WISCONSIN COALITION AGAINST SEXUAL ASSAULT

To: Members of the State Assembly Committee on Judiciary and the State Senate Committee on Judiciary and Public Safety
From: Wisconsin Coalition Against Sexual Assault
Re: Criminal Procedure Bill: AB 90 / SB 82
Date: August 20, 2015

Good morning, my name is Ian Henderson, director of legal and systems services for the Wisconsin Coalition Against Sexual Assault (WCASA). WCASA is a statewide membership agency comprised of organizations and individuals working to end sexual violence in Wisconsin. Among these are the 51 sexual assault service provider agencies throughout the state that offer support, advocacy and information to survivors of sexual assault and their families.

WCASA appreciates the efforts and good intentions that have gone into AB 90 / SB 82. We are supportive of the overall goals of improving the efficiency of the criminal justice system. While we do have specific concerns outlined below, we are not opposed to changes that reorganize the statutes to make them easier to understand nor are we opposed to codifying well-established case law.

However, we are very concerned about the proposal regarding motions to obtain evidence before trial under 971.49. This provision is a significant expansion of the subpoena power in criminal cases and one that will have a negative impact on sexual assault victims.

Under current law, a subpoena for the production of documents or other objects may only be issued in conjunction with a hearing, trial or other proceeding. Wis. Stat § 805.07(1). State v. Schaefer, 2008 WI 25, ¶44, 746 N.W.2d 457, 308 Wis. 2d. 279. The proposed language in 971.49 would allow the court to issue a subpoena for the production of documents and other tangible objects if it finds the evidence "*may be material* to the determination of issues in the case" (emphasis added). We are extremely concerned that this provision will shift the burden of protecting privacy interests to the party possessing the documents or objects in question.

For sexual assault victims, concerns over privacy are paramount after an assault. This expansion of the subpoena power could lead sexual assault victims to increasingly defend their privacy interests via pretrial litigation, and water down privacy protections enshrined in Wisconsin's Crime Victim Rights Laws (See Wis. Stat. § 950.04(1v)(ag), "*To be treated with fairness, dignity, and respect for their privacy* …) Even if survivors were able to keep their information out of court, the damage could already be done. The criminal justice system can already be traumatizing for sexual assault victims. We do not need to increase barriers to their willingness to report the sexual assault or to remain engaged with the criminal justice system.

The expansion of subpoena power contained in 971.49 could also weaken another crime victim right contained in Chapter 950. Under Wis. Stat. 950.04(1v)(k), crime victims have the right to "a speedy disposition of the case in order to minimize the length of time they must endure the stress of their responsibilities connected to the matter." As discussed above, we are concerned about increased pretrial litigation associated with the provisions contained in 971.49. The potential for multiple opportunities for additional pretrial hearings as both sexual assault victims

and third parties defend against subpoenas means victims have to wait even longer for justice. All of this serves to water down the speedy disposition provisions contained in Chapter 950.

Finally, we note that the expanded subpoena power puts Wisconsin out of step with the Federal Rules of Criminal Procedure. Unlike the provisions in AB 90 / SB 82, the Federal Rules of Criminal Procedure contain safeguards against broad and intrusive subpoenas. For example, under Federal Rule of Criminal Procedure 17, the party seeking a subpoena for documents must show:

- The documents are relevant
- The documents are admissible
- The documents are not obtainable through other reasonable means
- Pre-trial production is necessary
- The request is specific (i.e., not a "fishing expedition").

The proposed language in 971.49 contains no such safeguards. In fact, the party seeking the documents need only show the documents "may" be relevant, a low standard that increases the likelihood of intrusions on victim privacy and delays described above.

Thank you for your consideration. If you have any questions, please feel free to contact me at attorney@WCASA.org or at the phone number above.