

National Domestic Violence Prosecution

Best Practices Guide

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NDAA
WOMEN
PROSECUTORS
SECTION

The National Domestic Violence Prosecution Best Practices Guide is a living document highlighting current best practices in the prosecution of domestic violence.

It was inspired by the Women Prosecutors Section of the National District Attorneys Association (NDAA) and a National Symposium on the Prosecution of Domestic Violence Cases, hosted by the NDAA and Alliance for HOPE International in San Diego in October 2015. The two-day national symposium included 100 of our nation's leading prosecutors re-envisioning the prosecution of domestic violence cases in the United States.

Prosecutors and allied professionals are encouraged to continue developing this guide by contributing information on emerging best practices. NDAA recognizes that funding, local rules, or other state laws or local restrictions may prevent an office from adopting the various approaches suggested. This guide is not intended to replace practices and procedures already in operation, but to simply inform and recommend practices that are effective and consistent throughout the nation.

For additional suggested edits to this document, contact Tracy.Prior@sdca.org, Chair, Domestic Violence Subcommittee, NDAA Women's Section.

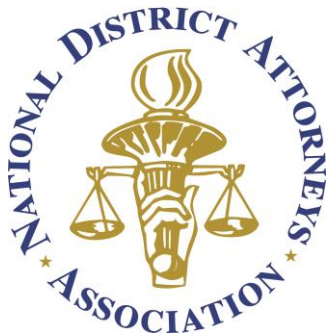


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INTRODUCTION

Domestic violence is no longer a private matter to be resolved by the family alone.¹ Rather, it is a social, economic, and public health concern. Nationally, about 31.5% of women and 27.5% of men have experienced physical violence by an intimate partner during their lifetimes. Of these, about 22.3% of women and 14% of men have experienced severe physical violence.² In addition to immediate physical injuries, victims of domestic violence suffer long-term social and psychological harms such as being fearful or concerned for their safety; developing symptoms of posttraumatic stress disorder; missing school; and finding themselves in need of housing, legal services, and medical care.³ About 47.1% of women and 46.5% of men have experienced psychological aggression by an intimate partner during their lifetimes.⁴

The toll is not only felt by the individual victim but by the entire family. Violence committed in front of family members, particularly children, can have physical, developmental, and psychological ramifications on those who witness the violence or try to intervene.⁵ The incidence of child abuse is higher in homes where women are abused by their partners, and these children are at a high risk of becoming victims or abusers as adults.⁶ Recent research has documented high rates of domestic violence perpetration and victimization in the lives of children growing up in domestic violence homes.⁷ In a 2013 study by Sam Houston University, researchers tracked children growing up in domestic violence homes for 20 years. Children from 78.6% of the families became perpetrators by the age of 21.⁸ Children from 75% of the families became victims of domestic violence by the age of 21.⁹

Society as a whole is further impacted by the demand domestic violence generates. The Centers for Disease Control and Prevention (CDC) reports that in 1995, the cost of domestic violence against women exceeded \$5.8 billion.¹⁰ Of this cost, \$4.1 billion were directly attributable to medical and mental healthcare costs with almost \$1.8 billion attributed to the indirect cost of lost productivity.¹¹ On average, victims lose about eight million days of paid work.¹² When converted to today's dollars, the cost of intimate partner violence (IPV), rape, physical assault, and stalking is more than \$8.3 billion.¹³

Domestic violence is not, and cannot remain thought to be, a private matter. The primary goals of this document are to increase victim safety, offender accountability, and community accountability by challenging prosecutors to aggressively prosecute domestic violence cases when the evidence supports prosecution and promoting multidisciplinary, multi-agency collaborations, including co-located service models such as family justice centers and similar multi-agency approaches and coordinated community responses. This document focuses on

¹ *National District Attorneys Association's Policy Positions on Domestic Violence* (pp. 1-33) (2004). Monterey, CA. Adopted by Board of Directors; *See also* Urban, R.P. (2000). *Nevada Domestic Violence Resource Manual* (pp. 1-399), NV: The Urban Group.

² Centers for Disease Control and Prevention, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011*, 1-18, 63 (SS08) (2014).

³ *Id.*

⁴ *Id.*

⁵ *National District Attorneys Association Policy Positions on Domestic Violence*, Adopted by the Board of Directors, October 23, 2004 (Monterey, CA).

⁶ *Domestic Violence & the Courtroom Knowing the Issues... Understanding the Victim*, 4 (2012), American Judges Association, <http://aja.ncsc.dni.us/pdfs/domestic-violence-the-courtroom.pdf>.

⁷ Kelly E Knight et al., *Generational Cycles of Intimate Partner Violence in the US: A Research Brief* (2013).

⁸ *Id.*

⁹ *Id.*

¹⁰ National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States* 32 (2003).

¹¹ *Id.* at 31.

¹² *Id.* at 18.

¹³ *Injury Prevention & Control: Division of Violence Prevention, Centers for Disease Control and Prevention* (2015), <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html>, *citing* Max W, Rice DP, Finkelstein E, Bardwell RA, Leadbetter S. The economic toll of intimate partner violence against women in the United States. *Violence Vict.* 2004;19(3):259-72.

strategies for the successful prosecution of cases even when victims are unable or unwilling to participate in prosecution. It also includes a discussion of ways prosecutors can play a valuable role in advocating for community-oriented interventions to help support survivors and their children in breaking the vicious, generational cycle of family violence.

*Justice is telling the truth about injustice,
repairing the harm as much as humanly possible,
and working to change the conditions that caused the injustice in the first place.*

—Desmond Tutu

DEFINITIONS

The language, definition, and elements of domestic violence in criminal statutes vary by state, and prosecutors and allies should have knowledge of the definitional statutes applicable in their jurisdiction. Common terms include domestic violence, domestic abuse, domestic battering, family violence, spousal abuse, and partner or family member assault.¹⁴ Federal agencies and researchers such as the CDC often employ the term “intimate partner violence” (IPV),¹⁵ and this document therefore uses the CDC’s definition of IPV to define domestic violence.

The CDC defines IPV as “a serious, preventable public health problem that affects millions of Americans.”¹⁶ The CDC further categorizes IPV into four types:

- (1) Physical violence, defined as “the intentional use of physical force with the potential for causing death, disability, injury, or harm”¹⁷
- (2) Sexual violence, subdivided into five categories
 - a. Rape or penetration of victim
 - b. Victim made to penetrate someone else
 - c. Non-physically pressured unwanted penetration
 - d. Unwanted sexual contact, defined as the “intentional touching of the victim or making the victim touch the perpetrator, either directly or through clothing . . . without the victim’s consent”¹⁸
 - e. Non-contact unwanted sexual experiences,¹⁹ defined as the “unwanted exposure to sexual situations (e.g., pornography); verbal or behavioral sexual harassment; threats of sexual violence to accomplish some other end; and /or unwanted filming, taking, or disseminating photographs of a sexual nature of another person”²⁰
- (3) Stalking, defined as “repeated, unwanted attention and contact that causes fear or concern for one’s own safety or the safety of someone else (e.g., family member or friend)”²¹
- (4) Psychological aggression, defined as the “use of verbal and non-verbal communication with the intent to harm another person mentally or emotionally, and/or to exert control over another person”²²

Although the definition of the term domestic violence is limiting, there is an interrelationship between domestic violence and crimes involving drug and alcohol use and abuse, animal cruelty, elder abuse, and child abuse.²³ Domestic violence has a dire impact on particularly vulnerable populations; recognizing and acknowledging the unique characteristics of these populations is therefore imperative.

¹⁴ *National District Attorneys*, *supra* note 1.

¹⁵ Injury Prevention & Control, *supra* note 10.

¹⁶ Intimate Partner Violence: Definitions, Centers for Disease Control and Prevention (2016), <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html>. *See also* Centers for Disease Control and Prevention, Intimate Partner Violence Surveillance Uniform Definitions and Recommended Data Elements (2015).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *National District Attorneys Association*, *supra* at note 1.

VICTIM RECANTATION, MINIMIZATION, AND SELF-BLAME

Victims and survivors of domestic violence may present very differently than victims of other crimes. These victims often recant, minimize, or altogether deny their abuse as a result of the power and control that permeates their intimate partner relationship.

Victims may recant their statements to law enforcement by minimizing the incident, denying it happened, faulting him or herself, or refusing to participate in prosecution. Domestic violence victims differ from victims of other crimes in that the domestic violence victim and the offender are never strangers. Instead, victims of domestic violence have an intimate relationship that is often spousal, romantic, sexual, parental, social, psychological, and/or financial. While victims of other crimes may want justice, vindication, and restitution, many victims of domestic violence do not; instead, they want the abuse to stop or their abuser to be taken for the night but not necessarily arrested and prosecuted.²⁴ Furthermore, months into the case, victims of domestic violence may have personally resolved the conflict by putting the arrest behind them and continuing their lives with their abuser.²⁵ If this is the case, victims may perceive their personal resolution, however fragile and temporary, to be threatened by the stress and upheaval of criminal prosecution.²⁶ They may then become uncooperative and hostile, leading to recantation. Recantation and nonparticipation in prosecution may be associated with the victim's financial dependence on their abuser; psychological vulnerability; perceptions of an unsympathetic criminal justice response; poor access to advocates; emotional attachment to the offender; family, cultural, or religious pressure to remain with their abuser; shame or embarrassment; fear of deportation; and feelings of guilt. Many victims of domestic violence view recantation as the safest and most prudent course of action.²⁷

Recantation encompasses a vast majority of the domestic violence prosecutor's caseload, occurring in about 80% of domestic violence criminal cases.²⁸ Strategizing ways to address and respond to recantation is therefore a bulk of the prosecutor's work. When a victim recants, minimizes, or refuses to participate in prosecution, criminal conviction rates for domestic violence are impacted. The United States Supreme Court's 2004 decision in *Crawford v. Washington* limited the prosecutor's ability to pursue a domestic violence case without the victim's testimony.²⁹ The results of this limiting decision in *Crawford* are evident in a study conducted by the Administrative Office of the Courts for Washington State from 1999 to 2010. Most notably, beginning in 2004, conviction rates for domestic violence decreased significantly.³⁰

The forms of control the offender exerts over the victim may be depicted in the Duluth's Model Power and Control Wheel.³¹ The wheel represents the dynamics of domestic violence, those being a cyclical pattern of actions intentionally used for power and control. This often doubles as an excellent tool to use when

²⁴ Linda McGuire, Criminal Prosecution of Domestic Violence

<http://www.mincava.umn.edu/documents/bwjp/prosecutev/prosecutev.html> (1999); see also Rebecca McKinstry, "An Exercise in Fiction": *The Sixth Amendment Confrontation Clause, Forfeiture by Wrongdoing, and Domestic Violence in Davis v. Washington*, 30 HARV. J.L. & GENDER 531, at 532, 539.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Lundy Bancroft & Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 99 (2002).

²⁸ Joan Meier, *Davis/Hammon, Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22–27 (2015). See also Andrew R Klein, *Practical Implications of Current Domestic Violence Research Part II: Prosecution* 2–92, National Institute of Justice (2009).

²⁹ *Crawford v. Washington*, 541 U.S. 36, 68 (2005).

³⁰ Sarah Veele, *Domestic Violence in Washington State: 1999-2010*, Washington State Center for Court Research 1-23.

³¹ Wheel Gallery, *Domestic Abuse Intervention Programs Home of the Duluth Model* (2011),

<http://www.theduluthmodel.org/training/wheels.html>. (While a reported 27.5% of men have experience physical violence, the Duluth model, developed for female victims, is still instructive in the intricacies of domestic violence). See also *Nevada Domestic Violence*, *supra* note 1.

interviewing a victim. The root of the violence—the need for power and control—lies in the center of the wheel. The spokes of the wheel represent the threats, intimidation, and coercion used to instill fear.³² The rim represents the acts of physical or sexual violence that hold the wheel together.³³ The use of violence enables and reinforces the use of psychological behaviors their abuser employs to have power and control over the victim. In a similar vein, witness tampering and intimidation is a significant problem in domestic violence cases due to the offender’s manipulation and threats.³⁴

In addition to their abuser’s behavior, factors such as family, cultural, and religious pressures to remain with their abuser; shame or embarrassment; fear of deportation; and feelings of guilt may prevent a victim from leaving their abuser and fully cooperating with law enforcement and prosecution. Victims may remain with their abusers for cultural or religious reasons, believing that the family must remain together, children need to be raised by both parents, the victim must remain faithful to the abusive spouse, or it is the victim’s responsibility to make the relationship work.³⁵

The prosecutor’s interests of offender accountability may conflict with the victim’s personal resolution of the case. Prosecutors should therefore devise methods to most practicably address the goals of all parties involved and to eliminate as many conflicts as possible.³⁶ While the prosecutor’s goals are to ensure the safety of the victim and community and to hold the offender accountable, the victim may want to continue his or her relationship with their abuser. This right of the victim to continue the relationship should not be confused with the obligation of the prosecutor to prosecute provable cases of abuse. The prosecutor should zealously prosecute the offender while remaining sensitive to and respectful of the victim’s personal resolution of the case.³⁷ Prosecutors should not, however, confuse their role in holding offenders accountable for criminal behavior with the victim’s often unrealistic belief that ending the prosecution will resolve the violence and abuse in the relationship.

The prosecutor should avoid the temptation to blame the victim for being uncooperative or unwilling to testify. Often it is better to shift the focus from questioning why victims do not wish to testify and why victims stay with their abusers, to questioning why abusers batter and why intervention is necessary. Asking why victims remain with abusers places the blame on the victim when it is the abuser who should be held accountable.³⁸ By listening to the victim’s perspective; exploring mutual interests; and clarifying the roles of the victim, the defendant, and the prosecutor, prosecutors may be able to reduce conflicts of interest and better help the victim understand why a prosecutor may prosecute irrespective of the victim’s reluctance to participate.³⁹ The core charge of the prosecutor is offender accountability, and prosecutors should not be misled by the false reality that dismissing the case will solve the abuse or end the violence in the relationship.⁴⁰

Effective listening requires an awareness of the background beliefs and experiences particularly vulnerable populations hold.

³² *Id.*

³³ *Id.*

³⁴ See AEquitas, *The Prosecutors’ Resource Witness Intimidation* (2014), <http://www.aequitasresource.org/The-Prosecutors-Resource-Intimidation.pdf>.

³⁵ *Nevada Domestic Violence*, *supra* note 1.

³⁶ *National District Attorneys*, *supra* note 1.

³⁷ *Id.*

³⁸ *Nevada Domestic Violence*, *supra* note 1.

³⁹ *Id.*

⁴⁰ Casey Gwinn and Gael Strack, *Hope for Hurting Families: Creating Family Justice Centers Across America* (2006), pp. 79-81.

CULTURAL COMPETENCE

Native American Victims

Among the American Indian and Alaska Native populations, an estimated 51.7% of women and 43.0% of men have experienced physical violence by an intimate partner during their lifetimes.⁴¹ Native American victims are disinclined to report domestic violence and be involved in the prosecution process for several reasons. Their cultures place great value on community and coming forward may threaten this communal and familial harmony.⁴² Not unlike women of other cultures, Native American women may fear losing custody of their children. Confusion surrounding federal and tribal jurisdiction may prevent offenders from being apprehended, prosecuted, and ultimately convicted.

African-American Victims

Among the African-American population, an estimated 41.2% of women and 36.3% of men have experienced physical violence from an intimate partner during their lifetimes.⁴³ About 17.4% of African-American women and 14.8% of African-American men have experienced sexual violence other than rape,⁴⁴ and about 8.8% of African-American women have been raped during their lifetimes.⁴⁵

Prosecutors should understand and acknowledge concerns and fears unique to African-American victims. In addition to the abovementioned reasons, this population may be reluctant to report domestic violence to law enforcement and participate in the prosecution of their abusers because of their suspicion of the justice system. They may also fear that they will not be believed, child protective services will become involved, or familial and communal units will be disrupted if they report “one of their own.”⁴⁶

African-American women victims are more likely to seek help from their social and religious communities, and the prosecutor should enlist the aid of multidisciplinary teams that can also help address the victim’s basic needs.

Hispanic Victims

Among the Hispanic population, an estimated 29.7% of women and 27.1% of men have experienced physical violence by an intimate partner during their lifetimes. About 9.9% of Hispanic women and 13.5% of Hispanic men have experienced sexual violence other than rape by an intimate partner during their lifetimes, and 6.2% of Hispanic women have been raped during their lifetimes.

Language barriers, immigration status, and cultural and religious beliefs may be responsible for Hispanic victims’ reluctance to participate in the prosecution of their abusers. Among the groups that are least likely to report, undocumented women have great fear of retaliation by both their abuser and their community. Their abuser may have threatened to report them to the Immigration and Naturalization Service (INS), and their community in whole or in part may also be undocumented and therefore unsupportive of any actions that may draw attention to its members.

⁴¹ Centers for Disease Control and Prevention, *supra* note 2.

⁴² Wisconsin Office of Justice Assistance, *supra* note 48.

⁴³ Centers for Disease Control and Prevention, *supra* note 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Wisconsin Office of Justice Assistance, *supra* note 48.

LGBTQ Victims

According to the National Coalition of Anti-Violence Programs (NCAVP), of the 2,679 reports of intimate partner violence received in 2012, 15.8% of victims experienced physical violence, 12.9% experienced harassment, and 11.3% experienced threats by an intimate partner.⁴⁷ This is consistent with the CDC's 2010 report estimating 43.8% of lesbian women and 26% of gay men have experienced physical violence, rape, and/or stalking by an intimate partner during their lifetimes.⁴⁸

Victims among the lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community face unique challenges in reporting abuse and participating in the prosecution of their abuser. Their close-knit community has historically been under scrutiny and criticism, and as a result LGBTQ victims may be reluctant to report the abuse for fear of betraying their community or stalling the community's efforts for social and legal recognition. LGBTQ victims may fear unequal treatment by the justice system, not being believed, or being "outed."⁴⁹ The NCAVP reports that in 2012, in about a third of the cases reported to law enforcement, the victim was arrested instead of the abuser, and he or she experienced further verbal abuse and physical and sexual violence by the police.⁵⁰

Teenage Victims

It is estimated that 71.1% of women and 58.2% of men have been victims of sexual violence, physical contact, or stalking by an intimate partner before 25 years of age. Of those victims, 23.2% of women and 14.1% of men first experienced one or more of these offenses before 18 years of age.⁵¹ Significantly, of those who experienced abuse before 18 years of age, 23.1% of women and 14% of men first experienced abuse between the ages of 11 and 17 years.⁵² Most strikingly, every year in the United States, about 1.5 million high school students experience physical abuse by a dating partner.⁵³

Teenage victims are a particularly vulnerable population, and multidisciplinary teams should therefore implement teenage dating abuse and healthy relationships awareness campaigns. These teams should include, but not be limited to, educators, students, parents, counselors, community members, school boards, elected officials, and advocates.

Multidisciplinary teams can reach teenagers through press conferences, public services announcements, posters, social media, and media outreach. For example, in San Diego County, an awareness campaign included a press conference at which the district attorney, the president of the Domestic Violence Council, the operation director of Strong Hearted Native Women's Coalition, and the San Diego Chargers kicker spoke; six public service announcements played during 1,301 spots between February 7 and July 31, 2016, including two spots during the Super Bowl; 6,000 posters distributed to local schools, social services agencies, healthcare sites, and courts; information dispensed through social media accounts; and media outreach through radio and television interviews.

While utilizing the internet to raise awareness, multidisciplinary teams, and particularly prosecutors, should recognize the implications the internet poses to the prosecution of offenders of teenage domestic violence. For

⁴⁷ National Coalition of Anti-Violence Programs (NCAVP), Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2012 (2016), http://www.avp.org/storage/documents/ncavp_2012_ipvreport.final.pdf.

⁴⁸ Centers for Disease Control and Prevention, The National Intimate Partner and Sexual Violence Survey 2010 Findings on Victimization by Sexual Orientation 19 (2013), http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

⁴⁹ Wisconsin Office of Justice Assistance, *supra* note 48.

⁵⁰ NCAVP, *supra* note 63.

⁵¹ Centers for Disease Control and Prevention, *supra* note 2.

⁵² *Id.*

⁵³ Break the Cycle, State Law Report Cards (2014), <http://www.breakthecycle.org/state-law-report-cards>.

instance, the defendant may try to utilize the teenage victim's social media accounts to paint the victim in a bad light and attack his or her character and credibility. The offender may also utilize social media to continue the abuse through stalking and threats. To address the potential damage to both the victim and the prosecution process, prosecutors should inquire into the victim's social media accounts in the early interview stages.

The trial phase of the prosecution process is also affected by factors unique to teenage victims. Teenagers are often negatively stereotyped as drinkers and drug users, disrespectful, difficult, rebellious, and even promiscuous,⁵⁴ and these stereotypes may seep into the courtroom. To prevent jurors from forming these stereotypes, or to deconstruct them where they have already been formed, prosecutors should expose these stereotypes early on by thoroughly learning about the individual teenager.

Self-blame and the fears of legal and social repercussions, not being believed, or being judged may lead teenage victims of domestic violence to omit, lie, or rationalize.⁵⁵ If, for example, a teenager lies about consuming alcohol, the prosecutor should not call the teenager a liar but should instead explain that although the teenager should not have drunk, the focus of the prosecution is the violence against the teenager.⁵⁶ Prosecutors can also offer expert witnesses to explain the reasons a teenager would omit or lie.

Child Victims and Witnesses

Childhood maltreatment is positively correlated with negative health and well-being later in life, as found by the Adverse Childhood Experiences (ACE) Study.⁵⁷ Particular attention should therefore be given to child victims and witnesses. Prosecutors should be mindful of how gender differences affect the experience of and response to domestic violence, as studies show boys are more approving of violence than girls.⁵⁸ Child victims and witnesses should receive immediate medical and mental care. As a response to the ACE Study's findings, many jurisdictions across the country, such as Stearns County, Minnesota,⁵⁹ are developing evidence-based, trauma-informed practices to address the impact of witnessing domestic violence.⁶⁰

Studies show that compared to children who have not witnessed domestic violence, child witnesses of domestic violence exhibit lower social competence and higher aggressive, antisocial, fearful, and inhibited behaviors.⁶¹ One study found that higher aggressive behaviors may be the result of the child victim and/or witness developing an attitude that justifies the use of violence as a way of enhancing reputation or self-image.⁶²

In addition to being emotionally distressed, children may be developmentally limited in their ability to communicate. To aid the child in telling his or her story, prosecutors should carefully listen to children and discern communication gaps. Prosecutors should use simple words and questions, use the child's own words, make use of looping questions to help the child construct a narrative, and remain sensitive to the fact that the child's notion of certain concepts such as time and distance will be different from an adults. Questions asking how far or for how long may confuse the child and force him or her to guess.⁶³

Prosecutors should acknowledge the trauma domestic violence inflicts on children and remain supportive and understanding of the child's trauma response. Children may feel divided between choosing between two parents

⁵⁴ Wisconsin Office of Justice Assistance, *supra* note 48.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Adverse Childhood Experiences (ACEs), Centers for Disease Control and Prevention (2016), <http://www.cdc.gov/violenceprevention/acestudy/>.

⁵⁸ Jeffrey Edleson, Problems Associated with Children's Witnessing of Domestic Violence (1997), http://www.vavnet.org/print-document.php?doc_id=392&find_type=web_sum_AR (last visited Mar 22, 2016).

⁵⁹ ACEs, *supra* note 42.

⁶⁰ See generally Casey Gwinn, *Cheering for the Children: Creating Pathways to HOPE for Children Exposed to Trauma* (2015).

⁶¹ Edleson, *supra* note 43.

⁶² *Id.*

⁶³ Wisconsin Office of Justice Assistance, Prosecutor's Sexual Assault Reference Book (2009).

and as a result may recant or be uncooperative. Prosecutors should allow children to express whatever positive emotions they may feel toward their abuser while assuring the child that it is never his or her fault. Allowing for this expressive function may help reduce the child's self-blame. Prosecutors are encouraged to record and memorialize early testimony.⁶⁴ Prosecutors should also be mindfully weighing the necessity of the child as a witness with their responsibility to ensure the innocent are protected from unwarranted harm.⁶⁵

Prosecutors and victim advocates should have knowledge of, inform victims of, and make use of statutory rights that some jurisdictions afford to children in addition to those afforded to all victims and witnesses.

TOOL BOX IDEAS

- **Train first responder law enforcement to take photographs of each child at the scene.**
- **Train first responders to document where children were in relation to the abuse occurring in the home.**
- **Charge child endangerment statutes whenever children are present at domestic violence scenes.**
- **Utilize experts in neurology and pediatrics to discuss how children who witness domestic violence suffer brain trauma and emotional injury.**

TENETS OF CASE HANDLING

Vertical Case Handling

Prosecution of domestic violence crimes differs from the prosecution other crimes and requires unique skills and mindsets because the key, and often only, witness may be reluctant to participate in prosecution.⁶⁶ Given the unique characteristics of domestic violence victims and the complex intricacies of their relationships with their abusers, specially trained prosecutors and vertical prosecution, or the practice of one prosecutor handling the case from filing to disposition, are often the most effective means of prosecuting domestic violence crimes.

Unlike victims of other crimes who generally want to be involved in the prosecution of the offender, domestic violence victims are often reluctant to disclose the abuse to anyone, particularly to law enforcement and prosecutors. Victims of domestic violence may have been physically, psychologically, socially, and financially damaged for such a long time, they distrust that anyone can help them. Specially trained prosecutors often have a better opportunity to build a relationship with the victim during the pendency of the case.

To help victims regain trust in themselves and the justice system, it is imperative that the prosecution process offers consistency and continuity. It is important that victims feel they are being heard, and this may be effectuated by asking the victim to tell his or her story to one prosecutor, one investigator, and one advocate. Ensuring only one prosecutor takes the victim through a case from start to finish has the potential to show that victim he or she does not have to resolve the problem alone and that the justice system can be counted on to help keep him or her safe.

⁶⁴ *Id.*

⁶⁵ National District Attorneys Association, National Prosecution Standards 1-1.1 (2016).

⁶⁶ Carrie Hobbs, Pam Loginsky & David Martin, Prosecutor's Domestic Violence Handbook (2016), <http://www.waprosecutors.org/MANUALS/DV/WAPA%20KCPAODV%20Manual%2012.11.14.pdf>.

Horizontal Case Handling

Vertical case handling may be problematic for high-volume jurisdictions. If a prosecutor is carrying a significant caseload, he or she may not have the ability to develop and maintain meaningful relationships with victims. Many large, urban jurisdictions therefore utilize horizontal case handling. In horizontal prosecution, prosecutors do not handle one case from beginning to end but rather handle multiple cases, performing the same task for each case. For example, one group of prosecutors may file cases, one may negotiate cases, and one may try cases.

The benefit of the victim's familiarity with the prosecutor that comes from vertical prosecution is instead derived from familiarity with the advocate in horizontal prosecution. Advocates keep cases vertical by always working with the same victims from beginning to end. If an agency utilizes horizontal prosecution, it is imperative that victim advocate services be valued and fully funded. Otherwise, this system can leave the victim feeling as if he or she is being passed around – the very problem vertical prosecution tries to avoid.⁶⁷

EVIDENCE-BASED PROSECUTION

Evidence-based prosecution is an approach whereby prosecutors build a case based on available evidence irrespective of the victim's willingness to participate in the case or testify against their abuser. This approach began around the mid 1980s and early 1990s in communities such as Duluth, MN; San Diego, CA; Los Angeles, CA; and Nashville, TN. Fundamental to the evidence-based prosecution approach is the principle that domestic violence cases that are provable should be prosecuted irrespective of whether the victim is cooperative or willing to participate in the case.⁶⁸ Early evidence reflected the success of evidence-based prosecution with multidisciplinary professionals working together.⁶⁹ While mandatory arrest of domestic violence offenders, in the absence of prosecution, was clearly ineffective in stopping domestic violence, the combination of mandatory arrest with an evidence-based prosecution approach proved effective in reducing recidivism and lethality.⁷⁰ Mandatory arrest and the pro-prosecution policies of the 1994 Violence Against Women Act resulted in an unexpected overflow of domestic violence cases which necessitated the creation of specialized units.⁷¹ As a result of reluctant and uncooperative victims, prosecutors began promoting evidence-based prosecution and collaborative approaches to meeting the needs of victims while prosecuting cases even without their participation.⁷²

Evidence-Based Prosecution versus No Drop Policies

Evidence-based prosecution has been referred to as victimless prosecution. This phrase minimizes the importance of the victim and the importance of victim advocacy services for all victims and their children. Domestic violence cases are not victimless crimes. Even when the prosecutor decides to proceed with a case without the victim's participation, every effort should be made to offer the victim advocacy services from all available resources, including victim witness programs and community-based advocacy organizations.

In some communities, prosecutors have attempted to implement a no drop policy, advocating for the filing of all cases and refusing to dismiss any cases once charges are filed. The NDAA does not support this approach.

⁶⁷ David Martin, Comments for DV Manual, (May 2016).

⁶⁸ Casey G. Gwinn, Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. L. REV. 1501, 1511-12 (1993).

⁶⁹ Robert C. Davis, Barbara E. Smith, Heather J. Davies, *Effects of No-Drop Prosecution of Domestic Violence Upon Conviction Rates*, 3 Justice Research and Policy 1-13 (2001).

⁷⁰ *Id.*

⁷¹ John M. Leventhal and Liberty Aldrich, *The Admission of Evidence in Domestic Violence Cases after Crawford v Washington: A National Survey*, 11 BERKELEY J. CRIM. L. 77, 80 (2006).

⁷² *Id.* at 81.

Neither the American Bar Association standards nor the filing standards for the NDAA support the prosecution of cases when the evidence does not support a reasonable likelihood of conviction.

The earliest protocols for the prosecution of domestic violence cases emphasized the following two-step evaluation process:

- (1) Is the case provable, beyond a reasonable doubt, without the participation of the victim, based on corroborating evidence? If yes, the case should be prosecuted even in the absence of victim participation or cooperation.
- (2) If the case is not provable without the participation of the victim, is the victim willing to testify, and what other evidence is necessary or can be identified to corroborate the testimony of the victim?⁷³

This multi-layered approach has been expanded over the years to include other considerations related to victim safety issues, the balancing of interests which must be considered when putting child witnesses on the stand to testify against an adult abuser in the home, and other considerations in the interests of justice. The core principles of evidence-based prosecution should continue to guide prosecutors in the review and prosecution of both misdemeanor and felony domestic violence cases. The California Attorney General's Office endorsed this approach in 2005, and it continues to be the majority approach in most California prosecutor's offices.⁷⁴

Law Enforcement Investigations

Effective prosecution of domestic violence crimes without the victim requires thorough investigation and evidence collection by law enforcement in collaboration with the prosecutor. A complete investigation should include formal recorded statements from the victim, the defendant, and all witnesses; physical evidence documented and inventoried; deoxyribonucleic acid (DNA) evidence; the defendant's prior record and other acts, including prior incidents of domestic violence; digital records; medical reports, including photographs and diagnoses; and any other pieces of evidence that will corroborate the charges.⁷⁵

Law enforcement should approach each report of domestic violence as if the case will be prosecuted months, possibly years from the incident date without the victim's participation.⁷⁶ Law enforcement should collect all of the evidence necessary for prosecution without reliance on the victim's in-court testimony. Evidence to be collected includes body worn camera videos; photographs of the victim and the scene; follow-up photographs; 911 tapes; written statements from the victim, defendant, witnesses, and child witnesses; interviews of neighbors, families, and friends of the victim and defendant; physical evidence; forensic examination results; and jail calls placed by the suspect after the incident. Without further jeopardizing the victim's safety, police officers should conduct follow-up interviews with the victim and "knock and talks" with witnesses in the days after the incident. Law enforcement should be aware of and prepared to enforce both local and federal domestic violence laws, including the elements of domestic violence crimes and criminal procedures such as warrantless searches and arrests.

It is imperative that incident reports be complete and thorough and forwarded to prosecutors without undue delay. Even while prosecutors are evaluating cases, aggressive victim advocacy services should be offered to the victim by both government- and nongovernment-based advocates.

⁷³ San Diego City Attorney's Office Domestic Violence Prosecution Protocol, August 1986.

⁷⁴ CAL.ATT'Y GEN'S.CRIME AND VIOLENCE PREVENTION CENTER, REPORT TO THE CALIFORNIA ATTORNEY GENERAL FROM THE TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE, KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY, p. 87 (June 2005), Available Upon Request from Alliance for HOPE International, (888) 511-3522.

⁷⁵ Wisconsin Office of Justice Assistance, *supra* note 48. See also Massachusetts District Attorneys Association (MDAA), Domestic Violence Trial Notebook (2015), <http://www.mass.gov/courts/docs/lawlib/docs/mdaa-domestic-violence.pdf>.

⁷⁶ *National Symposium on the Prosecution of Domestic Violence: Re-Envisioning Evidence-Based Prosecution in America*, (2015).

In determining probable cause, police officers should assess the appearance, demeanor, and injuries of the victim and the defendant as well as their relationship history, including any past incidents of domestic violence. Officers should also obtain contact information for all witnesses.

THE PROSECUTOR'S ROLE

Prosecutors should maintain their role as the ultimate decision maker in whether charges should be filed and pursued against a criminal defendant. Even in jurisdictions where private arrest or citizen's arrest is permissible, prosecutors should maintain the authority to proceed with cases that are provable and dismiss cases that are not supported by admissible evidence. Prosecutors must establish early contact with the victim to ensure the victim's safety and obtain more information on potential charges.⁷⁷

Interviewing the Victim

Ideally, the prosecutor should meet with the victim to explain the prosecution process and explore issues that may have been undetected in the initial police investigation. The prosecutor should have a third-party present, such as a law enforcement officer or detective, to record the interview in the event the victim later recants.⁷⁸

Interviewing the victim provides prosecutors with the opportunity to build rapport, rebuild the victim's confidence, and listen to the victim's concerns and desired outcome. It is also an opportunity for the prosecutor to explain his or her role and the role of the victim. The prosecutor should be mindful that domestic violence often minimizes or eliminates the victim's control over his or her life and should be respectful of a victim's frustration that, in his or her perspective, the control has now shifted from the defendant to the prosecutor. The prosecutor should explain that while the victim's input is valuable, it is the prosecutor's decision to file charges, the jury's duty to convict or acquit the defendant, and the judge's role to issue the sentence.⁷⁹

Prosecutors should personalize victim interviews by developing a thorough understanding of the victim's background, including social, economic, and cultural factors. Throughout the interview, prosecutors should engage in active listening, ask open-ended questions, seek narrative answers, be attentive to non-verbal communication, and allow moments of silence for the victim to think while keeping in mind that silence may be uncomfortable.⁸⁰

While prosecutors should allow for flexibility during victim and witness interviews, they should inquire about information that can be used in the later phases of the prosecution process. In light of the risk of recantation, prosecutors should collect information that will support the use of tools such as forfeiture hearings and prior bad acts without appearing to be undermining or disbelieving when interacting with the victim. For example, the prosecutor should inquire about past incidents of domestic violence and any information that corroborates those incidents as this may help establish a pattern of abuse and prove useful if any forfeiture by wrongdoing issues arise at trial.⁸¹ Prosecutors should also inquire into the defendant's past acts to determine if any can be introduced for reasons other than to show propensity, such as identity, intent, motive, common plan or scheme, signature, absence of mistake, or knowledge. Prosecutors should gather as much information as possible while remaining sensitive to the fact that doing so may force victims to relive the domestic violence experience.⁸²

⁷⁷ Hobbs, *supra* note 67.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Wisconsin Office of Justice Assistance, *supra* note 48.

⁸¹ AEquitas, The Prosecutors' Resource Forfeiture by Wrongdoing 5-6 (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

⁸² Hobbs, *supra* note 67.

Prosecutors and victim advocates should inform victims of domestic violence of their rights under the victim's bill of rights.⁸³ Prosecutors and victim advocates should further be mindful of the victim's safety if the victim remains with their abuser and encourage the victim to inform the lead law enforcement officer of future contact with or threats from the defendant. Victims may also be advised to keep a journal of any future contact with the defendant, particularly when it involves threats or violations of no contact orders.

ENLISTING VICTIM ADVOCACY

Victims often become socially, psychologically, and financially dependent on their abuser, and prosecutors should therefore enlist the aid of victim advocates to address the basic needs of victims and their families. Addressing health, food, and shelter needs may reduce some of the victim's fears and allow for more victim cooperation. Reviewing state and federal victim rights with the domestic violence victim may further provide him or her with the confidence needed to remain cooperative. System-based victim advocates should be trained to disclose Brady material and any other exculpatory evidence.⁸⁴

In addition to facilitating communication between victims and prosecutors, victim advocates help ensure that victims obtain a higher level of justice as victim advocates help victims meet their non-legal needs.⁸⁵

In enlisting the aid of a community-based victim advocate, prosecutors should remain mindful that just as the victim's interests may differ from the prosecutor's, so may the interests of victim advocates. Victim advocates may be interested in helping victims create safety plans and build support systems outside of the justice system that will enable them to reach self-sufficiency. Prosecutors should acknowledge this healthy tension, as it may lead to better, more informed decision-making.⁸⁶

System-based victim advocates should also assist with logistics such as confirming subpoena services and familiarizing victims with the courtroom. Victim advocates should be prepared to inform victims about their state and federal rights and to assist them with the applications and documents necessary for crime victims' compensation.⁸⁷

Victim advocates and prosecutors should have knowledge of domestic violence victims' coping mechanisms, such as drug and alcohol use, and be aware that the victim may be engage in criminal behavior. Victim advocates and prosecutors should refrain from judging victims and should instead explain to victims the consequences this behavior may have on their access to resources and safety and on their overall health.⁸⁸

Many repeat offenders re-victimize persons who have previously suffered abuse, and victim services should be more intensive in those cases. Ideally, each prosecutor's office should employ well-trained system-based victim advocates, but if limited resources do not allow for this, prosecutors should creatively allocate resources or look to outside partners.

When a prosecutor's office does not have the financial resources to employ its own team of system-based victim advocates, it should partner with community-based organizations. Most of these community-based organizations are non-profit organizations dependent on public and private grants, and as a result the services provided will differ among organizations. Some organizations may provide wraparound comprehensive support services while others may offer more specialized services. Community-based victim advocates may provide

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

confidential support services such as transportation services, emergency shelter, crisis intervention, and transitional housing.⁸⁹

RISK ASSESSMENT AND SAFETY PLANNING

Risk Assessment

The use of a risk assessment tool at the pre-trial stage is encouraged to better inform both the prosecutor of the charges to be filed and the judge of the dangerousness of the defendant.⁹⁰ Abusive relationships may be unpredictable and potentially escalate quickly, and certain factors can aid in assessing the lethality of particular situations. These factors include drug and alcohol abuse, an increase in the number and severity of violent episodes, threats of self-harm and harm to children, access to weapons, a history of psychiatric impairment, criminal history, the proximity of the victim and their abuser, and noncompliance with court orders.⁹¹

Some states have passed legislation mandating the use of standardized, evidence-based risk assessment tools to be administered to offenders post-arrest.⁹² Many states have chosen the Ontario Domestic Assault Risk Assessment (ODARA) tool and have created multidisciplinary teams to aid in the promotion and training of this tool.⁹³

The ODARA, consisting of a short number of very specific questions addressing threats, substance abuse, and the victim's fears, is an evidence-based risk assessment tool that identifies and assesses the domestic violence offender's risk of future violence against intimate partners.⁹⁴ The assessment tool was designed to be used by law enforcement in the field and requires no clinical experience. The assessment places the offender into seven risk categories, with the highest scores indicating offenders will abuse more, sooner, and more severely. The ODARA alone can be utilized with male and female offenders, where there is risk of lethality, and in cases of dating violence.

Safety Planning

The two leading danger assessment tools for victims of domestic violence are the Danger Assessment Tool, developed by Dr. Jacqueline Campbell, and Mosaic, developed by Gavin de Becker.⁹⁵ While the ODARA and other similar tools evaluate risk and danger by looking at the perpetrator, the Danger Assessment Tool and Mosaic look at risk from a victim's perspective and through victim reporting of prior perpetrator conduct. As discussed earlier, all victims in all cases in a prosecutor's office should be offered risk assessment and safety planning services regardless of whether the cases are prosecuted.

Many excellent models of safety plans are currently used in local agencies across the country. Massachusetts developed SafePlan, a model plan that is offered by various community-based organizations throughout the

⁸⁹ *Id.*

⁹⁰ Hobbs, *supra* note 67.

⁹¹ *Nevada Domestic Violence Resource Model, supra* note 1.

⁹² As part of comprehensive homicide reduction plan, in 2012 the Main Coalition to End Domestic Violence (MCEDV) joined with partners including the Maine Commission on Domestic and Sexual Abuse, the Maine Department of Public Safety, the Attorney General's Office, and the Maine Criminal Justice Academy to pass legislation that mandates the use of a standardized, evidence-based risk assessment tool for domestic violence offenders post-arrest [19-A M.R.S. §4012(6)].

⁹³ Domestic Violence and Abuse in Relationships: ODARA, Waypoint, <http://www.waypointcentre.ca/cms/one.aspx?portalId=10043&pageId=52600>.

⁹⁴ *Id.*

⁹⁵ See www.dangerassessment.org and www.mosaicmethod.org. Both tools are validated instruments and are used regularly by advocates and victim-witness services professionals to help victims identify how much danger they are in during the pendency of a case.

state.⁹⁶ SafePlan provides recommendations to victims of domestic violence and helps ensure their safety during a wide range of circumstances, such as when victims are on the job, in public, using technology, preparing to leave, or caught in explosive incidents. SafePlan also helps ensure the safety of victims' children and their emotional health.

DISCOURAGING DUAL ARRESTS

Law enforcement should thoroughly examine the victim, the defendant, and the scene to determine the predominant aggressor and avoid dual arrests. Law enforcement should consider any injuries sustained by either or both parties, the presence or use of drugs or alcohol, any prior history of abuse, and the demeanor of each party.⁹⁷ Police officers should thoroughly examine the physical evidence and implement a lethality assessment model at the scene to determine the future dangerousness of each party.

Police officers should consider possible scenarios, such as self-defense, and establish probable cause in identifying the predominant aggressor.

The passage of mandatory arrest laws has resulted in an increase in the number of women arrested in domestic violence cases. Prosecutors should have guidelines for addressing self-defense and battered spouse syndrome to prevent filing cases against victim-defendants.⁹⁸ While domestic violence victims may use violence against their batterers, some of this violence may be in self-defense, as proactive protection or to combat a long history of abuse, but law enforcement does not always document or even acknowledge it as such, resulting in the arrest of the victim.⁹⁹

Research surveys of police officers, prosecutors, defense attorneys, probation officers, and support services providers reflect that while the number of victim arrests has increased, the use of violence by victims has remained constant, suggesting greater manipulation of the justice system by defendants and lack of police training in the intricacies of domestic violence dynamics.¹⁰⁰

Arresting a victim has a significant negative impact on the victim. In addition to confirming the victim's fear that their abuser is in control, arresting the victim may lead to loss of public services and employment opportunities and loss of parental custody.¹⁰¹

In identifying the primary aggressor, police officers face several challenges. Officers often operate with limited information about the situation and without the parties' full criminal histories, and they may mistakenly believe mandatory arrest laws require them to arrest a party before leaving the scene. Officers may use specialized language or technical jargon that victims do not understand or may face language barriers when communicating with victims, defendants, and witnesses.¹⁰² Officers should assess all relevant factors, such as the size of both parties; fear exhibited by either or both parties; corroborating or contradictory statements from the victim, defendant, and witnesses; the presence of drugs or alcohol; known substance abuse issues for either or both parties; pattern evidence; and defensive wounds visible on either or both parties.

Mandatory training on assessing for the primary aggressor and protocols for determining survivor status should be implemented in both law enforcement and prosecuting agencies. Near and nonfatal strangulation cases

⁹⁶ Safety Plan, Massachusetts Office for Victim Assistance, <http://www.mass.gov/mova/docs/safety-plan/safety-plan-english.pdf>.

⁹⁷ *National Symposium*, *supra* note 77.

⁹⁸ Hobbs, *supra* note 67. *See also* Meg Crager, Merrill Cousin & Tara Hardy, *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region* (2003), <http://www.mincava.umn.edu/documents/victimdefendant/victimdefendant.html>.

⁹⁹ *See* Crager, *supra* note 93.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

(discussed below) often involve life-threatening violence to victims, yet most of the injuries perceived and reported by law enforcement may be inflicted by the victim on the defendant. Assessing for the primary aggressor is particularly critical in cases of near and nonfatal strangulation where victims may be arrested if the officer only observes and bases his investigation on the extent of visible injuries on both parties. It is imperative law enforcement be able to identify defensive and self-inflicted wounds.

Law enforcement should creatively allocate time and resources to use interpreters when necessary and adopt supervisory reviews with feedback and consultation.

DISCOURAGING WARRANTS THAT COMPEL VICTIMS TO COURT

It is best practice not to issue warrants that compel domestic violence victims to court. Warrants are an important tool for prosecutors to ensure that cases move forward and that violent abusers are held accountable. However, prosecutors must also recognize the real tensions that exist for domestic violence victims in particular and weigh them against every individual case and particular set of facts. Prosecutorial agencies should adopt protocols and policies that address the compulsion of victims to court and think through the scenario that may happen when warrants are issued for domestic violence victims. Prosecutor offices are strongly encouraged to require elected District Attorney or high supervisory level approval prior to requesting a warrant for a Domestic Violence victim.

When prosecutors request that warrants be issued, a case may get continued because the “necessary witness” did not show up, and the case may not result in a dismissal. However, sometime later, the domestic violence victim may be walking down the streets of the community with her children and get arrested on the warrant. Her children then must be placed in a transitional housing facility, and she ends up in jail. Despite the frustration that prosecutors face when witnesses don’t show up to court, this can re-victimize the domestic violence victim who has already suffered abuse. There are many things prosecutors can do short of asking that warrants issue for a domestic violence victim’s failure to appear:

- Work proactively with staff or advocates to educate the victim about the court process and calm any fears. Staff members, paralegals and advocates can be trained to educate domestic violence victims that once they come to court, they can tell their “side of the story” and that all they are required to do is tell the truth.
- Educate victims that the subpoena is an order of the court, and it is not his/her fault or choice to be subpoenaed to court. Lessening the pressure on victims can sometimes make them feel better about appearing.
- Find the criminal justice partner that developed the best rapport with the victim (i.e. the police officer, or the nurse) and enlist their help to make a phone call or text to the victim.
- Enlist community advocates to discuss with victims that they need only come to court and tell the truth. Remind victims they will be surrounded with services and support, including an advocate, court accompaniment and perhaps even an escort to and from their next destination.
- Prosecutors can remind victims that when they are on the witness stand the prosecutor will ask a litany of questions that show the accused it is not the victim’s fault, they are present in court. Questions can include 1) “Did you want to be here today?” 2) “Isn’t it true you love [the accused?] and still want to live with [the accused?] 3) “The only reason you are here today is because you got a court order to be here, correct?” 4) “You want [accused] to know you still love him/her, correct.” 5) “And you didn’t even report this abuse to the police correct?” 6) “Will you tell the truth here today even though you don’t want to be here?”
- As a last resort, request a warrant to “be held” but not issued, and then work to connect with the victim in a trauma-informed way. Often the existence of a non-issued warrant combined with a

compassionate explanation of the importance of coming to court to tell the truth will encourage victims to appear.

- Ask to trail the case for a couple hours until you have enough time to personally connect with the victim.
- Ask to trail until the afternoon or the next day so your staff with whom the victim-built rapport can re-initiate contact with the victim.
- Keep the court informed at all the attempts your staff is making to get victim into court.
- In jurisdictions that allow it, prosecutors can dismiss and refile the case or utilize particular legal statutes to “postpone” or request findings of “good cause to continue” when victims in domestic violence cases don’t show up to court.¹⁰³

The victim’s failure to appear in court is not uncommon. Victims may fail to appear by avoiding subpoena service, disobeying a subpoena, or recanting,¹⁰⁴ Domestic Violence prosecutors must recognize the myriad of reasons why victims might not want to come to court. Despite attempts at legal service of process, victims may be scared, embarrassed, or threatened by the abuser and given consequences for going to court. The victim may be caught in the cycle of violence and going to court may worsen the abuse. If a prosecutor has a reasonable belief that victims are uncooperative or unlikely to appear for a preliminary hearing or trial, it is essential to investigate their motivation for non-compliance (i.e. fear, reconciliation, escape etc.) This information can be pertinent for any potential forfeiture by wrongdoing hearing, or simply to educate the jury or judge why the victim is not appearing in court.

In the end, domestic violence cases must stand independent of our victim, anyhow. If we required his/her testimony in order to prove the case, perhaps we should not have issued, charged or filed it. This is the essence of evidence-based prosecution, described, *supra*.

PROHIBITING USE OF LIE DETECTOR TESTS FOR VICTIMS

Polygraph machines are a combination of instruments used to measure blood pressure, cardiac activity, respiration, the skin response to electricity, and sometimes muscle movements. These devices measure the body’s response to the stress normally associated with fear. If the examiner interprets the relevant questions as generating more arousal than control questions, the subject will be diagnosed as deceptive, or will “fail” the test.

Prosecutors should not polygraph test victims of Domestic Violence to determine if they are telling the truth. The idea that a law enforcement officer or prosecutor want to “test” the victim’s statement can increase the trauma to the victim and will steer victims away from the vital trusted relationship required between the victim and the domestic violence prosecutor. Implying that victims need to “prove” they are telling the truth by submitting to a polygraph – something other crime victims are not required to do, can cause distrust, fear and additional trauma to the victim.

Additionally, the validity of lie detector results is questioned in the absence of insight into brain mechanisms that underlie deception¹⁰⁵.

¹⁰³ See Md. Cod Ann., Rule 4-248 (1995) On motion of the State’s Attorney, the Maryland court may indefinitely postpone trial by making the charge “STET” on the docket. A “steted” charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of a court for good cause shown. *Smith v. State*, 295 A.2d 802, 806 (Md. Ct. Spec. App. 1972); Ca. Pen. Code 1387(a) and (b) [allowing refiling of domestic violence case when served victim fails to appear.]

¹⁰⁴ *Nevada Domestic Violence Resource Manual*, *supra* note 1.

¹⁰⁵ Iacono, W. G., (2008) Effective policing; Understanding how polygraph tests work and are used. *Criminal Justice and Behavior*, 35, 1295-1308.

The Violence Against Women Act prohibits polygraph testing for any victim of sexual assault,¹⁰⁶ and the fear, shame, embarrassment and self-blame a sexual assault victim experiences are analogous in the Domestic Violence context.

CONTINUED INVESTIGATION OF DEFENDANTS

Although access to the defendant will be severed after charges are filed, the prosecutor can continue his or her investigation of the defendant by reviewing criminal records, including out of state criminal information. The prosecutor must disclose to the defendant and to the court any exculpatory evidence he or she obtains, including victim recantations, even when the prosecutor believes it to be false.¹⁰⁷ Prosecutors should consider reviewing jail calls or visits from the defendant as these may be the basis for the victim's minimization or recantation. Prosecutors should continue to ask the victim whether the defendant has contacted him or her from jail and whether these contacts were attempts to dissuade the victim from participating in prosecution or testifying at trial. All of these efforts will additionally assist prosecutors in developing evidence for potential forfeiture by wrongdoing hearings.

UTILIZING RECORDED JAIL CALLS

Most jurisdictions record phone calls made by incarcerated defendants with admonishments to all parties that the call is being recorded. These recordings are a goldmine for prosecutors. Domestic Violence abusers often use power and control during jail phone calls to manipulate their victim, and even the victim's children in an attempt to gain further compliance.¹⁰⁸

One research study examined jail calls between domestic violence perpetrators and victims to explore how and why victims ultimately arrived at their decision to recant initial statements of abuse. The researchers studied 30-192 minutes of jail conversations between 25 male perpetrators and their female victims during the time defendant was in jail but prior to criminal charges being officially filed. The results showed that across couples consistently, a victim's decision to recant was influenced by manipulation on the defendant's part including defendant telling the victim he was suffering, or that the jail conditions were deplorably, or that life without her was unbearable. There was actually a cyclical process to the jail call discussion, beginning with the couple essentially arguing about the event and blaming each other, then the perpetrator using sympathy to appeal to the victim's emotions, then a discussion about memories the couple had and what life would be like apart, followed by a perpetrator asking the victim to recant, ending with the couple devising a recantation plan together. Rarely did a defendant use direct threats with a victim during these calls. The research found consistently that once a victim arrived at a decision to recant, the couple actually constructed the recantation plan by redefining the actual abusive event to protect the perpetrator, and actually told each other what to say or not to say in the criminal process.¹⁰⁹

This research about the jail call process between perpetrator and victim generates a call to action. Domestic Violence practitioners should understand the manipulative dynamic that goes on in jail calls and intervene by educating and preparing the victim to prevent and defend against the sophisticated techniques that abusers use

¹⁰⁶ 34 U.S.C. Section 10451.

¹⁰⁷ MDAA, *supra* note 76. *See also* Hobbs, *supra* note 67.

¹⁰⁸ *J Family Violence*, published online May 25, 2017, Volume 32, pp 1-4. <https://link.springer.com/article/10.1007/s10896-017-9919-2>; Professor Amy Bonomi, Department of Human Development and Family Studies, Michigan State University, East Lansing, USA; David Martin, Prosecuting Attorney, Domestic Violence Unit, King County, Seattle, WA.

¹⁰⁹ Amy E. Bonomi, Rashmi Gangamma, Chris R. Locke, Heather Katfiasz, David Martin. "Meet me at the hill where we used to park": Interpersonal processes associated with victim recantation. *Social Science and Medicine*, 2011, DOI, *Journal of Social Science and Medicine* 73 (2011) 1054-1061.

to win-over their victims. A best practice includes linking the victim quickly after defendant's incarceration to advocacy so the advocate can prepare the victim for the potential manipulative process that may happen in the call from their abuser. Any domestic violence professional that has a contact with a victim close in time to a defendant being incarcerated should discuss the fact that the defendant may very well try and call that victim from jail. Conversations such as "it is common for defendants to call and try to blame you or encourage you to blame yourself. I just want you to be prepared for that" are important to have. By educating victims about the researched dynamic of manipulation during jail calls, victims will become more empowered to protect against the manipulation and better their chances of overall healing and safety.

Additionally, jail calls may provide key pieces of information that prosecutors can use at trial or forfeiture by wrongdoing hearings and can even provide evidence for additional charges should a defendant threaten a victim or dissuade him/her from participating in the criminal process during the call. Prosecutors should make every effort to listen to jail calls especially during critical stages of the prosecution, such as arraignment, immediately before the preliminary hearing or grand jury, before any court appearances, and in the days leading up to trial. These stages of the criminal process are often trigger times for a manipulative defendant where extra efforts are made to persuade the victim to stand down, dissuade cooperation with the prosecution, or threaten retaliation if the victim comes to court.¹¹⁰

NEAR AND NONFATAL STRANGULATION

In the United States, about 10% of violent deaths result from strangulation, almost all of which involve manual (using hands, forearms, or knees) or ligature (using a cord) strangulation.¹¹¹ The majority of high-risk domestic violence victims experience nonfatal and near-fatal strangulation assaults.¹¹² Even more importantly, nonfatal strangulation is a high-grade marker for domestic violence homicides. If a victim is strangled one time by an intimate partner, he or she is 750% more likely to later be killed by that partner.¹¹³

The seminal work on the importance of strangulation began in the San Diego City Attorney's Office in 1995 under the leadership of then-Deputy City Attorney Gael Strack. Her 1995 research data became the basis for a published 2001 study of 300 strangulation misdemeanor cases. This study revealed that 50% of strangulation victims showed no visible signs of injury, 35% showed injuries too minor to photograph, and in the 15% of cases with visible injuries, such as redness, the photographs were too blurry to use in prosecution.¹¹⁴ In most cases, either police officers did not question victims about non-visible injuries and symptoms or the victims did not report their symptoms. In cases where victims reported symptoms, the symptoms included nausea, hyperventilation, loss of consciousness, memory loss, shaking, and throat pain.¹¹⁵

The authors of the study developed a training curriculum to guide law enforcement officers and suggested that police officers begin by changing their perspective and language. When a victim reports the abuser "choked"

¹¹⁰ Bennett, Goodman and Dutton, (1999) Systematic obstacles to the criminal prosecution of a battering partner. *Journal of Interpersonal Violence*, 18(6), 666-668; Ellison, (2002) Prosecuting Domestic Violence without victim participation. *The Modern Law Review*, 65(6), 834-858; Hart, (1993) Battered Women and the criminal justice system. *American Behavioral Scientist*, 36(5), 624-638.

¹¹¹ Gael Strack & George McClane, How to Improve Your Investigation and Prosecution of Strangulation Cases (2007), http://www.vavnet.org/summary.php?doc_id=2809&find_type=web_sum_GC.

¹¹² Casey Gwinn, Gael Strack, National District Attorneys Association, National Domestic Violence Prosecution Symposium, Presentation, October 28, 2015, San Diego, CA.

¹¹³ Nancy Glass, Jacqueline Campbell, et. al *Nonfatal Strangulation is an Important Risk Factor for Homicide*, 21 J. OF EMERGENCY MEDICINE, 329 (2008).

¹¹⁴ Strack, *supra* note 98. See also Gael Strack, George McClane, & Dean A. Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Issues*, 21 J. OF EMERGENCY MED. 317-322.

¹¹⁵ Improve your Investigation, *supra* note 81. See also Review of 300, *supra* note 101.

him or her, police officers should further investigate whether the incident was an attempted or near-fatal strangulation.

Law enforcement should be particularly attentive to signs of strangulation. Police officers should record victim statements (e.g., “he choked me”) and those describing the means of strangulation, (e.g., the defendant used his or her hands, objects, ligatures, or weapons; applied pressure; and made death threats).¹¹⁶ If the victim is unable to describe the event, police officers should use follow-up questions to determine the method and manner of strangulation. Strangulation injuries may be internal and not visible, and police officers should therefore record victim statements describing the extent of the injury, such as the amount of force or pressure the defendant applied, trouble breathing, and loss of consciousness, and officers should encourage victims to seek medical attention (and provide transportation to the hospital if necessary). Other signs of strangulation include voice hoarseness or complete loss of voice, breathing and swallowing difficulties, mental status changes, involuntary urination or defecation, and even miscarriage. When collecting physical evidence, police officers should locate and seize objects and weapons that may have been used, photograph both the victim’s and the defendant’s injuries (including distance and close-up photos), document and photograph petechiae, and record any changes in the victim’s voice or demeanor.¹¹⁷

After making observations at the crime scene, police officers should note their experience in their reports, obtain a copy of the 911 calls (as they may reflect a change in the victim’s voice), and record follow-up interviews.

Prosecutors should make use of forensic investigators and nurses, medical experts, emergency room physicians, and coroners during preliminary hearing and trial as a way to educate the judge and jury about non-visible symptoms and the seriousness of attempted, near, and nonfatal strangulation. Prosecutors should make clear to the judge and jury that strangulation is a lethal form of domestic violence, as unconsciousness can occur within seconds and death within minutes or less. Prosecutors should equip themselves with relevant caselaw that is beginning to specifically outline and describe the dangers of strangulation in a Domestic Violence Context.¹¹⁸

Alliance for HOPE International operates the Training Institute on Strangulation Prevention (TISP) and provides comprehensive training for all professionals in the handling of near and nonfatal strangulation cases. Their website, library of materials, and specialized trainings are an excellent resource for prosecutors.¹¹⁹ In collaboration with the California District Attorneys Association, the TISP published a manual on the investigation and prosecution of strangulation assaults.¹²⁰ In 2014, the *Domestic Violence Report* published a special issue focused on the handling of nonfatal strangulation assaults.¹²¹

Counties should consider developing nonfatal strangulation “protocols” for Law Enforcement and Health Care providers in order to best engage all relevant stakeholders in the identification, documentation and prosecution of these dangerous offenders.

Implementation of strangulation protocols for law enforcement can increase felony filings of strangulation cases as well as increase accountability for these potentially lethal offenders.¹²² 911 call dispatchers can be strongly encouraged to ask the simple question, “During the incident did anything go around or against your neck?”

¹¹⁶ Allison Turkel, “And Then He Choked Me”: Understanding, Investigating, and Prosecuting Strangulation Cases, http://www.ndaajustice.org/pdf/the_voice_vol_2_no_1_08.pdf.

¹¹⁷ *Id.*

¹¹⁸ *State v. Lewis* (2019) 333 Conn. 543.

¹¹⁹ <https://www.allianceforhope.com>.

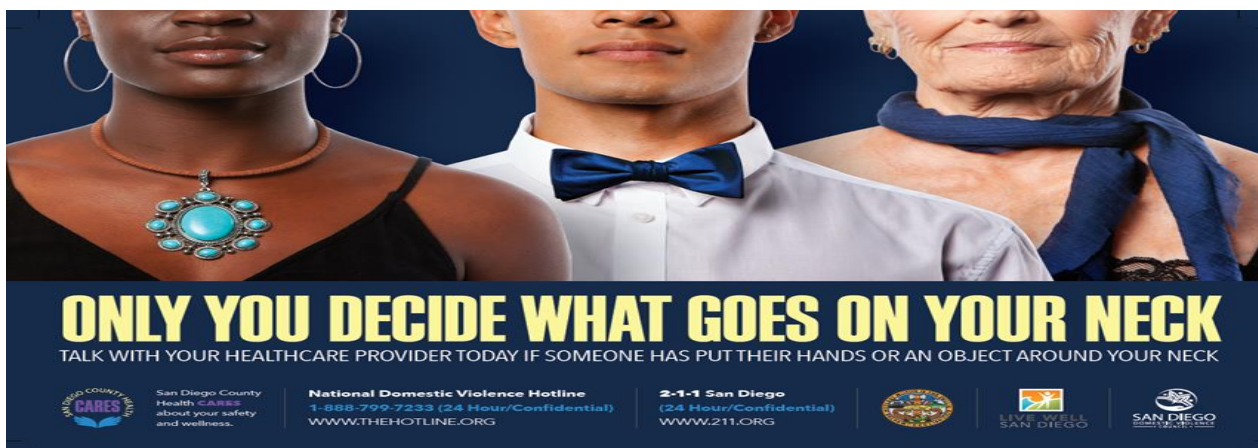
¹²⁰ For more information, go to www.strangulationtraininginstitute.org.

¹²¹ Gael Strack, Casey Gwinn, Eds., Special Issue, *Domestic Violence Report, Handling Strangulation Assaults*, Vol. 19, No. 6, ISSN 1086-1270, Pages 81-100, August/September 2014. <http://www.civicrosearchinstitute.com/pdfs/DVR1906.pdf>, Accessed June 6, 2016.

¹²² San Diego County’s felony filings of nonfatal strangulation cases increased almost seven-fold after implementation of when their 2017 *Strangulation Protocol*. For more information contact Tracy.Prior@sdceda.org.

Often dispatchers are the first touchpoint for a victim to report abuse, and victims, unless asked, might not self-identify a strangulation unless asked directly a question about it. First responders can be encouraged to additionally ask a screening question about strangulation and then fill out a “Strangulation Documentation Form” that identifies and documents signs and symptoms of strangulation that can later be used in court to prove elements of particular charges. Detectives can be encouraged to conduct follow-up questions surrounding signs and symptoms of strangulation and encourage additional medical care when appropriate. And finally, prosecutors should review strangulation cases for possible *felony* charges, as opposed to misdemeanor charges, and call medical professionals at trial to describe how the signs and symptoms documented by first responders are consistent with a strangulation event.

Implementation of strangulation awareness programs and protocols for health care professionals can also move the needle for better offender accountability and better victim safety. Medical professionals such as paramedics, ER doctors, nurses, and others are often the first eyes and ears on a serious domestic violence incident and victims trust medical professionals even more than law enforcement in some instances, to describe what happened to them. Medical professionals additionally, are often mandated reporters, and can be a pipeline to making victims safer once they know the dangers and signs/symptoms of nonlethal strangulation. Training paramedics, doctors and nurses to first, screen for strangulation, report to police when appropriate and provide safety planning and resources to the victims is a large step toward victim safety – and may even save lives. One county chose to announce a public health “advisory” health alert regarding the signs and symptoms and high lethality risks of non-fatal strangulation,¹²³ as well as launched a health campaign designed to increase awareness about the dangers of nonlethal strangulation to medical providers including physicians, nurses, public health officers and more.¹²⁴



MULTIJURISDICTIONAL PROSECUTIONS

Federal Law

Domestic violence is traditionally and principally a subject to be adjudicated by state and local jurisdictions. However, in certain situations, where interstate travel and firearms are involved, federal law allows for the prosecution of domestic violence. Below is a list of federal laws that may be used as tools for and during the prosecution of domestic violence offenders.¹²⁵ Where it seems appropriate to prosecute federally, the United States Attorney’s Office should be contacted.

- The Violence Against Women Act

¹²³ https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/cahan/communications_documents/02-12-19.pdf.

¹²⁴ www.SDCountyHealthCARES.org

¹²⁵ For a more complete list and summary of each of these, see *Nevada Domestic Violence Resource Manual*, *supra* note 1. See also MDA, *supra* note 76.

- Gun Control Act
- Interstate Travel to Commit Domestic Violence, 18 U.S.C. § 2261
- Interstate Stalking, 18 U.S.C. § 2261A
- Interstate Travel to Violate a Protection Order, 18 U.S.C. § 2262
- Possession of Firearm While Subject to Order of Protection, 18 U.S.C. § 922(g)(8)
- Transfer of Firearm to Person Subject to Prosecution Order, 18 U.S.C. § 922(d)(8)
- Possession of Firearm After Conviction of Misdemeanor Crime of Domestic Violence, 18 U.S.C. § 922(g)(9)
- Transfer of a Firearm to Person Convicted of Misdemeanor Crime of Domestic Violence, 18 U.S.C. § 922(d)(9)
- Amendment of the Brady Statement, 18 U.S.C. § 922
- Right of Victim to Speak at Bail Hearing, 18 U.S.C. § 2263
- Other Victims' Rights, 42 U.S.C. § 10606(b)
- Restitution, 18 U.S.C. § 2264
- Full Faith and Credit
- Self-Petitioning for Battered Immigrant Women and Children, 18 U.S.C. § 1154
- Victims of Trafficking and Violence Prevention Act of 2000 – U Visas

CHARGING THE DOMESTIC VIOLENCE CASE

Prosecutorial Discretion

Prosecutorial discretion is an effective tool for addressing domestic violence cases and is favored over a blanket no drop policy.¹²⁶ Given the dynamics of domestic violence and issues unique to domestic violence victims, a blanket policy may be too restrictive.¹²⁷

Consideration of the timing of filing charges is also important. Prosecutors should balance victim safety and a thorough investigation. Once charges are filed and the defendant exercises his Sixth Amendment right to counsel, the prosecutor's access to the defendant will likely be severed, limiting the investigation. However, quickly filing charges may prevent future abuse and the ability for the defendant to re-establish a relationship with the victim, as no contact orders and bond restrictions may become available.¹²⁸

When a case is not charged, the victim should be notified and a record of the uncharged incident report should be kept for future prosecutions.¹²⁹ In uncharged cases, the prosecutor should ensure that the victim receives information about social and medical resources.

Other Charges Supported by the Evidence

Prosecutors should carefully review the evidence for other charges, including attempt charges and enhancers. Including other charges may advance prosecutorial goals and serve as corroboration, provide the jury with a complete picture of the defendant, and bolster negotiation.¹³⁰ Additional charges that are commonly supported by the evidence include assault, battery, burglary, robbery, theft, false imprisonment, carjacking, mayhem,

¹²⁶ *National District Attorneys Association*, *supra* note 1.

¹²⁷ *Id.*

¹²⁸ Wisconsin Office of Justice Assistance, *supra* note 48.

¹²⁹ *Nevada Domestic Violence Resource Manual*, *supra* note 1.

¹³⁰ Wisconsin Office of Justice Assistance, *supra* note 48.

stalking, criminal threats, kidnapping, and child endangerment.¹³¹ Prosecutors should also consider joining cases, which can help establish the severity of the relationship and abuse between the victim and their abuser.¹³²

ARGUING BAIL AND THE INITIAL APPEARANCE

Prosecutors should ensure accuracy in the complaint prior to and during arraignment.¹³³ Arraignment is also an important opportunity for prosecutors to consider victim safety.¹³⁴

The prosecutor's considerations when advocating for bail conditions should include the seriousness and violence of the offense; use of weapons; lethality of the defendant; the defendant's criminal record and history of violence; the defendant's history of noncompliance with court orders and outstanding warrants; threats of death, injury, retaliation, and suicide; the victim's fears; and access to the victim.¹³⁵ Prosecutors should inquire about and identify any signs of strangulation as these signs may indicate severe violence patterns and high fatality risk.¹³⁶ If the defendant is released, prosecutors should advocate for written conditions, such as stay away from and no contact with the victim; global positioning system (GPS), tracking, or monitor devices for the defendant; restricting the defendant's access to firearms; prohibiting the use of substances and alcohol; and any reasonably necessary condition to ensure the defendant's appearance and the victim's safety.¹³⁷ If the facts do not support a high bail, but there is great safety concern, prosecutors in some states may move for a dangerousness hearing.¹³⁸

PRELIMINARY HEARINGS

The purpose of a preliminary hearing is to present evidence of probable cause that the defendant committed the crime charged. Prosecutors may also use a preliminary hearing as an opportunity to remove the defendant's domination and control over the victim and to eliminate any guilt the victim may feel by establishing that it is the prosecutor who is in charge of holding the defendant accountable.¹³⁹ The victim may be more likely to cooperate when he or she sees that the prosecution process is inevitable.

Although prosecutors should try to complete the preliminary hearing without the victim's testimony, there are benefits of the victim testifying during this early stage. Testifying will allow the victim to become comfortable with the form and substance of questions in a less public forum as may be at trial. A victim's testimony at the preliminary hearing, when subject to cross-examination, may also be useful evidence if the victim later recants.

Prosecutors should be mindful of the Confrontation Clause and set reasonable expectations when proceeding without the victim's direct testimony. Common evidence allowed without the victim's testimony includes admissions by party opponent, excited utterances, 911 calls, present sense impressions, and statements made for the purpose of medical diagnosis or treatment.

¹³¹ *Id.*

¹³² MDAA, *supra* note 76.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Wisconsin Office of Justice Assistance, *supra* note 48; *Nevada Domestic Violence Resource Manual*, *supra* note 1; Hobbs, *supra* note 67.

¹³⁶ MDAA, *supra* note 76.

¹³⁷ MDAA, *supra* note 76; Hobbs, *supra* note 67.

¹³⁸ MDAA, *supra* note 76.

¹³⁹ Wisconsin Office of Justice Assistance, *supra* note 48.

Prosecutors should also make use of their state’s available evidentiary objections, such as relevancy, discovery not allowed at the preliminary hearing, credibility as a non-issue during the preliminary hearing, evidence of a witness’s character and conduct, and rape shield law violations.¹⁴⁰

WITNESS PREPARATION

Although witnesses of domestic violence may be or become uncooperative, prosecutors must prepare them as much as possible. At a minimum, prosecutors should review with the witness the witness’s prior testimony, the form and substance of questions that will be asked during direct and cross examination, the form and substance of the witness’s answers, and any exhibits for which the witness will be used to lay the foundation.¹⁴¹

Prosecutors should avail themselves of all relevant statutory tools that may protect witnesses in the courtroom, such as the use of a support person, a therapy canine support dog, or other judicial courtroom control measures in order to make witnesses feel supported.

MOTIONS IN LIMINE

The defense often moves to dismiss a case in the pre-trial phase.¹⁴² Prosecutors are encouraged to practice the use of motions in limine to control the quantity and quality of information sought to be introduced. Prosecutors should move in limine to exclude evidence protected by rape shield laws, exclude privileged or confidential information, admit extrinsic evidence to prove the victim’s conduct, and admit the defendant’s prior bad acts (to prove identity, intent, motive, common plan or scheme, absence of mistake, signature, and knowledge).¹⁴³ Prosecutors should be prepared to argue exclusion of a victim’s prior drug use, drug treatment, specific acts of conduct, or improper character evidence. Prosecutors should also move pre-trial to join domestic violence cases; doing so may help establish the severity of the relationship and of the victim’s situation.¹⁴⁴

RAPE SHIELD LAWS

Nationally, about 19.3% of women and 1.7% of men have been raped during their lifetimes.¹⁴⁵ Of these, about 8.8% of women and 0.5% of men were raped by an intimate partner.¹⁴⁶

Rape shield laws protect victims of sexual assault by limiting the evidence the defendant is allowed to introduce to attack the victim’s credibility. Evidence of the victim’s sexual conduct to attack the victim’s credibility is only allowed if it is relevant to credibility, heard outside the jury’s presence, accompanied by an affidavit of proof, and presented through written motion.

The defendant may introduce this evidence to show the victim has falsely reported sexual assault in the past, the victim has previously engaged in consensual sexual conduct with the defendant, or the presence of semen other than the defendant’s.¹⁴⁷ Through evidentiary hearings, the prosecutor should contend there is insufficient

¹⁴⁰ *Id.*

¹⁴¹ MDAA, *supra* note 76.

¹⁴² *Id.*

¹⁴³ Wisconsin Office of Justice Assistance, *supra* note 48.

¹⁴⁴ MDAA, *supra* note 76.

¹⁴⁵ Centers for Disease Control, *supra* note 2.

¹⁴⁶ *Id.*

¹⁴⁷ Wisconsin Office of Justice Assistance, *supra* note 48.

evidence to prove the existence of inconsistent statements, false statements, or prior false allegations and should attack the other challenges on relevancy and prejudicial grounds.¹⁴⁸

TRIAL ISSUES AND STRATEGIES

Voir Dire

The complex dynamic between victims of domestic violence and their abusers and the likelihood that the victim may be uncooperative makes imperative the selection of jurors who will not adhere to stereotypes, will be sympathetic to the victim's fears, and will understand the reasons behind the victim's inconsistent statements. During voir dire, prosecutors should explore the jurors' general attitudes toward domestic violence by asking whether they believe domestic violence is to be resolved in the home or treated differently than other forms of violence and whether they believe the justice system should be involved when the victim does not want it to be.¹⁴⁹

Opening and Closing Statements

A common defense strategy is to shift the focus to the victim, and prosecutors should therefore select a theme that focuses on the defendant, such as highlighting that the defendant is a predator, manipulator, or opportunist.¹⁵⁰ The theme must make each juror personally invested and responsible for holding the offender accountable and protecting the victim. The prosecutor can achieve this by emphasizing domestic violence as not simply a dispute between intimate partners but a crime that results in harm extending beyond the individual victim to society as a whole.¹⁵¹ When appealing to societal impact, prosecutors should be knowledgeable of and comport to their state's ethical rules. Prosecutors should choose a theme that will help the jury make sense not only of the defendant's behavior but also that of the victim while ensuring the theme and prosecution remain defendant-centered.¹⁵² Prosecutors should consider statements such as "this is a case about power and control," "this is a case where a defendant would not take 'no' for an answer," or "this is a case where the victim was a prisoner in her own home."

Evidentiary Issues

Prosecutors should be aware of evidentiary tools available in their states, such as non-hearsay and hearsay exceptions, the use of medical and forensic testimony, and the use of non-victim witnesses. Prosecutors should become experts in these tools and the requirements of each (e.g., laying the foundation for introduction). Common non-hearsay includes prior consistent statements, prior inconsistent statements, and admissions by the party opponent. Common exceptions to hearsay include present sense impressions, excited utterances, statements made for the purpose of medical diagnosis or treatment, recorded recollections, and records of regularly conducted activities. Character evidence in the form of opinion, reputation, and specific instances of conduct as well as other acts evidence may be available to prosecutors in certain states. When a defense witness testifies to the defendant's good character, prosecutors can challenge the witness's credibility on grounds such as lack of personal knowledge, reliability of opinion, and contradicting the witness's opinion of the defendant's good character by asking the witness if he or she knows of the defendant's past instances of conduct, and if so,

¹⁴⁸ *Id.*

¹⁴⁹ MDAA, *supra* note 76; Hobbs, *supra* note 67.

¹⁵⁰ Wisconsin Office of Justice Assistance, *supra* note 48.

¹⁵¹ *Nevada Domestic Violence Resource Manual*, *supra* note 1.

¹⁵² MDAA, *supra* note 76.

how that information changed the witness's opinion.¹⁵³ Some jurisdictions allow evidence showing the defendant's consciousness of guilt, such as fleeing the scene, trying to flee the jurisdiction, or fleeing from police officers.¹⁵⁴ Jurisdictions that prohibit the introduction of prior bad acts to prove propensity may allow these acts to prove intent, motive, or absence of accident, or to rebut recantation and minimization, and prosecutors are encouraged to litigate these pre-trial issues.¹⁵⁵

Confrontation Clause¹⁵⁶

In 1980, the Supreme Court held in *Ohio v. Roberts*¹⁵⁷ that an unavailable witness's out-of-court statement could be admitted only if it bore "indicia of reliability."¹⁵⁸ The Court explained that reliability could be "inferred without more . . . where the evidence [fell] within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."¹⁵⁹

In 2004, *Crawford v. Washington*¹⁶⁰ overturned the *Ohio v. Roberts* "indicia of reliability" test, holding that "where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination."¹⁶¹ The Court gave no comprehensive definition of what constitutes "testimonial evidence" but enumerated instances where statements would be testimonial: preliminary hearings, before a grand jury, at a former trial, and during police interrogations.¹⁶² Excited utterances and other hearsay exceptions made to non-law enforcement persons, such as relatives and friends, may be considered non-testimonial.¹⁶³ Whether excited utterances made to law enforcement are nontestimonial is determined on a case-by-case basis.¹⁶⁴

In 2006, in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*,¹⁶⁵ the Supreme Court considered police interrogations and held that not all statements given to police are testimonial. Statements offered to police to assist in an ongoing emergency and 911 calls describing an ongoing domestic disturbance are nontestimonial.¹⁶⁶ However, where there is no immediate danger, statements given to the police at the crime scene are testimonial.¹⁶⁷

In 2011, the Supreme Court affirmed *Davis v. Washington* when it held in *Michigan v. Bryant* that statements given to the police about the perpetrator's identity and location were nontestimonial when the victim's primary purpose for offering the statements was to assist in an ongoing emergency.¹⁶⁸

¹⁵³ *Nevada Domestic Violence Resource Model*, *supra* note 1.

¹⁵⁴ MDAA, *supra* note 76.

¹⁵⁵ Hobbs, *supra* note 67.

¹⁵⁶ For a guide on the challenges and strategies relating to the Confrontation Clause, *see* AEquitas, *supra* note 82. For a discussion on *Crawford v. Washington* implication on child abuse prosecution, *see* Mary Sawicki, "The Crawford v. Washington Decision - Five Years Later" Implications for Child Abuse Prosecutors (2009), http://www.ndaa.org/pdf/update_vol_21_no_9_10.pdf. For a discussion on the implications of *Crawford v. Washington* on domestic violence cases, *see* Leventhal, *supra* note 72.

¹⁵⁷ *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹⁵⁸ *Id.* at 66.

¹⁵⁹ *Id.*

¹⁶⁰ *Crawford* 541 U.S., *supra* note 30 at 68 (2005).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Leventhal *supra* note 72.

¹⁶⁴ *Id.* at 89.

¹⁶⁵ *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* and *Hammond* were both domestic violence cases.

¹⁶⁶ *Id.* at 828. The Court noted that once the emergency has been addressed, the 911 call becomes testimonial.

¹⁶⁷ *Id.* at 813.

¹⁶⁸ *Michigan v. Bryant*, 562 U.S. 344, 377-78 (2011).

The Confrontation Clause does not apply when a victim is present at trial and recants or minimizes the facts because the victim is present to be cross-examined.¹⁶⁹

Forfeiture by Wrongdoing¹⁷⁰

The theory of forfeiture by wrongdoing allows the introduction of out-of-court statements by a witness whom the defendant has made unavailable.¹⁷¹ The doctrine applies only when “the defendant engage[s] in conduct *designed* to prevent the witness from testifying.”¹⁷²

In 2008, the Supreme Court held in *Giles v. California*¹⁷³ that the murder of a victim does not trigger the doctrine of forfeiture by wrongdoing because the purpose of the murder was not to keep the victim from testifying.¹⁷⁴ Discussing the implications of *Giles v. California* on domestic violence cases in dictum, the Court noted:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.¹⁷⁵

Thus, conduct “designed to prevent the witness from testifying” may be in the form of an ongoing pattern of abuse.¹⁷⁶

In most states, the standard of proof is preponderance of the evidence, and in the remaining few it is clear and convincing evidence.¹⁷⁷

Witness tampering is common in domestic violence cases.¹⁷⁸ Prosecutors, with the help of family advocates, should educate victims about manipulation and intimidation, emphasizing that their abuser’s wrongful acts are

¹⁶⁹ Hobbs, *supra* note 67.

¹⁷⁰ Markman, Isley. *The Admission of Hearsay Testimony under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts*. American University Criminal Law Brief 6, no. 2 (2010): 9-19. at p. 14 arguing that forfeiture by wrongdoing may be a more effective strategy and more protective of victim rights than the nontestimonial exception.

¹⁷¹ *Giles v. California*, 554 U.S. 353, 359 (2008); Fed. Rule Evid. 804(b)(6); *Reynolds v. United States*, 98 U.S. 145 (1879). The Supreme Court first addressed forfeiture by wrongdoing in *Reynolds*.

¹⁷² *Giles* 554 U.S. at 359 (emphasis in original).

¹⁷³ *Giles* 554 U.S.

¹⁷⁴ *Id.* at 361 (2008) (murder victim statements may come in as dying declarations).

¹⁷⁵ *Id.* at 377.

¹⁷⁶ AEquitas, *supra* note 82.

¹⁷⁷ *Id.*

¹⁷⁸ Hobbs, *supra* note 67.

not limited to criminal acts but also include promises to change, declarations of love, and marriage proposals when intended to prevent victims from testifying.¹⁷⁹

If the defendant attempts to induce a victim to not testify through acts of love and kindness, prosecutors may call experts to explain how the defendant's behavior perpetuates a cycle of violence that is characterized by a "period of tension building followed by an abusive episode that is resolved in a 'honeymoon phase.'"¹⁸⁰ Prosecutors should also consider whether additional charges of witness intimidation are appropriate.

Battered women's syndrome, sometimes referred to as battered person syndrome, can be described as the "behavioral and psychological consequences that many victims . . . experience as a consequence of living in domestic violence situations."¹⁸¹ Behaviors exhibited by these victims include appearing withdrawn, traumatized, or non-responsive and developing low self-esteem and negative coping mechanisms, such as drug and alcohol use. Prosecutors can use experts, psychologists, and social workers to explain the victim's behaviors to the jury. Such issues should be litigated pre-trial in accordance with applicable state standards.

Prosecutors should ensure that convictions secured through forfeiture by wrongdoing comport to the defendant's due process rights.¹⁸²

Evidentiary Hearings

The low standard of proof and admissibility of hearsay and testimonial evidence during forfeiture by wrongdoing hearings make these hearings a powerful tool.¹⁸³ Where prosecutors intend to admit out-of-court statements under a theory of forfeiture by wrongdoing, they should file a motion in limine and request an evidentiary hearing, during which rules of evidence are not applicable and a variety of information may be considered.¹⁸⁴ These are usually pre-trial hearings, but a hearing may be held mid-trial.¹⁸⁵

For the purposes of forfeiture by wrongdoing hearings, there are several ways a witness can be unavailable. A witness may fail to appear in court by avoiding subpoena service or disobeying subpoena.¹⁸⁶ A witness may also be considered unavailable where he or she appears in court but either refuses to testify or recants. Prosecutors should be prepared to argue ad hoc motions where witnesses refuse to testify or recant.¹⁸⁷

Prosecutors should be aware of their jurisdiction's requirements for forfeiture hearings and, at a minimum, explain due diligence and unavailability, remind the court of the standard of proof and admissibility of hearsay, and call witnesses.¹⁸⁸ Prosecutors should prove that the witness is unavailable, the defendant engaged in conduct that made the witness unavailable, and the defendant had the intent to make the witness unavailable.¹⁸⁹ Prosecutors should emphasize that intent can be inferred from acts such as promises to change, appeals to emotions, bribes, violations of a no contact order, and attempts to pressure the victim directly or through family.¹⁹⁰

¹⁷⁹ See Jeff Grabmeier, *Jailhouse Phone Calls Reveal Why Domestic Violence Victims Recant* The Ohio State University Research, <http://researchnews.osu.edu/archive/vicrecant.htm>. See also *AEquitas supra*, note 82 and *Hobbs, supra* note 67.

¹⁸⁰ *McKinstry, supra* note 22 at 438.

¹⁸¹ *Id.*; *Hobbs, supra* note 67.

¹⁸² *MDAA, supra* note 76.

¹⁸³ *McKinstry, supra* note 22 at 541; see also *MDAA supra* note 76.

¹⁸⁴ *MDAA, supra* note 76; see also *Hobbs, supra* note 67.

¹⁸⁵ *AEquitas, supra* note 82 at 5 (hearing held mid-trial because defendant sent individual to courtroom to intimidate witnesses).

¹⁸⁶ *Nevada Domestic Violence Resource Manual, supra* note 1.

¹⁸⁷ *AEquitas, supra* note 82 at 6.

¹⁸⁸ For a guide on what questions to ask of witnesses during a forfeiture by wrongdoing, see *AEquitas, supra* note 82 at 7-8.

¹⁸⁹ *Giles 554 U.S.*; see also *MDAA, supra* note 76.

¹⁹⁰ *Hobbs, supra* note 67.

Jailhouse phone calls may be subpoenaed and reviewed to prove the defendant has engaged in conduct intended to prevent the victim or witnesses from testifying. Defendants have become sophisticated in their jail calls, and prosecutors should therefore be on the lookout for ways in which defendants attempt to mask their conduct and intent, such as by using another inmate's pin number, persuading the victim to purchase a disposable phone, or routing calls from a third person to the victim.¹⁹¹ When reviewing jailhouse phone calls, prosecutors should be vigilant not to intentionally review calls that may be privileged, such as attorney-defendant calls, and implement a protocol for when a call is inadvertently reviewed.¹⁹²

Fifth Amendment Assertions by the Victim

Victims of domestic violence often assert their Fifth Amendment rights. When this occurs, prosecutors must inform the court so that an attorney can be appointed to him or her, and henceforth prosecutors must conduct all future communications in the presence of the victim's attorney.¹⁹³ Although victims can assert their Fifth Amendment rights, they must do so in response to particular questions and not as a blanket assertion.¹⁹⁴

Domestic violence prosecutors should keep in mind a defense attorney may advocate for a particular victim to be counseled for a Fifth Amendment claim, when under the circumstances, no legitimate Fifth Amendment privilege actually exists. For instance, recantation or minimization of a statement to an initial officer is part of the larger cycle of domestic violence and not necessarily a lie or separate crime for which a person may inculcate him or herself. Domestic violence prosecutors should identify victims that are experiencing the cycle of power and control within an intimate partner relationship and arm themselves with case law addressing true Fifth Amendment claims. Before ever charging a domestic violence victim with perjury or filing a false police report, prosecutors are strongly encouraged consider and explore fully the potential reasons behind a particular victim's asserting she "filed a false report" or "lied" during her testimony. Although evidence could support either, many times the victim is simply caught up in the cycle of violence and feels pressured to say she lied to protect the abuser.

Spousal and Therapist-Patient Privileges

Jurisdictions differ in their treatment of spousal privileges, and prosecutors should therefore be knowledgeable about the rules and exceptions to asserting privilege. Generally, privilege rules will contain exceptions for cases in which the defendant-spouse committed a crime against the testifying spouse.¹⁹⁵

Recanting Victims

When called to testify, domestic violence victims may feel forced to decide between testifying truthfully and their personal safety. Accordingly, prosecutors and law enforcement should be diligent in the evidence collection stages of prosecution to reduce the need for the victim to testify. When the need to call the victim outweighs victim safety concerns, and the victim recants on the stand, prosecutors should ask simple questions to confirm identity, time, and place; eliminate alternative explanations; and corroborate the first statement even if it requires going through the victim's prior statement line by line.¹⁹⁶

When a victim recants on the witness stand, prosecutors should attempt to refresh the victim's recollection with his or her past statement(s). If the witness does not remember, some jurisdictions permit the introduction of recorded recollection. Prosecutors may also impeach the witness or introduce prior inconsistent statements.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ MDAA, *supra* note 76.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ For a list of suggested questions, *see id.*

Some attorneys prefer not to impeach the victim on the stand, in essence viewing this process as re-victimizing. In such situations, the attorney may try to prove the case without calling the victim at all, through evidence-based prosecution.

Recantation is often the consequence of the highly sophisticated manipulation strategies of the defendant, and prosecutors should therefore inquire into the nature, source, timing, and consequences of the non-cooperation. Recent research from Michigan State Professor Amy Bonomi and King County Prosecutor David Martin highlights how Domestic Violence abusers triangulate their children into the abuse dynamic during jail calls.¹⁹⁷ Prosecutors should continue their investigation of the case past the issuance states to determine when and why the victim may be suddenly recanting.

Prosecutors should avoid dismissing a case simply because the victim is uncooperative and instead double their efforts to hold the defendant accountable.¹⁹⁸ Recanting victims are often labeled as uncooperative and not on board with the prosecutor's efforts. As a result, advocacy support may be minimized and reallocated to those who are deemed cooperative. However, given the reasons victims recant, those seen as uncooperative may be most in need of help, despite their lack of help-seeking behavior. Victims of charged domestic violence crimes infrequently seek services from a community-based domestic violence agency, and recanting victims may be even less likely to seek such help. Prosecutors should ensure they provide all victims, including recanting victims, with contact information for services and fully explain to them that these domestic violence agencies are equipped to address the often-needed long-term support services that help protect against re-victimization.

Expert Testimony

Prosecutors should make use of expert testimony to explain to the judge and jury why victims and witnesses recant, change their stories, omit or withhold information, and are reluctant to testify against the defendant. Prosecutors should call as experts medical professionals, psychologists, law enforcement, social workers, and victim advocates. When enlisting an expert, prosecutors should meet with the expert prior to trial to address the substance and form of their testimony, visual aids, and compensation.

Medical experts may testify to non-visible internal injuries, especially those sustained during near and nonfatal strangulation.

Law enforcement experts may testify about behaviors victims display that may seem odd to the jury.

Social workers and victim advocates may further explain common victim reactions, including victim fears responsible for recantation.

Exhibits

The use of exhibits can corroborate the victim's initial testimony and may be particularly useful in the event the victim recants, changes his or her story, or omits information. Exhibits should include body worn camera evidence showing the victim's demeanor at the scene, photographs of the scene and visible injuries, medical records of internal injuries, and video or audiotapes of the defendant or victim reflecting the extent of the injuries inflicted.

Common Defenses

Prosecutors should anticipate and prepare for the limited number of defenses that may be raised. In doing so, prosecutors should determine why each of the witnesses on the defense's witness list will be called and what

¹⁹⁷ *J Family Violence*, Volume 32, published online May 25, 2017, pp. 1-4. <https://link.springer.com/article/10.1007/s10896-017-9919-2>, Professor Amy Bonomi, Department of Human Development and Family Studies, Michigan State University, East Lansing, USA; David Martin, Prosecuting Attorney, Domestic Violence Unit, King County, Seattle, WA.

¹⁹⁸ Hobbs, *supra* note 67.

each may add to the defense's case. Prosecutors should prepare for both percipient witnesses and character and reputation witnesses.¹⁹⁹ Common defenses in cases of domestic violence include physical abuse, impugning the credibility of the victim, and intent issues. If the case involves sexual abuse within the intimate partner relationship, the defense is most often that the sexual conduct was consensual. Prosecutors must consider and address the plausible defenses in motions in limine and carry this throughout the case, from voir dire to sentencing.

Self-Defense

Defendants often raise self-defense despite the inherent risk of admitting to violent actions by doing so.²⁰⁰ In addressing this defense, prosecutors should try to limit victim exposure and testimony; scrutiny into the victim's behavior shifts the focus from the defendant to the victim and risks the victim becoming reluctant.²⁰¹ Many jurisdictions allow the prosecution to rebut the defendant's contention that the victim was the first aggressor through the defendant's prior violent acts.²⁰²

Provocation

In cases where the defendant tries to paint the victim as having provoked the defendant, the prosecutor should counter by portraying the victim as part of a group of people society should protect.²⁰³

He Said, She Said

Domestic violence most often occurs behind closed doors and out of the public eye, and the defense will try to make the domestic violence case into a he said, she said incident. Prosecutors are encouraged to address this defense by corroborating the victim's statement. Corroboration of the timeline, scene, and demeanors of the victim and defendant may aid when the actual assault cannot be corroborated.²⁰⁴ This is particularly important in cases where the victim is unavailable, and the prosecutor is left only with the victim's out-of-court statements.²⁰⁵

False Report

Often the defense will use a victim's recantation to argue that the victim is lying to attract attention or as a form of revenge.²⁰⁶

Victims of domestic violence recant for many reasons, as outlined above. Prosecutors should investigate why the victim in the case at bar is recanting and educate the jury and judge accordingly. If the victim is recanting under duress, the prosecutor must make the jury and judge aware. The prosecutor should further explain inconsistencies and omissions as understandable and seek clarification in a manner that is nonjudgmental.²⁰⁷ Prosecutors may also be able to prevent or reduce inconsistencies through vertical prosecution and collaboration with victim advocates. The fewer professionals with whom the victim shares his or her story, the fewer opportunities the victim has to recant.

¹⁹⁹ MDAA, *supra* note 76.

²⁰⁰ *Id.*; Nevada Domestic Violence Resource Manual, *supra* note 1.

²⁰¹ MDAA, *supra* note 76.

²⁰² *Id.*

²⁰³ Nevada Domestic Violence Resource Manual, *supra* note 1.

²⁰⁴ Wisconsin Office of Justice Assistance, *supra* note 48.

²⁰⁵ See discussion on Forfeiture by Wrongdoing.

²⁰⁶ Wisconsin Office of Justice Assistance, *supra* note 48.

²⁰⁷ *Id.*

PLEA BARGAINS

Zero tolerance and offender accountability policy considerations favor a prohibition against the use of plea bargains, diversion programs, or fines in domestic violence crimes.²⁰⁸ These tools should be used at the discretion of the prosecutor when the reduction is supported by the goals of prosecution, victim safety, and offender accountability and when the plead charge is another violent crime with a disposition similar to the domestic violence crime.²⁰⁹ Used in this way, plea bargaining is a suitable alternative where the domestic violence victim is unwilling or unable to testify.²¹⁰

DISPOSITION OF DOMESTIC VIOLENCE CASES

Because eradication of domestic violence requires a system-wide change in behaviors and beliefs, offenders are more likely to change when facing a combination of consequences; alone and without more, imprisonment, counseling, probation, prosecution, and arrest will not make an offender change.²¹¹

Prosecutors should consider the violence and seriousness of the charged crimes, the defendant's criminal history, the defendant's performance on probation, alcohol and drug abuse, mental health, and sentencing options when exploring disposition alternatives.²¹²

While seeking and considering the victim's input is important, prosecutors should explain the sentencing phase and make clear it is the judge, not the victim, who decides the sentence. Prosecutors may involve the victim in the sentencing phase through victim impact statements; with the assistance of a victim advocate, the victim may share the physical and psychological impact the abuse has had on him or her and the family.²¹³

Prosecutors should discuss plea offers with the victim, including the reasons for offering the plea agreement and the consequences facing the defendant.

Where a victim has documented personal and property damages, and where allowable by law, the prosecutor should request the court order restitution.²¹⁴

In some jurisdictions, sentences for certain domestic violence crimes include a certified batterer's intervention program. Results are mixed as to the effectiveness of these programs,²¹⁵ and prosecutors should be mindful not to mislead victims or promote outcomes that may not contribute to safety or accountability. According to the founder of Safe Horizons, the largest program for domestic violence offenders, batterer programs are better for accountability rather than reform.²¹⁶ Prosecutors must understand the issues surrounding the success of batterer's treatment programs and be able to provide informed responses to the issues in their jurisdiction. A

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Hobbs, *supra* note 67.

²¹² *Nevada Domestic Violence Resource Manual*, *supra* note 1.

²¹³ Wisconsin Office of Justice Assistance, *supra* note 48.

²¹⁴ *Nevada Domestic Violence Resource Manual*, *supra* note 1.

²¹⁵ U.S. Department of Justice, National Institute of Justice Annual Report (2009). NIJ, 2009. See Erica Bowen, Len Brown & Elizabeth Gilchrist, *Evaluating Probation Based Offender Programmes for Domestic Violence Perpetrators: A Pro-Feminist Approach*, 41 *The Howard J. of Criminal Justice* 221-236, (2002) (67% of batterers who completed psycho-educational batterer programs in the UK had not reoffended one year later, as opposed to only 25% of those who received other sanctions). See also Frederick Buttell, & Michelle Carney, *Psychological and demographic predictors of attrition among batterers court ordered into treatment*. 26 *Social Work Research* 31-41, (2002); see also Edward Gondolf, *Evaluating Batterer Counseling Programs: A Difficult Task Showing some Effects and Implications*, 9 *Aggression and Violent Behavior* 605-631 (2003); see also Alex Heckert & Edward Gondolf, *Predicting Abuse and Reassault Among Batterer Program Participants*, 3 *National Criminal Justice Reference Service*, 1-12 (2004) (Other studies and literature reviews report similar findings, with 60 to 80% of completers not reoffending).

²¹⁶ Tony Dokoupil, *Why Domestic Violence Prevention Programs Don't Work*, NBC News, October 4, 2014, <http://www.nbcnews.com/storyline/nfl-controversy/why-domestic-violence-prevention-programs-dont-work-n217346>.

one-size-fits-all program may not be best suited for a particular defendant, especially given the complex needs and risks of each particular case. Prosecutors would benefit from attending examples of their local batterer's programs, collaborating with local treatment providers, and connecting with the probation departments who certify such treatment programs.

MULTIDISCIPLINARY COLLABORATIVE EFFORTS

Victim cooperation increases the apprehension, prosecution, and conviction of defendants, and victims should therefore receive comprehensive wraparound support services to help alleviate their psychological, social, and financial fears. A multidisciplinary approach may help ensure that a victim is treated respectfully, compassionately, and with dignity. A multidisciplinary approach may also help secure defendant accountability and community safety.

Multidisciplinary collaboration should be prosecutor-led and should include, but not be limited to, law enforcement, judges and court staff, medical and mental health communities, victim and witness services within and outside the prosecutor's office, domestic violence survivors, clergy, probation and parole, corrections, civil attorneys, and child welfare services. Together, this multidisciplinary team should engage in developing practices and recommendations to promote victim safety and offender accountability. This team should, however, do more than provide support for the individual victim and hold the individual offender accountable; it should address the globalized impact domestic violence has on society and the impact current societal beliefs have on the reporting and prosecuting of domestic violence crimes.

Multidisciplinary teams should be both inward and outward looking. The team should look inward at how domestic violence has historically been prosecuted and use this information to improve future prosecutions. Through a consensus the team should develop and implement creative initiatives, and each member of the team, as well as the team as a whole, should receive ongoing training to ensure the success of those initiatives. In many communities, the progression of multidisciplinary work has gone from the creation of community task forces or coordinating councils, to the specialization of police officers and prosecutors into specialized units, to the development of coordinated community responses to domestic violence. Enhanced collaborative models may develop into the co-location of professionals, such as police officers with advocates, prosecutors, or both. Family Justice Centers (FJCs) and similar multi-agency (MA) models often become the culmination of local multidisciplinary efforts. Family Justice Centers seek to co-locate many professionals under one roof to create wraparound services for victims of domestic violence and sexual assault and their children. These types of creative initiatives have developed across the country and should be called out in this paper with a particular emphasis on the importance of prosecutors participating in such initiatives.

Family Justice Centers and Other Multi-Agency Models

In 2002, then-San Diego City Attorney Casey Gwinn, Assistant City Attorney Gael Strack, and San Diego County District Attorney Bonnie Dumanis, together along with the San Diego Domestic Violence Council and nearly 25 government and non-government allied agencies, opened the San Diego Family Justice Center. The San Diego FJC brought together 120 professionals and 120 volunteers to provide comprehensive, wraparound services to victims of domestic violence and their children.²¹⁷ This center represented the largest multi-agency collaboration ever developed in the United States, and early results documented a dramatic drop in domestic violence homicides in the City of San Diego, reduced domestic violence trials, and increased victim participation in the prosecution of domestic violence cases.²¹⁸ In 2003, President George W. Bush created the President's Family Justice Center Initiative and provided \$20 million to replicate the San Diego FJC model in 16 communities across the country. The U.S. Department of Justice identified FJCs as a best practice in the

²¹⁷ *Hope for Hurting Families*, *supra* note 41.

²¹⁸ *Id.*

investigation and prosecution of domestic violence cases and reported the following outcomes in the first five years of the FJC movement:

The documented and published outcomes have included: reduced homicides; increased victim safety; increased autonomy and empowerment for victims; reduced fear and anxiety for victims and their children; reduced recantation and minimization by victims when wrapped in services and support; increased efficiency in collaborative services to victims among service providers; increased prosecution of offenders; and dramatically increased community support for services to victims and their children through the Family Justice Center model.²¹⁹

Today, the National Institutes of Justice (NIJ) has documented the existence of 137 FJCs and similar MA models.²²⁰ Former Attorney General Eric Holder has called FJCs “the future of community-oriented policing in the United States” and praised the San Diego FJC and its founders as innovators in the enhancement of victim’s rights and the prosecution of domestic violence cases.²²¹

Prosecutors seeking to enhance the prosecution of domestic violence cases should look closely at the FJC model and similar MA models that bring together diverse professionals to work in multi-agency and multidisciplinary teams. Evidence supports not only better outcomes in the prosecution of domestic violence cases but the mitigating influence of FJCs and similar models in reducing policing bias in the handling of sexual assault and domestic violence cases. Recent research by the University of Miami and the American Civil Liberties Union (ACLU), studying gender bias in policing and its negative impact on the handling of domestic violence and sexual assault cases, cited FJCs and other types of co-location models as ways to mitigate gender bias against sexual assault and domestic violence survivors.²²²

Frequent Felon and Serious Offender Programs

Each year a small group of offenders are responsible for committing a large number of felonies, and limited resources should therefore be prioritized and allocated to the most dangerous offenders, without sacrificing quality response in general. For example, targeting repeat offenders may be accomplished by developing formal protocols in probation offices that allow police officers and prosecutors to quickly assess the offender’s history of victimization, or by establishing mechanisms for probation officers to inform prosecutors of an offender’s history.

To increase and ensure continued targeted prosecution, Stearns County created the nation’s first Domestic Violence Court for Repeat Felony Offenders in 2009.²²³ During the initial arrest stage, the court identifies repeat offenders and mandates immediate intensive supervision, including substance abuse testing and strict no contact orders. At the same time, victims are referred to support services. Law enforcement maintains a list with information such as employment addresses and vehicle information to ensure offenders remain away from victims.²²⁴ Finding that offenders sentenced to prison had the highest rates for re-offending, the court mandated target supervision upon their release. This specialized court has been effective for several reasons, including its

²¹⁹ Office on Violence Against Women, *The President’s Family Justice Center Initiative Best Practices*, 1-4 U.S. Department of Justice (2007).

²²⁰ See www.familyjusticecenter.org for complete listing of existing Family Justice Centers and similar multi-agency models in the United States.

²²¹ Eric Holder, Community-Oriented Policing Conference (COPS), (2011).

²²² Responses from the Field Sexual Assault, Domestic Violence, and Policing, 35-38 (2015).

²²³ Janelle Kendall, Stearns County Felony Domestic Violence Court: Increasing Victim Safety and Batterer Accountability through a Targeted Response to Dangerous Cases, Battered Women’s Justice Project (2014), <http://www.bwjpp.org/resource-center/resource-results/stearns-county-felony-domestic-violence-court-increasing-victim-safety-and-batterer-accountability-through-a-targeted-response-to-dangerous-cases.html>.

²²⁴ Star Tribune, *Stearns County Holds Domestic-Violence Perpetrators Accountable*, 2013, <http://www.startribune.com/stearns-county-holds-domestic-violence-perpetrators-accountable/209736971/>.

consistency and its structure, which allows defendants to appear before the same judges, prosecutors, and probation officers. This results in reduced repeat offenses and increased victim confidence.

Other strategies for addressing and targeting frequent felons and serious offenders include “eyes on you” probation visits, the use of “wobbling up” statutes, and GPS monitoring during pendency.

High Risk Domestic Violence Teams

A high risk domestic violence team operates on referrals from community partners and meets ad hoc to help particular victims in need of assistance. Although community initiatives promoting safety first should target all past, current, and potential victims of domestic abuse, victims or potential victims who display a high risk of experiencing domestic violence should be informed of and assisted in developing a safety plan, such as SafePlan (see above).

Domestic Violence Fatality Review and Safety Audit Teams

Domestic violence fatality review (in cases of victim deaths) and safety audit (in cases of nonfatal injuries) teams may identify weaknesses in the criminal justice system, discuss strategies for resolving the identified problems, and provide recommendations and resources to implement strategies. Fatality review teams should be comprised of representatives from a diverse group of agencies and departments in the county, meet once a month, and maintain strict confidentiality. For example, the County of San Diego Domestic Violence Fatality Review Team is a coordinated effort of 25 agencies and departments and includes the prosecutor’s office, medical examiner's office, community-based organizations, law enforcement, family justice centers, child welfare services, medical and mental health professionals, representatives from underserved communities, and representatives from batterer's treatment programs.²²⁵ This team has received state-wide recognition as a model for fatality review teams.

The Blueprint for Safety

The Saint Paul, Minnesota Blueprint for Safety describes the following six essential intervention characteristics that ensure victim safety and offender accountability:

- (1) Develop an interagency approach and collective goals
- (2) Evaluate the context and severity of abuse
- (3) Recognize domestic violence as a crime of pattern that will require engagement with victims and repeat offenders
- (4) Ensure quick consequences
- (5) Send messages to the community of help and accountability
- (6) Reduce unintended effects and inequity of treatment²²⁶

Judicial Awareness

The American Judges Association suggests judges practice the following to promote victim safety and offender accountability:²²⁷

- (1) Take time to carefully listen to and demonstrate concern for the victim’s situation
- (2) Understand the victim may be overwhelmed and using denial, rationalization, and minimization as coping methods

²²⁵ Domestic Violence Fatality Review Team, San Diego County District Attorney (2015), <http://www.sdcca.org/helping/domestic-violence-fatality-review-team.html>.

²²⁶ The Saint Paul Blueprint for Safety: An Interagency Response to Domestic Violence Crimes, <https://www.stpaul.gov/DocumentCenter/Government/Police/Projects/Blueprint%20for%20Safety/SaintPaulBlueprintForSafety.PDF>.

²²⁷ Domestic Violence & the Courtroom, *supra* note 6.

- (3) Inform the victim of options and provide information about social services for safety planning
- (4) Explain proceedings in plain terms and allow for victim input
- (5) Confirm the court record is clear and complete by inquiring into details
- (6) Create a zero-tolerance courtroom environment to reduce intimidation factors

The American Judges Association also recommends that judges remain aware of and sensitive to cultural concerns, considering the victim's cultural identity as well as their own.²²⁸

Lobbying and Legislative Involvement

Multidisciplinary teams should engage in lobbying and increased legislative involvement to encourage the funding of training for law enforcement and related agencies.

Funding

In addition to developing and implementing creative initiatives and trainings, multidisciplinary teams should take the lead in seeking, creating, and securing funding opportunities. Funding is necessary to sustain ongoing research and equip prosecutors and advocates on how to best serve victims and hold offenders accountable. It is also necessary to provide police officers, detectives, and probation officers with tools to effectively investigate and supervise offenders.

Although the Violence Against Women Act of 1994 is a primary source of funding, it should not be the only source. Other possible funding sources include public and private grants, Racketeer Influenced and Corrupt Organizations Act (RICO) funds, the Avon Foundation for Women,²²⁹ and creative community events such as annual galas. Public and private partnerships may also be beneficial in creating funding opportunities, securing resources for victims (e.g., cellular phone donations), and raising awareness.

TRAUMA-INFORMED PROSECUTORS

Trauma-Informed Practices by Prosecutors

Every day, domestic violence prosecutors encounter survivors of abuse and violence. Most victims have experienced trauma as a result of these direct and indirectly violent experiences. According to the American Psychological Association, trauma is as an emotional response to a terrible event. Survivors may experience short- and long-term responses such as numbness, flashbacks of the traumatic event, unpredictable emotions, difficulty concentrating, significant anxiety, depression, and difficulty sleeping. For survivors of domestic violence, the risk of trauma responses is often heightened by the dynamics of the abusive relationship (e.g., loss of control, abuse lasting over time and increasing in frequency and severity, threats or attempts to take the victim's life, and fear of harm to the victim's children or other loved ones).

Child who witness domestic violence between their parents or caregivers may experience lasting effects on their sense of safety, relationships, and brain development. The Adverse Childhood Experiences (ACE) Study conducted by Dr. Vincent Felitti in San Diego County demonstrated the long-term impacts of abuse and violence exposure on children.²³⁰ Using a longitudinal method, this research study demonstrated significant correlations between ACE scores and long-term physical and behavioral health outcomes, such as substance abuse, sexually transmitted diseases, heart disease, cancer, and emphysema.

²²⁸ See *id.* for a checklist on how judges can apply information about their own culture in domestic violence cases.

²²⁹ Domestic Violence Grants, Avon Foundation for Women (2016), <https://www.avonfoundation.org/grants/domestic-violence-grants/>.

²³⁰ Felitti VJ et al.: Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: the Adverse Childhood Experiences (ACE) study. 14 Am. J. Prev. Med. 245-258 (1998).

In our assistance and representation of domestic violence survivors, we have a professional duty as prosecutors, advocates, and legal staff to become well versed in trauma. Survivors are more likely to engage throughout the investigation and court process if trauma-informed practices (described below) are implemented. A trauma-informed organization works at all levels, incorporating professional practices, policies, and safe and welcoming environments, to infuse skills, awareness, knowledge of trauma, recovery, and resilience. The Substance Abuse and Mental Health Services Administration (SAMHSA) promotes safety and mutual respect in all environments that survivors may encounter in the days, months, and years following their traumatic experiences.²³¹ This should include law enforcement agencies, court systems, district and city attorney's offices, advocacy agencies, healthcare facilities, and other environments.

The SAMHSA encourages professionals to recognize the widespread impact of trauma, the signs and symptoms of trauma, and to learn about pathways to recovery. Administration has the responsibility to integrate knowledge about trauma into practice, develop procedures and policies within the organization, and take measures to prevent re-traumatization.

Trauma-informed practices within the criminal justice system should include:

- Respect; treat each client with respect, empathy, and validation
- Safety; throughout the organization, develop a safe and welcoming environment, both physically and psychologically
- Transparency and trustworthiness; be genuine, explain the process, and partner with the client in a working relationship towards mutual outcomes
- Dignity; recognize that the client may have a history of being mistreated and underrepresented and that it takes courage to seek help
- Non-judgmentalism; hold judgment and meet clients where they are at emotionally and cognitively, recognizing that everyone's experiences are different
- Integrity; follow the ethical and moral standards of your profession and your organization's practices and policies
- Empowerment and choice; recognize your client's strengths, validate his or her choices, and connect him or her with resources and advocacy services that improve understanding of safety and options
- Respect for diversity and the embrace of culture; be mindful of language and cultural considerations in providing support, utilize traditional cultural and peer support systems whenever possible, recognize historical trauma, and understand the diverse nature of each client and the unique needs of each person

By utilizing a trauma-informed approach, prosecutors can work to be compassionate, supportive, and true advocates for our victims. For many survivors, the abuse they recently experienced may be the most current incident in a long history of traumatic experiences. By adhering to these principles above, prosecutors have the opportunity to prevent further trauma and provide quality services for survivors of trauma and abuse.

²³¹ SAMHSA's Efforts to Address Trauma and Violence, Substance Abuse and Mental Health Services Administration (2016), <http://www.samhsa.gov/trauma-violence/samhsas-efforts>.

POLICE BODY-WORN CAMERAS

Law Enforcement Agencies across the country are beginning to wear body-worn cameras. Benefits accompanying body-worn cameras include increased transparency and police legitimacy, reduction of citizen complaints, improving behavior among both police and citizens, and documentation of a crime scene for later use in a jury trial.

Most domestic violence prosecutors who work in jurisdictions with body-worn camera evidence see a direct value to this kind of evidence. First, body-worn camera evidence assists issuing decisions. When a prosecutor is able to actually see the frightened or fearful demeanor of the victim, it may be easier to determine the likelihood of certain statements being admitted in court pursuant to evidentiary rules (i.e. spontaneous statements). Prosecutors may use to their benefit body-worn camera statements taken from the victim during negotiation of cases. Not uncommonly will a victim align with the defendant's counsel and advocate that law enforcement embellished the severity of the scene and the victim's demeanor. Body-worn cameras often shows the opposite. These cameras also assist in trial when victims recant their statements for reasons of fear, shame, embarrassment, or the general power and control exerted over them by the defendant. When a prosecutor can bring the jury back to the actual incident date, akin to 911 call evidence, the entire situation becomes raw, real, and more effective than stale testimony.

Research has supported what prosecutors are experiencing empirically. A February 2015 study examined the impact of deploying body-worn cameras in the Phoenix, Arizona police department, with one focus of the study being the impact on domestic violence case processing and outcomes. Analysis of the data revealed that upon deployment of body-worn cameras, cases were significantly more likely to be initiated, result in charges filed, and result in a guilty plea or guilty verdict.²³²

A 2016 study examined the effect of pre- and post-body-worn camera deployment on a number of outcomes related to prosecution and conviction in intimate partner violence cases. This study found that when compared with non body-worn camera cases, the cases with body-worn camera evidence were more likely to result in an arrest (40.0% vs. 34.3 %), charges filed (37.7% vs. 26%), the case furthered in the criminal system (12.7% vs. 6.2%), a guilty plea (4.4% vs. 1.2 %), and a guilty verdict at trial (4.4% vs. .09%).²³³

Prosecutors should work with their law enforcement agencies to develop policies and procedures that utilize and maximize this helpful and important evidence.

USE OF FORENSIC NURSES IN DOMESTIC VIOLENCE CASES

Domestic violence prosecutors should consider utilizing forensic nurse examiners to document and identify injuries and then testify about their findings. Specially trained forensic nurse examiners can take a full medical history, ask questions about what happened during the incident, examine the victim, and document and photograph any injuries. The nurses also provide victims with proper follow-up, connect them to advocacy resources, and may even refer a patient to the emergency room. Some states have state-mandated reporting

²³² Katz, Charles M., David E. Choate, Justin R. Ready, & Lidia Nuno. (2014). *Evaluating the Impact of Officer Body Worn Cameras in the Phoenix Police Department*. Phoenix, AZ: Center for Violence Prevention and Community Safety, Arizona State University.

²³³ *Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence* (Police Quarterly June, 2016) Weston J. Morrow, Charles M. Katz, and David E. Choate.

forms whereby the nurse charts the examination and later submits it to law enforcement, similar to a Sexual Assault Response examination.²³⁴

Prosecutors are encouraged to work with law enforcement and forensic nurses in their communities to develop protocols for use of forensic nurses in domestic violence strangulation or serious domestic violence assaults. One county recently utilized grant funding to provide no-cost examinations when referred by law enforcement agencies. To date, over 600 examinations have been completed. The forensic examination documentation is submitted by law enforcement as part of the prosecution package and reviewed by the prosecutor at the time a charging decision is made. The nurses testify to their findings at either preliminary hearing or trial, specifically to help prove necessary elements of charged crimes or for the necessary elements of proving a strangulation incident. In cases where forensic examinations were conducted and submitted to law enforcement, 97% of those cases were booked as felonies as opposed to misdemeanors. For the cases that were submitted with a forensic examination, 95% were charged by the prosecutor as felonies as opposed to misdemeanors. Cases with a forensic examination submitted resulted in a higher issuance rate than the general issuance rate for domestic violence cases. Lastly, cases with a forensic examination submitted resulted in higher prison sentences than general domestic violence cases.²³⁵

BEST PRACTICES DURING A PANDEMIC: HOW TO REACH AND SERVE OUR VICTIMS

March 2020 started a new normal for all of us. Quarantine or not, Domestic Violence is still happening behind closed doors, and prosecutors should remain dedicated to finding ways to connect and continue to serve their victims.

It is strongly encouraged that prosecutors find creative ways to reach out and check in on their victims during the pandemic. Stressors of trauma are often exacerbated by the extra stressors of sheltering in place or the loss of job that many victims experienced after COVID hit our communities. Many victims welcome a proactive connection from the trusted professionals who know about their case. Prosecutors should also keep in mind that there are risks associated with checking in with victims, such as the batterer seeing a text message come in, or intercepting a phone call, or simply wondering who their victim is talking to out of control. It is always best to preface contact with a victim with a statement such as, “Are you in a safe place to talk? What mode of communication is best and safest for you?”

Some best practices that have developed are increased use of telehealth for victims to continue their counseling sessions, as well as virtual “meets” either by skype, Facetime, or Microsoft Teams with counselors, advocates, or other trusted professionals. Prosecutors have welcomed victims into “virtual courtrooms” so those victims can view and participate in the criminal process. Best practices include posting information on agency websites that list all community domestic violence resources, hotline and shelter information. Social media messaging such as twitter and Facebook messages can let victims know what supportive resources are still available, how to continue with the restraining order process, or that the victim advocates in the office are still available to talk. Prosecutors can provide safety planning information on their websites or do a press release in order to get the information to the public.

One jurisdiction took an opportunity during the shelter in place timeframe to send text message rapid response survey to the victims in their caseloads to simply check in with them and provide resources and support. Specifically, 1,251 text messages were sent to domestic violence victims. 87% of the text messages went through to the victims, and 168 victims responded to the text message. The text message let the victim know “The District Attorney’s Office is working to protect the safety of victims. We want to know how the COVID-19 stay-at-home order has affected you. Please click here to let us know.” The text message then directed them

²³⁴ See California Emergency Management Agency, Form 2-502, www.ccfmnc.org.

²³⁵ San Diego County District Attorney and Palomar Health “Domestic Assault Forensic Examination” data, February, 2020.

to a 6-question survey with the following questions: 1) Since the COVID-19 stay-at-home order, how would you say you're doing overall? 2) Do any children under 18 live with you? 3) What is your current work situation? 4) Do you live with a partner? 5) Since the COVID-19 stay-at-home order, some households have experienced less domestic violence, some have seen no change, and some have experienced more domestic violence. For your household, would you say things have gotten better, worse, or are about the same? 6) Right now, is there anything that could help you stay safe from DV?" The victims were then directed to some educational materials and a DV prevention website (www.preventDV1.org). The office learned that of the victims texted, 35% were not working, and that 86% felt safe at the time, but 14% replied they needed help with financial resources, housing or the need to speak to an advocate. Victim advocates reached out to those victims who requested help in order to provide support and resources.²³⁶ The use of text messaging or any form of "check-in" with victims during the pandemic can be essential to calming a victim's stress or even saving a victim's life.

CONCLUSION

It is a privilege to prosecute domestic violence cases but takes a village to do so. It is the hope that this resource guide can be a pathway for prosecutors in your jurisdictions. Please pass the torch of knowledge from those that have been in the trenches for decades and continue to serve in trauma-informed ways to best protect victims and the communities in which you serve.

Please refer questions, suggestions, and comments to:

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