

Tips for Testifying as an Expert Witness in a Violence Against Women Prosecution

BY
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Expert testimony can overcome a jury's belief in myths about sexual assault or domestic violence, particularly when it explains lack of injury, apparently minor injury, or a victim's counterintuitive reactions to rape. Experts are professionals who, by virtue of their training, education, or experience, have particular knowledge not shared by the general public. In general, experts can give opinions where lay or fact witnesses cannot. This article offers practical tips on testifying as an expert witness in a competent and credible way in a violence against women prosecution.² It begins with general pointers for pretrial preparation and trial performance and then offers specific pointers for victim advocates and medical professionals.³

INTRODUCTION

Generally, expert testimony begins with the prosecutor proving that the witness is qualified to testify as an expert. During this portion of the testimony, the prosecutor will ask you about your training, education and qualifications.⁴ Qualifications are generally defined broadly and practical experience may qualify an expert to testify.⁵ When testifying about your qualifications, do not be modest. In the next segment of testimony, the prosecutor will ask you to give an expert opinion on the subject matter in question. This opinion will usually consist of the foundation or basis for your opinion (what documents you looked at, which people you interviewed), followed by your conclusion (i.e., your educated belief about what happened). You may be required to give your testimony in the form of an answer to a hypothetical question. Requirements and format of the questions vary from state to state and jurisdic-

tion to jurisdiction, so it is important to meet with the prosecutor prior to trial to discuss the format of your testimony.

GENERAL TIPS

Pretrial Preparation

Competent testimony starts with pretrial preparation. There are a number of things you can do before the case goes to trial to be a good witness. They include the following:

- Watch other experts testify to see what does or does not work.
- Participate in mock trials, if possible.
- Keep your *curriculum vitae* up-to-date. Make sure to include the following information: education (including degrees and training programs), employment and volunteer work in a related field, relevant experience, lectures you have given, awards, publications, licenses, board certifications, advisory or editorial board memberships, and membership in professional organizations.
- Make sure that you are familiar with any publications in your area of expertise, including any adverse material.
- Know the qualifications or requirements for membership for any organizations to which you belong.
- Know the ethical obligations or protocols that govern your profession or practice, if there are any.

By following these tips prior to being called as a witness, you will be free to concentrate on the case if and when you are called to testify.

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Once a case is ready for trial and you are called to testify, pretrial preparation is crucial. Review all of your notes and any evidence you might have to testify about. You must know what you said, wrote and did. If you wrote a report, make sure that it is thorough and accurate, or you can expect to be cross-examined about any inconsistencies or inaccuracies. Inform the prosecutor as soon as possible if you discover that the report contains an error or any missing information, and if necessary, supply an amended report to the prosecutor.

Consult with the prosecutor prior to trial, even if this can only be done by telephone or email. Discuss the prosecutor's expectations, the theme of the case, potential areas for impeachment, potential defense goals, the evidence in the case (including other witnesses who might be called), and the questions that will be asked of you. Ask the prosecutor where you fit in the big picture of the trial. The defense attorney may ask whether you met with the prosecutor prior to trial. It is expected that you would meet with the attorney who called you as a witness prior to testifying. Answer truthfully, and do not apologize for careful preparation.

THE TRIAL

Trial testimony consists of two parts: direct examination and cross examination. The attorney who calls you as a witness conducts direct examination. If you are a prosecution witness, the prosecutor will ask you questions during direct examination. From the moment you walk in the courtroom, the jury is deciding whether you are credible and evaluating your expert opinion. The golden rule in every case is ALWAYS tell the truth. When testifying, it is crucial to be as accurate and precise as possible. Words matter. For example, a witness might say, "He ripped my clothing off" but really mean, "He removed my clothing but did not tear it." It is important to say exactly what you mean. Try to be as specific as possible and avoid conclusory statements. The prosecu-

tor is trying to paint a picture for the jury; your details can help. It is better to say, "She was crying" than "She was sad," or "She was screaming and jumping up and down" as opposed to "She was excited."

DIRECT EXAMINATION

Let the prosecutor guide the questioning. Listen to the question that is asked and answer that specific question. If you do not understand a question, ask for clarification. Do not guess – if you do, the defense is liable to lead you down a path on cross examination where you did not intend to go. Do not rush to answer. If necessary, take a moment to think about your answer. If you do not know the answer to a question, simply say that you do not know. You can ask to refer to your records to refresh your memory, if necessary.⁶

Success at trial is not only dependent upon what you say; it also depends upon your appearance and attitude. As a professional, you should appear to be neutral and unbiased, as you are. Dress in a neat, clean, professional manner. Remember that you may be observed by potential jurors from the moment you arrive at the courthouse; behave accordingly. When in the courtroom, be aware of body language; the jury is watching you. Convey a sense of interest in the proceedings, but do not appear to be emotionally involved with the participants in the trial. Always be calm and polite. Remember that the jury is your audience; make eye contact with them whenever possible.

CROSS EXAMINATION

There are basically two types of cross examination: consensus-based and destructive. In consensus-based cross examination, the defense attorney attempts to secure concessions from you and then uses those areas of agreement to support his or her case. Destructive cross examination is what we typically see on television as cross examination – when the attorney attempts to discredit you or show that you are not accu-

rate or credible. Attorneys often start with the consensus-based approach and then switch to the destructive approach. It is not uncommon for defense attorneys to be hostile and intimidating toward you or attempt to make you angry. They know that if they succeed, you will not be able to think clearly, which will lessen your effectiveness as a witness. Do your best to remain calm. When disagreeing with the questioning attorney, do so without argument or interruption. Rely upon the prosecutor to make objections to improper questions and poor treatment of you by the defense attorney. (During your pretrial meeting, you may wish to address how the prosecutor will handle this.)

Remember that accuracy is extremely important. If the question on cross examination includes incorrect interpretations of your testimony or documentation, correct the erroneous information before answering the question. Be careful to provide consistent answers. Attorneys may ask the same question in different ways. If you make a mistake, correct it as soon as you discover it. Be aware of compound questions that might require a "yes" answer to one part of a question but require a "no" to another part of the question. Prosecutors should object to these questions, but if not, tell the judge or jury that you cannot answer that question with a simple "yes" or "no" before you answer. You can be cross examined with your testimony from prior cases; therefore, it is crucial to be accurate and honest in every case.

The following additional tips can help you succeed on cross examination:

- Stop talking when there is an objection. Wait for the judge to instruct you to answer the question or instruct the attorney to ask another.
- When preparing for cross examination, try to anticipate what you might be asked. Brainstorm with others and make a list of the questions you might expect. Think about all possible alternative explanations for the content of your testimony.

- Defense attorneys will often try to force you to answer “yes” or “no” to a question. If the question cannot be answered with a simple “yes” or “no,” tell the jury that. Ultimately, the judge may force you to respond without further explanation. If this happens, do your best to answer.
- You may be asked about inconsistencies in the case, especially if the victim gave inconsistent statements at various points during the investigation or trial. For example, you might be told, “She told the police officer/paramedic/jury something different.” Inconsistencies are a part of every case; learn to expect them. You should be prepared to explain how they might have occurred (but only if you know).
- If there are other possible conclusions or scenarios, be willing to acknowledge that they exist, regardless of how ridiculous they might be. If you are asked whether an alternative to your opinion is possible, and it is, you can acknowledge the possibility, then explain why you reached your particular conclusion.

LIMITATIONS ON TESTIMONY

Do not exceed the scope of your expertise. Occasionally, experts want to help the victim and go too far. Know the boundaries of your expertise and do not allow the attorney for either side to push you beyond those limitations. Experts should never testify as to whether they believe the victim is telling the truth; that is for the jury to decide. In addition, experts must be very careful about testifying that the victim was raped or whether the victim consented. This type of testimony almost always results in a mistrial of the case or the reversal of the conviction on appeal.⁷

SPECIFIC POINTERS Medical Experts

Doctors, nurses, paramedics and other medical personnel may be called to testify as medical experts. Medical experts may be



asked by prosecutors (or defense attorneys) to give a conclusory opinion about how an injury occurred. Be cautious when drawing conclusions. Your conclusion must not only be medically sound, it must be admissible in court. Some jurisdictions allow medical experts to testify as to whether a patient’s injuries were consistent with the patient’s description of how the injuries were caused. Ask the prosecutor whether you can legally draw conclusions about injury causation in your jurisdiction.

It is not uncommon for forensic nurse examiners⁸ to be cross examined as to whether they are an arm of law enforcement or the prosecution. When this happens, remember that your main function is administering medical treatment, not collecting evidence for the state. You are a licensed medical professional with specific obligations towards your patients under state law. To underscore the fact that you are a medical

professional, refer to the victim as “the patient” rather than “the victim.”

Victim Advocates

The first consideration for a victim advocate is whether to testify at all. Generally, advocates should avoid testifying in cases if they worked with the victim. When you testify in such a case, the victim may believe that you have betrayed her confidences and violated her privacy, especially if she has decided not to cooperate with the prosecution. Moreover, if you are in a state that protects a victim’s conversations with an advocate with a privilege, you may be in violation of the law.⁹ If your state which does not have a privilege statute, nothing that the victim said to you is protected. Make sure to speak to the prosecutor handling the case for state-specific information about privilege before you testify. Also, many state sexual assault and domestic violence coalitions have attorneys who may be able to assist you with questions regarding privilege in your state.

Second, if you are called to testify, be prepared for questions as to bias. Many of the advocates working in either sexual assault or domestic violence have experienced one or both in their own lives. Be sure you can answer truthfully that you have no interest in the outcome of the case, or answer truthfully that you do have bias and why. If you cannot give one of these two answers, discuss this issue with the prosecutor during your pretrial meeting, as he or she may be able to raise objections as to relevance of the details of your personal life.

CONCLUSION

The suggestions offered in this article can aid you in testifying as an expert witness in a competent and credible way. Each time you testify, ensure that you are as accurate and well-prepared as possible. Please contact NCPVAW with any questions or for additional resources. ■



If you are called to testify as an expert witness, please see:
Long, Jennifer, Working with Experts to Explain
Counterintuitive Behavior in Domestic Violence and Sexual
Assault Cases, *The Voice*, vol. 1, issue 4 (2006), available at
[http://www.ndaa.org/publications/newsletters/
the_voice_vol_1_no_4_2006.pdf](http://www.ndaa.org/publications/newsletters/the_voice_vol_1_no_4_2006.pdf).

For additional resources, please
see the National Center for the
Prosecution of Violence Against
Women (NCPVAW) Prosecution
Toolkit at [http://www.ndaa.org/
phpdocs/prosecution_toolkit.html](http://www.ndaa.org/phpdocs/prosecution_toolkit.html)
or email ncpvaw@ndaa.org or call
703-549-4253.

FOOTNOTES

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² While this article focuses on violence against women prosecutions, the tips apply to testifying in other types of cases as well.

³ There are many other types of experts who might testify in violence against women prosecutions. These include police officers, psychologists and toxicologists, among others.

⁴ The attorneys can stipulate to your qualifications, meaning you will not be asked these questions while on the witness stand.

⁵ Check your state's law for a specific definition of what is sufficient to qualify as an expert.

⁶ The law with respect to refreshing your memory varies from state to state, so, during your pretrial meeting, ask the prosecutor whether you will be allowed to look at your notes.

⁷ Again, check with the prosecutor prior to testifying with respect to the law in your state.

⁸ Note: this term is used as a catch-all phrase for the purposes of this article. The principles apply equally to any medical personnel performing forensic examinations.

⁹ Please contact NCPVAW for a compilation of state privilege laws.

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