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October 26, 2007

Chief Nannette H. Hegerty
Milwaukee Police Department
749 West State Street
Milwaukee, WI 53233

Re: Implementing Recommendations of the Fireworks Task Force

Dear Chief Hegerty:

Pursuant to a resolution of the Common Council created as File No. 070742, passed on September 25, 2007, please accept this communication as our response to the Common Council's directive that the Office of the City Attorney "advise the Police Department-Community Service Officers as to the steps required to cite an individual when evidence is captured using a digital camera." Although not specifically articulated within the resolution, we will assume that the Common Council was more particularly concerned about the introduction and admittance of digital photographic images into evidence in prosecutions of defendants engaged in the unlawful discharge of fireworks.

As you know, photographs may be accepted into evidence at trial as long as the requirements of authentication and identification are made through a process often referred to as "laying a foundation." Section 909.01 of the Wisconsin Statutes provides:

The requirement of authentication or identification as condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In turn, Wis. Stat. § 909.015(1) provides:

TESTIMONY OF WITNESSES WITH KNOWLEDGE.

Testimony of a witness with knowledge that a matter is what it is claimed to be.

The principal requirements for the admission of a photograph into evidence are relevance and authentication. Unless the photograph is submitted by a stipulation by both parties, the party attempting to admit the photograph into evidence must be prepared to offer testimony that the photograph is an accurate representation of what it is claimed to depict. This usually means someone must testify that the photograph accurately portrays the scene as viewed by that witness.

At present, the procedure for laying a foundation for the introduction into evidence of a digital photograph is not substantially different than the procedure used to lay a foundation for a photograph created with film. However, challenges to the admissibility of digital photographs are often raised in evidentiary proceedings based upon the concern and perception that digital photographs are more easily altered than film-based photographs. In fact, a bill was introduced in the Wisconsin Assembly two years ago to bar the use of digital photography in criminal cases. That bill was defeated, but its introduction and debate underscores the concerns, and perhaps distrust, that some people have regarding digital photography used as evidence in court proceedings.

In order to ensure the integrity of and the admissibility of digital photographs in court proceedings, the police department at a minimum should establish a standard operating procedure that focuses on two goals: (1) preserve the original image, and (2) follow a reliable process demonstrating the integrity of the image. The department should concentrate on chain of custody, image security, image enhancement, and release and availability of digital images.

In this instance, however, the likelihood of police personnel capturing an image of an illegal user of fireworks is remote. Therefore, any digital image of an individual unlawfully using fireworks will undoubtedly come from the camera of a citizen witness. If that is so, then the citizen witness's testimony establishing the authentication and identification of the image will be indispensable. Therefore, we advise the police department to take special care to ensure that the individual who took the photograph is clearly identified so that he or she can be subpoenaed

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to court and give testimony required to satisfy the evidentiary requirements as set forth above.

Very truly yours,

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1049-2007-2690