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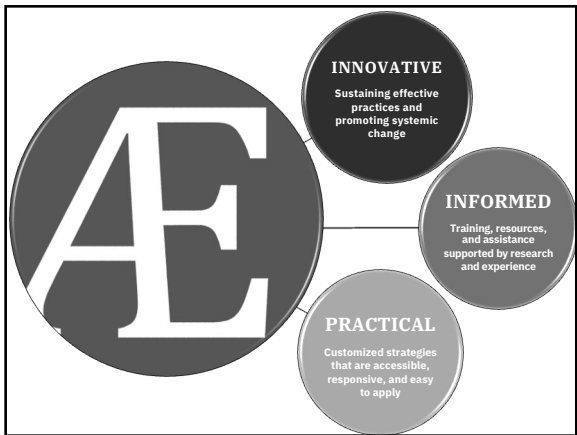
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What We Do	
<p><b>Resources</b> Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices</p>	<p><b>Consultations</b> Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions</p>
<p><b>Training Events</b> Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals</p>	<p><b>Partnerships &amp; Initiatives</b> Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training</p>

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## AEquitas Special Initiatives



**INNOVATIVE  
PROSECUTION  
SOLUTIONS**



**Model Response to**  
Sexual Violence for Prosecutors



**FIELD-GENERATED  
HUMAN TRAFFICKING**



**SAKI**  
SEXUAL ASSAULT  
KIT INITIATIVE  
Reform. Accountability. Justice.  
Prosecution Partner



**JUST EXITS**

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## Support

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## Acknowledgments

- Joyce Lukima, Chief Operating Officer, Pennsylvania Coalition Advancing Respect
- Patricia Frazier, PhD, Department of Psychology, University of Minnesota
- Victor Vieth, Chief Program Officer, Education & Research, Zero Abuse Project

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## Objectives

- 1. Recognize victim behaviors that may require explanation at trial.
- 2. Identify and prepare experts to educate factfinders about victim behaviors resulting from domestic and sexual violence.
- 3. Educate judges and juries about victim behaviors and dispel myths.

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## Understanding and Explaining Victim Behavior

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## 911 Call

- This is a recording of a 911 call from an actual case.
- Identifying information has been redacted.
- What victim behaviors are evident, based on the 911 tape?
- What victim behaviors might become an issue at trial in this case?

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## Questions

- What victim behaviors are evident, based on the 911 tape?
- What victim behaviors might not be understood by the jury?

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Why explain victim behavior?

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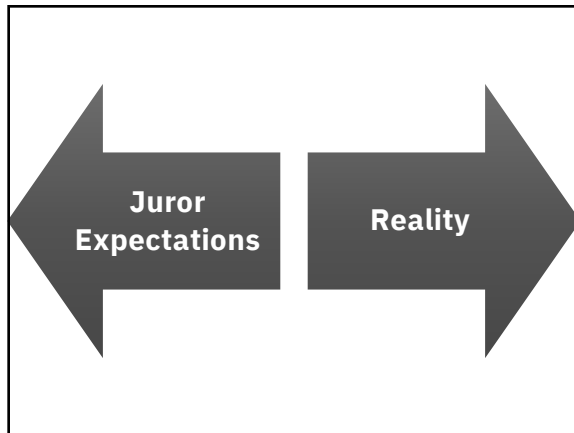
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Most Common Reactions to Sexual  
Assault Judged to be “Non-Intuitive”

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## Absence of Resistance

- Not screaming,
- Not yelling,
- Not shouting “no” during sexual assault, or
- Not fighting back

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## Delayed/Piecemeal Reporting

- The majority of sexual assaults are not reported immediately or in full detail.

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## “Non-Victim-like” Behavior in Aftermath

- Reactions do not match the stereotypes.

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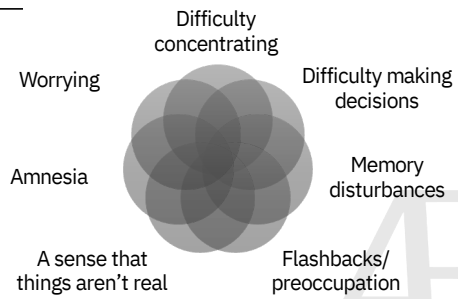
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## Common Cognitive Reactions



Common reactions to traumatic events, MITMEDICAL,  
<http://medweb.mit.edu/mentalhealth/mh-reactions.html>.

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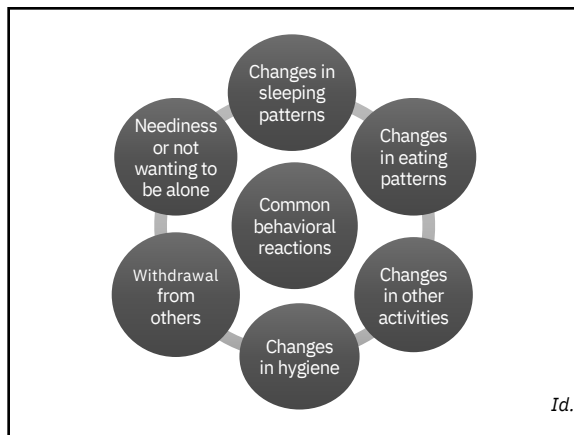
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*Id.*

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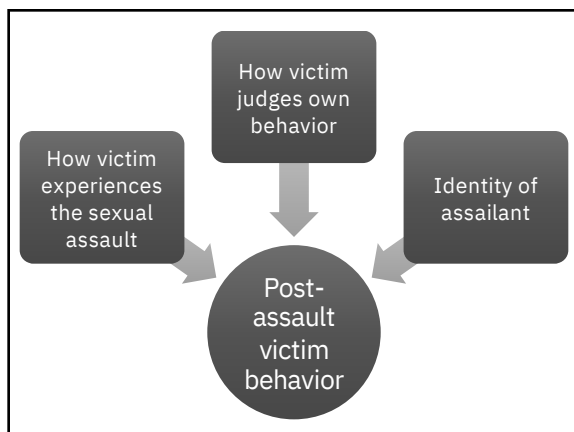
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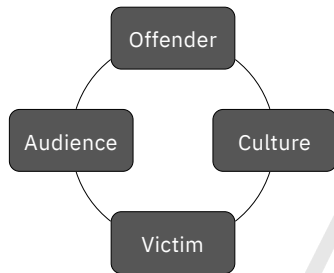
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## Victim's Context is Defined By:



**BEFORE, DURING, AND AFTER ASSAULT**

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## Memory

- Memories of rape rated as less clear and vivid than memories of other intense life experiences.
- Others also rated rape narratives as disorganized.
- In 17 studies of memories of traumatic events, there were inconsistencies over time in all studies.

M. P. Koss et al., *Traumatic memory characteristics: A cross-validated mediational model of response to rape among employed women*, 105(3) J. ABNORMAL PSYCH. 421 (1996);  
S. L. Halligan et al., *Posttraumatic stress disorder following assault: The role of cognitive processing, trauma memory, and appraisals*, 71(3) J. CONSULTING & CLINICAL PSYCH. 419 (2003); LIZ KELLY ET AL., *A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES* (2005).

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## Previous Trauma

- Survivors may have been **victimized multiple times**.
  - Many experience physical/sexual abuse as children.
- Survivors may have experienced **more than one form of abuse** as an adult.
- An estimated **68%** of women who have been **physically assaulted** by an intimate partner have been **sexually assaulted as well**.

JUDITH MCFARLANE, & ANN MALECHA, *SEXUAL ASSAULT AMONG INTIMATES: FREQUENCY, CONSEQUENCES, AND TREATMENTS* (2005)

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## Survivor Vignette

Lindsey

DVD: Virtual Practicum

(Int'l Ass'n of Forensic Nurses 2008)

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## Vignette Discussion

### Questions

- How will the defense frame this disclosure?
- How will you frame the disclosure in an offender-focused way?
  - I.e., What did suspect do to cause challenges?
- What are the areas for follow-up investigation? What can you corroborate?

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## Admissibility of Victim Behavior Expert (VBE) Testimony

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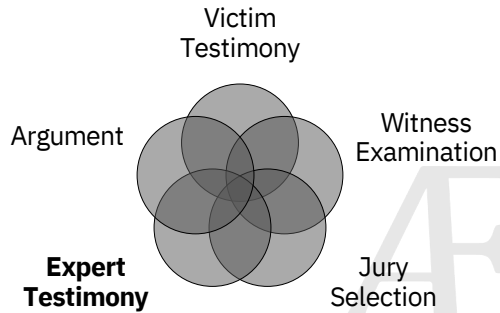
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## Educating Fact Finder



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## Legal Analysis



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## Evidence is Relevant if...

K.S.A. 60-401(b)

- It has “any tendency in reason to prove any material fact.”

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## Demonstrating Relevancy

- Jurors' beliefs in myths recognized in legal and social science literature.
- Subject matter is beyond ken and understanding of jurors.
- Left unaddressed, jurors will be without proper context to judge victim behavior.

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## CSI Effect

Based on our findings, jurors were more likely to find a defendant guilty than not guilty even without scientific evidence if the victim or other witnesses testified, except in the case of rape.

Honorable Donald E. Selton, *The 'CSI Effect': Does It Really Exist?*, 259 NAT'L INST. JUST. J. 1 (2008), <http://www.ojp.usdoj.gov/nij/journals/259/csi-effect.htm#note1>.

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“Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning.”

Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 (5/6) SEX ROLES 385 (2005).

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## Social Science

- Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 BRIT. J. CRIMINOLOGY 363 (2009).
- Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202 (2009).

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Proper  
Subject of  
Expert  
Testimony

Beyond the common  
ken and understanding  
of the average juror

Reliable

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## Testimony in form of opinion or inferences K.S.A. 60-456

- b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by **knowledge, skill, experience, training** or education may testify thereto in the form of an opinion **or otherwise** if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) **the witness has reliably applied the principles and methods to the facts of the case.**
- c) Unless the judge excludes the testimony, the judge shall be deemed to have made the finding requisite to its admission.
- d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

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## State v. Gaona

208 P.3d 308 (Kan. Ct. App. 2009)

- Defense objected to child forensic interviewer being qualified as expert witness in behavior of sexually abused children because of lack of training to diagnose mental disorders.
- Court of Appeals found her admissible as expert witness under K.S.A. 60-456(b)
- Her expertise was offered for general discussion of behavioral traits. NOT a medical diagnosis of specific victim.

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## Reliably Applying “Principles and Methods to Facts of Case”

- Experts can give opinion on ultimate issue, but cannot pass on weight or credibility of witnesses.

*State v. Ulate*, 219 P.3d 841, 848 (Kan. Ct. App. 2009).

- VBE who has directly or indirectly worked with victim or familiar with facts creates risk of bolstering.
- VBE discussing general victim behaviors and reactions relevant to case is applying principles and methods to facts of case.

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## Using Expert Witnesses

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What do you imagine when you think of an Expert Witness?

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Deciding Whether to Use an Expert

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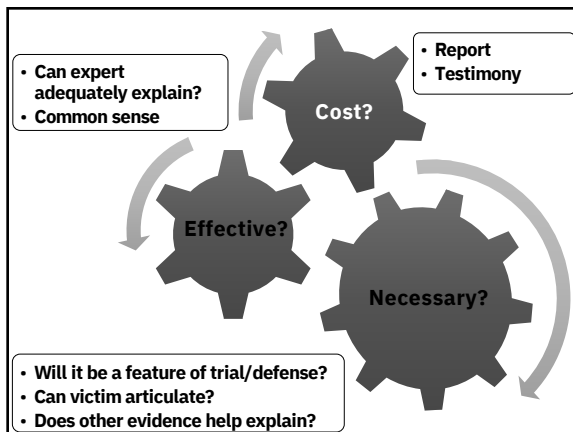
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## Expert Testimony



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Who may serve as an appropriate expert witness?

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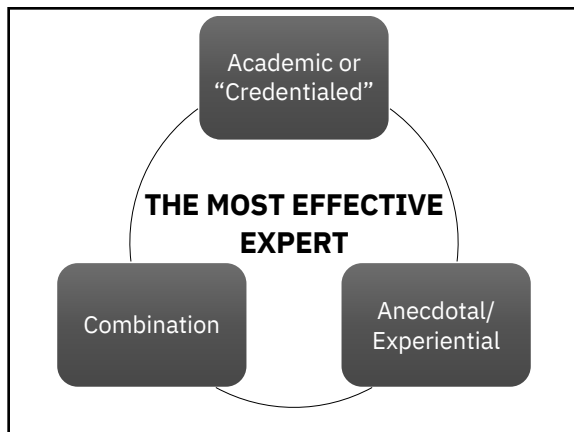
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## Testifying vs. Consulting Expert

Testifying	Consulting
<ul style="list-style-type: none"> <li>• Has not met victim</li> <li>• Is not diagnosing victim as rape or trafficking victim</li> <li>• Knows little of case facts</li> <li>• Only educating judge/jury on victim behavior/responses to trauma</li> </ul>	<ul style="list-style-type: none"> <li>• Ideally different from trial expert</li> <li>• Can review discovery and "connect the dots"               <ul style="list-style-type: none"> <li>◦ Trial expert should not review discovery, but will be provided appropriate information</li> </ul> </li> </ul>

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## Expert Qualifications

- Clinical experience
- Direct victim service
- Education
- Knowledge of relevant articles
- Authorship of articles
- Prior qualification

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## Selecting an Expert

At trial, avoid using advocates from your jurisdiction or who have worked with your victim.

- Conflicts of interest
- Confidentiality
- Bias

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## What is the behavior to be addressed?

What's "beyond the ken" of the average juror?

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## How to Identify the Behavior



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### Victim Behavior and Responses to Address at Trial

- Victim demeanor/affect not conforming to stereotypes
- Delayed/piecemeal disclosure
- Disclosure gaps/inconsistencies
- Minimizing/risk-taking post-victimization behavior
- Recantation/Minimization
- Others...

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### Other Dynamic Impacts on Victim Response

- Pre-existing or intimate partner relationship with offender
- Domestic violence victimization
- Victim's drug/alcohol use
- Cultural background and special/marginalized population issues

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### Terms to Avoid

- Post-Traumatic Stress Disorder (PTSD)
- Rape Trauma Syndrome
- Battered Woman (or Person) Syndrome
- Neurobiology of Trauma

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## The Danger Zones

Expert Witness Cannot Testify

Whether Victim is Telling the Truth  
(Applies to Both Sides)

That Victim's Statements are Reliable

To Accused's Guilt or Innocence

That Perpetrator Does/Does Not  
Fit Profile of Rapist

Statistics on Truthfulness/False Allegations

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## Preparing Expert Testimony for Trial

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## Updated Curriculum Vitae

Include all education, training, and  
experience:

- Other relevant work
- Previous testimony as expert
  - Prepare expert to be questioned in detail about CV
  - Will be sent out in discovery
  - Expect to be questioned about it

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## Prepare a Report

- Summarize anticipated testimony on relevant areas of victim behavior
- Reference articles routinely relied on regarding victim behavior
- Attach CV
- Report will be provided to other party

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## Professionalism

- Expert should be available to the defense.
  - Enhances credibility
  - Previews defense theories
- Avoid vulnerabilities.
  - Social media
  - Familiarity with recent research
  - Demeanor during cross-examination
  - Attire
- Do not opine on issues outside of expertise.

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## Shortly Before Trial

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## Expert:

Prepare with Prosecutor

- Review qualification questions.
- Determine most effective direct examination questions.
- Discuss expected areas of cross-examination and possible responses.
- Do NOT attempt to memorize.

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## What Prosecutor Should Understand About VBEs

### Qualifications

- Possible challenges
- Discuss which areas to highlight
- Review facts such as number of victims assisted

### Subject

- Not an “expert in counterintuitive behavior”
- Possible areas of qualification
- Generally no “diagnosis”

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## Pre-Trial Motion to Admit

- Ideally, filed well in advance; may require hearing.
- Expert should be prepared to testify if needed.
- Discuss any restrictions on scope of testimony at trial.

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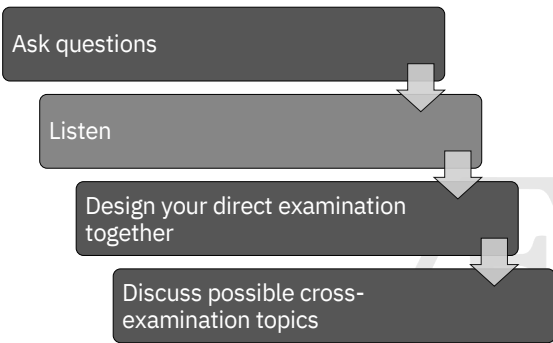
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## Preparing with the Expert



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## Presenting the Testimony

Nothing ever goes as planned!

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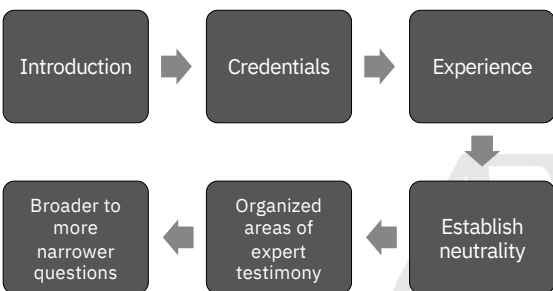
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## Create Roadmap



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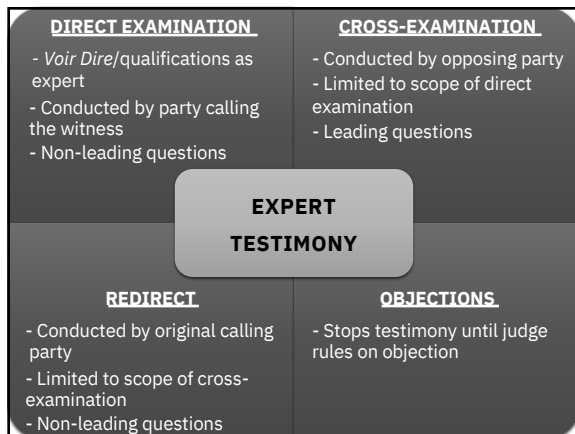
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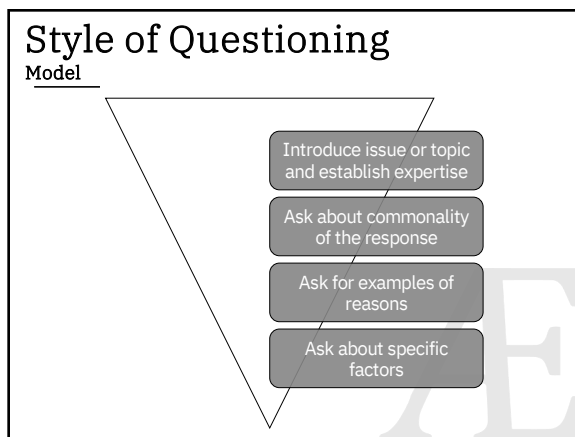
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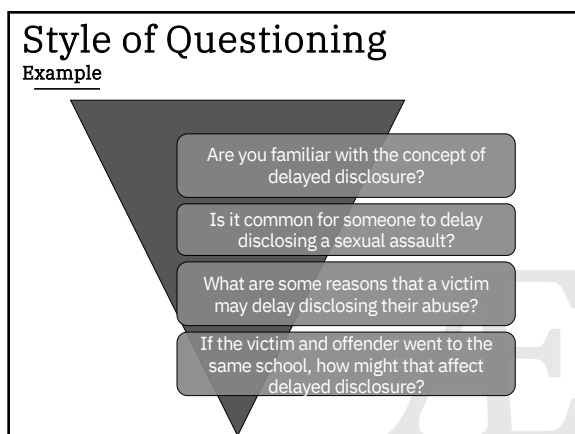
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# Use of Demonstratives

## Model

Introduce the demonstrative exhibit and ask the expert to identify it

Ask expert how it is used

Ask the expert questions to generally explain the exhibit

Ask specific questions and overlay case-specific facts

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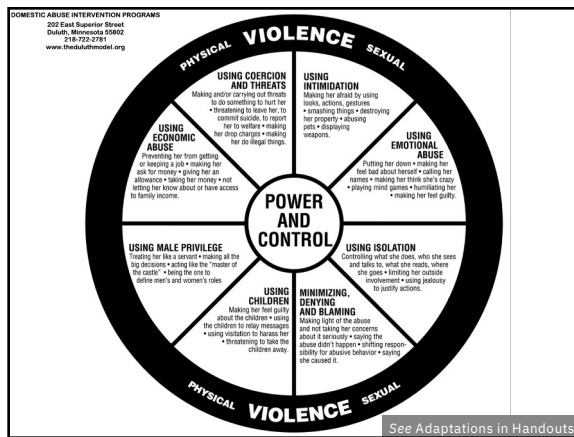
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# Use of Demonstratives

## Model

I'm showing you Demonstrative Exhibit A; do you recognize it?

Can you tell the jury what this is and how it's used?

I want to ask you about the spoke, "isolation"; what does that mean?

How might that be impacted when the victim does not speak English?

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## Trial Strategies

- Consider order of expert witnesses.
  - Testifying first provides fact finder with correct lens through which to view evidence.
  - Testifying after victim allows expert to address particular issues raised during testimony.
- In some circumstances, be prepared to use expert witness in rebuttal.

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## Opening Statements

- Keep focus on offender.
- Address challenging facts without apologizing.
- Talk about victim behavior.
  - Victim's explanation
  - Expert's explanation

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## While Testifying

- Answer ONLY the question asked.
- If necessary, ask for question to be repeated/reworded.
- OK to say, "I don't know."
- Don't exceed area of expertise.
- Don't argue/defend.
- Make eye contact and communicate with judge and jury.

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## Cross-Examination

- Bias/objectivity
- Opinions
  - Don't some victims also . . . ?
- Truth does not change depending on who asks the questions
- Watch your demeanor

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## The Truth

- Never try to shade the truth in an effort to help the case.
- Don't do anything that would harm your credibility, or cause the judge or jury to discount what you have to say.
- Preserve your reputation and that of other experts.

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## Limits of Expertise

- Experts should explain common victim behaviors without going beyond their area of expertise.
- Advocates should not testify about:
  - Psychiatry/medicine
  - Anatomy/physiology
  - Neurology

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## The Best Testimony is...



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## Peer Support

- Develop a peer group
- Meet regularly to discuss ongoing cases and relevant literature
- Observe one another testifying
- Provide critique
- Observe any expert testimony you can

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## Closing Argument

- Argue credibility.
- Expert testimony will help undercut defense attacks on victim's credibility.
- The expert's testimony was general, but you must explain how it applies to your victim.

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How do defense attorneys  
approach expert witnesses?

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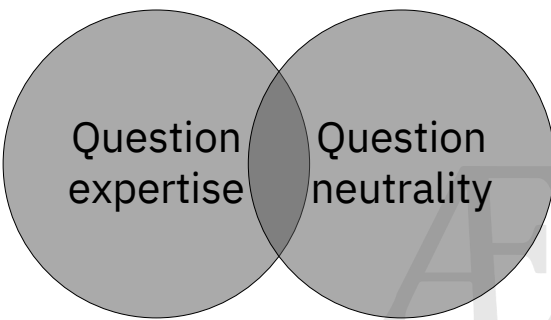
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## Defenses



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## Combatting Defenses

- Conduct thorough direct examination, establishing expert's expertise through training, education, and experience.
- Reinforce "blind" nature of testimony.
- Highlight any work they have done for the defense and/or that they made themselves available to the defense.

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## What about Defense VBEs?

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## Strategies for Defense VBEs

On receiving notice of defense VBE, make written request to meet, with courtesy copy to defense attorney.

- If agreed, bring witness to in-person or virtual meeting.
- If not agreed, use in cross-x to show bias/lack of partiality.
- Be sure to first consult with a VBE you regularly work with.

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## Strategies for Defense VBEs

Cont'd

Identify behavior or dynamic that VBE is addressing.

- Is it syndrome evidence (implanted memories, RTS) that could be challenged under *Frye*?
  - If not inadmissible under *Frye*, can syndrome-based VBE testimony be impeached as shoddy/vague science?

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## Strategies for Defense VBEs

Cont'd

Can defense VBE be used to build up your case?

- If expertise is experiential, will they concede some victims respond like your victim.
  - If they say no, they will sound incredible.
- Are there past experiences that defense can be impeached with (former SOAB).
- Your cross-x questions can be great opportunity to educate jury about range of victim responses.

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## Strategies for Defense VBEs

Cont'd

- Is the defense VBE really in the scope of § 5920?
  - Are they actually addressing how non-victims respond rather than how victims respond?
- But think of long game, if defense VBE is mislabeled under § 5920, could they have been introduced another way?
  - Is preclusion worth it?

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## Publications

- When and How: Admitting Expert Testimony on Victim Behavior in PA
- Pennsylvania's New Victim Behavior Expert Testimony Statute Upheld: *Com. v. Olivo*

Resources available at  
<https://aequitasresource.org/resources/>

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## Additional Resources

JENNIFER G. LONG,  
NAT'L DIST.  
ATTORNEYS ASS'N,  
INTRODUCING EXPERT  
TESTIMONY TO  
EXPLAIN VICTIM  
BEHAVIOR IN SEXUAL  
AND DOMESTIC  
VIOLENCE  
PROSECUTIONS  
(2007).

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## Going Forward

- Identify victim behaviors that may be an issue at trial.
- Identify and prepare experts to educate factfinders about victim behaviors resulting from domestic and sexual violence.
- Make expert testimony accessible for judges and juries.

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## Jonathan Kurland

ATTORNEY ADVISOR

✉ jkurland@aequitasresource.org  
📞 (202) 596-4227

📍 1000 Vermont Street NW, Suite 1010  
Washington, DC 20005

🌐 AEquitasResource.org

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## Office Hours

3<sup>rd</sup> Thursday of Every Month, from 2–4pm Eastern



Discuss the most pressing issues facing prosecutors and allied professionals today



Serve as a resource, and provide you with relevant resources



Connect you with other practitioners in the field to help foster peer relationships

Register here:  
<https://aequitasresource.org/trainings/>

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## The Traffick Report: Conversations with the Field



Last Wednesday of every month  
12–1:30pm Pacific; 3–4:30pm Eastern



An interactive and dynamic conversation with rotating topics and guest speakers



Hear from multidisciplinary professionals across the human trafficking field

Register here:  
<https://aequitasresource.org/trainings/>

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