

## Appendix 5C

Training Memo—Use of Expert Witnesses in Domestic Violence Cases<sup>1</sup>**Introduction**

The widespread myths surrounding domestic violence lead to a focus on the behavior of the victim rather than the behavior of the defendant. Many people, unaware of the effects of trauma, may find the victim’s behavior baffling and will have expectations about how a victim “should” behave. When the expectation of how a victim should behave conflicts with the victim’s actual behavior, the public may find a victim’s behavior to be “counterintuitive,” and therefore, evidence of her lack of credibility. However, experts who work with victims of domestic violence recognize that this behavior, viewed as counterintuitive by the public, is often a common response to trauma.

Counterintuitive victim behavior is actions or statements made by victims which seem to be illogical or poor decisions by the victim; behaviors that are not what the average person or juror would “expect” from a victim. The term “counterintuitive behavior” is **not** a psychological term nor does it define a victim’s behavior. Rather, it defines the public’s perception of the victim’s behavior and the disconnect between this perception and the victim’s actual behavior.

Not surprisingly, defense attorneys will exploit public distrust of domestic violence victims, suggesting that the victim’s behavior is not consistent with a “real” victim. The need for the victim’s credible testimony is often a cornerstone of the prosecutor’s case. If the perceived counterintuitive behavior is not explained, it may become an extremely effective defense weapon.

Traditionally, expert testimony was introduced primarily by attorneys defending victims of domestic violence who assaulted their abusers. This kind of testimony often focused on explaining Battered Woman Syndrome (BWS) to the jury. However, when explaining common victim behaviors, the terms and strategies applicable for a defense case may not be applicable to the prosecution. Expert testimony in the prosecution context is to explain to the jury myths about domestic violence and the effects of domestic violence on the victim.

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<sup>1</sup> Much of the material in this memo is adapted from “*Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*”, Jennifer Long, Nat’l District Attorneys Assoc., (August 2007).

## ***Admissibility of Expert Testimony***<sup>2</sup>

### **Battered Woman Syndrome**

In *State v. Henum*, 414 N.W.2d 793 (Minn. 1989) the Minnesota Supreme Court held that expert testimony on battered woman syndrome is admissible because it would help to explain a phenomenon not within the understanding of an ordinary lay person. The Court extended its holding in *Henum* in the 1997 case of *State v. Grecinger*, 569 N.W.2d 189 (Minn. 1997) by determining that expert testimony was admissible when offered by the prosecution. The Court found that the expert's testimony on battered woman syndrome could help the jury understand why the victim returned to the relationship with the defendant after the assaultive incident, told contradictory stories about how her injuries were inflicted, waited almost three years to pursue prosecution of Grecinger, and recanted statements she made to the police and the district court regarding Grecinger's abuse. The Court also found that expert testimony on BWS would help the jury understand the behavior of a woman suffering from the syndrome, which might otherwise be interpreted as a lack of credibility. Subsequent decisions have held that BWS testimony is admissible where the prosecution offered the testimony to explain why the victim recanted her story at trial and gave testimony that tended to exculpate the defendant. *State v. Vance*, 685 N.W.2d 713 (Minn. App. 2004); *appealed after new sentencing hearing State v. Vance*, 2008 WL 942553 (Minn. App. Apr 8, 2008), *affirmed State v. Vance*, 765 N.W.2d 390 (Minn. 2009); *State v. Plantin*, 682 N.W.2d 653 (Minn. App. 2004).

### **Domestic Violence and its Effects**

This training memo does not advocate using BWS evidence to explain victim behavior. Rather, testimony on domestic violence and its effects is the more effective information that should be brought before the fact-finder.

The above case law serves as a firm foundation for the admissibility of this kind of expert evidence. Moreover, the Court has held that the Frye-Mack test for the admissibility of expert testimony does not apply to social science evidence that offers an explanation of behavior.<sup>3</sup> See *State V. MacLennan*, 702 N.W.2d 219 (Min. 2005). Rather, the standard of R. 702, Minn. R. Evid. applies. That rule

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<sup>2</sup> A detailed explanation of the admissibility of expert testimony is beyond the scope of this memo. The memo outlines the basic issues to consider with specific focus on domestic violence cases and use of experts in that context.

<sup>3</sup> Minnesota adheres to the Frye-Mack standard for the admissibility of expert testimony. This standard requires that when novel scientific evidence is offered, the trial court must determine whether it is generally accepted in the relevant scientific community and whether the evidence has foundational reliability. See *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000).

requires that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence, a witness qualified as an expert by knowledge, skill, experience, training or education may testify. The Court looks to “whether the testimony will be helpful. If the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury’s ability to reach conclusions about that subject which is within their experience, then the testimony does not meet the helpfulness test. In determining admissibility, of course, the trial court also may rely on those considerations expressed in Minn. R. Evid. 403. Thus, the court may exclude the testimony if the court concludes that it will confuse the jury.” *Id.* at 233.

In Minnesota, if the witness is qualified as an expert, social science evidence explaining battering and its effects and counterintuitive victim behavior is admissible. The Frye-Mack test for admissibility of expert testimony does not apply. Rather, the court looks to the helpfulness of the evidence.

## ***Why Use of Expert Testimony on Domestic Violence and Its Effects is Important***

### **Myths about Domestic Violence and Why They Matter**

Common myths about domestic violence include:

- If it was really that bad, the victim would leave.
- Victims of domestic violence provoke the violence.
- Domestic violence is caused by alcohol or drugs.
- Domestic violence is out-of-control behavior.
- Domestic violence is caused by stress.
- Women exaggerate the problem of domestic abuse.
- Battered women are masochistic and provoke abuse; they must like it or they’d leave.

It is important to counter these myths because studies have found that belief in the myths of domestic violence negatively impacts the evaluation of a victim’s credibility.<sup>4</sup>

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<sup>4</sup> See Alana Bowman, A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers through Expert Witness Testimony of the Common Experiences of Battered Women, 2 S. CAL. REV. L. & WOMEN’S STUD. 219, 235

Victim behaviors may be confusing to jurors. Therefore, jurors may rely on myths or substitute their own wrong judgments. Further, “[m]any jurors evaluate a victim’s actions as if she had a wide range of options and support resources available to her, and tend to blame her for staying in abusive relationships [or for her assault.]”<sup>5</sup> Jurors often regard a victim’s behavior as evidence that she is unreliable. For example, one case notes, “[to] the average juror untutored in the psychological dynamics of domestic violence, the victim’s vacillating behavior towards the defendant—in particular her back and forth attempts to end the relationship—might have seemed counterintuitive and might have even suggested her version of events was inherently unreliable and unworthy of belief.”<sup>6</sup> A victim’s recantation is not self-explanatory. Without an explanation for it, jurors might substitute their own myths to explain the behavior. Unfortunately, the resulting misperception of the victim’s credibility may lead to a “not guilty” verdict.

Prosecutors need to place a victim’s counterintuitive behavior in context so that jurors do not assume that certain conduct is evidence of a victim’s dishonesty and lack of credibility. Prosecutors, therefore, should consult an expert—social worker, therapist, counselor, advocate—to explain victim behavior to the jury.<sup>7</sup>

If the prosecutor does not address and attempt to explain the counterintuitive behavior, either through expert testimony or the victim herself, the jury will be left without the proper context in which to evaluate her credibility.

### ***Focus of Testimony***

Expert testimony should focus on descriptions of the myths surrounding domestic violence, the dynamics of domestic violence, and common victim behaviors. The testimony would not address whether this victim suffers from BWS but rather would address battering and its effects. The use of an expert to testify about BWS

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(1992) (stating “studies document the findings that most people maintain misinformation about domestic abuse, which is detrimental to their evaluation of the battering victim’s credibility”).

<sup>5</sup> Nancy Lemon, Rhonda Martinson, & Carlose Monagas, *Expert Witnesses in Domestic Violence Trials: Policy Pros and Cons for Prosecutors*, at 11 (2001).

<sup>6</sup> *Com. V. Goetzendanner*, 679 N.E.2d at 240, 243 (Mass. App. Ct. 1997).

<sup>7</sup> In some jurisdictions in Minnesota, prosecutors have been successful in qualifying advocates as experts and having them testify to explain, based on training and experience, domestic violence and its effects including victims’ counterintuitive behaviors. Experts do not testify about the particular victim, but rather how victims as a group may behave. The testimony has been effective in countering assumptions and myths that may have a negative influence on jurors. Experts can be helpful to prosecutors in preparing a case whether or not their testimony is used at trial. Experts can provide the benefit of their experience and help prosecutors draft questions on direct examination and may help prosecutors to draft questions for a recanting victim.

is both ineffective and vulnerable to attacks that it is unreliable. Using syndromes and disorders to describe victim behavior risks making jurors believe that the victim suffers from a pathology. Also, because use of this term means that the expert is offering a subjective opinion about the victim, either directly or through a hypothetical, his/her opinions can be countered by a different expert's opinion of the same facts.

This kind of defense counter-attack can be neutralized by focusing the expert testimony on observations, experience, and/or review of articles or studies which address: (1) a general discussion of domestic violence; (2) the existence and prevalence of common myths surrounding this type of violence; and (3) common victim responses to trauma or behaviors in domestic violence cases. This approach does not include an expert opinion on whether a victim suffers from a syndrome or disorder, whether her behavior is consistent with an individual who suffers from a syndrome or disorder, or whether her behavior was caused by a particular event. Rather, it focuses on the observed behavior of victims who have experienced battering. Because the content of the testimony is objective (facts and observations) rather than subjective (diagnosis and conclusion), it remains effective testimony and thus, less vulnerable to defense attack.

This testimony should be based upon the expert's own experiences with victims and observations of victims' behaviors. For example, workers at battered women's shelters and battered women's advocates have qualified as experts and have testified regarding their own observations that most women do not report the first assault, even to friends and family, and they rarely report the first assault to police. Through hundreds and thousands of contacts with battered women, workers in shelters and programs are able to observe the behavior of victims of violence. In addition to referring to these observations during testimony, if the expert is familiar with any relevant literature or studies addressing victim behavior, they also should refer to them. The expert should also discuss his or her training and experiences as well as the public's belief in myths about domestic violence. The expert's testimony should focus on victim behaviors that are relevant to the case in which they are testifying. Experts should not, however, have reviewed the case file, nor should they give an opinion about this particular victim's behavior. Doing so risks exposing the victim to an examination by a defense expert. Further, it risks becoming excludable testimony on a victim's credibility rather than admissible testimony about common victim behavior.

Although expert testimony may include current research or articles related to victim behavior, the most effective qualification often will be an expert's extensive experience working with and observing domestic violence victims. The persuasiveness of the expert's testimony will depend on the extent of the expert's experience as well as his/her ability to articulate the observations and knowledge

gained in the course of that her experience. Because this type of testimony is an objective recitation of observations and experience, cross-examination likely will focus on the expert's credibility, breadth of experience, knowledge of the literature and bias towards victims of domestic violence.

### ***Preparation of Expert***

- Explain to the expert the necessary qualification requirements.
- Prepare the expert for any challenges to their qualification.
- Be sensitive to the fact that experts may worry that they will not be qualified.
- Never acquiesce to a defense request to stipulate to an expert's qualifications. It is important for the judge and the jury to understand the breadth of the expert's qualifications as the expert's qualifications relate directly to the expert's credibility.
- Discuss the subject on which the prosecutor will seek to offer the witness as an expert.
- Although the memo has used the term counterintuitive victim behavior, prosecutors should not offer their expert as an "expert in counterintuitive behavior". Rather an expert may be qualified in domestic violence, domestic violence myths, common victim behavior in domestic violence cases or domestic violence and its effects.
- Meet with the expert to go over the focus of their direct testimony.
- Prepare the expert for cross-examination. If possible, preparation should include a mock cross-examination.

### ***Common Defense Objections***

Defense attorneys commonly object to the introduction of expert testimony on victim behavior on the following grounds:

1. Relevance
2. Admissibility
3. Need for the expert testimony (i.e., the issue is not beyond the ken of the ordinary person)
4. Qualifications of the expert
5. Prejudice
6. Improper introduction of a defendant's uncharged misconduct

7. Improper bolstering
8. Lack of foundation
9. Legal conclusion (i.e., you're saying that she was a victim of domestic violence)
10. Speculation (i.e., you have no personal knowledge of this case, but you are saying she was a victim of domestic violence)

### ***Recommendations for Practice***<sup>8</sup>

- Consider using expert evidence that focuses on explaining domestic violence and its effects, widespread myths about domestic violence, and counterintuitive victim behavior.
- Experts can be qualified based on their experience.
- Consider requesting that an advocate or domestic violence agency staff person serve as an expert on domestic violence and victim behavior. Discuss the possibility with the local advocate and/or agency staff.
- In Minnesota, the Frye-Mack test does not apply to social science evidence that is offered to explain behavior. Rather, the test for admissibility is helpfulness pursuant to R. 702, Minn. R. Evid.

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<sup>8</sup> For a list of suggested questions to qualify an expert on victim behavior in domestic violence cases See *“Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions”* Appendix A, Jennifer Long, National District Attorneys Association, (August 2007). For a list of introductory questions for an expert to educate the jury on domestic violence and victim behavior See *Id.* at Appendix B.