

## 2005 ASSEMBLY BILL 261

March 18, 2005 – Introduced by Representatives KLEEFISCH, BOYLE, GUNDRUM, GUNDERSON, HAHN, DAVIS, HINES, LAMB, PRIDEMORE, BALLWEG, VOS, BERCEAU, TURNER, POCAN, RICHARDS, LEHMAN, STRACHOTA, SEIDEL, JESKEWITZ, MUSSER, ALBERS, OTT and PETROWSKI, cosponsored by Senators JAUCH, A. LASEE, ROESSLER, OLSEN, LASSA and COGGS. Referred to Committee on Judiciary.

1     **AN ACT** *to amend* 48.293 (3), 48.31 (2), 302.113 (9) (e), 302.114 (9) (d), 304.06 (3),  
2           304.06 (3d), 908.08 (title), 908.08 (1), 908.08 (2) (a), 908.08 (2) (b), 908.08 (3)  
3           (intro.), 908.08 (3) (a) (intro.), 908.08 (3) (b), 908.08 (4) (intro.), 908.08 (4) (i),  
4           908.08 (5) (a), 908.08 (5) (b), 908.08 (6), 908.08 (7), 938.293 (3), 938.31 (2),  
5           950.055 (2) (b), 967.04 (7) (a) (intro.), 967.04 (7) (b) 10., 967.04 (8) (a), 967.04 (8)  
6           (b) (intro.), 967.04 (9), 967.04 (10), 970.03 (14) (b), 971.23 (1) (e), 973.10 (2g) and  
7           973.10 (2m) of the statutes; **relating to:** use of and access to digital recordings  
8           of a child's statement in certain court and administrative proceedings.

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### ***Analysis by the Legislative Reference Bureau***

Current law permits a videotape of a child's testimony to be used under certain circumstances in criminal proceedings, proceedings to revoke a person's probation, parole, or extended supervision, or juvenile fact-finding hearings. Under certain circumstances, a party who possesses a videotape of a child's statement must also disclose the existence of that statement and make it available to other parties. Under

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this bill, a digital recording of a child's statement is to be treated in such cases in the same fashion as a videotaped statement.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 48.293 (3) of the statutes is amended to read:

2           48.293 (3) Upon request prior to the fact-finding hearing, counsel for the  
3 interests of the public shall disclose to the child, through his or her counsel or  
4 guardian ad litem, or to the unborn child, through the unborn child's guardian ad  
5 litem, the existence of any videotaped or digitally recorded oral statement of a child  
6 under s. 908.08 which is within the possession, custody or control of the state and  
7 shall make reasonable arrangements for the requesting person to view the  
8 ~~videotaped oral~~ statement. If, ~~subsequent to~~ after compliance with this subsection,  
9 the state obtains possession, custody or control of such a ~~videotaped~~ statement,  
10 counsel for the interests of the public shall promptly notify the requesting person of  
11 that fact and make reasonable arrangements for the requesting person to view the  
12 ~~videotaped oral~~ statement.

13           **SECTION 2.** 48.31 (2) of the statutes is amended to read:

14           48.31 (2) The hearing shall be to the court unless the child, the child's parent,  
15 guardian, or legal custodian, the unborn child by the unborn child's guardian ad  
16 litem, or the expectant mother of the unborn child exercises the right to a jury trial  
17 by demanding a jury trial at any time before or during the plea hearing. If a jury trial  
18 is demanded in a proceeding under s. 48.13 or 48.133, the jury shall consist of 6  
19 persons. If a jury trial is demanded in a proceeding under s. 48.42, the jury shall  
20 consist of 12 persons unless the parties agree to a lesser number. Chapters 756 and  
21 805 shall govern the selection of jurors. If the hearing involves a child victim or

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1 witness, as defined in s. 950.02, the court may order the taking and allow the use of  
2 a videotaped or digitally recorded deposition under s. 967.04 (7) to (10) and, with the  
3 district attorney, shall comply with s. 971.105. At the conclusion of the hearing, the  
4 court or jury shall make a determination of the facts, except that in a case alleging  
5 a child or an unborn child to be in need of protection or services under s. 48.13 or  
6 48.133, the court shall make the determination under s. 48.13 (intro.) or 48.133  
7 relating to whether the child or unborn child is in need of protection or services that  
8 can be ordered by the court. If the court finds that the child or unborn child is not  
9 within the jurisdiction of the court or, in a case alleging a child or an unborn child  
10 to be in need of protection or services under s. 48.13 or 48.133, that the child or  
11 unborn child is not in need of protection or services that can be ordered by the court  
12 or if the court or jury finds that the facts alleged in the petition have not been proved,  
13 the court shall dismiss the petition with prejudice.

14 **SECTION 3.** 302.113 (9) (e) of the statutes is amended to read:

15 302.113 (9) (e) If a hearing is to be held under par. (am) before the division of  
16 hearings and appeals in the department of administration, the hearing examiner  
17 may order the taking and allow the use of a videotaped or digitally recorded  
18 deposition under s. 967.04 (7) to (10).

19 **SECTION 4.** 302.114 (9) (d) of the statutes is amended to read:

20 302.114 (9) (d) If a hearing is to be held under par. (am) before the division of  
21 hearings and appeals in the department of administration, the hearing examiner  
22 may order the taking and allow the use of a videotaped or digitally recorded  
23 deposition under s. 967.04 (7) to (10).

24 **SECTION 5.** 304.06 (3) of the statutes is amended to read:

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1           304.06 (3) Every paroled prisoner remains in the legal custody of the  
2 department unless otherwise provided by the department. If the department alleges  
3 that any condition or rule of parole has been violated by the prisoner, the department  
4 may take physical custody of the prisoner for the investigation of the alleged  
5 violation. If the department is satisfied that any condition or rule of parole has been  
6 violated it shall afford the prisoner such administrative hearings as are required by  
7 law. Unless waived by the parolee, the final administrative hearing shall be held  
8 before a hearing examiner from the division of hearings and appeals in the  
9 department of administration who is licensed to practice law in this state. The  
10 hearing examiner shall enter an order revoking or not revoking parole. Upon request  
11 by either party, the administrator of the division of hearings and appeals shall review  
12 the order. The hearing examiner may order the taking and allow the use of a  
13 videotaped or digitally recorded deposition under s. 967.04 (7) to (10). If the parolee  
14 waives the final administrative hearing, the secretary of corrections shall enter an  
15 order revoking or not revoking parole. If the examiner, the administrator upon  
16 review, or the secretary in the case of a waiver finds that the prisoner has violated  
17 the rules or conditions of parole, the examiner, the administrator upon review, or the  
18 secretary in the case of a waiver, may order the prisoner returned to prison to  
19 continue serving his or her sentence, or to continue on parole. If the prisoner claims  
20 or appears to be indigent, the department shall refer the prisoner to the authority  
21 for indigency determinations specified under s. 977.07 (1).

22           **SECTION 6.** 304.06 (3d) of the statutes is amended to read:

23           304.06 (3d) Upon demand prior to a revocation hearing under sub. (3), the  
24 district attorney shall disclose to a defendant the existence of any videotaped or  
25 digitally recorded oral statement of a child under s. 908.08 which is within the

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1 possession, custody or control of the state and shall make reasonable arrangements  
2 for the defendant and defense counsel to view the ~~videotaped~~ statement. If,  
3 ~~subsequent to~~ after compliance with this subsection, the state obtains possession,  
4 custody or control of such a ~~videotaped~~ statement, the district attorney shall  
5 promptly notify the defendant of that fact and make reasonable arrangements for the  
6 defendant and defense counsel to view the ~~videotaped~~ statement.

7 **SECTION 7.** 908.08 (title) of the statutes is amended to read:

8 **908.08** (title) **Videotaped or digitally recorded statements of children.**

9 **SECTION 8.** 908.08 (1) of the statutes is amended to read:

10 **908.08 (1)** In any criminal trial or hearing, juvenile fact-finding hearing under  
11 s. 48.31 or 938.31 or revocation hearing under s. 302.113 (9) (am), 302.114 (9) (am),  
12 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the  
13 videotaped or digitally recorded oral statement of a child who is available to testify,  
14 as provided in this section.

15 **SECTION 9.** 908.08 (2) (a) of the statutes is amended to read:

16 **908.08 (2) (a)** Not less than 10 days ~~prior to~~ before the trial or hearing, or such  
17 later time as the court or hearing examiner permits upon cause shown, the party  
18 offering the statement shall file with the court or hearing officer an offer of proof  
19 showing the caption of the case, the name and present age of the child who has given  
20 the statement, the date, time and place of the statement and the name and business  
21 address of the ~~videotape~~ camera operator. That party shall give notice of the offer  
22 of proof to all other parties, including notice of reasonable opportunity for them to  
23 view the ~~videotape prior to~~ statement before the hearing under par. (b).

24 **SECTION 10.** 908.08 (2) (b) of the statutes is amended to read:

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1           908.08 (2) (b) ~~Prior to~~ Before the trial or hearing in which the statement is  
2 offered and upon notice to all parties, the court or hearing examiner shall conduct  
3 a hearing on the statement's admissibility. At or ~~prior to~~ before the hearing, the court  
4 shall view the videotape or digitally recorded statement. At the hearing, the court  
5 or hearing examiner shall rule on objections to the statement's admissibility in whole  
6 or in part. If the trial is to be tried by a jury, the court shall enter an order for editing  
7 as provided in s. 885.44 (12).

8           **SECTION 11.** 908.08 (3) (intro.) of the statutes is amended to read:

9           908.08 (3) (intro.) The court or hearing examiner shall admit the videotape or  
10 digitally recorded statement upon finding all of the following:

11           **SECTION 12.** 908.08 (3) (a) (intro.) of the statutes is amended to read:

12           908.08 (3) (a) (intro.) That the trial or hearing in which the videotape or  
13 digitally recorded statement is offered will commence:

14           **SECTION 13.** 908.08 (3) (b) of the statutes is amended to read:

15           908.08 (3) (b) That the videotape or digitally recorded statement is accurate  
16 and free from excision, alteration and visual or audio distortion.

17           **SECTION 14.** 908.08 (4) (intro.) of the statutes is amended to read:

18           908.08 (4) (intro.) In determining whether the interests of justice warrant the  
19 admission of a videotape or digitally recorded statement of a child who is at least 12  
20 years of age but younger than 16 years of age, among the factors which the court or  
21 hearing examiner may consider are any of the following:

22           **SECTION 15.** 908.08 (4) (i) of the statutes is amended to read:

23           908.08 (4) (i) Whether admission of the videotape or digitally recorded  
24 statement would reduce the mental or emotional strain of testifying or reduce the  
25 number of times the child will be required to testify.

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1           **SECTION 16.** 908.08 (5) (a) of the statutes is amended to read:

2           908.08 (5) (a) If the court or hearing examiner admits a videotape or digitally  
3 recorded statement under this section, the party who has offered the statement into  
4 evidence may nonetheless call the child to testify immediately after the videotape  
5 statement is shown to the trier of fact. Except as provided in par. (b), if that party  
6 does not call the child, the court or hearing examiner, upon request by any other  
7 party, shall order that the child be produced immediately following the showing of  
8 the videotape statement to the trier of fact for cross-examination.

9           **SECTION 17.** 908.08 (5) (b) of the statutes is amended to read:

10           908.08 (5) (b) If a videotape or digitally recorded statement under this section  
11 is shown at a preliminary examination under s. 970.03 and the party who offers the  
12 statement does not call the child to testify, the court may not order under par. (a) that  
13 the child be produced for cross-examination at the preliminary examination.

14           **SECTION 18.** 908.08 (6) of the statutes is amended to read:

15           908.08 (6) Videotaped or digitally recorded oral statements of children under  
16 this section in the possession, custody or control of the state are discoverable under  
17 ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

18           **SECTION 19.** 908.08 (7) of the statutes is amended to read:

19           908.08 (7) At a trial or hearing under sub. (1), a court or a hearing examiner  
20 may also admit into evidence a videotape or digitally recorded oral statement of a  
21 child that is hearsay and is admissible under this chapter as an exception to the  
22 hearsay rule.

23           **SECTION 20.** 938.293 (3) of the statutes is amended to read:

24           938.293 (3) Upon request prior to the fact-finding hearing, the district  
25 attorney shall disclose to the juvenile, and to the juvenile's counsel or guardian ad

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1 litem, the existence of any videotaped or digitally recorded oral statement of a  
2 juvenile child under s. 908.08 which is within the possession, custody or control of  
3 the state and shall make reasonable arrangements for the requesting person to view  
4 the ~~videotaped~~ oral statement. If, ~~subsequent to~~ after compliance with this  
5 subsection, the state obtains possession, custody or control of such a ~~videotaped~~  
6 statement, the district attorney shall promptly notify the requesting person of that  
7 fact and make reasonable arrangements for the requesting person to view the  
8 ~~videotaped~~ oral statement.

9 **SECTION 21.** 938.31 (2) of the statutes is amended to read:

10 938.31 (2) The hearing shall be to the court. If the hearing involves a child  
11 victim, as defined in s. 938.02 (20m) (a) 1., or a child witness, as defined in s. 950.02  
12 (5), the court may order the taking and allow the use of a videotaped or digitally  
13 recorded deposition under s. 967.04 (7) to (10) and, with the district attorney, shall  
14 comply with s. 971.105. At the conclusion of the hearing, the court shall make a  
15 determination of the facts. If the court finds that the juvenile is not within the  
16 jurisdiction of the court or the court finds that the facts alleged in the petition or  
17 citation have not been proved, the court shall dismiss the petition or citation with  
18 prejudice.

19 **SECTION 22.** 950.055 (2) (b) of the statutes is amended to read:

20 950.055 (2) (b) Advice to the judge, when appropriate and as a friend of the  
21 court, regarding the child's ability to understand proceedings and questions. The  
22 services may include providing assistance in determinations concerning the taking  
23 of videotaped or digitally recorded depositions under s. 908.08 or 967.04 (7) and (8)  
24 and the duty to expedite proceedings under s. 971.105.

25 **SECTION 23.** 967.04 (7) (a) (intro.) of the statutes is amended to read:



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1           967.04 (7) (a) (intro.) In any criminal prosecution or any proceeding under ch.  
2           48 or 938, any party may move the court to order the taking of a videotaped or  
3           digitally recorded deposition of a child who has been or is likely to be called as a  
4           witness. Upon notice and hearing, the court may issue an order for such a deposition  
5           if the trial or hearing in which the child may be called will commence:

6           **SECTION 24.** 967.04 (7) (b) 10. of the statutes is amended to read:

7           967.04 (7) (b) 10. Whether a videotaped or digitally recorded deposition would  
8           reduce the mental or emotional strain of testifying and whether the deposition could  
9           be used to reduce the number of times the child will be required to testify.

10          **SECTION 25.** 967.04 (8) (a) of the statutes is amended to read:

11          967.04 (8) (a) If the court orders a deposition under sub. (7), the judge shall  
12          preside at the taking of the deposition and enforce compliance with the applicable  
13          provisions of ss. 885.44 to 885.47. Notwithstanding s. 885.44 (5), counsel may make  
14          objections and the judge shall make rulings thereon as at trial. The clerk of court  
15          shall keep the certified original videotape or digitally recorded deposition under sub.  
16          (7) in a secure place. No person may inspect or copy the deposition except by order  
17          of the court upon a showing that inspection or copying is required for editing under  
18          s. 885.44 (12) or for the investigation, prosecution or defense of the action in which  
19          it was authorized or the provision of services to the child.

20          **SECTION 26.** 967.04 (8) (b) (intro.) of the statutes is amended to read:

21          967.04 (8) (b) (intro.) If the court orders a videotape or digitally recorded  
22          deposition under sub. (7), the court shall do all of the following:

23          **SECTION 27.** 967.04 (9) of the statutes is amended to read:

24          967.04 (9) In any criminal prosecution or juvenile fact–finding hearing under  
25          s. 48.31 or 938.31, the court may admit into evidence a videotaped or digitally

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1 recorded deposition taken under subs. (7) and (8) without an additional hearing  
2 under s. 908.08. In any proceeding under s. 302.113 (9) (am), 302.114 (9) (am), 304.06  
3 (3), or 973.10 (2), the hearing examiner may order and preside at the taking of a  
4 videotaped or digitally recorded deposition using the procedure provided in subs. (7)  
5 and (8) and may admit the videotaped or digitally recorded deposition into evidence  
6 without an additional hearing under s. 908.08.

7 **SECTION 28.** 967.04 (10) of the statutes is amended to read:

8 967.04 (10) If a court or hearing examiner admits a videotaped or digitally  
9 recorded deposition into evidence under sub. (9), the child may not be called as a  
10 witness at the proceeding in which it was admitted unless the court or hearing  
11 examiner so orders upon a showing that additional testimony by the child is required  
12 in the interest of fairness for reasons neither known nor with reasonable diligence  
13 discoverable at the time of the deposition by the party seeking to call the child. The  
14 testimony of a child who is required to testify under this subsection may be taken in  
15 accordance with s. 972.11 (2m), if applicable.

16 **SECTION 29.** 970.03 (14) (b) of the statutes is amended to read:

17 970.03 (14) (b) At any preliminary examination, the court shall admit a  
18 videotape or digitally recorded statement under s. 908.08 upon making the findings  
19 required under s. 908.08 (3). The child who makes the statement need not be called  
20 as a witness and, under the circumstances specified in s. 908.08 (5) (b), may not be  
21 compelled to undergo cross-examination.

22 **SECTION 30.** 971.23 (1) (e) of the statutes is amended to read:

23 971.23 (1) (e) Any relevant written or recorded statements of a witness named  
24 on a list under par. (d), including any videotaped or digitally recorded oral statement  
25 of a child under s. 908.08, any reports or statements of experts made in connection

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1 with the case or, if an expert does not prepare a report or statement, a written  
2 summary of the expert's findings or the subject matter of his or her testimony, and  
3 the results of any physical or mental examination, scientific test, experiment or  
4 comparison that the district attorney intends to offer in evidence at trial.

5 **SECTION 31.** 973.10 (2g) of the statutes is amended to read:

6 973.10 **(2g)** Upon demand prior to a revocation hearing under sub. (2), the  
7 district attorney shall disclose to a defendant the existence of any videotaped or  
8 digitally recorded oral statement of a child under s. 908.08 which is within the  
9 possession, custody or control of the state and shall make reasonable arrangements  
10 for the defendant and defense counsel to view the ~~videotaped~~ statement. If,  
11 ~~subsequent to~~ after compliance with this subsection, the state obtains possession,  
12 custody or control of such a ~~videotaped~~ statement, the district attorney shall  
13 promptly notify the defendant of that fact and make reasonable arrangements for the  
14 defendant and defense counsel to view the ~~videotaped~~ statement.

15 **SECTION 32.** 973.10 (2m) of the statutes is amended to read:

16 973.10 **(2m)** In any administrative hearing under sub. (2), the hearing  
17 examiner may order the taking and allow the use of a videotaped or digitally recorded  
18 deposition under s. 967.04 (7) to (10).

19 (END)