APPENDIX E:

HOW TO CREATE A
LOCAL LAW SECTION

How to Create a Local Law Section

Supplementing the National Curriculum

A local law section makes the program more relevant and useful for judges in a particular jurisdiction. When NJEP presents the program, the NJEP project attorney develops a specific local law section for each jurisdiction, which is reviewed by the judicial faculty members before it is included in the materials. Judges throughout the country have commented on how helpful it was to have all of the relevant material contained in the notebooks they received. Therefore, we strongly recommend that you include a section on local legal materials in the Participant's Binder.

The following types of material can be included, depending on what your planning committee thinks would be helpful:

- Key statutes and rules, including:
  - Sexual assault statutes;
  - Rape shield statutes and/or rules;
  - Sexual predator statutes, if applicable;
  - Pertinent sentencing statutes;
  - Sex offender registration statutes;
  - Victim's rights statutes and/or constitutional provisions; and,
  - Key rules of evidence, such as rules pertaining to expert witnesses and prior bad acts.
- Annotations of key sexual assault case law;
- Jury instructions used in sexual assault cases;
- Sample juror questionnaires used in sexual assault cases; and,
- Copies of new or pending legislation in this area.

Case Law Annotations

Preparation of the case law annotations can be quite time-consuming, but they are crucially important and especially appreciated by busy judges. Topics to cover in the case law annotations may include:

- Consent;
- Expert witnesses (for the complainant and the defendant);
- Force;
- Intent;
- Jury issues;
- Lay testimony about the complainant's behavior;
- Marital rape;
- No contest/*Alford* pleas;
- Penetration;
- "Physically helpless" definition, if applicable;

- Prior bad acts/other crimes evidence;
- Privilege and confidentiality issues related to the complainant's medical or psychological records;
- Psychological examination of the complainant;
- Rape shield;
- Sentencing issues;
- Sex offender registration requirements;
- Sexual contact;
- Sexual predator law, if applicable;
- Unconscious/asleep/disabled complainants;
- Victim's rights issues; and,
- *Voir Dire.*

Not all of the topics are relevant in every jurisdiction. The planning committee can select which topics are relevant in your particular state. Case law annotations on these key issues from jurisdictions around the country are included in this appendix. These annotations can be used as a model when summarizing the key case law in your jurisdiction. Some jurisdictions have also included copies of key cases as part of the local legal materials.

On the following pages are illustrative case annotations from local law sections for several states.

ILLUSTRATIVE CASES
(September, 2000)

The following case annotations deal with key issues discussed throughout the curriculum. Since statutory and case law varies widely from jurisdiction to jurisdiction, you should consult your own state's law when dealing with these difficult issues.

I. Consent

Commonwealth v. Berkowitz, 537 Pa. 143, 641 A.2d 1161 (1994) (mentioned in the DVD).
Facts: The complainant went to a friend's dorm room where she encountered the defendant. He pushed her onto the bed, removed her undergarments, and penetrated her. She indicated that the weight of his body was the "only force applied" during the encounter, but that she said "no" the whole time. She also tried to leave the room.
Holding: The fact that she said "no" would be relevant to the issue of consent, but is not relevant to the issue of force for a charge of rape. The phrase "forcible compulsion" is explicitly set forth in this statute, but the phrase "without the consent of the other" is conspicuously absent. This indicates a legislative intent that the term "forcible compulsion" should be interpreted as something more than lack of consent. The defendant's conviction for rape was reversed.

NOTE: In response to the public outcry after this decision was announced, the Pennsylvania legislature amended its statutes. This case was overruled by the subsequent statutory changes.

People v. Iniguez, 30 Cal. Rptr. 2d 258, 872 P.2d 1183 (Cal. 1994) (mentioned in the DVD).
Facts: The night before her wedding, the victim spent the night at her friend's house where she was raped by the friend's boyfriend. The victim was asleep and woke up to find the defendant, who was naked at the time, approaching her. The defendant, who outweighed the victim by approximately 100 pounds, pulled the victim's pants down, fondled her, and then inserted his penis inside her. Although she did not consent to sexual contact with defendant, the victim did not struggle or cry out during the assault because she panicked and froze. The jury found the defendant guilty of rape even though the victim was paralyzed with fear. The Court of Appeals reversed the defendant's conviction.
Holding: The Supreme Court found that where a victim was frozen with fear as a result of the defendant's force or implied threat, that level of force satisfied the "fear of immediate and unlawful bodily injury" element of the offense. The victim genuinely and reasonably responded with fear of immediate and unlawful bodily injury and the defendant used her fear to have sexual intercourse with her against her will.

Clark v. State, 261 Ga. 311, 404 S.E.2d 787 (1991).
Facts: The defendant claimed the victim consented to intercourse. The complainant testified that the defendant dragged her to his bedroom, placed her on the bed, talked to her about how she needed someone to "love" her, and raped her. She saw a large kitchen knife on a nearby chair. She testified that she did not consent and resisted no more than she did out of fear for her safety. The defendant claimed that, because the trial court's jury charge contained no reference to the reasonableness of the victim's apprehension, it erroneously shifted to the defendant the burden of proving that the victim consented.
Holding: This court has expressly disapproved of the practice in rape cases of instructing a jury that lack of resistance indicates that the victim passively consented. The issue in a rape case is whether the complainant "freely consented." That the alleged victim did not outwardly or physically resist does not mean that she freely consented. If the state establishes, beyond a reasonable doubt, that the complainant's lack of resistance resulted from apprehension of bodily harm, violence or other dangerous consequences, that lack of resistance does not constitute freely-given consent. The question is not whether the complainant's testimony as to her lack of consent is reasonable; nor is it whether the complainant's apprehension was reasonable. The question is whether the state has proven, beyond a reasonable doubt, that the complainant did not freely consent to the defendant's acts.

Commonwealth v. Williams, 294 Pa. Super. 93, 439 A.2d 765 (1982).
Facts: The complainant was stranded in a snowstorm and the defendant offered her a ride. He then told her he wanted "a little sex" and threatened to kill her if she tried to escape. She told him that if he "wanted to proceed with this, to go ahead" because she did not want him to hurt her. The defendant claimed that the court should have instructed the jury that if he reasonably believed the complainant had consented to his sexual advances that this would constitute a defense to the rape and IDSI charge.
Holding: If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by the legislature. The court refused to create such a defense.

State in re J.F.S., 803 P.2d 1254 (Utah App. 1990), *cert. denied,* (Utah 1991).
Facts: The juvenile was adjudicated delinquent, based on convictions which, if he were an adult, would have been rape and attempted rape. The first victim, P.A, was a fifteen year old classmate of the defendant. She testified that he forced her into a pump room at school, fondled her and forced her to have intercourse. She repeatedly told him "no," struggled and hit him once. She did not cry for help because she heard other boys running around and laughing as if "they knew what was going on." She did not tell anyone because she was moving to Maryland the next day and did not think anyone would believe her. After she moved, the principal of the Utah high school called her because the defendant had been bragging about his conquest. She told her parents after the telephone call.

The second victim, A.S., was walking with the defendant and he began kissing her. When he began removing her clothing, she "started getting scared" and told him to stop. He tried to force her to have intercourse while she continued to struggle. She did

not tell her parents because she thought it was her fault and thought it was not rape because the defendant was her friend.

The defendant claimed both incidents were consensual.

Holding: Utah has long held that consent as a defense to a charge of rape is a highly fact-sensitive issue, where great deference is afforded to the fact finder. In 1989, the consent provisions in the Utah rape and sexual abuse statutes were modified and the consent defense was significantly narrowed. The new statute eliminated the requirement that the victim "earnestly resist" the assailant, and also added specific circumstances which rebut an allegation of consent.

Some studies indicated that, while some women respond to sexual assault with active resistance, others freeze**.** Under the old "earnest resistance" standard, victims who refused to actively resist out of fear of escalating the violence, or victims whose natural response was to freeze, would be found to have consented to the attack. The resistance requirement has been eliminated.

Furthermore, the fact that preliminary consensual kissing and fondling occurred does not, as the defendant claims, negate the victim's assertion that she did not consent. Under the new statute, lack of consent can be expressed "through words or conduct." The evidence supports the juvenile court's conclusion that neither victim consented to sexual intercourse.

State in re M.T.S., 129 N.J. 422, 609 A.2d 1266 (1992).

Facts: A 17-year-old male juvenile was found delinquent for committing a sexual assault on a 15-year-old female resident of the house in which he was temporarily living. The victim testified that she woke to find the defendant having intercourse with her. She claimed she slapped him and then he stopped and left. He claimed that the intercourse was consensual until she said "stop, get off," and he complied. The trial court found that the victim had consented to "a session of kissing and heavy petting" with the defendant, but that she had not consented to the sexual intercourse. The Appellate Division reversed, finding that the "physical force" element required the application of some amount of force more than that necessary to accomplish penetration.

Holding: Any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The "physical force" requirement is satisfied if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration. Permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. Permission can be, and indeed often is, indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to show that a reasonable person would have believed that the complainant had affirmatively and freely-given authorization to the act.

In cases such as this one, in which the state does not allege violence or force extrinsic to the act of penetration, the fact-finder must decide whether the defendant's act of penetration took place in circumstances that lead the defendant to reasonably believe

that the complainant had freely given affirmative permission to the specific act of sexual penetration. The focus of attention must be on the nature of the defendant's actions. In these cases, neither the victim's subjective state of mind nor the reasonableness of the victim's actions is relevant to the offense. The law places no burden on the alleged victim to have expressed a lack of consent or to have denied permission, and no inquiry is made into what the alleged victim thought or desired or why he or she did not resist or protest.

In order to convict under the sexual assault statute in cases such as these, the state must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim. Such proof can be based on evidence of conduct or words in light of the surrounding circumstances and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, then the state must demonstrate that the defendant did not actually believe that affirmative permission had been freely given, or that the belief was unreasonable under all of the circumstances.

The finding of delinquency was affirmed.

State v. Archuleta, 747 P.2d 1019 (Utah 1987).

Facts: The defendant was convicted of raping a mentally impaired woman. The victim told him "no" several times and tried to push him away. She testified that she did not attempt to escape or obtain help because it was late at night and she was afraid of the defendant. He claimed, on appeal, that her failure to escape despite her opportunity to do so and her failure to cry out were inconsistent with her assertion that she did not consent to intercourse.

Holding: The victim repeatedly told the defendant "no" and tried to push him away. During his second attempt at sexual intercourse, she cried and tried to push him away. Her actions could not have been mistaken for consent.

State v. Brodniak, 221 Mont. 212, 718 P.2d 322 (1986).

Facts: The defendant was convicted of sexual intercourse without consent for raping a woman he met at a bar. He claimed that they engaged in consensual sexual acts, but that he did become violent at the end of the encounter. At trial, he proposed an instruction on consent which stated that the complainant's belief that he would injure her must be "reasonable." The proposed instruction also stated that consent may be manifested "by inaction as well as by positive affirmation."

Holding: The trial court properly denied defendant's request to use the instruction, which was long, erroneous and confusing. In addition, the instruction sought to bring in the complainant's state of mind, which has no place in the elements of the offense.

People v. Schmidt, 885 P.2d 312 (Colo. App. 1994), *cert. denied,* (Colo. 1994).
Facts: The defendant admitted that the victim said "no," but said that he did not believe she meant it.
Holding: The statement "no" provides a sufficient basis upon which a jury could find the victim resisted and that the defendant caused "submission against the victim's will." The court rejected the reasoning of the Pennsylvania Supreme Court in *Commonwealth v. Berkowitz,* 537 Pa. 143, 641 A.2d 1161 (1994). The victim's lack of consent is an element of the offense, rather than an affirmative defense of "mistake of fact."

II. Force

Commonwealth v. Richter, 450 Pa. Super. 383, 676 A.2d 1232 (1996).
Facts: The defendant visited his pregnant ex-wife. While there, he held her down, took her pants off, and told her that if she wanted anything for their son, she had to have intercourse with him. She cried and told him to stop, but did not struggle because, based on past experience, she knew he was capable of hurting her. She explained how he had savagely raped her in the past.
Holding: The defendant's past brutality, coupled with the complainant's troublesome pregnancy and his pinning her against the kitchen table, were enough to establish forcible compulsion or threat of forcible compulsion even though she failed to physically resist him.

State v. Moeller, 1 Neb. App. 1046, 510 N.W.2d 500 (1993).
Facts: The victim was asleep on a couch in her home. She awoke to find the defendant performing oral sex on her. The defendant claimed that the oral sex was consensual. He claimed that there was no evidence of force, coercion, or deception.
Holding: "Nebraska case law indicates that any form of nonconsensual sexual penetration violates the first degree sexual assault statute." *Id.* at 1049, 510 N.W.2d at 502. The state argued that the defendant removed the victim's clothing without her knowledge or assistance, which was conduct tantamount to force. Also, by claiming that he was her "boyfriend" as the victim awoke, the defendant deceived the victim. Furthermore, the state argued that the uncontroverted fact that the victim was sleeping during some, if not all, of the sexual encounter demonstrated that she was not capable of resisting or appraising the nature of her conduct. "The Nebraska Supreme Court has held that under the first degree sexual assault statute, a victim may be 'overcome in many ways short of force.' While this court recognizes that removing articles of clothing from a sleeping person, physically spreading her legs, and performing nonconsensual cunnilingus may not be the type of violent 'force' traditionally described in sexual assault cases, it is, nevertheless, force." *Id.* at 1050, 510 N.W.2d at 503. The record supports a conclusion that the force used was sufficient to violate the statute.

III. Intent

State v. Neumann, 179 Wis. 2d 687, 508 N.W.2d 54 (Wis. App. 1993), *review denied*, 513 N.W.2d 406 (Wis. 1994).
Facts: The defendant was charged with sexually assaulting a woman he had been dating for two years. They had engaged in consensual sexual intercourse prior to the assault. The defendant argued that the trial court's instruction on second degree sexual assault was in error in that it did not contain the element of intent. He also claimed that, since intent is an element of the offense, he should have been allowed to rely on voluntary intoxication as a defense.
Holding: By the language of the statute, the legislature has clearly indicated that sexual contact requires intent, both in the form of an intentional act, and a purpose for that act. By contrast, the legislature defined sexual intercourse without any reference to intent or purpose, and instead, defined the acts which would constitute sexual intercourse. Legislative history also indicates that no particular intent is required. The state argues, and we agree, that the legislature most likely concluded that a defendant's intent should not be an element of the crime because to allow a defendant to claim the defense of intoxication, and to use other defenses based upon lack of intent, would be contrary to the goals of enforcement and protection of bodily security. The offense of second degree sexual assault, as committed through sexual intercourse, does not require proof of intent.

IV. Expert Testimony

Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. App. 1923) (mentioned in the videotape).
Facts: The defendant was convicted of second degree murder. He claimed the court erred in not allowing expert testimony regarding the results of a "systolic blood pressure deception test" the defendant took. He tried to introduce expert testimony that blood pressure is influenced by changes in the subject's emotions, and that systolic blood pressure rises as a result of nervous impulses sent to the sympathetic branch of the autonomic nervous system. He sought to prove that truth was spontaneous, and came without conscious effort, but the utterance of a falsehood required a conscious effort, which would be reflected by a rise in blood pressure.
Holding: Expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. The systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) (mentioned in the videotape).
Facts: The petitioners sued on behalf of their children, who were born with severe birth defects. The District Court granted the respondent's motion for summary judgment, based on the respondent's expert's evaluation of published scientific literature on the subject of the prescription drug Benedectin and birth defects, in which the expert claimed

that there was no evidence that Benedectin caused birth defects. The court determined that the petitioner's expert testimony was based on unpublished works that did not meet the applicable "general acceptance" standard under *Frye v. United States*, 293 F. 1013 (D.C. App. 1923).
Holding: The Federal Rules of Evidence, not *Frye*, provide the standard for admitting scientific testimony at trial. General acceptance is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the testimony must rest on a reliable foundation and be relevant to the determination of the issue at hand. Rule 702's "helpfulness" standard does require a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654 (1986).
Facts: The doctor who examined the victim at the hospital testified as to her injuries and, when asked whether force was used, replied that, in his opinion, "this patient ... has been raped." The defendant had sought to prevent the doctor from expressing his opinion that the victim had been raped.
Holding: The correct test is whether the question is a proper one for opinion evidence, and not whether it goes to the ultimate issue. Although it is permissible for the expert to give his opinion as to facts in issue or even the ultimate issue where the question is a proper one for opinion evidence, the expert is not permitted to state a legal conclusion as to the ultimate matter at issue. The conviction was reversed.

People v. Hampton, 746 P.2d 947 (Colo. 1987).
Facts: Non-stranger rape case. The victim reported the assault 89 days after it occurred. The person in charge of the police department's Victim Services Unit was qualified as an expert in victimology. She never examined the victim, but she testified about rape victims' general reactions, the reasons for delayed reporting, and rape trauma syndrome.
Holding: The evidence was admissible under the C.R.E. 702 "helpfulness" standard. Given the limited scope of the testimony and the defendant's theory of the case, which raised the issue of the victim's delayed reporting, the testimony was permissible. The court rejected the use of the *Frye* test here. The case also discusses the relationship between PTSD and rape trauma syndrome.

State v. Brodniak, 221 Mont. 212, 718 P.2d 322 (1986).
Facts: The defendant was convicted of sexual intercourse without consent for raping a woman he met at a bar. At trial, he claimed that they engaged in consensual sexual acts, but that he did become violent at the end of the encounter. At the State's request, a psychologist examined the complainant to determine her psychological condition and to recommend treatment. The psychologist concluded that the complainant's "condition was consistent with all of the symptoms of the post traumatic stress disorder known as rape trauma syndrome." The defendant claimed that the psychologist's testimony should have been excluded, arguing, *inter alia,* that the testimony was an improper comment on the victim's credibility.
Holding: Rape trauma syndrome is a proper subject for expert testimony in a sexual intercourse without consent case. Where all that is disputed is the consent element, the evidence is relevant to the question of whether there was consent to engage in a sexual

act which the parties agree occurred. In cases from other jurisdictions in which RTS evidence was excluded, the experts all testified that the victim suffered from RTS and, therefore, concluded expressly or implicitly, that the victim had been raped. A qualified expert may explain RTS to the jury and express an opinion that the victim suffers from the syndrome, but may not testify otherwise as to the witness' credibility or believability. In this case, the expert's testimony about malingering and the statistical percentage of false accusations was improper comment on the complainant's credibility and should not have been admitted. In light of the overwhelming evidence of the defendant's guilt, however, the error was harmless.

State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990).
Facts: The state called a counselor from the local rape shelter to testify, over the defendant's objection, about the general behavior of sexual assault victims. The witness was not asked about the complainant's behavior or to compare the complainant's behavior to other rape victims' behavior. The witness described the series of emotional phases sexual assault victims generally go through that may bear on a victim's willingness to press charges.
Holding: In previous cases, we have upheld the introduction of expert testimony on the behavior of sexual assault victims to educate the jury when the complainant's conduct is seen as inconsistent with the claim of sexual assault. Expert testimony will be permitted if it serves the "particularly useful role of disabusing the jury about widely held misconceptions about sexual assault victims." The trial court did not abuse its discretion by admitting the evidence in this case.

State v. Finlayson, 956 P. 2d 283 (Utah App. 1998), *aff'd*, 994 P. 2d 1243 (Utah 2000).
Facts: The defendant was convicted of aggravated kidnapping, forcible sodomy, and rape. The victim was a Japanese student who had only been in the Untied States for approximately ten months and spoke little English. The defendant, who was fluent in Japanese, asked her to tutor him at his apartment. He asked for permission to kiss her. When she refused, he picked her up, carried her to the bedroom and sexually assaulted her. After she attempted to escape, he handcuffed her. He admitted at trial she said "no" and that he used the handcuffs, but claimed he used them only as a "joke." At trial, he sought to introduce expert testimony about traditional Japanese culture, to support his theory that the victim lied about the rape to "save face" because he did not want to have a serious relationship with her.
Holding: The defendant sought to introduce evidence and argue that the victim would act in conformity with traditional Japanese values simply because she was Japanese. The only possible relevance would be to attack her credibility. For this kind of evidence to be admissible, the defendant was required to lay a sufficient relevancy foundation. Here, he would have to show that she was aware of these "Japanese values," and that she was likely to act in conformity with them. Absent a proper foundation, the trial court was correct in refusing to permit the testimony.

V. Lay Testimony

Commonwealth v. Pickford, 370 Pa. Super. 444, 536 A.2d 1348 (1987).
Facts: The complainant and the defendant had a consensual sexual relationship, which had ended three weeks prior to the rape. The trial court refused to allow expert testimony about rape trauma syndrome, but did allow lay testimony regarding the complainant's post-rape behavior.
Holding: It is within the lay person's ability to understand the possible and probable effect of a forcible rape upon a person. The lay testimony was admissible.

Farley v. People, 746 P.2d 956 (Colo. 1987).
Facts: A counselor from the police victim services unit testified regarding the victim's demeanor after having interviewed the victim on the day of the assault. The counselor expressed her opinion that the victim's reactions were typical of victims of sexual assault and that her behavior was consistent with that of a rape victim. She was not offered as an expert witness. The defendant's objections to her opinion testimony were overruled.
Holding: The testimony did not constitute rape trauma syndrome evidence. The counselor was neither offered nor accepted as an expert. The witness offered her opinion, based upon her prior experience with rape victims, that the victim's reactions were very consistent with being a rape victim. The testimony was permissible opinion evidence from a lay witness under C.R.E. 701.

VI. No Contest/ "*Alford*" Pleas

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970)
Facts: The defendant was indicted for first degree murder, a capital offense under North Carolina law. On the advice of his court-appointed attorney, the defendant pled guilty to second degree murder in order to avoid the threat of the death penalty. Despite his plea, the defendant maintained that he was innocent. He was sentenced to 30 years imprisonment, the maximum sentence for second degree murder. He sought post-conviction relief based on the claim that his plea of guilty was invalid because it was the product of fear and coercion. After a hearing, the state court found that the plea was "willingly, knowingly, and understandingly" made on the advice of competent counsel and in the face of a strong prosecution case. The appeals court reversed on the ground that defendant's guilty plea was made involuntarily.
Holding: The Supreme Court vacated the judgment of the Court of Appeals. The Court stated that the test for determining the validity of guilty pleas is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. The defendant's guilty plea was not invalid because it was made to avoid the possibility of the death penalty. It was not constitutional error for the trial judge to accept the defendant's guilty plea, even though he simultaneously claimed he was innocent, in view of the strong factual basis for the plea and the defendant's clearly expressed desire to enter into it.

VII. Prior Bad Acts/Similar Transactions

Commonwealth v. Claypool, 508 Pa. 198, 495 A.2d 176 (1985).
Facts: The defendant told the complainant that he had been in jail before for raping his cousin's wife. The prosecutor tried to introduce the statement as evidence of the victim's lack of consent.
Holding: Where there is evidence that the defendant made a statement about prior criminal activity in order to threaten and intimidate his victim, and when force or threat of harm is an element of the crime for which the defendant is being tried, the evidence is admissible. The evidence must be accompanied by a cautionary instruction which fully and carefully explains to the jury the limited purpose for which that evidence is being admitted.

Davis v. State, 180 Ga. App. 190, 348 S.E.2d 730 (1986).
Facts: The defendant was charged with two rapes in which he initiated his attacks by asking the women to let him "hold" them. When they refused, he relied on his "brute strength" to subdue and rape his victims. The trial court allowed evidence of an earlier rape in which the defendant met a woman at a party, drove her to a secluded spot, told her he just wanted to hold her and then raped her.
Holding: Evidence of similar transactions is admissible when it is shown that the defendant is the perpetrator of the similar offense, and there is sufficient similarity between the other crime and the offense charged that "proof of the former tends to prove the latter." Evidence of independent crimes has been admitted to show "bent of mind and course of conduct, and has been most liberally extended in the area of sexual offenses." The evidence here was admissible to show the defendant's bent of mind to commit rape if his victims resisted his advances.

Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255 (1986).
Facts: The trial court admitted evidence of another rape the defendant had committed nine years earlier. In both instances, the defendant had beaten and sexually assaulted an elderly black woman in her home at night, after gaining access through a window and then using matches to find his way to the bedroom.
Holding: There were striking similarities between the two offenses. Thus, there was a logical connection between the two offenses, such that proof of the defendant's involvement in the earlier offense tended to prove his guilt of the offense for which he was on trial. The fact that nine years had passed did not sever the connections. The evidence was undoubtedly prejudicial to the defendant, as was the other evidence of his guilt, but it was nevertheless admissible.

State v. Oliver, 133 N.J. 141, 627 A.2d 144 (1993).
Facts: The defendant was convicted of sexually assaulting two women. He and the victims were close friends and had grown up in the same neighborhood. In both cases, the defendant brought the victim to his room while other family members were downstairs; engaged in conversation with them; drank some alcohol; and then "resorted

to brute force to cut off the victims' air supply until they relented." The defendant assaulted the second victim twelve days after the first assault. At trial, the state offered testimony of three other women who claimed that the defendant has sexually assaulted them in a similar manner.

Holding: The evidence of the other assaults did not show a common plan or scheme as defined by prior case law. There was no evidence, which suggested that the defendant had any "integrated plan" and that the assaults were components of that plan. The other-crimes evidence would be admissible, however, to show the feasibility of the defendant sexually assaulting women in his room while others were present in the house, to show his successful use of pretext to lure women into his room and to show his intent.

When a defendant claims that he had permission for the penetration, he puts his own state of mind in issue. Therefore, the evidence can be admitted to show his intent. Although the evidence is admissible to show intent, evidence of past acts to show present state of mind raises problems because the prejudice seemingly far outweighs the probative quality of the evidence. Therefore, we strongly suggest that the trial court limit use of the evidence to showing the feasibility of the crimes and the defendant's use of pretext.

On remand (the conviction was reversed on other grounds), the trial court must give a more explicit limiting instruction that specifically delineates the permissible uses of the evidence.

VIII. Rape Shield

Abdi v. State, 249 Ga. 827, 294 S.E.2d 506 (1982).

Facts: The complainant, when asked whether the defendant had ejaculated, made a remark about ejaculation. The defense counsel then asked, "You have had personal experience with that?" The prosecutor objected and the trial court declared a mistrial.

Holding: Where, as here, the remarks by defense counsel are in violation of the rape shield law, the declaration of a mistrial is certainly "in implementation of a legitimate state policy."

Banks v. State, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

Facts: The defense counsel asked a nurse who was testifying whether the victim had reported a prior act of consensual intercourse with the defendant. The defendant had notified the court of his intention to question the victim and two other witnesses about the prior sexual intercourse, but did not indicate that he planned to question the nurse also. After the defendant questioned the nurse, the trial court declared a mistrial. He claimed that the state was barred from trying him again.

Holding: The double jeopardy clause does not bar retrial following the declaration of a mistrial where there is "manifest necessity" for declaration of the mistrial or the "ends of public justice" would be defeated by allowing the trial to continue. Georgia's rape shield statute prohibits the introduction of evidence relating to the victim's past sexual history. It is a strong legislative attempt to protect the victim. It prohibits "all evidence relating to the past sexual behavior of the complaining witness, including marital history, mode of dress, general reputation for promiscuity, nonchastity or sexual mores contrary

to community standards...." The statute assists the truth-seeking process by preventing the jury from becoming inflamed or impassioned and deciding the case "on irrelevant and prejudicial evidence." The procedure specified in the statute is the "exclusive means" for admitting any evidence of the victim's past sexual history in a rape prosecution. Since the defendant failed to proffer information about the nurse's testimony, any reference to the victim's statement to the nurse was inadmissible.

The rape shield statute seeks "to eliminate any vestiges of the bias that 'women of promiscuous sexual reputation' are entitled to less protection under the rape laws than women of chaste reputation." These policies are so strong that a single unanswered question by defense counsel about the victim's sexual history may alone give rise to the manifest necessity for a mistrial.

Brown v. State, 214 Ga. App. 676, 448 S.E.2d 723 (1994).
Facts: The defendant sought to introduce testimony from other witnesses who claimed that they had sex with the victim for money or that she approached them to have sex in exchange for money.
Holding: The 1989 amendments to the rape shield statute narrowed the range of admissible evidence of a complainant's prior sexual behavior. Allowing evidence of prostitution that does not relate to the incident itself discourages reporting and prosecution of rapes. Even if the evidence is accurate, it does not remove the protection of the rape shield statute. The defendant was free to claim that the victim had consented to sex in exchange for money and to cross-examine her about any monetary basis for the consent. The court did not abuse its discretion in refusing to allow the other proffered testimony.

Commonwealth v. Berkowitz, 537 Pa. 143, 641 A.2d 1161 (1994).
Facts: The complainant went to a friend's dorm room where she encountered the defendant. He pushed her onto the bed, removed her undergarments, and penetrated her. She indicated that the weight of his body was the "only force applied" during the encounter, but that she said "no" the whole time. She also sought to leave the room. The defendant sought to introduce evidence that the victim's boyfriend was jealous over her infidelity and it was her fear of his jealousy which motivated her to accuse the defendant of rape.
Holding: The purpose of the rape shield law is to prevent a sexual assault trial from degenerating into an attack upon the victim's reputation for chastity. The allegation that the victim and her boyfriend had argued over her infidelity is so closely tied to the issue of the victim's fidelity that, for the purposes of the rape shield law, they are the same. This is precisely the type of allegation that the rape shield law is specifically designed to address.

Commonwealth v. Richter, 450 Pa. Super. 383, 676 A.2d 1232 (1996).
Facts: The defendant visited his pregnant ex-wife. While there, he held her down, took her pants off, and told her that if she wanted anything for their son, she had to have intercourse with him. She cried and told him to stop, but did not struggle because, based on past experience, she knew he was capable of hurting her. She explained how he had

savagely raped her in the past. He claimed that the trial court should not have admitted her testimony concerning the prior rapes.
Holding: To exclude the evidence would reward the defendant for raping the same victim multiple times. Without evidence of the brutality which served to wear down the victim's will to resist, forcible compulsion could not be established. In rape cases, evidence of a defendant's past violent crimes upon the victim is admissible to establish that sexual intercourse was achieved through forcible compulsion or the threat of forcible compulsion.

Harris v. State, 257 Ga. 666, 362 S.E.2d 211 (1987).
Facts: The defendant sought to introduce evidence of the victim's prior sexual behavior to show that she was a prostitute. He also claimed that the rape shield statute violated his Sixth Amendment right to confront witnesses.
Holding: There is no other crime we can think of in which all of the victims are denied protection simply because someone might fabricate a charge or because of the victim's prior conduct with others. Contrary to the defendant's position, if a victim is a prostitute, then it does not mean she cannot be raped nor does it mean she consents to sexual acts with everyone. The defendant's right to confront and cross-examine the witness concerning her past sexual behavior with others must bow to accommodate the state's interest in the rape shield statute. Because there was an allegation of consent, an *in camera* hearing would have been appropriate, but the defendant waived his right to the hearing.

Hicks v. State, 222 Ga. App. 828, 476 S.E.2d 101 (1996).
Facts: During the rape, the victim told the defendant about her prior sexual abuse by family members and others. She also told him about the emotional problems she was experiencing as a result of the past abuse. He sought to introduce the evidence, claiming it created an impression of implied consent and that the allegations may have been false.
Holding: The evidence was inadmissible under the rape shield law unless it proves past sexual behavior directly involving the defendant. Before evidence of prior false allegations can be admitted, the trial court must make a threshold determination, outside the presence of the jury, that a reasonable probability of falsity exists. The defendant proffered no evidence that the victim's allegations of past sexual abuse were false. Therefore, the conversation was properly excluded.

People v. Braley, 879 P.2d 410 (Colo. App. 1993), *cert. denied*, (Colo. 1994).
Facts: The defendant sought to introduce evidence of the victim's alleged prostitution, claiming that the evidence was admissible to show that the acts complained of were consensual. The trial court denied the request without a hearing.
Holding: The proffered evidence was presumptively irrelevant and the trial court properly concluded that the defendant's offer of proof was insufficient to require an evidentiary hearing.

People v. Moreno, 739 P.2d 866 (Colo. App. 1987), *cert. denied*, (Colo. 1987).
Facts: The defendant sought to introduce evidence that the victim was promiscuous, that she was willing to sleep with men on the first date, and that she actively pursued sexual

encounters with men. He claimed that her reputation was relevant to his state of mind, including his lack of intent to commit the crime and his perception that she consented.
Holding: There was no evidence that the *defendant* knew anything about the victim's reputation or prior sexual conduct at the time of the offense. Therefore, the defendant offered nothing the trial court could conclude was relevant to his state of mind, his lack of intent, or his perception of the situation.

People v. Murphy, 919 P.2d 191 (Colo. 1996).
Facts: The defendant invited the victim to his apartment, handcuffed him and sexually assaulted him. The defendant claimed that the victim was homosexual and that he had consented to the sexual activity. The victim testified that he was married and had a child. The defendant sought to question the victim about his sexual orientation and about any prior homosexual conduct. The trial court denied the defendant's requests, finding that the questions were barred by the rape shield statute, but allowed the defendant's expert to testify that certain homosexuals are married and that they may seek to deny their homosexuality by getting married.
Holding: The basic purpose of the rape shield statute is to provide rape and sexual assault victims greater protection from humiliating "fishing expeditions" into their past sexual conduct, unless a showing is made that the evidence would be relevant to some issue in the case. The rape shield statute's prohibition against evidence of a rape victim's past sexual conduct also precludes the introduction of evidence of the victim's sexual orientation. The Court of Appeals erroneously held that the prosecution opened the door to the defense's evidence about the victim's sexual orientation and past sexual conduct by allowing him to testify that he was married and had a child. Furthermore, the defendant's offer of proof was insufficient to meet the requirements of the rape shield statute.

Raines v. State, 191 Ga. App. 743, 382 S.E.2d 738 (1989).
Facts: The fourteen year-old victim accepted a ride home from the defendant. Instead of taking her home, he took her to a secluded location, demanded sex, and then raped her. The defendant contended that there was no evidence that the sexual acts were induced by any acts of force or threats of force on his part. At trial, the victim testified that she had not offered any physical resistance because she had been raped previously and had been advised against resisting an attack. The defendant also claimed the trial court erred in failing to sustain his objection to the admission of the victim's testimony regarding her prior rape.
Holding: Although true consent negates the element of force, it is entirely logical and legally certain that apparent "consent" induced by fear is not the free consent required, but is the mere product of force within the meaning of the statute. The rape shield statute did not bar the victim's testimony regarding her prior rape. The testimony related to the victim's past experiences and was relevant to explain her contemporaneous "state of mind" and conduct in failing to physically resist the defendant.

State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990).
Facts: The defendant filed a pre-trial motion seeking to introduce evidence at trial that the complainant had made prior untruthful allegations of sexual assault. The trial court

denied his request, holding that the testimony was "a lot of nebulousness" that would "lead to jury confusion."
Holding: Before admitting evidence of prior untruthful allegations, the trial court must make three determinations: (1) whether the proffered evidence fits within Wis. Stat. § 972.11(2)(b)(3); (2) whether the evidence is material to a fact at issue in the case; and (3) whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. The defendant must establish some factual basis before the trial court admits the evidence. The defendant should produce evidence "sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations." The trial court must make a preliminary finding, based on the offer of proof, that the jury could reasonably find that the complainant made prior untruthful allegations. The trial court did not abuse its discretion here.

State v. Gulrud, 140 Wis. 2d 721, 412 N.W.2d 139 (Wis. App. 1987), *review denied*, 416 N.W.2d 297 (Wis. 1987).
Facts: The defendant sought to introduce evidence that the complainant had sexual intercourse with another man between the time of the alleged assaults and the time she was examined at the hospital. He claimed that it would establish that someone else could have caused the complainant's injuries and that it would also impeach her credibility.
Holding: The statute precludes introduction of all evidence of the complainant's sexual conduct prior to the conclusion of the sexual assault trial, unless it fits within the statutory exceptions. The defendant failed to develop his argument that the evidence fit within the "source or origin of semen" exception. The evidence that the defendant sought to introduce would have created a very weak inference that another man could have caused the complainant's injuries. Balanced against this weak inference would be the very real danger that the jury could have concluded that the complainant was promiscuous, and punished her for her moral delinquency, instead of basing its decision on the evidence.

State v. Higley, 190 Mont. 412, 621 P.2d 1043 (1980).
Facts: The complainant was grabbed as she walked home at night. She was forced into a car, driven to a secluded spot and forced to have vaginal and oral sex. The defendant sought to introduce testimony that the complainant laughed after being asked later, "Where are all of Bozeman's rapists? [The victim] needs to be raped again." He also wanted to cross-examine the complainant about her jacket, which had inscribed on it, "Liquor in the front and poker in the back."
Holding: Rules limiting inquiry into the victim's sexual conduct are essential to preserve the integrity of the trial and to prevent it from becoming a trial of the victim. The victim's character is not in issue in a case such as this. Therefore, the potentially damaging evidence of specific acts and prior conduct should be kept from the jury. The trial judge did not improperly limit the defendant's rights in refusing to allow the proposed evidence.

State v. Hopkins, 221 Neb. 367, 377 N.W.2d 110 (1985).
Facts: The defendant, an acquaintance of the victim and her husband, was convicted of sexual assault. He sought to introduce testimony that the victim had sexual intercourse with him on five separate occasions during a two-month period, in the presence of the

victim's husband and with the husband's participation. The trial court ruled that the offer of proof was insufficient to establish the relevance of the victim's past sexual behavior.
Holding: At the *in camera* hearing, the only evidence offered was the victim's acknowledgment of the five sexual incidents with the defendant. He introduced no evidence that the victim consented to intercourse on the night in question. Evidence of a victim's past sexual behavior with the defendant is relevant only in those cases where the defendant makes a *prima facie* showing at the *in camera* hearing that the victim consented to the sexual act which is the subject of the charge. Because the defendant failed to do so, the trial court properly excluded the evidence. Furthermore, even if evidence of a victim's past sexual behavior is admissible, the trial court may, nevertheless, exclude the evidence based on a finding that the probative value is substantially outweighed by the danger of unfair prejudice, or by the other enumerated factors listed in Neb. Evid. R. 403.

State v. Jackson, 216 Wis. 2d 646, 575 N.W.2d 475 (Wis. 1998).
Facts: The complainant lived with the defendant and his girlfriend. The defendant claimed that he and the complainant had had consensual sexual intercourse on three occasions. He sought to introduce evidence of their prior consensual relationship at trial where he was charged with sexual assault, robbery, armed kidnapping, threat to injure, and armed burglary, all as a repeater. Although he denied any sexual contact had occurred during the incident, he still argued for the admission of the sexual history evidence. The trial court denied his request.
Holding: The defendant was required to make a three-part showing that: (1) the proffered evidence relates to sexual activities between the complainant and the defendant; (2) the evidence is material to a fact at issue; and (3) the evidence of sexual contact with the complainant is of sufficient probative value to outweigh its inflammatory and prejudicial nature. The same evidentiary burden set forth in *DeSantis* applies for this exception. The trial court must be able to conclude from the defendant's proffer that a reasonable person could reasonably infer that the prior sexual conduct occurred. Wis. Stat. § 971.31(11) embodies the legislature's distrust of evidence of a victim's prior sexual history by initially weighing the balance in favor of a determination that the evidence is inherently prejudicial. The defendant failed to meet both the materiality and probative evidence requirements. Therefore, his constitutional challenge to the trial court's refusal to lift the rape shield must fail.

State v. Lessley, 257 Neb. 903, 601 N.W.2d 521 (1999).
Facts: The defendant was convicted of first degree sexual assault for forcing anal intercourse on a co-worker. He admitted having sex with her, but claimed it was consensual. The trial court denied the defendant's pre-trial motion to introduce testimony of another co-worker who claimed that the victim had told him she had anal intercourse with men to avoid getting pregnant. In response to the prosecutor's questioning at trial, the victim testified that she was a lesbian, that she had never engaged in that type of sexual activity and that she did not know about ejaculation. When asked if she had anal intercourse to prevent pregnancy, she testified that she did not. After her testimony, the defendant renewed his motion, claiming that he should be able to impeach the victim with her prior statement to the co-worker. The trial court again denied his request. The

defendant argued that the state "opened the door" with its questions about the victim's sexual orientation and that excluding the evidence denied him his Sixth Amendment right to confrontation.

Holding: The statutory purpose of the rape shield law is to protect rape victims from grueling cross-examination concerning their previous sexual behavior. Under the rape shield law, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions: source of physical evidence or consent. It is clear that this evidence does not fit within those two exceptions. There are, however, certain circumstances in which the defendant's right to confrontation would require the admission of evidence that is inadmissible under the rape shield statute. This is such a case. The only issue here was consent. The victim's testimony regarding her sexual orientation permitted the jury to draw the inference that she did not consent. The defendant's proffered evidence would have made this critical inference less probable. The trial court erred in excluding the evidence because it materially impaired the defendant's right to confront his accuser on the dispositive issue of consent.

IX. Sexual Predator Statutes

Kansas v. Hendricks, 521 U.S. 346 (1997).

Facts: An inmate with a long history of sexually molesting children was scheduled to be released from prison. Kansas invoked its newly enacted Sexually Violent Predator Act for the first time, committing the defendant. He challenged his commitment on substantive due process, double jeopardy, and *ex post facto* grounds.

Holding: The Act's definition of "mental abnormality" satisfied substantive due process requirements. The Act did not establish criminal proceedings, and involuntary commitment under the Act was not punishment. Therefore, the defendant's commitment did not amount to a second prosecution and punishment for his underlying offense. Rather, the Act was civil in nature. Hendricks' *ex post facto* claim was similarly flawed, since the *ex post facto* clause pertains exclusively to penal statutes. Furthermore, the Act did not criminalize conduct that was legal before or deprive Hendricks of any defense that was available to him at the time.

X. Unconscious/Asleep/Disabled Victim

Commonwealth v. Price, 420 Pa. Super. 256, 616 A.2d 681 (1992).

Facts: The complainant was asleep when the defendant penetrated her. Upon waking, she screamed at him to "get off" of her and then physically struggled with him. He claimed she consented.

Holding: The statutory subsection that proscribes intercourse with "unconscious" persons was enacted to proscribe intercourse with persons unable to consent because of their physical condition. The court held that engaging in sexual intercourse with a sleeping victim was intended to be proscribed by the rape statute. A person who is asleep is certainly unaware of her surroundings and unable to protect against the serious personal intrusion caused by non-consensual intercourse.

Paul v. State, 144 Ga. App. 106, 240 S.E.2d 600 (1977).
Facts: The defendant was charged with rape and murder and was convicted of rape. The woman was intoxicated; expert testimony established that her blood alcohol content was .23 percent.
Holding: Sexual intercourse with a woman whose will is temporarily lost from intoxication, unconsciousness arising from the use of drugs or other causes, or sleep, is rape.

State v. Curtis, 144 Wis. 2d 691, 424 N.W.2d 719 (Wis. App. 1988), *review denied*, 428 N.W.2d 558 (Wis. 1988).
Facts: The sixteen-year-old complainant awoke to find her mother's boyfriend fondling her breast. He also attempted to sexually assault her after she woke up. The jury instruction defined second degree sexual assault as "sexual contact or sexual intercourse with a person who the defendant knows is unconscious." The trial court also instructed the jury that "unconscious includes the loss of awareness caused by sleep." The defendant argued that this instruction, in effect, directed a verdict against him on the element of unconsciousness.
Holding: "Unconscious" is a loss of awareness which *may* be caused by sleep. The trial court properly defined the element of unconsciousness and did not invade the jury's fact-finding function. The question of whether the complainant was in fact "unconscious" remained for the jury's determination.

XI. Victim's Mental State/ Medical Records

Commonwealth v. Askew, 446 Pa. Super. 301, 666 A.2d 1062 (1995), *appeal denied*, 683 A.2d 876 (Pa. 1996).
Facts: The trial court ordered a rape counseling center to turn over its records to the defendant.
Holding: The privilege is absolute and applies to oral communications as well as written records created during the course of the confidential relationship. However, if the Commonwealth has obtained access to information pertaining to the sexual assault counseling which it seeks to shield from the defense, the statutory privilege is inapplicable

Commonwealth v. Wilson, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, 504 U.S. 977 (1992).
Facts: The defendant sought to subpoena records maintained by the rape crisis center which treated the complainant, claiming that the confidentiality statute only prohibited the subpoena of a sexual assault counselor as a witness.
Holding: The statutory privilege must extend to the subpoena of records and other documents developed throughout the counseling relationship. Any other interpretation of the statute would render the entire privilege meaningless. The statutory privilege is constitutional.

J.B. v. State, 171 Ga. App. 373, 319 S.E.2d 465 (1984).
Facts: Three boys in the school auditorium raped a 14-year-old special education student. She had an IQ of 65 and the mental level of a 12-year-old. The defendant asked the court to order the victim to undergo a psychiatric examination because of "her mental deficiency and her observable passivity." The trial court refused.
Holding: We are aware of no statutory authority or case law in this state that mandates the involuntary examination of a rape victim. Under the circumstances of this case, we discern no abuse of discretion in the trial court's decision.

State v. Liddell, 211 Mont. 180, 685 P.2d 918 (1984).
Facts: The defendant asked the court to compel the complainant to be examined by the defendant's psychologist.
Holding: There is no legal authority for such a procedure. Rule 35(a), M.R.Civ. P., allows for a mental or physical examination when a party's mental or physical condition is in controversy. The victim in this matter is a ***witness,*** not a party. The issue in this case was whether the sexual intercourse was without her consent. The act was at issue, not the victim's state of mind. Therefore, it was proper for the trial court to refuse the defendant's request.

State v. J.G., 261 N.J. Super. 409, 619 A.2d 232 (1993).
Facts: The defendant and his friend sexually abused the defendant's four children, aged one to eight, while his blind wife was at a 20-day training course. After the children disclosed what happened, the wife and three of the children received counseling at a private mental health center. The defendant issued a subpoena for the files and the center, unaware of the privilege, released them to the defendant's attorney. The trial court quashed the subpoena, ordered the return of the privileged information and directed defense counsel not to reveal the contents of the file.
Holding: The victim-counselor privilege was enacted by the legislature in 1987. The protection afforded by the privilege is broad enough to encompass both direct and indirect victims of crimes of violence. We are reluctant to require an ***in camera*** inspection where, as here, the statute grants an absolute privilege. The center's inadvertent release of the confidential files did not constitute a waiver of the privilege.

XII. ***Voir Dire***

Mitchell v. State, 176 Ga. App. 32, 335 S.E.2d 150 (1985).
Facts: The trial court refused to allow the defendant to ask the following question during *voir dire*: "The accused is a black man. The two alleged victims in this case are white females. With that on your mind, is there anyone that would have any prejudice, bias, or leaning against [the defendant] simply because he is black"?
Holding: There was no constitutional error in prohibiting the defendant from asking the question, but the defendant had a statutory right to ask the question disallowed in this case since it related to the subject of "bias which the juror[s] might have respecting" him. The conviction was reversed.