

Victims and Witnesses with Developmental Disabilities¹ and the Prosecution of Sexual Assault

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INTRODUCTION

Individuals with a diagnosis of mental retardation or other form of developmental disability are at increased risk for becoming victims of sexual assault.⁴ Prosecutors must overcome a number of challenges when prosecuting sexual assaults involving individuals with mental retardation. These challenges include stereotypes about mental retardation, concerns over witness credibility, and challenges in communicating with people with mental retardation.⁵ To effectively prosecute crimes which victimize individuals with developmental disabilities, prosecutors must understand the diagnostics involved, community resources, and specific strategies to assist the victim in providing accurate and credible testimony. This article will provide a brief overview of developmental disabilities and the diagnostic criteria for mental retardation, and will then offer practical tips for prosecutors in cases where the victim in a sexual assault case has a diagnosis of mental retardation.

OVERVIEW OF DEVELOPMENTAL DISABILITIES

Prosecutors should be aware that developmental disabilities manifest themselves on a variety of levels,

depending on the severity of the disability as well as other factors. The term “developmental disability” refers to:

a diverse group of severe chronic conditions that are due to mental and/or physical impairments. People with developmental disabilities have problems with major life activities such as language, mobility, learning, self-help, and independent living. Developmental disabilities begin any time during development up to 22 years of age and usually last throughout a person’s lifetime.⁶

This is a broad definition encompassing many disorders, including, for example, mental retardation, cerebral palsy, borderline intellectual functioning, and autism spectrum disorders. It is important to note that an individual with a developmental delay may or may not meet the definition of mental retardation. In fact, some developmental disabilities, including Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, Conduct Disorder, and certain learning and communication disorders, will not directly affect intellectual ability, but may cause challenges for the victim on the witness stand.

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Mental retardation is a diagnostic construct⁷ that has undergone significant revision over the past century. Currently, the American Association on Intellectual and Developmental Disabilities (AAIDD) defines mental retardation as “ . . . a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior⁸ as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18.”⁹ In the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR, 2000), the American Psychiatric Association also provides diagnostic criteria for mental retardation. These include: “significantly subaverage intellectual functioning: an IQ of approximately 70 or below . . . concurrent deficits or impairment in present adaptive functioning . . . and age of onset before 18 years.”¹⁰ Together, the AAIDD and DSM-IV criteria regarding the diagnosis of mental retardation provide a relatively consistent framework to guide certain educational, clinical, and legal decisions.¹¹

A diagnosis of mental retardation, coupled with societal prejudice and stereotypes, may have unfortunate consequences for affected individuals. One such unfortunate consequence may be the tendency to view individuals with the same diagnosis as members of a homogeneous group.¹² However, beyond the three diagnostic criteria (i.e., lower intellectual functioning, adaptive behavior deficits, and onset before the age of 18), the diversity that exists is as complex as in people who do not have a diagnosis of mental retardation.¹³ Because of this diversity, prosecutors “must consider the abilities of an individual with intellectual disabilities to serve as a witness based on the specific requirements of the task rather than using global impression and stereotypes . . .”¹⁴

The tendency to stereotype individuals with mental retardation has particularly serious implications for crime victims. For example, police officers may be reluctant to pursue allegations of sexual assault when the victim has a diagnosis of mental retardation¹⁵ because they fear that the victim is incapable of providing reliable information. Prosecutors and judges may incorrectly assume that a victim with impaired cognition is legally incompetent to testify.¹⁶ Juries may be negatively influenced by the diagnosis of a mental retardation, and subsequently not review the witness’s testimony or evidence objectively.¹⁷

In fact, research has identified some common characteristics among individuals diagnosed with mental retardation that have direct implications for their ability to serve as witnesses. For instance, when confronted by an authority figure, these individuals may be more likely to claim knowledge they do not possess or acquiesce to demands.¹⁸ When questioned about events from the past, these individuals may not provide as complete an account as an individual without cognitive limitations.¹⁹ People with mental retardation can be more susceptible to leading questions than the general population, a finding likely related to memory capacity, the ability to cope with uncertainty, and the pressure associated with an interview. Individuals with mental retardation also may exhibit expressive and receptive language difficulties that decrease the probability of accurate communication with others.²⁰

The empirical literature regarding the *actual* abilities and performance of individuals with diagnoses of mental retardation in legal contexts suggests that, with appropriate accommodations, individuals with mental retardation can accurately

recall events, provide reliable and valid testimony, and resist suggestive or leading questions. Specifically, studies²¹ have shown that individuals diagnosed with mental retardation can provide accurate information about a personally-experienced event at a level comparable to those without mental retardation.²² Furthermore, when questioned in a manner consistent with their abilities, people with mental retardation were found to perform similarly to non-diagnosed individuals.²³ By tailoring language to match the victim’s abilities, the probability of accurate communication is dramatically increased.²⁴

Taken together, these research findings suggest a number of specific strategies to follow throughout the investigation and prosecution of a sexual violence case with a victim who has a diagnosis of mental retardation that can enhance the quality of the witness’s testimony, improve her²⁵ credibility with jurors, and reduce the likelihood of inaccurate testimony as a function of suggestibility.

TRIAL PREPARATION AND STRATEGIES

Prosecutors should make appropriate adjustments during trial preparation and trial itself when the victim has a diagnosis of mental retardation. In every case, the victim should be assessed on an individual, case-by-case basis. However, a victim with mental retardation will present unique challenges for prosecutors – from preparing for the first interview with the victim, to preparing the jury to hear testimony from the victim, to understanding how to conduct an appropriate direct examination of the victim. The following categories and tips are designed to provide prosecutors with a framework for preparing and litigating a sexual assault trial when the victim has a diagnosis of mental retardation.

Preparing the Victim

Community Support—Prosecutors should be proactive about reaching out to community organizations to ensure support systems are in place to assist crime victims with mental retardation. For example, some prosecutors' offices have established disabled persons units, which encompass both prosecutors and advocates who specialize in cases involving persons with developmental disabilities, including individuals with mental retardation.²⁶ Such units involve themselves in community partnerships with allied professionals (such as state departments of mental retardation) in order to prosecute cases in a multidisciplinary fashion.²⁷ Prosecutors who work in jurisdictions without such services should contact national organizations that provide resources and information for crime victims with mental retardation.²⁸ In addition, prosecutors should share information about these organizations and explain their resources to victims and their families so that they feel supported throughout the prosecution process.²⁹

Support Person—The prosecutor should find out who provides support to the victim in her everyday life. A victim with mental retardation likely has help on a daily basis from a parent, grandparent, caretaker, or perhaps someone who knows and has worked with her at a school or community center. If the victim has a support person or advocate (or if one is assigned after inception of the case), the prosecutor should speak to this person (see "Getting to Know the Victim" below). If the victim and the support person have a good relationship, the prosecutor can consider allowing that person to come to pretrial meetings and interviews. In addition, the prosecutor may wish to make a pretrial motion that permits a support person to sit with the victim

while she testifies to comfort the victim throughout the trial. The support person can sit near the witness stand or remain elsewhere in the courtroom.

Getting to Know the Victim—Before interviewing the victim, the prosecutor should have an in-depth conversation with the victim's support person as well as with others familiar with the victim's cognitive functioning and communication style. As in any sexual assault case, the prosecutor should use the initial interview of the victim as an opportunity to develop trust, as well as to learn about the victim outside the context of the criminal incident. The prosecutor should also become familiar with the victim's living situation, capabilities, and daily routine, taking care to notice the victim's speech patterns, expressions, and body language.

Talking to the victim and the victim's family members about the victim's speech and language is important to help the prosecutor understand the context of the criminal incident, how the victim reported the incident to others, and to determine any potential issues relating to the victim's trial testimony. If the victim's speech is limited, for example, her ability to communicate with police and investigators about the incident may have been adversely affected. Further, the prosecutor may have to phrase questions in a particular way during preparation and at trial so that the victim understands and can answer them without getting confused. The prosecutor may need to consult with a psychologist or other similar professional to determine how best to adjust language choice and communication style.

The victim's living situation, capabilities, and routine are important indicators of how the victim functions in society with strangers

and non-strangers. This information can help the prosecutor understand the nature of the relationship between the offender and the victim as well as anticipate or rebut potential defenses. If, for example, the offender claims the victim consented to the sexual contact, knowing the victim's capabilities will allow on the prosecutor to cross-examine the offender more effectively and prepare the necessary rebuttal witnesses.

Meeting and Interviewing the Victim—First, the prosecutor should determine where to interview the victim. Limiting distractions and creating an environment that feels comfortable and safe to the victim are priorities.³⁰ The prosecutor should take the victim into the courtroom at some point during a pretrial interview to see if she becomes distracted by that environment. Throughout each interview with the victim, the prosecutor should speak slowly and allow adequate time for the victim to answer each question. The prosecutor should ask both direct and leading questions in order to determine how well the victim can answer questions in different forms. In addition, the victim should be permitted to take frequent breaks, just as she should be permitted to do at trial.

The prosecutor should note any difficulties the victim has understanding and interpreting language, including certain vocabulary, sarcasm, or changes in tone of voice. It also is important to understand the extent to which the victim understands her condition and can explain her disability. The prosecutor should ask the victim about her condition and how she believes mental retardation affects her. The victim may be able to tell the prosecutor that there are certain

kinds of questions she will be unable to answer or certain situations that will be confusing. On the other hand, “[p]eople with mental retardation may try to hide their impairment or pretend greater capabilities than they actually possess.”³¹ The prosecutor must reconcile what the victim explains her limitations to be with what the prosecutor observes and learns.

The prosecutor should attempt to determine whether the victim appreciates the nature and consequences of the acts committed by the perpetrator. First, the prosecutor should probe the victim’s general understanding of human anatomy, reproduction, and contraception. The answers to these questions will aid the prosecutor in determining which anatomical terms are familiar to the victim and whether the victim appreciates the consequences of sexual activity.³² This is relevant in order to establish whether the element of psychological force is a component of the sexual assault.³³ In addition, this information will help the prosecutor explain the victim’s limitations to the jury and counter the possible defense that the victim consented to the sexual activity.

Pretrial Considerations

Determining Competence—The prosecutor should assess the competence of any witness, regardless of the existence or lack of a developmental disability. When interviewing a victim with mental retardation and speaking with her family members, the prosecutor should determine whether the victim can be deemed legally competent. A witness’s competence is based on her ability to understand issues and make decisions.³⁴ Often, a victim with mental retardation will present

competency challenges, simply because of misunderstandings or miscommunication.

It is important for the prosecutor to communicate to the fact finder that a cognitive impairment is not *per se* evidence of incompetence (see Federal Rule of Evidence 601 and see “Engaging a Mental Health Expert” below). The prosecutor should be prepared and have enough knowledge of the victim’s mental capabilities to explain to the judge the difference between the disability and competence. If the defense challenges the witness’s competence at trial, the prosecutor should be able to give an offer of proof of the witness’s competence by citing specific examples of her ability to understand issues and make decisions.

Engaging a Mental Health Expert—

The prosecutor may wish to retain a qualified mental health expert to testify to the victim’s abilities. In such cases, the prosecutor should ask the expert to examine the victim to assess her intellectual functioning, general cognitive abilities, level of adaptive functioning, and mental age level. (Note that many experts are shying away from mental age level, and are more comfortable reporting an equivalent grade level corresponding to test results.) The expert also should assess the victim’s concrete thinking ability, language abilities, and memory. A mental health expert may determine and then testify that the victim is capable of consenting to sexual activity, but, because of limitations associated with mental retardation, the victim was susceptible to psychological coercion from the defendant. The relevance of the victim’s developmental disability varies by jurisdiction. In some states,

for example, a victim with a diagnosis of severe mental retardation is considered incapable of consenting to sexual activity. Regardless of the jurisdiction, the expert should educate the jury regarding the nature of the victim’s disability, including medical, psychological, physical, and social implications, and set the stage for the victim’s testimony to follow.³⁵

It may not be necessary to retain a mental health expert. Often, the victim’s developmental disability is capable of being explained to the fact finder through testimony from the victim and family members who are familiar with her condition. However, expert testimony regarding a victim’s developmental disability and capabilities has been shown to improve jurors’ attitudes about cases involving individuals with intellectual disabilities and perceptions of the victim’s competence and accuracy.³⁶ The prosecution can rely on a psychologist, psychiatrist, social worker, nurse, or any other professional with specialized knowledge of mental retardation to provide expert testimony. The expert testimony should include: (1) the nature of the victim’s disability, including medical, psychological, physical, and social implications; (2) the particulars of the evaluation conducted on the victim; and (3) the victim’s current level of intellectual functioning, communication skills, and concrete thinking ability.

Pretrial Motions—Victims and witnesses with mental retardation experience many difficulties, including but not limited to fear, embarrassment, exhaustion, short concentration spans, and inadequate language skills. If state law permits, prosecutors may wish to make the following motions to reduce trauma to the victim and enhance the quality of her testimony:

Closed Courtroom

The prosecutor may wish to ask the court to rule that all persons be excluded from the courtroom except the parties and their immediate families, attorneys, officers of the court, jurors, newspaper reporters, and court reporters. If the prosecutor makes this request, she or he should be prepared to explain the possibility that the victim will suffer serious emotional trauma if required to testify in front of a large group of people, or that the victim may be too easily distracted if many people are in the courtroom. The prosecutor should explain that the request is due to the victim's nervousness and fear, and was made after direct observation by the prosecutor, the victim's support person(s), or the mental health expert.³⁷

Courtroom Configuration

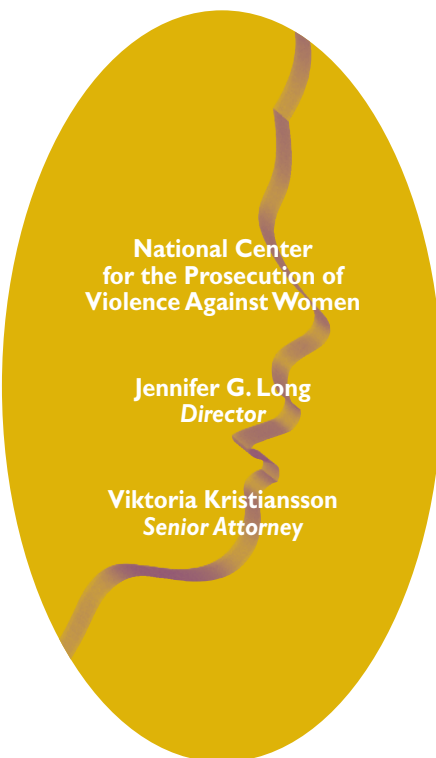
The prosecutor may wish to ask the court to rule that the offender not be seated directly in front of the victim while she testifies—again, because the victim may suffer such emotional trauma that it would interfere with her ability to testify. If this motion fails, the prosecutor can try to position her- or himself away from the defendant so the victim is focused on the prosecutor—not the defendant—during direct examination.

Trial Issues

Voir Dire—During jury selection for any sexual assault case, the prosecutor should address jurors' beliefs in common myths about sexual assault—e.g., only strangers rape; all victims are physically injured as a result of the assault; all victims behave in certain ways during and after the rape; women lie about getting raped; and rape victims

assume the risk of being raped. When the victim is diagnosed with mental retardation, the prosecutor also must address additional common myths about people with this diagnosis.

The prosecutor should explain to the jury that the victim's



competence is established if she can recall incidents and understands the oath to testify truthfully in court; prosecutors must stress that this test is applied to all witnesses regardless of their cognitive function. The jury should understand that evidence will be presented from the victim, her family members, and possibly a mental health expert, in addition to any other evidence in the case. The prosecutor must address the victim's diagnosis directly so the jury does not use the victim's condition as an excuse for the rape; the jurors should understand that the victim's condition is relevant

to the offender's selection of her. For example, it is possible that the victim was coerced or was unable to consent due to her developmental disability. In this case, the prosecutor can transform the issue of mental retardation from a concern or perceived weakness to evidence probative of the offender's selection of the victim.

Direct Examination of the Victim—To maximize the quality of the victim's testimony,³⁸ the prosecutor should schedule the victim's testimony around her meals, rest periods, and medication, as applicable. During direct examination of the victim, the prosecutor should elicit information that establishes the victim's competency and credibility; personalizes her; establishes her daily routine; details the criminal conduct to which she was subjected by the defendant; and, if applicable, describes her relationship to the defendant. The prosecutor should rely on open-ended, free-recall questions.³⁹ The questions should be asked clearly, using simple vocabulary so that the victim can answer the questions in her own words. This will enable the jury to understand the extent of the victim's ability to communicate and to see that the victim's thoughts are her own. The prosecutor also should use photographs and other demonstrative evidence, as the victim's accurate identification of these items will enhance the jury's confidence in the victim's identification of the crime scene, the defendant, and other critical evidence.

Cross-Examination of the Victim—The prosecutor should ask the court to rule that all questioning of the victim employ appropriate terminology,

grammar, and sentence structure, based on the victim's level of functioning, because researchers have found the most accurate information results from this type of question.⁴⁰ As noted above, individuals with mental retardation are more likely to say "yes" to questions, particularly leading questions, repeated questions, or those not understood by the witness.⁴¹ Questions that contain one or more negatives—e.g., "Isn't it true that you were not at the house?"—also can result in less than accurate responses.

In their 1999 study of witnesses with diagnoses of mental retardation, Kebbell and Hatton concluded that four cross-examination techniques presented difficulties: (1) use of advanced language with complex syntax; (2) excessive use of closed, i.e., yes/no questions; (3) use of suggestive or leading questions; and (4) a focus on trivial details or peripheral issues.⁴² It is particularly important that defense counsel be constrained in attempts to confuse the witness on cross-examination.⁴³ One study focusing on strategies for child witnesses with mental retardation produced findings that also may be useful for adult victims: "... [R]esponses to yes/no questions can be fairly accurate when presented in a neutral, non-coercive manner and when they are designed to examine alternative hypotheses about the child's experiences ..."⁴⁴

Corroborating Witnesses—Parents, guardians, siblings, and others should be called to testify about details of the victim's routine, ability to perceive, and personal habits. These individuals also may be able to corroborate the victim's testimony regarding details associated with the crime. By calling witnesses who are

familiar with the victim's learning and communication skills and abilities, the prosecutor can show jurors how the victim presents herself in her daily life, how much help the victim needs in order to engage in routine activities, how the defendant could have had access to the victim, how the victim and defendant interacted with each other, and how the victim ultimately reacted to and communicated about the sexual assault. When the victim is school-aged, the school psychologist may be able to provide valuable testimony on the victim's personal history, including her participation in special education and the details of her Individualized Education Plan (IEP).

Rebuttal Case—The defense may try to perpetuate myths regarding those with mental retardation by attacking the victim's ability to recount the incident and testify truthfully. In rebuttal, the prosecutor can address the defense attacks by calling witnesses who are familiar with the victim's behavior on a daily basis and who encountered the victim both before and after this incident was reported. The prosecutor should be prepared to offer expert and lay testimony to counter defense attempts to discredit the victim on such issues as suggestibility, misidentification, and fabrication or fantasy related to a diagnosis.

CONCLUSION

A victim with mental retardation poses unique concerns because the prosecutor must assess the condition and how it affects the victim—not only in terms of the victim's ability to communicate and live as a member of society, but also in terms of the criminal incident. The victim's developmental disability may

affect the way the sexual assault is reported and charged, depending on the extent of the mental retardation. The victim may have been impeded in her ability to communicate with civilian witnesses, police, and medical personnel. These communication issues will present challenges at trial, and may lead to misperceptions regarding the victim's competence and recollection of the incident itself and the details associated with the incident. Prosecutors should educate themselves about mental retardation, how the developmental disability can affect victims, and how to best communicate a victim's condition to the jury—through testimony from the victim, family members, a mental health expert, or other possible witnesses. Understanding the victim's mental retardation will allow the prosecutor to communicate to jurors how this condition played a role in the sexual assault starting with victim selection, moving to the dynamics of the victim's relationship with the offender both before and after the assault, and concluding with how, when, and why the victim ultimately disclosed the incident to another person. Presenting a complete picture of the victim to the jury should be the goal for each prosecutor who deals with a victim of sexual assault. Ultimately, if the prosecutor is familiar with the effects of the victim's mental retardation on the victim's daily life, the prosecutor will be successful in communicating those effects and their relevance to the sexual assault itself, thereby providing jurors the proper context in which to evaluate all of the evidence the case and achieving justice for the victim. ■



FOOTNOTES

- 1 This article focuses on victims with mental retardation, but includes information on victims with other developmental disabilities. The term "mental retardation" is the accepted terminology currently utilized by a number of relevant organizations, including the American Psychiatric Association, the American Psychological Association, and the American Association on Intellectual and Developmental Disabilities. Mental retardation is considered a discrete diagnostic entity that can be subsumed under the broad descriptive category of developmental disorders. Developmental disorders include a range of diagnoses that share one essential feature—that of disruptions in the normal developmental process. Space prohibits addressing the various developmental disorders and their relationship to the legal process.
- 2 Dr. Deal is an Assistant Professor in the Department of Psychology at Missouri State University.
- 3 Viktoria Kristiansson is a Senior Attorney at the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute/National District Attorneys Association. The authors wish to thank Kate Ryan, former Staff Attorney at the National Center for the Prosecution of Violence Against Women, for her contributions to this article.
- 4 See CHRISTOPHER WILLIAMS, *INVISIBLE VICTIMS: CRIME AND ABUSE AGAINST PEOPLE WITH LEARNING DISABILITIES* 6 (1995); Helen L. Westcott & David P.H. Jones, Annotation, *The Abuse of Disabled Children*, 40 *JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY AND ALLIED DISCIPLINES* 497-506 (1999).
- 5 See Kristine I. Ericson & Nitza B. Perlman, *Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities*, 25 *LAW AND HUMAN BEHAVIOR* 529-45 (2001); Fiona M. Munro & Michael T. Carlin, *Witness Competency—Truthfulness and Reliability Assessment: The Role of the Psychologist*, 7 *LEGAL AND CRIMINAL PSYCHOLOGY* 15-23 (2002); Denise C. Valenti-Hein & Linda D. Schwartz, *Witness Competency in People with Mental Retardation: Implications for Prosecution of Sexual Abuse*, 11 *SEXUALITY AND DISABILITY* 287-94 (1993).
- 6 <http://www.cdc.gov/ncbddd/dd/dd1.htm>, last visited March 9, 2007.
- 7 In this context, "diagnostic construct" refers to common symptoms and behaviors that are presumed to reflect the underlying condition or disorder—in this case, mental retardation.
- 8 Adaptive behavior refers to the "... collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." AMERICAN ASSOCIATION ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT*, at 14 (10th ed., 2002). These skills are acquired through formal and informal means and reflect how well an individual is able to respond to environmental demands and how well he or she meets the standards of personal independence expected of someone in his or her age group, social/cultural background, and community setting. It is influenced by such factors as education, motivation, personality characteristics, and social and vocational opportunities. Adaptive behavior must be assessed with a standardized measure, such as the Vineland Adaptive Behavior Scales, Second Edition. SARA S. SPARRO, DOMENIC V. CICHETTI, & DAVID A. BALL, *VINELAND ADAPTIVE BEHAVIOR SCALES* (2nd ed. 2005).
- 9 See MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, *supra* note 8, p. 8.
- 10 AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, at 49 (4th ed., text revision, 2000).
- 11 While mental retardation is a diagnostic construct that generally is consistent across purely clinical contexts, for legal purposes, this construct often is defined by statute or case law, and varies by state. The same individual may receive a different diagnosis solely as a function of geographic location. See <http://www.deathpenaltyinfo.org/article.php?scid=28&did=138>, last visited September 1, 2006.
- 12 Kolleen E. Hurley, *Atkins v. Virginia: The Validity of Presumed Deficits* (2005) (unpublished Ph.D. dissertation, University of Mississippi) (on file with the University of Mississippi and the author).
- 13 See *supra* note 9.
- 14 See Georgina Stobbs & Mark Rhys Kebbell, *Jurors' Perception of Witnesses with Intellectual Disabilities and the Influence of Expert Evidence*, 16 *JOURNAL OF APPLIED RESEARCH IN INTELLECTUAL DISABILITIES* 112 (2003).
- 15 See Jennifer Keilty & Georgina Connelly, *Making a Statement: An Explanatory Study of Barriers Facing Women with an Intellectual Disability when Making a Statement About Sexual Assault to Police*, 16 *DISABILITY & SOCIETY* 273-91 (2001).
- 16 See Mark Rhys Kebbell & Chris Hatton, *People with Mental Retardation as Witnesses in Court: A Review*, 37 *MENTAL RETARDATION* 179-87 (1999). See also Valenti-Hein & Schwartz, *supra* note 5.
- 17 See Stobbs & Kebbell, *supra* note 14.
- 18 See Ericson & Perlman, *supra* note 5.
- 19 See Kebbell & Hatton, *supra* note 16.
- 20 See Keilty & Connelly, *supra* note 15.
- 21 It should be noted much of the research literature addresses the abilities of children as witnesses or victims. This focus has included both children without mental retardation as well as those who have this diagnosis. Attention only recently has been directed toward adults with mental retardation. Readers should be cautious in applying findings based on samples of children to adults. Ultimately, each individual should be treated as unique and evaluated accordingly with an eye toward determining specific strengths and deficits as they pertain to involvement in the legal process.
- 22 Investigating the ability of children with diagnoses of mental retardation to recall real and imagined events, Gordon and colleagues found no differences in responses to open-ended questions, patterns of errors, or responses to misleading questions, when compared to non-diagnosed children. See Betty N. Gordon, K.G. Jens, R. Hollins, & T.E. Watson, *Remembering Activities Performed Versus Those Imagined: Implications for Testimony of Children with Mental Retardation* 23 *JOURNAL OF CLINICAL CHILD PSYCHOLOGY* 239-48 (1994). Using a similar research design, Michel and colleagues concluded: "It appears that at least under some conditions, children with mental retardation can provide accurate information about a personally experienced event on a level consistent with children of normal intelligence matched on MA (mental age)." See Margaret K. Michel, Betty N. Gordon, Peter A. Ornstein, & Mary Ann Simpson, *The Abilities of Children with Mental Retardation to Remember Personal Experiences: Implications for Testimony*, 29 *JOURNAL OF CHILD PSYCHOLOGY* 461, 462 (2000). Finally, in a review of published research in memory-related tasks, Kebbell and Hatton summarized: "[E]vidence suggests that with appropriate questioning individuals with mental retardation can give accurate accounts..." See Kebbell & Hatton, *supra* note 16, p. 182. The key to these related findings are the phrases "under some conditions" and "with appropriate questioning."
- 23 See Kebbell & Hatton, *supra* note 16.
- 24 See Keilty & Connelly, *supra* note 15.
- 25 See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004)*, <http://www.ojp.usdoj.gov/bjs/intimate/offender.htm>. In 2004, 96.9% of victims of intimate partner violence were female where the offender was male. See also U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004)*, <http://www.ojp.usdoj.gov/bjs/intimate/table/vomen.htm> (noting that in 75.3% of cases in 2004, offenders of intimate partner violence were male, regardless of the victim's gender). For this reason, the author will use "she" when referring to the victim and "he" when referring to the perpetrator or defendant. For additional information about this survey, please contact Chuck Rainville at NDAA's Office of Research and Evaluation.
- 26 See, e.g., the Elders and Persons with Disabilities Unit of the Suffolk County District Attorney's Office, available at http://www.mass.gov/dasuffolk/help_ev.html. In addition, several states have passed laws to enhance penalties for those who abuse individuals with mental retardation or other mental impairments. See, e.g., MASS. GEN. LAWS ch. 265, §§ 13F, 13K (2004).
- 27 See, e.g., State of Connecticut Department of Mental Retardation, available at <http://www.dmr.state.ct.us>.
- 28 See, e.g., Office of Justice Programs (<http://www.ojp.state.mn.us/MCCVS/>); The Arc of the United States (<http://www.thearc.org>); American Association on Intellectual and Developmental Disabilities (<http://www.aaid.org>); and Division on Developmental Disabilities (<http://www.dddec.org>).
- 29 See, e.g., Directory of Crime Victim Services: An OVC Online Resource, at http://ovc.ncjrs.gov/find_victim_services/.
- 30 See "Crime Victims Who Have Mental Retardation," available at <http://www.ojp.usdoj.gov/ovc/publications/infores/firststep/2002/chp5.html>.
- 31 *Id.*
- 32 The prosecutor should ensure that, as in most sexual assault cases, a physical examination of the victim is conducted as soon as possible after the assault is disclosed. A Sexual Assault Nurse Examiner (SANE) or qualified physician should conduct the exam both to identify and treat the victim's possible injuries and to preserve any evidence for the prosecution of the crime. It is important for the prosecutor to find out from the victim to what extent she appreciated the nature of the examination and how undergoing the exam made her feel.
- 33 See, e.g., 18 Pa.C.S. § 3121 (2).
- 34 BLACK'S LAW DICTIONARY 302 (8th ed. 1999).
- 35 The expert may also aid the court in assessing the competence of a victim with mental retardation. By focusing on the individual's strengths and weaknesses and not simply the diagnostic label, the expert may provide useful information to the court and all parties involved.
- 36 See Stobbs & Kebbell, *supra* note 14.
- 37 Note that some states allow a victim to testify by closed-circuit television in cases where the victim may suffer serious emotional or psychological harm if she has to testify in front of the defendant. Most states' laws regarding closed-circuit-television testimony are based on the chronological age of the witness, rather than her cognitive functioning level. However, the prosecutor should check the laws of his or her jurisdiction to determine if the state allows the defendant's right to confront his accuser to be balanced against the victim's impaired ability to communicate (and the possibility of unreliable testimony caused by the victim's traumatic reaction to the defendant's presence in court).
- 38 See *supra* note 30.
- 39 See Kebbell & Hatton, *supra* note 16.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 See Mark Rhys Kebbell, Chris Hatton, & S.D. Johnson, *Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?* 9 *LEGAL AND CRIMINOLOGICAL PSYCHOLOGY* 23-25 (2004). The authors concluded: "Witnesses with intellectual disabilities were significantly more likely than general population witnesses to agree with the force of a leading question, less likely to disagree with the force of the question, and less likely to provide additional information, particularly in cross-examination. Lawyers are likely to deliberately exploit the characteristics of leading questions... The implication of these results is that cross examination as currently practiced is particularly likely to lead to inaccurate testimony from witnesses with intellectual disabilities." *Id.* at 32.
- Prosecutors should move the court for limitations on cross-examination, but recognize that the direct examination must also conform to these restrictions. Cross-examination is thereby infringed only in form, not in substance, to allow for truthful testimony from the victim.
- 44 See Michel, et al., *supra* note 22.

ADDITIONAL REFERENCES

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INTERNET RESOURCES

American Association on Intellectual and Developmental Disabilities: <http://www.aaid.org/>

National Association for the Dually Diagnosed: <http://www.thenadd.org/>

The Disability Rights Network: <http://www.napas.org/>

American Psychological Association, Division 33, Mental Retardation/Developmental Disabilities: <http://www.apa.org/divisions/div33/homepage.html>

The Arc of the United States: <http://www.thearc.org/>

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