

# Consent Defense in Sexual Assault Cases

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## I. When “consent” available as defense

### *Not applicable:*

- Victim under 15 and under cannot consent (but see Sec. 948.10)
- Victim age 16 to 18 (Sec. 948.09)
- Victim mentally ill or deficient (Sec. 940.225(2)(c))
- Patient in hospital 940.225(2)(g) and (j)
- Inmate in correctional institution/probationer 940.225(2)(h) and (i)

### *Applicable*

Whenever “consent” is an element of the offense

## II. Investigation/Building your case

### a. Facts surrounding incident

- i. avoid losing evidence
- ii. Client’s version
- iii. Other witnesses friend/ strangers
- iv. Video images
- v. Paper trail

### b. Prior contact/prior sexual contact

- i. Client information
- ii. Victim may admit
- iii. Independent witnesses/roommates
- iv. Paper trail

### c. Motive to falsify

- i. Just mad
- ii. Fear of parents/boyfriend
- iii. Pregnancy
- iv. Venereal disease
- v. Victim unstable so falsifies or fanaticizes
- vi. Jealousy
- vii. Buyer’s remorse

### d. Prior false accusations

- i. Difficult to find - no data base by victim
- ii. Contact logs by police agency
- iii. Gossip – friends/ family
- iv. Admissibility -State v. DeSantis 155 Wis. 2d 774 (1989)

### e. Sane Exam

- i. Findings of expert – “results consistent with SA”
- ii. Review narratives/event details carefully to find discrepancies
  - 1. recitation of facts of incident/narrative

- 2. spontaneous statements during exam
- 3. medication
- 4. alcohol and/or drugs
- 5. prior victim of SA / whether reported to police
- 6. specific details of incident
- 7. history of relationship
- 8. behavior after assault
- iii. Photos taken external/internal – colposcopy
  - 1. Photos consistent with description? With SANE diagram?
  - 2. Internal bruising exist/ location of bruising
  - 3. independent expert
- f. On-line sources
  - i. Face book other social media
  - ii. Google/general search
- g. Preliminary hearing
  - i. Only chance to interview victim
  - ii. Open ended questions
  - iii. Detailed version of events
  - iv. Confirm theory of defense facts
  - v. Process of interview
    - 1. how many times interviewed
    - 2. who present
    - 3. length of interview
    - 4. assumptions

### III. Motions

- a. Suppress Evidence
  - i. Physical evidence
  - ii. Statements of Defendant
  - iii. DNA evidence obtained
- b. Obtain victim's psychiatric/psychological records
  - i. "Shiffra Motion", State v. Green, 253 Wis.. 2d 356 (1993)
- c. Rape Shield Law Sec. 972.11(2)
  - i. General purpose
  - ii. Motion before trial mandatory Secs. 971.31(11) and 972.11(2)(d)(2)
  - iii. Excludes victim's prior sexual history except:
    - 1. Past conduct w/ defendant
    - 2. past conduct showing source of semen, pregnancy or disease to show degree of SA/ extent of injury
    - 3. evidence of prior untruthful allegations of SA
  - iv. Excludes evidence of clothing of victim unless:
    - 1. relevant to a contested issue and
    - 2. probative value substantially outweighs all of following
      - a. danger of unfair prejudice, confusion of the issues
      - b. undue delay, waste of time cumulative evidence

- IV. Trial
  - a. Voir Dire
    - i. Individual Voir Dire
      - 1. victim of sexual assault
      - 2. close friend or relative victim of SA
    - ii. General questions
      - 1. Men vs. women
      - 2. Agree people lie about sex
      - 3. Degree of enforcement appropriate
      - 4. Falsely accused
      - 5. Counsel/ interact with victims
  - b. Opening statements
    - i. How much to disclose
    - ii. How much to criticize State
    - iii. How much to criticize victim
  - c. Cross exam of victim/witnesses
    - i. Consider how cross perceived
    - ii. Difficult witness/victim
    - iii. No cross ok
  - d. Presentation of defense witnesses
    - i. Don't give jury reason to weigh cases
    - ii. Defendant testifies – pitfalls/benefits
    - iii. How many witnesses are too many
  - e. Closing
    - i. Righteous indignation
    - ii. Plight of wrongfully accused
    - iii. Criticism of victim/victim's conduct
- V. Plea Negotiations
  - a. Good vs. ok case
  - b. Think about how much of client's statement to divulge
  - c. Alternate ways to approach subject
  - d. Know local culture on nature of plea i.e. Guilty vs. no contest
  - e. Advise client as to all ramification
    - i. 980
    - ii. DOC rules
    - iii. Registration requirement
- VI. Sentencing
  - a. Prior sex offenses – old police reports
  - b. History on supervision – DOC file
  - c. Consider expert evaluation – risk assessment tool.
  - d. DOC risk assessment
  - e. Family/ friends
  - f. PSI - Caution client on what to expect