



American Prosecutors  
Research Institute

*Introducing  
Expert Testimony  
to Explain Victim  
Behavior in  
Sexual and  
Domestic Violence  
Prosecutions*



Office on  
Violence Against Women

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*August 2007*

Jennifer G. Long



# TABLE OF CONTENTS

v	<b>Acknowledgments</b>
1	<b>Introduction</b>
5	<b>The Prevalence and Impact of Sexual and Domestic Violence Myths on Jury Verdicts</b> <i>The Myths</i> <i>The Impact of Myths on Jury Verdicts</i> <i>The Necessity of Expert Testimony to Dispel Myths and Provide Context for Victim Behavior</i>
11	<b>Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions</b> <i>“Counterintuitive” Behavior</i> <i>Other Common Terms</i> <i>Battered Woman Syndrome</i> <i>Battering and Its Effects</i> <i>Rape Trauma Syndrome</i> <i>Posttraumatic Stress Disorder</i>
17	<b>Recommended Practices for Introducing Expert Testimony to Explain Victim Behavior: A Three-Step Process</b> <i>Step One: Identify the Behavior That Jurors Will Perceive As Counterintuitive</i> <i>Step Two: Determine the Admissibility of Expert Testimony on Victim Behavior</i> <i>What does the law say?</i> <i>Admitting expert testimony on victim behavior under the federal rules of evidence</i> <i>Establishing relevance—F.R.E. 402</i> <i>The subject of expert testimony—F.R.E. 702</i> <i>Establishing “general acceptance” under Frye v. United States and “reliability” under Daubert v. Merrell Dow and Kumho Tire Co. Ltd. v. Carmichael</i>

*Avoiding Frye and Daubert?*

*Avoiding the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time—F.R.E. 403*

*Qualifying the expert*

**Step Three: Explain the Victim Behavior**

Determine the purpose of the expert testimony

Decide whether to call an expert in your case

Choose the most effective expert for your case

Prepare the expert to testify

Overcome common objections

Improper bolstering

Introduction of defendants uncharged  
misconduct

Foundation

Legal conclusion

Speculation

**41 Limitations on Common Practices of Introducing Expert Testimony on Victim Behavior**

*Character Evidence—F.R.E. 404*

*Limitations on the Use of BWS Testimony to Explain Victim Behavior*

*Limitations on the Use of “Battering and Its Effects” to Explain Victim Behavior*

*Limitations on the Use of RTS to Explain Victim Behavior*

*Limitations on the Use of PTSD to Explain Victim Behavior*

**47 Conclusion**

**49 Endnotes**

**61 Appendix A** *Qualifying the Expert*

**65 Appendix B** *Questions for the Expert*

**69 Appendix C** *Additional Sources*

**81 About the Author**

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# INTRODUCTION

The prevalence of sexual and domestic violence myths causes the public to search for reasons to doubt, rather than reasons to believe, allegations of a domestic or sexual assault. This doubt often is fueled by a focus on the victim's behavior both during and after the assault, which laypeople—who generally are inexperienced and uneducated about common victim responses to trauma—may find puzzling.<sup>1</sup> Frequently, the public's expectations of how victims “should” behave conflict with the way victims actually behave. When this occurs, the public perceives a victim's behavior as “counterintuitive,” and, therefore, compelling evidence of her lack of credibility.<sup>3</sup> Mental health experts as well as other professionals who work with domestic or sexual violence victims, however, understand that behavior termed counterintuitive by the public actually represents common victim responses to trauma.

Defense attorneys are eager to capitalize on the public's lack of knowledge and misconceptions about victim behavior. The defense routinely exploits public suspicion of sexual and domestic violence victims, arguing that a victim's behavior is inconsistent with the behavior of a “real” victim.<sup>4</sup> This often is an effective strategy where there are only two witnesses<sup>5</sup> to a sexual or domestic assault: the victim and her assailant – a common scenario in sexual and domestic violence prosecutions. These types of sexual and domestic violence cases are often described as “he said, she said,” and the trial unfolds into a focus on the victim's—rather than the defendant's—behavior. The victim's credibility becomes so inextricably linked with her behavior that, left unexplained, it will become the defense's most effective weapon to negate her testimony.<sup>6</sup>

Experienced prosecutors and other allied professionals familiar with victim behavior understand that victims have individual responses to trauma that are often counterintuitive to public expectations, but may be unable or unsure of how to explain this to the jury. Defense attorneys also understand the necessity of introducing expert testimony to explain sexual or domestic violence victim behavior to support an element of an affirmative defense, such as a claim of self-defense. For example, in one

case the defense argued: “Misconceptions regarding battered women abound, making it more likely than not that the average juror will draw from his or her own experience or common myths which may lead to a wholly incorrect conclusion.”<sup>7</sup> Historically, expert testimony to explain sexual or domestic violence victim behavior was offered primarily by defense attorneys. This testimony often focused on an examination of the defendant as well as a diagnosis or opinion that she suffered from Battered Woman Syndrome (BWS),<sup>8</sup> “Rape Trauma Syndrome (RTS),”<sup>9</sup> or that her actions were the results of “Battering and Its Effects.”<sup>10</sup> Eventually, prosecutors realized that explanations of common victim behaviors also would assist jurors in sexual and domestic violence prosecutions by countering the common myths and stereotypes that consistently hampered these prosecutions. Not surprisingly, some prosecutors simply copied the defense’s method of introducing expert testimony on syndromes to explain the behavior of sexual and domestic violence victims. For example, in some jurisdictions, the terms “Battered Woman Syndrome,” “Battering and Its Effects” and “Rape Trauma Syndrome” are offered by both prosecutors and defense attorneys to explain the behavior of sexual and domestic violence victims. The goals of explaining victim behavior in sexual and domestic violence prosecutions, however, are much different from those used by the defense to excuse or justify criminal behavior of sexual and domestic violence victims. As a result, terms and practices that may be well-suited to the defense have been ill-suited when employed by the prosecution.

The protocol for explaining victim behavior during a criminal prosecution depends upon the laws of a particular jurisdiction as well as the specific circumstances of each case.<sup>11</sup> Nevertheless, for the reasons set forth in this monograph, practices which include describing victim behavior in terms of a syndrome are not recommended. There are general rules that prosecutors can follow in order to explain victim behavior effectively. This monograph sets forth recommended practices for addressing victim behavior in a sexual or domestic violence prosecution, and providing an accurate context in which a jury can evaluate a victim’s behavior.<sup>12</sup> The first chapter addresses the prevalence of myths surrounding sexual and domestic violence and the impact of those myths on juror assessments of victim credibility as well as verdicts. The second chapter defines “coun-

terintuitive behavior” and other relevant terms used in case law and articles to describe victim behavior that does not comport with public expectations of sexual and domestic violence victims. The third chapter sets forth the recommended practices for introducing expert testimony to explain victim behavior in a sexual or domestic violence prosecution. The fourth chapter discusses the limitations on practices currently used to describe victim behavior. Finally, the appendix includes sample questions for qualifying experts and eliciting testimony on victim behavior. The appendix also includes a list of suggested sources, in addition to those cited in the body of this monograph, to which prosecutors can refer when preparing their case.



# THE PREVALENCE AND IMPACT OF SEXUAL AND DOMESTIC VIOLENCE MYTHS ON JURY VERDICTS

## *The Myths*

The prevalence of myths surrounding sexual violence is well-documented<sup>13</sup> and results in a focus on the victim.<sup>14</sup> “Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning.”<sup>15</sup> One “common myth is that rapists are most often strangers[,] who suddenly attack their victims in a dark alley.”<sup>16</sup> Regardless of whether the defendant is a stranger or someone the victim knows, jurors express victim blame “in several themes: victim masochism (e.g., she enjoyed it or wanted it), victim participation (e.g., she asked for it; it happens only to certain types of women), and victim fabrication (e.g., she lied or exaggerated).”<sup>17</sup>

Jurors often believe that a “real” victim would have promptly reported her assault to authorities, particularly in sexual assault cases. “For many years, the legal assumption with regard to rape victims was that they would complain immediately to authorities.”<sup>18</sup> For example, in 1949, the Washington Supreme Court noted:

[The hue and cry] doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon 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 [sic] that it is more likely that the liberties upon her person, if any, were not offensive and that consequently her present charge is fabricated . . .

Modernly, the inference affects the woman’s credibility generally, and the truth of her present complaint specifically, and consequently, we permit the state to show in its case-in-chief when the woman first made a complaint consistent with the charge.”<sup>19</sup>

Ultimately, Washington, along with many other jurisdictions, discredited this doctrine.<sup>20</sup> In other jurisdictions, however, the myth that victims immediately report their assaults continues to persist and is reflected in the current law. For example, in Pennsylvania, the jury is instructed that although a victim's failure to promptly report her assault is not conclusive evidence of consent, it should be considered in judging her credibility:

### 4.13A—FAILURE TO MAKE PROMPT COMPLAINT IN CERTAIN SEXUAL OFFENSES

1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without *[name of victim]'s* consent.

2. The evidence of *[name of victim]'s* [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the *[failure to complain]* *[delay in making a complaint]* should be considered in evaluating *[his]* *[her]* testimony and in deciding whether the act occurred *[at all]* *[with or without [his] [her] consent]*.

3. You must not consider *[name of victim]'s* [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent. *[name of victim]'s* failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of *[his]* *[her]* testimony and must be considered by you in light of all the evidence in the case.<sup>21</sup>

As explained in the Advisory Committee Note, this jury instruction is based upon a Pennsylvania statute reflecting the belief that a victim's failure to immediately report a sexual assault is relevant to her credibility:

The instruction is derived from section 3105 of the Crimes Code.

It is appropriate where the evidence suggests that an alleged victim, otherwise competent and able to do so, did not promptly report a sexual offense. *While lack of a prompt complaint does not defeat the charge, it may, in an appropriate case, have some evidentiary value in assessing the complainant's credibility as to either the actual occurrence of the offense, or the complainant's consent to the act otherwise constituting it.*<sup>22</sup>

According to Pennsylvania's "prompt complaint" statute:

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.<sup>23</sup>

The prevalence of myths surrounding domestic violence still exists, despite the increased media and political attention that has been focused on this issue. For example, many people still believe:

Domestic Violence is caused by alcohol or drugs.

Domestic Violence is out-of-control behavior.

Domestic Violence is caused by stress.<sup>24</sup>

Women exaggerate the problem of domestic abuse.

Battered women are masochistic and provoke abuse; they must like it or they'd leave.<sup>25</sup>

The public's belief in myths is reflected in the case law. One case notes that battered women are "subject to many misconceptions and myths, including the belief that the woman provokes the beatings or likes the beatings ... [when] she neither leaves the batterer nor seeks help."<sup>26</sup> Several clinical studies also have documented that the public's belief in "misinformation about domestic abuse [negatively impacts] their evaluation of [a] battering victim's credibility."<sup>27</sup> In addition, many law review articles address the admissibility of expert testimony to explain victim behavior and dispel myths.<sup>28</sup> For example, in support of her argument for the admission of expert testimony on domestic violence, Alana Bowman writes: "[e]xpert testimony that battering occurs in all cultures, religions,

ances, and economic levels serves to counter the ‘widespread public image’ of a typical batterer.’<sup>29</sup>

### ***The Impact of Myths on Jury Verdicts***

Common victim behaviors are often incomprehensible to laypeople.<sup>30</sup> Laypeople, therefore, often rely on myths or substitute their own wrong judgments. Further, “[m]any jurors evaluate a victim’s actions as if she had a wide range of options and support resources available to her, and tend to blame her for staying in abusive relationships [or for her assault.]”<sup>31</sup> Jurors often regard a victim’s behavior as evidence that she is unreliable. For example, one case notes, “[to] the average juror untutored in the psychological dynamics of domestic violence, the victim’s vacillating behavior towards the defendant—in particular her back and forth attempts to end the relationship—might have seemed counterintuitive and might have even suggested her version of events was inherently unreliable and unworthy of belief.”<sup>32</sup> Another case notes “the jury naturally would be puzzled by the complete about-face [the victim] made and would have great difficulty determining which version of [the victim’s] testimony it should believe.”<sup>33</sup> Further, in *People v. Ellis*,<sup>34</sup> the court recognized that a victim’s recantation was not self-explanatory and that without a possible explanation for it, jurors’ application of their common sense would likely lead to them to apply their own myths to the behavior.<sup>35</sup> As reflected in these decisions, even common victim responses to trauma may undermine a victim’s credibility in jurors’ eyes because jurors perceive the responses as counterintuitive.<sup>36</sup> Unfortunately, the resultant misperception of the victim’s credibility often leads to a “not guilty” verdict.

A juror’s substitution of his or her own judgment for the facts of the case can also happen in cases where the juror either has been, or knows, a victim of a domestic or sexual assault. In these cases it is not uncommon for jurors to condemn victims who do not behave as they or their acquaintances behaved. Further, jurors easily become fixated on their expectations of the victim’s as well as the defendant’s behavior.<sup>37</sup> If the victim fails to measure up to those expectations, jurors often jump to the conclusion that the victim is incredible and her testimony should not be believed. This misperception also results in not guilty verdicts.

***The Necessity of Expert Testimony to Dispel Myths and Provide Context for Victim Behavior***

Prosecutors must explain victim behavior to provide jurors with an accurate context in which to evaluate victim behavior so that jurors do not misjudge certain conduct as evidence of a victim's dishonesty and incredibility. Many courts have recognized that expert testimony is necessary to prevent jurors' from misjudging the victim based upon their misperceptions of victims. For example, in *U.S. v. Rynning*,<sup>38</sup> a case involving child sexual abuse, the United States Court of Appeals for the Armed Forces noted: "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."<sup>39</sup> Prosecutors, therefore, should consult an expert—social worker, therapist, counselor, psychologist or physician, among others—to explain victim behavior to the jury. If the prosecutor does not address and attempt to explain victim's behavior, either through expert testimony or the victim herself, the jury will be left without the proper context in which to evaluate her credibility.



## DEFINING “COUNTERINTUITIVE” AND OTHER COMMON TERMS USED TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS

### “Counterintuitive” Behavior

The term “counterintuitive” describes the public’s perception of victim behavior as not comporting with its expectations of a “real” victim’s behavior.<sup>40</sup>

Counterintuitive victim behavior refers to:

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.

Behaviors that are not what the average person would “expect” from a victim.

Jurors’ perceptions of victim behavior—rather than the behavior itself—as described by court [sic] and other scholars.<sup>41</sup>

The term “counterintuitive behavior” is **not** a psychological term nor does it define a victim’s behavior. Rather, it defines the public’s perception of the victim’s behavior and the failure of the public’s expectations to match actual victim behavior. As a result, it is useful in arguing the necessity and relevance of expert testimony that addresses sexual and domestic violence victim behavior.

Sexual and domestic violence victims behave in individual, multi-faceted, and complex ways. Their behaviors, therefore, cannot be reduced to simple terms. As a result, a prosecutor should not seek to qualify a witness as an expert in “counterintuitive victim behavior” nor should an expert’s experience be qualified as “experience working with counterintuitive victim behavior.”<sup>42</sup> In several cases involving sexual and domestic violence prosecutions, courts have used the term “counterintuitive” when examining the relevance and admissibility of expert testimony to explain victim behavior. For example, in 1988, the Washington Supreme Court

recognized the disconnect between public expectation of victim behavior and the actual victim behavior by noting that the ongoing nature of relationships in which there is domestic violence is “even more *counterintuitive* and difficult to understand” than the number of women who are victims of domestic violence.<sup>43</sup> “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.”<sup>44</sup> Similarly, the trial court in *State v. Searles*<sup>45</sup> concluded that the victim’s minimization of her injuries “would have appeared counterintuitive to jurors.”<sup>46</sup>

Other courts have recognized inconsistent statements, recantation, and delayed reporting as “counterintuitive” behaviors.<sup>47</sup> Even RTS,<sup>48</sup> a term which is not recommended to describe victim behavior, was described as manifesting itself in “counterintuitive behaviors that rape victims show, such as not leaving the relationship, being calm and composed after the rape, failing to report the rape for days or even months, recanting or giving contradictory testimony, and failing to identify the assailant or remember some of the assault.”<sup>49</sup>

### **Other Common Terms**

Prosecutors who seek to introduce expert testimony relevant to sexual and domestic violence victim behavior do so for different purposes than defense attorneys. Specifically, defense attorneys offer expert testimony to excuse, justify or mitigate their clients’ “criminal” behavior. Prosecutors, on the other hand, seek to introduce expert testimony to dispel myths and misconceptions so that a victim’s puzzling but non-criminal behavior can be fairly evaluated, i.e., to provide an accurate context in which to assess a victim’s behavior.

Historically, evidence explaining sexual and domestic violence victim behavior was introduced by defense attorneys seeking to support self-defense or duress claims raised by female defendants who were battered or sexually abused. This type of evidence traditionally was introduced by defense attorneys as BWS and, less frequently, as RTS. More recently, the term and scope of expert testimony addressing the behavior of battered

women—as both complainants and defendants—has been renamed “battering and its effects,”<sup>50</sup> a term which was developed to more accurately reflect the scientific and psychological research regarding battered women’s behavior and reactions to long-term abuse.<sup>51</sup> RTS, discussed below, also has been re-evaluated and criticized because the subsequent research has failed to replicate the findings of Burgess and Holstrom. Further, the term has come to encompass several different meanings.<sup>52</sup>

Notwithstanding the distinct purpose of each type of testimony, when prosecutors began introducing expert testimony to explain victim behavior, they often adopted the terms and methodologies used by defense attorneys. As a result, relevant case law, law review articles, and other scholarly pieces often use the same terms to describe victim behaviors that range from learned helplessness and homicide to a failure to report an assault. Victim behavior is also described in terms of: Battered Woman Syndrome (BWS); Rape Trauma Syndrome; Battering and Its Effects and Posttraumatic Stress Disorder<sup>53</sup> in sexual and domestic violence prosecutions as well as legal and psychological literature. Accordingly, the definitions of each term are set forth below. The limitations encountered when using these terms to describe victim behavior that is relevant to a sexual and domestic violence prosecution are addressed in *Limitations on Common Practices of Introducing Expert Testimony to Explain Victim Behavior*.

### **Battered Woman Syndrome**

In the late 1970s, Lenore Walker developed the term Battered Woman Syndrome<sup>54</sup> (hereinafter “BWS”) to describe “a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged [period] of time.”<sup>55</sup> The term BWS describes both a pattern of violence against a woman as well as the “measurable psychological changes that occur [in a woman] after exposure to repeated abuse.”<sup>56</sup> Expert testimony on BWS is “designed to apprise the jurors of certain repeated patterns of behavior on the part of many battered women. . . . [so that] the jurors [are] in a better position to determine whether these patterns of behavior might explain any perceived discrepancy between [the victim’s] words and deeds.”<sup>57</sup> Traditionally, evidence of BWS was presented by the defense to explain why a woman attacked or killed her alleged abuser.<sup>58</sup> Gradually,

prosecutors began offering testimony on BWS to explain victim behavior in a domestic violence prosecution.

“Learned helplessness” is a significant feature of BWS and describes a battered woman’s belief that any attempt to escape her abuse is futile.<sup>59</sup> According to Walker, a battered woman’s experience of random and uncontrollable abuse over time produces a psychological state of “learned helplessness” which manifests itself in her belief that she cannot escape her abuser.<sup>60</sup> Walker also concluded that a battered woman’s belief in the impossibility of her escape decreases her motivation to avoid her batterer’s violence.<sup>61</sup>

The theory of the “cycle of violence”<sup>62</sup> was originally integral to BWS. The term “cycle of violence” refers to a domestic violence theory that there are three distinct phases included in violent relationships: tension building phase, acute battering phase, and “honeymoon” or loving-contrition phase. Originally, Walker believed that a battered woman must experience at least two “cycles of violence” in order to develop BWS.<sup>63</sup> The parameters and definition of BWS, however, have evolved since Walker’s initial definition. Particularly significant to the evolution of knowledge about battered women is the acknowledgement that each battered woman’s experience is different. As a result, it is understood that not all battered women experience a cycle of violence.<sup>64</sup> Similarly, it is also recognized that the cycle of violence is only one of several theories regarding the dynamics of domestic violence. For example, the theories of “power and control” and “a continuum of violence” are both accepted. “Power and control” describes the physical, psychological, emotional, and financial ways in which a batterer controls his partner in a domestic violence relationship. The theory of a continuum of violence describes intimate partner violence that is constant and is expressed throughout the course of the relationship on a variety of levels, ranging from verbal abuse to low-level violence, through serious assaults, or possibly homicide. Many domestic violence relationships, however, follow no pattern or theory.

### **Battering and Its Effects**

In 1996, the U.S. Department of Justice (USDOJ) released a report entitled *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*.<sup>65</sup> One of the report’s conclusions was “the term ‘battered

woman syndrome’ is no longer useful or appropriate.”<sup>66</sup> Although the authors recognized the historical role of BWS in the introduction of expert testimony, they concluded “the term does not reflect the breadth of empirical knowledge now available concerning battering and its effects.”<sup>67</sup> They noted that:

“the phrase ‘battered woman syndrome’ implies that a single effect or set of effects characterizes the responses of all battered women, a position unsupported by the research findings or clinical experience. . . . They also raise[d] concerns that the word ‘syndrome’ may be misleading, by carrying connotations of pathology or disease, or that it may create a false perception that the battered woman ‘suffers from’ a mental defect. All preferred to refer to evidence or expert testimony on ‘battering and its effects’ and urged the adoption of this terminology as the standard phrase of reference.”<sup>68</sup>

The admissibility of expert testimony on Battering and Its Effects may be authorized by statute.<sup>69</sup> For example, California Evidence Code § 1107 states the term Battering and Its Effects is used to describe “the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence as well as general victim behavior.”<sup>70</sup> This term appears to encompass learned helplessness that causes a victim to kill her abuser as well as general testimony on common “non-criminal” victim behavior, such as a delayed report.<sup>71</sup> The definition of this term is so broad, however, that it can be ineffective at accurately describing common domestic violence victim behaviors. Further, since sexual and domestic violence victim behavior is individual and complex, it should not be reduced to a simple term.

### **Rape Trauma Syndrome**

The term “Rape Trauma Syndrome” (RTS) was created by Ann Burgess and Lynda Holmstrom in 1974 to describe recurring patterns of emotional distress in rape victims to explain their healing and coping stages. Based upon their interviews of 600 rape victims, Burgess and Holmstrom defined RTS as “the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape.”<sup>72</sup> They described RTS as “behavioral, somatic, and psychological reactions . . .

[which are] an acute stress reaction to a life-threatening situation.”<sup>73</sup> They further explained RTS as a two-phase response pattern. “[T]he first phase is marked by fear of physical injury, mutilation, and death. The second [phase] begins from two to six weeks after the assault and is characterized by a change in lifestyle, dreams, nightmares, depression, and the development of fears related to the attack.”<sup>74</sup> Subsequent research findings and clinical experiences, however, do not support this definition.

### **Posttraumatic Stress Disorder**

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)<sup>75</sup> includes rape as one of the “traumatic events that can lead to the development of [Posttraumatic Stress Disorder].”<sup>76</sup> Posttraumatic Stress Disorder (PTSD) is the “[d]evelopment of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity.”<sup>77</sup> “Traumatic events that are experienced directly include . . . sexual assault [and] physical attack.”<sup>78</sup> During the traumatic event, the individual experiences intense fear, helplessness, or horror.<sup>79</sup> The symptomatology of the disorder includes “flashbacks, distressing dreams, or reenactments of the traumatic events; persistent re-experiencing and persistent avoidance of stimuli related to the event(s); persistent symptoms of heightened physiological arousal as manifested in, for example, hypervigilance, irritability, or sleep difficulties; and/or a numbing of general responsiveness.”<sup>80</sup> These symptoms last at least one month and cause significant distress or impairment.<sup>81</sup> Although PTSD “was originally conceived to address the trauma experienced by combat veterans, it was soon recognized that the diagnosis had broad applications to all types of trauma, including “interpersonal stressors such as rape, sexual abuse, and physical battering.”<sup>82</sup>

## RECOMMENDED PRACTICES FOR INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR: A THREE-STEP PROCESS

**P**rosecutors should follow three steps when determining how to address and explain a victim's behavior. Step one: identify the behavior in the case that jurors will perceive as counterintuitive. Step two: determine if expert testimony explaining victim behavior is admissible in the jurisdiction or if the behavior will have to—or should—be explained in another manner.<sup>83</sup> Step three: explain the victim behavior effectively. Prosecutors who introduce expert testimony on victim behavior should be prepared to explain the behavior in a manner that respects the victim's integrity as well as the difficult situation in which she has found herself.

### ***Step One: Identify the Behavior that Jurors Will Perceive as Counterintuitive***

The first step in presenting expert testimony to explain victim behavior is to identify the behavior in the case that the jury will not understand. When preparing a case, prosecutors should review all evidence, including police and medical reports as well as witness statements for descriptions of victim behavior that may appear counterintuitive to the jury. Although each domestic violence or sexual assault case presents unique facts, there are common victim behaviors which, if present in a case, may cause jurors or judges to disbelieve the victim.

In *State v. Townsend*,<sup>84</sup> the New Jersey Supreme Court wrote: "We have no doubt that the ramifications of a battering relationship is still a subject that is beyond the ken of the average juror."<sup>85</sup> Specifically, many people expect domestic violence victims to leave their abusers, report the abuse, and testify on behalf of the state in the prosecution of their abusers following the first battering incident. The actual behavior of many domestic violence victims, however, is quite different from the public's expectations. Specifically, victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers. When these behaviors are present in a case, a prosecutor must be ready to address them either through the victim's testimony or an expert.

The behaviors of sexual assault victims—particularly non-stranger sexual assault victims—also frequently conflict with the type of behavior the public expects from a “real” victim. Without explanation, jurors use these behaviors as reasons to doubt a victim’s account of her assault. For example, the public expects sexual assault victims to scream during their rape; to forcefully resist their attackers; to report their rapes immediately; and to remain vigilant following their attacks. Victims, however, often do not scream or resist during a rape; they frequently delay reporting their rape;<sup>86</sup> and they often do not remain hypervigilant.

Once the prosecutor has identified the relevant behaviors, there are many ways to determine possible explanations for them. The most obvious way is to talk to the victim. Not only may she be able to explain the reasons for her behavior, she also may be able to articulate those reasons to a jury. Sometimes the reasons for her actions will appear rational and will be easy for the jury to accept. Other times, it will be difficult, or impossible, for her to explain her behavior to a jury, and expert testimony will thus be even more important.

Experts who have experience with victims and have observed their varied responses to trauma can assist in evaluating the relevant counterintuitive behaviors that exist in a case and offering possible explanations for them. The assistance of an expert can help a prosecutor develop a case theory or theme, outline direct examination of the victim, and understand cross-examination of the defendant or the victim. Prosecutors should not, however, seek assistance from an expert who has examined the victim or is currently providing treatment or counseling to the victim—except in very rare circumstances.<sup>87</sup> Examining a victim or using her treatment provider as a witness will erode her privacy interest in any treatment record. Prosecutors must be mindful that sexual and domestic violence victims have privileges and that these must be respected and guarded.<sup>88</sup> Not only must the privilege itself be respected, but the victim’s feelings must be considered. If a victim’s treatment provider testifies against a victim’s wishes, the victim will have no one to whom she can turn for private support.

**Step Two: Determine the Admissibility of Expert Testimony on Victim Behavior****What does the law say?**

In addition to establishing the admissibility of expert testimony on victim behavior in a jurisdiction, case law or statutes will explain why and how expert testimony is admissible in a jurisdiction.<sup>89</sup> For example, in *State v. Ciskie*,<sup>90</sup> the Washington Supreme Court explained that “neither logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror’s understanding.”<sup>91</sup> Not all jurisdictions, however, follow this reasoning. Although defendants who are claiming self defense or another affirmative defense on the basis of being sexual or domestic assault victims may introduce expert testimony explaining Battering and Its Effects in all 50 states and the District of Columbia,<sup>92</sup> only thirty-one states, the District of Columbia, the military, and federal jurisdictions have published cases permitting the *prosecution* to introduce expert testimony on adult victim behavior.<sup>93</sup> Significantly, Pennsylvania expressly prohibits the use of expert testimony to explain victim behavior.<sup>94</sup> Some of the remaining states have excluded the testimony based upon the purpose for which it was admitted or the particular facts of the case. Other states have limited the introduction of expert testimony on victim behavior to child sexual abuse cases. Finally, in some jurisdictions, there are simply no reported cases addressing this issue.<sup>95</sup>

Prosecutors in jurisdictions without case law or a statute that expressly excludes or admits expert testimony describing victim behavior should look to cases involving self-defense claims or child victims for guidance. If there is no analogous case law, prosecutors should prepare to argue the admissibility of expert testimony on victim behavior under their rules of evidence as well as *Daubert*,<sup>96</sup> *Kumho Tire*,<sup>97</sup> or *Frye*,<sup>98</sup> depending upon the jurisdiction’s standard for admitting testimony regarding scientific, technical, or other specialized knowledge.<sup>99</sup> In some jurisdictions, prosecutors may be able to argue that the testimony is not subject to review under these cases.<sup>100</sup>

In order to admit expert testimony, prosecutors must establish that it is relevant, that it represents the proper subject of expert testimony, that the

subject of the testimony meets the reliability requirements of *Daubert* and *Kumho Tire*, is generally accepted in the relevant scientific field as prescribed by *Frye*, or is not subject to a review under these cases, that the probative value of the evidence substantially outweighs its prejudicial value, and that the expert is qualified to testify.

When permissible under the laws of the jurisdiction, experts in sexual and domestic violence should focus their testimony on descriptions of the myths surrounding sexual or domestic assaults, the dynamics of sexual or domestic assaults, and common victim behaviors. This testimony should be based upon the “expert’s own experiences” with victims and observations of the victims’ behaviors.<sup>101</sup> “For example, workers at battered women’s shelters, battered women’s advocates, and qualified experts have testified regarding their own observations that most women do not report the first assault, even to friends and family and they rarely report the first assault to police.”<sup>102</sup> “Through the hundreds, even thousands of contacts with battered women resulting from hotline calls and direct-service, workers in shelters are able to closely observe the behavior or women who call daily.” If the expert is familiar with any relevant literature or studies addressing victim behavior, they also should refer to them.<sup>103</sup>

The expert’s testimony also should focus on victim behaviors that are relevant to the case in which they are testifying. Experts should not, however, have reviewed the case file, nor should they give an opinion about the victim’s behavior. Doing so risks exposing the victim to an examination by a defense expert. Further, it risks becoming an excludable commentary on a victim’s credibility rather than admissible testimony about common victim behavior.<sup>104</sup> In addition, since expert testimony about the specific behaviors of a victim is subjective, it is more vulnerable to attack by the defense, who may offer an expert whose subjective opinion may differ. When this happens, the weight of this testimony is greatly diminished.

### **Admitting expert testimony on victim behavior under the federal rules of evidence**

***Establishing Relevance—F.R.E. 402*** Under the Federal Rules of Evidence, the admissibility of expert testimony is governed by liberal standards, and is first analyzed according to the general rules of relevance.<sup>105</sup>

Federal Rule 402 provides that “[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.”<sup>106</sup> Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.<sup>107</sup>

Expert testimony about victim behavior is relevant in sexual and domestic violence cases because the victim’s credibility is inextricably linked to her behavior. Common victim behaviors often are counterintuitive to the public’s expectations. Left without an explanation, a victim’s behavior often becomes compelling evidence to jurors that the victim lacks credibility. The explanation of a victim’s counterintuitive behavior is relevant, therefore, because the jury’s ability to understand a victim’s behavior is intertwined with its ability to judge her credibility.<sup>108</sup>

One example of the jury’s common mischaracterization of domestic violence victims is their misunderstanding of a victim’s decision to remain in an abusive relationship as evidence of her complicity in or responsibility for her abuse. In many jurors’ eyes, victims who recant are viewed as liars whose original reports to police were baseless accusations concocted to manipulate the system. Alternatively, they are perceived as pathological women with low self-esteem who enjoy or perhaps deserve their abuse. Either interpretation has devastating consequences, often resulting in a not guilty verdict in a criminal prosecution.

Expert testimony on the general dynamics of domestic violence and common behaviors of domestic violence victims has been ruled relevant to explain a victim’s conduct or testimony to avoid mischaracterizations.<sup>109</sup> In domestic violence prosecutions, expert testimony indicating that it is not uncommon for a victim to later deny or minimize her abusers’ conduct has been ruled relevant to explain the possible reasons for inconsistencies between a victim’s testimony on the stand and her statements to police and prosecutors.<sup>110</sup> Many decisions have acknowledged that the public’s beliefs and attitudes about abused women are at odds with experts’ studies.<sup>111</sup> Some courts have recognized that although witness credibility is routinely judged by the “consistency [of the witness’ statements], willingness to aid the prosecution, and straightforward rendi-

tion of the facts,” abuse victims often lack these qualities for good reason.<sup>112</sup> Further, the courts have recognized that this behavior often is attributed to inaccuracy or deception<sup>113</sup> because of “widely held misconceptions . . . and popular myths.”<sup>114</sup>

The rationale for the admission of expert testimony to explain victim behavior in sexual assault cases is also based upon the negative impact of prevailing sexual assault myths on a jury’s assessment of victim credibility. Specifically, the reactions of rape victims, when contrary to the public’s expectations, are often exploited by the defense to demonstrate a victim’s lack of credibility. Although, statistics demonstrate that few victims report sexual assaults and it is uncommon for sexual assault victims to report their assaults immediately, the public still expects the victim to promptly report her assault.<sup>115</sup> As a result, juries require expert testimony to explain how a victim’s fear, shame, and guilt commonly result in her failure to speak of or report her rape. For example, after acknowledging the convention of rape victims’ failure to report, the Colorado Supreme Court wrote: “The lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims.”<sup>116</sup>

***The Subject of the Expert Testimony—F.R.E. 702*** Once relevance is established, prosecutors must show that the subject of expert testimony satisfies the requirements of F.R.E. 702. According to F.R.E. 702, if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>117</sup>

In sum, the proper subjects of expert testimony are topics beyond the ken and understanding of the average juror. Several decisions have adopted this very language when explaining the necessity of expert testimony to explain victim behavior in sexual and domestic violence cases. For example, in *Nixon v. U.S.*,<sup>118</sup> the D.C. District Court determined that

common myths and patterns of battering and common behaviors of battered victims were found to be beyond the ken of the average juror.<sup>119</sup> Further, in *People v. Taylor*,<sup>120</sup> the Court of Appeals of New York recognized: “Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970s, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror.”<sup>121</sup> Further, courts have reasoned that since juries often find victim behavior to be “incomprehensible”<sup>122</sup> and “counterintuitive”<sup>123</sup> prosecutors must explain it.

Prosecutors should note, however, that not all jurisdictions have found victim behavior that may be counterintuitive to jurors to be beyond their understanding. For example, in *Washington v. Cooke*,<sup>124</sup> the Washington Appellate Court concluded that expert testimony on victim behavior (here, termed battered woman syndrome) was not required to explain a victim’s decision to remain with her abuser when the defense argued that this behavior was inconsistent with a real victim’s behavior. Specifically, the court noted that “[e]xpert testimony is required when an essential element in a case is best established by opinion and the subject matter is beyond the expertise of a lay witness . . . .”<sup>125</sup> The court concluded that expert testimony was not required in this case because the “disputed elements were adequately proved with lay testimony. Personal relationships, even abusive relationships, are within the realm of the jury’s collective experience and common sense. The jurors [therefore] could evaluate the argument in light of human experience.”<sup>126</sup>

The subject of the expert’s testimony should be focused on objective observations from the expert’s experience with, or specialized knowledge about, common reactions of sexual or domestic violence victims. It should also focus on the behaviors and issues related to sexual and domestic violence that are relevant to the case in which they are testifying. Where relevant and admissible, an expert’s testimony may also include a discussion about myths related to sexual and domestic violence. Although expert testimony may include current research or articles related to victim behavior, the most effective qualification often will be an expert’s extensive experience working with or observing sexual or

domestic violence victims. The reliability of this type of testimony, as compared with an expert's subjective evaluation if a victim, rests squarely on the extent of the expert's experience as well as his or her ability to articulate the observations and knowledge gained in the course of his or her experience. Because the expert testimony is objective, cross-examination likely will focus on the expert's honesty, i.e., is he or she truthfully relating his or her experiences; the breadth of the expert's experience, his or her knowledge of the literature; as well as his or her bias towards victims of sexual or domestic violence. In addition, an expert also should discuss his or her training experiences, which can be relevant to victim behavior as well as the public's belief in myths about sexual or domestic violence. Victim advocates, shelter or crisis center directors, social workers, Sexual Assault Nurse Examiners (SANEs), psychologists, and psychiatrists are some examples of experts who will possess the qualifications and experience discussed above.

In many jurisdictions, it is still common practice for expert testimony on victim behavior to be introduced as BWS, RTS, or an evaluation that the victim's behavior is consistent with one of these syndromes. This strategy is both ineffective and vulnerable to attacks that it is unreliable. This is discussed in more detail in *Other Common Terms* as well as *Limitations on Common Practices of Introducing Expert Testimony on Victim Behavior*. Second, using syndromes and disorders to describe victim behavior risks making jurors believe that the victim suffers from a pathology. Finally, since expert's who use these terms often render a subjective opinion about the victim, either directly or through a hypothetical, there opinions are easily countered by a different expert's opinion of the same facts.

These common attacks on expert testimony addressing victim behavior can be avoided by focusing expert testimony on victim behavior on an expert's observations, research, writing, or review of articles or studies which address: (1) a general discussion of sexual or domestic violence; (2) the existence and prevalence of common myths surrounding these types of violence; and (3) common victim responses to trauma or behaviors in these types of cases. This method does not include an expert opinion on whether a victim suffers from a syndrome or disorder, whether her behavior is consistent with an individual who suffers from a syndrome or

disorder, or whether her behavior was caused by a particular event. Accordingly, this method avoids pathologizing the victim. In addition, because the subject of the testimony is objective (facts and observations) rather than subjective (diagnosis and conclusion), it remains effective testimony which is less vulnerable to attack.

***Establishing “general acceptance” under *Frye v. United States* and “reliability” under *Daubert v. Merrell Dow and Kumho Tire Co., Ltd.****

***v. Carmichael*** If proposed expert testimony is determined to be relevant and meet the requirements of F.R.E. 402 or the applicable state rules of evidence, the testimony still must be subjected to further scrutiny under a state’s interpretations of novel scientific evidence.<sup>127</sup> States generally use one of two standards to determine the admissibility of this type of evidence: *Frye v. United States* and *Daubert v. Merrell Dow*.<sup>128</sup>

• **Frye v. United States** In states that apply the traditional standard articulated in *Frye v. U.S.* for the admission of expert testimony, the testimony must be “based on a well-recognized scientific principle or discovery, and the theory from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field.”<sup>129</sup> Expert testimony addressing victim behavior has been found to be admissible under *Frye* in many jurisdictions. For example, in *People v. Ellis*,<sup>130</sup> the court cited a 1985 case in support of its conclusion that expert testimony on battered women’s behaviors “had ‘gained a substantial enough scientific acceptance to warrant admissibility.’”<sup>131</sup>

The “*Frye* test” bases the admissibility of expert testimony on general acceptance in a particular scientific discipline. One of the difficulties with this test is that it excludes otherwise valid and reliable testimony simply because it is too “new;” that is, it has not yet obtained general acceptance in the field. To rectify this problem, the United States Supreme Court adopted a more liberal test for the admission of novel scientific evidence in *Daubert v. Merrell Dow*.

• **Daubert v. Merrell Dow and Kumho Tire Co., Ltd. v. Carmichael** In *Daubert v. Merrell Dow*,<sup>132</sup> the Supreme Court ruled that the *Frye* test had been supplanted by the adoption of the Federal Rules of Evidence.

The Court then adopted a validity/reliability test for the admission of expert opinion testimony under F.R.E. 702. The Court held that a trial judge is required to make a preliminary assessment of whether the reasoning or methodology underlying the expert's testimony is scientifically sound (validity), and whether the reasoning or methodology properly applies to the facts at issue (reliability).<sup>133</sup> "Subsequently, in *Kumho Tire Co., Ltd. v. Carmichael*,<sup>134</sup> the Supreme Court held that *Daubert* applies not only to expert testimony based upon 'scientific knowledge' but also to 'technical' and other 'specialized' knowledge covered by F.R.E. 702. The Court noted that the "trial judge has a gatekeeping function in these inquiries to ensure that any and all expert testimony is not only relevant but reliable."<sup>135</sup> Experts have "testimonial latitude broader than other witnesses on the theory that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."<sup>136</sup> "In some cases, the reliability determination focuses on the expert's qualifications to render the opinion. . . . In others it might center on the factual basis or data that give rise to the opinion."<sup>137</sup> In addition, "*Kumho Tire* reiterated the instruction that [*Daubert*] factors 'are meant to be helpful, not definitive'<sup>138</sup> and emphasized that the factors may or may not be 'pertinent in assessing reliability depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'"<sup>139</sup>

Under *Daubert*, topics admissible through expert testimony are subject to the following criteria: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or has been published; (3) whether the theory or technique has a known or potential rate of error and what it is; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique is generally accepted in the relevant scientific community. As stated above, however, this list is not exhaustive and all factors do not need to be applied.<sup>140</sup>

***Avoiding Frye and Daubert?***<sup>141</sup> Some courts have held that expert testimony on victim behavior and similar matters is not even judged by a novel scientific evidence test. For example, in *State v. Borelli*,<sup>142</sup> a case in which the state admitted expert testimony from a sociologist concerning BWS, the Connecticut Supreme Court noted that it "does not apply the

*Frye* test to all types of expert testimony, even if technical or scientific concepts are involved.”<sup>143</sup> It continued by recognizing that an application of the *Frye* test is appropriate when “the experimental, mechanical, or theoretical nature of the scientific evidence had the ‘potential to mislead lay jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts, and the fancy devices employed.’”<sup>144</sup> It concluded by stating that “expert testimony need not satisfy the *Frye* test in cases where ‘the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert’s assertions based on his special skill or knowledge. . . . Furthermore, where understanding of the method is accessible to the jury, and not dependent on highly technical or obscure scientific theories, the expert’s qualifications, and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence.’”<sup>145</sup> In *Borelli*, the expert neither examined the victim nor offered any opinion as to whether she was battered or exhibited symptoms similar to other battered women.<sup>146</sup> In addition, he did not “apply any scientific instrument or test to specific evidence in the case, nor did he use battered woman’s syndrome as a diagnostic tool . . . [nor] did he apply any scientific test to a hypothetical question posed by the state.”<sup>147</sup> Rather, the expert’s testimony was “based on his observations of a large group of battered women through the lens of his educational background and experience. [Further, t]he state offered [the expert’s] testimony in order to provide an interpretation of the facts that a lay jury may not have perceived because of its lack of experience with battered women.”<sup>148</sup> In this case, the state offered the evidence “for the purpose of providing a possible explanation for the victim’s recantation and to impeach her subsequent testimony that she had lied” to get the defendant drug treatment.<sup>149</sup>

***Avoiding the Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time—F.R.E. 403*** Even though evidence is relevant, some courts may exclude testimony when they determine the danger of unfair prejudice substantially outweighs its probative value.<sup>150</sup> The final analysis that must be applied to the introduction of expert testimony is whether “its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, possibly misleading the jury,

or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>151</sup> “A synthesis of the courts’ reasonings in the cases that have allowed expert testimony [on victim behavior] reveals that the key consideration is whether such testimony can help explain seemingly bizarre or puzzling behavior by a witness without undue prejudice to the defendant.”<sup>152</sup>

“There is a kind of weighting or presumption in favor of admissibility built into F.R.E. 403.”<sup>153</sup> Evidence will not be excluded if the counterweights merely outweigh probativeness; they must ‘substantially outweigh.’ In addition, prejudice alone is not enough; the prejudice must be ‘unfair.’”<sup>154</sup> Generally, courts will focus on the reliability of the theories being expounded by the expert as a critical factor in weighing the probative value of expert testimony.<sup>155</sup> In addition, courts are concerned that the aura of trustworthiness or reliability that automatically attaches to expert opinion will cause a jury to give the evidence from the expert greater weight. This potential impact on the jury makes an unreliable opinion or one based upon an expert’s own *lay judgment* that much more dangerous—as jurors will then be focusing on improper testimony.<sup>156</sup> This analysis further underscores the recommendation that prosecutors focus the expert’s testimony on the expert’s experience and knowledge about common victim behaviors; it should not include an opinion that the victim’s behavior is consistent with that of other victims of assault.

***Qualifying the Expert*** Under F.R.E. 702, an expert must be qualified by “knowledge, skill, experience, training, or education.”<sup>157</sup> Qualifications are defined broadly. Generally, an individual with a reasonable pretense to specialized knowledge may be qualified as an expert based upon his or her clinical experience,<sup>158</sup> education, knowledge of relevant scholarly articles, authorship of articles, prior qualification, or a combination of the factors listed above.<sup>159</sup> “The trial court has discretion in determining the sufficiency of the expert’s qualifications and its decision will be reviewed only for manifest error and injustice.”<sup>160</sup> In addition, courts give much deference to their previous decisions and, therefore, experts who previously have been qualified to testify as an expert typically will be qualified again.<sup>161</sup>

Many experts who have been qualified to testify about victim behavior

in domestic violence cases have impressive credentials as well as extensive experience in treating battered women or sexual assault victims.<sup>162</sup> Other experts have been qualified based on their extensive clinical experience alone.<sup>163</sup> There is no single profession, training experience, or body of knowledge that makes one able to testify as an expert about victim behavior that jurors perceive as counterintuitive. The spectrum of experts is varied. Courts have held that “the witness d[oes] not have to be a trained clinician, capable of diagnosing . . . in order for the judge properly to qualify her as an expert concerning the general or typical characteristics . . . .”<sup>164</sup>

If all else fails and a court does not allow expert testimony, the victim or another witness may be able to testify about a victim’s behavior after the alleged incident.<sup>165</sup> In this scenario, the prosecutor must address the behavior during his or her closing and offer possible explanations for the behavior based upon the evidence introduced during the trial.

• **“Traditional” Expert Qualifications** Traditionally, courts have found licensed clinical psychologists,<sup>166</sup> psychological counselors, and psychiatric nurses all qualified as expert witnesses.<sup>167</sup> For example, in one case, a witness was qualified as an expert in the area of the “general characteristics of battered women,” based upon the witness’s experience with over “200 battered women over a period of years,” a master’s degree in social work, a doctorate in sociology, a tenured and visiting position as a professor, as well as numerous publications.<sup>168</sup> In another case, the court noted that an individual with the proper experience and training as either a psychologist or psychiatrist would be qualified to testify about RTS.<sup>169</sup> Finally, another witness was qualified as an expert in BWS, because she held “a bachelor’s degree in psychology, a master’s degree in counseling, and was at the dissertation level for her Ph.D. in marriage and family counseling . . . .”<sup>170</sup> The court did not care that defense showed on cross-examination that she had never published any articles or that she had never before testified as an expert witness.<sup>171</sup>

• **“Nontraditional” Expert Qualifications** A witness is not qualified as an expert by meeting a fixed set of criteria; the analysis is unique to the witness and the witness’s education, training, and experience. An

expert witness need not reach the highest levels of education, clinical experience, and research conducted in order to be qualified as such. Courts have recognized that “[f]ormal education . . . is not a prerequisite for expert status.”<sup>172</sup> The court in *Commonwealth v. Goetzendanner*<sup>173</sup> noted that “[t]he witness did not have to be a trained clinician . . . in order . . . [to testify] concerning the general or typical characteristics of BWS.”<sup>174</sup> In this case, the expert was the executive director of the New York State Office for Prevention of Domestic Violence, had over 10 years of experience in domestic violence programming and training, and had a bachelor’s degree in psychology.<sup>175</sup>

The following are examples of “nontraditional” experts who have been qualified to testify about victim behavior:<sup>176</sup>

- **Victim Advocate** In *Stevenson v. State*,<sup>177</sup> a victim advocate qualified as an expert witness in the area of sexual assault and common victim behavior based on her “fifty hours of sexual assault training[,] . . . work at [a] rape crisis center for over two years[,] . . . counseling] over 100 . . . victims of sexual assault,” publishing one article presented at a seminar, and writing several articles for the center’s newsletter.<sup>178</sup>
- **Victim Witness Coordinator** In *State v. Schaller*,<sup>179</sup> a victim-witness coordinator with a degree in social work, who had served as a liaison between victims and prosecutors for a lengthy period of time, was permitted to testify that it was “very common” for domestic violence victims to “later minimize or recant” an earlier assault accusation.<sup>180</sup>
- **Rape Crisis Center Counselor** In *State v. Robinson*,<sup>181</sup> a Wisconsin court found a worker at a rape crisis center to be qualified as an expert in sexual assault and common rape victim behavior as she “had six years of experience at the rape crisis center and had personally dealt with seventy to eighty victims.”<sup>182</sup> The court reasoned that, under Wisconsin’s equivalent of Federal Rule of Evidence 702, “a witness qualified as an expert by knowledge, skill, experience, training, or education may testify . . . .”<sup>183</sup> This witness was deemed an expert through her experience and was able to testify about misconceptions of rape victims.

- **Shelter Director and State Coalition Director** In the rape case *Thomas v. State*,<sup>184</sup> a director of a rape crisis center testified regarding the number of victims who delay reporting a rape or fail to report at all.<sup>185</sup> In a domestic violence case in Iowa, a shelter director was qualified as an expert in the general characteristics of BWS and was permitted to testify generally about BWS based upon her degree in social work; service as a director in related organizations for over ten years; involvement in counseling approximately 2000 battered women; training; participation on a task force; contribution to a task force publication; and her published article in a medical society.<sup>186</sup> The court noted that her degree in social work and her position as executive director of the Iowa Coalition Against Domestic Violence made her “impressive and easily [able to] qualify.”<sup>187</sup> A program services director of a battered women’s shelter was able to testify about family violence in another domestic violence case.<sup>188</sup>
- **Emergency Room Doctor** In *Russell v. State*,<sup>189</sup> the court found that a board-certified doctor in emergency medicine who received training in BWS and who diagnosed patients with BWS was qualified as an expert in BWS in order to refute a defense claim that the victim’s behavior was inconsistent with that of a sexual assault victim.<sup>190</sup> The court also found that “[b]attered woman syndrome is often relevant to the emergency treatment of women, and this diagnosis is often made by emergency room physicians.”<sup>191</sup> In *People v. Christel*,<sup>192</sup> the Michigan Supreme Court noted, “simply because [the doctor] never treated complainant or defendant does not disqualify him” because the doctor’s practice included domestic violence victims and he had written on that subject.<sup>193</sup>
- **Sexual Assault Nurse Examiner (SANE)** In *Escamilla v. Texas*,<sup>194</sup> a sexual assault nurse examiner (SANE) explained her role and that “her training and experience made her aware that some children delay reporting [child sexual abuse] for several reasons.”<sup>195</sup>
- **Social Worker** In *Simmons v. State*,<sup>196</sup> social workers were qualified as experts on victim behavior in the area of domestic violence and sexual violence based upon their training and experience.<sup>197</sup>

- **Law Enforcement Personnel** In *Escamilla*, a case that involved child sexual abuse, an investigator for the Llano County Sheriff's Department was permitted to testify that in her experience a "delayed outcry was normal."<sup>198</sup> Significantly, the court determined that because the witness was testifying about her personal experience, her testimony was not expert testimony. In this case, the expert had a Bachelor of Science degree in criminal justice "several years of experience as a forensic interviewer at a children's advocacy center."<sup>199</sup>

### **Step Three: Explaining the Victim Behavior**

Prosecutors should always consult their jurisdiction's law before making a motion to introduce expert testimony on victim behavior. If there is a conflict between the recommendations of this monograph and the rules mandated by a jurisdiction, prosecutors should defer to the specific practices of their jurisdiction. If a prosecutor practices in a jurisdiction that still employs syndrome testimony to explain victim behavior in sexual and domestic violence prosecutions, the prosecutor should consider ceasing this practice and introducing this testimony using accurate terminology and descriptions.

#### **Determine the purpose of the expert testimony**

Expert testimony should focus on victim behavior, a discussion of sexual or domestic violence as well as common myths and misconceptions about sexual and domestic violence. Prosecutors know all too well that one of the barriers to the successful prosecution of sexual and domestic violence cases is the perpetuation of myths. The primary purpose of the expert's testimony, therefore, is to dispel these myths. The expert may discuss articles or studies, either reviewed or conducted, as well as personal knowledge gained through delivering or attending trainings. Further, to limit confusion and ensure that the information delivered to jurors is relevant, prosecutors should guide an expert's testimony to ensure that the expert does not spend a great deal of time on issues that may be irrelevant to their case. For example, there are several older domestic violence theories. One such theory is the "cycle of violence." Although it may provide an accurate description of **some** relationships, this theory is not applicable to all domestic violence cases. As a result, experts should devote only minimal time, if any, to a discussion of this theory, unless it

directly applies to the case.<sup>200</sup> If this theory is inapplicable, expert testimony that includes more than a recognition of this theory's existence likely will leave jurors with the impression that either a cycle exists or should exist in the current prosecution. As a result, if no evidence of a cycle is introduced, jurors may decide, incorrectly, that an incident did not occur.

After the prosecutor reviews the case file, interviews the victim and other civilian witnesses, talks to the victim advocate, and perhaps consults with an expert, the prosecutor should be able to identify some behaviors exhibited by the victim in the case that the jury may perceive as counterintuitive. The prosecutor should guide the expert's testimony so that it is focused on victim behaviors that are relevant to the case presented. When testifying, experts should briefly discuss common behaviors that they have observed in victims with whom they have worked or about which they have studied or read. Prosecutors, however, should structure their questioning of the experts<sup>201</sup> to focus on the behaviors that the complainant exhibited, since these will raise the greatest questions in jurors' minds. For example, expert testimony in a sexual assault case where the victim avoids contact with her assailant following her assault should not include a long, essentially irrelevant, discussion of mastery, where victims continue to have contact with their assailant for various reasons including an attempt to regain control over their assault.<sup>202</sup>

### **Decide whether to call an expert in your case**

The decision to introduce expert testimony should be based on more than just the law of a particular jurisdiction. Just because expert testimony on victim behavior is admissible does not mean that prosecutors should introduce it. First, prosecutors should decide whether expert testimony is the most effective method of explaining a victim's behavior in a particular case. In some cases, the victim will be able to best articulate the reasons for her behavior. One example might be a case where a victim did not flee from a sexual or physical assault out of fear. The victim's testimony itself may provide a common-sense explanation that is far more compelling than abstract expert testimony.

In other cases, prosecutors may consider calling the victim's friends or family members to testify regarding changes in the victim's behavior pre-

and post-assault. These perceived changes may corroborate the victim's testimony about her feelings and behavior around the time of the assault and thus help to explain her actions to the jury.

Before presenting expert testimony, prosecutors should attempt to evaluate and understand the community in which they are prosecuting, as well as the jury panel and judge in each case. Some communities and some individual jurors may resist testimony from expert witnesses. Judges may have pre-conceived notions and biases as well. Alternatively, a community or judge may be receptive to expert testimony, but may have a bias against the expert available to the prosecutor.

As previously discussed, only in the rare case should a prosecutor offer expert testimony from an expert who has provided the victim with mental health treatment or a psychological examination. In such a case, victim privacy must be an utmost concern for the prosecutor when, as stated earlier, the decision to call this type of expert will expose the victim's mental health records to discovery and intense scrutiny. Since this will likely cause the victim emotional trauma, this practice is disfavored and should be used only after a full consideration of all available alternatives.

Prosecutors also should remember that a decision to use victim advocates as expert witnesses may implicate victim privacy and autonomy. Perhaps more importantly, these issues are implicated even when the advocate whom the prosecutor intends to call is not and has not been affiliated with an organization that has worked with the victim. Particularly in domestic violence cases where a victim is uncooperative with the prosecution, the potential exists that the victim will perceive an advocate's participation as a breach of trust or demonstration of disloyalty to her.

### **Choose the most effective expert for your case**

When choosing an expert, the prosecutor must determine what kind of expert will be most effective based on the law of the applicable jurisdiction as well as the facts of the case. Normally, the prosecutor will have to choose between an academic or "credentialed" expert whose experience is grounded in theory, an "anecdotal" expert whose experience is based upon "in the field" work with victims, or a combination of both. Depending on

the jurisdiction, however, prosecutors may have to consider the expert's profession. For example, if a prosecutor is considering using a current or former member of law enforcement to discuss victim behavior, the prosecutor should consider whether the jurisdiction permits expert testimony from a current or former law enforcement officer; the community's relationship with and attitudes toward law enforcement; and whether that relationship will enhance or counteract the expert testimony.

### **Prepare the expert to testify**<sup>203</sup>

Prosecutors must conduct appropriate pretrial preparation with even the most seasoned experts. First, experts should prepare for their qualification by reviewing their curriculum vitae and ensuring that it is current. Prosecutors should explain the necessary qualification requirements under F.R.E. 702. In addition, experts should be prepared for any challenges to their qualification. Prosecutors should be sensitive to the fact that experts may worry that they will not be qualified. This is particularly true when working with an expert who has not been qualified before or is a nontraditional expert, such as a victim advocate, rape crisis counselor, or shelter director. Prosecutors should never acquiesce to a defense request to stipulate to an expert's qualifications. It is important for the judge and the jury to understand the breadth of the expert's qualifications as well as the commonality of the victim behaviors that they may perceive as counterintuitive—as the expert's qualifications relate directly to the expert's credibility.

Expert witness preparation also must include a discussion about the subject matter on which the prosecutor will seek to offer the witness as an expert. Prosecutors should refer to the applicable law in their jurisdictions to determine in what, if any, subject matter a witness is legally required to be an expert in order to offer expert testimony. It bears repeating that although the victim behavior which necessitates the introduction of expert testimony has been described throughout this monograph as “counterintuitive,” prosecutors should **not** offer their expert as an “expert in counterintuitive behavior” (see *Chapter II*). Some examples of areas in which an expert may be qualified are “sexual or domestic violence,” “common sexual or domestic violence myths,” “common victim responses to trauma in sexual or domestic violence cases,” or “common victim behaviors in sexual or domestic violence cases.”

Prosecutors should meet with the expert to go over the purpose and focus of their direct testimony. This is the time to remind the expert about the issues and behaviors that are most critical to the case. Further, when working with a credentialed expert, such as a forensic psychiatrist or psychologist, prosecutors should be clear that a diagnosis or evaluation of the particular victim's behavior is not the intended focus of the expert testimony, unless the expert has been called to testify about the specific victim.<sup>204</sup> Finally, prosecutors should prepare the expert for cross-examination. Where possible, this preparation should include a rigorous mock cross-examination.

### **Overcome common objections**

Defense attorneys commonly object to the introduction of expert testimony on victim behavior on the following grounds: (1) relevance; (2) admissibility, including attacks under *Frye* and *Daubert*; (3) need for expert testimony (i.e., "It's not beyond the ken of the ordinary lay person..."); (4) qualifications of the expert; (5) prejudice or one of the other F.R.E. 403 relevancy counterweights; (6) improper introduction of a defendant's "uncharged misconduct;" (7) improper bolstering; (8) lack of foundation; (9) legal conclusion (i.e., "You're saying that she was abused..."); and (10) speculation (i.e., "You have no knowledge of this case, but you are guessing that she was abused"). The first five common objections are discussed in *Step Two* above. Objections 6 through 10 are addressed below.

### **Improper bolstering**

Expert testimony often is offered to rebut defense claims that the victim's behavior is inconsistent with that of a "real" victim. Some courts have ruled that the defendant does not have to attack the victim's credibility before the prosecution can offer expert testimony.<sup>205</sup> For example, in *State v. Vance*,<sup>206</sup> the Minnesota Court of Appeals ruled that "where the alleged victim's testimony is at issue, the district court may admit testimony . . . during the prosecution's case-in-chief, even if neither party directly attacks the victim's credibility."<sup>207</sup> Typically, however, defense attorneys attack a victim's credibility during their opening statements, thus placing credibility at issue.<sup>208</sup> Prosecutors also can introduce expert testimony in rebuttal;<sup>209</sup> however, it is not always strategically best to wait until rebuttal to explain the victim's behavior.

The guiding principle regarding introduction of expert testimony is usually whether or not the testimony “is relevant and helpful in understanding an issue in the case.”<sup>210</sup> Although the applicable issue in sexual and domestic violence cases is credibility, courts differ in their interpretation of how and when the victim’s credibility becomes an issue in a case.<sup>211</sup> Some courts state that certain behaviors, such as recanting, automatically cause credibility to be at issue.<sup>212</sup> Others have held that prosecutors can explain a victim’s behavior before the defense uses it to attack her credibility.<sup>213</sup> It is important, therefore, for prosecutors to understand their jurisdiction’s assessment of when a victim’s credibility has been attacked.

Regardless of the existence or the extent of a defense attack of the victim’s credibility, defense attorneys may object that the prosecution’s introduction of expert testimony to explain the victim’s behavior improperly invades the jury’s function by placing a “stamp of scientific legitimacy” on the victim’s allegations, and, therefore, improperly bolstering her credibility.<sup>214</sup>

Prosecutors may respond by arguing that the “[e]vidence [is] not offered to bolster, . . . but to provide the jury with an explanation for inconsistencies in [the victim’s] testimony.”<sup>215</sup> Prosecutors also may argue that the defense cross-examination of the victim’s failure to call out for help<sup>216</sup> necessitates expert testimony in order to debunk the common myth that all victims will cry out for help upon attack. When the defense cross-examined the victim about her silence in *Parrish v. State*, the Georgia Court of Appeals affirmed the trial court’s admission of expert testimony because “the conclusion of the expert is one which . . . is beyond the ken of the average layman.”<sup>217</sup> The court noted that “the defense opened the door by using the victim’s failure to seek help as evidence of her lack of credibility.”<sup>218</sup>

Defense attorneys also may object that the expert’s testimony improperly comments on the truthfulness of the victim.<sup>219</sup> The prosecution can respond that the objection lacks merit because “the fact that expert testimony indirectly touches upon a witness’ credibility does not render it inadmissible.”<sup>220</sup> Testimony is offered for a proper purpose; the fact that credibility may come into play does not bar the admission of the testimony.<sup>221</sup>

Finally, in cases where the victim recants, defense attorneys may object to

the admission of expert testimony on the grounds that since the victim's behavior favors the defendant, and therefore is not being attacked, expert testimony introduced to explain the behavior is improper. The prosecutor can respond to this assertion by arguing that "since it is a witness's puzzling behavior that triggers the need for expert testimony to help the jury assess the evidence before it, its introduction should not be dependent on a defense attack on the witness's credibility. . . . [Some] 'courts have ruled correctly that expert testimony that explains general characteristics to offset common misconceptions is permissible' even where the defense has not attacked the victim's credibility," e.g., where she recants and her testimony favors the defendant.<sup>222</sup>

### **Introduction of defendant's uncharged misconduct**

Prosecutors' introduction of expert testimony on victim behavior frequently implies the existence of other bad acts committed by the defendant. As a result, prosecutors should consider whether any part of the expert's testimony may implicate F.R.E. 404(b). If so, prosecutors should prepare, file, and argue a motion which puts the defense and the court on notice of any other acts the prosecutor seeks to introduce in the case-in-chief. Prosecutors should note that 404(b) may unintentionally be implicated during an expert's discussion of the theories or dynamics of domestic violence, e.g., cycle of violence or power and control, particularly if some factors are not present in the case. Other acts motions are helpful, therefore, to clarify the purpose of discussing these theories – to educate the jury about domestic violence. Alternatively, the court may want to give a limiting instruction to the jury explaining the purpose of the testimony. The prosecutor should ensure that the expert clarifies that he or she is not offering an opinion on the facts of the case or behavior of the victim, just educating the jurors about the expert's knowledge in the area and/or clinical experiences.

### **Foundation**

Another issue frequently raised in connection with the introduction of expert testimony on victim behavior is the failure of the prosecution to lay a proper foundation for the admission of expert testimony. "A proper foundation includes showing that the expert has the requisite knowledge, skill, education, and experience on which to base her opinion and that

the facts upon which the expert testifies have already been placed into evidence.”<sup>223</sup> In addition, there must be evidence of either a victim’s puzzling behavior, e.g., recantation or reunion with the batterer.<sup>224</sup>

### **Legal conclusion**

Prosecutors should be sure to avoid impermissible character evidence. Specifically, evidence of a person’s character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion.<sup>225</sup> This rule applies both to the victim and to the defendant. In addition, experts should never testify about a particular witness’s credibility or whether they believe an assault did or did not happen or a crime occurred. Experts should never testify as to whether they believe the victim is telling the truth or whether they believe the victim was sexually assaulted. “[T]he expert should not be asked to testify that a witness was in fact battered or raped or give any opinion as to the complainant’s truthfulness.”<sup>226</sup> This type of testimony almost always results in a mistrial of the case or the reversal of a conviction on appeal.

### **Speculation**

In one case, an expert asserted that it appeared likely that the alleged victim had truly been raped because she showed symptoms of RTS. Specifically, the expert testified: “In every rape victim I have seen, they exhibit consistent symptoms ... For example, body soreness, guilt, shame, feelings about the trial, nightmares, and flashbacks are all common symptoms that rape victims’ experience. There is a profile for rape victims and [she] fits it.”<sup>227</sup>

One article addressing domestic violence victim behavior notes, “to avoid undue prejudice to the defendant, the expert should testify only to the general characteristics of Battering and Its Effects and not whether the complainant exhibits these traits. Prosecutors should also refrain from using hypotheticals that too closely mirror the particular facts of the case at bar, because courts have deemed this technique as merely a tactic to circumvent the prohibition against offering expert testimony on whether the complainant was in fact battered.”<sup>228</sup> For the reasons set forth in this monograph, however, it is recommended that experts avoid labeling a victim’s behavior with a syndrome and instead focus on common issues and behaviors observed in their experience working with victims. In addition, where

## **INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR**

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relevant and admissible, experts should discuss myths observed in their training, experiences working with victims or through article or research reviews.

## LIMITATIONS ON COMMON PRACTICES OF INTRODUCING TESTIMONY ON VICTIM BEHAVIOR

On the surface, the methodology for introducing expert testimony on victim behavior in sexual and domestic violence prosecutions appears analogous to methods employed by defense attorneys in support of a self-defense or duress claim. “Particularly in criminal cases, litigants have sought to introduce expert testimony as to a long list of profiles said to be scientifically constructed or valid. The ‘battered woman syndrome’ has been invoked by women to support pleas of self defense in murder cases, to buttress defenses of duress in cases in which they aided their abusive partners in criminal activity, to explain inconsistencies in a woman’s statements or behavior, and in various other situations. Prosecutors in sexual abuse cases have relied on rape trauma syndrome to negate a claim of consent, to explain conflicting statements or actions of the complainant, to prove criminal sexual penetration, and defendants have introduced evidence that a complainant did not experience the syndrome’s symptoms.”<sup>229</sup>

A survey of law review articles and case law reveals the common practice of describing victim behavior in terms of BWS, RTS, “Battering and Its Effects,”<sup>230</sup> “effects of family violence,”<sup>231</sup> and PTSD<sup>232</sup> in both sexual and domestic violence cases. Confusion exists because, notwithstanding the specific definitions of each term, the terms are used liberally and sometimes interchangeably by judges, prosecutors, and experts to describe common victim behavior. Further, in criminal prosecutions, where self-defense is asserted by the defendant, the introduction of testimony on BWS is common in support of a self-defense claim and can at times be appropriate. Notwithstanding this practice, sexual and domestic violence prosecutions are different from cases in which a defendant seeks to justify or excuse her behavior.

The relevant case law and articles also demonstrate that prosecutors often copy defense strategies for explaining domestic and sexual violence victim behavior. The purpose of expert testimony, however, is different, depending on whether it is introduced on behalf of a complainant or a defendant in a criminal prosecution. As a result, the methodology employed by defense attorneys to excuse certain behaviors is less helpful

to prosecutors seeking to explain a victim's common, albeit puzzling, behavior. A defendant introduces such testimony to negate an element of the offense or to establish an affirmative defense by justifying or excusing the criminal behavior as that enacted by a "victim." When introduced by prosecutors, however, this evidence is offered to dispel myths and provide an accurate context in which to judge victim behavior. The major practical difference is that when the defense seeks to introduce expert testimony to satisfy an element of the defense or refute an element of the crime, the defendant is typically examined by a psychiatrist or psychologist who then testifies that the defendant did or did not have a psychological condition, for example, BWS. When the prosecution seeks to introduce expert testimony to dispel common juror myths and to provide a proper context for jurors to consider the victim's testimony, the victim should *not* be examined or evaluated by the expert. Instead, the expert testifies generally—allowing the jury to ultimately consider how the expert's testimony relates to the victim's behavior.

Prosecutors should consult with experts and carefully read case law to understand how such expert testimony has been explored in the literature and utilized in criminal prosecutions. For example, a case discussing expert testimony on BWS allegedly present in a female defendant accused of murdering her husband (the alleged batterer) may not be applicable and likely is distinguishable from a domestic violence case where the male defendant is the batterer and the prosecution is seeking to introduce expert testimony regarding victim behavior in its case-in-chief. The methodology used by defendants with the goal of ultimately arguing justification or affirmative defense for a defendant requires critical adjustments in its implementation and in the construct of the arguments if the prosecution seeks to rely on it. Adjustments include utilizing more accurate terms to describe behavior and adjusting the protocol for introducing it. Without these adjustments, prosecutors risk making errors in arguments for admission of such testimony, misusing the expert testimony, diluting the effectiveness of the evidence, and, at worst, introducing objectionable or inadmissible evidence.

Further, "[a]lthough the syndromes . . . may be useful in the clinical context, none of these syndromes are forensically useful because they do not

have diagnostic utility in differentiating between those who have been traumatized by rape, child abuse, or battering, and those who have not.”<sup>232</sup> There are further limitations to the terms and methodologies commonly used to explain victim behavior. These will be discussed below.

### **Character Evidence—F.R.E. 404**

Rule 404(a) of the Federal Rules of Evidence adopts the well-established rule that character evidence is inadmissible to prove that a person acted in conformity with that character. This rule is commonly implicated by prosecutors seeking to introduce a defendant’s uncharged conduct. It is generally thought that this type of evidence is either irrelevant or overly prejudicial. In other words, the prosecutor may not introduce evidence that the defendant is a “bad man” and has committed the current charges because of his bad character. “Bad character” of the defendant may, however, be offered by the prosecution where the defendant has offered evidence of his own good character or has attacked the character of the alleged victim. In the latter case, the prosecution may respond with “bad character” evidence limited to the character trait of the victim that was attacked by the defendant.

“When profile evidence is used defensively (to show good character, to restore credibility, or to prove apprehension in connection with a claim of self-defense), it falls under an exception to the rule against character evidence. Admissibility [in these cases turns on] the extent to which expert testimony would assist the jury viewed in light of the usual counterweights. The [court must consider the] qualifications of the expert, the degree of acceptance of the appropriate scientific community, the reliability and validity of using the profile, the need for the evidence in light of what most jurors know about the behaviors in question, whether the expert crosses the line between the general and the specific or tried to evaluate the truthfulness of the witness or class of witnesses, and, of course, the weight of the evidence.”<sup>234</sup> Expert testimony that is based upon syndrome evidence or a comparison of a specific victim’s behavior to a class of victims, therefore, risks impermissibly commenting on a victim’s credibility. Under 404(a) this type of testimony is both impermissible and suspect.<sup>235</sup> Indeed, the “probative value of character evidence generally is low while

the potential for distraction, time-consumption, and prejudice is high.”<sup>236</sup>

### ***Limitations on the Use of BWS Testimony to Explain Victim Behavior***

After Lenore Walker introduced the term BWS in 1979, the syndrome was initially used by defense attorneys to justify a defendant’s criminal actions. Later, prosecutors started introducing expert testimony on BWS to explain the victim’s behaviors to jurors. However, “[s]ince the late 1980s, numerous commentators have noted the need for a more representative articulation of the dynamics and effects of domestic violence.”<sup>237</sup> “While later research affirmed many aspects of Walker’s theory, her original BWS model proved to be overly rigid and contained a number of conceptual weaknesses.”<sup>238</sup> Other criticisms have invalidated the syndrome completely as unreliable and unsupported by the research.<sup>239</sup>

As described above, there is no “typical” domestic violence victim. Therefore, relying on BWS to explain the behavior of all domestic violence victims is impossible, because not all victims will satisfy the criteria of BWS. Second, the BWS label tends to pathologize a domestic violence victim because it attributes her “counterintuitive” behaviors to psychological conditions, when her behaviors may instead represent common responses to trauma or rational responses to the real pressures and dangers caused by her abuser.<sup>240</sup> For example, although some victims may stay with their abuser because they don’t believe they can escape, others might fear a reprisal if they leave.<sup>241</sup> Some victims may not be able to afford to pay their rents or mortgages or feed their children without their abuser’s salary. Other victims may be isolated from friends and family and thus feel they have nowhere to turn; still others may be pressured by friends and family to stay with the abuser.

Third, since BWS is not found as a recognized diagnosis in the Diagnostic and Statistical Manual of Disorders (DSM-IV-TR),<sup>242</sup> its continuing validity is vulnerable to criticism. In addition, opinion testimony that a victim is suffering from BWS may be attacked as overly subjective, especially since there are no standardized criteria for assessing the syndrome. Fourth, BWS is often offered as general testimony by an expert

who has not evaluated the victim. As a result, although the expert is testifying to behaviors exhibited by an individual with BWS, the expert is neither evaluating nor diagnosing the victim. The testimony, therefore, may be attacked as irrelevant or lacking in foundation. Fifth, the symptoms associated with BWS may be caused by incidents other than battering, such as other life threatening experiences. Finally, “restrictive theories, which narrowly define women’s experiences, may harm battered women both in the courtroom and by perpetuating popular and harmful misconceptions in their lives.”<sup>243</sup>

### ***Limitations on the Use of “Battering and Its Effects” to Explain Victim Behavior***

The biggest issue regarding “Battering and Its Effects” is that it is used to describe two separate things: (1) the psychological effects of battering on an individual; and (2) the common behaviors that victims of domestic violence exhibit which jurors perceive to be counterintuitive. One term, therefore, is used to describe both common *general* behaviors, e.g. recantation, minimization, observed by experts with experience working with domestic violence victims, as well as an *individual* domestic violence victim’s behavior resulting from her abuse, i.e. the victim’s murder of her abuser.<sup>244</sup> To the extent that expert testimony on Battering and Its Effects is offered to explain actions that one specific victim took, its introduction may be subject to all of the problems associated with the introduction of BWS evidence. When used to explain general victim behavior, it still may be problematic because experts still rely on the criteria of BWS to describe the victim’s behavior.<sup>245</sup>

### ***Limitations on the Use of RTS to Explain Victim Behavior***

From its inception, admission of testimony regarding RTS has been highly contested. In some jurisdictions, RTS has survived *Frye*, *Daubert*, or other state-specific challenges to the admission of expert testimony on this subject. However, other jurisdictions have not accepted this evidence when offered by the prosecution because it has been found to be unreliable.<sup>246</sup>

The problems associated with the introduction of expert testimony on BWS evidence also apply to the introduction of expert testimony on

RTS. First, the empirical research does not support an RTS diagnosis.<sup>247</sup> Second, the term RTS is confusing because it has come to encompass so many different meanings. Specifically, one article notes that it refers to “the original RTS developed in the 1970s, the more recent and empirically strong studies of reactions to rape, and the diagnosis of PTSD . . . of which RTS is often considered a subset.”<sup>248</sup> “These multiple connotations become confusing and problematic in the courtroom because judges, attorneys and even some experts often presume that RTS is a reference only to the original construct and literature developed by Burgess and Holstrom (1974).”<sup>249</sup> The expert, however, may be referring to the modern research regarding RTS, sexual assault victim behavior and PTSD.<sup>250</sup> Third, “the RTS label tends to pathologize victims of sexual violence when the victims may be exhibiting common, albeit counterintuitive to some laypeople, responses to trauma. This means that instead of looking at the victim’s individual reactions, victims are categorized as generally medically or psychologically “abnormal.”<sup>251</sup> Fourth, RTS is not found in the DSM-IV-TR, the standard reference for the diagnosis of psychological conditions, and, therefore, its reliability is vulnerable to attack.<sup>252</sup> Fifth, RTS is often offered as general testimony by an expert who has not evaluated the victim. As a result, the expert testifies about behaviors exhibited by an individual with RTS, but the expert has neither evaluated nor diagnosed the victim. Consequently, the testimony is then open to attack that the prosecutor failed to lay the proper foundation. Finally, the symptoms associated with RTS may be caused by incidents other than a sexual assault, such as an unrelated life threatening event.

### ***Limitations on the Use of PTSD to Explain Victim Behavior***

Prosecutors trying to introduce PTSD to explain victim behavior in a sexual assault or domestic violence case may confront several problems. First, the victim may not meet the DSM-IV-TR diagnostic criteria, i.e., she may not suffer from PTSD. Second, since symptoms must persist for one month, PTSD will not explain a victim’s behavior during the first 30 days following her traumatic experience.<sup>253</sup> Third, as with the other syndromes, ideally, the expert should not examine the victim. However, if the expert does not examine and diagnose the victim, but testifies about a specific syndrome, the jurors may view the expert’s testimony with skepticism.

## CONCLUSION

**P**rosecutors are united in the goal of seeking justice.<sup>254</sup> In sexual and domestic violence prosecutions, justice requires that prosecutors introduce evidence and testimony, which seeks to dispel myths and misconceptions about sexual and domestic violence so that jurors may accurately assess a victim's behavior, and, therefore, her credibility. In jurisdictions where expert testimony is admissible to explain victim behavior, prosecutors should consider offering experts to testify about their knowledge of and experience with sexual and domestic violence victims, their observations of common victim behaviors, the potential reasons for these behaviors, and, where appropriate, their understanding that often the reality of victim behavior does not comport with the public's expectations, i.e., common myths. Prosecutors should refrain from using syndrome evidence to capture victim behaviors. Instead, expert testimony should focus on the fact that individuals have responses to trauma which, although at times counterintuitive to a layperson, actually are common responses and reactions to their assaults. Prosecutors who wish to challenge their jurisdictions' established precedents against the introduction of expert testimony on victim behavior must be mindful of their ethical obligations to the court,<sup>255</sup> the protocol required to overturn existing law, the strength of their case, the necessity of expert testimony to the obtainment of a just verdict, and the impact that the required trial delay will have on victim safety. Further, even in jurisdictions in which this testimony is inadmissible, prosecutors should still work with experts to prepare their cases. As discussed above, experts can be helpful in identifying issues which may be addressed during direct or cross-examination that will help juries understand the reasons for a victim's behavior. In addition, even where admissible, expert testimony on victim behavior may not be necessary, especially where a victim or her friends or family can articulate effectively the reasons for her behavior.



## ENDNOTES

- <sup>1</sup> See, e.g., *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 243–44 (Mass. App. Ct. 1997); Cynthia Lynn Barnes, *Admissibility of Expert Testimony Concerning Domestic Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 A.L.R.5th 315 (Oct. 2005); Gregory G. Sarno, *Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome*, 42 A.L.R.4th 879 (July 2005).
- <sup>2</sup> See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993–2004), available at <http://www.ojp.usdoj.gov/bjs/intimate/offender.htm> (indicating that in 2004, 96.9% of victims of intimate partner violence were female where the offender was male); see also U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993–2004), available at <http://www.ojp.usdoj.gov/bjs/intimate/table/women.htm> (indicating that in 75.3% of cases in 2004, offenders of intimate partner violence were male, regardless of the victim's gender); see U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, VICTIMIZATION RATES FOR PERSONS AGE 12 AND OVER, BY GENDER AND AGE OF VICTIM AND TYPE OF CRIME (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf> (indicating that between 1994 and 2005, the average annual percentage of rape and sexual assault offenders who were male was 96.4%, and that a male's risk of suffering rape or sexual assault is statistically 0.0%). For this reason, the pronoun “she” is used when referring to a victim and the pronoun “he” is used to refer to the perpetrator; however, the principles discussed apply regardless of the sex of the victim or the perpetrator.
- <sup>3</sup> See *U.S. v. Rynning*, 47 M.J. 420, 422 (C.A.A.F. 1998) (noting that without expert testimony, a victim's counterintuitive behavior often undermines her credibility); see also Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 235 (1992) (stating “studies document the findings that most people maintain misinformation about domestic abuse, which is detrimental to their evaluation of the battering victim's credibility”).
- <sup>4</sup> For example, one county has attempted to raise a contributory fault defense in a civil suit filed by the family of a middle school-aged sexual assault victim, who was sexually assaulted by a sheriff's deputy based upon the girl's attempt to keep the relationship hidden from her parents and the sheriff's department. Andrew Binion, *County Files Appeal in Sex Case Involving Ex-Deputy*, THE KITSAP SUN, Apr. 11, 2007, available at [http://www1.kitsapsun.com/bsun/local/article/0,2403,BSUN\\_19088\\_5477103,00.html](http://www1.kitsapsun.com/bsun/local/article/0,2403,BSUN_19088_5477103,00.html).
- <sup>5</sup> This term includes “eye” or “ear” witnesses to the actual assault. It does not cover any individuals who may have observed the victim or defendant prior to or following the assault or any relevant witnesses related to forensic evidence.
- <sup>6</sup> See *Rynning*, 47 M.J. at 422 (stating “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”) (citation omitted) (quoting *U.S. v. Pagel*, 45 M.J. 64, 68 (C.A.A.F. 1996)).
- <sup>7</sup> *Bechtel v. State*, 840 P.2d 1, 8 (1992) (referencing LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1979)).
- <sup>8</sup> See *Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* for an explanation of this term. See also *supra* note 8 (although there

## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

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- are several variations of this term used in current case law and articles, e.g., “battered women syndrome” and “battered woman’s syndrome;” the author has chosen to use the term “battered woman syndrome” based upon WALKER, *supra* note 7. See also Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992) (stating “Battered Woman Syndrome is the name given to the measurable psychological changes that occur after exposure to repeated abuse”).
- <sup>9</sup> See *Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* for an explanation of this term.
- <sup>10</sup> *Id.*
- <sup>11</sup> Expert testimony offered by the prosecution to explain victim behavior is not admissible in all fifty states. Therefore, it is imperative for prosecutors to consult the law in their particular jurisdictions before seeking to introduce this type of evidence. The variations among the jurisdictions regarding the admissibility of this type of expert testimony are discussed in detail in *Recommended Practices for Introducing Expert Testimony to Explain Victim Behavior in Your Case*. In addition, prosecutors should refer to *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); see also Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227 (1996-1997); Barnes, *supra* note 1; Sarno, *supra* note 1.
- <sup>12</sup> See Bowman, *supra* note 3, at 237 (stating “[e]xpert testimony of the wide range of experiences of battered women is also admissible to create a context in which the finder of fact can judge the credibility of the battered woman”).
- <sup>13</sup> See Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCHOL. WOMEN Q. 133 (1994); Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE & VICTIMS 271 (1991).
- <sup>14</sup> See Laura E. Boesch, Bruce D. Sales, & Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL’Y & L. 414, (stating “[t]his focus on the victim is not surprising because U.S. society has a long history of holding persistent and harmful myths about rape and those who are victimized by it”).
- <sup>15</sup> Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53(5/6) SEX ROLES 385 (Sept. 2005). For a discussion of rape myth acceptance, see also Bettina Frese, Miguel Moya, & Jesús L. Megía, *Social Perception of Rape: How Rape Myth Acceptance Modulated the Influence of Situational Factors*, 19(2) J. INTERPERSONAL VIOL. 145 (Feb. 2004) (citing Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOCIAL PSYCHOL. 217-230 (1980) (describing rape myth acceptance (RMA) as “the amount of stereotypic ideas people have about rape, such as that women falsely accuse men of rape, rape is not harmful, women want or enjoy rape, or women cause or deserve rape by inappropriate or risky behavior”).
- <sup>16</sup> Ben-David, *Rape Perceptions*, *supra* note 15, at 386.
- <sup>17</sup> *Id.*; see also Lonsway, *supra* note 13, at 135 (addressing the myth that only certain types of victims are raped as well as the belief in the number of false claims).
- <sup>18</sup> *State v. Ciskie*, 751 P.2d 1165, 1171 (Wash. 1988).
- <sup>19</sup> *Id.* (citing *State v. Murley*, 212 P.2d 801, 804 (1949)).
- <sup>20</sup> See, e.g., *Ciskie*, 751 P.2d at 1165 (noting that the feudal doctrine of hue and cry was discredited in Washington).
- <sup>21</sup> Pa. SSJI (Crim.) 4.13A.
- <sup>22</sup> *Id.* (emphasis added).
- <sup>23</sup> 18 Pa.C.S.A. § 3105 (2006).

## ENDNOTES

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- 24 Nancy K.D. Lemon, et al., *Expert Witnesses in Domestic Violence Trials: Policy Pros and Cons for Prosecutors* 11 (2001) (unpublished manuscript, on file with the author).
- 25 *Id.* (citing Police Executive research forum, *Community-Oriented Policing and Violence Against Women*, Sec. 2 at p. 5-8 (1998)).
- 26 *People v. Ellis*, 650 N.Y.S.2d 503, 505-06 (1996).
- 27 *See Bowman*, *supra* note 3, at 235. *See also* Charles P. Ewing & Moss Aubrey, *Battered Women and Public Opinions: Some Realities About the Myths*, 4 J. FAM.VIOL. 105-25 (1987); Regina A. Schuller, Vicki L. Smith, & James M. Olson, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCHOL. 316-37 (1994).
- 28 *See, e.g.*, Barnes, *supra* note 1; Matthew P. Hawes, *Removing Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on Battered Woman Syndrome in Ohio*, 53 CLEV. ST. L. REV. 133 (2005-2006); Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998).
- 29 *Bowman*, *supra* note 3, at 243.
- 30 *See, e.g.*, *State v. Searles*, 680 A.2d 612, 615 (N.H. 1996) (citing *People v. Christel*, 537 N.W.2d 194, 202 (Mich.), *rehearing denied*, 539 N.W.2d 504 (1995) (citations omitted) (stating “victim[s] attempts to hide or minimize the effect of . . . & abuse or deni[al] or recant[ation of] the claim of abuse is behavior which is incomprehensible to average people”).
- 31 Nancy Lemon, Rhonda Martinson, & Carlose Monagas, *Expert Witnesses in Domestic Violence Trials: Policy Pros and Cons for Prosecutors*, at 11 (2001).
- 32 *Goetzendanner*, 679 N.E.2d at 243-44.
- 33 *Arcoren v. U.S.*, 929 F.2d 1235, 1240 (8th Cir. 1991).
- 34 *Ellis*, 650 N.Y.S.2d at 503. As noted in *Recommended Practices*, NCPVAW does not recommend that prosecutors offer expert testimony on syndrome evidence.
- 35 *Id.* at 508.
- 36 Terri Spahr Nelson, *Module 7: Expert Witnesses*, in *JUDGE ADVOCATE CURRICULUM ON REPORTING SEXUAL ASSAULT* (forthcoming 2007).
- 37 *See, e.g.*, *Bowman*, *supra* note 3, at 242 (discussing expectations of victim behavior in a battering circumstance); *see also* Ben-David, *supra* note 15 (discussing expectations of defendant behavior).
- 38 *Rynning*, 47 M.J. at 420.
- 39 *Id.* at 422 (citations omitted).
- 40 *See, e.g.*, *supra* notes 13 and 15 (for articles addressing domestic violence myths); *see also supra* note 27 (for articles discussing sexual assault myths).
- 41 Spahr Nelson, *supra* note 36.
- 42 The protocol for introducing this behavior through expert testimony is discussed in detail in *Recommended Practices*.
- 43 *Ciskie*, 751 P.2d at 1171 (emphasis added).
- 44 *Id.*
- 45 *Searles*, 680 A.2d at 612.
- 46 *Id.* at 615.
- 47 *See, e.g.*, *Rynning*, 47 M.J. 420.
- 48 *See Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* for an explanation of this term.
- 49 Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress*

## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

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- Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE UNIV. L. REV. 453, 461 (Fall 2003).
- <sup>50</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE & U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE OF MENTAL HEALTH, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO §40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996), available at [www.ncjrs.gov/pdffiles/batter.pdf](http://www.ncjrs.gov/pdffiles/batter.pdf); see also Cal. Evid. Code § 1107 (2007).
- <sup>51</sup> See THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, *supra* note 46, at i-ii.
- <sup>52</sup> Laura E. Boesch, Bruce D. Sales, & Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL'Y & L. 414.
- <sup>53</sup> For a more detailed discussion of Child Abuse Accommodation Syndrome (CAAS), see MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION: A COMPREHENSIVE REVIEW OF PORNOGRAPHY, PROSTITUTION, AND INTERNET CRIMES, VOL. 2 (2005). For the reasons discussed in this monograph, however, we do not recommend that prosecutors offer expert testimony on syndrome evidence.
- <sup>54</sup> LENORE E. WALKER, THE BATTERED WOMAN (1979).
- <sup>55</sup> *Ellis*, 650 N.Y.S.2d at 505; see also Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, *supra* note 9, at 326-30 (describing BWS as a subcategory of Posttraumatic Stress Disorder (PTSD)).
- <sup>56</sup> Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, *supra* note 9, at 326.
- <sup>57</sup> *Nixon v. U.S.*, 728 A.2d 582, 590 (D.C. 1999).
- <sup>58</sup> For examples of cases in which defendants sought to introduce evidence about battered woman syndrome in support of their self-defense claims, see *State v. Hennem*, 441 N.W.2d 793 (Minn. 1989); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981).
- <sup>59</sup> Lenore E. A. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY: AN INT'L J. 525-34, (1977-78).
- <sup>60</sup> *Id.*
- <sup>61</sup> Alafair S. Burke, *Rational Actors, Self-Defense and Duress, Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 224 (2002).
- <sup>62</sup> For a more detailed description of this theory, see LENORE E. WALKER, THE BATTERED WOMAN (1979); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 72 (1997); Burke, *supra* note 56; and Marilyn McMahan, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 PSYCHIATRY, PSYCHOL. & L. 23, 28 (1999).
- <sup>63</sup> See book and articles cited *supra* note 57; see also McMahan, *supra* note 57, at 27.
- <sup>64</sup> See MARY ANN DUTTON, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, IMPACT OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS INVOLVING BATTERED WOMEN (May 1996), at <http://www.ojp.usdoj.gov/ocom/94Guides/Trials/Valid/> (discussing the use of BWS in criminal prosecutions since the 1970s) (stating "the 'cycle of violence' is not the only pattern of abusive behavior found in battering relationships").
- <sup>65</sup> See THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, *supra* note 50.
- <sup>66</sup> *Id.* at vii.
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.*

## ENDNOTES

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- <sup>69</sup> See, e.g., Cal. Evid. Code § 1107.
- <sup>70</sup> *Id.*
- <sup>71</sup> See also Janet Parrish, *Expert Testimony on Battering and Its Effects*, 11 WIS. WOMEN'S L. J. 75, 82 (Summer 1996).
- <sup>72</sup> See State v. Black, 745 P.2d 12, 16 (1987) (citing Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974)).
- <sup>73</sup> *Id.*
- <sup>74</sup> State v. Huey, 699 P.2d 1290, 1293 (Ariz. 1985) (citing Paula Wilk, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U. L. REV. 417, 427 (1984)).
- <sup>75</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR].
- <sup>76</sup> Brett C. Trowbridge, *Expert Testimony*, *supra* note 49, at 461.
- <sup>77</sup> DSM-IV-TR at 463. Acute Stress Disorder (ASD) is similar to PTSD except its duration is less than one month and it involves prominent dissociative symptoms. ASD does not significantly vary in symptom presentation from PTSD. If the symptoms persist for more than 2 days, it is acute stress disorder. If symptoms persist for more than 30 days, it is PTSD; see also Boesch, *supra* note 14.
- <sup>78</sup> *Id.*
- <sup>79</sup> *Id.*
- <sup>80</sup> See Trowbridge, *supra* note 49, at 459 (citing DSM IV-TR at 467).
- <sup>81</sup> *Id.*; see also Dave R. Englert et al., *The Prosecutor's Guide to Mental Health Disorders*, 1(10) THE VOICE (Spring 2007).
- <sup>82</sup> Trowbridge, *supra* note 49.
- <sup>83</sup> Experts can be helpful to prosecutors in preparing a case whether or not their testimony is admissible at trial. Experts can provide the benefit of their experience and help prosecutors craft questions on direct examination that will elicit useful information. In addition, experts' assistance may enable prosecutors to craft effective questions of a recanting victim.
- <sup>84</sup> State v. Townsend, 897 A.2d 316 (N.J. 2006).
- <sup>85</sup> *Id.* at 327.
- <sup>86</sup> See generally CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (2002) (discussing rationales behind reporting behavior).
- <sup>87</sup> The prosecutor can consider seeking assistance from an expert who has examined the victim if the victim has a developmental or intellectual delay or suffers from a mental health disorder that is relevant to her victimization or the defense has attacked her credibility because of these conditions. See William Paul Deal & Viktoria Kristiansson, *Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault*, 1(12) THE VOICE (Spring 2007); see also Englert et al., *supra* note 76.
- <sup>88</sup> See, e.g., Commonwealth v. Agnew, 666 A.2d 1062 (Pa. Super. 1995) (stating that the act of obtaining records by the prosecutor may waive an applicable privilege, in this case records from a sexual assault counselor).
- <sup>89</sup> Please contact NCPVAW for a law chart containing relevant case law in your jurisdiction.
- <sup>90</sup> See Ciskie, 751 P.2d at 1165.

## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

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- <sup>91</sup> *Id.* at 1166.
- <sup>92</sup> See THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, *supra* note 50.
- <sup>93</sup> Please contact NCPVAW for law charts setting forth cases addressing admission of expert testimony to explain victim behavior. See also Sarah Gibbs Leivick, *Use of Battered Woman Syndrome to Defend the Abused and Prosecute the Abuser*, 6 GEO. J. GENDER & L. 391 (2005) (stating twenty states have permitted the prosecution to admit expert testimony on victim behavior related to domestic violence); see also Parrish, *supra* note 71.
- <sup>94</sup> See, e.g., Commonwealth v. Dunkle, 602 A.2d 830, 836 (Pa. 1992) (holding that delays in reporting and omissions in reporting of alleged child sexual assault victims was not beyond the knowledge or experience of the average layman).
- <sup>95</sup> See *supra* note 89.
- <sup>96</sup> See *supra* note 11.
- <sup>97</sup> *Id.*
- <sup>98</sup> *Id.*
- <sup>99</sup> But see State v. Borrelli, 629 A.2d 1105, 1111 (1993) (holding the *Frye* test inapplicable “where understanding of the method is accessible to the jury, and not dependent on familiarity with highly technical or obscure scientific theories, the expert’s qualifications, and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence”) (citations omitted). This theory will be discussed in further detail in *Admissibility of Expert Testimony under Frye, Daubert, and Kumho Tire*.
- <sup>100</sup> See e.g., Borelli, 629 A.2d 1105; see also Cal. Evid. Code §1107(b).
- <sup>101</sup> Bowman, *supra* note 3, at 237.
- <sup>102</sup> *Id.* at 237-38.
- <sup>103</sup> *Id.* at 238.
- <sup>104</sup> Prosecutors must consult the laws of their jurisdictions in order to determine whether expert testimony addressing counterintuitive victim behavior is admissible. NCPVAW has compiled research on this issue. See also, Parrish, *supra* note 71.
- <sup>105</sup> Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J. L. & SOC. PROBS. 277, 283 (1992).
- <sup>106</sup> FED. R. EVID. 402 (2006).
- <sup>107</sup> FED. R. EVID. 401 (2006).
- <sup>108</sup> See *supra* note 11 (explaining that the admissibility of expert testimony on victim behavior is dependent upon the laws of a particular jurisdiction).
- <sup>109</sup> *Id.*
- <sup>110</sup> See Barnes, *supra* note 1, at Sec. 3a (discussing abuse victims’ common recantations).
- <sup>111</sup> *Borelli*, 629 A.2d at 1112 (discussing jurors’ potential to believe in domestic violence myths); see also *Townsend*, 897 A.2d at 333-34 (stating “[w]e have no doubt that the ramifications of a battering relationship is still a subject that is beyond the ken of the average juror”).
- <sup>112</sup> See Barnes, *supra* note 1, at Sec. 3a (discussing abuse victims’ common recantations).
- <sup>113</sup> *Id.*
- <sup>114</sup> *Id.*
- <sup>115</sup> See JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN’S CONSENT

## ENDNOTES

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- SERIOUSLY (2005) at 4 (stating “[t]he facts in America are that most rapists are not prosecuted because somewhere between 60 and 90 percent of rape victims don’t report the crime”).
- 116 *People v. Hampton*, 746 P.2d 947, 952 (Colo. 1987); *but see* Pa. SSJI (Crim.) 4.13A, *supra* note 21.
- 117 FED. R. EVID. 702 (2006).
- 118 *See Nixon*, 728 A.2d at 582.
- 119 *Id.* at 590-91.
- 120 *Taylor*, 552 N.E.2d at 131.
- 121 *Id.* at 136.
- 122 *Christel*, 537 N.W.2d at 202.
- 123 *Rynning*, 47 M.J. at 422.
- 124 *State v. Cooke*, 1997 Wash. App. LEXIS 1212 (July 1997).
- 125 *Id.* at \*5.
- 126 *Id.*
- 127 *Contra* Cal. Evid. Code §1107(b) (stating “[t]he foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on intimate partner battering and its effects shall not be considered a new scientific technique whose reliability is unproven”).
- 128 Georgia, Utah, Virginia, and Wisconsin have adopted their own admissibility standards for novel scientific evidence. The standards in Georgia, Utah, and Virginia, however, are based upon reliability and are generally considered *Daubert* states. *See, e.g.*, Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2006). The standard for admitting expert testimony in Wisconsin is based upon relevance, and therefore is distinct from *Frye* and *Daubert*. *See, e.g.*, *State v. Peters*, 534 N.W.2d 867, 872 (Wis. Ct. of App. 1995).
- 129 *Frye*, 293 F. 1013. (*Frye* states: AZ, CA (*Kelly/Frye*), DC, FL, IL, KA, MD, MN (*Frye/Mack*), MO, NY, ND, PA, and WA). (AL and NJ have not rejected *Frye* in toto while applying *Daubert* factors).
- 130 *Ellis*, 650 N.Y.S.2d 503.
- 131 *Id.* at 505.
- 132 *Daubert*, 509 U.S. 579. (*Daubert* states: AK, AR, CO, CT, DE, HI, ID, IN, IA, KY, LA, ME, MA (*Daubert/Lanigan*), MI, MS (modified *Daubert*), MT, NE, NV, NH, NM, NC, OH, OK, OR, RI, SC, SD, TN, TX, VT, WV, WY, and federal jurisdictions).
- 133 *Id.* at 592-93.
- 134 *Kumho Tire Co.*, 526 U.S. 137.
- 135 *U.S. v. Quintanilla*, 56 M.J. 37, 84-85 (C.A.A.F. 2001) (citations omitted); *see also* Lustre, *supra* note 128 at \*2.
- 136 *Quintanilla*, 56 M.J. at 85 (citations omitted).
- 137 *Id.*
- 138 Michele Michelson, *Recent Development, The Admissibility of Expert Testimony on Battering and Its Effects After Kumho Tire*, 79 WASH. U. L.Q. 367, 371 (Spring 2001) (quoting *Kumho Tire Co.*, 526 U.S. at 151).
- 139 *Id.* (quoting Brief for the United States at 19, *Kumho Tire* (No. 97-1709)).

## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

---

- 140 See *Kumho Tire Co.*, 526 U.S. at 158.
- 141 See Bowman *supra* note 3, at 239 (discussing that evidence of battering and its effects is not subject to a *Kelly-Frye* review for admissibility).
- 142 *Borelli*, 629 A.2d 1105.
- 143 *Id.*
- 144 *Id.* at 1111 (quoting *State v. Hasan*, 534 A.2d 877, 879 (Conn. 1987)).
- 145 *Id.* (citing *Hasan*, 534 A.2d at 880).
- 146 *Id.* at 1111.
- 147 *Id.*
- 148 *Id.* (In this case, the expert described the victim's behavior in terms of BWS. For the reasons stated in this monograph, we do not recommend this practice.)
- 149 *Id.* at 1110.
- 150 FED. R. EVID. 403 (2006).
- 151 *Id.*
- 152 *Rogers*, *supra* note 28, at 67, 83.
- 153 PAUL R. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 78 (3d ed. 2007).
- 154 *Id.*
- 155 *Murphy*, *supra* note 105, at 284.
- 156 *Id.*
- 157 FED. R. EVID. 702 (2006).
- 158 See, e.g., *State v. Robinson*, 431 N.W.2d 165, 169 (Wis. 1988) (citing Wis. Stat. § 907.02, which mirrors E.R.E. 702's requirements for expert qualifications: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"); see also *Townsend*, 897 A.2d at 329 (citing *Rosenberg v. Tavorath*, 800 A.2d 216, 227 (App. Div. 2002) stating "evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience").
- 159 See *Arcoren*, 929 F.2d at 1240 (qualifying an expert "to testify about a victim's behavior based on her degree in psychology from the University of Michigan which is judicially noted as a respected university plus the length of actual time she has had in this general field"); see also *State v. Cababag*, 850 P.2d 716, 720 (Haw. Ct. App. 1993); *State v. Weaver*, 648 N.W.2d 355, 365 (S.D. 2002).
- 160 *Townsend*, 897 A.2d at 328.
- 161 See, e.g., *Townsend* at 328; *Ciskie*, 751 P.2d at 1169; *Borrelli*, 629 A.2d at 1112.
- 162 See *Barnes*, *supra* note 1. (discussing experts qualified to testify about victim behavior in domestic violence cases); see also *Sarno*, *supra* note 1 (discussing experts qualified to testify about victim behavior in sexual violence cases).
- 163 *Id.*
- 164 *Goetzendanner*, 679 N.E.2d at 244.
- 165 *Commonwealth v. Pickford*, 536 A.2d 1348 (Pa. 1987).
- 166 *Ward v. Commonwealth*, 570 S.E.2d 827, 829 (Va. 2002); see also *Odom v. State*, 711 N.E.2d 71 (Ind. App. 1999).

## ENDNOTES

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- 167 *State v. Liddell*, 685 P.2d 918, 922 (Mont. 1984).
- 168 *Borelli*, 629 A.2d at 1112.
- 169 *State v. Huey*, 699 P.2d 1290 (Ariz. 1985).
- 170 *State v. Frost*, 577 A.2d 1282, 1289 (N.J. App. Ct. 1990).
- 171 *Id.*
- 172 *Stevenson v. State*, 612 S.E.2d 521, 526 (Ga. Ct. App. 2005) (citing *Smith v. State*, 210 Ga. App. 451, 452 (1993)).
- 173 *Goetzendanner*, 679 N.E.2d 240.
- 174 *Id.* at 244.
- 175 *Id.* at 243.
- 176 In addition to the experts listed below, at least two states, South Carolina and Colorado, permit law enforcement personnel to testify about common victim behaviors based upon their experience.
- 177 *Stevenson*, 612 S.E.2d 521.
- 178 *Id.* at 525.
- 179 *State v. Schaller*, 544 N.W.2d 247 (Wis. Ct. App. 1995).
- 180 *Id.* at 251. (In this case, experts testified about victim behavior based upon their personal experience working with the victim. For the reasons described in this monograph, this practice should only be used in the rarest of cases.)
- 181 *Robinson*, 431 N.W.2d 165.
- 182 *Id.* at 169.
- 183 *Id.*
- 184 *Thomas v. State*, 521 S.E.2d 397 (1999); *see also Hawaii v. Clark*, 926 P.2d 194 (Haw. 1996).
- 185 *Id.*
- 186 *State v. Griffin*, 564 N.W.2d 370, 374 (Iowa 1997).
- 187 *Id.* at 374.
- 188 *Scugoza v. State*, 949 S.W.2d 360, 361 (Tex. Ct. App. 1997); *see also People v. Brown*, 94 P.3d 574, 576 (Ca. 2004).
- 189 *Russell v. State*, 934 P.2d 1335 (Alaska Ct. App. 1997).
- 190 *Id.* at 1342.
- 191 *Id.*
- 192 *Christel*, 537 N.W.2d 194.
- 193 *Id.* at 202.
- 194 *Escamilla v. Texas*, No. 06-05-00082-CR, 2006 Tex. App. LEXIS 762 (Tex. App. 6th 2006).
- 195 *Id.* at \*8.
- 196 *Simmons v. State*, 504 N.E.2d 575 (Ind. 1987).
- 197 *Id.* at 578.
- 198 *Escamilla*, 2006 Tex. App. LEXIS 762 at \*4.
- 199 *Id.*
- 200 Prosecutors who offer testimony on the cycle of violence will probably also have to prepare and file 404b motions in order to protect against defense objections or declaration of mistrial.
- 201 Tips for preparing experts to testify will be discussed in further detail below.

## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

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- 202 E-mail from Mr. Russell W. Strand, Chief, Family Law Enforcement Training Division, U.S. Army Military Police School, Fort Leonard Wood, MO (May 4, 2007 09:41:00 EST) (on file with author); *see also*, JOYCE HERMAN, *TRAUMA AND RECOVERY* (1992) at 38–42 (stating “[s]ometimes people reenact the traumatic moment with a fantasy of changing the outcome of the dangerous encounter. In their attempts to undo the traumatic moment, survivors may even put themselves at risk of further harm. . . . Reliving a trauma may offer an opportunity for mastery, but most survivors do not consciously seek or welcome the opportunity”).
- 203 For a more detailed discussion of victim preparations, *see* Teresa P. Scalzo, *Tips for Testifying as a Expert Witness in a Violence Against Women Prosecution*, 1(6) *THE VOICE* (2006).
- 204 Although each case is unique, as stated in this monograph, prosecutors should only call a victim’s treatment provider to testify as an expert in rare circumstances where the patient’s psychological condition is directly relevant to her victimization and where the testimony is absolutely necessary to the ability to prosecute the case. As stated before, the use of a victim’s treatment provider risks opening the victim’s records to discovery and her evaluation by defense experts.
- 205 *See, e.g.*, *State v. Vance*, 685 N.W.2d 713, 719 (Minn. Ct. App. 2004).
- 206 *Id.*
- 207 *Vance*, 685 N.W.2d at 720.
- 208 *See* Jennifer Adler Lifshitz, *Crime and Punishment Law Chapter: Battered Woman Syndrome and Prosecution of Domestic Abuse and Rape Cases*, 5 *GEO. J. GENDER & L.* 149, 162 (2004) (discussing *State v. Grecinger*, 569 NW 2d 189 (Minn 1997)); *see generally* Sarno, *supra* note 1.
- 209 *Christel*, 537 N.W.2d at 202.
- 210 *Id.* at 204.
- 211 Leivick, *Use of Battered Woman Syndrome, supra* note 93 at 400–01 (2005).
- 212 *Id.* at 400–01 (citing *Grecinger*, 569 N.W.2d 189).
- 213 *Id.* (citing *Searles*, 680 A.2d at 615 and *Frost*, 577 A.2d at 1289).
- 214 *See, e.g.*, *State v. Stringer*, 897 P.2d 1063, 1069 (Mont. 1995) (citing *State v. Harris*, 808 P.2d 453, 455 (Mont. 1991)).
- 215 *Id.* at 1069; *see also* *U.S. v. Halford*, 50 M.J. 402 (C.A.A.F. 1999).
- 216 *Parrish v. State*, 514 S.E.2d 458 (Ga. Ct. App. 1999).
- 217 *Id.* at 462 (citing *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981)).
- 218 *Id.* at 463.
- 219 *Id.* at 464 (citing *Jennette v. State*, 398 S.E.2d 734 (Ga. Ct. App. 1990).
- 220 *Id.* (citing *Barlow v. State*, 507 S.E.2d 416 (Ga. 1998).
- 221 *Id.*
- 222 *Rogers, supra* note 28, at 83–84 (1998).
- 223 *Carnahan v. State*, 681 N.E.2d 1164, 1167 (Ind. Ct. App. 1997) (citing *Henson v. State*, 535 N.E.2d 1189, 1191 (Ind. 1989)).
- 224 *Id.* at 1167.
- 225 *FED. R. EVID.* 404 (2006).
- 226 *Rogers, supra* note 28, at 86.
- 227 *Trowbridge, supra* note 49, at 454.
- 228 *Rogers, supra* note 28, at 86.
- 229 *MCCORMICK ON EVIDENCE* 352 (Kenneth S. Brown ed., 6th ed. 2006).

## ENDNOTES

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- 230 See Parrish, *supra* note 71.
- 231 Searles, 680 A.2d at 615.
- 232 See, e.g., *State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982); see also *Clark v. Florida*, 654 So. 2d 984 (Fla. 1995) (discussing PTSD and RTS, which the court did not admit to prove the assault, but, which, it noted in a footnote, would likely be admissible to counter “myths and misconceptions dealing with rape”).
- 233 See generally David L. Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 2-143 (2002).
- 234 McCORMICK, *supra* note 229, at 353.
- 235 See ROTHSTEIN, *supra* note 153 at 120 (stating “[b]ecause one certainly does not necessarily always act in accord with one’s general predispositions, and because of the inherent risk of prejudice, character evidence is viewed by the law as extremely suspect”).
- 236 McCORMICK, *supra* note 229 at 352.
- 237 Michelson, *supra* note 138, 374 (2001).
- 238 *Id.* at 374.
- 239 See Boesch, *supra* note 14, at 415 (stating “[a]lthough experts can provide important information when testifying, unsubstantiated, nonscientific testimony on . . . RTS can harm not only victims and alleged offenders, but also the field of psychology as a whole. If the field of psychology is to be acknowledged as scientific, then psychologists must operate within the limitations of the empirical research”).
- 240 Burke, *supra* note 56.
- 241 See generally, Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 (1) VIOLENCE & VICTIMS (1993); Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (1999) available at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_lethality.php](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_lethality.php) (discussing the significance of a separation or attempt to separate by the female party in a domestic homicide); see also Allie Phillips, *The Dynamics Between Animal Abuse, Child Abuse and Domestic Violence: How Pets Help Children*, 38 (5) THE PROSECUTOR, (Sept. – Oct.) (2003) (discussing the interrelationship between domestic violence and pet abuse).
- 242 This fact alone, however, should not be relied upon as evidence of the American Psychological Association’s (APA) disapproval of BWS. The APA has filed amicus briefs in support of BWS in at least two cases: *Hawthorne v. State*, 408 So.2d 801 (Fla. Dist. Ct. App. 1982) and *State v. Kelly*, 478 A.2d 364 (N.J. 1984).
- 243 Bowman, *supra* note 3, at 236.
- 244 Parrish, *supra* note 66.
- 245 See, e.g., *Carnahan v. State*, 681 N.E.2d 1164 (Ind. Ct. App. 1997).
- 246 See generally Sarno, *supra* note 1.
- 247 See Boesch, *supra* note 14, at 427 (stating “[t]here is no clinical diagnosis or solid empirical research on which to base ethical RTS testimony”).
- 248 See Boesch, *supra* note 14, at 416; see also Boesch, *infra* note 250.
- 249 *Id.* at 416.
- 250 *Id.*
- 251 MERRIAM-WEBSTER ONLINE, available at <http://www.m-w.com/dictionary/pathologize>.
- 252 *Black*, 745 P.2d at 13, 14 (noting that the APA indicates in DSM-IV-TR that “the stress and trauma associated with rape is merely one type of the larger phenomenon known as ‘post-trau-

## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

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- matic stress disorder'). *DSM-IV-TR* 236–38 (3d ed. 1980); *but see* Boeschen, *supra* note 14, at 417 (stating “the term RTS is not found in the *DSM-IV* (1994) nor in any previous editions”).
- 253 *See supra* note 77, discussing ASD; *see also* Boeschen, *supra* note 14 (discussing expert testimony on ASD in sexual assault cases).
- 254 *See* § 1.1 NDAA National Prosecution Standards, 2nd Ed. (1991) (stating “the primary responsibility of the prosecution is to see that justice is accomplished”).
- 255 *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (stating “[a] lawyer shall not knowingly: fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”).

# APPENDIX A

## Qualifying the Expert

*The following questions are examples of questions that may be used to qualify an expert to give testimony about victim behavior in sexual or domestic violence prosecutions. These questions are meant to be modified so that they are relevant to the experience of the expert witness.*

### A. Occupation

1. What is your occupation?
  - How long have you been employed in that capacity?
  - Describe the responsibilities of your position.
  - How long has the program been in existence?
  - What services does your program offer?
  - Do you supervise?
  - Do you train staff?
  - What is the total number of staff?
2. Shelter Employment/Rape Crisis Center/Other
  - How many contacts do you receive yearly from victims identifying themselves as having experienced abuse?
  - How many crisis calls do you receive yearly?
  - How many residents in your shelter at one time?
  - How many residents yearly? Adults? Children?
  - How long can residents stay?
  - Does your program offer any other services?
3. Counseling/Support Services
  - Are your services solely for victims of sexual assault/domestic violence?
  - Are your services solely for women?
  - How many persons are served by this program yearly?
4. Do you have direct contact with victims of sexual/domestic violence?
  - How many victims do you directly come in contact with yearly?
  - What is the approximate period of time you have contact with an individual victim?

- What is the nature of your contact with victims?
- 5. Do you or your program conduct interviews with victims?
  - What is the purpose of the interviews?
  - Are interviews conducted with both crisis calls and clients?
  - How long do the interviews last?
  - What kind of information do you maintain?
    - Type of assault?
    - Age of victim and assailant?
    - Length of relationship?

**B. Previous Occupation (if relevant)**

1. What was your previous occupation?
  - How long did you perform those duties?
  - What were your responsibilities?
  - Did you have direct contact with victims of sexual/domestic violence?
  - What was the nature of the contact?
2. Have you had any other relevant job experience with sexual/domestic violence victims?

**C. Education (if relevant)**

1. What is the highest degree you have obtained?
2. What was your area of concentration?
3. Did you conduct any field work related to sexual/domestic violence?
4. Have you conducted any research in this area?
5. Were the results of your study developed into a paper? Were they published?
6. Are you familiar with articles or studies related to sexual/domestic violence? Please discuss.

**D. Professional Affiliations**

1. Do you belong to any professional organizations or associations? Any related to sexual/domestic violence?
2. What is the nature and purpose of those organizations?
3. Do you belong to any county, state, or national organizations which specifically address sexual domestic violence issues?

4. What is the purpose of those organizations?
5. Are you involved with any committee work of these organizations?  
What is that nature of that committee work?

### **E. Training**

1. When you began your work at your program, did you receive any training in the issues of sexual/domestic violence?
  - Please describe that training.
  - Have you received any additional training in sexual/domestic violence issues?
  - Please describe that training.
2. Have you conducted any trainings yourself?
  - What were the topics of the trainings?
  - For whom did you conduct the trainings?
  - For what purpose were the trainings designed?
  - How many attended the trainings?
  - How often do you conduct such trainings?

### **F. Conferences**

1. Have you attended state or national sexual/domestic violence conferences?
2. Who sponsored the conference?
3. What was the purpose of the conference?
4. When and where was the conference?
5. Did you attend any workshops relevant to domestic violence issues?
6. Have you conducted any workshops or presentations at these conferences?

### **G. Previous Expert Testimony**

1. Have you testified previously in court?
2. Was it a criminal or civil case?
3. How many times?
4. For the defense or the prosecution?
5. Has the defense ever asked you to testify as an expert?
6. If asked, would you do so?



# APPENDIX B

## **Questions for the Expert**

*The following introductory questions can be used to educate the court and jury about sexual or domestic violence as well as to explain victim behavior.*

### **A. Issues Relevant to Sexual/Domestic Violence**

- Based upon your experience, training, education, and work with victims of sexual assault/domestic violence, what are some common issues associated with victims of sexual assault/domestic violence?
- Common theories related to sexual assault or domestic violence (focus on only those relevant to the case).
- Collateral consequences victims face as a result of assault (domestic violence).
- Common nature of non-stranger sexual assault (if permissible).
- Lethality (if permissible).

### **B. Myths About Sexual/Domestic Violence Held by the Public**

- Do you give presentations to civic groups, schools, and other public forums on issues associated with sexual assault/domestic violence, or have other opportunities to talk with members of the public about those issues?
- Have you found the public to be well informed about sexual assault/domestic violence, how it happens, and how victims react?
- Does the public have misconceptions about sexual assault/domestic violence?
- From your experience, how do most people develop these misconceptions?
- Are you familiar with any articles or books (or have you attended any trainings) discussing the myths versus the realities of sexual/domestic violence?

### **C. Victim Behaviors**

- Based upon your experience, training, education, and work with vic-

tims of sexual assault/domestic violence, what are some common victim behaviors/reactions to assault?

- Do all victims behave the same way?
- Through your numerous experiences with sexual assault/domestic victims, have you gathered insight into the reasons why a victim may behave a certain way?
- Based upon your experience, please explain the reasons.

### **Delayed Report**

- In your experience, do victims of sexual assault generally report that they have been sexually assaulted right away?
  - Do some never report or report only years later? Why is that?

### **Minimization**

- Based upon you experience, is it common for a sexual assault victim to minimize the level of violence she has endured?
  - Based upon your knowledge and experience, why does that happen?

### **Recantation or Reluctance to Testify**

- Based upon your experience, is it common for a sexual assault victim to deny violence has occurred as the incident passes in time? Why?
- From you experiences with sexual assault/domestic violence victims, is it common for victims to be reluctant to testify by the time the trial occurs? Why?

### **Flat Affect or Angry Victims**

- Does every victim react to the trauma of rape in the same way?
- Is it uncommon for a victim to show little emotion, or even exhibit seemingly inappropriate emotions, when asked to recount the trauma of rape?
- Do some victims even react angrily?
- What are some of the reasons you have discovered for this behavior?

### **Continued Contact With Assailant**

- Based upon your experience, are you aware of victims who have maintained contact with the individual who allegedly assaulted them?
- What are some of the reasons for this behavior?

**D. Knowledge of Present Case**

- Have you interviewed the victim in this case? Have you interviewed any witness connected with this case? Are you familiar with the facts of the case?
- Is your testimony today based on your experience, training, education, and work with victims of sexual/domestic assault?

*Adapted with permission from Herb Tanner, Jr., Violence Against Women Project Training Attorney Prosecuting Attorney's Association of Michigan.*



## APPENDIX C

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## INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

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## ABOUT THE AUTHOR

**J**ennifer Long is the Director of the National Center for The Prosecution of Violence Against Women at the American Prosecutors Research Institute, the research and technical assistance division of the National District Attorneys Association. Ms. Long has traveled across the country lecturing to prosecutors, law enforcement officers, victim advocates and other allied professionals on various issues related to violence against women. She has also provided technical assistance and trial support to criminal justice professionals throughout the nation and has served on a number of national committees dealing with sexual assault and domestic violence. Most recently, she served as a Senior Attorney at the National Center for the Prosecution of Violence Against Women.

Ms. Long served as an Assistant District Attorney in Philadelphia, Pennsylvania, where she prosecuted cases involving: narcotics, firearms, domestic violence, sexual assaults and child physical and sexual abuse. Subsequent to her tenure at the Philadelphia District Attorneys Office, Ms. Long worked at the law firm of Appleby, Spurling & Kempe in Hamilton, Bermuda. While living in Bermuda, she worked as a volunteer advocate in the Women's Resource Center, which provided legal services to victims of domestic violence. After leaving Bermuda, Ms. Long worked as an Associate at Morgan, Lewis & Bockius, LLP in Philadelphia. She also worked as an attorney in the Department of Veterans Affairs in Washington, DC. Ms. Long also served as a child advocate through the Support Center for Child Advocacy in Philadelphia, Pennsylvania.

Ms. Long graduated from Lehigh University with high honors in 1993, with a double major in English and East Asian Studies. She graduated from the University of Pennsylvania Law School and Fels School of Government in 1997. She is a member of the Pennsylvania and New Jersey bars. Ms. Long lives in Washington, DC with her husband, son and two dogs.





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