APPENDIX

Note: DOC 303.01. All the disciplinary rules for inmates are found under this chapter or authority is delegated for the making of additional specified policies and procedures in specified areas in these chapters. See DOC 303.08 and 303.63. Differences among institutions make some differences in specific policies and procedures relating to conduct necessary. Delegating authority to permit these differences, limited though they are, is provided for under this chapter. Chapter DOC 303 sets forth the procedure for inmate discipline. It structures the exercise of discretion at various decision making stages in the disciplinary process, including the decision to issue a conduct report, the decision to classify an alleged violation as major or minor, and sentencing. Codifying the rules of discipline in a clear, specific way serves important objectives by itself.

An important element of fairness is that people must know the rules which they are expected to follow. Rules which are unnecessarily ambiguous or overly broad are unfair, and so are rules which are unwritten and not known by all inmates. If inmates are aware of the rules and what they mean, they are more likely to obey than if they are uncertain about them. When rules are vague, overbroad, or unwritten, the interpretation and enforcement of them may vary greatly from officer to officer. Thus, having specific rules increases fairness and equality of treatment.

Clarity also saves time and money. When there is unnecessary ambiguity, there is also unnecessary disagreement which takes staff time and, ultimately, the time of lawyers and courts. Clarity in the rules can prevent the expenditure of time and money in settling such disagreements.

The English language is not so precise that ambiguity can be done away with entirely. Nor is that necessarily desirable, since flexibility is an important tool in the effective administration of the correctional system. Without flexibility, there is undue reliance on formalism and rules are enforced in a mechanical way.

Discretion is thus very important in corrections. Formal discipline is not always the best way to induce future compliance with rules; special circumstances may dictate harshness or leniency; different individuals respond differently to the same types of discipline or other treatment. The disciplinary rules are not intended to eliminate discretion in handling disciplinary problems, nor to disparage the quality of decision-making under the past system of broader discretion. In fact, the rules take advantage of what has been learned by experience and use this experience to provide guidelines for the future exercise of discretion.

Professor Kenneth Culp Davis says that there are 3 ways a rule regulates discretion. These rules of discipline regulate discretion in all 3 ways. (1) A rule can limit discretion by providing an outer limit on acceptable decision-making. For example, this section states that discipline cannot be imposed except for a violation under this chapter. Limits can be very broad or very narrow. This particular example still leaves a large area for discretion: whether or not to report an offense and how serious a punishment to impose are left open by this section. (2) A rule can structure discretion by providing guidelines, goals, or factors to be considered, without dictating a result. Commonly, structured discretion would be combined with a broad limit on discretion, instead of with a narrow limit or no limit. An example of a rule which structures discretion is DOC 303.65 (1), Offenses which do not require a conduct report. That section lists factors to be considered in determining whether a violation should be reported without creating a formula which must be strictly followed. (3) A rule can check discretion by providing for review of a decision by a higher-ranking officer. Two examples are review of the conduct report by the security office to determine if it is appropriate, and appeal of an adjustment committee's decision to the superintendent. See DOC 303.67 and 303.78.

Having specific, written rules which deal with prison discipline thus has the advantages of stating clearly what conduct is prohibited, of eliminating unnecessary discretion, increasing equality of treatment, increasing fairness, and raising the probability that inmates will follow the rules. In addition, there are advantages to the formal rulemaking *process*: (1) Rules are made by top officers and administrators in consultation with line staff and others, rather than *ad hoc* by correctional officers. Thus, greater experience can be brought to bear on the decision-making. (2) Rules are consciously made and the advantages and disadvantages of various alternatives are consciously weighed. This is superior to following unquestioned tradition. (3) The rulemaking process results in public input. The "sunshine" effect results in the elimination of abuses and can also provide new perspectives on more subtle questions. Also, corrections officers are public servants and rulemaking, by exposing their decision-making process to the public, is more democratic than a system of following unwritten or at least unpublished traditional policies.

For the reasons outlined above, among others, authorities on correctional standards agree that inmate disciplinary rules, including procedural rules, should be codified and made available to the inmates as a rulebook. See American Correctional Association's *Manual of Standards for Adult Correctional Institutions* (1977) (hereinafter "ACA"), standards 4296 and 4297; National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) (hereinafter "National Advisory Commission"), standard 2.11; Krantz et al., *Model Rules and Regulations on Prisoners' Rights and Responsibilities* (1973) (hereinafter *"Model Rules"* or *Krantz, et al."*), rules IVA-1 and IVA-2; National Council on Crime and Delinquency, *Model Act for the Protection of Rights of Prisoners* (1972), section 4; Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners* (1955), rule 29.

The above discussion addresses the question of why we have rules. As important, of course, is to identify the objectives of the disciplinary system itself. This is an issue which is rarely addressed and is widely misunderstood, both by inmates and staff. Sub. (3) addresses this question.

It is impossible for any community, including a prison community, to exist without order. No society or individual can exist without limits, which are usually in the form of rules. These rules provide the necessary structure and expectations that permit the community to function. Without such norms and expectations, people could not interact constructively with each other.

A prison community is like all others in that it requires order. This is basic to functioning at all, as well as to accomplishing correctional objectives.

People cannot participate in programs or work at jobs unless they are safe. Thus, a safe setting is essential to rehabilitation programs, whether they be jobs or psychological treatment.

Rehabilitation also requires teaching inmates—who have demonstrated their inability to live within rules—to live with others, within rules. Rules of discipline are some of those rules that prepare people to function within rules set by the community. If people violate, counseling and punishment is usually helpful in causing them to think carefully about their future acts.

People will not live by norms, however, unless those norms are enforced fairly and in a way that develops and maintains respect for the system. The system should get respect if it deserves it. To deserve it, it must be fair.

It is quite possible that security staff has more influence on the development of inmates' attitudes toward themselves, society and its norms than anyone else in prison. This is because inmates have more contact with line officers than treatment staff. The security staff, then, by the example it sets and by the way it enforces rules—fairly or unfairly*—greatly influences the process of rehabilitation.

The importance of the disciplinary system is reflected by the significance of its objectives.

Note: DOC 303.03. The concept of a lesser included offense is derived from the theory of the same name in the criminal law. In these rules, it serves two distinct functions. First, it serves to put the inmate on notice that he or she, while charged in writing with one offense, is also charged and may be convicted of *either* the offense charged or a lesser included offense.

The second function is to insure that an inmate is not *punished* twice for a single act which satisfies the elements of more than one offense, where conviction for more than one offense is unfair.

At the risk of oversimplifying, it is accurate to say that the technical definition requires that every element of the lesser offense is also an element of the greater offense. Rather than use this definition—and require analysis of the elements of each offense in individual cases, with inconsistency and confusion a likely result—the sections have been specifically labeled.

In some cases an offense would be a lesser included offense of another if the criminal law definition were used, yet it has been labeled as such. This is because the basic test in labeling certain offenses as "lesser included" is fairness: is it fair to say that an inmate has *notice* that he is accused of the "lesser" offense, if he has been *told* only that he is accused of the "greater" offense? Is it fair to convict and punish for 2 closely related offenses, when the inmate committed one act?

Under the old rules, the problem of lesser included offenses was not specifically mentioned. Apparently, what was done was that even if an inmate was found guilty of greater and lesser offenses, the penalty was approximately the same as for just one of the offenses. In other words, unfairness was avoided by the use of sentencing discretion. However, this was not entirely satisfactory since all of the offenses were listed on the inmate's permanent record.

Thus, the inmate's record may appear worse than it really is. Under this section, by contrast, an inmate cannot be found guilty of both a greater and a lesser offense based on the same incident. Sub. (3).

There are other implications which necessarily follow when lesser included offenses exist which are implicit in the section. If an inmate is charged with a lesser included offense and the case is considered by the committee, the inmate cannot be later charged with the greater offense. Similarly, if an inmate is charged and found guilty of a higher offense, he or she cannot later be charged with a lesser included offense.

If an act violates more than one section, the offense which best describes the conduct should be charged. This would not prevent separate convictions for a series of related but distinct acts.

Note: DOC 303.04. It is basic in criminal law that all serious or "malum in se" crimes require proof of culpable state of mind. *Morisette v. U.S.*, 342 U.S. 246 (1952); Remington and Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 Wis. L. Rev. 644.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil . . . . *Morisette*, at 250.

It is important to carry over this basic concept from the criminal law into the disciplinary rules used in prisons.

Strict liability rules are often perceived as being unfair, for the very reason discussed in *Morisette*, above: the concepts of free will and of culpability are deeply ingrained in our culture. Any child who pleads, "But I didn't do it on purpose!" has already learned this lesson. Inmates will lack respect for the disciplinary system if they see it as unfair, and this lack of respect will retard their adjustment and rehabilitation.

Many disciplinary offenses may result in a serious loss if the inmate is found guilty. They are also crimes, yet the decision in nearly all cases is to handle the situation internally rather than turning to the local prosecutor. It seems only fair to supply as many as possible of the safeguards available in a criminal prosecution in these cases. Procedural safeguards are already required: *Wolff v. McDonnell*, 418 U.S. 539 (1974). The substantive safeguard of proof of culpability should also be required.

"Culpability" as used in the above discussion means one of four things: that a person did an act intentionally, that a person failed to act despite knowledge of a situation and the opportunity to act, that a person acted with great carelessness, or that the person acted without appropriate care.

These four concepts are represented by the words "intentionally," "knowingly," "recklessly," and "negligently," which are defined under this section. The definitions are derived from s. 939.23, Stats., and the common law. Every substantive offense under this chapter contains one of these four words, or the phrase "with intent to," which describes the same culpability as "intentionally."

Under DOC 303.39, Creating a hazard, liability is based only on negligence, which is also defined in this section. In the prison setting, with many people living in very close proximity, high standards of care for the safety of all must be enforced. This is the only substantive rule for which negligence is the basis for liability.

Under the department's old policies and procedures, there was no explicit state of mind requirement. Nevertheless, both inmates and staff assumed that an inmate who did something accidentally was not guilty. This unstated policy has now been made explicit, by including one of the words from this section in every other section.

An alternative viewpoint to the one discussed above and reflected in this section is that the state of mind requirement should not be expressly included in the rules. The main reason for this view is that state of mind is difficult to prove and accused inmates will probably very frequently claim that their actions were accidental or excused for another reason. In the cases where the hearing officer or adjustment committee feels that the accused inmate was not culpable, it should dismiss the charge. In the majority of cases the need to prove the inmate's state of mind is satisfied because the hearing officer or adjustment committee can infer it from the act and surrounding circumstances. For example, if 2 inmates have a heated argument and one of them takes a knife and stabs the other, a permissible inference is that the first inmate intended to cause bodily injury to the second. In such a situation, there is little doubt that a finding of guilt on a charge of battery is proper.

Krantz, et al., *Model Rules and Regulations* (1973), rule IV A-6 contains the following requirement for establishing liability under its disciplinary code: "A person commits an offense

only when he engages in conduct which fulfills all the necessary elements of the offense and (1) the conduct was voluntary and was intentionally, recklessly, or negligently done . . ." This principle is applied in these sections.

Note: DOC 303.05. Sections 939.42-939.49, Stats., list the "defenses" which may be used in a criminal case. These are intoxication, mistake, privilege, coercion, necessity, self-defense and defense of others, and defense of property and protection against shoplifting. In addition, s. 971.15, Stats., states the defense of mental disease or defect. These statutory provisions formed the basis for the defenses listed under this section, but alteration was necessary to meet the special needs of the prison situation.

Sub. (1) is similar to the insanity defense in criminal law in Wisconsin. s. 971.15, Stats. The section is in simplified language.

Sub. (2) differs from the Wisconsin criminal code section on involuntary intoxication in several respects. s. 939.42 (1), Stats. It makes the involuntary intoxication defense parallel to the insanity defense, discussed above.

Section 939.42 (2), Stats., provides that voluntary intoxication which "negatives the existence of a state of mind essential to the crime" prevents a person from being convicted of the crime.

No defense parallel to s. 939.42 (2), Stats., for voluntary intoxication has been included in these sections. The reason is that in the prison situation (where all intoxication is forbidden), no defense based on *voluntary* intoxication is appropriate. Voluntary intoxication is so serious that public policy requires that it not be used to excuse an offense. If intoxication does in fact negate a state of mind, culpability sufficient for a finding of guilt lies in the fact of intoxication as a policy matter. See the discussion of this principle in the Model Penal Code Proposed Official Draft, Section 2.08.

Sub. (3) is the same as s. 939.43 (1), Stats. Just as, under that satute, a mistake of criminal law is no defense, so under this section a mistake concerning the disciplinary rules is no defense. A mistake of fact may be a defense. An example of such a situation is taking property of another but thinkig it is one's own property.

Drafting an appropriate self-defense section is difficult for a prison because of the importance of preventing fighting. Fights can lead to serious disruptions. On the other hand, it seems only fair to permit people to prevent others from harming them.

Sub. (4) permits an inmate to use minimum force in self-defense, to prevent injury to himself or herself. It does not permit use of force which could cause death to another, or the use of a weapon in self-defense. Under this section, any privilege is lost if fighting continues after an order to stop. Finally, the definition provides guidance to staff in determining whether minimum force was used.

There is no privilege to defend others in prison. It would reduce control and encourage gang activity.

Sub. (5) has no counterpart in the criminal law. However, the pervasiveness of state authority in the inmate's life and the necessity of requiring prompt and complete obedience make an analogy to military law rather than civilian criminal law appropriate. According to the *Manual for Courts Martial* (1969 Rev. Ed.) p. 29-35, "obedience to apparently lawful orders" is a defense to prosecution under the Uniform Code of Military Justice (UCMJ).

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

Thus, the defense here is even broader than under the UCMJ.

There is no privilege to defend one's property under this chapter. Return of the property can be accomplished in most cases by the staff after a complaint by the victim. Similarly, coercion and necessity do not excuse violations. It is thought that it is better to rely on the authority not to issue a conduct report in situations where these privilieges might otherwise be applicable. Also, the availability of correctional staff makes the need to rely on such defenses rare.

Note: DOC 303.06. The definition of attempt under sub. (1) is identical in content to the definition of intent, but in simpler language.

Under the Wisconsin criminal code, s. 939.32 (1), Stats., the penalty for an attempt is one-half the penalty for a completed offense. Similarly, Krantz et al., *Model Rules and Regulations* (1973) provide that maximum punishment for an attempt is two-thirds the maximum penalty

for the completed offense. Under sub. (3), however, the maximum penalty for an attempt may be the same as for a completed offense. This is based on the belief that an event over which the actor had no control should not reduce liability so greatly, and on the knowledge that the perpetrator of an attempt is just as dangerous and just as much in need of a deterrent (punishment) as the perpetrator of a completed offense. Of course, the circumstances of an attempt may lead to mitigation in punishment.

Under the department's former policies and procedures, attempt was not defined, but they did provide for equal punishment of attempts and completed offenses.

Sub. (2) has been added in order to allow keeping records of attempts and completed offenses separately. With a computer, the use of a suffix (instead of a special section number for attempt) means records can easily be retrieved of all attempts, or attempts for specific sections, or both attempts *and* completed offenses for specific sections.

Note: DOC 303.07. The definition of aiding and abetting used in this section is a combination of the crime of solicitation (sub. (1) (a), compare s. 939.30, Stats.) and aiding and abetting (sub. (1) (b)-(d), compare s. 939.05 (2) (b), Stats.). In the past, fine distinctions, often without real differences, have been made between accessories before and after the fact, principals, etc. Nowadays, Wisconsin and most other states combine all of these together as "aiding and abetting." s. 939.05 (2) (b), Stats. Wisconsin goes a step further and combines aiding and abetting together with actual commission and with vicarious liability of coconspirators. s. 939.05, Stats. However, no coconspirator liability has been included in this section because in those few cases where a coconspirator is liable as such but *not* for aiding and abetting, his or her relationship to the offense committed is such that the conspiracy section should be relied on. Separating conspiracy and aiding and abetting is also designed to avoid unnecessary confusion. See DOC 303.21.

Under the former policies and procedures, aiding and abetting was not defined, but the policy provided that "aiding and abetting another to engage in prohibited conduct, shall be considered an infraction of the rules involved."

As explained in the note to DOC 303.07, the use of a suffix to designate offenses involving attempt or aiding and abetting will simplify and improve record keeping.

Sub. (3) states a principle which is followed in modern criminal law. In Wisconin a person cannot be found guilty of aiding and abetting *and* the offense itself based on the same incident. In factually ambiguous situations, however, sub. (3) leaves open the option of charging a person with both and letting the hearing officer or adjustment committee decide which is most appropriate.

Subs. (4) and (6) are necessary because of the history of aiding and abetting. Traditionally, a person could not be tried as an accessory unless the principal had already been found guilty, and the accessory's sentence could not exceed the sentence of the principal. Neither of these is true under modern criminal law, and neither of these is true under the disciplinary rules. This is so because it is in the nature of some offenses that it is possible to identify 2 or more people as accessories, though it is impossible to know who did the completed act. Sub. (4) points out that, when possible, the principal should be identified. This gives the accused accessory a more fair opportunity to defend himself or herself.

Sub. (5) provides that the maximum sentence for aiding and abetting is the same as that provided for the offense itself in DOC 303.84. Obviously, however, in many cases the aider or abetter will not be as culpable as the actual perpetrator of the offense. In such cases, the committee or hearing officer should use its discretion to select an appropriate lower sentence.

This section is essentially the same as Krantz, et al., *Model Rules and Regulations* (1973), rule IV A-8.

Note: DOC 303.08. It is necessary to permit institutions to discipline inmates for violations of specific policies and procedures of the institution. For example, violation of posted work place policies or procedures regarding recreation may result in a penalty. Likewise, housing units may have policies and procedures necessary for the maintenance of order. These policies will vary from institution to institution and place to place within institutions.

In the past, inmates were sometimes punished for "disobeying orders" where the order was a written memorandum distributed to staff or posted at an earlier time but not currently posted on any inmate bulletin board because someone had taken it down. The inmate is not really culpable unless he or she is aware of the order, or should have been aware of it because it was posted at the time of the offense and he or she had had an opportunity to read it.

This section assures that inmates have notice of the conduct expected of them; this is essential to fairness and due process. See the note to DOC 303.01.

Of course, some inmates are unable to read. Staff should attempt to identify such inmates and communicate the rules orally to them.

Note: DOC 303.09. This section requires that the rules and notes pertaining to inmate discipline be published and distributed to the inmates at all institutions. This continues the existing practice.

Due process and fundamental fairness require that inmates be given notice of the rules they are expected to follow. In addition, awareness and understanding of the rules and of the sanctions for breaking them should increase compliance with them. Authorities on correctional standards agree that disciplinary rules should be made available to inmates in the form of a rule book. See the note to DOC 303.01.

Note: DOC 303.10. In a prison it is necessary to regulate very carefully the property which may be kept by the inmates. See "Contraband offenses," DOC 303.42-303.48. However, these offenses only punish knowing possession of certain items, or in the case of weapons and drug paraphernalia, possession with intent to use the items. Even where it is not possible to show that any inmate was in possession of a forbidden item, or where the inmate in possession did not have the required mental state, the item nevertheless should be taken out of circulation. This section provides the authority to deal with contraband in situations where no one is charged with an offense, as well as when someone is charged and found guilty.

Note: DOC 303.11. The main purpose of the section authorizing temporary lockup is to allow temporary detention of an inmate until it is possible to complete an investigation, cool down a volatile situation or hold a disciplinary hearing. The effort is to avoid punitive segregation without a prior hearing, while assuring that inmates can be separated from the general population when there is good reason to do so. The policy is to keep an inmate in TLU only as long as necessary and then either to release the inmate or put the inmate in segregation based on a disciplinary hearing which conforms to the provisions of this chapter. The frequent reviews by high-ranking administrators and the 21-day limit, both provided by sub. (3), are designed to implement this policy, as well as to give the inmate an opportunity to be heard on the issue of whether TLU is appropriate.

Where court decisions have dealt with temporary lockup, they have uniformly approved lockup without a prior hearing if the prison officials believe in good faith that there is an emergency or that the accused is likely to commit another offense if not locked up. See, for example, *Hayes v. Walker*, 555 F. 2d 625 (7th Cir. 1977). However, some courts have placed a time limit on temporary lockup: *U.S. ex. rel. Miller v. Twomey*, 479 F. 2d 701 (7th Cir. 1973), *cert. den.* 414 U.S. 1146 (reasonable time): *Enomoto v. Wright*, 46 L.W. 3325 (N.D. Cal. 1976), aff'd 46 L.W. 3525 (U.S. 1978) (72 hours).

In *Barnes v. Govt. of Virgin Islands*, 415 F. Supp. 1218 (D.C. V.I. 1976), the court required a hearing *prior* to lockup in all cases.

The policy is to use TLU only for an appropriate reason. Where TLU is no longer appropriate, it should be discontinued. There are situations, however, when its use for periods up to 21 days is justified. This period may be extended. It is anticipated that such extensions will be relatively rare. The need arises most commonly if the sheriff's department requests it, to permit the completion of an investigation. Periodic review is to insure that abuses do not occur.

Sub. (4) identifies the situations in which TLU may be appropriate.

It must be emphasized that there are dangers in correctional institutions that may not exist outside them. For example, an inmate who encourages others to defy authority may create an immediate and real danger. If TLU cannot be relied on to isolate such an individual, it is likely that measures have to be taken against the group, though the group is not culpable.

Likewise, an inmate who is intimidating a witness should be restricted, rather than the victim of the intimidation. This may be the only choice available to correctional officers. Sub. (4) (a).

During evening recreation, the staff is small, yet large numbers of inmates may be outside their cells. Unless the authority exists to temporarily isolate one who is trying to create a disturbance, it will be necessary to cut short recreation for everyone to prevent trouble. This seems unfair, yet would result if an inmate who was encouraging defiance were not isolated in such a situation. Sub. (4) (b).

Some inmates need to be temporarily isolated for their own protection. For example, an inmate may be endangered by virtue of having cooperated in an investigation. The threat may be such that the only effective way to protect him or her is through TLU. Sub. (4) (c).

Sometimes TLU is necessary to prevent escape. For example, an inmate in a camp who has committed an infraction that is ultimately going to affect an expected parole may panic and try to escape. Sub. (4) (d).

Finally, an inmate's presence in the general population may greatly inhibit an investigation because the inmate may destroy evidence not yet discovered by authorities. Temporary isolation until the evidence is found is required. Sub. (4) (e).

Note: DOC 303.12. This section is based on the old department policy and procedure 2.01 (Assault). The title of this section has been changed from "assault" to "battery" in order to conform to the title of the corresponding section in the criminal code, s. 940.19, Stats. The purpose of this section is to protect the personal security of all inmates, staff, and members of the public.

Virtually every instance where a person strikes another results in injury or pain under this section. Everything prohibited by the old policy is still prohibited, because aggressive behavior which does not result in injury could be punished as attempted battery (DOC 303.12-A), or as threats (DOC 303.16). See DOC 303.06 for the definition of attempt.

This section and DOC 303.17, Fighting, have considerable overlap. An inmate should not be found guilty of violating both sections based on a single incident. If it is possible to determine the aggressor in a fight, this section rather than DOC 303.17 should be used.

Lesser included offenses: DOC 303.17, Fighting and DOC 303.28 Disruptive Conduct.

Note: DOC 303.13. The department's former policy and procedure 2.02 (Sexual assault) has been split into 2 parts. The old policy did not define "sexual assault" at all. The definitions in DOC 303.13 and 303.14 are simplified versions of the definitions of "intercourse" and "sexual contact" in s. 940.225, Stats., and the 1975 sexual assault law. Most of the various situations covered by s. 940.225, Stats., such as intercourse with a child, are not relevant to the prison situation. Therefore, the only distinction in these sections is between non-consensual intercourse and all other types of non-consensual sexual contact. Intercourse is considered to be the more serious offense.

The old policy and procedure 2.02 was seldom used because of the difficulty of proving the offense while protecting the victim. The new procedural rules under this chapter make it easier to hold a disciplinary hearing while protecting the safety of the victim or informant.

Lesser included offenses: DOC 303.14, Sexual assault-contact; DOC 303.15, Sexual conduct.

Note: DOC 303.14. This section represents part of the former policy and procedure 2.02. The other part is DOC 303.13. See the note to that section.

Examples of violations of this section are kissing or handholding, grabbing or touching another person's breast, buttocks or genitals (even through clothing), rubbing one's genitals against another person (even through clothing). If the other person consents to the contact, this section is not violated, but *both* persons have violated DOC 303.15, Sexual conduct.

Violation of this section is less serious than violation of DOC 303.13, and this section is a lesser included offense of that one. See DOC 303.03 on lesser included offenses. However, where an inmate has violated this section in an attempt to rape the other person, a charge of attempted sexual assault-intercourse would be appropriate. See ch. DOC 309 for permissible displays of affection during visits.

Lesser included offense: DOC 303.15, Sexual conduct.

Note: DOC 303.15. This section is basically the same as the former policy and procedure 10.01.

Traditionally, non-marital sexual activity of all sorts has been a criminal offense, but outside of prison such activity is rarely prosecuted. Rather, the definition of such activity as a crime is mainly for the purpose of formally expressing disapproval. In the prison setting, because of segregation by sex, homosexual conduct is more prevalent than on the outside, and consequently the need to express disapproval of it is stronger. Also, it is not always possible to prove lack of consent to sexual activity in situations where it is likely that one inmate is taking advantage of another. Thus, prohibiting consensual sexual contact helps to prevent sexual assault. This section also forbids consensual sex between married people. See chapter DOC 309 for permissible displays of affection during visits.

Krantz, et al., *Model Rules and Regulations* (1973) does not forbid consensual sexual activity between inmates or between an inmate and another person. The omission is not explained.

Note: DOC 303.16. As with all of the offenses against persons, the purpose of this section is the protection of the safety and security of inmates, staff and the public. The section was derived from the former policy and procedure 2.03.

The old policy 2.03 was much broader than this section and did not define "threats." Thus, an inmate could be punished for threatening to do something which he or she had a legal right to do—for example, to bring a lawsuit or to write a letter. Such a rule has a chilling effect on the exercise of the protected rights of freedom of expression and access to the courts. Therefore, this section has been narrowed so that only certain types of threats are punishable. A threat to bring a lawsuit is not prohibited in this section. If an otherwise allowable "threat" is communicated in certain ways, however, DOC 303.28, Disruptive conduct or DOC 303.25, Disrespect, might be violated.

Under the Wisconsin criminal code, the following types of threats are punishable: threats to injure or accuse of crime, s. 943.30, Stats., and threats to communicate derogatory information, s. 943.31, Stats. Under either of these statutes, an element of extortion must be present, that is, the threat must be related to a demand for money or property from the victim. Extortion is *not* a necessary element to find guilt under this section.

Note: DOC 303.17. A principal purpose of this section is to protect the safety and security of inmates and staff. In addition, fights create a serious risk of disruption and must be considered serious offenses for this reason. Although inmates do have a limited privilege of self defense (see DOC 303.05), as a general rule they should learn to use non-violent means of settling disputes and they should depend on correctional officers rather than their own fists to defend them when attacked. Obviously it will often be difficult for correctional officers, the hearing officer or the adjustment committee to determine who started a fight and whether or not the other person exceeded the bounds of self-defense. Therefore, avoiding such situations entirely is the safest course.

It is intended that a person should not be found guilty under both DOC 303.12, Battery, and this section for the same fight. This section should be used for the person who willingly joins a fight when someone attacks him or her.

Lesser included offense: DOC 303.28, Disruptive Conduct.

Note: DOC 303.18. Former department policy and procedure 1.02 (Riots—Rebellion) covered a wide range of activity from very serious to minor. In order that the record of an inmate should more accurately reflect the seriousness of his or her acts, there are now three distinct offenses. DOC 303.18 is the most serious and should be used against "ringleaders" of a serious disturbance which involves violence. Those who actively participate but are not ringleaders should be charged under DOC 303.19. DOC 303.20 is designed for a non-violent disturbance—for example, a sitdown strike. A similar three-way division is used in Krantz, et al., *Model Rules and Regulations* (1973) at 147-149.

Lesser included offenses: DOC 303.19, Participating in a riot; DOC 303.20, Group resistance and petitions; DOC 303.28, Disruptive conduct.

Note: DOC 303.19. See the note to DOC 303.18.

Lesser included offenses: DOC 303.20, Group resistance and petitions; DOC 303.28, Disruptive conduct.

Note: DOC 303.20. DOC 303.20 is designed for a non-violent disturbance - for example, a sitdown strike. DOC 303.20 (1) differs from conspiracy (DOC 303.21) in that under this section each individual must actually disobey a rule or participate in unauthorized group activity, while under DOC 303.21 an inmate may be punished for merely planning an offense. Also, under DOC 303.21 a plan or agreement is required, while under sub. (1) spontaneous group action can be punished. Finally, punishment under this section can be added to punishment for the particular rule violated, while punishment for conspiracy cannot, because conspiracy is a lesser included offense of the planned offense.

Sub. (2) substantially follows the old policy and procedure of 14.03. The inmate complaint review system is the appropriate method for bringing group complaints. To permit such complaints or statements outside the system could seriously disrupt a prison. Experience has proven that it is important that there be as few opportunities as possible for coercion of one inmate by another. Unrestricted rights to petition in groups generates intimidation and coercion as inmates try to force others to join them. The authorized methods are thought to protect inmates' rights to petition and to express their views.

Furthermore, complaints outside the complaint system create confusion among staff. There is already provision for the investigation of complaints in the system. Staff (and their union) are frequently reluctant to cooperate in investigations made outside the system. This makes adequate investigation impossible and hurts morale and institutional security. It also makes an adequate response to the complaint impossible.

The complaint system, on the other hand, provides a structured way to investigate and respond to complaints. It requires, for example, time limits for reponses, to insure that the

complaints are addressed. It requires that complaints be signed. Without this, adequate investigation is usually impossible.

On balance, reliance on the complaint system seems to restrict first amendment rights only as is neccessary to permit the maintenance of order in institutions.

Sub. (2) prohibits petitions only within an institution. There is no intention to limit petitions addressed to those outside an institution. Typically, this activity is a letter signed by more than one inmate to a newspaper or public official.

Sub (3) makes it an offense to identify with a gang by some overt act such as signing. Gangs pose a serious threat to institutions. Like many prison rules, this one is aimed at conduct which taken alone might not seem serious to people without experience in corrections. In Wisconsin, the experience has been that permitting such activity creates significant problems and can contribute to the erosion of authority which leads to serious prison disturbances. States that have permitted such activity have uniformly had major problems in their institutions.

See the notes to DOC 303.18 and 303.21

Note: DOC 303.21. A purpose of conspiracy statutes in general and of this section is to enable law enforcement and correctional officers to prevent *group* criminal or prohibited activities at an earlier stage than the stage of attempt. Group activities against the rules pose a greater risk than similar individual activities, and this justifies intervention at an earlier stage and punishment for acts which, if done by an individual, would not be against the rules.

The content of sub. (1) of this section is similar to s. 939.31, Stats., though it differs in 2 important respects. The 2 elements of conspiracy under the statute are first, an agreement, and second, an overt act in furtherance of the conspiracy by one member of the group. Under this section, overt acts are not required because a prison setting may be so volatile that it is unwise to wait for such acts. As in the statute, the maximum penalty is the same as for the offense itself; an inmate cannot be found guilty of both conspiracy and the planned offense, because under DOC 303.03 conspiracy is a lesser included offense.

The reason that conspiracy has been made a lesser included offense is the similarity between conspiracy and attempt. Both kinds of offenses provide a sanction against activity which is preparatory to an actual offense. If the offense is completed, however, conspiracy should be included in the other offense just as attempt is.

This section has some overlap with DOC 303.20, Group resistance. However, an inmate need not personally break any substantive rule to be guilty of conspiracy; if a group of inmates agree to participate and then one inmate starts to put the plan into effect, *all* are guilty of conspiracy. On the other hand, no plan or agreement need be shown to prove a violation of DOC 303.20. DOC 303.20 is intended to deal with nonviolent group activity of a public, disruptive type, such as group refusal to work, while DOC 303.21 is aimed at secret plans for violations of all types.

Conspiracy is a lesser included offense of the planned offense and also of DOC 303.07, Aiding and abetting.

Note: DOC 303.22. Since escape is an extremely serious offense (it is one of the few disciplinary offenses which is frequently prosecuted), it is important to define it carefully. The old policy and procedure 4.01 was basically the same as this one; it read:

Residents shall not leave the confines of the institution proper, other designated authorized areas away from the institution to which they are assigned, or the custody and control of a staff member.

The only change is that now, if an inmate is off grounds on work or study release or on furlough, mere physical deviation from his or her assigned location is not enough to prove escape. Intent to escape must also be proved. This modification recognizes that unexpected situations may arise when an inmate is off grounds and unsupervised, and a certain amount of leeway must be available to inmates to deal with such situations. Of course, an inmate who deviated from a prescribed route or left an area would probably be guilty of violating DOC 303.24, Disobeying orders. If no unexpected situation arose, however, then deviation from the schedule would create a strong inference of intent to escape.

An inmate may be prosecuted in criminal court and also for a rule violation for the same incident.

Lesser included offense: DOC 303.51, Leaving assigned area.

Note: DOC 303.23. The purpose of this section is to help prevent more serious offenses, such as escape, and to promote identification of the offender in other cases.

Inmates may legitimately change their appearance in many ways: change of clothing, use of glasses and sunglasses, change of hairstyle, growing or shaving facial hair. Where such a change is the basis for a charge under this section, proof of the intent to prevent identification becomes crucial. Commission of certain offenses, for example, attempted escape, soon after such a change would be strong evidence of the intent to prevent identification.

On the other hand, where an illegitimate change of appearance is used, such as a mask or an officer's uniform, the intent to prevent identification can be inferred from the change of appearance itself.

Under s. 939.641, Stats., an additional sentence can be added if a crime was committed while the person's identity was concealed. Under this section, however, it is not necessary to show that another offense was committed, just that an intent to prevent identification existed.

This section is based on former policy and procedure 8.04 but is narrower in scope because of the intent requirement. The old policy was promulgated prior to liberalization of grooming rules allowing mustaches, beards and long hair for men. It could have been used against an inmate who shaved, changed his or her hairstyle, dyed or straightened his or her hair, or even started or stopped wearing glasses. Thus, it needed revision.

Note: DOC 303.24. There is no counterpart to this section in the criminal law, though people in the military are disciplined for failing to obey orders. Because of the close proximity of large numbers of people in a prison, prompt obedience to orders is necessary for orderly operation. Obedience is also an important aspect of learning self-discipline.

An analogy to military law is appropriate. Articles 90, 91, and 92 of the Uniform Code of Military Justice (UCMJ) cover disobeying a commissioned officer, non-commissioned officer or other lawful order, respectively. Articles 90 and 91 cover disobedience of a *direct* order while Article 92 covers general orders and indirect orders. The breakdown of sub. (1) into par. (a), (b), and (c) follows this plan. Par. (a) covers a direct verbal order. Par. (b) covers "general" orders, that is, those which apply to all or to a group of inmates, and which are properly posted. It is not necessary to show that the inmate actually knew of the order; it is the inmate's duty to read and remember posted or distributed orders. Par. (c) covers situations where a posted bulletin was improperly removed from the bulletin board, situations where an order was relayed indirectly to an inmate, and any other situation where the inmate actually knew of the order even though it was not directly given to him or her or was not properly posted.

A violation of this section should not be charged where the order violated was a posted bulletin and there is a more specific section which covers the same thing. For example, DOC 303.33, Attire, requires obedience to posted policies and procedures at each institution regarding clothing. If an inmate violates the posted policies, he or she should be charged with violating DOC 303.33, not this section. However, if an officer notices the improper clothing and tells the inmate to change, but the inmate does not change, then the inmate can be charged with violating *both* sections. Under this section, the staff member giving the order need not say, "I am giving a direct order," although this is frequently a desirable practice.

Note: DOC 303.25. Disrespectful behavior of the type prohibited by this section can lead to a breakdown of authority or a serious disturbance. This section is directed at conduct within the institution which is potentially disruptive or which erodes authority, not at activity outside the institution. The former policy and procedure 1.01 is very similar to this section.

Note: DOC 303.26. This section forbids all types of contacts between inmates and staff which could lead to favoritism or bribery. Just as theft would be very difficult to control in a prison without a rule prohibiting *all* transfer of property (See DOC 303.40), so bribery and favoritism would be difficult to control in the absence of a rule prohibiting all exchanges between staff and inmates. Also, the appearance of impropriety may be as destructive to inmate or staff morale as would actual impropriety. This section is derived from the former policy and procedure 3.09 and is identical in content. The only change is that the exceptions, which always existed, have been made explicit. The existence of unwritten exceptions tends to undermine respect for the rule as a whole because it may appear to the inmates to represent either half-hearted or arbitrary enforcement.

There is no counterpart to this section either in the criminal law or in Krantz, et al., *Model Rules and Regulations* (1973). However, the *Model Rules* do prohibit bribery (rule IVB-3(b)).

Note: DOC 303.27. Purposes of this section are to help maintain orderly and efficient operation of the institution and to encourage people to tell the truth. On the outside, lying is only punished as a criminal offense if the lie was made under oath. However, in prison the contacts between inmates and state authorities are much more pervasive and a false statement, even one not made under oath, can have serious consequences. On the other hand, in Krantz et al., *Model Rules and Regulations* (1973), the offense of lying is limited to situations where the lie is

either made under oath or is made with intent to obstruct the investigation of a suspected disciplinary offense.

This section is identical in substance to the first half of former policy and procedure 5.04. The second half of the old policy involved use of counterfeit or forged documents, etc. That half of the former policy has been added to the section on counterfeiting and forgery, now DOC 303.41.

This section is limited to lies which threaten the safety, security or integrity of the institution. See *State ex. rel. Ellenburg v. Gagnon*,76 Wis. 2d 532 (1976). This, of course, may include false statements to the adjustment committee, to a hearing examiner, or in an investigation.

Note: DOC 303.271. Lying about staff can hurt the staff member and affect staff morale generally. There have been several instances in which inmates deliberately made false allegations concerning corruption and sexual misconduct by staff. The nature of the allegations and the fact that, upon investigation, it became evident the inmate was trying to injure the staff member, led to the conclusion that this behavior should subject inmates to punishment. The inmate complaint review system will not insulate inmates from all liability. However, if the inmate does not reveal the false statement to persons outside the complaint system, it is unlikely he or she intended to harm the staff member and actual harm to the staff member is minimized. Since the implicated staff member cannot write the conduct report, the likelihood of retaliation against inmates for legitimate use of the complaint system is reduced. The requirements that the inmate knew the statement was false, that he or she intended to harm the staff member, and that he or she made that false statement public, safeguard inmates from punishment for making suggestions for investigation and statements that they thought were true.

Note: DOC 303.28. This section is intended to help preserve a reasonably quiet and orderly environment for the benefit of all inmates and staff. Its counterpart offense outside the institution setting is "disturbing the peace." As outside the institution, disruptive conduct frequently can and should be handled by a warning rather than a charge of violating this section. See DOC 303.65, offenses that do not require a conduct report.

This section is somewhat similar to DOC 303.29, Talking. That section should be used in situations where no talking is allowed, while this one should be used where an inmate disturbs others by unusually loud talking or unusually offensive language, as well as for non-verbal disruptions such as physically resisting a staff member. This section also overlaps with DOC 303.25, Disrespect. DOC 303.25, rather than this section, should be used when the disruptive tendency of an inmate's words or actions is due to his or her message of disrespect for a staff member. Disruptive conduct is a lesser-included offense of DOC 303.12, Battery, DOC 303.17, Fighting, DOC 303.18, Inciting a Riot, and of DOC 303.19, Participating in a Riot.

DOC 303.28 is based on former policy and procedure 2.04.

Lesser included offense: DOC 303.29, Talking.

Note: DOC 303.29. This section is intended to help provide a reasonably quiet and orderly environment for the benefit of all inmates and staff. Even talking in a normal tone of voice can be disturbing at certain times or places, for example while others are sleeping or watching TV. Also, talking can prevent other inmates from understanding instructions from staff which are being given to a group.

The former department policy and procedure 5.01 was not uniformly enforced from institution to institution because of varying needs. Recognizing that needs vary (for example, in some institutions the rooms or cells have solid doors; in others they do not), this section merely provides notice that policies on talking do exist and are posted.

Note: DOC 303.30. This is another example of a rule which prohibits action which in itself is not harmful; however, the rule is necessary as an aid in controlling more dangerous behavior. In this case, controlling secret means of communication helps prevent conspiracies and escapes. This section is not to be applied to persons speaking together in a foreign language. If at any time a deaf or mute person is an inmate at an institution, this section should not be applied to use of sign language by or to that person.

The section is derived from the former policy and procedure 5.02.

Note: DOC 303.31. This section is intended to protect members of the public from being misled by an inmate concerning his or her identity or status, and to avoid confusion of staff members concerning the identity of inmates. This section should not be interpreted to forbid use of common and recognizable nicknames, initials, or a shortened form of the first or last name.

This section is derived from former policies and procedures 15.01 and 15.02.

Note: DOC 303.32. The purpose of this section is three-fold: to prevent inmates who set up businesses from taking advantage of any member of the public; to prevent any state liability upon contracts entered into by inmates; and to prevent fraud on the public by inmates who order items and do not pay. If inmates were allowed to conduct businesses by mail from inside an institution, this would greatly increase the amount of mail and supervision required. Furthermore, it is possible an unsuspecting outsider would pay for something the inmate could not supply, leading to the unsatisfactory alternatives of a victim who has lost money, or state liability. Inmates have opportunities to work in institutional jobs and on work release, and to sell hobby items through official channels. These opportunities plus the exception provide sufficient ways for inmates to work, make money, and learn skills.

This section is derived from former policy and procedure 14.01.

Note: DOC 303.33. The purposes of rules on attire are: (1) to prohibit use of clothing which could create identification problems; (2) to simplify laundry and storage; (3) to prohibit use of clothing which could be used as a weapon, e.g., excessively heavy belt buckles; (4) to prohibit the use of clothing which could be used to hide contraband, e.g., lined belts; (5) to prevent the wearing of indecent outfits; and (6) to prevent the wearing of garments which could pose a danger to the wearer or others in certain work situations, or to require protective clothing for similar reasons, e.g., a hairnet.

Security needs and other circumstances vary from one institution to another, so the actual policies and procedures are to be determined at each institution and then posted. This section provides notice that these policies and procedures on clothing exist and must be followed.

If an inmate violates a clothing policy, it should ordinarily only be considered a violation of this section, not of DOC 303.24, Disobeying orders. If the inmate has refused to obey a direct order *in addition* to disobeying the posted policy, a charge of violating DOC 303.24 would be appropriate.

Under former department policy 8.02, policies on attire were different at each institution. Because of the different levels of security and different needs at the various institutions, no attempt was made to standardize the rules. Instead, this section gives notice that policies on clothing exist.

Note: DOC 303.34. Most cases of theft in prison are minor and criminal sanctions are not an effective means of deterring theft. In fact, this section alone is not considered enough to control theft without the addition of other sections such as DOC 303.40, Unauthorized transfer of property; DOC 303.50, Loitering; and DOC 303.52, Entry of another inmate's quarters.

The coverage of this section is intended to be the same as s. 943.20, Stats., although the definition of the offense is greatly simplified. Under the former policy and procedure 3.08, theft was not defined. This section should give additional guidance to the adjustment committee or hearings officer in the occasional borderline case.

Lesser included offense: DOC 303.40, Unauthorized transfer of property.

Note: DOC 303.35. A purpose of this section is to protect the property of inmates, staff, and the state. There is a parallel criminal statute, s. 943.01, Stats., but except in extreme cases, violations of this section will probably be handled through the disciplinary process rather than by prosecution. This section is identical in coverage to the former policy and procedure 3.03 (although the language has been simplified), except for the addition of the words "without authorization." However, the limitation expressed by these words was assumed to exist even under the old policy.

Inmates may only destroy their own property with specific authorization. "Authorization" is defined under DOC 303.02. Inmates may *not* authorize damage or alteration of property. This is because it is important to monitor such destruction. Without current property lists, it is impossible to keep track of property in institutions.

Note: DOC 303.36. See the notes to DOC 303.35 and 303.37. See too DOC 303.02.

Note: DOC 303.37. The purpose of this section is to protect the property and safety of inmates and staff and the property of the state. Because of the dangerous potential of fires, arson is punishable even if no damage to property occurs (see DOC 303.35). If damage does occur, an inmate could be punished for violating both this section and DOC 303.35. In addition, starting a fire or creating a fire hazard is punishable even where not done intentionally (see DOC 303.39). Violation of this section is more serious than violation of DOC 303.39. The difference in seriousness is the reason for splitting the former policy and procedure 3.03 into 2 parts.

This section differs from the criminal statutes on arson, ss. 943.02-943.05, Stats., in several ways. First, this section does not require proof of any damage. Second, lack of consent or intent to defraud need not be shown; in other words, inmates may not set fire to their own

property or anyone else's for any reason, except when directed to do so by a staff member. Third, no distinction is made in this section between arson of a building or of other property.

An unwritten but fairly obvious exception to this section is that under almost all circumstances, lighting a cigarette, cigar or pipe is not a violation.

Lesser included offenses: DOC 303.38, Causing an explosion or fire; DOC 303.39, Creating a hazard; DOC 303.47, Possession of contraband—miscellaneous.

Note: DOC 303.38. The purpose of this section is to protect the property and safety of inmates and staff and the property of the state. Because of the dangerous potential of explosions; intentionally causing an explosion is punishable even if no damage occurs, and if damage does occur an inmate could be punished for violating both this section and DOC 303.35. Also, negligently causing an explosion is punishable under DOC 303.39, if a hazard is thereby created.

Under the old policies and procedures there was no procedure dealing specifically with explosions. In order that each inmate's conduct record more closely reflect the seriousness of his or her offenses, and in order to give specific notice that explosions are considered serious offenses, this section was created.

Lesser included offense: DOC 303.39, Creating a hazard.

Note: DOC 303.39. The purpose of this section is to protect the property and personal safety of inmates and staff, and to protect state property. This is the only section under which an inmate can be punished for negligence or recklessness instead of an intentional action. Because of the high density living situation in a prison, carelessness can endanger large numbers of people and create a very serious risk. Therefore, the standard of care of reasonable people must be enforceable through the disciplinary process.

This section is derived from the former policy and procedure 3.02. However, that policy covered both intentional and negligent setting of fires, and it did not cover other types of hazards. Intentionally created risks of two kinds, fire and explosion, are now covered by DOC 303.37 and 303.38. This section is a lesser included offense of both of those sections.

Note: DOC 303.40. This section is designed to aid in the prevention of a variety of other offenses or undesirable activities: theft (or forced "borrowing," or unfair "sales"); gambling; selling of favors by inmates with access to supplies, equipment, information, etc.; and the selling of sexual favors.

Most property items of significant value are easily recognizable (inmates are not allowed to keep money in their possession), so if an item belonging to one inmate is found in the possession of another, a violation of this section is easy to prove even though it may be impossible to prove that theft, gambling or some other offense took place.

Some would argue that since at least one of the 2 parties to an exchange of property would be guilty of an offense in each of the above examples, this additional section is not needed, and besides, this section condemns much harmless or even beneficial activity (such as friendly sharing, trading, and gift-giving) along with the abuses. For example, Krantz et al. *Model Rules and Regulations* (1973), contains no rule forbidding transfer of property. However, the experience in Wisconsin has been that this section is necessary to prevent abuses of the types mentioned.

The purposes of this section should be borne in mind and conduct reports not written for petty and harmless violations such as exchanging single cigarettes, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier. Authorized transfers of books are not prohibited.

The former policy and procedure 3.06 included transfers between an inmate and any other person. Unauthorized acceptance of gifts from outsiders is covered by the sections on contraband (DOC 303.42-303.47). Unauthorized transfers involving staff members are covered by DOC 303.26, Soliciting staff. Unauthorized use of state property is covered by DOC 303.36, Misuse of state property. Therefore, this section only covers transfers between inmates. Unauthorized transfer of property is a lesser included offense of DOC 303.34, Theft, DOC 303.43, Possession of Intoxicants, and of DOC 303.57, Misuse of Prescription Medicine.

Note: DOC 303.41. This section is broader in scope than the criminal statute, s. 943.38 (1) and (2), Stats., since the statute only covers certain types of documents of "legal significance," such as contracts and public records. In the prison setting almost any writing is of potential legal significance, since letters are sometimes monitored, many memos are put into inmates' files, and notes might be used as evidence in disciplinary proceedings. Also, the smooth and fair operation of the prison depends on the reliability of records such as canteen books, passes, orders, prescriptions and files.

This section is derived from former policy and procedure 5.03. However, the old policy covered only the making or altering of a document, not its use (called "uttering" in criminal law). Use was punishable under former policy and procedure 5.04, which also covered lying. The 2 old policies have been reorganized so that both forgery and "uttering" are under this section, while lying is covered by DOC 303.27.

This section is not a lesser included offense of theft; if a forged document is successfully used to obtain someone else's property, the inmate has violated both DOC 303.34, Theft, and this section.

Note: DOC 303.42. Circulation of money is not permitted within the institutions for the same reasons that transfer of property is not allowed. See the note to DOC 303.40. Since unlike other types of personal property, money is not readily identifiable, it would be impossible to prevent transfer of money if inmates were allowed to keep it in the institution. Accounts have been set up for all inmates in which they can deposit their money and from which they can send money to friends, relatives or persons selling goods. See departmental rules relating to inmate accounts.

Only *knowing* possession of these items is an offense; therefore, an inmate can turn in items received through the mail if he or she does so promptly, and they will be deposited to his or her account or put in safekeeping, and he or she will not have committed any offense. Sub. (2).

Lesser included offense: DOC 303.47, Possession of contraband-miscellaneous.

Note: DOC 303.43. The purposes of this section are to prevent intoxicating substances from being brought into institutions, to protect inmates and staff from intoxicated persons and to prevent escape. People under the influence of intoxicants often act abnormally and may injure themselves or others. In a prison, intoxicants are particularly troublesome because acting without inhibition can be dangerous to others. Many inmates who try to escape and who attack staff and other inmates are under the influence. It is important to control such conduct by controlling the substances which create the risks.

See DOC 303.02 regarding the definitions of "authorization" and "intoxicating substance."

Lesser included offenses: DOC 303.40, Unauthorized transfer of property and DOC 303.47, Possession of contraband-miscellaneous.

Note: DOC 303.44. This section is designed to help carry out the same purposes described in the note to DOC 303.43 as the purposes for a rule against possession of intoxicating substances. It is easier to control the use of the forbidden substances if the means for making or using the substances are unavailable.

Because some items of paraphernalia may be legitimately possessed, this section contains a requirement of intent to use the item for manufacture or use of an intoxicating substance. For example, at some institutions inmates are allowed to make pipes in hobby shop, so possession of such pipes, by itself, cannot be made an offense. This does not permit the manufacture or possession of "pot pipes," however. Also, the definition of device in this section is somewhat vague. Examples are relied on to give specificity. Without the intent requirement, this section might not give sufficient notice of what is forbidden and thus, might violate the due process clause of the fourteenth amendment to the Constitution. Of course, intent can be inferred from the circumstances and the hearing officer or committee is not required to believe a denial of intent by the accused if there is other, contradictory evidence.

In the past, there has never been a rule against possession of paraphernalia. Nevertheless, inmates who possessed such items were often disciplined, under the supposed authority of either the general prohibition against contraband or the prohibition against possession of intoxicants. This section gives more specific notice to inmates of what is forbidden.

Lesser included offense: DOC 303.47, Possession of contraband-miscellaneous.

Note: DOC 303.45. The purpose of this section is to protect the safety of inmates and staff by taking dangerous items away from inmates whenever it appears that an inmate is planning to use an item as a weapon, and by making possession of weapons a punishable offense.

Because many items which an inmate may legitimatley possess could also be used as weapons, in the case of such items an intent to use the item as a weapon must be shown. Sub. (1). Intent will usually be inferred from the circumstances. For example, possession of a razor blade which is located in a razor or in a box of blades and with other toiletry items would not, in itself, be an offense. But carrying around a single razor blade, especially outside the cell, would probably be an offense.

Sub. (1) deals with items which are still in their original form and which have both a legitimate use and use as a weapon. Examples are knives, kitchen utensils, matches, cigarettes,

tools and heavy objects. On the other hand, sub. (2) deals with items which have been altered from their original form. Examples include a spoon or table knife which has been sharpened and a razor blade which has been taped or fitted to a handle. If an inmate makes or alters such an item, there is no need to show that he or she intened to *use* it as a weapon. It is only necessary to show that the inmate intended to make the item *suitable* for use as a weapon. In most cases, such an intent can be inferred from the mere fact of making the item.

Finally, sub. (3) deals with items which have no other purpose than to be used as weapons. Examples include guns, explosives, switchblade knives and many of the homemade items which are also covered by sub. (2). Inmates are not allowed to have such items under any circumstances and they will be confiscated. Also, if an inmate knowingly has such an item in his or her possession, the inmate is guilty of an offense.

Even if an inmate is found "not guilty" under this section because there was insufficient proof of intent and the item was not something that could only be used as a weapon, in many cases the inmate will nevertheless be guilty of misuse of state property (see DOC 303.36) or damage or alteration of property (see DOC 303.35). Examples include taking a kitchen utensil or tool away from the kitchen or shop where it is supposed to be used and altering a state owned item in a way that makes it more suitable for use as a weapon.

Lesser included offense: DOC 303.47, Possession of contraband-miscellaneous.

Note: DOC 303.46. The purpose of this section is the same as the purpose of DOC 303.42, Possession of money, and DOC 303.40, Unauthorized transfer of property: to aid in the prevention of various other offenses or abuses such as gambling; the sale of favors by inmates with access to supplies, equipment or information; the sale of sexual favors; and forced "selling," "giving" or "borrowing." Cigarettes are often used as a form of money in prisons, and transfer of cigarettes is difficult to detect because cigarettes are not individually identifiable. Therefore, use of cigarettes or cigars as a medium of exchange can be curbed by preventing hoarding of large quantities. Confiscation of the excess cigars or cigarettes whenever the inmate is found guilty (sub. (2)) is an additional deterrent. But since cigars and cigarettes do not in themselves pose a threat to order and security, sub. (2) also provides that they will be returned to the inmate if he or she is found not guilty.

The present practice is not to write conduct reports when the inmate gets excess cigarettes inadvertenly, for example, through the mail as a gift. Under this section, a conduct report would also be inappropriate.

Lesser included offense: DOC 303.47, Possession of contraband-miscellaneous.

Note: DOC 303.47. The purposes of controlling the types and quantities of property which inmates may have with them are: (1) to prevent trading, and more serious offenses associated with it, among inmates (see DOC 303.40 and note); (2) to simplify storage; (3) to keep out items which are likely to be misused; and (4) to keep out extremely valuable items which may create jealousy among inmates. Items in sub. (2) (b)-(d) are included in order to help prevent trading and theft.

Items which are covered by this section and are not covered by any of the more specific sections are items which are not, in themselves, dangerous. Therefore, even when an inmate is guilty because he or she failed to register an item, had a prohibited item or had too many of one kind of item, the inmate's property is not confiscated. Property is disposed of or returned in accordance with DOC 303.10.

The types of items allowable vary from institution to institution, so no actual listing is given here. Rather, a listing of all allowable property should be posted at each institution in accordance with department policies relating to personal property. This section gives notice that the posted lists exist and that violation of them is a disciplinary offense. Possession of Contraband—Miscellaneous is a lesser included offense of DOC 303.37, Arson, DOC 303.42, Possession of Money, DOC 303.43, Possession of Intoxicants, DOC 303.44, Possession of Drug Paraphernalia, DOC 303.45, Possession, Manufacture, and Alteration of Weapons, and of DOC 303.46, Possession of Excess Smoking Materials.

Note: DOC 303.48. Use of the mails is an important right of prisoners which is protected by the first amendment to the U.S. Constitution and may not be abridged except under the following circumstances:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . Second, the limitation of First Amendment freedoms must be no greater than necessary or essential to the protection of the particular governmental interest involved.

Procunier v. Martinez, 416 U.S. 396, 413 (1974); *X v. Gray*, 378 F. Supp. 1185, 1186 (E.D. Wis. 1974), aff'd 558 F. 2d 1033. See also *ACA*, standard 4306, Discussion:

Access to the public is an integral part of rehabilitation. Inmates should be permitted to communicate with their families and friends, as well as with public officials, the courts and their attorneys. All correspondence should be uncensored.

Chapter DOC 309 governs the use of the mail by inmates. Basically, inmates may correspond with anyone unless the inmate or the correspondent abuses the privilege. Then, the right to correspond with a particular person may be terminated pursuant to ch. DOC 309 or as part of a disciplinary hearing. Sub. (1) only comes into play if the right to correspond with a particular person has already been terminated. If the inmate nonetheless corresponds with that person, for example by enclosing a message inside a letter or package to someone else, the inmate has violated this section.

The purposes of sub. (2) are the same as the purposes of DOC 303.42 and 303.46. See the notes to those sections. Inmates should not be allowed to send away, for safekeeping, items which were improperly acquired, such as money, drugs, weapons or the property of others. This section is only intended to apply to situations where the inmate personally puts items into an envelope or package. For example, if money from the inmate's account is sent out to pay for a purchase, there is no violation.

A person should not be charged with a violation of DOC 303.30 and this section for the same act.

Note: DOC 303.49 to DOC 303.52. In general, all of the sections concerning movement have the following purposes: (1) to prevent escape by monitoring inmates' movements; (2) to prevent fights, assaults and disturbances by preventing gathering of groups except in closely supervised situations; and (3) to permit the effective monitoring of inmate activity both in the institution and while the inmate is on work or study release. In addition, DOC 303.49, Punctuality and attendance, is intended to promote the smooth running of all programs of work, study and recreation, and to promote development of punctual habits by inmates. DOC 303.52 has the additional purposes of preventing theft and other illicit activity. DOC 303.50 is not intended to prohibit normal conversation between inmates who are walking.

These sections were originally derived from the former policies and procedures 4.02-4.07 which were in effect prior to 1979. The policies entitled "Group Movement" and "Individual Movement" were eliminated in the initial promulgation of DOC 303 in August 1980, for the following reasons: (1) the 2 rules were not uniform from institution to institution, so it would be better to use posted policies; and (2) in most cases the offenses described were adequately covered by one of the other 4 sections or by DOC 303.20, Group Resistance.

Note: DOC 303.54. The purposes of this section are to aid in the enforcement of the contraband rules and to prevent possible poisoning or misuse of items due to improper labeling. The exact list of items which are covered by this section will be posted at each institution; this section only names the types of items which are likely to be covered.

Note: DOC 303.55. In the close living conditions of a prison, a messy or dirty room could become a breeding ground for bacteria or a haven for pests such as insects or mice, and thus threaten the health and safety of the inmate of that room and of others. Where two or more inmates share quarters, differences in habits of neatness could lead to arguments or to an unpleasant environment for one person. Finally, development of the habit of neatness is part of rehabilitation. For all of these reasons, neatness and cleanliness of rooms is regulated. However, since the layout of rooms, the laundry arrangements and the content of rooms varies greatly among institutions, the particular requirements are not contained in this section but instead will be posted at each residence hall or institution. See DOC 303.08, Institutional policies and procedures.

The organization of living quarters is also important because it is essential for staff to be able to observe quarters and because rooms can be arranged in a way that creates a fire hazard. Thus, the organization of rooms is also subject to rule-making.

Violation of DOC 303.24, Disobeying orders, should not be charged when an inmate violates this section, unless the inmate has been warned and still refuses to clean up. Also, in many cases of violation of this section, a conduct report is probably not necessary. See DOC 303.65, Offenses which do not require a conduct report.

Note: DOC 303.56. The purpose of this section is to protect the health and safety of all inmates and staff. Pests or infections can easily spread from person to person. This section does not, however, impose standards of taste upon inmates. For example, any hair style is acceptable as long as the hair is washed and combed often enough to prevent diseases or pests, and as long as on-the-job policies concerning hair are followed. This is in conformity with the *ACA*, standard 4303:

4303: *Written policy and procedure allow freedom in personal grooming, except where a valid state interest justifies otherwise. (Essential)* Discussion: Inmates should be permitted freedom in personal grooming so long as their appearance does not conflict with the institution's re-

quirements for safety, identification and hygiene. All regulations imposed should be the least restrictive necessary.

Note: DOC 303.57. Use of prescription medications must be carefully monitored because many of the medications have mind-altering qualities and could be abused just as controlled substances such as heroin, cocaine, marijuana, or alcohol can be abused. See note DOC 303.43, Possession of intoxicants, for the reasons behind the policy of not allowing inmates to use *any* mind-altering drugs.

Because the very same policy explains DOC 303.43 and 303.59, and this section, inmates should not be found guilty of violating both this section and one of the others on a single occasion unless more than one type of drug was involved. Rather, the reporting officer, or the hearing officer or adjustment committee, should decide which of the sections is most appropriate.

Lesser included offense: DOC 303.40, Unauthorized Transfer of Property.

Note: DOC 303.58. The purpose of this section is to protect the safety and health of the inmates. Tattooing, ear piercing and other forms of self-mutilation can lead to serious infections. In addition, some forms of disfigurement could lead to identification problems.

The wearing of pierced earrings is allowed, but inmates whose ears are not already pierced may not get them pierced while in prison.

This section is only intended to cover injury to oneself or to another person with that person's consent. Injury to another person without his or her consent is covered by DOC 303.12, Battery.

This section is derived from former policy and procedure 13.02.

Note: DOC 303.59. The reasons for the policy of not allowing inmates to use any kind of intoxicating drugs, including alcohol, are given in the note to DOC 303.43.

Misuse of prescription medications is not covered by this section because it is already an offense covered by DOC 303.57. For the purpose of deciding which of the 2 sections applies, "prescription medication" means only drugs obtained properly or improperly, directly or indirectly, from pharmacy supplies at the institution. The fact that a particular drug is sometimes prescribed by some doctor somewhere does not make it a "prescription medication" for purposes of this section.

In sub. (2) use of intoxicating substances is proven by a positive test result performed on body contents specimens or breath or through physical examinations, requested in accordance with DOC 306.16. The department uses reliable tests accepted by the scientific community and follows the standards suggested by the test authors or manufacturers. Refusal to provide breath or body fluid specimens or to submit to a physical examination is a separate offense since the inmate is refusing to obey a direct order. With respect to urinalysis, an inmate is considered to have refused to submit to a body fluids search if he or she does not provide a urine specimen within a reasonable time after the request.

Note: DOC 303.60. Gambling is forbidden for the following reasons: (1) it can result in some players being cheated or taken advantage of; (2) it can lead to serious debts which in turn lead to violence, intimidation and other problems; (3) even without cheating or large debts, it can create strong emotions leading to violence or other discipline problems; (4) some inmates have a psychological dependence on gambling (similar to alcoholism) which has been associated with criminal behavior in the past. Removing the opportunity for gambling could help such inmates to overcome this problem.

On the outside, although all gambling except licensed bingo or lotteries is forbidden (s. 945.02, Stats.), the statute is often not enforced against persons who engage in small-scale, private, non-commercial gambling with no links to organized crime. K. Davis *Police Discretion* (1975), p. 5. However, this section is aimed at just such activity.

Thus, for example, betting a pack of cigarettes on the outcome of a TV football game is an offense. It would also violate DOC 303.40, Unauthorized transfer of property, if the bet was paid. The experience of staff is that even this type of betting can lead to serious problems for the reasons listed earlier.

Sub. (2) provides that even a non-gambler can be guilty of an offense if that person organizes a game, lottery or pool.

This section is derived from the former policy and procedure 3.07.

Note: DOC 303.61. See the note to DOC 303.62.

Note: DOC 303.62. Performance of work assignments is vital to the operation of each institution. Laundry, food preparation, cleaning, and maintenance are among the tasks performed by inmates. Enforcement, through the disciplinary process, of the duty to work is necessary to the smooth running Sunday, unless the work is necessary for the running of the institution. Food service is an example of such work.

Even where an inmate is not assigned work which is vital to the institution's operation, he or she is nevertheless required by these sections to work or study if assigned to do so. These sections are designed to instill habits of dependability and responsibility which are important in getting and keeping jobs on the outside.

The *ACA* approves the requirement that inmates be required to work, but disapproves forced participation in educational or treatment programs.

Standard 4295, National Advisory Commission, *Corrections* (1973) suggests that inmates be paid at the prevailing wage paid in the community. Such a positive incentive to work, if it could be implemented in Wisconsin, might greatly reduce the need for discipline to force the inmates to work and to perform their work properly. Also, it would duplicate much more closely the work conditions existing on the outside, and thus would provide better preparation for working after release. However, at the present time, the idea of paying inmates the minimum wage is not under serious consideration, mainly for budgetary reasons. See generally, "Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms," 74 Mich. J.L. Reform 193 (Fall 1973). See the departmental rules on compensation and extra good time.

Note: DOC 303.63. Each institution, due chiefly to its unique physical facilities, security requirements and programs, must have the authority to regulate the matters specified in sub. (1) more specifically and frequently than is possible through the rulemaking process. This section provides the authority to do so. Only violations of policies and procedures authorized under this section and specifically under this chapter may be treated as violations permitting punishment. Such policies and procedures must be related to the objectives under DOC 303.01.

Note: DOC 303.631. This rule was formerly s. DOC 303.63(3).

Note: DOC 303.64. This section gives an overview of the different ways a rule violation can be handled. In general, less serious offenses are handled by informal means, such as counseling, warning or summary punishment with consent of the inmate. More serious offenses are handled by more formal means, including a hearing by an impartial officer or committee at least 24 hours after notice is given, an opportunity to respond to the charges and an opportunity for appeal. In addition, in the most serious or "major" cases the accused may have the opportunity to call witnesses and present evidence, the opportunity to confront and cross-examine adverse witnesses and the assistance of a staff member in preparing for the hearing.

The disciplinary process in correctional institutions is greatly misunderstood. This is principally because commentators focus on the so-called procedural due process aspects of the system, and devote inadequate attention to the substantive definition of offenses and the less visible, though significant, administrative decisions that occur before the formal system is invoked. Another reason is that commentators put great emphasis on due process, an important value, but they ignore other important objectives of the disciplinary system. Careful evaluation of due process can only be made in the context of the whole system, and with an understanding of the values it seeks to achieve.

Restating these objectives is important, because we cannot be reminded too often of the purposes of the system. It is crucial that order be maintained in institutions, both for the safety of inmates and staff and to provide an environment in which people can be constructively involved in programs. While the so-called formal process for discipline helps achieve these values, so do less formal measures. For example, an officer in a cell hall may maintain order by exercising sound judgment in writing conduct reports. In perhaps the majority of violations, counseling and a warning to the inmate is more effective and more efficient in maintaining order than invoking the formal process. It is also more fair, and develops respect for authority rather than distracting from it. This in itself is rehabilitative, because it contributes to the process of teaching people to live within acceptable limits. It also helps people understand that the system is not unnecessarily harsh and unyielding.

These objectives, as well as the objectives of punishment and deterrence, can also be served in the less formal process. Unnecessary formality may in fact detract from some of these objectives. For example, a formal adversary procedure may make it impossible to counsel an inmate about misbehavior, when counseling is more important than punishment. But, increasingly, there has been pressure to rely on formal procedure. Sometimes, this detracts from fairness and other values served by the system. This is not to say that inmates should not be treated fairly.

Appendix

One of the goals of the disciplinary procedure rules is to provide a speedy and fair determination of guilt or innocence. Speed is important because: (1) memories may fade and evidence grow stale as time passes; (2) an accused inmate may be in temporary lockup pending a hearing; (3) the time of institution staff should be conserved as much as possible to save money and to allow them to spend time on other functions; (4) a pending disciplinary charge can have adverse effects on an inmate's morale, assignment and transfer or parole prospects. Therefore, it should be resolved as quickly as possible.

The goal of fairness is advanced by the procedural rules in several ways: (1) the hearing officer or adjustment committee is impartial; (2) the officer's or committee's decision must be based on the evidence presented, and on a preponderance of that evidence; (3) various safeguards assure that the inmate's side of the story is fully presented. In some cases, any or all of the following are allowed: a staff member's help in preparing for the hearing, an opportunity to present evidence and witnesses, and an opportunity to confront and cross-examine adverse witnesses. In *all* cases, the inmate can make a statement on his or her own behalf; (4) the officer or committee is required to make a written report of the decision and reasons for it. This allows review of the decision; (5) there are guidelines set out to help the staff member make certain decisions, such as the decision whether to write a conduct report and the decision of what punishment to impose.

More procedural safeguards of the type just discussed could have been required to make disciplinary procedure resemble a criminal trial. Fairness might be increased somewhat by such additional safeguards. However, there are countervailing factors to be considered. Complex procedure may interfere with a speedy resolution of the case, which is important for reasons discussed earlier. An increase in the adversary quality of a disciplinary hearing is not desirable, because a more adversary hearing may tend to overemphasize the importance of a relatively minor incident and harden attitudes of inmates and staff toward each other. It may make counseling impossible. A discussion of the negative aspects of a highly adversary hearing is found in *Gagnon v. Scarpelli*, 411 U.S. 778, 787-788 (1973):

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decision-making process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.

Scarpelli, of course, dealt with probation and parole revocation, but the need for flexibility and informality also exists in the prison disciplinary situation, as explained in *Wolff v. McDonnell*, 418 U.S. 539, 562-563 (1974):

Proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution.

It is accurate to say that, in the disciplinary process, correctional staff are dealing with a wide range of behavior. Their objectives are varied and are sometimes in conflict. There is nothing improper about this. The variety of objectives and conduct makes for complexity. This chapter seeks to permit individualized, fair treatment of violators, while avoiding unnecessary complexity and meaningless procedures.

Note: DOC 303.65. In the past, discretion has always been exercised in the decision of whether or not to write conduct reports. This section recognizes that it is not desirable or necessary to handle all observed rule violations through the formal disciplinary process, and it provides guidelines for the exercise of discretion by correctional officers. This helps to increase

uniformity and to increase understanding of the disciplinary rules and the enforcement policy among both inmates and staff.

Non-enforcement of a disciplinary rule in certain situations is closely analogous to non-enforcement of criminal laws by police. Two noted commentators have strongly urged that police enforcement policies be made public in the form of administrative rules in order to provide public input and review of the policies, to increase uniformity of application, to provide guidelines to individual officers, and to provide notice to the public of the standard of behavior expected of them. K. Davis, *Police Discretion* (1975); H. Goldstein, *Policing a Free Society* (1977). This section also conforms to the *ACA*, standard 4315:

Written guidelines should specify misbehavior that may be handled informally. All other minor rule violations and all major rule violations should be handled through formal procedures that include the filing of a disciplinary report.

Although this section limits the officer's discretion (for example, an officer may not handle a major offense, such as fighting, informally), there is still considerable scope for the officer's judgment, for example, in deciding whether the inmate is likely to commit the offense again. The officer's experience can guide him or her in making this judgment better than a detailed rule could. Also, even if the officer *may* handle a rule violation informally, this section does not require the officer to do so when in his or her judgment discipline is needed.

Sub. (1) (d) refers to the purposes of the individual sections and the rules generally in DOC 303.01. A statement of the purpose of each disciplinary rule in this chapter can be found in the note to that section. These notes in some cases give examples of situations where the rule should normally not be enforced. For example, the note to DOC 303.40, Unauthorized transfer of property, states that: "[C]onduct reports [should] not [be]written for petty and harmless violations of this section, such as exchanging single cigarettes, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier."

Note: DOC 303.66. If an officer has decided, using the guidelines in DOC 303.65, that counseling or warning an inmate is not the best response to a particular infraction, the next step is to write a conduct report. The contents of the conduct report are described in sub. (2). A conduct report is the first step for all 3 types of formal disciplinary procedures: summary punishment, minor offense hearing and major offense hearing.

If the officer did not personally observe the infraction, sub. (1) requires that he or she investigate any allegation to be sure it is believable before writing a conduct report. An informal investigation by the reporting officer can save the time of the adjustment committee by weeding out unsupported complaints, and can also provide additional evidence to the adjustment committee if any is found. Also, it is fairer to the inmate to spare him a hearing when the officer cannot uncover sufficient evidence.

Sub. (3) provides that there should be a conduct report for each action which is alleged to violate the sections. If one action violates 3 sections only one report is required. Presumably, the report would list the sections violated and state the relevant facts. This is an effort to avoid unnecessary use of forms.

There is no "statute of limitations" for writing the report. Rather, the guiding factor, when there is time between the alleged offense and the conduct report, should be whether the inmate can defend himself or herself and not be unfairly precluded from doing so due to the passage of time.

Note: DOC 303.67. A conduct report is the initial step in the formal disciplinary process. It can be written by any correctional staff member. Unless the accused inmate admits the charges and submits to summary punishment (see DOC 303.74), the next step is review by the security office. The purpose of the review is to improve the consistency of the reports so that the rules are used in the same way in all reports, and to check the appropriateness of the charges in light of the narrative description section of each report. The review is not a substitute for continuing supervision and training of officers to make sure they all use the rules in the same way; however, it can serve as a tool in the supervision of officers while at the same time making sure that an inmate is not forced to go through a hearing based on an inappropriate charge, or conversely is not let off because the violation charged was under the wrong section.

If summary disposition of the case has already occurred, the security office also reviews the conduct report. The same type of review for the appropriateness of charges should be made, as well as a review of the appropriateness of writing a conduct report (see DOC 303.65) and of the appropriateness of the sentence imposed. The security director may reduce the punishment or charges, if a violation has been treated summarily but may not add to them, since summary punishment is based on consent of the inmate and the inmate has only admitted the charges which were originally written on the conduct report. Only if the conduct report and the punishment are approved may a record of the violation be included in the inmate's files.

Appendix

Note: DOC 303.68. For the reasons given in the note to DOC 303.64 and in *Wolff v. McDonnell*, 418 U.S. 539 (1974), greater procedural safeguards are used when a greater punishment is possible. The dividing line between the 2 types of formal hearing is the same as the one used in *Wolff, supra.* If segregation, extension of the mandatory release date or loss of good time is imposed, then all of the *Wolff* safeguards apply. If other lesser punishments are used, then a less formal procedure is used. In order to preserve the option of using a major punishment, the security office will designate a conduct report as containing a "major offense" whenever it seems possible that segregation, extension of the mandatory release date or loss of good time will be imposed by the adjustment committee. Some offenses must *always* be considered major offenses; these are listed in sub. (3). Violations of other sections will be considered individually and it is left to the security director's discretion whether to treat an offense as major or minor. However, guidelines for the exercise of this discretion are given in sub. (4).

When a security director treats an offense as a major offense, as allowed by sub. (4), the security director should indicate in the record of the disciplinary action some reason for that decision based on the criteria enumerated under sub. (4).

Note: DOC 303.69. This section reflects the conditions in adjustment segregation as they already exist at most institutions. The purpose of this section is to promote uniformity among all the institutions, to make sure minimum standards are met and to inform inmates what to expect.

Adjustment segregation lasts a maximum of 8 days, so very spartan conditions are permissible. However, visiting and mail rights are protected by the first amendment. See *Procunier v. Martinez*, 416 U.S. 396 (1974); *Mabra v. Schmidt*, 356 F. Supp. 620 (W.D. Wis. 1973).

While extra good time is not earned in this status, fractions of days are not deducted. See the departmental rules on extra good time and compensation.

Note: DOC 303.70. This section reflects the conditions in program segregation as they already exist at at least one institution. The purposes of this section are to promote uniformity among all the institutions, to make sure minimum standards, possibly required by the eighth amendment's "cruel and unusual punishment" clause are met and to inform inmates what to expect.

Subsection (3) clarifies what personal property inmates in program segregation may keep in their cells. Inmates may not keep electronic equipment or typewriters in their cells except as allowed by a particular institution's written policy. Each institution is expected to have a policy designed to motivate inmates to improve their behavior in segregated statuses so that they will be permitted to move into the general population of the institution.

Since program segregation may last for almost one year (or longer if a new offense is committed), the conditions are not as spartan as in adjustment segregation. In particular, more personal property is allowed and there is an opportunity to take advantage of programs. Sub. (7). A person's stay in program segregation may not be extended and he or she may be released at any time through the procedure established under this section.

Note: DOC 303.71. Controlled segregation is not intended as punishment but, as its name implies, it is to be used where it has been impossible to control a person in segregation. The purpose of the section is to promote uniformity in the use of controlled segregation and make sure minimum standards are met. In particular, incoming and outgoing mail is still allowed as if the inmate were not in segregation. This is a logical extension of *Procunier v. Martinez*, 416 U.S. 396, (1974). See also *X v. Gray*, 378 F. Supp. 1185 (E.D. Wis. 1974), aff'd 558 F. 2d 1033; *Vienneau v. Shanks*, 425 F. Supp. 676 (W.D. Wis. 1977).

Note: DOC 303.72. This section describes each of the minor penalties which may be imposed. The purpose of this section is to standardize the punishments used so that an inmate's disciplinary record is easier to understand, and to inform inmates of what to expect. There should be no referral to the program review committee for reclassification if a minor penalty is imposed, unless there has been a recent accumulation of such penalties.

Note: DOC 303.73. A number of rules cover conduct which is sometimes a criminal offense. However, many petty matters would probably not be prosecuted by the district attorney even if brought to his attention—for example, gambling. Also, in most cases, even outbreaks of violence are handled through disciplinary procedures rather than by prosecution. This section requires the superintendent to work with the district attorney in developing a policy on prosecution of crimes committed within the institution. The frustration and waste of time involved in referring cases which are dropped can be avoided, as well as the possibility of failing to refer a case which ought to be prosecuted. Naturally, the final decision is left up to the district attorney (sub. (2) (b)).

In developing the policy on referrral, it will become obvious that the disciplinary rules do not follow the criminal statutes exactly. Some crimes are not covered by the disciplinary rules. These are generally "white collar" crimes which are unlikely to be committed in prison.

Some rules cover both criminal and non-criminal activities. An example is DOC 303.43, Possession of intoxicants, which covers possession of alcohol as well as prescribed drugs. The notes to the individual sections explain the differences between each rule and the similar criminal statute.

Sub. (3) provides that disciplinary procedure can go forward even if the case will also be prosecuted as a criminal offense. This option is often needed for control because criminal procedure takes a long time and because a criminal conviction merely lengthens an inmate's sentence without changing the conditions of confinement. For some inmates, a longer sentence is very little deterrent. Also, it provides no protection to potential victims because the offender is not segregated from the general population. There is no double jeopary in having both a disciplinary hearing and a criminal trial on the same matter. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

Note: DOC 303.74. The availability of summary disposition avoids the necessity of a disciplinary hearing when the inmate agrees to summary disposition. Summary disposition is only allowed in relatively minor cases, those where the punishment is only one of the punishments listed in sub. (5). To further limit the possibility of abuse, any summarily-imposed punishment must be approved by the shift supervisor. Sub. (4). Also, summary punishments must be reviewed and approved by the security office before being entered in the inmate's disciplinary record or other files. See DOC 303.67.

In the recent past, summary disposition has not been used extensively. A hearing was held on all offenses. This section thus streamlines disciplinary procedure in minor, uncontested cases. One purpose of the section is to encourage summary disposition, where appropriate.

Note: DOC 303.75. The hearing procedure for minor violations, often called an "informal hearing," has several safeguards to protect the inmate from an erroneous or arbitrary decision. It is used in the following situations: (1) When the inmate did not agree to summary disposition, because he or she contested the facts or for some other reason; (2) When the appropriate punishment, if the inmate is found guilty, is more severe than permitted on summary disposition but not so severe as to require a full due process hearing; and (3) When the inmate waives a due process hearing.

The protections present in the minor hearing procedure are: subsection (1)—notice of charges; subsection (2)—specific time limits for the hearing and opportunity to waive them; subsection (3)—an impartial hearing officer; subsection (4)—opportunity for the inmate to explain or deny the charges; subsection (5)—a decision based on the preponderance of the evidence; subsection (6)—the right to appeal; and DOC 303.85—no records are kept in any offender-based file if the inmate is found not guilty.

The *ACA*, standard 4334, Discussion, draws the line between "major" and "minor" violations in a different place: "Minor violations usually are those punishable by no more than a reprimand or loss of commissary, entertainment or recreation privileges for not more than 24 hours." Because minor penalties as defined in DOC 303.68 include several which are more severe, the minor offense disciplinary procedure is somewhat more formal than that recommended by the *ACA*.

Note: DOC 303.76. DOC 303.76, 303.78, and 303.82 prescribe a hearing procedure for major offenses which complies with the requirements of *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974).

Subsection (1) concerns notice. With respect to notice, the Supreme Court said:

> We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

In accordance with *Taylor v. United States*, 414 U.S. 17 (1973), the inmate is informed that if he or she refuses to attend the hearing, the hearing may be held without the inmate being present.

Subsection (2) concerns waiver. When an inmate waives a hearing for a major due process violation, he or she waives all rights associated with that type of hearing and has only the rights associated with hearings for minor violations. Waiver includes waiving the right to question or confront witnesses. Just as a criminal defendant may waive his or her right to a trial, so an inmate accused of a disciplinary offense can waive his or her right to a due process hearing. In that case, a hearing of the type used for minor offenses is held. The inmate still has an opportunity to make a statement, there is an impartial hearing officer, a decision is based on the evidence, and an entry in the records is made only if the inmate is found guilty. See s. DOC 303.75 and Note.

To ensure that any waiver is a knowing, intelligent one, the inmate must be informed of his or her right to a due process hearing and what that entails; be informed of what the hearing will be like if he or she waives due process; and be informed that the waiver must be in writing.

A waiver is not an admission of guilt.

Subsection (3) concerns time limits, which are the same as those under s. DOC 303.75.

Subsection (4) allows the hearing to be held at one of a number of places. In the past, disciplinary hearings were held only at the institution to which the inmate was assigned at the time of the misconduct. Transfer brought disciplinary proceedings to an end. This was undesirable for a variety of reasons. Therefore, this section provides for hearings at the new location.

Generally, it is desirable to provide hearings where the violation occurred. This practice is current department policy. Sometimes, this is impossible, particularly in the camp system. When it is impossible, fairness requires that the inmate have the same protections where the hearing is held as he or she would have at the institution where the violation is alleged to have occurred.

Subsection (5) prescribes a hearing procedure for major offenses which complies with the requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974). Those requirements are:

(a) "A written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." *Morissey v. Brewer*, 408 U.S. 471, 489 (1972).

(b) The inmate is allowed to call witnesses and present documentary evidence in his or her defense if permitting him or her to do so will not jeopardize institutional safety or correctional goals.

(c) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings. Such procedures in the current environment, where prison disruption remains a serious concern, must be left to the discretion of the prison officials.

On cross-examination and confrontation of adverse witnesses, the court said:

In the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many states, including Nebraska, and the Federal Government to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least the Constitution, as we interpret it today, does not require the contrary assumption. Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries. *Id.* at 568.

Subsection (5) does not greatly limit the Adjustment Committee's discretion to prohibit cross-examination and confrontation, as it appears to do, because of the fact that the witness need not be called at all. The committee may rely on hearsay testimony if there is no reason to believe it is unreliable. See DOC 303.86, Evidence.

Subsection (6) requires that the committee give the inmate and his or her advocate a written copy of the decision. The Supreme Court stated about this requirement:

We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action. *Morrissey*, 408 U.S. at 489, 92 S. Ct. at 2604. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," Neb. Rev. Stat. s.83-185(4) (Cum. Supp. 1972), and are certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilita-

tive objective or prospect of prison disruption that can flow from the requirement of these statements.

Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974).

Subsection (7) gives the inmate the right to appeal an adverse decision. Appeal is not required by *Wolff v. McDonnell;* in fact, an opportunity for appeal is not even an element of required due process in a criminal proceeding. *Griffen v. Illinois*, 351 U.S. 12 (1956). Appeal or review is one of three ways of controlling discretion, according to Kenneth Culp Davis. The other 2 are limiting discretion by placing outer limits on it, and structuring discretion by listing guidelines or factors to be considered. Appeal increases uniformity in decision-making, may eliminate or reduce abuses of discretion, and provides an opportunity for the superintendent to review the work of his or her subordinates in handling disciplinary cases.

Note: DOC 303.78. Subsection (1) provides the inmate in a disciplinary hearing with a limited choice of advocates to permit avoidance of conflict-of-interest problems. The choice of an advocate, however, is not the inmate's constitutional right. Paragraph (b) provides a procedure for giving inmates a choice of advocates in institutions that use volunter or assigned advocates who are regular staff members. Paragraph (c) provides for a different procedure in institutions that employ permanent advocates. This rule allows the institution to assign advocates and to regulate their caseloads. If an inmate objects to the assignment of a particular advocate because that advocate has a known and demonstrable conflict of interest in the case, the institution should assign a different advocate to the inmate. An inmate has no due process or other right to know the procedure by which a particular advocate is selected in a particular case.

Note: DOC 303.81. The inmate facing a disciplinary proceeding for a major violation should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other documentary evidence.

This new rule requires the adjustment committee or hearing officer to state on the record its reason for determining that a witness need not be called. It is hoped that stating on the record the reasons for refusing to call a witness will facilitate review of disciplinary proceedings. The adjustment committee may determine that a witness should not be called because the testimony would be irrelevant, unnecessary, or due to other circumstances in an individual case.

The decision of whether to allow a witness to testify has been delegated to a hearing officer. Sub. (2). The time for making requests is limited under sub. (1), in order to give the hearing officer an opportunity to consider the request prior to time for the hearing, which normally must be held within 21 days. See DOC 303.76 (3).

Sub. (3) lists the factors to be considered in deciding whether to call a requested witness.

Subs. (4), (5) and (6) indicate that signed statements are preferable to other hearsay, but other hearsay may be relied on if necessary.

Subs. (7) and (9) provide that the same hearing officer who considers the requests for witnesses is also the person to schedule the hearing and notify all participants. There is a time limit on the hearing—it must be 2 to 21 days after notice to the inmate. See DOC 303.76 (3).

Sub. (8) forbids interviewing members of the public and requesting their presence at hearings without the hearing officer's permission. Members of the public are not permitted to attend hearings. Such people are usually employes and school officials who are involved in work and study release. There is no authority to compel their involvement in hearings. More importantly, requesting their involvement or permitting adversary interviewing seriously jeopardizes the programs by making the people unwilling to cooperate. It also creates the possibility that there will be harassment of such people. Instead, the work release coordinator should get whatever information these people have and provide it to the committee.

Note: DOC 303.82. *Wolff v. McDonnell*, 418 U.S. 539 (1974), requires that the adjustment committee members be impartial in the sense that they should not have personally observed or been a part of the incident which is the basis of disciplinary charges. However, the court

specifically held that a committee member could be "impartial" even if he or she was a staff member of the institution. Nevertheless, this section encourages some diversity on panels with 2 or 3 members.

The use of one and 2 member committees is a recent development. There are 2 principal reasons for it. The camp system has never held due process hearings because of the fact that the staff is small and it is impossible to involve staff from distant institutions. For example, some camps have as few as 4 staff members. To provide a 3 person committee and an advocate and to prevent the complainant from being one of these people is impossible. Of course, there would be no one to supervise the camp during the hearing, either. The conflict between the desire to have due process hearings at the camps and limited resources is resolved by permitting smaller committees.

The problem of available staff also exists at larger institutions. So many staff can be tied up in the process that other important functions are neglected. It is thought that fairness can be achieved by relying on smaller committees while other correctional objectives are also achieved.

Note: DOC 303.83. This section sets out the considerations which are actually used in deciding, within a range, how severe an inmate's punishment should be. It does not contain any formula for deciding the punishment. The actual sentence should be made higher or lower depending on the factors listed. For instance, if this is the fourth time the inmate has been in a fight in the last year, his or her sentence should be greater than average, unless other factors balance out the factor of the bad record.

The purpose of this section is to focus the committee's or officer's attention on the factors to be considered, and to remind them not to consider other factors such as personal feelings of like or dislike for the inmate involved.

Note: DOC 303.84. There are 2 limits on sentences which can be imposed for violation of a disciplinary rule: (1) A major penalty cannot be imposed unless the inmate either had a due process hearing or was given the opportunity for one and waived it; and (2) only certain lesser punishments can be imposed at a summary disposition. Major penalties are program and adjustment segregation, loss of good time for those inmates to whom 1983 Wisconsin Act 528 does not apply, and extension of mandatory release date for those inmates who committed offenses on or after June 1, 1984, and other inmates who chose to have 1983 Wisconsin Act 528 apply to them. See DOC 303.74. This section limits both the types and durations of penalties.

In every case where an inmate is found guilty of violating a disciplinary rule, one of the penalties listed in sub. (1) must be imposed. More than one penalty may be imposed. For example, if adjustment segregation is imposed, program segregation may also be imposed. Loss of good time or extension of mandatory release date, whichever is applicable, may be imposed in conjunction with either or both of these penalties. The inmate will then serve his or her time in each form of segregation and lose good time or have his or her mandatory release date extended. Similarly, more than one minor penalty may be imposed for a single offense. A major and minor penalty may be imposed for a major offense.

Sentences for program segregation may only be imposed for specific terms. The possible terms are 30, 60, 90, 120, 180 and in some cases, 360 days. This is contrary to, for example, adjustment segregation where terms from 1-8 days may be imposed. The specific term represents the longest time the inmate will stay in segregation unless he or she commits another offense. However, release prior to the end of the term is possible. DOC 303.70 provides that a placement in program segregation may be reviewed at any time and must be reviewed at least every 30 days.

The terms in sub. (2) (a) are maximums and should rarely be imposed.

The limits on loss of good time or extension of the mandatory release date which are found in sub. (2) (c) are required by s. 53.11 (2), Stats. (1981-82). Prior to the 1983 amendments, this statute limited the number of days of good time which could be lost to 5 for the first offense, 10 for the second, and 20 for each subsequent offense. Those limitations are still applicable to inmates who committed offenses before June 1, 1984, and did not choose to have 1983 Wis. Act 528 apply to them.

1983 Wis. Act 528 amended s. 53.11 (2), Stats. (1981-82) (now s. 302.11 (2), Stats.), in three specific ways. First, it replaced the concept of "good time" with extension of the mandatory release date. Second, it allowed an extension of an inmate's mandatory release date by not more than 10 days for the first offense, 20 for the second, and 40 for each subsequent offense. The adjustment committee must impose this extension of the mandatory release date. The third change the statute made was the mandatory extension of an inmate's mandatory release date by a number of days equal to 50% of the number of days spent in segregation. This number must be calculated when the inmate is released from segregation, since the inmate may not spend the full amount of time in segregation to which he or she was sentenced.

1983 Wisconsin Act 528 applies to inmates who committed offenses on or after June 1, 1984, and other inmates who chose to have the act apply to them.

Sections 53.11, Stats. (1981-2) and 302.11, Stats., follow current practice by limiting loss of good time or extension of the mandatory release date to major offenses.

Note: DOC 303.86. This section makes clear that the rules of evidence are not to be strictly followed in a disciplinary proceeding. Neither the officers nor the inmates have the training necessary to use the rules of evidence, which in any case were developed haphazardly and may not be the best way of insuring the reliability of evidence. Thus, a more flexible approach is used. The main guidelines are that the hearing officer or committee should try to allow only reliable evidence and evidence which is of more than marginal relevance. Hearsay should be carefully scrutinized since it is often unreliable: the statement is taken out of context and the demeanor of the witness cannot be observed. However, there is no need to find a neatly labeled exception; if a particular piece of hearsay seems useful, it can be admitted.

Subs. (3) and (4) address the problem of the unavailable witness. Sub. (3) contemplates that the statement and the identity of the maker will be available to the accused. Sub. (4) permits the identity of the witness to be withheld after a finding by the committee or hearing officer that to reveal it would substantially endanger the witness. This is not often a problem, but it does arise, particularly in cases of sexual assault. To protect the accused, it is required that there be corroboration; that the statement be under oath; that the content of the statement be revealed, consistent with the safety of the inmate. In addition, the committee or hearing officer may question the people who give the statements.

Sub. (5) deals with the handling of information received from a confidential informant. This information will not be placed in the inmate's case record where it would be accessible to him or her, but will be filed only in the security office.

Note: DOC 303.87. This rule is to make clear that technical, non-substantive errors on the part of staff in carrying out the procedures specified in this chapter, may, if harmless, be disregarded. For example, if an inmate is not served with an approved conduct report within the time specified, this would be harmless unless it affected the inmate's right to present a defense in a meaningful way. This rule conforms to present practices.