James E. Doyle Inn of Court
March 23, 2011

EVIDENCE VIGNETTES

Hon. Michael R. Fitzpatrick
Hon. John R. Storck

VIGNETTE #1 - Small Claims

Mr. Jones sues Mr. Steger for $5000 damage to his car claiming that Mr. Steger failed to yield at a red light. Both claim the other failed to yield. At trial both sides are represented by counsel.

Problem #1

After Mr. Jones has testified as to liability his attorney asks questions about damages.

Jones Atty: Mr. Jones did your car need repairs because of the accident?

Jones: Yes.

Jones Atty: I show you what has been marked exhibit 1 and 2. Are these the estimates you obtained from Reasonable Auto Repair Garage and Honest Joe's Auto Garage for the repairs that were needed because of the accident?

Jones: Yes.

Jones Atty: I move exhibits 1 and 2 into evidence.

Steger Atty: Objection. Hearsay

Ruling #1 A-Sustained.
B-Overruled

Mrs. Steger is called to the stand adversely by Mr. Jones attorney.

Jones Atty: Mrs. Steger you are the wife of the defendant Mr.Steger.

Mrs. Steger: Yes.

Jones Atty: Mrs. Steger did Mr. Steger tell you that he did not see the red light?

Steger Atty: Objection. Husband-Wife Privilege.

Ruling #2 A-Sustained.
B-Overruled

Problem #3
Prosecutor: What happened next?

Friday: I told Mr. West that cameras at the US Bank had shown Frank Gorshin opening an account with this check. I asked him if he had given Gorshin permission to have this check.

Prosecutor: What was his response?

Defense Atty: Objection. Hearsay.

Prosecutor: Your Honor, I'm not offering it to prove the truth of the matter asserted.

Ruling #3:

A – Sustained.
B – Overruled.

Problem #4
The prosecutor then calls Cesar Romero to the stand. After establishing who he is and what he does, the following exchange takes place.

Prosecutor: Mr. Romero, I'm now handing you Exhibit 2. Can you identify this?

Romero: This is a completed application form to open an account at US Bank.

Prosecutor: And what information does it contain?

Romero: It has the name of Adam West, his address, his telephone number, his social security number and his mother's maiden name.

Prosecutor: Have you ever seen this before?

Romero: Yes, it was given to me by an individual who identified himself as Adam West and who wanted to open an account.

Prosecutor: Is that individual present in court today, and if so, can you identify him?

[Romero identifies the defendant, Frank Gorshin.]

Prosecutor: Did you subsequently learn that this was not the real Adam West.

Romero: I did. I then called Adam West and asked him if he had given Frank Gorshin authorization to use the information contained on the application form.

Prosecutor: What was Mr. West's response?

Defense Atty: Objection. Hearsay.

Prosecutor: Your Honor, this is my last witness. I'm almost ready to rest.

Ruling #4

A – Sustained.

B – Overruled.

VIGNETTE #2 - Divorce

Mr. and Mrs. Hollister are embroiled in a bitter custody/placement battle.

Problem #1

The Court ordered the Family Court Counseling to perform a Custody Study. The study was not submitted to the Court and the parties until 2 days prior to trial. The individual who did the study is not available at the trial

At tiral Mr. Hollister wants the custody study received into evidence. The study includes extensive information concerning the excessive drinking by Mrs. Hollister and recommends primary placement with Mr. Hollister. Unfortunately the family court counselor who prepared the report is not available for the trial.

The following occurs at trial:

Mr. Hollister Attorney: Your honor I would move into evidence Exhibit #1, the written, comprehensive, and well thought out report of the Family Court Counselor. Although he/she is not available for the trial today this was a court ordered report. I am sure that the court and counsel have all read the report.

Mrs. Hollister's Attorney: Your Honor I object. The report was not timely submitted and should be excluded. Under the rules of evidence it needs to be authenticated. I have the right to cross examine the author of the report.

Mr. Holister's Attorney: Your honor this is a family case and the rules of evidence do not strictly apply. There was no court order requiring that the report be filed and exchanged at any certain time before the trial. You routinely consider reports such as presentence reports without the author present. There is no prejudice shown by Mrs. Hollister to the receipt of the report that was submitted only a couple of days before trial.

Ruling #1 A-Sustained – exclude report
B-Overruled – receive report

At the end of the testimony the Court asks for the recommendation of the G.A.L., Attorney Jones. The G.A.L. states: Your honor you have heard from a number of witnesses who have testified about the drinking habits of Mrs. Hollister. I talked to numerous other individuals who would also testify that Mrs. Hollister is an alcoholic and that she has even been under the influence while driving with the children."

Mrs. Hollister's Attorney: Your Honor, I object. There is no evidence in the record that my client was ever operating under the influence with the children in the car. The G.A.L. can only argue from facts in the record.

Attorney Jones: Your Honor, this is a Family Case and the rules of evidence do not strictly apply. You appoint me to assist in the gathering of the facts and because of my expertise in making appropriate recommendations for the best interest of the children. I should be entitled to report on the additional information I have gathered as the basis for my opinion.

Mrs. Hollister's Attorney: Your Honor, the rules of evidence do apply. Attorney Jones is not a fact gatherer and expert witness. She can only argue the facts in evidence and reasonable inferences from those facts.

Ruling #2 A-Sustained.
B-Overruled

VIGNETTE #3 JUVENILE CASE

Johnny B. Good, a 16 year old, is arrested for entering Marshland Pharmacy and shoplifting numerous boxes of Sudafed. The investigating officer spoke with Johnny's friend Susan who admitted that she had purchased methamphetamine from Johnny.

Johnny is taken into Temporary Physical Custody and the process begins.

Problem #1

At the temporary custody hearing Johnny opposes the requested temporary custody in secure. The first witness is social worker Sally Smith.

District Attorney: Ms Smith you are the social worker who took Mr. Good into temporary custody.

Ms. Smith: Yes

District Attorney: You are requesting that Mr. Goode be placed in secure detention based on your review of the police report?

Ms. Smith: Yes.

District Attorney: What did the police report state about Mr. Goode selling methamphetamine?

Ms. Smith: The officer stated that he talked to a Susan who admitted purchasing methamphetamine from Mr. Goode.

Defense Attorney: Your honor. I object. This is hearsay. I move that the last answer be stricken.

Ruling #1 A-Sustained.
B-Overruled

Problem #2

Johnny is sent to secure and demands a fact-finding hearing on the charges of retail theft and sale of meth. At the fact finding hearing the arresting officer, Officer Friendly, is called to testify. After preliminary questions are asked the following questions are asked:

District Attorney: Officer Friendly did you talk to a girl named Susan about Johnny selling methamphetamine to her.

Officer: Yes.

District Attorney: What did she tell you?

Defense Attorney: Objection. Hearsay.

•

Ruling #2 A-Sustained.
B-Overruled.

VIGNETTE #4 Summary Judgment

Palisades sued Spendthrift for non-payment of a credit card. The card was issued by Chase Bank. It was later assigned to Palisades when the account was delinquent.

Palisades moves for summary judgment and files an affidavit of Marie Oliphant, who averred hat she was "a duly authorized representative of Palisades, the owner of the account through purchase, that each attached document is a true and correct copy of the credit card statements that were mailed to Spendthrift on a monthly basis and there is a balance due of $27,343.17." The documents are entitled "Chase Mastercard Account Summary," and list Spendthrift as the cardholder and the amounts due for each month."

Spendthrift opposed the motion but did not submit any affidavits or other factual materials. He argues that Palisades' affidavits are not made on personal knowledge and do not set forth evidentiary facts as would be admissible in evidence. Palisades argues that the rules of evidence do not apply on motions, that the records are admissible as business record/regularly conducted activity, §908.03(6), Wis. Stats., and Spendthrift failed to file any affidavits in opposition to the motion.

Ruling:

A. Grant Summary Judgment

B. Deny Summary Judgment

VIGNETTE #5 HEARSAY – PRELIMINARY HEARING

Frank Gorshin is charged with identify theft. The complaining witness, Adam West, previously told Det. Joe Friday that someone had opened a bank account using one of his payroll checks and then had closed the account, taking out all of the money.
The prosecutor begins the preliminary hearing by calling his first witness, Det. Joe Friday. After preliminary testimony is heard which establishes the witness's credentials and investigation of this case, the following exchange takes place.

Problem #1
Prosecutor: Det. Friday, I'm showing you Exhibit 1. Can you identify this?

Friday: This is a payroll check from Bruce Wayne Company in the amount of $5000, made payable to Adam West.

Prosecutor: And where did you get Exhibit 1?

Friday: From Cesar Romero, who is a vice-president at US Bank.

Prosecutor: What did Mr. Romero Tell you about this check?

Objection: Hearsay

Prosecutor: Rule of Evidence do not apply at Preliminary.

Ruling #1:
A – Sustained.
B – Overruled.

Problem #2

Prosecutor: What did you do with the check?

Friday: I showed it to Adam West and asked him if it was his check.

Prosecutor: What was his response?

Defense Atty: Objection. Hearsay.

Prosecutor: Your Honor I need some leeway.

Ruling #2:
A – Sustained.
B – Overruled.

VIGNETTE 6 PRELIMINARY EXAMINATION - CONFRONTATION

Mackin, Hoppe and Bowman are charged with a burglary. Bowman gives a statement to detective implicating all three defendants. At Hoppe's prelim Bowman takes the fifth. The detective is called to stand:

District Attorney: Detective did you take a statement from Bowman?

Detective: Yes I did.

District Attorney: Did Bowman tell you how he, Mackin and Hoppe committed a burglary together?

Detective: Yes he did.

District Attorney: What did he tell you about the three of them committing a burglary together?

Defense Attorney for Hoppe: Objection! This is inadmissible hearsay and violates my client's constitutional confrontation rights. Bowman is not available to cross examine.

Ruling:

A-Sustain on hearsay and confrontation;
B-Sustain on confrontation,
C. Overrule

VIGNETTE #7 Hearsay and Confrontation

Crawford is charged with attempted murder for stabbing Lee with a knife. Crawford and his wife Sylvia went to Lee's apartment because they were upset over an earlier incident when Lee had tried to rape Sylvia. Sylvia observed the stabbing. Crawford's position at trial is that Lee had a weapon and that the stabbing was in self defense. Shortly after the stabbing Sylvia gives a statement to police that is against her penal interest and in which she states she did not see Lee with any weapon. Sylvia is unavailable at trial.

Problem #1 Statement not offered for Truth

District Attorney: Officer Christianson, were you on duty the night of March 5 of this year?

Officer: Yes, sir, I was.

District Attorney: Did you receive a call to go to Mr. Lee's apartment?

Officer: Yes, sir, the dispatcher directed me there around 11:00 p.m. to investigate a stabbing with a knife in which the victim was unarmed.

Defense Attorney: Objection, your Honor. Hearsay. I move to strike everything beyond the statement he was directed there around 11pm

District Attorney: It is not hearsay. It is not offered to prove the truth of the matter asserted, only that that is the reason why the officer went to the Lee apartment.

Ruling #1 A. Sustain;
B. Overrule

Problem #2 Police Taped Statement of Unavailable Witness

Later in the trial:

District Attorney: Your Honor I have had marked as an exhibit the taped statement of Sylvia. She is unavailable to testify at trial. This is a statement against her penal interest. I ask permission to play it to the jury to show that the victim did not have a weapon.

Defense Attorney: Objection, your Honor. The use of Sylvia's statement is a violation of the defendant's right of confrontation. I cannot cross examine a recorded statement.

District Attorney: Sylvia's statement was against her own penal interest because it implicated her as party to a crime. Although a statement against penal interest may not be

a firmly rooted hearsay exception there are particularized guarantees of trustworthiness here. She was an eye witness. She was given her Miranda rights. The statement was taken almost immediately after the incident. Confrontation is satisfied because of its reliability.

Ruling #2 A. Sustain;
B. Overrule

Second Fact Scenario:

Michelle calls 911 while her former boyfriend is beating her. While talking to the 911 operator she describes how Davis is "jumpin" on her, and "usin' his fists. She identifies Davis to the operator and then states that he is running away. The police quickly respond and find Michelle shaken and with fresh injuries to her forearm and face. They find her frantically trying to gather her children and possessions to leave her residence. Davis is charged with felony violation of a domestic no-contact order.

Problem #3 Admissibility of 911 Calls

At trial Michelle fails to appear. The officers testify as to the injuries of Michelle and her actions they observed. Neither can testify about the cause of the injuries. The State attempts to use the 911 tape.

District Attorney: Your Honor we would move into evidence the 911 tape of the call from the victim Michelle and ask permission to play it to the jury. The purpose is to identify the Defendant as the cause of the injuries.

Defense Attorney: Your Honor I object. This is in violation of the defendant's confrontation rights. We cannot cross examine a 911 tape.

District Attorney: Your Honor this is an excited utterance which is a firmly rooted hearsay exception. This was a cry for help from the victim, not a statement made to testify against the defendant. It is a reliable statement. Confrontation does not apply.

Ruling #3: A. Sustained;
B. Overruled

Third Fact Scenario:

Police respond to the Hammond home to a reported domestic disturbance. They find Amy Hammond on the front porch. She states that nothing was the matter but permits them to enter the home in which they find glass broken. She appears frightened. Mr. Hammond also denies any problem. The officers separate the Hammonds and are able to

obtain an oral statement from Amy indicating that Mr. had struck her, attacked a daughter, broke the glass, etc. Mr. Hammond is charged with Domestic Battery.

Problem # 4 Confrontation – Statement to Police at Scene

Amy Hammond fails to appear for trial. The officer is called to testify about what Mrs. Hammond told him.

District Attorney: Officer, did you take a statement from Amy Hammond concerning what happened.

Officer: Yes, I took her into a separate room to ask her questions and she told me what happened.

District Attorney: What did she tell you?

Defense Attorney: I object your honor. I acknowledge that the statement may be an excited utterance or a present sense impression but it violates the defendant's right of confrontation. Mrs. Hammond needs to be here to be cross examined.

District Attorney: Your honor excited utterance is a firmly rooted hearsay exception. Therefore it is reliable. There was no interrogation here. This was general on the scene questioning as to what happened. The officers needed to determine what happened to determine if Mrs. Hammond was in danger. Confrontation does not apply.

Ruling #4: A. Sustained;
B. Overruled

Problem #5 Forfeiture of Confrontation

The Judge flips a coin and the DA loses. The statement is kept out. The District Attorney attempts to get the statement in another way.

District Attorney: Your Honor I have a letter from Mrs. Hammond to me stating why she did not attend the trial today. She states in the letter that she has abused by Mr. Hammond for years, that she is afraid that he will kill her, and that he recently called her and told her that he would beat her and her daughter to death with his bare hands if she showed up to testify at the trial today. I ask that you consider this letter and forfeit Mr. Hammond's confrontation rights.

Defense Attorney: Your honor I strongly object to this hearsay letter being received. You have already ruled that the statement violates the defendant's confrontation rights.

District Attorney: Your honor I believe that the Defendant caused the witness not to be present today. He should not benefit from his wrongdoing; he should forfeit his right of confrontation.

Ruling #5: A. Refuse to consider the letter as hearsay
B. Consider the letter and admit the statement
C. Consider the letter and exclude the statement

VIGNETTE 8 EVIDENCE EXPERT

This is a medical malpractice case where the plaintiff has sued the defendant doctor on dual theories of negligence and failure to comply with the informed consent statute.

Plaintiff calls Dr. Ben Casey, who has been hired by plaintiff to give expert opinions regarding the alleged negligence of the defendant. After the necessary foundation is laid to establish the qualifications of Dr. Casey as well as his review of the relevant medical records, the following exchange takes place.

Problem #1
Pl's Atty: Dr. Casey, at my request, did you review this case to see if the defendant's treatment of the plaintiff was within the applicable standard of care?

Dr. Casey: Yes, I did.

Pl's Atty: Based upon your review, did you form an opinion as to whether the defendant's treatment deviated from the standard of care?

Def.'s Atty: Objection. Form of the question.

Ruling #1

A – Sustained.
B – Overruled.

Problem #2
Pl's Atty: Dr. Casey, based upon your review of the medical records, did you form an opinion, to a reasonable degree of medical certainty, as to whether the defendant's treatment of the plaintiff deviated from the standard of care?

Def's Atty: Objection. Form of the question.

Ruling #2

A – Sustained.
B – Overruled.

Problem #3
The court overrules the question. Dr. Casey states that he did form such an opinion and that his opinion is that the treatment did deviate from the standard of care.

Pl's Atty: Dr. Casey, do you have an opinion, to a reasonable degree of medical certainty, as to whether this treatment was a cause of the plaintiff's injuries?

Dr. Casey: I think that it's possible that the treatment by the defendant might have caused the plaintiff's injuries.

Def's Atty: Objection. Form of the answer.

Ruling #3

A – Sustained. Answer is stricken. Jury is instructed to disregard.
B – Overruled.

Problem #4
Plaintiff's counsel finishes with his direct examination of Dr. Casey.
Defendant's counsel begins his cross-examination.

Def's Atty: Dr. Casey, you have stated that you believe my client's treatment of the plaintiff deviated from the standard of care, correct?

Dr. Casey: That is correct.

Def's Atty: Doctor, you have also stated that this caused the plaintiff's injuries, correct?

Dr. Casey: That is correct.

Def's Atty: Dr. Casey, isn't it possible that plaintiff's injuries would have occurred even if there had been no treatment?

Pl's Atty: Objection. The question is not to the requisite degree of certainty.

Ruling #4

A – Sustained.
B – Overruled.

Problem #5

Plaintiff's counsel states his intention to call as an expert witness, Learned Hand, who is an attorney as well as an esteemed professor of law. Plaintiff's counsel says that Prof. Hand will testify and give opinions which explain to the jury various aspects of Wisconsin's Informed Consent Statute.

Defense counsel objects to such opinion evidence as being irrelevant.

Plaintiff's counsel responds that this is a complicated area, that Prof. Hand, who lectures on informed consent, is recognized as an expert in this area, and that this proposed testimony will assist the jury to determine a fact in issue. Thus, under § 907.02, Prof. Hand should be allowed to testify.

Ruling #5

Do you allow Prof. Hand to testify?

A – Yes.

B – No.

This case was commenced March 1, 2011. The Walkers moved into the house the Doyles used to live in. The Walkers put in new carpeting made by Union Industries. Shortly after moving into the house, Mrs. Walker experienced severe respiratory problems, wheezing, and shortness of breath. An air expert retained by Walkers found that there were volatile organic compounds (VOCs) present in the air in the house. This was true even after the carpeting made by Union was removed. Walkers started a product liability suit against Union alleging that the carpeting was defective. It is alleged that the VOCs from the carpet were significant enough even after the carpet's removal that the Walkers had to move out of the house at a significant loss of money.

Walkers also retained Dr. Fitzgerald, an allergist, who has been in practice for 35 years. He also teaches at the local medical school. Fitzgerald is of the opinion that Mrs. Walker's illness was caused by the carpeting and the resulting VOCs. He cited to published articles showing that this type of carpeting does emit certain types of VOCs. However, he has not published any peer-reviewed articles on this issue and in his opinion cited to no articles that are peer-reviewed which link these VOCs to the types of problems Mrs. Walker has. Fitzgerald has based his analysis on his treatment of Mrs. Walker, a differential diagnosis, and the temporal relationship between Mrs. Walker's illness and the installation of the carpeting.

Defendant Union has retained Dr. Jackson as an expert. It is Dr. Jackson's opinion that Mrs. Walker's unfortunate condition has absolutely no relationship to the carpeting or the VOCs.

Problem #1

Defendant Union has filed a Motion in Limine to exclude the testimony of Dr. Fitzgerald. Defendant's counsel, a former attorney general, asks that the trial judge make a determination on the reliability of the expert under new Sec. 907.02. Defendant's counsel argues that Dr. Fitzgerald and Dr. Jackson are diametrically opposed in the substance of their opinions and their methodology. Therefore, both opinions and methodologies of each expert cannot be "reliable." Defense counsel argues that the court must decide which opinion is "reliable" and by definition exclude the other one.

Ruling #1

A – Motion Granted

B – Motion Denied

Problem #2

Defense counsel moves to exclude Dr. Fitzgerald's testimony because there are no peer-reviewed studies relied upon by Dr. Fitzgerald in support of his opinion which links the carpet VOCs to Mrs. Walker's problem and Dr. Fitzgerald has not published any peer-reviewed articles on this particular subject.

Ruling #2

A – Motion Granted

B – Motion Denied

Problem #3

Dr. Fitzgerald sampled blood from Mrs. Walker. The testing of the blood did not support Dr. Fitzgerald's opinions. The doctor is of the opinion that, in his area of expertise, this blood test is only one of many factors to consider in the diagnosis. On the other hand, Dr. Jackson opines that, in this area of expertise, the blood test is definitive and the other factors are irrelevant. Defense counsel moves to exclude Dr. Fitzgerald's opinions because his methodology and opinions are flawed and unreliable.

Ruling #3

A – Motion Granted

B – Motion Denied

C – I need to hold a hearing

This case was commenced March 1, 2011. Six foot seven inch Dustin Hoffman was struck from behind in his automobile by a City of Beloit garbage truck. Hoffman estimated the truck was traveling 20 to 25 miles per hour before the collision and, after the collision, his car was pushed about 150 feet. Hoffman's car had $9,000 in damages. He further testified that his head was whipped backwards when the garbage truck collided with his car, his teeth clashed together and then his head came forward. Shortly thereafter, he had continuing problems with his jaw. The City of Beloit conceded negligence.

Hoffman was treated by Dr. Szell for his jaw problems. Szell is the Chairman of the Department of Oral Surgery at the Medical College of Wisconsin. Half of his 34 publications deal with TMJ problems. Szell examined Hoffman twice, was aware of Hoffman's description of the accident, and reviewed Hoffman's medical records.

Problem #4

In a Motion in Limine, the City's Attorney asks to exclude Szell's testimony regarding whether Hoffman's jaw problems were caused by the collision. It is alleged that Szell is not qualified to give an opinion under Wisconsin's new version of Sec. 907.02 because he is not an accident reconstruction expert.

Ruling #4

A – Motion Granted

B – Motion Denied

Problem #5

The City has filed another Motion in Limine. This motion requests that the following opinions of the doctor be excluded because the opinions are not reliable. First, Dr. Szell testified that, based upon the injury to Hoffman, the truck had to be going at least 40 miles per hour. Second, based upon the same injuries, the truck had to have been filled with at least five tons of garbage. Third, based on the injuries, Hoffman's neck snapped back and forth at 25 miles per hour.

Ruling #5

A – Motions Granted

B – Motions Denied

VIGNETTE #10 **906.11**

Michael Johnson is charged with repeated acts of sexual contact with APB, a 12-year-old. The defendant allegedly slept with the victim and had sexual contact with him at Johnson's Farm, NoWhere acres, in Dodge County, numerous times between June 1 and July 15, 2005

PROBLEM #1

The State calls as its first witness APB and establishes through his testimony that he stayed at Nowhere Acres with Michael Johnson from June 1 – July 15, 2005. The direct continues:

District Attorney – Andrew you said you lived at Nowhere Acres from June 1st to July 15th.

Andrew – yes

District Attorney – Andrew I would like to talk to you about what happened while you were sleeping there. While you were sleeping in Mr.Johnson's bed what if anything happened?

Defense Attorney: Objection. Leading

Ruling: A. Sustain,
B. Overrule,
C. Discretionary

PROBLEM #2

After the D.A. is done with direct, defense counsel begins cross-examination. Defense counsel does an extensive cross-examination of APB about perceived inconsistencies in his oral statements to other individuals about the alleged sexual assault. The highlighted inconsistencies address such factual issues as the time of year that the abuse occurred, the victim's grade in school at that time, and the circumstances leading up to the defendant's alleged abuse of the victim.

After the examination is APB is completed, the D.A. asks to be permitted to call the various individuals to whom APB gave oral statements, arguing that the purpose is to show consistency on significant factual issues.

Defense counsel objects arguing that those prior statements made to the other individuals are hearsay.

D.A. responds that the cross-examination of the victim distorted certain things because certain statements were not put in the proper context. D.A. wishes to have these individuals testify as to the victim's oral statements under the "rule of completeness."

Defense counsel replies that the "rule of completeness" is a statutory creation, codified in Wis. Stat. § 901.07, and that it applies to written or recorded statements only and does not apply to oral statements.

Ruling: A. Sustain the objection,
B. Overrule the objection,
C. Discretionary

VIGNETTE #11 IMPEACHMENT – PRIOR CONVICTIONS

It is September, 2009. Harold Kuntz is on trial for 1st degree murder, arson, and battery during a burglary.

Problem #1
The prosecutor has rested and the case is now with the defense. Kuntz takes the stand and testifies on direct. When his attorney is through questioning, the prosecutor begins his cross. The prosecutor believes that Kuntz has a prior criminal record and asks him the following.

Prosecutor: Mr. Kuntz, have you ever been convicted of a crime?

Defense Atty: Objection! Judge, may we have a sidebar?

Ruling #1:

A – Sustained. Counsel will approach the bench.
B – Overruled. The witness will answer the question.

Problem #2
Prior to trial, the prosecutor brings a motion in limine regarding the defendant's prior record.
Kuntz' prior record consists of the following misdemeanor convictions:

1. 1999 – carrying a concealed weapon
2. 1999 – battery
3. 2003 – reckless use of a weapon

The prosecutor asks for a ruling that the defendant has been convicted of a crime three previous times.
Defense counsel argues that none of the prior convictions should count because all of them are misdemeanors, none of them involve dishonesty and, furthermore, the two convictions in 1999 occurred over 10 years ago.

The court finds that the defendant has been convicted of a crime:

Ruling #2:

A – 0 times
B – 1 time
C – 2 times
D – 3 times

Problem #3
The court rules that the defendant has one prior conviction for purposes of impeachment.
The case proceeds to trial.
The defendant puts on no evidence and does not take the stand.
The prosecutor asks to be allowed to tell the jury that the defendant has one prior conviction.
Defense counsel objects.

Ruling #3:

A – Sustained.
B – Overruled.

Problem #4
The case is with the defense. The defendant takes the stand.
On direct examination, defense counsel elicits the following:

Defense Atty: Mr. Kuntz, have you ever been convicted of a crime?

Prosecutor: Objection! Defense counsel is impeaching his own witness.

Ruling #4

A – Sustained.
B – Overruled.

Problem #5
The defendant takes the stand.
His attorney elicits the following:

Defense Atty: Mr. Kuntz, have you ever been convicted of a crime?

Kuntz: Yes, I have.

Defense Atty: How many times?

Kuntz: Once.

Defense counsel finishes his direct examination.
The prosecution begins his cross-examination.

Prosecutor: Mr. Kuntz, you've been convicted of a crime one time?

Kuntz: Yes, sir.

Prosecutor: What were you convicted of?

Defense Atty: Objection!

Ruling #5

A – Sustained.
B – Overruled.

Problem #6
The prosecutor finishes his cross-examination.
Defense counsel begins his redirect.

Defense Atty: What were you convicted of?

Prosecutor: Objection! I wasn't allowed to ask that question. The court ruled that it is irrelevant.

Ruling #6

A – Sustained.
B – Overruled.

VIGNETTE 12 EVIDENCE OPINION

Victor Johnson is on trial for retail theft.

Evelyn Zahn, an employee at Blockbuster Video, has testified for the State. Zahn testified that she saw Johnson enter the store with an empty canvas bag and go to a table near the front of the store on which previously viewed videotapes were stacked for sale. She said she saw Johnson ripping the cardboard boxes that the tapes were in, and once saw him put a video into his canvas bag. She testified that she found the pieces of nine or ten cardboard slip sleeves strewn about the store. Those pieces contained the bar codes for the videos Johnson took. Zahn said that she noticed when Johnson began walking out of the store his canvas bag was now full, and that she asked him what was in it. She testified that he ignored her, and as he left the store he set off the security devices. Zahn said she followed Johnson outside and demanded the return of the tapes. According to Zahn, Johnson put the bag in a car on the passenger side then walked around the back of the car to the driver's side of the car. When he reached the driver's side of the car, where she was standing, he was holding a knife that he brandished at her.

Johnson has testified on direct examination and said that he did *not* take videotapes from the resale table because those tapes did not have any street value.

The prosecutor cross-examines Johnson and the following exchange takes place:

Q- Do you remember Ms. Zahn asking you what was in the bag before you hit the security buzzer?

A- That is not true at all.

Q- That just didn't happen?

A- That just didn't happen.

Q- So she is lying about that?

A- That is her version, sir, I can't call her a liar.

Q- She is just not telling the truth, correct?

Defense Atty: Objection. Under *Haseltine*, one witness may not testify that another witness is telling the truth.

Ruling #1:

A – Sustained.

B – Overruled.

James E. Doyle Inn of Court
March 23, 2011

EVIDENCE VIGNETTES
ANSWER SHEETS

Hon. Michael R. Fitzpatrick
Hon. John R. Storck

VIGNETTE #1 SMALL CLAIMS ANSWERS

Ruling #1 – Overruled. (Hearsay)
Ruling #2 - Sustained. (Privilege)

799.209(2),Stats. Rules of evidence do not apply to small claims except those relating to privileges. Evidence having **reasonable probative value** shall be admitted. The court may exclude irrelevant or repetitious evidence.

Caveat: 799.209(2) states: "An essential finding of fact may not be based **solely on a declarant's oral hearsay statement** unless it would be admissible under the rules of evidence." This is a rule concerning the sufficiency and not the admissibility of the evidence. An essential finding cannot be solely based on inadmissible oral hearsay. *Scholten Pattern Works v. Rodadway Exp.* 152 Wis.2d 253 (Ct.App. 1989)

VIGNETTE #2 DIVORCE ANSWERS

Ruling #1 – Sustained.
Ruling #2 - Sustained.

There is no general exception in Chapter 767 or in 911.01 Wisconsin Statutes that applies to family law cases. The rules of evidence apply to proceedings in front of a judge or a court commissioner. See 911.01 (1).

The G.A.L. is an advocate for the best interests of the child. The G.A.L. is not a fact gatherer who has the ability to present new factual information that is not a part of the record and not subject to cross-examination. *Hollister v. Hollister,* 173 Wis.2d 413 (Ct.App. 1992)

2009 Wisconsin Act 187 effective March 29, 2010 amended Section 767.405 Wisconsin Statutes. That section now requires that a custody study be submitted to the court and all parties at least 10 days "before the report is introduced into evidence." It also indicates that the court may "review the report, but may not rely upon it as evidence before it is properly introduced." For it to be properly introduced it "shall be offered in accordance with the rules of evidence...." Section 767.405(14)(b)1 Wisconsin Statutes.

VIGNETTE #3 - JUVENILE –ANSWERS

Ruling #1 – Overruled. (Hearsay at Temporary Custody)
Ruling #2 - Sustained. (Hearsay at Trial)

938.299(4) Stats. states that the rules of evidence apply at a fact-finding hearing. It further states that the rules of evidence do not apply at waiver hearings, temporary custody hearings, dispositional hearings, and sanction hearings. Hearsay at these hearings may be admitted if it "has demonstrable circumstantial guarantees of trustworthiness."

VIGNETTE #4 Summary Judgment Answer

Ruling: B – Deny Summary Judgment

Palisades Collection LLC v. Kalal, 2010 WI App 38. The affidavit does not establish a prima facie case for summary judgment because it does not show that the affiant is a witness qualified, based on personal knowledge, to testify to the elements required for admissibility of the account statements under hearsay except for a regularly conducted activity, Section 908.03(6) Wis. Stats. These are Chare's records, not Palisades' records and Oliphant is not the Chase records custodian or have personal knowledge of Chase's practices and procedures.

The non-moving party may not need to file an affidavit in opposition to summary judgment **if** the moving party's affidavit is challenged by the non-moving party **and** the non-moving party is able to show that the moving party did not make a *prima facie* case for summary judgment. *Kalal,* 2010 WI App. 38 ¶ 25 and *HSBC v. Griswold,* 2010 WL 5393263 (J. Vergeront, author), ¶ 16.

VIGNETTE #5 Preliminary Hearing ANSWERS

Ruling #1- A –Sustained.

Ruling #2 – B – Overruled.

The rules of evidence apply at preliminary hearings.
§§ 901.01, 911.01, Stats.

§ 970.03(11), Stats. states that a court may admit hearsay at a preliminary hearing for the purpose of showing:

(a) ownership of property;
(b) lack of consent to entry to, possession of, or destruction of property;
(c) element of identity theft offenses under § 943.201(2) [identity theft of individual]or § 943.203(2) [identity theft of entity].

SUMMARY
OF
APPLICABILITY OF RULES OF EVIDENCE

I. The applicability of the rules of evidence varies with the type of proceeding.

II. Rules of Evidence, except privileges, generally **do not apply** to:

A. **Small claims** actions, **except jury trials**, 799.209(2), and 911.01(4)(d)

B. **Juvenile proceedings** under Chap. **938, except fact finding hearings**, 938.299(4)

C. **Children's proceedings** under Chap. **48, except fact finding hearings**, 48.299(4)

D. **Extradition, sentencing, and bail hearings** 911.01(4)(c)

E. **John Doe** proceedings 911.01(4)(b)

F. Determination of **questions of fact preliminary to admissibility of evidence**. 911.01(4)(a) and 901.04(1).

II. Rules of Evidence, except privileges, **may be waived** by the court in conducting **restitution hearings**. 973.20(14)(d)

III. Admisibility of Evidence may be determined by statutes other than 901-911.

VIGNETTE 6 ANSWER
PRELIMINARY EXAMINATION - CONFRONTATION

Ruling: C. Overruled

The statement would fall under the "Statement against Interest" exception to the hearsay rule. The declarant, Bowman, is unavailable as a witness because of the privilege against self incrimination. 908.04(1)(a). The statement concerning his joint involvement in the burglary would be a statement against interest under 908.045(4).

The confrontation clause does not apply to preliminary examinations. A preliminary examination is a statutory under 970.03. It is not a constitutional right. The only right to question witnesses at a preliminary examination is the statutory right. *State v. Padilla*, 100 Wis.2d 414 (Ct.App. 1982). A *Crawford* analysis does not apply to a preliminary.

(This vignette is based on the unpublished decision in *St. v Mackin* 04-1890-CR(Wis.Ct.App.2005). In *Mackin* the Circuit Court excluded a statement at a preliminary examination using a confrontation analysis. The Court of Appeals reversed on the basis that confrontation did not apply at a preliminary hearing. However, each part of the statement needs to be analyzed to determine if there is an exception to the hearsay rule applies.)

VIGNETTE #7 Hearsay and Confrontation - Answers

Problem #1 Statement not offered for Truth of Matter Asserted
Ruling #1 – A. Sustained

908.01(3) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial…, offered in evidence to prove the truth of the matter asserted.

What is intent of offering the evidence that the stabbing was with a knife and the victim was unarmed? For Notice, knowledge, or State of Mind? Objector must state basis for objection but proponent has burden of proof in face of proper objection. *St. v Peters*, 166 Wis.2d 174 (Ct.App.1981)

Instruction to jury to limit purpose would confuse jury.

Problem #2 Confrontation – Police Taped Statement of Unavailable Witness
Ruling #2 Sustain

These are the facts of *Crawford v Washington* 541 U.S. 36 (2004). Crawford established a new confrontation analysis that requires that if "testimonial" hearsay evidence is at issue the 6th Amendment demands (1) Unavailability and (2) a prior opportunity for cross-examination for the hearsay evidence to be admissible.

"Testimonial" not fully defined by *Crawford*. However, "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford* at 68.

Ohio v Roberts 449 U.S. 56 (1980) still applies when not "testimonial" hearsay. *Roberts* permitted the admission of a hearsay statement if the statement "bears adequate indicial of reliability." The statement bears adequate indicia of reliability if it falls within a "firmly rooted" hearsay exception, or the witness is unavailable and it bears particularized guarantees of trustworthiness.

Problem #3 Confrontation – Admissibility of 911 Calls
Ruling #3 B. Overrule (Permit use of 911 call.)
Problem #4 Confrontation - Statement to Police at Scene
Ruling #4 A. Sustain (Prohibit use of statement)

These are the facts and holdings of the U.S. Supreme Court in *Davis v Washington, and Hammon v Indiana*, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006); decided June 19, 2006. The 911 call was not testimonial. The on scene statement was testimonial

The Supreme Court tried to clarify the definition of police interrogation that was "testimonial" by stating: "Statements are **nontestimonial when** made in the course of police interrogation under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to **meet an ongoing emergency**. They are **testimonial when** the circumstances objectively indicate that there is no such ongoing emergency, and the primary **purpose** of the interrogation is to **establish or prove past events potentially relevant to later criminal prosecution."**

The primary purpose of the interrogation can change from determining the need for emergency assistance into a testimonial statement. The Supreme Court directed that "Through in limine procedure, (courts) should redact or exclude the portions of any statement that have become testimonial…"

Michigan v. Bryant 562 U.S. ____(2011) decided 2/28/2011 held that a statement made by a shooting victim found by police in a parking lot some distance from shooting scene was for "primary purpose" of responding to "ongoing emergency." The issues of "ongoing emergency" and "primary purpose" require an objective analysis. *Bryant* considered that a gun was involved, that the shooter was on the loose, the informality of the questioning, and the danger to officers and public to determine that statement not testimonial.

Problem #5 Forfeiture of Confrontation
Ruling #5 B. Consider the letter and admit the statement

The letter is hearsay but the rules of evidence do not apply to evidence received for the purpose of determining the admissibility of evidence by a

judge. 911.01(4)(a) Stats. Also see *State v. Jiles* 262 Wis.2d 457, 476 (2003) which held that the rules of evidence do not apply at a MirandaGoodchild hearing.

The U.S. Supreme Court in *Davis* recognized that the right of confrontation can be forfeited by the Defendant. In *State v.Jensen,* 2007 WI 26, the Wisconsin Supreme Court adopted a broad forfeiture by wrongdoing doctrine, concluding that if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant. *Jensen* at ¶ 57. The U.S. Supreme Court in *Giles v. California,* 128 S.Ct. 2678 (June 25, 2008) held that forfeiture by wrongdoing only applies where it is shown that the defendant acted **with the intent** to prevent the witness from testifying.

VIGNETTE 8 ANSWERS

Ruling #1 – A – Sustained.

Ruling #2 – B – Overruled.

Ruling #3 – A – Sustained. Answer is stricken. Jury is instructed to disregard.
The expert opinion must be expressed to a requisite degree of certainty although not necessarily in specific language.
E.g., "Do you have an opinion to a reasonable degree of medical certainty?" or "Do you have an opinion to a reasonable degree of professional probability?"
Pucci v. Rausch, 51 Wis. 2d 513, 517-20 (1971)

Ruling #4 – B – Overruled.
The form of the question is proper on cross-examination by defense counsel. Opinions couched in terms of possibilities based upon adequate data or proof are admissible to defeat a claim by suggesting explanations other than that propounded by the plaintiff (who has the burden of proof). In other words, contrary opinion may be expressed in terms of possibilities.
Hernke v. Northern Ins. Co., 20 Wis. 2d 352, 360 (1963); *Milbauer v.Transport Employees' Mut. B. Soc.*, 56 Wis. 2d 860, 864 (1973); *Peil v. Kohnke*, 50 Wis. 2d 168, 183 (1971); *Roy v. St. Luke's Med. Ctr.*, 2007 WI App 218, 305 Wis. 2d 658, 673

Ruling #5 – B – No.
Legal expert may not give an opinion on domestic law.
Patients Compensation Fund v. Physicians Ins., 2000 WI App 248, 239 Wis. 2d 360, 367 fn.3 (Ct. App. 2000)

Ruling #1 – B – Motion Denied.

Just because two experts disagree, that does not mean that one expert's testimony must be excluded. Two experts with different results may both be "reliable" and it is up to the jury to decide how much weight to give "reliable" testimony. The focus in the analysis of the trial court is whether there are sufficient facts, and whether the expert has used reliable principles and methods, and then whether the expert has applied the principles and methods to the facts to reach a conclusion which might be reached by a reasonable expert in this field.

Daubert v. Merrell Dow, 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

Ruling #2 – B – Motion Denied.

It is not necessary that the expert have published in a particular area for the testimony to be reliable. *Kannankeril v. Terminix*, 128 F.3d 802, 809 (3rd Cir. 1997). In addition, the flexible nature of the inquiry regarding experts and the proper role of the jury in evaluating the ultimate credibility of an expert's opinion does not require a medical expert to always cite published studies on general causation to reliably conclude about a particular illness. In practice, physicians do not wait for conclusive or even published or peer-reviewed studies to make diagnoses to a reasonable degree of medical certainty. *Heller v. Shaw*, 167 F.3d 146, 155 (3rd Cir. 1999).

Ruling #3 – C – I need to hold a hearing.

An expert's principles and methods are not accurate and reliable simply because the expert says so. Depending on the facts of the case, the judge may have to spend more time and effort determining whether the expert's opinions are "reliable." *Kumho Tire v. Carmichael*, 526 U.S. at 152, 157. If the court determines (in an evidentiary hearing or by affidavits at the court's discretion) that in this area of expertise the blood test is the sole determinative factor, then it is likely that the opinions of Dr. Fitzgerald will be found unreliable.

Ruling #4 – B – Motion Denied. The Court will have properly exercised its discretion if the thought process of the Judge is explained on the record and the appropriate factors are reviewed. The new statute requires the Court to determine if the expert had sufficient data, reliable methods, and then applied the methods to the facts. Szell has based his opinions on data from Hoffman. Along with his practice and research he has sufficient background to opine on these TMJ problems.

> 907.02 If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

A question worth asking: Is the Supreme Court's discussion of cost still a factor under the new version of Sec. 907.02?

> "An accident reconstruction expert or an expert in kinematics is not required for an elementary discussion of whiplash, which is the abrupt jerking motion of the head, either backward or forward. Expert testimony on kinematics is not necessary to confirm the potential for whiplash when a fully loaded garbage truck smashes into a barely moving or stopped automobile, pushing it into another vehicle, sending it 100 to 150 feet from the point of origin, and causing $9000 in damages to the vehicle. Requiring specialized expert testimony beyond a medical expert in relatively simple automobile accident situations would escalate the cost of presenting personal injury cases without adequate justification. In short, it would present a serious issue in the administration of the legal system." (emphasis added)

Martindale v. Ripp, 629 N.W.2d 698, ¶65 (2001).

Ruling #5 – A – Motions Granted. Even under the more liberal relevance test of the prior 907.02, Wis. Stats., the Wisconsin Supreme Court did not allow the witness to testify on these issues since it was so far out of his area of expertise. These opinions are also beyond the information provided by Hoffman about events at the time of the collision.

> If Dr. Ryan had tried to testify about the speed of the garbage truck, the distances required to brake a garbage truck at a particular speed, the physics of Martindale pulling his car forward when he noticed the garbage truck bearing down on him, the significance of the garbage truck being fully loaded, the importance of a particular angle of collision, or how fast Martindale's head snapped backward and then forward, the issue would be different.

Martindale, ¶56.

VIGNETTE #10 **906.11**
ANSWERS

Ruling #1: C. Discretionary

906.11(1) Stats. states:
Control by Judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence …

906.11(3) Stats. States:
Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination….

Questions can be leading because of the form of the question, emphasis of certain words, the tone of the questioner, the questioner's nonverbal conduct, or the inclusion of facts still in controversy. Leading may be permitted when the witness is immature, when testimony relates to introductory or undisputed matter, when witness's recollection is exhausted, or because of physical or mental condition of witness. Whether to bar is discretionary with the court. *St. v Barnes* 203 Wis.2d 132(Ct.App.1996)

Ruling #2: C. Discretionary

State v. Eugenio, 219 Wis. 2d 391 (1998).
In this case, the Supreme Court noted that the rule of completeness for written statements is set forth in Wis. Stat. § 901.07. The Court held that the rule of completeness for oral statements is encompassed in Wis. Stat. § 906.11(1). The Court stated that both rules are designed to make the presentation of evidence fair and effective in order to ascertain the truth.
"The critical consideration in rule of completeness cases is whether the part of the statement offered into evidence creates an unfair and misleading impression without the remaining statements. Where a distortion can be averted, the material required for completeness is relevant to a fair representation. Thus, the evidence is admissible unless otherwise proscribed by law." (p. 411)
"The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide **context** and **prevent distortion**. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule." (p. 412)
As to the hearsay question, the Court found that the evidence was not offered to prove the truth of the matter asserted, but rather for the purpose of providing a fair context on which the trier of fact can evaluate the evidence already offered by the opposing party and thus, the evidence is by definition not hearsay. The Court also noted that, in other cases, where the evidence may fall within the classic definition of hearsay, the circuit court in its discretion may determine whether the fairness requirement of the rule of completeness outweighs the principles underpinning the exclusionary rules and permits the trier of fact to consider the additional offer of oral statements. (pp. 411-12)

VIGNETTE 11 ANSWERS

Ruling #1 – A – Sustained. Counsel will approach the bench.
§ 906.09 (3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION.
No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

Ruling #2 – B – 1 time.
State v. Kuntz, 160 Wis. 2d 722, 750-53(1991).
Proper exercise of discretion.

Ruling #3 – A – Sustained.
§ 906.09(1) GENERAL RULE.
For the purpose of attacking the credibility of a **witness**, evidence that the **witness** has been convicted of a crime or adjudicated delinquent is admissible…

Ruling #4 – B – Overruled.
§ 906.07 Who may impeach.
The credibility of a witness may be attacked by any party, including the party calling the witness.

Ruling #5 – A – Sustained.
"The examiner may only ask the witness if he has ever been convicted of a crime and if so how many times. If the witness's answers are truthful and accurate, then no further inquiry may be made."
State v. Kuntz, 160 Wis. 2d 722, 752(1991) [Citations omitted.]

Ruling #6 – B – Overruled.
It is permissible for a party's own counsel to elicit information on the nature of prior crimes on either direct or redirect examination.
State v. Bailey, 54 Wis. 2d 679, 689-90 (1972)

VIGNETTE 12 ANSWERS

Ruling #1 – B – Overruled.

State v. Johnson, 2004 WI 94, 273 Wis. 2d 626
Held – The cross-examination of Johnson was permissible.
Reason – The purpose and effect of the prosecutor's cross-examination was to impeach Johnson's credibility, not to bolster the credibility of another witness, because both Johnson and the other witness were testifying to their personal observations about the same events.

The Supreme Court distinguished between the *Haseltine* [*State v. Haseltine*, 120 Wis. 2d 92 (Ct. App. 1984] line of cases and the *Jackson* [*State v. Jackson*, 187 Wis. 2d 431] line of cases, and found no conflict between them.

"In the *Haseltine* line, the objected to testimony is simply bolstering another witness's testimony of an event about which the expert witness has no personal knowledge. It is generally done on direct examination and usurps the jury's role as the 'lie detector in the courtroom.' The jury can independently determine the credibility of each witness, and does not require an expert witness to assist it with that determination." [Citations omitted.] (p. 641)

"By contrast, in the *Jackson* line of cases, two witnesses are testifying about an event that both claim to have seen, and their testimony conflicts. The purpose and effect of the cross-examination of the second witness is to test that witness's credibility through his or her demeanor and answers to questions. It aids the jury in its truth-finding function. The testimony elicited by the prosecutor in *Bolden* and *Jackson* was not placed before the jury to bolster the credibility of the other witnesses. Instead, cross-examination was used to highlight the inconsistencies in the testimony, and give the witness an opportunity to explain those inconsistencies. As the court of appeal concluded, the questions posed 'were solely to impeach [the defendant's] credibility.' Such questions may help the jury assess the credibility of witnesses. Such a technique is permissible cross-examination." [Citations omitted.] (pp. 641-42)

Concurring Opinion – "I fear that the majority has opened the door to a line of questioning which invades the province of the jury, is of no probative value, and may prove misleading…It exchanges a bright line rule for one that may prove difficult to apply." (pp. 646-47)
"If there is a saving grace to the majority opinion, it is that judges remain free to control the mode and order of interrogation and presentation. Wis. Stat. § 906.11 requires judges to exercise control of their courtrooms so as to (a) make the interrogation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment. While under the majority's new test attorneys are not precluded from asking whether another witness is lying, circuit courts are not required to permit this mode of interrogation." (pp. 651-52)