

The Prosecutors' Resource on Sexual Violence Cases Involving Victims With Intellectual Disabilities¹

Prosecutors working sexual violence cases are no strangers to the unique challenges such cases present. Most prosecutors specializing in cases of sexual violence have developed not only the skills to meet the many evidentiary challenges, but the necessary empathy to work with vulnerable victims. However, one category of sexual violence crime requires additional skill beyond the usual high level of expertise—those where the victim has an intellectual disability.

The general term “disability” encompasses a wide variety of conditions that impact or limit a person’s physical, mental, or social well-being. Disabilities may be long-term or temporary; some disabilities are apparent at birth or become manifest during childhood, while others are acquired later in life as a result of physical trauma, illness, or old age. Some individuals have multiple disabilities. While some people with disabilities are largely self-sufficient, with minimal accommodations needed to manage daily life, many require varying degrees of assistance² of one kind or another to engage in certain activities. A sexual violence victim’s disability often plays a significant role in how they are selected by an offender for victimization, how a report is received and investigated, and how the case is tried to a jury.

Individuals with disabilities are victimized in serious violent crimes, including rape and sexual assault, at rates 2.5 times higher than the rate for people without disabilities.³ Among these victims, those with cognitive impairments experience the highest rate of serious violent crimes.⁴ Research suggests that crimes involving victims with disabilities are reported to law enforcement at rates similar to those involving other victims.⁵ Despite the prevalence of such victimization, however, investigation and prosecution of such crimes present additional challenges that can be overcome only with skills, practices, and expertise beyond those required for cases involving victims without disabilities.

While any type of disability can increase a person’s vulnerability to sexual violence and impact their interactions with the criminal justice process, the focus of this Resource is on issues arising in cases with victims having an intellectual disability. This Resource will explore some of the challenges that commonly arise in cases involving victims with an intellectual disability and suggest practices to effectively address those challenges during the investigative, pre-trial, and trial stages of a case.

Intellectual Disability

An intellectual disability is characterized by significant limitations in intellectual functioning that are generally accepted to equate to an IQ level of 70 or below and/or limitations in adaptive behavior. Adaptive behavior includes conceptual skills (relating to language and literacy; money, time, and number concepts; and self-direction); social skills (including interpersonal skills; social responsibility; self-esteem; gullibility; naïveté [i.e., wariness]; social problem solving; and the ability to follow rules, obey laws, and recognize the potential for victimization); and practical skills

(including personal care, occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone).⁶ The abilities and limitations of those with intellectual disability will vary from person to person; not everyone with an intellectual disability will have the same vulnerabilities, needs, degree of independence, or intellectual capacity. It is critical to understand while a victim with intellectual disability may have been evaluated to have a developmental age of a child, they are not a child; they have the life experience of their chronological age and should not be infantilized.

Victim-Perpetrator Relationship and Vulnerabilities Specific to Victims with Intellectual Disabilities

Any discussion of best practices for prosecution of cases involving victims with intellectual disability should begin with some analysis of factors that can make these victims more vulnerable to sexual violence. According to the Bureau of Justice statistics, people with intellectual disabilities are seven times more likely to be sexually assaulted than those without disabilities.⁷ One significant factor is that victims with disabilities are especially likely to know or to have a relationship with their offenders. Statistics compiled by the Department of Justice, along with data compiled from a study in Pennsylvania, suggest that 86 percent of sexual violence victims with cognitive disabilities are assaulted by someone they know, compared with 76 percent of victims without such disabilities.⁸ These statistics should not be surprising when one considers that opportunities for an offender to perpetrate will largely depend on access to a victim with identified vulnerabilities that can be exploited. Assailants in these cases may include intimate partners (current or former); family members; caregivers (including personal attendants or program staff) or others responsible for the well-being of the victim; as well as other participants or residents at programs, group homes, or other facilities.

Many perpetrators who prey upon people with disabilities serve in a caregiving or authoritative position. People with intellectual disabilities are often taught to be compliant with those who serve in such capacities, making them particularly vulnerable to manipulation by such perpetrators. Proximity and opportunities for isolation also make these victims more vulnerable to forcible assault. Perpetrators in a position of authority may also prevent or inhibit the victim from reporting what happened.

Some victims with intellectual disabilities may not even recognize what has happened to them as abuse. They may not be adequately educated⁹ or socialized about the distinctions between appropriate and exploitive physical contact.

Even when barriers to comprehension, disclosure, and reporting are overcome, there may be a tendency for law enforcement responders, as well as the public, to erroneously conflate intellectual disabilities with mental illnesses characterized by delusions or hallucinations, causing the credibility of the victim's report to be discounted.

Competency and Capacity

Intellectual disability may affect the victim's competency (the ability to testify in court) and capacity (the ability to make informed decisions, such as the ability to validly consent to sexual activity). These are two separate issues; a person may be competent to testify in court but still lack the capacity to consent to the sexual activity at issue. Moreover, a victim's capacity to consent must take into account the facts and circumstances surrounding the sexual act—a victim may have the general capacity to consent to a sexual act and yet lack the capacity to consent under the specific circumstances presented.¹⁰

“Competency” refers to the victim’s ability to distinguish truth from falsity, to understand the duty to tell the truth, and to communicate so as to be understood.¹¹ All adults are generally presumed to be competent to testify; however, when the victim has an intellectual disability, it may be necessary for the court to make a pretrial determination as to competency. If the victim is interviewed by a forensic interviewer, the interview should include questions relating to the victim’s competency. Such questions are routinely asked in the course of interviewing child victims of sexual violence.

Capacity to consent, on the other hand, must take into account not only the victim’s understanding of sexual acts but also the unique circumstances surrounding the act at issue. An evaluation of the victim’s capacity to consent should consider:¹²

- Whether the victim understands the sexual nature of the contact
 - What do they know about sexual activity in general?
 - What do they know about the specific type of sexual activity at issue?
 - Have they received sex education?
 - Are there support people (*e.g.*, family, friends, advocates, providers) with whom they can discuss issues of sexuality?
- Whether the victim understands and is capable of consenting to or refusing the sexual act
 - Are they able to understand the facts and choices they have in these circumstances?
 - Do they understand they can say “no” to the sexual act?
 - Are they able to weigh the consequences of their choice and to understand how it might affect them?
 - Are they capable of recognizing or reporting unwanted sexual advances or abuse?
- Whether the victim is able to effectively communicate their decision to consent or to refuse the sexual activity
- Whether the victim is familiar with the possible risks or consequences of the sexual activity
 - Do they understand safe sex practices, including those to avoid pregnancy or sexually-transmitted infections?
 - Do they understand the consequences of potential pregnancy and childbearing?
- The context in which the sexual activity occurred
 - Are there indications of coercion?
 - Was there undue pressure or an imbalance of power (*e.g.*, was the perpetrator a family member, care provider, staff member, or someone the victim felt must be obeyed)?

While victims with intellectual disabilities may be particularly vulnerable to sexual exploitation, it is important to note that many people with intellectual disabilities have the capacity to consent to sexual activity under non-exploitive conditions.¹³ People with intellectual disabilities that do not prevent them from making informed decisions about engaging in sexual activity are equally entitled to enjoy non-exploitive intimate relationships as people without disabilities. Protective parents, family members, and others may find it difficult to accept that the person with the disability was acting freely. For that reason, when a report of sexual violence is made by a third party, it is important to determine whether the victim was, in fact, engaging in consensual conduct. If so, then criminal prosecution is, of course, inappropriate. Instead, a social worker or other advocate may be able to refer the family for appropriate services to support their family member with intellectual disability.

Charging and Bail

Charging decisions in cases with victims who have intellectual disabilities will, of course, depend on the facts and evidence uncovered, as well as the applicable law of the jurisdiction. Some statutes have elements that explicitly reference the victim's cognitive ability, while even "standard" sex offenses and statutory defenses may have elements—typically those related to force/coercion or the victim's ability to consent—where the victim's intellectual capacity is relevant.

Conventional charging in cases of sexual abuse involving victims with intellectual disabilities typically involves a statute having the elements of sexual contact and a victim's mental incapacity to consent. The particulars of terminology and the level of culpability or *mens rea* that must be proved will vary from jurisdiction to jurisdiction. The statute may require proof of the offender's knowledge of, or recklessness or negligence with respect to, the victim's inability to consent. In many jurisdictions, sexual contact with a victim who has a disability impairing the ability to consent may be charged under the same statute as an act perpetrated on a victim whose capacity is temporarily impaired by drugs or alcohol. Finally, many jurisdictions have statutes criminalizing sexual activity by a caregiver upon a dependent person, making it unnecessary to address issues of consent; such cases will instead focus on proving the defendant's act and the status of the victim and the caregiver-defendant.

The availability of specialized statutes applicable to victims with disabilities should not cause more general sexual violence charges, with the element of force/coercion or general lack of consent, to be overlooked. Any statutory offenses with these elements should be charged where there is evidence to support them. The victim's disability may provide important context in evaluating the evidence of force/coercion or absence of consent. The quantum of force or the nature of the coercion necessary to compel the victim's submission may be much less, or much different, depending on effects the victim's disability has on the ability to recognize the offender's intention, to understand the nature of sexual activity, and/or to understand the right to refuse the sexual act. The victim's ability to express consent or non-consent may also be directly impacted by a disability.

Also consider whether statutory definitions of "force," "compulsion," or "coercion," or judicial interpretations of such statutory terms, encompass a broader scope than physical force or threat of physical force. Do the terms encompass the use of psychological or emotional power? This type of compulsion/coercion arises more frequently in situations where the assailant is an intimate partner, someone in an authoritative position with respect to the victim, or someone in a position to "groom" the victim to comply with demands for sexual acts.

There also may be statutes that criminalize the abuse or neglect of a dependent person. These types of charges may be brought against the perpetrator, if in a caregiving or supervisory capacity with respect to the victim, or against supervisory or other responsible parties whose neglect allowed the abuse to occur. While the punitive exposure may not be equivalent to sexual abuse charges, general abuse/neglect charges can help to ensure accountability for all responsible parties and to capture evidence revealing the scope of the victim's overall vulnerability and susceptibility to non-physical forms of coercion and control.

As with any case where a victim and offender have an ongoing relationship, consider the potential applicability of a stalking charge. Such a charge may be appropriate when the offender engaged in a course of conduct against the victim with the intent to cause fear or substantial emotional distress. A stalking charge will require investigation into

conduct and events beyond the discrete incident(s) of sexual abuse. When supported by the evidence, however, the addition of a stalking charge can help to illuminate the full scope of an offender's conduct toward the victim.

When the perpetrator—whether an intimate partner or another resident or participant in the same program or facility—also has an intellectual disability, consider whether the criminal justice process is the most appropriate response. While victim safety must be the immediate priority, a just decision whether to criminally charge should be informed by the victim's wishes, together with input from program staff and other experts. Depending on the circumstances, diversionary treatment with conditions such as counseling or therapy, along with restrictions to reduce the risk of re-offense, may be more just and appropriate than conventional prosecution.

Any bail conditions should include a prohibition on direct or indirect contact with the victim. If the defendant is a caregiver or otherwise employed in a setting that brings them into contact with other individuals with intellectual disabilities, contact with those individuals should also be prohibited as a condition of release.

Meeting with the Victim

Although many investigations will originate with a report by the abused victim, some—particularly those involving victims with serious communication barriers—will originate from reports by third-party witnesses. Anyone interviewing the victim should first learn as much as possible about the victim, including the nature and extent of the disability and any related communication difficulties. This information can be obtained from non-offending caregivers and from the victim's family and support network (*e.g.*, teachers and social workers). The questions that should be considered before meeting with the victim include:

- Are there physical maneuverability issues needed to accommodate the victim?
- What reliance, if any, does the victim have on others for daily needs such as transportation, communication, hygiene, etc.?
- What is the ability of the victim to report? If the victim does report, are there any safety or caretaking concerns that might be implicated (*e.g.*, will it be safe for the victim to return home or to their program)?
- How does the victim communicate? If the victim is unable to communicate in a traditional manner, are there other methods to enable communication, such as:
 - Communication aids (computer tablets, assistive and alternative communication devices or software, picture tablets, etc.);
 - Sign language interpreters, if the victim is able to sign;
 - Non-offending family members, caregivers, or professionals who already work with and can communicate with the victim.
- Are there certain times of the day, in relation to the victim's personal schedule, medication schedule, meals, or other activities, that are best for interviewing the victim so as to have their full attention and alertness?

This information-gathering will assist the interviewer in providing a victim-centered response, as well as shedding light on the ways in which the offender may have been able to target/exploit the victim's disability.

For the initial interview of the victim, consider using the services of a forensic interviewer from a Child Advocacy Center or similar agency. While adult victims with intellectual disabilities should not be infantilized, many of the trauma-informed techniques and practices employed in forensic interviews of children lend themselves quite readily to interviews of adult victims with intellectual disabilities. The interview should be recorded in the same fashion as interviews of child victims and should include questions to assess the victim's competency to testify, as well as questions addressing facts relevant to the victim's capacity to consent to the sexual act.

Plan to meet personally with the victim as soon as possible after the initial report (and the initial interview, if any). Consider whether your interview should be conducted in the prosecutor's office or whether the victim would be more comfortable in a familiar setting. The first meeting might simply involve rapport-building, offering the opportunity for an informal assessment of the victim's abilities and a chance for the victim to meet and begin to trust you and any other members of the prosecution team that they may encounter over the course of the case. Depending on how that first meeting goes, you may wish to have more than one meeting with the victim before beginning to talk about the crime or about the criminal justice process. Because of the need to establish rapport and trust, it is important to minimize the number of different prosecutors or investigators involved over the course of the proceedings; vertical prosecution should be the rule if at all possible. A third party, such as an investigator or advocate, should be present as a witness to all meetings or interviews with the victim to counter any defense allegations of inappropriate suggestion or pressure.

If you are meeting with the victim at the prosecutor's office, consider where the victim will wait upon arrival, who will be greeting the victim, and the impressions the office environment will make on the victim. The setting of a typical prosecutor's office (phones ringing, people talking or rushing to court, office equipment, public notices and decorations, etc.) may prove intimidating or distracting for the victim with an intellectual disability. A quiet, comfortably furnished room would be best. Similarly, bold jewelry, brightly patterned clothing, or fragrances worn by the prosecutor or investigator may be distracting for the victim—keep it simple.

The victim should always be made to feel safe and comfortable throughout the meeting or interview. Your language should be as simple and direct as possible, avoiding euphemisms or nuance that may confuse the victim and result in inaccurate responses. For example, a victim who is asked whether anyone "hurt you" may respond in the negative if they did not experience physical pain. In addition to building rapport and trust, the initial meeting(s) can provide a valuable opportunity to learn about the victim's communication style, *e.g.*, the victim's ability to respond to open-ended or leading questions, including those that suggest an incorrect answer. Take breaks as needed to enable the victim to remain focused and comfortable.

Bear in mind that the victim may also be trying to make a good impression and may try to appear to understand more than they actually do. In the course of early conversation, try to determine what insight the victim has about their own abilities and deficits. Use open-ended questions that do not require a "yes" or "no" answer, since the victim may be more apt to answer in the affirmative to please the questioner and mask his or her lack of understanding. This is also a good time to emphasize that there is nothing wrong with saying, "I don't know," in response to any question to which they do not know the answer.

When talking to the victim about the crime, use trauma-informed techniques that avoid blaming or embarrassing the victim.¹⁴ Reassure the victim that they did nothing wrong. In addition to the essential facts surrounding the crime, explore the victim's relationship (if any) with the offender. Does the victim remember when they first met? As with interviews of children, it may be necessary to bracket the approximate date in terms of significant personal events (*e.g.*, before you moved to this house, after Christmas). Did the victim like the offender? Was the offender nice to the victim? Mean? What did the offender do that was nice or mean? Be sure to allow adequate time for the victim to respond to any questions—asking two questions at once may be confusing.

If the victim and the offender were personally acquainted prior to the offense, there is a strong likelihood that the offender engaged in intimidation or manipulation to prevent the victim from disclosing the crime. Ask whether the offender engaged in any mutual promise not to disclose what happened or said anything about what would happen if the victim told anyone. At any subsequent meetings (which should occur on a regular basis throughout the course of the case), find out whether the defendant has been in contact with the victim and, if so, what they talked about. Of course, any violation of no-contact conditions should be the subject of an immediate motion to revoke bail and additional measures may be appropriate to ensure victim safety. Any acts of intimidation or manipulation intended to dissuade the victim from reporting the offense or from testifying at trial might be chargeable as witness intimidation or might provide a basis for a motion to admit the victim's out-of-court statements under the doctrine of forfeiture by wrongdoing if the victim is too fearful, as a result of the defendant's conduct, to testify at trial.¹⁵

Interview of the Suspect

As with all sexual violence investigations, the suspect should be interviewed if possible. In cases involving victims with intellectual disabilities, offenders may be eager to offer their version of the offense, emphasizing the absence of physical force and their belief that the victim consented. Even absent a confession, the offender may be willing to acknowledge the act and their awareness of the victim's disability. Such admissions will go a long way toward satisfying the burden of proof at trial. Moreover, exploring the offender's history in the course of the interview may reveal allegations made by additional victims, which could result in additional charges or evidence that might be admissible as another "bad act" potentially admissible under Fed. R. Evid. 404(b) or its equivalent.

Further Investigation

Arrange to interview the victim's family, teachers, aides, and others who have regular close contact with the victim. What have they observed about the victim's interactions with others and ability to function and make decisions on a day-to-day basis? Is the victim especially trusting of others? Does the victim crave approval and acceptance? Have there been changes in behavior that coincide with the assault?

Ask the victim's family, friends, or trusted professionals what, if anything, the victim has told them about the assault. Depending on the circumstances surrounding such disclosure (*i.e.*, whether the statement comes within a hearsay exception), such statements to family and others may be considered nontestimonial statements admissible under *Crawford* and its progeny and thus admissible even if the victim is unavailable to testify at trial.¹⁶

Consulting with Experts

Consulting with an expert early in the case helps to ensure a proper understanding of the victim's intellectual disability and the role that the disability played in the victimization. An accurate assessment of the manifestation and effects of the victim's disability is necessary for both prosecutors and fact-finders to make fully-informed decisions. An appropriate expert can shed light on the medical, physical, psychological, and social implications of a victim's intellectual disability. Specific topics that can be addressed include the victim's intellectual functioning, cognitive abilities, levels of adaptive functioning, developmental age or equivalent academic grade level, language ability and memory. A counselor, social worker, psychologist or psychiatrist may be qualified to serve as an expert for purposes of consultation and/or expert testimony at trial, provided that the expert's experience has focused on working with or studying intellectual disability. It may be advisable to work with two experts—one to assist in evaluating the facts and planning the testimony to be presented at trial, and a second expert to prepare an expert report and actually *testify* at trial.

Determine, with the assistance of your consulting expert and a careful analysis of the facts and law, what kind of expert testimony or opinions you plan to seek and to present at trial. In planning the presentation of expert testimony, it is important to keep a couple of considerations in mind. First, any materials that the testifying expert relies on to form the basis for an opinion will most likely have to be produced in discovery upon request. Because the victim has important privacy interests at stake, the records or reports that are provided to the testifying expert should be carefully selected to minimize the intrusion on the victim's privacy, while affording sufficient information to the testifying expert to enable them to form an opinion. Second, you must determine whether it is necessary for the victim to undergo a complete evaluation for purposes of securing an accurate opinion from the testifying expert. A new evaluation for trial purposes may result in a defense request for its own independent evaluation. Many people with disabilities will already have undergone numerous evaluations over the course of their lives for various purposes—there may be evaluations performed in connection with an Individualized Education Plan (IEP) or an Individual Habilitation Plan (IHP); there may be evaluations performed for the purpose of applying for Supplemental Security Income (SSI) benefits; there may have been other evaluations conducted for other purposes. Ask the testifying expert whether an existing evaluation may be sufficient for purposes of forming an opinion and testifying. If a new comprehensive evaluation is necessary, it may be possible to minimize the burden on the victim by arranging for the defense expert to observe the evaluation and perhaps pose any additional questions necessary for their purposes. This course has the advantage of ensuring that the defense evaluation is conducted in an appropriate manner. Any new evaluation performed for trial purposes should be videorecorded. The goal should be to minimize intrusive or repetitive examinations or evaluations and to protect the victim's privacy to the extent possible.

In addition to issues related to the victim's vulnerability and capacity to consent, the testifying expert should be prepared to explain the general nature of intellectual disability—including the fact that such disability does not cause hallucinations or delusions.

Pretrial Motion Practice

Depending on the evidence in the case, several types of pretrial motions may be appropriate.¹⁷

If an expert is to testify, a motion to present expert testimony should be filed, along with the expert's report and CV. Filing the motion in advance will educate the court about the nature of the victim's disability and help to set the stage for appropriate rulings on other motions and at trial.

A motion to determine the victim's competency to testify may be appropriate. Although all adults are generally presumed to be competent to testify, the victim's intellectual disability may cause the court to be concerned about the victim's competency. To the extent there are serious questions about the victim's competency, a preemptive motion can eliminate the risk of having the issue raised after the jury has been sworn--a situation that would be particularly problematic when the availability of interlocutory appeal is limited and the exclusion of the victim's testimony could jeopardize the entire case. The definition of "competence" may vary slightly from one jurisdiction to another, but generally speaking, competency to testify will involve an understanding of the obligation to tell the truth and the ability to communicate so as to be understood. Your expert can explain that the victim's disability does not prevent the victim from understanding the need to testify truthfully. With proper witness preparation, the victim's testimony at a competency hearing may also serve as a way for the victim to experience what it is like to testify in a courtroom and for you to observe any difficulties that might need to be addressed for trial.

A rape shield motion may be warranted to prevent introduction of irrelevant evidence pertaining to the victim's sexual history. Although rape shield statutes place the burden on the defense to file a motion before introducing such evidence, a preemptive motion to bar such evidence will provide an opportunity for the court to make a determination on the record that the evidence is inadmissible and that questioning on certain subjects will be barred.

A motion to accommodate the victim's needs during trial may be appropriate. Depending on the needs of the victim, such accommodations may include frequent breaks, presence of a support person, use of a comfort object such as a stuffed animal while testifying, use of a courthouse dog, use of an interpreter or assistive device to enable the victim to understand and be understood, and limitations on the form of questioning to ensure the victim does not become confused. Many such accommodations may be required under the Americans with Disabilities Act (ADA); your court should have an ADA compliance coordinator who can provide assistance in securing the necessary accommodations.¹⁸

A motion for the victim to testify via closed-circuit video may be necessary if the victim is too fearful to testify in the presence of the defendant. Many jurisdictions have statutory or rule provisions for such testimony in cases involving child victims. In *Maryland v. Craig*, the United States Supreme Court upheld a statute allowing for such a procedure when the child victim would, if compelled to testify in the presence of the defendant, suffer emotional distress such that the victim would be unable to reasonably communicate.¹⁹ The court must hold an evidentiary hearing to determine whether this victim would be so affected. Although *Craig* applies specifically to child victims, its reasoning should be equally applicable to adult victims with an intellectual disability.

If the victim is unavailable to testify due to incompetence or for any other reason, file a motion to admit any out-of-court statements that are nontestimonial under *Crawford* and its progeny and admissible under a hearsay exception. If the victim is unavailable due to the defendant's wrongdoing to prevent the victim from testifying, file a motion to admit any of the victim's out-of-court statements under the doctrine of forfeiture by wrongdoing. Where a particular out-of-court statement may be admissible under both theories, argue both theories and request that the court rule on both in the alternative.

Preparing for Court:

Proper witness preparation can go a long way toward ameliorating the victim's nervousness or fear about testifying at trial. Bring the victim to an empty courtroom late in the afternoon, when there is less activity in the courthouse. Show the victim where they will sit during the trial and explain who the other people in the courtroom will be and where those individuals will sit. Let the victim know that a bailiff or court officer will be present to make sure that everyone is safe. Explain that the judge will be wearing a big, black robe and that the judge's job is to make sure you (the prosecutor) and the other lawyer follow the rules. Reassure the victim that nobody will be mad at them if they make a mistake. The judge might remind everybody about the rules but nobody is going to be punished for what they say in the courtroom. Emphasize that the most important rule to remember is to tell the truth.

Of course, on the day and time the victim actually testifies, the courthouse is likely to be much more crowded and noisy. It may be helpful, after the first visit, to take the victim on a brief tour of the courthouse when the activity and noise level is higher so they are not taken by surprise and made excessively anxious by the difference on the day of testimony.

Explain to the victim what to do if they need a break to go to the restroom, get a drink, or to walk around for a few minutes—raising a hand, as in school, is the best way to get your attention. Discuss with the victim's support person whether having a glass of water on the witness stand would be helpful or merely distracting. Be sure to inform the judge and obtain approval for any necessary accommodations, including signaling for a break, that you propose.

While the victim should be prepared to answer questions on both direct and cross-examination, too much preparation may backfire. Explain that sometimes the judge might not like the way a question is asked, in which case the other lawyer will say, "Objection." Assure the victim that this is nothing to worry about—that the judge will decide if a question should be asked in a different way. Those rules are only for the lawyers to worry about, not the victim. Explain to the victim how items are introduced into evidence, if you expect to have the victim identify items, photographs, etc., that you intend to offer into evidence.

Jury Selection

Voir dire affords the first opportunity to begin to educate the jury about the issues in the case. In addition to questions typically used in sexual violence cases, it is important to probe potential jurors for familiarity with, and biases and attitudes concerning, people with intellectual disabilities. Suggested questions include:

- [Victim], who is the victim in this case, is a person with an intellectual disability. Has anyone here heard the term "intellectual disability"? Do you know what it means? [Explain that the term refers to conditions that used to be

described as “mental retardation,” but that the old term has been discarded in favor of the term “intellectual disability, which is considered more accurate and respectful by professionals who work with people having this type of disability.]

- How many of you have known someone with an intellectual disability?
 - How do you know this person?
 - How well do you know them?
 - Have you had an opportunity to observe how they interact with others?
 - What have you noticed?
- How do you feel about interacting with someone having an intellectual disability?
 - On a scale of one to ten, with one being “very uncomfortable” and ten being “very comfortable,” how would you feel about talking with someone who has an intellectual disability?
 - If a person with an intellectual disability came to you for help, would you feel comfortable providing such help or would you try to find someone else to help the person?
 - Why?
- I’m going to mention some things that people with intellectual disabilities might do and ask you to respond with how you feel about it. [For these questions, focus on issues that reflect the abilities of the victim in your case—follow up with “why” questions]
 - Working in a job that requires interaction with clients or customers.
 - Attending a public school with students who do not have a disability.
 - Going on a date with another person having an intellectual disability.
 - Going on a date with a person who does not have a disability.
- You will be hearing evidence that [Victim] was sexually assaulted by the defendant in this case. The defendant worked as a landscaper at the group home where [Victim] lived.
 - Do you think the fact that a person has an intellectual disability makes them more or less likely to tell the truth about what happened?
 - Why?
 - Might the fact that a person has an intellectual disability make it harder or easier for them to be sexually assaulted by someone they know?
 - Why?
- If [Victim] testifies in this case would you be able to fairly evaluate her testimony the same way you would any other witness?
- [Victim] may require certain accommodations to be able to testify in court, including [specify any accommodations]. Would her need for those accommodations cause you difficulty in objectively evaluating her testimony?
- Would anything about the victim’s disability make it difficult for you to be fair and impartial in this case?

Opening Statement

Before making your opening statement, craft a compelling theme for your case. Where the victim was manipulated into a sexual act by an offender whom the victim thought of as a friend, for example, the theme might be “an act of betrayal” or “she only wanted a friend.” Another good source for a theme might be found in the statement of the victim (“I thought he was nice”). The theme should be one that you can return to throughout the presentation of your case and in summation to remind the jury of what the defendant selfishly took from the victim by exploiting their disability.

In your opening, confront any perceived challenges head-on and without apology. Emphasize that the defendant is the one who selected this person to victimize, and that the victim was chosen *because of*, not in spite of, their disability. Victim's Testimony at Trial

Give careful thought to the timing of the victim's testimony. First, consider where in the order of proof the victim's testimony would have the most impact. It is generally best to call a couple of other witnesses to “set the scene” before the victim testifies—perhaps a first responder and/or the first person to whom the victim disclosed the assault. In addition, it may be best to call the disabilities expert and perhaps one or more other witnesses familiar with the victim to testify about the victim's abilities and disabilities before the victim takes the stand. This will help to prepare the jury for the victim's testimony. Conversely, having the expert testify after the victim may help to contextualize the victim's testimony and explain why the victim testified in the manner that he or she did.

Make every effort to call the victim to testify at the best time of day, taking into account the victim's schedule, including medication, meals and other important activities. On direct examination, ask questions in a form that will be most easily understood by the victim. During cross-examination, be vigilant for questions that the victim may not understand or that may cause confusion. Use open-ended questions on re-direct examination so that the victim can explain the limited answers to any leading questions that were posed on cross-examination.

Sentencing

Prosecutors should be prepared to debunk stereotypical notions that individuals with intellectual disabilities are spared from lasting psychological harm due to their intellectual limitations, especially if such suggestions are raised in mitigation of sentence by the defense or court. Victims with intellectual disabilities experience trauma and are affected by post-traumatic stress disorder as a result of the trauma that they have incurred.²⁰ In applicable cases, prosecutors should inform the court how the traumatic event impacted the life of the victim.

Coordinated Community Response for Victims with Disabilities

The development of sexual assault response teams (SARTs), coordinated community response teams (CCRs), and others multidisciplinary collaborations among prosecutors, law enforcement, advocates, and other stakeholders has significantly improved the response to crimes of sexual violence. Expanding these collaborative networks to include agencies and stakeholders that directly advocate for and provide services to individuals with developmental disabilities can help to ensure that victims with disabilities benefit from the same kind of enhanced response. Entities such as state or local agencies for independent living, developmental disability councils, university centers for excellence in developmental disabilities, service provider agencies, and other advocacy organizations serving people with dis-

abilities may not have routine contact with or understanding of the criminal justice system. Similarly, prosecutor's offices, law enforcement agencies, and domestic violence/rape crisis centers may not be aware of the scope of resources and support available in their community for individuals with disabilities. Building and maintaining relationships between disability agencies and criminal justice agencies will help to promote a more seamless and effective response when people with disabilities are sexually exploited and victimized.

Endnotes

- 1 Teresa Garvey and Jonathan Kurland, Attorney Advisors at AEquitas. AEquitas gratefully acknowledges the contributions of Beverly Frantz, Ph.D., Institute on Disabilities, Temple University and Robert Laurino, Special Deputy Attorney General; Chair, NJ Attorney General's Clergy Abuse Task Force. AEquitas would also like to thank Cary Zhang, Temple University Beasley School of Law 2021, for her assistance with research and edits.
- 2 In the disability community, the word "support" is used, rather than "assistance."
- 3 Bureau of Justice Statistics, *Summary-Crime Against Persons with Disabilities, 2009-2015-Statistical Tables*, NCJ 250632 (July 2017), available at <https://www.bjs.gov/content/pub/pdf/capd0915st.pdf>.
- 4 *Id.*
- 5 Nancy M. Fitzsimmons, *Justice for Crime Victims with Disabilities in the Criminal Justice System: An Examination of Barriers and Impetus for Change*, 13 U. St. Thomas L.J. 33, 71 (2016), available at <https://ir.stthomas.edu/ustlj/vol13/iss1/3/>.
- 6 *Frequently Asked Questions on Intellectual Disability*, American Association on Intellectual and Developmental Disabilities, available at <https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability> (last visited July 30, 2019).
- 7 Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR: All Things Considered (Jan. 8, 2018, 5:00 AM), available at <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>.
- 8 *Id.* (stating, "For women without disabilities, the rapist is a stranger 24 percent of the time, but for a woman with an intellectual disability it is less than 14 percent of the time.").
- 9 Many young people with intellectual disabilities have not received adequate sex education. See L. Grove, et al., *The Birds, Bees, and Special Needs: Making evidence-based sex education accessible for adolescents with intellectual disabilities*, 36(4) SEXUALITY AND DISABILITY 313-329 (2018).
10. See ANN LINDER, CAPACITY TO CONSENT TO SEXUAL ACTIVITY AMONG THOSE WITH DEVELOPMENTAL DISABILITIES 10 (Stanford Intellectual & Developmental Disability Law and Policy Project 2018), available at <https://law.stanford.edu/wp-content/uploads/2018/11/Ann-Linder-Capacity-to-Consent-to-Sexual-Activity-Among-those-with-Developmental-Disabilities.pdf> (noting that a finding that an individual was incapable of consenting in one instance does not necessarily preclude him/her from being able to consent at another instance in the future; as in many cases, the court looks to situational and dynamic factors); see also Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev. 480 (2018), available at <https://www.nyulawreview.org/wp-content/uploads/2018/06/NYULawReview-93-1-Harris.pdf>.
11. See *In re Penn*, 443 F.2d 663, 666–67 (D.C. Cir. 1970) (explaining that a witness's competency to testify is to be determined by the court, and that only persons whose capacity to observe, recollect, or communicate is so impaired as to render their testimony valueless are excluded from testifying).
12. Pennsylvania Coalition Against Rape, *Adults with Intellectual Disabilities: Capacity to Consent to Sexual Activity* (Technical Assistance Bulletin) (2017), available at https://pcar.org/sites/default/files/resource-pdfs/tab_2017_consent-capacity-id.pdf.
13. See *id.* at 2. (emphasizing that a diagnosis of intellectual disability, by itself, does not automatically mean that a person lacks capacity to consent to sexual activity, as that assumption would essentially nullify the sexual rights of people with intellectual disabilities).
14. It is recommended that victim interviews be conducted at advocacy centers wherein law enforcement officers work closely with social workers trained specifically in interviewing victims of crimes, and that interviews be conducted by a specialist who has been specifically trained in interviewing individuals with disabilities. See, e.g., Anne Marie Schubert et al., EFFECTIVE PROSECUTION OF CASES INVOLVING VICTIMS WITH DEVELOPMENTAL DISABILITIES: A PROTOCOL FOR INVESTIGATORS AND PROSECUTORS 10 (2007), available at <http://www.markwynn.com/wp-content/uploads/Effective-Prosecution-of-Cases-Involving-IWDDS.pdf>; see also Viktoria Kristiannson and Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 Strategies Newsletter (February 2015), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Integrating-A-Trauma-Informed-Response-In-VAW-and-HT-Strategies.pdf>.
15. Teresa Garvey, *Witness Intimidation: Meeting the Challenge* (AEquitas, 2013), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>.
16. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding "[w]here testimonial evidence is at issue...the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."); see also AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Crawford.pdf.
17. Please reach out to AEquitas to discuss relevant motions in cases involving victims with disabilities and strategies for litigating—or defending—against them.

- 18 For court-specific ADA accommodations, see the National Center for State Courts ADA Resource Guide at <https://www.ncsc.org/Topics/Access-and-Fairness/Americans-with-Disabilities-Act-ADA/Resource-Guide.aspx>.
- 19 See *Maryland v. Craig*, 497 U.S. 836 (1990).
- 20 See, e.g., *How Trauma Affects People With Intellectual Disabilities*, <https://www.thearc.org/document.doc?id=3655> (last visited August 1, 2019); see also Sarah Wigham & Eric Emerson, *Trauma and Life Events in Adults with Intellectual Disability*, 2 CURRENT DEVELOPMENTAL DISORDERS REP. 93 (2015), available at <https://link.springer.com/content/pdf/10.1007%2Fs40474-015-0041-y.pdf>.
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- 24 *Id.*
- 25 Nancy M. Fitzsimmons, *Justice for Crime Victims with Disabilities in the Criminal Justice System: An Examination of Barriers and Impetus for Change*, 13 U. ST. THOMAS L.J. 33, 71 (2016), available at <https://ir.stthomas.edu/ustlj/vol13/iss1/3/>.
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35. TERESA GARVEY, WITNESS INTIMIDATION: MEETING THE CHALLENGE (AEquitas, 2013), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>.

36. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding “[w]here testimonial evidence is at issue...the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”); *see also* AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Crawford.pdf.
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39. *See Maryland v. Craig*, 497 U.S. 836 (1990).
40. *See, e.g., How Trauma Affects People With Intellectual Disabilities*, <https://www.thearc.org/document.doc?id=3655> (last visited August 1, 2019); *see also* Sarah Wigham & Eric Emerson, *Trauma and Life Events in Adults with Intellectual Disability*, 2 CURRENT DEVELOPMENTAL DISORDERS REP. 93 (2015), available at <https://link.springer.com/content/pdf/10.1007%2Fs40474-015-0041-y.pdf>.

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