

NATIONAL JUDICIAL EDUCATION PROGRAM

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Understanding Sexual Violence: *The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault* **Participating Judges' Recommendations**

The following suggestions were developed by judges from more than twenty different jurisdictions who have attended the National Judicial Education Program's curriculum on *Understanding Sexual Violence*. During the training, judges were asked how they could incorporate the material they learned into their role as judges. Their ideas have been summarized here. Since laws and procedures vary, these ideas may or may not apply to your jurisdiction.

I. Throughout the Trial Process

A. General Sensitivity

- Be sensitive. Don't trivialize the issues. Avoid using demeaning language. Train and sensitize court personnel.
- Be aware of your body language so that your opinions and perceptions don't leak to the jury.
- Treat nonstranger rape as "real rape" at all stages of the proceeding, including when setting bail and at sentencing. Communicate to court staff, prosecutors, defense attorneys, law enforcement personnel, probation officers and medical personnel responsible for rape examinations your expectation that they will take nonstranger rape and marital rape as seriously as you do. Set the tone in handling these cases. Judges can communicate that rape = rape.
- In written opinions, do not use the complainant's name. Most rape victims want anonymity.

B. Access to Information

- Provide notice of pre-trial hearings to the complainant, who has the right to attend, but is not required to do so.
- Inform the complainant about the process via the victim assistance advocate.
- Allow the complainant to remain in the courtroom after testifying.

C. Scheduling

-- Appropriate Dates

- Avoid setting pre-trial proceedings or trials on the anniversary date of the alleged rape or sexual assault.
- Require all counsel to clear the dates with the complainant before setting any hearing or trial.

-- Firm/Priority Hearing and Trial Dates

- Indicate during the pre-trial phase that these cases will be given a priority setting. A speedy trial helps ensure that the complainant will proceed. Some judges advocated developing a separate calendar or an accelerated docket for these trials.
- Do not double set sexual assault cases or set them as back up trials.
- Set a *realistic* schedule for the process (which balances the rights of the defendant and complainant) and a firm trial date.
- Set high bonds, which moves the cases quickly and acknowledges the seriousness of the offense.

-- Continuances

- Many judges commented on the need to avoid continuances in these cases, especially those requested at the last minute. Some judges felt complainants should have input about whether a continuance is granted. Others advocated mailing requests for continuances to the complainant and the defendant.
- Make sure that victims' rights legislation requirements are complied with when granting continuances.

-- Delays

- Permit the complainant to be on-call to prevent waiting in the courthouse or in the courtroom.

D. Courtroom Logistics

-- Safe, Comfortable Courtroom Environment

- Provide a separate waiting room for complainants to minimize their exposure to defendants.
- Make the courtroom accessible to all participants. Allow prosecutors or victim advocates to show the complainant around the courtroom prior to trial. Ask if witnesses need special accommodations.
- Create a physically comfortable environment. Provide tissues and water on the witness stand.

- Allow the complainant to leave the witness stand during long sidebars or colloquies in chambers. Because a complainant in a sexual assault case may feel as if she is being undressed by the jurors and will imagine them recreating the rape in their minds, have the bailiff keep track of the time and indicate to the judge if the sidebar has extended beyond five minutes. This issue is particularly important for rape trials although it is a good idea for all trials involving violent crimes.
- Allow frequent recesses during the complainant's testimony, if necessary. Judges and attorneys should be patient. Take a recess if it seems useful to allow the complainant to recompose herself. Judges can comment, "It's OK for you to take your time."
- Try to arrange the schedule so that the complainant is on and off of the witness stand in one day.
- Speak to Sheriff's officers and other courtroom staff about the sensitive nature of the case to eliminate rude comments and promote security for the complainant.
- Bring the victim's and defendant's families in and advise them where they may sit and how to behave during the trial.
- Do not allow spectators to express opinions either through body language or facial expressions. Control the courtroom in these types of cases.

-- Support Personnel in the Courtroom

- Allow the complainant's counselor or support person to remain in the courtroom. (For example, Colorado has a new law that excepts a victim's advocate from sequestration and creates confidentiality.) Some judges indicated that they would allow the complainant to be seated near a support person, friend or relative who makes the witness feel at ease while testifying. The judges noted, however, that they must be careful not to send the wrong signal to the jury.
- Encourage victim advocates and support staff to be properly trained in courtroom behavior. They should not be telegraphing signals to the witnesses.

-- Public Access to the Hearings or Trial

- Some judges suggested closing hearings to protect the complainant where possible. Others advocated closing the courtroom only upon request. Judges also noted the importance of controlling trial spectators. Classes of school children should not be permitted to visit sexual assault trials.
- Some judges indicated that they would not permit cameras in the courtroom. Others recommended strictly controlling their use.

II. During the Pre-Trial Stage

A. Minimize Retraumatization, When Possible

- Judges noted that defense attorneys often use preliminary hearings and pre-trial conferences to obtain information not relevant to trial, and also to harass and intimidate complainants, so that they will not go forward for fear it will be worse at trial. The judges also noted that they are responsible for controlling these abuses.

B. Discovery/Interviews with the Complainant

- Encourage law enforcement and prosecutors to minimize the number of interviews of the complainant.
- Control discovery. Limit depositions. Some judges indicated that they would only permit one deposition of the complainant. Conduct depositions in the courtroom. If your jurisdiction allows, address the issue of the presence of the defendant at the deposition of the complainant.
- Minimize the number of times a complainant needs to come to court. Group issues for preliminary hearings so that those requiring the complainant to be present are held all at once and she does not have to attend others.
- Do not permit discovery to become a “fishing expedition.”

C. Pre-Trial Legal Issues

-- Bail

- Use the same standards in setting bail for defendants in stranger and nonstranger cases.

-- Motions Hearings

- Establish and adhere to deadlines for filing motions. Require that motions *in limine* be filed in advance and rule on them prior to trial.
- Set a schedule for early determination of rape shield issues. Be more aggressive in insisting that these matters be handled before trial.
- Enter pre-trial orders on rape shield law and prior bad acts, then the judge can “object” *sua sponte* if the attorneys violate the order.

-- Status/Pre-Trial Conference

- Hold a pre-trial or status conference to resolve pending legal issues. Set the stage for how the complainant will be treated and how the complainant will be addressed.

-- Requests for Mental Examination or Medical Records

- Scrutinize motions for mental examinations, which should be avoided. Carefully screen requests for and the admissibility of medical and psychiatric records. Respect issues of privilege when ruling on these motions.
- If you need to review the complainant's medical and psychological records, do so *in camera*.

--Subpoenas

- Scrutinize requests to subpoena the complainant for the preliminary hearing. Be on guard for possible subpoena rule violations. In ruling on a motion to quash, require an offer of proof before permitting defendants to subpoena all of the friends, family members, acquaintances, counselors and others who might support the complainant in the courtroom.

-- Gag Orders

- Consider entering gag orders at the pre-trial conference.

III. During the Trial

A. *Voir Dire*

- Have a conference with the attorneys before trial to review *voir dire* questions.
- If the judge is conducting *voir dire*, have attorneys submit proposed questions ahead of time.
- Take a more active role in *voir dire* by asking more thorough questions. Do *voir dire* in the jury room.
- Use a questionnaire to elicit sensitive information about potential jurors' sexual assault and abuse experience, whether as victims or defendants.
- Allow potential jurors to go into chambers to answer sensitive questions.
- Educate jurors during *voir dire*. Explain, for instance, that there can be rape without physical injury. Explain to jurors that this is not like a TV show.

B. Attorneys' Behavior

-- Appropriate Tone

- Give participants and witnesses the feeling that you are in control.
- Set the proper tone. Run a firm courtroom for all participants, especially during cross-examination. Enforce a "be polite" rule.

- Require everyone to address all witnesses by surnames so no one is infantilized. Insist on respectful forms of address and reference throughout the proceeding.
- Maintain the formality of the proceedings. Require counsel to use the podium. Require counsel to request leave of court to approach the complainant.
- Do not permit comments that trivialize rape and sexual assault.

--Questioning of Witnesses

- Sarcasm, as an expression of the attorney's opinion, is inappropriate.
- Exercise proper limitations and control over abusive cross-examination.
- Control the treatment of witnesses: do not allow repetition, badgering or misquoting of witnesses. Intervene if attorneys are yelling at the witness, are argumentative or are using intimidation.
- Stop inappropriate questioning immediately, such as impermissible questions related to prior sexual history. Excuse the jury and address the attorney directly.
- Limit and control objections. Do not permit speaking objections.

-- Demonstrations or Re-enactments

- Complainants should not be asked to show on their own bodies how they were touched or to demonstrate the position in which they were raped. Do not allow re-enactments. Use diagrams, dolls or expert testimony.

-- Privacy and Safety Issues

- Do not require the complainants to provide their address during their testimony.

C. Legal/Evidentiary Issues

- Allow expert witness testimony to explain victims' reactions to rape. Experts should testify regarding rape victims' patterns of behavior during the assault and after, including their reluctance to report or their delay in reporting. However, it is important not to allow experts to testify as to the witness' credibility, which is reversible error.
- Enforce the rules of evidence, including the rape shield law, thereby ensuring fairness to all parties.
- Resolve issues of the complainant's prior sexual history out of the presence of the jury, if the issue is not resolved pre-trial.
- Deal with legal issues in *in limine* rulings to minimize bench conferences.
- Draw sequestration orders as narrowly as possible.

- Allow the complaining witnesses to stay in the courtroom after their testimony. Many victims' rights statutes permit complainants to be present even if the complainants will be needed for narrow rebuttal testimony.

IV. At The Sentencing Hearing

A. Scheduling

- Set a firm date with adequate hearing time. Some judges recommended setting sentencing hearings in sexual assault cases on different dates from the regular docket to minimize the victim's public exposure.
- Invite victims to be present at sentencing -- schedule the hearing so that the victim can attend.
- Avoid continuing the sentencing hearing, unless the prosecution has not sought a victim impact statement.

B. "Real Rape"

- Treat nonstranger rape as a "real rape" in sentencing. Use the same standards in sentencing offenders in stranger and nonstranger cases.
- Set sentences commensurate with the gravity of the crime, the trauma to the victim and the danger to the community.
- Consider rejecting pleas that do not fully reflect these factors.
- Remember the psychological trauma of nonstranger rape. Some judges advocated allowing expert testimony about the victim's psychological injury at sentencing. Realize that there can be serious damage without broken bones.
- Consider the victim's emotional trauma as an aggravating factor at sentencing. Give these psychological injuries great weight as aggravating factors.
- Recognize that psychological injuries may actually cause physical injuries (*e.g.*, neurobiological damage).
- Sentence adolescent and young-adult rapists with appropriate severity to stop these rapists while they are young.
- Realize that the risk of re-offending is great in these cases.

C. General Considerations

- Comply with all victims' rights constitutional amendments and legislation.

- Make sure all sentencing materials are made part of the file, including the victim impact statement. These materials may be needed for later civil commitment proceedings as more states are passing sexual predator commitment statutes.
- Allow family members to speak if they wish, but be careful to only consider the appropriate sentencing factors.
- Require that all speakers address the judge, not each other.
- Consider the implications for restitution and civil remedies in accepting a plea bargain.
- Be sensitive to requests for restitution, for example, if the victim wants to be reimbursed for the costs of medical/psychological treatment. Refer the victim to appropriate support and intervention.

D. Pre-Sentence Investigations

- Require pre-sentence investigations for adult and juvenile offenders. Require that the PSI report address the victim's psychological trauma.
- Require that all staff doing pre-sentence investigations look for evidence of other victims or prior bad acts.
- Don't accept plea bargains prior to a pre-sentence investigation in these cases.
- Read all pre-sentence materials prior to the sentencing hearing. Be prepared for the sentencing hearing.

E. Interaction with the Victim

- Have the victim assistance advocate prepare the victim for the hearing.
- Allow the victims some control over how they make their statement (*e.g.*, through a written statement, through oral testimony, or by having the statement read by the victim or by someone else).
- Acknowledge, listen to and validate the victim. Acknowledge the impact of the assault at sentencing. Recognize that it may be hard for the victim to speak about the impact of her ordeal in front of others and give her support. If alcohol/drugs are involved, explain that it is not an excuse for the rape.
- Don't identify the victim without the victim's permission.

F. Victim Impact Statements

- Remind the prosecutor and the probation officer that you want the victim impact statement before the sentencing hearing. Require probation officers to include victim impact statements in their pre-sentence investigation reports. If there is no victim impact statement, require documentation that the prosecutor delivered the form to the victim.

- Use victim impact statements at sentencing. Acknowledge that you have read the statement. Read portions of the statement to the defendant, with the victim's permission. Keep in mind that many of these statements are personal, so get the victim's permission to read them out loud.
- Allow someone else to read the victim impact statement if the victim is unable to speak.
- Make sure the victim impact statement is made part of the record.

G. Victim's Testimony at Sentencing

- Make sure that victims are aware of their right to give a statement, even if there is a victim impact statement. If the victim is present and is not called by the prosecutor, ask if the victim wishes to make a statement.

H. Explanation of the Sentence

- Get a detailed factual basis for the crime through the defendant's own statements by questioning the defense attorney. Read the police reports into the record, or have the prosecutor read them. Ask the defendant if he disagrees with anything said. If the defendant disagrees with statements made, ask him to explain why the victim would lie.
- Explain the sentence to the victim and give the reasons for the sentence on the record. Include aggravating and mitigating factors. Have a prepared statement explaining the sentence.
- If the defendant is sentenced to probation, assure the victim that probation will be revoked if need be. Explain the level of supervision.
- Advocate stringent community monitoring for unincarcerated sex offenders.
- Make sure the victim has been informed about any plea bargain.
- Ensure that the victim has approved any plea bargain.
- Consider what you would do if a victim objected to a plea bargain. One suggestion was to bring the victim in ahead of time and give the victim a week to think about the plea.

I. Post-Sentencing Procedures

- Alert the victim to the possibility of a request by the defendant to modify the sentence. Have the prosecutor/victim advocate notify the victim of the hearing and explain the victim's right to attend.
- Consider denying bail pending appeal.

V. Outside the Courtroom

A. General Policies

- Communicate a user-friendly attitude and victim-sensitive views to the community, while maintaining the necessary impartiality. Foster a reputation for fairness and openness.
- Continue to participate in training as a judge to increase your knowledge and awareness.
- Work to change old perceptions and approaches just as reformers changed police protocols such as “walk around the block” for batterers.
- Encourage the press not to use complainants’/victims’ names.

B. Within the Legal/Law Enforcement Community

- Help create a formalized task force to talk about specific issues and problems in rape law or rape cases, beginning with the assumption that everything is open for discussion. For example, the presiding judge of the Sacramento Superior and Municipal Courts established the criminal justice cabinet to take up specific issues of domestic violence, using an interdisciplinary model. The cabinet members included the head of every criminal justice unit, such as the police, probation office, sheriffs’ offices, prosecutors, public defenders, and emergency room physicians.
- Encourage training for all legal personnel. Ensure that experienced people handle sexual assault cases. Appoint competent counsel to represent defendants to ensure fairness to defendants and reduce revictimization of complainants. Some judges also advocated appointing counsel for complainants to protect their privacy interests.
- Promote victim-witness assistance programs to educate the public and provide counseling and guidance for victims. Enhance court security and provide facilities where victims can wait.
- Work with the victim-witness office or other community resources to develop a referral system for victims.
- Encourage police departments and prosecutors to establish specialized sex crimes units and vertical prosecution so that the victim has one contact person.
- Invite the bar to a conference such as this one. In training sessions, engage in dialogues with members of the bar about methods of ensuring fairness and increasing sensitivity.
- Encourage appropriate legislative changes. Encourage revision of sentencing guidelines to take account of psychological injuries. Amend the victim’s rights statute to give the victim notice of any impending plea agreement. Develop protocols for new legislation, such as the sexual psychopath statutes and Megan’s law.

- Encourage the legislature to provide funding for: (1) DNA, HIV and STD testing of all defendants convicted of felonies; (2) medical treatment for victims, including repeat STD and HIV testing at 3-, 6- and 12-month intervals; and (3) PTSD (Posttraumatic Stress Disorder) counseling for victims.
- Talk to jurors after trials. One judge stated that she sends all jurors a letter informing them of her sentencing decisions.

C. Community Education

- Participate in community programs, such as:
 - Teaching school programs for faculty members and for children;
 - Inviting classes to the courtroom to observe and learn under appropriate circumstances; and,
 - Conducting court-related classes.
- Engage in public speaking/public education about preventing sexual assault and relevant legal issues. Participate in educational opportunities with other professionals.
- Support efforts to address violence. Foster awareness of non-stranger and spousal rape. Focus on the need to report sexual assaults.