



End Violence Against Women International  
(EVAWI)

# Start by Believing to Improve Responses to Sexual Assault and Prevent Gender Bias

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Mr. Tanner is a frequent lecturer and instructor for state and national organizations that serve law enforcement professionals and prosecutors. He has presented on the impact of the *Crawford v. Washington* case, ethics, domestic violence prosecutions, sexual assault and the impact of trauma on investigation and prosecution, expert testimony in domestic and sexual assault cases, cross examination of experts, and DNA evidence. Mr. Tanner has lectured on sexual assault trial advocacy, ethics, and evidence-based domestic violence prosecutions for the National District Attorney's Association (NDAA). He has presented for national organizations including the Battered Women's Justice Project, and the International Association of Chiefs of Police, both at its International Conference and as faculty for its Leadership Institute on Violence Against Women, Campus Leadership Institute on Violence Against Women, and the Train-the-Trainer Program.

Mr. Tanner's articles have been published in *The Georgia Prosecutor*, American Bar Association's *Criminal Justice Section Newsletter*, the *Michigan Bar Family Law Journal*, NDAA's *Prosecutor* magazine, and the *Sexual Assault Report*. He co-authored the Michigan Prosecutor *Sexual Assault Manual*, published in 2013.

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## Introduction

Do you remember 1994? *Boyz II Men* topped the pop charts for 14 weeks with their song “I’ll Make Love to You,” the World Series was cancelled due to the player’s strike, and the Violence Against Women Act (VAWA) was first passed. I remember trying sexual assault cases back then, before the advent of modern DNA technology. So much has changed, it is almost strange to think of a time when we didn’t have the DNA technology and tools that are currently available for sexual assault investigations and prosecutions.

Of course, DNA is not the only thing that’s changed our response to sexual assault. Since 1994, criminal justice professionals have taken a hard look at how we respond to sexual assault, and realized that there are implicit, and sometimes explicit, biases that have a significant impact on how these crimes are investigated and prosecuted – or more likely, not prosecuted. It seems that the grotesque stereotypes summed up by Sir Matthew Hale, the Chief Justice of England in the 17<sup>th</sup> century, still hold sway: “Rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho’ never so innocent.” Unfortunately, the reality is exactly the opposite. Rape is a very difficult accusation to make, and it is relatively easy to defend, because there are a host of stereotypes and misconceptions that stand ready to assist.

This is not to say that positive change hasn’t been made. More and more, the law enforcement response to sexual assault is being informed by research concerning the impact of trauma on behavior and memory. Policy reforms have been implemented to prevent gender bias in responses, and to conduct victim-centered and trauma-informed investigations and prosecutions. In other words, positive change is being driven on multiple fronts, including public awareness like the Start by Believing (SBB) campaign.

Perhaps inevitably, these changes are being scrutinized and sometimes attacked. Some have questioned whether a law enforcement investigator has already made up their mind, if they begin a victim interview by saying, “I’m sorry this happened to you.” A few courts have granted defense motions to prohibit the use of the word “victim” at trial, or in one extreme case, even prohibited the survivor from using her own words to describe what was done to her. The argument is that the very word “victim” or “rape” violates the presumption of innocence. SBB has not been immune to this scrutiny.

As of this writing, challenges to SBB have only been raised outside the courtroom. However, attacks outside the courtroom can dissuade jurisdictions from participating in SBB or considering more victim-centered approaches designed to prevent gender bias. Marshalling arguments against the attack, and showing that the campaign can be persuasively defended, could be the counterweight in favor of participating.



## Start by Believing: Improving Responses, One Disclosure at a Time

Start by Believing (SBB) is an awareness campaign focused on the public response to sexual assault, because the first person a victim confides in is typically a friend or family member. How they react determines in large part what happens next. A positive reaction can improve victims' well-being and increase the chance that they will report to law enforcement and reach out for help from other sources. Yet, it is also designed to improve professional responses as well. This is described by Sgt. Joanne Archambault (Ret), the founder and CEO of EVAWI, whose inspiration brought the campaign to life:

*I first realized the need for a campaign like SBB when I worked Child Abuse in the early 1980's. Little did I know then that there was even more bias to overcome when it comes to adolescent and adult victims of sexual assault.*

*The initial inspiration for the campaign was this: Time and time again, I saw sexual assault victims treated as though they had to prove they were a legitimate victim, before they would be taken seriously: "You say you were raped? Prove it!"*

*I never heard any officer demand that a victim of a burglary prove that they had a TV before taking a crime report. Yet this is exactly what we do to sexual assault victims every day – across this country, and around the world.*

When EVAWI first launched SBB in 2011, it was impossible to imagine how broadly it would be adopted, and how creative communities would be. Since the initial launch, the campaign has been adopted by hundreds of communities in the US and around the world. While it looks different in every community, the message is always the same: "When someone tells me they were raped or sexually assaulted, I Start by Believing."

Yet SBB is more than just a few words. It is not simply a pledge that an individual might take, or a campaign that a community might adopt. It is not a specific phrase that needs to be said to victims. Rather, SBB is a philosophical stance that should guide our responses to sexual assault. It "flips the script" on the message victims have historically received from professionals and support people, which is: "How do I know you're not lying?"

Truly implementing an SBB approach will have profound implications for virtually every aspect of an agency's and community's response. The philosophy should carry over into policies, daily practices, and multidisciplinary protocols. It should affect the language that we use, and the way we do our jobs. This is the type of strategy needed to reduce gender bias in criminal justice responses. Again, Joanne Archambault sums it up:

*Victims know when they are being heard and taken seriously – but it isn't because we say a few words. They know it from our actions. SBB is about listening carefully to victims, suspects and witnesses, and doing a thorough investigation, so decisions are based on all the information and evidence.*

## Preparing for Cross-Examination and Challenges

This Training Bulletin will delve into the challenges that have been raised with the SBB campaign, and the underlying philosophy of victim-centered approaches. In particular, I will address one specific manner of attack: Defense cross-examination aimed at exposing the law enforcement investigation of a sexual assault as biased. This bias could be based on the fact that an officer, investigator, or agency participated in an SBB campaign, or adopted victim-centered, trauma-informed investigative strategies.

First, I will outline the general nature of destructive cross-examination. Next, I'll discuss cross-examination specifically designed to expose bias based on SBB, drawing specific examples from a mock trial demonstration conducted at the 2017 International Conference on Sexual Assault, Domestic Violence, and Systems Change hosted by EVAWI. Finally, I will explain how to respond to this type of cross-examination, again giving specific examples of how to "rehabilitate" a witness and turn the defense's own cross-examination to the prosecutor's advantage, by describing how SBB works to reduce gender bias in the law enforcement investigation of sexual assault.

Yet there is also a broader point to keep in mind: Any attack on SBB is really an argument against the larger principle of victim-centered and trauma-informed practices. It is a condemnation of our efforts to prevent gender bias, by changing our response from one that is grounded in stereotypical assumptions and judgments about survivors, to one that is based on the neuroscience of trauma, and the realistic dynamics of sexual assault. Moreover, the arguments marshalled here, for responding to cross-examination, can be as powerful and persuasive outside the courtroom, as in it.

### The Nature of Cross-Examination

So how might SBB become an issue in a sexual assault trial? The answer lies in the general nature and purpose of cross-examination.

Cross-examination has been called the "greatest legal engine ever invented for the discovery of truth."<sup>1</sup> Those who've been subjected to cross-examination may well think otherwise; that the goal is not discovering the truth, so much as distorting it. However, whether it is conducted in service of the high-minded ideal of discovering the truth – or not – most cross-examinations are considered to be "destructive" in nature. Destructive cross is designed to make the jury question the credibility of a witness, and in turn, to raise doubt about the testimony and other evidence presented by the prosecution.

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<sup>1</sup> 5 John Henry Wigmore, *Evidence in Trials At Common Law*, § 1367, at 32 (James H. Chabourn ed., Little Brown 1974).



## Prior Inconsistent Statements

The most well-known method of destructive cross-examination is *impeachment by a prior inconsistent statement*. This type of cross-examination is familiar to most people, and in fact, it is probably what comes to mind when one hears the term “cross-examination.” In its most basic form, impeachment by prior inconsistent statement looks like this:

Attorney: *You just testified on direct examination that the person who attacked you was wearing a white t-shirt, do you remember saying that a moment ago?*

Witness: *Yes.*

Attorney: *Do you remember talking with a police officer a few days after reporting the attack?*

Witness: *Yes.*

Attorney: *And you made every effort to tell the officer the truth at that time, didn't you?*

Witness: *Yes.*

Attorney: *But in that statement to police, you told the officer that the person who attacked you was wearing a blue t-shirt, correct?*

At that point the impeachment is mostly accomplished. The witness can accept that he or she made the inconsistent statement, say they don't remember making the statement, or deny making the prior statement. Regardless of the answer given, the damage is already done; jurors are given a reason to question the truth of the inconsistent testimony, and the credibility of the witness in general.

## Allegations of Bias

When SBB becomes the subject of cross-examination, the nature of the attack is different. The witness's credibility is not impeached by a prior inconsistent statement, but rather by the allegation that their testimony is biased. It could either be: (a) biased in favor of the victim, (b) prejudiced against the defendant, or (c) compromised by a motive the witness has to testify untruthfully. SBB is one example of this type of attack.

To illustrate this type of cross-examination, the attorney might get a witness to acknowledge that he or she shares a family relationship with the victim or defendant. This line of examination relies on the logical inference that one's testimony about a relative is likely to be shaded in their favor. The examiner need do nothing more than establish the relationship and invite the jury to make the negative inference. Cross-examination designed to expose bias based on SBB is more nuanced, however.



## Start by Believing and the Biased Witness Attack

With this type of cross-examination, the attorney is trying to establish that the investigator's participation in SBB led to a rush to judgment and a flawed investigation. The idea is that the flawed investigation was intended to find only evidence to support that judgment, while ignoring evidence of the defendant's innocence.

How this might play out was demonstrated in April 2017, at EVAWI's annual international conference. At the conference, EVAWI staged a mock trial demonstration, with Detective Carl Hershman (Ret.) tasked with responding to defense challenges stemming from his involvement in a Start by Believing campaign. Roger Canaff, a former prosecutor who currently works as a trainer and consultant to law enforcement and prosecutors, conducted a cross-examination designed to undermine Hershman's credibility with accusations of bias. I conducted the direct and re-direct examination of Detective Hershman in the role of prosecutor. Miriam Falk, a career prosecutor and law enforcement trainer for the Wisconsin Department of Justice, played the role of judge, responding to questions and objections by both attorneys. Police Chief Jerald Monahan, President of EVAWI's Board of Directors, moderated the session. The full video of the mock trial demonstration is available [online](#). However, the excerpts presented in this Training Bulletin have been lightly edited for clarity and precision.

While this mock trial was based on a real case Detective Hershman investigated, defense attorney Canaff did not focus on the facts of the case, but on Hershman's participation and support of the victim-centered message of SBB. The cross-examination begins with Canaff laying the foundation for the attack by getting Hershman to agree that it is a bad idea to make premature judgments in any investigation.

Roger Canaff: *You agree that a good detective doesn't take sides or make immediate decisions at the onset of an investigation, correct?*

Carl Hershman: *Correct.*

Roger Canaff: *Because you agree that these kinds of initial assumptions could prove incorrect, is that right?*

Carl Hershman: *That is correct.*

Roger Canaff: *And you agree that if you make an incorrect assumption when investigating a possible crime, it could lead to a false arrest, correct?*

Carl Hershman: *That is correct.*

Roger Canaff: *Meaning the arrest of the wrong perpetrator?*

Carl Hershman: *Yes.*

Roger Canaff: *Or even somebody who didn't commit a crime at all, correct?*

Carl Hershman: *That is correct.*

Roger Canaff: *So, you'd agree that a detective does his or her best to avoid making a snap judgment that could lead to incorrect assumptions or conclusions, correct?*

Carl Hershman: *That is correct.*

Of course, everyone should agree with these statements. Canaff knows that jurors, as ordinary citizens, want to believe that law enforcement officers do not rush to judgment. The next step is to introduce the notion of bias. Note that Canaff doesn't ask Hershman to define bias, or even agree to a definition of bias. Rather, Canaff simply links the idea of bias to the case, by suggesting that it is the cause of an investigator's snap judgment.

Roger Canaff: *And you'd agree that the avoidance of bias is crucial in protecting against things like snap judgements or incorrect assumptions?*

Carl Hershman: *Yes.*

Roger Canaff: *So, good investigators guard against the possibility of being biased or even appearing that way, is that, right?*

Carl Hershman: *That is correct.*

Agreeing that a "good investigator" works to avoid *the appearance of bias* is a crucial step in the cross-examination. Actual bias is rather difficult to establish. But suggesting the appearance of bias is easy. With this foundation set, the main thrust of the cross-examination shifts to a specific kind of bias – confirmation bias.

Roger Canaff: *And additionally, Detective, you're familiar with the concept of confirmation bias, is that, right?*

Carl Hershman: *Yes.*

Roger Canaff: *You would agree with me that confirmation bias is a situation whereby an investigator, or anybody frankly, looks for facts to validate the conclusion that he or she has already reached, right?*

Carl Hershman: *That is correct.*

Roger Canaff: *So, you agree that if confirmation bias is operating in an investigation, it can lead to prejudging the evidence, is that, right?*

Carl Hershman: *That is correct.*

All that is left to complete the attack is to suggest that SBB is an expression of confirmation bias, which led Hershman to investigate the case with the goal of confirming his judgment, using only evidence supporting his belief in the victim.

Roger Canaff: *Well in fact, what Start by Believing asks of investigators, and others, is that the person responding to an accusation of sexual assault start by believing the accuser, is that correct?*

Carl Hershman: *That is correct.*

Roger Canaff: *So, when it comes to accusations of sexual assault, you've adopted this mindset to believe the accuser, correct?*

Carl Hershman: *That is correct.*

Roger Canaff: *In fact, as an adherent to Start by Believing, this is really how you're required to think when you begin your investigation, is that correct?*

Carl Hershman: *That's how you should start a case.*

Roger Canaff: *And that's exactly how you proceeded in this investigation, isn't it Detective?*

Carl Hershman: *Yes.*

Roger Canaff: *You believed Mary Anderson, the accuser in this case, from the start of your investigation, correct?*

Carl Hershman: *That is correct.*

When Canaff asserts that Hershman believed the victim from the very outset of the investigation, he establishes at least enough evidence to make a plausible argument that Hershman's investigation was biased toward finding evidence that supported that belief, while ignoring that which ran counter to it. As a final point, Canaff raises what he can argue is proof of confirmation bias in action:

Roger Canaff: *We've heard that you told Mary Anderson that you were, "Sorry this happened to her." Do you agree that you said those words to her?*

Carl Hershman: *Yes, I did.*

Roger Canaff: *It was the very first thing you said to her, correct?*

Carl Hershman: *That is correct.*

Roger Canaff: *So, you made this statement of your belief to her even before you did one speck of investigation with regard to this case, is that correct?*

Carl Hershman: *That is correct.*

Roger Canaff: *So, your statement to her wasn't based on any evidence that there had been an actual sexual assault, is that fair?*

Carl Hershman: *Yes.*

The argument that SBB leads to biased investigations is not currently supported by any evidence. In fact, it relies on a purposeful misunderstanding about what SBB is, and what it means for professionals who adopt the SBB philosophy. Since fortune favors the well-prepared, the obvious response is to know what SBB is, where it came from, and what it really means, and then to be able to communicate those facts to the jury.

## Responding to the Bias Attack

Is there anything that can be done to stop this line of attack? After all, the defense will not typically have any evidence that SBB actually led to a biased investigation. The attack simply relies on the implication that the SBB philosophy leads to such bias.

While it may seem somewhat unfair, this line of cross-examination will be difficult to prevent or stop. Each defendant has a right to confront the witnesses against him or her, granted in the 6<sup>th</sup> Amendment. The primary means of confrontation is the “crucible of cross-examination.”<sup>2</sup> However, that doesn’t mean that the 6<sup>th</sup> Amendment entitles the defendant to an effective cross-examination, or cross-examination in any manner on any subject.<sup>3</sup> There are times when the trial court can limit the scope and subject of cross-examination.<sup>4</sup> The essential problem is in trying to limit cross-examination on issues of bias. A witness’s potential bias is almost always relevant and material to the case, and the defendant’s right to cross-examination to expose potential bias is jealously protected.<sup>5</sup> We have recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.<sup>6</sup> So, while the trial court has some discretion to limit the scope and manner of cross-examination, motions to limit cross-examination to reveal a witness’s bias are unlikely to be met with success.

<sup>2</sup> *Crawford v. Washington*, 541 US36; 124 S.Ct. 1354; 158 L.Ed.2d 177 (2004).

<sup>3</sup> *Delaware v. Fensterer*, 474 US 15; 106 S.Ct. 292; 88 L.Ed.2d 15 (1985).

<sup>4</sup> See *Mancusi v. Stubbs*, 408 US 204; 92 S Ct 2308; 33 L.Ed.2d 293 (1972), *United States v. Nixon*, 418 US 683; 94 S Ct 3090; 41 L.Ed.2d 1039 (1974).

<sup>5</sup> “The partiality of a witness is subject to exploration at trial and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’” 3A J. Wigmore, *Evidence* § 940, p. 775 (Chadbourn rev.1970).

<sup>6</sup> *Davis v. Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974).



Perhaps the strongest argument against allowing this line of questioning is the fact that there is likely no evidence to suggest that the participation in an SBB campaign, or support for the SBB message, actually caused the investigator to ignore evidence that pointed toward the defendant's innocence or challenged the truthfulness of the victim. Put another way, it is unlikely that there will be any facts or evidence to support the argument that SBB causes investigators to be biased, and the connection between SBB and any biased investigation is too speculative to support this line of cross-examination.<sup>7</sup>

## Getting the Facts Out Through Re-Direct

If it becomes clear that cross-examination of this kind is going to happen, it's up to the investigator and prosecutor to formulate a response. Like many weapons used at trial, this one has two edges; it sounds damaging, and it may be effective, but at the same time, it presents an opportunity for the investigator to explain SBB to the jury with a level of detail that probably would not be allowed on direct exam. Done effectively, re-direct on SBB can make the defense rue the day they decided to try this method of cross.

### Explaining "Confirmation Bias"?

To pursue this strategy, the prosecutor must first meaningfully address the issue of confirmation bias during re-direct examination. Is there such a thing as confirmation bias? Does taking the SBB pledge "cause" it? The ready answers are "Yes" and "No." Confirmation bias is a real thing, but it has never been shown to be caused by SBB.

Confirmation bias describes the phenomenon "where human beings – including criminal justice professionals – tend to seek evidence that confirms pre-existing ideas and avoids or discredits evidence challenging these ideas."<sup>8</sup>

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<sup>7</sup> *Ray v. United States*, 620 A.2d 860, 862 (D.C.1993), holding that a proper foundation must be laid showing the cross-examiner has a good-faith basis for accusations of bias before being allowed to pursue that line of questioning.

<sup>8</sup> Archambault, Berkowitz, Lonsway, (2017) *False Reports*, EVAWI OnLine Training Institute, 43 [citation omitted].

## Confirmation Bias: An Example

To provide an example of confirmation bias, adult participants in one research study were offered information on hot-button issues like gun control or affirmative action. Each parcel of information was labelled by its source, which clearly suggested whether it was supportive, or opposing, a particular position. (For example, the information was labeled as coming from the National Rifle Association or Citizens Against Handguns).

Participants were then asked to choose which source of information was most credible and reliable. Although participants were instructed to be even-handed in their selections, they tended to choose sources that matched their pre-existing views. In other words, the study found that even when people are presented with a balanced set of facts, they tend to reinforce their pre-existing views by gravitating towards information they already agree with. This tendency was most pronounced among participants with more strongly held opinions on an issue.

Cook, J., Lewandowsky, S. (2011), *The Debunking Handbook*. St. Lucia, Australia: University of Queensland. November 5. ISBN 978-0- 646-56812-6. [<http://sks.to/debunk>]

When the defense uses cross-examination to challenge the credibility of an investigator based on confirmation bias, the implicit assumption is that something associated with SBB changed the investigator's worldview so significantly that she or he is no longer objectively seeking the facts; rather, the investigator is only looking for facts that support their new worldview that sexual assault victims are always telling the truth. In other words, SBB doesn't cause confirmation bias – that's something inherent in being human. The question is whether it causes a change in the investigator's belief about sexual assault victims and cases. All of which brings up the question: What beliefs were held by sexual assault investigators, prior to being exposed to SBB? This is a critical question that can be addressed by the prosecutor during re-direct examination.

### Using Re-Direct to Explain SBB

The importance of the investigator's testimony on re-direct cannot be overstated. During this re-direct examination, the investigator cannot simply deny the existence of bias. Re-direct has to be used to explain what SBB really is, and how it works to counter the real confirmation bias that has historically operated in sexual assault cases.

In the mock trial demonstration, I guided Detective Hershman through this explanation, as the prosecutor conducting a re-direct examination. I began by asking him to explain how law enforcement officers in his department were originally trained to investigate sexual assault cases.

Herb Tanner: *Detective, let's back up a little bit and talk about decades ago, when you were trained to investigate sexual assaults, when you first joined the San Diego*



*Police Department. Could you describe for us what that training was like, specific to sexual assault, what were you taught to look for back then?*

Carl Hershman: *Well, decades ago, we used the three-strike system. Meaning the third strike you're out, the case is over. When a victim would come forward and try to report a sexual assault, we would have that bias drilled in us, to look for those three strikes.*

Herb Tanner: *Let me see if I can understand what you're saying. When you say strikes, what were those strikes? Was there something that you were looking for that was important to you in the investigation?*

Carl Hershman: *Yes, and in this case for sexual assault, strike one for example would be a late-night party, strike two, not directly reporting to the police, strike three, [the victim] had been drinking too much and was rendered unconscious and wasn't able to give a clear, precise detailed statement. And if you want to go further, strike four, she wants to withdraw from the investigation.*

Herb Tanner: *So, when you investigated sexual assault cases, you looked for those strikes?*

Carl Hershman: *Yes, you'd purposefully look for those strikes so you can have a reason, if you will, to stop the case. Also, it confirms your bias that this wasn't real.*

To keep the demonstration as authentic as possible, Detective Hershman responded from his own experience, but what he's describing is how confirmation bias has traditionally operated, and still continues to operate in far too many places, within the criminal justice system. Reports of sexual assault have historically been treated with skepticism, if not outright hostility, and this is "all too often 'confirmed' with the response and behaviors of victims, which are seen as evidence that [the victim] is lying."<sup>9</sup>

How the witness explains the way sexual assault investigations were handled prior to SBB, is not terribly important, so long as it's true. What is more important is the fact that it *can be* explained. This description can then be framed as the real bias present in the justice system's response to sexual assault. It also sets the stage for a more detailed explanation of what SBB is, and more broadly, what it means to investigate sexual assault reports in a trauma-informed, victim-centered way. That explanation can include, as it did in the mock trial demonstration, the fact that SBB reinforces the importance of investigators *listening* to the victim, *documenting* what is said, and then

<sup>9</sup> Archambault et al, at 44.



*beginning a thorough investigation.* In other words, investigators must remain objective and not make any premature judgments about the report based on stereotypical and biased assumptions about the victim.

Herb Tanner: *Now, how did things change when Start by Believing came on the scene?*

Carl Hershman: *Well, Start by Believing was designed to train law enforcement, and also others in the community, that the three strikes system does not work. The system of three strikes does not work in sexual assault, that there's victimology, over a period of time that you start to understand with someone coming forward and wanting to report a sexual assault.*

Herb Tanner: *So, there are a number of elements to Start by Believing that are important to your investigation. Mr. Canaff said that you start by believing the victim. Do you believe everything that they tell you?*

Carl Hershman: *At the beginning, I want to get information from this person, so I want this person to feel comfortable to talk to me. So yes, I did. I documented what she told me and then later I build and corroborate. But at that moment, yes, I believed everything she told me.*

Herb Tanner: *And is there a significant aspect of training to the Start by Believing campaign?*

Carl Hershman: *Yes, to understand victimology of sexual assault victims when they do come forward, listen to what they have to say, document what they have to say, and then you start your investigation.*

Herb Tanner: *And is it part of the Start by Believing campaign that you believe what is said to you in the first initial interview, and that ends your investigation?*

Carl Hershman: *And it ends my investigation?*

Herb Tanner: *Yep, that's all you've got to do.*

Carl Hershman: *No, absolutely not.*

Herb Tanner: *What does it really say?*

Carl Hershman: *It really says to start an investigation, give that person the justice that they're seeking, the dignity of coming forward, and when they do report a crime, no matter how bizarre it is, do your job, take the next step, no*

*matter how many strikes you can see in a report, because you're going to see them.*

Again, Hershman's testimony reflects his own personal experience, and this excerpt is very short, compared to an actual trial. There are also a number of resources that can be cited, to reinforce the idea that SBB is focused on "flipping the script," from a traditional bias *against victims* to the position that a sexual assault report has merit unless proven otherwise and must be followed with a thorough and fair investigation.

## Using Re-direct to Explain Other Benefits of SBB

How a re-direct examination is constructed depends in part upon what's brought up in cross-examination. It is unethical to simply "lie in the weeds," waiting to present factual testimony in re-direct that should have been offered during the direct examination. That said, a bias attack on SBB should open a broad range of testimony for re-direct that can be used to rehabilitate the witness. Potential subjects for re-direct include the following.

### SBB Helps to Prevent Gender Bias

One strategy for re-direct is to argue that SBB actually helps *prevent* the impact of bias, rather than create it. This is the tact we took in the mock trial demonstration. There is an overwhelming body of evidence demonstrating that the criminal justice response to sexual assault has historically been driven by stereotypical judgments about gender, and misconceptions regarding how a victim of sexual assault should behave – before, during and after the assault. These misconceptions form the basis of the "three strikes" Hershman testified about in the mock trial demonstration. They also offer the means by which gender bias is expressed within the justice system's response to sexual assault.<sup>10</sup>

This is illustrated in the US Justice Department's report, summarizing the findings of their investigation of the New Orleans Police Department's response to sexual assault. In that report, investigators concluded that there were a number of serious deficiencies in the NOPD's response to sexual assault, including explicit statements of bias:

*We find that in situations where the Department pursues sexual assault complaints, the investigations are seriously deficient, marked by poor victim interviewing skills, missing or inadequate documentation, and minimal efforts to contact witnesses or interrogate suspects. The documentation we reviewed was replete with stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about the victims' perceived credibility, sexual history, or delay in contacting the police.*

<sup>10</sup> See, US Department of Justice (2015, December) [Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence](#); and [False Reports](#) OLT Module and resources cited.

This line of re-direct examination has two primary strengths. First, it establishes that bias is real, but clarifies that it has historically worked *against* sexual assault victims, leading to bad investigations. Second, it highlights the fact that the defense in a sexual assault case is likely relying on one or more of these stereotypical assumptions. Cross-examination about SBB thus opens the door to the real bias in the defense's arguments.

### **SBB Trains Investigators to Conduct Better Interviews**

Another line of re-direct examination is to argue that SBB trains investigators to conduct better interviews with sexual assault victims. There is a growing body of research on the impact of trauma on sexual assault victims' memories and behaviors. Those effects have often been misinterpreted as indicators of deception or a false report, contributing to the poor response to sexual assault reports.

SBB focuses training on changing traditional interviewing techniques to take into account the impact of trauma.<sup>11</sup> The end result is a better interview and a more accurate account of how the survivor experienced the sexual assault.<sup>12</sup>

### **SBB Reduces Secondary Victimization**

Re-direct can also highlight the fact that SBB can help to reduce the negative impact of criminal justice participation on sexual assault victims. Not surprisingly, research demonstrates that sexual assault victims are often traumatized by the experience of navigating a criminal justice system that harbors explicit and implicit expressions of gender bias. This secondary victimization can seriously compound the physical and health consequences of sexual assault.<sup>13</sup> This fact alone should motivate a change in the response to sexual assault survivors. But the often-appalling interviewing skills, premature judgments, and poor or non-existent investigations that are so often seen in sexual assault cases can also have broader impacts – not least of which is the increasing likelihood that victims will withdraw from the criminal justice system, thereby reinforcing the negative judgments about victims and perceptions that many sexual assault reports are false allegations.

<sup>11</sup> See EVAWI resources listed at the conclusion of this document.

<sup>12</sup> Campbell, R., Bybee, D., Ford, J.K., & Patterson, D. (2009). *Systems change analysis of SANE programs: Identifying the mediating mechanisms of criminal justice impact*. Washington, DC: US Department of Justice, National Institute of Justice (NCJ 226498).

<sup>13</sup> Campbell, J. (2006) Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference? *12 Violence Against Women* 11.

## Research: How Does Secondary Victimization Operate?

What do law enforcement officers say or do during an investigation that causes victims to feel traumatized? In one study, victims reported, and responding officers corroborated, that officers sometimes:

- Discourage victims from filing a report
- Are reluctant to take a report, or even refuse to do so
- Tell victims that their case is not serious enough to pursue
- Question victims about their clothing, prior sexual history, prior relationship with the perpetrator, resistance during the assault
- Ask if the victim responded sexually (e.g., had an orgasm) during the assault

Of course, not all law enforcement officers who participated in the study said or did these things. In some cases, the frequencies were actually quite small. However, the findings can nonetheless motivate us to review our responses to sexual assault victims and look for similar signs of implicit and explicit gender bias at work.

Campbell, J. (2006) Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference? 12 *Violence Against Women* 11.

## SBB Levels the Playing Field

The crux of this attack is the argument that investigators who take the SBB pledge, participate in a SBB campaign, utilize victim-centered best practices, or simply show empathy toward victims, will conduct incomplete investigations and ignore exculpatory evidence favorable to the suspect. Yet SBB training materials teach exactly the opposite. Therefore, the investigator should testify on re-direct about the actual investigative steps taken, highlighting the amount of follow-up investigation conducted to pursue leads that were developed through any interviews of the suspect(s) and interviews of any witnesses named by the suspect(s). When doing this, it is important to place the full extent of the investigation into the context of SBB, as Hershman did in this part of the demonstration:

Herb Tanner: *So, of course you did investigate this case and you spoke with Mr. Martinez [the suspect], and he sort of made clear to us his thoughts about you and your abilities. During that interview, did you ask him if there were any witnesses that you should talk to, to corroborate his version of events?*

Carl Hershman: *Yes, I did.*

Herb Tanner: *Did you talk to those witnesses and investigate that?*

Carl Hershman: *I did.*

Herb Tanner: Why? If you already believed that this happened?

Carl Hershman: Well I believed Mr. Martinez when he-

Herb Tanner: I'm sorry, I didn't hear that.

Carl Hershman: *I believed Mr. Martinez, his statement, what he told me, so I wanted to do the same for him as I do for the victim or any other suspect, is to go out and verify and corroborate what he told me.*

Herb Tanner: *So, is part of Start by Believing, or maybe even better would be to say part of a thorough investigation in sexual assault, as in any other crime, is to start by believing the people you are talking to and then continue the investigation?*

Carl Hershman: *Absolutely.*

It is not enough to simply testify that the investigation was thorough and complete, because the cross-examination theory hinges on the words “Start by Believing.” The implication is that believing a survivor puts them in some favored status that distorts, or even terminates the investigation before it even begins. Yet the nature of SBB is just the opposite. SBB materials and training emphasize the necessity of conducting a thorough, objective, and evidence-based investigation before making any judgments about the case. In short, victims of sexual assault should be treated like any other person reporting a crime. Hershman illustrated this bedrock principle when he said he “believed” the suspect and treated him the same way he would treat the victim or any other suspect or witness.

## Rising to the Challenge

As noted at the outset, challenges to SBB have only been raised outside the courtroom; actual cross-examination on SBB hasn't happened yet, at least as far as we know. So why the drama about something that hasn't happened yet? The simple answer is that it probably will happen, and refusing to prepare for this is a recipe for disaster. Also, as noted previously, attacks outside the courtroom can dissuade jurisdictions from participating in SBB or considering more victim-centered approaches designed to prevent gender bias. This Training Bulletin is designed to outline arguments against the attack, and show that the campaign can be persuasively defended, to encourage communities, including law enforcement agencies, to participate.

The prior section set out specific responses to the principle elements of the argument. There are also other things potential witnesses can and should do to prepare for their responses, and to help other team members prepare as well. The first, and obvious

thing to keep in mind, is to always tell the truth. The answers in the mock trial demonstration were based on Detective Hershman's personal knowledge and experience; although the basic nature of SBB should be familiar to everyone involved, the way it is explained must be unique, and in the witness's own words.

Second, successfully defending SBB requires the witness to know what the campaign is, and what it is not. The witness must become comfortable with explaining – in short, simple terms – what SBB is, and what it means to take the pledge or to work in an agency or community that has adopted the SBB philosophy. As a corollary to that, everyone on the investigative or trial team must have that knowledge, too. If the prosecutor isn't familiar with Start by Believing, it's up to the investigator to educate them – and vice versa. As a related note, it is also essential to know what other team members are saying about SBB, in print, on the internet, and in-person.

There is no way to completely insulate a witness from cross-examination implying bias based on the SBB philosophy, or any other victim-centered response, short of closing the courthouse doors. For far too long, this has been the criminal justice system's default response, by responding to reports with disbelief or outright hostility. Change is needed. SBB can be a critical part of that change, as described by Police Chief Jerald Monahan:

*For those agencies that choose to use it, it is defensible, it is worth fighting for, and it is a strategy that opens doors for victims and survivors to give full disclosure and feel safe when they do so.*



## Resources

For more information on the SBB campaign and associated topics, please see the following resources. All are available from the EVAWI website at [www.evawintl.org](http://www.evawintl.org).

### Training Bulletins:

[Start by Believing: Evaluating the Impact of Public Awareness Campaign Designed to Change the Community Response to Sexual Assault](#) (July 2013)

[Start by Believing: Participation of Criminal Justice Professionals](#) (September 2016)

[Understanding the Neurobiology of Trauma and Implications for Interviewing Victims](#) (November 2016)

[The Investigating Officer's Direct Exam: Strategic and Tactical Considerations to Take Advantage of the IO's Expertise](#) (June 2018)

[Interviews with Victims vs. Suspects: Start by Believing and the Question of Bias](#) (October 2018)

[Improving Responses to Sexual Assault Disclosures: Both Informal and Formal Support Providers](#) (June 2019)

[Becoming Trauma-Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews](#) (December 2019)

[Trauma-Informed Interviewing and the Criminal Sexual Assault Case: Where Investigative Technique Meets Evidentiary Value](#) (February 2020)

### OnLine Training Institute (OLTI) Modules:

[Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault](#) (January 2017)

[False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault](#) (May 2007)

### Webinars:

[Neurobiology of Sexual Assault, 2-part webinar series: Part 1](#) (September 2016)

[Neurobiology of Sexual Assault, 2-part webinar series: Part 2](#) (September 2016)

### Publications:

[Start by Believing: Changing Attitudes toward Sexual Assault](#) (April 2014)

