
Expert Testimony Workbook *for Healthcare Professionals*



This project was supported by Grant No. 2011-VAWA-00221 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily represent the views of the Department of Justice, Office on Violence Against Women.

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INTRODUCTION

Welcome! We hope this workbook is a valuable tool as you prepare to provide testimony in criminal cases. Because healthcare professionals have little time to observe or learn about what actually happens inside courtrooms, they are often anxious about being called to testify. This anxiety is understandable, since the courtroom is a venue foreign to many healthcare professionals and is no closer to what is shown on TV than healthcare is accurately portrayed on Grey's Anatomy or Private Practice.

The purpose of this workbook is to help prepare healthcare professionals to provide effective general expert testimony in adolescent- and adult-patient criminal sexual conduct cases. This workbook is intended to answer the healthcare professional's most frequently asked questions about what may be expected of them when preparing for and delivering testimony. This workbook is intended to assist any healthcare professional, but some of the sample questions posed here are most applicable to those most frequently called to testify, such as Registered Nurses (RNs), Sexual Assault Nurse Examiners (SANEs), physicians, nurse practitioners (NPs) and certified nurse midwives (CNMs), and others whom provide medical forensic care to patients who report a sexual assault.

Limitations of this workbook

This workbook is not intended to provide a comprehensive overview of testifying, rather, just a place to start. This workbook is intended to be in conjunction with live-action testimony role-playing through the Sexual Violence Justice Institute's Testimony Institutes. We encourage you to supplement your training and practice in other ways.

Portions of this workbook contain questions that healthcare professionals may be asked by either the prosecutor or defense attorney when testifying. Some questions contain sample answers in order to better illustrate what an answer may be. Please note that the sample answers should not be interpreted as "correct" answers. Based on your experience, the issue in dispute and many other factors, the sample example answer may or may not be appropriate.

Finally, this workbook does not provide education or sample questions about testifying in pediatric patient criminal sexual conduct cases.

Authors:

The following individuals contributed to the development of this workbook. Additional sources are cited throughout.

Amanda Bothun, JD candidate
Sara Gonsalves, JD
Glen Jacobsen, JD
Ellen Johnson, RN, CEN, CPEN, SANE-A
Caroline Palmer, JD
Ami Schneider, JD candidate
Karine Zakroczymski, RN, BSN, SANE-A

SECTION 1: THE BASICS

What is the difference between criminal and civil court?

Examples of cases brought in criminal court include murder, criminal sexual conduct, child abuse, or arson. Someone charged with a crime is called a defendant. Because crime causes social harm through the violation of public rights and duties owed to the whole community, the State itself brings charges against the defendant. In criminal court, the State must prove beyond a reasonable doubt that the defendant committed the crime. A criminal court's function is to determine whether or not the State has proven a defendant's guilt beyond a reasonable doubt. If the defendant is convicted, the defendant may be required to pay a fine and serve time in jail or in prison. If jail or prison time is 'stayed' or deferred, the defendant is placed on probation, where they may be ordered to submit to counseling, complete community service, or fulfill some combination of these options.

In contrast, a civil court's function is to resolve noncriminal disputes. Examples of cases brought in civil court include personal injury, divorce, medical malpractice, or employment law disputes. In a civil suit, a plaintiff brings a complaint against a defendant. The plaintiff must show by a preponderance of the evidence that the defendant is responsible for the plaintiff's injury or loss. Preponderance of the evidence (usually referred to as "more likely than not" constitutes a lower standard of proof than is required in a criminal case. Noncriminal disputes cannot result in jail, prison or probation time for a defendant who is found responsible for the harm. Instead, the defendant is usually required to pay monetary damages or take other measures to alleviate the past or future harm.

Sexual assault cases are most often tried in criminal court, but on occasion, civil cases may also deal with sexual assault. For example, a plaintiff may choose to bring a sexual assault claim as a tort (wrongful act or infringement of a right) in civil court. Another example is a university's adjudication process for an assault that occurred on campus or an assault that occurred between students. The purpose of a university's adjudication process is to decide what measures must be taken on campus to alleviate the harm caused to the victim student, such as expelling the defendant student. A third example is a victim or victim's family suing a nursing home for damages associated with a sexual assault that occurred on the nursing home's premises by an employee. Sometimes, both criminal charges and a civil suit are the result of the same conduct by the defendant. In general, the criminal matter is resolved before the civil action moves forward.

Why are these cases sometimes referred to as rape or sexual assault cases and other times as criminal sexual conduct cases?

The terms rape or sexual assault are most commonly used by the general public or in everyday conversation. In Minnesota, however, the laws criminalizing rape or sexual assault use the term criminal sexual conduct. For example, a defendant in Minnesota may be charged with Criminal Sexual Conduct in the 4th degree. There are 5 degrees, or severity levels, of criminal sexual conduct under Minnesota law.¹ In this document, these cases are referred to as criminal sexual conduct cases.

What is the difference between a bench trial and a jury trial?

In a jury trial, the jury (consisting of six or twelve members, plus some alternate members) decides the issues of fact and the judge determines issues of law (determining issues of law means that the judge serves as the gatekeeper, determining what evidence will be heard and what evidence will be kept out). In a jury trial, the jury decides whether the defendant is guilty or not guilty. Alternatively, when a bench trial occurs the judge will decide both issues of fact and law. In a bench trial, the judge decides whether the defendant is guilty or not guilty.

Who is a witness?

Most witnesses, known as lay witnesses, are allowed to testify about their personal knowledge of what they saw, heard, or experienced. Usually, a lay witness is only allowed to give an opinion or draw inferences which are (a) based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.³

Who is an expert witness?

Witnesses who are deemed to be experts are allowed to give their opinions because they have special training, education, and/or experience.² The expert's opinions help the judge or jury understand the significance of the evidence.

Specifically, Sexual Assault Forensic Examiners (RN; SANEs; NP; CNM; PA; Physicians) will usually be accepted when their qualifications can be properly put before the court.

But I'm not an expert!

There is no set of requisite qualifications that you must have to order to testify as an expert. For example, to be an expert you are not required to have a PhD in nursing nor do you need to have published studies or manuscripts on forensic nursing. Instead, to qualify as an expert, you

¹ See Minn. Stat. §§ 609.341 – 609.345 and Minn. Stat. § 609.3451.

² Minn. R. Evid. 702 (2006).

need to only know more than the judge or jury about a particular subject based on your specialized training or experience. As an expert, your testimony then aids the finder-of-fact (jury or judge) in making a decision.

What is credibility? How does it apply to me?

Credibility is the truthfulness, accuracy, or reliability of a witness. It is crucial for you to testify as accurately and precisely as possible. As a witness, once you have promised to testify truthfully (taken an oath) your credibility is up for debate. You, like all witnesses, will start out neutrally when you promise to testify truthfully, but ultimately this determination is left up to the jury to decide whether you have done so.

What should I wear?

It is important to dress professionally so that the jury's concentration is focused only on what you say. Dress as if you were going to a job interview, or an important work event. It is not appropriate to wear scrubs or a physician's coat, even though you may wear them every day in your role as a healthcare professional. You will still be able to convey that you are a healthcare professional without wearing your work uniform.

Dress comfortably. If you do not dress comfortably, the judge or jury may be able to sense your discomfort, and you do not want them to assume it is because you are uncomfortable with providing testimony.

Take your time and clarify the question

Try to relax, focus and listen carefully to what is being asked of you. Answer only the specific question you were asked, and then stop talking. It is proper to take a moment to pause and consider your answer before answering a question. It is also acceptable to request to have the question repeated or restated by either the prosecutor or the defense attorney. For instance, it is acceptable to say any of the following:

- "Will you please repeat that question?"
- "I'm sorry, I didn't understand. Will you please rephrase that question?"
- "I was not able to follow your question. Will you please restate it?"

To whom do I direct my answer?

One word or short answers may be directed toward the person who asked the question. Longer, more narrative answers should be directed toward the finder of fact, whether that is the jury or the judge. If you find this difficult to accomplish, however, be patient with yourself. Even the most seasoned witnesses sometimes find it difficult to remember to direct longer, more narrative answers to the jury or judge.

What do I do if there is an objection?

During your testimony, an attorney may object to the question that the opposing attorney asked of you, or may object to your answer. The objecting attorney must explain the reason for the objection to the judge. The judge will make a ruling on whether the objection is overruled (refused) or sustained (honored). During this time, remain silent and wait for the judge's ruling. If the judge overrules the objection, you may answer the question. If the judge sustains the objection, you may not answer the question. A good way to remember this is that sustain = starts with the letter "s" = shut your mouth, and overruled = starts with the letter "O" = open your mouth and answer. If you find this difficult to remember or aren't sure, the best practice is to simply wait for direction on whether to answer the question or not. Either the attorney questioning you or the judge will provide that direction to you.

Use plain words

Remember that your role is to educate the jury or judge. With that role in mind, providing testimony is similar to explaining a diagnosis or a treatment plan to a patient. Keep your answers simple and easy to understand. If you use technical words or acronyms, be sure to define them.

Remember the limitations of your role

Finally, it is crucial to remember the limits of your role as a healthcare professional. You are being asked to provide testimony because you either provided medical forensic care to the patient in a particular criminal sexual conduct case or because you possess specialized skills or knowledge about providing medical forensic care to patients in general. As a healthcare professional, the information you provide must be impartial and objective (not biased towards either the defendant or the victim in the case). Thus, your role is distinct from law enforcement and victim advocates.

Because you are being asked to provide testimony about your role as a healthcare professional, it is best to refer to the victim in the criminal case as the patient. Try not to use the terms "victim" or "survivor" because using such terms may give the jury or judge the impression that you are not impartial or objective.

If you are asked a question that lies outside your comfort zone, it is permissible (and encouraged) to tell the person asking you the question "I don't feel comfortable answering that question because it lies outside my area of expertise."

SECTION 2: WORKING WITH THE PROSECUTOR

Who is the prosecutor?

The prosecutor is the attorney who represents the state or the community in a criminal case. Oftentimes, prosecutors are also known as County Attorneys or Assistant County Attorneys. The prosecutor doesn't represent the victim directly, but rather represents the community in the case against the defendant. This is why cases are titled *The State of Minnesota vs. Defendant*, and do not include the victim's name in the title. The prosecutor's role is to prove to the fact-finder that the defendant committed all of the elements of a particular crime beyond a reasonable doubt. If you have been asked to provide testimony in a civil case, you will not be working with the prosecutor, but rather with a plaintiff's attorney, or an attorney who represents the party bringing the lawsuit.

Initial contact with the prosecutor

The prosecutor issues a subpoena requiring you to appear in court and may have already spoken to you about being an expert witness. However, if you receive a subpoena from a prosecutor without having spoken to her or him it is best to go ahead and contact the prosecutor yourself so you are adequately prepared. Also, speaking with the prosecutor is important because the subpoena may not identify the patient and you may not know which examination and patient the subpoena is referring to.³

Interacting with the Prosecutor

If possible, you should make an effort to facilitate the prosecutor's understanding of the entire exam process. If the prosecutor isn't already familiar with the exam process, encourage her or him to come to your office to view the exam environment, discuss the case with you in person, see the report as you discuss it, view photos, and look at the equipment that you use in the course of the examination. In addition, it is helpful to educate the prosecutor on how you conduct an exam and how you gather evidence from the patient. Be sure to go over the patient's statements, history, and physical findings with the prosecutor.

When on the stand, if you are asked whether you met ahead of time or prepared with the prosecutor, you should answer yes (if that is true). There is nothing wrong with meeting with the prosecutor ahead of time to discuss your testimony.

³ *Sexual Assault Forensic and Clinical Management Virtual Practicum DVD.*

SECTION 3: WORKING WITH THE DEFENSE ATTORNEY

Who is the defense attorney?

The defense attorney represents the defendant, the party whom the criminal case is brought against. It is the responsibility of the defense attorney to represent his or her client's best interests. Therefore, at trial it is the defense attorney's goal to create a reasonable doubt in the minds of the jurors. This means the defense attorney will try and convince the jury (or judge when no jury exists) that his or her client might not be guilty.

Will the defense attorney call me as a witness?

It is possible, although rare, for the defense attorney to call you as a witness. The reason this is rare is because findings from the examination that you conducted will help to corroborate and support the prosecutor's case. However, in some instances the overall impact of the examination will have the opposite result. For example a defense attorney may chose to call you as a witness if he or she believes your findings, such as no evidence proving a sexual assault, will be helpful to his or her case. Therefore, when serving as a defense attorney's witness you should educate the attorney, explain your findings, the methods you used, and help anticipate issues that may be associated with your testimony.⁴

Why would a defense attorney want to meet with me?

Excluding the rare instance in which you are a witness for the defense attorney, this usually occurs because you are an anticipated prosecution witness. When you are the prosecution's witness, the defense attorney will still want to know what you know prior to trial so he or she can more adequately prepare for your appearance on the stand. This means that defense attorney is likely to inquire about your findings and methods used during the exam as well as your scientific opinion as it relates to your findings.

Working with the defense attorney

You should try to interact with both the defense and prosecuting attorney in the same way. So, your opinion or your demeanor should not change based on who you are talking to. It is important to remember that the defense attorney is a necessary and important part of the justice system. A good defense attorney helps promote public safety in the same way that the prosecutor does, by ensuring that the correct people are held accountable for violent crime. The defense attorney is not your enemy.

⁴ *Sexual Assault Forensic and Clinical Management Virtual Practicum DVD.*

Be cautious, however, as it is the defense attorney's job to limit your effectiveness, cast doubt on your opinion, or discredit you or the importance of your testimony.⁵ A good defense attorney does these things in the pursuit of justice, and these tactics should not be taken personally. Always be courteous to a defense attorney, both in court and outside of court. You will lose credibility in the eyes of the fact-finder if you appear hostile, suspicious or mean in court.

You should interact with the defense attorney when asked to do so, so that the court does not raise a serious issue of bias that you have cooperated with the prosecutor, but refused to speak with the defense attorney. When on the stand, if you are asked whether you met ahead of time or prepared with the prosecutor or defense attorney, you should answer yes (if that is true). There is nothing wrong with meeting ahead of time with either or both attorney to discuss your testimony.

Although not at all common, it is possible for defendants to represent themselves "pro se", which means that they are acting as their own attorney in court. In such a case you must treat the defendant as though they actually are an attorney.

⁵ Id.

SECTION 4. QUALIFYING AS AN EXPERT WITNESS

To qualify you as an expert witness, it must first be shown that you possess knowledge, skill, experience, training, or education (or a combination thereof) to provide scientific, technical, or other specialized opinion about the evidence or a fact issue.⁶ To qualify as an expert, you will need to describe to the judge, through questioning, the knowledge, skill, experience, training or education that you possess. This process will be carried out at the beginning of your direct examination and will be the first questions that are asked of you. The party that subpoenaed you (usually the prosecutor) will be the one to ask the questions to qualify you as an expert.

A helpful way to prepare qualifying as an expert is to practice reciting your credentials and background so that you are comfortable doing so in court. You will also find it helpful to be prepared to provide additional details about your professional background because there is a good possibility questions on this may be asked.⁷

Sample qualifying expert questions⁸

The questions at the beginning (the qualifying questions) will be about you because you must first qualify as an expert witness in order to give testimony as an expert witness.

1. Please state your name, spelling the last name or What is your full name and will you please spell it for the record? (You might also be asked for your name and how it is spelled by the Court Clerk when they swear you in.) _____

2. Where are you employed? What is your title? _____

 - How long have you been employed there? _____
 - What are the responsibilities of your position? _____

 - How long has the program you work for been in existence? _____
 - How does a forensic nurse become involved in a sexual assault case? _____

⁶ Minn. R. Evid. 702 (2006).

⁷ *Sexual Assault Forensic and Clinical Management Virtual Practicum DVD*.

⁸ Sample Qualifying Questions Compiled from: Jennifer Markowitz, *A Prosecutor's Reference: Medical Evidence and the Role of Sexual Assault Nurse Examiners in Cases Involving Adult Victims*, 26-27, *AEquitas: The Prosecutor's Resource on Violence Against Women*, (2010) and Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, 61-63, American Prosecutors Research Institute, (2007).

- Do you train or supervise staff? _____

 - Do you currently work in any other area of nursing in addition to your forensic nursing role? _____

3. Why are you here today? _____

- a. *I am here today to explain my role as a [Sexual Assault Nurse Examiner] and the care I provided to the patient in this case.* _____

- b. *I was subpoenaed to be here.* _____
4. What is your educational background? _____

5. What is the highest degree you have obtained? _____

6. What was your area of concentration? _____

7. Do you hold any licensures or professional certifications? _____

8. Do you belong to any professional organizations? _____

9. Are you required to complete continuing education requirements to maintain those licensures or certifications? What type of continuing education have you completed? _____

10. How does a nurse/physician/other healthcare professional become specialized to work with patients who have been sexually assaulted? _____

11. What sort of training must be obtained to become specialized to work with patients who have been sexually assaulted? _____

12. Is there any special certification or degree that goes with this type of training? Have you obtained that certification? _____

13. What type of training did you receive? _____

14. Approximately how many medical forensic examinations have you performed? _____

15. What does a medical forensic examination entail? _____

16. How long does the medical forensic examination typically take? _____

17. Do you use any specialized tools or procedures during the medical forensic examination? Did you receive special training to learn how to use those tools or procedures? _____

a. What is a speculum used for? _____

b. What is the alternative light source used for? _____

18. What other services does your program offer to patients? _____

19. Do you only treat victims? Have you ever provided treatment to a defendant? _____

20. How are patients referred to your program? _____

21. After your initial medical forensic examination, do you perform any follow-up care to the patient? _____

22. What kind of records does your program maintain? _____

- a. Are you required by the hospital to maintain these records? _____

- b. Who is responsible for record retention? _____

23. Have you previously testified in court? _____

- a. Was it a civil or criminal case? _____

- b. How many times? _____

- c. For the defense or the prosecution? _____

- d. Has the defense ever asked you to testify? If asked, would you do so? _____

In Minnesota, once the prosecutor believes that sufficient expert foundation has been laid, they will proceed to the general, factual questions, and finally to your conclusions and opinions. If the attorney attempts to elicit an 'expert opinion' that the other attorney wants to object to, they object at that time, and it is then up to the judge to either overrule the objection (finding that sufficient expert foundation has already been laid) or to sustain the objection. If the objection is sustained, first attorney will have to try to lay more foundation with the witness, so that the witness can provide the requested opinion.

SECTION 5: THE IMPORTANCE OF YOUR CURRICULUM VITAE

What is a Curriculum Vitae or C.V.? How does it differ from a resume? What is my C.V. or resume used for?

A curriculum vitae is similar to a resume, but usually contains more detailed information than a resume. While a resume is intended to give potential employers the opportunity to quickly skim your experience or qualifications, a C.V. conveys much more detailed information about your education, publications, continuing education and job duties. Your C.V. will be the basis for the questions asked of you when you are qualified as an expert. A carefully organized, current, detailed C.V. will help establish your qualifications as a credible expert witness because it demonstrates in detail your specialized knowledge, education, and skills.

Regularly update your C.V. with:

- Number of years & months working as a healthcare professional
- Paid & volunteer experience
- Sexual assault presentations, trainings, & conferences you have attended (keep a file of all completion certificates)
- Articles or papers you have written on topics relevant to sexual assault
- Statistics, like the number (but not names!) of patients you have treated (i.e., Conducted over 150 medical forensic examinations on patients aged 13 – 85 since 2009)
- The name and duties associated with any committees, work groups or task forces on which you have served

Expert witness experience on your resume or C.V.

- Keep track of your past experience as an expert witness, by including the following information:
 - The name & location of the court (i.e., Olmsted County District Court, Rochester, Minnesota)
 - Type of case (i.e., criminal) and
 - The party for whom you testified (i.e., State of Minnesota)
 - The date (i.e., month and year)

To whom should I provide my C.V.?

You may provide your C.V. to anyone who requests it. Providing your C.V. to the prosecutor and/or defense attorney will help those professionals learn more about your qualifications and experience and will help them develop appropriate questions to pose to you.

What should my C.V. look like?

A sample C.V. is contained on the following pages. Please note that your experience and skills will differ; the most important thing is to include the information that will showcase your specialized knowledge and skill.

Sample C.V.

Name
Address
Phone Email

Education

06/95-06/98 X Residency Program
Minneapolis, MN
09/91-06/95 University of Minnesota Medical School
Minneapolis, MN
Doctorate of Medicine
09/84-08/91 Saint Cloud State University
Saint Cloud, MN
Bachelor of Arts

Professional Experience

08/03-05/08 Family Physician
X Medical Center

09/01-03/03 Assistant Director
X Residency Program

Research Experience

10/92-02/94 Research Assistant, Department of Pediatrics, Hospital Y

09/89-05/91 Senior Thesis : X

Volunteer Experience

11/09-present Board of Directors, Non-Profit Agency C, Anytown, Minnesota
2008-present Sexual Assault Multidisciplinary Action Response Team
2005 –present Medical Director, SANE program, Hospital Y

Presentations/Publications

08/03-08/09 Training of SANE nurses

- Facilitated and attended the initial 40 hours forensic medical training of registered nurses.
- Hired for the sexual assault nurse examiner program.

Continuing Education

July, 2007 12th Annual Emergency Nurses’ Association Conference. 16 hours of continuing educational units

February, 2009: 6th Annual SANE/SART Conference, Austin, TX. 24 hours of continuing education units

January 25-29, 2010: 24th Annual International Conference on Child and Family Malteatment

October, 2010: Advancing Our Care for the Sexual Assault Patient, St. Paul, Minnesota. 7 hours of continuing education units

Professional Memberships

American Academy of Family Physicians 1995 - present

American Medical Association 2000 – present

International Association of Forensic Nurses, Minnesota Chapter 2010– present

SECTION 6: DIRECT EXAMINATION

What is direct examination?

Direct examination is the first line of questioning that you will encounter as a witness and is conducted by the party who subpoenaed you to testify (usually the prosecutor).

What is a leading question?

Leading questions are generally not permitted on direct examination except to alert the witness to a change in the topic of inquiry or to direct the witness to a specific date or topic. A leading question is one that suggests the answer.⁹ Generally, it is a question that could be answered by simply stating either “yes” or “no.”

- Example: “Isn’t it true that you conducted a sexual assault examination on February 1st, 2011?”
- Example: “Did you have the opportunity to conduct a sexual assault examination on February 1st, 2011?”

When should I expect leading questions?

Leading questions are allowed during cross-examination. Most defense attorneys will use leading questions as part of their strategy and so you should expect them to be used during your cross-examination. Some examples of leading questions are provided in Section 7, Cross Examination.

Sample questions describing the medical forensic examination¹⁰

1. Describe, if you would please, in broad terms, a medical forensic examination. (Some prosecutors may have you describe the exam process twice or more. The first time serves as a general overview, providing a roadmap to the jury so that they know what a full exam consists of. The second time through the description will consist of the specific things that you did or didn’t do with that particular patient.) _____

⁹ Black’s Law Dictionary 969 (9th ed. 2010).

¹⁰ For an excellent source of potential questions, terms and definitions associated with the medical forensic examination, please refer to Jenifer Markowitz, *A Prosecutor’s Reference: Medical Evidence and the Role of Sexual Assault Nurse Examiners in Cases Involving Adult Victims* (Dec. 2010) available at http://www.aequitasresource.org/Prosecutor_Reference_Medical_Evidence.pdf (last visited October 20, 2011).

2. Did you have the opportunity to conduct a forensic sexual assault examination on (patient)? _____

3. Where did you meet with the patient? _____

4. What time in the day did that take place? _____

5. What information did you already have when you met with the patient? _____

6. You mentioned that one of the first things you do is ask about the patient's medical history. Why did you do that before the physical exam? _____

7. You stated that you asked the patient about what happened. Why did you do that? _____

8. What did the patient tell you about what happened? (Please note that there will often be a 'hearsay' objection at this time. Just stop and wait until you are either directed to answer the question or until a different question is asked). _____

9. Was anyone else present with the patient while she told you what had happened to her? _____

10. Can you please describe the specific steps you took in examining the patient in this case? _____

- Did you use anything/do anything to enhance your ability to see while performing this step? _____

- Colposcope, speculum, positioning technique _____

- What observations did you make while performing this step? _____

- Did you document your observations while performing this step? _____

- Did you collect anything during this step? What was done with what you collected? _____

- Did you find any foreign material during your exam? _____

- Were you able to identify it? Why or why not? _____

- What did you do with it? _____

11. On your report, you indicate that patient had not had consensual sexual contact for at least 72 hours prior to the exam—why is that important? _____

12. What is the purpose of the swabs? What is the purpose of a buccal swab? _____

13. What was done with those swabs? _____

14. Did the patient submit to a urine or blood test? _____

15. Was the patient given a pregnancy test? Why? What were the results? _____

16. What is emergency contraception? _____

17. Was the patient given any medication? Why? _____

18. What are those medications for? _____

19. Did you observe the patient's underwear? What did it look like? _____

20. Did the patient indicate if she had had a bowel movement or urinated since the assault? Why might that be important? _____

Sample questions related to genital anatomy

1. You referred earlier to the fact that the patient was/was not estrogenized. What does that mean? Why might that fact be relevant to the medical forensic exam? _____

2. You referred earlier to your observation of the patient's....
a. hymen. Will you please describe what/where the hymen is? _____

- b. posterior fourchette. Will you please describe what/where the posterior fourchette is? _____

- c. urethra. Will you please describe what/where the urethra is? _____

- d. labia minora. Will you please describe what/where the labia minora is? _____

- e. labia majora. Will you please describe what/where the labia majora is? _____

- f. cervix. Will you please describe what/where the cervix is? _____

- g. anus. Will you please describe what/where the anus is? _____

- h. clitoris. Will you please describe what/where the clitoris is? _____

- i. Fossa navicularis. Will you please describe what/where the fossa navicularis is? _____

- j. Mons pubis. Will you please describe what/where the mons pubis is? _____

- k. Perineum. Will you please describe what/where the perineum is? _____

Sample questions related to general and genital injuries or lack of general and genital injuries

1. Would you please describe the patient's physical appearance before you conducted the exam? Did you take a photo of the patient's general appearance before you conducted the exam? Why or why not? _____

2. In your experience, how often do you see injuries in patients reporting sexual assault?
3. Did you take photos of any injuries? Why or why not? _____

4. You documented that there was a slight tear to the patient's posterior fourchette at 6 o'clock. What does that mean? _____

5. You documented that there were petechiae present on the patient's (area). What are petechiae? _____

6. If a patient were sexually assaulted, wouldn't you expect to see genital injury? Why not? _____

7. How do you go about recording specific injuries once you find them? _____

8. Are the injuries you just described consistent with the use of force? _____

9. Is the injury you just described typical in sexual assault patients that you see? _____

10. Based your training, education, and experience were you able to form an opinion to a reasonable degree of scientific certainty about any of the injuries you observed? _____

11. Is it possible that a person could be sexually assaulted but there would be no injury? Can you explain how this is possible? _____

12. You testified that you did not observe any injuries in this case. Based upon your education, training, and experience, were you able to form an opinion to a reasonable degree of certainty about whether what you observed was consistent with the patient's history of what happened? _____

13. You testified that you inserted a speculum into the patient in order to conduct a portion of the exam. Isn't it possible that you caused the injury to the patient by inserting the speculum? _____

14. You documented that the victim had a bruise located (place). Are you able to tell us how long that bruise had been there? Why or why not? Are you able to tell us what may have caused that bruise? _____

Questions about diagnosis/findings/opinion

1. Were your findings consistent with the history and information that you received from the patient? _____

2. Why didn't you diagnose that the patient had been sexually assaulted? _____

Use of demonstratives/exhibits

It may be helpful to use an exhibit, drawing or another demonstrative (a prop) to help describe your role, anatomy, the medical forensic examination, or other topics to the jury or the judge. Any demonstrative you hope to use must be approved of ahead of time by the prosecutor, defense attorney or judge, however. If you believe that the use of a demonstrative could be

helpful when explaining a complicated topic, alert the prosecutor as soon as possible. The prosecutor must provide a copy of or a description of the demonstrative you hope to use to the defense attorney well before the trial date. For example, some healthcare professionals have found the use of a chart or another demonstrative helpful when describing genital anatomy like the hymen. Be sure not to rely on the use of a demonstrative, however, since there is no guarantee that its use will be approved of by the judge. You should be just as comfortable describing the item in words as you are utilizing the demonstrative.

What if I can't remember? Will I be able to look at my notes or the patient chart?

The prosecutor, defense attorney and jury understand that you have seen many patients and cannot remember every detail of every case. However, these individuals also expect that you will arrive at court ready to present evidence in the case at hand to minimize any delays. Thus, it is crucial to study the patient's chart as much as possible ahead of time to familiarize yourself with the specifics of the case. If it isn't possible to remember a specific detail, it is appropriate to ask the attorney questioning you whether you may refer to the patient's chart to refresh your memory. Then, once you have glanced at the chart and located the detail you need, you will then be able to answer the question. It usually isn't acceptable to read straight from the patient's chart or other notes you have taken, however.

Be sure to ask the prosecutor if you can take your file/chart/computer with you to the witness stand, or if you need to leave it at counsel table. This procedure will vary judge to judge. If you have to leave it on the table and you need to use it to refresh your memory, just ask to review it and it will be brought to you. You will be allowed to review it, then it will be taken away again, after which you will be allowed to answer the question. This process is to ensure that you are really refreshing your memory and not just reading something from the chart.

It is absolutely imperative that the prosecutor has a copy of your entire file/chart, as they in turn have to disclose it to the defense attorney. If the defense attorney hasn't seen something in the file/chart that you start testifying about, expect an objection. Such non-disclosure might well result in that particular evidence not being allowed in at trial. The judge could prohibit you from testifying on that subject at all. Anytime you update or add test results or lab work to your file/chart, you must make sure that the new information gets to the prosecutor as well.

SECTION 7: CROSS EXAMINATION

What is cross examination?

Cross examination is the line of questioning that comes after direct examination has concluded. The attorney that did not call you as a witness performs this line of questioning. Thus, in the majority of criminal cases, the defense attorney will be cross-examining you. The purpose of cross-examination is to limit the effectiveness of your testimony or discredit your opinion or recollection.¹¹ Despite this purpose, the defense attorney is not the enemy. Therefore, you should always be courteous and professional, and try not to take questions posed personally.

Tips on handling cross examination

- Listen to the question carefully.
- Stop talking if there is an objection to the question.
- It is common on cross-examination for questions to be leading. As a result, the questions may be confusing or difficult to follow. This is why it is important to make sure you never answer a question that you find confusing or guess at what the question may mean. If this occurs, you can ask for the question to be repeated.
- If a question makes wrong or erroneous assumptions, or assumes facts that are not true, you can point out those errors to the attorney and ask that the question be rephrased or restated.
- Be polite. It is important for the jury not to see you become flustered even if you feel that the defense attorney is trying to provoke emotion from you.
- Cross-examination is not a direct attack on you as an individual. Try not to take the questions personally.
- Remember, it is perfectly appropriate to state "I'm sorry, I can't answer that question. That question is outside the scope of my expertise."

Sample cross-examination questions

Because leading questions are allowed during cross examination, many questions posed will not be questions at all, but rather statements to which you as the witness will be invited to agree with.

1. Do you think all patients that claim to be sexually assaulted are telling the truth? _____

2. Isn't it true that you believe all of your patients? _____

¹¹ Black's 433.

3. Why aren't you a certified Sexual Assault Nurse Examiner? _____

4. If a woman was forcibly raped, wouldn't you expect to see injury? _____

5. Aren't you just a cop in a lab coat? Isn't it true that you cooperate with the police on these cases? _____

A: I am an independent medical professional. I provide medical forensic care to patients regardless of their decision to report the assault to the police. I do cooperate with the police in cases where the victim has decided to report the assault to the police, but I do not drive the investigation. _____

6. Do you act as an advocate on behalf of the patients that you see? _____

7. Isn't it true that nothing is ever 100% certain in the medical field? _____

8. Do you sympathize with your patients? What about this particular patient? _____

9. Isn't it true that each time you have testified as an expert in sexual assault cases you always testified for the prosecution? _____

10. You have seen genital injuries in patients that have not claimed to have been sexually assaulted, haven't you? _____

11. How have such injuries been sustained? _____

12. So injury alone doesn't prove anything one way or the other, does it? _____

13. Your exam doesn't show anything more than that the 'so called' victim had sex, does it? _____

14. Is there anything about your exam that proves 100% that my client had sex with your so called victim? _____

15. This is all just a case of you repeating what she told you, isn't it? _____

16. Ok, so you found a little abrasion, couldn't that be just the result of a little rough sex?
17. How about just being a little overeager? _____

18. Could it have happened when she was using a vibrator? _____

19. Did you find anything, anything at all, that proves 100% that she was raped? _____

20. Ok, so semen was inside her vagina, does that prove that she didn't consent to have sex? _____

I can't believe the defense attorney went there! Dealing with particularly challenging questions

Many of the defense attorney's questions on cross-examination will be difficult and are meant to be, as discussed earlier in this workbook. However, there are some questions that may prove particularly challenging. While it may be possible to avoid answering these questions based on the prosecuting attorney's objection, there is no guarantee that a judge will sustain the

objection. It is a good idea to plan for this possibility by talking with the prosecutor ahead of time and thinking about your possible answers.

One question that raises concern is about the frequency of false reporting of sexual assault. For example, a defense attorney might ask about statistical rates of false reporting. Inferences could be drawn from these statistics about frequency and types of reports that may cause the fact-finder to make assumptions about victim credibility. If you find, however, that you must answer this type of question you can either say you do not have knowledge of specific research studies, if in fact you do not, or if you do know, provide very general information (i.e. studies generally show low rates) but do not try to get more specific in your responses.

The other challenging question is more personal. A defense attorney might ask if you are a victim/survivor of sexual assault. This question is not relevant to the case but it might be asked anyway in an attempt to show that you are biased toward the victim in the case – and all victims in general – and therefore cannot be a reliable expert.

It may be a good idea to talk about this matter with the prosecutor while planning your testimony. You do not need to disclose personal history right away but you might ask the prosecutor whether she or he thinks the defense attorney will ask you any personal questions and whether you will have to answer them. Note that a prosecutor may be required to disclose to the defense that you are a survivor. If you are not comfortable with this possibility then testifying may not be a good idea for you. If you are comfortable, then consider how you would answer the question. For example, if you are a victim/survivor, you would answer “yes” and, if pressed further, that your background is part of the reason why you are interested in this issue or why you pursued the specialty that you did. You could also state that you have now heard about so many different sexual assault stories through your extensive patient work that you understand the issue from a variety of perspectives that go beyond your own. It should not be necessary for you to go any further. You are not the victim in the case.

SECTION 8: REDIRECT

What is redirect?

A redirect is a second direct examination that is done after the cross-examination and ordinarily is limited to matters covered during cross-examination. The redirect will be carried out by the party/attorney that you are serving as a witness for. Re-direct is a chance to clarify something that wasn't explained well in direct examination, or something that was confused during cross-examination. Leading questions are only allowed when changing from topic to topic.

Sample Redirect Questions

1. You stated in your testimony that you did not take any photographs of the injuries noted in your written report. Will you please explain why you didn't take any photographs? _____

2. You stated in your testimony that the female genitalia is made to accommodate penetration, and that, because of this, there may be no detectible injury from a sexual assault. Is that the case even when the examination is done only a few hours after the sexual assault as in this case? _____

3. Have you had the opportunity to follow up on cases that you have seen in the ER for a forensic sexual assault exam? Over what time period? How long, in general, does it take for scrapes and abrasions to heal? _____

4. Is there any way to tell what caused an injury, or when it was caused, after it has healed? _____

5. Is it possible that a healed abrasion is not even detectable? _____

6. Do you often see scaring of genital tissue? Why or why not? _____

7. Did you see anything at all that would controvert what your patient told you happened to her? _____

8. So, based on your training and experience, and to a reasonable degree of medical certainty, have you formed an opinion as to whether or not your patient was subjected to a forcible sexual encounter? (yes or no answer) _____

9. What is that opinion? _____

CONCLUSION

Thank you for your interest in testifying as an expert witness. Your years of experience have given you special knowledge that will help educate a judge and jury. This workbook is just one tool in developing your expert testimony skills. Other tools are practice, talking with peers, attending trainings, and, of course, your day-to-day experience.

As mentioned in the Introduction, this workbook is intended as a place to start. You will encounter experiences in court that are not mentioned in this workbook – it is not possible to imagine every scenario that might come up. But we do hope this workbook will give you the background to help you feel confident in your abilities as an expert. And we hope that you will share with us your stories and feedback so that we can continue to improve this workbook and our training.

Good luck!