

INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM  
BEHAVIOR IN SEXUAL AND  
DOMESTIC VIOLENCE PROSECUTIONS. *See Footer*

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1. MYTHS OF SEXUAL ASSAULT AND DOMESTIC VIOLENCE
  - a. Victim Behavior
    - i. Victim’s credibility becomes linked to her behavior.
  - b. Reporting
    - i. 1949 Washington State Supreme Court
      - (1) “The hue and cry doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties on her person and that, on trial, an offended female complainant’s omission of any showing as to when she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all, and therefore, that it is more likely that the liberties upon her person, if any, were not offensive and that consequently her present charge is fabricated...”
  - c. Alcohol and drugs
  - d. Out-of-control behavior
  - e. Stress
  - f. Exaggeration
  - g. Women provoke therefore they must like it.
  - h. Inherently unreliable
2. JURIES AND THE MYTHS
  - a. If you’ve never been a victim, you have no idea how you’d react.
    - i. “If that ever happened to me, I would...”
    - ii. “I’d never let that happen to me.”
  - b. Substitution of reality with myth.
  - c. Evaluate victim’s actions as if she had a wide range of options:
    - i. Supportive family
    - ii. Social workers
    - iii. Counselors, etc.
  - d. If she stays, she must be inherently unreliable and unworthy of belief.
  - e. Comparing this victim’s behavior with someone they know who has been a victim.
3. THE NECESSITY OF EXPERT TESTIMONY TO DISPEL THE MYTHS AND PROVIDE CONTEXT FOR VICTIM BEHAVIOR.

- a. Explaining victim behavior to give jurors an accurate context to evaluate victim's behavior.
  - b. Court's recognize the need for expert testimony regarding victim behavior.
    - i. "The victim's behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of counterintuitive behavior often occur in sexual abuse cases." *U.S. v. Rynning*
  - c. The experts
    - i. Social workers
    - ii. Therapists
    - iii. Counselors
    - iv. Psychologists
    - v. Physicians
    - vi. Victim advocates
      - (1) Caution: will this create any kind of conflict with VA.
        - (a) Perception that the advocate is disloyal to victim's, creates a breach of trust, etc.
4. DEFINING "COUNTERINTUITIVE" BEHAVIOR AND OTHER COMMON TERMS
- a. "Counterintuitive" victim behavior:
    - i. Refers to:
      - (1) Actions or statements made by victims in the aftermath of an assault which appear to other people as illogical or poor decisions by the victim.
      - (2) Behaviors that are not what the average person would "expect" from a victim.
      - (3) Juror's perceptions of victim behavior - rather than the behavior itself - as described by courts and other scholars.
    - ii. "Counterintuitive behavior" is NOT:
      - (1) A psychological term; or
      - (2) A definition of victim behavior.
    - iii. "Counterintuitive behavior" is:
      - (1) Public's perception of the victim's behavior; and
      - (2) The failure of the public's expectations to match actual victim behavior.
    - iv. This provides basis for arguing for the need of an expert to explain the victim's behavior.
  - b. Washington Supreme Court, 1988, recognized the disconnect between public expectations of victim behavior and the actual victim behavior.
    - i. "The ongoing nature of relationships where there is domestic violence is "even more *counterintuitive* and difficult to understand" than the number of women who are victims of domestic violence."

- ii. “The average juror’s *intuitive* response could well be to assume that someone in such circumstances could simply leave her mate, and that failure to do so signals exaggeration of the violent nature of incidents and consensual participation.”
  - c. Common terms used in sexual assault and domestic violence cases.
    - i. Battered Women Syndrome (BWS)
    - ii. Rape Trauma Syndrom
    - iii. Battering and Its Effects
    - iv. Posttraumatic Stress Disorder (PTSD)
    - v. Cycle of Violence
  - d. Danger of using one of the common terms.
    - i. Dispute whether or not such conditions are legitimate.
    - ii. Are often terms used by defense attorneys to explain defendant’s behavior.
    - iii. Your victim’s behavior may not fit into a “nice, neat package.”
    - iv. “Syndrome,” “Disorder” implicate connotation of pathology or disease or create false perception that the victim suffers from a mental defect.
5. THREE-STEP PROCESS FOR INTRODUCING EXPERT TESTIMONY
- a. Identify the behavior that jurors will perceive as “counterintuitive.”
    - i. Review of all the evidence that may appear to be counterintuitive.
      - (1) Police report
      - (2) Victim statement
      - (3) Medical report
      - (4) Witness statements/descriptions of victim
      - (5) 911 call
      - (6) Defendant’s statement
    - ii. Do NOT seek assistance from an expert who has examined the victim or is currently providing treatment or counseling.
      - (1) Victim’s privacy interest.
      - (2) Erosion of trust relationship
  - b. Determine the admissibility of expert testimony.
    - i. UPC template memo
  - c. Explaining the victim’s behavior.
    - i. Expert’s testimony should focus on:
      - (1) victim behavior;
      - (2) discussion/explanation of sexual or domestic violence;
      - (3) common myths associated with both.
        - (a) Primary purpose of expert is to dispel the myths.
    - ii. Keep experts focused on relevant issues and don’t let them fall back on old or outdated theories.

- iii. This victim's behavior is a common behavior that the expert has observed in other victims with whom they've worked or about which they've studied or read.
  - d. Do NOT offer expert as an expert in "counterintuitive behavior."
    - i. Expert is an expert in the behavior of victims.
- 6. Preparing your expert
  - a. Standard stuff
    - i. Curriculum vitae
    - ii. URE 702
    - iii. Etc.
  - b. The "real" preparation
    - i. Educate them on the mechanics of trial.
    - ii. Go over the questions you are going to ask.
      - (1) Do not expect them to provide you with a list of questions that you should ask them.
    - iii. Go over the issues and behaviors that are most critical to the case.
    - iv. Unless the expert is being called to testify regarding a your victim, remind the expert that a diagnosis or evaluation of your victim is not the purpose of the testimony.
    - v. Prepare them for cross-examination.
      - (1) Explain potential objections by defense counsel.
        - (a) Relevance, admissibility, foundation, improper bolstering, etc.
      - (2) YOU need to be prepared to respond to the objections.
- 7. Motion in Limine
  - a. Get your expert admitted prior to trial.
  - b. Don't forget to establish your expert's credentials again at trial.
- 8. 404b Motions
  - a. UPC in the drafting stages of template motion.