

**USE OF AND PREPARING FOR EXPERTS
IN DOMESTIC VIOLENCE CASES:**

WHY? WHO? WHEN? HOW?

I. WHY?

A. EDUCATION OF JURY DURING VOIR DIRE

1. **Explore whether jurors' own experience with domestic violence affects their impartiality.**

-“Do any of you have personal experience with domestic violence.”
2. **Use voir dire as a tool to identify prejudice.**

-“Does anyone think it is not a crime to assault a family member?”
-“Now that you know the complainant recanted can you still be objective, or is anyone's mind closed?”
3. **Explore prejudices with respect to psychiatric defenses.**

-“Would any of you refuse to listen to an expert in psychiatry?”
4. **Refer to “Voir Dire in Domestic Violence Cases” by Sarah M. Buel**
5. **Explore prejudices with respect to Expert Testimony**

B. EXPLANATION OF BEHAVIOR AT TRIAL.

1. The common (not legal) definition of battering is "a pattern of abusive or coercive behavior or threats of abusive or coercive behavior used to control and exert power over another".

Using this definition, we want to let the triers of fact understand that the behaviors testified to are responses to being battered. Battered Woman Syndrome described helplessness, passivity, and forms of psychological damage. This limited stereotype does not adequately reflect the experiences of many battered women.

Batterers use different techniques and individuals have different life experiences and coping tools to deal with batterers. This means individual cases vary but there are similarities seen over and over by professionals that work with victims and perpetrators.

Battered Women's Syndrome is not a psychiatric diagnosis but an explanation of behavior that has consistently been held beyond the "ken" (knowledge and experience) of the average juror, rendering expert testimony admissible. (*State v Borelli*, 629 A2d 1105 [CT, 1993]; *People v Christel*, 537 NW2d 194 [Mich, 1995]; *State v Bednarz*, 507 NW2d 168 [Wisc, 1993]; *State v Stringer*, 897 P2d 1063 [Mont, 1995]; *People v Lafferty*, 9 P3d 1132 (Col, 1999); *State v Swift*, 844 A2d 802 [VT, 2004]; *People v Ellis*, 170 Misc 2d 945 [NY, 1996]; *People v Hryckewicz*, 221 AD2d 990 [NY, 1995]; *State v Cababaj*, 850 P2d 716 (Hawaii, 1993); *Commonwealth v Crawford*, 706 NE2d 289 [MA, 1999]; *Scugoza v State*, 949 SW2d 360 [TX, 1997]; *State v Grecinger*, 569 NW2d 189 [MN, 1997]).

Issues to be explored:

- Refusal to testify against the abuser
- Recantation
- Minimization
- Self-blame
- Inability to leave the abuser
- Common myths and misconceptions
- Defendants diminished capacity or lack of intent
- Bolster defendant's credibility
- Show existence of mitigating factors

- Flat affect or lack of emotion
- Batterer is filter for what is right and wrong

Mitigating factors that must be considered

- Perceptions of danger
- Weapons used
- Children's experiences (victim or witness)
- Sexual assault
- Consequences of battering on the state of mind
- Individual stress coping mechanisms
- History of violence against victim
- Recovery environment
- History of violence in the relationship
- Efforts to protect self and barriers to those efforts
- Social and psychological impacts of violence
- Context in which violence occurred
- Reactions to trauma
- Characteristics of violence

2. **Psychiatric defenses,** (not guilty by reason of insanity) - necessarily carry a psychiatric diagnosis requiring professional expert testimony generally of some sort of delusion or command: the defendant did not know or appreciate the nature and consequences of his actions or did not know they were wrong (McNaughton rule or variation).

-Delusion vs. Impulse

-Affirmative Defense burden of proving by a preponderance of the evidence vs. Prosecutor's burden of disproving beyond a reasonable doubt (see: *Vann v Commonwealth*, 544 SE2d 879 [VA, 2001]; *Bryan v Mullin*, 335 F. 3d 1207 [OK, 2003]).

-*Federal Rule* (18 USC 17). "It is an affirmative defense to a prosecution under any Federal statute that at the time of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense."

-*Federal Rule Of Evidence* (FRE) 704 - Opinion on Ultimate Issue, allows an expert to render an opinion even though it

"embraces an ultimate issue to be decided by the trier of fact." But this general rule is subject to subdivision (b), which states that: "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

3. Battering and its effects

Language is important in discussing these issues. We must convey the idea that although there are similarities to cases of domestic violence we must be conscious that there are distinct differences.

Offering evidence of effects of battering is not a defense. Instead this evidence is used to assist fact finders in determination of relevant factors to specific case.

C. SUPPORT TO ATTORNEY DURING TRIAL

1. Explain statements made by victim
2. Explain statements/behaviors of perpetrator, family and friends of perpetrator
3. Help formulate cross-examination
4. Give context to
 - a. Murder for hire or killing while the partner is asleep versus self-defense
 - b. Why battered women do not leave an abusive relationship
 - c. Acts under duress
5. Types of assistance provided by domestic violence experts:
 - a. Case specific - information about a particular battered woman or a face to face evaluation
 - b. Places unique facts in a framework of what is known in the literature
 - c. Consult with attorney to develop specific questions for evaluation and trial
 - d. Assist and support victim/defendant when not being used for testimony

II. WHO?

A. PROFESSIONAL WITNESS

1. Psychiatrist
2. Psychologist
3. Clinical Social Worker

4. Advocate

NOTE: Degreed expert is one that has conducted extensive research, had clinical experience, has a knowledge of the dynamics of domestic violence, trauma and stress reactions.

It is important that the expert/evaluator:

- 1) Establish he/she is being paid
- 2) Establish that he/she has examined the defendant
- 3) Create a context for actions taken and establish the reasonableness of the actions given the situation
- 4) Have an advocate contact victim to provide support

B. LAY WITNESS

1. Executive Director of OPDV with psychology degree and two years DV experience (*Commonwealth v Goetzendammer*, 679 NE2d 240 [Mass.]
2. Director of clinical services with master's degree in counseling and DV workshop training (*State v Frost*, 577 A2d 1282 [NJ, 1990]).
3. Witness with years of interviewing and counseling experience in DV (*Harris v State*, 84 P2d 731 [K, 2004]).
4. Director of shelter with DV experience (*Hawks v State*, 479 SE2d 186 [GA, 1996]).
5. Likewise California (*People v Vernon*, 2003 WL 22904316, Michigan; *People v Goodsell*, 2003 WL 1558219); and North Carolina (*State v Johnson*, 571 SE2d 87 [2002]).
6. The first to consider using the effects of battering was 1977 Supreme Court of *Washington State v Wanrow* ruled in a self-defense case that a woman was "entitled to have the jury consider actions in light of her own perceptions of the situation".
7. Referring to a report published by US Department of Justice and US Department of Health and Human Services in May 1996, "The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Cases", almost 35 states found "generic" (lay) testimony admissible to explain battering

and its effects generally.

- C. **FEDERAL RULES OF EVIDENCE 702**: "If ...specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise..."

-**Lauria v National Railroad Passenger Corp.** 145 F2d 593 (CA, 1998) there is no requirement that an expert have a professional degree: "specialized knowledge" can be based on practical or work experience in the subject field.

III. **WHEN?**

Note: The use of experts in a variety of cases in which domestic violence is an issue helps triers of fact dispel common misconceptions that interfere with fact finders ability to consider issues of the case. Expert testimony will help fact finders more effectively evaluate evidence. Expert witnesses, advocates and attorneys should be encouraged to develop good working relationships. This will allow attorneys to best decide how, when and why to use an expert, and whether or not they should actually testify. After testifying, an expert may be able to help the prosecutor with cross-examination as the trial **proceeds.**

A. **Prosecution**

- when there is some other evidence that the complaining witness exhibits behavior typically associated with the syndrome (see: *Arcoren v U.S.*, 992 F.2d 1235; *State v Frost*, 577 A.2d 1282 [NJ, 1990]; *Pruitt v State*, 296 SE2d 795 [GA,1986]; *State v Stringer*, 897 P2d 1063 [Mont, 1995]).

1. Expert witnesses can explain why victims recant, appear uncooperative, take responsibility, testify for the abusers, provide conflicting statements provide relevant information regarding race/culture
2. Experts can assist the prosecutor pay more attention to the effects of domestic violence at the charging stage.
3. Experts can assist with ideas/ cautions for cross

examinations.

B. Defense

- to allow submission of justification(self-defense) charge for jury's consideration on objective and subjective elements of the defense (*Harrington v State*, 858 So.2d 273 [AL, 2003]); *People v Torres*, 128 Misc 2d 945 [NY, 1996]); *People v Ciervo*, 123 Ad2d 393 [NY, 1986]).

Did the defendant honestly believe she needed to defend herself against imminent death or injury? (*Austin v State*, 566 SE2d 673 [GA, 2002]; *People v Yaklich*, 833 P2d 758 [CO, 1991]; *People v Aris*, 215 Cal. App. 3d 1178; *State v Steward*, 763 P2d 572 [KA, 1988]; *State v Gallegos*, 719 P2d 1268 [NM, 1986]; *State v Leidhold*, 334 NW2d 811 [No. Dak.,, 1983]).

The defense of battered women who had killed their batterers led to the recognition of relevance for related defenses such as duress.

C. Civil Actions

- It is important to consider expert testimony in other venues where the same understanding applies:

Divorce

Custody

Protection orders

Tort actions

Contract cases

Clemency actions

Immigration status actions

Other criminal actions such as drug sales, robbery, prostitution

D. NOT GUILTY BY REASON OF INSANITY DEFENSE

-Whenever there is "some" evidence of legal insanity.

-We also need to be clear that in the vast majority of cases, the person who has been battered is not mentally ill.

-Some measures of "Battered Women Syndrome" are problematic The development of this definition included the Cycle of Violence theory. This theory often doesn't fit the circumstances in individual cases. Another theory is that battered women suffer Post Traumatic Stress Syndrome. Some do and some don't. This

diagnosis requires a specific constellation of symptoms that may be present in some battered women but often isn't.

IV. BY WHAT RULES?

A. ABA Standards

ABA Standard for Criminal Justice 3-3.3: Relations With Expert Witnesses:

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the prosecutor should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) A prosecutor should not pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

The **Commentary** to Standard 3-3.3 warns that prosecutors should never attempt to bias the opinion of an expert. It also advises that: "Depending on the extent of the expert's experience with courtroom procedure, the prosecutor should explain the workings of the adversary system and the expert witness's role within it as an independent and impartial expert. The prosecutor should also explain that the expert is to testify in accordance with the standards of the expert's discipline without regard to what is best for the prosecution."

B. False Testimony by the Expert Witness

Sometimes, an expert witness will overstate his or her opinion to such an extent, that it borders on false testimony. This is not to be permitted by either side, as all lawyers are ethically bound by the duty of candor.

1. ABA Model Rules

ABA Model Rule 3.3 - Candor Toward the Tribunal, states in pertinent part of subsection (a) that:

A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered

material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”

ABA Model Rule 3.3 Comment

Rule 3.3 Comment [5], Offering Evidence: Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

Rule 3.3 Comment [8], Offering Evidence: The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f).1 Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Rule 3.3 Comment [10], Remedial Measures states in pertinent part: Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer maybe surprised when the lawyer’s client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. . . .

ABA Model Rule 3.4 – Fairness to Opposing Party and Counsel:

This rule states in pertinent part that: A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law

¹ Rule 1.0(f) states: “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

2. ABA Standards for Criminal Justice Prosecution Function

ABA Standards for Criminal Justice 3-2.8(a):

A prosecutor should not intentionally misrepresent matters of fact or law to the court.

ABA Standards for Criminal Justice 3-5.6(a):

A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

IV. HOW?

NOTE: This type of testimony is designed to give the triers of fact a context for the actions of a woman who has been battered. This is called social framework testimony and is used to "employ social science research... to provide social and psychological context in which trier of fact can understand and evaluate claims about the ultimate facts".

A. PRELIMINARY INQUIRY

1. Is the testimony relevant to an issue at trial, i.e., what independent evidence of abuse exists (*Pruitt v State, supra; State v Stringer, supra; People v Christel, 537 NW2d 194 [MI, 1995]*).
2. Is the witness an expert
-Refer to "Daubert Questions for Expert Witnesses"
3. Is the expert testimony reliable

B. QUALIFYING THE EXPERT

1. Education
2. Licenses
3. Experience and Training
4. Breadth of knowledge of relevant literature and others in the field
5. Publications
6. Certificates, awards
7. Prior court qualification as an expert
8. Refer to "Laying the Foundation" excerpt from Model Protocol for Law Enforcement, Prosecutors and Judges by South

9. Payment

C. TRIAL JUDGE AS GATEKEEPER - judges have broad ("wise and wide") discretion in deciding whether or not to allow expert testimony. Those decisions will only be "upset for a manifest abuse of discretion", and this is the person who must be convinced by the prosecution or defense (*State v Vunbach*, 791 A2d 569 [CT, 2002]; *State v Stringer*, 897 P2d 1063 [Mont, 1995]; *People v Fasy*, 829 P2d 1314 [Colo, 1992]; *State v Cordeiro*, 56 P3d 692 [HA, 2002]).

The use of experts in domestic violence cases increases demand for judicial education and is helpful convincing a reluctant judge to accept non-degreed/lay witness expert. It highlights the need for judges to be well informed about battering and its effects in order to inform their rulings, explanations and jury instructions. It also highlights the need for judges to be familiar with scientific methods of research.

D. PITFALLS IN TESTIMONY

-Many courts will not allow prosecution experts to testify as to specifics; that is, no ultimate conclusions; no offender profiling; no bolstering credibility; no propensity testimony.

-Experts who are advocates in practice, should not advocate in court, especially on cross-examination.

-Concrete vs. speculative.

-1996 Report - A review of state court cases showed that convictions of Battered women reversed less than 1/3 of cases appealed. Of the cases reversed less than 1/2 were due to the erroneous exclusion of, limitation of, or failure to present expert testimony.

D. Crawford V. Washington

In *Crawford v. Washington*, (2004) 541 U.S. 36, the United States Supreme Court held that a hearsay declarant's statement given in response to police interrogation is inadmissible at trial, even if the court finds it to be "reliable," unless the declarant is

unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. The Court referred to such statements as "testimonial" in nature. (*Id.* at 52-53.)

"Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at 68.)

FRE 703, however, permits an expert to render an opinion based on facts that are not admissible in evidence, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." It logically follows that such facts will include out-of-court statements, as such statements are often relevant to how the expert formed his or her opinion.

Handouts:

- Voir Dire in Domestic Violence Cases, Sarah M. Buel
- Laying the Foundation, South Carolina Office of the Attorney General and South Carolina Criminal Justice Academy
- Daubert Questions for Expert Witnesses, Sarah M. Buel
- In Limine Motion

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