

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American
Judges Association

American Judges Association

2017

Domestic Violence Expert Witness Testimony: A Guide for the Judiciary

Victoria L. Lutz

CU's School of Public Affairs Master Program

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>

Lutz, Victoria L., "Domestic Violence Expert Witness Testimony: A Guide for the Judiciary" (2017). *Court Review: The Journal of the American Judges Association*. 633.
<https://digitalcommons.unl.edu/ajacourtreview/633>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Domestic Violence Expert Witness Testimony: A Guide for the Judiciary

Victoria L. Lutz

WHY AN EXPERT IS NEEDED

A woman is battered in the United States every nine seconds.¹ Between 25% and 31% of American women will be physically or sexually assaulted by an intimate partner at some point during their lives²—an estimated 1.3 million women annually.³ Intimate partner homicides make up 40% to 50% of all murders of women in the United States.⁴ Every day in the United States, more than three women are killed by their abusers.⁵ The statistics from Canada are similarly astounding. “Half of all women in Canada have experienced at least one incident of physical or sexual violence since the age of 16.”⁶

These facts are difficult to believe and even more difficult to fathom. How can it be that a woman is in more danger from her life partner than from strangers on the street? How does the good, kind juror who has never witnessed an abuser slap or even browbeat his wife accept that the same man, who is calm and

non-violent at work, can hit his wife with a bat and leave her bleeding on the side of a highway? How does the self-made working single mother of three on the jury evaluate the testimony of the wealthy victim who testifies that her paramour has been sexually assaulting her for years but that she still loves him?

So much about domestic violence is counterintuitive. Myths and misunderstandings cloud the vision of even those intent on seeing the issues clearly. For these reasons, domestic violence experts can be valuable resources in cases involving intimate partner violence.⁷

ADMISSIBILITY OF DOMESTIC VIOLENCE EXPERT TESTIMONY

Courts in all 50 states and the District of Columbia as well as the Supreme Court of Canada have admitted domestic violence expert testimony for at least the past 20 years.⁸ In my

In adapting *A Guide to Domestic Violence Expert Testimony in Colorado*, 45 COLO. LAW. 63, Nov. 2016, my goals are: (1) to promote in the judiciary a deeper understanding and possibly an expanded acceptance of the validity and usefulness of domestic violence expert testimony and (2) to share information from the original guide, which I wrote for attorneys and experts, so that there would be a common appreciation among all relevant parties about the “who, what, why, when, where, and how” of domestic violence expert testimony. I have not attempted to canvas North American statutes and caselaw but have offered Colorado statutes and precedent (which follow the Federal Rules of Evidence to a large degree) and a sampling of other legal authorities as representative sources. I would like to thank The Honorable Julie K. Field, Colorado Eighth Judicial District; The Honorable Evelyn Frazee, Supreme Court, Rochester, New York; and Judge Janice Rosa, Buffalo Family Court Chief Judge (ret’d), for their wise council and generous assistance in helping me to draft this article in a manner that would be useful to the bench.

Footnotes

1. Alanna Vaglanos, *30 Shocking Domestic Violence Statistics That Remind Us It's an Epidemic*, HUFFINGTON POST, October 23, 2014, http://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics_n_5959776.html.
2. Bea Hanson, *Interventions for Batterers*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 419, 438 (Albert R. Roberts ed., 2002) (citing a 1999 study by six named researchers).
3. PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000), available at www.ncjrs.gov/pdffiles1/nij/183781.pdf; PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000), available at www.ncjrs.gov/pdffiles1/nij/181867.pdf.
4. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 15 (partially revised March 11, 2014),

available at www.ncjrs.gov/pdffiles1/jr000250e.pdf (a lengthy NIJ study by Jacquelyn C. Campbell and 11 other authors of Campbell's Danger Assessment Tool).

5. Soraya Chemaly, *50 Facts About Domestic Violence*, THE HUFFINGTON POST, November 30, 2012, www.huffingtonpost.com/soraya-chemaly/50-actual-facts-about-dom_b_2193904.html.
6. See *The Facts About Violence Against Women*, CANADIAN WOMEN'S FOUNDATION, <http://www.canadianwomen.org/facts-about-violence>.
7. The instant article focuses on the most frequently used domestic violence experts in Colorado and elsewhere: those who do not meet with clients and do not testify as mental health professionals who provide opinions on a victim's medical or therapeutic diagnosis.
8. NATIONAL INSTITUTE OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, at ii (1996), available at <https://www.ncjrs.gov/pdffiles/batter.pdf> [hereinafter NIJ REPORT]. For examples of 15 state statutes that allow domestic violence expert testimony, see National Clearinghouse for the Defense of Battered Women, *Expert Testimony—Battering and Its Effects: Statutes*, in THE ANNOTATED BIBLIOGRAPHY, November 11, 2016 (on file with the author). See also Teresa M. Garvey & Stephanie Ritter, *Pennsylvania's New Victim Behavior Expert Witness Testimony Statute Upheld: Commonwealth v. Olivo*, STRATEGIES IN BRIEF, June 2016, <http://www.aequitasresource.org/Pennsylvania-New-Victim-Behavior-Expert-Testimony-Statute-Upheld-Commonwealth-v.-Olivo-SIB25.pdf>; LAWYER'S MANUAL ON DOMESTIC VIOLENCE, REPRESENTING THE VICTIM 102, 124 (Mary Rothwell Davis, Dorchen A. Leidholdt & Charlotte A. Watson, eds., 6th ed. 2015), <https://www.nycourts.gov/ip/womeninthecourts/pdfs/DV-Lawyers-Manual-Book.pdf>; Nancy K. D. Lemon, *A Transformative Process: Working as a Domestic Violence Expert Witness*, 24 BERKELEY J. GENDER L. & JUST. 208 (2013), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1280&context=bgjl>. A leading Supreme Court of Canada case accepting use of battered woman syndrome is *R. v. Lavallee*, 1 S.C.R. 852 (1990).

home state, Colorado, appellate courts have approved this type of testimony since 1999.⁹ Yet the foundations for admitting domestic violence expert testimony, the parameters of its use at trial, the qualifications necessary to become an expert, and even the accepted nomenclature for this type of testimony are often decided on a case-by-case or court-by-court basis. This article addresses these topics and includes best-practice considerations and suggestions.

THE VALUE OF DOMESTIC VIOLENCE TESTIMONY TO EDUCATE THE TRIERS OF FACT AND DISPEL MYTHS

Over half the states in the U.S. now mandate domestic violence training for judicial officers.¹⁰ Attorneys and jurors often do not come into the courtroom as well educated about intimate partner violence as judges. And even an educated judiciary will not be as up-to-date concerning the dynamics of domestic violence as an expert.¹¹

It is a mistake to assume that, because jurors nowadays may have heard about or read about domestic violence, they do not need an education about intimate partner violence. Often what little knowledge jurors possess about domestic violence comes from Twitter, Facebook, movies, and television.¹² Many jurors have been lucky enough to have never been personally impacted by domestic violence. Moreover, to the extent that prospective jurors have in some way experienced domestic violence, they are likely to be challenged and

often are not empaneled.

Because the triers of fact in a domestic violence case frequently will benefit from hearing an expert deconstruct stereotypes, dispel myths, and explain battering and its effects, attorneys whose clients are touched by this type of violence would be wise to contact a qualified domestic violence expert to talk through issues and possible retention.¹³

The attorney, after selecting and retaining the expert, “must work with the expert to prepare the case for trial.”¹⁴ To prepare an effective and persuasive presentation of expert testimony, the attorney should supply the expert with all information the expert will need to prepare to testify and explain what the court will require before and during the proceedings. The attorney and the expert should work together to educate each other and prepare for trial.¹⁵ “Expert testimony which is both helpful and persuasive to the fact-finder . . . does not happen by itself; it takes long hours of careful preparation.”¹⁶ If domestic violence is an important element in the case, counsel who proceeds without consulting an expert in the field proceeds at a decided disadvantage.

Attorneys and jurors often do not come into the courtroom as well educated about intimate partner violence as judges.

9. *People v. Lafferty*, 9 P3d 1132, 1135 (Colo. App. 1999); *People v. Johnson*, 74 P3d 349, 353 (Colo. App. 2002) (“The reliability of the principles underlying the battered woman opinion evidence is well recognized.”). See *People v. Shreck*, 22 P3d 68 (Colo. 2001) (clarifying Colorado’s criteria for the admission of expert witness testimony generally); see also Colo. R. Evid. 702 (enumerating statutory prerequisites for admission of expert testimony); Colo. R. Evid. 403 (authorizing a court to exclude relevant evidence if, for example, its probative value is substantially outweighed by the danger of unfair prejudice); see generally Fed. R. Evid. 702 and 403.
10. See National Council of Juvenile and Family Court Judges, *Mandatory Domestic Violence Training for Judges* (2013), <http://www.ncjfcj.org/sites/default/files/chart-mandatory-dv-training-for-judges.pdf>.
11. Consider evolving research documenting an increase in litigation abuse, its effects, and ways that the justice system can mitigate this type of domestic terrorism, for example: David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429 (2015).
12. “A significant percentage of people have serious misconceptions about sexual assault, domestic violence and intimate partner sexual abuse.” *Module VIII: Jury Selection*, INTIMATE PARTNER SEXUAL ABUSE, ADJUDICATING THIS HIDDEN DIMENSION OF DOMESTIC VIOLENCE CASES 14, www.njep-ipsacourse.org/JurySelection/Key-Points-JurySelection.php. See also Bonnie E. Carlson & Alissa Poltitz Worden, *Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey*, 20 J. INTERPERSONAL VIOLENCE 1197, 1206 (2005), available at www.ncbi.nlm.nih.gov/pubmed/16162487 (“Most [of 1,200 phone call] respondents think about the causes of violence in the context of individual problems, relationships, and families, not as a problem with roots in our society or culture. Few believe that women are the cause of their own

- abuse; one fourth still believe that some women want to be abused, and most believe that women can end abusive relationships.”); Myrna S. Raeder, *The Better Way: The Role of Batterers’ Profiles and Expert ‘Social Framework’ Background in Cases Implicating Domestic Violence*, 68 UNIV. COLO. L. REV. 147, 182-83 (1997); Charles Patrick Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities About the Myths*, 2 J. FAMILY VIOLENCE 257 (1987), available at link.springer.com/article/10.1007%2FBF00976543.
13. The purpose of such a conversation should include weighing the pros and cons of offering any expert testimony at all. A litigating attorney who is well versed in the dynamics of domestic violence may choose to forgo offering expert testimony and simply handle domestic violence education via witness testimony, in voir dire, in summation, and, as appropriate, throughout a trial or hearing. Another option is for the attorney to employ an expert as a pretrial consultant or as one who may be present throughout case preparation and court proceedings but have no role as a potential witness. Regardless of whether expert testimony is to be offered in a civil or criminal case, the expert, as witness, consultant, or both, will be of most use to the court when contacted by the attorney at the outset of the proceedings and consulted regularly throughout the matter. The expert can provide assistance, for example, in fleshing out the theory of the case, pursuing new avenues of investigation and new witnesses, verifying foundational grounds for the expert’s testimony, offering voir dire questions, and assisting with lines of inquiry for witnesses.
14. See James H. Seckinger, *Presenting Expert Testimony*, 15 AM. J. TRIAL ADVOCACY 215, 251 (1991), available at scholarship.law.nd.edu/law_faculty_scholarship/12.
15. *Id.* at 251-53.
16. *Id.* at 253.

[M]any myths and misunderstandings exist that can alter how the trier of fact perceives testimony concerning acts of coercive control

EVOLUTION OF THE DYNAMICS OF DOMESTIC VIOLENCE IN THE COURTROOM

Until about 50 years ago, what happened between intimate partners behind closed doors was considered a private matter. This dangerous attitude gradually has yielded to empirical reality.¹⁷ In 1964, the first battered women's shelter in the United States opened its doors.¹⁸ In the 1970s, social workers, psychologists, healthcare workers, and all man-

ner of professional caregivers and researchers began identifying, analyzing, and addressing what has since been labeled the "public health epidemic" of domestic violence.¹⁹

In 1979, psychologist Lenore Walker introduced the "battered woman syndrome" theory to describe the impact of domestic violence that she witnessed in the battered women she studied.²⁰ She used the "cycle of violence" concept to show how the domestic violence relationship evolved.²¹ She adapted and advanced the concept of "learned helplessness" to explain why battered women in her study found it difficult to safely escape abusers.²²

Nearly 40 years of research have confirmed that "battered woman syndrome" was just the beginning of our understanding of domestic violence (or "intimate partner violence," as it is frequently called).²³ We now know that battered woman syndrome, which is sometimes described as a subset of post-traumatic stress disorder, affects only some battered women.²⁴ The "cycle of violence" may reflect the initial but not necessarily the long-term experiences of many battered women, while "learned helplessness" is a term that has conjured much misinterpretation and taken decades to clarify.²⁵

Often the legal system uses battered woman syndrome as a shorthand for explaining the dynamics of a battering relationship.²⁶ However, one of the shortcomings of using the term "battered woman syndrome" is that it simultaneously fails to encompass the batterer's grab bag of controlling behaviors and the victim's variety of responses to those behaviors. Decades of research and experience have resulted in conceptualizing "battering and its effects"²⁷ and "social framework evidence"²⁸ as better paradigms than any syndrome to explain intimate partner violence and abuse.²⁹

Regardless of the words that are used to label or describe domestic violence, many myths and misunderstandings exist that can alter how the trier of fact perceives testimony concerning acts of coercive control, battering behaviors, and responses to intimate partner violence. A domestic violence

17. See Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Toward a New Understanding*, 19 FORDHAM URB. L.J. 567, 567-72 (1992) (describing the history of violence against women).

18. JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN 12 (1998).

19. Melissa Jeltsen, *Joe Biden: Domestic Violence Is a 'Public Health Epidemic'*, THE HUFFINGTON POST, March 20, 2015, http://www.huffingtonpost.com/2015/03/20/biden-domestic-violence-epidemic_n_6911820.html.

20. See LENORE E. WALKER, THE BATTERED WOMAN 42-70 (1979); see also LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (3d ed. 2013, originally published 1984).

21. *Id.* See also WALKER 2013, *supra* note 20, at 98-102 for the history of Walker's cycle of violence and more recent research.

22. WALKER 2013, *supra* note 20. For the history and Walker's updated analysis of learned helplessness in the context of domestic violence, see pages 69-84. The original term "learned helplessness" evolved as psychologist Martin Seligman's theory to explain the results of experiments in which dogs were subjected to electric shocks at random intervals and, over time, did not act aggressively to avoid those shocks, even when escape routes were possible. See MARTIN SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH 21-24 (1975).

23. "Domestic violence" is a process whereby a dating partner, intimate partner, spouse, or ex-partner uses emotional, psychological, physical, sexual, or economic abuse to exert power and control over the other person. Domestic violence is also called intimate-partner violence. Regardless of which term is used, it is characterized by a malevolent course of coercive control where one person dominates the other through intimidation, isolation, violence, and other abuse. Both definitions are useful; the second helps clarify how the key motivating element of the abuse—control—is orchestrated. Domestic violence is similarly described by SUSAN

SCHECHTER & JEFFREY L. EDLESON, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999). For Colorado's statutory definitions, see CRS § 18-6-800.3(1) (criminal) and CRS § 13-14-101 (2) (domestic relations). See generally EVAN STARK, COERCIVE CONTROL (2007). Throughout this article, as in much of the literature on point, "domestic violence," "intimate partner violence," and "battering" are used interchangeably.

24. Prevalence studies of battered women have found rates of post-traumatic stress disorder ranging from 31% to 84%. NIJ REPORT, *supra* note 8, at 19.

25. *Id.* at 6-7, 18. Battered women are not *per se* helpless; in fact, many are savvy survivors who have jobs and income of their own and a level of independence that belies an overbroad categorization of their behavior as "learned helplessness." See generally Kathleen J. Ferrara & Noël Bridget Busch-Armendariz, *The Use of Expert Testimony in Intimate Partner Violence*, VAWnet, Aug. 2009, http://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf.

26. NIJ REPORT, *supra* note 8, at i-ii.

27. "With respect to validity, a review of the research literature concluded that expert testimony on battering and its effects can be supported by an extensive body of scientific and clinical knowledge about the dynamics of domestic violence and traumatic stress reactions." NIJ REPORT, *supra* note 8, at ii.

28. *Id.* at 21. Social framework evidence derives from social science research that provides a social and psychological context in which the trier of fact can understand and evaluate claims about the ultimate fact. See also Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 32 LAW & CONTEMP. PROBS. 133 (1989), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1874&context=faculty_scholarship.

29. NIJ REPORT, *supra* note 8, at 20-21.

expert witness is best suited to explain battering and its effects and can identify and dispel common misunderstandings. Conversely, without the assistance of an expert, the fact-finder might misconstrue abusive acts to be benign, myths to be reality, and a victim's responses to be unreasonable.

GENERIC DOMESTIC VIOLENCE AND "MYTH-BUSTING" INFORMATION

On direct examination, short questions and clear answers should be used to educate the jury about domestic violence and the misconceptions that many people harbor concerning battering and its effects. While no list of substantive topics is exhaustive, the following are common direct examination areas of inquiry in domestic violence cases:³⁰

- state who retained the expert and what the fee is;
- state whether the expert knows or met with any witnesses;
- describe what the expert has done to prepare for this trial;
- define domestic violence;³¹
- define intimate partner violence;³²
- provide statistics that highlight the impact of domestic violence on American society (see sidebar entitled "Domestic Violence by the Numbers");
- explain why domestic violence is called a "process";

- define battered woman syndrome;³³
- define battering and its effects;³⁴
- define social framework evidence;³⁵
- explain common myths or misconceptions many people have about domestic violence (see sidebar entitled "Misconceptions about Domestic Violence");
- explain why batterers abuse;³⁶
- explain what the research states about how batterers generally act;
- explain how victims generally act;³⁷
- explain how the "process" of domestic violence starts and proceeds by using a visual of the cycle of violence, explaining the concept's origin, value, and limitations for use;³⁸
- describe methods abusers employ to control their victims (e.g., by using the Power and Control Wheel after explaining its origin and highlighting relevant sections of quadrants as pre-arranged with counsel);³⁹

On direct examination, short questions and clear answers should be used to educate the jury about domestic violence and the misconceptions that many people harbor

30. The author has testified in numerous domestic relations and criminal cases, and the listed "bulleted" questions have always been held admissible. Sample transcripts are on file with the author.

31. See SCHECHTER & EDELSON, *supra* note 23.

32. *Id.*

33. NIJ REPORT, *supra* note 8. See *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992) (*rev'd* on grounds unrelated to battered woman syndrome, *United States v. Martinez-Martinez*, 369 F.3d 1076 (9th Cir. 2004)). Current clinical and technical knowledge about the dynamics of domestic violence suggests augmenting and updating past research via the analysis of battering and its effects on the victim as well as the role played by social framework evidence.

34. Explaining the way batterers abuse their victims and the effects that the battering produces can help in parsing and understanding the myriad large and small types of coercive control batterers exert, along with battered women's responses, behaviors, and thought processes.

35. Developing an understanding of the victim's social framework requires an exploration of options and limitations placed on her from sources beyond the batterer. The social framework may include shelters, the justice system, a personal support network, as well as a victim's upbringing, education, economic stability, mental and physical health, religious and cultural tradition, and so on. These framework elements can help or hinder a domestic violence victim and, therefore, are relevant in determining why she does what she does, which can sometimes seem incongruous. The expert is able to connect the social framework dots and provide research-validated theories that explain victim behaviors as rational responses to otherwise irrational situations.

36. There is no consistent clinical agreement about why men batter. Many studies suggest that learned behavior is a common factor and that they do it because they can and because it provides them the sense of control that they seek. See WALKER 2013, *supra* note

20, at 114; see generally LUNDY BANCROFT, WHY DOES HE DO THAT? 38 (2002).

37. "Battered women do not fit a singular profile." Cheryl A. Terrance et al., *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 944 (2012) (citing Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1993)).

38. A "cycle of violence" visual is useful in explaining how violent relationships often begin. See *The Cycle of Violence*, BUILDING FUTURES FREE FROM HOMELESSNESS AND FAMILY VIOLENCE, www.bfvc.org/pdf/Cycle%20of%20Violence.pdf. Almost always there is a pleasant courtship phase. Usually what follows is a "tension-building phase" when little insults, put-downs, and psychological abuse create a sense in the victim that she is walking on eggshells. The next phase is the "acute incident of battering" phase, when a push, a slap, or some other type of more seriously abusive behavior punctuates the tension and sends a clear message of domination to the victim. After this first episode, the batterer often tries to make amends, to "make-up" and calm things down; this is sometimes called "the honeymoon phase." Time passes, and the cycle may repeat itself. After any number of cycles, the honeymoon phase may flatten into simply a "lull in the hostilities." For many women in domestic violence shelters, their lives before their entry had become less cyclical than flat-lined realities of ongoing anxiety, abuse, and violence.

39. The Power and Control Wheel gives examples of typical batterer manipulation and abuse within the "spokes." The "hub" around which they are all connected is the batterer's goal of power and control. Keeping all the pieces in play is the "rim" of sexual and physical violence. See *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROJECT, www.theduluthmodel.org/training/wheels.html.

DOMESTIC VIOLENCE BY THE NUMBERS

3.3 million: Estimated number of children in the United States each year who witness violence against their mother or female caretaker by a family member.

40-60: Percentage of men who abuse women who also abuse children.

1 in 5: Number of teenage girls who said they have been in a relationship where the boyfriend threatened violence or self-harm if a breakup was to occur.

90-95: Percentage of domestic violence victims who are women.

175,000: Number of workdays American employees miss each year due to domestic violence.

40-70: Percentage of female murder victims in the United States who were killed by their husbands or boyfriends, often within an ongoing abusive relationship.

Source: These statistics were accessed from domesticshelters.org, at www.domesticshelters.org/domestic-violence-articles-information/faq/domestic-violence-statistics#.V0oJha_mqUk

- define intermittent reinforcement;⁴⁰
- define learned helplessness;⁴¹
- explain the Stockholm Syndrome (or the Hostage Syndrome);⁴²
- explain the significance of an escalation in or change in the type of abuse;
- explain the term “lethality assessment”;⁴³
- explain what fatality review boards are;
- name commonly accepted high-risk or lethality factors;⁴⁴
- address why a battered woman doesn’t leave.⁴⁵

EXPLANATIONS THAT ARE PARTICULAR TO THE CASE AT BAR

In addition to testifying about myths and general domestic violence information, experts can help fact-finders understand certain dynamics of domestic violence that are particular to a given case by explaining:

- why a victim of domestic violence might tell law enforcement or healthcare professionals how she received the fresh bruise on her cheek and then later refuse to testify;⁴⁶
- why she may recant what she said at the time of the abuse;⁴⁷
- why she may change or minimize what she said at the time of the abuse;⁴⁸
- why she might blame herself for provoking whatever violence occurred;

40. Intermittent reinforcement occurs when there is repeated unpredictable positive and negative reinforcement of behaviors, which then erodes a victim’s self-confidence, encourages traumatic bonding, and fosters her inability to predict the outcome of her actions. See generally Hanson, *supra* note 2.

41. The battered woman can become so worn down by the abuse and by its nature of intermittent reinforcement that she can no longer perceive—she has learned that she is helpless to perceive—that her actions will have a particular outcome. These women can be helpless to perceive safe alternatives. See WALKER, *supra* note 20. Alternatively, the battered woman’s passivity may be an actual coping mechanism that minimizes her risk, which suggests she is not helpless regardless of how she may appear. See Mary Ann Dutton, *Update of the “Battered Woman Syndrome” Critique*, VAWNET, Aug. 2009, http://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf.

42. See STARK, *supra* note 23, at 335-36. The Stockholm Syndrome refers to the type of bonding that occurred in Sweden when a bank was robbed and the hostages that were taken, after being with their captors for several days, all sympathized with the captors’ cause and did not want them to be punished. See also BESSEL VAN DER KOLK, *THE BODY KEEPS SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 135 (2014) (“Hostages have put up bail for their captors, expressed a wish to marry them, or had sexual relations with them; victims of domestic violence often cover up for their abusers.”).

43. Lethality assessment is a means by which domestic violence victims and the systems that try to end domestic violence look to the past to enhance awareness of the potential for future dangerousness. The goal of lethality assessment is to document and explain high-risk factors that have been co-extensive with an increased probability of serious or lethal domestic violence. See Neil Websdale, *Lethality Assessment Tools: A Critical Analysis*, VAWNET, Feb.

2000, <http://community.iaclea.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d5e56abb-ef1a-4d25-95d3-e749e0fd428d>.

44. See *id.* These include: (1) recent escalation or change in type of domestic violence; (2) prior history of domestic violence, especially choking or strangulation; (3) leaving a violent relationship; (4) obsessive-possessiveness; (5) prior police involvement; (6) threats to kill; (7) access to/use of weapons (especially guns); (8) significant substance abuse; (9) batterer’s acute perception of betrayal; (10) prior criminal history of the batterer; (11) mental illness of the batterer; (12) batterer’s suicidal ideation; (13) the victim’s perception. See also Jacquelyn C. Campbell, *Danger Assessment* (2003), www.dangerassessment.org/uploads/pdf/DAEnglish2010.pdf; Janet A. Johnson et al., *Death by Intimacy: Risk Factors for Domestic Violence*, 20 PACE L. REV. 263 (2000).

45. See Sarah M. Buel, *Fifty Obstacles to Leaving*, a.k.a., *Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19. A dozen categories under which many others fall are: fear, love, children, finances, traumatic bonding, culture, religion, embarrassment, low self-esteem, isolation, medical dependency, and “crazy-making” by the batterer (a term used to describe the batterer’s attempts to confuse the victim by offering contradictory statements to make her think she is losing her mind and must simply depend on him and do what he tells her to do). “Separation assault” is so common that the term has been coined to highlight how dangerous the act of leaving can be. Separation assault is the attack on a victim’s body and volition by which the batterer seeks to prevent her from leaving, retaliate and punish her for the separation, and/or force her to return. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991).

46. See *People v. Wallin*, 167 P.3d 183, 188 (Colo. App. 2007).

47. *Id.*; *Lafferty*, 9 P.3d at 1134-36.

48. *Wallin*, 167 P.3d at 188; *Johnson*, 74 P.3d at 353.

- why she might not want to involve the police or government systems;
- how sexual violence affects an intimate partner (as opposed to a stranger);
- why she may not recognize sexual assault by her husband as a crime or a problem, or even something she will agree to talk about;⁴⁹
- the meaning of otherwise seemingly benign comments, looks, or actions by the batterer that, when explained in context, are subtle but real threats to the victim;
- the role of the victim's financial and economic dependence on her abuser;
- how the threat of removal of the victim's children can control her behavior;
- the effects of immigration concerns;
- the limitations created by a victim's ethnicity, religion, culture, and language;
- the victim's reactions to the batterer threatening or attempting suicide if the victim leaves;
- case-focused lethality factors and the meaning of changes in abuse patterns;
- the impact of real or implied threats against, or violence toward, the victim's children, extended family, or pets;
- why a domestic violence victim might sense that her batterer intends to seriously injure or kill her even before he takes any action;
- why a battered woman defendant charged with killing her abuser might say it was all her fault, even if she acted in self-defense;
- how a domestic violence victim might experience duress from her abuser that she is helpless to resist.

TYPES OF CASES WHERE DOMESTIC VIOLENCE TESTIMONY CAN BE HELPFUL

This section does not attempt to present an exhaustive list of the myriad types of situations in which a domestic violence expert might be used. The list of possible uses of an expert is as endless as the list of ways by which an abuser can attempt to harm a victim.

This section canvasses some of the most common uses of a qualified domestic violence expert, whether as a witness at trial or a non-witness trial consultant. Some cases can include one domestic violence expert, while others might employ both a case-specific expert—for example to testify about a post-traumatic stress diagnosis of a client—and a general domestic violence expert to explain myths about domestic violence that could taint the fact-finder's view of the facts.

DOMESTIC RELATIONS AND CIVIL CASES

It is not uncommon for marital disputes to include allega-

tions of mistreatment, sometimes encompassing the children. A domestic violence expert may be called on to testify at proceedings for protection orders, temporary orders, permanent orders, allocation of parental responsibilities, and in all manner of domestic relations cases.

Experts can describe approaches adults sometimes employ to protect children, approaches that may not at first blush seem protective in nature. If, for example, a mother yells harshly at her young son for misbehaving and sends him to bed without dinner, it may be to avoid what the mother knows from experience the father will do if left to his own devices: whip the boy with a belt. An expert could also explain the impact of emotional abuse, the “silent treatment,” requiring the child to beg for money for the abused parent, using the child as a “mole” to continue to exert power and control over a divorced spouse, and how the abuse of a parent impacts the psyche of a child.

Expert witnesses also testify in tort actions, contract cases, clemency actions, and at different types of civil hearings, such as administrative, immigration, and student disciplinary proceedings.

CRIMINAL CASES

Use of domestic violence expert witnesses in the prosecution of batterers and in the defense of battered women is no longer novel.

In the prosecution context, domestic violence experts testify in cases involving murder, assault, and all forms of violent behavior, kidnapping of the victim or children, theft, stalking, and criminal mischief, when the objective is to harass or harm the victim.⁵⁰ For example, in a case where a batterer charged with murdering his partner tries to blame the victim, the expert offering general testimony could explain battering and its effects to help the jury understand the victim's behavior leading up to the homicide.

An expert can explain evidence of battering that could inform a plea offer; suggest reasons for a victim's ambivalent behavior so that the prosecution could argue for appropriate bail in a domestic violence case that fortuitously resulted in no injuries; or help the fact-finder evaluate a victim's refusal to testify if such a victim is isolated, disabled, and dependent on her batterer for medical assistance.

Probably the most frequent use of expert witnesses by the defense is where the battered woman has fought back and injured or killed her abuser and asserts self-defense.⁵¹ The

This section canvasses some of the most common uses of a qualified domestic violence expert

49. In 1988, Colorado enacted legislation barring the use of a “marital defense” in sexual assault cases (unless otherwise specified in the elements of an offense). See CRS § 18-3-409.

50. See, e.g., *People v. Ruibal*, 2015 COA 55 (*cert. granted* as to the testimony of the forensic pathologist); see also *People v. Lafferty*, 9 P.3d 1132; *People v. Johnson*, 74 P.3d 349.

51. See *People v. Yaklich*, 833 P.2d 758, 761 (Colo. App. 1991)

(approving in general battered woman expert evidence of the “cycle of violence” and “how a battering relationship generates different perspectives of danger, imminence, and necessary force” in support of a defense theory of self-defense, but holding, in this murder-for-hire case, that self-defense was not an available option to the defendant).

An expert in a field of specialized knowledge like domestic violence . . . has an obligation to stay current in the field.

“sleeping victim” homicide is one variety of such cases.⁵² The domestic violence expert can be used to explain how a history of battering and certain types of threatening behaviors can announce to a victim that deadly physical force is imminent. Other defense uses include an explanation of the impact of a batterer’s duress on

a domestic violence victim and why a victim may commit a crime because she has been coerced to do so by her batterer.⁵³

A domestic violence expert also can be useful in submitting sentencing memoranda and parole letters.

CREDENTIALS/QUALIFICATIONS THAT THE COURT SHOULD LOOK FOR, AND LAYING THE PROPER FOUNDATION FOR DOMESTIC VIOLENCE EXPERT TESTIMONY

Regardless of whether the domestic violence expert witness is providing expert testimony as a profession, as a part-time job, or only infrequently, education about domestic violence to courts, attorneys, jurors, and others should be the expert’s passionate pursuit—and the expert’s experience and knowledge should demonstrate that passion. An expert in a field of specialized knowledge like domestic violence, which encompasses behavioral, legal, medical, cultural, sociological, psychological, and other dynamics, has an obligation to stay current in the field. At its core, specialized knowledge presupposes ongoing critical reevaluation.⁵⁴

There is no college degree or any education required by the courts to be qualified as a domestic violence expert, and there is no formal ethical code for domestic violence expert witnesses as there is for attorneys. But expertise in any endeavor requires both ongoing training and specialized familiarity with the topic. If domestic violence experts do not possess relevant and cur-

rently valid intimate partner violence information, their credibility suffers, as does the testimony and assistance that they provide. For example, in-service trainings and advocacy with hundreds of rural Colorado clients may equip a shelter advocate to testify about general domestic violence myths but may not prepare this expert to testify about the unusual cultural aspects of the sexual abuse of a monolingual Vietnamese wife.

The legal criteria that a court uses to decide whether to endorse experts is arguably different from the criteria that domestic violence experts should require of themselves before taking the stand and opining on intimate partner violence.⁵⁵ While years of victim advocacy may prove adequate for qualification, keeping abreast of advances in the field of intimate-partner-violence research should be part of the tool kit every domestic violence expert brings into the courtroom.⁵⁶

WHO IS QUALIFIED TO BE A DOMESTIC VIOLENCE EXPERT?

Rule 702 of the Colorado Rules of Evidence states that, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”⁵⁷ It is the job of the qualified domestic violence expert witness to provide specialized knowledge useful in assisting the trier of fact to dispel misconceptions about intimate partner violence and to assist the trier of fact to understand the evidence and determine facts at issue.

A domestic violence expert may be, for example, an advocate at a domestic violence shelter, a mental healthcare provider, a domestic violence educator, or an attorney who has specialized knowledge in this field.⁵⁸ There is no requirement for any type of degree, license, or certification process. Rather, the sole standard that the expert must meet is that he or she has “scientific, technical or other specialized knowledge” that will “assist the trier of fact.”⁵⁹

52. See *id.* at 762 for cases illustrating the divergence in how courts have resolved whether self-defense is available to battered women defendants who have killed their abusers during a lull in the violence.

53. Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much*, 22 BERKELEY J. GENDER L. & JUST. 2 (2013).

54. See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

55. See Andrew W. Jurs, *The Gatekeeper’s Toolbox: A Survey on Judicial Handling of Expert-Reliability Motions*, 51 CT. REV. 8 (2014) (indicating that, since *Daubert*, in many cases reliability standards had tightened). In Colorado, for a domestic violence advocate to claim a confidential relationship with domestic violence clients, the advocate must satisfy a statutory requirement to undergo 15 hours of domestic violence training. CRS § 13-90-107. Many advocates all over the United States, however, benefit from regular exposure to inter- and intra-agency domestic violence trainings as well as intimate partner violence state and local conferences.

56. As a pragmatic matter, experts will find their trial experience more satisfying and less subject to a crushing cross-examination if they are prepared to answer questions, for example, about “parental alienation syndrome” or “situational couple violence” or any of

the other developments in relevant social science literature that touch on or deal directly with intimate partner violence. This heightened level of readiness to testify is partly the function of the expert’s responsibility to seek out continuing domestic violence education and training and partly the function of quality witness preparation by the examining attorney. For a discussion of parental alienation syndrome and domestic violence, see, e.g., LUNDY BANCROFT ET AL., *THE BATTERER AS PARENT* 134-37 (2002), and *Parental Alienation Syndrome: Debunked, Disproven, and Dangerous Theory*, PARENTS UNITED FOR CHANGE, parentsunitedforchange.com/uploads/Parental_Alienation_Syndrome.pdf (citing multiple sources through 2013). Two recommended sources for learning about situational couple violence are: MICHAEL JOHNSON, *A TYPOLOGY OF DOMESTIC VIOLENCE* (2008), and Joan S. Meier, *Johnson’s Differentiation Theory: Is It Really Empirically Supported?* 12 J. CHILD CUSTODY 4 (2015).

57. Colo. R. Evid. 702.

58. See, e.g., *Huntoon v. TCI Cablevision of Colorado*, 969 P.2d 681 (Colo. 1998), for examples of Colorado’s broad approach to admission of expert witness testimony.

59. Colo. R. Evid. 702.

The Colorado Supreme Court in *People v. Shreck*⁶⁰ provided the following criteria for courts to use in applying the Rule 702 standard: “(1) the scientific principles at issue are reasonably reliable, (2) the witness is qualified to opine on such principles, and (3) the testimony will be useful to the jury.”⁶¹ Additionally, the probative value may not be outweighed by the danger of unfair prejudice or the other trial concerns of Rule 403.⁶² “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁶³

“An abuse of discretion does not occur [in determining the admissibility of expert testimony] unless the trial court’s ruling is manifestly arbitrary, unreasonable, or unfair.”⁶⁴ The court is given broad discretion in determining who meets this standard and must make its findings on the record.⁶⁵

WHAT TOPIC AREAS MUST THE EXPERT BE ABLE TO ADDRESS?

In preparing to testify, the domestic violence expert and retaining counsel should discuss discovery rules and decide how their communications will be handled. Requirements for discovery are statutory; for example, if a domestic violence expert is retained by the prosecution, the prosecuting attorney must make available to the defense “any reports or statements of experts made in connection with the particular case.”⁶⁶

To benefit most from the attorney/expert relationship, counsel should seek the assistance of the domestic violence expert in creating a detailed set of questions and answers (Q&A) that the expert and the attorney determine are relevant to domestic violence generally and to the issues in their case specifically. Some questions (e.g., concerning necessary expert witness qualifications and definitions of critical domestic violence terms) will be standard because they apply to most, if not all, domestic violence cases. Other questions obviously need to be targeted to address the facts of a particular case. Usually, experts provide their qualifications at the beginning of their testimony.

PEDIGREE AND ENDORSEMENT DETAILS

As part of standard trial preparation, the attorney and expert should carefully lay out, topic by topic and question by question, how the expert’s domestic violence pedigree and endorsement references will be presented. Once a legal foundation of the reason for the need for expert testimony is estab-

lished for the court (e.g., to explain why a battered woman stays with a partner who abuses her), Colorado courts are generally receptive to domestic violence expert evidence and will consider the qualifications of the proposed expert.⁶⁷

Based on anecdotal data, it seems that courts give great weight to experiential expertise, especially expertise gained from years of working with battered women. Problems, however, can arise if an expert has only minimal training. Such an expert becomes susceptible to undermining cross-examination into his or her limited knowledge of state-of-the-art interpersonal violence social science advances.

Library shelves contain hundreds of domestic violence books and treatises, and the Internet is filled with constantly evolving research about intimate partner violence. Therefore, an “expert” who, for example, relies on an outdated 1979 book as a source⁶⁸ should no more be deemed a domestic violence expert than a physician who relies on a 1979 book as a primary source of information. Updating and keeping current are hallmarks of reliable expertise in any field.

Similarly, an attorney who hires an expert with excellent educational credentials but who has never assisted domestic violence victims may find that this expert is unable to “tell it like it is” and simply parrots information found in books. Counsel may also encounter problems in qualifying such an “ivory tower” expert.

Every domestic violence expert’s initial courtroom challenge is to prove his or her unique expertise to the fact-finder judge or jury. By the time the expert has finished explaining his or her qualifications to the jury, the jury should feel comfortable suspending popular preconceptions and allowing this expert to lead the way to a new understanding of what battering really means.

Jurors who are impressed by the expert’s experience and training are more likely to be impressed by the expert’s testimony. While this may sound obvious, it is worth mentioning

[A]n “expert” who . . . relies on an outdated 1979 book as a source should no more be deemed a domestic violence expert than a physician who relies on a 1979 book as a primary source of information.

60. *Shreck*, 22 P.3d at 69.

61. *Id.* See also *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007) (“Admissible testimony must be grounded in ‘the methods and procedures of science rather than subjective belief or unsupported speculation.’”) (citing *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 639 (D. Colo. 2006)).

62. See *Shreck*, 22 P.3d at 79; *Masters v. People*, 58 P.3d 979, 989 (Colo. 2002) (no single test can be applied to the multitude of potential areas of expert testimony).

63. Colo. R. Evid. 403.

64. *Wallin*, 167 P.3d at 187 (quoting *Johnson*, 74 P.3d at 352).

65. *People v. Williams*, 790 P.2d 796 (Colo. 1990); *Estate of Ford v. Eicher*, 250 P.3d 262, 266 (Colo. 2011).

66. See Colo. R. Crim. P. 16 (1)(A)(I & III). Relevant defense discovery requirements are outlined in Colo. R. Crim. P. 16 (1)(e)(2)(c). Civil discovery concerning general domestic violence experts is governed by Colo. R. Crim. P. 26 (a)(2).

67. See, e.g., *Lafferty*, 9 P.3d at 1134-36; *Johnson*, 74 P.3d at 353.

68. This occurred in an unreported felony case in Colorado in 2015. The expert’s source was Walker’s 1979 book, *The Battered Woman*, *supra* note 20, which was cited without reference to changes in Walker’s updated books, the last being *The Battered Woman Syndrome*, *supra* note 20. The proposed expert was qualified by the court over the defense attorney’s objection. (Source information is on file with the author.)

[T]he attorney should pay attention to anything unusual in the expert's background and especially what qualifications are closely related to the issues in the case.

because, in many cases, counsel will stipulate to the admission of an expert. This is a mistake. Especially in a jury trial, it is unwise to waive any part of qualifying the domestic violence expert witness. Such a waiver squanders the expert's clear path to grabbing the attention and, more important, to earning the support of jurors who *want* to be impressed and enlightened.

If the court urges the examining counsel to accept opposing counsel's stipulation on

qualifications, the examining counsel might urge the court to include in the stipulation not only qualifications but also credibility. While such a stipulation may not be agreed to, it focuses the court on why qualifications are critical for the trier of fact to hear. If respect for the court indicates it is wise to stipulate to the expert's qualifications, on summation the examining attorney benefits by being able to argue that even opposing counsel accepted the qualifications of the expert.⁶⁹ In such a case, if the court halts qualification questioning, experts should be prepared to insert their relevant qualifications, as appropriate, during their substantive testimony.

Before any court proceeding, when preparing qualifying questions for the expert, the attorney should pay attention to anything unusual in the expert's background and especially what qualifications are closely related to the issues in the case.

In broad brush strokes, these endorsement categories include but are not limited to:

- name, business address, and field of expertise;
- current and past employment information, dates, and responsibilities;
- number of victims assisted by the witness;
- number of victims assisted by staff that the witness has supervised;
- formal education, especially as related to domestic violence;
- trainings and conferences attended;
- relevant courses taught by the expert;
- professional licenses, certifications, and affiliations;
- familiarity with the body of domestic violence literature;
- how the witness's testimony draws from scholarly research and client assistance;
- previous expert testimony;
- personal research on domestic violence, battered woman syndrome, battering and its effects, and social framework evidence;
- whether the testimony the witness will be providing is accepted as reliable by the domestic violence research community.

When the witness has testified to his or her credentials and expertise, the attorney will tender the witness as a domestic violence expert. The expert should not be offered as a "battered woman syndrome expert" (unless the expert is a psychologist, mental health expert, or medical professional whose credentials support the provision of a medical diagnosis and the evidence being offered is framed as mental health evidence of, e.g., post-traumatic stress disorder). This expert should, however, be able to explain that battered woman syndrome is not a diagnosis but rather a constellation of emotional, psychological, and physical responses to domestic violence. Once formally accepted as an expert by the court, the expert can begin the substantive part of the testimony.

For attorneys looking to question a potential expert during voir dire, the aforementioned list may also be helpful.

FOUNDATIONS FOR ADMISSIBILITY

In some cases, an oral motion or simply an endorsement together with a curriculum vitae is sufficient, but in most cases where a domestic violence expert is offered, a foundation must be proffered via written motion to the court within the statutory time frame, and endorsement of a specific expert must be requested.⁷⁰ The motion should set forth the foundational areas the expert will testify about (e.g., the cycle of violence, recantation, minimization, common indicia of domestic violence, why domestic violence victims do not leave, lethality indicators, or the effects of domestic violence on children). The motion should also include case law and statutory support, the experiential and educational bases for qualifying the expert, and the expert's accompanying curriculum vitae.

SUMMARY OF THE TESTIMONY OR OFFER OF PROOF

In a criminal matter, the prosecutor often will seek a list of the expert's sources and sometimes a Summary of the Testimony (unless, as in some places in metro Denver, the court allows the prosecutor's Notice of Expert Endorsement to obviate the need for a Summary). The defense generally requires a Summary of the Testimony from the domestic violence expert.

In domestic and civil cases, the expert is required to submit a written Report or an Offer of Proof. The Report or Offer of Proof is submitted to the court, and, in certain proceedings or jurisdictions (e.g., in Larimer County, Colorado, domestic relations temporary orders), a court may simply ask the domestic violence expert witness under oath if he or she agrees with what is contained in the Report or Offer of Proof. If so, that affirmation under oath will take the place of most direct examination questioning, and the opposing counsel may cross-examine the witness based on what is in the document.

The attorney who retains the expert, whether a prosecutor, defense attorney, domestic attorney, or civil attorney, should request a list of cases on which the expert has been retained to consult or testify, as well as contact information for the attorneys who have hired the expert. As part of discovery, this list should be exchanged along with the Summary of the Evidence,

69. See Seckinger, *supra* note 14.

70. See, e.g., Colo. R. Crim. P. 16; Colo. R. Crim. P. 26 (a)(2)(a-c);

Colo. R. Crim. P. 1973 § 16-5-203, as amended; Colo. R. Evid. 702.

Report, or Offer of Proof; the expert's curriculum vitae; a list of sources the expert is relying on in the case at bar; and any other materials prepared by the expert for the case.

HOW DOMESTIC VIOLENCE EXPERT TESTIMONY IS CLASSIFIED: "GENERAL" AND "CASE-SPECIFIC" TESTIMONY

Expert testimony in domestic violence cases is often classified as either "general" or "case specific"; both types are permitted by CRE 702.⁷¹ There are two main substantive differences between general and case-specific testimony: Experts hired to provide "general" testimony do not meet complaining witnesses, defendants, parties, or witnesses and do not provide diagnoses; experts who provide "case-specific" testimony meet with clients and sometimes witnesses and are permitted to provide diagnostic testimony.⁷²

The case-specific expert has broad latitude to offer professional opinions, while carefully framed hypotheticals or "behavior-based" questions can be used to maximize the testimony of the general domestic violence expert in either civil or criminal cases. Testimony that addresses an ultimate issue is not automatically objectionable in a civil case,⁷³ but in criminal cases the expert must avoid offering an opinion on the mental state of the defendant or on an element of the crime charged or of a defense.⁷⁴

GENERAL TESTIMONY

The purpose of general expert testimony, which is the type the prosecution in Colorado offers most frequently, is to educate the jury about the general dynamics of domestic violence (e.g., the "power and control" concept) and common misconceptions that can cloud the truth (e.g., if domestic violence were truly severe and ongoing, a person would leave the relationship). The prosecution's preference for general testimony is aimed partly at thwarting a possible perception by the jury that most domestic violence experts—who often have a background of experience in battered women's shelters—favor women. This concern is based on the fact that most domestic violence prosecutions have female complainants and male defendants, and many domestic violence expert witnesses are females who testify primarily (or only) for the prosecution.⁷⁵

If the experts have not spoken with witnesses, the experts can be viewed as providing accepted social science information only, not commentary on anything specific to the case that the jurors are deciding. Additionally, prosecutors sometimes

71. NIJ REPORT, *supra* note 8, at 38. See Anna Farber Conrad, *The Use of Victim Advocates and Expert Witnesses in Battered Women Cases*, COLO. LAW., Dec. 2001.

72. Cindene Pezzell, *Testifying as an Expert Witness: Understanding the Role of Experts and Different Legal Arenas*, NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN (webinar May 1, 2013), http://ncdbw.org/experts_recordings.htm.

73. Colo. R. Evid. 704(a).

74. Colo. R. Evid. 704(b).

75. Experts who only testify for the prosecution open the door to cross-examination questions about their prosecutorial bias and professional objectivity.

MISCONCEPTIONS ABOUT DOMESTIC VIOLENCE

Myth: Batterers must be mentally ill.

Fact: "There is general agreement that men who batter do not have severe mental disorders."¹ "Their *value system* is unhealthy, not their psychology."²

Myth: It is safer for a battered woman to leave the abuser than to stay with him.

Fact: This can be a time of heightened risk; between 50% and 75% of battered women who are killed by their abusers are killed at the point of separation or after they have left.³

Myth: It can't have been as bad as she said it was because she wouldn't have stayed.

Fact: "Studies show that women seldom overestimate danger, but they DO underestimate."⁴

Myth: Substance abuse—alcohol or drug abuse—causes domestic violence.

Fact: Many addicts do not abuse, and many batterers do not drink or use drugs. While extreme addiction or a sudden change in substance abuse may signal a higher risk of lethal violence, this co-occurrence is not the root cause of the abuse.⁵

Myth: Women who stay with batterers are masochistic.

Fact: Research suggests that victims of domestic violence, like victims of other crimes such as car thefts, do not share a pathology of masochism.⁶

Myth: Women batter men just as much as men batter women.

Fact: This is false.⁷ In fact, 95% of domestic violence is reported by women who are abused by their male partner. "Wives were about half of all spouses in 2002 but 81% of all persons killed by their spouse."⁸ The analysis of this myth allows the expert to explain that validated studies over the past 40 years have consistently found that, even though most men are not abusers, 85% to 97% of batterers are male, and the vast majority of their victims are female.⁹ This is not to say that a man cannot be a victim of domestic violence, only that it is not common, and male victims are often victims of male partners.

1. Daniel G. Saunders, *Batterers, Personality Characteristics of*, ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE 69-71 (2008), available at <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/90026/Saunders%20DG%202008%20-%20Personality%20Characteristics%20of%20Batterers%20Enycl%20IPV%20.pdf?sequence=117>

2. See generally RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* (1988) (reporting that mental illness accounts for only 10% of abusive incidents).

3. LUNDY BANCROFT, *WHY DOES HE DO THAT?* 38 (2002).

4. Jana Kasperkevic, *Private Violence*, THE GUARDIAN, October 20, 2014, available at www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice.

5. Jacquelyn C. Campbell, Daniel W. Webster & Nancy Glass, *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 670 (2009), available at file:///C:/Users/Robert/Downloads/The_Danger_Assessment_Validation_of_a_Lethality_Ri.pdf.

6. "Substance abuse, like mental illness, does not cause partner abuse but can increase the risk of violence." BANCROFT, *supra* note 2, at 103.

7. V.A. Moss, *Battered Women and the Myth of Masochism*, 29 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERV. 18 (1991).

8. See LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (3d ed. 2013).

9. UNITED STATES DEPARTMENT OF JUSTICE, *FAMILY VIOLENCE STATISTICS 18* (2005), <https://www.bjs.gov/content/pub/pdf/fvs03.pdf>.

9. See, e.g., *Understanding Domestic Violence Abusers*, NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <http://www.opdv.ny.gov/professionals/abusers/genderandip.html#dvandgender> (noting that "[a]bout 97% of abusers are men who have a female partner").

One of the shortcomings of testifying blind is that the expert cannot put the pieces of the specific puzzle together

believe that expert testimony that has no basis in the facts of the case is less likely to trigger appellate issues because there is little risk that the witness will inappropriately express an opinion about whether the complainant is a victim of domestic violence, whether any part of her testimony is true, or whether an element of the crime has been established

by the expert's testimony.⁷⁶

The common denominator of the "blind," "skeletal," and "document review" prosecution approaches is that the expert providing general testimony does not meet with the complainant or any witness.

BLIND TESTIMONY

Blind testimony is a way to address concerns about bias. It is the narrowest presentation of testimony in which experts testify "blind," meaning they are told nothing about the facts of the case. Experts who testify blind usually do not review any case documents or other materials. The belief that a fact-finder will find a blind expert more unbiased than one who knows about the facts of the case is understandable but may not always be accurate. An effective way to minimize bias concerns is to select a domestic violence expert who testifies for both men and women, as well as for the prosecution and the defense.

THE SKELETAL APPROACH

"Skeletal" information explaining why the expert is needed is part of the foundational details of a Notice of Endorsement. Conversations with Colorado prosecutors from different parts of the state indicate that domestic violence experts who provide general testimony are often given at least this "skeletal" understanding of the case's potential trial issues (e.g., recantation, minimization, language or immigration concerns, reasons for delayed reporting, role of alcohol or drugs, and why a victim of serious physical injury would testify for the abuser). These experts do not know the facts of the case, but they are not blind to the principal issues.

This type of general testimony can better prepare the expert to address the issues the defense has already learned about, while avoiding discovery and appellate worries about the expert vouching for the complaining witness. Because the defense and prosecution are privy to the issues, it makes little sense that the expert, hired to provide specialized knowledge, be blind to those issues.

DOCUMENT REVIEW

Many prosecutors prefer that their domestic violence expert has knowledge of the relevant facts of the case and thus enable the expert to perform a document review of specific portions of the case file. The belief is that the expert who is blind to the

facts will not be as helpful as the expert who can see the issues clearly and in context.

A few examples highlight how document review by the expert can be useful to the trier of fact. What may appear to the layperson as normal behavior may be recognized by the expert as part of a pattern of coercive control. In the movie *Sleeping with the Enemy*,⁷⁷ for example, the husband compulsively required the towels be straightened. By itself, this behavior meant little; in the context of other evidence of manipulation and control, this fastidiousness became part of establishing the obsessive-possessive pattern of domestic violence that was the theme of the film.⁷⁸

Alternatively, violence between intimates at first blush can look like domestic violence, but it might be motivated by goals other than power and control. The gambler husband who kills his wife may or may not simply want to inherit her estate, and the elderly woman who kills her ailing husband may or may not be a victim of caregiver fatigue rather than a perpetrator of domestic violence. One of the shortcomings of testifying blind is that the expert cannot put the pieces of the specific puzzle together if the expert cannot see them.

If, for example, an expert is to testify in a recanting-victim case where the victim does not speak English and came recently from a foreign country, it may be that domestic violence is not a crime in that country or, conversely, that domestic violence has a longer history of criminalization in the country of her origin than in the United States. In the former scenario, the expert would be able to say that a victim who grows up in a patriarchal society that devalues women is likely to be submissive and reluctant to "disobey" her husband; in the latter scenario, culture may have little or nothing to do with why a victim would recant.

In the case of a victim from a patriarchal society, the prosecutor can ask the expert if, for example, a specific behavior such as keeping silent about abuse is a type of behavior the expert has learned about or sees as consistent with the behavior of a battered woman from a repressive society. If the expert has had no previous experience with this category of victim, the expert will have the opportunity to research this point before trial. If the expert learns that a victim from this society who claimed domestic violence would have been jailed or killed by her family members for reporting abuse, this information is helpful to the jury in understanding why such a victim might keep silent.

The blind expert (or even the expert who has been given only skeletal information about the issues) would not know the victim's nationality and culture, might not be able to address these points on direct examination, and would likely be attacked on cross-examination by a defense attorney who had more information on the victim's background than the expert.

While in one case, the expert offering general domestic violence testimony may be able to testify competently without knowledge of the issues or the facts, in another case, the expert may need context and a clear understanding of the issues. The needs of each case should dictate the approach to be taken. In

76. Farber Conrad, *supra* note 71.

77. *SLEEPING WITH THE ENEMY* (Twentieth Century Fox 1990).

78. *Id.*

all cases, the expert should be afforded sufficient details from which to form an educated view of how social framework evidence can impact the issues.

AN ADDITIONAL APPROACH

An expanded form of general testimony is often used by the defense in criminal cases and by attorneys in domestic relations and other civil cases. Here, the domestic violence expert, who is not in the healthcare profession and does not meet with any potential witness in the case, reviews much if not all of the attorney's file (that is not privileged or work product) and is thus able to discern which statements, acts, omissions, background data, cultural norms, family attitudes, religious constraints, financial pressures, and other social framework details are relevant to an analysis of battering and its effects in the case. The usefulness of the expert is increased proportionately with the expert's specialized knowledge of how the facts and circumstances relate to the dynamics of domestic violence.

With some exceptions for the case-specific expert who is providing a diagnosis, the domestic violence expert may not express an opinion as to whether a witness is being truthful.⁷⁹ The expert may not usurp the province of the trier of fact.

CASE-SPECIFIC TESTIMONY

Classic case-specific testimony is offered by domestic violence experts who are qualified to render medical diagnoses. These experts are employed in domestic relations and criminal cases, often to evaluate a victim's possible post-traumatic stress disorder or other mental issues.

With case-specific testimony, the expert meets the victim, reads the file, sometimes becomes familiar with other parties to the proceeding, submits a report, and can render a medical opinion.⁸⁰ Healthcare professionals, psychologists, and psychiatrists provide this type of examination and testimony.

THREE CASES, THREE VERDICTS

Case #1: The complainant, a tattooed 19-year-old goth, went to the police because her 25-year-old gang-member boyfriend had raped her the week before. He had been controlling and verbally abusive, but this sexual assault was the first time he had physically harmed her. At trial, the victim minimized the attack and framed it as rough sex, even though forensics and her initial statement supported a claim of rape.

How was the jury to decide what factors to consider in evaluating such minimization behavior, and how could the prosecution address a misconception that this situation was not intimate partner violence because there was not a pattern of violence? Finally, the prosecution had to dispel any misconception that rape is something strangers do, not intimate partners.

The prosecutor used a domestic violence expert to explain

to the jury that recantation, denial, and minimization of intimate partner violence are statistically validated victim behaviors in more than four-fifths of domestic violence prosecutions. The expert also explained that physical violence, such as sexual violence, can flow from emotional and psychological abuse and that rape is much more common between intimates or acquaintances than strangers.

The jury acquitted the defendant.⁸¹

Case #2: The defendant took the knife off the kitchen counter and stabbed her unarmed boyfriend once in the chest. As she ran to her neighbor's house to get help, her boyfriend died. She was charged with murder, and the matter was presented to the grand jury for indictment. Several witnesses testified that the deceased had beaten the defendant many times in the past; that there was a protection order against him and that the defendant had twice unsuccessfully called the police to come and arrest him; and that the defendant still bore the scars on her neck where he had tried to choke her during his recent sexual demands. The defendant had given a full confession, which the prosecutor shared with the grand jury.

But if the deceased had really been so violent for so long, how could anyone believe that this defendant would have stayed with him? If the defendant's description of her abuse was fabricated, then she must have killed the deceased in cold blood. Many jurors would have to wonder why a severely battered woman stays with her batterer.

The defendant did not appear before the grand jury. A domestic violence expert witness testified that batterers sometimes telegraph what they are going to do, and victims then may recognize an increased level of immediate dangerousness. If a batterer has attempted to choke a victim before as part of a sex act and clues her that this is what he wants to do again, she might sense what is coming. (In this case, the deceased would tell the defendant to go get into her "black teddy" when he wanted to engage in asphyxiation sex.) If she has had no success warding him off during an attack, if she has been nearly killed during the last attack, if she has had no luck with a non-responsive justice system, she could believe she must be proactive or risk imminent rape and worse.

The grand jury returned no true bill, and the case against the defendant was dismissed.⁸²

The prosecutor used a domestic violence expert to explain . . . that recantation, denial, and minimization . . . are statistically validated victim behaviors in more than four-fifths of . . . prosecutions.

79. See *Lafferty*, 9 P.3d at 1135 (an expert may not give opinion testimony about whether the victim is telling the truth on a specific occasion or vouch for the victim's credibility).

80. NIJ REPORT, *supra* note 8, at 21 ("Case-specific testimony, or conclusions about a particular battered woman, requires a face-to-face evaluation of the battered woman."). Concerning discovery in domestic relations cases that include mental health witnesses, see,

e.g., CPLR 16.2(e)(3).

81. Information about this 2013 Colorado case is on file with the author.

82. See Victoria Lutz & Cara M. Bonomolo, *The Battered Woman, Self-Defense, and the Grand Jury: Why the Jury Refused to Indict*, TRIAL, August 1996.

Case #3: A mother of four was charged with murder for running over and killing her husband. The facts of the incident were not in dispute. Directly before the homicide, the deceased, sitting next to the defendant as she drove, had been punching and slapping her face. He got out of the passenger's side of the car, walked around to the driver's side window, and started to punch her face again. Witnesses testified to this string of events and called 911 but did not intervene. Then he taunted the defendant, saying that she did not have the guts to hit him. As he faced her and began to walk toward their house, the defendant briefly accelerated, hitting and killing her husband. Her children testified to the father's decades-long abuse of their mother.

How could the jury decide if this was premeditated murder or whether someone in the defendant's situation, with her history of long-term and ongoing abuse, would see her husband's acts as a continuing course of conduct requiring an exercise of self-defense to avoid continuation of the beating as they entered their home?

An expert gave evidence about the impact of decades of battering, belittling, threats, and economic and psychological abuse on the behavior of a person in the defendant's situation and how this type of situation is similar to that of a hostage in the split second when the hostage has to choose fight or flight—and flight has never worked before.

The jury acquitted the defendant of murder and convicted her of criminally negligent homicide, which carried a much lower sentence.⁸³

I was the attorney of record or the expert witness in the three cases above. I am sure that, in each case, the jury heard domestic violence myths debunked and incongruous information made understandable. I am sure that the verdicts were more justly rendered because of that information.

CONCLUSION

This article has been an attempt to place the judiciary, attorneys, and experts on the same page to facilitate a communion of process and practice in using domestic violence experts. Domestic violence continues to be a plague on our communities. As judges balance impartiality, due process considerations, victims' rights, and the awareness that domestic violence can be a morass of contradictory signals, there is every reason to view domestic violence expert testimony as a boon to clarity and fairness in the courtroom.



For most of her 38-year legal career, Vicki Lutz has worked to end sexual and domestic violence. Currently, she provides domestic violence expert counsel and testimony in civil and criminal cases throughout Colorado and performs annual grant review for the Department of Justice's Office on Violence Against Women. She is admitted to the Colorado and New York bars

and has been endorsed and qualified as an expert witness in many federal and state courts.

From 2004 to 2012, Ms. Lutz was the executive director of Colorado's Crossroads Safehouse, and during the decade prior to 2004 she held the same title at New York's Pace Women's Justice Center. She has been a law professor and has handled civil and criminal cases ranging from harassment to homicide. In addition to training thousands on gender violence issues in America, Canada, and Africa, she has authored more than 17 books or articles. She was on the faculty of the National Institute for Trial Advocacy (NITA) for six years and is the recipient of many honors. Under a 2012-2014 Colorado University grant, she was a statewide consultant for domestic violence programs, and, since 2016, she has taught "Interpersonal Violence Law and Public Policy" in CU's School of Public Affairs Master Program.

83. Information about this 2015 Colorado case is on file with the author.

The Resource Page continued from page 44.



WEBSITES OF INTEREST

Several organizations maintain websites with useful resources on domestic violence. Here are some of the best:

American Bar Association Commission on Domestic and Sexual Violence
<https://goo.gl/cciGwk>

Building Futures with Women and Children
<https://goo.gl/OQUQ9E>

Center for Court Innovation
<http://courttinnovation.org>

Domestic Abuse Intervention Programs (the home of the Duluth Model)
<http://theduluthmodel.org>

National Center for State Courts
<https://goo.gl/qhwZ9f>

National Council of Juvenile and Family Court Judges
<https://goo.gl/HEJgDv>

Answers to Crossword

from page 42

T	S	E	W	E	P	E	L	V	A	N	E	Y
E	T	S	A	N	E	L	E	I	R	A	V	A
A	M	A	T	A	S	T	E	S	A	M	A	H
T	O	M	M	S	I	S	E	G	A	R	R	E
O	B	O	T	I	N	I	T	A	D	E	E	T
N	B	U	N	C	L	O	I	D	O	R	D	N
M	L	Y	S	A	N	E	R	S	A	O	D	E
S	E	R	E	S	A	L	L	A	N	L	A	N
T	U	I	G	E	P	S	T	E	R	S	T	E
E	N	I	L	L	R	E	D	I	N	N	N	E
I	L	A	R	E	R	Y	E	R	A	B	H	H
P	M	G	O	A	F	I	N	I	N	E	T	E
R	I	U	N	A	R	L	W	A	R	E	L	L
D	E	I	M	O	R	E	T	A	S	N	A	R
T	E	L	A	T	F	L	A	T	T	S	K	I