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# STOP Newsletter

**Services and Training  
for Officers and Prosecutors**



Developed by the Pennsylvania Coalition Against Rape  
and the Pennsylvania Coalition Against Domestic Violence.



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for Officers and Prosecutors**

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SPECIAL  
DOUBLE ISSUE!

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

By Teresa Scalzo, Esq.,<sup>1</sup> Department of Defense,  
Sexual Assault Prevention and Response Office

Expert testimony can overcome a jury's belief in myths about sexual assault, particularly when it explains lack of injury or a victim's counterintuitive reactions to rape. Experts are professionals who, by virtue of their training, education, or experience have a 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 violence against women prosecution.<sup>2</sup> It will provide general pointers appropriate for law enforcement as well as specific pointers for victim advocates.

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.<sup>3</sup> 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.

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<sup>1</sup>Teresa Scalzo, Esquire, is the Senior Policy Advisor for the Department of Defense, Sexual Assault Prevention and Response Office.

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

<sup>3</sup> The attorneys can stipulate to your qualifications, meaning you will not be asked these questions while on the witness stand.

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



### 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:

- ◆ Watch other experts 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), 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 you are familiar with any publications in your area of expertise, including any adverse material.
- ◆ Know the qualifications or requirements for membership in any organizations to which you belong.
- ◆ Know the ethical obligations or protocols that govern your profession or practice.

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.

Once a case is ready for trial and you are called to testify, pretrial preparation is crucial. Review all 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 it is thorough and accurate, or you can expect to be cross-examined about any inconsistencies. Inform the prosecutor as soon as possible if you discover that a report contains an error or is missing information. If necessary, supply an amendment to the report.

Consult with the prosecutor prior to trial, even if this can only be done by telephone or e-mail. Discuss the prosecutor's expectations, theme of the case, potential areas for impeachment, potential defense goals, the evidence in the case, and the questions that will be asked of you. Ask the prosecutor where you fit in the big picture of the trial.

The defense 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.

#### 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 the question, ask for clarification. If you don't know the answer it is better to state that "you don't know" rather than to guess or attempt an incomplete answer. You can ask to refer to your notes to refresh your memory, if necessary.<sup>4</sup>

<sup>4</sup> Prior to the trial, ask your prosecutor whether or not you can refer to your notes.

## 2007 Events Calendar

### April

- 10-11 Intersections: Mental Health Issues and Crime Victims  
Central Pennsylvania College Conference Center  
Cumberland County  
Contact: PCAR or PCADV
- 18 First Responders of Sexual Assault  
Sheraton Reading Hotel  
Bucks County  
Contact: PCAR

### May

- 10 Male Victims of Child Sexual Abuse  
Holiday Inn West Chester  
Chester County  
Contact: PCAR
- 17 Male Victims of Child Sexual Abuse  
Four Points Sheraton, Mars  
Butler County  
Contact: PCAR
- 23 First Responders of Sexual Assault  
Keystone College, La Plume  
Lackawanna County  
Contact: PCAR
- 24 First Responders of Sexual Assault  
College Misericordia, Dallas  
Luzerne County  
Contact: PCAR

### September

- 12-14 National Sexual Assault Conference  
Renaissance Harborplace Hotel  
Baltimore, MD  
Contact: PCAR

If you have any questions about the trainings listed, please contact PCAR at 1-800-692-7445 or PCADV at 1-800-932-4632.

Sometimes a sexual assault center may be asked to provide an expert to testify about general issues relating to sexual violence such as victim response, delayed reporting, etc. If the center provides an expert it should be someone who has not worked with the victim in the case. Also, if called to testify, the advocate should be prepared for questions of bias. Some sexual assault advocates have experienced violence in their own lives and the influence this abuse has on their testimony may be questioned. If a witness' prior abuse does create bias, the advocate should discuss this with the prosecutor prior to the trial.

**Final Points:**

From the moment you walk into the courtroom, the jury is deciding whether you are credible. Success at trial is not only dependent upon what you say; it also depends upon your appearance and attitude. As a professional, you should be neutral and unbiased. You should always tell the truth, and be as accurate and concise in your statements as possible. When testifying, words matter! Try to avoid statements that draw a conclusion and testify only to what you saw, not what you think.

Appearance and demeanor is also important in the courtroom. 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. Always be calm and polite. Remember, the jury is your audience; make eye contact with them whenever possible.

Remember, if you are called as an expert witness, it is because you have a body of knowledge not held by the general public. You ARE an expert in your field and your testimony can be critical to the outcome of a trial. ♦



**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 tries to discredit the witness by exposing perceived inaccuracies in the testimony. 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. This strategy is an attempt to cause you to lose focus and lessen your credibility as a witness.

**Some tips that may help in this situation include:**

- ♦ Remain calm (remember, this is not a personal attack but a trial strategy)
- ♦ When disagreeing with an attorney do so without argument.
- ♦ Rely on the prosecutor to make objections to improper questions or poor treatment of you by the defense attorney.

If a 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. Be aware of compound questions that might require a "yes" to one part of the question and a "no" to another part. 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 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 ask the attorney to ask another.
- ♦ Try to anticipate what you might be asked.

Brainstorm with others and make a list of questions you might expect.

- ♦ Defense attorneys will often try to force you to answer "yes" or "no" to a question. If the question cannot be answered simply tell the jury that. Ultimately, the judge may force you to respond without further explanation.
- ♦ You may be asked about inconsistencies in the case, especially if the victim gave inconsistent statements at various points during an investigation. You should be prepared to explain how these inconsistencies 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.

**Victim Advocates:**

The first consideration for a victim advocate is whether to testify at all. In Pennsylvania, a victim's communication with a sexual assault advocate is considered confidential through the Confidential Communications to Sexual Assault Counselors statute 42 Pa. C.S.A. Sec. 5945.1. According to this statute confidential communications includes:

*"All information, oral, or written, transmitted between a victim of a sexual assault and a sexual assault counselor in the course of their relationship, including, but not limited to, any advice, reports, statistical data, memoranda, working papers, record or the like, given or made during the relationship."*

The statute states that no sexual assault counselor may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor. It is important for the investigative team to understand that privilege belongs to the client and can only be waived by the client. If an advocate breaches that privilege, they would likely be terminated from their job and could face civil repercussions.

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## Crawford - Hammon - Davis Trio of Supreme Court Opinions Impact Evidence-Based Prosecutions

By Ellen Kramer Adler, PCADV PA Managing Attorney

Courts, prosecutors, law enforcement and victim advocates struggle with how to use victims' prior statements at trial when the victim is unavailable to testify. In March 2004, *Crawford v. Washington*<sup>1</sup> provided some guidance on the issue by interpreting the Sixth Amendment Confrontation Clause<sup>2</sup> and setting forth broad factors for identifying when a statement is "testimonial" in nature and thus subject to the defendant's Sixth Amendment rights. Pursuant to *Crawford*, a statement is testimonial and not admissible without the defendant's opportunity to cross-examine when:

- ◆ A government agent was involved in creating the testimony or taking a formal statement AND
- ◆ An objective person would understand that the statements might be used in court.<sup>3</sup>

The U.S. Supreme Court recently applied *Crawford* to give further guidance to determining under what circumstances statements made to law enforcement personnel are admissible without being subject to the Sixth Amendment Confrontation Clause. In the case of *Davis v. Washington* and *Hammon v. Indiana*,<sup>4</sup> the Court considers separate fact scenarios that challenge the admissibility of statements made to law enforcement by victims of domestic violence. In both instances, the trial courts admitted the statements despite the fact that neither victim testified at trial.

In *Davis*, the defendant was charged with violating a no-contact order after police responded to a 911 call. While on the telephone, the victim identified her assailant by name and told the operator that he had used his fists to beat her. The victim did

not testify at trial and the state offered the recording of her 911 call as evidence over the objection of the defendant. The state Supreme Court held that the call was not "testimonial" under the *Crawford* ruling because the 911 call is not of the same nature as an in-custody interrogation by police. The U.S. Supreme Court affirmed.

In *Hammon*, the defendant was charged with domestic battery after police responded to a call from the residence. While being questioned, Mrs. Hammon told an officer that her husband had thrown her to the ground and beaten her. She, too, did not testify at trial. Instead, the officer testified as to what she had told him, over the objection of defendant's attorney. The testimony was admitted as an excited utterance exception to the hearsay rule.

The Indiana Supreme Court affirmed, defining "testimonial" statements as those made under circumstances where the principal motive of either the speaker or the person receiving the information is to preserve it for future use in legal proceedings. Finding that the officer's principal motive for questioning the wife was to assess and secure the situation and not to preserve the statements for future testimony, the Court affirmed the admissibility of the statements. The U.S. Supreme Court reversed, finding that at the time the victim spoke to the officer, the emergency had ended. The statements were taken only in anticipation of charges

being filed against the perpetrator and the eventuality of a trial. Accordingly, the Court found that the statements made to the officer were testimonial and therefore inadmissible without the defendant's opportunity to cross-examine Mrs. Hammon. It is first important to note that while *Crawford* deals generally

with statements made to government officials, *Hammon* and *Davis* more narrowly apply to statements made to law enforcement officials during interrogation. *Davis* involves a call to the 911 operator, an agent of law enforcement, and the communication of facts as they were happening. The victim was not relaying information that had already happened. She was in danger, unprotected and spontaneously calling for help. By contrast the Court determined that the statement in *Hammon* was taken for the purpose of investigating a past crime. Justice Scalia finds for the majority that the incident had ended and that the victim was no longer in danger. He writes: "[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."<sup>5</sup>

It is also important to note the Court's observation that domestic violence is a crime "notoriously susceptible to intimidation or coercion"<sup>6</sup> of the victim and that courts must protect the integrity of the proceedings when the defendant claims the right to confront an unavailable witness. Advocates express concern about the Court's conclusion that because Mrs. Hammon's statement was taken by law enforcement after the alleged perpetrator left the residence, the danger of the situation had ended. In fact, we recognize in the advocacy community that the danger is on-going and may actually escalate upon the arrival of law enforcement. Justice Thomas, in his dissent, states it well:

... [T]he fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that *Hammon* did not act abusively towards his wife in the presence of the officers, ... and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning...<sup>7</sup>

The Court still has not provided a comprehensive definition of

"testimonial statements." By focusing on defining the scope of the emergency and what actually was happening at the scene, victims' statements to law enforcement in the absence of the perpetrator might still be admissible in the context of an on-going emergency. Also, *Hammon/Davis* only applies to situations involving statements to law enforcement in the course of an interrogation.

Under different facts, *Crawford* may still control. The significance of this decision also implicates prosecutors' reliance on evidence-based prosecution strategies. Recognizing the barriers preventing victims from testifying in court, they strategically collect evidence during their investigation to use at trial in the event that the victim is unavailable. Accordingly, photographs, medical records, and 911 tapes are preserved, as well as any spontaneous declarations made to investigating officers. The focus on this type of evidence gathering enables

prosecution in cases where the victim of the abuse is unavailable to testify. Even with the instant ruling, prosecutors should not be discouraged from engaging with law enforcement in this type of criminal investigation.

This Court identifies another avenue to pursue domestic violence prosecutions in the absence of a victim's testimony. *Hammon* is remanded for a forfeiture hearing, if requested, to determine if the defendant has waived his Sixth Amendment right to confrontation by intentionally preventing a victim/witness from testifying as the result of his misconduct, including threats and intimidation. The Court writes, "one who obtains the absence of a

witness by wrongdoing forfeits the constitutional right to confrontation."<sup>8</sup> Pennsylvania prosecutors may want to dedicate investigatory resources to build a case for forfeiture in appropriate cases.

In conclusion, *Hammon/Davis* can be used in meaningful ways to protect victims of domestic violence and their children. There are strong messages about the lethality of domestic violence, the need to hold defendants accountable when their intimidating behavior results in a victim's decision not to testify, and road maps for forfeiture hearings and evidence-based prosecutions. Pennsylvania STOP teams are encouraged to utilize the strengths of this opinion to continue to prosecute perpetrators and hold them accountable for violent and intimidating behaviors. ◆

<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>2</sup> The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. CONST. amend. VI,

<sup>3</sup> *Crawford*, 541 U.S. at 52.

<sup>4</sup> *Davis v. Washington*, 547 U.S. \_\_\_\_, 126 S. Ct. 2266 (2006).

<sup>5</sup> *Davis*, 126 S.Ct. at 2273.

<sup>6</sup> *Davis*, 126 S.Ct. at 2280.

<sup>7</sup> *Davis*, 126 S. Ct. at 2284.

<sup>8</sup> *Davis*, 126 S. Ct. at 2280.

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