

## 11. Examiner Court Appearances

Recommendations at a glance for jurisdictions to maximize the usefulness of examiner testimony:

- Encourage broad education for examiners on testifying in court.
- Promote prompt notification of examiners if there is a need for them to testify in court.
- Encourage pretrial preparation of examiners.
- Encourage examiners to seek feedback on their testimony to improve effectiveness of future court appearances.

It should be expected that examiners will be called on to testify in court as either fact and/or expert witnesses,<sup>307</sup> even though in some cases, a plea bargain may be agreed upon, or the prosecuting attorney may decide not to try the case. Examiners should always conduct and document each examination knowing that legal testimony may ultimately be required.

### **Encourage broad education for examiners on testifying in court:**<sup>308</sup>

- Provide them with information about courtroom proceeding basics (e.g., criminal justice process and terms, who typically is present,<sup>309</sup> and prosecution and defense strategies).
- Educate them about different types of testimony (including what can and cannot be said during testimony). This information should assist examiners in explaining to patients during the exam their potential role as a witness should the case be prosecuted.
- Help them understand that testifying in court can be a difficult experience. In almost every case that is litigated, cross-examination after initial testimony will occur. Cross-examination is a part of our constitutional framework, but as defense counsel represent alleged offenders, their questions may be perceived by examiners as intimidating and hostile. It is critical that examiners are prepared to effectively handle such situations and have a support system in place to help them prepare for and deal with related stress they may experience.
- Provide them with pretrial preparation (see the section below on this topic).

Involve trainers from health care, prosecution, and the judiciary in trainings on court testimony. Also, include defense attorneys who can educate examiners on defense perspectives. In addition to attending trainings, examiners should stay abreast of cutting-edge practices and related case law (e.g., rulings that impact the scope of issues they can testify on in court).<sup>310</sup>

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<sup>307</sup> An expert witness is person who has training, education, and experience on a particular subject and who is formally found to be qualified as an expert by a judge. Expert witnesses may give opinions in court on matters in which their expertise is relevant. Nonexpert witnesses normally cannot give opinions in response to questions in court, but can only testify to the facts (what has been observed, collected, or heard). (Drawn from San Diego County's *SART Standards of Practice*, 2001, p. 40.)

<sup>308</sup> This section is partially adapted from the International Association of Forensic Nurses, *SANE Education Guidelines*, 1999. One useful resource for SANEs and attorneys who utilize SANEs for testimony is L. Ledray and L. Barry, Sexual Assault Clinical Issues: SANE Expert and Factual Testimony, *Journal of Emergency Nursing*, 24(3), June 1998, pp. 284–287.

<sup>309</sup> The following may be present in the courtroom: the judge, prosecutor, defense attorney, jury, bailiff, clerk, court reporter, law enforcement investigator, victim, defendant, and victim advocate.

<sup>310</sup> This section focuses on preparing examiners for court testimony. Beyond preparing examiners, it is critical to encourage training for attorneys who try these cases on how to properly interpret and use the medical forensic examination. In addition, they need an accurate understanding about the education and clinical preparation, roles, and responsibilities of the forensic examiner. Like examiners, they can benefit from participating in mock trials and need ongoing education to stay abreast of the latest best practices and related case law. Prosecutors should be aware of and share related case law and protocol guides with judges as references to qualify examiners as expert witnesses. They can also share questions they plan to ask to establish credentials of these witnesses. Additionally, prosecutors must understand how to educate the jury about evidence that will be presented (e.g., a lack of physical injury does not equal lack of sexual assault). Similarly, it is important to encourage judicial education on issues related to examiner testimony. Judges may not understand all that occurs during the exam process or the full extent of examiner expertise. *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases, Video Library I: Presenting Medical Evidence in an Adult Rape Trial*, 2002, is a useful resource for prosecutors and judges (for more information, see <http://www.legalmomentum.org/our-work/njep/njep-sexual-assault.html>). The National Judicial Education Program (NJEPP) offers this resource. It also offers a judicial curriculum on sexual assault trials.

**Promote prompt notification of examiners if there is a need for them to testify in court.** Examiners should be informed well in advance of a trial if they are being called as witnesses. It may be helpful for attorneys calling them (both prosecutors and defense attorneys) to first develop relationships with coordinators of examiner programs, if they exist, or staff that oversee examiners at the exam site. In some facilities, they may need to reach out to risk management departments, which oversee all potential areas of liability for the facility. The first time an attorney contacts the witness should not be through a subpoena. Unexpected subpoenas can cause examiners a great deal of anxiety.<sup>311</sup>

Attorneys should regard examiners they call as witnesses with respect for the knowledge and expertise examiners offer to the court. They also should work to minimize the amount of time examiners wait to testify, allowing them to return to their work as quickly as possible. Judges also should be aware of the need to give examiners priority in the scheduling of testimony.

**Encourage pretrial preparation of examiners.**<sup>312</sup> Examiners should be prepared for both direct examination and cross examination. When preparing to testify, the following suggestions may be useful to examiners:

- Although the criminal justice record includes the medical forensic report, photographs, and the results of evidence analysis, medical records are confidential in most jurisdictions. Before examiners or other involved health care providers can talk with an attorney about information in patients' medical records, those records must be successfully subpoenaed. Health care facilities and/or independent examiner programs typically have procedures in place for handling subpoenas.<sup>313</sup>
- It is critical that examiners meet in advance with the attorney(s) calling them as witnesses, in order to prepare for testimony in individual cases. Not only should they review and discuss the initial examination of the patient, but also any subsequent contacts between the patient and the examiner.
- Prior to testifying, examiners should review records of the exam and keep a log of materials reviewed.
- Expert witnesses should be prepared to educate the court, particularly jurors. They should consider terminology and descriptions that will most clearly advise lay persons in the courtroom.
- Examiners should keep in mind that anything they write about the case is potentially discoverable.
- Examiners should be prepared to prove qualifications and ready to discuss educational background, clinical experience, and prior experience as expert witnesses. They may also need to explain qualifications if they are testifying to facts in a case. They should keep a portfolio that lists education, experience, and previous appearances as a witness.<sup>314</sup>
- Examiners should understand that they may not testify as to whether patients consented to sexual contact; that is for the jury to decide. However, some jurisdictions allow expert testimony that speaks to the consistency between patients' statements and injuries rather than attempting to draw conclusions about how injuries were caused or whether a sexual assault occurred.<sup>315</sup>

During testimony, examiners should consider the following:

- The role of the examiner in court is to educate judges and juries.
- Business attire is appropriate for court appearances. Limit excessive jewelry and other accessories which can be distracting.
- Be sincere, polite, and appear in control. Being nervous is normal, even for examiners who have testified previously. Make eye contact with those doing the questioning as well as with the jury.
- Listen to the questions carefully. Allow time to compose answers before speaking. Be concise and correct in responses. Avoid terms such as "I believe" or "I think."

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<sup>311</sup> This paragraph was drawn from the video reference guide for *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases, Video Library I: Presenting Medical Evidence in an Adult Rape Trial*, 2002, pp. 17–18.

<sup>312</sup> Section partially adapted from Arkansas's *Sexual Assault: A Hospital/Community Protocol for Forensic and Medical Examination*, 2001, pp. L1–3.

<sup>313</sup> This bullet was drawn from the video reference guide for *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases, Video Library I: Presenting Medical Evidence in an Adult Rape Trial*, 2002, pp. 17–18.

<sup>314</sup> See L. Ledray and L. Barry, Sexual Assault Clinical Issues: SANE Expert and Factual Testimony, *Journal of Emergency Nursing*, 24(3), June 1998, pp. 284–87, for more discussion on qualifying as an expert witness.

<sup>315</sup> This bullet was drawn from the video reference guide for *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases, Video Library I: Presenting Medical Evidence in an Adult Rape Trial*, 2002, pp. 19–20.

- Avoid medical jargon to the extent possible. If it is needed, define its usage.
- Answer only questions that are asked. Ask the questioning attorney for clarification or to restate the question if needed.
- If the answer to a question is not known, say so. There is no reason for examiners to explain why they do not know the answer. They can ask to refer to records if their memories need refreshing.
- Let the attorney guide the questioning. Answer only questions that are asked. Ask the questioning attorney for clarification or to restate the question if needed. Do not elaborate unless the attorney or judge asks for more information.
- If it is realized that an error or omission occurred in testimony, acknowledge it politely.

Although it is most likely that examiners will be called by the prosecution, they may also be called by the defense. In either case, examiners are expected to give objective testimony. In addition to the previous tips, examiners should consider the following:

- Seek guidance from the prosecutor regarding appropriate interaction with the defense attorney prior to testimony.
- When disagreeing with the questioning attorney, do so without argument or interruption.
- Be aware of the phrasing of questions by the cross-examining attorney that may be designed to place doubt on examiner testimony. For instance, if a compound question is asked, the answer to one part may be “yes” and to the other part may be “no.” Be sure to divide answers as appropriate.
- If the questions of the cross-examining attorney include incorrect interpretation of previous examiner testimony or documentation, the erroneous information should be corrected.
- Be careful to provide consistent answers, especially if cross-examining attorneys ask the same question several times, using different wording.

**Encourage examiners to seek feedback on their courtroom testimony to improve the effectiveness of future court appearances.** For example, after the legal proceedings have been completed, examiners may wish to meet with prosecutors for feedback and evaluation of their testimony. Examiners might also want to observe other experts testify in these cases.