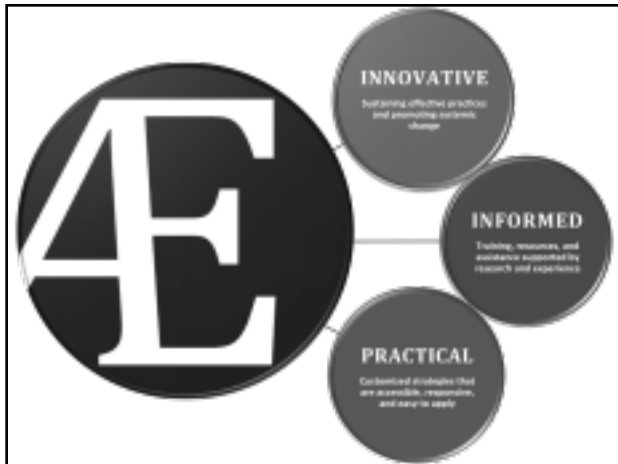


ALCOHOL-FACILITATED SEXUAL ASSAULT

Who Needs Force When You Have Alcohol?

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN



AEQUITAS

AVAILABLE 24/7 VIA TELEPHONE AND/OR EMAIL

TECHNICAL ASSISTANCE

- Case Consultations
- Research

TRAININGS

- Live
- Online

RESOURCES

- Recorded Webinars
- Model Briefs, Motions, Expert Reports, etc...
- Sample Voir Dire Questions, Expert Examinations, etc...

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

SUPPORT

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- Jennifer M. Sommers, Special Assistant Attorney General, New York

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OBJECTIVES

- Analyze cases with a better understanding of basic toxicology.
- Recognize offender behaviors that facilitate the perpetration of sexual assaults where alcohol is involved.
- Implement trauma-informed techniques in evidence gathering, interviewing, pretrial litigation, and presenting evidence at trial.

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Q: What is alcohol-facilitated sexual assault (AFSA)?

A: The victim is too intoxicated to consent due to:

- Surreptitious administration by assailant
- Voluntary use by the victim
- Combination of both

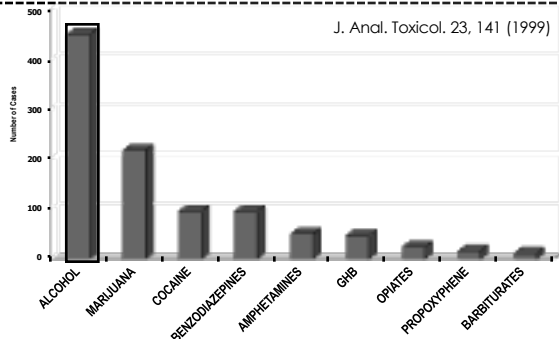
AFSA OR...

Who needs force when you have alcohol?



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PREVALENCE OF DRUGS USED IN SEXUAL ASSAULT CASES

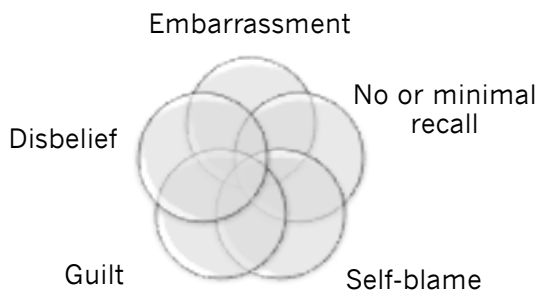


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Victims of drug-facilitated or incapacitated rape were less likely than victims of forcible rape to report to authorities

DEAN KILPATRICK, ET AL, DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY (2007)

WHY ARE THESE CASES NOT REPORTED?



PROVING THE CRIME

Tips and Tools To Better Investigate and Build Cases

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2-STEP ANALYSIS

Assuming the victim's version is 100% true, do the allegations constitute rape?

Can you prove the victim's allegations?

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STEP 1

Is it rape?

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STATE STATUTES

Review your statutes that cover sexual offenses

- What sex acts are covered?
- What force is/is not required?
- How is “consent” defined?
- Are there separate statutes that deal with AFSA?
 - Carefully look at statutory definitions and related case law

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...BUT HE WAS DRUNK TOO

“So, why wasn’t it just drunk sex?”
Isn’t his intoxication a defense?

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MENS REA

- Rape = usually a general intent crime; voluntary intoxication is not a defense
- Compare with other crimes in which intoxication allowed as defense in jurisdiction
- Prosecution must prove defendant *knew* victim was incapacitated and / or unable to consent

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QUESTIONS

- Please reach out to AEquitas, with any questions, as we have a comprehensive compilation of state statutes and analysis
- STATUTES *in Review* survey of the law, August 2016

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STEP 2

Can you prove the rape in a court of law?

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LOOK AT THE TOTALITY OF THE CIRCUMSTANCES

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OBJECTIVES

- Understand toxicology basics
- Establish victim credibility
- Corroborate
- Document offender's actions

TOXICOLOGY

The Impact of Alcohol and Drugs

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“If recreational drugs were tools, alcohol would be a sledgehammer”

Aaron M. White, *What Happened? Alcohol, Memory Blackouts and the Brain*, 27(2) ALCOHOL RES & G. HEALTH 16 (2003)

BASIC TOXICOLOGY

Alcohol is a central nervous system (CNS) depressant

Impairs cognition and psychomotor skills

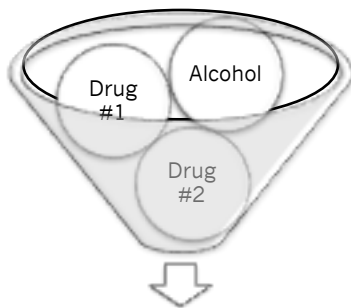
As consumption increases, alcohol progressively impairs bodily functions and abilities

LEVEL OF IMPAIRMENT

Rate of absorption variables

- Food
- Body size
- Amount and type of alcohol
- Duration of drinking
- Fatigue
- Tolerance rates
- Combination of alcohol with other drugs

SYNERGISTIC EFFECT



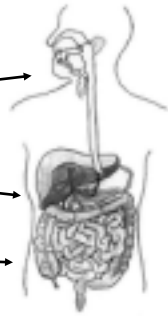
The interaction of two or more substances or other agents to produce a combined effect that is greater than the sum of their separate effects

WHERE IS ALCOHOL ABSORBED?

Mouth ~ 2%

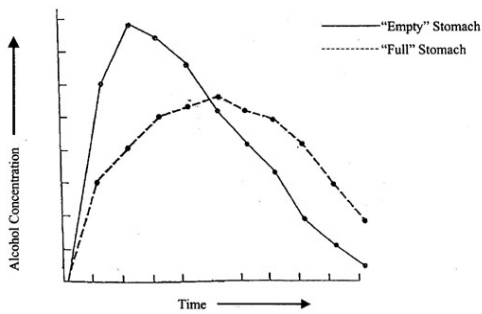
Stomach - up to 20%

Small Intestine - Majority



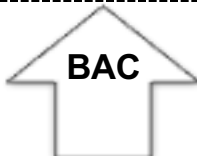
Human Digestive System Diagram

EFFECT OF STOMACH CONTENT

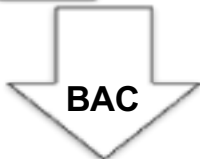


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MUSCLE v. FAT



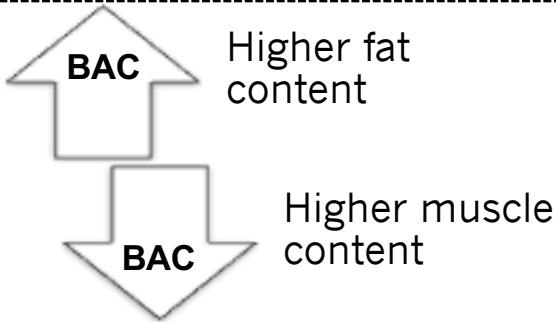
Alcohol will not leave the blood and enter fat



Alcohol will leave the blood and enter muscle

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PRACTICAL APPLICATION



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AVERAGE MALE

68% Water

Higher proportion of muscle compared with women

AVERAGE FEMALE

55% Water

Higher proportion of fat compared with men

Alcohol Alert: Alcohol and Women, NAT'L INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/aa10.htm> (last visited July 28, 2015); M. Frezza, et. al., *High blood alcohol levels in women: The role of decreased gastric alcohol dehydrogenase activity and first-pass metabolism*, 322(2) THE NEW ENGLAND J. OF MEDICINE 95-99 (1990)

WHAT IT MEANS

Increased BAC in women for a given quantity of alcohol; e.g.,

- 140 lb. male and 140 lb. female each consume six 12-oz. beers over 2 hours:
 - ◉ Male ~ .14 – .15
 - ◉ Female ~ .18 – .19

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ANOTHER EXAMPLE

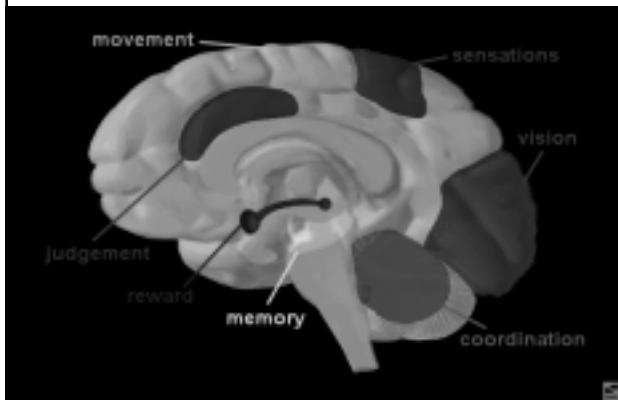
190 lb. male and 125 lb. female each consume six 12 oz. beers over 2 hours:

- Male ~ .09 – .11
- Female ~ .19 – .21

Potentially more than double

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CNS DEPRESSION



| BAC (G/100 ML OF BLOOD OR G/210 L OF BREATH) | STAGE | CLINICAL SYMPTOMS |
|--|-------------|---|
| 0.01 - 0.05 | SUBCLINICAL | BEHAVIOR NEARLY NORMAL BY ORDINARY OBSERVATION |
| 0.03 - 0.12 | EUPHORIA | MILD EUPHORIA, SOCIABILITY, TALKATIVENESS, INCREASED SELF-CONFIDENCE; DECREASED INHIBITIONS; DIMINUTION OF ATTENTION, JUDGMENT AND CONTROL. BEGINNING OF SENSORY-MOTOR IMPAIRMENT, LOSS OF EFFICIENCY IN FINER PERFORMANCE TESTS. |
| 0.09 - 0.25 | EXCITEMENT | EMOTIONAL INSTABILITY; LOSS OF CRITICAL JUDGMENT, IMPAIRMENT OF PERCEPTION, MEMORY AND COMPREHENSION, DECREASED SENSITORY RESPONSE; INCREASED REACTION TIME, REDUCED VISUAL ACUITY; PERIPHERAL VISION AND GLARE RECOVERY, SENSORY-MOTOR INCOORDINATION; IMPAIRED BALANCE, DROWSINESS. |
| 0.18 - 0.30 | CONFUSION | DISORIENTATION, MENTAL CONFUSION; DIZZINESS, EXAGGERATED EMOTIONAL STATES, DISTURBANCES OF VISION AND OF PERCEPTION OF COLOR, FORM, MOTION AND DIMENSIONS; INCREASED PAIN THRESHOLD, INCREASED MUSCULAR INCOORDINATION; STAGGERING GAIT; SLURRED SPEECH, APATHY, LETHARGY. |
| 0.25 - 0.40 | STUPOR | GENERAL INERTIA; APPROACHING LOSS OF MOTOR FUNCTIONS; MARKEDLY DECREASED RESPONSE TO STIMULI; MARKED MUSCULAR INCOORDINATION; INABILITY TO STAND OR WALK; VOMITING; INCONTINENCE; IMPAIRED CONSCIOUSNESS; SLEEP OR STUPOR |
| 0.35 - 0.50 | COMA | COMPLETE UNCONSCIOUSNESS; DEPRESSED OR ABOLISHED REFLEXES; SUBNORMAL BODY TEMPERATURE INCONTINENCE; IMPAIRMENT OF CIRCULATION AND RESPIRATION; POSSIBLE DEATH |
| 0.45+ | DEATH | DEATH FROM RESPIRATORY ARREST |

BLACKOUTS v. PASS OUTS

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BLACKOUTS

- Periods of memory loss
- No loss of consciousness
- Brain's ability to form long-term memories from short-term memories is destroyed

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WHEN DO BLACKOUTS HAPPEN?

- Not predicted by BAC only
- More likely to suffer the effects of blackout if BAC rises rapidly as opposed to slowly; e.g. shots

Aaron M. White, *What Happened? Alcohol, Memory, Blackouts, and the Brain*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> (last visited July 14, 2015)

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PASS OUTS

- Alcohol-induced unconsciousness
- Sedation due to CNS depressant effect
- Resembles sedated state associated with surgery
- Can last for hours
- Groggy-sedated feeling can linger for 24 hours

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DRUGS v. ALCOHOL

- Similar in action on the CNS
- Similar in effects on the body
- Drugs act much more quickly and with greater potency than alcohol
- Synergistic effects when consumed with alcohol

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**DOES FAILURE TO DETECT
=
NO DRUG USED?**

NO!

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WHY NOT?

- Drugs are metabolized rapidly and eliminated from the body
- Window for detection (with traditional tests) is brief

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RESOURCES



http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf

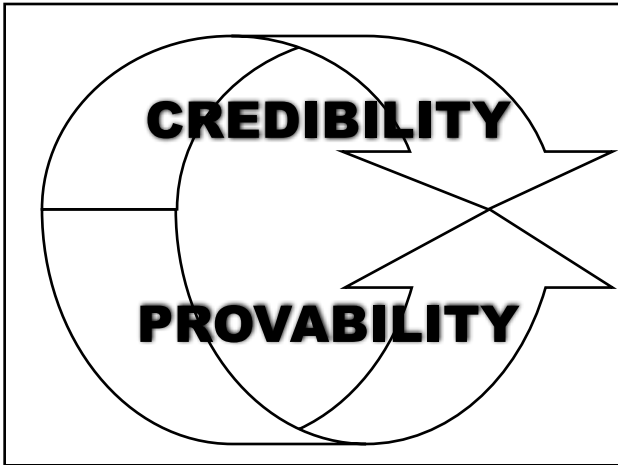


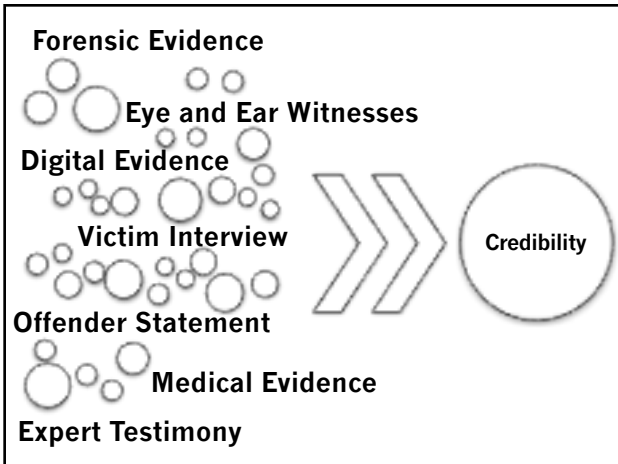
http://www.ndaa.org/pdf/toxicology_final.pdf

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VICTIM CREDIBILITY

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PERCEPTION AND MEMORY

| | |
|---|--|
| <p>Was she able to perceive what was happening around her?</p> <ul style="list-style-type: none"> • Degree of intoxication | <p>What does she remember?</p> <ul style="list-style-type: none"> • The day, evening, night? • The incident? • Did she blackout or pass out? • Can anything refresh victim's memory? |
|---|--|

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INCONSISTENT MEMORY

- Alcohol and / or neurobiology of trauma may cause inconsistencies in statements
- Victim may be embarrassed
- Victim may fear getting in trouble
- Different (types of) interviews by different interviewers

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WITNESSES

- Victim's friends
- Bartenders
- Prompt complaint
- Offender's ex-girlfriends
- Others at party / bar / event
- Cab or Uber driver

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PROMPT COMPLAINT

- If there is NOT a prompt complaint:
 - Ask victim about what she did following the assault
 - Talk to those with whom she interacted
 - Prosecution may be able to use an expert at trial
- If there IS a prompt complaint:
 - Interview witness

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Many states have law addressing the admissibility of "prompt complaint" testimony

- Is the statement admissible as substantive evidence?
- What are the foundational requirements for admissibility?
- Can the witness identify the offender?

EVIDENCE COLLECTION

| CRIME SCENE | OTHER PHYSICAL EVIDENCE |
|--|--|
| <ul style="list-style-type: none"> • Blood • Hair • Urine • Vomit • Semen • Sheets • Clothing • Condom | <ul style="list-style-type: none"> • Surveillance tapes • Social media, cell phones • Glasses, punch bowls • Receipts or credit card charges |

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SEXUAL ASSAULT NURSE EXAMINER (SANE)

- Incapacitated patients are statistically significantly less likely to have genital and non-genital trauma than patients who were not incapacitated at the time of the assault
- Most common non-genital injury = bruising to the arms and legs

ANDRE ROSAY & TARA HENRY, FINAL REPORT: ALASKA SEXUAL ASSAULT NURSE EXAMINER STUDY (Oct. 2008)

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PRETEXTUAL COMMUNICATIONS

- Check the law
- Make sure the victim or cooperating witness can handle it
- Plan carefully
 - Consider different mediums of communication
 - What should you say?

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OFFENDER INTERVIEW

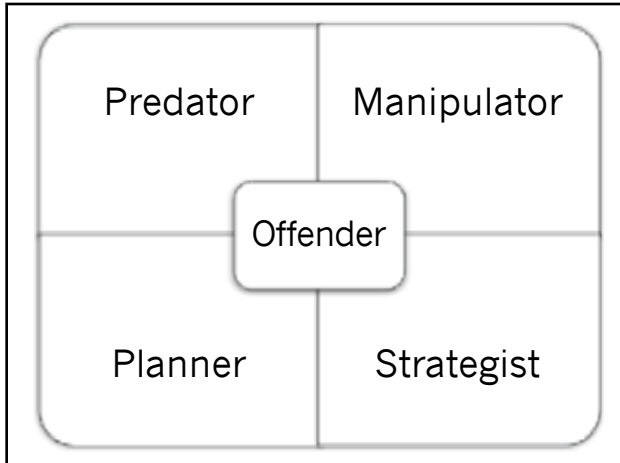
- Always attempt an interview!!
- Get the offender to corroborate specifics of victim's account
- Ask about whether he believes the victim was drunk – why or why not?
- Why does he think the encounter was consensual?

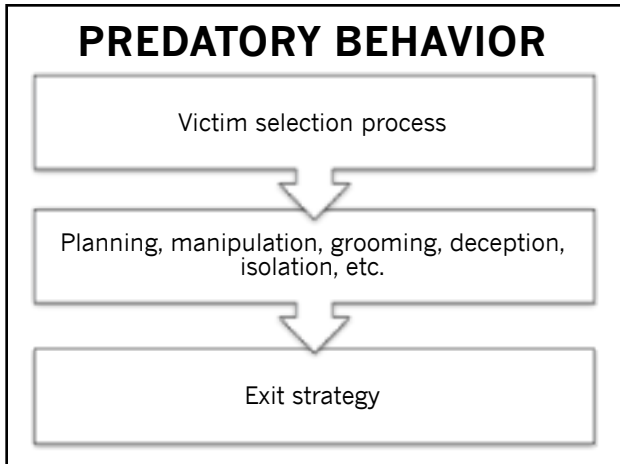
AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

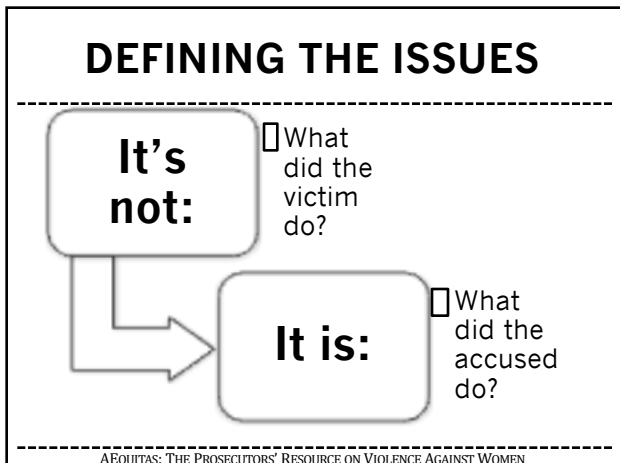
OFFENDER'S ACTIONS



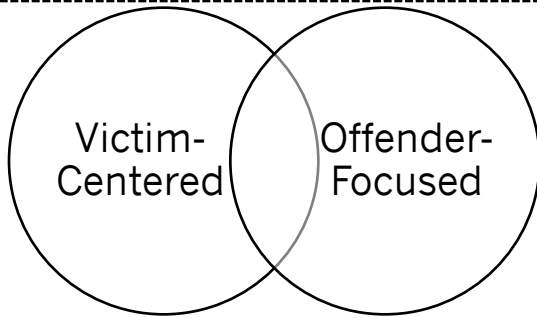
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MISSION



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TRAUMA-INFORMED INTERVIEWING

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“[These] are deeply traumatic crimes that can cause severe damage to survivors’ emotional, spiritual, and psychological well-being [F]ar too many survivors are harmed or retraumatized by insensitive, uninformed, or inadequate community and criminal justice system responses.”

Bea Hanson, Principal Deputy Director, U.S. Department of Justice,
Office on Violence Against Women, July 30, 2014

THE EFFECTS OF TRAUMA

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“Traumatic events are extraordinary, not because they occur rarely but rather because they overwhelm the ordinary human adaptation to life.”

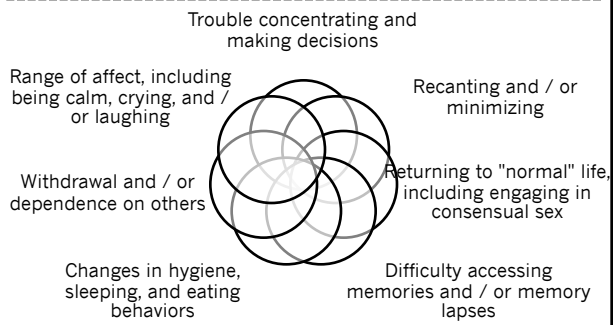
Judith Herman, Center for Nonviolence and Social Justice

EFFECTS OF TRAUMA

- There is no “blue print” of how trauma impacts an individual
- Cognition and behavior are affected by trauma
- Recognizing some common reactions to trauma can assist us in responding to victims of sexual assault

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COMMON REACTIONS



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REMINDER

- Offender inflicted trauma on victim
- Offender is responsible for the victim's reaction to that trauma

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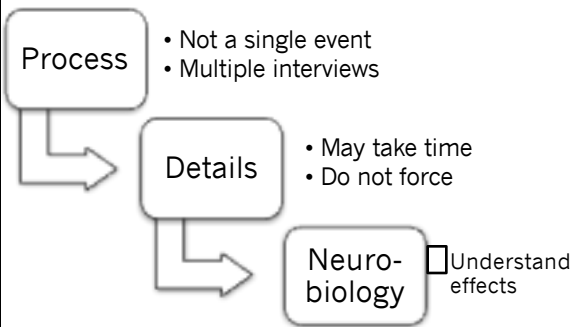
INTERVIEW



INTERROGATION



DIFFERENT APPROACH



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TRAUMATIC MEMORY

...the story can come out in bits and pieces and fits and starts and cycle back over on itself, or, "Oh wait a minute, I remembered this detail." It comes out in a very disorganized way...

Interview with Dr. Rebecca Campbell, NAT'L INSTITUTE OF JUSTICE (Jun. 18, 2012), <http://nij.ncjrs.gov/multimedia/video-campbell.htm>

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MULTIPLE INTERVIEWS

| INITIAL | FOLLOW-UP |
|---|--|
| <ul style="list-style-type: none"> • Build rapport • Establish general facts of the case • Identify evidentiary leads • Talk about safety plan and witness intimidation • Plan for follow-up meeting | <ul style="list-style-type: none"> • Follow-up on initial interview • Gather more detailed information about assault |

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RAPPORT BUILDING

Establish trust

- Provide victim with some control over the interview
- Be truthful, but not discouraging
- Don't make promises you can't keep
- Acknowledge trauma

Get to know the victim

- Talk to victim about their lives – before and after the assault
- Let them know you care

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INTERVIEWING BASICS

- Don't interrupt
- Refrain from excessive note taking
- Avoid judgmental questions – or ones that could be *heard* as being judgmental
- Recreate the reality of the crime

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KEY WORDS

AVOID ASKING:

- *Why* didn't you...?
- *Why* did you...?

DO ASK:

- Are you *able* to tell me...?
- What are you *able* to tell me about...?

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TYPES OF QUESTIONS

Open

Leading



Closed

Follow
Up

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OPEN QUESTIONS

Invite victim to volunteer as much information as possible

- How did the night start?
- What was the party like?
- What are you able to tell me about what happened once you were alone?

Be careful not to interrupt the victim

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CLOSED QUESTIONS

Narrow and seek a one or two-word answer

- When you left your house, was it dark outside?
- Did you pay for the drinks?
- Do you remember anyone taking photos at the party?

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FOLLOW-UP QUESTIONS

Used to clarify a response to an open question

- When you say that he gave you a funny look, can you describe that a little more?
- You said that there was a “tussle” – what do you mean by that?

Be careful not to interrupt

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LEADING QUESTIONS

Suggest an answer in the questions and are used to confirm facts that logically flow from the victim's responses

- You drank the shot he bought you?
- Your friend was not there at that point?

Use sparingly

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SUMMARY

List the facts and feelings you have learned in the interview and invite the victim to elaborate or explain anything that was misunderstood or omitted

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DETAILS

- An open-ended, narrative approach that elicits sensory details can allow a victim to describe the assault in her/his own words
- Pay attention to small details that victim focuses on – they may turn out to be very important
- What the victim smelled, felt, or heard can help us gather corroborating evidence

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PRETRIAL LITIGATION

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TOPICS

- Rape shield
- Victim privacy
- Admissible statements
- Prior bad act evidence

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MOTIONS *IN LIMINE*

- Preview evidence for judge
- Brief complex legal issues
- Establish evidence that will and will not be admitted at trial
- Requires thoughtful consideration of case well in advance of trial date

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RAPE SHIELD

ADVISOR COMMITTEE NOTES, FRE 412

“The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”

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PROTECTIVE ORDERS

Protect identity of victim

Use initials

Redact any “identifying information”

Guard against disclosure of privileged information

Counseling records

SANE photographs

Privacy concerns of victims and witnesses

Facebook

Cell phones

ADMIT STATEMENTS

NON-HEARSAY

- Not for the truth of the matter asserted
- Verbal acts
- Prior consistent statements when offered to rebut an implied charge of fabrication

HEARSAY EXCEPTIONS

- Statements for medical treatment
- Excited utterances
- Then-existing mental, emotional, or physical condition
- Present sense impression

Is a *Crawford* analysis necessary?

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PRIOR BAD ACT EVIDENCE

- Requires diligent, thorough investigation into offender's background; not just criminal history
- Subsequent acts are also admissible under rule
 - Witness intimidation
 - Tampering with witnesses or evidence

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COLLABORATING WITH ALLIED PROFESSIONALS

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TRUE COLLABORATION

- Provides victim with holistic support, including safety planning
- Demonstrates systematic engagement
- Improves communication
- Identifies gaps
- Enhances participation
- Educates each partner about each others' roles and expertise
- Encourages mutual respect

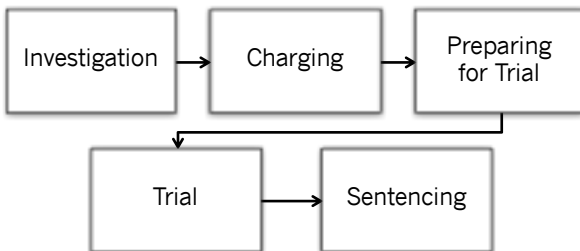
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BENEFIT TO PROSECUTOR

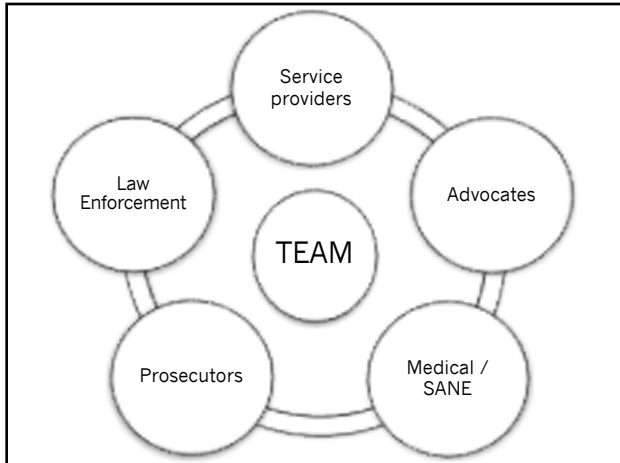
- Recognize impact of trauma on victim behavior
- Sharpens focus on offender
- Collection and analysis of evidence
- Enhances interviewing skills
- Compelling evidence and connection with jury

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EDUCATION



AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN



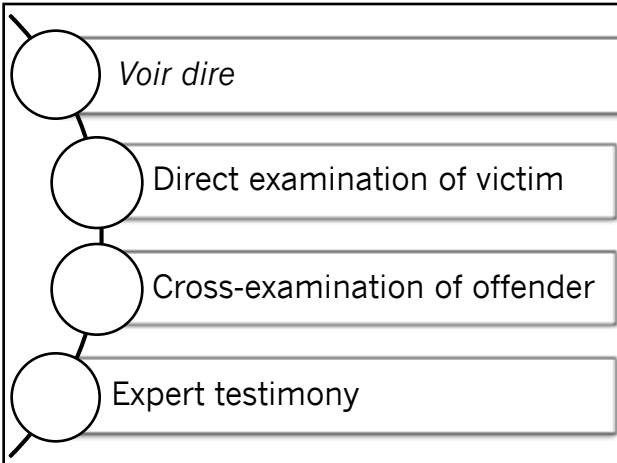
PARTICIPATION

- Be present
- Listen
- Learn distinct roles
- Accept criticism
- Identify gaps and challenges
- Analyze successes
- Educate others
- Share appropriate information
- Encourage input
- Commit to sustainability

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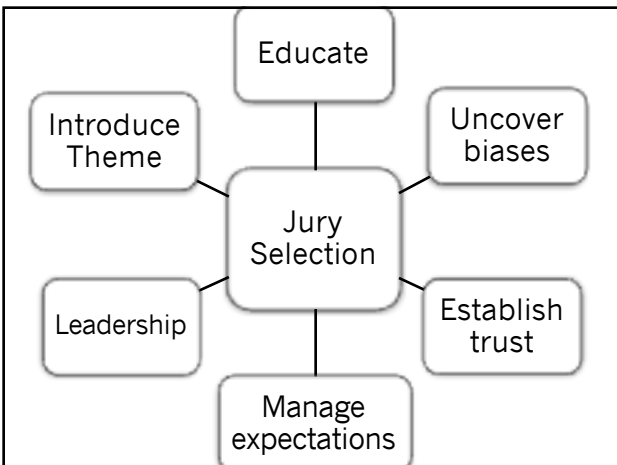
TRIAL STRATEGIES

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**GETTING THE MOST OUT
OF VOIR DIRE**

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UNCOVER BIASES

Will the juror be able to “get” ...

- Traumatic events impact victim behavior
- Consent
- Victim is not on trial
- Popular media portrayal of rapists is not consistent with reality

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ESTABLISH TRUST

- Be accurate about the law
- Be respectful to Judge, defense attorney, defendant, court staff, and jurors

Jurors watch everything you do!

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LEADERSHIP

- Inspire jurors
- Be authentic and genuine
- Do not be repetitive
- Use appropriate humor

#1 BE YOU

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MANAGE EXPECTATIONS

- Victim may not have immediately reported the assault
- Offender may be likeable
- Victim may have consented to some of the activity
- Offender may not have used violence

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OFFENDER-FOCUSED THEMES

PREYING ON
THE MOST
VULNERABLE

WOLF IN
SHEEP'S
CLOTHING

SETTING A
TRAP

FRIEND
BECOMES A
STRANGER

USING A
SWORD AS A
SHIELD

ALCOHOL AS
A WEAPON

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WITNESS EXAMINATIONS

Direct, Cross, and
Redirect

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INVESTIGATORS

- Ask about demeanor of witness at each point of interaction
- Use as a “pseudo” expert
 - Why did you talk to the victim multiple times?
 - Why did you put the victim in touch with the service provider?
- Acknowledge mistakes and misperceptions

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DIRECT OF VICTIM

- Introduce victim
- Start with questions about what happened well before the assault and continue to well after
- Confront challenging aspects of case head on
- Recreate the reality of the crime

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RECREATE THE REALITY

Tapping into emotional and sensory memories

Are you able to tell us what you tasted when he forced his tongue down your throat?

When you were inside his room, were you able to hear anything?

What was the first thing that you saw when you woke up?

ANTICIPATE CROSS-EXAM

- Identify possible topics
- Demonstrate vulnerability and offender causation
 - Use of drugs or alcohol
 - Delayed disclosure
 - Trauma / alcohol / memory

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CROSS-EXAMINATION

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OFFENDER TESTIMONY

- Offenders
- Rely on us to buy into myths about sexual assault
 - May have gotten away with their behavior before
 - Want to tell their side of the story

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STRATEGIES

- Get agreement on as many aspects of the case as possible
- Point out that they were aware of the victims' intoxication
- Play along with the offender's narrative when appropriate

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EXPERT TESTIMONY

**Is it admissible?
How do I introduce it?**

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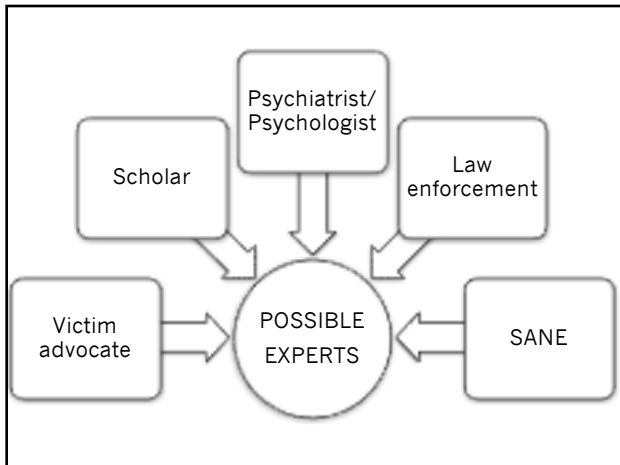
EXPERT TESTIMONY

FED. R. EVID. 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

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PHYSICAL EVIDENCE

| EVIDENCE | TESTIFYING WITNESS |
|--|--|
| <ul style="list-style-type: none"> • Injuries or lack of • SANE examination • Victim demeanor | <ul style="list-style-type: none"> • Doctor • Nurse • SANE • Fire/Rescue |

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67% of rape victims reported no physical injuries in addition to the rape. Only 6% sustained severe physical injuries.

Office of Justice Programs, National Crime Victimization Survey, Injuries from Violent Crime (June 2001)

Over 70% of rape victims reported no physical injuries in addition to the rape. Only 4% sustained serious physical injuries.

Crime Victims Research & Treatment Center, National Victims Center, Rape in America (Apr. 23, 1992)

CSI EFFECT

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

Honorable Donald E. Selton, *The 'CSI Effect': Does It Really Exist?*, NATIONAL INSTITUTE OF JUSTICE
<http://www.ojp.usdoj.gov/nij/journals/259/csi-effect.htm#note1>

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EFFECTS OF ALCOHOL

| EVIDENCE | TESTIFYING WITNESS |
|--|--|
| <ul style="list-style-type: none">• Blood-alcohol content (BAC) of victim and/or offender• Synergistic effect of alcohol and drugs• Disparate effect of alcohol on men v. women• Blackout v. pass out | <ul style="list-style-type: none">• Doctor• Nurse• SANE• Law enforcement• Toxicologist |

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EXPLAINING VICTIM BEHAVIOR

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

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

EXPERT TESTIMONY

Juror expectations

□ We have to meet expectations or explain why not

Victim credibility

□ Jurors need context within which to analyze victim's behavior

Myths

□ Left unexplained, jurors may base assessment of credibility on myth

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VICTIM CREDIBILITY

U.S. v. PAGEL, 45 M.J. 64, 68 (CAAF 1996)

“This Court on numerous occasions has recognized that the behavioral characteristics or behavioral patterns of an alleged victim in a sexual abuse case may need to be explained by expert testimony, especially where that behavior would seem to be counterintuitive.”

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STATE v. OBETA

796 N.W.2D 282, 285 (MINN. 2011)

Allowed expert testimony to “dispel commonly-held rape myths”

- Delayed disclosure by rape victim
- Lack of physical injuries
- Submissive conduct during rape

No difference between allowing this in adult sexual assault cases as allowed in child sex assault cases

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AVOID THE DANGER ZONE

An expert CANNOT:

- Testify about a particular witness's credibility
- Be a human lie detector
- Testify as to whether an assault did or did not happen

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CAVEATS

Experts are not always necessary or effective

Behavior may not be the proper subject of expert testimony

All experts are not created equal

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GOING FORWARD

- Recognize alcohol as a powerful weapon used by offenders to facilitate sexual assault
- Corroborate every possible detail
- Focus on sensory details to recreate the reality of the crime
- Engage with allied professionals in your community to promote cooperation and coordination

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