

Appendix 5D

**Sample Policy Language—
When to Compel a Victim to Testify**

The Blueprint authors are constructing a number of policies using samples from other jurisdictions and applying them to the integrated Blueprint package. Whether and when to compel a victim's testimony is one such policy. This sample is based on one prepared by Aequitas: The Prosecutors' Resource on Violence Against Women, a new technical assistance and training provider created to address the needs of prosecutors and allied professionals, particularly OVW grantees, who work on issues related to the prosecution of violence against women.¹

Suggested Policy

“It is the policy of this office that no prosecutor may request a warrant for the arrest of a domestic violence victim for non-appearance or for not cooperating in a domestic violence prosecution unless said prosecutor has obtained the approval of the supervising prosecutor. As prosecutors are considering whether to petition the office for a warrant for a domestic violence victim, the following training memo serves to provide a background for this policy and practice recommendations for its application.”

Policy Foundations

In domestic violence prosecutions, compelling the testimony of an uncooperative domestic abuse victim through a warrant² or other means is ineffective and may be dangerous. Model prosecution and law enforcement programs demonstrate nationally that its widespread use is counterproductive, increasing risk to victims and decreasing offender accountability overall. Accordingly, federal Violence Against Women legislation and policies have strongly discouraged its use as a direct safety risk to victims. Jurisdictions that inappropriately compel testimony risk losing federal funding directly and risk the funding of partner agencies by inappropriately coercing victim testimony. However, in very rare circumstances, its application to cases with unusually high victim safety risks may be appropriate.

Victims of domestic abuse must be treated differently than other crime victims because they are not similarly situated to other crime victims and witnesses. The prospective testimony of victims of domestic abuse often places them in imminent danger of future harm by their abusive intimate partner.³ Furthermore, victims of abuse commonly experience the justice system at the same time that their abusers are re-victimizing them by attempting to prevent them from testifying through intimidation, solicitation to commit perjury, bribes, and even threats. Offenders appreciate that they

¹ Aequitas is a partnership between OVW, the Pennsylvania Coalition Against Rape (PCAR), and the Battered Women's Justice Project (BWJP).

² MINN. STAT. § 588.20 (2009).

³ VERA INSTITUTE OF JUSTICE, PROSECUTING WITNESS TAMPERING, BAIL JUMPING, AND BATTERING FROM BEHIND BARS (2006).

have a constitutional right to confront their accuser and that a victim's failure to cooperate or appear at trial will likely result in a dismissal of their criminal case. This re-victimization is compounded when abusers exploit victims' financial hardships, family or childcare needs, fear, societal norms, and isolation. Moreover, victims who are compelled by law enforcement to testify in spite of these risks may ultimately have their safety compromised in the immediate future and in the long-term be unwilling to disclose future abuse.

In very rare circumstances, however, it may become necessary for prosecutors to use these extreme measures to ensure the immediate safety of the victim or third parties. In these rare circumstances, prosecutors must give substantial consideration to potential sanctions, system roles, and best practices to improve offender accountability and reduce overall impact on victims and third parties.

Federal Prohibitions and Potential Sanctions

Arresting victims for failing to cooperate in a prosecution not only creates significant safety risks for victims, but also may endanger federal funding. VAWA-funded offices⁴ are “*strongly discouraged from proposing projects that include any activities that may compromise victim safety such as the following: ...Requiring victims to report sexual assault, stalking, or domestic violence crimes to law enforcement or forcing victims to participate in criminal proceedings...; and procedures that would force victims of domestic violence to testify against their abusers or impose other sanctions on them. Rather, procedures that provide victims the opportunity to make an informed choice about whether to testify are encouraged.*”⁵ Moreover, these actions can also endanger VAWA funding of partner agencies, regardless of whether they were involved in arresting the victim. When a group of agencies works collaboratively on a VAWA grant, the entire grant could be jeopardized, even though only one of the partner agencies engaged in the problematic behavior, underscoring the seriousness of these decisions and the immediate impact on victims and justice partners.⁶

Compelling Victims Distracts from Offender Accountability

Independent of federal funding sanctions, compelling victim testimony in abuse cases in lieu of other law enforcement initiatives is counterproductive. Victims often become uncooperative with the criminal prosecution as the direct result of the defendant attempting to intimidate, harass, bribe, and even threaten them. Law enforcement, however, often perceives that a victim's failure to cooperate is simply a “choice” because police and prosecutors are unaware of the victim's reasons and are not monitoring for this level of intimidation. When prosecutors simultaneously re-victimize victims of abuse through perceived sanctions for their lack of cooperation, such as arrest warrants and other punitive measures, it becomes more difficult for law enforcement to monitor, detect, and hold offenders accountable for their behavior. Conversely, when prosecutors and police officers promote victim education, increase monitoring of offender behavior, and target offenders for contributing to a victim's lack of cooperation, they significantly increase evidence that in many

⁴ Violence Against Women Act of 1994 (VAWA) P.L. No. 103-322, 108 Stat. 1796 (1994), codified at 42 U.S.C. § 13981 (1994).

⁵ *Id.*

⁶ *Id.*

circumstances will enable them to proceed to trial without the victim. This in turn re-focuses the courts on the offender's accountability rather than the victim's.⁷

Recommendations for practice

GUIDANCE: When a warrant may be necessary

The following factors should be considered when a prosecutor believes that a warrant or other measure to compel a victim's testimony may be necessary:

- The prosecution must first determine that there is no alternative theory (hearsay exception/independent witness) to proceed to trial without the victim's in-court testimony.
- The decision to request a warrant to arrest a victim to compel testimony should be considered only well in advance of trial/testimony and should never be decided on the day of trial.
- Warrants should be considered only when the conclusion is reached that the victim, the community and/or a third party is at high risk of serious or lethal harm. and that compelling the victim's testimony is necessary.
- Warrants should be considered only when the strength of the state's case is such that in the prosecutor's judgment a guilty verdict is highly probable with the victim's in-court-compelled testimony.
- Warrants should be considered only when there is sufficient consequence (potential sentence length) to ensure that the defendant will be subsequently sentenced in a manner that guarantees to a reasonable degree that the victim will be safe from direct harm from the abuser.
- The decision to issue a warrant should be approved by a supervising prosecutor.
- The supervising prosecutor who approves the warrant should draft a brief internal memo to the file and to the chief prosecutor documenting the reasons for compelling the witness' testimony, the steps taken to minimize the impact of the decision on the victim and third parties, and an explanation of why the decision is justified as an exception to the office policy of strongly discouraging this practice.

REQUIREMENTS: What must be done before a warrant is issued

Once a decision has been made to compel a victim's testimony through a warrant, the prosecution should follow through with the following steps prior to petitioning the court for a warrant:

- The prosecution must first fully investigate to determine whether the defendant attempted to dissuade the victim from attending court and whether forfeiture by wrongdoing can be proven by a preponderance of the evidence.
 - Check jail phone calls to the victim and third parties.
 - Check all jail US mail correspondence logs.

⁷ See *supra* note 2.

- Check all jail visitation logs.
- Exhaust all investigation leads concerning any attempt by the defendant to dissuade the victim from testifying, either directly or through a third party.

PREPARATION: Minimizing the impact

Prior to obtaining a warrant, the prosecution should follow through with the following level of preparation to ensure that the impact of the warrant on the victim and third parties is minimized.

- Ensure that all efforts have been exhausted to notify the victim that the prosecutor will be requesting a warrant to encourage and enable them appear voluntarily. (This includes assisting in and offering all voluntary means of appearance including a detective picking up victims and bringing them to court.)
- Ensure that the warrant is entered into the system with a requirement that the law enforcement agency that arrests the victim contact the prosecutor and advocate immediately upon arrest.
- Ensure that upon reviewing the warrant, the court also agrees to hear the warrant return as a priority over all other cases to ensure the victim remains in custody for the shortest period of time as is necessary for the court to address conditions of release and cooperation with a future court date.
- Ensure that proper childcare services (through family or victim-approved third parties) and victim advocacy services are contacted and that any other victim and/or third-party needs are met upon execution of the warrant and its duration.
- Ensure that the court prioritizes the case for the earliest possible date for testimony, taking priority over other cases due to the impact that compelling the testimony will have on the victim and third parties.
- **WARNING:** In instances where the victim cannot be located after the warrant is entered, the prosecutor must have the warrant quashed the moment it is no longer necessary (upon dismissal of the case, etc.)