



The Use of Expert Testimony on Intimate Partner Violence

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Since the late 1970s, courts throughout the United States have admitted testimony about intimate partner violence (IPV) to help judges and juries interpret evidence and understand the experiences of people involved in abusive intimate relationships (Dutton, 1992; Osthoff & Maguigan, 2005; Schneider, 2000; Stark, 2007). The use of expert testimony has expanded from traditional self-defense cases when women killed abusive partners to also include cases of duress or coercion in which women perpetrate crimes against others, failure to protect cases, immigration, family law and torts, and to assist in the prosecution of abusive partners. Many legal experts agree that expert witnesses are ever more critical in trials (Coenen, 2006; Tirella, 2006; Gould, 1999; Young & Dematteo, 2008). Courts need alternative explanations for and clarification of the myths about IPV for two reasons. First, IPV is a complex phenomenon that is not easily understood or encapsulated in a syndrome or psychological diagnosis. Second, in cases involving survivors of IPV, the facts often diverge from common sense understanding and from what the general public believes about survivors of abuse (Ellison, 2005; Zykorie, 2002). Criminal and civil courts have accepted the use of expert testimony on IPV as a mechanism for addressing this lack of knowledge and for achieving just outcomes. Advocates, law enforcement officers trained on IPV, and IPV researchers are ideal candidates for providing this education through expert testimony.

Despite a progressive transformation of the legal, community, and social service response to IPV, the general public, professionals, academics,

and advocates continue to express inaccurate and incomplete understanding of the relevant issues. In this document, we provide an overview of the uses of expert testimony, the qualifications of experts, and the literature on the use of testimony on the effects of battering. Our discussion is based on the research literature as well as our own experience as expert witnesses in all types of cases discussed. We begin with (1) a brief overview of the development of expert testimony on IPV and the shift from “battered woman syndrome” to testimony on “battering and its effects.” We then (2) discuss the ways that expert testimony has been used in criminal and civil cases. The qualifications of experts are an important consideration in developing effective use of expert testimony, (3) we describe the credentials and qualities of effective witnesses and the possible roles they can serve, and (4) conclude with a summary of arguments for and against the use of expert testimony in cases involving IPV and considerations for future research on this topic.

Battered Woman Syndrome versus Battering and Its Effects

The first use of expert testimony on IPV in criminal trials relied on the concept of the battered woman syndrome as originally articulated by Lenore Walker (1979). The syndrome described women’s psychological responses to IPV, including learned helplessness, and Walker’s three stage cycle of violence (tension building, acute battering, and reconciliation). In response to a mandate from the Violence Against Women Act of 1994, the National

Institute of Justice (NIJ) and the National Institute of Mental Health (NIMH) published a three part report, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials* (NIJ & NIMH, 1996). In this report, Malcolm Gordon (1996) concludes that there is an extensive body of scientific knowledge on IPV that meets the standards for admission of expert testimony in legal proceedings. Gordon (1996) suggested replacing the term “battered woman syndrome” with “testimony on battering and its effects” (p. 22) because syndrome implies that all women respond to battering in the same way and that psychological reactions are the primary, most significant consequence of IPV. Numerous authors have echoed the report’s findings and encouraged discontinuation of the term “battered woman syndrome” (see Dutton, 1996a and 2009 for a thorough discussion of this issue). Regrettably, a review of the literature and anecdotal accounts suggest that battered woman syndrome continues to be used (Ferraro, 2003).

The NIJ/NIMH report also includes Parrish’s (1996) trend analysis of state laws and legal decisions at state and federal levels on the use of expert testimony on IPV. By 1996, all 50 states, as well as the District of Columbia, had accepted such testimony. The report’s most significant finding was that only 14% of 152 cases of battered women defendants were reversed on appeal due to issues related to expert testimony, principally the failure to introduce expert testimony at trial (Parrish, 1996). This low rate of reversals, consistent with Maguigan’s (1991) seminal study, demonstrates that the introduction of expert testimony does not ensure acquittals of battered women defendants. Moreover, Parrish emphasizes that there is no true battered woman’s defense; only traditional defenses to criminal conduct in which testimony about battering and its effects may assist in explaining a battered defendant’s conduct. Parrish outlines 14 suggested questions for future research. We have been unable to locate studies that answer *any* of these important questions central to a comprehensive analysis of the use of expert testimony in IPV cases.

Since the publication of the NIJ/NIMH (1996) report over a decade ago, case law has shifted requirements for expert qualifications (see below), the permissible scope of testimony (Leivick, 2005), as well as mandates for state funding of experts for indigent defendants (Warren, 2002). An update of the 1996 trend analysis would be extremely beneficial for the field.

Dutton’s final component in the NIJ/NIMH (1996b) report describes the results of a focus group conducted with judges, defense attorneys, prosecutors, expert witnesses, and advocates about the use of expert testimony on battering and its effects in criminal trials. In specific cases, the group reported that:

The most important impact of such testimony was to assist the factfinders in considering evidence presented in the case. The strong consensus was that expert testimony is most likely to clarify the evidence for the factfinder when it is drawn from the extensive body of available scientific and clinical knowledge and when that connection is made relevant to the factfinder” (Dutton, 1996b, p. 151).

The focus group also reported that the use of expert testimony in criminal cases has the indirect benefit of educating criminal justice actors as well as the larger community about the nature of IPV. While the NIJ/NIMH (1996) report has been an invaluable tool for attorneys, advocates, researchers, and expert witnesses, its central findings are still not well integrated into practice and research. Scholarly articles and legal actors continue to use the language of “battered woman syndrome” (see Hawes, 2005; Lancaster, 2004; Leivick, 2005; Terrance & Matheson, 2003) most likely because of precedence and because it resonates with the public. However, the limitations and potentially harmful implications for battered defendants are well documented (Stark, 2007).

Qualifications of Experts

Courts consider several criteria for expert witnesses. Courts evaluate a person's experience, knowledge, and skills and do not limit experts to those with advanced degrees (Ellison, 2005; Gould, 1999; Hamilton, 2009; Zykorie, 2002). Experts on IPV should have specialized training and experience and be familiar with the court's need for clear and objective testimony (Siegel, 2008). Some argue that expert witnesses are most effective when they have testified for both the prosecution or plaintiff and the defense (Lonsway, 2005; Kesselheim & Studdert, 2006).

Understanding what does not work when establishing expert credibility is important. In a study about the use of experts in federal trials, Johnson, Krafka, and Cecil (2000) found that judges and attorneys identified and ranked their five top problems with expert witnesses as: the abandonment of objectivity and siding with the side that hired them, the cost of experts, the dubious validity or reliability of the testimony, conflicts among experts, and an inequality in the competence of experts from both sides. Johnson and colleagues (2000) also identified the top two reasons that judges *excluded* expert testimony in a trial: (1) the expert's testimony and the methodology underlying that testimony were not reliable, and (2) the prejudicial nature of the testimony outweighed its probative value. Thus, it is imperative that an IPV expert be adequately prepared and ground their testimony in an established body of knowledge, rather than in popularized notions or ideological slogans. Although many advocates are well versed in this knowledge, evidence of formal training through courses or workshops bolsters credibility. Experts should not exaggerate their qualifications.

To be most effective, IPV experts should also be familiar with and understand IPV within the context of culture. The nature and consequences of IPV vary considerably, and cultural dimensions may be central to educating a court or jury about a specific case. At the same time, cultural knowledge itself is insufficient to qualify as an expert on IPV, as

the "culture excuse" has sometimes been used to legitimate a perpetrator's actions. There is no single source that can provide cultural competence across the range of cultures, but Natalie Sokoloff's (2005) anthology, *Domestic Violence at the Margins*, is an excellent resource. IPV experts may seek advice from people within the survivor's community who can provide indigenous knowledge about cultural norms and practices.

Experts' previous qualifications or disqualifications as an expert witness should not be used to determine their suitability in a current case (Prager & Marshall, 2005). Prager and Marshall (2005) conclude "generally, such an inquiry is improper and should be prohibited as a matter of law... because such information may tip the scales of justice in a close case and, arguably, may result in a reversible error" (p. 561). Therefore, if an advocate or researcher is excluded as a witness in one case, it does not necessarily mean that they will be excluded in subsequent cases. The reverse is also true. That is, being qualified in one case does not necessarily establish qualification in future cases. Experts are qualified by courts through a series of questions by both sides and a review of the person's curriculum vitae or resume. However, qualification by a judge in one case tends to influence positively the evaluations of judges in future cases.

Roles of Experts

Expert witnesses, including IPV experts, may serve the court in several functions. Experts may provide direct testimony, such as offering general facts about the prevalence, dynamics, and consequences of IPV, and specifics about a client's case. An expert witness may also provide consultation services to counsel (Krafka, Dunn, Johnson, Cecil, & Miletich, 2002), such as helping to develop trial strategies, preparing the survivor for trial, or assisting with jury selection (Lonsway, 2005).

After nearly 40 years of awareness, education, and research, misconceptions about domestic violence persist, and domestic violence experts are needed to address these myths (Hamilton, 2009;

Zykorie, 2002). Often, IPV experts answer the invariable question, “why did she stay?” (Buel, 1999). A skilled expert witness answers in ways that underscore the complex dynamics of an abusive relationship, including issues of power and control, and without pathologizing the survivor (Osthoff & Maguigan, 2005). As noted by judges and attorneys, the validity and reliability of these claims should be supported by reference to the research literature as well as the oath of truthfulness under which experts testify (Zykorie, 2002). Courts require expert witnesses to cite research that is peer reviewed and generally accepted in the scientific community. Thus, experts should be able to explain the controversies within the body of research and demonstrate awareness of all significant positions on these issues.

Use of Experts in Various Types of Cases

Criminal Cases

Expert testimony on battering and its effects falls into the category of “social framework testimony.” This form of testimony is available to all criminal defendants as a way to help explain a person’s actions within the broader context of their life experiences. It is not uniquely available to survivors of IPV. Courts have routinely permitted information about a deceased’s prior relationship to a defendant in a murder trial to help evaluate the defendant’s perception of threat (Osthoff & Maguigan, 2005).

Initially, expert testimony was introduced in cases where women killed their intimate partners following a history of violent victimization. Defendants employed traditional self-defense laws that acknowledge a person’s right to defend their life in a context of imminent or immediate threat. Self-defense standards were crafted to reflect the experiences of a “reasonable man” and vary across states. A majority of jurisdictions do not require that a person retreat if they reasonably believe that they are in danger of unlawful bodily harm. In other states, people have a “duty to retreat,” unless they are in their own home. Self-defense also requires that people use force proportionate to that used by

their attacker (Melton, Petrila, Pythress, & Slobogin, 1997, p. 210).

Expert testimony in traditional cases of lethal confrontation help to explain a battered woman’s perception of threat and the impossibility of escape, even when the strict standards of imminence or immediacy were not met. Expert testimony is also used in non-confrontational situations, such as a sleeping husband, to explain how a battered defendant’s perception of threat extended to situations where it appeared she had an opportunity to retreat. Courts accept expert testimony on grounds that juries might not apply a standard of reasonableness and acknowledge the perception of danger common to a woman who has suffered severe abuse from the intimate partner whom she killed. The use of expert testimony in traditional self defense cases is well established and encoded in state statutes and case law. Testimony may be introduced at any stage in the process, including grand jury hearings, plea negotiations, trials, sentencing, and clemency or parole hearings. In some instances, the State may be open to conversations with an expert prior to indictment and may drop or reduce charges based on explanations provided by the expert.

A controversial use of expert testimony in battered women’s self-defense cases is in murder for hire cases, or third-party murders. These cases imply calculated premeditation and, thus, are charged as first degree murder. Ferraro (2006) found that even when courts agree that a woman was battered and feared her abuser, they do not agree that such fear justifies employment of a third party for self-defense. Expert testimony is also relevant in cases where a woman commits a crime against a third party under direct orders or coercion from her abusive partner. Duress or coercion defenses explain how a person may perpetrate a crime due to direct threats of death or bodily harm. States vary in their standards for duress, but most states exclude a duress defense for intentional homicide (Melton et al., 1997). Expert testimony on battering and its effects can help explain why a woman was unable to deny an abuser’s demand that she commit a crime or why she failed to report

a crime that she witnessed. Testimony assists in explaining the defendant's actions, not excusing them. Expert testimony has also been used in cases where women's violent partners harmed or killed their children or where women perpetrated crimes against their own children or step-children under orders from their abusers.

Failure to protect cases bring criminal charges against women who remain in violent relationships after becoming aware of their partner's abuse of their children, or who fail to obtain appropriate medical treatment for their children following child abuse (see Stark, 2007). There is no systematic analysis of the success of expert testimony in these cases, but there is anecdotal evidence that outcomes range from case dismissal to life sentences. These cases invoke deep feelings about maternal care, and, in most cases where expert testimony is introduced, they require explanation of the multiple social, legal, and psychological barriers that contribute to a woman's inability to save her children from her own abuser.

The vast majority of criminal cases are settled through plea negotiations rather than trials. The role of experts in cases where battered defendants plead guilty is to assist the defense team in explaining to the court the ways that a history of IPV mitigates the seriousness of the offense and justifies a more lenient sentence. Most battered defendants have little or no criminal history, and this often results in a reduced sentence. Judges also consider evidence of IPV in determining an appropriate sentence. Experts generally provide this evidence in the form of a written report, but may also be asked to testify in a sentencing hearing. When testifying at a sentencing hearing for a murder, the expert may face the victim's grieving family members, who may also have an opportunity to express their opinions and desires to the court.

Expert testimony has also been accepted to assist in the prosecution of IPV perpetrators (Hamilton, 2009; Hawes, 2005; Rogers, 1998). Experts can assist by explaining the apparently "puzzling" behavior of a survivor who recants her original statements, minimizes the level of abuse, or

refuses to cooperate with the prosecution. People within the legal system often express frustration about the perceived tendency of IPV survivors to "drop charges" and reunite with their abusive partners. In response, some jurisdictions have instituted "no drop" policies. Ford and Regoli (1993), however, found that for survivor-initiated charges (as opposed to on-scene arrests), "permitting victims to drop charges significantly reduces their risk of further violence" (p. 157). That is, prosecutors supporting women's use of the criminal justice system as a bargaining resource in securing her safety can most effectively assist in achieving the woman's safety despite dropped charges. At the same time, Ferraro and Boychuk's (1992) comparison of intimate and non-intimate assault cases found a similar rate of no-shows and requests for dismissals among both types of survivors. In other words, survivors of IPV were no less cooperative with prosecution than survivors of other forms of interpersonal violence.

Expert testimony can assist women in the clemency process. Especially for women who were convicted prior to statutory changes that admitted evidence of IPV in criminal trials, evidence of IPV can be presented to boards evaluating the validity and strength of women's cases. The clemency movement has had varying levels of success, with strong movements in Ohio, Florida, and California (Gagné, 1998). Free Battered Women, a San Francisco based nonprofit, has helped to gain release of 19 survivors who had served lengthy sentences for killing their abusive partners. But, as Andrea Bible, coordinator of Free Battered Women notes, the laws allowing battered women to apply for clemency are not "self-implementing. It takes people and resources to apply the law" (Bevino-Ring, 2007, p. 19).

Marital Dissolution and Child Custody Cases

As of 2004, 49 states and the District of Columbia enacted legislation that requires consideration of IPV in marital dissolution and child custody hearings (Rosen & O'Sullivan, 2005). All states use mediation sessions prior to family court hearings but

vary in their requirements for mediation (Johnson, Saccuzzo, & Koen, 2005). The issue of mediation in IPV cases is hotly contested (Ver Steegh & Dalton, 2008). Practitioners and researchers are split on how to handle dissolution and custody in cases of IPV. Many experts on IPV have argued that mediation is not safe or appropriate in cases of IPV and have worked to pass legislation that excludes such cases from mediation mandates (Bryan, 1992; Grillo, 1991; Hart, 1990; Pagelow, 1992; Pearson, 1997). Even those in favor of mediation note the importance of specialized training and the need for awareness of the dangers and restraints faced by battered women in mediation (Maxwell, 1999). Following the recommendations of the 1994 National Council of Juvenile and Family Court Judges (NCJFCJ) Model Code on Domestic and Family Violence (National Council of Juvenile and Family Court Judges, 1994), many states include a “rebuttable presumption” *against* the award of sole or joint custody to a parent who has perpetrated IPV against the other parent.

Many advocates and researchers argue for the continuing importance of a detailed consideration of IPV in dissolution and custody cases. Researchers have demonstrated patterns of manipulation, minimization of harm, threats, and violent retaliation by abusive men in the process of separation, divorce, and custody proceedings (Arendell, 1995; Bancroft, 2002; Jaffe, Lemon, & Poisson, 2003; Ptacek, 1999). These patterns, as well as women’s fear, intimidation, and exhaustion, are often invisible to those unfamiliar with the dynamics of IPV. Researchers in California and Washington found that mediators and judges failed to identify IPV in custody cases even when petitioners indicated the presence of IPV on their applications (Johnson, et al., 2005) or when there was a documented, substantiated history of IPV (Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005). These research findings strengthen the argument for the use of expert testimony on IPV in dissolution and custody cases.

However, judges are not obligated to admit such testimony and may limit consideration of IPV to cases with documentation through police reports,

medical records, or orders of protection. In many cases, a court appointed psychologist evaluates the family and makes a recommendation to the court. The introduction of an expert on IPV by one parent may be viewed as a challenge to the court’s authority and the competence of the appointed expert as well as the judge. Since one factor influencing determination of a child’s best interest is the perceived willingness of a parent to support contact and smooth relationships with the other parent, introduction of expert testimony on IPV may be interpreted as evidence of a parent’s hostility toward the other. Recently, some states have passed legislation that suspends the requirement of open contact with a documented perpetrator of IPV. There has not been any systematic research that evaluates the use of expert testimony in dissolution and custody cases. Therefore, potential contributions and limitations should be weighed cautiously in decisions about the value of expert testimony in this context.

Tort Cases

Expert witnesses have testified in tort cases involving personal injury or medical malpractice (Krafka et al., 2002; Linn, 1999). In those cases, experts often give their opinions on liability or damages (Tirella, 2006). Most experts in tort cases are physicians and mental health professionals, engineers and scientists, financial or market analysts, and academicians (Diamond, 2007). Zykorie (2002) argues that there are benefits of using domestic violence advocates as expert witnesses because they may provide expertise for a lower fee or pro bono and their experiences increase their capabilities to describe the complex dynamics of IPV in simple and straightforward terms.

While little is written about expert testimony in tort cases involving IPV, there has been a groundswell of civil tort cases brought by survivors and their legal representatives. Civil cases are being ushered through our courts by faculty and law students working in domestic violence and civil litigation clinics in schools of law and nonprofit organizations. For example, staff attorneys at the Never Again Foundation take on tort cases involving

domestic violence by bringing liability claims against perpetrators to seek justice for survivors. They utilize the services of expert witnesses who agree to support their work on a pro bono basis.

Immigration Cases

The Violence Against Women Act (VAWA) (last reauthorized in 2005) provides legal remedies for immigrant women who experience IPV. Specifically, the reauthorization of VAWA in 2000 allowed battered immigrant women to self-petition for legal permanent residency without the assistance of their abusive spouses. To make these claims, respondents must have suffered substantial physical or mental abuse from their intimate partners. As in the case of domestic violence tort claims, the literature about expert testimony in immigration cases is also lacking. Because of the complexity of immigration law, expert witnesses are often used in asylum cases to provide clarification of substantive issues related to the claim (Immigration Equality, 2008). Offering an opinion on the credibility of a respondent and the consequences of deportation in VAWA immigration cases are also important and useful. Expert witnesses in immigration cases are often needed to educate the court on the prevalence, dynamics, and complexity of IPV, the effects of trauma and abuse on survivors, the impact of deportation on the survivors and their children, and the lack of resources for survivors in their countries of origin. According to Welch (2004), “in many cases, the immigrant’s life is not the only one profoundly impacted by deportation; family members, employers, and communities are also adversely affected” (p. 545).

Conclusion

The use of expert testimony on IPV is critical to developing legal responses that are responsive to the experiences of women. Yet this testimony is fraught with contradictions and dilemmas. If experts rely on a unidimensional and pathological model of IPV, they affirm an image that contradicts the diversity, strength, and resourcefulness of women (Biggers,

2005; Ferraro, 2006). The “battered woman syndrome” language that has proven so popular and resistant to change implies a “traumatization” model (Stark, 2007) that is in conflict with most women’s experiences. This “revives concepts of excuse” (Schneider, 2000, p. 135) that not only emphasize women’s defects but also sparks accusations that expert testimony on IPV “excuses” murder and undermines both the integrity of the court (Faigman & Wright, 1997) and the moral fabric of society (Dershowitz, 1994). Yet these reified, distorted representations of women often elicit greater sympathy and more lenient responses than those that adhere to more nuanced and realistic depictions (Stark, 2007, p. 138).

Research indicates that both judges and juries are moving beyond strictly psychological understandings of IPV (Hamilton, 2009). Therefore, it is essential that those providing expert testimony on IPV avail themselves of the full range of information available and focus beyond the specific psychological consequences of abuse. The research on the effective use of expert testimony is in its infancy and significant questions remain unanswered. Trend analyses of statutory and case law has not been conducted since Parrish’s work in 1996, and, most notably, studies of the effectiveness of expert testimony in criminal prosecution or defense or in civil cases do not exist.

We need to know how characteristics of defendants and the particulars of their cases influence outcomes. The existing research on this topic is limited to juror simulation studies, which are useful but cannot substitute for analyses of actual cases. We also need to know more about effective expert testimony, both in terms of content and the qualities of the expert witness. We would profit from consideration of the treatment of IPV cases in other countries. Future research should build on the solid foundation of empirical evidence and theoretical analyses discussed and remain focused on the goal of achieving justice for IPV survivors.

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In Brief:

The Use of Expert Testimony on Intimate Partner Violence

Criminal and civil courts throughout the United States accept expert testimony on intimate partner violence (IPV) to dispel myths and to achieve just outcomes. Testimony has moved beyond the notion of the “battered woman syndrome” to include the full range of consequences of IPV. There is no psychological diagnosis that captures the experiences of victims of IPV and there is no single, uniform response to IPV. Expert testimony can be provided by anyone with specialized training and experience with IPV. The most effective experts understand the legal process, base their testimony on state of the art scientific knowledge, and consider cultural dimensions of IPV.

Expert witnesses on IPV serve the court in several functions. They may provide direct testimony, assist an attorney with trial strategies, prepare a survivor for trial, or assist with jury selection. Often, IPV experts answer the question, “why did she stay?” A skilled expert witness answers in ways that underscore the complex dynamics of an abusive relationship, including issues of power and control, and without pathologizing the survivor. Testimony is given under oath and should be based on generally accepted research and an awareness of all significant positions on controversies in the field.

IPV experts may participate in many types of cases. These include:

- Criminal cases: The expert provides information on how IPV affects a victim’s perceptions and actions. Testimony may be introduced at any stage in the process, including grand jury hearings, plea negotiations, trials, sentencing, and clemency or parole hearings. The most widely accepted use of IPV experts is in traditional self defense cases when a victim of IPV kills the abuser. IPV experts are also used to explain why a victim commits a crime under orders from an abuser, fails to report an abuser’s crimes, or does not prevent or intervene in the abuse of children by the perpetrator. Experts are often needed to explain why victims do not report, change their stories, recant testimony, or assist in the prosecution of perpetrators.
- Marital dissolution and child custody cases: Researchers have demonstrated patterns of manipulation, minimization of harm, threats, and violent retaliation by perpetrators of IPV in the process of separation, divorce, and custody proceedings. Experts can help explain these patterns and the threat to children and non-abusing parents.
- Tort cases: Experts can help explain the damages experienced by victims to establish the basis for compensation.
- Immigration cases: Expert witnesses in immigration cases are often needed to educate the court on the prevalence, dynamics, and complexity of IPV, the effects of trauma and abuse on survivors, the impact of deportation on the survivors and their children, and the lack of resources for survivors in their countries of origin.

The use of expert testimony on IPV is critical to develop legal responses that are responsive to the experiences of survivors. Yet this testimony is fraught with contradictions and dilemmas. If experts rely on a unidimensional and pathological model of IPV, they affirm an image that contradicts the diversity, strength, and resourcefulness of survivors. These reified, distorted representations, however, often elicit greater sympathy and more lenient responses than those that adhere to more nuanced and realistic depictions. The research on the effective use of expert testimony is in its infancy. Future research should build on the solid foundation of empirical evidence and theoretical analyses to date and remain focused on the goal of achieving justice for IPV survivors.