

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

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Understanding Sexual Violence
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Introduction To The Curriculum

This introductory section offers an overview of the curriculum and guidance to the program planning committee, program moderator, and members of the faculty. Instructions for planning, logistics, exercises, and ordering videos used in the program are provided throughout this Faculty Manual in conjunction with each unit. Detailed instructions including the substantive content are provided in the description of each unit.

Intended Audiences

This curriculum is designed primarily for prosecutors who handle felony sexual assault and rape cases. However, the audience should not be limited to those prosecutors. The information is also relevant for appellate prosecutors and for future sex crimes prosecutors, as well as those who conduct preliminary hearings or grand jury presentations, or who handle misdemeanor sexual assault cases. One veteran prosecutor with twenty years of experience told us that after attending this program he finally understood how to prosecute an acquaintance rape case. Another, who had been a prosecutor for only six weeks, said he was drinking in every word.

Curriculum Perspective

This curriculum focuses on nonstranger rape of adult female victims. It presents the latest social science research about victims, offenders and jury decisionmaking, as well as how to use expert witnesses, medical research, DNA, and information about Drug-Facilitated Rape.

This curriculum follows educational models based on research about effective adult learning techniques. Adult learners need to:

- relate new information to what they already know;
- reflect on the new information; and
- apply the new information to real problems they encounter in their work.

This curriculum seeks to help prosecutors “develop further their abilities related to decision making, analysis, and awareness of their own values”¹ in rape cases.

¹ Charles Claxton, *Curriculum Development in Judicial Education: A Development Model*, paper presented at the Advanced Leadership Training Program, Leadership in Judicial Education, Washington D.C. (August 26-29, 1993) at 4.

Case File: State v. Michael Cates

The curriculum uses a case file, *State v. Michael Cates* to explore the various issues presented in rape and sexual assault prosecutions. Print the case file before reading through the Faculty Manual. **The reader should refer to the case file while becoming familiar with the curriculum.** If you are reading this in hard copy, the case file is in Appendix 2 of the Faculty Manual. The case file is also available in PDF format on the VAWO website, at <http://www.vaw.umn.edu/FinalDocuments/usvpros.asp>. The case file is used throughout the four-day training.

Each unit of the curriculum builds on the previous unit's lessons. As participants work through the issues in the case, they gain a deeper appreciation of it and come to understand that the case is stronger than they may have first realized.

The major themes are repeated and reinforced as the curriculum moves from unit to unit. It is important for the faculty to refer to those lessons and focus on the links between various topics presented. For example: "In this unit, we will discuss the importance of re-creating the reality of the crime during the direct examination of the victim. Use what you have learned from the victim impact expert and from the lecture on expert witnesses in thinking about how to craft the direct examination questions."

Repeating and reinforcing these major themes requires that each faculty member be knowledgeable about the curriculum as a whole and be able to relate his or her unit to what came before and what will come after. **This is NOT a curriculum in which individual experts can drop in to present their set pieces and leave.**

Goals and Objectives

After completing this curriculum and the exercises included, participants will be able to:

1. Identify common societal myths and biases that may impugn the integrity of the trial process in rape cases.
2. Understand how these rape myths affect the perceived credibility of the victim, charging decisions, and juror attitudes.
3. Craft *voir dire* questions designed to elicit misconceptions about rape that could undermine the fairness of juror deliberations.
4. Identify the short and long-term psychological and physiological effects of rape on victims.
5. Understand the impact of the criminal justice system on adult victims of sexual assault.

6. Minimize victim retraumatization throughout the pre-indictment, trial and sentencing phases.
7. Understand the detrimental effect of delay on the victim in these cases.
8. Effectively interview a complainant to elicit details of the crime and minimize retraumatization.
9. Craft the complainant's direct examination to re-create the reality of the crime.
10. Be sensitive to the wide variety of possible cultural differences between the prosecutor and the complainant, the prosecutor and the jury, and the complainant and the jury in order to develop strategies to bridge these gaps.
11. Introduce and use expert testimony, understanding the limitations of that testimony.
12. Understand the importance of expert medical testimony even in a case where the victim did not appear to have extrinsic physical injuries.
13. Understand what a Sexual Assault Forensic Examiner does.
14. Understand the nonstranger rapist who does not fit the stereotypical view of who rapists are and what they look like.
15. Understand how to investigate and use a defendant's prior bad acts in a consent case.
16. Understand key components and limitations of effective sex offender treatment.
17. Apply the information learned in this curriculum when making decisions regarding charging the defendant, plea offers, and sentencing recommendations.
18. Promote the sensitive and informed handling of rape cases.
19. Work effectively with victim advocates.
20. Recognize, deal with and prevent vicarious trauma.
21. Understand DNA evidence and how to make it comprehensible to a jury.
22. Understand how to investigate and prosecute drug-facilitated rapes.
23. Apply the lessons learned during this program in their own offices and communities.

Curriculum Format

This curriculum comprises three parts:

- Part I. Faculty Manual
- Part II. Participant's Binder
- Part III. Resources Book, Volumes I and II

Part I, the Faculty Manual, explains in detail how to present the curriculum and the substantive content to be communicated. It is essential reading for everyone involved in planning and teaching this curriculum, including outside experts. It should be used in training prosecutor presenters and non-prosecutor faculty.

Part II, the Participant's Binder, contains all of the materials participants will need during the program: the case study, exercise directions and worksheets, report back forms, lecture outlines, checklists, hardcopy of the experts' slides for easy reference and evaluation instruments.

Part III, the Resources Book, Volumes I and II, contains reports, studies, articles, and excerpts that provide background on the substantive content of the curriculum and permit the reader to consider these subjects in greater depth than may be possible during the program.

The contents of Parts II and III, the Participant's Binder and the Resources Book, Volumes I and II, should be reproduced and provided to participants at the program.

Planning the Program

Prosecutors and prosecutor coordinators wishing to present the full curriculum need to plan carefully. The initial steps for planning this program are similar to those for any prosecutor education program.

Planning Committee

The first step is to convene a planning committee (the committee). If the state prosecutor coordinator is not the convenor, s/he should be included as a member of the committee. The other members should be prosecutors who are experienced trainers, as well as prosecutors who are knowledgeable about the subject and have tried sexual assault cases.

Beginning the Planning Process

The committee should read the Faculty Manual and Participant's Binder, view all the videotapes used during the program, and be familiar with the Resources Book, Volumes I and II. One objective of the committee should be to plan the program in light of local needs. The committee should consider such issues as:

- the nature of the audience for the program, including the prosecutors' level of experience;
- the key objectives of the program;
- adapting the curriculum to reflect local statutes and case law;
- the anticipated number of participants; and
- the time available, i.e., whether the program will be presented in one session or over a period of time.

Curriculum Faculty

The choice of program faculty is critical. The curriculum requires faculty with a wide variety of expertise, as described below. In choosing faculty, select people who will agree to be trained in presenting this curriculum. As stated earlier, this is not a curriculum in which individual faculty can drop in to present their set pieces and leave. Each faculty member's specific responsibilities are detailed on pages xiv-xvi.

Program Moderator

The program moderator acts as the "Master of Ceremonies" for the entire four-day program. The program moderator has primary responsibility for opening and closing the program and each unit, keeping the program running on time, referring participants to the relevant sections of the Participant's Binder and Resources Book, distributing and collecting daily evaluations and distributing Certificates of Completion and Continuing Legal Education Certificates. The program moderator must be willing and able to challenge his or her colleagues in a diplomatic and non-judgmental way, in order to keep the discussions focused on the key issues raised by the curriculum.

The program moderator can also serve as a faculty member and teach one or more of the units.

Prosecutor Presenters and Expert Faculty

The curriculum requires as faculty:

- prosecutors with extensive experience with adult sexual assault cases;
- a victim impact expert with extensive experience with adult sexual assault victims;
- a sex offender expert with extensive experience with sex offenders who victimize adults;
- a victim advocate with extensive experience with adult sexual assault cases;
- a Sexual Assault Forensic Examiner;
- an individual with expertise in cultural competence, who may be one of the experts listed above;
- a DNA expert; and
- an expert on drug-facilitated rape.

With respect to the units on DNA and drug-facilitated rape, the Laboratory Units of the Federal Bureau of Investigation provide skilled trainers from the Bureau's DNA and Forensic Toxicology Laboratories. Contact Dr. Joseph A. Di Zinno, Section Chief, Scientific Analysis Section, F.B.I. Laboratory, directly to arrange for presenters. His phone number is 202-324-4416. Call as far in advance of your program as possible.

Each faculty member must be both an expert in his or her field and a *skilled trainer*. The committee should involve these experts in the planning process as soon as they are identified and work with them throughout, so that they are aware of what is expected of them and what their role is in the context of the entire curriculum.

Expert Faculty Presenters

When non-prosecutor faculty are invited to speak, special issues arise. In order for their presentations to be instructive and acceptable to prosecutors, these presenters may need assistance in developing their materials and approach for a prosecution audience. The non-prosecutor presenter should understand the prosecutor's role and legal and ethical obligations. Prosecutors experienced in prosecutor education should work with these experts to prepare their presentations. They should act as "translators" who draw out the implications of the medical and social science for the prosecutors. The expert must link the non-legal information to the prosecutor's responsibilities in charging and prosecuting a case and explain how it can be applied. It is important that experts not speak in jargon or in abstractions. For example, the victim impact expert should not simply say that rape victims often suffer denial after the assault, but rather explain what "denial" means. The expert should explain how denial manifests itself and what that means for the trial process. For instance, a victim may not always cooperate in the trial process; she may miss appointments with the prosecutor or arrive late for court dates.

The prosecutor educators can confer credibility on the non-prosecutor presenters by introducing them in a way that stresses their expertise and legitimates the importance and relevance of the material in assisting the prosecutor to prosecute these cases.

This group of experts, referred to collectively below as expert faculty presenters are the content experts on particular subjects. They have responsibility for presenting one or more units. These faculty presenters may also serve as small-group facilitators whenever possible.

Small-Group Facilitators

The committee should select small-group facilitators, one for every six to eight prosecutors. The committee may wish to use the faculty in this role. They will already know the curriculum, therefore minimizing the necessity for additional training. This also avoids the problem of the faculty sitting together and talking during the program, which is disruptive and creates an unpleasant atmosphere. Again, be mindful that small-group facilitators must be knowledgeable about the subject, the curriculum, and be skilled

facilitators. The committee should strive to incorporate balance in faculty selection with respect to level of experience, sex, ethnicity, race, geography and jurisdictions.

Conduct faculty training on small-group facilitation whether you use the faculty presenters for this task or choose others. Facilitators must be completely familiar with the exercises in order to properly direct their groups.

Faculty Duties

Program Moderator

The program moderator is key. The prosecutor selected for that position should be knowledgeable about sexual assault cases, familiar with the curriculum, and a skilled facilitator.

Program Moderator's Duties

Before the program, the program moderator should:

- become completely familiar with the Faculty Manual, including the slides provided at the end of the Faculty Manual in the Appendices;
- review the Participant's Binder and the Resources Book;
- answer the questions in the Participant's Binder to become familiar with the exercises;
- watch the videos;
- review the relevant local statutes, rules, and leading cases;
- prepare opening and closing remarks;
- prepare faculty introductions; and
- participate in faculty training.

During the program the program moderator is responsible for:

- welcoming participants;
- introducing the program;
- explaining the Resources Book (see below);
- making certain the group adheres to the agenda;
- distributing each day's evaluation and ensuring that it is completed by day's end;
- introducing each unit of the program;
- introducing the faculty;
- making sure the discussion stays focused;
- managing the participants in such a way that no one dominates the discussions and that all of the prosecutors are encouraged to participate;
- closing each unit and suggesting future uses for the Resources Book;
- having participants complete their surveys, postcards, and evaluations;
- collecting the surveys, postcards, and evaluations;
- closing the program; and
- distributing Certificates of Completion and CLE Credit Forms.

Explaining the Resources Book:

At the start of each unit, the program moderator should write on a flip chart or overhead slide the relevant volume(s) and tab(s) references from the Resources Book. While introducing each unit of the program, refer to relevant materials in the Resources Book by indicating the volume and tabs where they can be located. Repeat this at the end of each unit.

Prosecutor Presenters' and Experts' Duties

Before the program the expert faculty presenters should:

- become completely familiar with the Faculty Manual unit(s) which the expert will be presenting and prepare his or her presentation, lecture and slides according to the instructions in the manual;
- review the complete Faculty Manual, including the slides provided at the end of the Faculty Manual in the Appendices, to understand how his or her unit(s) fit into the entire curriculum;
- review the Participant's Binder and segments of the Resources Book relevant to the expert faculty member's unit;
- answer the questions in the Participant's Binder to become familiar with the exercises;
- watch the videos relevant to their units;
- review the relevant local statutes, rules and leading cases;
- participate in faculty training;

During the program the expert faculty presenters are responsible for:

- facilitating discussion, as appropriate, during the units they teach;
- ensuring that certain participants do not dominate the discussion;
- responding to questions as they arise; and
- referring to the Resources Book whenever relevant and reminding participants to use it for future cases.

Small-Group Facilitators' Duties

Prior to the faculty training meeting the small-group facilitators should:

- become completely familiar with the Faculty Manual, including the slides provided at the end of the Faculty Manual in the Appendices;
- review the Participant's Binder and Resources Book;
- answer the questions in the Participant's Binder to familiarize themselves with the exercises;
- watch the videos; and
- review the relevant local statutes, rules and leading cases.

During the program, the small-group facilitators lead each of the small-group exercises included in the curriculum. For each exercise, the facilitator should:

- introduce him or herself and the other participants in the small group (for the first exercise only);
- give directions for the exercise;
- assign a reporter as per directions in the exercises;
- appoint one group member to keep track of the time for each exercise;
- facilitate discussion of the exercise;
- emphasize the interactive quality of the training so participants will be actively engaged and encouraged to participate in every aspect of the program;
- keep the group focused on the topic of the exercise;
- encourage different viewpoints to be discussed before the group decides on a response;
- elicit responses from the quieter members of the group; and
- ensure that certain members of the group do not dominate the discussion.

Schedule Faculty Workshop

A critical element in the planning process is faculty training. To ensure that each faculty member is thoroughly familiar with the curriculum generally and the sections he or she will teach, it is essential to conduct one or more faculty workshops. It is important for the faculty to meet in-person to work out the presentations, discuss supplementing the curriculum with local legal material, and arrange the necessary program logistics. Local experts may have additional materials or suggestions to incorporate. During this workshop, the faculty will act as both presenter and audience. This ensures that the presenters understand what they are required to present, the flow of the program, and that they are familiar with the overall curriculum.

The committee should set a faculty workshop agenda. This agenda should reflect the order of the overall curriculum agenda. This will show the full faculty how the various components of the program build upon each other. Allow two days for the faculty workshop.

Send the Faculty Manual, Participant's Binder, Resources Book, Volumes I and II, and faculty workshop agenda to faculty well in advance of the workshop.

The prosecutor coordinator or whoever is planning the program should provide the necessary audio-visual equipment to show the slides, videotapes or overhead slides for each unit presented. This will give the faculty a clear sense of how these materials are incorporated into the program. Arrange to have lunch delivered to the meeting to save time.

Curriculum Length

Rape and sexual assault are subjects to which a great deal of time could and should be devoted. This curriculum requires four days to present in its entirety. Although the program is long, participants in the pilot programs reported that each unit was important and recommended that nothing be cut. Therefore, we encourage you to plan your program with this in mind.

If it is not possible to devote the full four days to the curriculum in one session, it can also be presented as a series of two or four parts. Keep in mind that each unit builds on what was covered in the prior units and these critical lessons will be lost if too much time elapses between sessions. Therefore, present the sessions in close succession.

Curriculum Program Agenda

The suggested agenda for the full four-day program is on the following pages.

Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases

SUGGESTED FOUR-DAY AGENDA

Day I:

8:00-8:30 a.m.	Registration
8:30-9:00 a.m.	Welcome/Participant Self-Introductions
9:00-9:15 a.m.	Introduction, Overview of Program & Resources Book and Faculty Introductions
9:15-10:15 a.m.	Opening Your Case File – <i>State v. Michael Cates</i>: Case Evaluation and Ethical Considerations
10:15-10:30 a.m.	Break

VICTIMS: WHAT PROSECUTORS NEED TO KNOW

10:30-12:00 p.m.	Victim Impact – Overview
12:00-1:00 p.m.	Lunch
1:00-2:00 p.m.	The Neurobiology of Trauma: Implications for Rape Victims
2:00-2:15 p.m.	Victim Impact and Interviewing: Who Must the Complainant Tell
2:15-3:30 p.m.	Interviews: Working With the Victim to Pull the Case Together
3:30-3:45 p.m.	Break

3:45-4:45 p.m.	Enhancing the Prosecutor/Victim Partnership: Building Trust
4:45-4:50 p.m.	Stretch Break
4:50-5:35 p.m.	Exercise: Getting the Real Deal

CONCLUSION DAY I

Day II:

8:30-9:00 a.m.	Victim Advocate/Prosecutor Relationship
9:00-9:30 a.m.	Trial Preparation and Practice: Part I: Educating and Supporting the Complainant 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
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?
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
2:45-3:00 p.m.	Break
3:00-4:00 p.m.	State-Specific Law: Rape Shield Law, State-of-Mind/Experts
4:00-4:15 p.m.	Break
4:15-5:15 p.m.	How to Keep on Keepin' On: Overcoming Vicarious Trauma

CONCLUSION DAY II

Day III:

OFFENDERS: WHAT PROSECUTORS NEED TO KNOW

8:30-9:30 a.m.	Myths and Realities - Overview
9:30-9:35 a.m.	Stretch Break
9:35-10:35 a.m.	Serial Offending and Prior Bad Acts
10:35-10:45 a.m.	Break
10:45-11:15 a.m.	State-Specific Law Section: Prior Bad Acts
11:15-11:20 a.m.	Stretch Break
11:20-12:30 p.m.	Pleas and Sentencing
12:30-1:30 p.m.	Lunch
1:30-2:30 p.m.	Cross-Examination of a Defendant in a Consent Case
2:30-2:35 p.m.	Stretch Break
2:35-3:35 p.m.	<i>Voir Dire</i>: Overview
3:35-3:45 p.m.	Break
3:45-4:45 p.m.	<i>Voir Dire</i>: Exercises

CONCLUSION DAY III

Day IV:

8:30-10:00 a.m.	DNA Primer
10:00-10:15 a.m.	Break
10:15-12:15 p.m.	Drug-Facilitated Rape
12:15-1:15 p.m.	Lunch
1:15-2:15 p.m.	Improving Your Agency: How to Get There
2:15-2:30 p.m.	Closing Remarks, Certificates of Completion & C.L.E. Credit Forms

CONCLUSION OF PROGRAM

The Agenda

The suggested agenda on the previous pages includes all of the units in the order in which they should be presented during the full four-day program. If four days is more time than can be devoted in one session, the committee can plan to present the complete program in two, two-day sessions or four daylong sessions. However, as noted above, it is important to present these sessions close in time to each other to benefit from the fact that each unit of the curriculum builds on those that preceded it.

Breaks and Lunches

The suggested four-day agenda contained in this Faculty Manual recommends short breaks and one-hour lunch breaks for each training day. The committee should be mindful of your audience's needs and schedule breaks and lunches with which the prosecutors in your jurisdiction are comfortable. Adult learning principles recommend that adult learners need to break at least every 90 minutes.

State Specific Materials

This curriculum is presented as a "generic model" to be adapted to reflect each state's statutes and case law. State statutes on rape and sexual assault may differ widely. Some do not use the word "rape." Some require consent "freely and voluntarily given." One statute provides a lesser penalty for the rapist of a "social companion." Some still maintain the marital rape exemption. Your state statutes and case law will affect many issues discussed in this curriculum. The curriculum includes hypotheticals. It may be necessary to alter these in order to be relevant in your state and give participants the opportunity to apply your state law. The exercises should be useful in training your prosecutors to apply your state law to an issue that may be presented in a local case. You may want to obtain rape statistics for your state, as well as information about local resources for rape victims, victim right's legislation and sex offender treatment options. Locate local experts in these fields to participate in your program and present each unit.

Visual Materials

Research has shown that adult learning is more effective and is retained for a longer period when the information presented is conveyed both visually and orally. Therefore, we urge faculty to present information through slides or overheads and videotapes, as well as by lecture and discussion.

Slides

Almost every unit of the curriculum includes slides related to the expert presentations or the exercises. These slides are provided in the Appendices at the back of this Faculty Manual. In each unit of the curriculum, the faculty is referred to the Appendix which contains the slides for that unit. The committee can reproduce the slides in either Power Point format, for those who have access to Power Point on their computers and an LCD

projector, or as overhead slides on acetate transparencies. In either case, the slides can also be printed in notebook format, three to a page, to be placed in the Participant's Binders. These slides can be accessed on the VAWO website at:

<http://www.vaw.umn.edu/FinalDocuments/usvpros.asp>

The website contains all of the slides used in the curriculum.

Videotapes

The curriculum uses several videotape presentations:

- *Someone You Know;*
- *State of Art Forensic Examination of the Adult Sexual Assault Victim;*
- *Sexual Assault Care: Sexual Assault the Health Care Response;*
- *Celebrate Living;*
- *Bob and Lisa Mock Jury Deliberation;* and
- *The "Undetected" Rapist.*

If it is not possible to find a prosecutor from your jurisdiction or an F.B.I. Forensic Toxicologist able to teach the unit on drug-facilitated rape, substitute the videotape *The Prosecution of Rohypnol and GHB Related Sexual Assaults* for a live presentation.

This Faculty Manual provides a description of each videotape and how to use it in the unit where it is to be shown. Ordering information is also provided on pages xxv and xxvi. Be mindful of the time it will take to order and receive the tapes. You will want them in your possession well before the planning committee meeting.

These videos are important because they visually communicate concepts that cannot be conveyed in the abstract. For example, *State of Art Forensic Examination of the Adult Sexual Assault Victim* graphically presents a sexual assault examination. The videotape will enable prosecutors to understand the medical procedures a rape victim must endure, and be able to describe this procedure to the jury. It can also help prosecutors to understand aspects of a sexual assault examination that a defense attorney might challenge during the medical witness' cross-examination.

Videotape Ordering Information

“Someone You Know,” contact:

The Phoenix Learning Group, Inc.
2349 Chaffee Drive
St. Louis, MO 63146
Phone: (314) 569-0211
Fax: (314) 569-2834
E-mail: phoenix@world.att
Cost: \$125.00

“State of Art Forensic Examination of the Adult Sexual Assault Victim,” contact:

Dr. Randall L. Brown, Medical Director
STOP Rape Crisis Center
District Attorney’s Office
233 St. Ferdinand Street
Baton Rouge, LA 70802
Phone: (225) 389-3456
Fax: (225) 389-5685
Email: jwood@ebrda.org
No Cost

“Sexual Assault Care: Sexual Assault the Health Care Response,” contact:

Institute of Legal Medicine, University of Bern
Buhlstrasse, 20,
CH-3012 Bern
SWITZERLAND
Phone: (41)(31) 631-8412
Fax: (41)(31) 631-3833
E-mail: dna@irm.unibe.ch
Request the medical version #ISBN-3-95-21547-0-9.
Cost: approximately \$90.00 US

“Celebrate Living,” a 4-minute motivational video, contact:

United Way of America
701 N. Fairfax Street
Alexandria, VA. 22314-2045
Phone: (703) 836-7100
Fax: (703) 683-7840
Web site: www.unitedway.org
Cost: \$15.00

“The ‘Undetected’ Rapist,” contact:

National Judicial Education Program
395 Hudson Street, 5th Floor
New York, NY 10014
Phone: (212) 925-6635
Fax: (212) 226-1066
E-mail: njep@nowldef.org
Cost: \$15.00

“Bob and Lisa” Mock Jury Deliberation, contact:

Stephen J. Paterson
President
Jury Sciences, LLC
609 Deep Valley Drive, Suite 200
Rolling Hills Estates, CA 90274
Phone: (310) 544-8773
Fax: (310) 544-8794
E-mail: sjp@vindim.com
Cost: \$50.00

“The Prosecution of Rohypnol and GHB Related Sexual Assaults,” contact:

Tamara Kitchen
Administrative Assistant
American Prosecutors Research Institute
Violence Against Women Program
99 Canal Center Plaza
Alexandria VA 22314
Phone: (703) 519-1659
Fax: (703) 836-3195
E-mail: tamara.kitchen@ndaa-apri.org
Cost: \$30.00 (video and manual)

Program Logistics

The logistics involved in presenting *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases* depend on the number of days chosen for the program, the number of participants, the size of the room and the number of faculty, facilitators and other presenters. This section contains suggestions about the program logistics which can be tailored depending on the type of program you plan to present.

Group Size

The National Judicial Education Program has presented this four-day program to groups of approximately 25 to 30 prosecutors. The prosecutors were divided into small groups of six to eight, with a trained faculty member assigned to each group to facilitate the small-group discussions and exercises.

If the planning committee decides to present the program to a larger group, we strongly recommend training additional prosecutors to act as small-group facilitators.

Room Size and Room Set-Up

The curriculum uses many slides and videotapes. Although copies of all of the slides should be reproduced for the Participant's Binder, it is important that participants do not need to strain to see the visuals. The room should be small enough so that all participants can easily see the slide screen and television monitor. You may need more than one monitor to provide a good view for all participants. The room should also be large enough to allow all participants space to open their Participant's Binders on their tables, allowing them to read the questions posed for each exercise and take notes.

Table Set-Up

The room should be set up so that participants are sitting at round tables. Seat participants so that they can see the presenter without having to turn their chairs. When the National Judicial Education Program presents the curriculum, we use large round tables and seat participants in a semi-circle facing forward. This gives them room to spread out their materials and they do not have to turn to see the slide screen or television monitor. The participants at each table then become the small group for the discussions. A small-group facilitator is assigned to each table.

Lighting

Participants need to be able to see the slide screen and television monitors without any glare. They also need to be able to see the program moderator and presenters. If lights are dimmed to enable participants to see the slides and videos, arrange for some spot lighting, or turn the lights back up at the end of each unit, so that the moderator or other presenters are not standing in the dark.

Other Necessary Materials

You will need to have one postage-paid postcard for each participant. The postcards will be distributed on Day IV, during the “Improving Your Agency: How to Get There” segment of the program.

Audio-Visual and Other Equipment Requirements

You will need a variety of audio-visual equipment to present this curriculum. The equipment needed depends on the room size, the number of participants and whether you select a Power Point or overhead format. Following are the basic requirements, which can be tailored to meet the needs of your particular program:

- **Television Monitors and VHS Video Player:** At least one television monitor, preferably the largest one available, and a VHS video player are required to show the videos. We recommend that you use two television monitors, if possible, to make it easier for participants to view the screen.
- **Slide screen:** Whether you select Power Point slides or overheads you will need a screen on which to show them. Place the screen and projector far enough away from each other to avoid image distortion.
- **LCD Projector:** If you select the Power Point format you will need an LCD projector, which works with a computer to display the Power Point slides.
- **Overhead Projector:** If you select the overhead format you will need an overhead projector to show the slides. Remember that the overheads must be printed on acetate transparencies.
- **Podium and Speaker’s Microphone:** The program moderator should have a podium and a microphone. A hand-held microphone is awkward for the moderator to use, so we suggest that you use either a lapel microphone or one attached to the podium.
- **Faculty Lapel Microphones:** A lapel microphone is recommended for faculty so that they are not tied to the podium.
- **Head Table with Microphones:** If you are using a panel of presenters, we recommend that you set up a head table with separate microphones, if possible.
- **Other Microphones:** Depending on the size of the group, you may want to have a few hand-held wireless microphones to use when participants are speaking so that everyone can hear the comments made.
- **Flip Charts, White Board or Overhead Projector:** Some presenters like to record comments or suggestions on a flip chart, a white board or an overhead

transparency. If your planning committee decides to use any of these visual aids, be sure you have an adequate supply of non-toxic pens as well.

Terminology

The curriculum focuses on adult female victims because they constitute the majority of rape victims. Therefore, victims, complaining witnesses, and complainants are referred to as “she” and defendants as “he.” There are references to male victims in the forensic examination videotape and the Resources Book.

For ease of reference, the terms victim, complaining witness, and complainant are used interchangeably.

Sensitivity to the Subject Matter

Rape is a highly charged subject. This is particularly true of nonstranger rape. All faculty should be prepared for the possibility of intense, emotional and possibly angry responses from participants, or even a hostile refusal to participate at all. It is therefore particularly important to direct non-prosecutor faculty to avoid being personal or confrontational with participants.

Given the high incidence of sex crimes against children and adults, it is likely that some participants or members of their families have been victims of sexual abuse or assault. This program may be difficult for them. It is of utmost importance that no experience of sexual abuse be minimized or trivialized.

Be careful about permitting questions about the personal experiences of prosecutors in the audience. Done carefully, however, this can be a powerful teaching tool. For example, a criminal law professor at the University of Kentucky begins teaching about rape by asking each student to state what he or she does on a daily basis to protect himself or herself from rape. She begins with the men and gets no response apart from silence and nervous laughter. When she asks the women, every one of them has something to say. The men are always amazed to learn that fear of rape is a daily concern for their female colleagues. If you use such a technique, it should be no more personal than this.

No faculty member should make jokes about the subject matter. These jokes may be intended as a well-meant effort to diffuse nervous tension in the room, but they work to trivialize the issue.

Concluding The Program

Closing Remarks

In addition to completing each unit with a formal closing, at the end of the program the program moderator should take a few minutes to make closing remarks.

At the end of these remarks the moderator should ask participants to complete and submit their evaluations, as described below. Allow at least five minutes writing time. Once all evaluations are in, the moderator presents each participant with a certificate of completion and, if the program has been approved in advance by your state's bar association, a Continuing Legal Education (C.L.E.) credit form.

Evaluation Instrument

For the pilot programs of this curriculum, the National Judicial Education Program developed a highly detailed evaluation instrument. The aim is to evaluate each unit's faculty presentations and written materials. We have found it a good practice to provide the evaluation for each day's program on that morning and ask participants to fill it in at the end of each unit. Be sure to allow time at the end of the day for participants to complete the day's evaluation and turn it in. This allows participants to make their comments immediately. The complete evaluation instrument is included at Appendix 1 of this Faculty Manual.

Continuing Legal Education

Check with your state's bar association about how your organization can become an approved C.L.E. provider. Allow at least eight weeks from the start of the C.L.E. provider application process to the time you schedule this program.

Certificate of Completion

After all of the evaluations are turned in, the program moderator presents each participant with a Certificate of Completion, included at Appendix 21 of this Faculty Manual.

Feedback About Your Program

The National Judicial Education Program is interested in receiving ongoing feedback about this curriculum and would appreciate it if prosecutor coordinators would send evaluation summaries and other feedback to:

Lynn Hecht Schafran, Esq.
Director
National Judicial Education Program
395 Hudson Street, 5th Floor
New York, NY 10014
(212) 925-6635
(212) 226-1066 – FAX
njep@nowldef.org
www.njep.org

This will enable us to learn more about how the curriculum is received and guide us as we develop additional material for prosecutors and others in the legal system.

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?

**UNDERSTANDING SEXUAL VIOLENCE:
PROSECUTING ADULT RAPE AND SEXUAL
ASSAULT CASES**

**FACULTY MANUAL
PROGRAM CONTENT**

UNDERSTANDING SEXUAL VIOLENCE: **PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES**

FACULTY MANUAL

This part of the Faculty Manual provides detailed instructions for each unit of the curriculum, including format, content, visuals, exercises and worksheets.

REGISTRATION

Staff Needed: Administrative Support Personnel to register participants

Time Allotted: Day I: 8:00 to 8:30 a.m.
30 minutes

Overview:

Distribute the “Family Feud” Survey on page 95 to participants. The data from this survey will be used in the unit titled “How to Keep on Keepin’ On” at the end of Day II.

WELCOME/PARTICIPANTS’ SELF-INTRODUCTIONS

Faculty Needed: Program Moderator

Time Allotted: Day I: 8:30 a.m. to 9:00 a.m.
30 minutes

Visuals for Unit: Slide is in Appendix 3, Welcome.

Special Instructions for the Faculty:

- Ask participants to briefly state:
 - *their names,*

- *agencies,*
- *type of jurisdiction (e.g., rural, urban),*
- *whether the agency is a specialized unit or handles a variety of cases, and*
- *the number of sex crimes cases they have tried.*

INTRODUCTION, OVERVIEW OF PROGRAM & RESOURCES BOOK AND FACULTY INTRODUCTIONS

Faculty Needed: Program Moderator

Time Allotted: Day I: 9:00 to 9:15 a.m.
15 minutes

Special Instructions for the Faculty:

- Ask participants to complete the survey distributed at registration and return it to the program moderator;
- Present the program overview below;
- Present the Resources Book overview below;
- Introduce prosecutor presenter for opening exercise.

Program Overview:

Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases is an intensive four-day program. The curriculum explores the complex issues arising from a rape case. This curriculum is NOT a typical trial advocacy course. It explores victim impact, current social science research, the latest evidence-collection techniques, medical research, and information about sex offenders to inform and assist in the prosecution of rape and sexual assault cases.

The participants are presented with a case file on day one and, over the course of the curriculum, work through the issues, myths, and stereotypes that it presents. Each unit builds on the information taught in the prior unit. In learning about the complaining witness, the incident, and the issues surrounding the attack, the participants build their case file.

This curriculum uses a combination of teaching techniques: lectures; video presentations; interactive exercises; and large and small group discussions.

Resources Book Overview:

Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases includes a Resources Book, Volumes I and II, of studies, articles, checklists, transcripts, websites, and article abstracts which provide the reader with in-depth information about the issues explored during the four-day program. This Resources Book is a valuable asset for any prosecutor's office. If the reader is presented with a difficult issue just before a trial or at a pre-trial hearing, the Resources Book may provide a number of

relevant articles on the issue. During each unit, we will direct you to the relevant materials in your Resources Book.

OPENING YOUR CASE FILE – *STATE V. MICHAEL CATES*: CASE EVALUATION AND ETHICAL CONSIDERATIONS

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Small Group Exercise

Time Allotted: Day I: 9:15 to 10:15 a.m.
1 hour

Content Overview – Case Evaluation:

This exercise is intended to simulate an ADA’s first encounter with and assessment of a case. The goal is to generate a wide-ranging discussion about the special challenges that rape myths and the use of alcohol pose for prosecuting these cases, and the importance of interdisciplinary cooperation and building bridges to the other professionals (e.g., police, victim advocates, Sexual Assault Forensic Examiners) who help make a case. The case study introduced here, *State v. Michael Cates*, will be used and developed throughout the program.

This Faculty Manual Contains:

- *State v. Michael Cates* case file. This is in Appendix 2 as a PDF file.
- “*State v. Michael Cates* Case File” Exercise Directions and Worksheet, page 6.

Visuals for Unit:

- Slides are in Appendix 4, *State v. Michael Cates*: Case Evaluation and Ethical Considerations.

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.

Special Instructions for the Faculty:

- “Opening Your Case File – Strengths and Weaknesses”
 - **Directions for Exercise:** Prosecutor presenter divides the room in half and assigns one half to argue the strengths of the case and the other half to argue the weaknesses as these issues would be evaluated in assessing whether to file

charges. Allow 10 minutes for participants to discuss the strengths/weaknesses at their tables.

- **Query the two sides:** Based on what you know now, what are the strengths/weaknesses of this case? What rape myths will you have to counter? Who will help you make your case? Allow 20 minutes for the report back.
- **Key Point:** There are no good or bad facts; there are only facts. Some help your case, others present challenges to overcome. Prosecutors must learn to deal with all of the facts of a case.

- **Subjects for Discussion:**

- Not rape if they knew each other
- She voluntarily went with him to dorm room so not rape
- He employed a ruse to get her to his room
- Complainant invited sexual activity by sitting on defendant's bed and kissing him
- She was drinking with him so not rape
- She claims struggle and he is significantly bigger than she is
- Delayed report so not rape

[Police report shows date of occurrence as two months prior to report.]

- No physical injuries so not rape
- How will you make your case?
- What do you expect the defense to argue?
- Who will help you make your case?
 - police
 - investigator
 - victim advocate
 - Sexual Assault Forensic Examiner
 - expert witness—psychology
 - who else?
- If the group views the case through a victim-blaming lens, the prosecutor presenter must point this out to the group. The prosecutor presenter should shift the focus onto the defendant's conduct. Over the course of the four-day program, reinforce the importance of examining the defendant's conduct and placing the blame on the defendant.

Content Overview – Ethical Considerations:

The “Ethical Considerations” exercise is intended to provoke discussion about the ethical responsibilities required of each prosecutor in balancing the commitment to enforce the law, protect the community, do justice, represent the state, and prove each element of each offense charged against the defendant beyond a reasonable doubt.

The Faculty Manual Contains:

- “Ethical Considerations” Exercise Directions and Worksheet on page 7.

Visuals for Unit:

- Slides are in Appendix 4, *State v. Michael Cates*: Case Evaluation and Ethical Considerations.

The Participant's Binder Contains:

- “Ethical Considerations” Exercise Directions and Worksheet, at Tab 3, page 3-17.

Special Instructions for the Faculty:

- **Explain “Ethical Considerations” Exercise** – Give participants five minutes to write, then ask:
 - What does prosecutor’s discretion mean to you?
 - What ethical issues do you consider when exercising it?
 - Given the facts of this case, what is your ethical responsibility under the Prosecutors’ Code of Conduct, which requires that a prosecutor must prove each element of each crime charged against the defendant “beyond a reasonable doubt?”
 - What does “beyond a reasonable doubt” mean?
 - Is it an objective or subjective standard?
- **Refer the Participants to the Resources Book:** 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 **Break**

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.

STRENGTHS	WEAKNESSES

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?

VICTIMS: WHAT PROSECUTORS NEED TO KNOW

VICTIM IMPACT – OVERVIEW

Faculty Needed: Victim Impact Expert

Format for Unit: Lectures, Video and Group Discussion

Time Allotted: Day I: 10:30 a.m. to 12:00 p.m.
1 hour, 30 minutes

Content Overview – Victim Impact:

This “Victim Impact – Overview” section is divided into three parts:

- *Part I: Victim’s Behavior During the Assault* focuses on the victim’s response during an assault. The victim impact expert will explain the flight, fight or freeze responses, covering issues such as frozen fright, dissociation and automatic and strategic non-resistance
- *Part II: Videotape “Someone You Know”* graphically depicts the real-life emotional responses of victims of non-stranger rape. Show “Someone You Know” Video, then debrief the participants.
- *Part III: Sequelae of Rape Victimization* focuses on the victim’s post-assault response including Acute Stress Disorder, Rape-Related Posttraumatic Stress Disorder, reasons for delayed reporting and their implications for the interview and trial processes, and how prosecutors can support victims, minimize re-traumatization and develop maximum cooperation and information. When a prosecutor understands a victim’s behavior, it allows the prosecutor to be more supportive, thereby gaining the victim’s trust and cooperation.

This Faculty Manual Contains:

- Directions for showing the video on page 9.
- Video Synopsis of “Someone You Know” on page 11.
- Faculty Cheat Sheet for video discussion on page 12.

Visuals for Unit: Slides are in Appendix 5, Victim Impact.

The Participant’s Binder Contains:

- Expert’s Slides for Parts I and III are in Tab 4, page 4-2.

Special Instructions for the Faculty:

- **Faculty Introductions:** Program moderator introduces the victim impact expert and explains the three segments of this unit: overview, application and exercises.
- **Lecture Outline/Visuals:** The 53 slides in Appendix 3 provide the outline of the substantive content for sections 1 and 3. The expert should use these visuals as the outline of the presentation.
- **“Someone You Know” Video and Debriefing:** The expert shows the first twenty minutes of the video “Someone You Know,” then debriefs participants on their reactions. This video brings home the damage of nonstranger rape and its very long-term duration.

Note that the accounts you will see in this video are somewhat atypical in that some of these victims suffered serious physical injury and/or weapons were used in the attack. Most rape victims do not suffer physical injury and generally weapons are not used. Nonetheless, this is the best video currently available on the impact of nonstranger rape. You can point out to participants that the video is atypical in this one respect.

“Someone You Know” is an intense video that has a strong effect on many viewers. After you stop the video, leave a moment or two of silence to allow it to sink in and let participants collect their thoughts before turning on the lights and beginning the discussion.

It is important to allow time for discussion after the video presentation. We have presented this video with and without discussion and found that a discussion much improved the understanding of the issues. For example, the first victim in the video married a year and a half after the rape. She still reports flashbacks, difficulty with her sexual relationship with her husband, and suicidal thoughts and actions. Nevertheless, several judges in a program that did not allow time for discussion said at lunch that they felt the fact that she was able to marry lessened the impact of the trauma. By airing this in discussion, the judges understood more clearly that the marriage was a desperate attempt at normalcy.

In case certain key questions are not asked during the discussion, use the “Cheat Sheet” that follows on page 12 and make the points listed.

The video “Someone You Know” can be
ordered from :

Phoenix Learning Group, Inc.
2349 Chaffee Drive
St. Louis, MO 63146
Phone: (314) 569-0211
Fax: (314) 569-2834
Email: phoenix@world.att
Cost: \$125.00

- **Refer the Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 3, “Victim Impact.”

12:00-1:00 **Lunch**

VIDEO SYNOPSIS

“Someone You Know”

The video begins with a voice-over reenactment and printout of the transcript of an actual 911 call. It opens with the female victim screaming that someone is trying to break into her home and continues with her on the line to the police as the man breaks into her home and rapes her. The male narrator of the film points out that most women fear stranger rape, but that “*Someone You Know*” poses a greater threat, as revealed in the 1985 statistics on reported and unreported stranger and nonstranger rape, which he recites.

This is followed by interviews with 7 women – 5 in their 20s, one about 30, one 50; 6 white, 1 black – who were raped by nonstrangers: a long-term ex-boyfriend, dates, a friend’s brother, and a gang of college students. The women describe the horror of the experience and its indelible impact on their lives. These rapes happened between one and ten years before the film was made, and the women are still traumatized. They have nightmares, flashbacks, great difficulty in trusting any man, constant fears of rape and other symptoms of Rape-Related Posttraumatic Stress Disorder.

The scenes with the rape victims are inter-cut with commentary by the director of the Rape Treatment Center at Santa Monica-UCLA Medical Center and a leading academic researcher on campus rape. These experts explain that, contrary to common misperceptions, rape by someone you know is not simply about “bad sex,” but rather a horrible violation in which women feel totally powerless and often fear for their lives.

Stopping the Film: Part I of the film does not have a formal end, but the themes clearly switch at this point. Stop the film after approximately 20 minutes (after Gail Abarbanel, Director of the Rape Treatment Center at Santa Monica-UCLA Medical Center, talks about how striking it is that every rape victim she has seen believed she was confronting death).

FACULTY CHEAT SHEET
“Someone You Know” Videotape: Discussion

If prosecutors in the audience do not raise the following questions about this video, the expert should make the points below:

Victim Who Married:

The first woman in the film got married a year and a half after the rape. If she was so traumatized, how could she get married? Does that mean she wasn't really so upset?

Duration of Posttraumatic Stress Disorder:

One of the women in the film said the rape had happened ten years ago and she is still terrified. Is such a long duration of Posttraumatic Stress Disorder unusual?

Level of Violence/Use of Weapons:

You said before the film began that the stories in the film were atypical in that they involved a lot more violence and weapons than is usual. Is the reason these women are so traumatized the fact that they were beaten up and threatened with guns or other weapons?

THE NEUROBIOLOGY OF TRAUMA: IMPLICATIONS FOR RAPE VICTIMS

Faculty Needed: Victim Impact Expert

Format for Unit: Lecture

Time Allotted: Day I: 1:00 to 2:00 p.m.
 1 hour

Content Overview – Neurobiology of Trauma:

New brain research demonstrates that traumatic memories are stored and retrieved in different ways than non-traumatic memories, with significant implications for victims' ability to recall and recount.

Visuals for Unit:

- Slides are in Appendix 6, Neurobiology of Trauma. These visuals provide the outline of the substantive content of the expert's presentation.

The Participant's Binder Contains:

- "Neurobiology of Trauma" Slides at Tab 5, page 5-2.

Special Instructions for the Faculty:

- **Lecture Outline/Visuals:** The visuals provide the outline of the substantive content of this section. The expert should use these visuals as the outline of their presentation.
- **Refer the Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 3, "Victim Impact."

VICTIM IMPACT AND INTERVIEWING: WHO MUST THE COMPLAINANT TELL

- Faculty Needed:** Victim Impact Expert
- Format for Unit:** Plenary Exercise
- Time Allotted:** Day I: 2:00 to 2:15 p.m.
15 minutes

Content Overview – Who Must the Complainant Tell:

Once a person discloses a sexual assault, she or he must give a detailed account of the incident to many people (e.g., friends, family members, police, medical personnel, crime Victim Advocates and, finally, you). This exercise presents a typical chronology in which a victim must relate this highly personal information to dozens of people in the course of a prosecution.

This Faculty Manual Contains:

- A Faculty Cheat Sheet for this exercise is on page 16.

Special Instructions for the Faculty:

- **Explain “Who Must the Complainant Tell” Exercise:**
The prosecutor presenter states the following and, as she speaks to the participants asks the requisite number of them to stand. At the end of the list everyone in the room should be standing. This gives everyone in the room a picture of how many strangers a complaining witness must tell.
 - A sexual assault victim first tells a friend or family member (1) who encourages her to call the police.
 - The victim then tells a dispatcher (2) who sends a uniformed officer to respond.
 - She tells the first officer (3) what happened, and if the officer requests assistance from a supervisor she will have to tell the story again. (4)
 - The victim is then taken by ambulance to a hospital. While in the ambulance she has to tell the EMS personnel what happened. (5)
 - When she arrives at the hospital the victim then tells the clerk or triage nurse what happened. (6)
 - A physician or nurse (7) next interviews the victim; a rape crisis counselor (8) might be present for support.

- The preliminary report is sent to investigations and the detective assigned to the case will contact the victim for a follow-up interview. (9)
- The detective arranges for an interview with the prosecutor (10).
- At this time a Victim Advocate may be assigned. (11)
- Fast forwarding to the trial and skipping the preliminary hearing or Grand Jury, the victim will have to again tell her story in a courtroom in the presence of a judge (12) a prosecutor (13) a defense attorney (14) the defendant (15) a court reporter (16) the jury (17-28) the court officers (29-31) and anyone who happens into the courtroom.

These are only some of the people the victim will tell about this traumatic experience. Given that the victim must describe her experience to so many people in such different situations, it is understandable that inconsistencies often arise.

FACULTY CHEAT SHEET

STATE V. MICHAEL CATES

Who Must the Complainant Tell

After the demonstration part of the exercise there will be approximately ten minutes left to question participants about its implications. Here are suggested questions for the Prosecutor Presenter to choose from.

1. Do you expect the complaining witness to relate the attack in the same way each time the facts are retold?
2. Why or why not?
3. What problems arise from a complaining witness having to describe the attack so often?
4. What can you do to avoid a complaining witness having to retell the event countless times?
5. If the complaining witness tells inconsistent versions of the attack, how do you deal with the inconsistencies?
6. When do you deal with them during the proceedings?
7. During the *voir dire*, will you ask the *venire* anything relating to possible inconsistent statements? If so, what?
8. What will you say during your opening statement?

INTERVIEWS: WORKING WITH THE VICTIM TO PULL THE CASE TOGETHER

Faculty Needed: Prosecutor Presenter(s)
Victim Impact Expert
Victim Advocate

Format for Unit: Group Discussion and Lecture

Time Allotted: Day I: 2:15 to 3:30 p.m.
1 hour, 15 minutes

Content Overview – Working with the Victim to Pull the Case Together:

This unit's focus is on the value of eliciting the complaining witness' detailed recollection of the assault (e.g., how she felt during and after; tactile memories of room, floor, etc.) for use at trial. This is especially important in a frozen fright case to allow the jury to understand the victim's state of mind during the incident. This unit continues to build on what participants have already learned from the case file. What questions would participants ask of complainant in the *Cates* case?

Visuals for Unit: Slides are in Appendix 7, Interviewing the Victim.

The Participant's Binder Contains:

- The outline "Working with the Victim to Pull the Case Together" is in Tab 6, page 6-2.

Special Instructions for the Faculty:

- **Explain the goals of the interview:**
 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.
- **Explain the group discussion:** Before beginning the lecture portion of this unit, the presenter should ask participants how they would prepare for the interview with Amanda Brown. Write the responses on a flip chart. Discuss the points below if not mentioned by the participants.

- **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.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 9, “Witness Preparation.”

Content Overview – Tensions In the Interviewing Process:

These interviews are difficult in that the complainant may be emotionally vulnerable, displacing her anger onto the prosecutor. The prosecutor may be facing the statutory deadline in which to get the information needed to present to a Grand Jury or in a preliminary hearing, in order to get an indictment.

This section explores how a prosecutor can overcome these tensions, in order to maximize the information obtained while minimizing retraumatization. The three faculty needed for this segment address three aspects of this challenge as follows:

- *Prosecutor Presenter:* “What You Need to Elicit”
- *Victim Impact Expert:* “How to Accomplish This While Minimizing Retraumatization”
- *Victim Advocate:* “How to Get What You Need”

Caveat:

Tailor this section to reflect your jurisdiction’s procedures. This section is now designed to reflect the needs of jurisdictions dealing with grand jury or preliminary hearing time constraints.

In some jurisdictions, prosecutors do not interview the complainant before charging a case, but rely on the police investigation. This is a potentially problematic practice, in that much can be learned from the complainant regarding what happened during the incident. After interviewing a complainant a prosecutor may decide that different or

additional charges should be lodged against the defendant. If this program is presented in a jurisdiction where the prosecutor does not interview the complainant before charging the case there should be a discussion about such a practice.

Special Instructions for the Faculty – Lecture: Key Points For Conducting 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 where the parties have any acquaintance with each other, ask the victim “*how*” she knows the defendant. Simply asking “*if*” a victim knows a defendant may produce a “*no*” 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?

TENSIONS IN THE INITIAL INTERVIEW

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Exercise and Plenary Discussion

Content Overview – Tensions in the Initial Interview:

A prosecutor must elicit sufficient information before the statutory deadline for a preliminary hearing or Grand Jury presentation to make out a *prima facie* showing of every element of every crime charged. Often a complainant's psychological state and negative experience with the criminal justice system make it difficult to elicit this information. This segment uses hypotheticals presenting the complaining witness in three different emotional states to provide prosecutors with ideas for maximizing the information gathered in the initial interview while minimizing retraumatization.

This Faculty Manual Contains:

- “Tensions in the Initial Interview” Exercise Directions and Worksheet on page 23.

Visuals for Unit: Slides are in Appendix 7, Interviewing the Victim.

The Participant's Binder Contains:

- “Tensions in the Initial Interview” Exercise Directions and Worksheet at Tab 6, page 6-5.

Special Instructions for the Faculty:

- **Explain “Tensions in the Initial Interview” Exercise:**
Three hypotheticals on the complaining witness' possible response during the initial interview.
 - **Directions for Exercise:** The worksheet that follows presents three scenarios respecting the way Amanda Brown might behave during her initial interview with the prosecutor. For each, consider how you will elicit the information you need while minimizing retraumatization. Allow 10 minutes to discuss the three hypotheticals with your tablemates. Expert leads a plenary discussion for the remaining 20 minutes.

If the discussion leader notices that one person or group is more vocal than the others, ask that person or group select another person or group to respond, or ask who has not spoken yet. It is a good practice to avoid allowing one person or group to dominate the discussion.

- **Key Points For Faculty:**
 - Ask participants if anyone has dealt with victims in similar emotional states?
 - What did you do?
 - If not, what would you do?

- If no response from participants, have victim impact expert explain the best way to maximize interviewing while minimizing retraumatization.
- Stress multidisciplinary teamwork with Victim Advocate and possibly others.
- Important to ask victim and Victim Advocate about victim's prior experience in the system to determine whether this is a factor in her reticence/resistance.

- **Issues to review:**

- shock/Acute Stress Disorder/R-RPTSD Symptoms
- inability or unwillingness to recount aspects of the incident
- prevent revictimizing the victim
- statutory time limits for preliminary hearing & Grand Jury

3:30 – 3:45 *Break*

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?

ENHANCING THE PROSECUTOR/VICTIM PARTNERSHIP: BUILDING TRUST

Faculty Needed: Prosecutor

Format for Unit: Small Group Exercise and Plenary Discussion

Time Allotted: Day I: 3:45 to 4:45 p.m.
1 hour

Content Overview – Enhancing the Prosecutor/Victim Partnership:

This unit focuses on identifying and bridging the differences between prosecutors’ and victims’ backgrounds (e.g., race, class, age, gender, education). We will discuss how these differences can affect prosecutors’ and victims’ interactions, becoming a barrier to effective prosecution, and share strategies to overcome these barriers and build trust.

This Faculty Manual Contains:

- “Building Trust with Amanda Brown” Exercise Directions and Worksheet at page 28.
- “Building Trust with Diverse Victims” Exercise Directions and Worksheet at page 29.
- “Building Trust with Diverse Victims” Faculty Cheat Sheet at page 30.

Visuals for Unit: Slides are in Appendix 8, Enhancing the Prosecutor/Victim Partnership: Building Trust.

The Participant’s Binder Contains:

- “Building Trust with Amanda Brown” Exercise Directions and Worksheet, at Tab 6, page 6-10.
- “Building Trust with Diverse Victims” Exercise Directions and Worksheet, at Tab 6, page 6-11.

Special Instructions for the Faculty:

- *Explain Exercise: “Building Trust with Amanda Brown” (15 minutes)*

Using what participants have learned from the case file State v. Michael Cates,

and the additional facts about Complaining Witness Amanda Brown revealed on

the worksheet for this exercise, address the issues of:

- *how the complainant may be different from you;*

- *what challenges you anticipate in building bridges to the complainant; and*
 - *what strategies you would employ in overcoming these challenges.*
- **Directions for Exercise:** Allow five minutes for participants to jot down their answers on the worksheet and discuss their answers with their tablemates preparatory to a report back. The reporter will be the person at the table whose last name is closest to the letter L, who was not a reporter for earlier exercises. Allow 10 minutes for the report back.
- *Explain Exercise: “Building Trust with Diverse Victims” (45 minutes)*

The second part of this exercise is devoted to expanding the discussion to address challenges and strategies generally. It consists of a table discussion and a report back based on three hypotheticals.

 - *Table Discussion: Have the participants discuss these hypotheticals at their tables for 15 minutes. Participants should call on their prior experiences and brainstorm regarding how they would overcome challenges in the three hypotheticals presented. What strategies would they use to build trust with these three victims?*
 - **Report Back:** The participants may have experience in diverse communities and therefore have good practical strategies that they employ in overcoming challenges to building trust. Use this report back to elicit participants’ strategies. The reporter (see directions above) from each table reports. No repeats — each reporter adds new ideas. Prosecutor presenter recaps and invites contributions from other faculty. Group Discussion. Allow 30 minutes for this group discussion.
- **Discussion Tips and Key Points**
 - Stress sharing good strategies in overcoming challenges.
 - In any group of prosecutors, but especially in a group that is predominantly white, it is important to address prejudices and pre-existing biases, real and imagined. Generally, a white person addressing these issues is not seen as having a particular agenda, whereas a person of color is viewed through a particular lens. Additionally, like members of a group “hear” each other more easily. It is easier for police officers to discuss difficult matters with other police officers, judges to talk to judges, and men to discuss violence against women with other men.

- Address the power imbalance. Many complainants are intimidated by the prosecutor because of the difference in education, class, sex or simply because the prosecutor represents the state or is viewed as all-powerful. An example of how to acknowledge this power imbalance is to admit that you don't know what it is like to live in the victim's skin. Indicate that you are relying on her to help you learn what happened so that you can develop the case together.
- Cultural competence is not only about the differences between the prosecutor and the complainant. The prosecutor must be alert to differences between him/herself, and the complainant and the jury that may affect the case.
- What is culture?
- Cultural competence is not just about race and ethnicity. It includes class, sexual orientation, age, disability, religion, etc.
- Why cultural competence will make you a better prosecutor.
- **Direct participants' attention to the many types of communities about which there is specific information in the Resources Book** (e.g., elderly, lesbian, African-Americans). Encourage participants to obtain the materials on the mentally disabled, for which there is an order form, so that this material will be available when needed.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 4, "Cultural Competence and Victim Sensitivity."

4:45 – 4:50 **Stretch Break**

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.

FACULTY CHEAT SHEET

***ENHANCING THE PROSECUTOR/VICTIM PARTNERSHIP:
BUILDING TRUST***

Building Trust with Diverse Victims

If during the report back participants are unable to think of any strategies to overcome potential problems, the prosecutor presenter may use the points below to start the discussion.

Respect is the key to building trust in each of these hypotheticals.

Keep in mind difficulties prosecutors may encounter with the jury and any fears the victim may have about being “judged by a jury.”

Deaf Victim

1. Ask the victim’s friend or a family member to assist in the initial contact with the complainant.
2. Ask the victim what method of communication she prefers to use.
3. Ask the victim how you can contact her.
4. Ask if she has a TTY.
5. Ask if she reads English.
- 6a. Determine if she is comfortable discussing the incident in the presence of the friend or family member once you have established a method of communication and before asking about the incident.
- 6b. If she is not comfortable proceeding in the presence of a friend or family member, make arrangements to communicate with her through an interpreter.
7. Ask her to stop you at any time to ask questions or to explain a concept she does not understand.
8. Explain that you may stop her to ask for clarification.

Lesbian Victim

1. Ask if the victim has a support system.
2. Ask if she has any non-legal concerns, such as being “outed.”
3. Always tell the truth.
4. Never guarantee a particular outcome.
5. Explain that you cannot present the case without her cooperation and you will do the best you can.
6. Ask about her experience with the arresting officer and with the hospital staff.

Uneducated Victim

1. Use simple language, but be careful not to talk down to her.
2. Reassure the victim that you welcome all of her questions.
3. Explain that if she thinks of questions when she gets home you will be available to answer them.
4. Ask her to stop you if she does not understand something.
5. Ask her about what frightens her about the criminal justice system.
6. Explain where in the criminal process the case is each time you meet with her.
7. Support the victim; do not make her feel deficient.
8. Explain that she is a partner in the presentation of the case.

EXERCISE: GETTING THE REAL DEAL

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Small Group Exercise

Time Allotted: Day I: 4:50 to 5:35 p.m.
45 minutes

Content Overview – Getting the Real Deal:

Complaining witnesses are often reluctant to reveal facts that would cast them in a poor light, but prosecutors must have this information to avoid being blindsided at trial. This exercise explores techniques to elicit these important (though unfavorable) facts from the complaining witness, while building rapport.

This Faculty Manual Contains:

- “*State v. Michael Cates* Getting the Real Deal” Exercise Rules for Faculty Only, page 29.
- “Getting the Real Deal” Participants’ Exercise Directions and Worksheet, page 31.
- “Getting the Real Deal” Exercise, a handout for participant playing the complaining witness, page 32.
- “The Full Story” Handout for all participants, page 33.
- “*State v. Michael Cates*” Faculty Cheat Sheet, page 35.

The Participant’s Binder Contains:

- “Getting the Real Deal” Exercise Directions and Worksheet at Tab 7, page 7-7.

Special Instructions for the Faculty:

- **Explain “Getting the Real Deal” Exercise:** Interviewing Role Play.
In this table exercise one participant plays the complaining witness and is given a list of four negative, undisclosed facts that the prosecutor must elicit to fully understand the case. Each complaining witness is given one of these facts to focus on. The complaining witness leaves the room for five minutes while participants develop a questioning strategy. Then the complaining witness returns and the group questions him or her for ten minutes. This is followed by a fifteen-minute report back and group discussion about whether the tables elicited the undisclosed facts and the effectiveness of the interviewing. Next, each participant is given “The Full Story” handout and there is a fifteen-minute discussion about how these new facts will affect their trial strategy.

After this exercise, participants receive “The Full Story,” which provides more detail than the case file.

FACULTY ONLY: RULES FOR GETTING THE REAL DEAL EXERCISE
STATE v. MICHAEL CATES

Getting the Real Deal Exercise

Directions: At each table the prosecutor whose last name begins with the letter M or the letter closest to it plays the complaining witness in *State v. Michael Cates*. She is very reluctant to disclose anything beyond what is already known from the case file and initial interview. However, there are four important undisclosed facts about the rape that the prosecutors must elicit. The prosecutor presenter assigns one of these undisclosed facts to the complaining witness at each table.

Each complaining witness leaves the table for 5 minutes while the other prosecutors caucus to discuss their interviewing strategies and develop a set of questions. The prosecutor to the immediate left of the prosecutor playing the complaining witness uses these and other questions to conduct the interview for 10 minutes.

Listed below are facts that for a variety of reasons have not yet been disclosed in our model case. They are unpleasant facts, or facts that the complainant believes will hurt her credibility or hurt the case if she tells. *If the complainant is asked a direct or effectively probing question about any of these facts she must respond. Otherwise, make the interlocutor work for the information.* After 15 minutes, the prosecutor presenter 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 facts 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.

The Undisclosed Facts

1. You and the defendant were smoking pot before the rape. You are afraid that the prosecutor will believe that you are a bad person because you engaged in an illegal activity. Further, you are afraid that you will be arrested and prosecuted if you reveal this to the prosecutor.
2. You and the defendant drank rum and cokes. You did not tell the prosecutor that you actually drank two and one half drinks in fairly quick succession. You were drunk, but aware of what was happening around you.
3. You did not tell the prosecutor that the defendant drove you home after the incident. You did not tell because you did not think it was important. It happened after the incident. Further, you think that no one will ever know this.

4. You called the defendant the next day. A woman answered the phone. You only left your name and phone number and no other message.

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.

HANDOUT FOR PARTICIPANT PLAYING THE COMPLAINING WITNESS ONLY
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 in *State v. Michael Cates*, who is very reluctant to disclose anything beyond what is already known from the case file and initial interview. The prosecutor presenter will assign one undisclosed fact to each complaining witness.

The complaining witnesses leave their table for 5 minutes while the other prosecutors caucus to discuss their interviewing strategies and develop a set of questions. The prosecutor to the immediate left of the prosecutor playing the complaining witness uses these and other questions to conduct the interview for 10 minutes.

Listed below are facts that for a variety of reasons you have not yet disclosed in our model case. They are unpleasant facts, or facts that you believe will hurt your credibility or hurt the case if you tell. *If you, as the complainant, are asked a direct or effectively probing question about any of these facts you must respond. Otherwise, make your interlocutor work for the information.*

Listed below are the four undisclosed facts. After 15 minutes, the prosecutor presenter will ask the complaining witness at each table to tell whether the question was able to elicit the assigned fact and how he or she did it, and will put the facts on a flip chart. The faculty will then comment on effective interviewing techniques. The complaining witness should also be asked how the questioner did and whether any of the questions felt unnecessarily insensitive or inappropriate.

The Undisclosed Facts

1. You and the defendant were smoking pot before the rape. You are afraid the prosecutor will believe you are a bad person because you engaged in an illegal activity. Further, you are afraid you will be arrested and prosecuted if you reveal this to the prosecutor.
2. You and the defendant drank rum and cokes. You did not tell the prosecutor that you actually drank two and one half drinks in fairly quick succession. You were drunk, but aware of what was happening around you.
3. You did not tell the prosecutor that the defendant drove you home after the incident. You did not tell because you did not think it was important. It happened after the incident. Further, you think that no one will ever know this.

4. You called the defendant the next day. A woman answered the phone. You only left your name and phone number and no other message.

HANDOUT TO BE GIVEN TO ALL PARTICIPANTS
STATE v. MICHAEL CATES

The Full Story

On or about Dec. 15, 1999, both the Complaining Witness, Amanda Brown, and the Defendant, Michael Cates, who are members of their school's drama club, were at a rehearsal. The rehearsal ended at about 10:30 p.m.. Cates, who was friendly with Ms. Brown, offered to drive her home. He said that it would be safer than taking public transportation. Amanda Brown accepted the ride. She had known Michael Cates for about a year. He was a polite, well-mannered young man. She had a little crush on him. Amanda Brown got into Cates' car. Cates looked at the dashboard and said he needed to get gas. He then said he needed to get his gas credit card from his room. He asked her to come up to his dorm room, which she did.

Cates took off his coat and asked her to do the same. She thought this was odd, but did not want to be rude. Ms. Brown took off her coat. She said that she needed to get home or her parents would worry. Then Cates offered her an alcoholic beverage, i.e., rum and coke. They both drank. Ms. Brown mentioned leaving again, but Cates assured her that they would leave in a minute. She eventually drank two rum and cokes. Both Amanda Brown and Cates smoked a joint. Ms. Brown had smoked pot on two prior occasions. Ms. Brown and Cates were sitting on the bed in his dorm room. They began making out. Cates put his hands on Amanda Brown's breasts and tried to unclasp her bra. Ms. Brown told Cates to stop. She struggled with Cates. Cates said, "You know you want it, that's why you are here." He pulled her sweater over her head. Cates pushed Amanda Brown down onto the bed and got on top of her. She repeatedly told him to stop and said, "Why are you doing this? I want you to stop. I am serious, stop." As Ms. Brown struggled with Cates, she broke a fingernail to the quick. Amanda Brown then noticed that Cates' demeanor changed. He looked angry and she thought he would explode with rage. Cates pushed up her skirt and removed her underwear. As he pulled down her underwear, the watch that he wore dragged across Ms. Brown's upper thigh and caused an abrasion. He held her arms above her head and put his knees between her legs, forcing them apart. He touched her vagina. He then inserted his penis into her vagina. Amanda Brown cried.

When Cates was finished he got off of Ms. Brown. He got dressed. Ms. Brown put her clothes on. She did not say anything. He then drove her home.

The next day, when Amanda Brown finally woke up, she was bewildered and angry about what Michael Cates had done to her. She called his home to confront him. A woman answered the telephone. She told Ms. Brown that Cates was not home, but she would take a message. Ms. Brown left her name and phone number.

Ten days after the incident, Amanda Brown went to her own doctor, who has known her all of her life. She wanted to make sure that Cates did not give her any STDs. Ms. Brown did not tell the doctor she was raped. The doctor found no physical injury or disease, but noted that Ms. Brown's depressed demeanor was very different from prior visits when she was lively and engaged.

1. Defendant persuaded Ms. Brown to go to his room under a ruse. [intent]
1. The parties knew each other.

Over the next few months, Amanda Brown experienced depression, lack of interest in life and mood swings. She slept for long periods of time, seldom left her room, missed classes and dropped out of the drama club. Her grades slipped, and she gained weight.

About two months after the incident, Amanda Brown had an argument with a close friend who was attempting to get her to come out of her room and attend a concert. During the argument, Ms. Brown blurted out that she'd been raped by Michael Cates, and that was why she did not want to go out. The friend urged Ms. Brown to report the incident. Ms. Brown called the police and a uniform officer took the initial report from her. Amanda Brown then spoke with a Special Victims Squad Detective.

Amanda Brown is a 19-year-old college sophomore. She won an academic scholarship to the university she and the defendant attended. Before the rape she maintained a 4.0 GPA. She and the defendant were both members of the drama club. Ms. Brown is 5'1" tall and weighed 105 pounds at the time of the attack.

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.

Michael Cates is a 20-year-old white college junior. He is from a middle class working family. They own a one-family suburban home. He is an average student. The defendant is 6'2", muscular and weighs 195 pounds.

- | | |
|---|--|
| 2. The defendant mixed the drinks; they were very strong. [intent] | 2. Ms. Brown went to defendant's dorm room "voluntarily." |
| 3. Ms. Brown is articulate. | 3. Ms. Brown sat on defendant's bed. |
| 4. Ms. Brown resisted both verbally and physically. | 4. They were kissing before the rape. |
| 5. Injury to fingernail and thigh. | 5. They smoked pot. |
| 6. The defendant's statements, "You know you want it, that's why you're here." [intent] | 6. Ms. Brown drank rum and cokes with the defendant. |
| 7. Ms. Brown's demeanor before and after the attack. | 7. Defendant drove Ms. Brown home. |
| 8. Outcry witness. | 8. Ms. Brown called Defendant's home and left her name and phone number. |
| 9. Outcry was unplanned. | 9. No finding of genital injury. |
| | 10. Delayed outcry. |

Facts

Challenging Facts

Special Instructions for Faculty:

Day I ends here. Be sure that participants have completed and turned in their daily evaluations.

CONCLUSION DAY I

VICTIM ADVOCATE/PROSECUTOR RELATIONSHIP

- Faculty Needed:** Victim Advocate
- Format for Unit:** Lecture and Discussion
- Time Allotted:** Day II: 8:30 to 9:00 a.m.
30 minutes

Content Overview – Victim Advocate/ Prosecutor Relationship:

This unit explores how working effectively with victim advocates within and outside of the D.A.’s agency can help you make your case. A victim who feels emotionally supported by the prosecutor and victim advocate will be a stronger witness, thereby making your case stronger.

This Faculty Manual Contains:

- “Victim Advocate/ Prosecutor Relationship (Lecture Outline),” page 42. It should be used in the victim advocate’s presentation.
- “Sample Victim Advocate Disclosure Form,” page 43.

The Participant’s Binder Contains:

- “Victim Advocate’s Outline” at Tab 7, page 7-2.
- “Sample Victim Advocate Disclosure Form” at Tab 7, page 7-3.

Special Instructions for the Faculty

- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 5, “Working With Victim Advocates.”

Victim Advocate/Prosecutor Relationship (Lecture 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)

Date

TRIAL PREPARATION AND PRACTICE
PART I: EDUCATING AND SUPPORTING THE COMPLAINANT

Faculty Needed: Prosecutor Presenter(s)
 Victim Advocate

Format for Unit: Lecture and Discussion

Time Allotted: Day II: 9:00 to 9:30 a.m.
 30 minutes

Content Overview – Preparing the Complainant for Trial:

Rape cases are stronger and the likelihood of conviction is higher if the complainant is made to feel an ally or partner in the process, with full support from the prosecutor's office and other agencies involved in the case. The first part of this unit explores a victim-focused trial preparation procedure that can enhance the complainant's ability to provide the prosecutor with detailed information and testify effectively. Some of the topics covered are:

- walking complainant through the trial process
- dealing with continuances
- affect and anger while testifying

The second part of this unit briefly explores the prosecutor's trial preparation.

The Participant's Binder Contains:

- The outline for this unit is at Tab 7, page 7-6.

Special Instructions for the Faculty– Lecture Outline:

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.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 9, “Witness Preparation.”

TRIAL PREPARATION AND PRACTICE

PART II: THINKING ABOUT TRIAL

Special Instructions for the Faculty – Lecture Outline:

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.

9:30-9:45 **Break**

**DIRECT EXAMINATION OF THE COMPLAINANT:
RECREATING THE REALITY OF THE CRIME**

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Lecture

Time Allotted: Day II: 9:45 to 10:45 a.m.
1 hour

Content Overview – How to Recreate the Crime and Victim’s Feelings for the Jury:

This unit focuses on goals for direct examination. 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.

Visuals for Unit: Slides are in Appendix 9, Direct Examination.

The Participant’s Binder Contains:

- The outline for this unit at Tab 7, page 7-10.
- Relevant slides at Tab 7, page 7-14.

Special Instructions for the Faculty – Lecture:

- **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.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume I, Tab 9, “Witness Preparation.”

10:45-10:55 **Break**

WHAT DO SEXUAL ASSAULT FORENSIC EXAMINERS DO, AND WHAT CAN THEY DO FOR YOU?

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

Format for Unit: Lecture, video presentation and plenary discussion.

Time Allotted: Day II: 10:55 a.m. to 12:40 p.m.
45 minutes

Content Overview – S.A.F.E.s: Their Role and What They Can Do for Your Case:

Medical professionals specially trained to handle sexual assault cases can be critically important in presenting and explaining the physical evidence, or lack thereof, at trials. This unit of the curriculum covers medical terminology, the forensic examination including colposcopy, how to use this information at trial and how to get a S.A.F.E. program in your community. There are four parts to this unit:

Part I – Sexual Assault Forensic Examiner Overview.

- A. Lecture on the following topics:
 - 1.Role of S.A.F.E.
 - 2.Medical Terminology
 - 3.Human Sexual Response
 - 4.Colposcopy Slides
- B. Plenary Discussion
 - 1. When is it too late for an exam?
 - 2. Is finding nothing and having to turn that information over too dangerous?
 - 3. If there are no findings of physical injury to the complaining witness, how do you deal with this issue?
 - 4. What myths does this raise?
 - 5. At what point in the trial would you address this?
 - 6. What *voir dire* questions would you ask?
 - 7. What could you say in your opening?
 - 8. Would you address this in your direct examination? How?

Part II – Videos: Forensic Examinations.

- A. “State of Art Forensic Examination of the Adult Sexual Assault Victim” shows the forensic examination of a female victim;
- B. An excerpt from “Sexual Assault Care: Sexual Assault the Health Care Response” shows the forensic examination of a male victim.
- C. Debrief the audience

Part III – Colposcope Slides.

Part IV – Bringing a S.A.F.E. program to your community.

This Faculty Manual Contains:

- “Introduction to the Sexual Assault Forensic Examiner Role,” a text outline to follow the visual presentation, on page 56.
- “Amanda Brown’s Medical History” in Appendix 11.

Visuals for Unit: Slides are in Appendix 10, Sexual Assault Forensic Examiners.

The Participant’s Binder Contains:

- Related slides at Tab 8, page 8-2.
- Outline for unit at Tab 8, page 8-14.
- “Amanda Brown’s Medical History” at Tab 8, page 8-19.

Special Instructions for the Faculty:

- **Content Outline/Visuals:** The 34 visuals provide an outline for the Identification of Sexual Assault Trauma portion of this unit. The expert’s presentation should use these visuals as the outline of this portion of the presentation. These slides follow the text outline, “Introduction to the Sexual Assault Examiner Role.” This outline discusses the S.A.F.E.’s role, education and training, how to evaluate the competency of S.A.F.E.s, and where S.A.F.E. programs can be located.
- **Explain “Amanda Brown’s Medical History”:** Ask participants to read this medical history on their own and think about the difference between this medical history taken by a trained Sexual Assault Examiner and a medical history taken by an Emergency Department physician with no special training.
- **Directions for showing the forensic examination videos:** Explain that the purpose of showing the video is not to train prosecutors to perform a forensic exam, but to enable them to understand what an examination is like in order to describe it to a jury and defend against defense attacks on the conduct of the examination and the chain of evidence.

The female victim in the first video sustained injuries other than the rape itself. This is atypical in that most victims present in the emergency room without bruises, lacerations or other physical injuries. Also note that sexual assault evidence collection kits vary from state to state.

Two videos are shown during this presentation: the first, “State of Art Forensic Examination of the Adult Sexual Assault Victim” depicts a forensic examination of a female victim. Because the purpose of showing this tape is to provide a clear understanding of what a sexual assault evidence collection examination is like, show only the portions of the tape depicting the examination. Begin the tape at “Step 1” or about four minutes into the tape. Show the next 14 minutes and stop the tape before Dr. Brown examines the “wet prep slide” under the microscope.

The second video, “Sexual Assault Care: Sexual Assault the Health Care Response,” is used to show prosecutors the sexual assault evidence collection examination of a male victim. (The same procedures are followed for an examination of a male victim or defendant.) Begin about 41 minutes into the tape, after a yellow balloon is inserted into the female victim’s vaginal vault. Play the tape for about two minutes. Stop the tape before the physician swabs the male victim’s mouth.

To order a video of the adult female victim, “State of Art Forensic Examination of the Adult Sexual Assault Victim,” contact:

Dr. Randall L. Brown
Medical Director
STOP Rape Crisis Center
District Attorney’s Office
233 St. Ferdinand Street
Baton Rouge, LA 70802

Phone: (225) 389-3456

Fax: (225) 389-5685

Email: jwood@ebrda.org

Cost: None

To order the 53 minute Swiss video, “Sexual Assault Care: Sexual Assault the Health Care Response” contact:

Institute of Legal Medicine, University of Bern
Buhlstrasse, 20, CH-3012 Bern
SWITZERLAND

Phone: (41)(31) 631-8412

Fax: (41)(31)631-3833

Email: dna@irm.unibe.ch

Cost: approximately \$90.00 U.S.

Request the medical version #ISBN-3-95-21547-0-9. This video presents forensic examinations of both a male and female victim.

- **Debriefing from the “State of Art Forensic Examination of the Adult Sexual Assault Victim” Video.** Ask participants:
 1. Reactions to seeing the film.
 2. What about this examination was good/bad from the prosecutor’s point of view? List the responses on a flip chart.
 3. Discuss the bad points.
 4. Assume you are the defense attorney. How would you challenge this examination?
 5. From the prosecutor’s point of view, what did you like/dislike about the doctor’s interviewing technique?
- **Colposcope Slides and Fact Patterns:** The S.A.F.E. Presenter should utilize slides from other presentations or her own or others’ practice to carefully illustrate what a colposcope is and what it can show under magnification. This presentation should give meaning to terms such as “posterior fourchette” discussed under medical terminology in Part I of this unit and teach prosecutors how to use this resource in court.
- **How to develop a S.A.F.E. program in your community:** To develop a Sexual Assault Forensic Examiner Program in your community, contact:
 - Office of Victims of Crime, Training and Technical Project at (800) 627-6872. The Office of Victims of Crime offers a one-day technical assistance program to any community that wants to develop a Sexual Assault Forensic Examiner site program; or
 - Contact Linda Ledray, Ph.D., R.N., F.A.A.N. at the Sexual Assault Resource Service, Minneapolis, MN, (612) 347-5832.
- **Refer Participants to the Resources Book:** 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 **Lunch**

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.

HOW AN EXPERT CAN HELP YOU SUPPORT THE COMPLAINANT AND PROVE YOUR CASE MORE EFFECTIVELY

Faculty Needed: Prosecutor Presenter(s)
Victim Impact Expert

Format for Unit: Lecture

Time Allotted: Day II: 1:40 to 2:45 p.m.
1 hour, 5 minutes

Content Overview – How to Use an Expert to Prove Your Case More Effectively:

In order to successfully prosecute sexual assault cases, prosecutors often need to combat prevalent rape myths and victim blaming, and explain victims' counterintuitive behavior. Expert witnesses can help the prosecutor explain the victim's behavior and prove the element of lack of consent. This section focuses primarily on the use of psychological experts in sexual assault cases. We discuss key terminology, ways in which psychological experts can testify, and ways in which prosecutors can use an expert in a sexual assault case even if the expert will not be testifying. This section also addresses legal trends across the country with respect to the admissibility of expert testimony.

This Faculty Manual Contains:

- Lecture Outline: "How an Expert Can Help You Support the Complainant and Make Your Case More Effectively" begins on page 63.
- "A Prosecutor's Checklist: Using a Psychological Expert in a Sexual Assault Case" begins on page 74.
- "Tips on Working with a Medical Expert in a Sexual Assault Case" begins on page 81.
- "Expert's Checklist" begins on page 84.

Visuals for Unit: Slides are in Appendix 12, Expert Witnesses.

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.
- Local Law Case Annotations at Tab 8, page 8-63.

Special Instructions for the Faculty:

- **Tailor this lecture to your state’s case law:** This material addresses general issues related to expert testimony in sexual assault cases. The presentation should be tailored to and supplemented with the local law and practice from the jurisdiction where the training takes place to make it more useful for the participants. Certain sections may not apply, depending on how developed the state’s law is on the subject. The presenter will need to make the necessary adjustments after reviewing the state’s law where the program is being given.
- **Note on four checklists:** These materials include four checklists for prosecutors to use in interviewing and preparing psychological and medical expert witnesses for a sexual assault trial. The first three of these checklists are for the prosecutor. The fourth, “Expert’s Checklist: Courtroom Testimony in Sexual Assault Cases,” is to be given to the expert to help him or her to prepare.
- **Refer Participants to the Case Annotations Included in the Participant’s Binder:** The Participant’s Binder contains a collection of case annotations related to the admissibility of expert witness testimony and issues of confidentiality and privilege. These annotations come from selected states throughout the country where the National Judicial Education Program has presented its *Understanding Sexual Violence* curriculum to judges. The document also contains annotations of more recent cases that address these issues.
- **Give 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.
- **Refer Participants to the Resources Book:** 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 **Break**

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

Presenter's Outline

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";

¹ Laura E. Boeschen, 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.

- Why victims may continue contact with the perpetrator, especially 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.

³ Boeschen, *supra* note 1, at 416.

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

- **RTS should NOT be used by experts in court.**
- 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 Boeschen, *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

NOTE to faculty: At this point in the presentation, you should call on the victim impact expert who presented in the earlier part of the program, as well as the prosecutor faculty members and the prosecutors in the audience, for a short discussion about cases in which the victim impact presenter testified as an expert or the prosecutors used expert witnesses. Quickly address the following topics:

- 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.
 - *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

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

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 Expert¹

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;
- Articles written on topics within the area of expertise;

¹ 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.

- 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 Trial²

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;

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.

- 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.

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*,¹ 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.²

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.³

¹ 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.

² *Id.*, at 60.

³ *Id.*

- 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 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.⁴
- 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.⁵

Checklist for Prosecutors Using Medical Experts⁶

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.

⁴ *Id.*

⁵ *Id.*, at 60-61.

⁶ *Id.*, at 60-61 (adapted from Dr. Weaver's *Important Checklist Elements*).

- Plan on spending an hour or two reviewing the specific details of the hospital evaluation.
- 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 Case¹

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;
- Additional class work or training in your field of expertise;

¹ 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.

- 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.

STATE-SPECIFIC LAW: RAPE SHIELD LAW, STATE-OF-MIND/EXPERTS

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Small Group Exercise and Plenary Discussion

Time Allotted: Day II: 3:00 to 4:00 p.m.
1 hour

Content Overview – State-Specific Law:

To effectively prosecute these cases, prosecutors must be able to apply their own state laws regarding rape shield, admission of expert testimony, “state of mind” evidence, force, consent and prior bad acts. A key piece of evidence may be the defendant’s prior bad acts, an important topic that is covered later in the training. This segment covers rape shield, admission of expert testimony, force, consent and “state-of-mind” evidence. The exercises consist of hypotheticals which question the admissibility of various types of evidence under the prosecutors’ state law. This unit gives participants an opportunity to apply their state law to the facts of *State v. Michael Cates*.

This Faculty Manual Contains:

- “Rape Shield” Exercise Directions and Worksheet on page 91.
- “State-of-Mind/Experts” Exercise Directions and Worksheet on page 92.

The Participant’s Binder Contains:

- “Rape Shield” Exercise Directions and Worksheet at Tab 8, page 8-80.
- “State-of-Mind/Experts” Exercise Directions and Worksheet at Tab 8, page 8-81.

Special Instructions for the Faculty:

- **Explain “Rape Shield” Exercise** (30 minutes): Five hypothetical facts that the defense attorney may try to introduce at trial are presented. Plenary discussion to follow the exercise.
- **Explain “State-of-Mind/Experts” Exercise** (30 minutes): Prosecutor presenter divides the room in half and assigns one half question 1 and one half question 2. This hypothetical assumes that Amanda Brown froze and did not struggle against Michael Cates. Using your state law, develop strategies for admitting this powerful state-of-mind evidence at trial. Plenary discussion follows the small group exercise.

4:00-4:15 **Break**

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?

HOW TO KEEP ON KEEPIN' ON: OVERCOMING VICARIOUS TRAUMA

Faculty Needed: Various Faculty

Format for Unit: Lecture, Plenary and Small Group Exercises and Video Presentation

Time Allotted: Day II: 4:15 to 5:15 p.m.
1 hour

Content Overview – How to Keep on Keepin' On:

Rape victims are traumatized, and those who repeatedly prosecute these extremely difficult cases often experience vicarious trauma. This segment covers the need for prosecutors to acknowledge how stressful these cases are and to develop strategies to minimize their own traumatization. Therefore, this section should be fun.

The focus of this section should be on recognizing and preventing vicarious trauma. Humor, fun and “mental health breaks” are important prevention strategies.

This unit consists of:

- a word-association game;
- a video;
- a lecture; and
- a “Family Feud” type game, using the survey distributed on Day I of the conference during registration.

This Faculty Manual Contains:

- “Rules of the Game: Family Feud” on page 97.
- “Family Feud” Survey Handout on page 99.

Visuals for Unit: Slides are in Appendix 13, Vicarious Trauma.

Special Instructions for the Faculty:

- **Explain Exercise “Word Association” Game:** Use the visual in Appendix 10 to determine whether the group has “been doing this job too long.” The slide lists three sets of words: boy scouts, priests, and day care. Prosecutors who have been prosecuting sex crimes cases for a while have a different response to these words than the general public. Ask the group to call out the first word that comes to mind. Allow two minutes for the Word Association Game.

- **Show Video:** “Celebrate Living” is approximately four minutes long. This video encourages viewers to take time to feel joy and see the beauty that surrounds us.

To order “Celebrate Living,” a 4-minute motivational video, contact:
United Way of America
701 N. Fairfax Street
Alexandria, VA. 22314-2045
Phone: (703) 836-7100
Fax: (703) 683-7840
www.unitedway.org
Cost: \$15.00

- **Lecture Outline: The Difference Between Vicarious Trauma and Burn-Out**
 - Burn-out occurs when one is tired, overwhelmed, distant from the job: the hours, the tasks, the commute, the boss, the rules and the relationships.
 - Vicarious trauma occurs when the individual is overwhelmed by the experiences of the victims: their pain, loss and grief, witnessing family tragedy, sensory overload and repetitive crises.
 - Burn-out and Vicarious Trauma can occur simultaneously!!
 - **The Signs and Symptoms of Burn-Out**

Burn-Out will normally occur slowly, over a long period of time. It may manifest itself physically or mentally. Symptoms of burn-out include:

 - Physical Burn-Out
 - Feelings of intense fatigue;
 - Vulnerability to viral infection; and/or
 - Immune system breakdown.
 - Psychological Burn-Out
 - Feeling of lack of control over commitments;
 - An incorrect belief that you are accomplishing less;
 - A growing tendency to think negatively;
 - Loss of a sense of purpose and energy; and/or
 - Increasing detachment from relationships that causes conflict and stress, adding to burn-out.
 - **The Signs and Symptoms of Vicarious Trauma**
 - Taking your complainants “home” with you;

- Feeling very emotional during or after working with a survivor;
 - Sleeplessness;
 - Generalized anxiety;
 - Feelings of being overwhelmed;
 - Feelings of incompetence; and/or
 - Listlessness, low grade depression, the blahs.
 - Intrusive thoughts of clients, families and traumatic events: dreams, nightmares, daydreaming, recurring images or vivid mental replaying of clients' trauma;
 - Anger or pervasive cynicism about the complainants, their families, the system, yourself and/or the staff culture;
 - Hyper-aroused or over-reacting to insignificant events (especially at home);
 - Revenge fantasies;
 - Emotional detachment to significant others (numbing, flat affect, loss of humor/warmth);
 - Lack of interest in sex or romance;
 - Tendency to talk about sexual assault (or other client trauma) all the time;
 - See all complainants as potential victims or abusers;
 - Second guessing and gossiping if staff members have been victims themselves;
 - Fear of the possibility of personal tragedy; and/or
 - Haunting memories of one's own traumatic events.
- **3 Risk Factors for Vicarious Trauma**
- Exposure to the stories (or images) of multiple victims;
 - Your empathetic sensitivity to their suffering; and
 - Any unresolved emotional issues that relate (affectively or symbolically) to the suffering seen.
- **Prevention Strategies and Solutions**
- Techniques for recognizing and dealing with your own issues which get stirred up;
 - Break from the psychological intensity of trauma work;
 - Social time with staff (off work topics);
 - "Mental health breaks;"
 - Reconnect with community, friends;
 - Sports, hobbies;
 - Vacation (at least two weeks long);
 - Experiences which instill comfort and hope;
 - Confine case conferences to legal and victim-focused issues;
 - Recognize when your personal issues interfere and bring them to an appropriate forum;
 - Set clear boundaries between home and work, e.g., work clothes and fun clothes;

- Use rituals to separate work from rest of life, e.g., special music in the car on the way home, leaving your “things” in the car or a separate room;
 - Balance your work load as to types of client problems;
 - Self-care and self-nurturance (a necessity!!).
-
- **Explain Exercise “Family Feud”:** This exercise utilizes the survey about stressors and coping methods distributed on Day I of the conference during registration. Directions are on the following page.
 - **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 11, “Vicarious Trauma.”

Special Instructions for Faculty:

Day II ends here. Be sure that participants have completed and turned in their daily evaluations.

CONCLUSION DAY II

RULES OF THE GAME

FAMILY FEUD

“Family Feud” is an adaptation of the television game show of the same name. The object of the game is to guess the most popular answers to various survey questions, *e.g.*, “*Give me the name of a famous George.*”

Each table constitutes a family. Each family must select a tablemate to represent it. Each family representative answers the questions for the family. Encourage the families to help their representative loudly during the game.

In each of 5 survey rounds, the family representatives attempt to guess the most popular answers to a question. A family earns points for correct answers along the way. For example, if a family’s representative said, “Washington” to the question about “a famous George” and that was the most popular answer, that family would receive 100 points; if it was the second most popular answer, 80 points; third most popular, 60 points, and so on.

Each survey question will have the five top responses listed below it on the game board, each covered by a slip of paper. Each family representative submits one answer per round; if the answer is one of those 5 listed on the game board the family receives the corresponding points.

The family with the most points at the end of the game wins.

During registration on Day I of the conference, each participant was asked to fill out and return the survey found on page 95. *The collective surveys provide the answer board for the game. At some point between registration and this unit, faculty analyze the surveys to see what the top five answers were in each category.*

The five subject areas are:

1. stressors at home;
2. stressors at work;
3. interoffice tensions;
4. coping methods at home; and
5. coping methods at work.

The game equipment and personnel consist of these components:

- Answer board — Displays survey questions and top five answers. At the start of the game the answers are covered with a flap of paper over the answer indicating the point assignment.

- Timer — counts down 10 seconds to respond to each question. (The timer can be an individual with a stopwatch, or someone who just counts to him/herself.) Each round should take no longer than 3 minutes.
- Scoreboard — flip chart or china board to display players' scores.
- Referee(s) — in the event there is a conflict, it will be settled by the referee(s).

Playing the Game:

After the family representatives have been selected it is time to get ready for the Feud. The presenter announces the first question and states that “X” number of people (the number of students in attendance) were surveyed and the top five responses to the question are listed under each of the five flaps.

The presenter starts the timer as soon as the question is revealed, allowing 10 seconds for the representatives to consult with their families. Each representative must then submit an answer, which is his or her guess as to the most popular answer to the question. If a family representative guesses one of the top answers on the board, that answer will be revealed along with the number of people surveyed who matched that response. The presenter will list the points won by each family on the flip chart. Each family takes a turn. If an answer is missed, the presenter reveals it after all the players have completed the round. Each round should take no longer than 3 minutes.

The presenter adds the points won in each round and the family with the highest score wins. The presenter awards them a fun prize.

Prizes: *Prizes should be simple and inexpensive, e.g., little stuffed animals and stress balls.*

HANDOUT

Survey

Directions: Please take a few minutes to answer the follow survey questions. A faculty member will collect these surveys to be used later during the conference.

Name five major stressors at home.

- 1.
- 2.
- 3.
- 4.
- 5.

Name five major stressors at work.

- 1.
- 2.
- 3.
- 4.
- 5.

Name five causes of interoffice tension.

- 1.
- 2.
- 3.
- 4.
- 5.

List five coping methods you use to relieve stress at home.

- 1.
- 2.
- 3.
- 4.
- 5.

List five coping methods you use to relieve stress at work.

- 1.
- 2.
- 3.
- 4.
- 5.

MYTHS AND REALITIES - OVERVIEW

Faculty Needed: Offender Expert

Format for Unit: Lecture

Time Allotted: Day III: 8:30 to 9:30 a.m.
1 hour

Content Overview – Myths and Realities:

The sex offender expert will provide a comprehensive overview of sex offenders (e.g., characteristics, myths, planning, multiple offending patterns). The focus will be on nonstranger rapists who are difficult to prosecute because they do not meet society's expectations about who rapists are and what they look like. This unit uses a video reenactment of an interview with a pre-law student who casually discusses the planning process he and his fraternity brothers engage in to target their victims.

Visuals for Unit:

- Slides are in Appendix 14, Offenders: Myths and Realities – Overview. These visuals provide the outline of the substantive content of the expert's presentation.

The Participant's Binder Contains:

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

Special Instructions for the Faculty:

- **Lecture Outline/Visuals:** The visuals provide the outline of the substantive content of this section. The expert should use these visuals as the outline of their presentation.
- **Video Ordering:** To order a videotape of "The 'Undetected' Rapist," use the order form on the following page.

9:30-9:35 **Stretch Break**

THE “UNDETECTED” RAPIST

Re-enactment of an interview conducted by Dr. David Lisak, excerpted from the National Judicial Education Program’s video curriculum, *Understanding Sexual Violence: The Judge’s Role in Stranger and Nonstranger Rape and Sexual Assault Cases*.

Video Order Form

Contact

Name: _____

Organization Name: _____

Address: _____

Phone: _____ Fax: _____

Email: _____

Number of Videos at \$15.00 each: _____

Running time: 6 minutes, 18 seconds.

Please remit your enclosed payment in the amount of _____ to NOW Legal Defense and Education Fund, earmarked for NJEP. You may pay by check or credit card. If you wish to pay by credit card, please complete the following:

Check one: ☐ Visa ☐ Mastercard ☐ American Express

Card Number: _____ Exp. Date: ____/____

Billing Address: _____

Signature: _____

Mail your order form and payment to:

National Judicial Education Program
395 Hudson Street, 5th Floor
New York, NY 10014

Orders cannot be processed until payment is received. Our federal tax ID number, which you may need for ordering, is 23-7085442. Please allow two to three weeks for delivery. These prices include regular postage within the United States. If you are outside the United States, postage will depend on your location and postal preference, i.e., surface or air.

For more information, contact the National Judicial Education Program at NOW Legal Defense and Education Fund at (212) 925-6635; Fax: (212) 226-1066, 395 Hudson Street, 5th Floor, New York, NY 10014-3684, njep@nowldef.org.

SERIAL OFFENDING AND PRIOR BAD ACTS

Faculty Needed: Offender Expert
Prosecutor Presenter(s)

Format for Unit: Lecture and Video

Time Allotted: Day III: 9:35 to 10:35 a.m.
1 hour

Content Overview – Serial Offending and Prior Bad Acts:

The offender expert reviews the research about undetected nonstranger serial rapists. The offender expert and prosecutor presenter discuss the implications of this research for the trend toward admitting prior bad acts in sexual assault cases.

Visuals for Unit:

- Slides are in Appendix 15, Offenders: Serial Offending and Prior Bad Acts. These visuals provide the outline of the substantive content of the expert's presentation.

The Participant's Binder Contains:

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

Special Instructions for the Faculty:

- **Lecture Outline/Visuals:** The visuals provide the outline of the substantive content of this section. The expert should use these visuals as the outline of their presentation.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 13, "Sex Offenders, Sentencing and Sex Offender Treatment."

10:35-10:45 **Break**

STATE-SPECIFIC LAW SECTION: PRIOR BAD ACTS

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Small Group Exercise

Time Allotted: Day III: 10:45 to 11:15
30 minutes

Content Overview – Prior Bad Acts:

To effectively prosecute rape and sexual assault cases, prosecutors must be able to apply their state’s law regarding prior bad acts. This unit gives participants an opportunity to apply their law to the facts of *State v. Michael Cates*.

This Faculty Manual Contains:

- The “Prior Bad Acts” Exercise Directions and Worksheet is on page 104.

The Participant’s Binder Contains:

- The “Prior Bad Acts” Exercise Directions and Worksheet at Tab 9, page 9-14.

Special Instructions for the Faculty:

- **Explain Exercise “Prior Bad Acts”:** Give participants the four prior bad acts scenarios and which, if any, they would seek to introduce at trial. Allow participants five minutes to write down their answers, 10 minutes to discuss their responses with their tablemates, and 15 minutes to report back.
- **Refer to the Resources Book:** Other material relevant to this section is in Volume II, Tab 13, “Sex Offenders, Sentencing and Sex Offender Treatment.”

11:15-11:20 **Stretch Break**

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?

PLEAS AND SENTENCING

Faculty Needed: Prosecutor Presenter(s)
Offender Expert

Format for Unit: Lecture and Two Small Group Exercises

Time Allotted: Day III: 11:20 a.m. to 12:30 p.m.
1 hour, 10 minutes

Content Overview – Pleas and Sentencing:

The sex offender expert discusses effective sentencing and the importance of a plea in which the defendant admits guilt. The prosecutor presenter explores the tension between this and the real world of sentences and plea offers.

This Faculty Manual Contains:

- The “Sentencing Recommendations” Exercise Directions and Worksheet is on page 107.
- “Defendant’s Sentencing Proposal” Exercise Directions and Worksheet is on page 108.
- “Defendant’s Sentencing Proposal” is on page 109.
- A Faculty Cheat Sheet for the response to the “Defendant’s Sentencing Proposal” follows on page 110.

Visuals for Unit:

- Slides are in Appendix 16, Offenders: Pleas and Sentencing. These visuals provide the outline of the substantive content of the expert’s presentation.

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.
- The “Defendant’s Sentencing Proposal” at Tab 10, page 10-9.

Special Instructions for the Faculty:

- **Lecture Outline/Visuals:** The visuals provide the outline of the substantive content of this section. The expert should use the visuals as the outline of the presentation.
- **Explain Exercise “Sentencing Recommendations”:** Ask participants to review “The Full Story” Handout, page 37 in this Faculty Manual (approximately two minutes). Then have them use the worksheet at page 10-7 in the Participant’s Binder to jot down their responses. Allow five minutes for this portion of the exercise. Then the faculty presenter should ask participants for their responses. The faculty presenter should record the participants’ responses on a flip chart or overhead slide. Allow 10 minutes for the discussion.
 - What would you recommend as a sentence in a:
 - Plea offer before trial?
 - Would you accept an *Alford* or “no contest” plea?
 - What is the effect of registry laws on pleas?
 - Conviction after trial?
 - Can Cates’ unchanged prior bad acts be introduced?
- **Explain Exercise “Defendant’s Sentencing Proposal”:** At page 109 is the narrative of defendant’s sentencing proposal. Ask participants to read this proposal (approximately two minutes). Then conduct a ten-minute plenary discussion about how they would respond.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 13, “Sex Offenders, Sentencing and Sex Offender Treatment.”

12:30-1:30 **Lunch**

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 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?

●

●

●

●

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.

FACULTY CHEAT SHEET
STATE v. MICHAEL CATES

Sample Response to the Defendant's Sentencing Proposal

Treatment Plan:

Private one-on-one therapy is not appropriate for sex offenders. Sex offender treatment is specialized, comprehensive, multi-method, and extremely tough. Real sex offender treatment includes a comprehensive assessment and treatment plan, behavioral modification, empathy training, group therapy, recognizing offense precursors, plethysmograph/polygraph testing and relapse prevention. It is not weekly, individual therapy sessions. Further, administering the MMPI is only one small part of a complete risk assessment, which requires tests specifically focused on sex offending, which the MMPI is not.

Community Service Proposal:

Regarding community service, absolutely no assignment to a rape crisis center or domestic violence shelter is appropriate. This is the worst possible form of community service for a defendant who has demonstrated a problem with violence against women. This is so for two reasons: first, it puts these other women, who have already been victimized, at risk; second, rapists with cognitive distortions about women do not develop victim empathy just by being around other victims. If they develop it at all, it only comes from intensive specialized treatment.

Defense Characterization of the Case:

The defense characterization of this case is highly objectionable. This defendant was convicted by a jury of a violent crime. But he has not admitted his guilt or taken responsibility for the crime. Rather, he blames it on alcohol and characterizes the rape as a “misunderstanding.” While we are here to talk about the sentence for the defendant, the victim in this case has already been sentenced, as you heard in her impact statement. This defendant will only serve a term of years; Ms. Brown will serve a life sentence. She has told the Court that she will never forget the rape and her life will never be the same.

The defense attorney has urged you to take into account the fact that the defendant is a young man with his life ahead of him. I implore you to consider that before this rape Ms. Brown was looking forward to the life ahead of her. The defense has asked for probation, treatment, and community service. Such a sentence is not commensurate with this crime, will not communicate the severity of his conduct, and will not deter the defendant from committing similar crimes in the future.*

- * If you are in a state where Cates' prior bad acts were admissible at trial and/or could be introduced as evidence in the sentencing phase, include comments on his history as a serial rapist.

CROSS-EXAMINATION OF A DEFENDANT IN A CONSENT CASE

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Large Group Exercise

Time Allotted: Day III: 1:30 to 2:30 p.m.
1 hour

Content Overview – Cross-Examination:

This exercise is designed to help participants incorporate the information presented during the Sex Offender section in structuring their cross-examination of the Defendant, Michael Cates. Participants will be asked to identify areas of cross-examination and design specific questions to elicit particular responses from him.

This Faculty Manual Contains:

- “Cross-Examination” Exercise Directions and Worksheet on page 112.
- The Faculty Cheat Sheet is on page 113.

Visuals for Unit: Slides are in Appendix 17, Cross-Examination.

The Participant’s Binder Contains:

- “Cross-Examination” Exercise Directions and Worksheet at Tab 10, page 10-12.
- Relevant slides at Tab 10, page 10-13.

Special Instructions for the Faculty:

- **Explain “Cross-Examination” Exercise:** Ask participants to take ten minutes to respond to the questions on the “Cross-Examination” Worksheet at page 10-12 in the Participant’s Binder. Allow 10 minutes for participants to discuss their responses with their tablemates. Use the remaining 40 minutes to engage all participants in a discussion about their responses. The prosecutor presenter should record the responses on a flip chart or overhead slide.
- **Refer the Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 14, “Cross-Examination.”

2:30-2:35 Stretch Break

WORKSHEET

STATE v. MICHAEL CATES

Cross-Examination Exercise

Directions: Take 10 minutes to jot down your answers to each of the following questions. Then take 10 minutes to discuss your responses with your tablemates. During the remaining 40 minutes the prosecutor presenter will ask all participants to discuss their responses.

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?

FACULTY CHEAT SHEET

STATE v. MICHAEL CATES

Cross-Examination

If participants do not mention the topics listed below, the prosecutor presenter should raise them during the discussion.

DO:

- Corroborate the victim's account of the facts
- Assess the defendant after his direct examination
- Consider how, if at all, you would change your cross-examination strategies after the defendant testifies

AVOID:

- Fact-finding during cross-examination
- Giving the defendant an opportunity to retell his story on cross-examination
- Aggressive questioning
- Arguing with the witness
- Asking the "one question too many"

VOIR DIRE: OVERVIEW

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

Format for Unit: Video, Lecture and Exercises

Time Allotted: Day III: 2:35 to 3:35 p.m.
1 hour

Content Overview – *Voir Dire*:

Given society's adherence to rape myths, *voir dire* is often the crucial point of a rape/sexual assault trial. Building on the discussion of rape myths that begins in the program's opening exercise, this segment utilizes lecture, discussion and exercises to cover the purposes of rape case *voir dire*, the linkage between *voir dire* and summation, research on juror attitudes toward rape cases, and constructing/asking effective *voir dire* question in these types of cases. The pre-conference assignment asking participants about *voir dire* questions and strategies comes into play here.

This Faculty Manual Contains:

- “Bob and Lisa” Mock Jury Deliberation Video Synopsis on page 116.
- A Faculty Cheat Sheet for use in the debriefing on page 117.
- Text of “What the Research About Rape Jurors Tells Us” Lecture beginning on page 118.

Visuals for Unit: Slides are in Appendix 18, *Voir Dire*.

The Participant's Binder Contains:

- Relevant slides at Tab 11, page 11-2.

Special Instructions for the Faculty:

- **Show Videotape “Bob and Lisa” Mock Jury Deliberation:** The presenter should show the first 6 minutes of the videotape.
- **Lecture Outline: “What the Research About Rape Jurors Tells Us”:** Text of “What the Research About Rape Jurors Tells Us” begins at page 118.
- **Explain goals of rape *voir dire*:**
 - seeking the “bad” answer
 - identifying and striking biased jurors

- preparing for summation

- **Discuss Jury Questionnaires:** Some jurisdictions allow the use of jury questionnaires. Discuss:
 - pros/cons of using jury questionnaires;
 - what to include in a jury questionnaire; and
 - combined use of questionnaire and face-to-face *voir dire*.

3:35-3:45 **Break**

VIDEO SYNOPSIS
“Bob and Lisa” Mock Jury Deliberation

Agreed Upon Facts:

- Bob and Lisa are both college students, juniors at local university.
- They had two prior dates and kissed.
- Bob invited Lisa to a Saturday night fraternity party.
- It was noisy so she went to his room.
- They both sipped beer there.
- He is 6', 170 lbs.
- She is 5'5", 120 lbs.

Lisa:

- She claims they began kissing and then he became aggressive and pushed her and held her down.
- She couldn't push him off. Afraid he'd push her in the face.
- She said stop. He didn't.
- She ran home to sorority house. No one was around.
- She showered and tried to sleep.
- She had nightmares.
- Sunday – she was exhausted and stayed in bed.
- Monday – she told her house mother, who took her to the health center.

Bob:

- She wore a very sexy dress.
- At fraternity party, she asked to go to quieter place to talk — they went to his room.
- She was aggressive and called the shots. They had sex. Not rape.
- Afterward she dressed and said “we'll talk soon — okay?” and left.

To order “Bob and Lisa” contact:

Stephen J. Paterson
President
Jury Sciences, LLC
609 Deep Valley Drive, Suite 200
Rolling Hills Estates, CA 90274
Phone: (310) 544-8773
Fax: (310) 544-8794
Email: sjp@vindim.com
Cost: \$50.00

FACULTY CHEAT SHEET

Video: Mock Jury Deliberation in “Bob and Lisa” Case

The prosecutor presenter should begin by asking participants what they noticed regarding the jurors’ deliberations.

- What issues did the jurors focus on?
- Did participants mention that the jurors misstated the trial testimony about where it was that “no one was around” for Lisa to tell? If not, discuss this problem.
- What implications does this have for participants’ trial strategies?
- What myths controlled the juror’s deliberations?
 - Delayed reporting
 - Lisa’s lack of resistance
 - No weapons used
 - No extrinsic physical injury
 - Lisa voluntarily accompanying Bob to his room
- How would participants address rape myths during trial?
- If the participants don’t mention it, point out that the jurors never mention the defendant’s conduct.
- What does this mean for the prosecutor’s trial strategy?
- What would the participants do during trial to focus the jury’s attention on the defendant’s conduct?

What the Research About Rape Jurors Tells Us

By Lynn Hecht Schafran, Esq.
Director
National Judicial Education Program

[If you show the Bob and Lisa Mock Jury Deliberation videotape, begin here. If not, modify this opening as needed.]

We have just heard a fascinating dialogue among a group of diverse citizens selected by a prominent jury consulting firm to participate in a mock jury deliberation. Among the questions their comments raise is: are these individuals *sui generis*? Or are they typical of sexual assault jurors everywhere?

Knowing whether the viewpoints expressed by these jurors are typical is important not only from the point of view of achieving more convictions, but also from the point of view of the integrity of the jury system. The theory of the system is that we select individuals who either do not have – or can put aside – their biases, listen open-mindedly to the evidence, and follow the law as the judge instructs. If we have an area of law where jurors cannot do that, where cases are being decided on extra-legal factors related to myths and psychological needs, then the system is not working and we need to figure out how to fix it. The apt metaphor here is not a level playing field. Criminal cases rightly place an extremely high burden of proof on the prosecution, i.e., beyond a reasonable doubt. Rather, the apt metaphor is: is everyone playing by the rules?

Juries are an endless source of fascination to judges, lawyers and social scientists. The first large-scale jury research was conducted by Harry Kalven and Hans Zeisel in the 1960s.¹ They observed jury deliberations and surveyed judges in detail about individual cases and the judges' agreement or disagreement with jurors' decisions in these cases. From their sample of 3,576 criminal jury trials they focused particularly on the impact of extralegal information in the 25% of cases where there was judge/jury disagreement, and how this extralegal information accounts for the fact that in the vast majority of cases where there was disagreement, the jury was more lenient than the judge would have been.

Within the group of cases of particular interest to Kalven and Zeisel was one group where the judge/jury disagreement was sharpest. These were the 42 cases of what the researchers called "simple rape." That is, one perpetrator, the parties knew each other, no weapon was used, and there was no physical injury extrinsic to the rape. There were 42 of these cases, and only 3 convictions. The researchers found almost 100% disagreement between judge and jury in the half of these cases where there was a rape charge and a lesser included offense. The judge would have convicted of rape; the jury went for the lesser offense.

¹ Harry Kalven Jr. and Hans Zeisel, *THE AMERICAN JURY* (1966).

In cases where the juries had to choose between finding the defendant guilty of rape or acquitting him, juries acquitted where judges would have convicted. Kalven and Zeisel described the actions of all these juries as “the jury chooses to redefine the crime of rape in terms of its notions of assumptions of risk.”² In other words, if she went to a bar, went to the defendant’s apartment, etc., she assumed the risk.

Now fast forward 20 years to the early 1980s. Has anything changed? In the early 1980s Gary LaFree led a team of social scientists in a major jury study of sexual assault cases in Indianapolis.³ The researchers conducted in-depth 90-minute interviews with 331 men and women who had sat on rape case juries.

They found that jurors made their decisions based on the victim’s “character” and lifestyle even where there was proof of use of a weapon or victim injury. Jurors were less likely to believe in the defendant’s guilt when the victim reportedly drank or used drugs, was acquainted with the defendant, or engaged in sex outside marriage. LaFree wrote that the jurors disregarded the evidence and decided cases on the basis of their personal values. And these values were so rigid with respect to appropriate behavior for women that they even disbelieved women who held non-traditional jobs, for example, a woman who drove a school bus.

Another factor that emerged starkly in the LaFree study is the issue of race.

When we think about rape and race, most of us think about the extreme animus toward black men charged with raping white women. This aspect of the rape and race issue did emerge in the Indiana study. “Taken together, the results indicate that processing decisions in these sexual assault cases were affected by the race composition of the victim-defendant dyad, and the cumulative effect of race composition was substantial.”⁴ But what also emerged was a strong devaluation of African-American women as victims of sexual assault: “It is clear from the analysis that black offender-white victim rapes resulted in substantially more serious penalties than other rapes.... Moreover, black *intraracial* assaults consistently resulted in the least serious punishment for offenders.”⁵ For example, in one of the cases a juror said of a 13-year-old black victim that she came from a bad neighborhood and probably wasn’t a virgin anyway.

This devaluation of women of color in sexual assault cases is vividly demonstrated by a study of sentencing in Dallas, Texas. In Texas, juries impose sentences. When prosecutors make plea bargains, it is, in the words of the Dallas prosecutor at the time, the “juries [who] set the benchmark.”⁶ A study of sentencing and pleas by a local newspaper in 1990 found that the median sentence for a black man who raped a white woman was 19 years and the median sentence for a white man who raped a

² *Id.* at 254

³ Gary D. LaFree, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989)

⁴ *Id.* at 140

⁵ *Id.* at 145, emphasis supplied

⁶ Herndon, Ray F. “Race Tilts the Scales of Justice,” *Dallas Times Herald*, 1990, at A 22.

black woman was 10 years. This is a very interesting differential, but even more revealing were the statistics on same-race rape (which, despite the stereotypes, is what the vast majority of rapes are). The median sentence for white on white rapes was 5 years, for Hispanic/Hispanic rape 2.5 years, and for black on black rape 1 year.

The origins of this devaluation of women of color who are victims of sexual assault go back to slavery. White men repeatedly raped black female slaves with total impunity. To avoid acknowledging, even to themselves, the truth of what they were doing, these men invented the victim-blaming myth of the promiscuous black woman who had seduced them.

Rape, Racism, and the Law in 6 Harvard Women's L. J. 103 (1983)⁷ is an article about this aspect of rape and race that I recommend to you because we are clearly living with this attitude still today. The comfort people feel with this attitude is such that some will even express it openly. A few years ago in Westchester County, N.Y., a black woman was raped on the examining table by a white doctor. At first he denied sexual contact. When the DNA came back he claimed that the sex was consensual and he denied it only so his wife would not know what he'd done. After he was acquitted, a white male juror wrote to the prosecutor, "We thought a black female like that would be flattered by the attention of a white doctor."⁸

Other jury research has found jurors preoccupied with the victim's resistance. In the recent past, rape laws in every state called for utmost resistance, but that has been phased out of the law. Yet in the LaFree study of Indiana jurors, 32% believed that a woman's resistance to her attacker is a critical factor in determining the rapist's culpability and 59% believed a woman should do everything she can to repel her attacker.

Given that jurors are screened — that is, they go through a *voir dire* process intended to eliminate those who cannot follow the law — one might think that juror attitudes would look different than those of the general population, but they do not. For example, in 1991 Time/CNN commissioned a national opinion poll on these issues and found that 38% of men and 37% of women said that a raped woman is partly to blame if she dresses provocatively. A 1998 survey among a properly randomized sample of Georgia residents aged 18 to 49 revealed that sexual stereotypes and myths regarding sexual assault and rape persist.⁹ When asked how strongly they agree or disagree with the statement, "Many women cry rape—saying they have been raped when it really hasn't happened," 49% of men and 42% of women polled expressed some degree of agreement with the statement. We know that the vast majority of rapes involve no weapons. But 48% of men and 48% of women in the Georgia study believed that sexual assault necessarily includes the use of a gun or other weapon. We know the particularly

⁷ The author is Jennifer Wiggins.

⁸ Telephone interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, New York (April 21, 1992).

⁹ Global Strategy Group, Inc., for the Georgia Network to End Sexual Assault (1998).

devastating effects of marital rape. But in the Georgia study, 20% of men and 9% of women believed a woman has no right to say “no” to her husband. And if you think the next generation of jurors is going to think differently, in a 1988 survey of 1,700 6th to 9th grade students in Rhode Island, 65% of the boys and 57% of the girls said that in a dating relationship, it was acceptable for a man to force a woman to have sex if the couple had been dating more than six months. Half of the students said that a woman who walks alone is asking to be raped.

You may have been struck by the fact that the percentages of men and women, and boys and girls are so close on many of these questions. Another aspect of juror attitudes that has fascinated researchers and tripped up many a prosecutor is the apparent hostility of many women jurors toward the complaining witness. New prosecutors are frequently surprised by how censorious women jurors are of the complainant’s behavior.

The assumption is made that because women are most at risk of rape, they will be most sympathetic to the alleged victim. But for many women, that is exactly why they are hostile. It is a matter of psychological self-protection. *If I can distance myself from you; if I can say that I would never go to a bar or a man’s apartment or accept a ride from someone I only knew slightly, then I don’t have to acknowledge my own vulnerability.* This is an enormously powerful motivator. As Aristotle put it — “If people claiming pity are too close to oneself, then we feel about them as if we were in danger ourselves” and we do not extend our pity to them.

Now all of this, of course, is going on subconsciously. The question of how to surface it, and get women to set it aside and attend to the evidence and the law, or remove them from the jury if they cannot, is the challenge, as it is with all types of bias in these cases.

A particularly hard case is the male juror who has engaged in conduct that meets the legal definition of rape, but who never viewed his behavior as criminal. Such a juror may come to understand the true nature of his conduct during trial and realize, consciously or subconsciously, that if he votes to convict the defendant he is acknowledging his crime and convicting himself. Or he may identify with the behavior and not think the defendant did anything wrong. In either case, he will vote to acquit, no matter what the evidence.

What can be asked during *voir dire* to meet these challenges we now take up with you.

VOIR DIRE: EXERCISES

Faculty Needed: Prosecutor Presenter(s)

Format for Unit: Lecture and Small Group Exercise

Time Allotted: Day III: 3:45 to 4:45 p.m.
1 hour

Content Overview – Crafting Your *Voir Dire*:

This unit is divided into two sections. During the first section, the prosecutor presenter will lecture on the critical link between what the jury hears during *voir dire* and again in the prosecutor’s summation. Then participants will apply what they have learned in the prior units of the program to craft *voir dire* questions for *State v. Michael Cates*.

This Faculty Manual Contains:

- “*Voir Dire* Exercise” Directions and Worksheet (Overview) on page 125.
- Individual Participants’ Exercise Directions and Worksheet on page 126.
- Reporter’s Exercise Directions and Worksheet on page 127.
- Report back instructions on page 123.
- A Faculty Cheat Sheet on page 128.

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.
- Reporter’s Exercise Directions and Worksheet at Tab 11, page 11-9.

Special Instructions for the Faculty:

- **Lecture Outline – The Critical Link Between *Voir Dire* and Summation:**
 - Each state has its Criminal Jury Instructions (C.J.I.). These are instructions given by the judge at the end of the trial. Each instruction presents the jury with the elements of the crime that the prosecutor must prove beyond a reasonable doubt.
 - As the prosecutor begins to prepare the case she should have the C.J.I. instructions which will be used in her case. Use the C.J.I. to craft your *voir dire* questions.

- The C.J.I. can help a prosecutor prepare *voir dire* questions addressing rape myths, e.g.: “If the judge tells you that the law does not require that the state prove injury, will you be able to follow the law as the judge gives it to you, or will you assume that no injury means no rape?”
- Whenever possible the prosecutor should use the language from these instructions in her *voir dire* and summation.
- Thus, when the judge instructs the jurors on the law, they will have already heard the same language from the prosecutor. The jurors will then be somewhat familiar with the language and remember that the prosecutor used the law throughout the trial. Be careful not to instruct the jury on the law or you will incur the judge’s ire.
- **Explain “*Voir Dire*” Exercise:** (45 minutes) Participants develop *voir dire* questions for *State v. Michael Cates* at individual tables (15 minutes), followed by a report back for 30 minutes.
- **Instructions for *State v. Michael Cates Voir Dire* - Report Back:** Take the next thirty minutes to explore the *voir dire* questions developed by the participants. Write each question on a flip chart. With respect to each question:
 - Question #1: Ask each table to share its #1 *voir dire* question as long as it is not repetitive.
 - Why did you ask that question?
 - What did you hope to get from it?
 - What did you hope to learn about that juror?
 - Question #2: Ask each table to share its #2 *voir dire* question as long as there is no repetition.
 - Question #3: Ask each table to share its #3 *voir dire* question as long as there is no repetition.

If the group did not develop questions to detect an undetected rapist, the presenter should probe the group about what type of questions might accomplish this objective.

- **For suggestions see:** “Undetected Rapist – Faculty Cheat Sheet” on page 128 and Resources Book, Volume II, Tab 12, “Voire Dire” and Jury Instructions, where you will find specific suggestions for questions and instructions relating to consent, force, resistance, alcohol, rape between parties who know each other, and delayed reporting.

- **Refer Participants to the Resources Book:** 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.”

Special Instructions for Faculty:

Day III ends here. Be sure that participants have completed and turned in their daily evaluations.

CONCLUSION DAY III

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.

REPORTER'S WORKSHEET
STATE v. MICHAEL CATES

Voir Dire Exercise

Directions: The reporter is the person at the table whose first name begins with the letter A or the letter closest to it. As the reporter, please use this sheet to record the group's top three to five questions in rank order. During the 10-minute table discussion the group should determine which *voir dire* question will be ordered as #1, 2, 3, and so forth. During the 30-minute report back the reporter will give the table's # 1 question. If time permits, we will go on to # 2, and so forth.

1.

2.

3.

4.

5.

FACULTY CHEAT SHEET

STATE v. MICHAEL CATES

Voir Dire

Undetected Rapist

If Group Did Not Develop Questions On This Issue

Ask group—How would you identify and eliminate an “undetected rapist” on your jury?

Must underscore need for open-ended question.

If Group Did Develop Questions On This Issue

Highlight this for the group.

Must underscore need for open-ended question.

DNA PRIMER

Faculty Needed: DNA Expert

Format for Unit: Lecture

Time Allotted: Day IV: 8:30 to 10:00 a.m.
1 hour, 30 minutes

Content Overview – Basic DNA:

This segment covers the basics of what DNA is, how it can help you prove a case, and how to examine a DNA expert.

Visuals for Unit:

- Slides are in Appendix 19, DNA. These visuals provide the outline of the substantive content of the expert's presentation.

The Participant's Binder Contains:

- Slides for this unit at Tab 12, page 12-2.

Special Instructions for the Faculty:

- **Lecture Outline/Visuals:** The visuals provide the outline of the substantive content of this section. The expert should use these visuals as the outline of the presentation.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 15, "DNA."

10:00-10:15 **Break**

DRUG-FACILITATED RAPE

Faculty Needed: Forensic Toxicologist
Prosecutor Presenter(s)

Format for Unit: Lecture and Discussion

Time Allotted: Day IV: 10:15 a.m. to 12:15 p.m.
2 hours

Content Overview – Drug-Facilitated Rape:

Drug-facilitated rape is a critical and growing problem across the country. Investigating and prosecuting these cases demands great sophistication because of the victim's fragmented or obliterated memory and the frequent lack of medical evidence that drugs were used. In order to handle these cases, prosecutors need to educate their local police, hospitals and medical professionals about the indicia of drug-facilitated rape and how to collect and preserve the medical evidence.

Visuals for Unit:

- Slides are in Appendix 20, Drug-Facilitated Rape. These visuals provide the outline of the substantive content of the expert's presentation.

The Participant's Binder Contains:

- Slides for this unit at Tab 13, page 13-2.

Special Instructions for the Faculty:

- **Lecture Outline/Visuals:** The visuals provide the outline of the outline of the substantive content of this section. The expert should use these visuals as the outline of the presentation.
- **Videotape Substitution for Lecture:** This segment will cover all these issues using a lecture and discussion format. However, if you are unable to locate a prosecutor presenter who has tried drug-facilitated rape cases and a forensic toxicologist, The American Prosecutor's Research Institute has produced a videotape and manual entitled, *The Prosecution of Rohypnol and GHB Related Sexual Assaults* (1999). You can use the APRI videotape as a substitute for a live presentation.

To order "The Prosecution of Rohypnol and GHB
Related Sexual Assaults," contact:
Tamara Kitchen, Administrative Assistant
American Prosecutors Research Institute
Violence Against Women Program
99 Canal Center Plaza

- **Refer the Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 16, “Drug-Facilitated Rape.

12:15-1:15 **Lunch**

IMPROVING YOUR AGENCY: HOW TO GET THERE

Faculty Needed: Program Moderator
 Prosecutor Presenter(s)

Format for Unit: Small Group Exercise

Time Allotted: Day IV: 1:15 to 2:15 p.m.
 1 hour

Content Overview – Improving Your Agency:

This segment focuses on what participants will do with what they have learned at this program. What do they want to implement at home? What concrete actions will they take to do it? What resources will they need? What barriers will they confront? The segment addresses improving participants' agencies from within (e.g., encouraging vertical prosecution units, using these training materials for others in the office) and how to foster the interagency cooperation so essential to improving the justice system's handling of sexual assault cases.

This discussion will recognize the fact that prosecutor's offices are organizations headed by elected officials and participants may have limited authority to introduce these suggestions and reforms.

This Faculty Manual Contains:

- "Commitment" Worksheets on pages 134, 135 and 136.

The Participant's Binder Contains:

- "Commitment" Worksheets at Tab 14, pages 14-2 to 14-4.

Special Instructions for the Faculty:

- **Explain Exercise "What I Will Do At Home":** (20 minutes) Direct participants to complete the three-part exercise that asks:
 1. What one thing will you do *personally* to incorporate what you have learned during this program?
 2. What one thing will you do in your *office* to incorporate what

- you have learned during this program?
3. What one thing will you do in your *community* to incorporate what you have learned during this program?

For each question participants are asked what they will commit to, what barriers they anticipate and how they will overcome them. Participants complete worksheets and discuss at their tables the actions they will take.

- **Facilitate a report back:** Plenary Discussion (40 minutes) Moderator calls on selected participants to state their commitments, then invites other participants to offer ideas to help the selected participants accomplish their goals. No speaker repeats a commitment another has stated. After the first speaker, other speakers offer only enhancements or new commitments.
- **Distribute postcards:** The program moderator should hand each participant a postage-paid postcard. The moderator asks the participants to self-address the postcard and, on the reverse side, list the responses to the three-question exercise. The program moderator collects the postcards at the end of the discussion. The postcards should be mailed to the participants after a three to four month period. Receiving the postcard will “tickle” participants’ memory about what was learned during the program and their commitment to bring it home.
- **Refer Participants to the Resources Book:** Other material relevant to this section is in Volume II, Tab 17, “Improving Your Agency, Interagency Cooperation and Working with the Community.”

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?

CLOSING REMARKS, CERTIFICATES OF COMPLETION & C.L.E. CREDIT FORM

Faculty Needed: Program Moderator

Time Allotted: Day IV: 2:15 to 2:30 p.m.
15 minutes

Content Overview – Closing Remarks:

The program moderator should take a few minutes to make closing remarks. Some important points to cover include:

- emphasizing that the topics covered in this program – current social science and medical research, *voir dire*, sex offender information, cultural competence, evidence collection techniques – have direct application in the prosecution of these difficult cases;
- encouraging prosecutors to minimize retraumatization of victims, while still protecting the case and meeting statutory requirements;
- reminding participants that the work they do, while very difficult, is greatly appreciated and they are courageous to do it;
- giving them a large dose of encouragement;
- explaining that the written material in the Resources Book, Volumes I and II will serve as an excellent resource in the future; and
- thanking the participants for their attention and participation.

Special Instructions for the Faculty:

- **Note on evaluations and forms:** At the end of these remarks, ask participants to complete and submit their evaluations. Allow at least five minutes writing time. Once all evaluations are in, present each participant with a Certificate of Completion and a C.L.E. form (if your program has received prior approval as a C.L.E. provider).
- **Certificate of Completion:** Refer to Appendix 21 for a sample Certificate of Completion.

CONCLUSION OF PROGRAM

CONCLUSION OF PROGRAM

TABLE OF CONTENTS
VOLUME I

Tab 1: Prosecutor’s Code of Conduct

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).

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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:

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<<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.

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