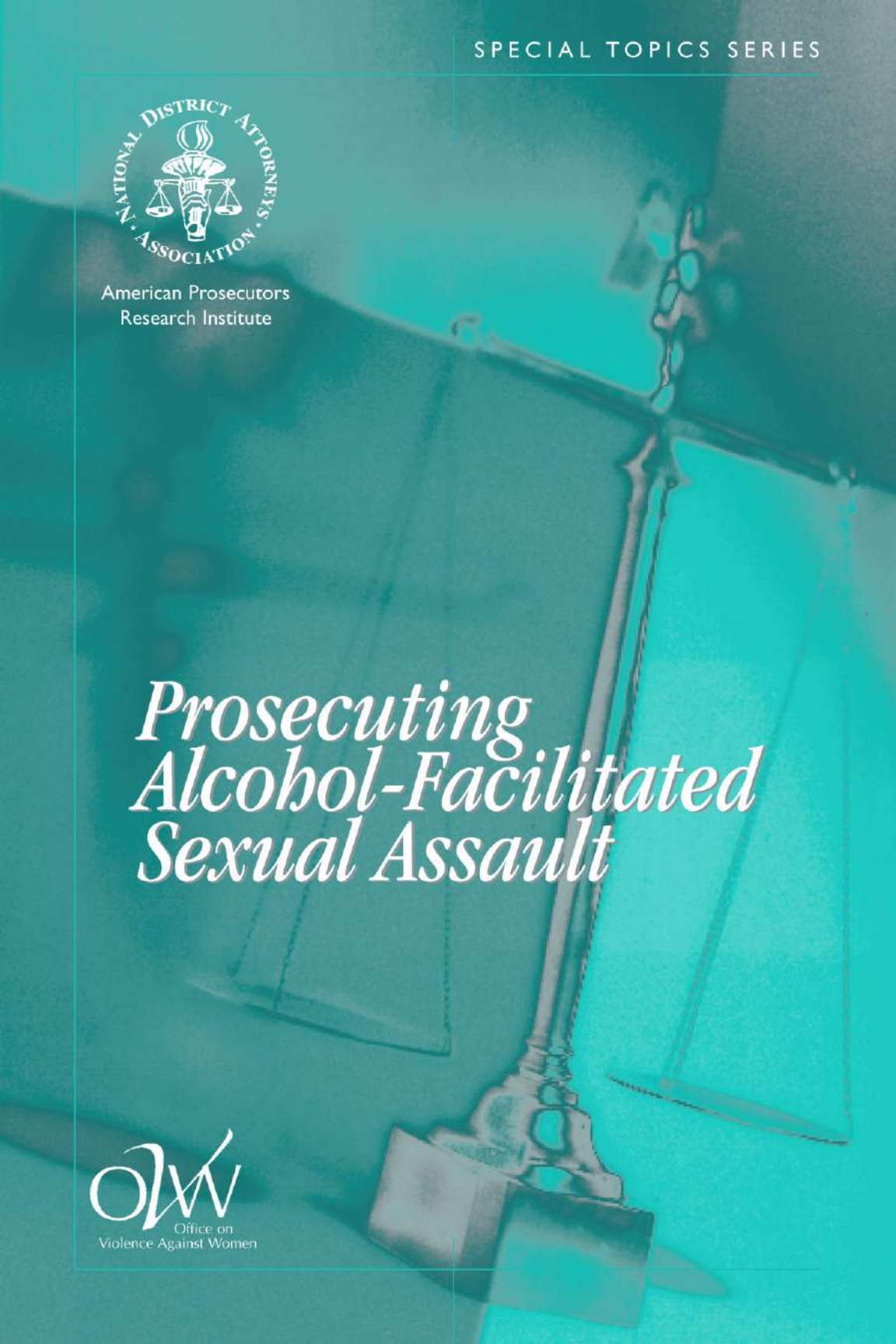
SPECIAL TOPICS SERIES



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Prosecuting Alcohol-Facilitated Sexual Assault

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Prosecuting Alcohol-Facilitated Sexual Assault

August 2007

Teresa P. Scalzo

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INTRODUCTION

Widespread anecdotal evidence indicates that the majority of rape and sexual assault cases[1] being reported to law enforcement involve alcohol use by the victim, the defendant, or both. Arriving at a definitive statistic on the prevalence of alcohol in rape and sexual assault cases is an arduous, if not impossible, task. Only a fraction of sexual victimizations are reported to police, and those that are reported rarely include accurate details on the level of perpetrator or victim intoxication.[2] Statistics on the prevalence of alcohol in sexual assault cases vary. "Research with convicted rapists, community samples of sexual assault perpetrators and victims, and college student perpetrators and victims consistently finds that approximately half of sexual assaults are associated with alcohol use by the perpetrator, victim, or both."[3] Crowell and Burgess suggest that alcohol use has been reported in up to seventy-five percent of acquaintance rapes.[4] Yet another estimate finds that 97,000 college students between the ages of eighteen and twenty-four are the victims of alcohol related sexual assaults each year.[5] Clearly, a high percentage of rapes and sexual assaults are facilitated by alcohol.

Despite the prevalence of alcohol-facilitated sexual assault (AFSA), a number of barriers to successful prosecution exist. First, the use of alcohol in American society is quite common. Jurors may question whether the offender actually committed rape or just had consensual, albeit drunken, sex with the victim. Second, jurors may view a voluntarily intoxicated victim with skepticism or dislike, and may assume that she[6] put herself in danger with her behavior. Research has demonstrated that individuals tend to view women who drink or get drunk as more sexually available, and more likely to engage in sexual acts than women who abstain from alcohol.[7] Third, AFSA cases are complicated by the physical manifestations of alcohol. "Alcohol decreases inhibitions, impairs perception, and may cause amnesia and/or loss of consciousness, especially if used in conjunction with other drugs."[8] Victims may not be able to clearly perceive and/or remember the details of the assault.

This monograph discusses the prosecution of AFSA with a specific focus on AFSA when the victim is voluntarily intoxicated.[9] It begins with a

basic overview of toxicology. Next, it suggests a three-step process for prosecuting AFSA cases: (1) making the charging decision; (2) analyzing credibility and corroboration; and (3) trying the case. Finally, the monograph provides techniques for overcoming common defenses.

Overview of Toxicology

"If recreational drugs were tools, alcohol would be a sledgehammer. Few cognitive functions or behaviors escape the impact of alcohol, a fact that has long been recognized in literature."[10] Alcohol is a central nervous system (CNS) depressant.[11] As the consumption of alcohol increases, its effect increases as well.[12] "A small amount of alcohol eases tension, a large amount removes inhibitions, and a still larger amount prevents the potential victim from resisting the aggressor."[13]

> Alcohol impairs both cognition (the process of knowing, thinking, learning, and judging) and psychomotor skills (voluntary movement). Alcohol first affects the most recently developed parts of the brain, which are responsible for judgment, inhibition, personality, intellectual, and emotional states. As alcohol concentration increases, the impairment of psychomotor functions such as muscular coordination, balance, eye movement, etc. also increase. As alcohol concentration continues to increase, involuntary movement, such as respiration, is affected, leading to possible coma or death.[14]

Alcohol progressively impairs all bodily functions and abilities governed by the brain.[15] Impairment increases as blood alcohol concentration (BAC) increases. BAC can be measured with a sample of blood or breath. It can also be estimated based upon a number of factors, including, among other things, what the person drank and how quickly, what the person ate, and the person's body weight. The effects of alcohol are exacerbated when ingested in the presence of other drugs having depressant effects such as sedatives, hypnotics, anticonvulsants, some antidepressants, tranquilizers, some analgesics, and opiates.[16]

Due to the cognitive and motor impairments caused by alcohol, intoxicated women may be less likely than sober women to realize that the perpetrator is trying to sexually assault them.[17] Moreover, "perpetrators may not need to be as physically forceful with extremely intoxicated victims because less force is required to subdue them."[18] "The desirable effect of alcohol to a sexual offender is its similarity to therapeutic and

abused drugs such as tranquilizers, narcotics, sedatives, and hypnotics."[19] However, unlike many other drugs used to facilitate sexual assault, alcohol is legal and readily available.[20]

To the perpetrator of AFSA, the toxicological effects of alcohol are a useful weapon. However, to the prosecutor of AFSA, the toxicological effects of alcohol can present an extreme challenge. One reason the cases are so difficult is that most of them are reported at a time when the victim is no longer intoxicated, making it difficult to assess the victim's BAC at the time of the incident.

THREE-STEP PROCESS

Too often, AFSA cases are lost due to improper charging decisions or investigations that are inadequate to support the charging decision that was made. The investigation and prosecution of AFSA where the victim is voluntarily intoxicated can be broken down into the following three-step process: (1) making the charging decision; (2) analyzing credibility and corroboration; and (3) trying the case. The steps are explained ad seriatim.

Step 1: Making the Charging Decision[21]

The most important step in successfully prosecuting AFSA where the victim is voluntarily intoxicated is making the correct charging decision.[22] A prosecution cannot succeed if the charges have not been properly filed. When beginning to analyze whether charges should be filed, the prosecutor should assume that the victim's version of events and any supporting evidence is true and accurate. Analysis of credibility and corroboration will occur in step two, but prosecutors should start with the best possible case scenario. If the elements of the crime cannot be proven when this assumption is made, the prosecutor ultimately will not succeed at trial.

To begin, the prosecutor should determine which theory of sexual assault to allege. Three potential charging theories exist for proving sexual assault of a voluntarily intoxicated victim.[23] First, sexual assault can be proven in the traditional way by demonstrating that the defendant had intercourse with a victim without consent by using force or the threat of force. In these cases, the victim is intoxicated but proof of the level of intoxication is not an element of the crime. Intoxication is only relevant to the victim's credibility and vulnerability. Second, sexual assault can be proven by showing that the victim was unconscious at the time of the rape and therefore could not consent.[24] Third, sexual assault can occur when the victim was too intoxicated to consent.[25] Regarding the latter cases, the victim's level of intoxication must be proven; however, "rape law essentially dispenses with the force requirement by finding that the force necessary for penetration is sufficient."[26] Thus, the issue at trial will generally be whether the victim was incapacitated to the point of not being able to consent.

When possible, the prosecution should proceed under a theory of rape by force as this is more consistent with the stereotype of rape believed by the public, and thus, by potential jurors.[27] Moreover, the victim's state of intoxication, which can be difficult to prove, need not be proven under this theory. Even if it could be proven, "[t]here is no bright line test that defines precisely how much alcohol or drugs result in a person's inability to consent to sex."[28] Moving from an estimated value for the BAC to a correct statement about the degree of intoxication during the crucial period can be challenging.[29]

Even where the measured values are reliable and accurate, substantial variability in tolerances for alcohol, absorption rates, and clearance rates, both among individuals and within the same individual from one situation to another, complicates efforts to deduce the true extent of intoxication at the time of an arrest or accident.[30] "Expert testimony would ordinarily be needed to establish that the party with the measured or inferred BAC was intoxicated during the period in question."[31]

If no physical force was used but the victim was unconscious, the prosecution should proceed under the theory that the perpetrator raped an unconscious victim. When dealing with a victim who was unconscious, the primary challenge will be showing that the victim actually was unconscious for all or part of the rape. Meeting the element of penetration also will usually be a challenge with an unconscious victim. If the first two alternatives are not options, the prosecution can proceed under the theory that the victim was too intoxicated to consent.

When deciding whether to charge based on the theory that it was rape because the victim was too intoxicated to consent, it is crucial to analyze the elements of the crime being alleged. As in all cases, prosecutors must ensure that they are proceeding under a valid legal theory. Although intercourse with someone who is too intoxicated to consent always constitutes *moral* rape, it is only a crime if it meets the *legal* definition of rape. In the United States, jurisdictions define this crime in various ways, which include the following:[32]

- Either statute or case law specifically outlaws having intercourse with a person who is too intoxicated to consent.[33] In these states, the victim's intoxication negates the element of consent, thereby showing that the sexual act occurred without consent.

- Rape occurs when the defendant has sexual intercourse with a person who is "mentally incapacitated," which is generally defined as being rendered temporarily incapable of appraising his or her conduct due to the influence of a narcotic, anesthetic, or other substance. In these jurisdictions, the prosecution generally must show that the victim was "mentally incapacitated" or "mentally incapable of resisting due to drugs, alcohol, or an anesthetic."[34]

- Rape occurs when the defendant has intercourse with someone who is "physically helpless." In these jurisdictions, the prosecution can show that the victim was intoxicated to the point of being physically helpless because she was unconscious, unaware that the intercourse was occurring, physically powerless, physically incapable of resisting, or physically disabled due to intoxication.[35]

In addition to the elements stated above, some jurisdictions require the prosecution to prove that the defendant knew that the victim was intoxicated.[36] A victim can become intoxicated by drugs and/or alcohol in three ways: (1) surreptitious administration by the assailant; (2) mixing of prescription or over-the-counter drugs with alcohol or recreational drugs; or (3) recreational use by the victim. This monograph focuses on the latter two forms of intoxication only.[37]

Once the charging theory has been determined, a chart analyzing what evidence exists regarding each element should be prepared. Can the victim testify to all elements of the crime? It is not uncommon for victims who were intoxicated at the time of the crime to forget pieces of the incident. This may or may not be fatal to a prosecution, depending on whether other evidence exists. For this reason, the chart is helpful in visualizing which memory lapses are fatal and which are not.

CHARGE[38]

ELEMENT(S)	WITNESS(ES)	EVIDENCE
Defendant engages in sexual intercourse		
With another person who is unconscious OR physically unable to communicate unwillingness to an act		

The primary challenge in prosecuting rape cases where the victim is voluntarily intoxicated is that society tends to have difficulty distinguishing between drunken sex and rape. Instead of assuming that it was probably rape because the woman was too drunk to consent, people tend to assume that the woman consented because she was intoxicated and simply regretted the sexual encounter later. In these cases, the defense tends to argue: "It's not rape; it's regret," or, "It's buyer's remorse." Prosecutors must overcome the tendency to focus on and blame the victim and re-direct the focus back to the offender's actions, and thus on the elements of the crime. It is the prosecutor's job to show jurors why the case before them is a case of sexual assault and not just drunken sex that was later regretted.

Generally, there is not a bright-line test for showing that the victim was too intoxicated to consent, thereby distinguishing sexual assault from drunken sex. In drunk driving cases, the prosecution can show that the driver had a certain BAC; therefore, the driver is guilty. Sexual assault cases involving alcohol are not as clear cut. There is not a universal BAC at which the law or the experts agree that people are no longer capable of consenting to intercourse. Instead, the equation involves an analysis of the totality of the circumstances and numerous factors. The factors discussed herein are divided into two parts: (1) general factors and (2) predatory behavior on the part of the defendant. By analyzing these factors and considering the totality of the circumstances, the prosecutor can determine whether the case is sexual assault or not.

Analyzing Consent and Distinguishing Rape from Drunken Sex: General Factors

- ***What is the type of rape alleged?*** If the type of rape involves force or the threat of force, the defense that the victim consented and merely regretted it later is viable only if the defendant claims the victim consented to whatever rough sex was equivalent to the force. When the prosecution has alleged force or threats of force, the consent defense should be looked upon with skepticism.

- ***How drunk was the victim?*** The more intoxicated the victim was, the less likely it is that she was capable of consenting. The following factors can aid in this determination:
    - Was she conscious or unconscious? Did she regain consciousness during the rape? Did she pass out during the rape? If so, what did the accused do?
    - Did she black out?
    - Did she vomit?
    - Could she speak? Was she slurring? Was she able to communicate coherently?
    - Was she able to walk or did someone (in particular, the defendant) have to carry her? Did she have to lean on someone?
    - Was she able to dress/undress herself?
    - Were her clothes disheveled?
    - Was she responsive or in a nonresponsive state?
    - Was she able to perform physical tasks or was her coordination impacted? For example, did she light the wrong end of a cigarette or spill things?
    - Did she urinate or defecate on herself?
    - What was her level of mental alertness?
    - Did she do anything else to indicate whether she was capable of cognitive functioning? For example, did she use her credit card? Did she use her cell phone or e-mail?
- ***Is there a motive to lie?*** If not, why is the victim's veracity being questioned?
- ***What are the time and circumstances of the report?*** Did the victim come forward as soon as she was physically able or did she wait? What made her come forward? Did she tell anyone about the incident prior

to going to the hospital or calling the police? What prompted her to report when she did and why?

- A delayed report is not fatal to the prosecution of a rape case; however, the reason for the delay must be explored. Investigators must interview any eye or ear witnesses to the delayed report, the rape itself, and to anything that might have happened in the intervening time between the rape and the report to the police.
- When analyzing the impact of a delayed report, remember that, according to the National College Women Sexual Victimization Survey, almost half of the women who are by definition rape victims do not self-identify as rape victims.[39] These women know that something bad happened to them, that someone had sex with them when they were too drunk to consent, or that someone held them down and forced them to have sex against their will. But they often do not label themselves as "rape victims." If a victim does not self-identify as a rape victim, it will impact her choice to call the police immediately. Why call the police if you have not been raped?

- ***What was the victim's physical condition?*** Was she menstruating? Was she wearing a tampon? Was she previously injured? Was she undergoing medical treatment for a yeast or fungal infection or other uncomfortable condition? Was there anything else that would argue against the intercourse being voluntary?
- ***Was the victim injured?*** If so, what do the injuries show?
- ***Where did the incident happen?*** Which of the parties was at the incident location first? Is this a case where the victim went to bed and the defendant followed her to her bedroom? Are the facts of the incident consistent with a consensual encounter?
- ***What sexual positions are alleged and how do those positions fit with the victim's degree of intoxication?*** For example, it would be difficult (although not necessarily impossible) for a person who was too drunk to consent to intercourse to stand and have sex in a shower stall.
- ***Was there prior interaction between the victim and the defendant?*** Are they boyfriend and girlfriend? Did they even know each other before the night in question?

Analyzing Consent and Distinguishing Rape from Drunken Sex: Defendant's Predatory Behavior

Prosecutors will face perhaps their greatest challenge in AFSA cases where the defendant was drunk as well. Alcohol consumption by perpetrators and victims tends to co-occur.[40] The reality is that approximately fifty percent of all sexual assaults are committed by a man who has been drinking.[41] "Although alcohol consumption and sexual assault frequently co-occur, this phenomenon does not prove that alcohol use causes sexual assault."[42] Nevertheless, many defendants will attempt to use alcohol as an excuse for rape.[43] The public has a tendency to view rape of a voluntarily intoxicated victim as more of an opportunistic crime than a predatory crime. When a jury hears that the defendant was drinking, it is easy for jurors to assume that it was drunken sex as opposed to sexual assault unless prosecutors disenchant them of the idea. Jurors may think: "There but for the grace of God, go I (or my son or my friend)." It is the prosecutor's job to keep the focus on the defendant and his behavior.

Most states do not recognize voluntary intoxication as a defense; however, some do.[44] Even in states that do not recognize intoxication as a defense, it may be a barrier to prosecution. Prosecutors can overcome the hurdle of the intoxication defense by looking for the defendant's predatory behavior. The prosecutor must look carefully at all the facts of the case to determine whether the defendant is a predator or just a drunk guy who did not intentionally rape anyone. Often, a successful predator will mask his actions in such a way that they appear opportunistic as opposed to predatory. The more predatory the defendant's behavior, the easier it is to prove that he is a rapist. Factors to consider include the following:

- ***Did the defendant use force or threaten the victim?*** Using force or threats of force to accomplish intercourse is not consistent with consensual sex.
- ***Did the victim say "no?"*** If so, why did the defendant disregard her "no?" Why was the victim's "no" not good enough for the defendant? Ignoring a sexual partner when she says "no" is not consistent with consensual sex.
- ***Look at the defendant's level of intoxication.*** What was his capacity to do other things? Could he walk? Talk? Play pool? Drive a car? Was his

speech slurred? The more sober he was, the easier it is to show he was a predator, especially if the victim was extremely intoxicated.

- ***Was there any planning or manipulation on the part of the defendant?*** Were there any attempts to deceive the victim? Did the defendant do anything to control the situation and overcome the victim's will? Did he isolate her? Did he lie to her?
- ***Is there any evidence of grooming?*** Did the defendant do anything during the time prior to the rape to gain the victim's trust? Did he do anything to make it easier to rape her? Is there any evidence that he set her up? For example, did he talk about making a "special punch" to get his "target" drunk? Did he buy her drinks and encourage her to drink them in an attempt to get her drunk?
- ***Did the defendant prey upon the victim's vulnerabilities?*** Did he do anything to wear down the victim's resistance? Is there any evidence that the defendant selected the victim because he knew that she would be an easy target?
- ***Has the defendant done it before?*** Have anyone else ever accused him of rape or other misconduct? Has anyone ever seen women leaving his room/apartment/home crying or distraught?[45]
- ***Did the defendant know the victim?*** If so, did he use his knowledge or familiarity with the victim to gain access to her or to isolate her? Did he use his knowledge to attempt to silence her?

Consideration of the factors listed above should help prosecutors analyze whether the defendant is a predator and distinguish between drunken sex and rape.

Step 2: Analyzing Credibility and Corroboration

The second step in handling AFSA cases is determining whether the allegations can be proven by analyzing the victim's credibility as well as any corroboration that exists. Jurors' negative perceptions of a victim's credibility can be a significant barrier to successful prosecution. In rape cases, credibility of the victim and provability of the case are inherently intertwined, in large part because rape is a crime of secrecy. There are almost never eyewitnesses to a rape. Moreover, rape cases rarely have physical evidence that conclusively proves that a rape occurred.

Prosecutors are often left with the victim's word, which means that a jury must find the victim credible before they will convict the defendant.

Jurors may be reluctant to convict on the victim's word alone because they believe they need evidence to corroborate the victim's testimony regarding the actual moment the rape occurred. This belief is so strong that a number of states have jury instructions advising jurors that the victim's word need not be corroborated.[46] However, a prosecutor should not be discouraged when presented with a case where the primary evidence is the victim's testimony. Although a prosecutor may be unable to present physical or other evidence to corroborate the victim's testimony about the moment of the rape, the prosecutor can give context to the victim's version of events, thereby allowing the jury to evaluate her credibility.

The victim's credibility can be broken down into five components: (1) actual credibility; (2) the victim's ability to perceive at the time of the incident; (3) the victim's ability to remember what happened; (4) the existence of corroborative evidence; and (5) the victim's likeability. The first four factors are valid charging considerations; the fifth is not. However, victim likeability must be understood and recognized by law enforcement and prosecutors if they are to obtain a conviction; therefore it is discussed herein.

Actual Credibility

The first factor is actual credibility. A victim who was voluntarily intoxicated at the time of a rape may feel shame or self-blame for allowing herself to be placed in a risky situation. Consequently, she may be reluctant to reveal embarrassing details. As a result, she may appear to have something to hide. She may also become hostile and defensive in order to protect herself. Furthermore, a victim may withhold information she views as insignificant without realizing that it is critical to be truthful about every minor detail, regardless of how insignificant it may seem to her. In a case where the victim deliberately withholds information, lies about small details, or is inadvertently inaccurate, jurors will likely be reluctant to convict the defendant because they will be worried that a victim who lies about small details may be inclined to lie about the rape itself, especially when the law requires the jury to believe the prosecution's case beyond a reasonable doubt.

Prosecutors should encourage the victim to be completely honest, even about embarrassing or seemingly insignificant details. First, explain to the victim the importance of telling the truth, no matter how painful or embarrassing it might be. Explain to the victim the significance of omitting information, even about seemingly insignificant details.

Ability To Perceive

The second factor that relates to a victim's credibility is how well the victim was able to perceive what was happening at the time of the incident. The ability to perceive diminishes as the level of intoxication increases. A victim who could not clearly perceive what was happening at the time of the crime will not be able to testify in detail about what happened because she does not know.[47] If the victim was passed out at the time of the rape, she had no ability to perceive because she was unconscious. Unless the victim woke up during the rape, the prosecution will have to find an alternative way to prove what happened.[48]

As explained above, although the victim's ability to perceive diminishes as she becomes more intoxicated, there is not a particular BAC at which one can definitively say that perception no longer exists. It is rare in a case of AFSA for the prosecution to know the victim's BAC at the time of the rape. Even in cases where the BAC is known, the prosecution must analyze the victim's ability to perceive by determining how the victim was impacted by the consumption of alcohol. It is important to explain the relevance of perception to victims, especially in cases where the lack of perception is the primary barrier to prosecution.

In determining how the victim's ability to perceive was impaired, look at the following:

- What is the victim able to tell you she perceived at the time?
- Can she relate details of the incident?
- Can she tell you who else was there? What were they doing?
- How intoxicated was the victim?
- Were the victim's motor skills impaired? Was she able to walk? Did she fall?
- What was the victim's physical condition? Was she vomiting? Was her speech slurred?

The defense may attempt to challenge the witness's testimony on the grounds that the witness is not competent; however, it is unlikely that a court will find a witness incompetent on this basis as long as the witness can testify that she was able to perceive the incident.[49] There is a distinction between attacks on competence and attacks on credibility.[50] When a witness is intoxicated at the time of an occurrence about which the witness has testified, intoxication is a proper matter for the jury to consider as affecting the witness's credibility.[51] "If the witness was under the influence at the time of the events which [s]he describes in his[/her] testimony or at the time [s]he testifies, this condition is provable, on cross or by extrinsic evidence, to impeach."[52]

Ability To Remember

The third factor that relates to a victim's credibility is the victim's ability to remember what happened. In order to be able to testify about what happened, the victim must, of course, be able to remember what happened. If she does not remember, there must be some other way to prove what happened or the case cannot go forward.[53] Although the victim may not remember every detail of the assault, she may have other information that is crucial to the case. When interviewing the victim about her memory, explain why you are asking. Encourage the victim to speak with an advocate for additional support.

Alcohol consumption diminishes the ability of the victim to remember what happened. "As the amount of alcohol consumed increases, so does the magnitude of the memory impairments."[54] Large quantities of alcohol, particularly if consumed rapidly, may result in the victim experiencing either a fragmentary or an *en bloc* blackout.[55] Fragmentary blackouts occur when people may recall portions of the episode after the incident when cues for events are provided.[56] *En bloc* blackouts have "definitive starting points, contain amnesia for all events within a discrete period, end with a sense of lost time, and require a high blood alcohol concentration."[57] The *en bloc* blackout is not a "process of forgetting, but rather one of not remembering."[58] "In contrast, fragmentary blackouts involve a more transient, perhaps forgetful memory loss for which aspects of experience are recalled via provision of pertinent cues. Thus, memory traces form but require facilitation to be accessed."[59]

Existence of Corroborative Evidence

The fourth factor that relates to victim credibility is the prosecution's ability to corroborate the victim's version of events. In cases where corroborative evidence exists, it may compensate for lack of perception or memory. There is always something more to corroborate the victim if we look hard enough.

Corroboration is important because it gives the jury a context in which to evaluate the victim's testimony. The evidence might only corroborate a small piece of the victim's version of events, but each piece of corroboration builds upon the last and enhances a jury's ability to find the victim credible. This principle can be illustrated with the diagram pictured below.[60] In the majority of rape cases, there are almost never any eyewitnesses to the rape, making the description of the moment of the rape "he said/she said." In order to decide who is credible, jurors need a context in which to evaluate the victim's credibility. Prosecutors can give jurors a context by giving them the "circles of credibility." These include, among other things, medical evidence, eye and ear witnesses, and physical evidence. In some cases, a prosecutor might be able to corroborate a victim's testimony with expert testimony that explains behavior that is counterintuitive to juror expectations.[61] In others, corroboration might consist of the defendant's statement or confession. The evidence need not conclusively prove that a rape occurred; rather, it must give the jury a sufficient context in which to evaluate the victim's credibility.

CREDIBILITY



Consequently, prosecutors should corroborate everything possible. Corroboration may include the following:

- ***Physical evidence.*** Instruct investigators to look for physical evidence that not only proves that the act occurred, but also evidence that overcomes the consent defense. In addition to traditional physical evidence, investigators should look for photos on digital cameras and cell phones, cell phone records, and any recordings that might exist. Investigators should also look for proof of where the victim was and what was done there. Such evidence can include blood, hair, urine, vomit, clothing, personal items, or even credit card receipts.
- ***Fresh complaint witnesses.*** As in many rape cases, in cases where the victim was intoxicated, the victim may delay reporting, thereby causing evidence collection problems. A delay in reporting may also cause credibility issues. Therefore, it is crucial to explore why the victim delayed reporting. What did she do after the incident? Who saw her first after the incident? Who did she first tell? Why did she report when she did and to whom did she report? Law enforcement must interview each of those people.

- ***Eyewitnesses to any part of the chain of events.*** When looking for corroboration, investigators should ask the victim whether anyone else was present during any part of the incident. Are there any witnesses to the ingestion of the alcohol or to the incident? What did they see or hear?
  - Investigators should attempt to interview bartenders and waitresses. Although they might be reluctant to talk because of legal liability, they may be willing to do so. Investigators should ask them how much the victim had to drink. Did she appear to be drunk or high? In addition, they should be asked whether the defendant frequents that bar and, if so, how he behaves when he is there. "Remember that these suspects are often serial rapists. They may frequent the same locations, but because of severe under-reporting and failures by the criminal justice system, they are very active and confident that they will never be caught or prosecuted."[62]
- ***Friends of the victim.*** Who sees the victim on a regular basis? Who saw the victim around the time of the incident? What can the victim's friends tell you?
- ***Other women the defendant may have dated.*** Although they may not offer anything beneficial to the prosecutor, they may be victims who never reported.
- ***Friends of the defendant.*** Even though interviewing these witnesses may seem illogical because one would presume they would be on the defendant's side, they can frequently corroborate innocuous details, or even disclose details they do not believe to be important, but which are crucial to the prosecution's case.
- ***Surveillance tapes from the place where the victim was drinking or anywhere she went afterward.***
- ***Medical evidence.*** Are there any physical injuries? What, if anything, do they demonstrate? Remember that seemingly innocent injuries, such as scrapes to the victim's knees from falling down, might provide corroboration of her being too drunk to consent.
- ***Interview the defendant whenever possible.*** Although the defendant may refuse to speak to an investigator, many times suspects in sexual assault cases where the victim was voluntarily intoxicated will want to tell the police why they are not guilty. They will often want to talk about how the victim consented. Defendants in AFSA cases are similar to those in other drug-facilitated sexual assault (DFSA) cases.

- In DFSA cases, the suspect will often admit that he had sex with the victim, but [will claim] that it was a consensual act. The suspect may use the victim's history of substance abuse or promiscuous behavior to direct blame to her and hold her responsible for the sexual contact. In the case of a consent defense involving a DFSA, investigators should get the suspect to acknowledge the victim's extreme level of intoxication. For example, he may admit that she was throwing up and lying in her own vomit. He will often try to convince the investigator that the sex act was still consensual, but it becomes more difficult for the jury to believe.[63]

- If the defendant will agree to be interviewed, ask:
  - Did he know that the victim was drunk? What signs of intoxication did the victim exhibit?
  - Did he see her drink? How much did she drink?
  - Who gave her the alcohol? Who purchased the alcohol?
  - Ask the defendant why he thinks the encounter was consensual (if he does).
  - Did the victim say yes? Did she say no? If she said "no," why did he disregard it or not believe it?

■ ***Pretext phone calls.*** Some states allow pretext phone calls[64] in which the victim calls the defendant and the conversation is tape-recorded.[65] Defendants may acknowledge that intercourse occurred and that the victim was intoxicated, which can be useful as corroboration even if, by itself, the recording of the pretext call does not conclusively prove that a rape occurred. Investigators planning to do a pretext phone call should check the law and plan carefully. What is going to be said during the call? What is the goal of the call? Is it to corroborate intercourse, to corroborate that the victim was passed out, to show that the victim said no, or some other goal? Decide who is going to make the call. Will it be the victim or a mutual friend? If it is going to be the victim, make sure that the victim is emotionally stable enough to handle the call. If the victim is working with a victim advocate or counselor, work with that individual as well. A pretext phone call should not be made at the cost of further emotionally injuring the victim.

Jurors will be more likely to find a victim credible when other aspects of her testimony are corroborated. For this reason, corroboration is key, regardless of how small the point being corroborated. Although the evidence may corroborate non-essential points in the case, when it surrounds the victim's testimony, it gives the jury a context in which to evaluate it.

Victim Likeability

Although victim likeability is not a valid charging consideration, nor is it legally relevant for a jury to consider, jurors tend to believe people they like. In addition, a jury may decide that a victim who engaged in risky behavior is not as worthy of protection as a victim who did not engage in risky behavior. The unfortunate reality of rape cases is that the flaws that make the victim a target for the offender also make the victim less credible in a jury's eyes. For example, a victim who goes to a bar and drinks to the point of vomiting and unconsciousness will be an easy target for a predator. This victim may be viewed with skepticism or dislike by a jury that assumes that she put herself in danger with her behavior. The jury may be inclined to believe that she assumed the risk of rape by becoming intoxicated to the point of being unable to protect herself. Although assumption of the risk is not a defense to rape, defense attorneys may use it to achieve jury nullification.[66] Also, the jury may believe that the victim's risky behavior translated into a "yes" and was equivalent to consent; therefore, they may find the defendant not guilty.

Furthermore, a victim who was voluntarily intoxicated at the time of the rape may blame herself for putting herself in a risky situation. As a result, she may not want to cooperate with the prosecution. She may appear hostile or defensive, which may cause her to appear less sympathetic or less credible.

It is important for the prosecution to consider whether the victim is likeable because there are a number of strategies that can limit the impact of victim likeability on the jury's decision making. For example, prosecutors should force the defense to follow the rules which were established to protect victims and level the playing field. *See Step 3, Pretrial Motions, infra* for a complete discussion of the use of pretrial motions. The following section discusses trial techniques that can be used as well.

All victims deserve protection; prosecutors and allied professionals should implement strategies for protecting each and every one. In doing so, however, prosecutors must be cognizant of any flaws that may exist either with the victim or the case in order to ensure the greatest chance of success at trial.

Step 3: Trying the Case

Offender-Focused Prosecution

AFSA cases are difficult to win at trial. Jurors tend to view AFSA cases as crimes of opportunity rather than deliberate, intentional crimes; therefore, it is not uncommon for them to be forgiving of defendants accused of AFSA. The prosecutor can overcome this tendency by using an offender-focused approach to the trial. This focus explains to the jury why a rapist would prey upon a person like the victim. The characteristics that cause the victim to seem flawed to the jury–and thus unlikeable–are the same characteristics that made her an appealing victim to the rapist. The rapist selected her because of those very characteristics. Communicating this to the jury refocuses the jury's attention on the defendant's predatory behavior. Utilizing an offender-focused investigation and prosecution can show jurors why the defendant before them is a predator as opposed to a nice guy caught in a bad predicament through no fault of his own.[67] Although prosecutors generally focus on the offender when trying any other criminal case, they tend to focus on the victim and any of the victim's flaws or vulnerabilities in rape cases. Rape cases must be tried in the same way that other criminal cases are tried–with a focus on the offender.

Instead of viewing a victim's vulnerabilities as weaknesses, explain why a predator would target a person with those vulnerabilities. The reality of rape cases is that the better a target a victim is for an offender, the worse the victim generally will be viewed as a witness for the prosecution. The flaws that make the victim a target for the offender also often make the victim less credible in a jury's eyes. For example, a victim who goes to a bar and drinks to the point of vomiting and unconsciousness will be an easy target for a predator. A victim who becomes voluntarily intoxicated does not do so with the expectation that she will be sexually assaulted. Voluntary intoxication does not equal consent to sexual acts. Remind the

jury that defendants generally select their victims with the intention of not getting caught. Show the jury that the crime was intentional and deliberate, even if it was opportunistic.

Using an offender-focused approach to the investigation and prosecution of sex crimes can overcome a number of common challenges in rape cases.[68] For example, a prosecutor may be able to explain how a defendant was able to rape a victim without using a traditional weapon. Jurors generally expect that a rapist will use a weapon, or at least use some form of excessive force. However, in 2005, only seven percent of rapes involved the use of a firearm and three percent involved a knife.[69] Nonstranger rapists generally use only the force necessary to overcome the victim's resistance. In many cases, this may equate to nothing more than lying on top of the victim and pinning her arms down. Nonstranger rapists are also far more likely to gain control of their victims through psychological or emotional force–the use of deception, manipulation, planning, premeditation, and betraying victims' trust. One of the most common tools used by nonstranger rapists is alcohol.[70] Prosecutors should look for evidence of all of these tools. Did the defendant lie to the victim by promising her a safe ride home and then driving her to a field where he raped her? Did he trick her by asking to come inside her home to use the bathroom? Did he buy her drinks or convince her to keep drinking when she wanted to stop?

Another challenge that can be overcome with an offender-focused prosecution is delayed reporting by the victim. Rather than viewing the delayed report as vulnerability on the part of the victim, consider whether the defendant played a role in delaying the report. Did the defendant do something as part of his "exit strategy"[71] to keep the victim quiet? Did he threaten her, either with force or blackmail (by threatening to get her into trouble for any bad decisions she made that he took advantage of)? Did he make her question her own judgment by telling her she had led him on, thereby causing him to rape her? If so, explain the delayed report in terms of the defendant's exit strategy and how it was almost successful in keeping the victim quiet. In these kinds of situations, the prosecutor could argue, "He tried to shame her into silence."

The prosecutor can focus on other themes as well when prosecuting an

offender-focused AFSA case. Sample themes include: "Who needs force when you have alcohol?" or "The defendant committed the perfect crime."[72] The prosecutor can also argue, "A predator picks his prey;" however, use caution when labeling a perpetrator of AFSA a "predator" at trial. Although a person who rapes an incapacitated victim is a predator, the jury may view the prosecution as overzealous if jurors are not convinced that the defendant is a predator. Instead, show that the defendant acted intentionally, deliberately, thoughtfully, and freely, and that he was in charge.

Pretrial Motions

Prosecutors should utilize pretrial motions to protect the victim's physical safety and privacy. The following are some pretrial motions the prosecutor should consider filing.

- ***Bond.*** File a motion to revoke bond if the defendant contacts the victim (or her friends or family members).
- ***Courtroom.*** File a motion to clear the courtroom of individuals who might threaten or attempt to intimidate the victim. Request extra deputies for the courtroom or arrange for a deputy or police officer to escort her between her car and the courthouse. You may not always succeed, but the victim will see that you are fighting to protect her.
- ***Rape shield.*** Oppose defense attempts to pierce the rape shield law.[73] If the defendant has not filed a rape shield motion, the prosecutor should consider filing a motion preemptively to preclude the defense from piercing the rape shield law by introducing instances of the victim's past sexual behavior.[74]
- ***Motion in limine to exclude irrelevant facts***. A prosecutor might also be able to file a pretrial motion to exclude references to irrelevant bad behavior, such as prior convictions or drug and alcohol use on other occasions. If the victim is an alcoholic, is it relevant to this case? "Standing alone, the mere fact of chronic alcoholism is ordinarily not provable on credibility."[75]
- ***Illegal defenses***. In states where voluntary intoxication is not a defense, the prosecutor should file a motion to preclude its use as a defense and include a brief summary of supporting statutes or case law. Although many judges are familiar with the law precluding the use of intoxication as a defense in the states in which it is not a defense, it cannot

hurt to ensure that the judge has this law at his or her fingertips.

- ***Other bad acts (404(b))***. When possible, the prosecutor may file a motion to introduce evidence of the defendant's other bad acts.[76] All too often, in nonstranger rape cases, the investigation looks only at the current case and does not look for prior rapes. When possible, the prosecutor should ask police officers to interview the defendant's friends, prior girlfriends, and others who might know about prior acts. Although these people may have a reason to lie, they may also be willing to assist. If the defendant has any prior cases, review those cases, even if they were dismissed. Further investigation might be warranted. Do not only look for completed rapes; also look for evidence that can be used to demonstrate the defendant's pattern of behavior toward women. Prior bad acts stopping short of actual rape may support the argument that he deceived the victim, manipulated her, or planned and premeditated the rape.

Working with the Victim

Prosecutors can do at least three things to assist the victim in testifying in a competent and credible manner: (1) support; (2) protect; and (3) prepare the victim.

- ***Support the Victim.*** Support can be provided in a number of ways. For example, a multidisciplinary Sexual Assault Response Team (SART)[77] can support and comfort the victim, especially when the team includes victim advocates who can work with prosecutors to ensure that the victim is comfortable on the witness stand. A SART can empower the victim and give her the support she needs to make it through the investigation and trial process. Other ways to support the victim include: creating a Sexual Assault Nurse Examiner (SANE)[78] program, working with victim advocates, and providing a safe and comfortable place for the victim to wait to testify. A victim who feels supported is more likely to feel comfortable on the witness stand, which will make her a better witness.

- ***Protect the Victim.*** A prosecutor should protect the victim to the best of his or her ability. A victim who feels protected through the process is less likely to become defensive or angry on the witness stand. When a victim becomes angry or defensive, jurors are likely to believe that she has something to hide, rather than recognizing these reactions as nor-

mal human behavior. When the defense files frivolous motions intended to harass and intimidate the victim, oppose them. For example, if the defense files motions requesting a psychological examination of the victim or asking for the victim's counseling records, oppose them. Oppose attempts to pierce the rape shield law. *See Pretrial Motions*.

- ***Prepare the Victim.*** Testifying in court can be as traumatic as the original rape because the victim is forced to relive the rape mentally.[79] Prosecutors should prepare victims not only for direct examination but also for the harsh reality of cross-examination. To prepare a victim, discuss her substantive testimony as well as basic rules for testifying. Tell the victim that the most important rule for her to follow in the courtroom is to be truthful. As discussed above, the victim should be told, "Be honest about all details of the event, even if the details are embarrassing." Explain to the victim that if she attempts to hide or exaggerate small details, the defense will probably be able to show this on cross-examination. The defense will then argue in closing that the victim is a liar and cannot be believed about the rape if she cannot be believed about the small details. Instruct the victim on the importance of accuracy. For example, a victim may be inclined to say that the defendant "ripped" off her panties, when in fact he pulled them off, but did not rip them. The slightest imprecision opens the door for cross-examination and may call the victim's credibility into question. Ask her to try to stay calm, since a victim who becomes angry will be unable to think clearly. Working with victim advocates can make the preparation for direct examination more comfortable for the victim and thus, more productive for the prosecutor.

  In cases where the consent defense is used, cross-examination may be particularly harsh. Victims who are prepared in advance for the challenge of the experience will be better witnesses when they testify. It will also be easier for them to endure the trial process if they understand that they are not being asked difficult questions because they are a bad person or because they did something wrong. Instead, if they are being cross-examined harshly, it is because the defense attorney is doing his or her job–protecting the client. An advocate may be extremely helpful to the victim and to the prosecutor by being present during preparation for

cross-examination and during the trial itself. It might also be helpful to have someone other than the prosecutor conduct a mock cross-examination of the victim.[80]

In addition, when prepping the victim for trial, the prosecution team should reinforce that the victim is not responsible for the rape. The defendant, not the victim, is responsible for his behavior, and thus, the rape. Although the victim is not responsible for the rape, it is crucial to be honest about all details of the case, especially drug and alcohol use.

When preparing the victim for cross-examination, discuss questions the defense attorney is likely to ask. Explain that the defense is likely to portray her as a promiscuous party girl. If there is any memory loss, they will be certain to focus on the fact that there are things she does not remember. They might ask questions like, "You consented to drink, and you consented to drug use, didn't you?" Let the victim know that it is appropriate to respond truthfully that she might have consented to other things, but she did not consent to intercourse. If there is a delay in reporting, the defense will inquire about it. If there were potential consequences for the victim that were not enforced, such as being kicked out of college for drinking or drug use, these will certainly be raised at trial.

Voir Dire

Although voir dire can be used to educate a jury panel, it is unlikely that prosecutors will be able to change long-standing prejudices of jurors who are inclined to believe rape stereotypes and myths. Prosecutors will generally be more successful by eliminating jurors who hold such deep-rooted beliefs that they cannot be fair. By asking questions in voir dire about jurors' preconceived opinions about women who, for example, consume alcohol in a bar with a man, the prosecutor can try to keep people with such biases off the jury. Prosecutors can also distinguish the current case and show the jury that this particular case is not just drunken sex; rather, it is rape. For a complete list of suggested voir dire questions, see Appendix A.

Witness Order

Witnesses do not necessarily need to be presented in chronological order. If there is a witness who supports the victim's testimony in a way

that makes the victim appear more credible, present that witness before the victim. With this approach, when the jurors hear the victim's testimony, they will already be inclined to find her credible. For example, consider starting with a witness who saw the victim immediately after the incident in a highly emotional state or a medical witness who treated an injury.[81]

Direct Examination of the Victim

The myth of "real rape" portrays the rapist as a stranger to the victim. However, in reality, most victims know their rapists.[82] As a result, it is common for a victim of nonstranger rape to be with the defendant voluntarily at the time of the rape. In fact, at least "eighty percent of all sexual assaults occur during social interaction, typically on a date."[83] Prior to the rape, the defendant was not a stranger, so it was not unreasonable to trust him. As a result of trusting the defendant, the victim did not recognize the danger until it was too late. Prosecutors must show the jury why the victim initially trusted the defendant and how he was able to trick her and take advantage of her trust. At what moment did the victim recognize that she was in danger? Very often, victims do not recognize the danger until it is too late because they perceive the defendant to be safe.[84]

At trial, first have the victim explain who the defendant appeared to be, and then explain who he really was. Ask her to describe for the jury the moment she realized that she was in danger and that he was going to rape her. Ask her to describe any changes in his demeanor, speech, or behavior. The contrast will show the jurors that although the defendant did not initially fit their stereotype of a "real" rapist, he is, nevertheless, guilty. Show the jury that it was the defendant who tricked the victim into believing that he was someone who would not hurt her. Argue that the defendant became a stranger to the victim when he raped her.

In rape cases, inconsistencies in the victim's statements and testimony tend to take on gigantic proportions. Members of the public who are unwilling to admit that they believe that women lie about rape will often freely admit that they would hesitate to convict a defendant of rape without some form of corroboration, even though it is not required for a conviction. Prosecutors must review all victim statements, identify any

inconsistencies or partial revelations, and address them with the victim and other witnesses prior to trial. Prepare the victim to answer the defense's inevitable questions about the inconsistencies. When the jurors understand that the inconsistencies were not deliberate lies on the part of the victim, they will be more likely to find her credible.

The prosecutor must personalize the victim. The jury must understand who she is in order to understand her choices and behavior. Therefore, the prosecutor must introduce the victim to the jury with sufficient foundation questions.

Finally, the prosecutor must show the jury why the victim's intoxication should not prevent them from finding her credible. The prosecutor must show the jury that the victim was able to perceive at the time of the incident and is able to remember now. Show as many minor details as possible. What were the victim's motor skills like? What tasks was she able to perform? What else does she remember? The prosecutor should give the jury sufficient details to analyze the victim's ability to perceive and remember to enable the jury to engage in the process the prosecutor engaged in prior to trial when analyzing the victim's ability to perceive and remember.

Medical Evidence

Many jurors believe that all women who are raped sustain serious physical injuries. They do not understand how a rape can occur without injury. The reality is that very few rape victims sustain any physical injuries other than the rape itself.[85] When a medical examination is done, it is important to present thorough testimony about the examination, even if it shows that no injury occurred. If a sexual assault forensic examination was done, do not stipulate to testimony about the exam. Have the nurse or doctor who performed it explain it in as much detail as possible. The procedure is long and very invasive. Jurors who understand what the victim had to endure in order to prosecute the case will be more likely to find her credible. If the jurisdiction allows, corroborate the victim's statement about her reaction to the rape by having the nurse or doctor testify to the victim's demeanor throughout the exam. In many jurisdictions, the nurse or doctor spends hours with the patient, due to the length of the exam.
In addition to explaining the details of the examination, it is important to

present expert testimony explaining any injury or lack thereof.[86] When injury exists, use an expert to explain that the victim's description of how the injury occurred is consistent with the examiner's findings. If there is no injury, use the expert to explain how it is possible that a woman could be raped but have no physical injuries. Have the expert testify that the lack of trauma is not inconsistent with rape. Have the expert testify that in his/her training, practice, and experience, significant physical injury from a rape is extremely rare. Moreover, if the victim was unconscious, it is likely that there will not be any injuries at all; an unconscious victim cannot resist. Similarly, there will probably not be torn clothing. Look for injuries consistent with a drunken victim. For example, are there bumps to the victim's head, abrasions on her back, or other bruises that support her level of intoxication?

It must be remembered that rape victims who do not suffer immediately apparent injury may still suffer severe long-term consequences. "A number of long-lasting symptoms and illnesses have been associated with sexual victimization including chronic pelvic pain; premenstrual syndrome; gastrointestinal disorders; and a variety of chronic pain disorders, including headache, back pain, and facial pain."[87] If any of these symptoms or illnesses is present by the time the case goes to trial, evidence of them may be presented.

Experts on Victim Behavior[88]

Victims often behave in ways that are counterintuitive to jurors' expectations. Jurors expect "real" rape victims to resist their attackers to the utmost of their ability, report the rape immediately, and be hysterical in court. In reality, victims behave in any number of ways, many of them counterintuitive.[89] When victims do not behave in ways that are consistent with jurors' expectations, jurors tend to assume that the victims are lying.

To explain a victim's counterintuitive response to rape to a jury, the prosecutor must first understand it. Identify any behaviors that appear counterintuitive, such as not screaming during the rape, failing to immediately report the rape, or continuing to socialize with the rapist. Work with the victim and any of her counselors or advocates to understand these behaviors. For example, if a victim delayed in reporting the rape to the police,

ask her why. Remember that it is not uncommon for victims to recognize that something horrible happened to them without labeling it as rape.[90] Often, a victim may not label the traumatic experience as rape until after a discussion with a friend, law enforcement officer, or medical personnel.

When explaining any counterintuitive behavior to a jury, a prosecutor must present the jury with enough evidence of the victim's background to enable the jurors to understand that her reaction, while counterintuitive to them, was absolutely natural to her. Consider the example of a college student who was using cocaine on the night she was raped and who delayed in reporting because she knew she would lose her scholarship if her college found out that she was using cocaine. Before explaining the cocaine use to the jury, explain that the victim was the first in her family to attend college and that, without her scholarship, she would have been unable to afford to continue her schooling. When the jurors appreciate the impact of losing the scholarship, they will be more likely to understand why she did not report a rape.

Finally, consider presenting expert testimony to explain the victim's counterintuitive reactions. An experienced expert can explain behaviors a jury might otherwise not understand. An expert need not be expensive. For example, a community-based victim advocate who has worked with many victims and can articulate the various behaviors victims commonly engage in, including those that are counterintuitive, would be a competent expert who might not charge a large fee for testifying.[91]

Experts on Intoxication

As discussed above, proving a victim's degree of intoxication may be difficult without a BAC. Even when the BAC is known, the prosecutor must show the relationship between the BAC and the degree of intoxication.[92] The prosecutor may need to call an expert to explain various issues, including the victim's degree of intoxication, the victim's inability to consent (if this is the theory of the prosecution), the victim's ability to remember (or not remember), and the victim's ability to perceive (or not perceive). It may be better to use expert testimony in rebuttal.

Various experts can be used to explain issues regarding the victim's

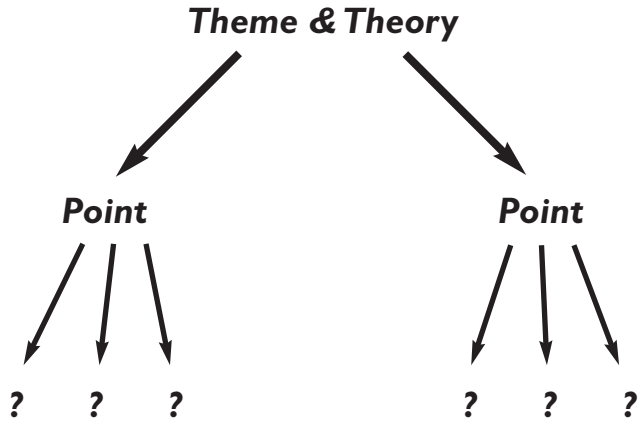
intoxication. The prosecutor can call a toxicologist or pharmacologist who is familiar with the science of intoxication. In addition or in the alternative, the prosecutor can call someone who is familiar with intoxicated people, such as a police officer, an emergency doctor, or a SANE. *For sample questions that can be used to introduce expert testimony on intoxication, see Appendix B.*

Cross-Examination of the Defendant

Jurors may think of AFSA cases as "he said/she said" cases. The defendant is one-half of that equation; therefore, it is important to cross-examine him well. Cross must be carefully planned. Prosecutors must anticipate the defendant's possible testimony and prepare various questions. In doing so, prosecutors can accomplish the purpose of cross by making points that can be used in closing to support the prosecution's theory of the case. The prosecutor should begin with the theme and theory of the case in mind, then articulate points that will be made in closing. Finally, the prosecutor should think of questions that can be used to make the points. The diagram below illustrates this technique.

For a sample cross-examination worksheet, see Appendix C.

CROSS-EXAMINATION PROCEDURE



Defendants in sexual assault cases are not easy to cross-examine. They have a substantial interest in lying and may actually believe their own lies. Often, they will minimize and rationalize. In addition, they have generally spent a good deal of time thinking about the case and rehearsing. Many sex offenders are very accomplished at presenting a façade designed to hide the truth about themselves.[93] "Sex offenders have secretive and manipulative lifestyles, and many of their sexual assaults are so well planned that they appear to occur without forethought."[94] "The skills used to manipulate victims have also been employed to manipulate criminal justice officials."[95]

Consensus based cross-examination may be particularly effective when the defense is consent. In this scenario, the prosecutor should attempt to get the defendant to agree to as many of the facts of the case as possible. Ideally, the prosecutor will be able to argue in closing "the only fact with which he disagrees is the one which makes him guilty–whether or not she consented."

The following is a list of suggested topics for cross-examination.

- ***Intercourse.*** Have the accused corroborate that the intercourse occurred.
- ***Accused's state of intoxication.*** Either he was very drunk (and therefore should not be able to remember clearly what happened) or he was sober enough to have the ability to perceive and remember (and therefore, sober enough to know better).
- ***Other illegal acts.***
  - Know the law–be careful!
  - Drug use/possession
  - Underage drinking
- ***Accused is a predator.*** What is attractive about a really drunk woman? A woman who is vomiting? An unconscious woman?
  - Did he pour the drinks? How much alcohol was in them? Was he trying to get the victim drunk? Nonstranger rapists frequently report "intentionally getting the woman drunk in order to have sexual intercourse with her."[96]
  - Can you show that the defendant is hostile toward women generally?[97] "With respect to personality traits, men who had committed sexual assault were more hostile toward women and lower in empathy compared with other men."[98]

- ***Consistencies***. Verify all consistencies between the defense and the prosecution.
  - Victim's drunken state
  - Details of the encounter
- ***Inconsistencies.***
  - Known facts
  - Evidence
  - Other witnesses

If the defense is consent:

- ***Did the victim say no?*** How? When? How many times?
- ***Did the defendant use force?*** "[M]en who had committed sexual assaults were more likely to hold adversarial beliefs about relationships between men and women (e.g., 'all's fair in love and war') and to consider the use of force in interpersonal relationships acceptable."[99]
- ***Did the victim say yes?*** How? When? How many times?
- ***The defendant chose the victim.*** When the defense is consent, the defendant must acknowledge that he wanted to have sex with the victim. If not, how did the sex occur?
  - What were the defendant's intentions?
  - Did he want to have sex with the victim? If so, what steps did he take in order to have sex with her?
  - Did he want to get the victim alone? If so, what steps did he take to get the victim alone?
- ***If the defendant claims that there was a relationship or that he was dating the victim.*** Tie him to details. Ask was there a relationship? How long was the relationship? When did they meet? Did he know her friends or family? Was he in love with her? How much in love was he? Did he tell anyone about it? Who? When? What? "[S]exual assaults involving alcohol consumption are more likely than any other sexual assaults to occur between men and women who do not know each other (e.g., strangers, acquaintances, or casual dates as opposed to steady dates or spouses)."[100]
- ***If the defendant claims that he knew the victim "wanted him."*** Explore her "desire" and show how ridiculous this is. Ask:
  - How did he know?
  - How did she communicate her desire?

- A look?
- Body language?
- Words?
- Do other women want him?

■ ***When the defendant bashes the victim in his testimony.*** Show the difference between the time of the rape and now.
- He liked her enough then to have sex with her–why does he have negative things to say now?
- Contrast the romantic descriptions of the encounter vs. negative descriptions of the victim. What happened to change things, if not the rape? Corroborate the lack of pre-rape conflict.
- Did the victim's behavior change after the rape?
- What motive does she have to lie? If she is normally a liar, why was he with her?

■ ***If there is evidence that the defendant manipulated the victim, lied to her, or tricked her,*** ask about it.

■ ***Inconsistent actions.*** Did the defendant say one thing but act inconsistently? Does he have a girlfriend? A wife? If so, why was he with the victim?

■ ***Post-rape behavior that shows consciousness of guilt.*** Is his behavior consistent with consensual sex? Actions speak louder than words. Show any changes in the defendant's behavior and inconsistent acts.

■ ***Does the defendant believe rape myths and stereotypes?*** Be cautious with this line of questioning. It will only be effective if the jury recognizes that the defendant's beliefs are false. "Sexually assaultive men often describe women who drink in bars as 'loose,' immoral women who are appropriate targets for sexual aggression."[101] "For example, incarcerated rapists often rationalize that their victim either desired or deserved to experience forced sexual acts."[102]
- What behavior does he think constitutes consent?
  - Kissing?
  - Fondling?
  - Drinking?
  - Wearing certain clothing?
  - Going to a bar by herself?

When cross-examining, remember that some men may purposely get drunk when they want to act sexually aggressive, in order to use intoxi-

cation as an excuse for their socially inappropriate behavior.[103] In addition, "[b]eliefs and myths about rape may serve as rationalizations for those who commit violent acts."[104]

Overcoming Defenses–General

In AFSA cases, the consent defense can be used in two main ways: (1) defendants can argue that the victim consented and is now lying; or (2) the defendant can argue that the victim consented, but was so intoxicated that she does not remember that she consented. Advocates should be extremely useful when the consent defense is raised because the defense tends to shift the focus to the victim and her behavior, which may make the trial experience even more challenging for victims than it already is.

When defendants choose to argue that the victim consented and is now lying about it, they may focus on a number of things. In cases where the victim has a potential motive to lie, they will focus on it. In cases where the victim behaved in counterintuitive ways, the defense will argue that the victim is lying because she did not behave the way a rape victim is supposed to behave. For example, in cases where the victim delayed in reporting, the defense will generally try to argue that the victim waited to report the incident to law enforcement because she was lying. If the victim has filed a civil suit, they may ask questions about how much money the victim hopes to win. If the victim had or has a husband or boyfriend, the defense might ask questions about the relationship to show that the victim is lying to preserve it. In these cases, the defense often uses the mantra, "it's not rape, it's regret" or "buyer's remorse."

Overcoming the Blackout vs. Pass Out Defense

The second way that the defense can argue the consent defense is to try to prove that the victim consented to the intercourse but does not remember due to her high level of intoxication at the time of the crime. Defendants who make this argument portray the incident as drunken sex, as opposed to rape. This line of attack is palatable to jurors because the victim is not vilified; rather, she is portrayed as being mistaken. The defense will try to make it look as though the victim blacked out and forgot large periods of time. Often the defendant will testify that the victim does not remember that she behaved promiscuously and possibly even initiated sexual contact with him.

Some defense attorneys bolster this argument by calling an expert witness to say the victim blacked out. They may use a toxicologist, a pharmacologist, an emergency doctor, or someone else with expertise in blackouts.

The blackout defense is particularly common in cases where the victim was unconscious at the time of the rape. There are a number of steps that can be taken when this defense is raised. First, if expert testimony is going to be proffered, the prosecutor should ask the judge to hold the defense to the discovery rules. Prosecutors should get the current curriculum vitae of the defense expert. Prosecutors must make sure that the proposed expert is qualified to testify on the topic. If not, object.[105] Prosecutors should also request a written report from the expert.

Next, prosecutors should object on relevance grounds. Until there is evidence in the record that a blackout occurred, there is no factual basis to admit this testimony. Prosecutors should force the defense to proffer the testimony that will support the introduction of the blackout testimony. Unless the witness can diagnose the victim as having suffered from a blackout at the time, any expert testimony would only lead the jury to speculate about whether the victim was in an alcoholic blackout. Such speculation would be more prejudicial than probative.[106] Prosecutors can file a motion *in limine* to preclude the defense from using the term "blackout" unless there is evidence on the record to show that what occurred was a blackout and not just inconsistencies in the victim's memory or testimony.

If a defense expert uses the "blackout defense," the victim must be very clear about what she remembers and what she does not. If she is certain of something for a particular reason, she should explain the reason. The prosecutor must be prepared to cross-examine the expert well. The following questions can be asked when cross-examining the defense expert:

- **Blackout vs. Pass Out**
  - Blackouts do not involve a loss of consciousness, correct?
  - The conditions blacking out and passing out are mutually exclusive, aren't they?
  - When a person is passed out, she is unconscious, correct?
  - When a person is blacked out, she is conscious, correct? A blackout is

simply when a person cannot remember what happened during a time period because his or her brain was not recording memories during that time, isn't that true?

- If a person blacked out, she would know that she had "lost time" right? In other words, she was not recording any memories if she were blacked out, correct? If she were passed out, she was not observing anything because she was basically asleep, correct?
- Assume that a person experienced a blackout. During the time period of the blackout, that person was able to perceive what was happening at the time it happened, correct?
  - "Intoxicated subjects are typically able to repeat new information immediately after its presentation and often can keep it active in short-term storage for up to a few minutes if they are not distracted.[107]
  - Alcohol seems to influence most stages of the process of memory formation, storage, and retrieval to some degree, but its primary effect appears to be on the transfer of information from short-term to long-term storage.[108]
- **Subjective**
  - Your opinion is based upon facts gained by talking to the defense or the defendant, isn't it?
  - "[M]ost of the evidence of a blackout is provided by subjective recall from the accused and so may be of questionable veracity."[109]
  - If the victim's testimony is true, then this theory of blackout would not apply, would it?
- **Scientific issues**
  - There is widespread debate in the medical and scientific communities regarding the evaluation and diagnosis of blackouts, right?
  - Isn't it true that there is no scientific consensus as to what constitutes a blackout? Isn't it true that there is no way to do any scientific tests to determine whether the victim had a blackout?
- If the defense cites any studies, be sure to be familiar with the studies and how they were done. "Although alcohol blackouts have been defined as evidence of both alcohol misuse and alcohol dependence in the majority of formal diagnostic systems, they remain an enigma."[110]
  - What was the purpose of the study? Early research into alcohol-induced blackouts began in the 1940s with the work of E.M. Jellinek (1946).[111]

Jellinek's initial characterization of blackouts was based on data collected from a survey of Alcoholics Anonymous members. Noting that recovering alcoholics frequently reported having experienced alcohol-induced amnesia while they were drinking, Jellinek concluded that the occurrence of blackouts is a powerful indicator of alcoholism.[112]

- This research was never intended to analyze the nature of blackouts on the brain; rather, it was intended to determine whether blackouts could serve as a predictor of alcoholism. "For a long time, alcohol-induced blackouts were merely studied as predictors of future alcoholism."[113] Moreover, some studies were done on people who were defendants in the criminal justice system who had raised the issue of having an alcoholic blackout as a defense. Naturally, the subjects in these studies would have a motive to answer questions in a certain way. In these surveys, "strategic goals may motivate blackout claims."[114]
- How was the study done? "Most of the research conducted on blackouts during the past fifty years has involved surveys, interviews, and direct observation of middle-aged, primarily male alcoholics, many of whom were hospitalized."[115]
- Blackouts only affect memory of events that occurred during the intoxicated state. "Although alcohol impairs short-term memory, which may interfere with storing information about ongoing behavior, remote memory remains intact."[116] "Thus, even during a blackout, a person should be aware that what he is about to do is wrong."[117]

■ **Intoxication issues**

- If a person drank only beer, it is unlikely that she experienced a blackout, correct?
- In a study conducted by White et al., only one subject indicated (s)he drank beer alone before experiencing a blackout. Most subjects (forty percent) drank either liquor alone or a combination of beer and liquor (forty-two percent).[118]
- When a person is drunk enough to black out, she is extremely intoxicated, correct? What other signs of intoxication would she show? (The prosecutor can then argue that the offender should have known

that the victim could not consent.)

- "As the amount of alcohol consumed increases, so does the magnitude of memory impairments."[119] "There is agreement that the en block type of blackout requires the ingestion of large amounts of alcohol; a high blood alcohol level (BAL) is usually a necessary component."[120]
- The plausibility of a blackout claim at a BAC less than 250 mg/mL is doubtful.[121] One study estimated peak BACs during the night of a blackout to be thirty percent for men and thirty-five percent for women.[122]
- If the defense expert states that a person may experience a blackout and may or may not appear to be intoxicated, remember the history of research into blackouts. "Clinical research has focused primarily on cognitive impairments and memory deficits among alcoholics."[123]
- "Until recently, much of the information we had about behavior exhibited while in a blackout state was derived from members of Alcoholics Anonymous."[124] An alcoholic is likely to have a higher tolerance for alcohol and is less likely to exhibit signs of being intoxicated. Several studies show that the average number of drinks before blackout was approximately fifteen in four hours.[125]

Conclusion

Following the three-step process discussed herein can help prosecutors overcome the challenges associated with AFSA cases. First, prosecutors must make the correct charging decision, beginning with the assumption that the victim's version of events is correct. Prosecutors should also look for factors that distinguish the present rape case from merely an encounter involving drunken sex. Next, prosecutors should analyze the victim's credibility and any corroborating evidence. Finally, prosecutors must try the case in a way that supports and protects the victim and focuses the jury's attention on the defendant's behavior, thereby enabling prosecutors to overcome common defenses.

ENDNOTES

[1] In this article, the terms "rape" and "sexual assault" are used interchangeably.
[2] Antonia Abbey et al., *Alcohol and Sexual Assault*, 25(1) ALCOHOL RES. & HEALTH 43 (2001) *available at* http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm.
[3] Antonia Abbey et al., *The Relationship Between the Quantity of Alcohol Consumed and the Severity of Sexual Assaults Committed by College Men*, 18(7) J. OF INTERPERSONAL VIOLENCE 813 (July 2003).
[4] NATIONAL RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 55 (Nancy A. Crowell & Ann W. Burgess eds., 1996).
[5] NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM: A SNAPSHOT OF ANNUAL HIGH-RISK COLLEGE DRINKING CONSEQUENCES, *at* http://www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx.
[6] From 1992 to 2000, females accounted for ninety-four percent of the victims of all completed rapes, ninety-one percent of the victims of all attempted rapes, and eighty-nine percent of the victims of all completed and attempted sexual assaults. In single-offender rapes and sexual assaults, the percentage of male offenders is nearly ninety-nine percent. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2001 (August 2002). 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.
[7] William Recording et al., *The Role of Alcohol Expectancies and Alcohol Consumption Among Sexually Victimized and Nonvictimized College Women*, 16(4) J. OF INTERPERSONAL VIOLENCE 297 (2001).
[8] James C. Garriott & Ashraf Mozayani, *Ethanol, in* DRUG FACILITATED SEXUAL ASSAULT: A FORENSIC HANDBOOK 85 (Marc A. LeBeau & Ashraf Mozayani eds., 2001).
[9] Although many of the same principles apply when the victim is involuntarily intoxicated, that is not the focus of this monograph. For resources on prosecuting cases where the victim is involuntarily intoxicated, please see AMERICAN PROSECUTORS RESEARCH INSTITUTE, THE PROSECUTION OF ROHYPNOL AND GHB RELATED ASSAULTS. The manual can be requested from the National Center for the Prosecution of Violence Against Women (NCVPAW) at ncpvaw@ndaa.org or 703-549-9222.
[10] Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27(2) ALCOHOL RES. & HEALTH 186 (2003), *available at* http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm.
[11] Patrick Harding, *Interpretation of Alcohol Results*, *in* ALCOHOL TOXICOLOGY FOR PROSECUTORS: TARGETING HARDCORE IMPAIRED DRIVERS 8 (American Prosecutors Research Institute ed., 2003); *see* Garriott, *supra* note 8, at 77.
[12] Harding, *supra* note 11, at 8.
[13] Garriott, *supra* note 8, at 83.
[14] Harding, *supra* note 11, at 8.
[15] Garriott, *supra* note 8, at 79.
[16] Garriott, *supra* note 8, at 90.
[17] Abbey et al., *supra* note 3.
[18] *Id.* at 815. "[V]ictim drinking was related to less offender aggression, possibly because force was not needed to complete rape of a drinking victim." Sarah E. Ullman, George Karabatsos, &

Mary P. Koss, *Alcohol and Sexual Assault in a National Sample of College Women*, 14(6) J. INTERPERSONAL VIOLENCE 621 (June 1999).

19 Garriott, *supra* note 8, at 77.

20 Garriott, *supra* note 8, at 83. Eighty-two percent of people twelve and older have used alcohol at least once in their lifetimes and nearly half of all Americans twelve and older (approximately 109 million people) have used alcohol during the past month. NATIONAL CLEARINGHOUSE FOR ALCOHOL & DRUG INFORMATION, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2(1) SUBSTANCE ABUSE IN BRIEF (April 2003).

21 The process for filing charges varies by jurisdiction. In some jurisdictions, the police file charges, while in other jurisdictions, the prosecutor has the power to file charges. This section is written as though the prosecutor is the decision maker in the charging process; however, the analysis remains the same regardless of whether the prosecutor, the police officer, or a combination of the two make the decision.

22 Probable cause is the ethical standard attorneys must follow with respect to charging decisions. *See, e.g.*, Rule 3.8(a), Model Rules of Professional Conduct. "The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

23 Please see state specific law as each state has its own charges. These three theories were determined by surveying the nation's rape statutes.

24 This type of rape may fall under the definition of "physically helpless."

25 Note that there are additional types of rape; however, this monograph focuses on sexual assault of the voluntarily intoxicated victim.

26 Patricia A. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 137 (2002).

27 The term "real rape" was originally defined by Susan Estrich as the stereotype of an assault committed by an armed stranger with a great deal of force. SUSAN ESTRICH, REAL RAPE (1988).

28 Ilene Seidman & Susan Vickers, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice Symposium: The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 485-86 (2005).

29 MCCORMICK ON EVIDENCE 342 (Kenneth S. Broun et al. eds., 6th ed. 2006).

30 *Id.*

31 *Id.*

32 Note that some states have statutes making it a crime to have intercourse with a person who is mentally defective but it is unlikely that a person will fall into this category due to intoxication.

33 *See, e.g.,* Arizona: A.R.S. §§ 13-1401 and 13-1406; Illinois: 720 Ill. Comp. Stat. 5/12-13; Kansas: K.S.A. § 21-3502; Maine: 17-A M.R.S. § 109; Missouri: R.S.Mo. §§ 566.040 and 566.061; and Wisconsin: Wis. Stat. § 940.225.

34 *See, e.g.,* Arkansas: A.C.A. §§ 5-14-101 and 5-14-103; Colorado: C.R.S. § 18-3-40; Illinois: 20 IL Comp. Stat. § 51/12-13; Iowa: Iowa Code 709.1l; Montana: M.C.A. §§ 45-2-101 and 45-5-502; Nebraska: R.R.S. Neb. § 28-319; Nevada: N.R.S. 200.366; New Mexico: NM Stat. § 30-9-10; New York: NY CLS Penal § 130.05; South Dakota: S.D. Codified Laws § 22-22-7.2; Virginia: VA Code §§ 18.2-61 and 18.2-67.10; Washington: ARCW § 9A.44.060. Note that a number of states require that the substance be administered to the person without the person's consent in order to find that the person was mentally incapacitated. *See, e.g.*, Arkansas: A.C.A. §§ 5-14-101 and 5-14-103; Hawaii: HRS § 707-731; Kentucky: K.R.S. § 510.050; Maryland: Md. Criminal Law Code Ann. §§ 3-301 and 3-304; Minnesota: Minn. Stat. §§ 609.341 and 609.342

35 *See, e.g.,* Alabama: Code of Ala. §§ 13A-6-60 and 13A-6-61; Arkansas: A.C.A. §§ 5-14-101 and 5-14-103; Colorado: C.R.S. §§ 18-3-401 and 18-3-402; Connecticut: Conn. Gen. Stat. 53a-

67 and 53a-71; Florida: Fla. Stat. 794.011; Kansas: K.R.S. § 510.040; Maine: 17-A M.R.S. 255-A; Maryland: Md. Criminal Law Code Ann. §§ 3-301 and 3-304; Michigan: MCLS § 750.520a; Minnesota: Minn. Stat. §§ 609.341 and 609.342; Mississippi: Miss. Code §§ 97-3-95 and 97-3-97; Montana: M.C.A. §§ 45-2-101 and 45-5-502; Nebraska: R.R.S. Neb. § 28-319; New Hampshire: R.S.A. 632-A:2; New Jersey: NJ Stat. 2C:14-2; New Mexico: NM Stat. § 30-9-10; Nevada: N.R.S. 200.366; New York: NY CLS Penal § 130.35; North Carolina: N.C. Gen. Stat. 14-27.5; Oklahoma: 21 Okl. St. 1111; Oregon: ORS 163.427; Pennsylvania: 18 Pa.C.S. § 3121; Rhode Island: R.I. Gen. Laws §§ 11-37-1 and 11-37-2; Tennessee: Tenn. Code 39-13-501 and 503; Texas: Tex. Penal Code § 22.011; Utah: Utah Code Ann. §§ 76-5-402 and 66-5-406; Washington: ARCW § 9A.44.060; West Virginia: W. VA. Code §§ 61-8B-1 and 61-8B-4; and Wyoming: Wyo. Stat. § 6-2-302.

36 *See, e.g.*, R.R.S. Neb. § 28-319 and Wis. Stat. § 940.225.

37 For a discussion of sexual assault when the victim has been surreptitiously intoxicated, *see* THE PROSECUTION OF ROHYPNOL AND GHB RELATED ASSAULTS, *supra* note 9.

38 This chart is based upon Kentucky law. "A person is guilty of rape in the first degree when [h]e engages in sexual intercourse with another person who is incapable of consent because he is physically helpless." K.R.S. § 510.040. "Physically helpless means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act. Physically helpless also includes a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug." K.R.S. § 510.040.

39 MICHAEL RAND & CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *How Much Violence Against Women Is There?* VIOLENCE AGAINST WOMEN AND FAMILY VIOLENCE: DEVELOPMENTS IN RESEARCH, PRACTICE AND POLICY 8 (NCJ 199701) (Bonnie S. Fisher ed., 2004), *available at* http://www.ncjrs.gov/pdffiles1/nij/199702.pdf.

40 Abbey et al., *supra* note 2.

41 Antonia Abbey et al., *Sexual Assault and Alcohol Consumption: What Do We Need to Know About Their Relationship and What Kinds of Research Are Still Needed?*, 9 AGGRESSION & VIOLENCE BEHAVIOR 271-303 (2004).

42 Abbey et al., *supra* note 2, at 44.

43 "[H]eavy drinkers may routinely use alcohol as an excuse for engaging in socially unacceptable behavior, including sexual assault." Abbey et al., *supra* note 2, at 46.

44 Trial techniques for dealing with this issue are discussed in **Step 3: Trial**.

45 *See* **Step 3: Trial** – Other Bad Acts.

46 To prove that a defendant is guilty of rape or sexual assault, a prosecutor does not need to corroborate a victim's testimony. For example, 18 PA. C.S.A. § 3106 (2006) provides:

> The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

This section parallels § 213.6(5) of the Model Penal Code.

47 "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." FED. R. EVID. 602 (Lack of Personal Knowledge, in pertinent part).

48 For example, the prosecution can use circumstantial evidence, which is evidence other than direct eyewitness testimony. "Circumstantial evidence also may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired

conclusion." MCCORMICK, *supra* note 29, at 308.

49 "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." FED. R. EVID. 601 (General Rule of Competency).

50 *See* MCCORMICK, *supra* note 29, at 80.

51 *See* Commonwealth v. Rouchie, 7 A.2d 102, 107 (Pa. Super. Ct. 1939).

52 MCCORMICK, *supra* note 29, at 80.

53 The prosecutor may not be able to prove every element of the crime if the victim is unable to remember.

54 White, *supra* note 10.

55 *Id.* at 194.

56 Kim van Oorsouw et al., *Alcoholic Blackout for Criminally Relevant Behavior* 32 J. AM. ACAD. PSYCHIATRY L. 364 (2004).

57 Brian Hatzler & Kim Fromme, *Fragmentary Blackouts: Their Etiology and Effect on Alcohol Expectancies,* 27(4) ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 628-637 (April 2003).

58 *Id.* at 547.

59 *Id.*

60 The diagram depicts the major categories of evidence. Note that other types or categories of evidence may exist.

61 *See* JENNIFER LONG, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS (American Prosecutors Research Institute, 2007). To request a copy, please contact the National Center for the Prosecution of Violence Against Women at ncpvaw@ndaa.org or 703-549-9222.

62 Joanne Archambault, Trinka Porrata, & Peter Sturman, *Investigating DFSA Cases, in* DRUG-FACILITATED SEXUAL ASSAULT 271 (Marc A. LeBeau & Ashraf Mozayani eds., 2001).

63 *Id.* at 270.

64 "In a pretext phone call the investigating officer arranges for the victim to telephone the suspect and attempts to elicit evidence or other incriminating information from him while the investigator tapes the call." PROSECUTION OF ROHYPNOL, *supra* note 9, at 11.

65 Victim advocates can assist and support the victim in cases when pretext phone calls are used, both during the phone call and at trial when the tape is used as evidence.

66 Jury nullification occurs when the defense elicits evidence or suggests that the jury should acquit the defendant for reasons other than legally recognized defenses.

67 To ensure that the evidence enables them to conduct an offender-focused prosecution, prosecutors should train police to conduct offender-focused investigations in rape cases. For more information, please contact the National Center for the Prosecution of Violence Against Women at ncpvaw@ndaa.org or 703-549-9222.

68 The discussion of offender-focused prosecution is taken, in large part, from the following publication: Teresa Scalzo, *Overcoming the Consent Defense*, 1(7) THE VOICE (2006).

69 SHANNAN M. CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2005 10 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv04.pdf.

70 In a study that assessed 1,882 men for acts of interpersonal violence, 120 of the men self-reported acts that met the legal definitions of rape or attempted rape but were not prosecuted by criminal justice authorities. "A majority of these men, 80.8%, reported committing rapes of women who were incapacitated because of drugs or alcohol; 17.5% reported using threats or overt force in attempted rapes; 9.2% reported using threats or overt force to coerce sexual intercourse and 10% reported using threats or overt force to coerce oral sex." David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) VIOLENCE & VICTIMS 78 (2002).

71 "Exit strategy" refers to the defendant's plan for getting away with the crime. It includes steps he took to keep the victim quiet and to destroy evidence, as well as anything else done to preclude getting caught.

72 The prosecutor could then argue that this was the perfect crime because the victim was unable to resist and unlikely to remember.

73 *See, e.g.*, FED. R. EVID., Rule 412 (Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition).

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

74 A sample motion can be obtained from NCPVAW's Prosecution Toolkit at http://www.ndaa.org/phpdocs/prosecution_toolkit.html.

75 MCCORMICK, *supra* note 29 at 80.

76 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of the evidence it intends to introduce at trial." FED. R. EVID. 404(b).

77 A SART should include prosecutors, police officers, victim advocates, and Sexual Assault Nurse/Forensic Examiners, among others. These allied professionals must be involved from the

beginning of the case. If a SART does not exist in your community, consider starting one.

78 SANE programs have different names, including Sexual Assault Forensic Examiner Program. For the purpose of this article, the abbreviation SANE is used.

79 The public setting, the presence of the offender and the difficulty of cross-examination may be very stressful and can return a victim to a state of crisis. Robert R. Hazelwood & Ann Wolbert Burgess, PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH 39 (3rd ed. 2001). Looking at the perpetrator may remind a sexual assault victim of the circumstances underlying the crime and may thereby produce psychological trauma. Richard P. Wiebe, *The Mental Health Implications of Crime Victims' Rights, in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS OF THERAPEUTIC JURISPRUDENCE 216 (David B. Wexler & Bruce J. Winnick eds., 1996).

80 Many experts believe that having the prosecutor play the role of the cross-examiner may subconsciously confuse the victim and damage the rapport between the victim and the prosecutor.

81 If the prosecutor intends to introduce any statements through this witness, he or she should be prepared to overcome potential hearsay objections.

82 In 2005, seventy-three percent of rapes/sexual assaults against women were perpetrated by someone known to the victim. CATALANO, *supra* note 69. Ninety percent of college women who are victims of rape or attempted rape know their assailant. BONNIE S. FISHER, FRANCIS T. CULLEN, & MICHAEL G. TURNER, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 17 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

83 Abbey et al., *supra* note 2, at 46.

84 Prosecutors can analogize the defendant to Dr. Jekyll and Mr. Hyde.

85 From 1992-2000, approximately sixty-seven percent of victims of completed rapes sustained no physical injury other than the rape itself, and only five percent sustained severe physical injuries. RENNISON, *supra* note 6.

86 If the court will not accept the medical person who performed the exam as an expert, bring in a separate medical expert to explain the victim's injuries or lack thereof.

87 NATIONAL RESEARCH COUNCIL, *supra* note 4, at 77.

88 *See* LONG, *supra* note 61.

89 Sixteen percent of rape victims report being raped to the police. Approximately twenty-five percent of the rapes reported were reported over twenty-four hours after the assault. NATIONAL VICTIMS CENTER & CRIME VICTIMS RESEARCH & TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION (1992).

90 The National College Women Sexual Victimization Survey showed that almost half of the women who were characterized as victims of a completed rape did not consider themselves to be victims of rape. RAND, *supra* note 39.

91 Do not use an advocate who has worked with the victim. Instead, consider calling an advocate from the state coalition or another local rape crisis center.

92 MCCORMICK, *supra* note 29 at 341.

93 KIM ENGLISH, SUZANNE PULLEN & LINDA JONES, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, *Managing Adult Sex Offenders in the Community – A Containment Approach*, RESEARCH IN BRIEF 2 (January 1997), *available at* http://www.ncjrs.gov/pdffiles/sexoff.pdf.

94 *Id.*

95 *Id.*

96 Abbey et al., *supra* note 2, at 46.

97 Prior to utilizing this line of cross-examination, determine whether a 404(b) other bad acts motion will need to be filed.

98 Abbey et al., *supra* note 2, at 45.

99 Abbey et al., *supra* note 2, at 45.

100 Abbey et al., *supra* note 2, at 44.
101 Abbey et al., *supra* note 2, at 46.
102 NATIONAL RESEARCH COUNCIL, *supra* note 4, at 56.
103 Abbey et al., *supra* note 2, at 46.
104 NATIONAL RESEARCH COUNCIL, *supra* note 4, at 55.
105 *See* Ragsdale v. State, 23 P.3d 653 (Alaska 2001). In *Ragsdale*, the court held that the proposed defense expert, an outpatient alcohol counselor, was not qualified to give expert testimony on the topic of alcoholic blackouts. The proposed expert did not have expertise in diagnosing whether a person might have been experiencing an alcoholic blackout based upon the individuals' alcohol consumption or behavior.
106 *Id.*
107 White, *supra* note 10, at 187.
108 White, *supra* note 10, at 187, Figure 1.
109 Robert P. Granacher, Jr., MD, *Commentary: Alcoholic Blackout and Allegation of Amnesia During Criminal Acts*, 32 J. AM. ACAD. PSYCHIATRY LAW 371-72 (2004).
110 Karen M. Jennison & Kenneth A. Johnson, *Drinking-Induced Blackouts among Young Adults: Results from a National Longitudinal Study* 29(1) INT'L J. OF ADDICTIONS 23, 24 (1994).
111 Elvin Morton Jellinek, *Phases in the Drinking History of Alcoholics: Analysis of a Survey Conducted by the Official Organization of Alcoholics Anonymous* 7:1 Q.J. STUD. ALCOHOL 88 (1946).
112 White, *supra* note 10, at 188.
113 van Oorsouw, *supra* note 56, at 365. Note that later studies show that twenty-five percent of "healthy college students report being familiar with alcoholic blackouts." *Id.*
114 *See* van Oorsouw, *supra* note 56, at 369.
115 White, *supra* note 10, at 189.
116 van Oorsouw, *supra* note 56, at 365.
117 van Oorsouw, *supra* note 56, at 365.
118 Aaron M. White et al., *Experiential Aspects of Alcohol-Induced Blackouts Among College Students*, 30(1) AM. J. OF DRUG & ALCOHOL ABUSE 205 (2004).
119 White, *supra* note 10, at 186, 194.
120 Jennison, *supra* note 110, at 25.
121 van Oorsouw, *supra* note 56, at 364, 370.
122 White et al., *supra* note 118, at 205, 216.
123 Jennison, *supra* note 110, at 23, 24.
124 Jennison, *supra* note 110, at 26.
125 van Oorsouw, *supra* note 56, at 369.
126 Ensure that this witness has a sufficient background in pharmacology to testify about the effects of alcohol.
127 Garriott, *supra* note 8.

APPENDIX A

Sample Voir Dire Questions for a Sexual Assault Trial

The following questions should be asked in a sexual assault case in conjunction with standard voir dire questions. Select the categories and questions that are pertinent to the issues in your case. The questions should be made specific to the facts of your case.

Graphic Nature of Crime/Discussion of Sex

Graphic Nature of Crime:

Will you have any difficulty sitting and listening to testimony concerning matters of a graphic sexual nature and then discussing it with other members of the jury?

Sexual Words:

During the course of this trial, it will be necessary to ask graphic questions, discuss sexual issues, and use words like "penis" and "vagina." Bearing in mind that sex is not something talked about very easily, especially in public, do you think that you would have any problem listening to the testimony?

Prior Victimization or Accusation:

Have you, a close friend, or a family member ever been accused of a sexual assault? Have you, a close friend, or a family member even been the victim of a sexual assault? (Note: If a juror answers yes to this question, ask to discuss the response privately at sidebar, if possible.)

Questions Related to Alcohol

Trauma:

Do you believe that it is less traumatic to be raped when a person is unconscious rather than when a person is awake?

Do you believe that it is less traumatic to be raped when you have memory lapses or an incomplete memory of the rape?

Drinking:

Is there anyone here who does not drink alcohol? Is there anyone here who has a problem with people who drink alcohol? In this case, you will hear that the victim was drinking prior to being raped. Is there anyone here who would have a problem listening to and evaluating testimony from a victim who was drinking around the time the rape occurred?

If a woman gets drunk, does she assume the risk of rape?

Do you think that if a woman drinks, she is indicating that she is available for sex?

Note: When a juror responds that a behavior indicates that a woman is available for sex, follow up by asking: Does a man have a right to expect sex? If so, is it acceptable to use physical force?

Hanging Out in a Bar:

You will hear that the victim met the defendant when she was hanging out in a bar. Is there anyone here who would have a problem with that?

Do you think that a woman who hangs out in a bar is indicating that she is available for sex?

Blackout vs. Pass Out:

If the victim says that she was unconscious during all or part of the rape due to intoxication, will you automatically disbelieve her testimony?

If the victim testifies that there are minor details which she cannot remember due to intoxication, will you automatically disbelieve her testimony?

If the Defendant's Voluntary Intoxication is a Defense or Otherwise Admissible at Trial:

Should a defendant be excused because he was also drunk?

If the judge instructs you that voluntary intoxication is not a defense, will you be able to put aside your bias and follow the law?

Overcoming the Five Most Common Rape Myths

Myth #1 – Only strangers rape.

Defendant's Appearance:

What does a rapist look like?

Can you tell a rapist by looking at him?

The judge will tell you that your verdict is not to be based upon sympathy for the defendant. Is there anyone here who would have a problem finding the defendant guilty if he does not fit the image of a rapist?

Disagreement with the Legal Definition of Rape:

The judge will define sexual assault (or rape) for you. If the judge gives you a definition that is different than your definition, will you have a problem accepting the judge's definition?

Prior Relationship Between Victim and Defendant:

In this case, you will hear that the victim was dating the defendant prior to the sexual assault. Without having heard any of the evidence, does it concern you that the victim had a prior relationship with the defendant?

Will you be inclined to find that the victim is not credible simply because she was dating the defendant at the time of the incident?

Myth #2 – Rapists always use weapons and cause physical injury. All victims resist.

Necessity of Weapon:

In this case you will hear that no gun or knife was used. In other words, you will hear that no traditional weapon was used. Do you understand that sexual assault can happen without a traditional weapon? Is there anyone who disagrees with this?

Necessity of Injury:

In this case, you will hear that the victim was not seriously physically

injured. Is there anyone here who will have a problem with the case because of this? Is there anyone here who believes that if a woman is not seriously physically injured, then she was not raped? Is there anyone here who will have a problem finding the victim credible simply because of this?

Necessity of a Certain Minimum Amount of Force in Order To Convict:
Is there anyone here who believes that a certain minimum amount of physical force must be present in order for the defendant to be guilty of rape?

Myth #3 – Victims behave in certain ways.
If the victim's behavior before, during, or after the rape is not what you would expect from someone who has been raped, will you automatically disbelieve her?

• Behavior During the Rape
Do you expect the victim of a rape to behave in a certain way during the rape?
Expectation of Resistance:
The judge will instruct you that a victim is not required to physically resist a defendant's advances. Is there anyone here who believes it is his/her job to decide whether a victim should resist a defendant's advances? Is there anyone here who would not be able to convict the defendant unless the victim put up a good fight?

• Behavior After Rape
Prompt Complaint:
You will hear that the victim did not report the sexual assault to the police immediately. She will explain the reason for the delay to you. Is there anyone here who would have a problem finding the defendant guilty because the victim did not report the sexual assault to the police immediately?

Can follow up with:
Would you be committed to hearing the victim's reasons for the delay before you evaluate her credibility?

Other questions should also be asked about any other behaviors that do not fit society's beliefs about how a rape victim should behave after a rape.

For Example: You will hear that the victim allowed the defendant to drive her home after the rape. She will tell you that the assault occurred on a deserted road and she had no idea where she was. She will also tell you that allowing the defendant to drive her home appeared to be the only viable option at the time. Is there anyone here who would have a problem with this case because the victim allowed the defendant to drive her home after he raped her?

• **Behavior on the Witness Stand**
Do you have any opinion about how a rape victim should act or react when talking or testifying about the assault? If the victim's behavior during the trial is not what you would expect from someone who has been raped, will you automatically disbelieve her?

Myth #4 – Women lie about being raped.
Women Lie About Being Raped:
Do you know anyone who has ever lied about being raped?
No Eyewitnesses Other than Victim:
Rape is a crime of secrecy. There are hardly ever any eyewitnesses other than the victim. Is there anyone here who would have a problem finding the defendant guilty because the only eyewitness is the victim?
Corroboration:
The law allows you to find a defendant guilty based upon the testimony of one person alone. In other words, the State can prove its case by presenting only one witness. In this case, you will hear the victim's testimony that the defendant (briefly summarize facts). Is there anyone who would have difficulty finding the defendant guilty without more than one witness to the crime?

The judge will tell you that there is no requirement that the victim's testimony be corroborated. Despite that, do you believe that it is necessary that the victim's testimony be corroborated by additional evidence?

Is there anyone here who would have difficulty finding the defendant guilty without physical evidence?

Is there anyone here who would have difficulty finding the defendant guilty without medical evidence?

Myth #5 – Rape victims can assume the risk of being raped.
Prosecutors should identify any challenging facts that can be used to insinuate that the victim somehow "assumed the risk of being raped" and ask questions to to iensure that potential jurors will not hold these facts against the victim.

Is it ever acceptable to have sex with someone against his or her will?

Do you believe that under some circumstances a woman may deserve to be sexually assaulted?

Lack of Sympathy for Victim:

The law does not distinguish between victims. It merely looks at whether the victim consented or not. If you decide the case based upon your feelings for the victim, your verdict will not reflect the truth. Can you promise to decide the case based upon the evidence presented and not whether you like the victim or not?

Should a defendant get a "pass" in a rape case because he picks an unsympathetic victim?

Wearing Certain Clothing:

You will hear that the victim was wearing a very short skirt at the time she was raped. Is there anyone here who would have a problem with this case because of the way the victim was dressed? Is there anyone here who thinks that a woman who dresses in a certain way is asking to be raped?

Accepting a Ride or Date:

You will hear that the victim accepted a ride from the defendant (or a date). Is there anyone here who would have a problem with this case because the victim accepted a ride (or date) with the defendant?

Using Drugs:

You will hear that the victim was using drugs prior to being raped. Is there anyone here who would have a problem with the fact that the victim was using drugs? Is there anyone here who believes that when the victim used drugs, she assumed the consequences of whatever happened to her as a result?

Kissing (or Other Voluntary Sexual Actions):

You will hear that the victim voluntarily kissed the defendant. You will also hear that when he tried to have intercourse with her, she told him no. The testimony will show that the defendant disregarded the victim when she told him no and forced her to have intercourse against her will. Is there anyone here who thinks that by kissing the defendant, the victim consented to intercourse? Is there anyone here who thinks has a problem with the case because the victim voluntarily kissed the defendant?

Prior Consensual Contact:

You will hear that the victim and defendant had consensual sexual contact on an occasion prior to the date in question. Is there anyone here who would have a problem with this case because of that? Is there anyone here who thinks that a woman who has had prior consensual contact with a man cannot be raped by that man?

Going to Defendant's Apartment:

You will hear that the victim was in the defendant's apartment at the time of the sexual assault. Is there anyone here who would have a problem with this case because the alleged crime occurred in the defendant's apartment? Is there anyone here who thinks the victim consented to intercourse by going to the defendant's apartment?

Being a Prostitute (or Other Criminal Behavior):

You will hear that the victim in this case was a prostitute. She will tell you that she did not consent to have intercourse with the defendant. Is there anyone who has a problem with this case because the victim was a prostitute (or had a criminal record or committed some other crime that the jury will hear about at trial)? Does anyone believe that getting

raped is a risk that a prostitute assumes when she takes up that line of work?

Final Questions

Follow the Law:

Can you all agree that, regardless of your personal opinions about what the law ought to be, you will follow the law as the judge gives it to you?

Based upon the law as the judge gives it to you, if I prove all of the elements to you beyond a reasonable doubt, will you convict the defendant?

Any Other Reason:

If I prove to you beyond a reasonable doubt that the defendant committed the crime he is accused of, is there any reason you would not be able to find him guilty? Is there anyone here who could not?

For additional information, contact:

The National Center for the Prosecution of Violence Against Women
National District Attorneys Association
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APPENDIX B

Expert on Intoxication

Qualifications
The prosecutor must qualify the witness as an expert prior to any opinion testimony. For example, if the expert is going to opine about intoxication and the ability to consent, make sure that the witness' qualifications to do this are addressed.

In general, the following areas should be covered:
- Name
- Education (Accredited university?)
- Training
- Licenses
- Work experience (Accredited lab or hospital?)
- Publications (Peer-reviewed?)
- Teaching experience
- Awards/Professional recognition
- Prior expert testimony (Prosecution? Defense? Civil? Payment? Jurisdiction/Location?)
- Continuing education (Courses, Journals read, etc.)

Move curriculum vitae into evidence.

Forensic Toxicologist[126]

Note: These questions can be modified to comport with the law of the state. For example, a prosecutor may need to demonstrate that a victim was mentally incapable or physically helpless as opposed to showing that the person was too intoxicated to consent. The prosecutor should determine what the expert testimony is intended to prove.

- What is a forensic toxicologist?
- Have you ever had the opportunity to observe intoxicated people? Under what circumstances?

- How many times? In what capacity?
- Have you received any specialized training on evaluating whether a person is intoxicated?
- How were you able to tell that they were intoxicated? (Ensure that the expert lists signs of intoxication.)

In addition to general physical observations, can tests be conducted to determine whether a person is intoxicated?

- What are those tests?
  - Example: Ask the person's name, the date, the name of the current U.S. president, field sobriety tests, finger to nose test, etc.
  - What are you looking for when you conduct those tests?
  - Based on those tests, how can you conclude that a person is intoxicated?

Hypothetical:

- State the facts of the case that relate to the person's level of intoxication.
- Are you able to form an opinion to a reasonable degree of scientific certainty regarding whether the person in the hypothetical was intoxicated?
- In your opinion, was the person intoxicated?
- Are you able to form an opinion to a reasonable degree of scientific certainty about whether a person's decision-making abilities, processing of information, inhibitions, etc. would be affected by this level of intoxication?
- Would a person at that level of intoxication possess the mental capacity to consent to intercourse?
- How would this affect the person's ability to consent to intercourse based upon his/her intoxication?
  - Be cautious not to ask whether or not the person actually consented as this may invade the province of the fact finder. Make sure to check the law in your state when asking this question to ensure that it is phrased properly.
- What is your opinion?

Explain the effects of alcohol on a person. (Note: An alternative way to ask this is to have the expert explain the Dubowski stages of intoxication.[127])

- What is the effect on physical abilities?

• What is the effect on mental abilities?
Explain blood alcohol (BAC) to the jury.
• What is the relationship between a person's BAC and intoxication?
• Does alcohol affect everyone the same way?
• Explain the differences in how alcohol affects people.

Hypothetical:
Note: When using this hypothetical remember that BAC is not solely determinative of a person's level of intoxication. An inexperienced drinker can be much more intoxicated at a lower BAC than an alcoholic.

• Describe the facts of the case. Include victim's height, weight, gender, general state of health (note that body temperature has an effect on absorption) number and type of drinks consumed and over what time period, and what was eaten if known.
• Are you able to estimate this person's blood alcohol level (BAC)?
• How did you estimate that BAC? (Have the expert describe any calculations that were done in lay person's terms.)
At a BAC of _____, can you describe the effects of alcohol?
  • What would a person's mental abilities be at that BAC?
  • What would that person's emotional state be at that BAC?
In your opinion, to a reasonable degree of scientific certainty, would that person be intoxicated?
In your opinion, to a reasonable degree of scientific certainty, would that person be able to consent to intercourse?
  • Would that person, in other words, possess the mental capacity to consent to intercourse?

If attempting to prove that a witness was passed out and not blacked out:
• What is a blackout?
• Can alcohol cause blackouts?
• Are there different types of blackouts?
• Describe them.
• Do blackouts affect a person's ability to recall events? How so?
• How do you determine whether a person was blacked out?
• Is a blackout the same as being unconscious?
• Is it possible for a person to pass out from intoxication?

- Hypothetical:
  - Assume (the facts of the case). Is it possible that this person was "unconscious" at this level of intoxication?
  - How would you determine if the person was passed out vs. blacked out?

APPENDIX C

CROSS-EXAMINATION WORKSHEET

THEORY		
POINT	**POINT**	**POINT**
Supporting Facts	**Supporting Facts**	**Supporting Facts**

About the Author

Teresa Scalzo is the former director of the National Center for the Prosecution of Violence Against Women (NCPVAW) at the American Prosecutors Research Institute (APRI). Ms. Scalzo 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 oversaw the creation of the *National Institute on the Prosecution of Domestic Violence* and the *National Institute on the Prosecution of Sexual Violence*. She designed the curricula for *Evidence Based Prosecution* and *Sexual Assault Trial Advocacy* for the National Advocacy Center and the *Sexual Assault Prevention and Response Advanced Training for JAG Officers* (FY 06-03) for the Department of Defense Joint Task Force on Sexual Assault Response and Prevention. 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.

Ms. Scalzo served as a law clerk to the Honorable Jack A. Panella of the Northampton County Court of Common Pleas in Easton, Pennsylvania from 1993 to 1994. From 1994 until 1997, Ms. Scalzo served as an Assistant Public Defender in Northampton County and maintained a private law practice. From 1997 until October 2001, Ms. Scalzo was an Assistant District Attorney in Northampton County, Pennsylvania where she held various positions, including Chief of the Sexual Assault Unit and Coordinator of Police Training. As Chief of the Sexual Assault Unit, she drafted a protocol for investigating and prosecuting sexual assault cases and trained local police officers in the protocol and handling of sexual assault matters. Most recently, she served as the Policy Attorney for the National District Attorneys Association in Alexandria, Virginia.

Ms. Scalzo was an adjunct professor at the Fogelsville Campus of Penn State University where she taught in the paralegal program. Additionally, she was an adjunct professor at Northampton County Community College in the Criminal Justice Program.

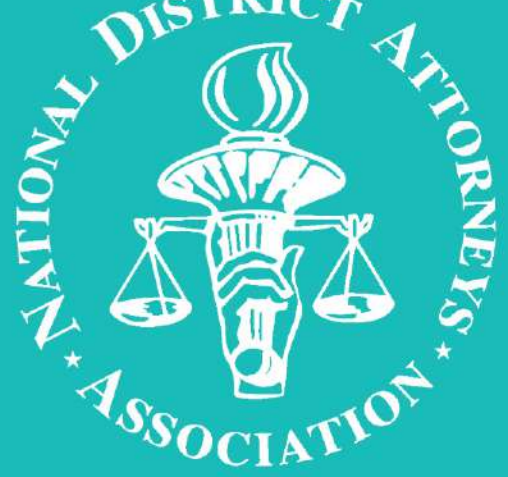
Ms. Scalzo is the author of *Preliminary Hearings: A Manual for Pennsylvania Prosecutors*, which was published by the Pennsylvania District Attorneys Association. She was a contributing author for the *Pennsylvania Benchbook on Crimes of Sexual Violence.* Additionally, she has authored numerous articles for *The Prosecutor*, the magazine of the National District Attorneys Association and *The Voice*, NCPVAW's newsletter.

In 2001, Ms. Scalzo received the Allied Professional Award for Outstanding Commitment to Victims' Services from the Crime Victims Council of the Lehigh Valley.

Ms. Scalzo graduated from Trinity College in Hartford, Connecticut with a major in economics and *cum laude* from Temple Law School in Philadelphia, Pennsylvania. She is a member of the Pennsylvania bar, the Eastern District of Pennsylvania bar and the Third Circuit Court of Appeals bar.



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