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The Modified Romberg Balance Test and Medical Journals

Readers who have followed our previous columns¹ may have noted that we are not big fans of the use of field sobriety tests (better referred to as “exercises”) to attempt to ascertain a person’s impairment at the scene of a traffic stop.

The problem with police relying on these exercises to determine one’s level of impairment first occurred to us when we were in our 20s, as neither of us could walk a straight line or stand with a foot in the air for 30 seconds. If we could not successfully *perform* these exercises in a level, carpeted courtroom, how could we expect people stopped for a traffic infraction to *perform* the same exercises on a roadway at night while they are in fear of being arrested?

As we evolved as defense attorneys, we both independently began to review the literature about these exercises, not only by reviewing the police literature provided by the National Highway Traffic Safety Administration (NHTSA) but also by reviewing medical journals as well. And, not surprisingly, the medical folks have a radically different view of the accuracy of these exercises when used by police officers.

One such exercise involves the Modified Romberg Balance (MRB) exercise. The original MRB test was

one used primarily in the medical field to measure one’s sense of balance. Specifically, this exercise assesses the function of the dorsal column of the spinal cord. The dorsal column is responsible for proprioception, or sense of body positioning in space.² The MRB exercise is taught to officers in both the Advanced Roadside Impaired Driving Enforcement (ARIDE)³ and Drug Evaluation and Classification Program (DRE)⁴ curricula as one of the “divided attention psychophysical” tests.

In the ARIDE curriculum, the MRB exercise is used to establish probable cause to arrest. In the DRE context, this test is administered after arrest to assist the officer in determining whether the suspect is under the influence of a drug other than alcohol and to identify the drug category. As noted below, this is an important distinction to make when considering the suspect’s statements in response to the officer’s questions. Moreover, defense practitioners are seeing this exercise being administered more frequently to suspects suspected of only overindulging in alcohol. The authors suspect this is a result of more officers being trained under the ARIDE curriculum — now the most popular continuing education course among officers. DRE training also mentions this test for use in examining alcohol-impaired subjects.⁵

The ARIDE curriculum states in its manual/guide that the MRB test “is adapted and modified from its original use as a neurological assessment tool. It can be administered to check a subject’s time estimation, balance, and presence of tremors (eyelid and body).”⁶

“Since part of the MRB test checks for balance, care should be taken to ensure the test is conducted on

BY STEVEN OBERMAN AND ROBERT “BOBBY” REIFF

found internal change. There has been such a transformation that the person sitting next to me is not the same person who committed the offenses. My client has changed so much that we can now be sure that if you release him, everything will be all right.

QC: What role do polygraphs play?

RJ: My jurisdiction uses polygraphs to determine if clients are managing their deviance, and those results tend to trump any expert opinions. Though inadmissible in criminal proceedings, polygraph examinations are key components of the SVP treatment program. Polygraphs are routinely used and presented in court. Thus, it is important to know how to use them for a client's benefit. The importance of polygraphs is twofold: (1) to show that the client is being truthful about various matters, and (2) to show that the client is managing his or her deviance. The primary focus of our trial presentation is the client's story of change, which includes expert testimony of risk-relevant change manifested by current volitional control, and polygraphs are the most objective proof that can be offered of that change. Some of the different types of polygraphs include the following:

- ❖ Sexual History Polygraphs.
- ❖ Sex Offender Disclosure Polygraphs.
- ❖ Offense Polygraphs.
- ❖ Penile Plethysmograph (PPG) Corroboration Polygraphs.
- ❖ Sexual Interest Polygraphs.
- ❖ Maintenance Polygraphs.
- ❖ Sexual Fantasy and Masturbation (SFM) Log Polygraphs.

The beauty of polygraph examinations is that passed polygraphs show change.

QC: What is defense counsel's endgame?

RJ: The goal is always to win. To win in these cases is to educate the trier of fact in a way that addresses their fears and empowers them to do what is just. To achieve that success, defense counsel must sell three things:

1. The Passage of Time.
2. The Power of Treatment.
3. The Possibility of Transformation.

Research shows that for the majority of people who commit criminal offenses of any type, as time progresses, they are less likely to reoffend. Age is a robust protective factor. Also, research shows that treatment has the power to greatly reduce risk. Research further shows that even sex offenders can — and do — change. Success requires counsel to be the ambassador and trumpet all three things.

QC: A client's transformation reminds you of the movie *The Wiz*. Why?

RJ: In criminal defense lawyer language, *The Wiz* is about four people who have different issues that are ruining their lives. They are on a journey to get answers that will address their issues. Someone tells them that if they can get to the Wiz, he can fix their problems. Along the journey, they all take ownership of their issues, but they still think they need the Wiz to validate them. And then they find out that the Wiz is a fraud. They realize that they don't need the Wiz to validate their transformation, and the minute they take responsibility, they begin to change. Our clients know how they are viewed in society, and one of my primary goals is to encourage and empower clients to take ownership of their own issues and the change necessary to get them out.

QC: After successful treatment, what transformation should we expect to see?

RJ: People focus more on the person rather than statistics. They care about whether, if released, the client is going to molest a child. They care about whether the client is going to rape someone in the parking lot. In order to challenge that, defense counsel has to sell the change and transformation of the client.

It is important to note that progress in treatment suppresses an individual's risk to sexually reoffend and reduces the risk estimates. Assessing a person's progress in treatment requires an examination of the person's current level of treatment and the progress made since his commitment or last discharge trial, whichever is relevant to the litigation. The goal of

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treatment is to help patients identify their deviance and risk factors and develop tools that will enable them to control that deviance when returned to the community. Therefore, the ideological viewpoint of the attorney representing sexually violent persons has to center around one fundamental concept of human behavior: *people change*, thereby recognizing that treatment of sexually violent persons is intended to effectuate change.

We must understand that treatment of sexually violent persons focuses on two things. *First*, it teaches clients to identify their deviance. *Second*, it teaches clients how to manage their deviance. Treatment does not take away the deviance or what clients are attracted to; it teaches clients how to refrain from acting on what they are attracted to.

That's how I think about these cases. It is a paradigm shift. And I can stand on that viewpoint because statistics show that those who are able to accomplish those two treatment goals tend not to reoffend.

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a level surface and in an environment that is appropriate for this type of test when conducted at roadside.⁷

Officer's Instructions

As detailed in the ARIDE Participant Guide, the instructions to be given by the officer include the following:

Administrative Procedures Instruction Stage⁸

1. Stand straight with your feet together and your arms down at your sides.
2. Remain in this position while I finish giving the instructions.
3. Do not start the test until I say "start."
4. Ask if the subject understands the instructions.

Make sure to obtain a verbal response from the subject.

5. When I tell you to start, I want you to tilt your head back slightly and close your eyes.

DEMONSTRATE how the head should be tilted, but DO NOT CLOSE YOUR EYES while demonstrating.

6. Once you have closed your eyes, I want you to remain in that position until you think 30 seconds have gone by.
7. As soon as you think 30 seconds have passed, open your eyes, tilt your head forward, and say "stop."
8. Do you understand?

Make sure to obtain a verbal response from the subject.

Balancing Stage⁹

1. Look at your timing device and pick a convenient time to start the test.
2. Tell the subject to tilt their head back and close their eyes.
3. Tell the subject to begin or start the test.
4. Keep track of time while the subject performs the test.
5. Check subject for presence of

tremors (eyelid and/or body) and sway.

6. When the subject opens their eyes, ask them "how much time was that?"
7. Record how much time actually elapsed from the start of the test until the subject opened their eyes or was told to stop. (If the subject continues to keep their eyes closed for 90 seconds, stop the test and record the fact it was terminated at 90 seconds.)

Make sure to document their "exact" verbal response.

This divided attention test was not one of the original six tests evaluated to determine if it could reliably distinguish blood alcohol concentrations at or above .10% in DUI suspects. Nor was it evaluated in the subsequent NHTSA Standardized Field Sobriety Tests validation studies. In fact, other than the statement, "Research has indicated a non-impaired subject's time estimation will typically be within +/- 5 seconds of 30 seconds,"¹⁰ there is no mention of the reliability of this test to determine impairment or any particular concentration of alcohol or drug in one's blood.

One should also note the following language in the 2018 ARIDE Instructor Guide: "*The use of the MRB Test time estimation to predict or relate to certain drug categories is not supported by research at this time. Performance outside the range of plus or minus five seconds must be used cautiously and considered with the totality of the decision process.*"¹¹ Not surprisingly, this information was entirely deleted from the 2023 update to the Guide.

Furthermore, although the estimated time of 30 seconds, as well as the extent and direction that the suspect sways, is recorded, the only established criterion to determine if the suspect passes or fails this test is whether the suspect estimates 30 seconds within +/- 5 seconds. Defense lawyers are left to wonder how this test can meet the evidentiary relevancy requirement for admissibility in court.

NIH Study

The National Institute of Health (NIH) provides an interesting history of the Romberg test in one of its papers:¹²

The Romberg's sign or Romberg's test is named after a European neurologist, Moritz Romberg; historically, this was described by Marshall Hall,

Moritz Romberg, and Bernardus Brach. Initially, this sign was tethered *specifically with tertiary syphilis patients* who exhibited neurologic signs of late-stage disease referred to as locomotor ataxia, or tables dorsalis.

When examining a patient's neurological effects from sequelae *involving late-stage syphilis*, the Romberg sign became a precise test to determine the integrity of the dorsal column pathway of the brain and spinal cord, which controls proprioception. Proprioception is the sense of awareness of the position and movement of the body. Romberg described this sign as a severe postural impairment in a darkroom setting or with eyes closed of patients who had severe damage to the posterior dorsal columns of the spinal cord. Used as a precise clinical tool, the Romberg test is positive if a patient cannot maintain an upright stance with vision eliminated or in the darkness.¹³

In that National Institute of Health study¹⁴ of diagnostic tests to determine neurologic impairment, the Romberg balance test is discussed. "The purpose of this evaluation, *administered by any trained individual*, is to identify a particular impairment in patients with specific proprioception difficulties for purposes of intervention and improving patient outcomes. This activity covers the proper execution and interpretation of the Romberg test as a diagnostic tool."¹⁵

In another interesting observation, the authors of this NIH paper wrote that "[t]he Romberg maneuver is a commonly performed test during the neurological exam. It is a valuable clinical sign to evaluate the integrity of the dorsal columns of the spinal cord and is particularly useful in patients with ataxia or severe incoordination."¹⁶

Of course, this test is not specific to syphilis. "*The Romberg test is quite helpful in a broad range of neurologic disease* states in assessing and confirming various neurological conditions including, but not limited to, Parkinson's disease (causes postural instability and a shuffling gait), Friedreich ataxia (causes staggering gait and frequent falls), *vitamin B12 deficiency* (causes ataxia gait), Tertiary syphilis (causes sensory ataxia; impaired proprioception), normal pressure hydrocephalus in

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the elderly (truncal ataxia with falls), Wernicke's syndrome (associated with chronic alcoholism which causes limb ataxia), and Ménière's disease."¹⁷

That portion of their observations troubled the second author, as he has been diagnosed with a vitamin B12 deficiency after his most recent annual physical blood test results were received. Did that cause him to have an ataxia gait? What exactly is an ataxia gait? He soon learned that "[a]taxia is typically defined as the presence of abnormal, uncoordinated movements. This usage describes signs and symptoms without reference to specific diseases. An unsteady, staggering gait is described as an ataxic gait because walking is uncoordinated and appears to be 'not ordered'."¹⁸

An examination of these materials showed so many causes other than the syphilis condition that we became concerned. Was this exercise instead just a good indication of syphilis impairment? More importantly, why do the police think *this* exercise is a good one, when administered by a police officer with minimal, if any, training to interpret the test, to detect impairment due to an intoxicant?

One of the other troubling factors regarding the Romberg exercise is that

the police instruct the subject, "[w]hen I tell you to start, I want you to tilt your head back slightly and close your eyes."¹⁹ In practice, we have even seen/heard some officers tell the subject to "tilt your head *all the way back*" when performing the exercise.

In the exercise created by Dr. Romberg, and subsequently used by doctors, the individuals being examined are *not* asked to tilt their heads back.²⁰ Why does that difference in instructions make a difference in the test results? A human head, on average, weighs 11 pounds.²¹ Additionally, tilting one's head causes certain fluids in the ear, nose, and head to be altered. There is a heavy weight now altering one's positional stance, and the fluids are accumulating in areas that are not the normal locations for them.

The medical study also notes that "[i]f performed in the correct setting and manner by a trained medical professional, there are no known complications of this clinical test."²² Police officers are *not* trained medical professionals, and tests administered on the side of the road usually take place in the dark of the night and with external factors such as wind and blasts of air from passing vehicles. This is hardly the setting Dr.

Romberg anticipated when he created this test to measure balance.

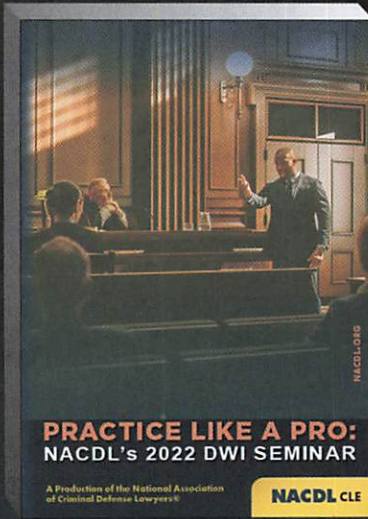
As part of the medical Romberg exercise, the subject is instructed "to *keep their eyes open* while the examiner assesses the patient's body movement relative to balance."²³ This is done to help examiners establish a baseline for their observations. Yet the officer on the side of the road never attempts to set a baseline for the individual's examination.

The Romberg study also warned that "a positive Romberg test may result from inherited, metabolic, toxic, immunologic, or other disorders."²⁴

Other Defense Considerations

It is interesting to note that this test is designed to detect swaying in the suspect, presumably a symptom of intoxication. A scientific study, however, has concluded that even high doses of alcohol have little effect on body sway. As reported in Fagen, Tiplady, and Scott, "Effects of Ethanol on Psychomotor Performance,"²⁵ researchers administered doses of alcohol to a number of subjects in proportion to their body weight and then tested them for body sway with a "Wright-Codocataxiometer." The results uniformly showed that body sway increased significantly

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only after 2.5 to 3 hours had passed after drinking had been concluded — in other words, during the so-called hangover period. Prior to that time, there was little, if any, noticeable sway in the subjects.²⁶ Most importantly, even normal individuals will tend to sway when placed in the Romberg position, which makes this test extremely suspect in terms of its reliability.²⁷ Interestingly, a study published in 2011 found significant statistical variations in performance on this test based on age, gender, and race/ethnicity.²⁸

Another important consideration exists when evaluating cases where the MRB was used to establish probable cause to arrest the suspect or after arrest when *Miranda*²⁹ rights are not provided to the suspect. As mentioned above, the officer is to note both the amount of time it took the suspect to estimate 30 seconds by stating “stop,” and the “exact response” to the question, “How much time was that?” Moreover, arresting officers will often ask a question along the lines of, “How did you (what method did you use to) determine the elapsed time?” The officers expect a sober person to respond, “by counting one thousand-one, one thousand-two,” or some variation thereof. These compelled statements may be deemed testimonial self-incrimination if the suspect has not been advised of the *Miranda* rights prior to the test.³⁰

It is also important to note that the suspect in alcohol-related DUIs and ARIDE investigations is typically not yet placed under arrest at the time of the MRB test. Yet, in DRE investigations, the suspect has likely been formally arrested prior to the administration of this test. If the *Miranda* warnings are not properly given prior to the MRB test, much of the evidence obtained may be inadmissible. Prior to or post-arrest, counsel should never simply assume that the defendant has been properly advised of constitutional rights before the administration of this test.

Conclusion

The next time an officer claims that defense counsel’s client did not successfully perform the Romberg balance exercise, and that deficient performance was indicative of impairment, perhaps counsel’s cross-examination of the officer should include a short history lesson.

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Notes

1. See, e.g., Steven Oberman, *DWI: Drunk or Drowsy? How Fatigue Can Be Mistaken for*

Intoxication, THE CHAMPION, Feb. 2001, at 57; Steven Oberman & Sara Compher-Rice, *DUI: The Standardized Field Sobriety Tests Validation Myth*, THE CHAMPION, June 2006, at 35; Robert S. Reiff, *Auditioning for Your Freedom: Combatting the Use of Field Sobriety Exercises in the DUI Prosecution*, THE CHAMPION, April 2014, at 50; Robert S. Reiff, *The Godmother of Field Sobriety Tests: The Best of the Worst*, THE CHAMPION, March 2022, at 59.

2. *How the Romberg Test Is Used to Identify and Diagnose Imbalance Issues*, HEALTHLINE.COM, <https://www.healthline.com/health/romberg-test#What-is-Rombergs-test?> (last visited March 23, 2023).

3. See Advanced Roadside Impaired Driving Enforcement (ARIDE) Participant Guide, Session 5, at 9 (revised 02/2023).

4. See Drug Evaluation and Classification (Pre-School) Participant Guide, Session 3, at 2 (revised 02/2023); see also Drug Recognition Expert Course (DRE), Participant Guide, Session 4, at 9 (revised 02/2023).

5. See Drug Recognition Expert Course (DRE) Participant Manual, Session 4, at 20 (revised 02/2023).

6. ARIDE Participant Guide, Session 5, at 9 (revised 02/2023).

7. *Id.*

8. *Id.* at 10.

9. *Id.* at 11.

10. *Id.* at 12.

11. ARIDE Instructor Guide, Session 5, at 19 (revised 02/2018) (emphasis added).

12. J. FORBES, S. MUNAKOMI & H. CRONOVICH, *Romberg Test* (updated Feb. 12, 2023); <https://www.ncbi.nlm.nih.gov/books/NBK563187/> (last visited March 31, 2023).

13. *Id.* (emphasis added).

14. *Id.*

15. See *id.*, at 1 (emphasis added).

16. *Id.* at 2.

17. *Id.* at 2 (emphasis added).

18. NEUROLOGY AND NEUROSURGERY - ATAXIA CENTER, *What Is Ataxia?* https://www.hopkinsmedicine.org/neurology_neurosurgery/centers_clinics/ataxia/conditions/#:~:text=Ataxia%20is%20typically%20defined%20as,to%20be%20not%20ordered (last visited March 31, 2023).

19. See ARIDE Participant Guide, Session 5, at 10 (revised 02/2023).

20. See J. Forbes et al., *supra* note 12, at 3 (Technique).

21. GW OSTEOPATHY, *How Much Does Your Head Weigh?* <https://www.gwosteopathy.co.uk/much-head-weigh/#:~:text=Believe%20it%20or%20not%2C%20the,keeping%20that%20weight%20in%20place> (last visited March 31, 2023).

22. See J. Forbes et al., *supra* note 12, at 4 (Complications).

23. *Id.* (Technique) (emphasis added).

24. *Id.* (Clinical Significance) (emphasis added), citing A. Khasnis & R.M. Gokula, *Romberg’s Test* 49(2) J. POSTGRAD. MED. 169-72 (April-June 2003) (PubMed: 12867698).

25. 59 BRIT. J. ANAESTHESIA 961 (1987).

26. *Id.*

27. DAVID ANSHEL, NEUROLOGY: PRETEST SELF-ASSESSMENT AND REVIEW 23 (8th ed. 2012).

28. See Yuri Agrawal et al., *The Modified Romberg Balance Test: Normative Data in U.S. Adults*, 32 OTOTOLOGY & NEUROTOLOGY 1309-1311 (2011).

29. *Miranda v. Arizona*, 86 S. Ct. 1602 (1966).

30. See, e.g., *People v. Bejasa*, 140 Cal.Rptr.3d 80 (Cal. Ct. App. 2012) (holding that the act of calculating time, rather than mere rote counting, amounts to testimonial evidence under *Pennsylvania v. Muniz*, 110 S. Ct. 2638 (1990)). ■

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The Importance of Arguing for a ‘Split’ Sentence for White Collar Offenders Facing Sentencing Guidelines Above Zone C

The goal at any federal sentencing is for the court to impose a sentence that is sufficient, but not greater than necessary.¹ While a noncustodial sentence has historically been imposed on white collar offenders, more recently, the courts of appeal have made it clear that white collar offenders must face a term of imprisonment in order to fulfill the goal of deterrence under the Sentencing Guidelines.²

When a federal sentencing court finds circumstances warrant a “split” sentence that includes a term of imprisonment combined with a term of community service or home confinement, it cannot impose such a split sentence when the Guidelines are above Zone C.³ Because the amount of loss in most white collar prosecutions increases the prospective sentence to Zone D,⁴ the reality of federal white collar sentencing is that most defendants face the prospect of a lengthy term of confinement within the Bureau of Prisons. Defense counsel, however, can utilize a provision within the Criminal Code, implemented by the Sentencing Guidelines, that effectively allows for the imposition of a “split” sentence in Zone D cases through the post-imprisonment condition of supervised release.

Background on ‘Split’ Sentences

The Sentencing Guidelines provide for different sentencing options based on the zone (A through D)⁵ within which a defendant’s sentencing range falls. Zone A spans from probation only to a prison term of six months. If the guideline range is in Zone A, a sentence of imprisonment is not required.⁶ For sentencing ranges that fall within Zone B or Zone C, the Sentencing Guidelines state that the minimum term *may* be satisfied by a “sentence of imprisonment.” However, the Guidelines further state that a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement or home detention will satisfy the Zone B and C sentencing requirements.⁷ If a defendant falls within Zone D, the minimum term must be satisfied by a sentence of imprisonment.⁸ However, the term of imprisonment may be followed by a term of supervised release with a special condition of home confinement.

A provision within the Criminal Code, however, effectively allows for the imposition of a “split” sentence in Zone D cases through the post-imprisonment condition of supervised release.⁹ Because supervised release, including a special condition of home confinement, is considered “imprisonment” for purposes of sentencing, the use of home confinement during post-imprisonment supervised release creates an avenue for a court to reduce the time of confinement within the Bureau of Prisons, while imposing the “imprisonment” that the courts of appeal demand for white collar offenders.

In *United States v. Lopez-Pastrana*, the court explained that a term of supervised release with a special condition of home confinement is still considered in “custody”:

BY JOSEPH A. DEMARIA AND MARISSA KOBLITZ KINGMAN

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Arguing for a Return to the Community

By Quintin Chatman

What challenges face a defense attorney in a case involving a sex offense?

What is the public's perception of someone who, after serving time for a sex crime, is ready to return to the community? Richard Jones, a defense attorney in Wisconsin, discusses these questions with Quintin Chatman,

editor of *The Champion*. Jones talks about the difficulties and the hurdles involved in sex offender cases, and he reveals his three primary goals for each client.



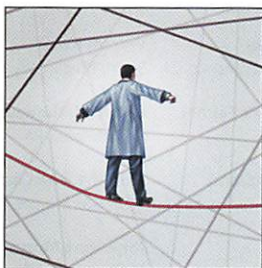
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22 The Modified Romberg Balance Test and Medical Journals

By Steven Oberman and Robert "Bobby" Reiff

A medical study noted that if performed in the correct setting by a trained medical professional, there are no known complications for the Romberg balance test. Police officers are *not* trained medical professionals, and sobriety tests administered on the side of the road usually take place in the dark and with external factors

such as wind and blasts of air from passing vehicles. Steven Oberman and Robert Reiff explain why they are not fans of the Romberg field sobriety exercise.



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 By Nellie L. King

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28 The Importance of Arguing for a 'Split' Sentence for White Collar Offenders Facing Sentencing Guidelines Above Zone C

By Joseph A. DeMaria and Marissa Koblitz Kingman

When a federal court finds circumstances warrant a "split" sentence that includes a term of imprisonment combined with a term of community service or home confinement, it cannot impose such a split sentence when the Sentencing Guidelines are above Zone C. Because the amount of loss in most white collar prosecutions increases the prospective sentence to Zone D, the reality is that most defendants face a lengthy term of confinement. Defense counsel, however, can utilize a provision within the Criminal Code, implemented by the Guidelines, that allows for a split sentence in Zone D cases through the post-imprisonment condition of supervised release. Joseph A. DeMaria and Marissa Koblitz Kingman explain how to argue for the Zone D split sentence.



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52 Litigating Domestic Violence Cases: Accurate, Reliable Research Can Make a Difference

By John Hamel and Brenda Russell

Since the advent of mandatory arrest laws in the 1990s, attorneys have seen an increase in defendants seeking legal representation for crimes related to domestic violence. When representing men accused of domestic violence, do lawyers consider hiring an expert for the defense? The authors note that experts can help attorneys and jurors better understand the function of stereotypes and how they play a significant role in domestic violence cases. Despite recent research finding that domestic violence is not necessarily a crime against women, the traditional ways of thinking about domestic violence continue to inform how (1) statutes are written, (2) police are trained to conduct domestic violence investigations, and (3) cases are prosecuted.

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Bobby,

Your article appears on
page 22. Thanks for your help.

Q. Chatman

Editor, The Champion magazine

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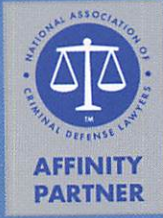
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