

Module IX: Evidentiary Issues

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(24 Pages)

Learning Objectives:

This module will enable a judge to:

- Apply the rules of evidence in intimate partner sexual abuse cases.
- Apply the rape shield law in cases where the parties have a history of consensual sex.
- Determine the admissibility of prior bad acts.
- Determine when to admit expert witness testimony related to intimate partner sexual abuse including recantation, delayed report, failure to appear and unemotional affect during testimony.

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Resources**Module IX: Evidentiary Issues****Introduction: Evidentiary Issues**

Evidentiary issues unique to intimate partner sexual abuse arise out of the complex relationship between the defendant and victim. What aspects are relevant to the legal matter under consideration? Are prior consensual sexual relations relevant on the issue of consent? Are prior acts of violence admissible? Should an expert be allowed to testify to educate the trier of fact as to how to assess the victim's counterintuitive behaviors such as continuing cohabit with the defendant despite the allegations of sexual violence before the court?

These and related evidentiary issues are considered in this section. While rules vary among jurisdictions, this overview will identify issues and frame the differing policy choices presented, along with case law from courts that have considered the issues in depth.

The issues discussed in this module are:

- Rape shield law—relevance of the victim's sexual history, particularly with the defendant;
- Prior bad acts—admissibility of the defendant's prior acts of sexual or physical violence;
- Expert testimony to explain the often counterintuitive of victims of intimate partner sexual abuse and battering.

Other evidentiary issues are discussed in [Marital Privilege and Confidentiality of Victim Records](#).

Resources

Statutes

- VOL. 412 FEDERAL RULE OF EVIDENCE

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Rape Shield Law - Historical Roots

Historically, a woman was required to establish her chastity in order to assert rape since it was thought that a chaste woman would be more likely to resist a sexual assault. As a result, prosecutions for rape focused on the character and sexual history of the complainant, often overshadowing the defendant's alleged conduct. Women were understandably reluctant to pursue claims of sexual assault and convictions were rare.

As rape laws and accompanying evidentiary requirements were reformed in order to allow women to bring their assailants to justice, states began to enact "Rape Shield Laws." Nearly every state adopted such legislation between 1974 and the early 1980s. These laws barred inquiry into a woman's prior sexual history for the purpose of portraying her as a person likely to engage in sexual relations.



There were exceptions to the "shield," however, and most of these laws were enacted prior to any significant reform in marital rape exemptions. Thus, evidence that a woman previously consented to sexual relations with the defendant is nearly always admissible to support an inference that she also consented to relations on the occasion in question.

Federal Rule of Evidence 412, for example, states that evidence of a rape complainant's sexual history is inadmissible, except:

- 1) when it is offered "to prove that a person other than the accused was the source of semen, injury, or other physical evidence;"
- 2) when it is offered to prove consent and consists of "specific instances of sexual behavior by the alleged victim with respect to the person accused;" or
- 3) when the exclusion of the evidence "would violate the constitutional rights of the defendant."

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Rape Shield Law and Intimate Partner Sexual Assault

When the rape shield laws were written, there was little understanding of the fact that the vast majority of rapes are committed by someone known to the victim. Subsequent research revealed that not only is most rape nonstranger rape, but that a significant percentage of rapists are or have been in an intimate relationship with their victims. The most recent national study found that 43 percent of all rapes were committed by spouses, ex-spouses, boyfriends or ex-boyfriends (Tjaden & Thoennes, *Extent, Nature and Consequences of Rape Victimization*, 2006 at 26).

Given this reality, the unforeseen consequence of subsection (2) of the typical rape shield law is that it permits at least some evidence of a victim's sexual history in a large percentage of rape prosecutions.

As a result, rape shield laws can often run counter to the understanding integral to the repeal of marital rape exemptions: that consent to sexual relations in a marriage is not on-going. Proposed evidence should be carefully examined to determine if it really is probative of consent, or if its prejudicial value outweighs its evidentiary usefulness.



Resources

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)

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Rape Shield Law - Exceptions

The exceptions in state rape shield laws tend to fall into one of four categories:

1. Legislated Exceptions (majority of states):

- Contain general prohibition of evidence concerning victim's prior sexual conduct with legislated exceptions
- These exceptions vary from state to state and include issues such as:
 - Prior sexual history with the defendant
 - Alternate source of semen, pregnancy or injury
 - Accused had reasonable but mistaken belief in victim's consent
 - Evidence complainant made prior false accusations of sexual assault

2. Constitutional Catch-All Laws

- Similar to legislated exception laws with added provision that evidence of victim's prior sexual conduct is admissible if Constitution requires it

3. Judicial Discretion Laws

- No legislated exceptions, but judges granted broad discretion to admit or bar evidence of a complainant's sexual history

4. Evidentiary Purpose Law

- Admissibility determined by purpose for which it is being introduced
 - California and Delaware bar evidence of victim's sexual history with the defendant to establish consent, but evidence may be introduced to attack complainant's credibility
 - Nevada and Washington have the opposite standard: such evidence is inadmissible to attack the victim's credibility, but admissible on the issue of consent

(Michelle J. Anderson, [Understanding Rape Shield Laws](#) (PDF 90KB), excerpted from *Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEORGE WASHINGTON LAW REVIEW 51 (Feb. 2002): PDF.

Resources

Articles

- Michelle J. Anderson, [Understanding Rape Shield Laws, excerpted from, Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law](#), VOL. 70 GEO. WASH. L. REV. 51 (Feb. 2002) 90KB

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Rape Shield Law - Mistake of Fact Defense

A defendant will sometimes seek to explore evidence of a victim's sexual history in order to offer a defense that he held a "reasonable belief of consent" to sexual contact and therefore did not intend to rape the victim. The reasonable belief of consent defense contains two elements, one subjective and one objective. First, at the time of the sexual conduct, the defendant must have honestly believed the victim consented. Second, the defendant's belief must have been reasonable.

Nevertheless, courts continue to examine the defendant's culpability in light of the victim's conduct, rather than the reasonableness of the defendant's subjective belief that the victim consented, particularly when a defendant does not testify. These defenses often take the finder of fact back to the historical preference for evidence of resistance in order to establish the defendant's guilt of rape, even though reform of rape law has generally eliminated the requirement that a victim "resist" her assailant in order to prove forcible compulsion. Coerced "consent" is often conflated with actual consent. See [Victims and Offenders: Acquiescence Out Of Fear](#), and Dane Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE LAW JOURNAL 2687, at 2691, n. 61 (1991) (discussing varying approaches to issue of "reasonable mistake" in numerous jurisdictions).

Resources

Articles

- Dane Berliner, *Rethinking the Reasonable Belief Defense to Rape*, VOL. 100 YALE L. J. 2687 (1991)

Resources

Cases

- *Jones v. State*, 74 S.W. 3d 663, 667 ARK (2002)

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Rape Shield Law - Admission of Photographs, Videos and Weblogs

A significant issue with respect to rape shield laws in intimate partner sexual abuse cases is admission of photographs, videos and web blogs claimed by the defense to depict consensual sex and thus to show that the alleged victim enjoyed the activities complained of. Recall the case described in [Institutional Responses](#), [Prosecutor Response](#), in which a husband forced his wife to be videotaped simulating a sex act with a cucumber and demanded that she look like she was enjoying it. Had that case gone to trial, the defendant would likely have tried to have this video admitted.



In *Jones v. State*, 348 Ark. 619, 74 S.W. 3d 663 (2002) the defendant in a marital rape prosecution sought to introduce photographs of his estranged wife masturbating and engaging with him in oral and anal sex and anal sex with a dildo. He claimed that these photographs were essential "to refute the allegations against him that he forced the victim to engage in deviate sexual acts." The prosecutor argued that the photographs were not relevant to the victim's consent on the night of the rape. The judge held an *in camera* hearing and ruled that the photographs would be admissible if the victim denied engaging in the acts in

question, but otherwise not, even if she claimed that she had done so unwillingly. The victim acknowledged engaging in all the acts depicted but claimed that it was without consent. In affirming the defendant's conviction, the Arkansas Supreme Court noted, in words generally applicable to consideration of rape shield issues:

"The purpose of our rape-shield statute...is to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt.... The rape-shield statute prohibits admission of evidence of a victim's prior sexual conduct, unless such conduct pertains to the act upon which the prosecution is based.... Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act; there must be some additional evidence connecting such prior acts to the alleged consent in the present case before the prior acts become relevant.... However, even such relevant evidence is not admissible unless the trial court, in an *in camera* hearing, makes a written determination that the probative value of the evidence outweighs its inflammatory or prejudicial nature.... The trial court is vested with a great deal of discretion in ruling whether the victim's prior sexual conduct is relevant."

— 219 348 Ark. at 628, citations omitted.

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Self Test: Rape Shield Law

Once an intimate partner sexual abuse victim declines to testify there is little the court can do to encourage her to go forward.

- a. True
- b. False

Because of the special risks inherent in domestic violence prosecutions, statements to police officers and prosecutors following up on complaints are generally admissible even if the complainant is not available for cross-examination.

- a. True
- b. False

Evidence that a complainant was promiscuous in her sexual relationships can be highly relevant to the question of whether she consented to an alleged assault.

- a. True
- b. False

A testimonial statement is one made after the immediate events that are the subject of a prosecution have passed.

- a. True
- b. False

If the prosecution establishes that the victim has not appeared at trial because of the defendant's efforts to intimidate her, the right to confrontation is forfeited and the victim's out of court statements are admissible.

- a. True
- b. False

Rape shield laws are of limited use in intimate partner sexual abuse prosecutions because of the common exception for evidence of sexual history between the complainant and the defendant.

- a. True
- b. False

Prior acts of sexual conduct with a defendant are not in themselves evidence of consent to a subsequent sexual act.

- a. True
- b. False

See Answers

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Prior Bad Acts - Statutory Trends Toward Admissibility

Introduction of "prior bad acts evidence"—proof that in the past the defendant committed acts similar to those charged—has traditionally been closely limited to proof of matters such as intent, motive, identity, common scheme or plan. *See, e.g.*, Federal Rule of Evidence 404. The prohibition is rooted in the principle that a jury hearing of prior similar acts may convict the defendant of the charged crime because it believes, based on the past conduct, that the defendant committed the present crime as well, or that it may be so repelled by the past incidents that it will convict in response to those matters.

Increasingly, federal and state statutes have created exceptions to permit use of prior bad acts evidence in sexual assault and domestic violence cases, in a variety of contexts and for a range of purposes.

Domestic violence and intimate partner sexual abuse most often take place as a *pattern* of abuse. When a court or jury hears evidence concerning only an isolated incident, the greater pattern of coercion and control is lost. The escalation of violence and sexual degradation over the years becomes invisible. The incident that finally brings the case into court may be trivialized as a one-time event. Permitting the trier of fact to hear about the defendant's prior similar conduct places the alleged offense in perspective.

In cases of sexual assault, the Federal Rules of Evidence were modified in 1994 to permit consideration of evidence of a defendant's prior sexual assaults or acts of child molestation "for its bearing on any matter to which it is relevant." Federal Rule of Evidence 413(a) (sexual assault); Federal Rule of Evidence 414 (child molestation). These statutes have survived constitutional challenge. *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998), cert. denied, 525 U.S. 887 (1998).

Resources

Cases

- *United States v. Enjady*, 134 F.3d 1427 (10TH CIR. 1998) (1998)

Statutes

- VOL. 404 FEDERAL RULE OF EVIDENCE
- VOL. 413(A) FEDERAL RULE OF EVIDENCE
- VOL. 414 FEDERAL RULE OF EVIDENCE

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Prior Bad Acts - Statutory Trends Toward Admissibility (cont'd)

Many states followed suit, and a few expanded this allowance to evidence of prior domestic violence. *E.g.*, California Evidence Code § 1108 (sexual offenses), § 1109 (domestic violence); Alaska R. Evid. § 404(b)(3) (sexual offenses) and (4) (domestic violence). In the instance of intimate partner sexual abuse, prior bad acts of both sexual assault and domestic violence may be relevant. The majority of states only permit such evidence on noncharacter issues. Other states define "noncharacter" quite expansively, to include matters such as "history of the relationship." These rules open the door quite wide for prosecutors. A limited few permit use of such evidence for purposes of establishing propensity to commit the charged offense (Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes*, 2003).



A recently enacted Minnesota statute, § 634.20 (2006), is an example of an expansive noncharacter statute. It permits introduction of prior domestic abuse to shed light on a claim of intimate partner sexual abuse, such as evidence refuting a defendant's claim that injuries to his girlfriend's vagina occurred during consensual sexual relations. *State v. Hardy*, 2007 Min. App. Unpub. LEXIS 196 (Minn. Ct. App. 2007).

Admission by Case Law

Even where no express statutory exemption exists for evidence of prior acts of sexual assault and domestic violence, courts across the country have admitted this evidence for many purposes as more probative than prejudicial. However, if evidence of prior bad acts is to be used, "the connection between the other acts evidence and the permissible purpose for the current charged case should be clear, and the issue upon which the other acts evidence is said to bear should be the subject of genuine dispute." (Kovach, *supra* at 1128.)

Resources

Articles

- Andrea Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future*, Vol. 2003 UNIVERSITY OF ILLINOIS L. REV. 1115 (2003)

Cases

- *State v. Hardy*, MIN. APP. UNPUB. LEXIS 196 MINN. CT. APP (2007)

Statutes

- ALASKA R. EVID. 404(b)(3) and (4)
- CALIFORNIA EVIDENCE CODE 1109
- CALIFORNIA EVIDENCE CODE 1108
- MINNESOTA STATUTES ANNOTATED 634.20 (2006)

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Prior Bad Acts - Admission by Case Law

Illustrative cases on the admission of prior bad acts evidence in intimate partner sexual abuse cases and the grounds for admissibility include:

- *People v. Luna*, Not Reported in Cal. Rptr. 2d, 2003 WL116425 (Cal. App. 2 Dist.). Evidence of defendant's prior alleged, unadjudicated sexual and domestic violence against his ex-wife admitted in trial for rape of current wife under California Evidence Code § 1108 and § 1109. **[CAVEAT: This case contains extremely disturbing descriptions of sexual and physical violence.]**
- *People v. Goodsell*, 2003 Mich. App. LEXIS 819 (Mich. Ct. App. 2003). Evidence of defendant's admitted prior abusive behavior shed light on his "state of mind" at the time of the alleged sexual assault and tended to refute his claim that the sexual relations were consensual.
- *State v. Bell*, 122 P. 3d 420, 2005 WL 3030333 (Kan. App.) (Unpub. Opinion). Defendant convicted of rape and domestic battery against his girlfriend claims the incident complained of was consensual "rough sex." Court admitted evidence of his prior repeated acts of violence against her. "Our appellate courts have consistently held that evidence of a continuing course of conduct between the same parties is admissible..." *Id.* at *2.
- *State v. Frost*, 242 N.J. Super. 601; 577 A. 2d 1282; 1990 N.J. Super. LEXIS 308. Defendant convicted on several counts including first-degree aggravated sexual assault of his girlfriend of three and a half years. Trial court's admission of testimony about defendant's prior assaults on the victim upheld because of their relevance to showing the victim's state of mind.

"The other crimes evidence here, in essence, was part and parcel of the State's theory regarding the battered woman syndrome. To understand why L.S. [the victim] would not have simply run away from defendant, evidence of the parties' prior relationship, including the prior assaults committed upon the victim by the defendant, would indeed have been quite relevant. Viewed in this light, the evidence tended to prove, not necessarily defendant's state of mind but rather L.S.'s. Since the list of examples in Evid.R. 55 is not exhaustive, and since L.S.'s state of mind was a genuine fact which was directly put into issue by defendant, this testimony was admissible."

— *Id.* at 620.

Resources

Cases

- *State v. Frost*, 242 N.J. SUPER. 601; 577 A. 2D 1282; N.J. SUPER. LEXIS 308 (1990)
- *People v. Goodsell*, 2003 MICH. APP. LEXIS 819 (2003)
- *People v. Luna*, NOT REPORTED IN CAL. RPTR. 2D, 2003 WL 116425 (CAL. APP. 2 DIST.) (2003)
- *State v. Bell*, 122 P. 3D 420, 2005 WL 30333 (KAN. APP.) (UNPUB. OPINION) (2005)

Resources

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Prior Bad Acts - Admission by Case Law (cont'd)

- *State v. Rogers*, Not Reported in N.W. 2d, 2005 WL 2516964. Defendant convicted of sexually assaulting his wife appealed admission of his ex-wife's testimony about his previous conviction for assaulting her. The appellate opinion details the facts of both of these prolonged, extremely violent and strikingly similar assaults. The court upheld admission of the prior bad acts evidence on two grounds: common plan and intent.



"The trial court properly admitted the testimony of defendant's former wife. This testimony was introduced for the purpose of showing defendant's common plan, scheme or system of exerting physical control over his spouse. Such evidence is admissible if there is a sufficient factual nexus between the prior conviction and the charged offense; *i.e.*, the prior conviction is similar enough to be materially and logically relevant. However, general similarity is insufficient. There must be 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'...

The assaults involved several common features reflecting a common scheme or system in physically abusing his spouses. The incidents of domestic violence were 'sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.'

This testimony was also highly relevant. Defendant asserted that an argument with the complainant escalated and that he did not intend to injure her. To establish felonious assault, however, the prosecution must show that defendant intended 'to injure or place the victim in reasonable apprehension of immediate battery.' The prior incident of domestic violence clearly tends to show that defendant intended to cause harm to the complainant."

— *Id.* at *2. (Citations and footnotes omitted.)

Cases

- *State v. Rogers*, NOT REPORTED IN N.W. 2D, WL 2516964 (2005)

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Self Test: Prior Bad Acts

Evidence of prior violent acts may be admissible in a trial that includes current allegations of sexual assault if the connection between the proffered evidence and matter at trial is clear and provides necessary context for a fair adjudication.

- a. True
- b. False

Evidence of a prior sexual assault has no bearing on a defendant's state of mind at the time of a later, charged sexual assault.

- a. True
- b. False

When a defendant claims a sexual encounter charged as an assault was "consensual", evidence of prior similar assaults may be probative of a common scheme and plan, and therefore admissible.

- a. True
- b. False

The current trend in new federal and state evidence laws is to permit evidence of prior bad acts in cases of domestic violence and sexual assault.

- a. True
- b. False

See Answers

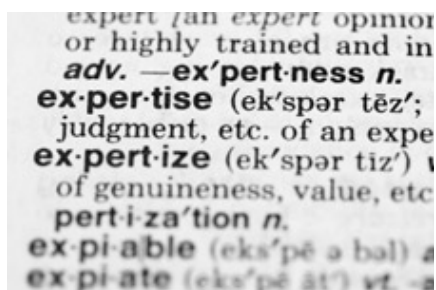
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Expert Witnesses - Introduction

Victims of intimate partner sexual abuse often behave in ways that are counterintuitive or inexplicable to those without specialized training and experience. Thus, whether a case is bench or jury tried, expert witnesses can provide information and perspectives critical to conducting a fair trial (Schafran, *Writing and Reading About Rape: A Primer*, 1993).

Expert testimony may be admitted when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue (Federal Rule of Evidence 702). Expert witnesses are called in intimate partner sexual abuse trials to educate jurors as to the effects of domestic violence and sexual assault on a victim's behavior, perceptions, beliefs and demeanor. An expert may testify on issues such as rape-related posttraumatic stress disorder (PTSD) and battered woman syndrome to rebut a defendant's attack on a complainant's credibility and to explain behavior that could be incorrectly construed as inconsistent with that of a sexual assault victim. *See, e.g., People v. Moreno*, No. 212999, 2000 WL 33420630, at *2 (Mich. Ct. App. May 16, 2000); *Arcoren v. United States of America*, 929 F.2d 1235, 1240 (8th Cir. 1991); Dutton, *Understanding Women's Responses to Domestic Violence* (1990).

Expert testimony allows the trier of fact to make credibility assessments when a victim's or defendant's behavior or actions seem erratic, illogical or inconsistent with the way such a person is expected to act. Jurors' common knowledge is often infused with incorrect assumptions about how the victims of intimate partner sexual abuse will behave. Jurors' logic, often drawn from their own experience, may lead them to wholly incorrect conclusions. An expert witness can correct inaccurate preconceived ideas of how an intimate partner sexual abuse victim should act by explaining how victims *do* act. Expert testimony enables jurors to recognize that their prior conclusions are more like common myths, than common knowledge. *See, e.g., State v. Koss*, 551 N.E.2d 970 (Ohio 1990) (citing *State v. Kelly*, 478 A.2d 364 (N.J. 1984)).



Resources

Articles

- Lynn Hecht Schafran, [*Writing and Reading about Rape: A Primer*](#), VOL. 66 ST. JOHN'S L. REV. 979 (1993) 4.2MB
- Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, VOL. 8 COLUMBIA J. GENDER AND LAW 67 (1998)

Nonperiodical Literature

- Kimberly A. Lonsway, PhD., National Center on Domestic Sexual Violence, [THE USE OF EXPERT WITNESSES IN CASES INVOLVING SEXUAL ASSAULT](#) (2005)
- Mary Ann Dutton, [*Understanding Women's Responses to Domestic Violence: Redefinition of Battered Women's Syndrome*](#), VOL. 21 HOFSTRA L. R. 1190 (1993) 3 MB

Statutes

- VOL. 702 FEDERAL RULE OF EVIDENCE

Cases

- *People v. Moreno*, No. 212999, 2000 WL 33420630 MICH. CT. APP (May 16, 2000)
- *Arcoren v. United States of America*, 929 F.2d 1235 (8TH CIR.) (1991)
- *State v. Koss*, 551 N.E.2d 970 OHIO (1990)

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Expert Witnesses - Introduction (cont'd)

For instance, victims may delay reporting, continue to have contact with the defendant after reporting, fail to leave an abusive partner after an instance of violence, or recant all or parts of a criminal report between reporting and trial. Such actions are typical of victims of intimate partner sexual abuse and other types of domestic violence, but may seem confusing or illogical to the trier of fact, and may be used to attack the victim's credibility in court. Expert testimony is used to rebut credibility attacks based on the victim's particular actions by providing background information on the typical behavior of intimate partner sexual abuse or domestic violence victims.

Experts may provide general background about matters such as the medical and psychological realities of rape-related posttraumatic stress disorder and battered woman syndrome. *E.g.*, *State v. Griffin*, 564 N.W. 2nd 370 (Iowa 1997); *People v. Wu*, No. H024094, LEXIS 508 (Cal. Ct. App. Jan. 16, 2003).

Professionals who have frequent contact with rape or domestic violence survivors, such as police officers, doctors, nurses, forensic sexual assault examiners and victim advocates may also testify as to typical behavior of the victims of those crimes, *E.g.*, *People v. Small*, No. 175662, 1996 WL 33348738 (Mich. Ct. App. Oct. 25, 1996).

Expert testimony of this nature has been admitted across the country under both the *Daubert* and *Frye* tests. Experts may not opine as to whether an alleged victim is telling the truth or the act charged did happen. *E.g.*, *State v. Pansagrau*, 524 N.W. 207 (Iowa 1994). Experts may state that in their opinion the victim's conduct or affect is consistent with that of victims in cases of the kind at issue.

Resources

Cases

- *State v. Pansagrau*, 524 N.W. 207 IOWA (1994)
- *State v. Griffin*, 564 N.W. 2ND 370 IOWA (1997)
- *People v. Small*, No. 175662, 1996 WL 33348738 MICH. CT. APP (Oct. 25, 1996)
- *People v. Wu*, CAL. APP UNPUB. LEXIS 508 (2003)

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Expert Witnesses - Recanted Testimony

Expert testimony can shed light on many different victim behaviors. Since victims react differently to stressful situations, such as leaving an abuser, contact with law enforcement, or appearance in court, it is important to know the range of victim behaviors that may be the subject of expert testimony.

Victims of intimate partner sexual abuse often recant reports to the police or prior statements and testimony due to fear of future violence, threats, a feeling of personal responsibility for the abuse, shame, fear of testifying in court or a belief that the violence in the relationship is over. Victims who recant often give detailed accounts of the violence shortly after an incident, often supported by material evidence, but later avow that their prior testimony was untrue. Expert testimony assists jurors in understanding why victims so often recant and in assessing a victim's credibility when she recants earlier testimony and later gives a blatantly conflicting account. *E.g., Arcoren v. United States of America*, 929 F.2d 1235 (8th Cir. 1991). (Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions*, 2005-6.)

Resources

Articles

- Mathew P. Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio*, VOL. 53 CLEVELAND ST. L. REV. 133 (2005-2006)

Cases

- *State v. Ramirez*, 921 A.2D 702 CONN. APP (2007)
- *Arcoren v. United States of America*, 929 F.2D 1235 (8TH CIR.) (1991)
- *People v. Small*, No. 175662, 1996 WL 33348738 MICH. CT. APP (Oct. 25, 1996)

Resources**Module IX: Evidentiary Issues****Expert Witnesses - Delayed Reporting**

Jurors often equate delayed reporting with fabricating. But victims of intimate partner sexual abuse typically delay reporting for a variety of reasons. As discussed in [Why Victims Don't Report](#), victims may be afraid or ashamed to report, it may take some time for them to identify unwanted sex as rape, or they may fear retaliation by the perpetrator and/or rejection by their community. Professionals who frequently take reports of sexual assault, such as detectives, doctors or nurses, may be called as expert witnesses on the behavior of sexual violence victims and the frequency of delayed reporting. *E.g.*, *State v. Ramirez*, 921 A.2d 702 (Conn. App. 2007); *People v. Small*, No. 175662, 1996 WL 33348738 (Mich. Ct. App Oct. 25, 1996).

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Expert Witnesses - Absence of Physical Injuries

- Jurors expect sexual assault victims to have visible physical injuries, especially genital injuries. These injuries are perceived as proof of resistance and non-consent. While many victims of intimate partner sexual abuse also suffer severe physical violence, physical assaults may not happen at the same time as sexual assaults. Sexual assault and rape victims typically suffer no visible physical injury. Many marital rape victims have no visible physical injuries because they acquiesce to unwanted sex out of fear that resisting will provoke more severe violence. Marital rape researchers David Finkelhor and Kersti Yllo have written of the "special problem of resistance to sexual assault in a marriage. These women frequently stressed the need to keep things civil and maintain the façade of a marriage... A victim of marital rape has to face her assailant the next morning over breakfast." (FINKELHOR & YLLO, LICENSE TO RAPE, 1985 at 112.)

In an article titled *Rape by Acquiescence*, researcher Kathleen C. Basile noted: "These relationships were not usually characterized by physical force, just enough verbal threats to create an environment defined by fear and filled with the tension of wondering what might happen if she did not give in." (Basile, *Rape by Acquiescence*, 1999 at 1049.) One of the women in her sample describes the circumstances of her acquiescence:

"Oh, there was one point that he took out a gun, he had a little pistol, and uh, scared me half to death. I was shaking all over and he was looking for it and I had hidden it. He was looking through all my drawers and threw out everything from, you know, my bras and panties and things were all over the place, and he was looking for his gun. And so, after that episode, I just didn't dare, you know. I would just go through with it [sex], there was no way I was going to say no."

— Ellen, quoted in Basile, *Rape by Acquiescence* (1999) at 1049. See [Victims and Offenders, Marital Rape Typologies](#).

Health care professionals, such as doctors or nurses familiar with sexual assault examinations can testify that many sexual assaults result in no visible injury and lack of injury is not evidence that no sexual assault occurred. *E.g.*, *State v. Tully*, 155 P.3d 744 (Kan. Ct. App. 2007). NJEP's *Presenting Medical Evidence in an Adult Rape Trial* explains why there are usually no visible physical injuries in a rape or sexual assault and provides detailed anatomical charts illustrating the



Resources

Articles

- Kathleen C. Basile, *Rape by Acquiescence: The Ways in Which Women 'Give in' to Unwanted Sex With Their Husbands*, VOL. 5 VIOLENCE AGAINST WOMEN 9 (September 1999)

Nonperiodical Literature

- David Finkelhor, Kersti Yllo, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985)

Cases

- *State v. Tully*, 155 P.3d 744 KAN. CT. APP (2007)

Videos

- National Judicial Education Program, [Presenting Medical Evidence in an Adult Rape Trial](#), VIDEO RESOURCE GUIDE

types of injuries associated with rape as well as information about the forensic sexual assault examination (National Judicial Education Program, *Presenting Medical Evidence in an Adult Rape Trial* DVD and DVD [Transcript](#) (PDF 130KB), (2002)).

Module IX: Evidentiary Issues

Expert Witnesses - Continued Contact with Perpetrator

Victims of intimate partner violence are often unable to leave the perpetrator and may continue to have contact with the defendant after reporting the crime. They may have no safe place to go or means of support, may believe the perpetrator's claims that the violence is over, may believe they deserved the violent treatment, or may continue to contact the perpetrator in an attempt to discover why the violence happened. Expert testimony on the effects of battering can help jurors understand the cycles of violence and non-violence in an abusive relationship, and the difficulty victims have in extricating themselves from the relationship and cutting off all contact with the perpetrator. *E.g.*, *Com. v. Goetzendanner*, 679 N.E.2d 240 (Mass. Ct. App. 1997); *State of New Jersey v. Frost*, 577 A.2d 1282 (N.J. Ct. App. 1990).



Resources

Articles

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

Cases

- *State of New Jersey v. Frost*, 577 A.2d 1282 N.J. Ct. App (1990)
- *People v. Gallegos*, 644 P.2d 920 COLO (1982)
- *Commonwealth v. Goetzendanner*, 679 N.E.2d 240 MASS. CT. APP (1997)
- *People v. Moreno*, No. 212999, 2000 WL 33420630 MICH. CT. APP (May 16, 2000)
- *State v. Hippler*, 724 N.W.2d 702 WIS. CT. APP (2006)

Resources

Module IX: Evidentiary Issues

Expert Witnesses - Demeanor

As discussed in [Jury Selection, Identifying Biased Jurors](#), jurors often have definite expectations about how sexual assault victims should behave on the witness stand. In fact, victims of intimate partner sexual abuse may display a variety of demeanors in court and while testifying. They may avoid eye contact, appear nervous, or present a flat, non-emotive affect when delivering testimony. These variations in demeanor may result from shame associated with speaking about personal matters in public, nervousness at testifying in court, or be a typical



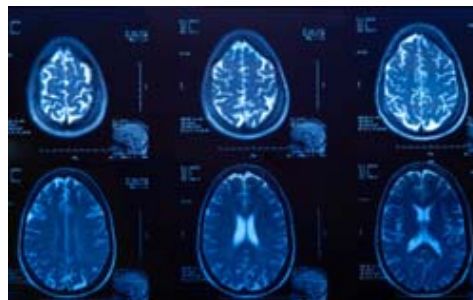
symptom of posttraumatic stress disorder. Expert testimony from a professional experienced in working with sexual assault victims or able to testify about the symptoms and effects of PTSD can help jurors understand and evaluate the credibility of victims who don't behave the way jurors would expect a rape victim to act. *E.g. People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *State v. Hippler*, 724 N.W.2d 702 (Wis. Ct. App. 2006); *People v. Moreno*, No. 212999, 2000 WL 33420630 (Mich. Ct. App. May 16, 2000); Schafran, *Writing and Reading About Rape*.

Module IX: Evidentiary Issues

Expert Witnesses - Complex PTSD

Victims of long-term domestic violence and/or repeated sexual assault may display symptoms that go beyond typical posttraumatic stress disorder (PTSD). Ongoing, repeated traumas disrupt normal beliefs and alter perceptions of the self and others. Victims lose sight of reference points outside of the violent situation. Victims of such abuse experience a deep numbing-out because the psyche simply cannot sustain high levels of trauma on an ongoing basis.

These victims present as flat and non-emotive, particularly when discussing instances of abuse, as they can no longer withstand the full emotional experience that most would perceive as a normal reaction to violence. Victims in this state also experience profound self-doubt and despair. This condition is sometimes referred to as "Complex PTSD" or "Disorder of Extreme Stress Not Otherwise Specified" (DESNOS) (Jill Stultz, LCSW, *Body and Soul: Medical and Therapeutic Interventions*, Domestic Violence and Sexual Assault: Integrating Insights and Practice Conference, Fordham Law School, (February 28—March 1, 2005). Expert testimony from a professional or psychologist who has experience with long term domestic violence can help jurors understand unexpected emotional, or non-emotional, reactions in intimate partner sexual violence victims.



Resources

Articles

- Jane Harris Aiken , Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, COURT REVIEW 18 (Summer 2002)

Nonperiodical Literature

- David Lisak, *The Neurobiology of Trauma* ed: National Judicial Education Program, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT CASES (2005)

Cases

- *Farley v. People*, 746 P.2d 956 COLO (1987)

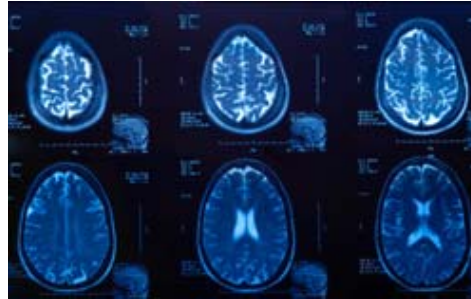
Resources

Module IX: Evidentiary Issues

Expert Witnesses - Traumatic Memory

Victims may have been traumatized by the violence, and therefore may be confused about the order of events or give slightly inconsistent testimony when interviewed at different times. *E.g., Farley v. People*, 746 P.2d 956 (Colo. 1987). Recent research on the physical effects of a traumatic event, such as a sexual assault, on a victim's brain reveals that traumatic memories are actually created, stored and retrieved differently than non-traumatic memories.

The difference is that it is harder to access these memories, and that at times victims remember different aspects of the traumatic event. This has profound implications for the criminal justice system, which expects crime victims to have perfect recall of the crime and consistently give an identical account to police, prosecutors and in the courtroom. For a discussion of this research click here for, Dr. David Lisak, [The Neurobiology of Trauma](#) (Lisak, [The Neurobiology of Trauma](#) (PDF 234KB), 2000).



Module IX: Evidentiary Issues

Self Test: Expert Witnesses

Jurors should rightly expect to see a victim of intimate partner sexual abuse break down on the stand.

- a. True
- b. False

Jurors should rightly expect intimate partner sexual abuse victims to have given a coherent, chronological account to law enforcement, victim advocates, and prosecutors and to give an identical account in court.

- a. True
- b. False

An individual who works frequently with sexual assault victims, such as a police officer or victim advocate, lacks sufficient depth and breadth of knowledge to qualify as an "expert" on typical victim responses to intimate partner sexual abuse.

- a. True
- b. False

It does not take an expert to understand how someone would behave after being sexually assaulted by a loved one.

- a. True
- b. False

Expert testimony explaining why a victim of intimate partner sexual abuse might recant would constitute impermissible bolstering.

- a. True
- b. False

See Answers

Module IX: Evidentiary Issues

KeyPoints: Evidentiary Issues

Rape Shield Law

- Rape shield laws barring inquiry into a victim's sexual history, were enacted to counter the long-held requirement that a woman could not establish rape unless she could also prove that she was "chaste."
- Rape shield laws generally allow inquiry into prior sexual contact between the defendant and the complainant. Because the majority of rapes are perpetrated by someone the complainant knows and may have been intimate with, this exception undercuts the purpose of the rule.
- A significant rape shield law issue in modern intimate partner sexual abuse cases is admission of photographs, videos and weblogs that the defense claims depict consensual sex and show that the alleged victim enjoyed the activities complained of.
- A court considering whether to admit such evidence should examine closely the question of whether the evidence is truly probative of consent.

Prior Bad Acts

- Evidence of a defendant's prior wrongful conduct has generally been held inadmissible if its sole evidentiary purpose is to demonstrate the defendant's propensity to commit the charged offense.
- Increasingly, federal and state statutes have created exceptions for use of prior bad acts evidence in sexual assault and domestic violence cases, in a variety of contexts and for a range of purposes.
- Because domestic violence and intimate partner sexual abuse often occur as part of a pattern of behavior or course of conduct, evidence of similar prior bad acts may be essential to understanding the import of the charged acts.
- If evidence of prior bad acts is to be used, the connection between the other acts evidence and the permissible purpose for the current charged case should be clear, and the issue upon which the other acts evidence is said to bear should be the subject of genuine dispute.

Expert Witnesses

- There are widespread misconceptions in the legal and lay communities about how sexual assault victims behave during and after the attack.
- In an intimate partner sexual abuse trial, expert testimony concerning battered woman syndrome, rape-related posttraumatic stress disorder and marital rape may be essential to explain issues such as:
 - Why the complainant did not immediately leave her partner.
 - Why she experienced some sexual contact as assaultive, even when she consented on other occasions.
 - Why she did not resist the sexual contact she considered assaultive.
 - Why she has no visible physical injuries.

- Why she did not report the assaults sooner.
- Why intimate partner sexual abuse is especially harmful to victims.
- Why the complainant's demeanor on the witness stand may not be what jurors expect.