

LAW WEEK COLORADO

A Blurry Picture

Research can do more harm than good in sexual offense litigation, defense attorneys say

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Perceptions about sexually based offenses can complicate the litigation process, from expert witness testimony to jury selection. Christopher Braddock, a solo practitioner who has a criminal defense practice in Denver, said he believes research about sexual offenses used in litigation presents a problem because parties will use studies to bolster their side of the case. But he believes such research, though worth doing, does not have a place in litigation because each case has unique circumstances to consider that studies can't explain. In addition, Braddock said, a reliable base of data hasn't been established, making it a mistake to apply patterns and predictors to any particular case.

"People look for the easy answers. ... And I think when it comes right down to it, there are really no easy answers," Braddock said. "This research is very difficult to do because of all the (variables) that you have that you cannot control."

The underlying data about sexually based offenses is imperfect because it relies on self-reporting, Braddock said, and in addition, each study is based on different criteria. Moreover, either party in litigation can choose research that supports its side of the case.

"Depending upon what you want that expert to say, you can always find research to substantiate what you want to say," he said. "Whether it's on disclosure, whether it's repetitive behavior, whether it's why people do this, whether it's anything."

Braddock explained social science studies differ from scientific ones because they often involve looking backward at things that have already

happened to see if they fit specific theories. They are difficult to conduct reliably, interpret and replicate, he believes.

Criminal defense attorney Tom Ward of McDermott Stuart & Ward talked about his belief that using testimony from expert witnesses based on research and studies is problematic also because it is nearly always used to try to determine the credibility of a victim or complaining witness in a given case. Ward said he believes a jury should judge credibility, rather than an expert.

"I don't think that research has gotten very good at determining whether a particular person is telling the truth in a given situation or not," he said. "And it's not really an appropriate topic for an expert to be giving opinions on."

Ward also echoed Braddock's opinion on the misguidedness of applying circumstances in other situations involving sexual offenses to a given case.

"Using research and studies to try to overlay what has happened in other situations to explain the behavior or testimony of a witness in this case that is surrounded by its own set of circumstances, one doesn't always translate to the other," he said.

But Emily Tofte Nestaval, executive director of the Rocky Mountain Victim Law Center, took a different view on the use of research and studies in litigation. She explained expert witnesses can play an important role because they often testify about how victims experience trauma, which can serve to challenge possible misconceptions.

"We all have assumptions of what we would do in the wake of victimization," she said. "And juries walk into those rooms with those same

assumptions. And it's important to really understand that how we think victims should behave in the wake of victimization is not actually what happens for a myriad of reasons." In contrast to Ward's view, she said this type of testimony is useful in supporting a victim's credibility.

Nestaval also disagreed that the baseline of research on sexual offenses isn't reliable. "There's also a lot of research around the neurobiology of trauma, and what actually happens in the brain that causes these behaviors in victims," she said. "So when you partner the neurobiology with also the social perceptions of what's happening, the research is important."

Braddock added he believes that it is problematic to use expert witnesses in the social sciences who testify about such research when they have not participated in the research themselves or talked with the victim in a given case because jurors rely on experts to educate them about relevant topics.

But Nestaval said this type of blind testimony, while common, is not the only kind given by experts. They will sometimes dig into the facts of the case and talk to the victim themselves, and subsequently testify with their professional opinion on how they believe research applies to a given case. She said she believes even blind testimony has a place because an expert can still educate a jury broadly about misconceptions of victim behavior.

JUROR IMPACT

Ward discussed the responsibilities attorneys have because of how perceptions of sexual offenses can affect juror bias. He said jurors have to be willing to discuss the difficult

subject matter in court, and attorneys must discern whether potential jurors are open to it.

He acknowledged the difficulty of finding jurors who do not have extreme biases toward the subject of sexual offenses and said factors such as personal experience with sexual assault or even simply a deep interest in the topic can give an attorney insight into a juror's possible prejudices.

Braddock also explained how misconceptions about sexual offenses can affect jurors' view of a case, using those committed against children as an example.

He said he believes one common fallacy is that perpetrators must have experienced sexual assault or abuse as children themselves, and reiterated that it's problematic to try to establish definitive patterns.

"I think our tendency is (to) try to put everything into one box," he said.

Ward also pointed to what he called a "cultural shift" toward the perception that false accusations of sexual offenses never take place and said an attorney needs to discern whether potential jurors can at least consider the notion that they can happen.

Braddock said he has seen sexual offenses create bias throughout the legal system such as in prosecutors and in judges' rulings, not just in jurors.

"Everybody's a person," he said. "Everyone has their own biases they bring to the table. ... Misconceptions that have been out there for many, many years that probably are going to take many more years to disprove and for people to realize (they) are not true." •

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