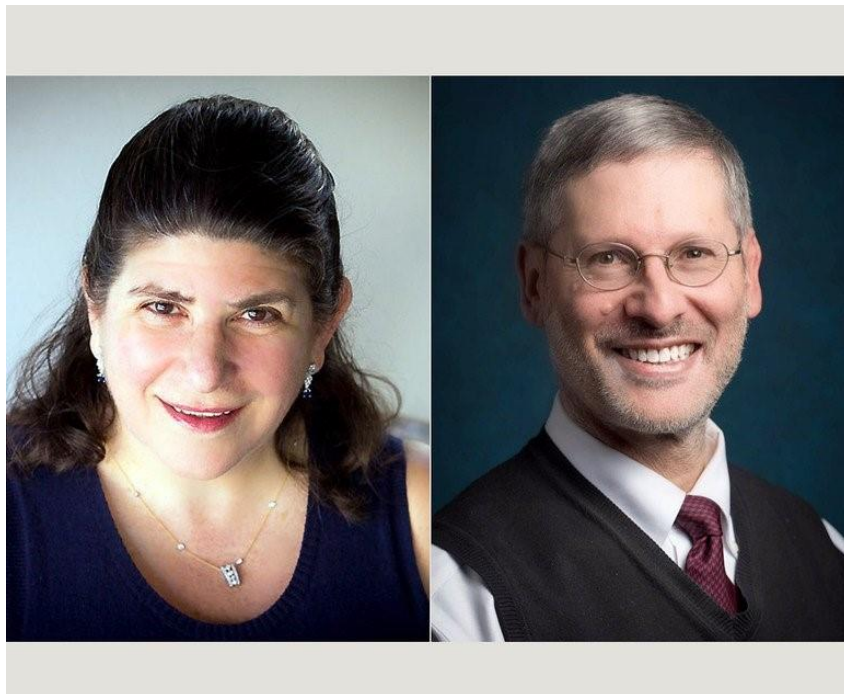


Applying Federal Rules of Evidence to sexual abuse cases can be a nuanced undertaking

Elisa Reiter and Daniel Pollack | November 23, 2021



Because sexual abuse may often involve only the two people who know what really happened, numerous legal issues will be at the heart of formal judicial proceedings. Credibility and clarity are paramount. Society, the justice system, and attorneys rightly view a nonconsensual sexual assault as a serious criminal offense. Proving the offense in court can involve proper application of case law and Federal Rules of Evidence. In a recent case, *United States v. Parson*, 2021 U.S. Dist. LEXIS 218968 (Case No. 21-CR-0112-CVE; November 12, 2021), Fed. R. Evid. 403 and Fed. R. Evid. 703 were in the spotlight.

The specific language of each Rule reads as follows:

- Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

- Rule 703. Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

In this case, the United States District Court for the Northern District of Oklahoma grappled with the issue of Dr. Lauren Conway's proposed testimony in a case involving allegations of sexual abuse: "Dr. Conway's testimony that the majority of confirmed sexual abuse cases have normal anogenital exams." What should a physician or psychologist be aware of in terms of allegations of sexual abuse?

Sexual abuse is defined as any sexual activity that a child cannot comprehend or give consent to, or that violates the law. The sexual activity may include fondling, oral-genital, genital and anal contact, as

well as exhibitionism, voyeurism and exposure to pornography. Sexual abuse must be differentiated from “sexual play” or age-appropriate behavior. In sexual play, the developmental level of the participants should be similar, and the activity should occur without coercion. For example, preschool children viewing each other’s genitalia without force is considered to be “normal,” while a developmentally more mature child engaging a young child in sexual behavior warrants investigation. Perpetrators may be relatives or nonrelatives and are most frequently male. Adolescent perpetrators are not uncommon, and many have a personal history of sexual and/or physical abuse.

In *Parson*, on March 24, 2021, the defendant was indicted for aggravated sexual abuse of a minor in Indian Territory. The criticism of Dr. Conway’s proposed testimony that the “majority of confirmed sexual abuse cases have normal anogenital exams” was based on two points:

1. The testimony was improper as impermissible corroboration or vouching; or
2. A purported scientific fact lacking adequate basis established by the mental health professional.

The government presented Dr. Conway’s curriculum vitae, along with several academic articles in support of her stance. The trial court stands as a gatekeeper, pursuant to FRE 702, and the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The U.S. District Court for the Northern District of Oklahoma found that “the peer-reviewed, academic resources provided by plaintiff, including an AAP clinical guide for practitioners, demonstrate that other experts in Dr. Conway’s specialization have reached the exact same conclusion.” As a result, the court found that Dr. Conway’s statement was based on sufficient facts and data. In addition, the court found that “this expert

opinion is helpful to the jury in deciding how to weigh the probative value of the alleged victim's normal anogenital exam in this case."

Was Dr. Conway's testimony needlessly cumulative? Did admission of the statement risk unduly prejudice the jury? When reviewing FRE 403, the Oklahoma court ruled that "Dr. Conway's statement adds context and a frame of reference for her other statement that a normal exam neither confirms nor refutes an allegation of sexual abuse." Defendant's counsel may cross-examine Dr. Conway as to any purported contradiction between whether a normal exam neither confirms nor refutes sexual abuse allegations, and that the majority of confirmed sexual abuse cases have normal anogenital exams. The net result? A reversal of a prior ruling on a motion *in limine*. The court concluded that:

1. Conway's expert opinion that the majority of confirmed sexual abuse cases have normal anogenital exams is based on sufficient facts and data and is therefore helpful to the jury; and, therefore,
2. Conway's testimony should be admitted.

The word 'nuance' derives from the French word '*nuer*' meaning 'shade,' 'subtlety,' and based on the Latin word '*nubes*,' meaning 'cloud'. One takeaway from this case: The responsibility of every court is to ensure that subtlety and clarity are not lost in the shadows of procedure.

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