

# National Sexual Assault Investigation and Prosecution Best Practices Guide

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The National Sexual Assault Investigation and Prosecution Best Practices Guide is a living document highlighting current best practices in the investigation and prosecution of Sexual Assault.

Prosecutors and allied professionals are encouraged to continue developing this guide by contributing information on emerging best practices. NDAA recognizes that funding, local rules, or other state laws or local restrictions may prevent an office from adopting the various approaches suggested. This guide is not intended to replace practices and procedures already in operation, but to simply inform and recommend practices that are effective and consistent throughout the nation.

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## Introduction

Sexual Assault remains one of the most serious, yet under-reported crimes in the country. “According to the 1996 National Violence Against Women Survey in the United States, one in six women has been a victim of sexual assault or rape. The survey also estimated that more than 300,000 women, and nearly 93,000 men, are raped every year in the United States (Tjaden & Thoennes, 2000)The variety of emotions that sexual assault victims experience, including shame, humiliation and even guilt play a significant role in under reporting. However, law enforcement, including prosecutors, must accept partial blame. Despite their best intentions, many jurisdictions have been slow to acknowledge the impact that criminal investigations and trial have on the lives of sexual assault survivors, and have failed to take essential steps to mitigate that impact. This paper is intended to advance a victim-centric approach which is easily adaptable to any jurisdiction. Tailored to address the unparalleled harm victims experience as a result of sexual violence, this approach makes adjustments to guard against re-victimizing survivors who choose to brave the criminal justice process. Until rates of reporting these crimes increase, these offenders will be emboldened to continue destroying lives.

From the officer who takes the initial report to the prosecutor who takes the case to trial, success depends on being able to adapt the “standard” investigation and prosecution response to a response that not only anticipates the challenges and vulnerabilities inherent in these types of crimes, but also pushes the criminal justice system to accommodate for those stressors. This paper incorporates best practices utilized by police agencies, prosecutors, health care providers, crisis counselors, and legislators that can be used to bring about needed change in this arena.

## Definitions

Sexual assault is generally defined as any act of sexual contact without consent or without legal consent due to age, or lack of mental or physical incapacity. However, specific legal definitions for sexual assault vary by state, territory and federal statute, as well as by campus, tribal and military codes. For example, The California Penal Code (section 261.6) defines consent to mean positive cooperation in act or attitude. The person must act freely and voluntarily and know the nature of the act involved. Illinois law stipulates that the victim's manner of dress at the time of the offense does not constitute consent (720 ILCS 5/12-17), and according to the University of Virginia, consent means words or actions that show a voluntary agreement to engage in mutually agreed-upon sexual activity. Schools teach students that consent is an uninfluenced “Yes” — where both people feel free to say yes or no or to withdraw consent at any time. The topic of consent will be addressed in more detail below.

## Costs of Sexual Assault

Sexual assault is a crime with emotional, physical, and economic consequences for victims and communities. The shock waves that emanate from sexual victimization touch not only the victim but also the victims' immediate family, relatives, colleagues, neighbors and acquaintances. These effects can endure for years or even a lifetime (Programs, 2011). Sexual Assault is not merely a crime against a particular victim, but one that permeates the very fabric of a community.

## **The Problem**

Many law enforcement agencies and prosecutors' offices continue to process sexual assault cases in the same manner as they would a robbery or burglary with little understanding of, or consideration for, the effects of trauma on the victim. Once a report has been made by a victim of a sexual assault, he or she is asked to re-tell what happened over and over again in each stage of the investigation/prosecution of the case, and is expected to do so in a chronological and organized narrative. Weeks may go by without the victim knowing whether the assailant will be arrested, charged, or prosecuted, or, if the assailant is arrested, whether he will be released from custody. During trial, the focus may be on the victim's prior sexual history, behavior or life-style rather than the defendant's conduct. Law Enforcement and Prosecutors must first realize that handling these types of cases requires a different approach, and they must process these cases in a way that will increase positive victim outcomes, and ultimately, increase the reporting of these crimes.

## **The Solution**

The nature of sex crimes demand sensitivity and a nuanced, and trauma-informed, investigative and prosecutorial approach that can only be achieved by vertical units comprised of dedicated, specially trained individuals to conduct victim sensitive investigations and prosecutions. Creating a multi-disciplinary team comprised of law enforcement, medical professionals, victim advocates/counselors, and prosecutors, who will be responsible for devising county-wide protocols for a standardized response to sexual assaults, provides a consistent and collaborative approach.

## **Use of SART Model**

Developing a Sexual Assault Response Team (SART) utilizes a multi-disciplinary, victim sensitive approach to investigating and prosecuting sexual assault cases. The core members of the SART include law enforcement, victim advocates, forensic medical/laboratory personnel (i.e. SANE's and DNA experts), forensic interviewers, and prosecutors. These teams work together collaboratively to ensure a coordinated response ensuring victims' needs are a priority, this will increase public safety and result in

an increase in offender accountability. These teams can be effectively utilized even in smaller jurisdictions.

In general, SARTs support victims' rights, commit to meeting victims' needs, enhance evidence collection, and educate the community about available intervention and prevention services. Teams often define themselves by the level of cooperation and collaboration among members. For example, sexual assault response teams generally include medical, legal, and advocacy agencies or organizations that cooperate and communicate with each other while serving victims. Most response teams have cooperative interagency understandings, host regularly scheduled team meetings, and commonly share resources and expertise. However, the team members and their agencies maintain their own guidelines and protocols rather than establishing a collaborative team identity. This model allows multiple agencies to monitor the overall effectiveness of interagency responses, review the consequences of those responses for criminal justice proceedings, and address emerging issues proactively.

SARTs that define themselves as response teams activate and dispatch team members (law enforcement officers, forensic medical examiners, advocates, and sometimes prosecutors) in a coordinated fashion to provide integrated and immediate responses following sexual assaults. The primary advantage of a response team model is that it minimizes the number of contacts that victims must initially make to receive quality medical, legal, and advocacy services. Since response team members are activated together, the specific roles and responsibilities of participating agencies are interwoven into team guidelines and protocols that coordinate interdisciplinary responsibilities based on expertise. (Programs, 2011).

## **Trauma Informed Training**

To ensure sexual assault victims are being informed and supported at every step in the criminal justice process, it is essential for all agencies who are involved in these cases to be trained in proper trauma informed responses to this vulnerable population. A lack of understanding on this topic can cause harm to a victim and in turn, harm to the case. An investigator's or prosecutor's word choice, question posed, or perceived body language can cause a victim to feel threatened, not believed or worse yet, question why they chose to report the incident to begin with. With proper training from skilled professionals on this topic, the entire multidisciplinary team can effectively support victims through their words and actions. It can be something as simple as telling the victim, "I want you to know at the outset, I believe you," or "I'm sorry this happened to you, how are you doing?" or just acknowledging what a difficult position they are in and admiring the courage they had to come forward. Even in situations where charges may not be filed against the offender, the approach taken with the victim is important to ensure victims feel heard, supported and not deterred to make future reports in the unfortunate event it happens again. If a case does go forward, it would be beneficial for the prosecutor or victim advocate to make regular contact with the victim to make sure they know what is going on with the case, see how they are doing and if they have questions. Flexibility, understanding, and patience are critical in any interaction with a sexual assault victim, and getting the right training is

necessary to appropriately address their concerns and unique issues. Not only will this ensure the victims feel supported and encourage reporting of these crimes, but inevitably it will help down the line with prosecuting these cases.

## **INVESTIGATIONS**

### **Law Enforcement Response**

When a sexual assault is reported, the patrol officer who responds initially will assess the medical needs of the victim and conduct a limited interview of the victim and witnesses to confirm a sex crime has occurred. Once established, the officer notifies the on-call detective from the sexual assault unit who, in turn, responds to the scene to take over the investigation. Where appropriate, the initial patrol officer will arrange for a victim advocate to be present at the same time the detective arrives. The advocate will provide the victim with support and should provide written notification of the victim's rights. The patrol officer will thoroughly document all activity in a report. After the on-call sexual assault unit detective responds and assumes the investigation, the need for a forensic medical examination will be assessed. If needed, the victim is transported to the appropriate facility with sensitivity for her privacy and needs.

It is recommended that prosecutors reach out to local law enforcement and encourage the on-call sexual assault detective to contact designated prosecutors with expertise in sexual assault upon initial dispatch to an acute report. By doing so the prosecutor can communicate with law enforcement at the front end of the investigation regarding what evidence or information might be needed based on the particular facts of each case.

Additionally, it is recommended that as part of, or in addition to, any SART protocol adopted in a given jurisdiction that multi-disciplinary meetings be held on a regular basis (weekly, bi-weekly, monthly, dependent on volume and need) involving prosecutors, investigating officers, victim's service providers, forensic medical professionals (SANEs), forensic interviewers, and other appropriate disciplines at which cases/investigations can be staffed. Prosecutors and investigators can benefit from the expertise of relevant professionals as it relates to unusual or counter-intuitive victim response or behaviors, and such meetings invite open discussions and suggestions for additional investigation needed in order to build a strong case for filing and later trial. Active involvement of prosecutors in assuring that law enforcement conducts complete and thorough investigations prior to the charging decision is a critical tool in ensuring that subsequent prosecutions are successful, and also ensures that charges are not brought in cases which later become impossible to prosecute due to developments in the follow-up investigation – an outcome which is devastating for victims and poses due process concerns for suspects.

### **Victim interview**

Research has shown that the stress and trauma reactions experienced by officers in life threatening situations are very similar to those experienced by Sexual Assault victims. (Archambault & Lonsway, 2008) Prosecutors should consider encouraging local law enforcement to adopt interviewing



protocols for victims of sexual assault which take in to account the recommended protocol for interviewing officers involved in critical incidents. These protocol generally include components of reassurance on the scene, the provision of mental health advocates, collection of evidence in a private and respectful manner, removal from the scene as expeditiously as possible, the provision of necessary medical care in a timely fashion, and validation of normal stress reactions (stoic denial through abject panic, and back again.) (Miller, 2006)

Investigators should consider the use of techniques like Forensic Experiential Trauma Interviewing when interviewing a victim in order to encourage more free narrative responses, and more complete recall. Likewise, prosecutors should consider using similar techniques when conducting preparatory meetings, or even direct examinations as they are most likely to elicit the most complete information. (Strand, 2017) Further, prosecutors should be cognizant of a victim's age, and culture, and their impact on disclosure in both evaluating the credibility of a victim's statement, and also, in attempting to conduct preparatory interviews and meetings. (Powell, 2003)

The Detective should ensure that the interview with the victim is recorded, whenever possible, to ensure that the victim does not have to re-tell the events of an extremely traumatic occurrence. This recording can be as informal as an audio recording using a smartphone if other facilities are not available, are not feasible, or would be overly intimidating to the victim. The detective should re-interview witnesses previously identified by the initial responding officer. The same detective should remain the investigator on the case and should be responsible for conducting a thorough investigation, including obtaining necessary search warrants, obtaining necessary consents, identifying and interviewing additional witnesses, collecting evidence, submitting evidence to the crime lab, obtaining warrants and utilizing all available investigative tools to develop the case to be presented to the prosecution. The detective should accompany the victim to the initial meeting with the prosecution team to document any additional statements the victim may make and to ensure a smooth transition from the investigative team to the prosecution team.

The Detective should work closely with the prosecutor assigned to the case to ensure the goal of offender accountability is achieved. While both the detective and prosecutor perform different functions in the progression of the case, each adds value to the other's function by sharing their perspectives and insight. Wherever possible, collaboration between the prosecution and investigation teams should be fostered and fortified.

## **Victim Advocacy**

A victim's cooperation can be won or lost very early in the process. It is critical to have a Victim Advocate involved with the investigation and prosecution upon initiation of a case. These advocates are trained in trauma-informed advocacy and will work together with law enforcement to encourage and support the victim through the difficult process. In many jurisdictions, advocates are employed by prosecutors, but work closely with law enforcement officers and detectives, sometimes being physically present during investigations. They provide support and service referrals to victims regardless of whether the case is ever referred for prosecution. Ideally, advocates would have access to all police reports filed the previous day and will scan them for reports of sexual crimes. Within the first week (if

not sooner), an advocate should contact the sexual assault victim to introduce themselves, explain their role, assess the victim's needs, refer to services and answer questions the victim may have about the process. For continuity, the advocate who makes the initial contact with the victim should remain the assigned advocate throughout the case, unless the victim no longer desires his or her services.

### **Victim Access Through Non-Investigative Reporting**

Many times, victims of sexual assault do not call law enforcement for an investigatory response, but, instead, go to the emergency room seeking medical treatment or call a crisis hot-line. These victims may want a forensic exam, but may not wish to report the incident to law enforcement at that time. The Non-Investigative Reporting process ensures a timely collection of biological evidence and retention of that evidence for a specific period of time before destruction. This process permits the victim time to consider his or her options without losing the opportunity to have critical evidence properly collected and stored. Many jurisdictions have begun to provide a mechanism for victims to participate in a non-investigative reporting process, (such as the "You Have Options" program, [www.reportingoptions.org](http://www.reportingoptions.org)) and some advise that overall reports of sexual assault have increased as a result of the institution of such programs as victims feel more comfortable coming forward, empowered in the process, and ultimately are more likely to move forward with a prosecution. Each law enforcement agency should adopt protocols to address when it is appropriate to explain the non-investigative reporting procedure, who will be responsible for such an explanation, where evidence collection kits will be stored, and the method of labeling the evidence collection kits to ensure victim confidentiality while providing cross reference information to properly identify the victim should an investigation be requested at a later time.

Additionally, consideration should be used by medical professionals who conduct the forensic exam to comply with the victim's wishes not to report to law enforcement while still meeting their obligations as mandated reporters. Some jurisdictions have addressed this dichotomy by having the medical facility contact law enforcement to provide basic information to law enforcement (i.e. Jane/John Doe presented to the medical facility in response to a sexual assault and provide the location of where the assault occurred). Providing the location of the sexual assault is important to establish which law enforcement agency has jurisdiction over the investigation should the victim choose to request an investigation at a later date. The agency identified should be responsible for collecting the rape kit from the facility and assigning a cross-reference number to be affixed to the outside of the rape kit. The same number should be placed on the examination form and deposited inside the sealed kit. By providing the kit and examination form to law enforcement, the medical professional may be deemed to have met their reporting requirement while also complying with the victim's wishes. The cross reference number should also be given to the victim for use if they choose to initiate an investigation at a later time.

### **The Forensic Examination**

In those jurisdictions where prosecutors and investigators lack access to a formalized SAFE (Sexual Assault Forensic Examiner) or SANE (Sexual Assault Nurse Examiner) program, protocols should be developed for medical professionals who conduct the forensic examinations to ensure competent

examination, evidence collection and preservation, including photographic documentation, and acute medical treatment. Some considerations to include when developing these protocols are: identifying designated sites for forensic exams (versus conducting them in multiple Emergency Departments); use of experienced, specially trained, licensed practitioners; necessary steps to ensure preservation of evidence and chain of custody; provision of thorough and objective written documentation of examination and findings; provision of referrals or treatment for general medical needs; STD concerns and testing, protocols for obtaining and execution of search warrants on non-consenting suspects and/or unconscious or medically incapacitated victims; the ability of minors to give consent and/or requirements to obtain consent from a parent or legal guardian of the minor while balancing a minor's right to privacy; and protocols for non-investigative reporting.

## **PROSECUTION**

### **Vertical Prosecution Units**

To maximize victim satisfaction and comfort, as well as ensure successful prosecutions, specially trained prosecutors should be assigned to sexual assault cases. Whenever possible the same prosecutor should be assigned to a case from pre-charging to sentencing. The assigned Prosecutor should seek to work collaboratively with other experienced sexual assault prosecutors through both formal and informal staffings of cases and issues. Such an approach provides the assigned prosecutor with extended support from other experienced and knowledgeable sexual assault prosecutors, and assists in ensuring consistency in plea bargaining. If the Prosecutor's Office has in-house victim advocates and/or investigators, there should also be one particular victim advocate/investigator assigned to assist the prosecutor with the case. Having a pre-determined and unchanging team of professionals communicate and interact with victims may provide a sense of familiarity, and accessibility, and hopefully will engender greater trust in the prosecution team. It is important to remember that typically, the victim advocate in a Prosecutor's office does not owe the same duty of confidentiality to a victim as an independent, or community based, sexual assault victim advocate. Victims should be informed that the communications they have with law enforcement based advocates may, dependent on local discovery rules, be disclosed to the defense attorney, or the defendant. As a result, prosecutors may wish to reach out to community based organizations to assist the victim in accessing additional resources as well as to provide the victim with a more confidential source of support. Providing access to a community based advocate may serve to further empower victims.

### **Charging Decisions**

It is recommended that the prosecution team assigned to a sexual assault case meet with the victim prior to making a charging decision, or as soon as possible thereafter. Goals of the initial meeting with the victim should include assessing victim's needs, building rapport, making sure the victim is advised of their rights, asking questions to fill in gaps where reports are incomplete or need clarification, (prosecutors should avoid requesting the victim attempt to recite the event as part of this initial contact, unless it is necessary to the charging decision due to an insufficient initial investigation), explaining the criminal justice system and how it works. During the initial meeting with the victim, a

prosecutor should be assessing credibility, getting a commitment to cooperate with the prosecution should charges be filed, advising the victim he/she will be notified once a charging decision is made (as a general rule, do not indicate at the initial meeting whether or not charges will be filed) and making them aware of issues that may arise by communicating any details about the case via social media (i.e. other people can obtain those communications and use them in court).

The filing of criminal charges, or the decision not to file, should be made as quickly as reasonably possible and should be reviewed with supervisory staff when appropriate. Additional investigation may be required prior to making a final charging decision. The assigned prosecutor should keep the victim informed of any charging decisions made and/or whether more time is needed to make a charging decision due to a need for further investigation. Also, if charges are not filed and an offender is released from custody, the prosecutor should notify the victim immediately to ensure the victim has ample opportunity to take any measures necessary to ensure victim safety (i.e. obtaining protective/restraining orders, changing locks, relocation, etc.).

### **Duty to Educate**

Charging decisions, as well as decisions relating to the viability of a case at trial hinge on a prosecutor's assessment of the believability of a victim, as well as the "provability" of the case. In order for a prosecutor to accurately evaluate these cases, it is important for them to know the common behaviors and dynamics that are seen in sexual assault victims. Research demonstrates that the responses of victims of sexual assault, both before, during, and after the assault is often counter-intuitive to the general public, as are common offender dynamics. The counter-intuitive nature of these responses and mechanisms of offending can serve to create barriers in the assessment of a victim's credibility. As a result, it is imperative that law enforcement officers and prosecutors obtain training relating to victim and offender dynamics so that they can better understand and assess the evidence in any given case.

Additionally, research indicates that credibility is the single most important component in a law enforcement officer's investigative decision making, and a prosecutor's decision to file a case (Beichner, 2012) Law enforcement members cite a lack of consistency as the single most important factor in determining that a sexual assault victim lacks credibility. However, the research is clear that trauma impacts a witness' ability to accurately recall and relay information about the traumatic event, especially when confronted with a traditional interview setting (Beahrs, 1996), (Archambault, 2008). As a result, it is important that prosecutors who handle cases involving sexual assault educate themselves on issues surrounding trauma response, and the impact of trauma on memory and recall in order to aid with critical decision making during the life of the case.

### **Protecting Victim Privacy**

When filing charges in sexual assault cases, there are best practices to consider that will protect victim privacy and provide anonymity. These best practices include: redacting police reports and other documents prior to providing in discovery; listing the victim's name as John/Jane Doe, with an initial and either first or last name (i.e. L. Smith or Lisa S.); filing motions requesting that the victim be referred to as such in court hearings. Where media is a concern, request that the court order that the victim's name

not be used nor may they be photographed. Because search warrants are discoverable, the affidavit for the search warrant should refer to the victim as “the victim” only, where appropriate. Assigning a prosecutor to assist law enforcement with search warrants, among other aspects of the investigation, is highly desirable. Federal and State law provide protection to victims and their medical and psychological records. Victims have a right to object to the release of any personal records which may be the subject of a subpoena duces tecum, and a right to be heard. Best practices dictate that a victim be notified when any attempt is made to obtain personal records of the victim. Some states and certain federal laws require notice be provided to the victim, or target of any subpoena duces tecum. In the event that a victim consents to a release of personal information, or if there is a court order requiring the release, efforts should be made to narrowly tailor the information provided to ensure only relevant portions of the records are returned to the court. If the victim objects to the release of records, the Prosecutor should request the court to conduct an in-camera review of the records and determine which portions, if any, are relevant and should be released with a protective order in place to restrict or prohibit dissemination and copying of the records and requiring return of the records upon conclusion of the case.

Likewise, it is often necessary for law enforcement to obtain waivers for the receipt of otherwise confidential or privileged materials such as medical or psychiatric records. Law enforcement and Prosecutors are encouraged to carefully consider the need for such waivers as it relates to the case, and to carefully tailor such waivers (date, subject matter, treatment provider etc.) in order to prevent wholesale release of the entirety of a victim’s otherwise irrelevant, and confidential records.

### **Bail Conditions**

In arguing for appropriate bond conditions in sexual assault cases prosecutors must, as in every case, consider community as well as victim safety, and encourage the court to impose those conditions most likely to avoid re-offense and ensure community safety. To that end, it is always appropriate to request the court order an offender to have no contact with the victim in a case. It may also be appropriate to request limitations with respect to an offender’s contact with a wide class of individuals, for example anyone under the age of 18, including an offender’s own children, or impose certain geographic restrictions. This is so even if the named victim in your case is an adult. Research based on offenders’ own self reports with respect to offense patterns demonstrates that offenders frequently cross –offend (i.e.; offend against individuals in a variety of different demographic groups, or engage in multiple types of offending). For example: crossover sexual offenses were analyzed in a sample of 223 incarcerated and 266 paroled sexual offenders at the Colorado Department of Corrections. During polygraph testing the majority of incarcerated offenders admitted to sexually assaulting both children and adults from multiple relationship types. Further, the majority of incarcerated offenders who had sexually assaulted children admitted to sexually assaulting both relatives and nonrelatives. The offenders also admitted to sexually assaulting victims across genders. (Heil, 2003)

Oftentimes, courts will impose conditions which restrict contact to only that contact which is supervised by another adult. These types of conditions, however, do not necessarily ensure the safety of children in the presence of the offender due to the fact that offenders often offend while non-offending

adults are in the room or even within arm's reach of the victim-child and perpetrator.<sup>1</sup> Prosecutors should endeavor to be aware of the research relating to risk assessment, as well as offending patterns in order to make cogent and persuasive bond arguments. However, Prosecutors should also be aware of the growing body of federal case law which addresses due process concerns relating to standard conditions for the supervision of sexual offenders in general and restrictions on contact with one's own children specifically cases like US v. Burns, 775 F.3d 1221 (10<sup>th</sup> Cir., 2015), and be prepared to advance evidence based arguments for requested conditions/restrictions.

### **Creating a Victim Friendly Courtroom**

By engaging in aggressive motions practice (discussed below), utilizing victim support persons/ animals, and explaining the court room process prior to the victim testifying, prosecutors can create a victim friendly courtroom. Explaining to the victim the ability to use court process to secure witness attendance, including the victim, helps prepare them for the reality that they will have to appear in court and testify. Preparing the victim for testimony is essential in ensuring the victim will be as comfortable as possible presenting his/her testimony in court. Advising the victim of the topics you anticipate covering in your direct examination, as well as those topics you suspect the defense will focus on in cross examination, allows your victim time to mentally prepare for the rigors of testifying. Asking a victim who they would like in the courtroom as a support person while they are testifying, and taking the necessary steps to ensure that individual is present in the courtroom and visible from the witness stand can further boost a victim's sense that s/he is supported through the process, and will increase confidence and comfort on the stand. Further, simply showing the victim the courtroom when it is empty and explaining to him/her where all of the participants in the process will be seated, explaining the rules of the courtroom, and conducting a practice session (involving benign questions not related to the case) from the witness chair can be extremely beneficial.

### **Jury Selection**

In selecting a jury in a sexual assault case a prosecutor should be aware of the inherent biases and prejudices present in the population at large such as beliefs that alcohol is appropriately used as a dis-inhibitor, that sexual assault is only perpetrated by strangers or involves significant physical violence, or beliefs that excuse sexual assault when the perpetrator is young and perhaps intoxicated. These beliefs and phenomena are sometimes referred to as "rape culture", or "rape myth acceptance". Additionally, prosecutors should identify the manner in which rape myths, and commonly held misconceptions about sexual assault, victim response, offender demographics, and memory could impact a prospective juror's interpretation of the evidence and acceptance of prosecutorial themes. In considering the demographics of the jury prosecutors should be mindful of the fact that research indicates that men tend to endorse rape myth acceptance at higher rates than women. Similarly,

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<sup>1</sup> . In one study it was found that offenders offended when other non-collaborating persons were present, specifically: 54% of offenders molested one child when another child was present; 23.9% offended when another adult was present; 14.2% offended when another child and another adult were present. 44.3% committed the acts when they knew the other person in the room was awake; 25.7% when another child was in the same bed; 12.4% when another adult was in the same bed; 3.5% when both another child and adult were in the same bed. The reasons given for engaging in this behavior were that it: increased excitement, created a sense of mastery, was compulsive sexual behavior, or "stupidity." (Underwood, 1999).

individuals with lower educational levels tend to endorse acceptance of commonly held rape myths (Suarez, 2010). This does not mean that a sexual assault jury should only consist of women with post-graduate degrees. In fact, there is much to be gained from choosing a jury pool with wide and varying socio-economic backgrounds, genders, and ethnicities, but this knowledge should inform a prosecutor's strategic decisions as to which jurors to *begin* inquiry with regarding specific topics. Prosecutors should be careful, however, to never presuppose that an individual juror endorses or holds any particular value, viewpoint, or bias based on any demographic characteristic.

Prosecutors should consider discussing common evidentiary hurdles in common sense ways. This gives jurors an opportunity to relate what on face may seem like unusual, or "bad" facts, to their own personal experiences; an example would be a discussion with jurors about animals who freeze rather than run or fight in life threatening situations (deer in the headlights). Such a conversation primes jurors for expert testimony later in the case presentation about trauma response, and assists the juror to understand why a victim might not fight, or might offer only minimal resistance. Likewise, prosecutors can use common daily memory flaws, or the differences in how individuals perceive a jointly witnessed event to prepare the jury for anticipated memory flaws or inconsistencies between the victim and other eye witnesses. Prosecutors can use "ripped from the headlines" scenarios to discuss victim responses before, during and after sexual assault (ex: delayed disclosures, failure to fight back), and offender dynamics ( ex: offending in "public" locations) to identify those jurors who endorse rape myths, as well as to further lay the ground work for the presentation of evidence in the case. In those jurisdictions in which prosecutors are prohibited from engaging in direct voir dire of the jury panel prosecutors should carefully consider these concepts and issues in formulating questionnaires or suggesting questions for the Judge to use during the court's voir dire.

### **Framing the Case/Pay Attention to the "Language" of Consent**

"No means No" has been the contextual framework of sexual assault, both stranger and non-stranger, for decades, but oftentimes prosecutors and investigators find themselves confronted by cases in which a victim has not, in fact, said the word "No," or engaged in overt physically resistant activities in response to the sexual aggression of the perpetrator. These cases are often viewed as "miscommunication" cases; circumstances where the victim has not communicated her lack of consent and thus the perpetrator has proceeded under the misconception that consent exists. In these cases it is critical that prosecutors and investigators remember that only "Yes" means "Yes." The investigation should be conducted in a way that focuses on how the offender used mechanisms to obtain access to the victim and how the victim was able to communicate their lack of consent (beyond "no"). Exploring the victim's thought process behind each action or statement they made during the sexual assault can be extremely powerful and informative when presenting the case at trial. Investigators and prosecutors should remember that many victims are not aggressive or assertive in verbalizing a lack of consent out of fear that failure to comply will result in great physical harm, and instead utilize indirect methods designed to put the offender off and avoid a physical confrontation. For example, a victim may tell an offender they are interested "but not tonight" or "not here" or may respond in physically subtle ways: turning a head when being kissed, or not responding physically to the ministrations of the offender.

It is important to remain offender focused in the investigation and the case presentation . It is critical to ask oneself, and the jury, at what point the victim communicated *consent*, rather than permit the offender or the defense to frame the issue as when the victim communicated a *lack* of consent. The later defense argument presupposes that all victims consent to an activity until they affirmatively tell the offender they do not. It is useful to utilize examples from other types of offenses to illustrate this point; for example: the victim of a burglary generally does not consent to the entry of his/her home even if they have not posted no trespass warnings which would affirmatively prohibit entry to the dwelling; it goes without saying that generally we recognize that until we are expressly invited in to someone's home that we cannot enter. The same is true in the context of sexual assault. It is incumbent on prosecutors to 1) remind juries of this significant fact and 2) to highlight for the jury all of the ways in which the victim communicated a lack of consent short of the word "No." This can only be achieved if prosecutors and investigators conduct careful, focused and detailed investigations and witness preparation meetings to explore the mechanisms the victim used to communicate with the offender, and the thought process behind each action or statement.

Additionally, prosecutors should be mindful of their word choice when presenting a case to a jury, or in arguing to a judge. Prosecutors should refrain from using verbiage which implies the victim was an active or willing participant in the sexual assault. Use of the "language of consent" has the effect of subtly influencing the listener to interpret the interaction as consensual. Prosecutors should, instead, endeavor to describe the acts committed in terms of the physical action that was done. For example, it is common for individuals when referring to forced oral penetration to state "the victim *performed* oral sex on the perpetrator." The use of the verb "perform" subtly implies that the victim was an active and willing participant. Likewise, phrases such as: "they had sex" or "he had sex with her" imply again that both parties are active and willing participants. Instead prosecutors should consider simply stating "the offender put his penis in the victim's vagina (mouth, anus, etc.)." By specifically describing the physical action the prosecutor avoids using the language of consent and the possibility that a jury or judicial officer will be subconsciously swayed by word choice to interpret the action as consensual rather than as a criminal act.

### **Aggressive Motions Practice**

Several high profile sexual assault cases have demonstrated the aggressive nature with which defense attorneys approach cases involving sexual assault. The aggressive defense posturing often times has the effect of chilling the desire of victims to proceed, of prosecutors to set cases for trial, and of new victims to report and cooperate in the investigation of sexual offenses committed against them. In sexual assault cases prosecutors should engage in active and aggressive motions practice filing both defensive as well as offensive motions; with the goal of limiting the manner in which the proceedings re-traumatize the victim, as well as ensuring a fair and just trial for both the defendant and the Prosecution. Prosecutors should file discovery demands which request strict compliance by the defense with local discovery rules, as well as request any discretionary disclosures to the prosecution authorized by the constitution and local rules. Further, the prosecutor should request protective orders relating to sensitive discovery such as photographs taken of the victim during a sexual assault exam, medical records, the victim's address and even the victim's name (if appropriate). These orders should seek to



limit the members of the defense team who are permitted to access that information and requesting its immediate return upon the return of a verdict or entry of a plea. Additionally, the Prosecutor should file motions prohibiting the issuance of subpoenas for a victim's medical, psychological, school or other privileged or confidential records without prior court order, and should aggressively litigate against the granting of any such order if requested. Prosecutors should be knowledgeable of any local "rape shield" provisions and should file motions demanding compliance in advance of trial, even in those states where the provisions are self-executing. Prosecutors should strategically evaluate the admissibility of child hearsay statements under local rule as well as federal and state confrontation clause provisions and, when appropriate, should file motions for the admission of such statements. Prosecutors should also strategically and humanely evaluate having a therapy animal present during testimony, and/or the use of closed circuit television for the presentation of child victim testimony. Prosecutors should consider filing motions to admit expert testimony to address common myths and misconceptions surrounding victim and offender responses and dynamics, and/or addressing medical findings, or the lack thereof.

Research indicates that many sexual assault perpetrators have committed other acts of sexual violence prior to arrest. One study conducted by Abel, et. al. reveals that when given assurances of confidentiality, 126 identified rapists admitted to 907 acts against 882 victims. (Abel, 1987) Similarly, Weinrott and Saylor reported that 37 rapists in their study had been charged with 66 offenses against a mean of 1.8 victims, but when given an opportunity to self-report confidentially the same 37 offenders admitted 433 rapes against a mean of 11.7 victims. (Weinrott, 1991) Prosecutors should ensure that law enforcement conduct complete and *offender focused* investigations and should inquire as to the existence of other acts evidence and ensure that any such evidence is fully and completely investigated. If other transactions evidence exists, prosecutors should file motions pursuant to local rule and case law seeking the admission of other acts evidence at trial in the case. Prosecutors should further educate themselves on concepts such as grooming as it relates to both adult and child victims and be prepared to argue the relevance of grooming behaviors as *res gestae* or other acts evidence. Finally, prosecutors should seek to preclude the admission of irrelevant or overly prejudicial other transactions evidence relating to the victim, as well as irrelevant or unduly prejudicial evidence relating to the victim's mental health history, substance use or abuse, lifestyle, sexual orientation, or other character type evidence through the filing of pretrial motions demanding disclosure of the nature of any such evidence and a pre-trial ruling on its admissibility. Overall, a strategic and aggressive approach to motions practice in these cases is effective in protecting and supporting the victim, and in protecting the efficacy and integrity of the case presentation as a whole.

## **Title IX and Clery Act**

Many Prosecutors may, at some point in their careers, find themselves attempting to navigate the intersection between criminal prosecution and the obligations of educational institutions to comply with the provisions of the Clery Act and Title IX. Title IX is explicit that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C.

1681(a). Enacted in 1972 the statute was for many years most closely associated with the struggle to create equality in women's sports programs. In April of 2011 a letter issued by the Department of Education's Office for Civil Rights stated, "The sexual harassment of students, including sexual offenses, interferes with students' rights to receive an education free from discrimination and, in the case of sexual violence, is a crime." Thus it became clear Title IX applies not just to equality of opportunity in program availability, but to equality of treatment in all aspects of campus life and to the prevention of gender based discrimination or harassment at federally funded institutions.

Title IX requires that federally funded educational institutions implement grievance procedures for students and faculty alleging discrimination (to include sexual violence). The Act *requires* that institutions conduct independent investigations, make factual findings, and if a finding of discrimination is made they are required to take steps to prevent the reoccurrence of any sexual violence and remedy the discriminatory effects on the complainant and others. This requirement applies to violence *which occurs both on, and off campus, if such violence involves students, staff or faculty* as the institution must assess whether the violence occurred in the context of an educational program or activity, or had continuing effects on campus, or in an off-campus education program or activity. Prosecutors should be aware that as Administrations change, so too may the reach of Title IX.

Additionally, the Clery Act requires institutions to record and report statistics related to criminal activity which occurs on campuses. The act further mandates institutions make "timely" warnings to students, staff, and faculty when the institution is aware of any campus safety concern. Though no specific definition of "timely" is provided by the Act and the guiding literature most institutions tend to interpret the requirement to mean that warnings must be issued within 24-48 hours. The warnings must state the nature of the safety concern though they do not typically provide the names of victims or suspects.

In conducting Title IX investigations, institutions must conduct their own investigations independent of law enforcement, must provide notice to both parties, and must afford both parties equal due process protections. In addition, institutions are required to complete investigations and issue findings within 60 days of the initiation of the complaint. As a result, prosecutors and law enforcement may find themselves significantly disadvantaged at the outset of an investigation as the suspect, and potentially witnesses, may have already received notice that a complaint had been made either through the issuance of the Clery Act notice, or the issuance by the institution's Title IX office of notice that a complaint has been made and the specifics of the allegations being made. Additionally, suspects are typically privy, at some point during the institution's investigation, to the specific statements of the victim and other witnesses, and often times engage legal counsel who is also privy to the information long before a formal charging decision is made by a prosecuting attorney. The investigatory implications of these facts are obvious. However, prosecutors can also use these processes to their advantage. Many times institutional investigations can uncover witnesses who might be unknown to law enforcement, and because participation in the institutional investigation is mandated for students, staff, and faculty the institutions often have statements from witnesses who may choose not to cooperate with or participate in the law enforcement investigation.

The investigation records are generally confidential and protected under the Federal Educational Right to Privacy Act (FERPA), but may be obtained pursuant to a validly issued search warrant or court issued subpoena (Note: prosecutors should be aware that if they seek a subpoena for the materials, FERPA requires the institution to provide notice to the involved students and their parents of the existence of the subpoena and the content thereof so that they may object if they choose, *unless* the court specifically orders the institution not to reveal the existence of the subpoena or its contents).

Prosecutors in jurisdictions with institutions subject to the provisions of Title IX should actively seek to develop quality working relationships with the Title IX offices of those organizations. They should also endeavor if at all possible to engage the Title IX investigators for those institutions in training related to trauma response and victim and offender dynamics in order to assist the institutions in coming to fair and evidence based factual findings. Having a good working relationship and providing training to these institutions and their investigators can help to ensure that investigations are conducted with an eye towards the issues inherent in cases involving sexual violence such that the investigation conducted by the institution creates as few barriers as possible to a subsequent successful prosecution.

## **Evidentiary Issues**

### **Hearsay and Reliability of Statements**

Some states provide expanded hearsay exceptions that allow victim statements made out of court to be admissible under certain circumstances. For example, in Illinois, if a victim makes statements to "medical personnel for the purpose of medical diagnosis or treatment, including descriptions of the cause of the symptom, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment", those statements are admissible. 720 ILCS 5/115-13. Additionally, for victims of sex offenses who are under the age of 13, if a victim makes a statement to another to complain about a sex offense and the statement relates to an element of the sex offense charged, the Court may admit that statement if the court conducts a hearing outside the presence of the jury and finds that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and the child either testifies at the proceeding, or is unavailable as a witness and there is corroborating evidence of the act which is the subject of the statement." 720 ILCS 5/115-10. It is critical to evaluate each out of court statement made by a victim to determine if it meets a hearsay exception, or is potentially "residual hearsay," and can be admitted at trial as evidence. It goes without saying that these hearsay statements can be quite powerful evidence during case presentation. Such statements can demonstrate consistency in statements made by the victim, provide details into the pain and suffering they have experienced and give real context to the disclosures made.

### **Evidence of Prior Offenses**

Nationally, there exist statutory, or evidential rule provisions that allow evidence of prior sex offenses to be entered as evidence in a subsequent case charging an offender with a sex offense. For example, in Illinois the offender's commission of a prior sex offense will be admissible as evidence in a subsequent prosecution for a sex offense, if the court finds that the evidence is otherwise admissible

under the rules of evidence. It may then be considered for its bearing on any matter to which it is relevant. To be admissible, the court must weigh the probative value of the evidence against the prejudicial effect to the defendant and consider the proximity in time to the predicate offense, the factual similarities between the offenses, or other relevant facts and circumstances if the prosecution has given notice to the defendant of its intent to introduce evidence and disclosed the evidence, including statements of the witnesses or a summary of the substance of any testimony at a reasonable time in advance of trial. 720 ILCS 5/115-7.3. Many states have similar such provisions which act in concert with, or in place of, Rule 404 of either the Federal or local rules of evidence.. Prosecutors should familiarize themselves with the statutes and rules which apply to the admission of other acts evidence and the case law interpreting those provisions. Prosecutors should aggressively litigate the admissibility of other transactions evidence for legitimate purposes such as proving motive, intent, common plan or scheme, identity, lack of absence or mistake, and any other purpose for which it might be relevant and admissible.

### **Use of Experts**

As previously discussed, sexual offenders often times perpetrate in places or ways which seem counter-intuitive to the average juror. Likewise, victim responses during sexual assault, lack of injury sustained by a victim, and the impact of trauma on memory run counter to commonly accepted rape myths, and what jurors believe they know about sexual assault. Many of these issues can be addressed, and their impact blunted, by a skilled and targeted voir dire (if permitted in your jurisdiction). However, it is of critical importance that prosecutors utilize expert witnesses who can discuss issues relating to memory, delayed disclosure, lack of injury, the fight, flight, or freeze response common during traumatic situations, and the research relating to offender dynamics (grooming, perpetration patterns, victim selection, perpetration when others are present etc.). While urban prosecutors may have access to a larger pool of potential experts, rural prosecutors are encouraged to look to local Universities/Colleges, as well as local victim's services agencies for potential candidates. Expert testimony should not be considered simply superfluous, or an unnecessary expense, but rather as a critical component of a thorough and effective prosecution in these often times emotional charged, and complex cases.

## **COMMON DEFENSES**

### **Consent**

With the advent of DNA technology, defense strategies in adult victim sexual assault cases have increasingly focused on the consent defense versus the traditional general denial. In preparing to confront a consent defense prosecutors should focus on ensuring an exhaustive investigation has been conducted pre-trial and should present a victim-centered, but offender focused, case to the jury. Prosecutors should utilize traditionally "negative" facts such as victim intoxication, mental illness, generally poor decision making, etc. in a positive manner assisting the jury to understand that these very factors are what make the victim a good victim choice for a predatory defendant. In alcohol/drug facilitated sexual assaults prosecutors should very carefully investigate and establish the victim's level of

intoxication through interviews with eye witnesses (friends, bar employees/regulars, other party goers, etc.) as well as through the use of surveillance videos, text messages and voice mail messages that may have been sent by the victim during the night, both before and after the assault, and any other potential information sources. Questions to be answered include (but are not limited to): was the victim vomiting, slurring her speech, oriented to person, place, and time, what was the status of her motor skills, had/did she pass out, did she have control of her bodily functions, was she able to dress/undress herself, was she disheveled? Additionally, investigation should focus on the relationship between the offender and the victim and the offender's actions on the night in question: was he buying drinks for the victim, or surreptitiously ensuring her drink was always full? Did he seek to isolate the victim by either excluding others from conversation or encouraging the victim to move to a different location? Did he lie to the victim? What was his level of intoxication? Where did the perpetrator take the victim, and where was her stated destination?

Also, as previously discussed, prosecutors should seek to admit evidence relating to other transactions, even if those allegations are not identical to the incident in question. Lack of similarity between offenses cannot mitigate the powerful fact that the defendant has previously committed a sexual offense against another before, or after, the charged offense. Finally, prosecutors should present testimony relating to evidence of traumatic response, personality changes observed by friends, family members, co-workers, and teachers, changes in social interactions, changes in school or work performance, steps taken to increase personal sense of safety (did the victim install an alarm, buy a gun/dog, take self-defense courses, get a roommate, move home with her parents or other family?). In other words, who the victim was BEFORE the assault is not who the victim is NOW; such dramatic or extensive behavioral changes would be difficult to characterize as an after effect of a regretful decision, but are strongly indicative of sexual assault.

Lastly, prosecutors should organize cases with an eye towards corroborating as many components of the victim's factual account as possible, not simply those which relate to the assault itself, as each corroborated fact builds the victim's credibility with the jury and places the assault in context. (Scalzo, 2007) Evidence relating to the impact of the assault on the victim can be powerful evidence combatting a "buyer's remorse" defense – juries should be made to understand the various steps of the process including the invasiveness of a sexual assault examination, as well as the social consequences of disclosure. The prosecutor should ask the jury to consider whether a victim would go through what a victim must go through to get to trial if she was merely ashamed of her behavior.

### **Lack of Injury**

Jurors often times expect in sexual assault cases that a victim will sustain physical injury either to the ano-genital region or elsewhere on the victim's body. This belief is a function of acceptance of common rape myths (rapes are terribly violent, and victims fight back) as well as a lack of understanding about human anatomy. It will be useful in combatting this defense to present expert testimony relating to trauma response (fight, flight or freeze), as well as testimony relating to the use of "instrumental violence" (that violence which is sufficient to obtain submission). Instrumental violence can be as little as the perpetrator's weight on the victim's body. With respect to a lack of ano-genital trauma the testimony of a medical professional who can testify as an expert as to the structure and the speed with

which the ano-genital regions heal will be essential in assisting the jury to understand what it is they are (or are not) seeing. This is especially critical in cases involving child sexual assault victims where common misperceptions about the nature of the hymen or fragile anal tissues can often lead juries to doubt a child's testimony due to a lack of medical "evidence" indicating that an assault has occurred. It is important that the jury understand that a normal exam (i.e.; one in which there is no observed physical injury) is, in fact, not inconsistent with, or contradictory of, a report of sexual penetration or abuse. (Horner, 2010)

### **False Reports/ Suggestibility (i.e.; The Divorce Myth or Parental Alienation Syndrome)**

In child sexual abuse cases it is not uncommon for the defense to assert that the report is a false one. Usually the defense asserts that some adult has coerced or encouraged a child to falsely report an allegation, and most often this is asserted in cases involving divorced or divorcing parents. These cases are those most often viewed with skepticism by prosecutors, law enforcement and social workers as well and are frequently not completely investigated, not filed, or quickly dismissed. (Brown, 2000) However, the research indicates that false reports of sexual abuse in the context of a divorce are no more common in divorce than in non-divorce situations (Thoennes, 1990). Some research places the rate of false report at just 2%. (Trocme, 2005) While disclosures in a divorce context may seem more frequent, the research indicates that this is likely due to the dynamics of disclosure itself in that the child's disclosure may precipitate the non-offending parent's decision to leave the relationship in an effort to protect the child, that a child may feel more safe in disclosing sexual abuse when the offending parent is no longer in the home, or in constant contact with the victim child, or the fact that the divorce itself may precipitate the offending behavior as the offender struggles to cope with feelings of loneliness, isolation, lack of access to a sexual partner, and lack of control over daily life. Indeed at the time when a child may be MOST at risk of sexual abuse they are LEAST likely to be believed. (Faller, 1991) This is another important area in which expert testimony can be an effective tool for combating commonly held, but patently false, beliefs.

Inherent in many false allegation defenses in child sexual abuse cases are assertions that children are naturally "suggestible" and thus the veracity of the allegation should be doubted. There exist a number of prominent and respected defense experts who regularly testify as to the suggestibility of children. These experts generally rely on research generated, or inspired, by Drs. Ceci and Bruck. It is important to note that despite the tenor of this research Drs. Ceci et al. readily admit that their own research demonstrates that the majority of children are NOT suggestible (Ceci, 2002). The research, which primarily has focused on preschool aged children, has been soundly criticized for a lack of ecological validity. Prosecutors should educate themselves on the research done by Dr. Gail Goodman, and others, in which children were studied in more topic appropriate ways (questioning related to body touch by a physician during a medical examination v. questioning relating to self-touch during a game of "Simon Says" conducted multiple weeks prior to the interview). The research clearly indicates that children are not significantly suggestible related to personally significant events, (Goodman, 1990) especially when interviewed shortly after the event (Bruck, 1995). Additionally, the research indicates that it is difficult to get a child to adopt negative attitudes, or make negative assertions, relating to

individuals with whom the child has a positive relationship or about whom the child has developed a positive stereotype (Lyon, 1999).

Finally, many defense attorneys will utilize a parental alienation defense citing the work of Dr. Gardner and his theories relating to what he refers to as a “parental alienation syndrome.” In confronting this defense it is again necessary that prosecutors educate themselves on the research. It is important to note that Dr. Gardner’s “syndrome” was rejected for inclusion in both the DSMIV and DSMV, and that the research conducted by Dr. Gardner on the topic consisted of interviews with the alienated parent alone (Johnston, 2004).

Variations of this suggestibility theme include expert testimony relating to source monitoring errors (a situation in which the source of a memory is incorrectly attributed to some other recollected experience), and false memory. As with the above discussed defenses extensive research exists, and prosecutors should seek to both independently educate themselves on the asserted defense topic, as well as seek out local or national experts to assist in understanding, and confronting the defense expert.

### **Drug and/or Alcohol Facilitated Sexual Assault**

Studies have repeatedly shown that a large number of sexual assaults are completed or attempted when drugs, or alcohol, have been consumed by either the perpetrator, the victim, or both. Frighteningly, studies have shown that the use of alcohol or drugs by a perpetrator may actually increase the likelihood that an individual will engage in sexually aggressive or violent behavior, not because of the effect of alcohol on the individual, but because of the individual’s perceptions of how alcohol will, or does, affect him or her, and an inherent belief that engaging in such activity is excusable when one is intoxicated. Several studies have demonstrated that college men who thought they were drinking alcohol were more sexually aroused by depictions of forcible rape than college men who did not think they had consumed alcohol (George W. M., 1986) (George W. , 1991). It is notable that, *actual* alcohol consumption did *not* affect these men’s sexual arousal. The authors have posited that perpetrators may use alcohol use as a justification of behavior they recognize as deviant. Studies have also demonstrated that stereotypes of women who drink lead to the perception that a drinking female is more sexually receptive or promiscuous than a non-drinking female. (George W. C., 1995) Further, studies have shown that perpetrators actively utilize alcohol (and other drugs) in order to facilitate the sexual assault (Kanin, 1985) (Mosher, 1986). Three-quarters of the college date rapists interviewed by Kanin indicated that they purposely got a date intoxicated to have sexual intercourse with her.

The presence of alcohol or drug use creates multiple difficulties for prosecutors. In addition to the impact of the above discussed stereotypes on the perceptions of jurors, and judicial officers, prosecutors are often faced with a victim who cannot remember all or part of the offense. In these cases prosecutors again should encourage investigators to engage in thorough offender centered investigations, as opposed to investigations which focus primarily on the victim’s behaviors or responses. Investigations should focus on the victim’s level of intoxication and ability to comprehend or capacity for consent as well as the perpetrator’s actions which perhaps contributed to the level of intoxication as well as the perpetrator’s response to it. The investigation should also encompass an

examination of the ways in which the victim communicated a lack of consent, or failed to communicate consent, as discussed above. These facts should be highlighted and emphasized for the jury or judicial officer in order to overcome the obvious barriers inherent in these types of cases.

## DNA

The increase in the availability of DNA evidence, as well as improvements in DNA technology over the years has caused a shift in common defenses from “it wasn’t me/it didn’t happen” type defenses towards “consent” defenses. That said it is still important that investigating officers collect evidence which may contain genetic materials for testing, as this evidence may be useful in contradicting an offender’s narrative of the event, and of course in identifying perpetrators and ensuring strong and proper convictions. Prosecutors should stay abreast of the technology as it develops, and should be aware that with increasing sensitivity and advances in science it may be possible for defendants to argue, with some scientific backing, defenses which are premised on the theory that the transfer of DNA occurred in some innocent fashion (such as both parties touching the same door handle). Prosecutors should not hesitate to discuss such potential defenses with the expert conducting forensic testing in the case in order to effectively address and counter such defenses at trial.

## CONCLUSION

Sexual Violence exacts an exorbitantly high cost both literally and figuratively on the victims of the offenses, as well as on society as a whole with the fiscal cost of sexual violence estimated at \$250 billion dollars/year (not including the personal expenses incurred by victims or the costs of incarceration of offenders) (Minnesota Department of Health). Despite this fact, it remains one of the most, if not the most, difficult areas of prosecution. The unique challenges presented by the combined impacts of societal misunderstandings of both the nature of the evidence, the offense itself, and victim response thereto, as well as the evidentiary challenges inherent in such cases can be daunting. However, prosecutors can experience success in prosecuting acts of sexual violence through careful investigation, close attention to detail, strong advocacy, and employing victim-centric approaches to case preparation. Cases involving sexual violence have traditionally focused on the victim, the victim’s behavior, statements and actions. Successful prosecutions, however, center on providing proper support for the victim/survivor through the process, and focus instead on the offender and the dynamics of the offense itself. Prosecutors should expect to expend significant time on the investigation, preparation, and presentation of such cases, and should not hesitate to utilize a variety of tools to ensure that a just result is reached in each case.



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