

## Module VIII: Jury Selection

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(14 Pages)

#### Learning Objectives:

#### This module will enable judges to:

- Utilize questionnaires to enable potential jurors with personal experience as victims or perpetrators of intimate partner sexual abuse, domestic violence, sexual abuse or child sexual abuse to disclose that history with the maximum privacy possible
- Provide support for jurors who often find making these disclosures traumatic.
- Conduct voir dire that identifies jurors whose personal experience with intimate partner sexual abuse, domestic violence and sexual abuse will make them unable to be impartial, but who did not self-identify on the questionnaire
- Conduct *voir dire* that identifies jurors whose attitudes toward intimate partner sexual abuse, domestic violence and sexual abuse will make them unable to be impartial

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## Module VIII: Jury Selection

### Judge's Critical Role in *Voir Dire*

Selecting a jury for a marital rape trial, an intimate partner sexual abuse trial, or a trial of co-occurring intimate partner sexual abuse and battering presents many challenges. Juror bias in these types of cases, based on jurors' personal experiences and expectations and the widespread misconceptions about sexual assault, domestic violence and intimate partner sexual abuse, is well documented.

Judges often struggle with how much to allow in *voir dire*. Moreover, in most jurisdictions *voir dire* is the province of litigants' attorneys, and judges are reluctant to usurp that role. Nonetheless, anyone who has spent time conducting jury trials knows that jurors' biases are rarely discovered in traditional, truncated *voir dire*. Allowing the time necessary to identify these biases in intimate partner sexual abuse trials is essential. *Voir dire* is an opportunity for the court to see that the playing field is leveled. Ensuring that an intimate partner sexual abuse case is not decided on the basis of jurors' belief in rape myths should be a concern of the court, not just the position of one party. Judges can establish with the attorneys before *voir dire* begins the questions essential to seating an unbiased jury. Whether or not that discussion precedes *voir dire*, if the judge sees that the questions essential to fairness are not being asked, the judge can require the attorneys to ask them, or do so him or herself.



## Resources

### Articles

- Kathleen C. Basile, *Attitudes Toward Wife Rape: Effects of Social Background and Victim Status*, VOL. 17 VIOLENCE AND VICTIMS 341 (June 2002)

### Nonperiodical Literature

- Jim Hopper, [SEXUAL ABUSE OF MALES: PREVALENCE, POSSIBLE LAST SIDE EFFECTS & RESOURCES](#) (last revised 3/23/07)

## Resources

### Module VIII: Jury Selection

#### Sexual Assault Case Jurors

Seating an unbiased jury in any type of rape or sexual assault trial has two aspects:

- questioning potential jurors about their own experience of sexual assault
- identifying and excusing potential jurors who so adhere to rape myths that they will be unable to listen to the facts and follow the law with an open mind

#### Sexual Victimization Among Potential Jurors

Because so many people, particularly women, have been victims of sexual assault as children, adults or both, it is typical for a significant percentage of the jury pool to be immediately excused from any type of sexual assault case because of their personal experience. For example, in a 1997 national study of attitudes toward public policy issues including wife rape conducted by the Applied Research Center at Georgia State University, 28% of the women in the sample were victims of forced sex (Basile, *Attitudes Toward Wife Rape*, 2002).

This study did not ask the men in the sample about victimization, but a survey of studies of male rape victims reveals a prevalence rate for sexual assault perpetrated against males between 4.8% and 28% (Hopper, *Sexual Abuse of Males: Prevalence, Possible Last Side Effects & Resources*, 2007, available [here](#)).

## Module VIII: Jury Selection

### Jury Questionnaires

To identify those whose personal experience of sexual victimization or perpetration as children or adults disqualifies them from serving as jurors in sexual assault cases it is best practice to use a jury questionnaire. It is critical that this information be elicited with maximum sensitivity and privacy.

Judges should also know what resources are locally available for counseling victims of sexual assault that occurred at any time in the individual's life. Some jurors have never told anyone of their victimization, and even for those who have, making the disclosure in court is traumatic. Judges should be able to refer women and men who make these disclosures to appropriate sources of support.

In administering the questionnaire the judge must make clear that even if the sexual assault was not reported to the police at the time, it counts for the juror questionnaire. In a Wisconsin child sexual abuse case, a juror did not disclose during *voir dire* that she was sexually abused as a child because the abuse was never reported. During deliberations she said that she believed the alleged victim because the same thing had happened to her. When this information came to light after the trial, a new trial was ordered (*State v. Delgado*, 223 Wis.2d 270, 588 N.W. 2d 1, 1999).

The questionnaire should also ask about perpetration that would disqualify a potential juror from a sexual assault case. This is difficult information to elicit. Beyond the obvious reasons of denial and not wanting to be arrested, many offenders will acknowledge engaging in forced sexual conduct, but do not label what they have done as a criminal act and would not consider the same behavior by another to be a crime. See [Defining Intimate Partner Sexual Abuse and Assessing its Prevalence: Study of Abusive Men: Northeastern Study "Northeastern City Study"](#), and [Victims and Offenders: Failure to Recognize "Rape"](#). Therefore, it is useful to ask not only direct questions – *e.g.*, have you or anyone close to you ever been charged with a sexual offense – but also behaviorally-based questions, *e.g.*, Have you ever forced someone to have sex when they did not want to by holding them down or threatening them?

Two types of questionnaires intended to elicit information about adult and child sexual assault victimization and perpetration are provided here:

- [Jury Questionnaire developed by Judge William Hughes of Indiana](#). (PDF 9KB) When Judge Hughes began administering this questionnaire the number of potential jurors self-identifying as victims of adult or child sexual abuse and assault rose by 20.3%.

### Resources

#### *Nonperiodical Literature*

- National Judicial Education Program, [Jury Questionnaires](#)  
UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT (2005)

#### *Cases*

- *State v. Delgado*, 223 Wis.2d 270, 588 N.W. 2d 1 (1999)
- Hon. J. Richard Couzens, Hon. Tricia Bigelow, Administrative Office of the Courts, [Appendix 10-A](#) CALIFORNIA BENCHBOOK: ADJUDICATING SEX CRIMES 122 (2006) PDF 12KB

- [Jury Questionnaire from the California Benchbook for Adjudicating Sex Crimes](#) (PDF 12KB)

## Module VIII: Jury Selection

### Identifying Biased Jurors

Crafting *voir dire* questions that will exclude from the jury pool the perpetrators who did not self-identify on the jury questionnaire and those who believe so strongly in rape myths that they cannot listen to the evidence and follow the law is difficult but essential. Read Lynn Hecht Schafran, [The Importance of Voir Dire in Rape Trials](#) (PDF 348KB).

Some of the common misconceptions about rape and sexual assault, particularly intimate partner sexual abuse, about which judges and attorneys may want to question potential jurors include:

- It cannot be rape if the two people are married or know each other
- Nonconsensual sex cannot exist in a relationship where there is or has been consensual sex
- Couples in intimate relationships are used to having sex together so forced sex does little psychological damage
- Rapists are sex-crazed strangers who jump from the bushes with a knife or gun
- Rape usually happens in public places such as alleys and dark parking lots
- The woman must have done something to signal consent such as wear provocative clothing or accept an expensive dinner
- Rape is only defined as forced penile-vaginal penetration
- A "real rape" victim has serious physical and genital injuries that prove she resisted the rapist and did not consent
- A "real rape" victim would report the rape immediately
- At trial a "real rape" victim will show a particular kind and level of emotion: she will cry, but not too much; she will not be angry or have a flat affect



### Resources

#### Articles

- Lynn Hecht Schafran, [The Importance of Voir Dire in Rape Trials](#), TRIAL 26 (August 1992)



## Module VIII: Jury Selection

### Identifying Biased Jurors (cont'd)

These misconceptions are explored and debunked in Schafran, [Writing and Reading About Rape](#) (PDF 4.08MB) (1993), and in the National Judicial Education Program's DVD, PRESENTING MEDICAL EVIDENCE IN AN ADULT RAPE TRIAL, [transcript](#) (PDF 2.96MB).

There is substantial research showing that not only are these rape myths exactly what many people do believe, but that jurors base their decisions in rape cases on their own notions of the alleged victim's character and "assumption of risk" (e.g., going to a bar or accepting a ride) and that victims who are women of color, particularly African American women, are especially disbelieved and devalued.

For example, in the most extensive study of actual rape case jurors ever conducted, 331 Indianapolis women and men participated in lengthy, individual post-trial interviews. These jurors expressed extreme reluctance to believe that a sexual attack was a rape if the parties knew one another, if the woman held a non-stereotypically female job, or if the victim was black (GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT, 1989).

Additionally, contrary to the assumption that women are the most desirable jurors in rape cases, many women cannot acknowledge their own vulnerability and distance themselves from it by blaming the victim.

For a discussion of the research on rape case jurors see, *Jurors' Decision-Making in Sexual Assault Cases in NATIONAL JUDICIAL EDUCATION PROGRAM*, [UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE](#) (PDF 33KB) (2005).

## Resources

### Articles

- Lynn Hecht Schafran, [Writing and Reading about Rape: A Primer](#), VOL. 66 ST. JOHN'S L. REV. 979 (1993) 4.2MB

### Nonperiodical Literature

- Gary LaFree, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989)
- Heather Parker, National Judicial Education Program, [Jurors' Decision-Making in Sexual Assault Cases](#) UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT (2005)
- [NATIONAL JUDICIAL EDUCATION PROGRAM'S DVD, PRESENTING MEDICAL EVIDENCE IN AN ADULT RAPE TRIAL, TRANSCRIPT](#) (2007) PDF 2.96MB

## Module VIII: Jury Selection

### Marital Rape Case Jurors

The study *Attitudes Toward Wife Rape* cited earlier provides a good picture of the challenge of seating a jury in a marital rape case. In addition to the potential jurors who would have to be excused because they are sexual assault survivors, 18% of the respondents in this national sample did not believe that husbands ever use force (e.g., hitting, holding down, using a weapon) to make their wives have sex and another 5% were not sure. Linda Fairstein, a prosecutor who was for nearly thirty years head of the Manhattan, New York District Attorney's Sex Crimes Unit, tells of a child sexual abuse trial she lost because one juror refused to believe that sexual activity between an adult and a child could ever happen. Fairstein did not think to *voir dire* about such a belief, or whether the individual who held it could be persuaded otherwise.

The respondents in the *Attitudes Toward Wife Rape* study who said they thought husbands do sometimes force their wives to have sex were then asked with what frequency this happens in society-at-large. Four percent thought it rare and 15% said not very often. An event perceived as rare or unusual is examined with more skepticism than an event perceived as commonplace: is the event complained of even possible? Thus, nearly one-fifth of this national sample would likely be exceptionally skeptical of a claim of marital rape, demanding something beyond the standard of proof required in the criminal or civil case.



Another issue is devaluation of this crime. For example, in a study by early researchers in this field in which respondents were given a list of 140 crimes and asked to rank their severity, "forcible rape of a former spouse" was ranked below stealing \$25 (FINKELHOR & YLLO, LICENSE TO RAPE, 1985 at 152-154).

In a slightly later study, 64% of the men and 63% of the women surveyed did not consider "unwanted sexual intercourse between a husband and a wife" to be rape (GORDON & RIGER, THE FEMALE FEAR, 1989). So little attention has been paid to intimate partner sexual abuse in the subsequent years that we cannot assume a 21st century survey would yield a sharply different result.

## Resources

### *Nonperiodical Literature*

- David Finkelhor, Kersty Yllo, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985)
- Margaret Gordon, Stephanie Riger, THE FEMALE FEAR: THE SOCIAL COST OF RAPE (1989)

### *Articles*

- Kathleen C. Basile, *Attitudes Toward Wife Rape: Effects of Social Background and Victim Status*, VOL. 17 VIOLENCE AND VICTIMS 341 (June 2002)



## Module VIII: Jury Selection

### Developing *Voir Dire* Questions

An effective way to gauge potential jurors' ability to listen to an intimate partner sexual abuse case with an open mind is to use analogies or hypothetical situations. Some examples are below.

- *Jurors often have a difficult time accepting that there can be nonconsensual, forced sex in a relationship where there has been consensual sex.*
  - In *voir dire*: Ask the jury to imagine a husband and a wife who have been married for some time and have a joint bank account. Now ask them to imagine the husband or wife decides to open a separate joint bank account to save for their children's education. The husband/wife informs the spouse that the other person must not take money from the new account. Now ask the jurors to imagine that one day the husband/wife takes money from this separate account without asking his/her spouse. Ask the jury if they would consider that stealing.
- *Jurors are often critical of victims of domestic violence and intimate partner sexual abuse for staying in their relationships for years rather than leaving after the violence began.*
  - In *voir dire*: Ask the jury if they have ever worked for an awful boss who was mean and critical about their work. Next, ask the jury if they stayed in that situation, even though they knew their boss was mistreating them. Ask them why they stayed.
- *Jurors often take the attitude that failing to report a rape immediately means the claim is fabricated.*
  - In *voir dire*: Ask the jury if they have ever had a terrible and embarrassing secret that they did not want anyone to know and that they never told anyone. Next, ask the jury to imagine telling someone this secret, despite having concealed it for years. Now ask, should the fact that they kept that secret for all those years make them less credible when they finally divulge it?



## Module VIII: Jury Selection

### Developing *Voir Dire* Questions (cont'd)

It is also necessary, of course, to address the relevant issues directly. In *People v. Goodsell*, 203 Mich. App. LEXIS 819 (Mich. Ct. App. 2003), (Unpublished opinion), for example, after the defendant was convicted of two counts of first-degree criminal sexual conduct for raping his girlfriend, he appealed on several grounds including prejudicial voir dire.



"Defendant argues that the trial court asked prejudicial and misleading questions during jury voir dire that served to improperly influence the jury. *Defendant particularly objects to the question, 'Do all of you agree that if a man uses force or coercion, such as putting a knife to the head of his girlfriend, that it is still a sexual assault, even if his girlfriend might have consented without it?'*.... [T]he questions to which defendant objects were tailored to discover whether any jurors had preconceived notions about whether a person could be punished for a forcible sexual assault upon a former consensual lover. The questions did not remove the presumption of innocence, and the trial court reiterated in its jury instructions that defendant was presumed to be innocent."

— *Id.* at 7-8 (emphasis added).

## Resources

### Cases

- *People v. Goodsell*, 2003 MICH. APP. LEXIS 819 (2003)

## Module VIII: Jury Selection

### Complex *Voir Dire* in Cases of Co-Occurring Intimate Partner Sexual Abuse and Battery

In a case alleging both sexual and physical violence the situation becomes even more complicated. Juror Questionnaires and *voir dire* questions must develop information about victimization, perpetration and attitudes toward both types of crime. One study suggests that jurors are more likely to believe a charge of spousal rape if there was prior domestic violence (Langhinrichsen-Rohling & Monson, *Marital Rape: Is the Crime Taken Seriously Without Co-Occurring Physical Abuse?*, 1998).



This means that in co-occurrence cases *voir dire* must address the myriad biases and misconceptions attendant on domestic violence as well as those respecting marital rape. What did she do to provoke it? Didn't she really enjoy it? Why did she fail to go forward with prior cases? Why didn't she just leave? And here, too, the issue of jurors with personal experience of domestic violence must be addressed through questionnaires and careful, thorough, sensitive *voir dire*.

According to national research, "22.1 percent of surveyed women and 7.4 percent of surveyed men reported being physically assaulted by a current or former intimate partner" (TJADEN & THOENNES, [INTIMATE PARTNER VIOLENCE](#) (PDF 1.17MB), 2000 at 10). Thus, the likelihood that a potential juror has direct knowledge of domestic violence as a victim, a perpetrator, or someone close to such a person is high. Women with personal experience of domestic violence are often hostile to women who did not handle their situation in the same way, or they deny their own situations because acknowledging them is just too painful.

## Resources

### Articles

- Jennifer Langhinrichsen-Rohling, Candice M. Monson, *Marital Rape: Is the Crime Taken Seriously Without Co-occurring Physical Abuse?*, VOL. 13 JOURNAL OF FAMILY VIOLENCE 433 (1998)

### Nonperiodical Literature

- Patricia Tjaden, Nancy Thoennes, U.S. Department of Justice, [EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, NATIONAL INSTITUTE OF JUSTICE](#) (2000)

## Module VIII: Jury Selection

### Non-disclosing Jurors

#### Resources

##### *Cases*

- *Shirley Burton v. Sharon Johnson*, 948 F.2d 1150, U.S. APP. LEXIS 25794 (1991)

##### *Articles*

- Lynn Hecht Schafran, *The Importance of Voir Dire in Rape Trials*, TRIAL 26 (August 1992)

For example, *Shirley Burton v. Sharon Johnson*, 948 F.2d 1150, 1991 U.S. App. LEXIS 25794, involved a habeas corpus petition in which a victim of alleged marital rape and domestic violence who killed her husband was granted a new state murder trial. At Burton's original state trial the court denied the defense request for sequestered, individual questioning of the jurors on the issues of physical, emotional and sexual abuse of wives and children, despite an expert's affidavit on jury selection dynamics and "the hesitancy of people to speak about sensitive subjects when others are present." *Id.* at 1151. This court also divided the potential jurors into two large groups of 29 jurors each and limited *voir dire* of each group to one hour.

At trial Shirley Burton produced extensive evidence of her husband's repeated physical, sexual and verbal assaults upon her and her two children. After she was convicted her attorneys learned that at least three jurors were close to abusive situations they did not disclose during *voir dire*.

One woman stated that she had a "close relationship" with someone who did not kill her batterer and thus she believed that Burton could have handled her situation differently (*Id.* at 1154). Another woman disclosed that she was "the subject of long-standing abuse" by a batterer to whom she was still married and that one of her children was in counseling because of the abuse. She requested that her name and testimony be sealed because she was frightened that her husband might abuse her and her children if he learned of her statement. She explained that she disclosed none of this during *voir dire* because "she tried not to think of her own situation by pushing her own experience to the edge of consciousness" (*Id.* at 1158).

The district court ordered a new trial and the Tenth Circuit affirmed, writing:

"Here the record is clear that Mrs. G was dishonest in her response to questions on *voir dire* – this is true whether or not she simply did not, or could not respond properly because of her own emotional distress. This dishonesty, of itself, is evidence of bias."

— *Id.* at 1159.



### Conclusion

Thorough *voir dire* takes time, but due to the unique issues respecting rape and domestic violence trials, whether it is the judge or the attorneys who conduct the *voir dire*, it cannot be rushed. Read Lynn Hecht Schafran, [The Importance of Voir Dire in Rape Trials](#) (PDF 348KB), August 1992.



## Module VIII: Jury Selection

### Self Test and Answers

**According to a study of a nationally representative sample, what percentage of adult Americans does not believe that husbands ever use force to compel their wives to have sex?**

- a. 3%
- b. 7%
- c. 13%
- d. 18%

**In another national study, respondents ranked forcible rape of a former spouse as less serious than stealing.**

- a. True
- b. False

**Women jurors who have experienced an intimate partner abuse are usually more supportive of alleged rape and domestic violence victims than men.**

- a. True
- b. False

**A potential juror who has been the victim of a sexual assault need not be required to disclose that highly personal information during voir dire.**

- a. True
- b. False

See Answers



## Module VIII: Jury Selection

### Reflection Questions

*Where the reflection question includes multiple questions, please answer one at a time, and click the "Save and See Comment" button for the question you're answering. From the answer page you can click the "Return to Questions" button to go back and answer the other questions, or to modify your answer. Unlike the self-tests, your reflection question answers are saved so that you can come back to them at a later time.*

**What are the three questions you think would be essential to ask potential jurors in a case of marital rape or rape in an intimate partner relationship?**

Save and See Comment

**In your jurisdiction who conducts *voir dire*? The judge? The lawyers? The judge and the lawyers? If, in an intimate partner sexual abuse trial the lawyers were not asking these essential questions, what action would you take?**

Save and See Comment



## Module VIII: Jury Selection

### Key Points: Jury Selection

- Selecting a jury for an intimate partner sexual abuse trial or a trial of co-occurring intimate partner sexual abuse and battering presents many challenges.
- Thorough, careful *voir dire* is essential to identify potential jurors who, because of personal experience or adherence to the myths about rape, domestic violence and intimate partner sexual abuse, cannot listen to the evidence with an open mind and follow the law.
- A significant percentage of women and men in the jury pool for a sexual assault or domestic violence case will have to be excused because of their personal experience with these kinds of violence.
- It is best practice to use jury questionnaires to elicit this information with maximum privacy and sensitivity.
- Judges should know what resources are locally available for counseling potential jurors who disclose sexual assault that occurred at any time in the juror's life.
- The judge should make clear that even unreported instances of sexual assault, domestic violence, child abuse and child sexual abuse are to be included in answering the questionnaire.
- A significant percentage of people have serious misconceptions about sexual assault, domestic violence and intimate partner sexual abuse. They do not believe that husbands use force to compel their wives to have sex, or that there can be nonconsensual sex in a relationship with consensual sex, or that marital rape is a serious crime.
- *Voir dire* should include behaviorally-based questions and questioning by analogy to fully elicit experiences of victimization and perpetration not acknowledged in questionnaires and to probe jurors' ability to listen to the evidence with an open mind and follow the law.
- If the trial is proceeding without the complainant, jurors should be questioned about how that may affect their view of the case.