire to preserve the relationship. A domestic violence victim may attempt to maintain a civil relationship with the abuser due to the necessity of future interactions surrounding shared children, other family or community. Forcing a victim to testify could drastically increase the victim’s risk of future harm and the level of danger the victim and the children may experience.

### **A. Prosecute Without Victim Testimony (Evidence-Based Prosecution)**

Although the U.S. Supreme Court’s *Crawford* decision makes it more difficult to prosecute a domestic violence criminal case without victim testimony, many criminal cases can proceed without victim testimony if prosecutors, police, and other investigators gather and preserve evidence, conduct thorough investigations, and use nonhearsay and nontestimonial victim statements. Other strategies, such as application of the doctrine of forfeiture by wrongdoing and careful application of the primary purpose test, may also be successful to introduce testimonial statements notwithstanding Confrontation challenges. Cases that are brought to court that rely solely on victim testimony may place the victim in greater danger, and this practice may cause the case to fail if the victim refuses to testify.

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<sup>251</sup> *Id.* § 505(b)(2)(i).

<sup>252</sup> The District Attorney Association opposed the expansion of permissive self-defense.

<sup>253</sup> *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989).

**For more information about strategies that may be successful for prosecuting domestic violence cases without active victim participation, see section XI: Hearsay, Confrontation and Domestic Violence.**

**B. Promote Victim Safety – Refer To Domestic Violence Program**

If the prosecutor believes that the victim is refusing to testify because of safety concerns or coercion, one appropriate response might be referral to a domestic violence advocate to address safety-planning issues.

**C. Seek a Criminal Protective Order**

Another alternative to promote victim safety is to seek a protective order from the court pursuant to section 4954 of the Crimes Code.<sup>254</sup> A court with jurisdiction over any criminal matter may, after a hearing, issue a protective order.<sup>255</sup> A protective order hearing may include hearsay or the declarations of the prosecutor that the witness or victim has been intimidated or is reasonably likely to be intimidated.<sup>256</sup>

**D. Consider Material Witness Warrants**

A material witness warrant may be an effective tool for prosecutors to compel victims to testify at trial. However, compelling testimony through the use of a warrant in domestic violence prosecutions can place an unwilling victim at risk of increased harm by the abuser. Moreover, compelling testimony in this manner could expose the victim to criminal charges if they feel it is safer to recant or change their story than to testify. So, while using a material witness warrant may help to prosecute a crime, it may inadvertently re-victimize an already vulnerable witness.

Before resorting to a material witness warrant, explore other options, such as evidence-based prosecution and/or protective orders. If a victim is still unwilling to testify, ask the victim why they are fearful or reluctant to testify. Encouraging testimony by providing additional protection that the victim may need to feel safe provides the victim with reassurance, rather than an ultimatum.

**Questions? Comments? Further Assistance?**

**Call PCADV!**

PCADV's legal department offers extensive technical assistance and training on issues related to the prosecution of domestic violence.

Please feel free to contact us with questions, comments, or for further assistance!

**717-671-4767 / 888-235-3425 / 888-23-LEGAL**

<sup>254</sup> 18 PA. C.S. § 4954.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

### Appendix A: Child Victim/Witness Hearsay Statements in Various Proceedings

	<b>PFA temporary order proceeding</b>	<b>PFA final order hearing</b>	<b>PFA contempt proceedings (quasi-criminal in nature)</b>	<b>Criminal cases</b>
<b>General Admissibility</b>	Admissible, regardless of whether the child testifies. These are <i>ex parte</i> hearings; safety is the overriding goal, and due process protections are temporarily suspended. 23 Pa. C.S. § 6107(b).	Probably admissible, provided the requirements of 42 Pa. C.S. § 5985.1 are met, regardless of whether the child testifies.	Nontestimonial statements are admissible, provided the requirements of 42 Pa. C.S. § 5985.1 are met. <i>See</i> Commonwealth v. Hunzer, 868 A.2d 498 (Pa. Super. 2005).  Testimonial statements may also be admissible if the child testifies at the hearing, either directly or via closed-circuit television. <i>See</i> Commonwealth v. Geiger, 987 A.2d 743 (Pa. Super. 2008); 42 Pa. C.S. § 5984.1 (recorded testimony).	Nontestimonial statements are admissible, provided the requirements of 42 Pa. C.S. § 5985.1 are met. <i>See</i> Commonwealth v. Hunzer, 868 A.2d 498 (Pa. Super. 2005).  Testimonial statements may also be admissible if the child testifies at the hearing, either directly or via closed-circuit television. <i>See</i> Commonwealth v. Geiger, 987 A.2d 743 (Pa. Super. 2008); 42 Pa. C.S. § 5984.1 (recorded testimony).
<b>Notice Requirements</b>	None. Temporary PFA order proceedings are <i>ex parte</i> . 23 Pa. C.S. § 6107(b).	Yes, 42 Pa. C.S. § 5985.1 requires notice of statement and particulars sufficient that defendant has fair opportunity to prepare to meet statement, <i>See</i> Commonwealth v. Crossley, 711 A.2d 1025 (Pa. Super. 1998).	Yes, 42 Pa. C.S. § 5985.1 requires notice of statement and particulars sufficient that defendant has fair opportunity to prepare to meet statement. <i>See</i> Commonwealth v. Crossley, 711 A.2d 1025 (Pa. Super. 1998).	Yes, 42 Pa. C.S. § 5985.1 requires notice of statement and particulars sufficient that defendant has fair opportunity to prepare to meet statement. <i>See</i> Commonwealth v. Crossley, 711 A.2d 1025 (Pa. Super. 1998).

APPENDIX A

	<b>PFA temporary order proceeding</b>	<b>PFA final order hearing</b>	<b>PFA contempt proceedings (quasi-criminal in nature)</b>	<b>Criminal cases</b>
<b>Other Due Process Protections</b>	Sworn testimony or affidavit and verification are required. Additional due process protections come into play at PFA final order hearing. <i>See</i> 23 Pa. C.S. §§ 6106, 6107(b).	Yes, 42 Pa. C.S. § 5985.1 contains other due process protections. Child must either testify or court must hold <i>in camera</i> hearing to determine whether child is unavailable because testifying will cause emotional distress such that child cannot communicate. Defendant's attorney may be present.	Yes, 42 Pa. C.S. § 5985.1 contains other due process protections. Child must either testify or court must hold <i>in camera</i> hearing to determine whether child is unavailable because testifying will cause emotional distress such that child cannot communicate. Defendant's attorney may be present.	Yes, 42 Pa. C.S. § 5985.1 contains other due process protections. Child must either testify or court must hold <i>in camera</i> hearing to determine whether child is unavailable because testifying will cause emotional distress such that child cannot communicate. Defendant's attorney may be present.
<b>Sixth Amendment / PA Constitutional Right to Confrontation</b>	Confrontation does not apply because this is an <i>ex parte</i> , civil hearing.	Confrontation is probably not implicated. PFA proceedings are civil in nature. Generally, the right to confrontation applies in criminal cases only. No PA appellate cases on this issue.	Confrontation likely applies because PFA contempt proceedings are quasi-criminal. However, child hearsay statements may still be admissible. Nontestimonial statements are admissible notwithstanding confrontation. Testimonial statements are admissible if the child testifies, either directly or via closed-circuit television. (See above).	Yes, Confrontation applies. However, child hearsay statements may still be admissible. Nontestimonial statements are admissible notwithstanding confrontation. Testimonial statements are admissible if the child testifies, either directly or via closed-circuit television. (See above)

## Appendix B: Sample Motion in Limine: Challenging the Admission of Social Media Evidence

*\*This sample includes draft language that can be adapted to the facts of your case. If you would like an electronic copy in .doc format, please contact PCADV legal department at 717-671-4767. PCADV can provide you with assistance to adapt this sample to the facts of your case.*

### Motion in Limine

1. On December 1, 2012 Defendant was arrested by the Harrisburg Police Department on the charges of simple assault and terroristic threats.
2. Harrisburg Police will testify at trial that reporting Officer Diligent observed bruising and redness to the right eye and neck of the victim witness. Additionally, Defendant made an unsolicited utterance to Officer Diligent declaring, "I didn't hit her that hard."
3. Charges were held at the preliminary hearing and a date for a jury trial has been scheduled for March 10, 2012. The Commonwealth presents this Motion in Limine in anticipation of that trial date.
4. During discovery, Defendant produced copies of a personal webpage on Look Book, a social web site used by the Defendant and victim witness. Defendant submits that the documents produced are from the Look Book account of victim witness from the dates of January 1, 2013, to January 15, 2013, and include statements allegedly made by the victim witness as well as unknown individuals that are members of her Look Book page.
5. The Commonwealth objects to the admission of this Look Book page, as it has not been properly authenticated and its admission would be misleading and prejudicial to the fact finder. (See attached Brief in Support of the Commonwealth's Motion in Limine).
6. The Commonwealth further objects to the use of these Look Book pages, as the contents constitute inadmissible hearsay. Statements made by contributors other than the victim witness are hearsay and fit under no established exception to the rule.
7. The Commonwealth requests that this Honorable Court exclude the Defendant's presentation of Look Book pages from the alleged account of victim witness from the dates of January 1, 2013 to January 15, 2013, as they are inadmissible evidence.

Wherefore, the Commonwealth requests this Honorable Court find that the Look Book pages submitted by the Defendant as evidence for trial are inadmissible evidence and are barred from being admitted or referenced at trial.

**Order Language**

It is hereby ordered upon the Commonwealth's Motion in Limine and the Brief in Support of the Commonwealth's Motions in Limine, the Look Book pages submitted by Defendant for evidence at trial are inadmissible evidence and are barred from being admitted or referenced at trial.

**Brief in Support**

The Commonwealth objects to the admission of Look Book evidence by the Defendant on the grounds that the evidence has not been properly authenticated.

The Superior Court has addressed the authentication of electronic evidence and has found that the existing rules of evidence are sufficient in establishing standards for admissibility of electronic evidence and each case is to be evaluated as the unique circumstances of the cases and their evidence require.

We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.

In re F.P., 878 A.2d 91 (Pa. Super. 2005)

The court in In re F.P. reviews the standards established for authentication in the Pennsylvania Rules of Evidence and emphasizes that authentication, as a condition precedent to the admission of evidence, is satisfied by additional evidence that corroborates the submission is what the proponent claims. Id. at 201.

It is well established in both rule and precedent that testimony of a witness with *personal knowledge* that a matter is what it is claimed to be may be sufficient to authenticate or identify the evidence. Pa. R.E. 901(b)(1); *see also* Official Comment (citing Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980); Heller v. Equitable Gas Co., 333 Pa. 433, 3 A.2d 343 (1939)). The Court has further qualified that a document may be authenticated by circumstantial evidence. Commonwealth v. Brooks, 352 Pa. Super. 394, 508 A.2d 316, 318 (Pa. Super. 1986). "Proof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing." Id. at 319 (quoting McCormick, EVIDENCE § 222 (E. Cleary 2d ed. 1972)).

In the instant case, the testimony of the Defendant that he observed the pages on Look Book and printed them are not enough to authenticate the documents and attribute the contents as written and published by the victim witness for the Commonwealth. The Defendant does not have the "personal knowledge" as required to authenticate the submission. This conclusion is in line with recent Pennsylvania cases examining the need for sufficient direct and/or circumstantial evidence to support the authenticity of electronic evidence proffered in court.

For example, the In re F.P. court found that an electronic writing was sufficiently authenticated when coupled with significant direct and circumstantial evidence. In that case, the electronic conversation in question took place between the defendant and victim witness, so the defendant proffering the evidence had first-hand knowledge of the conversation. Further, the trial court utilized circumstantial evidence such as consistency in the writing, use of first name of the author, and corroboration of authorities that questioned the parties about the electronic communication to support the authentication.

Similarly, but with a different result, the court in Commonwealth v. Koch, 39 A.3d 996 (Pa. Super. 2011), *appeal granted* 44 A.3d 1147 (Pa. 2012), found that there was insufficient direct

and/or circumstantial evidence to support admission of electronic communications. In *Koch*, the defendant appealed her conviction for possession of a controlled substance (marijuana) as an accomplice and possession with intent to deliver. During the course of a warranted search, police seized two cell phones, one of which belonged to the defendant. Text messages from the phones were transcribed and admitted at trial over defendant's objections that they were hearsay and lacked authentication. The defense noted that the messages clearly showed that Koch had not written all of the messages.

On appeal, the superior court noted its prior decision in *In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005), and explained that electronic communications could be authenticated by their contents in the same way that other evidence is authenticated. Testimony by a person with personal knowledge or circumstantial evidence is sufficient where circumstances support a finding that the evidence is genuine. The court explained that the person to whom the number is assigned does not necessarily have exclusive use of the cell phone. Circumstantial evidence corroborating the identity of the sender is necessary. The court concluded that no evidence was offered to show that the defendant wrote the drug-related messages, nor were there any contextual clues that would tend to reveal the identity of the sender. The fact that the cell phone was found on a table in close proximity to Koch was not sufficient to authenticate the messages. The superior court reversed the judgment of sentence and remanded for a new trial; however, the Pennsylvania Supreme Court granted the Commonwealth's Petition for Allowance of Appeal on March 12, 2012.

In the case at bar, Defendant has not submitted any additional direct or circumstantial evidence to corroborate his assertion that the victim witness made the electronic submission. He relies solely on his testimony. Further, Defendant had access to the victims Look Book pages as well as the capability of altering, adding, deleting, and fabricating the victim witness's communications. Therefore, the Commonwealth objects to the Look Book pages submitted by the Defendant as evidence for trial and asserts that the pages should be barred from being admitted or referenced at trial.