

UNDERSTANDING SEXUAL VIOLENCE

Prosecuting Adult Rape and Sexual Assault Cases

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*A project of Legal Momentum in cooperation with the
National Association of Women Judges

National Judicial Education Program*

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Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases

Pre-Conference Assignments

Overview: Participants are asked to think about the questions below prior to attending the conference. Their answers will be elicited throughout the program.

1. What was the best *voir dire* question you ever asked or heard about in a nonstranger rape case?
2. What was the most effective prosecution strategy you ever used or heard about in a nonstranger rape case?
3. What was the most effective defense tactic you have encountered or heard about in a nonstranger rape case?
4. What obligations must you fulfill under your state's victims' rights legislation?
5. Prosecutors and complainants are often from different backgrounds—what strategies have you used to bridge the gaps?

PROGRAM AGENDA

Day I:

8:00-8:30 a.m.

Registration

Staff: Administrative Support Personnel to register participants

8:30-9:00 a.m.

Welcome/Participant Self-Introductions

Faculty: Program Moderator

9:00-9:15 a.m.

Introduction, Overview of Program & Resources Book and Faculty Introductions

Faculty: Program Moderator

9:15-10:15 a.m.

Opening Your Case File – *State v. Michael Cates*: Case Evaluation and Ethical Considerations

Faculty: Prosecutor Presenter(s)

The Participant's Binder Contains: The case file *State v. Michael Cates* (Detective's Report and District Attorney write up), at Tab 3, page 3-2, "Opening Your Case File" Worksheet, at Tab 3, page 3-15, and "Ethical Considerations" Exercise Directions and Worksheet, at Tab 3, page 3-17.

The Resources Book Contains: Other material relevant to this section is in Volume 1, Tab 1, "Prosecutor's Code of Conduct," Tab 2, "Rape Myths: The Prosecutor's Special Challenge," and Tab 8, "Investigation Techniques," as well as in Volume II, Tab 17, "Interagency Cooperation."

10:15-10:30 a.m.

Break

VICTIMS: WHAT PROSECUTORS NEED TO KNOW

10:30-12:00 p.m.

Victim Impact – Overview

Faculty: Victim Impact Expert

The Participant's Binder Contains: Expert's Slides for Parts I and III are in Tab 4, page 4-2.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 3, "Victim Impact."

12:00-1:00 p.m.

Lunch

1:00-2:00 p.m.

The Neurobiology of Trauma: Implications for Rape Victims

Faculty: Victim Impact Expert

The Participant's Binder Contains: "Neurobiology of Trauma" Slides at Tab 5, page 5-2.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 3, "Victim Impact."

2:00-2:15 p.m.

Victim Impact and Interviewing: Who Must the Complaint Tell

Faculty: Victim Impact Expert

2:15-3:30 p.m.

Interviews: Working With the Victim to Pull the Case Together

Faculty: Prosecutor Presenter(s), Victim Impact Expert and Victim Advocate

The Participant's Binder Contains: The outline "Working with the Victim to Pull the Case Together" is in Tab 6, page 6-2, and "Tensions in the Initial Interview" Exercise Directions and Worksheet at Tab 6, page 6-5.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 9, "Witness Preparation."

3:30-3:45 p. m.

Break

3:45-4:45 p.m.

Enhancing the Prosecutor/Victim Partnership: Building Trust

Faculty: Prosecutor

The Participant's Binder Contains: "Building Trust with Amada Brown" Exercise Directions and Worksheet at Tab 6, page 6-10

and “Building Trust with Diverse Victims” Exercise Directions and Worksheet at Tab 6, page 6-11.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 4, “Cultural Competence and Victim Sensitivity.”

4:45-4:50 p.m.

Stretch Break

4:50-5:35 p.m.

Exercise: Getting the Real Deal

Faculty: Prosecutor Presenter(s)

The Participant’s Binder Contains: “Getting the Real Deal” Exercise Directions and Worksheet at Tab 6, page 6-7.

CONCLUSION DAY I

Day II:

8:30-9:00 a.m.

Victim Advocate/Prosecutor Relationship

Faculty: Victim Advocate

The Participant's Binder Contains: "Victim Advocate's Outline" at Tab 7, page 7-10 and "Sample Victim Advocate Disclosure Form" at Tab 7, page 7-11.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 5, "Working With Victim Advocates."

9:00-9:30 a.m.

Trial Preparation and Practice:

Part I: Educating and Supporting the Complainant

Faculty: Prosecutor Presenter(s), Victim Advocate

The Participant's Binder Contains: The outline for this unit is at Tab 7, page 7-6.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 9, "Witness Preparation."

Part II: Thinking About Trial

9:30-9:45 a.m.

Break

9:45-10:45 a.m.

Direct Examination of the Complainant: Recreating the Reality of the Crime

Faculty: Prosecutor Presenter(s)

The Participant's Binder Contains: The outline for this unit at Tab 7, page 7-10 and relevant slides at Tab 7, page 7-14.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 9, "Witness Preparation."

10:45-10:55 a.m.

Break

10:55-12:40 p.m.

What Do Sexual Assault Forensic Examiners Do, and What Can They Do for You?

Faculty: Sexual Assault Forensic Examiner (S.A.F.E.), Prosecutor
Presenter(s)

The Participant's Binder Contains: Related slides at Tab 8, page 8-2, outline for unit at Tab 8, page 8-14, and "Amanda Brown's Medical History" at Tab 8, page 8-19.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 6, "Sexual Assault Forensic Examiners, S.A.N.E. and Medical Evidence."

12:40-1:40 p.m.

Lunch

1:40-2:45 p.m.

How An Expert Can Help You Support the Complainant and Prove Your Case More Effectively

Faculty: Prosecutor Presenter(s), Victim Impact Expert

The Participant's Binder Contains: Copies of all slides for this unit at Tab 8, page 8-29, "How an Expert Can Help You Support the Complainant and Make Your Case More Effectively" at Tab 8, page 8-36, "A Prosecutor's Checklist: Using a Psychological Expert in a Sexual Assault Case" at Tab 8, page 8-47, "Tips on Working with a Medical Expert in a Sexual Assault Case" at Tab 8, page 8-54, "Expert's Checklist" at Tab 8, page 8-57, and Local Law Case Annotations at Tab 8, page 8-63.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 3, "Victim Impact," and "Expert Testimony in Sexual Assault Cases: Selected Case Law from Around the Country" which is in Volume I, Tab 7, "Expert Witnesses."

2:45-3:00 p.m.

Break

3:00-4:00 p.m.

State-Specific Law: Rape Shield Law, State-of-Mind/Experts

Faculty: Prosecutor Presenter(s)

The Participant's Binder Contains: "Rape Shield" Exercise Directions and Worksheet at Tab 8, page 8-80 and "State-of-Mind/Experts" Exercise Directions and Worksheet at Tab 8, page 8-81.

4:00-4:15 p.m.

Break

4:15-5:15 p.m.

How to Keep on Keepin' On: Overcoming Vicarious Trauma

Faculty: Various Faculty

The Resources Book Contain: Other material relevant to this section is in Volume II, Tab 11, “Vicarious Trauma.”

CONCLUSION DAY II

Day III:

OFFENDERS: WHAT PROSECUTORS NEED TO KNOW

8:30-9:30 a.m. **Myths and Realities - Overview**

Faculty: Offender Expert

The Participant's Binder Contains: The Expert's slides for this unit, at Tab 9, page 9-2.

9:30-9:35 a.m. **Stretch Break**

9:35-10:35 a.m. **Serial Offending and Prior Bad Acts**

Faculty Needed: Offender Expert, Prosecutor Presenter(s)

The Participant's Binder Contains: The Expert's slides for this unit, at Tab 9, page 9-8.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 13, "Sex Offenders, Sentencing and Sex Offender Treatment."

10:35-10:45 a.m. **Break**

10:45-11:15 a.m. **State-Specific Law Section: Prior Bad Acts**

Faculty: Prosecutor Presenter(s)

The Participant's Binder Contains: The "Prior Bad Acts" Exercise Directions and Worksheet at Tab 9, page 9-14.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 13, "Sex Offenders, Sentencing and Sex Offender Treatment."

11:15-11:20 a.m. **Stretch Break**

11:20-12:30 p.m. **Pleas and Sentencing**

Faculty: Prosecutor Presenter(s), Offender Expert

The Participant's Binder Contains: Relevant slides at Tab 10, page 10-2, the "Sentencing Recommendations" Exercise Directions and Worksheet at Tab 10, page 10-7, the "Defendant's Sentencing

Proposal” Exercise Directions and Worksheet at Tab 10, page 10-8, and the “Defendant’s Sentencing Proposal” at Tab 10, page 10-9.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 13, “Sex Offenders, Sentencing and Sex Offender Treatment.”

12:30-1:30 p.m.

Lunch

1:30-2:30 p.m.

Cross-Examination of a Defendant in a Consent Case

Faculty: Prosecutor Presenter(s)

The Participant’s Binder Contains: “Cross-Examination” Exercise Directions and Worksheet at Tab 10, page 10-12 and relevant slides at Tab 10, page 10-13.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 14, “Cross-Examination.”

2:30-2:35 p.m.

Stretch Break

2:35-3:35 p.m.

***Voir Dire*: Overview**

Faculty: Prosecutor Presenter(s), Expert on Juror Attitudes in Rape/Sexual Assault Cases

The Participant’s Binder Contains: Relevant slides at Tab 11, page 11-2.

3:35-3:45 p.m.

Break

3:45-4:45 p.m.

***Voir Dire*: Exercises**

Faculty: Prosecutor Presenter(s)

The Participant’s Binder Contains: “*Voir Dire*” Slides at Tab 11, page 11-2, “*Voir Dire* Exercise” Directions and Worksheet (Overview) at Tab 11, page 11-7, Individual Participants’ Exercise Directions and Worksheet at Tab 11, page 11-8, and Reporter’s Exercise Directions and Worksheet at Tab 11, page 11-9.

The Resources Book Contains: Other material relevant to this section is in Volume I, Tab 2, “Rape Myths: A Prosecutor’s Special Challenge” and in Volume II, Tab 12, “*Voir Dire*.”

CONCLUSION DAY III

Day IV:

8:30-10:00 a.m.

DNA Primer

Faculty: DNA Expert

The Participant's Binder Contains: Slides for this unit at Tab 12, page 12-2.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 15, "DNA."

10:00-10:15 a.m.

Break

10:15-12:15 p.m.

Drug-Facilitated Rape

Faculty: Forensic Toxicologist, Prosecutor Presenter(s)

The Participant's Binder Contains: Slides for this unit at Tab 13, page 13-2.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 16, "Drug-Facilitated Rape."

12:15-1:15 p.m.

Lunch

1:15-2:15 p.m.

Improving Your Agency: How to Get There

Faculty: Program Moderator, Prosecutor Presenter(s)

The Participant's Binder Contains: "Commitment" Worksheets at Tab 14, pages 14-2 to 14-4.

The Resources Book Contains: Other material relevant to this section is in Volume II, Tab 17, "Improving Your Agency, Interagency Cooperation and Working with the Community."

2:15-2:30 p.m.

Closing Remarks, Certificates of Completion & C.L.E. Credit Forms

Faculty: Program Moderator

CONCLUSION OF PROGRAM

Faculty Roster

Place Faculty Roster Here

Faculty Biographies

Place Faculty Biographies Here

Participant Roster

Add List of Participants'
Contact Information Here

Case Evaluation

CASE FILE

State v. Michael Cates

(<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab3/casefile.pdf> –
to open this file you will need Adobe Acrobat installed on your computer.)

WORKSHEET
STATE V. MICHAEL CATES

Case File Exercise

Directions: Participants are divided in half. Based on the information in the case file, half the room is assigned to argue the strengths of the case and half to argue the weaknesses.

Use this worksheet to note your assessment of the case, depending on your assignment. Then discuss the case at your table preparatory to a report back and group discussion. Allow 10 minutes for this portion of the exercise.

The reporter is the person at the table whose last name begins with Z or the letter closest to it. If you are the reporter, please use the back of this sheet to take notes during your table's discussion and to prepare for the report back to the full group. Allow 20 minutes for the report back.

<i>STRENGTHS</i>	<i>WEAKNESSES</i>

Ethical Considerations

WORKSHEET

STATE V. MICHAEL CATES

Ethical Considerations Exercise

Directions: Take five minutes to jot down your responses to these questions. The prosecutor presenter will ask participants for their answers. Allow 25 minutes for this discussion.

What does prosecutorial discretion mean to you?

What ethical issues do you consider when exercising your prosecutorial discretion?

We have discussed the case of *State v. Michael Cates*. In thinking about whether to charge a case of this nature, what ethical issues do you consider?

Resources for

State v. Michael Cates

The Resource Book materials relevant to this section are listed below:

- ***Volume I, Tab 1, “Prosecutor’s Code of Conduct”***
- ***Volume I, Tab 2, “Rape Myths: The Prosecutor’s Special Challenge”***
- ***Volume I, Tab 8, “Investigation Techniques”***
- ***Volume II, Tab 17, “Interagency Cooperation”***

Victim Impact – Overview

Expert's Slides Victim Impact – Overview

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab4/victimimpactslices/>

or Power Point at

<http://www.vaw.umn.edu/Finaldocuments/pbinder/tab4/victimslippt.ppt>.

Resources for

Victim Impact – Overview

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 3, “Victim Impact.”

The Neurobiology of Trauma: Implications for Rape Victims

Slides for Neurobiology of Trauma

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab5/neurobiologyoftrauma/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab5/neuro.ppt>.

Resources for

The Neurobiology of Trauma:
Implications for Rape Victims

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 3, “Victim Impact.”

Interviews: Working with the
Victim to Pull
the Case Together

OUTLINE

Working With the Victim to Pull the Case Together

Interviewing the Victim

Goals:

1. Build rapport.
2. Get the facts of the crime.
3. Learn everything about what happened before, during and after the crime.
(Develop texture and details).
4. Avoid retraumatizing the victim.

Before the complainant arrives in your office:

- Read every report, statement, medical chart and other any document(s) related to the case.
- Listen to 911 tapes, if they exist.
- Review crime scene photos, diagrams and reports, if they exist.
- Read the law relevant to the facts presented.
- Speak with the police involved in the case.
- Start a list of possible witnesses and evidence they would provide if called to testify.
- Never make a charging decision before interviewing the victim.

The Interview:

- Give the victim control over some aspects of the interview. Ask how she wishes to be addressed, whether she wants to sit or stand, and what time to conduct the interview. These seem like small and insignificant items, however, the person before you has experienced lack of control so profound that these small measures of control may be extremely important to her.
- At each meeting with the victim explain what will happen and why you are requesting the meeting.
- Explain what is happening with the case each time you meet with the victim.
- Explain what role she will play on that day.
- Always tell the truth and NEVER promise what you cannot deliver, e.g., a conviction at trial.
- Explain at the beginning that the trial process often is slow and there are frequent delays.
- Let the witness talk. Encourage her to use the narrative form to tell what happened.

- This form allows for a clearer sense of the facts, and will afford you an opportunity to appraise the witness in terms of intelligence, verbal ability, memory, emotion, personality, bias, and body language.
- The narrative form will help you get the overall picture of what occurred.
- After the complainant has described the incident, ask her to break it down in small bits. Small bits of information are easier for the witness to describe and for a jury to digest.
- Probe the details of each segment:
 - pre-incident (what was the complainant doing before the rape);
 - incident (the rape);
 - post-incident (where did she go, who did she call, who did she see);
 - Reporting (when, to whom) if the incident was not reported immediately.
- LISTEN to what the victim is saying. Assume nothing.
- Remember that each time the victim retells the facts of the incident it is traumatic. Attempt to minimize that trauma.
- Tell the victim that if there is anything she does not understand you will explain it to her. Explain that there is no shame in not understanding a particular word or legal process. Be patient and caring.
- Remind the victim that you need to know every fact regardless of how insignificant it seems, or if she believes it will hurt the case. Remember there is no such thing as an unnecessary fact.
- Ask the complainant to close her eyes and visualize in her mind's eye the scene, the objects there, the lighting, the distances, and just what happened.
- Recognize that this will cause trauma and be prepared to deal with it.
- Recognize that the victim is the expert on what happened to her. Learn from her.
- More likely than not the victim will be different from you— age, race, sex, sexual orientation or any of a number of other ways. Do not presume you know or understand her. Ask for her guidance and explain that you can learn from her. This will go a long way to establishing a rapport with the victim.
- Ask the victim how she knows the defendant. In a case when the parties have any acquaintance with each other, ask the victim “*how*” she knows the defendant. Simply asking “*if*” a victim knows a defendant often produces a where the acquaintance is recent or slight.
- Explain that the defendant is telling his attorney everything about the crime from his point of view. If they were drinking or using drugs, the defense attorney knows it. Ask her what he is telling his attorney.
- Remind her that the defense attorney will cross-examine her during the trial. If you are surprised by hidden facts it might be impossible to protect her.
- If you sense that the victim is being less than truthful, remind the victim about telling the truth, and about perjury.
- Let the victim know that you may require her to retell the facts of the incident many times so that you can clearly understand what happened.
- If a question/problem presents itself while the victim is retelling her account of the facts, ask her about it. If you have the question, so will the jury. You

may want to address it on your direct examination rather than allow defense the opportunity to bring it out on cross-examination. Do not allow the jury to speculate about any issue.

- Ask the victim to tell you in great detail about what she was doing before the incident, e.g., who was she with, where they were, how did she get to the location where the rape took place.
- Ask the victim to tell you in as much detail as possible how the rape ended.
- What did the defendant say to the victim?
- Were they interrupted? If so by whom?
- What did she do afterward?

WORKSHEET

STATE V. MICHAEL CATES

Tensions in the Initial Interview Exercise

Hypotheticals

In each of the following hypotheticals assume that:

- you are meeting the complainant for the first time;
- the case file was given to you shortly before the meeting;
- the alleged perpetrator is in custody;
- you have only a short time before you must present the case to either the Grand Jury or at a preliminary hearing.

If you do not meet the statutory time requirement for your jurisdiction, the defendant will be released.

Take 10 minutes to discuss the following three hypotheticals with your tablemates. The faculty presenter will then conduct a plenary discussion for the remaining 20 minutes:

1. Your complainant (Amanda Brown) comes to your office with her friend. As you know, the complainant is a 19 year-old college student. She claims to have been raped by a classmate. As she sits in your office, crying while rocking back and forth, all she can say is, "He raped me." She stares into space and is not responsive to any of your questions.

What do you do?

2. We are changing the fact pattern. This time you learn that Amanda Brown had quite a bit to drink. She does not remember how much she drank. She is fuzzy about the details of the incident. She does know that she did not want to have sex with the defendant.

What, if any, new problems does this present for your case?

What interview techniques will you use, given these facts?

3. Once again, we are changing the fact pattern. Complainant Amanda Brown readily states that she was raped by Michael Cates, but when asked to tell more about the sexual conduct, she refuses. She taps her fingers on your desk, swings her foot, looks out the window and will not look at you while she speaks. Every now and again she lets out a deep breath. She asks why you need to ask such questions.

The law in your state requires that the complaining witness testify with specificity regarding what is meant by rape. She must testify about the specific sexual conduct, i.e., what body parts touched which body parts.

What strategies would you use to get the information you need to proceed?

PARTICIPANTS' WORKSHEET

STATE V. MICHAEL CATES

Getting the Real Deal Exercise

Directions: At each table the prosecutor whose last name begins with the letter closest to the letter M plays the complaining witness, who is very reluctant to disclose anything beyond what you already know from the case file and initial interview.

The complaining witness leaves the table for 5 minutes while the other prosecutors caucus to discuss their interviewing strategies and develop a set of questions. Whoever is seated to the immediate left of the complaining witness uses these and other questions to conduct the interview for 10 minutes. After 15 minutes, the moderator asks the complaining witness at each table to tell whether the questioner was able to elicit the assigned fact and how he or she did it, and puts the fact on a flip chart. The complaining witness should also be asked how the questioner did and whether any of the questions felt unnecessarily insensitive or inappropriate. The faculty will then comment on effective interviewing techniques. Allow 15 minutes for this discussion.

Note your suggested questions below.

Resources for

Interviews: Working With the Victim to
Pull the Case Together

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 3, “Victim Impact.”
- Volume II, Tab 9, “Witness Preparation.”

Enhancing Prosecutor/Victim Partnership: Building Trust

WORKSHEET
STATE V. MICHAEL CATES

Building Trust with Amanda Brown

Directions: Below are some facts you have already learned about complaining witness Amanda Brown and some additional facts. Take five minutes to discuss the questions below with your tablemates and complete the worksheet. The reporter will be the individual whose last name is closest to the letter L, who was not a reporter from an earlier exercise.

Facts

Amanda Brown is a 19-year-old college sophomore. She is black, 5'1" and 105 pounds. She won an academic scholarship to the university she and the defendant attended. She maintained a 4.0 GPA. She and the defendant were both members of the drama club.

Ms. Brown is a first generation American. Both of her parents emigrated from Jamaica. The Browns do not believe in bringing their "troubles" to government agencies. They do not trust the police or the criminal justice system. They have seen how the police treat other members of their community. The Browns are strict Catholics and brought up Amanda and their other children in the Church. Amanda herself is a very devout Catholic.

How are you and Amanda Brown different from each other?

What challenges will you face in bridging these differences?

What strategies will you use to overcome them?

Worksheet

ENHANCING THE PROSECUTOR/VICTIM PARTNERSHIP: BUILDING TRUST

Building Trust with Diverse Victims

Directions: Take 15 minutes to discuss the three hypotheticals below with your tablemates and complete the worksheet. Develop strategies to establish a trusting partnership with the complainant. Use your prior experience and what you have learned thus far in the training to develop these strategies. The reporter will be the individual who acted as the reporter in the prior “Building Trust with Amanda Brown” exercise.

1a. The victim is a young deaf woman. How can you communicate with her?

1b. It has now come to your attention that she does not understand American-sign language. How would you proceed?

2. The victim is a lesbian. She does not believe the prosecutor has an interest in seeing justice done in her case. Her experiences with the criminal justice system, thus far, have not been good.

3. The victim is a 20-year old mother of three. She has not completed school and has trouble reading. The only contact she has had with the criminal justice system is through her brother who was arrested, but never charged.

Resources for

Enhancing the Prosecutor/Victim Partnership: Building Trust

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 4, “Cultural Competence and Victim Sensitivity.”

Victim Advocate/Prosecutor Relationship

Victim Advocate/Prosecutor Relationship Outline

1. District Attorney's Office Sensitive Crimes Unit
 - A. How does it operate? (role of advocates)
 - B. Why was it established?
 - C. Differences between in-house advocates and outside agency advocates
 - D. Advantages of in-house advocates
 1. Close proximity
 2. Familiarity with criminal justice system
 3. Ability to work closely with prosecutors and establish team effort
 4. Credibility with outside agencies because of association with prosecutor's office
 - E. Disadvantages
 1. Victims may see advocate as part of the system
 2. Outside agencies may see advocates as part of the system
 3. Difficulty in defining advocate's role
 4. Privilege/confidentiality issues
2. History of sexual assault advocacy work
 - A. Grass roots movement
 1. Challenge to beliefs and attitudes about women and the acceptance of sexual violence against them
 2. Need for survivor's experiences to be at the forefront of all efforts in this area
 3. Need for survivors and advocates in policy-making processes
 - B. Movement was in response to poor treatment of victims by
 1. Police
 2. Prosecutors
 3. Medical Professionals
 4. Judges
 5. Defense Attorneys
 - C. Changes that occurred
 1. Revision of laws
 2. Rape crisis centers
 3. Legal advocates
 4. Medical protocols
 5. Law enforcement and prosecutor training
 6. Coordinated Community Response
3. How the prosecution can best benefit from the work of Victim Advocates
 - A. Define goals
 - B. Healthy debates not power struggles
 - C. Have advocates play a role in system advocacy, e.g., legislative changes
 - D. Learn from each other, e.g., cultural competency
 - E. Assistance with victim rights legislation implementation
 - F. Training new prosecutors in victim issues

- G. Second opinions on difficult decisions
- H. Advocate as active member of prosecution team

Sample Victim Advocate Disclosure Form

Name of Victim: _____

D.O.B.: _____

I acknowledge that _____ explained to me that information I
(Advocate's Name)

discuss with _____ District Attorney's Victim Advocates may
(Your Office)

be shared with the assistant district attorneys and advocates in the Victim Advocates' Unit, law enforcement, court personnel, office staff, probation and parole agents, pre-sentence writers, Department of Human Services and Crime Victim Compensation.

The information shared will be for the purpose of assisting with the investigation and prosecution of the matter involving:

(Defendant's name or description of assault if defendant is not known):

Signature

(Relationship to above, if other than victim)

Understanding Sexual Violence
Prosecuting Adult Rape and Sexual Assault Cases
National Judicial Education Program, Legal Momentum
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Date

Resources for

Victim Advocate/Prosecutor Relationship

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 5, “Working With Victim Advocates.”

Trial Preparation and Practice

OUTLINE

Trial Preparation and Practice

Part I: Preparing the Complainant for Trial

- Reduce the victim's stress by explaining each phase of trial.
- First, explain what she will do during the trial. Explain that she will not be allowed to wait inside the courtroom but must wait elsewhere until she testifies. (Hopefully, your office has a victim advocate who has worked with the victim throughout the pendency of the case and will be with her during the trial). Tell her that she will be sworn in or, if she does not swear, can affirm an oath. Explain where she will be seated in the courtroom and where everyone will be in that courtroom.
- Special Circumstance – The Identification Case: Victims typically ask whether the defendant will be in the courtroom. If identity is not an issue in the case you should be sure to tell her that he will be there and she should prepare herself to see him. However, if identification is an issue in the case telling the victim that the defendant will be there and/or showing her a photograph will compromise the in-court identification. If, in an identification case, defendant will be in the courtroom, say only "If you see him in the courtroom, point him out or tell us." Defense attorneys in this type of case will ask the complainant whether the prosecutor told her that the defendant would be in the courtroom and where he would be sitting. If the victim says yes to either question the judge will disallow the in-court identification.
- Explain to the complaining witness that criminal cases are often repeatedly adjourned for reasons having nothing to do with her case, e.g., the court's calendar, the defense attorney on trial on another case, or witnesses are not available. Keep the complaining witness informed about the reason for each adjournment. Try to avoid adjournments, if possible, by requesting accelerated trial dates, if your jurisdiction permits, or ask for a trial date certain.
- Explain what "objections" are and what to do if either attorney objects to a question. Tell her what the words "overruled" and "sustained" mean. Explain that if she forgets she should ask the judge to clarify.
- Remind the victim to ask for an explanation of a word, concept, or question she does not understand, regardless of who asks the question. Assure her that it is okay to say she does not understand a question, or that she cannot remember

something. She should also be assured that it is okay to disagree with any mischaracterization of her testimony.

- After you have explained the process to her, show her. Take the victim to court and let her watch someone testify. Ask her to critique the witness. Then, in an empty courtroom, have the victim sit on the witness stand. If the judge in your case is willing, have her meet the judge. Show her where you will sit. Ask her some introductory questions to get used to the acoustics in the courtroom. If a microphone will be used, have the victim practice answering your questions using it.
- You and the advocate may need to discuss clothing choices with the victim. Never attempt to overhaul the personality of a victim by having her dress in a manner that is not comfortable for her. You or the victim advocate can emphasize that it is important to show respect for the court and dress accordingly.
- Prepare the victim for cross-examination.
 - Remind her that the defense attorney may attempt to make her angry while she is testifying, or that he may be very sweet and make her feel as if she must agree with him even though he is mischaracterizing her testimony.
 - Remind the complaining witness to not assist the defense case by becoming angry with the defense attorney, whose job it is to challenge her credibility.
 - Have a colleague walk through a mock cross-examination with the victim.

Part II: Prosecutor's Trial Preparation

- Review the Criminal Jury Instructions for each element of the crime you must prove at trial.
- Create a summation folder. As you think of issues you want to use in your summation, jot them down and put them in the folder.
- Prepare your summation before constructing your *voir dire*, direct examinations and the defendant's cross-examination.
- Create a folder for each witness you are going to present at trial. Put the evidence, e.g., medical chart, photos, or diagrams you hope to introduce through this witness in the folder along with the questions for this witness. If you think of a question just throw it into the folder.
- Craft the victim's direct examination with the expert witness' testimony in mind. Later in the program there is a unit about expert witnesses and how to use them. Prepare your questions so that the victim's response will be supported by the

expert witness. If you are not able to admit an expert's testimony, consult with the expert to craft direct examination questions to support the theory of your case.

- In your summation, use the victim's testimony to conclude that her behavior was consistent with a traumatic event.

Direct Examination of the
Complainant: Recreating the
Reality of the Crime

OUTLINE

How to Recreate the Crime and Victim's Feelings for the Jury

An effective direct examination should achieve the following:

1. Humanize the victim for the jurors. Have them “get to know” her.
2. Allow the jury to see, hear and feel what the victim felt during the crime.
3. Prove every element of every offense charged against the defendant beyond a reasonable doubt.
4. Explain the facts fully so that the jury cannot speculate about any issue.
5. Make the witness invulnerable to cross-examination.

• Thinking about the Direct Examination

- On all your direct examinations use one of the following magic words to begin each question: Who, What, Why, Where, When, and How.
- Use simple language. No one cares how smart you are.
- Each question should deal with only one fact.
- Write out every element of each crime you must prove beyond a reasonable doubt.
- Determine how each bit of evidence you present will accomplish the goal of proving every element of each crime beyond a reasonable doubt.
- Know both the facts and the elements of the crimes you must prove.
- Direct examination should flow like a conversation. The prosecutor should not be too busy reading the next question to listen to the answers.

• Introducing the Victim to the Jury

- Take time to introduce the victim at the beginning of the direct examination. Defense attorneys spend a great deal of time presenting their client in a sympathetic light to the jury. You should do the same for the victim.
- Show the jury that the victim is one of them. She has ties to the community, may attend school or church, and may have a family.
- This type of questioning does two things: it allows the jury to “get to know” the victim; and it allows the victim to “warm up” before she must testify about the facts of the rape.
- Introduce a victim's criminal history during the introductory portion of your direct examination. Neutralize this information by introducing it on direct, thereby defanging any defense strategy.
- Ask the victim about her relationship with the defendant.
 - How does she know him?
 - For how long has she known him?

- How did she feel about him before the attack?
- How does she feel about him now?

- **Recreating the Reality of the Crime**

- Think of each witness' segment of the account of what happened as a movie:
 - Each segment is a series of frames in the movie.
 - Together they tell about the whole incident. The witnesses are creating moving pictures for the jury.
 - The more detailed the "picture" of the incident the complainant and other witnesses can paint, the more likely it will be that the jury believes them.
- Use Sensory Details:
 - The complainant's credibility is always at issue in sexual assault cases, therefore it is important to provide the jury with the sort of tactile, sensory evidence, listed below, that is hard to fabricate.
 - Break down her account of the facts into small segments. Try tying each segment to an element of the crime you need to prove.
 - Ask her to describe the sensory details connected with each segment.
 - Craft questions to elicit evidence regarding the smells
 - the floor; or
 - the bed, or the ground against the complainant's body.
 - Placement of various body parts during the incident:
 - where were her hands, legs, torso;
 - where were the defendant's hands, legs, torso; and
 - what method(s) the defendant used to restrain or strike complainant.
 - Description of the defendant's body, starting from the head and working your way down to his feet. For example:
 - Hair: color, style, amount, density, pattern
 - Eyes: color, size, shape, unusual characteristics (crossed, etc.); glasses (type, style), eyebrows (bushy)
 - Nose: flat, thick, thin, broken, nose ring
 - Mouth: lips, moustache (thick, thin, type), beard (full, thin, thick, type)
 - Teeth: yellow, missing, gold, broken, crooked, spaces, braces
 - Voice: accent, speech impediment, harsh, refined, pitch, tone
 - Breath: odor (foul, sweet, alcohol, smoke, garlic)
 - Body: type (fat, thin, muscular); scars, marks, (tattoos, moles, birthmarks); odor (cologne, etc.)
 - Penis: color of his penis compared to the rest of his body (same, darker, lighter); circumcised or uncircumcised
 - Pubic hair: color; texture; hair pattern

- Height:
 - As compared to the complainant, the ADA or police officer
 - Did the victim look up at the defendant?
 - Did she look down at the defendant?
 - Weight: as compared to the police officer, the ADA or the complainant
 - Jewelry: rings, earrings, nipple rings, nose rings, Prince Albert, bracelet, necklace, etc.
 - Clothing:
 - Brand, color, markings, designs
 - Shoes, (clean/new, dirty/old)
 - Suit, work clothes, shorts and t-shirt, gang colors, sweats.
 - Description of the surroundings:
 - What were the surroundings made of?
 - What were the stairs made of (metal, concrete, wood)?
 - Sounds she heard during the attack (traffic, trains, voices, music)
 - Weather conditions at the time of the attack:
 - Rain, sunny, cold, hot, windy
 - Anything else that the victim tells you happened during the attack should be presented during the direct examination.
- Use emotional details:
 - Use non-judgmental open-ended questions which allow the complaining witness to provide detailed responses to the questions.
 - Ask the complaining witness about her emotions during each stage of the attack.
 - just prior to the attack
 - as the attack continued
 - when it stopped.
- **How the Attack Ended**
 - Ask how the attack ended.
 - Ask if the attack stopped because the defendant ended it or because there was an interruption.
 - The defendant may have ended the rape or sexual assault by making threats, giving orders, warnings, or asking the complainant for a date.
 - The answer to these questions may provide important evidence to establish the defendant's state of mind, direction of flight or suggest other witnesses to corroborate the victim's testimony.
 - Ask the complainant the following questions and any other questions relevant to the facts of your particular case:
 - What did defendant say after the sexual assault was completed?
 - Did he gloat? Or apologize?

- Did he go to sleep?
- Did he ask for a date? Or when they could see each other again?
- Did he take her home?
- Did he tell her to follow any instructions?
- Did he warn her not to tell anyone?
- What was his exact conduct after the attack?
 - Have the victim describe his demeanor.
- What was her emotional state of mind?
 - Have the victim describe what she did after the attack.
- Did she report it to the police?
 - How was the incident reported?
 - When?
 - If not reported immediately, why not?
- Ask the victim to describe the details of reporting the crime to the police.
 - The place where the report was taken.
 - How many people were around?
 - Were her children in the room?
 - Did she leave anything out of the report? If so, why?
 - Her emotional state during the reporting process.
 - How long did it take to report?
 - How long did it feel like it took?
- Ask if the victim received medical attention.
 - If not, why?
 - Describe the medical facility.
 - How did she get there?
 - Was she alone, with her children, friend, family, or police?
 - When did she go to receive medical attention?
 - How long had she been in the police station, before going to the hospital?
 - How many people were in the Emergency Department.
 - Was it crowded?
 - Empty?
 - What was she thinking?
 - How did she feel?
 - Emotionally
 - Physically.
- It is always a good idea to end on a strong point.

Direct Examination Slides

Slides can be found in .html at

[des/](http://www.vaw.umn.edu/FinalDocuments/pbinder/tab7/directexaminationsli) or Power Point at

[http://www.vaw.umn.edu/FinalDocuments/pbinder/tab7/dslides.ppt.](http://www.vaw.umn.edu/FinalDocuments/pbinder/tab7/dslides.ppt)

Resources for

Direct Examination of the Complainant:
Recreating the Reality of the Crime

The Resource Book material relevant to this section is listed below:

- Volume I, Tab 1, “Victim Impact” and
- Volume II, Tab 9, “Witness Interview.”

What Do Sexual Assault
Forensic Examiners Do, and
What Can They Do for You?

Sexual Assault Forensic Examiner Slides

Slides can be found in .html at

<http://vaw.umn.edu/FinalDocuments/pbinder/tab4/victimimpactslices/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab4/vicimsli.ppt>.

INTRODUCTION TO THE SEXUAL ASSAULT FORENSIC EXAMINER ROLE

Donna A. Gaffney, RN, DNSc, FAAN

The Role: The sexual assault examiner is a specially trained nurse or physician who provides comprehensive treatment to survivors of sexual violence. This professional is not merely a technician who collects evidence, but a knowledgeable and compassionate health care provider who understands every aspect of the victim's experience. The sexual assault examiner's skillful assessment techniques, thorough understanding of the dynamics of rape and the mechanics of injury provide a solid foundation for accurate evaluation of injury. Although this role prioritizes the importance of the victim's treatment and recovery, sexual assault examiners also recognize the importance of objective documentation and the need to provide testimony based on their professional expertise.

The Educational Preparation: The sexual assault examiner is well prepared in medical and forensic sciences as well as the legal aspects of sexual assault. The first training programs were developed over twenty years ago by professional nurses. It is important to note that information relevant to the assessment and treatment of sexual assault victims and the collection of evidence is generally *not* included in basic nursing and medical education curricula. Today there are accepted educational standards which guide the structure and information contained in sexual assault examiner courses. Programs must be a minimum of 40 hours and grounded in the most current research and theories in the field. There are also requirements for clinical skill development, ongoing education and supervision. Professionals working with child survivors must complete an additional 40 hour course. New Jersey, Texas and Maryland have mandated their own educational criteria for any professional who practices as a sexual assault examiner in their states.

TITLES, ABBREVIATIONS AND ACRONYMS:

S. A. N. E.

Sexual Assault Nurse Examiner

S. A. R. T.

Sexual Assault Response Team

S. A. F. E.

Sexual Assault Forensic Examiner

S. A. E.

Sexual Assault Examiner

S.A.R.C.

Sexual Assault Response Clinician

S.A.R.S.

Sexual Assault Resource Service

THE ROLE OF THE SEXUAL ASSAULT EXAMINER

- A. Who can practice as a Sexual Assault Examiner?
 - 1. A licensed professional nurse
 - 2. An advanced practice nurse: nurse practitioner, nurse midwife
 - 3. A licensed physician
 - 4. Physician's Assistant (only under the supervision of a physician)
- B. What Does A Sexual Assault Examiner Do?
 - 1. Provides a comprehensive assessment/evaluation
 - 2. Collects evidence
 - 3. Provides treatment as needed
 - 4. Refers for further medical evaluation and treatment
 - 5. Provides testimony if necessary

EDUCATIONAL PREPARATION OF SEXUAL ASSAULT EXAMINERS

(Note: The curriculum content listed below was developed by Donna Gaffney for "The Assessment and Evaluation of the Adult Sexual Assault Survivor," 1995. The course is five full days and offers 44 continuing education contact hours for participants. Course development was funded through the New York State Department of Health, and training was supported by the NY Division of Criminal Justice Services.)

Clinical Forensics and Forensic Nursing

- Standards of Practice, Current Forensic Issues
- S.A.F.E., S.A.N.E., S.A.R.T. Programs
- Rape Crisis Programs and the Role of the Advocate

Dynamics of Sexual Assault

- Historical Overview
- Offender and Victim Behaviors
- The Mythology of Sexual Assault
- Intimate Violence and Domestic Violence

The Psychological Aspects of Sexual Assault

- Consent: Developmental and Cognitive Factors
- Cognitive Processing of Traumatic Events, Brain Chemistry
- Symptoms of Trauma, Acute Stress Disorder
- PTSD and Risk Factors
- Vicarious Traumatization

The Elements of The Forensic Interview and Therapeutic Communication

- Documentation of Behaviors (verbal and nonverbal)

Mechanics of Injury and Determinants of Injury in Sexual Assault

- Terminology and Mechanics
- The Role of the Human Sexual Response
- Factors Related to the Victim, Offender and Circumstances
- Documentation of Injury

Assessment of the Sexual Assault Victim

- Strategies for Taking a Comprehensive History
- The Head to Toe Examination
- The Pelvic Examination (speculum and bimanual)
- The Male Examination
- Colposcopy and Other Technology

Evidence Collection

- Forensic Analysis, DNA & Challenges of Evidence Collection Process
- Steps in the Process
- Chain of Custody
- The Rape Evidence Collection Kit

Treatment of Sexual Assault Survivors

- Sexually Transmitted Infections
- Post-Coital Contraception
- HIV Prophylaxis and the Sexual Assault Survivor
- Referral, Follow Up and the Long Term Effects of Sexual Assault
- Interpersonal Violence: Referrals and Follow-up

Special Considerations and Needs of Different Populations

- Alcohol, Drugs and Sexual Assault
- The Influence of Developmental Stage and Disabilities on the Assessment Process
- Date Rape and Adolescents
- The Influence of Cultural Diversity and Sexual Orientation on the Assessment Process
- Gay, Lesbian, Bisexual and Trans-Gendered Survivors

The Law and Sexual Assault

- State Laws
- Role of Law Enforcement
- Rape Shield Law
- Court Procedures
- Strategies to consider when the Judge will not permit the S.A.E. to testify as an expert
- Legal and Ethical Responsibilities
- Consent
- Testimony: Fact Witness and Expert Witness

Limitations of Expert Witness' Testimony

May never conclude that the victim was raped, or that
injury means lack of consent

Professional Development Issues

Community Interventions

Goals of the Precepted Experience and Setting Up a Preceptorship

EVALUATION OF COMPETENCY OF SEXUAL ASSAULT EXAMINERS

1. Pretest
2. Examination/Case Study Review Post-Course
3. Competency Based Preceptorship
4. Peer Supervision
5. Continuous Evaluation/Supervision
6. Participation in Multidisciplinary Team Meetings
7. Continuing Education
8. Professional Memberships
9. Adherence to Standards of Practice (professional, state, organizational)

PROGRAM LOCATIONS AND VARIATIONS

1. Services delivered through an on-call program or on-staff in hospital
2. In a hospital emergency department, or room adjacent to the ED (St. Luke's-Roosevelt, Hospital Center, NYC)
3. In a hospital clinic
4. In a free-standing clinic or rape crisis center
5. In school-based clinics or college health services
6. In a private practice setting
7. In a Police Department (Tulsa, OK)
8. In a Prosecutor's Office (Monmouth County, NJ)
9. Through a Visiting Nurses Service (Westchester County, NY)

REFERENCES

- American Nurses Association (1997) The Scope and Standards of Forensic Nursing Practice. ANA: Washington, DC.
- Gaffney, Donna. (1995) The Assessment and Evaluation of the Adult Sexual Assault Survivor. (Unpublished curriculum and resource manual).
- Gaffney, D. (1997) Community Based Sexual Assault Intervention Programs. Sexual Assault Reports, 1 (September)
- Gaffney, D. (1999) Educating Clinicians: The Case for Scholarship and Science. At-Risk Children and Families. Vol. 2, No. 5.
- International Association of Forensic Nurses. (1996) Sexual Assault Nurse Examiner Standards of Practice. IAFN: Pitman, NJ.
- International Association of Forensic Nurses. (1998) Educational Standards for Sexual Assault Nurse Examiner Training Programs. IAFN: Pitman, NJ

Ledray, Linda E & Arndt S. (1994) Examining the Sexual Assault Victim; A New Model for Nursing Care. *Journal of Psychosocial Nursing & Mental Health Services*. 32 (2): 7-12.

Amanda Brown's Medical History

MEDICAL HISTORY OF AMANDA BROWN

From the “Full Story”

Amanda Brown sought medical attention ten days after the incident. She wanted to make sure that Cates did not give her an STD. She did not tell her doctor she was raped. The doctor noted there was no physical injury or disease but identified that she exhibited a depressed demeanor, which was very different from prior visits when she was lively and engaged.

What Really Happened

Amanda was at home on her semester break and she became increasingly concerned that she had an STD. She didn't feel right, had some burning on urination and itching in the genital area. She was continually thinking about the assault and became more and more despondent, quieter and did not visit with her friends who were also home from college on semester break. In desperation she finally made an appointment with her doctor.

What could have happened if Amanda Brown's Doctor was trained in S.A.F.E. techniques

Amanda Brown has been a patient of Dr. Angela Diaz since she was a child. Amanda had her first pelvic examination and pap smear before she entered college. The nineteen-year-old has never had a serious boyfriend and when offered birth control pills she vehemently refused saying it was against her religion. Amanda was a bit apprehensive before the exam but when Dr. Diaz gave her strategies for relaxation she was cooperative, comfortable, and easily engaged in a conversation about gynecologic health.

It had been 18 months since this first pelvic examination and Dr. Diaz became concerned there was something very different about this visit. In addition to recognizing that Amanda's mood was dysphoric, she also presented with vague symptoms indicating a urinary tract infection and became evasive when asked why she had concerns about an STD. Dr. Diaz did not initially notice any physical genital injuries but she did observe some minor findings.

While examining Amanda, Dr. Diaz noticed a long scabbed abrasion (3" x 1/4") on the outer aspect of her left thigh. When Dr. Diaz asked Amanda how it happened, she stated, "I don't know how it got there." When Amanda described her symptoms of burning on urination, Dr. Diaz was quite confident that she had become sexually active. Amanda adamantly denied sexual activity but still asked if she could have a sexually transmitted disease.

In addition, Amanda seemed very fidgety on the exam table. As Dr. Diaz inserted the speculum Amanda started to bite her lip, became tearful and clenched her fists. She pulled away and pushed her pelvis downward, making visualization nearly impossible. The muscle tension in Amanda's legs and perineal area made it extremely difficult to adequately examine Amanda. This was in marked contrast to what the doctor remembered from Amanda's first pelvic exam.

Dr. Diaz decided she needed to do a complete evaluation and assessment for sexual abuse/assault. She began by explaining to Amanda that she would like to talk to her a bit more and do a thorough examination and take some samples, but only after they talked. She took Amanda to her office and moved her chair from behind her desk and sat facing Amanda. She talked about her observations and that she was concerned. She also told Amanda that anything she discussed would be confidential unless Amanda decided to share it with anyone else. Amanda immediately said, "You're not going to tell the police are you?" Amanda looked at the floor and did not make eye contact with Dr. Diaz, and then became tearful. Dr. Diaz assured her she could take as long as she needed, that she would stay with her until they were finished. Dr. Diaz calmly and sensitively asked Amanda to explain the reason for her coming to the office.

"Tell me what happened that you think you might have an STD?"

"Nothing, I was just worried."

"When did the worrying start?"

"Almost two weeks ago."

"Tell me what happened at that time."

No answer.

"Try to think back, it was before the holidays, and you were probably finished with classes and maybe taking exams. What day of the week was it? What else was going on that day?"

No answer, and biting her lip.

"Amanda, tell me what you are thinking about."

She starts to cry.

"It's okay to cry, I'll wait until you can talk."

"I had my last exam that day and then I had to go to rehearsal, it was our holiday musical...."

(Dr. Diaz nods)

"This guy, he was in the play too, he offered to drop me off at home after rehearsal...it was late so I said okay. I can't believe I did that, I am so stupid."

"You're not stupid...lots of people give friends rides home...go on."

Amanda then proceeded to describe the events of that night. As Dr. Diaz listened carefully to Amanda's description of the events, she noted her demeanor, facial expression, eye contact and posture. She also noted how the information contained in the history would inform her history and the physical examination.

The Assault History

Amanda told Dr. Diaz she drank two rum and cokes and smoked “a joint.”

Two other times, that’s all...

I felt really tired, we were sitting on his bed. There was no place else to sit, and then he started to kiss me.

That part was okay.

Then he put his hands on my boobs, here, and tried to unhook my bra.

I told him to “stop.” I even tried to get off the bed but my legs were like rubber and the room started to spin around me.

I struggled with him...

I pushed him away, but he is so much bigger and stronger than me it was like trying to get out from under a boulder. And it hurt. One of my fingers bent back and my nail broke off and started to bleed.

Then he said, “You know you want it, that’s why you are here.”

I couldn’t believe he would say such a thing, I went to his room because he needed to get his gas card. I was so upset. I mean I kind of liked

History and Physical

Have you had alcohol in the past?
How much do you usually drink?
Describe for me how you felt then?
Could you speak?
Were you able to walk?
How fast did you drink the R & Cs?
Have you smoked marijuana before?
Have you ever smoked pot before?

How did it make you feel?

What was your reaction to that?
What did you say or do?

What did he do?

What did you do then?
What did you say?

What did he do next?

What do you mean by struggle?
Describe for me exactly what you did.

Where did it hurt? Show me.
(Identify possibility of bruises)

(Inspect hands and compare nails)

What did you do then?

him. I just can't believe I was so stupid, it was all my fault.

You were not stupid, and it was not your fault. You agreed to go to his room, that's all.
Tell me what happened next.

He grabbed my sweater and pulled it off. It was new, and I was worried he would wreck it and then my mother would be mad. She would ask me how it got so stretched out and then she would know.

(Ask later about the sweater)
It sounds like there were lots of things going through your mind. What did you do then?

I told him to "stop" that I had to go home or I would be in trouble but he pushed me back on the bed and then (she pauses, starts to cry...)

I can see it is hard for you to talk about that night.
(Diaz allows silence)

...he...he...got on top of me.
I kept telling him to stop, I even asked him "Why are you doing this? I want you to stop. I am serious, stop."

What did he do when you told him to stop?

He looked different, all of a sudden he looked really mean...

Describe for me how he looked different.

He looked mean and I thought he would just explode... He clenched his teeth, his eyes got narrow and dark. I've never seen him like that, I thought he would do something to me....
I was really afraid.

What did you do when he looked so mean?

I started to cry but I was so afraid, I couldn't even move. I just laid there. (Starts to cry)

What happened then?

He just grabbed my skirt, shoved it up...

(Examine thigh again, take measurements)

Then he grabbed my underpants and pulled

them off. It hurt, he scratched me or something. I couldn't see but when you asked me before about the scab on my leg, I think that's where he hurt me. I couldn't see because he pinned my arms over my head. I couldn't move, he was so big.

Go on, Amanda.

He...he...(cries again) put his knees between my legs, I couldn't close my legs, I tried. I kept trying.

He touched me.

Amanda, where did he touch you?

Down there.

Where "down there"?

He stuck his fingers inside me.

Where inside you?

You know, where I get my period.

Your vagina?

Yea.....

What else happened?

He forced himself into me.

What do you mean forced himself?

He put his "thing" into me and pushed hard.

Do you mean his penis?

Yea...

Amanda, could you tell if he ejaculated? If he "came" inside of you?

I don't know. He groaned and then stopped.

What did he do then?

He just got dressed as if nothing had happened. I went into the bathroom, there was blood and stuff on my legs. I just wiped myself and got dressed.

How did you wipe yourself?

I used my underwear.

What happened to the underwear?

I threw them in a corner in my closet. I never want to see them again.

Are the underpants still there?

I don't know, I guess so, I couldn't put them in the laundry basket, my mother would see....
(cries again)...my parents would be so angry.

(She nods her head 'yes')

What about STDs?

I don't think I could be, I just finished my period the day before...this...happened...

I am afraid what people will think if I tell...

Amanda, I know you're worried about your parents but I must make sure that you are okay. I would like to examine you again. We'll go slowly so you will feel as comfortable as possible. We can stop whenever you need to.

We will do some tests and give you some medicine to make sure you do not get any diseases. We will also be sure that you are not pregnant.

I will do a test anyway, just to be sure. I will also explain how to help your body heal. You will have to decide if you are going to report this. You can think about it while I examine you. This should not have happened to you.

It is very hard to talk about these things. I want you to meet our rape crisis counselor later. She will answer any questions you might have and can assist you in that process. But for now, let's be sure you are okay. You did the right thing by coming here today. This is not your fault. Let's go into the next room.

The Physical Examination

Dr. Diaz brought Amanda into her examining room. She did a complete head to toe examination and inspected every part of her body. She identified the abrasion on Amanda's thigh, measured it and took a photograph as well as drawing a body diagram on the medical record. She also found several old bruises (yellowing) on Amanda's inner thighs and her inner knee. Each time Dr. Diaz noted an abnormal area she pointed it out to Amanda and asked what could have caused the injury. Amanda was able to fill in more details from that night. Dr. Diaz completed the pelvic examination, and there were no injuries or abnormalities noted. She took swabs for STD testing and blood work for HIV and pregnancy testing. She gave Amanda medication for her urinary tract infection, STD prophylaxis, instructions for self-care, and an appointment for a follow up visit in two weeks. She then referred her to the rape crisis counselor.

Resources for

**What Do Sexual Assault Forensic Examiners Do,
and What Can They Do for You?**

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 6, “Sexual Assault Forensic Examiners, SANE and Medical Evidence.”
- Volume II, Tab 11, “Vicarious Trauma.”

How an Expert Can Help You
Support the Complainant
and Prove Your Case More
Effectively

Expert Witnesses Slides

Slides can be found in .html at

<http://vaw.umn.edu/FinalDocuments/pbinder/tab8/expertwitnessslides/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab8/expertsli.ppt>.

How an Expert Can Help You Support the Complainant and Prove Your Case More Effectively

I. Using a Psychological Expert in a Sexual Assault Case

A. Deciding Whether to Use a Psychological Expert

Women who claim they were sexually assaulted are often viewed with skepticism. Challenges to a sexual assault victim's credibility are common in the courtroom and in the community.¹ Sexual assault victims also often act in ways that are counterintuitive. Although the elements of resistance and corroboration have been removed from state statutes, many jurors still believe that a sexual assault victim should fight back and immediately report the incident. Stereotypes and myths about rape cause many to shift their focus from the rapist to the victim. In addition, where the defense is consent, prosecutors often need help rebutting the "he said – she said" argument. For these reasons, expert testimony is often useful in sexual assault cases to explain the victim's counterintuitive behavior, to explain the complexities of sexual assault, and to respond to the defendant's claim that the incident was consensual.

B. Key Issues Where Expert Testimony Might be Helpful²

Prosecutors across the country have used experts in sexual assault cases to address several key issues. Experts can address such issues as:

- Why victims delay reporting;
- Why victims blame themselves;
- Why victims minimize the events and their injuries;
- Why victims have incomplete or inconsistent memories of the incident;
- Why victims do not always physically resist or escape;
- "Frozen fright";
- Why victims may continue contact with the perpetrator, especially

¹ Laura E. Boesch, Bruce D. Sales, & Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOLOGY, PUB. POL'Y & LAW 414 (1998).

² This section was adapted from *The Practical Use of Expert Witnesses in Cases Involving Violence Against Women*, by Anne Munch, Esq., presented at the Fourth Annual STOP Violence Against Women Conference, Baton Rouge, Louisiana, April 13, 2000.

- if they had a previous relationship based on trust;
- The victim's behavior as compared with behavior of other sexual assault victims;
- The victim's lack of physical injury;
- The victim's demeanor after the assault;
- Posttraumatic Stress Disorder and other common psychological reactions to trauma; and,
- Why victims recant.

NOTE: An expert should not testify about a particular witness's credibility or whether an assault did or did not happen. Experts should never testify as to whether they believe the victim is telling the truth or whether they believe the victim was sexually assaulted. This type of testimony almost always results in a mistrial of the case or the reversal of a conviction on appeal.

II. Important Terminology

There are several key terms which prosecutors must understand in dealing with sexual assault victims and preparing experts to testify in these cases. Unfortunately, there is a great deal of confusion about these terms, and courts have used the terms rather indiscriminately and in certain circumstances, incorrectly, when ruling on the admissibility of expert testimony in sexual assault trials.

A. Rape Trauma Syndrome (RTS)

- The phrase was originally used by Ann Burgess and Lynda Holmstrom to describe common reactions they observed in rape victims seen in the emergency room.³
- RTS refers to the victim's stages of recovery, not symptoms.
- These stages were defined to aid in the therapeutic process, but the terminology was used in courts to explain common reactions to rape to the jury.
- RTS is not a psychological diagnosis that is recognized in the field.
- RTS is not included in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).⁴
- RTS is more vulnerable to attack because of the research upon which it is based.
- RTS should NOT be used by experts in court.

³ Boeschen, *supra* note 1, at 416.

⁴ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994).

- However, many legal opinions and legal articles still use RTS terminology. These materials must be read carefully before drawing conclusions about the admissibility of expert testimony.
- Courts are also still admitting expert testimony about RTS, reflecting this confusion.
 - *See, e.g., State v. Kinney*, No. 99-122 (Vt. Oct. 13, 2000) (case still subject to motions for reargument and formal revision) (rape trauma syndrome is professionally recognized as a type of posttraumatic stress disorder).

B. Posttraumatic Stress Disorder (PTSD)

- PTSD is the primary trauma-related diagnosis included in the DSM-IV.
- It is an AXIS I diagnosis (Clinical Disorders; Other Conditions that May Be a Focus of Clinical Attention) in the DSM-IV.
- Diagnostic criteria include exposure to a traumatic event and certain associated reactions and symptoms.
- Duration of symptoms is more than one month.
- Originally developed to address the psychological trauma of Vietnam veterans.⁵
- PTSD is the preferred diagnosis for expert testimony.
- PTSD does not include all of the symptoms (such as depression, anxiety, anger, guilt, humiliation, sexual dysfunction, and disruption of core belief systems) that are also common among sexual assault victims.⁶
- The expert needs to clarify that sexual assault victims often suffer from symptoms other than PTSD.
- Experts also need to explain that not all sexual assault victims suffer from PTSD.
- Experts should use any other accepted diagnoses that apply (such as depression).
- PTSD may be caused by a trauma other than sexual assault.
- Many victims suffer from multiple traumas. Therefore, it is difficult to say with certainty that a specific trauma caused the PTSD reaction.⁷
- An expert can try to show the symptoms' cause with a thorough assessment of the temporal sequence of events and symptoms and a detailed description of the victim's intrusive symptoms.⁸

⁵ Boesch, *supra* note 1, at 417.

⁶ *Id.*, at 418.

⁷ *Id.*, at 419.

⁸ *Id.*

- Symptoms may overlap with the criteria for several other clinical disorders.⁹
- Courts often confuse this diagnosis with RTS.
- Testimony about PTSD has been admitted in many courts.
 - *See, e.g., State v. Liddell*, 211 Mont. 180, 685 P.2d 918 (1984) (expert testimony from a psychiatric nurse admitted to aid the jury in determining whether there was consent).
 - *Lane v. Commonwealth*, No. 2161-98-2 (Va. App. Sept. 28, 1999) (expert testimony about the victim's PTSD diagnosis being consistent with sexual abuse permitted since the expert did not opine that the victim had been abused).
- Testimony is deemed admissible by statute in at least one state.
 - *See* ILL. REV. STAT. Ch. 5 § 115-7.2. "In a prosecution for an illegal sexual act perpetrated upon a victim, testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome *shall be* admissible as evidence." (Emphasis added).

C. Acute Stress Disorder (ASD)

- DSM-IV diagnosis for symptoms that last a minimum of two days and a maximum of four weeks.
- Diagnosis used in the immediate aftermath of a trauma.
- ASD is used to describe the PTSD-like intrusive thoughts and avoidance symptoms during the first thirty days of symptoms.
- If symptoms persist for more than thirty days, the PTSD diagnosis is used.

III. Levels of Expert Testimony¹⁰

A. Level 1: Testimony About Specific Behaviors of Sexual Assault Victims That Are Described as "Unusual" by the Defense

- Expert testimony is used to respond to the defendant's claim that the victim's behavior was not consistent with that of a sexual assault victim. The defendant may have raised the questions through cross-examination of the victim or in the defendant's case-in-chief.
- The defense attorney has introduced testimony about the victim's "unusual" behavior, such as:
 - The victim's delay in reporting;

⁹ *Id.*, at 420.

¹⁰ This section is adapted from Boesch, *supra* note 1, at 424-428.

- The victim's failure to recall details or omission of certain aspects of the sexual assault;
- The victim's inability to immediately tell the police the assailant's name;
- The victim's apparent lack of emotion following the assault;
- The victim's denial of the sexual assault; or,
- The victim's memory loss about events preceding or during the assault.
- The expert is used to explain that these behaviors are not unusual in a sexual assault victim.
- The testimony only provides general information to jurors in an effort to combat the prevalent myths and stereotypes about sexual assault victims.
- *See, e.g., State v. DeSantis*, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990) (counselor from the local rape crisis shelter was permitted to testify, over the defendant's objection, about the general behavior of sexual assault victims).

B. Level 2: Testimony About Common Reactions to Sexual Assault and the General Diagnostic Criteria of PTSD or Rape Trauma

- This level of testimony involves a discussion of common post-assault behaviors and experiences, and includes a description of the criteria for PTSD or the effects of rape trauma.
- The expert does not examine the victim and does not discuss the specific victim's behavior or symptoms.
- The testimony is kept at a general level.
- The expert should do more than just describe PTSD symptoms. The expert should also explain other empirically validated, common post-assault behaviors which are not included in the PTSD diagnosis (such as sexual dysfunction or depression).
- The expert should not use RTS testimony.
- *See, e.g., State v. Kinney*, No. 99-122 (Vt. Oct. 13, 2000) (case still subject to motions for reargument and formal revision) (expert was allowed to testify about behaviors and symptoms experienced by trauma victims).

C. Level 3: Expert Gives an Opinion About the Consistency of a Victim's Behavior or Symptoms with PTSD or Rape Trauma

- Here the expert is allowed to discuss whether the victim's symptoms are consistent with the symptom criteria for PTSD or other trauma-related diagnoses.

- The expert does not examine or diagnose the victim or claim that the victim suffers from PTSD or any other diagnosis.
- The expert does not imply that the victim is being truthful in describing her symptoms.
- The expert can point out the consistencies between the victim's reported symptoms and common post-assault responses.
- The expert should not use RTS testimony.
- There are numerous examples of cases in which this type of evidence was held to be admissible. *See, e.g.:*
 - *State v. Rogers*, 992 P.2d 229 (Mont. 1999) (Emergency Department physician was allowed to testify that the victim's emotional state at the time of the examination was consistent with that of other rape victims he had examined).
 - *State v. Doporto*, 935 P.2d 484 (Utah 1997) (an expert may testify that a victim's behavior was consistent with symptoms that might be exhibited by one who has been sexually abused).

D. Level 4: The Expert Testifies that the Victim Suffers From PTSD

- At this level, the expert describes the victim's symptoms and states that the victim meets the criteria for a clinical diagnosis of PTSD.
- The expert would probably need to examine the victim to make the diagnosis.
- The expert does not testify that the victim was raped.
- The expert acknowledges that other forms of trauma may cause PTSD.
- You can anticipate a defense objection that this testimony improperly bolsters the victim's credibility.
- The expert should not use RTS testimony.
- *See, e.g., State v. Allewalt*, 517 A.2d 741 (Md. 1986) (the expert examined the victim and testified that he believed she suffered from PTSD).

E. Level 5: The Expert Opinion Goes Beyond a Diagnosis (The Danger Zone!)

- At this level, the expert testifies that the victim is telling the truth or that the victim was raped.
- This almost guarantees a mistrial or the reversal of any conviction on appeal.
- DO NOT allow your experts to cross this line.
- It clearly invades the jury's province and bears directly on the victim's credibility.
- There are numerous examples here as well:
 - *See, e.g., Nichols v. State*, 177 Ga. App. 689, 340 S.E.2d 654 (1986) (the defendant's conviction was reversed because the Emergency Department physician stated that, in his opinion, the victim was raped).
 - *Smith v. State*, 259 Ga. 135, 377 S.E.2d 158 (1989) (trial court erred in allowing the state's child abuse expert to testify that, in her opinion, the victim told the truth in her allegations against the defendant).

IV. Examples Where Expert Testimony Was Helpful and Where It Was Not

- Have the expert who addresses victim impact during the training give examples of cases in which s/he has testified where s/he felt that her/his testimony was helpful and where it was not.
- Have the prosecutors who are members of the faculty and who are in the audience describe cases in which they felt they used an expert successfully and where they felt the testimony did not help their case.

- Discuss why the testimony helped in certain cases and why it did not in others.
- See if you can discern a pattern.

V. Other Types of Expert Witnesses

- A witness does not necessarily have to be a clinical psychologist or psychiatrist in order to testify as an expert in a sexual assault trial.
- Courts have admitted testimony from other witnesses, such as:
 - The person in charge of a police department Victim Services Unit was allowed to testify as an expert on victimology in *People v. Hampton*, 746 P.2d 947 (Colo. 1987).
 - A counselor from a local rape crisis team was allowed to testify about the general behavior of sexual assault victims in *State v. DeSantis*, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990).
 - A counselor from a rape crisis center was qualified as an expert and testified about her observations of the victim, about the victim's fear of retaliation, and the victim's flat affect in *State v. Robinson*, 146 Wis. 2d 315, 431 N.W.2d 165 (Wis. 1988).
- Be sure to check the case law in your own jurisdiction to determine the boundaries of permissible testimony and who can be qualified as an expert.

VI. Lay Witnesses to Establish Trauma Response

- Courts have even permitted lay witnesses to testify about a victim's post-assault behavior or symptoms. Examples include:
 - A counselor from a police Victim Services Unit was allowed to testify as a lay witness regarding the victim's demeanor the day she reported the assault, and to express an opinion that the victim's reactions were typical of victims of sexual assault, in *Farley v. People*, 746 P.2d 956 (Colo. 1987).
 - In *Commonwealth v. Pickford*, 370 Pa. Super. 444, 536 A.2d 1348 (1987), the court refused to allow expert testimony about rape trauma syndrome. It did, however, allow lay testimony regarding the victim's post-rape behavior.
 - In *State v. Hickmott*, Case No. 98 CA 01 (Ohio App. Feb. 5, 1999), the court allowed the victim to testify that she suffered from PTSD, finding that her testimony was highly relevant and probative to the issue of whether she consented.
- Once again, check your local law on this issue.

VII. Issues Related to Confidentiality and Privilege

Issues related to confidentiality and privilege are very important in sexual assault cases.

A. Privileged Communication with the Treating Therapist

- This issue is particularly relevant when the prosecutor decides to call the treating therapist as an expert witness.
- Communication within the therapeutic relationship is privileged.
- Some states have extended the privilege to rape crisis center counselors.
 - *See, e.g.,* COLO. REV. STAT. § 13-70-107(1)(k) (a victim's advocate shall not be examined as to any communication made to such victim's advocate...by a victim of sexual assault...in person or through the media of written records or reports without the consent of the victim).
 - *See also, Commonwealth v. Wilson*, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, 504 U.S. 977 (1992) (the statutory privilege protects communication with a sexual assault counselor).
- The privilege may be waived if you call the treating therapist as a witness.
- Think carefully about the implications of calling a treating therapist as an expert witness.
- It is often best to use an expert who has no connection with the victim to avoid conflicts of interest and protect the victim's therapeutic relationship.
- Treating therapists are also more likely to cross the line and talk about the victim's truthfulness!
- If you do need to call the treating therapist, file a motion asking the court to limit the questioning to the relevant time period or topic.

B. Confidentiality of Records

- Defense attorneys often seek the victim's counseling records, even if the treating therapist is not testifying.
- Confidentiality of rape crisis center records is protected by statute in some states and by case law in others.
 - *See, e.g.,* COLO. REV. STAT. § 13-70-107(1)(k) (a victim's advocate shall not be examined as to any communication made to such victim's advocate...by a victim of sexual assault...in person or through the media of written records or reports without the consent of the victim).
 - *See also, Commonwealth v. Wilson*, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, 504 U.S. 977 (1992) (the statutory privilege must extend to the subpoena of records and other documents developed throughout the counseling relationship).

- *See, also, State v. J.G.*, 261 N.J. Super. 409, 619 A.2d 232 (1993)
(The defendant sexually assaulted his children. He sought access to counseling records for his wife, who he had not sexually abused,

- as well as for his children, who were his victims. The court held that the victim-counselor privilege was broad enough to encompass both direct and indirect victims of crime, so the defendant's request to discover counseling records for his wife and children was denied).
- Courts have also denied defendants' requests for access to other counseling records.
 - *See, e.g., State v. Maniero*, 189 Wis. 2d 80, 525 N.W.2d 304 (Wis. App. 1994), *review denied*, 531 N.W.2d 326 (Wis. 1995) (the defendant was not entitled to review the victim's psychiatric records where the state did not introduce expert testimony about the victims' psychiatric condition, nor did it rely on any of her psychiatric records).
- However, some courts have held that a sexual assault victim's rape crisis center or mental health records are discoverable.
 - *See, e.g., Commonwealth v. Neumyer*, 432 Mass. 23, 731 N.E.2d 1053 (2000) (the defendant's proffer was sufficient to establish the necessary relevancy and materiality of the victim's rape crisis center records to warrant an *in camera* review of the records, despite the statutory privilege).
 - *See also, State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989) (the trial court committed reversible error in denying the defendant access to the victim's treatment records).
- These privileges may also be waived, so be careful!
 - *See, e.g., Commonwealth v. Davis*, 437 Pa. Super. 471, 650 A.2d 452 (1994), *aff'd*, 674 A.2d 214 (Pa. 1996) (the privilege was waived when the complainant and her family allowed the prosecutor to have access to the records).

VIII. Using an Expert Who You Will Not Call to Testify

Even if you are not planning to call an expert to testify at trial, there are many ways you can use an expert to help you prepare for trial and to help support the victim through the process. Some examples are:

- Use your expert, your Victim-Witness staff, the local rape crisis center counselor or the victim's treating therapist to help support and prepare the victim for trial.
- Use the expert to help you "follow the trauma."¹¹ PTSD and other trauma-related symptoms help demonstrate that the sexual activity was not consensual.

¹¹ SCOTT WYATT & DONALD G. LINTON, ACQUAINTANCE RAPE INVESTIGATION AND PROSECUTION 54-58 (1999)

- *See, Rape Trauma Symptom Rating Scale in your Resources Book in Vol. I, Tab 3, "Victim Impact".*
- Use what you learned from the expert to help you prepare your *voir dire* questions, your direct examination of the victim and your cross-examination of the defendant.
- If the defendant is planning to call an expert, use your expert to help you prepare your cross-examination of the defense expert, by suggesting areas of inquiry or specific questions. Have your expert review the defense expert's *curriculum vitae* and published materials. Ask your expert to find out about the defense expert by contacting professional organizations or other sources to provide you with additional information.

IX. Other Issues Related to the Admissibility of Expert Testimony

The case annotations contained in *Expert Testimony in Sexual Assault Cases: Selected Case Law from Around the Country*, provide numerous examples of cases in which courts found expert testimony admissible and cases in which the courts held that the evidence was not admissible. This section mentions a few other issues that emerge in these cases.

A. Expert Testimony about False Reporting

- Some appellate courts have held that expert testimony about the incidence of false reporting in sexual assault cases is impermissible.
 - *State v. Kinney*, No. 99-122 (Vt. Oct. 13, 2000) (case still subject to motions for reargument and formal revision) (the expert's testimony about the rate of false reporting was improperly admitted, but did not constitute reversible error).
 - *State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986) (The expert's testimony about malingering and the statistical percentage of false accusations was improper comment on the complainant's credibility and should not have been admitted. In light of the overwhelming evidence of the defendant's guilt, however, the error was harmless).
- Unless your courts specifically permit this testimony, it would be wise to avoid it.
- If the defendant attempts to introduce this type of testimony, object strenuously.

B. Expert Testimony that the Defendant Does Not Fit the "Profile" of a Sex Offender

- Several appellate decisions address the issue of the admissibility of expert testimony proffered by the defendant in which the expert plans to testify that the defendant does not fit the “profile” of a sex offender.
- There is no validity to the concept that there is a reliable “profile” of a sex offender.
- Nevertheless, some courts have admitted this evidence or found that it was relevant:

- *State v. Miller*, 709 P.2d 350 (Utah 1985) (The defendant proffered expert testimony to describe the typical psychological profile of individuals who sexually abuse children. The trial court refused to permit it. On appeal the court held that the testimony would have been relevant, but that the trial court did not err in excluding the evidence under the provisions of Utah R. Evid. 403.).
- *State v. Cavallo*, 88 N.J. 508, 443 A.2d 1020 (1982) (One of the defendants sought to offer expert testimony that he did not have the psychological traits of a rapist. The appellate court held that the expert's testimony made it more likely than otherwise that the defendant did not rape the victim. Consequently, the proffered testimony was relevant.).
- *State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Wis. App. 1998) (The defendant proffered expert testimony that he did not show any evidence of a diagnosable sexual disorder and, absent a diagnosable disorder, it was unlikely that such a person would molest a child. The trial court refused to permit the testimony and the appellate court reversed, finding that the expert's testimony would have assisted the jury in determining the likelihood that the defendant committed the charged offense.).
- You should strenuously object to the introduction of this type of evidence. Reputable researchers in this field do not accept the concept of a "profile."

A Prosecutor's Checklist: Using a Psychological Expert in a Sexual Assault Case

Use this checklist to prepare your expert for trial.

I. Preparing Your Expert¹²

A. Meet with the expert far in advance of the scheduled trial.

Before any expert testifies at the trial, you should meet with the expert and establish the scope and breadth of the expert's testimony. Interview your expert as soon as you possibly can. In this pre-trial meeting, discuss the following with the expert:

- The types of questions the expert will be asked to establish the expert's credentials and expertise;
- The boundaries of the expert's testimony;
- The types of questions the expert will be asked on direct examination;
- Areas the expert will not be asked about;
- Areas or types of testimony that the expert should specifically avoid;
- How the expert should prepare for cross-examination; and,
- Questions the expert can expect from opposing counsel.

B. Review the expert's credentials and expertise.

You need to have sufficient information about an individual to offer him or her as an expert witness. If you do not lay the proper foundation, the court will not qualify your witness as an expert. If the witness is not qualified as an expert, the witness cannot offer opinion testimony. During your preliminary meetings, ask the expert the following types of questions so you will have the information you need to lay the foundation for the expert's testimony at trial:

Educational/Professional Background:

- Education: university, graduate school, particular classes in area of expertise;
- Degrees held;
- Additional class work or training in the field of expertise;

¹² This section was adapted in part from *The Practical Use of Expert Witnesses in Cases Involving Violence Against Women*, by Anne Munch, Esq., presented at the Fourth Annual STOP Violence Against Women Conference, Baton Rouge, Louisiana, April 13, 2000.

- Articles written on topics within the area of expertise;
- Publication titles, journals and dates the articles were published;
- Whether the articles were the subject of peer review;
- Teaching experience;
- Subjects taught;
- Teaching location;
- Length of teaching experience;
- Memberships in any professional organizations; and
- Types of professional organizations (invitation only or open to any interested person).

Area of Practice:

- Type of professional practice;
- Length of time in professional practice;
- Number of clients treated;
- Number of sexual assault victims treated;
- Define Rape-Related Posttraumatic Stress Disorder; and
- Number of clients treated who suffer from Rape-Related Posttraumatic Stress Disorder.

Previous Expert Testimony:

- Any previous courtroom testimony;
- If so, explain:
 - when;
 - in which courts (state or Federal);
 - attorneys' names;
 - facts of those cases;
 - whether they were criminal or civil cases;
 - which side called the expert as a witness; and
 - whether your expert qualified as an expert in these other cases.
- In any case where your expert has testified, it would be wise to obtain a transcript of the expert's testimony.
- Find out whether any court ever refused to qualify your witness as an expert.

C. You and your expert should talk to others who have testified as expert witnesses in court.

If an expert has not testified before, the prospect can be very intimidating. You and your expert should contact other experts who have testified and ask them about their experiences, especially during cross-examination. Contact other prosecutors, professional associations, local state sexual assault coalitions or local rape crisis programs to get names of others who have testified.

D. Prepare your expert for the courtroom experience.

Tell your expert to use plain language while testifying. Jurors do not have the benefit of the expert's education and it is critical that the jurors understand what the expert is saying. If the expert has to use technical terms, remind the expert to explain the term's meaning in plain English before continuing his or her testimony.

During your pre-trial meeting, talk to your expert about the general practices of the opposing attorney and judge. If you can, tell the expert about defense counsel's demeanor during cross-examination. Also provide the expert with the opportunity to observe the courtroom before the expert is scheduled to testify. If time permits, conduct a practice direct examination and cross-examination with the expert.

Experts may feel that they do not need to prepare as carefully if they have testified before. It is crucially important for you to explain that each case is different, as is each attorney. You need to prepare each expert witness regardless of the number of times that witness has testified in the past.

E. Use your expert to help you prepare for trial.

Use what you have learned from your expert to craft questions for *voir dire*, to plan your direct examination of the victim and to plan your cross-examination of the defendant. Find out whether the defense attorney intends to call an expert and get that expert's name. If the defense is planning on calling an expert witness, use your expert to help you prepare for cross-examination. You and your expert should be familiar with the defense expert's background, credentials and written materials. Obtain a copy of the defense expert's *curriculum vitae* and review it with your expert. In addition, get transcripts of the defense expert's prior testimony and copies of any publications. Ask your expert to read the defense expert's articles and suggest areas for cross-examination. Also ask your expert to find out about the defense expert by contacting professional organizations or other sources to provide additional background information.

F. Prepare your expert to discuss his or her fee while testifying.

If your expert is charging a fee for his or her testimony, discuss the fee ahead of time with your expert. You may want to ask your expert about the fee during direct examination to avoid difficult cross-examination on the issue. If not, warn the expert to expect to be asked about the fee in cross-examination. The expert must be prepared to explain his or her fee in matter-of-fact terms, without getting defensive.

G. Explain what you need to establish in court and define key legal terminology.

Tell your expert exactly what information you need to have developed during direct testimony. After you have reviewed your questions with your expert, ask if you have missed any key areas of inquiry. Find out if there are other specific questions you should ask the expert at trial. Explain that you would appreciate any insight that will strengthen your case or help you avoid surprises. Use your expert to teach you about your case.

In addition, explain the key phrases or terminology you will use or need your expert to use while testifying. Requirements vary from state to state about what key phrases

are necessary before an expert can state an opinion. Explain the legal significance of such legal phrases as “within a reasonable degree of medical certainty” and “consistent with.” Also explain the distinction between something that is “possible” or “probable.”

H. Make sure the experts understand the form their testimony will take.

Prosecutors should be sure to explain to their experts whether the experts will be asked to provide background information about common reactions of sexual assault victims, opinion testimony, or testimony based on hypothetical questions. The type of permissible expert testimony varies widely from jurisdiction to jurisdiction and it is important that the expert understand the permissible parameters before testifying. Each type is summarized below:

- **Testimony to provide background information**

Here, experts can testify about general relevant principles. The judge or jury is then left to apply the principles to the facts of the case. Background information about such common characteristics as delayed reporting, self-blame, lack of physical injury, fragmented memories, recanting and minimization helps the judge or jury understand key issues of the case and allows them to choose whether to apply what they have learned in deciding the case before them.

- **Opinion testimony**

In general, experts can give opinions where lay witnesses cannot. Before an expert can express an opinion, the expert must possess a reasonable certainty about the stated opinion. The expert’s opinion should not be based on guesswork or speculation, but the expert need not be absolutely certain. Different jurisdictions use different standards to determine the admissibility of expert testimony. Be sure you are familiar with your state’s requirements and explain them to your expert during your pre-trial meetings.

Remember experts should not give opinions about whether the victim in the particular case is telling the truth or has been sexually assaulted.

- **Testimony based on hypothetical questions**

Traditionally, many states forced experts to express their opinions only in response to a hypothetical form of questioning. Today, these types of questions are not used as often because they can be cumbersome and confusing. When used, these questions may be offered by either side, and may sound something like this:

“Please assume the following facts...” (A set of facts will be given that may mirror the facts of the case.) “In your opinion, are these facts consistent or inconsistent with someone who has experienced sexual assault?”

Warn your expert that if the defense attorney uses a hypothetical question during cross-examination at trial, the expert should listen very carefully to the question and articulate all distinctions the expert perceives between the hypothetical question and your set of facts.

I. Review the relevant research and literature.

There has been a great deal of research over the last several years about the psychological sequelae of rape victimization and the traumatic response. Recent advances in neurobiology demonstrate that traumatic memories are actually stored and retrieved differently than non-traumatic memories. Be sure that both you and your expert are familiar with and have reviewed the current research in this area before the expert testifies.

J. Respect confidentiality and privileges, and determine if there is a conflict of interest in the case.

An expert witness should be cautious about testifying about a patient in a criminal case. The dangers of violating confidentiality and privileged communication are high under these circumstances. If you do decide to ask a treating therapist to testify about a former or current patient, you must make sure that the patient has been fully informed about the confidentiality and privilege issues that may arise as a result of the therapist’s testimony. This issue should be discussed in detail with the patient and the therapist. You should also file a motion asking the court to limit questioning of the therapist to the relevant time frame or topic. You need to carefully think through the implications of using a treating therapist as a witness in a criminal trial. It is often best to use an expert who has no connection to the case, so conflicts of interest can be avoided and the victim’s therapeutic relationship can be protected.

Another difficult area that arises in sexual assault case is the confidentiality of the victim’s therapist’s records. Defense attorneys often try to gain access to the victim’s

records. Victims' therapy records may have information, unrelated to their sexual assault, which they do not want disclosed. If the therapist is associated with a hospital or mental health center, the therapist's Risk Management Department may become involved with any request for the facility's records. Each state's law varies on this issue, so you need to be familiar with your state's privilege and confidentiality laws. It is important that you do what you can to protect the victim's privacy and the confidentiality of her therapy records.

K. Caution your expert to be careful when using statistics.

Because statistics can be so persuasive and they are commonly attacked on cross-examination, it is important that experts use accurate, reliable figures when testifying. The expert should be prepared to discuss where he or she obtained the statistics and how the results were determined. Experts should also cite statistics from the original source (professional journal, original research, government publication, etc.), NOT from a magazine or newspaper article.

II. Courtroom Logistics and Scheduling

Tell your expert where to park ahead of time. If possible, have someone from your office meet the expert at the courthouse door and bring the expert to the courtroom. If no one is available, give clear and specific directions from the courthouse door to the courtroom. Explain to the expert what he or she should do upon arrival (wait outside the courtroom or come inside and sit down).

Explain that trials are often continued and schedules are often delayed. Tell the expert that you will make every effort to provide him or her with advance warning of any delays and accommodate the expert's schedule, but that it is not always possible. Explain that the judge, not you, controls the court calendar. Keep in touch with your expert.

III. Qualifying Your Expert at Trial¹³

When offering a witness as an expert, you must establish the witness's qualifications to the court's satisfaction. Usually this is accomplished by demonstrating the witness' knowledge and skill in a particular area. Some factors that the court may consider are:

- Whether the person has ever previously been qualified as an expert;
- The expert's employment history;
- The expert's experience in the field in which he or she is being offered as an expert;
- The expert's education;
- The expert's professional affiliations, and positions within professional organizations;
- The expert's publications in the field and professional papers presented;
- Any other specialized or professional training the expert has received; and
- The expert's familiarity with current literature and research in the particular field.

¹³ This section was adapted from *The Practical Use of Expert Witnesses in Cases Involving Violence Against Women*, by Anne Munch, Esq., presented at the Fourth Annual STOP Violence Against Women Conference, Baton Rouge, Louisiana, April 13, 2000.

At trial, you will ask your expert questions that cover these topics, and offer the witness as an expert. The defense attorney then has an opportunity to question or challenge the qualifications, or *voir dire*, the witness.

It is ultimately up to the judge to determine whether the person has been properly qualified as an expert. Never assume that the judge will permit an expert to testify.

Tips on Working with a Medical Expert in a Sexual Assault Case

If the victim received medical attention after the assault, prosecutors frequently call medical experts to testify at trial. These experts, either emergency room physicians, or, if your community has a Sexual Assault Forensic Examiner (SAFE) program, the SAFE nurse, describe their medical findings from their examination of the victim. The following suggestions are adapted from Dr. Michael Weaver's *Optimizing Physician/Nurse Role in the Criminal Justice System*,¹⁴ which is included in your Resources Book in Volume I, Tab 7, "Expert Witnesses." From a physician's point of view, these recommendations are ways in which prosecutors can make it easier for the medical clinician to testify in a sexual assault trial.

1. Clinical Issues

- Many medical schools and nursing schools do not teach students how to conduct clinical forensic examinations.
- This is changing with advent of the SAFE programs, but SAFE clinicians are not available in all jurisdictions.
- Physicians or nurses usually examine sexual assault victims many months, or even years, before the case comes to trial. As a result, the clinician's memory about important details, such as the patient's demeanor, may have faded.
- If a SAFE clinician is not available, the responsibility for sexual assault examinations rotates from clinician to clinician. Therefore, the clinicians may perform only a few of these examinations in any given year.
- Given that so few of these cases actually go to trial, it is important to understand that the clinician may have little experience testifying and may be very apprehensive about doing so.¹⁵

2. Professional Courtesy

- Clinicians do not want their first contact with a prosecutor to be in the form of a subpoena. This is a bad way to initiate contact because when clinicians receive unexpected subpoenas, their initial reaction is often fear that they are being sued for malpractice.¹⁶
- It is also important to give the clinicians as much notice as possible when asking them to testify. Clinicians are frustrated when they are asked to testify with little

¹⁴ This section is adapted from Michael Weaver, *Optimizing Physician/Nurse Role in the Criminal Justice System*, National Non-Stranger Sexual Assault Symposium Proceedings Report, Denver Sexual Assault Interagency Council (April, 2000). Michael Weaver, M.D., FACEP, is a member of the Kansas City Sexual Assault Task Force and has lectured for the National College of District Attorneys on issues related to sexual assault.

¹⁵ *Id.*, at 60.

¹⁶ *Id.*

advance notice. A last minute subpoena may diminish the spirit of cooperation and damage the working relationship between the prosecutor and the clinician.

- Many physicians and nurses have fixed schedules that are set months in advance. It is often difficult to get coverage and the clinician may be forced to work multiple shifts in a row if notice is given at the last minute.
- Giving last minute notice may also produce a hostile witness who has not had time to properly review the record or the relevant professional literature.¹⁷
- Trials often have unpredictable schedules. Clinicians appreciate being scheduled to testify either first thing in the morning or right after the lunch break to minimize waiting time. Explain to the clinician that although you will do everything you can do to minimize delays, the judge controls the calendar and cases are often continued and schedules are often rearranged at the last minute.
- Ask the clinician to arrive an hour early to give the clinician time to ask any questions or review material with the prosecutor.
- During re-direct, give the clinician the opportunity to clarify misconceptions that may have arisen during cross-examination.
- As a courtesy, call or write to the clinician after the trial to let the clinician know the outcome and thank him or her for assisting with the trial.¹⁸

Checklist for Prosecutors Using Medical Experts¹⁹

1. Initial Forensic Clinician Contact

- Arrange your initial meeting as soon as possible after the case begins, well in advance of the trial date.
- Avoid the use of subpoenas that are delivered without prior notice.
- Telephone or visit the clinicians prior to the start of their shift.
- Provide the clinician with a copy of the clinical record and the proposed trial dates.
- Establish a preferred method for contact to arrange a formal case review.

2. Formal Case Review

- Schedule the meeting at least two weeks prior to the trial.
- Avoid scheduling the meeting during the clinician's shift or at the end of the shift.
- Meet at the hospital.
- Plan on spending an hour or two reviewing the specific details of the hospital evaluation.

¹⁷ *Id.*

¹⁸ *Id.*, at 60-61.

¹⁹ *Id.*, at 60-61 (adapted from Dr. Weaver's *Important Checklist Elements*).

- Review direct quotes and statements made for the purpose of medical diagnosis or treatment.
- Clarify the terminology used, e.g., 6 o'clock position, posterior fourchette, and fossa navicularis.
- Review the particular hospital's rape kit, the use of toluidine dye or colposcopy, the chain of evidence, and routine laboratory procedures.
- Carefully review any complaints of pain by the patient.
- Discuss the use of drawings or blow-up diagrams.
- Avoid use of the phrase "Rape Trauma Syndrome."

3. Know Your Witness

- Decide whether you want to qualify the clinician as an expert or a fact witness.
- Discuss the clinician's previous trial experience, professional training, certifications, and publications.
- Understand the potential power of a SAFE evidentiary examination.
- Discuss the limits of clinical expertise. Understand what the clinician cannot do, e.g., analyze DNA or determine the age of bruises.
- Provide guidelines for Effective testimony, which address such issues as courtroom etiquette, direct and cross-examination procedures, and the legal implication of the use of certain terminology, e.g., probable vs. possible.
- Provide relevant medical literature for the clinician to review.

Expert's Checklist: Courtroom Testimony in A Sexual Assault Case

*Give the checklist on the next page to your
expert to help him or her prepare for trial.*

Expert's Checklist: Courtroom Testimony in A Sexual Assault Case²⁰

You have been asked to testify as an expert witness in a criminal sexual assault trial. Here are some basic guidelines, which will help you prepare for your testimony. These guidelines are very general. Each state has different rules about whether experts can testify and what they can talk about when they are on the witness stand. Ask the prosecutor who has requested your testimony to explain the specific requirements for this particular trial. The following suggestions are offered to help you prepare to testify:

1. Meet with the prosecutor far in advance of the scheduled trial.

Before testifying at the trial, you should meet with the prosecutor and establish the scope and breadth of your testimony. This meeting should take place as soon as possible after you have been contacted to testify. In this meeting, be prepared to talk about the following issues:

- The types of questions you will be asked to establish your credentials and expertise;
- The boundaries of your testimony;
- The types of questions you will be asked by the prosecutor on direct examination;
- Areas you will not be asked about;
- Areas that you should specifically avoid;
- How to prepare for cross-examination; and
- Questions to expect from opposing counsel.

2. Be prepared to discuss your qualifications, education and experience.

The prosecutor needs to have sufficient information about you to offer you as an expert witness at trial. Be prepared to discuss with the prosecutor the following questions about your background:

Educational/Professional Background:

- Education: university, graduate school, particular classes in area of expertise;
- Degrees held;

²⁰ This checklist was adapted from *The Practical Use of Expert Witnesses in Cases Involving Violence Against Women*, by Anne Munch, Esq., presented at the Fourth Annual STOP Violence Against Women Conference, Baton Rouge, Louisiana, April 13, 2000.

- Additional class work or training in your field of expertise;
- Articles written on topics within your area of expertise;
- Publication titles, journals and dates the articles were published;
- Whether the articles were the subject of peer review;
- Teaching experience;
- Subjects taught;
- Teaching location;
- Length of teaching experience;
- Memberships in any professional organizations; and
- Types of professional organizations (invitation only or open to any interested person).

Area of Practice:

- Type of professional practice;
- Length of time in professional practice;
- Number of clients treated;
- Number of sexual assault victims treated;
- Definition of Rape-Related Posttraumatic Stress Disorder; and
- Number of clients treated who suffer from Rape-Related Posttraumatic Stress Disorder.

Previous Expert Testimony:

- Any previous courtroom testimony;
- If so, explain:
 - when;
 - in which courts (state or Federal);
 - attorneys' names;
 - facts of those cases;
 - whether they were criminal or civil cases;
 - which side called you as a witness; and
 - whether you were qualified as an expert in these other cases.
- In any case where you have testified, the attorney may want to obtain a transcript of your testimony.
- Whether any court ever refused to qualify you as an expert.

3. Talk to others who have testified as expert witnesses in court.

The prospect of testifying in court can be very intimidating, particularly if you have not testified many times before. Even if you have testified numerous times, each attorney has a different style of questioning and cross-examination. Judges have different styles of managing their courtrooms and each case has different facts and nuances. You should contact other experts who have testified and ask them about their experiences, especially during cross-examination. Contact other prosecutors,

professional associations, local state sexual assault coalitions or local rape crisis programs to get names of others who have testified.

In addition, ask the prosecutor about general practices of the opposing counsel and judge and ask to observe the courtroom before you testify. If time permits, ask the prosecutor to conduct a practice direct examination and cross-examination with you.

Find out whether the other side intends to call an expert and get that expert's name. Be familiar with that expert's background and credentials. Be prepared to suggest areas of inquiry for cross-examination of the other expert.

4. Be prepared to discuss your fee while testifying.

If you are charging a fee for your testimony, discuss the fee ahead of time with the prosecutor, and agree on the amount. Be prepared to discuss your fee during your testimony, either during your direct examination or on cross-examination. The prosecutor may want to ask you about the fee during direct examination to avoid difficult cross-examination on the issue. Be prepared to explain your fee in matter-of-fact terms, without getting defensive.

5. Find out what you need to establish in court and make sure you understand key legal terminology.

Find out from the prosecutor exactly what information you need to develop during your direct testimony. After the prosecutor has reviewed the areas of inquiry with you, tell the prosecutor if he or she has missed any key issues you would like to discuss. The prosecutor is relying on your insight to strengthen the case and avoid surprises at trial. Suggest other specific questions you think would be helpful. Keep in mind, however, that it is up to the attorney to decide which questions to ask.

Make sure the prosecutor explains the key phrases or terminology that he or she will use or needs you to use while testifying. Requirements vary from state to state about what key phrases are necessary before an expert can state an opinion. Make sure the prosecutor explains the legal significance of such legal phrases as "within a reasonable degree of medical certainty" and "consistent with." Also be sure you understand the legal distinction between something that is "possible" or "probable."

6. Prepare your testimony using plain language and understandable terminology.

You need to use plain language while testifying. Jurors do not have the benefit of your education and it is critical that the jurors understand what you are saying. If you have to use technical terms, explain the term's meaning in plain English before continuing your testimony.

7. Have the attorney explain the form your expert testimony will take. It will usually take one of the following three forms:

a. Testimony to provide background information

Experts can testify about issues outside of the jury's general knowledge and understanding. The judge or jury is then left to apply the information to the facts of the case. Background information about such common characteristics as delayed reporting, self-blame, lack of physical injury, fragmented memories, recanting and minimization helps the judge or jury understand key issues of the case and allows them to choose whether to apply what they have learned in deciding the case before them.

b. Opinion testimony

In general, witnesses qualified as experts can give opinions where lay witnesses cannot. Before an expert can express an opinion, the expert must possess a reasonable certainty about the stated opinion. The expert's opinion should not be based on guesswork or speculation. To assist the prosecutor in establishing your reasonable certainty about your opinions, be prepared to address the following types of questions:

- What facts did you consider in forming your opinion?
- What are the relevant theories and principles that support your opinion?
- Have these theories and principles been tested?
- Have these theories or principles been published?
- Have they been published in peer-review law journals?
- Are these theories or principles generally accepted in your professional community?
- What appropriate assessment of methods did you use?
- How would you defend or explain your opinion, if challenged?

Remember you should never give opinions about whether the victim in the particular case is telling the truth or has been sexually assaulted.

c. Testimony based on hypothetical questions

Some states require experts to express their opinions only in response to a hypothetical form of questioning. These types of questions are not used as often now because they can be cumbersome and confusing. When used, these questions may be offered by either side, and may sound something like this:

“Please assume the following facts...” (A set of facts will be given that may mirror the facts of the case.) “In your opinion, are these facts consistent or inconsistent with someone who has experienced sexual assault?”

If a hypothetical question is used during your cross-examination, listen very carefully to the question. Explain all distinctions you perceive between the hypothetical question and your set of facts before answering the question.

8. Review the relevant research and literature.

There has been a great deal of research over the last several years about the psychological sequelae of rape victimization and the traumatic response. Be sure that you are familiar with, and have recently reviewed, the current research in this area before testifying.

9. Be aware of issues related to confidentiality and privilege, and determine if there is a conflict of interest in the case.

An expert witness should be cautious about testifying about a client in a criminal case. The dangers of violating confidentiality and privileged communication are high

under these circumstances. If you do decide to testify about an on-going client, you must make sure that the client has been fully informed about the confidentiality and privilege issues that may arise as a result of your testimony. This issue should be discussed in detail with the prosecutor as well. It is often best to use an expert who has no connection to the case, so conflicts of interest can be avoided.

Another difficult area that arises in sexual assault cases is the confidentiality of the victim's therapist's records. Defense attorneys often try to get access to the victim's records. Victims' therapy records may have information, unrelated to their sexual assault, which they do not want disclosed. If you are associated with a hospital or mental health center, your Risk Management Department may get involved with any request for the facility's records. Each state's law varies on this issue, so you need to be familiar with your state's privilege and confidentiality laws. It is important that you do what you can to protect the victim's privacy and the confidentiality of her therapy records. Make sure you discuss these issues with the prosecutor, if they apply in your case.

10. Be careful when using statistics.

Because statistics can be so persuasive and they are commonly attacked on cross-examination, it is important to use accurate, reliable figures in your testimony. Be prepared to discuss where you obtained the statistics and how the results were determined. Cite statistics from the original source (professional journal, original research, government publication, etc.), NOT from a magazine or newspaper article.

11. Be familiar with courtroom logistics and scheduling.

Find out from the prosecutor where you should park and exactly where you should go when you arrive at the courthouse. Most courthouses have numerous courtrooms and you need to be sure you know where to go. Get clear and specific directions from the courthouse door to the courtroom. Find out what you should do upon arrival (wait outside the courtroom or come inside and sit down).

It is important that you understand that trials are often postponed and schedules are often delayed. You can ask the prosecutor to provide you with advance warning of any delays and accommodate your schedule, but that that is not always possible. You need to understand that the judge, not the attorneys, controls the court calendar. Witnesses often take longer than anticipated, cross-examination may take longer than expected and many other issues arise that affect a trial schedule. Keep in touch with the prosecutor and be patient. Delays are inevitable and unavoidable.

Expert Testimony in Sexual Assault Cases: Selected Case Law from Around the Country (December, 2000)

This material contains a collection of case annotations related to the admissibility of expert witness testimony and issues of confidentiality and privilege. The annotations deal primarily with cases in which the victim was an adult, rather than a child. Since issues related to child victims are so different, the only annotations included in which the victim was a child are ones where the holding would also apply to adult victims. These annotations come from selected states throughout the country where NJEP has presented its *Understanding Sexual Violence* curriculum to judges. The document also contains annotations of more recent cases that address these issues.

The Attorney's Caveat: This is a rapidly changing area of the law and each jurisdiction is different. You need to carefully review your own state's statutes and case law before you attempt to introduce expert testimony in a sexual assault case.

I. Expert Testimony Admitted

A. Psychological or Psychiatric Witnesses

Lane v. Commonwealth, Record No. 2161-98-2 (Va. App. Sept. 28, 1999).

Facts: The defendant was convicted of rape and forcible sodomy of his stepdaughter. At trial, the detective who investigated the case testified as an expert on recantation in child abuse cases. In addition, the court allowed the victim's mental health counselor to testify about Posttraumatic Stress Disorder. The defendant appealed his conviction, objecting to the testimony of these two witnesses.

Holding: The trial court properly admitted the testimony of both witnesses. First, the detective had investigated three hundred sexual assault cases and had undergone specialized training in the area of sexual abuse and children's recantation of abuse allegations. Therefore, the trial court did not abuse its discretion in permitting the detective to give an expert opinion on the likelihood of recantation. Second, the counselor's testimony about sexual assault triggering PTSD was proper because she did

not opine that the victim had been abused. Rather, the witness testified that the victim's PTSD diagnosis was consistent with sexual abuse. Accordingly, the defendant's conviction was affirmed.

People v. Thompson, 699 N.Y.S.2d 770, 267 A.D.2d 602 (N.Y. App. Div. 1999).

Facts: The defendant was convicted of rape and sexual abuse of his sixteen-year-old niece. The victim alleged that the defendant raped her in 1995, and sexually abused her again in 1997. The victim did not report the first rape until the time of the second incident. At trial, the defendant objected to the State's expert testimony regarding rape trauma syndrome because the expert did not examine or interview the victim. The

defendant also objected to the conviction as a whole, claiming that the weight of the evidence did not support a conviction because the victim delayed reporting the first rape for eighteen months.

Holding: The testimony of the expert was admissible even though he did not interview the victim, because the testimony was limited in scope to explaining behavior that might appear unusual to a lay juror not ordinarily familiar with the patterns of response exhibited by rape victims. Furthermore, the State's expert testified that it was not unusual for a rape victim to postpone the reporting of an incident and that familiarity with the attacker may contribute to a victim's reluctance to disclose. Accordingly, the defendant's conviction was affirmed.

State v. Allewalt, 517 A.2d 741 (Md. 1986).

Facts: The defendant was convicted of rape in the second degree. The defendant was the boyfriend of the victim's daughter and was living in the victim's home at the time of the assault. After consuming fifteen to twenty beers one evening, the defendant returned home, forced his way into the victim's bedroom, carried her down the hall to another bedroom, threw her onto a bed and raped her. The defendant claimed that the sex was consensual. The State called an expert forensic psychiatrist, who had examined the victim, to testify about Posttraumatic Stress Disorder. The doctor testified that PTSD is recognized as the emotional reaction to a traumatic event, that he examined the victim at the State's request, and that he believed that the victim suffered from PTSD. When asked by the State, "Based on what she told you, what would be the trauma that forms the basis for your opinion?" The doctor replied, "The only trauma that she claims that she went through at that time was being raped." *Id.*, at 755. The defendant appealed his conviction, contesting the admission of the doctor's testimony. The Court of Special Appeals, Maryland's intermediate appellate court, found that PTSD testimony was inadmissible because its prejudicial impact in a rape case outweighs its probative value, and overturned the defendant's conviction.

Holding: The Court of Special Appeals imposed an unreasonably high standard for the admissibility of medical opinion evidence. There is no dispute that psychiatrists and psychologists recognize PTSD as an anxiety disorder. One of the diagnostic criteria for PTSD is the "existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone." *Id.*, at 754. The psychiatrist was well within his special training and experience when he diagnosed the victim with PTSD, and when he opined that the "recognizable stressor" was the rape described to him by the victim. The Court of Special Appeals' finding was based on the assumption that the jury would be confused and might conclude that, because rape was one of the possible causes of PTSD, it had in fact caused the disorder in the victim. The doctor never used the term "rape trauma syndrome," and he was careful to point out that severe traumas, other than rape, can produce the disorder that warranted the diagnosis of PTSD. In addition, the doctor did not express an opinion about the victim's credibility.

State v. Brodniak, 221 Mont. 212, 718 P.2d 322 (1986).

Facts: The defendant was convicted of sexual intercourse without consent for raping a woman he met at a bar. At trial, he claimed that they engaged in consensual sexual acts, but that he did become violent at the end of the encounter. At the State's request, a

psychologist examined the complainant to determine her psychological condition and to recommend treatment. The psychologist concluded that the complainant's "condition was consistent with all of the symptoms of the Posttraumatic Stress Disorder known as rape trauma syndrome." *Id.*, 718 P.2d at 326. The psychologist also testified about malingering and the low probability of false reports. The defendant claimed that the psychologist's testimony should have been excluded, arguing, *inter alia*, that the testimony was an improper comment on the victim's credibility.

Holding: Rape trauma syndrome is a proper subject for expert testimony in a sexual intercourse without consent case. Where all that is disputed is the consent element, the evidence is relevant to the question of whether there was consent to engage in a sexual act which the parties agree occurred. In cases from other jurisdictions in which RTS evidence was excluded, the experts all testified that the victim suffered from RTS and, therefore, concluded expressly or implicitly, that the victim had been raped. A qualified expert may explain RTS to the jury and express an opinion that the victim suffers from the syndrome, but may not testify otherwise as to the witness' credibility or believability. In this case, the expert's testimony about malingering and the statistical percentage of false accusations was improper comment on the complainant's credibility and should not have been admitted. In light of the overwhelming evidence of the defendant's guilt, however, the error was harmless.

State v. Doport, 935 P.2d 484 (Utah 1997).

Facts: The defendant was convicted of sodomy on a child. An expert witness testified about the nature of behavior frequently exhibited by child sexual abuse victims. He explained that children typically do not report abuse until several years later. He also briefly related some common behavioral changes in children who are sexually abused, particularly guilt, isolation, and poor performance and disruptive behavior in school.

Holding: An expert witness may testify that a "victim's behavior was consistent with symptoms that might be exhibited by one who has been sexually abused," as long as the expert does not testify about any kind of sexual abuse profile or that the victim's symptoms demonstrated that the victim had been sexually abused. *Id.*, at 495. The expert's testimony fell within permissible bounds.

State v. Kinney, No. 99-122 (Vt. Oct. 13, 2000) (case still subject to motions for reargument and formal revision).

Facts: The defendant was convicted of kidnapping and rape. At trial, he objected to the testimony of an expert who testified about rape trauma syndrome and the typical behaviors of adult rape victims. The expert also testified about the rarity of false reporting of rape. The defendant objected to the testimony about false reporting because the expert had not examined the victim. In addition, the defendant objected to the admission of expert testimony about rape trauma syndrome.

Holding: The trial court properly admitted the expert's testimony. Expert evidence of rape trauma syndrome and the associated typical behavior of adult rape victims is admissible to assist the jury in evaluating the evidence and, frequently, to respond to the defendant's claim that the victim's behavior after the alleged rape was inconsistent with

the victim's claim that she was raped. Rape trauma syndrome is professionally recognized as a type of Posttraumatic Stress Disorder, and the behavioral characteristics

of rape victims have been the subject of numerous professional studies. Here, the expert never interviewed the victim and offered no opinion about whether the victim suffered from rape trauma syndrome or exhibited any of the behavior of a rape victim. However, the expert's testimony about the rate of false reporting of rape was improperly admitted because the jury could infer from her testimony that scientific studies have shown that almost no woman falsely claims to have been raped and convict the defendant on that basis. However, the failure to exclude this testimony did not result in reversible error, and the defendant's conviction was affirmed.

State v. Liddell, 211 Mont. 180, 685 P.2d 918 (1984).

Facts: The defendant claimed that he had a prior sexual relationship with the complainant and that she consented to sexual intercourse on the night in question. She testified that she invited him to her home for the express purpose of telling him to leave her alone and that she never had consensual sex with him. A psychiatric nurse testified at trial about the victim's severe headaches and her Posttraumatic Stress Disorder.

Holding: Psychiatric testimony is admissible to aid a jury in determining whether there was consent to engage in a sexual act which the parties agreed did occur. It remains up to the jury to determine whether the evidence is credible.

State v. Mason, 283 Mont. 149, 941 P.2d 437 (1997).

Facts: The complainant, who was nineteen years old, reported that her granduncle sexually abused her when she was thirteen. At trial, her school counselor and therapist testified about their counseling relationships with her and that they observed certain behavioral characteristics, such as depression, guilt and anger, which are symptomatic of sexual abuse victims.

Holding: The counselors did not testify regarding whether the complainant was telling the truth or give their opinions as to her credibility. The testimony did not corroborate her testimony. Instead, it set forth the counselors' personal observations regarding her behavior, which was relevant to the issue of whether the offenses charged actually occurred.

United States v. Halford, 50 M.J. 402 (C.A.A.F. 1999).

Facts: The defendant raped the victim after they attended a party and drank together. Later in the evening, another man who had been romantically pursuing the victim discovered that she had sexual intercourse with the defendant, and he responded by physically assaulting her. Then, the other man and two of his friends raped the victim again. The victim did not report any of the rapes until a week later when she was hospitalized because of a drug overdose. During his opening statement, the defense attorney argued that the victim was not believable because of inconsistencies in her statement, retractions, lack of physical evidence and her refusal to talk about the crime. At trial, the government offered evidence from a psychologist who treated the victim. The psychologist testified about behavioral characteristics of rape victims in order to counter the defendant's attacks on the victim's credibility.

Holding: The expert's testimony was properly admitted to allow the government to explain the victim's behavior when the defendant attacked it. In addition, the doctor did not express an opinion about the victim's credibility or whether a rape had occurred.

Once the defense indicated that its theory was to attack the victim's credibility, it was appropriate for the prosecution to put the victim's inconsistencies and retractions and her refusal to cooperate in context. Under this theory, the probative value of the doctor's testimony outweighed any prejudice to the defendant. Accordingly, the defendant's conviction was affirmed.

B. Victim Advocate or Police Witnesses

Lane v. Commonwealth, Record No. 2161-98-2 (Va. App. Sept. 28, 1999).

Facts: The defendant was convicted of rape and forcible sodomy of his stepdaughter. At trial, the detective who investigated the case testified as an expert on recantation in child abuse cases. In addition, the court allowed the victim's mental health counselor to testify about Posttraumatic Stress Disorder. The defendant appealed his conviction, objecting to the testimony of these two witnesses.

Holding: The trial court properly admitted the testimony of both witnesses. First, the detective had investigated three hundred sexual assault cases and had undergone specialized training in the area of sexual abuse and children's recantation of abuse allegations. Therefore, the trial court did not abuse its discretion in permitting the detective to give an expert opinion on the likelihood of recantation. Second, the counselor's testimony about sexual assault triggering PTSD was proper because she did not opine that the victim had been abused. Rather, the witness testified that the victim's PTSD diagnosis was consistent with sexual abuse. Accordingly, the defendant's conviction was affirmed.

People v. Hampton, 746 P.2d 947 (Colo. 1987).

Facts: Non-stranger rape. The victim reported the assault 89 days after it occurred. The person in charge of the police department's Victim Services Unit was qualified as an expert in victimology. She never examined the victim, but she testified about rape victims' general reactions, the reasons for delayed reporting, and rape trauma syndrome.

Holding: The evidence was admissible under the C.R.E. 702 "helpfulness" standard. Given the limited scope of the testimony and the defendant's theory of the case, which raised the issue of the victim's delayed reporting, the testimony was permissible. The court rejected the use of the *Frye* test here. The case also discusses the relationship between PTSD and rape trauma syndrome.

State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990).

Facts: The state called a counselor from the local rape shelter to testify, over the defendant's objection, about the general behavior of sexual assault victims. The witness was not asked about the complainant's behavior or to compare the complainant's behavior to other rape victims' behavior. The witness described the series of emotional phases sexual assault victims generally go through that may bear on a victim's willingness to press charges.

Holding: In previous cases, we have upheld the introduction of expert testimony on the behavior of sexual assault victims to educate the jury when the complainant's conduct is

seen as inconsistent with the claim of sexual assault. Expert testimony will be permitted if it serves the “particularly useful role of disabusing the jury about widely held

misconceptions about sexual assault victims.” *Id.*, 456 N.W.2d at 609. The trial court did not abuse its discretion by admitting the evidence in this case.

State v. Robinson, 146 Wis. 2d 315, 431 N.W.2d 165 (Wis. 1988).

Facts: The defendant was awaiting the start of a county jail sentence for sexually assaulting a minor when he sexually assaulted the complainant. She was pregnant at the time. The defendant and the complainant had had a consensual sexual relationship that ended a month before the assault. At trial, a worker from the rape crisis center was qualified as an expert and testified about her observations of the complainant, about the complainant’s fear of retaliation, and that it was common for rape victims to exhibit a flat affect after the assault.

Holding: The witness had six years of experience at the rape crisis center and had personally dealt with seventy to eighty victims. The court did not abuse its discretion in qualifying her as an expert. The witness was not asked to draw any inferences or offer any opinions about the complainant based on what she had observed in working with other sexual assault victims. The expert testimony in this case was helpful to the jury because the defendant attempted to capitalize on the misconception that all sexual assault victims are emotional following the assault. The testimony helped the jury understand reactions with which it perhaps was not familiar. The use of expert testimony in relating observations of the way other sexual assault victims actually behave served a particularly useful role by disabusing the jury of some widely held misconceptions about sexual assault victims.

C. Emergency Room Physician or Nurse

State v. Alvarado, No. 18235-5-III (Wash. App. Oct. 3, 2000).

Facts: The defendant was convicted of first-degree rape. At trial, the emergency room nurse who first examined the victim testified that, in her opinion, the red marks found on the victim’s neck and shoulders were consistent with a sexual assault. She also indicated that the choke marks and the hold marks on the victim’s shoulders were not consistent with someone who had had consensual sex. In addition, the emergency room physician who examined the victim testified, without objection, that based on her medical assessment, the victim had been sexually assaulted. On appeal, the defendant claimed ineffective assistance of counsel and challenged the admission of the expert testimony.

Holding: The testimony of the medical experts was properly admitted. First, an opinion may be admitted if it is based solely on inferences from the physical evidence and on the expert’s experience. Here, the medical experts’ opinions were based solely on their experience and on their inferences from the physical evidence. Accordingly, the defendant’s conviction was affirmed.

State v. Rogers, 992 P.2d 229 (Mont. 1999).

Facts: The defendant met the victim at a bar, where they talked, had drinks and danced. The victim refused the defendant’s sexual advances throughout the evening. When she left the bar, the defendant followed her in his vehicle and forced her to stop. He then

grabbed the victim's arm and threatened to hurt her if she did not do what he wanted. The victim told the defendant, "If you're gonna do this, do it in my truck." *Id.*, at 230.

Then the defendant got into the victim's truck and forced her to have oral and vaginal intercourse. The victim asked the defendant to use a condom, but he declined. After the assault, the defendant and the victim spoke for a short while in her truck. Even though the victim was hesitant to report the assault, a friend later convinced her to do so, and she was taken to a hospital where she was examined by the emergency room physician. At trial, the State introduced testimony, over the objection of the defendant, of two other women who claimed to have been previously sexually assaulted by the defendant. In addition, the State introduced testimony of the emergency room physician who examined the victim. On appeal, the defendant objected to the testimony of the previous victims and the ER physician.

Holding: The State did not need to qualify the ER physician as an expert in rape trauma syndrome because of his twelve years of experience and previous exposure to rape victims. The ER physician did not specifically testify about rape trauma syndrome. Rather, the physician testified about whether the victim's emotional state at the time of examination was consistent with that of other women he had examined who reported being raped. The physician did not testify about the victim's credibility. He carefully limited his testimony to his observations of her, as compared with other women he had examined who reported being raped. However, the court did find in favor of the defendant on the prior bad acts testimony because there was not enough of a similarity between the three incidents for the defendant's behavior to qualify as a common plan or scheme.

D. Lay Witnesses

Commonwealth v. Pickford, 370 Pa. Super. 444, 536 A.2d 1348 (1987).

Facts: The complainant and the defendant had a consensual sexual relationship, which had ended three weeks prior to the rape. The trial court refused to allow expert testimony about rape trauma syndrome, but did allow lay testimony regarding the complainant's post-rape behavior.

Holding: It is within the layperson's ability to understand the possible and probable effect of a forcible rape upon a person. The lay testimony was admissible.

Farley v. People, 746 P.2d 956 (Colo. 1987).

Facts: A counselor from the police victim services unit testified regarding the victim's demeanor after having interviewed the victim on the day of the assault. The counselor expressed her opinion that the victim's reactions were typical of victims of sexual assault and that her behavior was consistent with that of a rape victim. She was not offered as an expert witness. The defendant's objections to her opinion testimony were overruled.

Holding: The testimony did not constitute rape trauma syndrome evidence. The counselor was neither offered nor accepted as an expert. The witness offered her opinion, based upon her prior experience with rape victims, that the victim's reactions were very consistent with being a rape victim. The testimony was permissible opinion evidence from a lay witness under C.R.E. 701.

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State v. Hickmott, Case No. 98 CA 01 (Ohio App. Feb. 5, 1999).

Facts: The defendant was convicted of four counts of rape. The defendant has lived with the victim intermittently for ten years and he was the father of her four children. On appeal, the defendant argued that the trial court erred by allowing the victim to testify that she suffered from Posttraumatic Stress Disorder, without expert testimony.

Holding: The trial court properly admitted the victim's statement because the victim's mental condition after the incident was highly relevant and probative to the issue of whether or not she was a willing participant in the sexual activity. The fact that the victim put a label on her mental condition that may have a technical meaning did not render that testimony unfairly prejudicial. Accordingly, the defendant's conviction was affirmed.

II. Expert Testimony Not Admissible

Commonwealth v. Gallagher, 519 Pa. 291, 547 A.2d 355 (1988).

Facts: The defendant posed as a police officer and sexually assaulted the complainant. She could not identify the defendant two weeks after the assault, but did identify him four years later. Ann Burgess testified, as an expert, about rape trauma syndrome in general and that the complainant had rape trauma syndrome. Dr. Burgess also related her opinion about how RTS bore upon the identification process.

Holding: Expert testimony on rape trauma syndrome is inadmissible to explain that such trauma could prevent a victim from making a timely identification of her assailant.

Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654 (1986).

Facts: The doctor who examined the victim at the hospital testified as to her injuries and, when asked whether force was used, replied that, in his opinion, "this patient...[had] been raped." *Id.*, 340 S.E.2d at 656. The defendant had sought to prevent the doctor from expressing his opinion that the victim had been raped.

Holding: The correct test is whether the question is a proper one for opinion evidence, and not whether it goes to the ultimate issue. Although it is permissible for the expert to give his opinion as to facts in issue or even the ultimate issue where the question is a proper one for opinion evidence, the expert is not permitted to state a legal conclusion as to the ultimate matter at issue. The conviction was reversed.

Smith v. State, 259 Ga. 135, 377 S.E.2d 158 (1989).

Facts: Following testimony by several defense witnesses that they would not believe the child victim under oath, the trial court permitted the state's child-abuse expert to testify that, in her opinion, the victim told the expert the truth regarding the allegations against the defendant.

Holding: The rule is that an expert may not testify as to his or her opinion as to the existence *vel non* of a fact unless the inference to be drawn from facts in evidence is beyond the jurors' ken. Here, the victim's truthfulness or credibility was not beyond the jurors' ken. Therefore, the trial court erred in permitting the testimony.

III. Issues Related to Privilege and Confidentiality

A. Records Protected by the Privilege

Commonwealth v. Wilson, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, 504 U.S. 977 (1992).

Facts: The defendant sought to subpoena records maintained by the rape crisis center that treated the complainant, claiming that the confidentiality statute only prohibited the subpoena of a sexual assault counselor as a witness.

Holding: The statutory privilege must extend to the subpoena of records and other documents developed throughout the counseling relationship. Any other interpretation of the statute would render the entire privilege meaningless. The statutory privilege is constitutional.

State v. J.G., 261 N.J. Super. 409, 619 A.2d 232 (1993).

Facts: The defendant and his friend sexually abused the defendant's four children, aged one to eight, while his blind wife was at a 20-day training course. After the children disclosed what happened, the wife and three of the children received counseling at a private mental health center. The defendant issued a subpoena for the files and the center, unaware of the privilege, released them to the defendant's attorney. The trial court quashed the subpoena, ordered the return of the privileged information and directed defense counsel not to reveal the contents of the file.

Holding: The victim-counselor privilege was enacted by the legislature in 1987. The protection afforded by the privilege is broad enough to encompass both direct and indirect victims of crimes of violence. Therefore, it protected the mother's counseling records, even though she was not a victim, as well as the children's records. We are reluctant to require an *in camera* inspection where, as here, the statute grants an absolute privilege. The center's inadvertent release of the confidential files did not constitute a waiver of the privilege.

State v. Maniero, 189 Wis. 2d 80, 525 N.W.2d 304 (Wis. App. 1994), *review denied*, 531 N.W.2d 326 (Wis. 1995).

Facts: The defendant was charged with improperly touching his fifteen-year-old babysitter on numerous occasions over a five-month period. After making the allegations, the complainant was admitted to an in-patient psychiatric unit because she was emotionally distraught and suicidal. The defendant sought access to the complainant's psychiatric records. The trial court did an *in camera* review of the records and refused to disclose them to the defendant.

Holding: The only cause identified by the complainant's treating professionals for her depression and suicidal ideation was the alleged sexual assault. That was the entire focus of her stay and treatment at the psychiatric unit. *State v. Maday*, 179 Wis. 2d 346, 507 N.W.2d 365 (Wis. App. 1993), *review dismissed*, 510 N.W.2d 139 (Wis. 1993), is not controlling. In *Maday*, the state was responsible for generating the psychological evidence at issue, whereas here the complainant sought treatment independent of the state. More importantly, the state here did not introduce any expert testimony regarding

the complainant's psychiatric condition after making the allegations, nor did it rely on any of her psychiatric records. The court's review of the records was sufficient to protect the defendant's due process rights while protecting the complainant's privacy rights.

B. Records Not Protected by the Privilege

Commonwealth v. Neumyer, 432 Mass. 23, 731 N.E.2d 1053 (2000).

Facts: At the probable cause hearing, the victim testified that the defendant raped and indecently assaulted her early one morning in the backseat of her car. She also testified that she only remembered portions of the incident due to her intoxicated condition. Later that day, she asked her friend how the friend would define "rape." The victim then called the rape crisis center, with her friend present, and told the counselor that she thought she had been raped, but didn't know what rape was. The counselor suggested that she go to the hospital. The victim went to the hospital the next day and called the police from there. On cross-examination at the preliminary hearing, the victim responded that she and the counselor discussed how to define rape. The defendant filed a motion asking for an *in camera* review of the rape crisis center records. The rape crisis center refused to produce the records, asserting that they were privileged under the Massachusetts statute that protects disclosure of a victim's sessions with a sexual assault counselor. The court held the rape crisis center in contempt and imposed a fine of \$100.00 per day for each day that the center did not produce the records. The defendant then pled guilty. The rape crisis center appealed the trial court's order finding the center in contempt.

Holding: The case was not moot since the contempt order still stood after the defendant pled guilty. That portion of the records that set forth the time, date, and fact of a communication between the victim and the rape crisis counselor was not protected by the sexual assault counselor privilege. The defendant's proffer was sufficient to establish the necessary relevancy and materiality to warrant *in camera* review of the records. The key point in the affidavit was that the victim only formed the opinion that she was raped after speaking with the counselor. The judge accurately considered the calls the "turning point" and concluded that a finder of fact could be influenced by the content of these calls "which caused the complainant to become certain of her situation." *Id.*, 731 N.E.2d at 1060. In addition, the exact content of the calls was material that might not be obtained elsewhere. The proffer was clearly sufficient to support the trial court's determination that there was a good faith, specific, and reasonable basis for believing that the records could contain exculpatory evidence that would be relevant and material to the defense, and that this material could not be obtained from other sources. We agree that the legislature intended the widest scope possible for this privilege, but the privilege must be limited by the constitutional rights of the defendant.

(*But see*, the strongly worded dissent which asserts that the decision will result in a virtually automatic *in camera* inspection for an entire class of privileged material, despite the legislature's intent to create a privilege with no exceptions.)

State v. Trammell, 231 Neb. 137, 435 N.W.2d 197 (1989).

Facts: The defendant was convicted of first-degree sexual assault and of being a habitual criminal. The victim was a forty-year-old woman who “had a nervous breakdown when she was [thirteen] years of age and was institutionalized on three different occasions.” *Id.*

at 139, 435 N.W.2d at 199. Her last admission was when she was twenty-seven years old. She testified that she was taking Prolixin on an intermittent basis as a sedative and to “calm her nerves.” The emergency room physician testified that Prolixin was usually prescribed to control psychosis. He also stated that psychotic individuals not on medication can display psychotic behavior and appear normal shortly thereafter, and that individuals who took the medication for several years and then stopped taking it could return to their psychotic condition. The state sought to prevent the defendant from adducing evidence regarding the victim’s past physical or mental illnesses or her previous hospitalizations. She refused to waive her physician-patient privilege with respect to her prior hospitalizations or her current treatment, other than that necessitated by the assault. The defendant claimed that the trial court erred in not allowing him to discover and present evidence of the victim’s past and present psychiatric condition.

Holding: The records of the victim’s hospitalization twelve or thirteen years ago and her treatment at that time deal with matters too remote to have any relevance in this case and, consequently, there was no error in refusing to permit the defendant to explore those issues. Yet, the victim’s current treatment records are relevant. The victim was a witness, not a party, and therefore has not placed her mental condition in issue. The fact, however, that the privilege protects disclosure of confidential communications between the victim and those who are treating her for her mental condition does not leave the defendant without a remedy. In such situations, if the witness refuses to waive the privilege, the witness cannot testify because the defendant is prevented from full cross-examination. The trial court committed reversible error “in permitting the victim to testify without permitting the defendant to discover and produce evidence concerning the current treatment of the victim’s mental condition.” *Id.* at 143, 435 N.W.2d at 201.

C. Privilege Waived

Commonwealth v. Davis, 437 Pa. Super. 471, 650 A.2d 452 (1994), *aff’d*, 674 A.2d 214 (Pa. 1996).

Facts: The defendant tried to introduce evidence from the child complainant’s family therapy sessions. The victim consented, but the other family members did not.

Holding: The privilege was waived when the complainant and her family allowed the prosecutor to have access to the records.

IV. Other Key Issues Related to Expert Testimony

A. *Expert Testimony About the Frequency of False Reporting*

State v. Brodniak, 221 Mont. 212, 718 P.2d 322 (1986).

Facts: The defendant was convicted of sexual intercourse without consent for raping a woman he met at a bar. At trial, he claimed that they engaged in consensual sexual acts, but that he did become violent at the end of the encounter. At the State’s request, a psychologist examined the complainant to determine her psychological condition and to recommend treatment. The psychologist concluded that the complainant’s “condition

was consistent with all of the symptoms of the Posttraumatic Stress Disorder known as rape trauma syndrome.” *Id.*, 718 P.2d at 326. The psychologist also testified about

malinger and the low probability of false reports. The defendant claimed that the psychologist's testimony should have been excluded, arguing, *inter alia*, that the testimony was an improper comment on the victim's credibility.

Holding: Rape trauma syndrome is a proper subject for expert testimony in a sexual intercourse without consent case. Where all that is disputed is the consent element, the evidence is relevant to the question of whether there was consent to engage in a sexual act which the parties agree occurred. In cases from other jurisdictions in which RTS evidence was excluded, the experts all testified that the victim suffered from RTS and, therefore, concluded expressly or implicitly, that the victim had been raped. A qualified expert may explain RTS to the jury and express an opinion that the victim suffers from the syndrome, but may not testify otherwise as to the witness' credibility or believability. In this case, the expert's testimony about malingering and the statistical percentage of false accusations was improper comment on the complainant's credibility and should not have been admitted. In light of the overwhelming evidence of the defendant's guilt, however, the error was harmless.

State v. Kinney, No. 99-122 (Vt. Oct. 13, 2000) (case still subject to motions for reargument and formal revision).

Facts: The defendant was convicted of kidnapping and rape. At trial, he objected to the testimony of an expert who testified about rape trauma syndrome and the typical behaviors of adult rape victims. The expert also testified about the rarity of false reporting of rape. The defendant objected to the testimony about false reporting because the expert had not examined the victim. In addition, the defendant objected to the admission of expert testimony about rape trauma syndrome.

Holding: The trial court properly admitted the expert's testimony. Expert evidence of rape trauma syndrome and the associated typical behavior of adult rape victims is admissible to assist the jury in evaluating the evidence and, frequently, to respond to the defendant's claim that the victim's behavior after the alleged rape was inconsistent with the victim's claim that she was raped. Rape trauma syndrome is professionally recognized as a type of Posttraumatic Stress Disorder, and the behavioral characteristics of rape victims had been the subject of numerous professional studies. Here, the expert never interviewed the victim and offered no opinion whether the victim suffered from rape trauma syndrome or exhibited any of the behavior of a rape victim. However, the expert's testimony about the rate of false reporting of rape was improperly admitted because the jury could infer from her testimony that scientific studies have shown that almost no woman falsely claims to have been raped and convict the defendant on that basis. However, the failure to exclude this testimony did not result in reversible error, and the defendant's conviction was affirmed.

B. Expert Testimony About the Defendant or the "Profile" of a Sex Offender

Harwood v. State, 195 Ga. App. 465, 394 S.E.2d 109 (1990), *cert. denied*, (Ga. 1990).

Facts: The defendant was charged with sexually molesting his five-year-old daughter. He admitted molesting his older daughter for ten years, from the time she was four until she experienced a false pregnancy at fourteen. He claimed that he had rehabilitated

himself in the years before the birth of his younger daughter. At trial, the state called a psychologist and asked his opinion, based on hypothetical questions. The psychologist testified that given the hypothetical man's history, in the absence of treatment, the mere passage of time meant the incestuous behavior was more likely to reoccur when the opportunity presented itself. He also testified that no one "is simply going to learn how through the passage of time to control these types of actions." *Id.*, 394 S.E.2d at 110.

Holding: There is no merit to the defendant's argument that the trial court erred in admitting the evidence. "[T]he recurrence of compulsive behaviors and the likelihood of a person with compulsive behavior rehabilitating himself without treatment are subject matters not within the scope of the ordinary laymen's knowledge and experience, and thus evidence regarding these matters was properly admissible under OCGA § 24-9-67." *Id.*

State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763 (Wis. 1987).

Facts: The defendant was convicted of second-degree sexual assault of his fourteen-year-old niece by marriage. On appeal, he claimed that the trial court abused its discretion in refusing to allow a psychologist to testify that the defendant did not fit the "psychological profile" of known incest offenders. His expert administered tests, interviewed the defendant and compared the defendant's psychological profile with that of known "incestuous" sex offenders. The expert concluded that the defendant's psychological profile was "diametrically opposed or different from the profile established for incestuous fathers and sexual offenders." *Id.*, 398 N.W.2d at 767.

Holding: The trial court found that the proffered testimony went to the matter of assessing witness credibility. The trial court had a reasonable basis for excluding the expert testimony. Whether or not the proffered testimony would be admissible as evidence of a character trait of the accused, under Wis. Stat. § 904.04(1)(a), we need not decide because the attorney did not raise the issue.

State v. Richard A.P., 223 Wis. 2d 777, 589 N.W.2d 674 (Wis. App. 1998).

Facts: The defendant was convicted of having sexual contact with his stepdaughter's five-year-old son. Prior to trial the defendant asked permission to introduce evidence of his character through expert testimony of a psychologist who had examined him. The psychologist would have testified that the defendant did not show any evidence of any diagnosable sexual disorder and, absent a diagnosable disorder, it was unlikely that such a person would molest a child. The trial court ruled that the expert could only testify if he could say that if the defendant sexually assaulted this child, he would have a diagnosable disorder. The expert could not, so the trial court excluded the testimony. The trial court did, however, allow a psychologist to testify as a lay witness that the psychologist did not believe that the defendant had "the characteristics that sexual abusers, pedophiles, have." *Id.*, 589 N.W.2d at 682.

Holding: The admissibility of expert opinion testimony as to a defendant's character for sexual deviance is an open question in Wisconsin. The expert's testimony would have assisted the jury in determining the likelihood that the defendant committed the charged offense. Moreover, the evidence code expressly recognizes a defendant's right to present

evidence of a pertinent character trait. Wis. Stat. § 904.04(1)(a). This evidence may be presented through testimony as to reputation or by testimony in the form of an opinion.

Prior case law holds that arguments or evidence about character profile, which seek to explain conduct or the absence of it, must be supported by competent underlying expert testimony. Character evidence about the accused may only be offered by the accused. The state may only offer countervailing evidence by way of rebuttal. The conviction was reversed since “there exists a reasonable probability that the exclusion of [the expert’s] testimony contributed to [the defendant’s] conviction.” *Id.*, 589 N.W.2d at 683.

State v. Cavallo, 88 N.J. 508, 443 A.2d 1020 (1982).

Facts: The defendants were convicted of abducting a woman from a bar and raping her. They claimed that she went with them willingly to engage in consensual sexual activity. At trial, one of the defendants sought to offer expert testimony that he did not have the psychological traits of a rapist. The trial court refused to permit the testimony.

Holding: For the purposes of determining relevancy, we treat the proffered testimony as reliable. Assuming the reliability of the expert’s conclusions, his testimony makes it more likely than otherwise that the defendant did not rape the victim. Consequently, the proffered testimony was relevant.

Having concluded that it was relevant, we must now determine whether the proffered testimony satisfied the special limitations placed on expert testimony. Since there were no questions raised as to the psychiatrist’s general qualifications, the relevant inquiry is whether the testimony satisfied New Jersey’s “standard of acceptability for scientific evidence.” Two assumptions underlie the proposed testimony: (1) that there are particular mental characteristics peculiar to rapists; and (2) that psychiatrists, by examining an individual, can determine whether or not he possesses those characteristics. The evidence was excluded based on a determination that it lacked the indicia of reliability and, therefore, was likely to confuse and divert the jury, rather than inform it. The defendants did not meet their burden of showing that the scientific community generally accepts the existence of identifiable character traits common to rapists. They also did not demonstrate that psychiatrists possess any special ability to discern whether an individual is likely to be a rapist. Until the scientific reliability of this type of evidence is established, it is not admissible.

State v. Miller, 709 P.2d 350 (Utah 1985).

Facts: The defendant was convicted of sexually abusing a child. He claimed that the trial court erred in excluding his proffered expert psychiatric testimony. The expert proposed to describe the typical psychological profile of individuals who sexually abuse children. The expert also planned to testify about the tendency of prepubescent girls, and to a lesser extent, prepubescent boys, to interpret certain situations as sexually threatening to them when the circumstances are actually completely innocent. The defendant also sought to introduce character evidence regarding his past moral conduct toward children.

Holding: The expert testimony about the characteristics of sex offenders, in conjunction with the proffered testimony from the defendant, would have been relevant to a pertinent train of his character, namely, the incongruity of his personality traits with those of individuals capable of and likely to commit sexual offenses against children.

Notwithstanding the relevance, however, the trial court was within its discretion in excluding the evidence under the provisions of Utah R. Evid. 403. The trial court's

decision to exclude the second portion of the expert's testimony, which related to the character or credibility of the accused, was not manifestly erroneous.

C. Expert Testimony About the Victim's Culture

State v. Finlayson, 956 P.2d 283 (Utah App. 1998), *aff'd*, 994 P.2d 1243 (Utah 2000).

Facts: The defendant was convicted of aggravated kidnapping, forcible sodomy, and rape. The victim was a Japanese student who had only been in the United States for approximately ten months and spoke little English. The defendant, who was fluent in Japanese, asked her to tutor him at his apartment. He asked for permission to kiss her. When she refused, he picked her up, carried her to the bedroom and sexually assaulted her. After she attempted to escape, he handcuffed her. He admitted at trial she said "no" and that he used the handcuffs, but claimed he used them only as a "joke." At trial, he sought to introduce expert testimony about traditional Japanese culture, to support his theory that the victim lied about the rape to "save face" because he did not want to have a serious relationship with her.

Holding: The defendant sought to introduce evidence and argue that the victim would act in conformity with traditional Japanese values simply because she was Japanese. The only possible relevance would be to attack her credibility. For this kind of evidence to be admissible, the defendant was required to lay a sufficient relevancy foundation. Here, he would have to show that she was aware of these "Japanese values," and that she was likely to act in conformity with them. Absent a proper foundation, the trial court was correct in refusing to permit the testimony.

Resources for

**How an Expert Can Help You Support the Complainant
and Prove Your Case More Effectively**

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 3, “Victim Impact.”
- Volume I, Tab 7, “Expert Witnesses.”

State-Specific Law:
Rape Shield and
State-of-Mind/Experts

WORKSHEET
STATE v. MICHAEL CATES

Rape Shield Exercise

Directions: Take fifteen minutes to jot down your responses to the questions below and discuss your responses with your tablemates. Be prepared to oppose the defense attorney's motion. After the discussion, a reporter from each table will report on these responses to the full group. The reporter will be the participant whose last name is closest to the letter B, who was not a reporter for the earlier exercises. You are to assume the following facts for the purposes of this exercise only. Allow 15 minutes for the report back.

During trial preparation you discover that the defense attorney may attempt to introduce the following:

- Amanda Brown has dated many men since she began attending Marlow College.
- Amanda Brown is known to "hang out" in a bar just down the road from the college.
- She has been seen in this bar dancing suggestively with her dates.
- Amanda Brown was wearing an animal print thong on the night of the incident.
- Amanda Brown's sweater was tight, and her skirt was very short.

☐ How do you handle these possible defense tactics?

Defense Counsel has moved to compel the State to turn over Ms. Brown's sweater and skirt.

☐ What is your response to the motion?

☐ Are you obliged to obtain these items from Ms. Brown?

WORKSHEET
STATE v. MICHAEL CATES

State-of-Mind/Experts Exercise

Directions: Participants are divided in half. Half the room is assigned to respond to question 1 and the other half is assigned to question 2.

Take fifteen minutes to discuss your responses to the assigned question below with your tablemates. After the discussion, a reporter from each table will report on these responses to the full group. The reporter will be the participant whose last name is closest to the letter F, who was not a reporter for an earlier exercise. You are to assume the following facts for the purposes of this exercise only. Allow 15 minutes for the report back.

Rather than Amanda Brown offering any verbal or physical resistance, she simply sat on the bed and did not say anything to the defendant. She just stared into space, her body stiffened and she cried during the incident.

During the interview she describes the defendant's demeanor as very angry.

Ms. Brown describes the event as if she watched it from a corner of the room. She says she felt as if it was happening to someone else, but she also felt that her life was in danger.

1. Resistance is not an element of the crime, but jurors often equate lack of resistance to consent. Using what you have learned in previous units of this curriculum, how would you use Amanda Brown's "frozen fright" reaction in your case-in-chief?

2. You want an expert witness to testify that Amanda Brown's reaction is consistent with frozen fright or dissociation which are frequently seen responses in victims of sexual assault. Under your state law, what arguments would you make to convince the judge to admit this testimony?

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Add State-Specific
Law Here

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Offenders: What Prosecutors Need to Know

Offenders: Myths and Realities – Overview Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab9/offenderslides/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab9/offender.ppt>.

Offenders: Serial Offending and Prior Bad Acts Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab9/priorbadactsslides/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab9/priorsli.ppt>.

Prior Bad Acts

Worksheet

STATE v. MICHAEL CATES

Prior Bad Acts Exercise

Directions: Take five minutes to write down the answers to the questions below, and then ten minutes to discuss your responses to the assigned question below with your tablemates. After the discussion, a reporter from each table will report on these responses to the full group for an additional fifteen minutes. The reporter will be the participant whose last name is closest to the letter I, who was not a reporter for an earlier exercise. If under your state law you may be able to admit some or all of these prior bad acts, be prepared to explain which incident(s) you would seek to introduce at trial and why.

During trial preparation you discover several other women who claim to have been sexually assaulted by Michael Cates.

- One woman never reported the incident because she was embarrassed and ashamed.
- A second woman reported the rape, but the college took no action.
- A third woman reported the sexual assault to the police, but the police declined action because she was intoxicated.
- A fourth woman states that she attended a party where Michael Cates pressured her to drink much more than she was used to drinking. She was so drunk that she was unable to walk. Her friend found her in a room alone with Mr. Cates and insisted she leave. The woman explains that her friend carried her out of the room and took her home. This woman does not indicate that there was any sexual contact between her and Mr. Cates.

1. Which of these witnesses would you want to testify?

2. What specific arguments would you make to persuade the judge to admit this evidence?

Resources for

Offenders: What Prosecutors Need to Know

The Resource Book materials relevant to this section are listed below:

- Volume II, Tab 13, “Sex Offenders, Sentencing and Sex Offender Treatment.”

Pleas and Sentencing

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Offenders: Pleas and Sentencing Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab10/pleasandsentencingslides/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab10/pleassli.ppt>.

Worksheet

STATE V. MICHAEL CATES

Sentencing Recommendations

Directions: Re-read “The Full Story” Handout. Then take five minutes to jot down your responses to the questions below. During the next 10 minutes, share your responses with the full group.

- What plea offer would you offer before trial?

- Would you accept an *Alford* or “no contest” plea? Why/why not?

- If your state has a registry law, is the registration affected by the plea?

- What sentence would you recommend after a conviction at trial?

- In your state, can you introduce evidence of Cates’ uncharged prior bad acts at sentencing?

WORKSHEET

STATE v. MICHAEL CATES

Defendant's Sentencing Proposal

Directions: Read the “Defendant’s Sentencing Proposal” on the following page (approximately two minutes). Be prepared to respond to the several aspects of the this proposal. Use this worksheet to jot down your responses. Allow ten minutes for this discussion.

How do you respond to the several aspects of the defendant’s sentencing proposal?

●

●

●

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DEFENDANT'S SENTENCING PROPOSAL

STATE v. MICHAEL CATES

At some point in your negotiations, or, at a sentencing hearing, Mr. Cates' attorney offers the following sentencing proposal. How do you respond?

My client is sorry that the situation got out of hand on their date, mostly because of the alcohol they both consumed. He understands that Ms. Brown is upset and he regrets the misunderstanding. He never intended to cause her any harm.

Consider the many factors in this case which show that incarceration is inappropriate. Why ruin a good kid's life? This is Mr. Cates' first offense. He has not been in trouble with the law before this incident. There were no weapons; he wasn't violent; he did not threaten Ms. Brown. She wasn't hurt. Ms. Brown wasn't beaten or even bruised.

Therefore, we think it appropriate that Mr. Cates be placed on probation, continue the treatment he has already begun on an outpatient basis, and in addition be required to complete community service.

We have met with the college officials who have agreed to his continued enrollment once he has been placed on probation. Thus he will have stability in his life.

Mr. Cates has begun treatment with Dr. Stewart Stuart. Dr. Stuart is well known and has worked with many criminal offenders over the past three years. He has effectively treated many of his patients. Mr. Cates has been attending individual therapy sessions with Dr. Stuart and is actively participating in those sessions. His parents are supportive and are paying for his therapy.

Dr. Stuart conducted a careful risk assessment and evaluation of Mr. Cates, using the MMPI to determine the type of treatment plan to employ in this case. Dr. Stuart also believes the defendant is a good candidate for treatment and is at low risk to repeat this offense because he does not fit the profile of a rapist and this was his first encounter with the law.

The other component of the doctor's treatment plan is to have the court direct the defendant to perform community service in either a rape crisis center or a domestic

violence shelter, so that he can understand the harm suffered by women and develop empathy with them.

My client is ready to do the recommended community service.

Resources for

Prior Bad Acts & Sentencing

The Resource Book material relevant to this section is listed below:

- Volume II, Tab 13, “Sex Offenders, Sentencing and Sex Offender Treatment.”

Cross-Examination of a Defendant in a Consent Case

1. Using what we have learned from the Offender Expert's presentation on sex offenders, what areas of cross-examination can you identify for Mr. Cates in *State v. Michael Cates*?
2. What questions would you want to ask if Michael Cates takes the stand? What responses do you hope to elicit from him?

Cross-Examination Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab10/crossexamslides/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab10/crossslides.ppt>.

Resources for

Cross-Examination of a Defendant in a Consent Case

The Resource Book material relevant to this section is listed below:

- Volume II, Tab 14, “Cross-Examination.”

Voir Dire

Voir Dire Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab11/voirdireslides/> or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab11/voirdslidesli.ppt>.

WORKSHEET (OVERVIEW)

STATE v. MICHAEL CATES

Voir Dire Exercise

Directions: Please take five minutes to craft questions for the *State v. Michael Cates voir dire*. Assume your *voir dire* will be curtailed, so rank your own questions in order of importance. List your priority questions on the Individual Participants' Worksheet. Then discuss your questions with your tablemates for ten minutes and agree on the group's top three to five questions, again in rank order. These should be listed on the reporter's Worksheet. The reporter will be the participant whose last name is closest to the letter A, who has not been a reporter for an earlier exercises. During the 30 minute report back each reporter will give the table's #1 question. After some discussion, the reporter will go on to question #2. If there is time after discussion, we will go on to #3 and so forth.

- As a pre-conference assignment you were asked "What was the best *voir dire* question you ever asked or heard about in a nonstranger rape or sexual assault case?" Is that question applicable to the *State v. Michael Cates* case?
- What three to five questions would you most want to ask if crafting *voir dire* questions for *State v. Michael Cates*?
- What questions would you ask to identify an undetected rapist on the panel?

INDIVIDUAL PARTICIPANTS' WORKSHEET
STATE v. MICHAEL CATES

Voir Dire Exercise

Directions: Please take five minutes to craft questions for the *State v. Michael Cates voir dire*. Discuss your questions with your tablemates. During the 30-minute report back, the reporter will give the table's # 1 question. If there is time after discussion, the presenter will go on to the next question, and so forth.

The three to five questions I would most want to ask are:

1.

2.

3.

4.

5.

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Resources for

Voir Dire

The Resource Book materials relevant to this section are listed below:

- Volume I, Tab 2, “Rape Myths: The Prosecutor’s Special Challenge.”
- Volume II, Tab 12, “Voir Dire.”

DNA Primer

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DNA Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab12/dnaslides>

/ or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab12/dnaslide.ppt>.

Resources for

DNA Primer

The Resource Book materials relevant to this section are listed below:

- Volume II, Tab 15, “DNA.”

Drug-Facilitated Rape

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Drug-Facilitated Rape Slides

Slides can be found in .html at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab13/dfrslides/>

or Power Point at

<http://www.vaw.umn.edu/FinalDocuments/pbinder/tab11/dfrdsli.ppt>.

Resources for
Drug-Facilitated Rape

The Resource Book materials relevant to this section are listed below:

- Volume II, Tab 17, “Drug-Facilitated Rape.”

Improving Your Agency: How to Get There

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Commitment 1 – List one thing you will do *personally* to incorporate what you have learned in this program:

Questions

1. What barriers do you anticipate?

2. How will you overcome them?

Commitment 2 – List one thing you will do in your *office* to incorporate what you have learned in this program:

Questions

1. What barriers do you anticipate?

2. How will you overcome them?

Commitment 3 – List one thing you will do for your *community* to incorporate what you have learned in this program:

Questions

1. What barriers do you anticipate?

2. How will you overcome them?

Resources for

Improving Your Agency: How to Get There

The Resource Book materials relevant to this section are listed below:

- Volume II, Tab 17, “Improving Your Agency, Interagency Cooperation and Working with the Community.”

Resources Book

This program includes a Resources Book, Volumes I and II. The Table of Contents for this Resources Book follows this page. As you have seen in the Program Agenda, in each unit there is a reference to the relevant section of the Resources Book.

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NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *THE NATIONAL PROSECUTION STANDARDS: ETHICS AND PROFESSIONALISM* (2nd ed. 1991).

Tab 2: Rape Myths: The Prosecutor’s Special Challenge

Lynn Hecht Schafran, *Barriers to Credibility: Understanding and Countering Rape Myths*, in UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT, Tab 2 (National Judicial Education Program 1994), *adapted from* Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S L. REV. 979 (1993).

Judge Richard T. Andrias, *Rape Myths: A Persistent Problem in Defining and Prosecuting Rape*, ABA CRIMINAL JUSTICE, Summer 1992, at 3.

Tab 3: Victim Impact

Overviews:

Lynn Hecht Schafran & Danielle Ben-Jehuda, *Rape Victims and Victim Impact*, in UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT, Unit I (National Judicial Education Program 1994).

Gail Abarbanel, LCSW, & Gloria Richman, LCSW, *The Rape Victim*, in CRISIS INTERVENTION BOOK 2: THE PRACTITIONER’S SOURCEBOOK FOR BRIEF THERAPY, at 1 (Howard J. Parad & Libbie G. Parad, eds., Family Service America, Milwaukee, WI, 1990).

CRIME VICTIMS TREATMENT CENTER, ST. LUKE'S-ROOSEVELT HOSPITAL CENTER, N.Y., COMMON PHYSICAL AND PSYCHOLOGICAL REACTIONS TO SEXUAL VIOLENCE (date unknown).

CRIME VICTIMS TREATMENT CENTER, ST. LUKE'S-ROOSEVELT HOSPITAL CENTER, N.Y., POST-TRAUMATIC STRESS DISORDER (date unknown)
(Summarizing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC CRITERIA AND STATISTIC MANUAL OF MENTAL DISORDERS (4th ed.) (date unknown)).

David Lisak, Ph.D., *The Neurobiology of Trauma*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000).

BOULDER COUNTY RAPE CRISIS TEAM, RAPE TRAUMA SYMPTOM RATING SCALE (date unknown).

Female Victims:

NATIONAL CENTER FOR VICTIMS OF CRIME, ARLINGTON, VA & CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION (1992).

Anne Seymour & Anna Whalley, *Sexual Assault*, in NATIONAL VICTIM ASSISTANCE ACADEMY TEXT, at 10-1 (Victims Assistance Legal Organization & Office for Victims of Crime, U.S. Dep't of Justice 2000).

Mark A. Whatley, *For Better or Worse: The Case of Marital Rape*, VIOLENCE AND VICTIMS, Spring 1993, at 29 (abstract).

Male Victims:

Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, AM. J. PSYCHIATRY, July 1980, at 806.

Tab 4: Cultural Competence and Victim Sensitivity

Overviews:

Joel Epstein & Stacia Langenbahn, *Outreach to Previously Underserved Populations*, in CRIMINAL JUSTICE AND COMMUNITY RESPONSE TO RAPE, at 66 (Office of Justice Programs, U.S. Dep't of Justice 1994).

Linda E. Ledray, *Working with Special Populations*, in SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE, at 79 (Office for Victims Crime, U.S. Dep't of Justice) (date unknown).

Women of Color:

Women of Color Resource Center, *Sexual Assault Resources for Women of Color* (visited March 2000)
<<http://www.coloredgirls.org/dirindex.html>>.

African-American Women:

KIRSTON L. ISGRO, SURVIVING: HOW SEXUAL ASSAULT SERVICE PROVIDERS CAN BETTER UNDERSTAND AND SERVE CULTURALLY DIVERSE POPULATIONS (Columbus Urban League Rape Prevention Program 1994).

Lynn Hecht Schafran, *Women of Color as Victims of Gender-Based Violence*, in WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE FOR WOMEN OF COLOR IN THE COURTS, Unit III (National Judicial Education Program 1998).

Disabled Women:

Nora J. Baladerian, *Table of Contents*, from INTERVIEWING SKILLS TO USE WITH ABUSE VICTIMS WHO HAVE DEVELOPMENTAL DISABILITIES, at v (Spectrum Institute 1998).

Elderly Women:

Kathleen Quinn, *Older Women: Hidden Sexual Abuse Victims*, COALITION COMMENTARY, Winter 1994, at 1.

Immigrant Women:

LESLYE ORLOFF & RACHEL LITTLE, OVERVIEW OF DOMESTIC VIOLENCE AND BATTERED IMMIGRANT ISSUES (Immigrant Women Program, NOW Legal Defense & Education Fund 1999).

MASSACHUSETTS DEP'T OF PUBLIC HEALTH, *Immigrant and Refugee Survivors*, in SEXUAL ASSAULT TRAINING MANUAL, at 13-1 (date unknown).

Jewish American Women:

Heather Robinson, *Overcoming the Taboo*, THE JEWISH WEEK, May 5, 2000 (page unknown).

Native American Women:

See Schafran, *supra* under African-American Women.

Asian Pacific American Women:

Jean Dietz, *Rape turns refugee women into the “silent sufferers,”* THE GLOBE, June 8, 1986 (page unknown).

Nilda Rimonte, *Pacific-Asian Survivors, in* LOS ANGELES COUNTY PROTOCOL, at 106 (date unknown) (abstract).*

Lesbians:

BROOKLYN WOMEN’S ANTI-RAPE EXCHANGE, *Lesbian Rape Survivors, in* THE BWARE TRAINING MANUAL, at 103 (date unknown) (abstract).*

* Article on file with the National Judicial Education Program.

Tab 5: Working with Victim Advocates

DONNA MEDLEY, GOVERNMENT-BASED AND COMMUNITY-BASED VICTIM ADVOCATES: ROLES AND RESPONSIBILITIES (date unknown), *adapted from* TEXAS COUNCIL AGAINST DOMESTIC VIOLENCE & THE BATTERED WOMEN'S JUSTICE PROJECT, COMMUNITY-BASED VICTIM ADVOCATES: ROLES AND RESPONSIBILITIES (date unknown).

Tab 6: Sexual Assault Forensic Examiners, SANE and Medical Evidence

Testimony of Dr. Ingrid Flores, *People v. Eaddy*, No. 4291/97 (N.Y. Crim. Ct. July 6, 1999).

Anatomical Charts, Medical Glossary and Acronyms:

Female Pelvic Organs (side view).

Diagram of Vaginal Area.

ANNE MARIE HABER, PARTIAL GLOSSARY OF FORENSIC TERMS (date unknown).

ANNE MARIE HABER, SOME TECHNICAL TERMS FOR ANATOMY, INJURY, AND FORENSIC EQUIPMENT & TECHNIQUES (2000).

NEW YORK PROSECUTORS TRAINING INSTITUTE, GLOSSARY OF MEDICAL TERMS (April 1999).

MARY D'ANDREA, DISTRICT ATTORNEY'S OFFICE-BRONX COUNTY, MEDICAL AND MENTAL HEALTH CENTER ABBREVIATIONS AND SYMBOLS.

SAFE and SANE:

LINDA E. LEDRAY, *Sane Program Model*, in SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE, at 7 (Office for Victims Crime, U.S. Dep't of Justice 1997).

LINDA E. LEDRAY, *SART: A Community Approach*, in SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE, at 13 (Office for Victims Crime, U.S. Dep't of Justice 1997).

LINDA E. LEDRAY, *Sane Program Operation*, in SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE, at 63 (Office for Victims Crime, U.S. Dep't of Justice 1997).

LINDA E. LEDRAY, *Clinical Skills Competency Checklist*, in *SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE*, at 175 (Office for Victims Crime, U.S. Dep't of Justice 1997).

LINDA E. LEDRAY, *Appendix J* (reprinting various forms), in *SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE*, at 203 (Office for Victims Crime, U.S. Dep't of Justice 1997).

Linda E. Ledray & Lee Barry, *SANE Expert and Factual Testimony*, *JOURNAL OF EMERGENCY NURSING*, June 1998, at 284 (abstract).

DONNA GAFFNEY, *DOCUMENTATION FOR SEXUAL ASSAULT EXAMINERS* (2000).

Colposcopy:

Leland C. Lenahan, et al., *Colposcopy in Evaluation of the Adult Sexual Assault Victim*, *AMERICAN JOURNAL OF EMERGENCY MEDICINE*, March 1998, at 183 (abstract).

Margaret J. McGregor, M.D., MHSc, et al., *Examination for sexual assault: Is the documentation of physical injury associated with the laying of charges? A retrospective cohort study*, *CANADIAN MEDICAL ASSOCIATION JOURNAL*, June 1999, at 1565.

Tab 7: Expert Witnesses

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Expert Testimony*, in *VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT WORKSHOP: THE PROSECUTION OF SEXUAL ASSAULT CASES*, at 107 (1999).

ROBERTA M. BALDINI, *FORENSIC SEROLOGY: DIRECT EXAMINATION* (1997).

Testimony of Carol Jenny, M.D., Director, Child Protection Team, Children's Hospital, Denver, Colorado, *People v. Garvin*, No. 91CR1007 (Colo. August 5, 1992).

CRIME VICTIMS TREATMENT CENTER, ST. LUKE'S-ROOSEVELT HOSPITAL CENTER, N.Y., USES OF EXPERT WITNESSES (date unknown).

Claudia J. Bayliff, *How An Expert Can Help You Support the Complainant and Prove Your Case More Effectively*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000).

Claudia J. Bayliff, *A Prosecutor's Checklist: Using A Psychological Expert in a Sexual Assault Case*, in UNDERSTANDING SEXUAL VIOLENCE:

PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000), *adapted from* ANNE MUNCH, THE PRACTICAL USE OF EXPERT WITNESSES IN CASES INVOLVING VIOLENCE AGAINST WOMEN, *presented at* the Fourth Annual STOP Violence Against Women Conference, Baton Rouge, LA (2000).

Claudia J. Bayliff, *Expert's Checklist: Guide to Courtroom Testimony in Sexual Assault Cases*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000), *adapted from* ANNE MUNCH, THE PRACTICAL USE OF EXPERT WITNESSES IN CASES INVOLVING VIOLENCE AGAINST WOMEN, *presented at* the Fourth Annual STOP Violence Against Women Conference, Baton Rouge, LA (2000).

Claudia J. Bayliff, *Tips on Working with a Medical Expert in a Sexual Assault Case*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000), *adapted from* Michael Weaver, *Optimizing Physician/Nurse Role in the Criminal Justice System*, in NATIONAL NON-STRANGER SEXUAL ASSAULT SYMPOSIUM PROCEEDINGS REPORT (Denver Sexual Assault Interagency Council 2000).

Michael Weaver, M.D., FACEP, *Optimizing Physician/Nurse Role in the Criminal Justice System*, in NATIONAL NON-STRANGER SEXUAL ASSAULT SYMPOSIUM PROCEEDINGS REPORT (Denver Sexual Assault Interagency Council 2000).

Laura E. Boeschen, et al., *Rape Trauma Experts in the Courtroom*, PSYCHOLOGY, PUBLIC POLICY AND LAW, Vol. 4, No. 1/2 (1998), at 414 (abstract).

Claudia J. Bayliff, *Expert Testimony in Sexual Assault Cases: Selected Case Law from Around the Country*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000).

Tab 8: Investigation Techniques

SUSAN MORLEY, TRAINING IN THE HANDLING OF SEX OFFENSE INVESTIGATIONS FOR THE NEW YORK POLICE DEPARTMENT (1997).

ANNE MUNCH, SEXUAL ASSAULT INVESTIGATION CHECKLIST (The Ending Violence Against Women Project) (date unknown).

HAROLD EISENGA, USING “PRETEXT” PHONE CALLS IN SEXUAL ASSAULT INVESTIGATIONS (date unknown). *See also* U.S. Dep’t of Justice materials under Drug-Facilitated Rape.

TRINKA PORRATA, INVESTIGATIVE CONSIDERATIONS WHEN DRUGS ARE
SUSPECTED IN SEXUAL ASSAULT CASES AND SAMPLE SEARCH WARRANT
(date unknown).

Michael Welner & Elizabeth Delfs, *The Forensic Panel* (visited October
2000) <<http://www.forensicpanel.com>>.

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AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Victim Interview*, in VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT WORKSHOP: THE PROSECUTION OF SEXUAL ASSAULT CASES, at 69 (1999).

Roberta M. Baldini, *Witness Interview*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000).

Amanda Konradi, *Understanding Rape Survivors' Preparation for Court*, VIOLENCE AGAINST WOMEN, March 1996, at 25 (abstract).

Amanda Konradi, *Too Little, Too Late: Prosecutors' Pre-Court Preparation of Rape Survivors*, 22 LAW AND SOCIAL INQUIRY 1 (1997).

PATRICIA POWERS, ADVOCACY OF VICTIMS' RIGHTS IN THE NEW MILLENNIUM: AN ERA OF COMMUNITIES (1999).

ROBERT T. JOHNSON, DISTRICT ATTORNEY'S OFFICE-BRONX COUNTY, N.Y., DOMESTIC AND SEXUAL VIOLENCE CASES: EVIDENCE COLLECTION, DOMESTIC VIOLENCE/SEXUAL ABUSE HISTORY AND EVALUATION CHECKLIST (date unknown).

Tab 10 Motion and Trial Practice

SEAN ROCHE, DISTRICT ATTORNEY'S OFFICE-BRONX COUNTY, N.Y., CHECKLIST/TRANSFER SHEET (date unknown).

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Pre-Trial Motions, in*
VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT WORKSHOP:
THE PROSECUTION OF SEXUAL ASSAULT CASES, at 75 (1999).

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Tough Cases, in*
VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT WORKSHOP:
THE PROSECUTION OF SEXUAL ASSAULT CASES, at 223 (1999).

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Trying the Case, in*
VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT
WORKSHOP: THE PROSECUTION OF SEXUAL ASSAULT CASES, at 203 (1999).

Tab 11 Vicarious Trauma

DONNA GAFFNEY, PH. D., ASSAULT ON THE SENSES AND THE PSYCHE: SECONDARY TRAUMATIZATION (2000).

Linda E. Ledray, *Maintaining a Healthy Ongoing Program*, in SEXUAL ASSAULT NURSE EXAMINER, DEVELOPMENT AND OPERATION GUIDE, at 127 (Office for Victims Crime, U.S. Department of Justice) (date unknown).

Anne K. Seymour, *Mental Health Needs: Stress Management*, in NATIONAL VICTIM ASSISTANCE ACADEMY TEXT, at 6.2-1 (U.S. Dep't of Justice 1999).

Tab 12 Voir Dire

LYNN HECHT SCHAFRAN, WHAT THE RESEARCH ABOUT RAPE JURORS TELLS US, (2000).

ROBERTA BALDINI & JUDGE LESLIE CROCKER SNYDER, VOIR DIRE AND SUMMATION: THE CRITICAL LINK (1999).

Julie A. Wright, *Using the Female Perspective in Prosecuting Rape Cases*, THE PROSECUTOR (Texas District & County Attorneys Association), January/February 1995, at 19.

RICHARD A. BROWN, DISTRICT ATTORNEY'S OFFICE-QUEENS COUNTY, N.Y., *Voir Dire in Sex Crimes Cases*, in PROSECUTOR'S MANUAL FOR SEX CRIMES, at 20 (1997).

ROBERTA M. BALDINI, ET AL., JURY SELECTION IN CASES INVOLVING GAY/LESBIAN VICTIMS: SUGGESTIONS FOR ASSISTANT DISTRICT ATTORNEYS (1995).

PATRICIA POWERS, STRATEGIC VOIR DIRE (1999).

SEX OFFENSE/DOMESTIC VIOLENCE SECTION, U.S. ATTORNEY'S OFFICE,
WASHINGTON, D.C., SAMPLE JURY QUESTIONNAIRES USED IN SEXUAL
ASSAULT CASES (1997).

Lynn Hecht Schafran & Danielle Ben-Jehuda, *Voir Dire and Jury
Instruction*, in UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL
RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT,
Unit IV (National Judicial Education Program 2000).

Tab 13 Sex Offenders, Sentencing and Sex Offender Treatment

Lynn Hecht Schafran & Danielle Ben-Jehuda, *Sex Offenders, Treatment and Sentencing*, in UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT, Unit III (National Judicial Education Program 2000).

Linda S. Grossman, et al., *Are Sex Offenders Treatable? A Research Overview*, PSYCHIATRIC SERVICES, March 1999, at 349.

David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, in LAW IN A THERAPUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, at 157 (Carolina Academic Press 1996).

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Effective Sentencing*, in VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT WORKSHOP: THE PROSECUTION OF SEXUAL ASSAULT CASES, at 245 (1999).

Tab 14 Cross-Examination

JAMES W. MCELHANEY, *Cross Examination*, 74 A.B.A.J. 117 (1988).

Roberta M. Baldini, *Cross-Examination: Impeachment with Prior Inconsistent Statement*, in UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (National Judicial Education Program 2000).

Tab 15 DNA

NATIONAL INSTITUTE OF JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA EVIDENCE (date unknown).

BARRY DUCEMAN, THREE “GIFTS” OF FORENSIC DNA TECHNOLOGY (Statewide Conference on the Investigation & Prosecution of Sexual Assault and Domestic Violence, Poughkeepsie, N.Y., September 1998).

PATRICIA LOFTUS, M.S.N., M.S.F., *CODIS: The Combined Deoxyribonucleic Acid Index System for DNA Typing*, THE CRIME VICTIMS REPORT, January/February 1999, at 6.

ARLENE KENT-WILKINSON, R.N., M.N., FORENSIC LISTSERVS.

MELISSA MOURGES, DISTRICT ATTORNEY'S OFFICE-NEW YORK COUNTY, N.Y., HYPOTHETICAL SEXUAL ASSAULT CASE (date unknown).

MELISSA MOURGES, DISTRICT ATTORNEY'S OFFICE-NEW YORK COUNTY, N.Y., SAMPLE QUESTIONS FOR A DNA EXPERT (date unknown).

MELISSA MOURGES, DISTRICT ATTORNEY'S OFFICE-NEW YORK COUNTY, N.Y., EVIDENCE FROM CITY OF NEW YORK, DEPARTMENT OF HEALTH, OFFICE OF CHIEF MEDICAL EXAMINER (1997).

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *DNA Expert*, in VIOLENCE AGAINST WOMEN ADVANCED SEXUAL ASSAULT WORKSHOP: THE PROSECUTION OF SEXUAL ASSAULT CASES, at 149 (1999).

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Overview of Services*, in AMERICAN PROSECUTORS RESEARCH INSTITUTE DNA LEGAL ASSISTANCE UNIT (2000).

Bill Dedman, *Warrant Seeks Rape Suspect Based Only on DNA*, N.Y. TIMES, October 7, 1999 (page unknown) (abstract).

Michael Welner & Elizabeth Delfs, *The Forensic Panel* (visited OCTOBER 2000) <<http://www.forensicpanel.com>>.

Tab 16 Drug-Facilitated Rape

Michael Welner & Elizabeth Delfs, *Rapist in a Glass: The Big Picture of the Rohypnol Wars*, 1 THE FORENSIC ECHO 11 (1997). *See also* Michael Welner & Elizabeth Delfs, *The Forensic Panel* (visited OCTOBER 2000) <<http://www.forensicpanel.com>>; *see also* enclosed flyer.

AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Table of Contents*, in THE PROSECUTION OF ROHYPNOL AND GHB RELATED SEXUAL ASSAULTS (date unknown).

U.S. DEPARTMENT OF JUSTICE, DRUG-FACILITATED RAPE: OVERVIEW AND INVESTIGATIVE CONSIDERATIONS (March 1998).

U.S. DEPARTMENT OF JUSTICE, GHB (GAMMA HYDROXYBUTYRATE) INFORMATION SHEET (1998).

HAROLD EISENGA, USING "PRETEXT" PHONE CALLS IN SEXUAL ASSAULT INVESTIGATIONS (date unknown).

U.S. DEPARTMENT OF JUSTICE, DRUG-FACILITATED RAPE DRUGS (date unknown) (abstract).

Tab 17 Improving Your Agency, Interagency Cooperation and Working with the Community

U.S. DEPARTMENT OF JUSTICE, *Prosecution, in* NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY, at 73 (1996).

NATIONAL CENTER FOR VICTIMS OF CRIME, *Prosecution as a Component of Victim-Centered Case Management*, in LOOKING BACK, MOVING FORWARD: GUIDEBOOK FOR COMMUNITIES RESPONDING TO SEXUAL ASSAULT AND A PROGRAM FOR COMMUNITIES RESPONDING TO SEXUAL ASSAULT, at VI-1 (1993).

Martha R. Burt, et al., Developing a Community System, in Taking Action: Mobilizing Your Community Against Rape, at 251 (1997) (unpublished manuscript, on file with the National Judicial Education Program).

Alexandra H. Walker, *Sexual Assault Protocol Summit*, in THE NORTH CAROLINA PROTOCOL DEVELOPMENT SUMMITS: A MONOGRAPH FOR THE STOP VIOLENCE AGAINST WOMEN GRANTS TECHNICAL ASSISTANCE PROJECT, at 25 (January 1998).