• *Redefining the role of attorneys and the bar.* The legal marketplace is changing quickly and radically. Legal services are offered on the Web, unbundling is developing as an alternative to traditional full representation, ethics rules are in flux, many litigants avoid what they perceive to be the high cost of legal services by self-representing, and others proceed pro se because they think their case is simple enough to do so. The response of lawyers and the organized bar will influence and be influenced by these and other developments.

It has been a busy three years since the publication of *Meeting the Challenge of Pro Se Litigation.* Like the court futures movement of the early 1990s, pro se litigation is an issue whose time has come. It gains power from already existing initiatives in enhancing public trust and confidence in the courts, improving access to justice, building court-community collaboration, and providing excellent customer service to court users.

But as Arthur Vanderbilt said many years ago, reform is no sport for the short-winded. Effectively meeting the challenge of pro se litigation is a long-term effort, requiring overcoming barriers, questioning the usual way of doing things, dealing with the complexities of collaborating with other stakeholders, testing innovative approaches, and most of all, persevering.

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Meeting the challenge of rape trials

by Lynn Hecht Schafran

Rape cases present a unique challenge for the courts. Judges responding to a recent survey reported that compared with other types of cases, sexual offense cases are "more difficult... to preside [over] from a legal and technical standpoint, a personal and emotional viewpoint, and a public scrutiny and public pressure perspective."[1] To help judges meet this challenge the National Judicial Education Program has released a video/self-study guide version of its highly regarded curriculum, *Understanding Sexual Violence: The Judge's Role in Stranger and Nonstranger Rape and Sexual Assault Cases.* Judges can use this video version individually, on their own time, as well as in small groups and at judicial colleges.

Every litigator knows that a trial is about storytelling. The winner is the party whose story best fits the decision maker's understanding of how the world works. Rape victims are particularly disadvantaged because their experience so rarely conforms to the story of rape imprinted on the public mind. In the stereotyped story, rape is an infrequent crime committed by a sex-starved stranger who leaps from the bushes with a knife. The victim resists to the utmost, sustains visible physical injuries, and immediately reports to the police. In reality, as documented in the 1992 federally-funded *Rape in America* study, the vast majority of the hundreds of thousands of rapes committed each year are perpetrated by someone who knows the victim, has full access to consensual sex, and uses no weapon.[2] The victim does not resist because she fears serious physical injury or death. She sustains no visible injuries but her psychological injuries are profound. If she is one of the small number of victims who reports the rape, her report is delayed.

This chasm between perception and reality has important repercussions in the courts. While no court intends to retraumatize a victim, a judge's lack of factual information about rape can have just this result. For example, a judge unfamiliar with the reasons so many victims do not resist may disbelieve the victim and communicate that disbelief to the victim and the jury, either directly or through body language. Judges need to know that many rape victims experience psychological states known as frozen fright and dissociation. In the first the victim is paralyzed with fear. In the second she experiences the assault as if it were happening to someone else and becomes completely passive. Still other victims use nonresistance as a deliberate survival strategy to avoid physical injury beyond the rape.

Jurors' misperceptions about rape victims' resistance highlight how critical it is that judges allow or conduct a thorough *voir dire* to remove jurors so wedded to rape myths that they cannot apply the law fairly. Although resistance is not an element of the crime, in a study of 331 Indiana rape case jurors 32 percent believed that a woman's resistance is a critical factor in determining the rapist's culpability and 59 percent believed a woman should do everything possible to repel her attacker.[3]

Misperceptions about the behaviors of rapists are also widespread. Contrary to the stereotype, rape is not an impulsive act but a planned crime. Nor is it the result of too much to drink. Rapists use alcohol as a disinhibitor that frees them to do what they want to do. But when rape is perceived as simply the impulsive act of a young man who drank too much, sentences do not reflect how dangerous these offenders really are.

Inappropriate sentences may also result from mistaken assumptions about who commits rape. Sex offenders are often well-educated, well-employed, well-dressed, and have no

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A detailed description of *Understanding Sexual Violence: The Judge's Role in Stranger and Nonstranger Rape Cases* can be found at www.njep.org .The video curriculum can be borrowed from each state's judicial educator or purchased directly from NJEP. For more information contact NJEP at 212/925-6635 or njep@nowldef.org.

1. Bumby & Maddox, *Judges' Knowledge About Sexual Offenders, Difficulties Presiding Over Sexual Offense Cases, and Opinions on Sentencing, Treatment, and Legislation,* 11 SEXUAL ABUSE: J. RES. AND TREATMENT 305 (1999).

2. CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 5 (1992).

3. La Free, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989).

4. Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists,* __ VIOLENCE AND VICTIMS__(forthcoming 2001).

5. Rehnquist, *2000 Year-End Report on the Federal Judiciary,* THE THIRD BRANCH, January 2001 at 1, 6.

prior records. Because they do not look like the "typical" criminal, they are not perceived as dangerous. Yet research on what are called "undetected rapists," male college and university students who freely acknowledge committing acts that meet the legal definition of rape but who have never been reported much less prosecuted, documents that the majority are serial offenders, and many have committed other interpersonal crimes such as domestic violence and child abuse.[4]

Sentences can also be skewed by the justice system's failure to appreciate the "invisible injury" of rape. While victims rarely sustain serious physical injury, rape takes a terrible psychological toll which may last a lifetime. Many victims self-medicate their psychological pain with alcohol and drugs. About 13 percent become suicidal.

Educating judges

Chief Justice William Rehnquist recently observed that because judges face cases that straddle the intersections of law and the physical, biological, and social sciences, judicial education is essential to "help judges sort out relevant facts from the panoply of information with which the adversary system bombards them... [This] contributes to the independent decisionmaking that is the judge's fundamental duty."[5] To provide judges with the medical, psychological, and social science information that is essential background for rape cases, and to suggest ways to minimize retraumatizing the victim without undermining defendants' rights, the National Judicial Education Program (NJEP) in 1994 published a model curriculum on *Understanding Sexual Violence*, which has been presented in more than 20 states. Continued support from the State Justice Institute and the Department of Justice, Office of Justice Programs, Violence Against Women Office has now enabled NJEP to make this information even more accessible by turning its two-day "live" presentation into a four-hour video with self-study guide that can be used for independent study and in small or large groups. The 40 trial and appellate judges from all parts of the country who piloted this video curriculum gave it high marks. Colorado District Court Judge Robert Lowenbach wrote

> "[T]he experts were very knowledgable and ...the Judge panelists' comments were thoughtful and thought provoking....Having just recently assumed a criminal assignment, I learned a lot."

Montana Supreme Court Justice William Leaphart commented,

> "The program as a whole is excellent, in particular educating the audience about nonstranger rape and all the misconceptions about rape that pervade the perceptions of ... jurors and judges."

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Viewpoint

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"no." These large entities will drive down the costs of legal services, enabling many more people to obtain professional help. They will result in higher-quality work and better outcomes for clients. That lawyers will not ultimately control the practice does not really matter, since the marketplace will demand both quality and loyalty to client.

I believe, however, that there are significant dangers in a legal profession dominated by a small number of economically powerful players, including:

Local monopolies. Since the legal market remains highly geographically fragmented, there is a real risk that in any one jurisdiction a single corporate entity will effectively control everything—access for lawyers, access for clients, the pricing structure, and the quality of practice. The effects could be disastrous.

Lack of autonomy. Attorneys dependent on large entities and with little choice between these entities will find their loyalty to their clients diluted. In particular, they may be forced to accept pricing mechanisms that inhibit quality practice.

Lack of innovation. Highly capitalized systems, as we know from industry, are ultimately very conservative. With automation, routine practice will be much easier and of higher quality, but also likely to be much more expensive to change. It is likely, therefore, that the legal professional will be discouraged from developing innovative theories or techniques.

Surrender to the market. In the end, however, what I fear most is the final surrender to the market. Most of us became lawyers because we believed—and still believe, on our better days—that the system ultimately worked to improve the world. If the bulk of legal practice moved through a small number of economically powerful players, it would be only a matter of time before those players moved to reshape the legal system in their interest—a *business* interest, not a public interest. (Indeed, even today, it is hard to deny that bar associations tend to defend their members' economic interests, rather than a broader public interest.) Issues of court reform, access to justice, legal procedure, and even the underlying substantive rights would become captive to the economic interests of those powerful economic players.

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If we agree that technology can offer huge improvements in the delivery of quality legal services, but that there are dangers inherent in economic consolidation, then we must find ways to structure the profession to give lawyers and clients the benefits of technology while minimizing the dangers of centralized power. In short, we must transform it into the customer-driven, public interest profession that it holds itself out as being.