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# I. INTRODUCTION

Victimization in the lives of people with disabilities is a real and potent threat. Crimes facing people with disabilities include a vast category of offenses ranging from financial exploitation, to emotional abuse, sexual abuse, simple assault and even murder. Although current research on the prevalence of violence against individuals with disabilities is lacking, the research that is available is startling. For example:

1. Children and adults with disabilities experience violence and abuse at least twice as often as their non-disabled peers. When considering multiple perpetrators, research suggests that people with disabilities may be abused 3 to 10 times as often as their peers without disabilities. (Sobsey and Doe, 1991).
2. A study of psychiatric inpatients found that 81% had been physically or sexually assaulted, and that a person with mental illness is 24 times more likely to be a victim of rape. (Jacobson & Richardson, American Journal of Psychiatry, 1987). It is reported that 68% of outpatients have been victimized by physical or sexual assault (L'Institut Roeher Institute, 1994).

Staff at a residential facility discovered that a 21 year old, who was profoundly retarded, was pregnant. The facility requested a gynecological exam of 35 women residents, ages ranging from 13-55 years old. Sixty nine percent of the residents were profoundly retarded, and 31% had some self care. The results found two residents with Chlamydia, a sexually transmitted disease, and 20% with healed genital trauma consistent with prior penetration. (Elvik, Berkowitz, 1990, recalculated by Dr. Marilyn Kaufhold, 2000).
3. Research consistently shows that women with disabilities, regardless of age, race, ethnicity, sexual orientation or class, are assaulted, raped and abused at a rate 2 times greater than women without a disability. (Sobsey, 1994; Cusitar 1994). Women with disabilities are more likely than other women to be victimized, to experience violence that is more severe and prolonged, and to suffer more serious and chronic effects from that violence. (Sobsey, 1994).
4. Only 3% of sexual abuse cases involving people with developmental disabilities will ever be reported. (Valenti-Hein & Schwartz, 1995).

The purpose of this curriculum is to equip prosecutors with the knowledge and tools needed to pursue cases involving victims with disabilities. We hope to provide insight into the complexity of prosecuting a case involving a victim with a disability, while providing practical advice to be used when assessing the case. This curriculum is designed to provide prosecutors with basic knowledge to enhance disability awareness, to learn the impact a disability may have on an individual's ability to interact with the criminal justice system, and impart the skills necessary to ensure appropriate and nondiscriminatory responses to victims who have a disability. The goal of this training is not to familiarize the trainee with every type of disability, but to offer practical tips and strategies to enable law enforcement officials to vigorously pursue

cases where the victim is an individual with a disability--thereby creating an accessible criminal justice system and ensuring justice for all.

## **RISK FACTORS LEADING TO ABUSE**

Several studies have identified the following main risk factors for violence against people with disabilities:

1. Negative public attitudes about disability.
2. Reliance of people with disabilities upon others for care.
3. Lack of support services available to people with disabilities.
4. Social isolation of people with disabilities and lack of opportunity to develop social skills.
5. Nature and severity of disability.
6. Gender.
7. Poverty and other economic factors affecting people with disabilities.
8. Inability to escape the abuse.
9. Lack of control or choice over their personal affairs.
10. Lack of credibility of people with disabilities when they report or disclose.
11. Socialization of people with disabilities to be compliant.
12. Alcohol and drug abuse by perpetrators.
13. Desire for acceptance.
14. Inability to identify actions against them as actual crimes.
15. Clustered living situations.

Prosecuting a sexual assault case when the victim is a person with a disability can be challenging and time consuming. Stereotypes and myths may effect the perception of the police, prosecutor, and/or jury on the ability of the victim to tell the truth or be an effective witness. The victim may have memory deficits which effect his/her ability to recall the crime. When the person with a disability is a victim of sexual assault, reporting of the crime may not occur until some time after the event because the victim did not have the vocabulary to identify the assault. Whatever the issue is, there is no doubt you will face many obstacles when pursuing a case where the victim is a person with a disability.

## **OVERCOMING OBSTACLES**

Investigating a case where the victim is a person with a disability can produce unexpected obstacles which must be overcome for a successful prosecution. Cases involving victims with disabilities often lack witnesses or physical evidence. Victims with disabilities are often mistakenly assumed to be incompetent witnesses. The victim may have a communication problem or memory impairment. For example, a case involving a victim with mental illness presents unique and difficult challenges for a prosecutor. Too often, the allegations of a person with mental illness are explained away as delusions. The existence of a severe mental illness places the prosecutor in a position where they must decide if the event actually occurred, or is a by-product of the mental illness. To add to that challenge, the mental illness label creates visions of untrustworthiness in juror's minds. What can a prosecutor do to overcome these challenges?

- Meet with the victim at the earliest possible time. Look for consistency in story

and corroboration of facts.

- Speak to caretakers, family members and other interested persons to determine the severity of the mental illness, and the existence of other reports of abuse or criminal allegations made by the victim.
- Through use of an expert, educate the jury, as well as the court, on the symptoms of the mental illness, and how the mental illness effects the victim's coping with the crime, ability to fabricate, etc.
- Ask questions of the jury during voir dire in order to detect prejudice or bias against people with mental illness.
- Utilize a SANE examination in order to determine if any physical evidence exists.

Additionally, in order to overcome the obstacles inherent in sexual assault and domestic violence cases involving victims with disabilities, the investigation and prosecution should minimally include the following components:

1. Experienced and specialized prosecutors;
2. Experienced and specialized investigators with training on investigations involving people with disabilities;
3. Vertical prosecutions by specialized sexual abuse units within county prosecutor's offices;
4. Cooperation between law enforcement, Adult Protective Services, Division of Developmental Disabilities, and other interested agencies; and
5. Utilization of all techniques and methods at one's disposal, including reliance upon professionals (experts) from other disciplines.

## **PEOPLE FIRST LANGUAGE**

Language is an important factor in the way information is communicated. The words we chose and the way we communicate can relay more about our attitudes and prejudices than we might realize. The use of "People First Language" represents a change in how language has been used as an identifier in the past, and when used, communicates respect for the person with a disability. When referring to an individual with a disability, we refer to the person first and then to the situation, condition or disability--if it is relevant. Once we become attuned to the preferred way of referring to individuals, the old habits become truly inappropriate.

The proper use of words and language will aid an investigation. If the victim feels respected and valued, she/he may feel empowered to cooperate with the investigation. On the other hand, a victim who is stereotyped, talked down to, or treated like a child, may feel humiliated and disrespected, which could lead to their lack of cooperation and participation in the investigation.

By using terms, such as “suffering from” or “afflicted”, we are continuing the notion that people with disabilities are different and of less value than other people. This language devalues a person and will directly affect the way individuals with disabilities are treated. In 1998, in Fort Worth, Texas, Robert Neville, Jr. was convicted of killing a young woman with a cognitive disability by using her as “target practice.” On the stand, Neville justified the shooting by stating: “She was suffering anyway. So I guess we just gave her a back door.” Neville’s belief that the victim was “suffering” because she had a cognitive disability allowed him to devalue her as a human being, and treat her as less than human by using her for “target practice.” Be mindful of the underlying painful message communicated to victims by comments such as “I can’t believe they did this to someone like you”; “She’s disabled and he raped her anyway”; or “To steal from a blind man. That’s got to be the lowest.” The message is that one considers people who have a disability as “less than” complete human beings.

Language can devalue a person. Devaluation is expressed in the language that the media uses to describe crimes against persons with disabilities. For example, in the case of a 12 year old girl from Washington, DC, the newspaper accounts consistently referred to the crimes against her as abuse rather than rape, assault and torture although she had been repeatedly penetrated with a broom handle, bitten and tied up. In another case, a lawyer arguing for leniency for a health care worker who had murdered several persons with disabilities in a hospital stated, “The punishment should be equal to the crime. These people who died didn’t really live. Their lives weren’t worth anything. Why should a person who is a real person be punished for the deaths of nonpersons?” If given the opportunity to speak to the public or media, make sure you use appropriate language, and stress the egregiousness of crimes committed against people with disabilities.

It is especially important to use people first language when communicating with a jury or judge. Although an average juror may not notice if you utilize people first language, they will definitely notice if you refer to the victim in a disrespectful or dehumanizing manner. While we cannot escape the degrading terminology included in the law, such as “mentally defective”, we can minimize the effect by controlling our use of language to make sure the victim is respected and valued as an individual human being.

## **PEOPLE FIRST LANGUAGE**

### **People First Language**

people with disabilities  
people who experience disabilities  
person who has developmental disabilities  
person who lives with disabilities  
person who uses a wheelchair  
person who is deaf or hard of hearing  
person who is blind or has low vision  
she/he is of short stature  
accessible or designated parking  
person with a mental illness

### **Labels Not to be Used**

the disabled  
the handicapped  
the retarded or mentally retarded  
crippled  
wheelchair bound, confined to a wheelchair  
the deaf, deaf and dumb  
the blind  
dwarf or midget  
handicapped parking  
the mentally ill

### **Words or Phrases to Just Plain Avoid**

special  
special needs  
afflicted  
suffers from  
impaired  
charity case  
birth defect  
mongoloid  
kids or children (when referring to adults)  
differently abled  
ill  
crazy  
mute  
physically challenged  
retard  
mental case  
slow

List distributed by Disability Services ASAP (A Safety Awareness Program) of Safe Place, Austin Texas, 2002

## II. OVERVIEW OF DISABILITIES

### PHYSICAL DISABILITIES

A physical disability is a condition which may effect a person's ability to walk or move freely, touch, taste, see, smell or hear. A person who has a physical disability may use crutches, a wheelchair, prosthesis, a brace or walker to aid their movement, or they may not use any type of mobility aid. A physical disability may not be apparent immediately, as in the case of epilepsy. A person can be born with a physical disability or acquire the disability through an accident or illness. There is no clear definition to encompass all the different types of physical disabilities, or how a particular disability may effect each person's life.

A person with a physical disability may depend on another person for care. That dependence on another person may prevent the victim from seeking help or leaving a violent relationship. Even if the person does decide to leave the relationship, there are often many barriers that they face. Often there is no place for a victim with a physical disability to go since many programs and/or shelters cannot meet the needs of attendant care and/or are not accessible for wheelchairs or other needed services, such as sign language interpreters.

I knew at this point my life was in danger and I wanted out of this relationship. At the same time, this was the man that I thought loved me and was helping me with some of my personal care services. I thought, "If I leave him and hire an attendant to come in, what would someone do to me who I didn't know, if he was already doing these things to me?"

Kimberly

When communicating with a person with a physical disability, it is important to note that there may be certain accommodations which must be met, and the victim should be asked what they need to effectively communicate with law enforcement. For example, a victim may require transportation, or an accessible bathroom. Further, a person who is deaf or hard of hearing may require a sign language interpreter. If a person who is deaf or hard of hearing requests a sign language interpreter, one must be provided and the cost should be covered by the Prosecutor's Office. N.J.S.A. 2B:8-1; N.J.S.A. 34:1-69.10. A qualified interpreter facilitates communication between hearing and persons who are deaf/hard of hearing. In New Jersey, the interpreter must be certified by the Registry of Interpreters for the Deaf to be considered qualified to interpret.

NJ Division of the Deaf and Hard of Hearing  
Interpreter Referral Service can be reached at:  
1-800-792-8339.

Also, remember that a person with a speech impediment may be more difficult to understand on video or audio tape. Do not rely on the video or audio tape to determine whether that person can communicate effectively. Meet with the victim at the earliest possible time in order to assess the extent of the communication difficulties first hand.

### MENTAL ILLNESS



More than 5 million Americans experience an acute episode of mental illness. Mental illness can be described as a disorder of the brain that impacts a person's thoughts, mood, feelings, or ability to relate to others or cope with ordinary functioning. However, the person does not necessarily have lower intelligence. Persons of any race, religion, age, income status and gender can experience mental illness. All of the major mental illnesses are biological brain disorders. For many individuals, mental illness can be treated with medication, therapy, and/or other support. Having a mental illness or psychiatric label can be stigmatizing if the person has unpredictable behaviors or is perceived to have inappropriate social behaviors. Mental illness and psychiatric labels are complex and can be challenging to service providers, families, community members, and the person experiencing a mental illness episode.

Communicating with a person experiencing mental illness can be challenging. The person may not trust the police due to previous encounters or fear of strangers. The person may have been repeatedly victimized and deceived by family members, caregivers, medical personnel, etc., and have a particularly hard time trusting you. The person may be trying to hide the abuse for fear of institutionalization, loss of child custody, or fear of not being believed. In order to facilitate communication with a person with mental illness, remember the following:

1. It is important to remain calm, patient and focused when speaking to someone with mental illness.
2. Your comfort level is highly important when communicating with a person with mental illness. Be aware of your posture, eye contact, and personal space with the individual. Take your cues from the individual, and be flexible in adapting your communication style.
3. If you are having difficulty understanding a person, listen carefully, and wait for them to finish speaking before clarifying. It is not helpful to pretend you understand. Clarify by asking short yes/no questions or by repeating what you heard. Listen attentively as the person responds.
4. Be honest with feedback and respectful when setting limits with the individual. Make sure that you provide clear limits about what services/supports you can and cannot provide. Also, make sure the victim understands the limits of your services, and refer them to other services which may be able to help.
5. Have one person ask the questions. The environment should be quiet, calm and free of distractions. This effort will allow the person to remain calm and focused.

## **DEVELOPMENTAL DISABILITIES**

New Jersey law, N.J.S.A. 30:6D-3, states that a developmental disability is a chronic disability which:

- is attributable to a mental or physical impairment;
- is manifested before the age of 22;

- is likely to continue indefinitely;
- reflects the person's need for a combination of special interdisciplinary or generic care, or other services, which are lifelong or of extended duration, and are individually planned for; and
- results in substantial functional limitations of three or more of the following:
  - self-care
  - receptive and expressive language
  - learning
  - mobility
  - self-direction
  - capacity for independent living
  - economic self sufficiency

Prosecutors should be aware, however, that this definition is more expansive than the definition for mental retardation found in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed. (DSM IV-TR).

Developmental disabilities include cognitive disabilities, autism, cerebral palsy, epilepsy, spina bifida and other neurological impairments where the above criteria are met.

## Discussion Points

- **Think of your office structure. What structural barriers exist for a person in a wheelchair? What procedural barriers exist for a person with a disability in accessing your services? What specific changes can be made to accommodate people with disabilities?**
- **You receive a call from a municipal police department looking for advice. A woman who is deaf has come into the department looking distraught. She is able to communicate by writing down her words, but has asked for a sign language interpreter. The department does not think it is needed since the woman can communicate through pen and pad, but they ask for your advice. What do you tell them? At what stage of an investigation is a sign language interpreter needed?**

## III. BUILDING YOUR CASE

## INTERVIEW

The victim should be interviewed at the earliest time possible. For victims with developmental disabilities, the interview should be scheduled in a distraction free environment, such as the county child advocacy center. You can expect the interview with the victim to be time consuming, and depending on the severity of the disability, challenging. If possible, only one interview should occur, and it should be videotaped. The video tape will help you assess the case at the onset, although it should not take the place of meeting with the victim in person. Additionally, the videotaped interview captures the interview process and can be used to dispel any defense argument that the victim, because of the disability, is suggestible to saying or believing certain things happened to them and is relaying information the professionals have planted in their head during the interview process. (See, State v. Michaels, 136 N.J. 299 (1994) for discussion of “taint” hearings in child sexual abuse cases).

As a prosecutor, you should collect as much information as possible on the specific disability before meeting with the victim. Extra time and effort may be necessary to build the rapport needed to gain the trust of the victim. This extra time with the victim will also help you to evaluate the person’s functioning level and any communication difficulties a person may have. The valuable information you gain about the victim during your meetings with him or her will also give you the tools needed to effectively communicate with the person during direct examination.

Since interviewing requires persons with developmental disabilities to utilize the skill areas in which they are most deficient (language, abstracts, concepts, and short-term memory), it is likely to be a frustrating event for all. An investigation into a suspected sexual assault will require an interview with multiple purposes. The obvious purpose is to ascertain what happened. During that interview, you will also want to preliminarily evaluate the victim to determine if he/she could consent to the sexual acts, and if he/she is competent to testify. Initially, you will also want to determine the victim’s sexual knowledge or exposure, and if there were any previous instances of sexual assault or encounters.

The following are some suggestions for increasing the validity of the information secured through an interview or testimony of a person who is developmentally disabled.

- Avoid or simplify conceptual questions. When referring to time concepts, use everyday events to mark time rather than calendar dates and clock time. “Four o’clock PM on May 25, 2004” may have little meaning for a person with a cognitive disability, but terms such as “after school” and “on the way home from work” are more concrete and allow an interviewer to gain the same information. Ask “who”, “what” and “where” questions. “How” and “why” questions may be more difficult to understand.
- Use terms that are meaningful to the interviewee. Avoid technical terms, e.g. ejaculation. For example, when discussing a sexual assault case, anatomical terms may be unfamiliar to a person. It is critical to use terms the victim is familiar with. Ask family members, caregivers, friends, the victim, etc. which terms fit which body part. Do not assume the

### Questions that work:

Tell me what happened?  
When did this happen?  
Who was with you?  
What did they look like?  
What color shirt was he wearing?

victim's use of a word indicates that he/she knows what that word means or that both of you mean the same thing. For example, "he tickled me" or "he bothered me" could have two totally different meanings for a person. Additionally, use pictures or anatomically correct dolls which gives the victim a tool to demonstrate that which they may be unable to speak about clearly. Be mindful if the pictures or dolls are too distracting to that particular victim, and remove them if necessary.

- Avoid compound questions. "Did you walk home and see Dave on the street?" should be broken into two sentences. Avoid legal jargon (defendant, perpetrator, sexual assault, etc.) and multiple choice questions.
- If possible, avoid yes-no questions. They foster acquiescence that will be difficult to detect until damage is done. Many individuals with developmental disabilities will answer "yes" repeatedly to questions that they do not understand. Such responses will lead to false impressions. This happens because the person with a developmental disability is trying to please you by telling you what he/she thinks you want to hear. Many people with disabilities have been taught through experience to please people in authority. The individual with a developmental disability also may not want to appear that he/she does not understand the question by routinely giving a "yes" response. Never ask the victim to take a guess, and remind the victim to only talk about what they know happened through personal experience. Tell the person that it is okay to say "I don't know" to a question, if they really do not know.
- It is critical to gain the trust of witnesses and victims before formal interviewing takes place. Before the formal interview, ask the victim questions about their interests and activities. In the case of Nicki, a 21 year old cognitively disabled woman, the Prosecutor visited her home on two occasions before asking any questions about the alleged crime. When the time came to talk about the crime, Nicki was less reluctant. In addition, the interviewer gained a solid awareness of her level of understanding and communication. Pay attention to affect (feeling), non-verbal cues, over compliance, resistance and body language. As you show them you are caring and want to understand, they will be more likely to open up to you.
- Utilize the knowledge of professionals and individuals who know the person with the developmental disability before you begin to interview. Prepare your questions in advance and review them with a person who has knowledge of the individual's functioning so they can help rephrase questions in a way that is likely to lead to a more valid response.
- Get professional assistance when you suspect a person has a developmental disability. The person with a disability may have been "classified" for special education purposes. This is based upon an Individual Education Plan (IEP) that must be developed annually, with an assessment by a school psychologist performed every three years. The special education teacher and school psychologist can provide invaluable free assistance with parent/guardian/victim consent. Many university psychology and special education programs have faculty who are experts in developmental disabilities. Most faculty at public/state universities are expected to provide public service. There are many individuals intimately involved in seeking to promote equal justice for persons with developmental disabilities, and would be willing to help for little or no fee.

- Provide a distraction free environment. Try to use your County's Child Advocacy Center for the most comfortable and accommodating space.
- Seek multiple sources of information to confirm responses. When interviewees are having difficulty explaining an event, ask them to show you what happened. Anatomical drawings or dolls can be used for the individual to explain a sexual act. If you are unsure if the person really understands you, ask him or her to repeat it in their own words.
- Conduct interviews quickly after the initial report. This alleviates memory problems and prevents charges that others unduly influenced the victim's statements.
- Avoid ending with a question, such as "He told you not to tell, didn't he?" Avoid double negatives, negative stereotypes and words with more than one meaning. For example, the County Prosecutor was introduced to a sixteen year old sexual assault victim who is developmentally disabled as the "big cheese." After meeting the prosecutor, the victim stated, "He doesn't look like a cheese to me." She was unable to understand the use of the word "big cheese" to mean boss, and not the actual food.
- Avoid the use of relationship words, such as "your stepfather" and use the name the victim calls the alleged perpetrator. Use names of persons, places or things, as opposed to pronouns or titles which could lead to a misunderstanding.
- Always alert the victim to the topic you are inquiring about. Avoid shifting back and forth between topics without signaling to the victim that you are doing so. Give the person time to answer the question before rephrasing it.
- Speak directly to the person, make eye contact and be patient.
- Treat adults like adults, avoid words and phrases used when speaking to children.

## **CORROBORATING EVIDENCE**

When the victim is a person with a disability, sometimes the best evidence in a prosecution is that which bolsters the victim's credibility. Corroborating evidence, such as other witnesses, experts, medical examinations (SANE exam) and other types of physical forensic evidence can make or break your case. Additionally, corroborating details may help you prove an element of the sexual assault, such as whether or not the victim can refuse a sexual encounter, or how well a perpetrator knew the victim.

### **Signs of Sexual Abuse**

Individuals who may be unable or too frightened to talk about sexual abuse may exhibit a number of behavioral and/or physical signs. Time should be taken to question caregivers, friends, parents, teachers and staff to ascertain whether or not the victim's behavior changed after the abuse. Evidence of behavior patterns which show emotional distress will enhance the victim's credibility and corroborate his/her testimony. Behavioral signs of abuse include:

- Extreme changes in behavior such as withdrawal, angry outbursts, masturbation, or sexual aggression towards others.
- Recurrent nightmares, disturbed sleep patterns or fear of the dark.
- Regression to more infantile behavior such as bed-wetting, thumb sucking or excessive crying.
- Unusual and new interest in or knowledge of sexual matters.
- Expressing affection in unusual and inappropriate ways for them.
- A sudden change in clothing habits, e.g., layering of clothing, sleeping fully dressed or disrobing in public.
- Fear of a person or an intense dislike at being left somewhere or without someone.
- Change in personal hygiene.
- Eating disorders, stomach aches or a sudden increase or decrease in eating.
- Fear of being touched, or shying away from being touched.
- Alcohol or substance abuse, or exhibits stress related illness (physical complaints).
- Hesitates to speak with others around, exhibits distrust of others, fears being touched, or shies away from being touched.

In May, 1994, a 21-year old woman with Down Syndrome (Nicki) was raped by a 21 year old neighbor. It was not until September, 1994, that the incident was reported to police. The long delay illustrates some of the problems of reporting encountered by individuals with cognitive disabilities and their caregivers. At the time of the event, Nicki did not know how to report the incident to her family. After the incident, she told her parents, "The boy bothered me." Her parents assumed this was a continuation of the occasional taunts she had endured and counseled her to ignore him. Nicki's reaction to the assault grew increasingly severe, and her parents, friends and neighbors started noticing significant changes in her behavior. She no longer rode her bicycle around the neighborhood, and she began relating details of the assault in a disjointed and confusing manner. She was no longer outgoing. The officer assigned to the case took the time to learn about Nicki's disability, and her behavioral, physical and social patterns. The Assistant District Attorney assigned to the case immediately sought assistance from an expert in developmental disabilities who provided her with invaluable information and guidance. The prosecution team learned that Nicki's troubling behavior began after the alleged sexual assault, and used that knowledge to help corroborate Nicki's testimony. The prosecution team successfully convicted the perpetrator, depending largely on Nicki's testimony.

- Avoids specific settings or specific people.
- Shows signs of depression, poor self esteem or self destructive behavior.

### **Witnesses**

The list of witnesses should not be limited to those who may or may not have witnessed the incident. It should also include any person who may have noticed a change in behavior, habits or characteristics on the part of the victim. The list of witnesses should include teachers, social workers, therapists, caretakers, supervisors, friends and neighbors, as well as any other person who could corroborate the victim's story. Corroboration of the victim's story may also be found by questioning people who knew the suspect had access to the victim.

A witness who is vitally important to the case is the person who was first told about the assault. Ask that person exactly what was said. The information will be important for you to assess the credibility and truthfulness of the victim's story. It may also be admissible in a sex crimes trial as *fresh complaint* evidence.

### **Access to Records**

Medical records, school records, and other records are particularly important in cases involving a person with a disability. The records may tend to show the person's ability or inability to consent to sexual acts. They will show the nature of the disability, and how it affects this particular person. If the victim is or was a student, the school records should include the Individualized Education Plan (IEP). The IEP includes an annual review of the student's academic and social functioning, along with IQ test results and review by school psychologist. The IEP can be helpful as you assess your case, even if the victim has been out of school for a number of years. To access the IEP, try to obtain consent through the victim or guardian. If consent is not received, a court order will be necessary.

### **HIPAA**

Since the implementation of the Health Insurance Portability and Accountability Act of 1996 (hereinafter referred to as "HIPAA") getting a victim's consent to release their medical records is more important than ever. 42 U.S.C.A. 1 *et seq.* HIPAA applies to "covered entities" such as health care plans, providers, and clearinghouses and may create an obstacle in accessing the victim's medical records. Hospitals, psychiatric facilities and facilities for people with developmental disabilities are covered entities under HIPAA. HIPAA protects "individually identifiable health information" which includes any information which would identify the person. It limits disclosure of patient's records to the following circumstances:

- patient provides written authorization (permission) for the disclosure
- disclosure is for health oversight purposes
- disclosure is for certain law enforcement purposes
- disclosure is otherwise required by law, e.g. court order

The HIPAA privacy rule provides several law enforcement exceptions to the new

requirement that patients authorize a covered entity's disclosure of their protected health information before a disclosure will be made. If you need access to a victim's medical records, but the covered entity or a person speaking on behalf of a covered entity, says: *"Sorry, I can't give you that information because of HIPAA..."* you know that there are exceptions which would allow you access to that information. The relevant section of HIPAA, found at 45 C.F.R. 164.512(f), reads as follows:

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(I) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

(2) Permitted disclosures: Limited information for identification and location purposes. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(I) The covered entity may disclose only the following information:

(A) Name and address;

(B) Date and place of birth;

(C) Social security number;

(D) ABO blood type and Rh factor;

(E) Type of injury;

(F) Date and time of treatment;

(G) Date and time of death, if applicable; and

(H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

(3) Permitted disclosure: Victims of a crime. Except for disclosures required by law as



permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this section, if:

- (I) The individual agrees to the disclosure; or
- (ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:
  - (A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;
  - (B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and
  - (C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) Permitted disclosure: Decedents. A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

(5) Permitted disclosure: Crime on premises. A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

(6) Permitted disclosure: Reporting crime in emergencies.

(I) A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

- (A) The commission and nature of a crime;
- (B) The location of such crime or of the victim(s) of such crime; and
- (C) The identity, description, and location of the perpetrator of such crime.

(ii) If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(I) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(I) of this section does not apply and any disclosure to a law enforcement official for law enforcement purposes is subject to paragraph (c) of this section.

In New Jersey, the Attorney General promulgated the *Directive Concerning the Use of Grand Jury Subpoenas to Compel Hospitals to Produce Medical Records* after certain hospitals refused to release medical records in response to grand jury subpoenas. The Attorney General found that, despite the fact that HIPAA allowed disclosure of medical records in response to a grand jury subpoena, it was nonetheless necessary and appropriate to make certain that county prosecutors and the Division of Criminal Justice take additional steps to safeguard the privacy rights of patients, and especially those patients who are crime victims. See New Jersey Constitution, Art. 1, para. 22 (requiring victims of crime to be treated with fairness, compassion, and respect by the criminal justice system). Accordingly, the Attorney General Directive Concerning the Use of Grand Jury Subpoenas to Compel Hospitals to Produce Medical Records charged county prosecutors and the Division of Criminal Justice to observe the

following procedures and confidentiality safeguards:

[1]. Specificity and Limitations on Grand Jury Subpoenas to Compel Production of Medical Records.

A grand jury subpoena seeking medical records should be narrowly focused and should be used only to compel the production of medical records that are reasonably believed to be relevant to the investigation and a determination of the appropriate offense, if any, to be charged. The scope of a subpoena duces tecum should be limited to compel only the production of those medical records that relate, for example, to injuries that were sustained by the victim in the course of the specific criminal act or episode that is under investigation. (Note, however, that it is conceivable that, depending on the circumstances, records pertaining to medical services provided on other occasions may also be relevant to the criminal investigation.) Prosecutors should therefore make certain that such subpoenas specify, to the greatest extent practicable, the date on which the suspected crime occurred so as to limit the scope of the subpoena.

[2]. Certain Types of Medical Records That Should be Obtained by Court Order Rather than Grand Jury Subpoena. As a general proposition, a grand jury subpoena should not be used to compel hospitals to produce medical records that are reasonably believed to include :

(1) confidential communications that are subject to the psychologist patient privilege established by N.J.S.A. 45:14B-28 and N.J.R.E. 505 (which privilege is broader than the physician-patient privilege);

(2) information that a person has AIDS or HIV infection, which information is confidential and subject to disclosure restrictions pursuant to the "AIDS Assistance Act" codified at N.J.S.A. 26:5C-1. (Note that N.J.S.A. 26:5C-9(a) generally requires a court order based upon a showing of good cause before the record of a person who has or is suspected of having AIDS or HIV infection may be disclosed, and N.J.S.A. 26:5C-9(b) permits a court to authorize disclosure of a person's AIDS/HIV records "for the purpose of conducting an investigation of or prosecution for a crime of which the person is suspected only if the crime is a first degree crime and there is a reasonable likelihood that the record in question will disclose material information of substantial value to the investigation or prosecution."); or

(3) information about substance abuse diagnosis and treatment that is protected under 42 U.S.C. § 290dd-2, 42 U.S.C. § 290ee-3, and 42 C.F.R. Part 2. (Note that these federal laws and regulations which restrict law enforcement access to drug and alcohol abuse counseling records generally do not apply to a hospital's emergency department or the general treatment areas of the hospital; rather, these restrictions apply only to those medical personnel in a general medical care facility whose "primary function" is the provision of alcohol or drug abuse diagnoses, treatment or referral for treatment. See 42 C.F.R. § 2.1-2.12.)

A county prosecutor or the Division of Criminal Justice should apply to a judge for a court order, in lieu of a grand jury subpoena, to compel a hospital to disclose any of these specially protected types of medical records. As a general proposition, and because the prosecutor may not know whether such specially protected materials are in the possession of the hospital, it is the hospital's responsibility to redact such protected information from other materials provided to the prosecutor pursuant to the subpoena. The hospital in that event would be expected to move to quash the subpoena with respect to the protected information. The Division of Law has advised the University of Medicine and Dentistry of New Jersey and other hospitals that they should resist subpoenas that seek psychologist-patient, AIDS/HIV, substance abuse and substance treatment records. The Division of Law has also asked hospitals to consult with the prosecutor's office when such records are within the scope of the

records sought by the grand jury subpoena.

[3]. Preservation of Confidentiality of Medical Records.

It is the responsibility of the county prosecutors and the Division of Criminal Justice to ensure that all medical records obtained by means of a grand jury subpoena are kept strictly confidential and are used only for criminal investigatory purposes. Prosecutors must at all times safeguard the secrecy of the grand jury process and must take special precautions to guard against the unauthorized disclosure of medical records. Accordingly, medical records obtained by grand jury subpoena should be segregated in the prosecutor's file to make certain that they are not turned over as part of a routine discovery package. These records should not be disclosed to defense counsel unless and until the assistant prosecutor or deputy attorney general handling the case has specifically determined that (1) the medical record is required to be turned over in discovery pursuant to R. 3:13-3, and (2) there is no basis to redact information and to seek a protective order. It is the responsibility of the county prosecutor or the Division of Criminal Justice to apply for a protective order pursuant to R. 3:13-3f when necessary to preclude the inappropriate disclosure of any medical record or portion thereof. (For example, if medical records obtained by a grand jury subpoena include information that is subject to the "rape shield" law codified at N.J.S.A. 2C:14-7 and N.J.R.E. 412 (e.g., information concerning whether the victim had previously engaged in sexual intercourse, or had an abortion), the county prosecutor or Division of Criminal Justice should seek a protective order and should not disclose this information unless expressly ordered to do so by a court of competent jurisdiction.)

[4]. Disputes and Controversies.

County prosecutors should notify the Division of Criminal Justice if a hospital moves to quash a grand jury subpoena for medical records, or if the prosecutor deems it necessary to seek an order to show cause to compel production of documents pursuant to a grand jury subpoena. The Division of Criminal Justice will assist the county prosecutors in any such litigation. All questions concerning the implementation of this Directive should be directed to the Chief of the Appellate Bureau, Division of Criminal Justice, or to the Counsel to the Director of the Division of Criminal Justice.

As you can see, HIPAA regulations and the Attorney General Directive do allow the disclosure of protected health care information in response to a grand jury subpoena and/or a court order. 45 C.F.R. 164.512 (f)(1)(ii). From the earliest point of the investigation, all reasonable attempts should be made to get a written authorization from the victim. If that is not possible, a court order or grand jury subpoena should be utilized in accordance with the Attorney General Directive Concerning the Use of Grand Jury Subpoenas to Compel Hospitals to Produce Medical Records. Make sure the investigators working on the case notify you immediately if the covered entity refuses to release the records. If the covered entity refuses to release the records despite the production of the subpoena or court order, additional action will be needed to compel production.

In cases involving a victim with a disability, medical records will be important to analyze different aspects of the case including, but not limited to: competency to testify; ability to consent to sexual relations; previous injuries; and victim's functioning level and knowledge. The records may also be important to show what the defendant knew about the victim's disability, or should have known, based on a medical diagnosis of the victim's condition and functioning level.

## **SART/SANE Examination**

In most cases involving a sexual assault, the report of the crime is not made within five days after the incident, which is the optimal time to collect evidence in a SART/SANE examination. However, even if the report is not made until much later, a gynecological exam may still be of value to show any trauma or penetration experienced by the victim in the past. Although not definitive, the information from a gynecological exam may be particularly helpful if a person's disability rendered her unable to ever consent to sexual relations, such as a person with a severe cognitive disability. The value of a gynecological exam must be weighed against the effect it will have on the victim. If the exam would be too traumatic, it should not occur. A medical examination of a male victim may also be helpful to determine if any injuries were sustained in the past.

Despite a person's disability, most people are legally capable of making their own medical decisions. If a person is an adult, they should be presumed capable of making such decisions, unless a legal guardian has been appointed for them by a court. Guardianship may be for the individual's estate, or for the individual's person, or for both. N.J.S.A. 3B:12-25. If a guardian has been appointed, either the person's family or the residential center should be able to provide that information. The guardian should have letters of guardianship from the surrogate. Whether the victim is male or female, the victim's guardian, as long as not a suspect in the sexual assault case, should be consulted, and the final decision whether to permit the examination should be made by the guardian. The guardian should also sign a release of medical records so you can get access to the information. The health care provider performing the exam should be asked to note any apparent difficulties understanding concepts or procedures during the exam. The information may be valuable later to show the victim's level of understanding.

If the guardian is a suspect, or there is reason to believe the guardian is protecting the alleged perpetrator, explore other options to secure the SANE exam, such as a search warrant to recover physical evidence.

## **Statements Made by Defendant or Victim**

In practice, many statements made by the defendant and victim may be inadmissible as hearsay under the Rules of Evidence. To make matters more complicated for prosecutors, in 2004, the Supreme Court ruled that the Confrontation Clause will only be satisfied when admitting an out of court, testimonial statement if the declarant is available for cross examination. Crawford v. Washington, 124 S. Ct. 1354 (2004). If the victim is unavailable for cross examination, either due to incompetency as a witness, or other reason, the Crawford case makes it more difficult to introduce the out of court statements made by the victim if those statements are "testimonial."

Although the Supreme Court did not define "testimonial" in the Crawford case, the Court suggests that testimonial statements are those "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, at 1364. To determine if the statement made by the victim is testimonial, and therefore, inadmissible, consider the following:

- To whom was the statement made?
- In what capacity was the listener acting?
- Why did the listener hear the statement?
- What was the purpose of the statement?
- Was the statement initiated by the listener or declarant?
- Was the statement made for the purpose of seeking aid or medical treatment?
- How was the statement memorialized?
- Was the statement taken during structured questioning?
- What was the statement?

Remember, Crawford only applies if the declarant is unavailable for cross examination, so if the victim is available and actually testifies, but recants or is unable to recall the events, the confrontation clause is satisfied. In such cases, regardless of whether prior statements are deemed testimonial, such statements are admissible so long as they do not violate hearsay rules. See, People v. Hunter, 2004 Cal. App. Unpub. LEXIS 5548 (2004)(victim's statements to police did not violate *Crawford* because she testified at trial).

It is important to differentiate testimonial statements from excited utterances. Excited utterances are "statement(s) relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate." N.J.R.E. 803(c)(2). Excited utterances are admissible in court as an exception to the hearsay rule, and Crawford does not apply since the statements, by definition, are non-testimonial. Excited utterances may be helpful in proving your case. To determine if the victim or defendant made any excited utterances, the following factors should be considered:

1. The amount of time that transpired between the initial observation of the event and the subsequent declaration of the statement.
2. The circumstances of the event.
3. The mental or physical condition of the declarant.
4. The shock produced.
5. The nature of the statement.
6. Whether the statement was made voluntarily or in response to a question.

In cases involving a victim with a disability, the excited utterance exception has been used even when the declarant was found incompetent to testify as a witness at trial. For example, in State v. Simmons, 52 N.J. 538 (1968), cert den., 395 U.S. 924 (1969), the court upheld the admissibility of hearsay testimony of spontaneous declarations made by a declarant who was mentally retarded, deaf and mute. In that case, the declarant was raped and in the hospital after the attack, she was able to identify her assailant in what was ruled a spontaneous declaration. The Court ruled that it was proper to allow the observations of others as to the out of court spontaneous identification even though the victim could not have testified in court about it. The spontaneous declaration in Simmons would now be governed by N.J.R.E. 803(c)(2), excited utterance exception to the hearsay rule.

In State v. Scherzer, the court allowed a statement made by the victim three days after the event which was probative to her mental state at the time of the attack under N.J.R.E. 803 (c)(1), the present sense impression exception. 301 N.J. Super. 363 (App. Div), *certif. den.*, 151 N.J. 466 (1997). N.J.R.E. 803 (c)(1) provides a hearsay exception to “a statement of observation, description, or explanation of an event or condition made while or immediately after the declarant was perceiving the event or condition and without opportunity to deliberate or fabricate.” The Scherzer court found that the victim’s comment to her swimming instructor asking how to say “no” if the incident occurred again, went to the victim’s mental state at the time of the crime; and it specifically bolstered the prosecutor’s contentions that the victim did not know that she *could* refuse defendants’ advances, nor did she know *how* to refuse such advances.

### **Rape Shield Statutes**

N.J.S.A. 2C:14-7. Victim's previous sexual conduct; manner of dress

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, endangering the welfare of a child in violation of N.J.S. 2C:24-4 or the fourth degree crime of lewdness in violation of subsection b. of N.J.S. 2C:14-4, evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit such evidence for any purpose, the defendant must apply for an order of the court before the trial or preliminary hearing, except that the court may allow the motion to be made during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material and meets the requirements of subsections c. and d. of this section and that the probative value of the evidence offered substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under the order of the court.

b. In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.

c. Evidence of previous sexual conduct with persons other than the defendant which is offered by any lay or expert witness shall not be considered relevant unless it is material to proving the source of semen, pregnancy or disease.

d. Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.

e. Evidence of the manner in which the victim was dressed at the time an offense was

committed shall not be admitted unless such evidence is determined by the court to be relevant and admissible in the interest of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury or at such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination. A statement by the court of its findings shall also be included in the record.

f. For the purposes of this section, "sexual conduct" shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, sexual activities reflected in gynecological records, living arrangement and life style.

Prosecutors should note, however, that the New Jersey Supreme Court in State v. Garron, 177 N.J. 147 (2003), lowered the evidential standard that the Legislature adopted after the State v. Scherzer trial. The Court indicated that to conform to the strictures of the Confrontation and Compulsory Process Clauses, the defense need only show that evidence relevant to the defense has probative value that outweighs its prejudicial effect, rather than the "highly material" and "substantially outweighs" standard enunciated by the statute. *Id.* at 172-73.

In sexual assault cases involving victims with disabilities, the question of consent and competency to consent will most likely be an issue. Remember, if your victim has had sex on prior occasions, that alone is not necessarily evidence of his/her ability to consent. You should oppose any attempts by the defense to admit evidence of prior sexual acts under the Rape Shield Law, N.J.S.A. 2C:14-7. In State v. Cuni, the State claimed the victim lacked the mental capacity to withhold consent to sexual acts. 159 N.J. 584 (1999). The defense tried to introduce evidence that the victim had sex on two prior occasions, over eleven years ago. The Court held that past consensual sexual experiences -- as opposed to previous incidents where a victim effectively refused consent -- are not sufficiently probative to demonstrate the capacity to consent. *Id.* at 601.

## IV. PREPARING FOR TRIAL

### VICTIM CONSIDERATIONS

As is obvious throughout this curriculum, the victim's disability will have a huge impact on your ability to prove your case. There are many things to consider when dealing with a case involving a victim with a disability, such as: competency to testify, ability to consent to sexual acts and pre trial preparation needed to effectuate a thorough and useful testimony. There are also motion considerations, issues involving the scheduling of testimony and useful expert testimony which may be unique to cases involving a person with a disability.

### **Preparing Victims for Trial**

Testifying in open court is a stressful endeavor. For a person with a disability, the experience may be compounded by their lack of understanding, inability to freely maneuver in the courtroom, or another aspect of their disability. The following tips will help you prepare your victim for trial in order to effectuate the best possible outcome:

1. Be sure to accommodate the victim's needs. A person may need a sign language interpreter, transportation, etc. Coordinate with your victim/witness counselors, as well as the court's ADA Coordinators to insure the victim's needs are being met.
2. If possible, try to avoid adjournments. The victim may not feel safe until the defendant goes to trial.
3. Show the victim the grand jury room/courtroom. Allow him/her to sit in the witness stand, and ask some introductory questions for the victim to practice. This will enhance the victim's comfort level. If time and opportunity allow, have the victim sit in on an actual trial.
4. Explain to the victim that it is okay to say he/she does not understand a question, or that he/she cannot remember something. He/she should also be told it is okay to disagree with any characterization of his/her testimony given by others. This concept, however, may be extremely difficult for a person with a developmental disability to grasp or follow, especially in light of their desire to please the questioner and reluctance to appear not to understand the question. You should emphasize that when asking him/her questions on the stand, it is okay for him/her to say, "I don't know."
5. Be aware for the need for a support person.
6. It is important to learn the victim's schedule, for medication issues and otherwise, in order to schedule his/her testimony for the time of day the victim will be at his/her best. For example, if the victim takes a nap everyday at 2, you may try to avoid that time of day for his/her testimony. If the victim is tired, it may affect his/her ability to recount the events or to communicate. Additionally, learn the victim's cues for when he/she is tired, or hungry, and work around them during his/her testimony. Take many breaks, if needed, and ask his/her caregiver to bring along whatever medications, snacks, etc. he/she might need to sustain him/her for the day.

### **Force and Consent**



In sexual assault cases involving a person with a disability, physical force may not be an issue. In New Jersey, a person is guilty of aggravated sexual assault if he/she commits an act of sexual penetration with another person the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated. N.J.S.A. 2C:14-2(a)(7). Mentally defective means that condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent. N.J.S.A. 2C:14-1(h). Physically helpless means that condition in which a person is unconscious or is physically unable to flee or is physically unable to communicate unwillingness to act. N.J.S.A. 2C:14-1(g).

New Jersey's consent statute also clearly states that assent does not constitute consent where it is: given by a person who is legally incompetent; given by a person who by reason of a mental disease or defect is unable to reasonably judge the harmfulness of the conduct; or, induced through force, duress, or deception. N.J.S.A. 2C:2-10c. Since consent may not be an issue, the investigation may need to focus on the following questions:

Did sexual contact occur?  
Is the victim able to consent to sexual contact?  
Did the suspect know, or should he/she have known, that the victim was unable to consent to sexual contact due to a mental defect, physical helplessness or mental incapacitation?

The New Jersey Supreme Court clarified the definition of "mentally defective" by holding that a person is mentally defective under N.J.S.A. 2C:14-2(a)(7) if, "at the time of the sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another." State v. Olivia, 123 N.J. 550 (1991). Once a victim is found to be mentally defective, consent is not a defense because it is believed that a mentally defective person is incapable of providing consent. To determine if the victim is or is not "mentally defective" under the statute, evidence is included which tends to show:

1. knowledge that conduct is sexual;
2. understanding that one has the right to refuse to engage in sex; and
3. the ability to assert that right.

If a victim is "mentally defective" pursuant to the statute, and therefore, unable to consent to sexual acts, you will need an expert evaluation. However, when conducting the victim interview, you can rely on particular elements specific to each individual which will help you conclude if the person is capable of providing consent.

### **Evidence of Ability or Inability to Consent**

The specific elements which can show an ability or inability to consent, include, but are not limited to:

- Victim's understanding of consequences of sexual intercourse: During the initial interview, appraise the victim's knowledge level. In other words, does the victim understand the true nature, quality and consequences of the act? Questions regarding the victim's true understanding of human reproduction and contraception are vital in this determination. For example, the questions, "where do babies come from?" or "how do babies get inside women?" and "who asks for sex?" are helpful. The answers could assist you in determining whether the victim has a competent understanding of the consequences of engaging in sexual conduct.
- Victim's understanding of the nature of sexual intercourse: The consensual capacity involves knowing that one's body is private and is not subject to the physical invasions of another, and that one has the right and ability to refuse to engage in sexual activity. The cognitive capacity, which is also implicit in the notion of consensual capacity, involves the knowledge that the conduct is distinctively sexual. Determine whether the victim is capable of understanding sexual activity, and that others may not engage in sexual activity with them without their consent. This goes directly to the victim's ability to exercise the right to refuse to engage in sexual conduct with another. Although a victim may have a concrete understanding of sexual relations, he/she may be unable to exercise his/her right to refuse to engage in sexual activity. Previous incidents of sexual contact may be relevant; especially incidents close in time to the current one in which the victim actually refused sexual advances. Inquire about prior sexual conduct. The defense may attempt to present prior sexual conduct to establish that the victim consented in the past. Mere capitulation does not constitute consent. The Rape Shield Law may prevent information about past sexual relations from being admitted into evidence.
- Victim's susceptibility and need to please: Witnesses will be able to offer you information on the victim's past which goes to show her eagerness to fit in and please others. A victim's eagerness to please leaves him/her particularly vulnerable to abuse. His/her susceptibility and need to please may also go to his/her ability to exercise his/her right to refuse sexual contact. School counselors or teachers may offer you examples of the victim's susceptibility and need to please. Siblings, friends and neighbors may have witnessed the victim's attempts to please others, or interactions with other people which show his/her inability to say no to requests.
- Victim's IQ test and mental age: The IQ and mental age will be a vital piece of evidence during the criminal trial. Some experts will be reluctant to compare the equivalent mental age of an individual with a developmental disability to that of a non-disabled peer. The expert, however, will be able to provide the approximate educational grade level of the individual's functioning. The prosecutor then can draw the comparison of grade level to age level (e.g., a second grade educational level would be found in children who are approximately 7 years old.) Obtain a complete developmental history at the outset of the investigation. The Division of Developmental Disabilities may have complete records on adults who have been diagnosed as "mentally retarded" and are receiving assistance. If the victim attends or is attending special education classes, the school district will

maintain an Individual Educational Plan (IEP). The IEP contains information on the victim's educational level and social goals. The IEP provides practical understanding of a person's functioning level. Determine if there is a school psychologist familiar with the victim. The school psychologist may be a valuable, unbiased witness or lay witness.

Retain a psychologist experienced in dealing with individuals meeting the DSM-IV-TR criteria for "mental retardation" and who is familiar with the victim's specific impairment and any cultural issues. Have the victim examined by the expert to determine: 1) adaptive functioning to confirm that the victim is developmentally disabled; 2) IQ level and corresponding mental age; and 3) concrete thinking ability.

If the evidence shows that the victim was able to consent to sexual activities, the case becomes a traditional sexual assault case where you seek evidence to show sexual contact occurred either by force or against the will of the victim. In those cases, the person's disability becomes a secondary factor, and evidence to show the person has a disability will be needed for the jury's information, but not to prove the crime.

### **Did the defendant know, or should he/she have known that the victim was "mentally defective"?**

You can show the defendant knew the victim was cognitively disabled by showing their interaction together. Did they go to school together? Did they have mutual friends? Is the disability apparent after a few minutes of conversation with the victim? Where did the victim and defendant meet and when? By reviewing the complete set of facts, you can ascertain what a reasonable person knew or should have known about the victim. Also, don't discount the past experiences of the defendant which may give them more of a reason to recognize someone with a disability. For example, does the defendant have any special training? Does the defendant have any relatives with disabilities? What is defendant's past work and volunteer experiences? To prove defendant knew the victim was disabled, consider calling the following witnesses:

- Family Members
- Experts
- Lay Experts
- Victim
- Friends
- Co-workers
- Siblings
- School guidance counselors or psychologists

### **Competency to Testify**

#### **Evidence Rule 601. GENERAL RULE OF COMPETENCY**

Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or

through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law.

The policy set forth in N.J.R.E. 601 assumes that all people are competent to be witnesses. A person with a disability or mental illness will only be disqualified from testifying if the trial court makes the finding that they are incapable of either communicating adequately or understanding their obligation to tell the truth. More than likely, the defense will assert that the victim should be disqualified as a witness due to incompetency. The determination of whether a person is competent to be a witness lies within the discretion of the trial judge. State v. R.W., 104 N.J. 14, 19 (1986). A preliminary hearing should be conducted in order for the trial judge to determine if grounds for disqualification of a witness exist. At the preliminary hearing, the burden of proof falls upon the party asserting that grounds for disqualification are present. "Since witness disqualification tends to lead toward the suppression of the truth, any claim of disqualification must be strictly construed in favor of the admission of pertinent testimony that the witness might offer." State v. R.W., at 19.

As an aid in making the competency determination, a trial court can order a witness to submit to psychiatric testing. State v. Falcetano, 107 N.J. Super. 383, 387 (Law Div. 1969). Such an order is "an extraordinary measure" and should only be taken if there is a substantial need for it. State v. R.W., 104 N.J. 14, 22-23 (1986). Specifically, the party requesting such testing must convince the court that there is "something peculiar, unique or abnormal" about the witness that would affect his/her competence "or the court's ability to assess that competence, or raise unusual difficulties in assessing the witness's credibility." Id. Age of a proposed witness alone cannot be considered "peculiar" or "abnormal" so as to justify an order for psychiatric testing. Id. at 23. In the same respect, the existence of a disability is not, by itself, enough to sustain an order for psychiatric testing. See, State v. Scherzer, 301 N.J. Super. 363 (App. Div.), cert.den., 151 N.J. 466 (1997). For the trial court to order psychiatric testing, the defense must offer evidence to show how the witness's disability affects his/her ability to know truth from lies, or affects the courts ability to measure the witness's competency.

Before allowing a witness to testify, the prosecuting attorney should make his/her own assessment of the witness's competency. To make such an assessment, you should speak to counselors, educators, parents, guardians, family members and doctors to learn everything you can about the individual, and the extent of the disability. Specifically, you want to know if the individual knows the difference between the truth and a lie, and understands that if they lie, it could have negative implications, such as punishment. In State v. R.W., the three and one-half-year-old victim was ruled competent to testify even though the child "equated truthfulness with telling what was 'real' and lying with telling that which was 'pretend.'" 104 N.J. at 18. In State v. Davis, a four and five year old were found competent to testify where they demonstrated they knew the difference between telling a lie and the truth, and the one witness stated that if he lied, he would get a spanking, and the other witness stated that if he lied he would be punished by the judge. 229 N.J. Super. 66 (App. Div. 1988).

During the competency hearing, make sure to ask the victim information which they are familiar with. For example, ask the victim about his/her last birthday, or a recent trip or holiday. The victim's ability to recount these events, unrelated to the actual crime committed, will educate the court on the functioning level of the individual. Additionally, use examples to illustrate the victim's understanding of the truth versus a lie. Such as, "if I told you there was an

elephant in the room, would that be the truth or a lie?” and “If I told you my shirt was red, would that be the truth?” See *Id.* at 77 (alternative methods to establish competency to testify). Be cautious about asking questions ending with two choices. Some persons with disabilities have echolalia, a condition which leads them to repeat what they have just heard. Rather than giving an independent answer, they may just repeat the second of two choices, and that may not be the correct answer.

This can also be a problem if the witness does not understand the question. Many people with disabilities go to great lengths both to please people in authority and to hide their disability. As with yes-no questions, the witness may just guess at the answer they think you want to hear in order to conceal their lack of understanding.

### **When a Witness is found to be Incompetent**

When a witness is disqualified from testifying, other avenues to admit relevant communication made by the witness may exist. Specifically, exceptions to the hearsay exclusionary rule should be explored.

## **EXPERTS**

Experts in cases involving a victim with a disability may be needed for a variety of reasons. An expert on the specific disability affecting your victim will be needed early on as you prepare your case. Most importantly, an expert will help support the victim and prove your case more effectively. Additionally, you need someone to explain to the jury the nature of the person's disability and dispel any myths the jury may hold about that disability. In New Jersey, there are three requirements for the admission of expert testimony: (1) it must concern matters "beyond the ken" of the average juror; (2) the scientific theory must be sufficiently reliable (generally accepted in the appropriate profession); and (3) the expert must have sufficient expertise. State v. Kelly, 97 N.J. 178 (1984).

Here are some examples of ways to utilize an expert in the disability related field:

1. Educate you on the specific disability;
2. Review your direct examination questions of the victim to determine best way to ask the questions in manner most conducive to victim understanding;
3. Help you prepare victim for testifying in court room;
4. Educate you on victim's ability or inability to fabricate;
5. Educate you on the victim's specific strengths and weaknesses; i.e., level of functioning;
6. Help you determine victim's sexual knowledge, exposure and ability to consent to sex;
7. Act as liaison between family and prosecutor's office;

8. Help family cope with the trauma of child/relative being victimized;
9. Educate you on the effect the assault has had on victim through evaluation for post traumatic stress syndrome--rape trauma syndrome, etc.

Experts chosen to help you prepare for trial may come from a variety of sources, such as:

1. Psychologist/Psychiatrist experienced with the specific disability;
2. University and college psychology and special education faculties;
3. Staff from advocacy and treatment community groups, such as the Arc of New Jersey;
4. Social workers or case workers familiar with victim;
5. School personnel familiar with victim; including guidance counselors, teachers, social workers, and psychologists; and
6. Rape care counselors from local rape crisis center who specialize in victims with disabilities, if available.

Here are things to consider when choosing an expert to help you prepare for the trial, and/or to testify:

1. Cultural considerations;
2. Relationship with Victim;
3. Psychologist/Patient Privilege;
4. Experience with particular disability;
5. Experience with sexual assault and domestic violence victims;
6. Experience testifying in court as an expert witness;
7. Familiarity with current research and scientific data;
8. Fee, if any.

An expert to testify on the effect the sexual assault has had on a victim, or to explain a victim's behavior, is just as important as an expert to testify about the victim's specific disability. An expert familiar with people with disabilities should be used to addressing issues that may be particular to the victim's disability, along with issues surrounding the sexual assault, including any post traumatic stress syndrome testimony. The expert testimony, along with any lay witnesses that can testify to the victim's post assault behavior, can lend credibility to the victim's story.

As the prosecuting attorney, you will need to weigh the impact of using a treating therapist as an expert witness. First, the defense would surely lodge a biased attack during

cross examination. Additionally, it would open up the counseling records of the victim for scrutiny. Careful consideration of the available options, such as protection orders, and pros and cons of each is important in this area.

## PRETRIAL MOTIONS

RULE 404(b): Other crimes, wrongs or acts. Evidence of other crimes wrongs, or acts is not admissible to prove the disposition of a person in order to show he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Rule 404(b) may be helpful to you to prove your case, and refute many defense arguments. In State v. Cusick, 219 N.J. Super. 452 (App.Div. 1987), the Court held that prior acts of sexual abuse against children were necessary for the jury to hear so they could not find that the defendant accidentally or unintentionally touched the victim's breast or vagina while he was cradling the child. Since many of your cases may involve caretakers, accident or mistake may be a defense, and evidence of other wrongs will be relevant to dispel their arguments. Prior wrongs committed by defendant may also be essential to show the defendant had opportunity to physically and sexually assault the victim. In State v. Oliver, 133 N.J. 141 (1993), the defendant, who was charged with sexual assault, introduced testimony of members of his family to the effect that they had not heard signs of any sort of struggle at the time of the alleged assault, thus placing the issue of opportunity in dispute. The Court held that the State could properly introduce evidence concerning similar sexual assaults that the defendant had committed upon other victims to show the feasibility of the proposition that he could sexually assault a victim in his room without anyone hearing anything unusual. *Id.* Since many of your cases will involve incidents without witnesses to the physical or sexual abuse, the defendant may claim it did not occur. Showing that he physically and sexually abused others, without ever being criminally charged, or fired if the assaults occurred at his workplace, would negate such a defense, and show the possibility that defendant had an opportunity to do the same to the victim. Obviously, prior bad acts can also be probative to show preparation, plan, and knowledge of the person's disability, which is important in sexual assault cases.

Evidence of previous bad acts are only admissible if a four prong test is satisfied. Specifically, it must be shown that the prior conduct is: 1) relevant to a material issue; 2) similar in kind to that which is charged currently and must have occurred reasonably close in time to the events at issue in the criminal trial; 3) there must be clear and convincing proof of the prior conduct; and 4) the probative value of the prior conduct can not be outweighed by its apparent prejudice. Cofield, 127 N.J. 328, 338 (1992).

Additionally, you may want to anticipate the victim's needs and prepare the court through motion or stipulations that you will be accommodating the witness. For example, there may be a need for frequent breaks or a support person. You may also want to limit or ask the court to direct the format of questions during cross in order to achieve the most effective and truthful responses.

## V. TRIAL

### JURY SELECTION

As in most cases, choosing the right jury can mean the difference between a guilty and not guilty verdict. When the victim is a person with a disability, you need to be aware of biases, myths and stereotypes which may affect a juror's perspective on the event. The most important information to know about jurors is their feelings, opinions, beliefs and values about people with disabilities. It is through these viewpoints that jurors process, or in the case of bias, distort the information they receive and arrive at the decisions they make at trial.

Society often devalues and dehumanizes individuals with disabilities. Calling a person a "vegetable" or in a "vegetative state" is an example of society dehumanizing a person. Labeling the killing of individuals with a disability a "mercy killing" is another example. Dehumanization is a critical factor in disinhibiting violence. When dehumanization is great enough, people no longer feel inhibition or guilt in directing violence toward an individual.

In order to obtain the information you need to select a jury free of prejudice or bias against people with disabilities, offer to help the court by creating a jury questionnaire. Jurors will be more likely to divulge any bias against people with disabilities if they do not have to admit to it in front of the other jurors. If the court deems the questionnaire unnecessary, request permission to submit questions to be asked during voir dire which are aimed at facilitating disclosure of prejudice.

Additionally, it is important to include the standard sexual abuse questions during voir dire, such as those questions involving delayed reporting, inconsistent/recanted disclosure, and explicit content.

### OPENING STATEMENT

The opening statement should incorporate the theme of your case. Specifically, you want to humanize the victim, define the facts, and introduce the statutory language of the sexual assault statutes. Introducing the statutory language will be important since inherent in the term "mentally defective" is the idea that the victim is somehow flawed.

### Discussion Points

- **Examples of questions to be included on a jury questionnaire**
- **Examples of voir dire questions for standard sexual abuse case**



## **WITNESSES**

Rule 611. Mode and Order of Interrogation and Presentation.

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

A person with a developmental disability may want to please the interviewer or comply with the demands of the interviewer, and, as a result, offer contradictory testimony. Additionally, the victim may not understand or appreciate the adversarial nature of cross examination. You can limit the ability of the defense attorney to manipulate the victim by asking the court to require the defense to formulate their questions in the most understandable manner for the victim. Perhaps, you may want to ask the Court to limit the use of yes/no questions, which often leads to the individual answering the way they believe the interviewer wants them to. You should not consider an individual a poor witness because of their susceptibility or suggestibility, but must be prepared to counter those factors during the course of the trial.

## **DIRECT EXAMINATION OF THE WITNESS**

The key to the successful testimony of the victim with a disability is preparation. Some hints in ascertaining the information you need during direct examination are included in other parts of this curriculum. In summary, they include:

1. Consider and know your victim's schedule, needs and communication difficulties. Be aware of the victim's cues for fatigue, hunger, medication, etc. Ask for frequent breaks to meet the needs of the victim.
2. Prepare your victim by following the tips on page
3. Avoid yes/no questions. Remember the victim with a developmental disability may be trying to please you so asking a yes/no question may cause the victim to respond the way he/she thinks will please you. Ask open ended questions that prompt the victim to tell his/her story.
4. Lend encouragement to alleviate fears. Make sure the victim knows that she is safe in the courtroom.
5. Limit courtroom movement and noise to maintain the most distraction free environment possible.

6. Speak on the level of, but not down to the witness. Moderate your tone of voice, and be patient.
7. Be concrete, and keep it simple.
8. Use demonstrative evidence during the direct examination as a way to facilitate communication. Such demonstrative evidence can be replicas, illustrations and demonstrations which aid the victim in telling her story.
9. Be prepared to counter the defense attack on your preparation of the victim and your relationship with the victim during re-direct examination.
10. Humanize the victim and let the juror's get to know her.
11. Begin your questioning of the victim by having her recall an event insignificant to the actual crime. This will allow the jury to experience the victim's ability to recall, and gauge her functioning level.
12. Try to end on a strong point.

## **SENTENCING AND PLEA DEAL AGREEMENT**

Since individuals with disabilities may be viewed as less valuable of a person than a person without a disability, punishment against people who victimize individuals with disabilities may be less severe. For example, the University of Alberta Abuse and Disability Project conducted an experiment where they asked a group of law students to read a short vignette that described an individual who had been convicted of assault. Then they were asked what sentence would be appropriate. The vignettes they read were all the same except that half described the victim as simply a "co-worker" while the other half described the victim as a "co-worker who was mentally handicapped." Since the crimes were identical, the sentences should have been the same, but they were significantly different. When the victim was described as mentally handicapped, eight times as many people thought that a suspended sentence would be adequate, and only 29% (compared to 53% for the victim without a disability) thought jail time should be required. Under New Jersey law, the fact that the defendant either knew or should have known the victim was age 60 or above, or disabled, is an aggravating factor for the court to weigh at the time of sentencing. N.J.S.A. 2C: 44-1a(12).

Whenever a person is convicted of aggravated sexual assault, sexual assault or aggravated criminal sexual contact or kidnapping, N.J.S.A. 2C:47-1 et. seq., provides that defendants must be referred to the Adult Diagnostic and Treatment Center for physical and psychological evaluation. If the Center's report indicates that defendant's conduct is found to be characterized by a pattern of repetitive and compulsive behavior, the defendant may be sentenced to ADTC for specialized treatment.

## Discussion Points

1. You are handling a case involving a victim with a developmental disability who was sexually assaulted by an employment case worker who visited her at her job once every two weeks. During the course of the investigation, you discover several other women who claim to have been sexually assaulted by the defendant, Robert. Which of the following witnesses would you want to testify? What arguments would you make to persuade the judge to admit this evidence?

- Mary, another client of the defendant with a developmental disability, claims Robert is her boyfriend. She tells your investigator that “boyfriend” means a person who has sex with you. Mary has never told anyone that Robert is her boyfriend, because he asked her not to.
- June, a woman with a developmental disability, works in the office mail room of Robert’s former employer--a for profit corporation that runs group homes. Robert was in charge of the work program. June claims Robert drove her home one night, followed her into her apartment, and had sex with her. June told her boss, and Robert was fired. The police were never contacted.

## VI. STATUTES

### CRIMES AGAINST PERSONS WITH DISABILITIES

The New Jersey Criminal Code establishes a number of crimes targeting the abuse of

individuals with disabilities. They include:

- N.J.S.A. 2C:12-1(d) (assault by an employee upon an institutionalized elderly person);
- N.J.S.A. 2C:14-2a(7) (sexual assault/contact upon a person who is physically helpless, mentally defective, or mentally incapacitated);
- N.J.S.A. 2C:14-4b(2) (lewdness, where act is likely to be observed by a person with a mental disease or defect);
- N.J.S.A. 2C:24-7 (endangering the welfare of a person unable to care for himself/herself because of a mental disease or defect);
- N.J.S.A. 2C:24-8 (neglect by caretaker of a person who is age 60 or older, or disabled); and
- N.J.S.A. 2C:16-1 (bias intimidation against victim due to his/her handicap).

## **NJ BIAS CRIME**

When addressing crimes involving individuals with disabilities, the question becomes whether crimes that are motivated by the victim's vulnerability, rather than hostility towards the victim because of his or her identity, should be classified as a hate crime? For example, should the criminal who assaults a blind vendor, because he believes the vendor will be unable to identify him, be charged with a hate crime? Doesn't the defendant's actions equate to targeting the individual because of his disability? Due to the complex nature of bias crimes, these questions can only be answered on a case by case basis, after reviewing the totality of the circumstances surrounding the incident.

For a person with a disability, and his or her community, the impact of the crime may be particularly serious due to that person's vulnerability. Therefore, investigations into crimes involving victims with disabilities should be reviewed for bias purpose or intent. If your office has a bias officer or assistant prosecutor assigned specifically to bias crime cases, ask that person to review your case for a possible bias motivation. For further guidance, refer to the Attorney General Bias Incident Investigative Standards.

New Jersey's Bias Intimidation statute, found at N.J.S.A. 2C:16-1, states:

### **2C:16-1. Bias intimidation**

a. Bias Intimidation. A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; N.J.S.2C:33-4; N.J.S.2C:39-3; N.J.S.2C:39-4 or N.J.S.2C:39-5,

(1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity; or

(2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, handicap, sexual orientation, or ethnicity; or

(3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, handicap, sexual orientation, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, handicap, sexual orientation, or ethnicity.

b. Permissive inference concerning selection of targeted person or property. Proof that the target of the underlying offense was selected by the defendant, or by another acting in concert with the defendant, because of race, color, religion, gender, handicap, sexual orientation, or ethnicity shall give rise to a permissive inference by the trier of fact that the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity.

c. Grading. Bias intimidation is a crime of the fourth degree if the underlying offense referred to in subsection a. is a disorderly persons offense or petty disorderly persons offense. Otherwise, bias intimidation is a crime one degree higher than the most serious underlying crime referred to in subsection a., except that where the underlying crime is a crime of the first degree, bias intimidation is a first-degree crime and the defendant upon conviction thereof may, notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S.2C:43-6, be sentenced to an ordinary term of imprisonment between 15 years and 30 years, with a presumptive term of 20 years.

d. Gender exemption in sexual offense prosecutions. It shall not be a violation of subsection a. if the underlying criminal offense is a violation of chapter 14 of Title 2C of the New Jersey Statutes and the circumstance specified in paragraph (1), (2) or (3) of subsection a. of this section is based solely upon the gender of the victim.

e. Merger. Notwithstanding the provisions of N.J.S.2C:1-8 or any other provision of law, a conviction for bias intimidation shall not merge with a conviction of any of the underlying offenses referred to in subsection a. of this section, nor shall any conviction for such underlying offense merge with a conviction for bias intimidation. The court shall impose separate sentences upon a conviction for bias intimidation and a conviction of any underlying offense.

## **AMERICANS WITH DISABILITIES ACT**

Prosecutors should be mindful of the requirement under the Title II of the Americans with Disabilities Act (ADA) which requires law enforcement to provide victims of crime who have a disability an equal opportunity to benefit from and participate in all programs, services, and activities of the law enforcement agency. Law enforcement, therefore, is required to make reasonable modifications to policies, practices, and procedures when needed to accommodate crime victims who have a disability, unless doing so would fundamentally alter the service, program or activity the agency provides. When necessary, the prosecutor should address any needed accommodation request to the Court which allows the victim full access to the trial process.

The New Jersey Judiciary will provide meaningful access to all of its services, programs,

and activities for qualified individuals with disabilities. Individuals requiring accommodation to access judicial services or programs should contact the appropriate ADA Coordinator at least two weeks prior to any scheduled judicial proceeding, hearing, or activity. For emergent judicial matters, the ADA Coordinator should be contacted immediately.

N.J.S.A. 3B:12-25. Appointment of guardian other than a testamentary guardian

The Superior Court may determine the mental incompetency of an alleged mental incompetent and appoint a guardian for his person, guardian for his estate or a guardian for his person and estate. Letters of guardianship shall be granted to the spouse, if the spouse is living with the incompetent as man and wife at the time the incompetency arose, or to his heirs, or if none of them will accept the letters or it is proven to the court that no appointment from among them will be to the best interest of the incompetent or his estate, then to any other proper person as will accept the same.

## **MISCELLANEOUS PROVISIONS**

N.J.S.A. 34:1-69.10. Qualified interpreter for hearing impaired persons' appointment; prohibition of retention in custody pending arrival.

The appointing authority shall appoint a qualified interpreter to assist a hearing impaired person throughout the proceedings and in preparation with counsel as follows:

- a. In any case before any court or grand jury in which a hearing impaired person is a party, either as a complainant, defendant or witness, or as hearing impaired parents of a juvenile;
  - b. At all stages in any proceeding of a judicial or quasi-judicial nature before any State agency or county or municipal governing body or agency in which a hearing impaired person is a principal party in interest, either as a complainant, defendant, witness or suppliant, or as hearing impaired parents of a juvenile;
  - c. In any proceedings in which a hearing impaired person may be subject to confinement or criminal sanction or in any proceeding preliminary thereto, including a coroner's inquest, grand jury proceedings and proceedings related to mental health commitments. A hearing impaired person who has been arrested and who is otherwise eligible for release shall not be held in custody pending the arrival of an interpreter.
- (1) When a hearing impaired person is arrested for an alleged violation of a criminal law, a qualified interpreter shall be appointed prior to reading of Miranda warnings, interrogating or taking a statement from the hearing impaired person.
- (2) Any statement, written or oral, made by a hearing impaired person in reply to a question from a law enforcement officer or any other person having a prosecutorial function in any criminal or quasi-criminal proceeding shall not be used against that hearing impaired person unless either the statement was made or elicited through a qualified interpreter and was made knowingly, voluntarily and intelligently, or the hearing impaired person has requested a waiver pursuant to section 10 of this act and the court makes a finding that any statement made by the hearing impaired person was made knowingly, voluntarily and intelligently.

(3) The provisions of this subsection shall not apply to apprehensions, arrests or statements involving a violation of Title 39 of the Revised Statutes (Motor Vehicles and Traffic Regulation).

#### N.J.S.A. 2B:8-1. Interpreters

Each county shall provide interpreting services necessary for cases from that county in the Law Division and the Family Part of the Chancery Division. A county may provide interpreting services through the use of persons hired for that purpose. If interpreters are employed, they shall be appointed and shall perform their duties in the manner established by the Chief Justice, and shall serve at the pleasure of the appointing authority. For the purpose of determining their compensation, these employees shall be considered county employees.

As used in this section "interpreting services" shall include the provision of services to assist a developmentally disabled person, as that term is defined in section 3 of P.L.1977, c.82 C.30:6D-3), and to assist a hearing impaired person to understand questions and to frame and express answers in a criminal proceeding; provided that the person is not otherwise disqualified as a witness.

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