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January 11, 2011

Sen. Rich Zipperer (Dist. 33)
Committee on Judiciary & Government
State Capitol, Room 323 South
P.O. Box 7882
Madison, WI 53707-7882

Rep. Jim Ott (Dist. 23)
Committee on Judiciary & Ethics
State Capitol, Room 317 North
P.O. Box 8953
Madison, WI 53708

RE: **Sections 33 - 38 of Assembly Bill 1 (Special Session)**

Dear Sen. Zipperer and Rep. Ott:

The Executive Board of the Wisconsin District Attorneys Association reviewed Assembly Bill (AB) 1 that was introduced in the Special Session. The WDAA believes that sections 33 through 38 of AB-1 will have a significant detrimental effect on crime victims in Wisconsin based upon the proposed changes to sections 907.01 and 907.02 of the Wisconsin Statutes.

Changes in the standard applied to expert testimony may substantially affect our prosecution of criminal, juvenile, traffic, and sexually violent person cases in state courts. Passage of this legislation may also increase the workload of the Wisconsin State Crime Laboratories and it will certainly increase the cost counties incur in their role of providing our offices with the financial support necessary to procure expert witnesses.

In the past, the WDAA has opposed legislation that would impose the more restrictive *Daubert* standard (Federal Rule of Evidence 702) on expert witness evidence. We continue to do so. However, this legislation appears to be even more restrictive than *Daubert*.

First, although Sections 33 through 38 of this bill largely track the Federal Rules of Evidence (FRE) 701-702, as amended in 2000, there is a critical difference. Section 35 modified FRE 702 by requiring that the proponent of the evidence show that it is "true", far more demanding than the *Daubert* test. There are constant shifts and advances in science and forensic evidence. From our standpoint, one need only look at the evolution in thinking about mental diseases manifested in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) or recent advances in genetic testing to illustrate that our present standard of demonstrating reliability has been an effective method for preserving the integrity of the criminal court process.

The new proposed standard will lead to uncertain and unpredictable results. The legislation does not articulate how the proponent would show that the

principles and methods are “true” and by what criteria. It is not clear at what point in time something will be considered “true” and how many tests or studies must be completed. Appellate courts may interpret this language as a “true science” standard that will dramatically increase our workload as well as the courts and public defenders. The fiscal estimate of the legislation, both state and local tax burdens, must also be thoughtfully constructed.

Even adopting FRE 702 (the *Daubert* standard) would significantly curtail our ability to prove our cases. The standard created by AB-1 would virtually eliminate “experiential experts.” “Experiential experts” serve a critical function in educating our citizens on issues outside the realm of general knowledge and dispelling common myths held by many within society. At present, we routinely elicit testimony from experienced police officers testifying as experts regarding drug trafficking methods, criminal gang operations, and the extent of a driver’s impairment to safely operate a motor vehicle in drunk driving cases. We also elicit testimony from social workers regarding the impact of child abuse and neglect on families and children, Sexual Assault Nurse Examiners (SANE) to dispel the myth that no injuries means no assault, child forensic interviewers to educate the jury on issues relating to child disclosure, child memory, and child perception, and domestic violence advocates on the impact of trauma on a person’s ability to recall and convey information to law enforcement following rape or other forms of violence.

This bill will also impact our ability to sustain our burden of proof in the prosecution of sexually violent person commitments under Chapter 980 of the Wisconsin Statutes. Using the *Daubert* standard, a court in New Hampshire prohibited the state from the following forms of expert testimony: “[T]estimony that the jury should consider as additional ‘factors’ that respondent has not shown remorse for his actions, has not shown empathy for his victims, that the respondent is a ‘chronic offender of a predatory nature,’ or that respondent’s victims were entirely male; testimony that the jury should give a particular amount of additional weight to the number of respondent’s victims due to the Static-99’s limited consideration of that factor; testimony attempting to quantify the impact of respondent’s failure to complete treatment on his recidivism risk; testimony attempting to place respondent at a particular point within the ranges of recidivism risk outlined by the new norms; testimony that respondent’s recidivism risk is necessarily within the ranges outlined by the new norms; and testimony attempting to assign respondent either a quantified . . . or a qualified . . . recidivism risk.” *State of New Hampshire v. William Ploof*, 2007-E-0238., at 42, available at www.static99.org/pdfdocs/daubert-order4-28-09.pdf.

The current scientific methodology used in predicting sexual reoffending rates has been accepted by Wisconsin courts. Passage of this bill with its new restrictions on expert testimony may throw into question the use of these actuarial instruments and open up an entire new round of challenges in these important cases.

Currently, expert witnesses can testify on scientific, technical, or other specialized knowledge if it will assist the trier of fact. Our present standards require the trial court to determine reliability and usefulness of this evidence to the fact finder. Wisconsin law on expert testimony has been well developed, and trial courts have generally have been capable in determining what expert testimony is appropriate for juries to consider. In addition, Wisconsin law provides for the full cross examination of experts that ensures any questionable expert testimony can be challenged.

In the interest of assisting crime victims, we would also request an exception in family court and restraining order hearings. Like prosecutors, attorneys handling these cases use the same experts, such as social workers, sexual assault nurse examiners, child forensic interviewers and


domestic violence advocates to help the trier of fact understand victim and abuser behaviors. In intimate partner and family violence cases, there are many complex issues, including interfamilial dynamics, that may impact why a victim may recant or delay reporting an incident or the impact of emotional abuse on children.

We do not take a position on changes that will make it more difficult for civil tort attorneys to meet their burden of proof in state courts. However, most trials conducted in this State occur in criminal court where the burden of proof is beyond a reasonable doubt. It is a burden we willingly embrace and a privilege to represent the citizens of the State of Wisconsin. This legislation will make our job of protecting the public and holding offenders accountable more difficult by restricting or eliminating reliable and useful expert testimony.

We are requesting an opportunity to meet with you to address these issues. At a minimum, we are requesting that the present evidentiary rules be maintained for criminal, juvenile (including any proceeding or petition pursuant to Chapter 48 filed by the District Attorney, Corporation Counsel or other appropriate official under Section 48.09), traffic, and proceedings under Chapter 980.

Thank you for your attention to this request.

Respectfully Submitted,



Winn S. Collins
WDAA President

cc: Governor Scott Walker
Attorney General J.B. Van Hollen
Sen. Neal Kedzie (Dist. 11), Vice-Chair of Committee on Judiciary & Government Operations
Sen. Pam Galloway (Dist. 29), Member of Committee on Judiciary & Government Operations
Sen. Fred Risser (Dist. 26), Member of Committee on Judiciary & Government Operations
Sen. Jon Erpenbach (Dist. 27), Member of Committee on Judiciary & Government Operations
Rep. Tom Larson (Dist. 67), Vice-Chair of Assembly Committee on Judiciary and Ethics
Rep. Samantha Kerkman (Dist. 66), Member of Assembly Committee on Judiciary and Ethics
Rep. Joel Kleefisch (Dist. 38), Member of Assembly Committee on Judiciary and Ethics
Rep. Andre Jacque (Dist. 2), Member of Assembly Committee on Judiciary and Ethics
Rep. Gary Hebl (Dist. 46), Member of Assembly Committee on Judiciary and Ethics
Rep. Tony Staskunas (Dist. 15), Member of Assembly Committee on Judiciary and Ethics
Rep. David Cullen (Dist. 13), Member of Assembly Committee on Judiciary and Ethics
Director of Policy and Legislative Affairs Ryan Murray, Office of the Governor
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Director of Legal & Systems Services Ian Henderson, Wisconsin Coalition Against Sexual Assault