

# Who Are They to Judge? The Jury. That's Who!

## Jury Selection in Sexual Assault Cases

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## Jury Selection

### Preliminary Thoughts

- Does your jury selection sound like a cross examination?
- Will your questions actually elicit information from a juror?
  - Will it be truthful or what the jury thinks that you want to hear?
- Does your jury selection focus on irrelevant issues?
- Does your jury selection ask questions that the defense will cover?

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## How Do We Keep the Balance True

- Know public opinion about sexual assault
- Honestly assess your case and likely defenses
- Formulate questions that help jurors to see that the concepts that we want them to accept as true aren't so different than their own experience

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What Causes Us to Start at a Disadvantage?

- What do jurors say when they acquit?

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What Causes Us to Start at a Disadvantage?

- What do jurors say when they acquit?
  - I think *something* happened, but I just don't know what.
  - I think he's probably guilty but it just wasn't proof beyond a reasonable doubt.
  - The evidence was very confusing . . .

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Why Do We Lose Sexual Assault Cases

- Jurors think that they know rape when they see it
- And when the assault doesn't reach up and smack them, the emotional reaction is lacking
- And when they don't feel the outrage, they acquit.

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### Why Do We Lose Sexual Assault Cases

- When the victim, witnesses, evidence, etc. don't meet their expectations, they think that *their disappointment* is reasonable doubt

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### Begin at the Beginning . . .

- I am not a jury consultant or a shrink
- But we are prosecutors
  - We meet with survivors of sexual assault
    - We have reactions to them
    - We watch how other people respond to them
    - We watch how they interact with others

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### But we are prosecutors . . .

- We analyze cases
  - We know where our case is weak
  - We know what our police officers did not do
  - We know what evidence wasn't tested
- We know what the public thinks about rape
  - We know what the public thinks about rape (even when they won't say it)
  - We know what they think about victims
  - We know how they respond to defendants

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### Jury Selection Sexual Assault Cases

- You need to find jurors who accept that
  - Rape can happen within a relationship
  - A woman who is raped might still love her rapist
    - And might even remain in a relationship with him
  - It is NOT normal to want to disclose the rape right away . . .
    - Or even to recognize what happened as rape!
  - The burden of proof is the same, whether the guy “looks like” a rapist or not!

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### If You’re Going to Pick a Solid Jury

- You need to know what is “wrong” with your case.
- You need to know the issues that will cause the jury to focus on the victim, not on the batterer
- You need to ask questions in a way that encourage juror honesty and that translate case concepts into juror “real life” experiences

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### Assessing Your Case

- You need to know where your case is weak
  - Not just *legitimately* weak but where your case lacks jury appeal
    - Quote from a prosecutor: “There are only 2 questions a jury must answer before convicting: “Did the defendant do it?” and “Why do I care?”

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**Know How Your Case  
Will Affect Jurors**

Ask Yourself This:

if  
the jury believes **all** of the state's evidence  
and  
believes that you proved **every** element  
why would the jury still acquit?

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**Assessing Your Case**

- What are the weaknesses in your case, individually?
  - Talk to your professional witnesses:
    - Was there anything about the case, the victim, the disclosure, that cause you to question the veracity of the allegation?
  - Talk to friends and family:
    - What questions do they have?
  - Roundtable your case with other prosecutors:
    - And throw in a non-abuse prosecutor just to make them appreciate their cushy positions and all of their evidence!

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**Jury Selection Strategies:  
Know Your Boundaries in *Voir Dire***

- Do NOT get too fact specific
  - Go broad with analogies
- **BATSON!!!**
  - Remember that it applies to gender as well as race
- Be cautious when discussing tricky legal issues
  - E.g. Defendant testifying

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Jury Selection

## CRAFTING QUESTIONS

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Jury Selection Strategies:  
Reduce the Law to "Real Life"

- Take the broad concept and relate it to something within the juror's own experiences
  - They will hold your victim and case to unrealistic standards unless and until they realize how similar the case is to their everyday experiences

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Knowing Who Can  
Handle Your Case

- Ability to decide whether you proved the case, even if there are missing pieces
- Ability to hold someone accountable for criminal behavior, even if it challenges their beliefs about domestic and sexual violence.
- Ability to make and stand by a difficult decision and to make judgments based on logic and reason, not emotion.

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### Who Can Handle Your Case

- Are they good decision-makers?
  - How do they make difficult decisions?
  - How comfortable are they with decision-making?
  - How often do they have to make decisions that affect others?
  - How do they go about making those decisions?
  - How do they make decisions on a team?

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### Line of Questioning: The Decision

- I would like each of you to think of a major decision you have made in the last 2 years
  - What factors did you take into account in making the decision?
  - Did you consult others in making the decision?
    - How did you choose who you would consult?
  - Did you make a final decision?
  - How do you feel about the decision that you made?
  - Do you feel good about *how* you made the decision, even if, in retrospect, you might make a different decision?

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### Finding Good “Deciders”

- What does the prospective juror (PJ) do for a living?
  - How often does the PJ have to make tough decisions?
  - How reliant is the PJ on a supervisor / superior to make final judgments?
- How does the PJ make decisions in personal life?

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### Finding Good “Deciders”

- Are there things in this PJ’s background that would cloud their ability to make a difficult decision well?
  - Prior victimization?
  - Prior accusation (friend / family / self)?
  - Bad experience with law enforcement?
  - Identification with defendant?
  - Too “forgiving?”
  - Affiliation with defense-based service providers?

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### Jury Trials: Think About It

- If the defendant was making a purely technical, legal argument, why take the case to a jury?
  - Unless, of course, the defense plans to appeal to jury biases and prejudices about domestic and sexual violence!

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### Golden Rule of Jury Selection

You will never change a juror’s deeply held, pre-conceived opinions.

You just want to uncover those opinions *during voir dire* so that you can get rid of the freaky people who will tank your jury.

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**Jury Selection:  
General Advice**

- Read stories about sexual violence in your on-line newspapers and check the comments section
  - Reader comments may spur a good discussion of the issues in your case
- Use analogies!!!

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**Common Juror Issues with  
Sexual Violence**

- **Victims Who Don't "Act" like Victims**
- **Consent**
- **Inconsistent Statements**
- **Delays in Disclosure**
- **Loyalty to offenders (intimate partner cases)**

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**Victim Behaviors**

- How would you feel if . . .
- Juror on the spot
- Last painfully embarrassing moment

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### Victim Demeanor

- Courtroom Demeanor:
  - Tragic events in your community
  - Describing consensual sexual experiences
  
- Other analogies
  - Haunted House
  - Car accident

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### Turning Myths into Voir Dire Ideas

- Consent Once = Consent Forever
  - The Charitable Donation
    - Given to online charity
    - Solicited after the donation but didn't give
    - What if the charity withdrew money without consent from you?

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### Turning Myths Into Voir Dire: Inconsistent Statements

- Inconsistent statements
  - We as adults never tell the same story the exact same way every time
  - How much we tell of the story depends on the audience
  - Being inconsistent doesn't make us unreliable. It makes us human.

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Reducing the Law:  
Inconsistent Statements

- Childbirth analogy
  - Father’s perspective is vastly different than the mother’s!
  - No one remembers every medical person in the room!
  - How accurate do you think their measures of time are?

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Reducing the Law: Delayed Disclosure

- Delayed Disclosure is just a fancy way of saying that the victim kept a secret
  - Almost every adult has kept a very serious secret at some point in his / her life
    - It doesn’t make the adult un-credible
    - It doesn’t make the secret false
  - Since the defendant *encouraged secrecy* and lying, why is victim now a liar?

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Reducing the Law:  
Delayed Disclosure

- Delayed disclosure
  - Delayed disclosure simply means that the victim kept the abuse a secret
  - We as adults have all kept something a secret
  - We had good reason for keeping quiet, and our silence was usually designed to protect someone else
    - We had opportunities to tell, but choose not to tell
    - We made decisions about who to tell and when to tell
    - Our desire to come completely clean about the secret was impacted by the response of the 1<sup>st</sup> person we told
- Keeping a secret doesn’t mean it never happened
- Keeping a secret doesn’t make the secret-keeper a liar

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Turning Myths Into  
Voir Dire Ideas

• **The  
Bad  
Boss**

- Review things that bosses do
- How it made the PJ feel
- PJ didn't quit right away and may not have told anyone
- Only told when it was safe
- Liked the job but wanted the abusive conduct to stop

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Turning Myths Into  
Voir Dire Ideas

• **Women lie about  
and rape**

- Do I generally believe that women lie about DV / rape?
- Do I believe that this is an easy lie to tell?
- Do I come to the table presuming that she's lying? (Or that she has something to hide, there must be more to this since it's going to trial)?

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Turning Myths Into  
Voir Dire Ideas

• **Victims assume  
the risk of being  
hurt if they stay  
with someone  
who is violent**

- Are there some people who just "ask for it?"
- What does the phrase "once a victim, twice a volunteer" mean to you?
- When does "putting yourself in a vulnerable position" excuse criminal conduct?

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### Reducing the Law: Divided Loyalties

- Every adult has, at some point in time, loved a person or displayed loyalty to a person who did not have his / her best interests at heart
- We stayed in those situations because there was some benefit to staying that outweighed the benefits of addressing the negatives

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### Reducing the Law: Divided Loyalties

- Divided loyalties: The Embarrassing Family Member
  - Just because we kept quiet about the negatives, it doesn't make them go away
  - And we may have waited until we were "safe" to tell anyone about them

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### Recantation

- You're right, *I'm* wrong.
  - Have you ever "taken something back?"
    - Why did you do it?
    - Were you telling the truth when you took it back?
    - How can you trust a person who has "taken it back?"

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### Turning Myths Into Voi Dire Ideas

- Rape happens because the victim must have done something to provoke it
  - Do you have to understand the motive to believe that the crime happened?
  - What type of conduct would give someone legal permission to hurt someone else?

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### Jury Selection

- A marriage license or a child or a relationship or a date is not permission to force sex
  - When is it OK to force a person to have sex?
    - What about “pushing” a little harder?
  - What about other crimes committed against intimates?
  - Is bodily integrity more important than property?
  - Which hurts more: betrayal by a stranger or by someone you love?

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### Reducing the Law: Disbelief and Reasonable Doubt

- **WE WORK TO DISBELIEVE PAINFUL THINGS**
  - Describe to me something in your life that when you first heard it, you didn’t want to believe it. (*think cancer diagnosis*)

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Reducing the Law:  
Disbelief and Reasonable Doubt

- Why didn't you want to believe it?
- What things did you do to try to find an alternate explanation?
- Were there signs of the illness / the event that preceded the ultimate diagnosis / final event that were ignored?
  - Why do you think that people sometimes ignore warning signs?

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Reducing the Law: Disbelief and Doubt

- **WE WORK TO DISBELIEVE PAINFUL THINGS**
  - What type of things in life do we work *not* to believe?
    - Why do we try not to believe certain things?

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Reducing the Law:  
Disbelief and Doubt

- Is anyone here familiar with the facts of the Jaycee Dugard case?
  - Have them describe.
  - Do you have any trouble believing that this guy kidnapped her and held her hostage for years?
  - Is your reaction to child sexual abuse different when the child isn't abused by a stranger, but rather is abused by a loved one?
    - How is your reaction different?
    - Why do you think that your reaction is different?

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Reducing the Law:  
Disbelief and Doubt

• **THE BURDEN OF PROOF DOESN'T CHANGE JUST BECAUSE THE DEFENDANT ISN'T A STRANGER**

- Does anyone here *want* to believe that a woman could be raped by someone she knows?
  - Why not?
  - What is easier to believe, that we made a “mistake” or that a guy would rape a friend of his?
  - Knowing that, how can you assure the state that you wouldn't hold us to a higher burden of proof than if the person accused of the abuse was a stranger?

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Reducing the Law:  
Disbelief and Doubt

• **THE BURDEN OF PROOF DOESN'T CHANGE JUST BECAUSE THE DEFENDANT ISN'T A STRANGER**

- In other words, if the person sitting here accused of rape was a stranger, do you think it would be easier or harder to believe that this person committed the crime of sexual assault?
  - Why or why not?

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Reducing the Law:  
Disbelief and Doubt

• **THE BURDEN OF PROOF DOESN'T CHANGE JUST BECAUSE THE DEFENDANT ISN'T A STRANGER**

- So as I stand here, trying to pick a jury who can be fair to the defendant and fair to the state, I need to know *honestly* whether you would hold me to a higher standard because the defendant is someone who knows the alleged victim?
  - How would I know that?

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Reducing the Law:  
Medical Experts

• **HOW DOES YOUR JUROR RESOLVE  
CONFLICT OF OPINIONS?**

- In everyday life, we hear conflicting and sometimes confusing accounts of very important matters
- What criteria do you use to evaluate whether you believe what someone tells you?
- What factors make a person believable?
- What factors make a person unbelievable?

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**Jury Selection**  
**GIVING GENERAL ADVICE**

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Analogies / Examples:  
General Advice

- Strategize with other prosecutors for admissible analogies
- Always memorize your “wrap up,” which ties the analogy into the relevant case concept
- Be prepared to quickly and succinctly explain to the Judge why these questions are permissible

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Jury Selection Strategy:  
Preempt the Defense

- Acknowledge the burden of proof
  - Proof beyond a *reasonable* doubt
  - Evidence that leaves you firmly convinced
  - There are few things we know in life with absolute certainty
    - If you had actually witnessed this crime, then you couldn't be a juror, so the concept of impartial jurors presumes that you will judge credibility

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Jury Selection Strategy:  
Preempt the Defense

- These cases are difficult emotionally
  - Testimony may be difficult to hear, but that is normal
- It is the Defendant's constitutional right not to testify
- The Judge will equip the jurors – with instructions – for this "difficult" task

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Jury Selection Strategy:  
Prioritize Your Questions

- Know where you want to go and be prepared to transit seamlessly between lines of questions
  - Especially if objections are sustained
- Know what the biggest issue in your case is and have multiple avenues for addressing it

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### General Advice on Jury Selection

- Cautionary tale:
  - Quanardel Wells is a serial rapist
    - He abducts women and sexually assaults them and forces them to withdraw money from ATM's.
  - This is your jury foreman:
    - Feminist
    - Highly educated
    - Political aspirations (is a democrat)
    - Plaintiff's attorney

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### General Advice on Jury Selection

- Verdict: not guilty
- Quanadrel Wells raped again after that verdict. Many times.
- Quote in the paper from Linda Pence:
  - She believed he was guilty but voted for acquittal because she thought prosecutors failed to prove it. After the trial, she said, she called Wells' attorney to ask him to advise his client to walk a straight line because "he just got a gift from God."

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### General Advice: Do I Have a Point?

- **YES!**
  - **General advice is dangerous!**
    - Every juror has a secret. The question is "how will it affect your case?"
    - Failing to ask open-ended questions, relying on stereotypes, can tank your case.

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**Identify Myth-Believers**

- Make it OK for your prospective jurors to actually tell you what they are thinking
- Craft questions that address myths and beliefs systems without asking the ultimate question
- Follow Adrienne's Rules . . .

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Rule #1:  
Always Have  
Someone Sit With You  
During Jury Selection

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Rule #2:  
Talk to every juror

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Rule #3:

Never Keep a Juror  
Who Has Acquitted  
on Another Jury or  
Who Has Been Accused of this  
Type of Crime  
(Inc. Family / Friends)

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Rule #4

- As a general rule, survivors don't make good jurors . . . but they can educate your prospective jurors.

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Rule #5:

Don't Waste a Lot of Time on Jurors  
You're Going to Strike

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Rule #6:  
*Voir Dire* Is Like Dating: If You're Talking Too  
Much, You're Doing It Wrong

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Rule #7:  
Don't be afraid  
to question jurors  
about controversial  
subjects

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Rule #8:  
Watch the body language  
of other jurors  
when "freaky" juror  
is speaking

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Rule #9:  
Be Suspicious of Jurors Who Won't  
Answer Your Questions

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Rule #10:  
Always Try to  
Hold Back One Strike

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Rule #11:  
Always Ask  
"Is There Anything I  
Should Know About You"  
and  
"Are There Any  
Questions You Have  
for Me?"

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Rule #12:  
LISTEN, LISTEN, LISTEN

• **New Rule: Tattletale!!!!**

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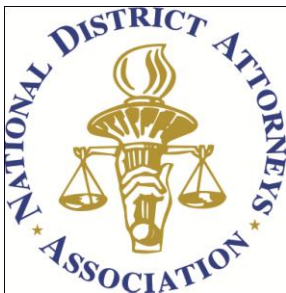
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## INTRODUCTION

### **RAPE:**

What is the first thing that comes to mind when you hear the term “rape?”

- Is there anyone whose first thought is “I’ll bet she made it up?” “Another scorned woman?”
  - IF YES:
    - Why is that your first thought?
    - Does anyone here think that rape is an easy allegation to make?
    - Easy to the point that a case gets investigated and charges filed?
- Does everyone here believe that rape happens?
- Has anyone here ever seen a rape occur?
- If you haven’t seen it, but you know it happens, why is it that you believe it without seeing it without your own 2 eyes?

*Is it fair to say that we know that rape happens because people give accounts of rape that we believe*

### **CHILD MOLESTATION:**

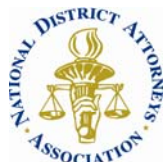
What is the first thing that comes to mind when you hear the term “child molestation?”

- Is there anyone whose first thought is “I’ll bet the kid is lying?” “Another kid who has watched too much TV or is trying to get attention?”
  - IF YES:
    - Why is that your first thought?
    - Does anyone here think that molestation is an easy allegation to make?
    - Easy to the point that a case gets investigated and charges filed?
- Does everyone here believe that child molestation happens?
- Has anyone here ever seen a child being molested?
- If you haven’t seen it, but you know it happens, why is it that you believe it without seeing it without your own 2 eyes?

*Is it fair to say that we know that molestation happens because people give accounts of molestation that we believe?*

### **DOMESTIC VIOLENCE:**

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## The National Center for the Prosecution of Violence Against Women

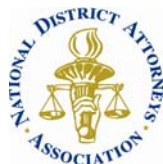
What is the first thing that comes to mind when you hear the term “DOMESTIC VIOLENCE?”

- Is there anyone whose first thought is “I’ll bet she made it up?” “wonder what he did to make her mad?”
  - IF YES:
    - Why is that your first thought?
    - Does anyone here think that intimate partner abuse is an easy allegation to make?
    - Easy to the point that a case gets investigated and charges filed?
- Does everyone here believe that spousal abuse happens?
- Has anyone here ever seen domestic violence occur?
- If you haven’t seen it, but you know it happens, why is it that you believe it without seeing it without your own 2 eyes?

*Is it fair to say that we know that domestic violence happens because people give accounts of domestic violence that we believe?*

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Prepared by NCPVAW at National District Attorneys Association (2009).



## CREDIBILITY

So if a person were to describe a sexual assault (or other crime) to you, how would you figure out whether they were telling you the truth?

### ▪ Demeanor on the Stand

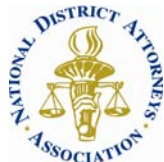
- Sir, if I were to ask to you stand up and to describe your last consensual sexual encounter to these jurors, how do you think you would feel?
- Don't worry, I'm not going to ask you to do that, but even the thought of being asked to do that . . . do you think it would make a person uncomfortable?
  - And how might that discomfort manifest itself on the witness stand?
  - How do you think it would affect witness behavior?
    - Be able to look you in the eye?
    - Might have trouble answering questions?
    - Fidget with clothes or jewelry?
  - Do you think that those indicators of nerves are indicators of lying?
    - Why not?

*Get a few jurors to say that not looking you in the eye, quiet voice – not an indicator of lying because this would be really hard to discuss*

- So then how would you judge credibility?

### ▪ Inconsistent Statements

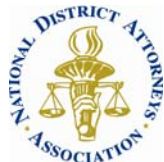
- I would like each of you to think of a major life event that has happened in the last (time period in which the assault occurred)? Everyone have an event?
  - What is that event? (find someone who says wedding or birth)
  - Do you ever discuss that event with other people? Who?
    - Do you tell the story of your *wedding / birth / death* the same way every single time that you tell it?
      - Why not?
    - How do you decide what details you're going to give?
    - Is the way that you're telling the story affected at all by your mood that day?
    - By how you feel your story is being received?
  - And I take it that there were other people present during the event?
    - Do you think that they describe the event the same way that you do?
    - Why wouldn't they describe it exactly the same way?
  - So if you don't tell the story the same way every single time, how would someone know that you aren't lying?



## The National Center for the Prosecution of Violence Against Women

- Is it fair to say that no one – except a seasoned liar – would tell the same story the same way with the same words every single time?
    - Do those inconsistencies mean that a person is lying?
    - Well, if you don't tell the story the same way as another witness, does that mean that *either* of you are lying?
      - Why not?
    - *So if there are inconsistencies in what a witness has said on prior occasions or between how 2 witnesses describe the same event, is that dishonesty?*
      - *Why not?*
  - Likewise, is there any juror here who could recall every single sexual experience that you have had with your spouse in the last 3 years?
    - Who initiated it?
    - What specific acts occurred?
    - Where everyone else in the house was located?
    - Exact time of day?
    - So if you can't remember that, is there anyone who would hold a child to the standard of remembering every single act of molestation that occurred over a period of years?
  - **MEMORY (Specifically Memory and terror):**
    - Who here has ever went to a haunted house as a child?
    - How many haunted houses did you go to as a child?
    - Was it scary?
      - **(Pick a juror out who says the experience was scary)**
      - **Mrs. Smith, you're going to be a witness about your haunted house experience, okay?**
      - Do you remember your visit to the haunted house?
        - When was it?
        - What time of day was it?
        - What was the address of the haunted house?
        - What group sponsored the haunted house?
      - Tell me some of the things that you saw in the haunted house.
      - Do you remember the exact order of scary things that you saw?
      - Do you remember the costumes worn by every single person in the haunted house?
      - Could you tell every single event that occurred in the haunted house?
- 

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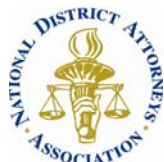
- Why not?
- Does the fact that the experience was scary affect your ability to remember every single detail?
- When you were going through the haunted house, did you ever ask yourself “how much longer” or did you feel at the end “thank God I’m out of here!”
- Would you agree with me that something that makes the haunted house a little less scary is the fact that *you know that it is going to end?*
  - And that you were going to a safe place at the end of your haunted house experience?

**(now pick another juror who will critique Mrs. Smith’s testimony)**

**Mr. Jones, let’s talk about Mrs. Smith’s testimony**

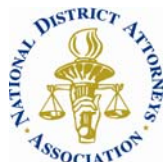
- Do you believe her when she tells you that she has been to a haunted house?
- Now it seems to me that there are a lot of things she doesn’t remember, so how is it that you believe her?
- Do you expect her to be able to recount every single detail?
- How do you think that the passage of time affects her memory?
- How do you think that her fear while in the house affects her memory?
- Do those factors, however, make her unreliable?
- Does her inability to remember every single detail affect your ability to believe her?
  - What if Mrs. Smith told you that there were 3 ghosts in the haunted house and another person who said that he went through the house said that there were only 2 ghosts.
  - Would that affect your ability to believe Mrs. Smith?
    - Why or why not?
    - *So if a person experiences a scary or traumatic event, might that affect their ability to recall every single detail?*
    - *Especially if they didn’t know how the event was going to end?*
    - *But are those people still capable of being truthful, accurate reporters of the event?*

*You could also use the example of being in a car accident, since it is often very scary and happens quickly, and if everyone could agree as to what happened, we wouldn’t need investigators and police.*



## VULNERABILITY TO CRIME

- Has anyone ever heard someone speak about a crime victim, saying “well, if only he had not ‘fill in the blanks,’ this never would have happened.”
  - For example, a man living in a really nice house that borders on a poorer edge of town whose house is broken into and you find out that he doesn’t have a burglar alarm.
  - What about a woman who goes to an ATM at night and gets robbed?
  - A store owner who is working at his convenience store – a store that doesn’t have working video cameras – and is held up at gunpoint
- Does anyone think that those people deserved to be victimized because they did something that made themselves more vulnerable to crime?
  - So if you were a juror on a store robbery case, and one of your fellow jurors said “doesn’t this guy know what part of town his store is located in? I think he was just asking to be robbed!”
    - Do you think that the law requires that victims of crime be “smart” in order to receive justice? Why not?
- Are any of the people in those scenarios less believable because they may not have exercised common sense?
  - Why not?
- So if, during the context of a rape case, a fellow juror said during deliberations “hey look, she went out drinking with her friends and she got really drunk. This guy just lucked into a drunk girl,” how would you respond to that comment?
  - If we agree that a victim’s failure to exercise common sense isn’t a defense to a convenience store robbery or a home burglary, do you think it should be a defense to rape?
  - Why not?
  - Our state / commonwealth defines rape as . . . *PROVIDE YOUR STATE’S DEFINITION*
    - Is there anything within that definition that says “if the victim does not exercise common sense, it is OK to force her to have sex?”
      - Is there anything in that definition that requires me to prove that some of the victim’s decisions did not make it easier for a criminal defendant to force her to submit to certain acts?
  - Have you ever heard safety experts like John Walsh (America’s Most Wanted) say things like “if you’re being abducted, and someone is trying to force you into a car or get you somewhere more remote, don’t get into that car. If they’re going to shoot you, let them do it right there with witnesses. Letting them take you someplace more secluded will not help you.”

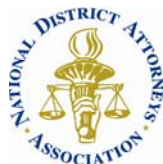


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- So if you were sitting on a jury, and you heard that a victim didn't do what experts say to do - she was scared and when the carjacker forced her into the car, she didn't jump out when she had the chance – would anyone interpret that as consent to being carjacked? Anyone reasonably argue that if she didn't really want to be carjacked, she would have jumped? Why not?

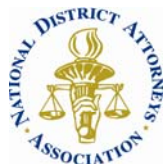
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## LACK OF FORCE – SEXUAL ASSAULT

- Provide your state's / commonwealth's definition of force and of what a victim is / is not required to do.
- Anyone here who does not think that definition is fair? Do you think a victim should have to do more? Why not?
- So if you saw pictures of a victim and she was not beaten up, clothes not torn, would that cause you to question whether she had been assaulted? Why not?
  - What if there's no weapon involved? Does anyone think a victim should have to do more if there's no gun?
- Why don't you think that the law requires that the victim "put up a fight?"
- Are there things that might be more frightening to a victim than a weapon?
  - Like what?
  - Ever heard the term "frozen with fear?"
  - What about personal threats?
    - Are their substitutes for force that can be just as scary?
    - What about the threat to ruin reputation?
    - To hurt family?
    - You'll be sorry?
    - "I think we can both agree this would be better not to talk about. You know that no one will believe you."
- What kind of factors impact how we respond when we are scared, angry, upset?
  
- What if you heard a juror say "if I was being assaulted, I would have fought! I would have bit his penis right off!" How would you respond to that?
  - Out of curiosity, have any of you ever heard of a case where a victim did actually bite a rapist's penis off?
    - Why do you think that is?
  - How many of you have ever been driving on ice when your car starts to skid?
    - How does it feel?
    - Do you always do the right thing by pumping your brakes and turning in the direction of the skid?
    - Why not?





**DELAYED DISCLOSURE**

Keeping a secret doesn't make a victim a liar:

How many of you have ever kept a secret?

I want you to think of the most serious secret you have ever kept – don't worry, I'm not going to ask you what that secret is!

Juror *x*, how long did you keep that secret?

Why did you keep the information secretive?

Of you jurors you have had a secret, who eventually disclosed the secret?

How did you choose the person to whom you would disclose?

Did you tell the entire secret at first or did you slowly disclose bit by bit?

Why did you disclose this way?

As you told the secret, were you concerned about how the person you were telling would react?

Why were you concerned?

How did the person that you told respond?

How did you feel about telling?

In order to preserve the secret, did you ever have to lie, either directly or by omission?

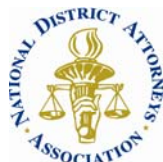
Why did you lie?

Does the fact that you kept important information a secret make you a liar?

Does it make you unworthy of belief?

Does it mean that material that you kept secret never happened?

So if a witness told you that the subject of their testimony was a secret and that they had lied to preserve that secret, how would you decide whether to believe that witness?



**DIVIDED LOYALTIES / STAYING IN AN ABUSIVE ENVIRONMENT**

How many of you have ever had a bad boss?

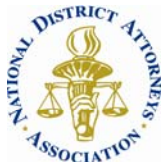
- And by bad boss, let me clarify that I mean someone who was abusive, disrespectful, may have issued professional threats, paid you disparately based on race / sex / religion.
- How many of you left that job right away upon discovering the abuse?
- How long did you stay?
- Why did you stay?
- How comfortable did you feel trying to address the situation while you were still working there?
- Were there things about your boss that you liked?
- Things about your job that you liked?
- Fair to say that there were just things about your boss that you wanted to change?

So if a person, upon hearing an account of your story, were to say “there’s no way that could have happened . . . if it was that bad, you would have left,” how would you respond?

- What if they said “I’ll bet you’re only saying that b/c you’re disgruntled?”

Is it possible to love a person who hurts you?

- How is that possible?
- How would those conflicting feelings affect your credibility determinations?



CONSENT

Why would victim lie?

Regret?

Spurned by defendant?

Caught by someone (boyfriend / parent)

Get commitments that “he said, she said” isn’t an excuse to not deliberate

Is there anything in the law that says that if the victim and the suspect give two different accounts, jurors should not have to deliberate?

Why do you think that is?

How would you decide whether an account of a sexual assault is reasonable?

Describe a situation in your everyday life where you have had to compare 2 stories and to decide which one to believe?

What factors influenced your decision?

Where you comfortable with your decision/?

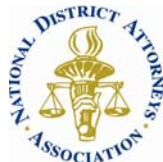
Why?

Do you think that most sexual assaults occur in the presence of other people?

Where do you think they occur?

Who chooses where a sexual assault occurs?

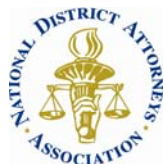
Who determines how much force is used to accomplish a rape?



CSI EFFECT

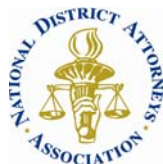
Do any of you watch CSI?

- Why do you watch it?
- This may sound silly to ask, but do you believe that the sciences that you see on the show actually exist in the way they are represented on the show?
  - Why not?
- How do you think that what you see on TV will affect your expectation of the evidence that the State or the defendant might bring into Court?
- How would you react during deliberations if you thought a certain test should have been run?
  - What if there wasn't any evidence in court about the existence or the ability to do that kind of testing?
  - Example: You might hear a defense attorney ask if the investigator collected fingerprints from the victim's home. The investigator answers the question. So would it be OK for you, as jurors, to discuss the absence of fingerprint evidence in deliberation?
  - What if, however, one of the jurors started talking about some kind of testing that was never even discussed in court. How would you respond if you were on that jury?
- Can everyone agree that, if seated on the jury, they will base decisions about whether I proved my case based on the evidence presented? I like to think about cases like a jigsaw puzzle: as long as you as jurors are firmly convinced of what is shown in the puzzle that is proof beyond a reasonable doubt, even if you don't have every single piece of the puzzle.
  - Example: Guy robs a 7-11 that has really good security video. You can look at this video and see plain as day that it is the defendant. The defendant is also stopped by police a mile from the 7-11 and is found with the money from the store, the wallet of the guy who was working the counter in the store, and a package of ho-ho's from the store in his pocket.
    - Is there anyone here who would start asking "well where's the DNA evidence?"
      - "Did they test for fingerprint evidence?"
  - Is anyone here going to hold it against the State if there just isn't DNA evidence presented?
    - Why is it that DNA or other forensic evidence might not be presented?
      - Even if you think to yourself "I don't think that the police did a very good job of processing the crime scene. I think



they should have looked for more” – can you agree that there is a difference between rating a police investigation and proving a case?

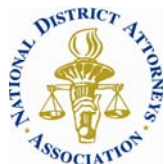
- **USE JON-BENET RAMSEY EXAMPLE:**
  - Is anyone here familiar with the investigation of the Jon-Benet Ramsey case?
    - Would you agree that the police originally did not do a good job of collecting evidence? Did not preserve crime scene? In way over their heads?
    - Evidence was not correctly collected in that case, right?
  - So let’s say that 5 years down the road, a guy comes forward and he says I killed Jon-Benet, and he produces a pair of her underwear and some other items that were taken at the time of the kidnapping, including items that do match the child’s DNA. Police are also able to trace his movements, showing that he was living in the child’s neighborhood, but then moved out the day after the murder.
    - If a subsequent juror said to you “I don’t care what evidence does exist, that crime scene was just so messed up, I don’t know how I could convict,” how would you respond to that juror?
    -
  - Likewise, if DNA evidence isn’t presented, is there anyone who will hold it against the Defendant? Who would say, “well if he really didn’t do it, then he would have presented DNA evidence? He would have that Innocence Project on board?” Do you understand that it’s the state’s burden to prove its case – not the defendant’s burden to get the evidence and disprove the case?



## INTOXICATION

Need to identify the issues with alcohol:

- A. *Affect of memory*
- Need to weed out jurors who have no experience with alcohol
  - Need to find jurors who know that while alcohol can impair memory, that depends on a number of factors and very much on the individual
  - Find a juror who is comfortable talking about alcohol use and ask some questions about its effect on memory
  - Go back to questions about vulnerability
- B. *“She was drunk and she wanted it”*
- She just “doesn’t remember” consenting
    - Use the same tactic of identifying a drinking juror and ask about effects
  - She regrets it now
    - General concept of buyer’s remorse
    - Like making a purchase
      - You get the item home, start to assemble it and it is missing pieces vs. getting the item home and realizing you can’t really afford it
    - Victim is afraid of someone finding out
  - Blackout
    - Ask about experiences with blackout / passout
      - Do you always “lose time” before passing out?
    - Really something you need an expert witness to explain
- C. *Victim passed out and was unaware conduct was occurring*
- Indiana law says that a woman can be raped if she is “Unaware that the conduct is occurring”
  - How would you expect the state to show that?
  - What if a victim was intoxicated and had passed out?
    - Unable to physically fight due to intoxication?
  - What if you were on the jury and another juror said “look, that law was meant to protect “innocent” victims. If you go out drinking and you get so drunk that you pass out, you’re not innocent in this?”
- 

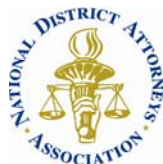


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- D. *Drunk defendant: this was just drunk sex*
- Even if both parties have been drinking, you still want a commitment from jurors that they will look at the evidence and what it says
  - Want a commitment that they will look at evidence of intoxication
    - Planning
    - Isolation
    - What evidence would show that a person was aware?

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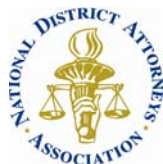
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## STATUTORY RAPE

In Indiana, our laws say that it is illegal to have sex with children of a certain age. For instance, Indiana law says that if you are more than 21 years old, you can't have sex with a 15 year old girl

- Is there anyone here who has a problem with laws that prohibit sexual conduct with minors?
  - What if the minor wanted the contact? Should that be a defense?
  - Who here has helped one of their children learn how to drive a car?
    - Now before your child was legally allowed to sit behind the wheel of a car, did he / she want to drive? Even before it was legal?
    - Now because they really wanted to drive, should have helped them sneak and fake a driver's license? Why not? But they really wanted it?
- Tobacco sales to minors, alcohol sales to minors
  - In these cases, the kids want what is illegal, right? Think that they can handle it?
  - These kids actively pursue means to get alcohol? Work pretty hard at it?
  - Is "the child wanted it" ever an acceptable defense? Why not?
- So in a sexual misconduct case, should "the child wanted it" be a defense? Why or why not?
- What if the child doesn't look how you think a 14, 15 year old should look? Would that affect your judgment?
  - We have laws that require carding for alcohol purchases . . .





**“BUT HE COULD HAVE ANY WOMAN HE WANTED”**

Go to standard questions about proving motive

It is not an element of the crime

Winona Ryder theft example

Here is a woman who didn't need to steal, but she did

We can't explain why, and why doesn't even matter.

The state only has to prove that the specific charged acts did occur

(It's best to have photos of these guys)

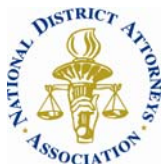
Has anyone ever wondered why people trusted Bernie Madoff with their money?

- In looking at a picture of him, would you ever have thought “Now this guy looks like he would steal my cash?”
- If he looked like a thief, how do you think that people would have felt about trusting him with their money?

What about the guy accused of committing the Craigslist murders and robberies?

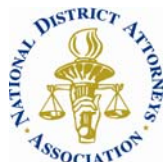
- If you just saw him on the street, what would you think about him?
- Anyone think “this man looks like a killer?”
- Do you think that his appearance helped him to gain access to victims?

So in deciding whether the state has proved its case, how are you going to answer the thought that *will* run through your mind “But he doesn't look like a (child molester / abusive parent / rapist / batterer)?



**CAN YOU CONVICT ON THE WORD OF A CHILD?**

- Use a poster with the definition of your main charge
- Ask the jurors if they see any type of evidence requirement in there
  - Specific number of witnesses?
  - DNA? Fingerprints?
  - Confession by defendant?
- Why do you think that there is no legal requirement that there be DNA evidence?
- Why do you think that there is no requirement that there be an eyewitness to the crime?
- Why do you think that there is no requirement that there be physical evidence?
- Does anyone think that there should be a requirement?
- What if you were selected on this jury and you heard the evidence in the case and you went back to deliberate. One of your fellow jurors said “I believe the victim is telling the truth, but I can’t convict without an eyewitness.” How would you respond?
- Could you convict based on the word of a child, if that child’s testimony establishes each of these elements beyond a reasonable doubt?
  - Why or why not?
  - Who here thinks that a child’s word alone can be proof beyond a reasonable doubt?
    - Why or why not?
  - So if, for instance, an adult were to remove a child’s pants and rub the child’s penis for a minute with his hand, would you expect to see physical injury? Would you expect any physical evidence? If the adult lives with the child, would you expect any eyewitnesses? So should it be legal to do that to a child? (BE PREPARED TO MAKE THIS INTO A SCENARIO WITH AN ADULT)
- Who decides where a crime occurs?
  - Who decides whether to inflict injury?
  - Who decides who witnesses the crime?
  - Who decides whether to leave behind physical evidence?
- So if a criminal decides to simply fondle a child, outside the presence of others and not inflict physical injury, that would be legal, right?
  - Illegal, but you wouldn’t convict him of it? So legal, right?



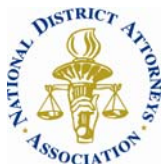
**EXPERT WITNESS TESTIMONY**

In the health care debate, how many of you have really paid attention to the parties make their pitch?

- When you hear the different pitches, how do you decide what the truth is?
- Has anyone else had to listen to different professional opinions and come to a conclusion about which one is accurate?
  - How comfortable are you with that type of assessment?
  - What factors do you take into account when deciding whether a professional is telling you the truth?
- If you heard two (2) professional witnesses testify in court, and they rendered contradictory opinions, how would you determine who was telling the truth?
  - Is there anyone who would not feel comfortable making that type of determination?
  - Is there anyone who believes that if two professional witnesses render different opinions, you can't believe either one of them? Can't convict?

I want you to think of the most difficult decision you have ever had to make.

- How long did it take you to make your decision?
- Who did you consult in making your decision?
- What factors did you take into account?
- Did you research your decision/
- How did you ultimately come to a conclusion?
- How long ago was it that you made this decision?
  - In retrospect, how do you feel about the decision that you made?



## NEGLECT SCENARIOS

What duty does a parent owe his child when it comes to caring for the child?

Do you think that the State has a right to require a certain standard of care?

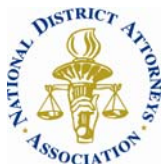
- Why?
- Is it OK to hold a parent *criminally* responsible for not providing that standard of care, as opposed to just taking the child away?
  - Why do you feel that way?
- Is there a difference between being a bad parent and engaging in criminal endangerment?
  - When do you think that line gets crossed?
  - Example: Parent buying her child cheetos, koolaid, and M&M's for dinner vs. parent of a diabetic child feeding that child a diet of koolaid and M&M's and not teaching the child to monitor blood sugar or administer insulin
- If a parent wasn't providing that standard of care, what excuses would you find legally acceptable for not providing that care?
- Should a lack of a formal education be a legal excuse for neglecting your children?
  - Why or why not?
- What about drug addiction? Claims of domestic violence?

Meth Exposed Children:

- Review the law with jurors
  - Do you think this is a fair law? Why / why not?

Accomplice Liability / Failure to Protect From Abuse:

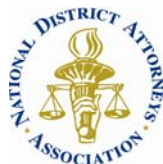
- What responsibility does a parent have to protect his / her child from being abused?
  - What steps should she have to take to protect her child?
  - What if that means turning in someone she loves?
- Is it OK to hold a parent *criminally* responsible for not protecting the child, as opposed to just taking the child away?
  - Why do you feel that way?
- Who thinks that CPS is the appropriate place to deal with child neglect?
  - Why?



MENTAL HEALTH MITIGATION

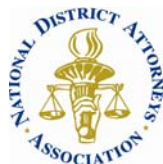
Does anyone here believe that a person would have to have a mental illness in order to hurt a child?

- That a person would have to be “sick?”
- Is that something that I should have to prove, that there is some kind of mental disorder? Why / why not?
- Is that something that I should have to *disprove*? That the person isn’t mentally ill?
- Why do you think that a person would hurt a child?
- What if I can’t prove to you *why* a person hurt a child. Is that a reason to acquit if you believe that the person hurt the child? Why / why not?
  - Why wouldn’t the law require me to prove what a defendant is thinking?



**DEFENSE OF “ACCIDENT” OR MISINTERPRATION OF TOUCH**

- I want you to presume that you are being asked to sit as jurors in a case involving a motor vehicle collision. The Defendant is accused of intentionally running his car into his friend’s car. The Defendant claims that it was an accident – he did not intend to hit his friend’s car.
  - How would you determine whether the crash was accidental?
  - What information would you want in order to make your decision?
  - Are there ways to know a person’s intent without hearing it spoken?
    - When you’re driving, you don’t communicate by words with other drivers, right?
    - How do you judge what another car is going to do?
    - And you rely on that ability to “read” other drivers in order to stay alive on the roads?
  
- When a person tells you, in everyday life, that something was accidental or that they didn’t mean to do it, how do you determine whether you believe that person?
  - But what if they seem really sincere when they speak to you?
  - What if they don’t seem like the “type” of person who would intentionally hurt another?
  - What does the phrase “Actions speak louder than words” mean to you?
  - How comfortable would you be applying these common sense principles in a jury room?



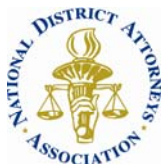
## RECANTATION

How many of you have ever had an argument with your spouse or someone else that you lived with?

- Have you ever, during the course of the argument, said “You’re right, I’m wrong?”
- What did you mean when you said that?
- Did you actually mean that you were wrong?
  - Then why did you say it?
  - Why would you want to make peace with your spouse when you were, *so obviously*, correct?
- So when you made your argument – an argument that you later retracted in the name of making peace – were you lying?
  - Why not?

Do you think that the desire to “make peace” or to make it better is a natural part of any relationship?

- Why do you think that?
- Just because one party “takes back” a statement, does that mean that the statement wasn’t true?
- What would be some reasons why a person might “take back” a statement that he or she made to the police?
- For what reasons might a witness change his or her story about an incident?
  - Does that mean that the original statement was a lie?
  - How would you discern which statement was true?
  - Does anyone here think that if there’s been a change in story that you simply could not rely on either account given?
  - How would you decide whether any of the accounts was believable?
- Is anyone inclined to say “look, they’re no kin to me, so it’s a coin toss, and I don’t really care. Not guilty.”



## PROVOCATION

Have any of you heard the joke “What do you say to a woman with 2 black eyes?”  
Nothing. You already told her twice.

- What do you think that joke means?
- So when is it permissible to use physical force against another person?
- What about against someone who loves you?
- What if they really made you mad? Does that make it ok?
- What if you caught them cheating?

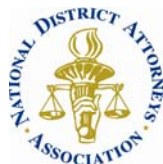
What does the phrase “mutual combat” mean to you?

What does the phrase “self-defense” mean to you?

- “He hit me, so I hit him back.” Is that self-defense?
- “He hit me, and I was afraid that he would hit me again, so I push him out of the way.” Is that self-defense?
  - What is the difference in those two scenarios?
- If someone slaps you or throws a drink on you, what should you be able to do in response?
  - So if a man were to approach a guy in a bar and throw a drink on him, and the other guy were to get up and just pummel the tar out of the drink thrower, is that legally permissible?
    - Why do you think so?

When you hear about an instance of domestic violence, do any of you wonder what led up to the assault itself?

- Why? Of course, it’s natural to wonder. I guess the better question is “Why does it matter?” What, leading up to a physical assault, would justify the use of physical force against another person?





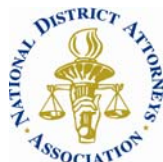
**REPEAT VICTIMIZATION or “WHY DOES SHE STAY”**

Has anyone ever heard the phrase “once a victim, twice a volunteer?”

- What does that mean?
- Have you ever heard someone ask, when talking about domestic violence, ‘why doesn’t she just leave?’
  - Why do you think people ask that?
  - Is there anything illegal about remaining in a home or living environment where someone hurts you?
  - Is there anything illegal about assaulting someone who lives with you?
  - So why is it that people want to know why the victim stays, rather than asking ‘why does he keep hitting her?’

Why would a person remain in a violent relationship?

- Does staying in a relationship with a person who you claim physically assaults you mean that there really isn’t any violence?
  - Why not?



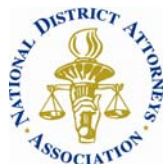
## PRIVATE BUSINESS vs. CRIMINAL BEHAVIOR

When does “family business” become criminal behavior?

- What if a criminal act occurs between family members, but the family says “we want to handle this ourselves.” What should the government do?
- What are some reasons why the government should be involved?
- What if the victim of the crime says that she doesn’t want the government to be involved?
- So let’s say that you were on a jury in a theft case. Defendant was accused of stealing money from his parents by making unauthorized purchases on their credit cards. The parents paid back the credit company, said that they know he shouldn’t have done it, but they don’t want to see their son in trouble. If, however, you believed beyond a reasonable doubt that the son had done the things he was accused of doing, how would you vote?
  - How would you respond to a fellow juror who said “look, no harm, no foul. The parents – the victims – don’t care. Why should we?”
- So what if you acquitted on the theory that the parents didn’t care, and 2 years later, you picked up the paper and read that this same defendant had been able to secure employment in a retirement home and had now committed the same crimes that he once committed against his parents but now against the residents of the home. How would you feel then?
- Do you understand that there are reasons why the law doesn’t ask “does the victim want the offender convicted?” Why?

When violence does involve the family or a victim who loves the person who is accused of committing the crime, how would their feelings about cooperating with the prosecutor affect your ability to believe that they say?

- How would you expect them to behave when being questioned?
- Why would they behave that way?



• **CHILD ABUSE QUESTIONS FROM VICTOR VIETH**

Update - Volume 11, Number 7, 1998

**Using Voir Dire to Reduce Juror Bias in Child Abuse Cases**

by Victor I. Vieth<sup>1</sup>

Jurors often base their verdicts not only on the facts presented but "upon feelings, emotions, and previously held beliefs..."<sup>2</sup> In a case of child abuse, the beliefs and attitudes of jurors often work to a prosecutor's disadvantage.

According to one study, a majority of jurors believe children are easily manipulated into making false reports and that most children who are sexually abused suffer injuries.<sup>3</sup> More than one-third of jurors in this study expect a victim to resist abuse, cry for help, or flee.<sup>4</sup> Likewise, children who do not cry or otherwise show emotion while testifying are perceived by some jurors to be lacking in credibility.<sup>5</sup>

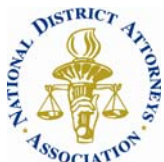
In jurisdictions permitting attorney-conducted voir dire, prosecutors have a golden opportunity to explore the biases of jurors. In doing so, a prosecutor may also be able to "educate" the jury about the dynamics of child abuse and cause a potential juror to limit or alter his or her biases.<sup>6</sup> Getting jurors to reflect on their own experiences as children and as parents can be an effective means of achieving this goal. Consider adopting this approach in the following problem areas confronting prosecutors in most abuse cases.

**1. Children lie for a reason.** Given the fear of many jurors that children often falsely accuse adults of abuse, a prosecutor must deal at the outset with the issue of children lying. A sage prosecutor will not claim that children do not lie. Such an argument runs counter to the experience of most jurors and is contradicted by research.<sup>7</sup> Instead, a prosecutor should assert that children who lie do so for a reason and attempt to get jurors to agree with this assertion. The following line of inquiry illustrates this approach:

Have you ever been lied to? Have you been lied to more than once? Have you been lied to by more than one person? Based on this experience, do you find that people lie for the fun of it or because they have a reason? Is this true of children as well as adults?

In closing argument, remind the jurors of their own experiences and argue the child in the case before them has no reason to lie about the abuse.<sup>8</sup>

**2. Differentiate between big and small lies.** Get jurors to articulate that although children lie about spilled milk and who was in the cookie jar, they



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don't often lie about matters of grave importance. The following line of questioning is illustrative:

Do you have children? How many children? What is the age range of your children? Have your children ever lied to you? What sorts of things have your children lied about?

**3. Children are less likely to be sophisticated liars.** Continuing on the theme that children lie about small affairs, get jurors to articulate that most children are also poor liars. Try the following approach:

When your child was young, between the ages of 4-6, how could you tell if he was lying? When lying, could he keep a consistent story intact throughout several recitations? In general, do you believe that adults are more sophisticated liars than children?

**4. A troubled childhood may be caused by abuse.** Prosecutors often worry about statements from victims who have a history of behavior problems, juvenile delinquency, and drug and alcohol use. This history often contrasts with the pristine image of the offender. When confronted with this scenario, get jurors committed to the proposition that abuse may cause a child to act out or seek solace in chemicals. Try the following:

Would you be surprised if a child victimized by abuse had emotional or behavioral problems? Would you be surprised if a child victimized by abuse became involved with drugs or alcohol? Would you be surprised if such a child became promiscuous? Why not?

**5. The child's delay in reporting.** As previously noted, many jurors expect a child to promptly report abuse and take all reasonable steps to ward off the offender. To get the jury to consider the situation from the child's point of view, try the following questions:

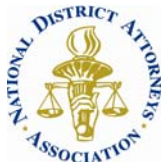
During your childhood, how many members of this jury panel were ever picked on by a bully? From the show of hands, it appears that almost all of you have been picked on by a bully. Now, how many of you ever reported the bullying to a school teacher, parent, or anyone else who could protect you from the bully? Why not?

In closing argument, remind the jurors of the feelings of fear and embarrassment which kept them from seeking protection from a childhood bully. Then argue how much more reluctant a child abused by an adult will be to seek help.

**6. The child's anticipated demeanor.** A prosecutor must prepare the jury for the possibility the child will have emotional difficulties testifying at trial. On the other hand, many jurors expect an abused child will be emotionally

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Prepared by NCPVAW at National District Attorneys Association (2009).



distraught when speaking about the abuse and may deem unbelievable a child who does not display these emotions. To prepare for either occurrence, consider the following questions:

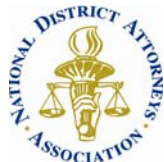
Have you ever testified in court? How did you feel? Were you nervous? Why were you nervous? Based on your experience, do you believe a child testifying in court might also be nervous? Do you believe most adults are uncomfortable speaking in public about their sexual history? Why? Do you believe many children will also feel uncomfortable speaking publicly about sexual matters? Why? Have you ever had to tell someone about a traumatic or painful event, such as a death in the family? The first time you spoke of the event was it difficult to speak without displaying emotion? The more times you had to speak of the event, was it easier or more difficult to speak of the event without emotion?

**7. Statutory rape/jury nullification.** There are organizations which condone sexual contact with children so long as the touching is "consensual."<sup>9</sup> While most people disagree with this view, some jurors get upset if a prosecutor applies statutory rape laws to teenagers who are only several years older than their victims and who profess to be in love. In such a situation, there is a real danger of jury nullification. To protect against this possibility, consider the following questions:

There are organizations and individuals in our society who condone sexual contact with children as an acceptable choice. Is there any member of the jury panel who holds such a view? How do you feel about laws which make it a crime to have sex with children even if the child does not resist or say no? Do you believe a child can consent to sexual activity with an adult? Why not? Assume that, during the course of your deliberations, you decide the state has proved its case beyond a reasonable doubt but that you personally believe the law the defendant violated is unjust. Would you be able to fulfill your oath and find the defendant guilty based on the evidence? Why or why not?

**8. Inconsistent statements.** Like adults, children often give inconsistent statements concerning their victimization. Since defense counsel will likely argue these inconsistencies are evidence of unreliability, it is wise to begin to address this issue during voir dire. Ask potential jurors to think of an important event in their life such as their wedding day. Then ask the following:

Have you been consistent as to each detail of your wedding as you have described the event over the years? Would you agree that sometimes we are tired and may not tell all the details of an event when asked? Would you agree that sometimes a question focuses on a certain aspect of an event, such as the wedding reception as opposed to the ceremony, and our answer reflects the focus of the question? Would you agree that, as time



passes, our memory for the details of an event fades?

In closing argument, remind the jurors that the more times we are asked to recount an event, the greater the likelihood of inconsistent statements. Argue that we cannot expect more of a child than we expect of ourselves as adults.

**9. Stereotypes.** Many jurors believe child abusers act and look the part of a "dirty old man." This is problematic when the defendant is a respected member of the community. To address this issue, voir dire questions may include: Do you have a stereotypical view as to the kind of person who would molest children? Do you think you can spot a child molester simply by looking at him?

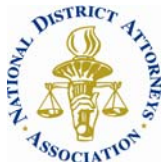
**10. The lack of medical evidence.** Though an expert may be necessary to drive home the point that most child sexual abuse cases do not involve positive medical findings, you can begin the process of education during voir dire. Indeed, you may wish to lay the groundwork for your expert by asking questions such as: in determining what, if any, injuries are to be expected when a child is sexually abused, would it be helpful to hear testimony from a pediatrician?

**11. The lack of witnesses.** Jurors are sometimes reluctant to convict based solely on the testimony of a child. Begin to address the question in voir dire by reminding the jury that these crimes occur in secret. The following questions may suffice:

Generally speaking, do you believe children are sexually molested in public or private? Would you be surprised if a victim or perpetrator did not speak openly about the abuse? In order to convict someone of child abuse, would you require something more than eyewitness testimony?

**12. Child abuse really happens.** Since many people believe false accusations of abuse are rampant, it is important to explore this issue with the jury. The following questions may expose this bias: do you believe that child abuse does in fact happen and that many adults molest children? Do you believe the issue is overblown? Why or why not?

**13. An open mind.** When a defense attorney completes voir dire, many jurors are left with the impression that "proof beyond a reasonable doubt" is an impossible standard to meet. To bring the jurors back to neutral ground, consider the following questions: Have you so firmly planted in your mind the concept of proof beyond a reasonable doubt that you have foreclosed any possibility I can prove my case? Will you agree to hold me to my burden to prove the case beyond a reasonable doubt but not hold me to a higher standard?



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There are, of course, many more issues that can be covered in voir dire and there are many excellent resources to assist prosecutors.<sup>10</sup> The attorneys at APRI's National Center for Prosecution of Child Abuse can also assist you in crafting voir dire questions appropriate to the unique facts of your case. Since the fate of many children rest in the hands of jurors, prosecutors are obligated to select jurors who put aside stereotypes and who evaluate the evidence by applying reason and common sense.

1 Senior Attorney, APRI's National Center for Prosecution of Child Abuse

2 Paul DerOhnesian II, *Sexual Assault Trials* 121 (1995).

3 Susan Morison and Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 *Child Abuse and Neglect* 595, 608 (1992).

4 *Id.*

5 See Pamela C. Regan and Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13 *Journal of Family Violence* 187 (1998).

6 For a discussion on using voir dire to "educate" a jury, see *Investigation and Prosecution of Child Abuse*, Second Edition 310-313 (APRI's National Center for Prosecution of Child Abuse 1993).

7 See Stephen J. Ceci and Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 *Psychological Bulletin* 403, 425-427 (1993).

8 For a list of arguments to make in closing argument in support of a child's credibility, see Victor I. Vieth, *When a Child Testifies: Getting the Jury to Believe the Victim*, 17 *Aba Child Law Practice* 22 (April 1998).

9 For example, Robert Rhodes of the North American Man/Boy Love Association believes there should be no age of consent laws. See David Hechler, *The Battle and the Backlash* 293-299 (1988)

10 See e.g. *Investigation and Prosecution of Child Abuse*, Second Edition 299-316 (APRI's National Center for Prosecution of Child Abuse 1993); Paul DerOhnesian II, *Sexual Assault Trials* 121-164 (1995).

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Prepared by NCPVAW at National District Attorneys Association (2009).

