

**Building & Enhancing Rural
Coordinated Community Response to Battering:**

**October 21-23, 2014
Bloomington, MN**

**Role of the Prosecutor in a
Coordinated Community
Response**

**Matt Wiese, Prosecuting Attorney
Marquette County, Michigan**



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The Role of the Prosecutor in a CCR

- **Give Partners “*full access*” to information**
- **Provide leadership**
- **All Partners are EQUAL, with equal value and mutual respect**
- **Who are the partners?**



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The partners are all direct players and parties affected by the crime.



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What is the Prosecutor's:

- **Mission:** As part of an agency?
- **Function:** As a practitioner, professional?
- **Purpose:** Charging, Negotiating, Trial?
- **Role:** Setting policy & direction?
- **Promoter:** Community face, spokesperson?

How do these fit within the framework of a Coordinated Community Response?



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Making Victim Safety a Central Feature of the Criminal Justice System's Response to Domestic Violence

- 1. Change How We Think About The Violence**
- 2. Change How People Act on Cases**
- 3. Change How We Network & Communicate With Each Other**



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Making Victim Safety a Central Feature of the Criminal Justice System's Response to Domestic Violence

- 4. Develop Written Policies that Include Community Based Advocacy Programs**
 - Vertical Prosecution**
 - Working with Community Based Advocates**
 - Develop Written Policies that Include Community Based Advocacy Program**



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Prosecutor's Role in Enhancing Victim Safety

- **Contact victim early and often**
- **Work with advocates**
- **Evaluate risk factors**
- **Create safety plan**
- **Prepare victim for court**
- **Vertical prosecution**



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Prosecutor's Role in Enhancing Victim Safety

- **Assist with & enforce “no contacts” & restraining orders**
- **Keep victim informed**
- **Focus on offender or system, not victim**
- **Don't prosecute victims (contempt, perjury, making false police report)**



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Prosecutor's Role in Enhancing Victim Safety

- **Collect and share data**
- **Public awareness initiatives**
- **Don't minimize violence**
- **Allow for real victim input into process**



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Prosecutor's Role in Enhancing Victim Safety

- **Institutionalize practices into CCR**
 - **policies**
 - **procedures**
 - **protocols**
 - **practices**
 - **forms**



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Prosecutor's "Can Do" List

8 Things to be more Effective in a CCR

- 1. Assess the Violence**
- 2. Incorporate Safety for Victims in Procedures**
- 3. Network and Communicate**
- 4. Create a Multi-Agency Tracking System**



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Prosecutor's "Can Do" List

8 Things to be more Effective in a CCR

- 5. Intervene in a Way to Promote Victim Safety**
- 6. Confront the Offender-Hold Offender Accountable**
- 7. Address Harm Done to Children**
- 8. Evaluate From the Standpoint of Victims**



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**Prosecuting The
Domestic Violence Case**
SPECIFIC TASKS

**Matt Wiese, Prosecuting Attorney
Marquette County, Michigan**



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**Making Key Prosecution Charging
Decisions**

- Request and consider a wide range of information
- Evaluate the history, context, and severity of violence
- Consider harm to children and use of children as instrument of abuse
- Evaluate risk and lethality factors
- Charge with attention to victim safety, including safety of victim defendant
- Understand factors related to victim availability to the prosecution process
- Evaluate prior incidents and convictions
- Consider options in declining cases
- Engage and collaborate with victims in making charging decisions
- Communicate charging decisions and respond to inquiries



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Evaluating Risk & Lethality Factors:

- Stalking
- Strangulation
- Threats to kill the victim
- Threats of suicide
- Forced sex or pressuring for sex
- Serious injury to victim
- Weapons
- Violence outside the home
- Aggression toward interveners
- Threats to family, coworkers or victim's new partner
- Abuse of or killing of animals
- Damaging victim's property
- Violence during pregnancy or shortly after giving birth
- Hostage-taking or restraint
- Acts exhibiting extreme hostility toward the victim

See handout: Practitioner's Guide to Risk and Danger



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Evaluating Prior Incidents & Convictions:

- Review prior recent incidents & charge if sufficient evidence:
 - Against the same victim
 - Against another victim
- Evaluate prior convictions to determine possible enhancements
 - Use flexibly to serve both victim safety & offender accountability



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Reviewing Policy

- Underlying principles and philosophy
- Criteria and procedures
- Monitoring and supporting compliance



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Developing Principles, Practices and Philosophies

- Adhere to an interagency approach and collective intervention goals
- Build attention to the context and severity of abuse
- Recognize that most domestic violence is a patterned crime requiring continuing engagement
- Seek sure and swift consequences
- Messages of help and accountability
- Reduces unintended consequences and the disparity of impact



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Sample policy segment #1

The Any County District Attorney's Office has a **zero tolerance policy** on domestic violence.

Zero tolerance means the district attorney's office will not drop cases when factors indicative of danger are present.

Those factors include but are not limited to:

- Severe injury to a victim resulting in hospitalization
- Threats to kill a victim
- Strangulation
- Defendant with a history of many police encounters



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Sample policy segment #2

The Our County District Attorney's Office has a **no-drop policy** on domestic violence.

No-drop means prosecutors should pursue cases for which there is strong evidence, even when victims refuse to cooperate.



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Monitoring & compliance

- Link to next points of intervention
- Specify the how, when, and with whom for information-sharing
- Track practitioner compliance and exceptions
- Ensure compliance and address non-compliance
- Continuing education and training
- Establish a process of record sharing and external monitoring



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Summary

- Stay updated on current laws
- Consider all sources of information
- Evaluate and document history, context, and risk
- Consider decisions related to victim defendants and impact on future risk
- Connect with advocates



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Unique Aspects of Domestic Violence

Create list:



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Unique Aspects of Domestic Violence

- The relationship “*tip of the ice berg*”
What sank the Titanic? That which was unseen.
- The relationship will continue – *Regardless*
- Societal/Historical Context
- Bias – Cops, Advocates, Prosecutors, Staff
Neutralize the Bias
- Lethality – Dangerousness Assessments
- One chance at the investigation



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Prosecutor's Face Problematic Assumptions

Create List:



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Problematic Assumptions Prosecutor's Face

- The V should want CJ intervention
- The police arrested the correct person
- The V will participate/testify
- A conviction will be a good result for the V
- If convicted the D will change his ways
- LE always does a complete investigation
- The V's use of violence was not self defense
- If there are children, interventions makes them safer
- The D stops manipulating after he is arrested
- The V is ready to makes changes in the relationship
- Arrest and charging does not = B/D REASONABLE DOUBT
- Advocates will see things as we see things.....



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Problematic Assumptions Prosecutor's Face

- If the V has returned to the D she is not afraid of the D
- The V shouldn't lie to protect the D
- We wouldn't do what she does....
- If she left, things would work out better
- V's that are "frequent flyers" are
- If V HBD or drunk then.....
- If V exhibited hostile behavior then her testimony will be tainted or not valid
- All CCR partners will participate and agree on the process and outcome



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Intangible or Philosophical Charging Considerations

- Participating V
- Risk Assessment
- Children involved
- Probable Cause or B/D Reasonable Doubt
- History
- Was there an arrest



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Tangible Charging Considerations

- Injuries
- Witnesses
- Statements
- Physical Evidence:
9-1-1 Calls, Photos, Medical Records, Objects
- 404b History
- State Law
- Charging Policy
- Other Factors?



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Paradigm Shift After Arrest & Charging

THE PROBLEM: do we stop focusing on the batterer and shift our focus on the V?

Think about what the D is doing?

How do we keep our focus on the D?



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The Crawford Decision



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Is Crawford Insurmountable?

No!

Forfeiture of rights of
confrontation....

Where do we go from here?
Discussion.....



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How to build a case that reduces reliance on battered women's testimony in the aftermath of the Crawford Decision

- Forfeiture of Confrontation Right by Wrongdoing
- 5th Amendment Requires Production of the Witness to Satisfy the Confrontation Clause
- Once Produced; Hearsay Statements Should be Admissible
- Balance Victim Safety
vis-à-vis
- Offender Accountability



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How to build a case that reduces reliance on battered women's testimony in the aftermath of the Crawford Decision

“The old fashioned way, like we did before Crawford. By conducting a thorough and complete investigation, including accurately recording the nature and circumstances of all witness statements, and documenting and gathering all available evidence.”



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Pretrial Release



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Typical Bond Factors

- Ties to the community
- Citizenship/immigration status
- Employment status
- Flight risk
- Probation/parole status
- Public-community safety
- Any factor deemed relevant by the judge



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Bond Information Sheet for Domestic Violence Victims



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Plea Negotiations

- What are we trying to achieve?
- How do we assess our cases?
- Is there a standard/policy?
- Are there exceptions?
What are they?



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Trial Preparation

- How do we contact the V?
- How do we prepare the V for trial?
- Advocate involvement?
- Witness list, preparation
- Exhibits, how are they used?
- Evaluating the case and the evidence....



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Trial & Preparation

Linkages

- LE
- 9-1-1
- Advocates
- Medical Personnel
- Others?



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Trial & Preparation

Resources:

- Witness budgets
- Court budgets
- Evidence prep & expense
- Victim services
- LE resources – overtime?



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The 7 Phases of Prosecution in a Coordinated Community Response

Matt Wiese, Prosecuting Attorney
Marquette County, Michigan



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- 1. Charging**
- 2. Case Preparation**
- 3. Pre-Trial**
- 4. Jury Selection**
- 5. Opening Statement**
- 6. Case Presentation**
-Prosecution & Defense
- 7. Closing Arguments**



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1 Philosophical Charging Considerations

- | | |
|--------------------------------|--------------------------|
| ✓ Participating Victim? | ✓ Prior History? |
| ✓ Risk Assessment | ✓ Charging Policy |
| ✓ Children Present? | ✓ Arrest of Perp |
| ✓ Probable Cause or | |
| Proof Beyond a | |
| Reasonable Doubt? | |



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1**Tangible Charging Considerations**

- ✓ **Injuries?**
- ✓ **Witnesses?**
- ✓ **Statements**
- ✓ **Physical Evidence**
 - ✓ **9-1-1 Tape**
 - ✓ **Photos**
 - ✓ **Medical Records**
 - ✓ **Objects**



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2**Case Preparation**

- ✓ **Meet with Victim**
- ✓ **Victim Preparation**
- ✓ **Advocate Referral**
- ✓ **Prepare Witness List**
- ✓ **Prepare Exhibit List**
- ✓ **Evaluating Evidence**



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2 Case Preparation

A Case Theme Should Begin to Emerge



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3 Pre-Trial Phase

- ✓ **Plea Agreements**
- ✓ **Motions**
 - ✓ **Admissibility of Evidence**
 - ✓ **Hearsay Statements**
 - ✓ **9-1-1**
 - ✓ **Expert Witness**
 - ✓ **Other Acts**
- ✓ **Jury Instructions**



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4 Jury Selection Phase

- ✓ **Selection of citizens who can be fair & impartial to hear the evidence of the case.**
- ✓ **Selected through a process of questions & answers.**
- ✓ **Can be excused for cause by the judge or peremptorily by the attorneys.**
- ✓ **Judge & state law governs the nature & extent of questions.**



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4 Jury Selection Phase

Voir Dire Questions

**Develop & Use
CASE THEME!**



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5 Opening Statement

Must be based upon what the attorneys intend to prove with the evidence they will present to the jury.

***Should not be argumentative.**

***Should not be based on opinion.**



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5 Opening Statement

**Develop & Use
CASE THEME!**



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6**Case Presentation
Prosecution & Defense**

- ✓ **Present witnesses and evidence.**
- ✓ **Both must be relevant to the incident.**
- ✓ **Witnesses are subject to both direct & cross-exam.**
- ✓ **Direct Exam-no leading questions.**
- ✓ **Cross Exam-Leading questions, but not hostile or argumentative. Must allow witness the opportunity to answer the questions.**



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6**Prosecution
Case Presentation**

- ✓ **Start Strong & End Strong**
- ✓ **Acknowledge Weaknesses in Case in Chief**
- ✓ **Strategies Concerning Use of Witnesses & Evidence**
- ✓ **Anticipate Defense Strategies**

DON'T FORGET CASE THEME!



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6 Defense Case Presentation

Possible Defense Strategies:

- ✓ Reasonable Doubt (Not-Guilty)**
- ✓ Innocent (Didn't Do It)**
- ✓ Self Defense (Most Common)**



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7 Closing Arguments

Must be based upon the evidence presented by either side during the trial.



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7 Closing Arguments

Potential Fatal Flaws:

- ✓ **Misleading the Jury on the Facts**
- ✓ **Being a Spin Doctor**
- ✓ **Not being Yourself**

Don't forget to use your theme.



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WORKING WITH LAW ENFORCEMENT

Training - Making or Breaking the Case

**Matt Wiese, Prosecuting Attorney
Marquette County, Michigan**



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Self Defense

Self-defense is defined as a person's justifiable use of force against another person when such force is necessary to defend themselves or a third party from what they reasonably believe to be the use, or imminent use, of unlawful physical force.



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Self Defense Factors

- **Offensive Wounds**
- **Defensive Wounds**
- **Use of Weapons**
- **“Reasonable Belief”**



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Establishing Predominant (Primary) Physical Aggressor

A finding of assaultive or violent behavior by both parties involved in a domestic violence incident does not necessarily require that domestic violence be substantiated against both parties.



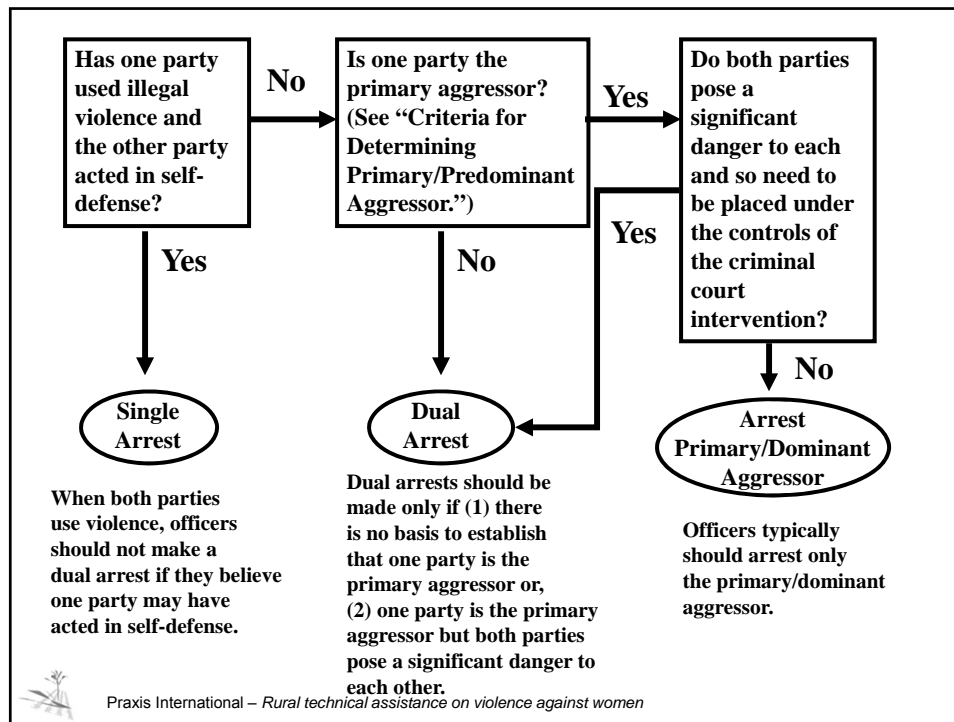
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Predominant Aggressor

1. **Existence of offensive and defensive wounds**
2. **The prior history of violence**
3. **The size, strength and bulk of the parties**
4. **Each party's ability to do what was alleged**
5. **All other evidence (both physical and circumstantial)**
6. **All other witness statements (including children)**
7. **The severity and extent of injuries**
8. **Likelihood of future injury to either party**
9. **Who is afraid of whom?**
10. **Was the force or violence used to punish or retaliate?**



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REPORT WRITING



DOCUMENTING ALL THE EVIDENCE



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TESTIFYING AT TRIAL



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Appendix 5A

Training Memo—Implications of *Crawford* and *Davis* for Prosecution of Domestic Abuse Cases

Even if the victim is unavailable for trial, prosecutors should strive to prove a domestic assault case, in way that is victim-centered but not victim-dependent. Prosecution can proceed while at the same time minimizing the victim's need to confront the offender.

One strategy that can help accomplish this goal is the use of exceptions to the hearsay rule, such as excited utterances, to admit into evidence the statements of the unavailable victim. In 2004, the United States Supreme Court issued a decision in *Crawford v. Washington*¹ that limits a prosecutor's ability to have these statements admitted. *Crawford* held that in order to satisfy the Confrontation Clause of the Sixth Amendment of the U.S. Constitution the statement is admissible only if it is not "testimonial."²

The U.S. Supreme Court did not completely define what a testimonial statement is. However, it did indicate that testimonial statements are made in a formal setting or in circumstances in which the declarant (the person making the statement) reasonably believed that the statement would be used later in trial.³

Two years later, the Supreme Court in *Davis v. Washington* refined the standard for admissibility and held that statements are "non-testimonial" when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal proceedings.⁴ In other words, statements made in the course of providing information to officials during an ongoing emergency are non-testimonial, while statements made in order to prove that certain events occurred are testimonial.

The *Davis* decision increases the importance of supporting victims so that they are willing and able to testify. Such support does not include threatening to place a victim in custody to ensure that she or he will be available to testify at trial, or carrying out that threat. Such actions may have serious, negative consequences for a victim's safety and well-being. However, in appropriate cases it may be advisable to send a patrol officer or investigator to the victim's residence to facilitate the victim's appearance at trial. *Davis* also increases the importance of 911's documentation of the nature of the emergency and request for assistance, and police documentation of statements made initially at the scene while the emergent situation is continuing.

¹ 541 U.S. 36 (2004)

² If the declarant is unavailable for trial, testimonial statements may be admitted if the defendant had a prior opportunity to cross-examine the declarant. *Crawford* 541 U.S. at 68.

³ *Crawford*, at 51-54.

⁴ *Davis v. Washington*, 126 S. Ct. 2266 (2006)

Because the victim's availability at trial in domestic abuse cases is a continuing challenge, prosecutors should be prepared to assess each case in light of applicable case law and where appropriate, argue that the victim's statements are non-testimonial and thus admissible. 911 calls and initial statements at the scene will be primarily for the purpose of assessing an emergency, and securing the safety of the victim and the responding police officers. Admissibility of these statements will enhance the likelihood of successful prosecution. Concurrent with assessing whether statements are testimonial, prosecutors should also be evaluating the circumstances of each case where the victim has become unavailable to assess whether the defendant caused the unavailability and thus forfeited his right to confront the witness (see *Appendix 5B: Training Memo—The Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Cases*).

Many defendants are on probation when they commit a new domestic assault.⁵ Given the prosecution difficulties post-*Davis*, in some cases a probation violation hearing may provide a more successful vehicle for holding defendants accountable for their behavior. The Sixth Amendment Confrontation Clause does not apply to violation hearings. Evidence that may not be admissible pursuant to *Davis* in a new prosecution for the new offense should be admissible in the violation hearing.⁶ Another advantage of pursuing a violation of already-imposed conditions of probation is that it is likely to be a much faster process than prosecuting a new charge. Swift consequences for prohibited behavior may be a more effective deterrent than a long-delayed new prosecution. Also, it is well settled that double jeopardy does not attach to revocation hearings and thus there is no bar to proceeding with a revocation hearing and also prosecution for the same conduct.⁷ Revocation of probation or parole is considered a continuation of the original prosecution and a reinstatement of the original sentence rather than punishment of the more recent misconduct.⁸ The purpose of the violation hearing is to determine whether the conditions of probation have been violated, not to convict the defendant of a new crime and thus double jeopardy does not apply.

Recommendations for practice

- ☐ Inform the victim of the risks and benefits of testifying, and the risks and benefits of not testifying.

⁵ Matthew Du Rose, et al., Bureau of Justice Statistics, FAMILY VIOLENCE STATISTICS, NCJ 207846 (June 2005), at 47 (finding that at the time of most recent arrest for family assault, 38.2% of defendants had a criminal justice status including 27.9% who were on probation and 4.4 % who were on parole).

⁶ The majority view in the federal courts and most state courts have held that *Crawford* and the Sixth Amendment do not apply to revocation hearings. See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 *Tex. L. Rev* 311 n.222 (2006). With respect to requirements for revocation hearings under the Due Process Clause, the United States Supreme Court has permitted the prosecution to introduce reliable hearsay where necessary in the interests of justice. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

⁷ Several circuits have held that the Double Jeopardy Clause does not apply to parole or probation revocation proceedings. See e.g. *Jonas v. Wainwright*, 779 F.2d 1576, 1577 (11th Cir. 1986); *Thompson v. Reivitz*, 746 F.2d 397, 399 (7th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985); *United States v. Whitney*, 649 F.2d 296,298 (5th Cir. 1981); *Dunn v. California Dep't of Corrections*, 401 F.2d 340,342 (9th Cir. 1968). Additionally, the United States Supreme Court has held that a probation revocation hearing is not a stage in the criminal prosecution of an individual. See *Morrissey* at 480.

⁸ See *State v. McKenzie*, 542 N.W.2d 616, 620 (Minn. 1996).

- ☐ Do not threaten to or place a victim in custody in ensure witness availability. In appropriate cases consider sending a patrol officer or investigator to the victim's residence to facilitate the victim's appearance at trial.
- ☐ In the event the victim is reluctant to participate, consider the victim's safety in addition to the other goals of prosecution.
- ☐ If the victim is unavailable for trial, evaluate the contents of the 911 call and the description of the scene and circumstances in the police reports to determine if a good faith argument may be made that victim statements to law enforcement are non-testimonial
- ☐ Work in partnership with advocates to support victims through the prosecution process and increase the likelihood that victims will be willing and able to testify at trial.
- ☐ Review police reports, 911 calls, interviews, statements and the medical condition of the victim to assess whether the circumstances objectively indicate that the primary purpose of the 911 response and the questions at the scene were to enable police assistance to meet an ongoing emergency.
- ☐ Increase use of violation hearings when new offense presents evidentiary difficulties and proceeding with the probation violation will enhance offender accountability and victim safety.
- ☐ Supervising attorneys should review random files in which the victim did not appear at trial to determine if a *Crawford* review occurred and if elements were appropriately assessed.
- ☐ In cases where the defendant was on probation when new offense occurred, supervising attorneys should review files in collaboration with probation to determine if probation violations are increasingly being brought forward and utilized to hold defendant's accountable for their actions.
- ☐ Train 911 operators in safety-oriented responses.
- ☐ Train responding police officers on the decisions in *Crawford* and *Davis* and how those decisions affect police actions.
- ☐ Train probation officers on the increased importance of bringing forward probation violations.

Case Law

- Crawford v. Washington, 541 U.S. 36 (2004)
- Davis v. Washington, 126 S. Ct. 2266 (2006)
- State v. Wright, 726 N.W.2d 464 (Minn. 2007)
- State v. Warsame, 735 N.W.2d 684 (Minn. 2007)

Appendix 5B

Training Memo – The Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Cases

United States Supreme Court Cases

Both the *Crawford* and *Davis* decisions recognize the doctrine of forfeiture by wrongdoing. If the defendant obtains the absence of the witness by wrongdoing, the defendant forfeits his constitutional right to confront the witness and his constitutional objection to hearsay statements of the witness. In domestic violence cases, the victim/witness is especially vulnerable to threats and intimidation. Studies suggest that over half of defendants in domestic violence cases issue threats or retaliate against accusers.¹ The *Crawford* and *Davis* decisions, by making the live testimony of the victim at trial more important than it had been, also increased the significance of the doctrine of forfeiture by wrongdoing. Vigorous pursuit of the forfeiture doctrine will lead to more successful prosecutions and discourage defendants from attempting to intimidate victims.

The U.S. Supreme Court held in *Giles v. California*, 128 S. Ct. 2678 (2008), that uncontroverted testimony is not admissible under the forfeiture doctrine without a showing that the defendant intended to prevent a witness from testifying. The Court noted that acts of domestic violence are often intended to dissuade a victim from resorting to outside help, and that a defendant's prior abuse or threats of abuse, intended to dissuade a victim from resorting to outside help, would be highly relevant to determining the intent of a defendant's subsequent act causing the witness's absence, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Minnesota Supreme Court Cases—Evaluating the Defendant's Actions

Whether a defendant has acted to intimidate a witness with the intent of procuring her/his absence is a fact-specific determination. The following cases provide guidance regarding the need for the state to demonstrate that the surrounding circumstances that show that the defendant's actions were intended to procure the unavailability of the witness.

In two companion cases, an accomplice to murder gave statements at her arrest and at her own trial but then refused to testify at the defendant's trial, stating that she feared she or her child would be harmed. The Minnesota Supreme Court found that the defendant forfeited his right to confrontation even though there was no evidence showing that the defendant threatened the accomplice between the time of her grand jury testimony and the time of the trial. The court cited

¹ See *State v. Mechling*, 633 S.E. 2d 311, 324 (W.Va. 2006). See also Randall Fritzler & Lenore Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 Ct. Rev. 28, 33 (2000) (indicating that research shows that batterers threaten retaliatory violence in as many as half of all cases and 30 per cent of batterers assault their victims again during the predisposition phase).

the fact that the defendant had repeatedly threatened her to induce her to effectuate his murder plan, sent a man who had beaten her who told her to follow defendant's orders, and that the woman who defendant planned to murder was a potential witness, *See State v. Olson*, 291 N.W.2d 203 (Minn. 1980), and *State v. Black*, 291 N.W.2d 208 (1980).

A year later the Minnesota Supreme Court found that a claim of forfeiture would not be upheld when the "state did not show that there was any direct or indirect evidence indicating that defendant's conduct had caused the Fischer's [the witnesses] silence. . . ." *State v. Hansen*, 312 N.W.2d 96, 105 (1981). In *Hansen*, the court found that while the witnesses may have feared they would be harmed, there was no evidence that the defendant or anyone acting on his behalf had intimidated the witnesses by general or specific threats.

In a later case, the Minnesota Supreme Court upheld a finding of forfeiture in which both the witness and the defendant were members of the same gang. *State v. Byers*, 570 N.W.2d 487 (Minn. 1997). The court in this case found that the gang "conspiracy of silence" implicitly included the threat of violence against any member who broke the agreement. The conspiracy of silence in conjunction with the defendant's wearing of gang colors and the entry into the courtroom of several other persons attired in gang colors when the witness was called to testify was sufficient to find that the defendant had waived his sixth amendment rights to confront the witness. The court stated that "if you can intimidate a witness in open court with impunity there is no need to engage in violence or threats of violence. . . . [A] witness' absence and silence may be procured by agreement as effectively as it can be by violence or threats of violence." *Byers* at 495.

It is clear from these cases that the court is looking at all of the circumstances in order to determine if the defendant, by his actions, forfeited his right to confront a witness. Therefore, prosecutors need to undertake a similar evaluative process in domestic violence cases.

Use in Domestic Violence Cases

For the forfeiture doctrine to be useful in domestic violence cases, it must be understood within the context of the battering relationship. Courts must be educated to recognize that the domestic violence case may not follow the typical witness tampering scenario in which a crime is committed, and later the defendant engages in specific acts that cause the witness's unavailability (e.g., the phone call from jail threatening to kill the witness if the witness testifies at trial). While such threats may occur in battering relationships, a range of other behaviors must be also considered in determining if the defendant's actions caused the unavailability of the victim or witness in a domestic violence case. The typical time frame of a criminal act, arrest, and intimidating or threatening behavior toward the witness may not be present in the same time sequence in domestic violence cases. Threats directed at the victim, her children or other family members may have occurred prior to the current incident as a means of controlling her behavior. The patterned nature of domestic violence means that a broader time frame should be considered by the court.

The pattern of behavior present in domestic violence cases also means that the court should be open in evaluating what it considers to be misconduct that causes unavailability. It may be extremely challenging to separate out those actions that would typically be viewed as “witness tampering” from the violent incident that resulted in the arrest. Because a battering relationship is likely to consist of a series of abusive actions, it is difficult to divide the defendant’s prior criminal act from the act of intimidating the victim or witness. In battering relationships, additional acts to intimidate the victim or witness are often not necessary. The acts of domestic violence are sufficient to obtain the victim’s unavailability. However, pursuant to the *Giles* case, the defendant must also have intended that result.

In domestic violence cases where there has been a long history of violence, the possibility of forfeiture should be considered when the victim is unavailable. As with other preliminary evidentiary questions, hearsay should be admissible to prove forfeiture and the standard of proof should be preponderance of the evidence.²

Recommendations for Practice

The constraints placed on the admissibility of evidence as a result of the *Crawford* and *Davis* cases mean that prosecutors must be creative in developing new tools and modifying existing ones to enhance the likelihood of successfully prosecuting domestic assault cases. In light of the critical role the forfeiture by wrongdoing doctrine plays in prosecution as a result of the *Crawford* and *Davis* decisions, prosecutor’s offices should consider directing resources to assist the actions of collaborating agencies and to engage in the following measures:

- ☐ Request review of recorded post-arrest defendant phone calls from jail or prison.
- ☐ Train police, when responding to a domestic violence case, to ask specifically whether the defendant has ever made statements directed toward the victim, her children and other family members threatening harm if the victim contacts the police or participates in the prosecution process.
- ☐ Train police and investigators to inquire about and gather voice mails, emails, text messages, either prior- or post-arrest sent by the defendant that may include threats.
- ☐ Where appropriate, inquire of advocates working with the victim if statements by the defendant have been made threatening the victim or her family.
- ☐ In collaboration with the police and advocates, institute post-arrest procedures to follow-up with the victim to inquire about post-arrest contact between the defendant and victim.

² See Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271 (2006).

INITIAL DV INTERVIEW**DATE:** _____**INTERVIEWER:** _____**INTERVIEWEE:** _____**OTHERS PRESENT:** _____**CASE NAME:** _____

- ☐ Victim read police report ☐ Rec'd copy of report
☐ Victim confirms allegations ☐ Victim made changes to position:

Witnesses to the incident (kids, neighbors, family, etc.): _____

Does defendant have prior DV history, assault history or PPO's? ☐ Yes ☐ No
 Where/When? _____

☐ Policed called in past Jurisdiction _____ Agency _____

☐ Threats to kill victim ☐ past ☐ present

Witnesses: _____

☐ Threats to kill self ☐ past ☐ present

Witnesses: _____

☐ Threats to children ☐ past ☐ present

Witnesses: _____

☐ Threats to kill other ☐ past ☐ present

Witnesses: _____

☐ Attempted murder of victim in the past ☐ yes ☐ no

Witnesses: _____

☐ Threats to harm victim if s/he cooperates with law enforcement/prosecution/court_____

☐ Alcohol/drug use/abuse: Rehab? ☐ When/Where: _____

Successful? ☐

☐ Threats to kidnap/hold hostage victim/children/others:

☐ Does he harm children? ☐ Pets? ☐ Property

Continued on next page...

- ☐ History of domestic violence between victim and defendant:

What was the first incident of DV with the defendant? _____

What was the most frightening incident? _____

What has been your most effective strategy for keeping yourself safe? _____

For keeping kids safe? _____

What legal action will keep you safe? _____

What will place you in danger? _____

What have you lost financially or materially from the acts of DV? _____

What types of legal needs do you have?

☐ Divorce ☐ Custody ☐ Support ☐ PPO ☐ Other: _____

Has defendant ever made you sign a behavior contract? ____ Do you still have it? ____

How many pets have been in the household over the course of the relationship? ____

History of domestic violence for defendant and others: _____

- ☐ APA explained court process, including plea and sentencing
Explain how Defendant will lie about court dates, penalties, legal rights, etc.

- ☐ APA explained plea negotiations generally

- ☐ APA discussed the specific plea of:

☐ Victim ☐ agreed ☐ disagreed with plea offer

Victim would like the following changes to the plea agreement:

- ☐ APA explained decision-making process

- ☐ APA explained need for victim's input

- ☐ How safe do you feel? (0 – safe; 10 – in serious danger)

1	2	3	4	5	6	7	8	9	10
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

- ☐ Medical treatment sought? ☐ Yes ☐ No Provider name: _____

Did anyone take photos/video of the incident injury? ☐ Yes ☐ No

Do you know of anyone who has suffered violence at the defendant's hands?

☐ Yes ☐ No

RISK FACTORS FOR VICTIMIZATION

- ☐ Prior history of DV
- ☐ Being female
- ☐ Young age
- ☐ Heavy alcohol and drug use
- ☐ High risk sexual behavior
- ☐ Witnessing or experiencing violence as a child
- ☐ Being less educated
- ☐ Unemployment
- ☐ For men, having a different ethnicity from their partner
- ☐ For women, being American Indian/ Alaskan Native or African-American
- ☐ For women, having a verbally abusive, jealous or possessive partner
- ☐ Prior history of DV

Relationship Factors

- ☐ Couples with income, educational or job status disparities
- ☐ Dominance and control of the relationship by the male

RISK FACTORS FOR PERPETRATION

- ☐ Low self-esteem
- ☐ Low income
- ☐ Low academic achievement
- ☐ Involvement in aggressive or delinquent behavior as a youth
- ☐ Heavy alcohol and drug use
- ☐ Depression
- ☐ Anger and hostility
- ☐ Personality disorders
- ☐ Prior history of being physically abusive
- ☐ Having a few friends and being isolated from other people
- ☐ Having few friends and being isolated from other people
- ☐ Unemployment
- ☐ Economic stress
- ☐ Emotional dependence and insecurity
- ☐ Belief in strict gender roles (male dominance and aggression in relationships)
- ☐ Desire for power and control in relationships
- ☐ Being a victim of physical or psychological abuse (consistently one of the strongest predictors of perpetration)

Relationship Factors

- ☐ Marital conflicts – fights, tensions and other struggles
- ☐ Marital instability – divorce and separations
- ☐ Dominance and control of the relationship by the male
- ☐ Economic stress
- ☐ Unhealthy family relations and interactions

People v. _____

Case Opening Instructions for Staff

- ☐ Make copies of following for both police agency/ court/pros
 - Bond Analysis
 - Prosecution Memo
 - _____
- ☐ Schedule Victim and Harbor for appointment within
 - 24/48hrs
 - week
 - 48/ 72 hours before PRELIM PTC
- ☐ If Victim cannot be contacted within 24 hours ask Harbor House if they have had contact. If necessary ask police to contact victim to schedule appointment.
 - Contact made with HH on _____ by _____
 - Police Requested to contact Victim on _____ by _____
- ☐ Schedule other witnesses for appointment:
 - _____
 - _____
- ☐ Obtain certified copies of D's prior DV convictions from the following court(s)
 - _____
 - _____
- ☐ Pull old DV prosecution files from our files
 - Contact following prosecution office for copies of police reports

- ☐ Pull PPO, PPO Application from 25th Circuit Court
From other court _____
- ☐ Send copy of police report to probation/parole officer _____

Sentence: _____ Date: _____
 _____ Prob. _____ D/S _____ Jail _____ Prison _____

Detail Sentence: _____

JURY SELECTION - VOIR DIRE

JURY QUESTIONS

A. Questions of Bias and Ability to Follow the Law

1. Will you base your decision in this case apart from any feelings of sympathy for or prejudice against either the defendant or the victim of this case?
2. Do you have any feelings that crimes that take place in the home should not be prosecuted?
3. Do you feel that family problems that lead to violence should be handled outside of court?
4. If evidence is presented to you that would leave no doubt in your mind of the defendant's guilt, would it be difficult for you to vote guilty because of religious, philosophical or moral response?

B. Questions Pertaining to Violence in General

1. Have you ever been involved in a physical altercation as a participant, victim, or witness?
2. Have you or has anyone close to you ever been the victim of violence?
3. Have you or has anyone close to you been involved in marital disputes that involved physical violence?
4. Have you, any member of your family, or any close friend been involved in a dispute in which the police have been called?
5. Have you ever notified the police to respond to a neighbor's home because you thought a physical dispute was going on?
6. Have you ever heard what you believe was a physical altercation taking place at a neighbor's home?
7. Have you had occasion to call the police for your own protection from physical violence?
8. Have you had occasion to call the police to protect others from physical violence?
9. Do you have strong feelings about use of violence?
10. Have you ever experienced fear due to apprehension of violence?
11. Have you ever known a normally pleasant person to become aggressive and violent/combatative after consuming alcohol or drugs?

C. Questions Pertaining to Domestic Violence

1. Do you feel that domestic violence cases -- and by that I mean violence between persons in primarily romantic relations whether they be married, not-married-but-living together, dating -- should be handled in the home?
2. Do you feel that prosecuting crimes that occur within the family home:
 - Is a waste of taxpayer's money?
 - Causes homicide?
 - Is inappropriate compared with handling such matters privately?
3. Have you or anyone close to you ever been involved in a family violence situation?
4. Were there children present during the violence?
5. Do you think that a family member has the right to hit or punch another family member (husband/wife, brother, sister)?
6. Do you believe that the law allows family members to do so?
7. Do you think that an assault in the kitchen is different from an assault in the street?

D. Questions Re: Proving This Kind of Offense

1. Would you expect an assault between family members or person living together to occur in a public place or in private at home? Why?
2. Do you believe that the State of Michigan has a responsibility to prosecute persons who cause violence in the home even though the victim does not want to proceed either out of loyalty, love, fear or persuasion?

E. Questions Re: Crime Against Society

1. Are you familiar with the phrases, "The victim dropped the charges" and "The victim pressed charges"?
2. Do you understand that the People of the State of Michigan are entitled to prosecute the defendant for allegations of domestic violence irrespective of the wishes of the victim?
3. Do you have any feelings that the government should not have the right to prosecute a case like this if the victim does not want the government to do so?
4. Do you believe society should be any more concerned or any less concerned about violence between people who know each other than people who are strangers?

F. Questions Re: Race/Ethnic Issues

1. Do you believe spousal abuse is confined to any one race or socioeconomic group?
2. In evaluating your own ability to judge a case such as this fairly, do you feel you have any stereotypes in your mind of who commits violent acts and who does not?

Voir Dire Questions Developed by Casey G. Gwinn, San Diego City Attorney, modified and adapted by Matthew J. Wiese, Marquette County Michigan Prosecuting Attorney's Office [1996].

The Non-Participating Victim

Proving the Case without the Victim's Testimony

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Introduction

This article is based in part on the experiences and the strategies that evolved over ten years of prosecuting domestic violence crime. Currently there is a lot of national discussion on the issue of proving a domestic violence case without the victim's testimony. This discussion only addresses one half of the issue. The discussion also needs to focus on the safety issues that effect the victim of domestic violence when the criminal justice system intervenes in her life. The intent of this article is to highlight some prosecution experiences working with domestic violence victims and to outline some useful strategies for working with the victim of domestic violence. This article will address two major themes from a prosecutor's perspective: 1) Working with the victim of domestic violence, and 2) How to prove the case without the victim's participation.

The term *victimless prosecution* has been used synonymously with the concept of prosecuting domestic violence cases. It was not until recently that some prosecutors have begun to realize that the successful prosecution of domestic violence cases is not only about *victimless prosecution*. Many prosecutors have developed strategies that they believe are in the best interests of domestic violence victim. Prosecutors are finally pushing the criminal justice system to address domestic violence as a criminal matter with this new approach called the victimless prosecution of domestic violence cases. Therein lies part of the problem. There is no such thing as victimless prosecution in a domestic violence case. This is not about labeling or "political correctness", it is about how we think about and process domestic violence cases. Perhaps most importantly it is about not forgetting the victim in our rush to seek justice in cases of domestic violence.

Working with the Victim of Domestic Violence

It is important for trial prosecutors who handle domestic violence cases to develop certain beliefs or a basic set of values about the victim's role and the role of the criminal justice system. These beliefs or values need to be incorporated into prosecution protocols, law enforcement policies, and the community's coordinated response to domestic violence. The crux or core of these values must be based on victim safety. Some basic principles could include, but are certainly not limited to the following:

- **The victim's participation in the criminal justice system response to domestic violence is not necessarily in the best interests of the victim.**
- **The criminal justice system response to domestic violence cannot always provide safety from the batterer when the victim participates.**
- **The criminal justice system should not punish victims for choosing not to participate.**
- **Successful strategies for the prosecution of domestic violence cases include proceeding without victim participation.**
- **Successful prosecution strategies are not based solely on the rate of conviction.**

1989

Sherri walked into the prosecutor's office. The secretary at the front asked her what she wanted. "I want to drop the assault charges filed against my boyfriend" she replied. Sherri was firmly told to have a seat in the hall while the appropriate paperwork was prepared. She was never asked if she wanted to speak to an advocate or a prosecutor. No one inquired about her safety. The office staff stood around in the front reception area and ridiculed her for not leaving that guy.

The luv affidavit [as it was called on the word processor] was a fill in the blank form that allowed the secretary to fill in the appropriate blank spaces. It even had a signature line for the secretary to sign as a notary so that the victim's request to drop charges appeared to be a legal document.

Sherri was told to sign on the line and informed that the charges would be dropped. Those of us in the office said things like "when will she finally leave that guy?" and "some day she is going to end up dead if she doesn't leave that guy!" But what else could we do if she would not even help herself?

Sheri eventually left her abuser. She even obtained a restraining order.

Her abuser, also the father of her children, shot Sherri to death with a hunting rifle in the driveway of her home on January 27, 1992. After killing her he turned the gun on himself and committed suicide.

As a prosecutor it is tempting to step in and say there will not be another Sherri in my jurisdiction. To set firm policies that say “we do not drop domestic violence cases!” In some cases it may be enough to tell the victim, defendant, or his lawyer that the victim can not drop the charges.

1993

The victim sat across from me in my office and asked when things had changed? What did she mean I asked? When did we stop requiring the victim to press charges? When did domestic violence victims stop having the ability to drop charges?

“Within the last year or so”, I replied. “Why”, I asked. Her husband told her the last time to get her ass down to the prosecutor’s office and get the charges dropped. They were dropped, the case dismissed, and the violence had continued. Until this time when it had finally gotten so bad that she called the police again, even though she knew he would force her to drop the charges again. “You mean I can’t drop charges anymore?” “Had I known, I would have called the police sooner.”

Another likely scenario however, is that the victim will not cooperate. Especially, if her perception is that the prosecutor’s role is only about winning or losing the case. It is her life, not just a case. If she chooses to not participate with the prosecution she may then be perceived as part of the problem, but the case can still proceed even if she chooses to, or can not assist in the prosecution. The domestic violence case is not a “one size fits all” proposition. The victim can not be ignored if the prosecution response includes a concern for the victim’s safety.

1993

Erica had worked with the shelter advocate and met with me prior to the trial of Brian, her abusive boyfriend. On the day of trial she sat on the side of the courtroom behind the defendant. She acted like she did not know me. To make matters worse the advocate was sitting next to her. During the first recess, after the jury had been selected, the advocate informed me that Erica would testify for the defendant and refuse to testify for the prosecution.

Erica did not make a very good defense witness. Her girlfriend, to whom she had initially reported the incident, testified to Erica's original description of what had happened under an excited utterance exception to the hearsay rule. The jury found Brian guilty.

After the verdict the advocate approached me and told me that Erica wanted to thank me for prosecuting the case and to apologize for not being much of a help to the prosecution. It seems Erica wanted Brian to get help, and she wanted to try and work things out with him.

Many prosecutors become upset when the victim chooses to not participate with the prosecution of her batterer. Our instincts tell us that the victim is now on the other side and that she will sabotage "our" case. A mistake often made at this juncture is to shut out the once "cooperative" victim and not keep her informed about the process. The prosecutor often exacerbates the perceived hostility from the victim when she is shut out of the process. After a few unsuccessful attempts to prosecute this type of case many prosecutors will give up on taking these types of cases to trial. Worse yet, some domestic violence victims are subjected to criminal prosecution for filing a false police report or perjury.

Victims of domestic violence often behave in ways that seem inexplicable to prosecutors. Apparent reluctance, lack of cooperation or participation, and even hostility by the victim is not uncommon in domestic violence prosecutions. It is not an accurate characterization to merely label the domestic violence victim generically as a *hostile witness*.

There are many reasons why a victim will not participate with criminal prosecution. The reasons are similar as to why she *chooses* to stay with the batterer. Perhaps the most significant reason is that it is more dangerous for the victim when she *chooses* to leave the relationship or participate with criminal prosecution.

1994

Kim, the victim took the stand for the defendant, her batterer husband. During the prosecution's cross-examination she defiantly glared at the jury and told the panel how

the prosecutor would not even listen to her. It took the jury about 20 minutes to acquit her husband once she was done explaining how inconsiderate and insensitive I had been.

A number of jurors asked me after the trial why I did not take the time to talk with the victim and explain the process? Another juror asked me what it was that I had done to make her so angry with me. "I didn't listen to her because she was a hostile witness" I replied. "It's no wonder" he replied, "with the way the system treated her."

By understanding the difficulties a victim faces when considering whether or not to participate with criminal justice process prosecutors will be able to avoid the frustration that results from creating an antagonistic relationship with the victim. Prosecutors need to have a thorough understanding of domestic violence dynamics and be aware of the reasons why a victim may choose to not participate with criminal prosecution. Prosecutors must develop an approach to domestic violence cases that incorporates the victim's concerns or perspective. This type of an approach can increase victim safety and help hold offenders accountable.

A victim's position on any given case will often range from one extreme to another. One victim may demand prosecution on a seemingly minor domestic violence incident, while another who is the victim of a serious violent incident may request that charges be dropped or not even want to participate in the proceedings. Domestic violence victims can fall into any number of categories. The following examples are just a few of how a victim may present in a domestic violence prosecution. With the exception of the cooperative victim, all could be considered non-participating victims:

- **Cooperative Victim**
- **Uncooperative Victim**
- **Unavailable Victim**
- **Hostile Victim**
- **Recanting Victim**
- **Reluctant Victim**

Common Characteristics That Many Victims Believe

There may be many reasons for the victim to not participate. The victim may believe that no one will be able to help her but herself. Many times she will accept responsibility for the

batterer's actions. One crucial aspect that is common among many victims is that they will often believe the myths about domestic violence and battering. Domestic violence victims may believe that they are either crazy or mentally ill, that women of their social status [whatever it may be] do not become victims of domestic violence. Domestic violence victims will often accept the excuses that substance abuse or drinking causes the batterer to act the way he does. Finally, some victims will feel that the children need their father and they do not want to separate or break the family up, even if the father is violent.

Domestic violence victims often believe in the family structure and may even accept the traditional gender roles of women. They often present themselves with low self-esteem. They may believe that they can control the situation by not causing problems or by not "rocking the boat". Almost all-domestic violence victims live in fear of physical violence. One common characteristic among many domestic violence victims is they will go to great lengths to protect their children. Many will sacrifice themselves and accept the battering if it will protect their children.

Although many jurisdictions have set up systems to respond to domestic violence cases, the domestic violence victim may still try and accept total responsibility for the case. To help diffuse this notion it is important for the prosecutor to stress that the case is being brought by the police and prosecutor's office. The victim needs to hear that she does not press charges. Additionally, the prosecutor should tell the victim that the reason for criminal charges is to provide for her safety, hold the batterer accountable, and to hopefully prevent future incidents of domestic violence. Finally, prosecutors need to tell victims that the case will focus on the batterer's negative behavior and not the victim's behavior.

1996

Anne took the stand to testify for her husband who had been charged with the crime of domestic violence assault & battery against her. She testified that the whole incident had been blown out of proportion and that this was all a big misunderstanding. After her direct examination the prosecutor asked her if anyone had explained to her why her husband was on trial, if this was all such a big misunderstanding? "I know that domestic violence is a crime, and that the police and prosecution have to go forward with the case if there is evidence of the crime" answered Anne.

The jury found Anne's husband guilty. Afterwards some of the jurors commented that a combination of factors had swayed them: the thorough police investigation, the 9-1-1 tape, and Anne's testimony. A number of jurors stated that it was obvious to them what had happened and that Anne's testimony made her appear as if she were just going through the motions, trying to cover for her husband. One juror stated that she was worried for Anne's safety and felt obligated to do something. She also wanted to know if the defendant would be required to go to some sort of a program.

***Checklist: Direct & Cross-Examination
Questions for the Domestic Violence Victim
When She Recants Her Statement***

- ✓ Didn't you tell the police something different than what you have testified?
- ✓ You never told the police that you started the fight?
- ✓ Were you were upset and crying when the police interviewed you?
- ✓ You told them about the incident right after it happened-correct?
- ✓ Have you reviewed the evidence in this case?
- ✓ You say that the police have misconstrued your statement?
- ✓ Have you seen the other witness statements? Did you hear their testimony?
- ✓ Their statements were not misconstrued-were they?
- ✓ Are you saying that all this evidence is being misconstrued?
- ✓ Did you call 9-1-1?
- ✓ 9-1-1 is for emergencies-correct?
- ✓ Are you trying to protect the defendant by testifying here today?
- ✓ What is the status of your marriage [relationship] with the defendant?
- ✓ Has he agreed to some sort of counseling?
- ✓ Has he made any promises to you?
- ✓ Has he stopped drinking [if applicable]?
- ✓ Have you and the defendant gotten back together?
- ✓ Do you still love the defendant?

Checklist: Direct & Cross-Examination Questions for the Domestic Violence Victim

It is important to continue to set the tone when conducting either direct or cross-examination of a domestic violence victim. The following questions are designed to help explain to the court or jury the dynamics of domestic violence and the victim's motivation for testifying. Not all of the following questions are appropriate for all victim typologies and should be modified or adapted depending on the type of domestic violence victim witness testifying. Some of the questions may not be admissible in all jurisdictions and should be modified accordingly.

Prosecutors should not be judgmental of the domestic violence victim when she is testifying. Victim contact prior to trial and proper preparation will allow the prosecutor to present the facts and circumstances surrounding the victim's testimony in a non-antagonistic or overly judgmental fashion. By meeting with the victim prior to trial the prosecutor can often diffuse hostility that the victim may have. A feeling of frustration or lack of understanding or information that the domestic violence victim has about the criminal justice process often causes this hostility.

- ✓ Are you here today because of a subpoena?
- ✓ Are you reluctant to testify?
- ✓ When did you become reluctant or refuse to testify?
- ✓ Did we meet to discuss the case?
- ✓ Do you understand why this case is being prosecuted?
- ✓ Were you living with the defendant when this incident happened?
- ✓ Are you living with the defendant now?
- ✓ [If not] Does the defendant know where you are staying?
- ✓ Are you employed?
- ✓ Is the defendant employed?
- ✓ Who makes more?
- ✓ Are the household finances shared?
- ✓ Do both you and the defendant contribute equally to the household budget?
- ✓ Who pays the bills in your household? Whose money is used to pay the bills?
- ✓ Do you and the defendant have children together?
- ✓ How did you get to court today? How will you get home?
- ✓ Have you seen or read the police reports and witness statements?
- ✓ Have you seen the photographs?
- ✓ Have you listened to the 9-1-1 tape? Is that your voice [your child's', neighbor etc]?
- ✓ Have you talked about the case with the defendant?
- ✓ What did he say about the case?
- ✓ Has he apologized to you? What did he say?
- ✓ Did he tell that he didn't mean to hurt you?
- ✓ Did he say that this would never happen again?
- ✓ Did he ask you to drop charges?
- ✓ Do you know that you can not drop charges? That the police [prosecutor] press charges?
- ✓ Did he tell you that he meant to hurt you? Did he threaten you?
- ✓ Did he ask you not to testify?
- ✓ Did anyone else talk to you about your testimony? His family? His friends?
- ✓ Are you afraid of the defendant?
- ✓ Has he threatened you?

It can be extremely frustrating from a prosecution perspective to work with the domestic violence victim. Domestic violence victims seem to fit many different profiles. The following profiles were developed with the assistance of a domestic violence shelter advocate after participating in many victim appointments at the prosecutor's office. They are not intended to be definitive of all domestic violence victims, but rather a practical view or example of the types of victims the prosecuting attorney will encounter when handling domestic violence cases. These may include, but are not necessarily limited to some of the following:

Substance Abuser

This victim may be using alcohol, illegal drugs, or prescription drugs. Many domestic violence victims medicate themselves to escape the violence.

Mentally Ill

Numerous mentally ill individuals fall prey to abusive personalities. They may believe that they cannot care for themselves and a batterer will often substantiate and reinforce this belief at every opportunity.

Depression

This would include both clinical and environmental depression. A batterer may work diligently at keeping a victim in this state. It is very difficult for the victim to see through the situation when she is depressed. Subsequently, she is less likely to leave and the batterer blames her for her depression.

Women Who Use Violence

Many battered women use violence, either out of frustration, retaliation, or in self-defense. Some domestic violence victims will even initiate the confrontation because she can see the tension building and to "get it over with".

Minimizing Victim

The domestic violence victim may often state things both to herself and out loud to the effect of "the abuse is not so bad, it has been worse in the past".

Fixated Victim

The fixated domestic violence victim may focus her energy on the batterer and his problems and needs.

Victim in Denial

A domestic violence victim who is in denial may not want to let go of the family and allow the family secret of domestic violence to become known. This type of victim may often make excuses and “cover” for the batterer.

Shock

This type of domestic violence victim often appears to be in a dazed state, and may act and function in a “robot like” state of calm. The reverse to this type of victim who is in shock is that she may often be hysterical and unable to focus on her immediate needs.

Anger

This type of domestic violence victim may often express anger at the “system” that is interfering with her life, or she may focus and direct her anger at the batterer.

Guilt

This type of domestic violence victim will often blame herself and state things to the effect of “if only I had done...” or “I should have”. The victim in denial will often go through these phases of shock, anger, and guilt; and will often go through this range of emotions in this order.

As is true with a majority of criminal prosecutions, many domestic violence cases never get to the point of trial. Most criminal charges are resolved through plea agreements and pre-trial proceedings. Many jurisdictions however have a disproportionately high dismissal rate for domestic violence charges. This is often because of a lack of victim participation and prosecution strategies for working with domestic violence victims. Many cases are dismissed during the pre-trial stage because the victim is considered hostile because she chooses to not participate. In some cases the victim is placed in jeopardy because she chooses to not participate in prosecution. This is often the result of the development of an antagonistic relationship between the victim and the prosecuting attorney.

It is vital that prosecutors who handle domestic violence cases have at least a basic understanding of domestic violence dynamics. The domestic violence victim's experience, in the context of participating with criminal prosecution, is quite different than other crime victim's. The obstacles and potential for threatening consequences that the victim faces could include:

1. threats from the batterer toward the victim, the victim's family or friends to prevent the victim from cooperating;
2. lack of assurance that the criminal justice system can provide safety for the victim from the batterer if the victim cooperates;
3. the batterer knows where to find the victim and can continue to intimidate the victim throughout the criminal justice proceedings;
4. the victim and the batterer may still be living together, the victim may not have an alternative place to live, or the victim may be financially dependent upon the batterer and be forced to continue residing in the same household;
5. the victim may have been forced or threatened to rescind or request dismissal of charges in the past;
6. the victim may have suffered consequences for participating in the past;
7. the victim may have participated in the past and the criminal justice system failed to protect her, provide adequate intervention to hold the batterer accountable or stop the violence;
8. the batterer knows the victim and can interfere with the victim's ability to appear in court by intercepting her mail, or misinforming the victim about court dates, etc.;
9. the batterer can interfere by talking to the victim about the case and can intimidate her by providing misinformation about the court process;
10. the time demands that prosecution places on the victim may inhibit her from participating because of delays and continuances;
11. defense initiated delays intended to inconvenience the victim through lost time at work, increased child care and transportation costs, etc.;
12. both the batterer's and victim's family and friends may pressure the victim to not cooperate;
13. the victim may lack valid information about the criminal justice system.

Many of the obstacles listed above can be addressed during jury selection or with the use of an expert witness. Not only must the prosecutor handling the case understand these obstacles, but it is also crucial that the trier of fact become educated about these obstacles before they are asked to decide the case. If the jury can not understand the victim's perspective then it is unlikely that they will be able to objectively evaluate the case in the proper perspective. [Please see accompanying checklists and chapters ____ & ____ concerning jury selection, and expert witness testimony.]

CHECKLIST: VOIR DIRE QUESTIONS

It is important to set the tone for the prosecution of a domestic violence case, especially when the victim chooses to not participate. Jury selection is one of the most important aspects of successful prosecution of domestic violence cases. This is an opportunity to educate the potential jurors on the dynamics of domestic violence and the reasons why a domestic violence victim would choose to not participate in prosecution.

A. Questions of Bias and Ability to Follow the Law

1. Will you base your decision in this case apart from any feelings of sympathy for or prejudice against either the defendant or the victim of this case?
2. Do you have any feelings that crimes that take place in the home should not be prosecuted?
3. Do you feel that family problems that lead to violence should be handled outside of court?
4. If evidence is presented to you that would leave no doubt in your mind of the defendant's guilt, would it be difficult for you to vote guilty because of religious, philosophical or moral response?

B. Questions Pertaining to Violence in General

1. Have you ever been involved in a physical altercation as a participant, victim, or witness?
2. Have you or has anyone close to you ever been the victim of violence?
3. Have you or has anyone close to you been involved in marital disputes that involved physical violence?
4. Have you, any member of your family, or any close friend been involved in a dispute in which the police have been called?
5. Have you ever notified the police to respond to a neighbor's home because you thought a physical dispute was going on?
6. Have you ever heard what you believe was a physical altercation taking place at a neighbor's home?
7. Have you had occasion to call the police for your own protection from physical violence?
8. Have you had occasion to call the police to protect others from physical violence?
9. Do you have strong feelings about use of violence?
10. Have you ever experienced fear due to apprehension of violence?
11. Have you ever known a normally pleasant person to become aggressive and violent/combatative after consuming alcohol or drugs?

C. Questions Pertaining to Domestic Violence

1. Do you feel that domestic violence cases -- and by that I mean violence between persons in primarily romantic relations whether they be married, not-married-but-living together, dating - should be handled in the home?
2. Do you feel that prosecuting crimes that occur within the family home:
 - Is a waste of taxpayer's money?
 - Causes homicide?
 - Is inappropriate compared with handling such matters privately?
3. Have you or anyone close to you ever been involved in a family violence situation?
4. Were there children present during the violence?
5. Do you think that a family member has the right to hit or punch another family member (husband/wife, brother, sister)?
6. Do you believe that the law allows family members to do so?
7. Do you think that an assault in the kitchen is different from an assault in the street?

D. Questions Re: Proving This Kind of Offense

1. Would you expect an assault between family members or person living together to occur in a public place or in private at home? Why?
2. Do you believe that the State of _____ has a responsibility to prosecute persons who cause violence in the home even though the victim does not want to proceed either out of loyalty, love, fear or persuasion?

E. Questions Re: Crime Against Society

1. Are you familiar with the phrases, "The victim dropped the charges" and "The victim pressed charges"?
2. Do you understand that the People of the State of _____ are entitled to prosecute the defendant for allegations of domestic violence irrespective of the wishes of the victim?
3. Do you have any feelings that the government should not have the right to prosecute a case like this if the victim does not want the government to do so?
4. Do you believe society should be any more concerned or any less concerned about violence between people who know each other than people who are strangers?

F. Questions Re: Race/Ethnic Issues

1. Do you believe spousal abuse is confined to any one race or socioeconomic group?
2. In evaluating your own ability to judge a case such as this fairly, do you feel you have any stereotypes in your mind of who commits violent acts and who does not?

Voir Dire Questions Developed by Casey G. Gwinn, San Diego City Attorney, modified and adapted by Matthew J. Wiese, Marquette County Michigan Assistant Prosecuting Attorney's Office [1996].

If possible, prosecutor's offices should utilize "vertical prosecution" to ensure that the domestic violence victim does not have to repeat her story repeatedly to different people. Simply stated vertical prosecution is the process whereby one prosecutor is either assigned to handle all domestic violence cases, or certain cases are assigned to a certain prosecutor. The prosecutor assigned will handle to case from beginning to end, preferably from the charging stage to the disposition stage. Vertical prosecution tends to develop consistency in the handling of cases and creates an atmosphere of familiarity or comfort for the victim. It also reduces the requirement that the victim must repeat her situation repeatedly to many different prosecution officials. [See Victim Contact Check List.]

***Checklist: Contact With The
Domestic Violence Victim***

- ✓ **Make Contact As Soon As Possible**
- ✓ **Explain & Clearly Define Roles & Options**
 - ✓ **Prosecutor**
 - ✓ **Victim**
 - ✓ **Advocate**
 - ✓ **Police**
 - ✓ **Defendant & Attorney**
 - ✓ **Court Process**
 - ✓ **Pleas Agreements, Bond Conditions, No-Contact Orders**
- ✓ **Emphasize Domestic Violence Is A Crime**
- ✓ **Explain Goals of Criminal Prosecution**
 - ✓ **Victim Safety**
 - ✓ **Offender Accountability**
 - ✓ **Reduce Domestic Violence**
- ✓ **Be honest & straight-forward**
- ✓ **Explain The Case-Including All The Evidence**
 - ✓ **9-1-1 Tape**
 - ✓ **Photographs**
 - ✓ **Witness statements**
- ✓ **Don't make promises you can't keep!**

Many prosecuting attorneys' offices have developed protocols for working with domestic violence victims. Typically, this will involve making contact with the victim as soon as possible after the investigation is received by the prosecutor's office. It is important to utilize the prosecutor's office victim-witness staff or personnel, as well as the local shelter advocate when meeting or talking with the victim. This approach tends to force the "system" to coordinate its efforts to help the victim, and promotes victim confidence in the system's ability to address her problems.

How to Prove the Case without the Victim's Participation

Developing an effective prosecution approach to prosecuting crimes of domestic violence without victim participation does not happen by mandate. It is more than just going to court armed with all the evidence that can prove the case without the victim's testimony. Without putting certain basic practices into place first there will be no evidence to proceed to court with.

The first step requires developing common ground between the beliefs and philosophies of the local shelter program by developing a complimentary law enforcement and prosecution philosophy. An effective way to implement the areas of agreement is to create a written domestic violence policy for your jurisdiction or community. A written policy needs to be a collaborative effort by the shelter, local law enforcement agencies, and the prosecuting attorney. The policy should define the roles and state the duties of the shelter, police, and prosecution. This would include everything from direct victim services, arrest and evidence gathering policies, and a prosecution policy or protocol.

The issue of law enforcement liability in the area of domestic violence response is probably the strongest impetus for law enforcement administrators to consider a written domestic violence policy. Additionally, the federal Violence Against Women Act requires collaboration with local shelter programs to be eligible for federal funds to enhance local efforts in this area.

Policies are of no value if not implemented and followed. It is important to work with law enforcement to develop training. The training should involve prosecution, shelter personnel, and law enforcement. It is easier to resolve issues and there is less chance for “finger pointing” or “blaming” when all three are involved. In many jurisdictions the prosecuting attorney will need to take the initiative to begin this process. Especially, if there is local law enforcement resistance to having shelter personnel involved with the training.

1992

The local law enforcement administrator told me “there is no way in hell my guys are going to sit through two hours of domestic violence training and listen to some advocate from the shelter”. Over time and with the urging of the prosecuting attorney however, this hard line attitude softened. Advocates are now a regular part of law enforcement training.

If possible, create a signature page to include in your domestic violence policy. The director of your jurisdiction’s shelter program, the elected prosecuting official and the chief law enforcement administrator for each police department should sign the policy, as well as all other agencies that are part of your community response to domestic violence.

1995

We issued a press release announcing the adoption and implementation of a new domestic violence policy. The shelter director, the elected prosecuting attorney, and all but one of the police chiefs attended the meeting. The local paper, radio, and television stations covered it.

Not only do these public pronouncements make the administrators more accountable for domestic violence issues, but there are also a lot of ancillary benefits. The first responders get the message that the bosses are concerned about this issue. Victims and perpetrators may see the coverage and possibly seek help. Finally, the public and potential jury pool hears the message that domestic violence is a crime. [See Policy Check List.]

LAW ENFORCEMENT & PROSECUTION POLICY DEVELOPMENT CHECKLIST

- ✓ **DEVELOP WRITTEN POLICY**
- ✓ **ARREST AND LIABILITY ISSUES**
- ✓ **LETHALITY FACTORS**
- ✓ **ON-SCENE INVESTIGATION**
- ✓ **REPORT WRITING**
- ✓ **VICTIM ASSISTANCE**
- ✓ **SIGNATURE PAGE**

EVIDENCE GATHERING

HEARSAY EXCEPTIONS-*FIND THEM & USE THEM!*

- ✓ Excited utterances
- ✓ Present sense impressions
- ✓ Then existing physical, emotional, mental condition
- ✓ Statements made for medical diagnosis
- ✓ Medical records
- ✓ Recorded statements
- ✓ Police reports

WITNESSES

- ✓ Neighbors
- ✓ Mothers, sisters, girlfriends
- ✓ Responding officer
- ✓ Dispatcher
- ✓ Emergency room doctor or nurse

COMPLETE & THOROUGH INVESTIGATION

Creation of Standardized Incident Report Form?

- ✓ Documentation of injuries
- ✓ Description of victim's physical and emotional appearance
- ✓ Description of scene
- ✓ Photographs of injuries and scene
- ✓ Photographs of Victim & Defendant
- ✓ Photographs of Children-(Proceed with caution)
- ✓ Tape recordings -
- ✓ Dispatch or 9-1-1 audio
- ✓ Video patrol car tapes

During the busy day to day business of a prosecuting attorneys office it is easy to get caught up in the issue of the moment, the most recent police investigation or legal issue. While this is happening it is often difficult to keep track of upcoming trials. It is the prosecutor's responsibility to see to it that the case is properly prepared to proceed to trial. The prosecution of domestic violence cases makes this task even more difficult because of the volatility and volume of cases.

Domestic violence cases are typically part of a misdemeanor court docket flooded with hundreds of cases proceeding to trial. It is important that the domestic violence case get the extra attention that it merits. Practically speaking it is nearly impossible for one prosecutor handling a full docket of cases, plus other prosecution duties, to keep track of all the details of every case. Consequently many domestic violence cases end up getting reviewed for final trial preparation at the last minute. Typically, a week and even a day before trial.

At this juncture it is often discovered that the victim can not be located. Worse yet, crucial evidence may not have been gathered, lost, and deemed inadmissible because it was not properly disclosed to the defense. A system needs to be implemented in the prosecutor's office for keeping track of the necessary details of the domestic violence case. This system will need to complement the law enforcement and system response or policies implemented in your jurisdiction.

Crucial evidence such as 9-1-1 tapes, medical records, original and follow up photographs, complete witness interviews often get overlooked as the case proceeds through the system. The victim's location or her position on the case needs to be incorporated in preparing the case for trial. This type of evidence and victim information is vital to the successful prosecution of domestic violence cases, especially without victim participation.

The key to successful prosecution of domestic violence cases without victim participation is the ability to prove the case with evidence that is not dependent on the victim. Many prosecutors have said that homicide cases are proven every day in America without victim participation. Although this is a somewhat morbid analysis the analogy to the prosecution of domestic violence cases is appropriate. The same techniques can be successfully applied to the prosecution of domestic violence cases. Unfortunately it is not realistic to expect the prosecutor's office to give the same amount of attention to domestic violence cases as is given to homicide prosecutions.

The domestic violence case is proven without victim participation on a number of fronts. The actual "nuts & bolts" of prosecution requires the gathering of all possible evidence to prove the case without the victim's testimony. This is most often accomplished by the introduction of evidence through the use of hearsay exceptions. Evidence gathering alone, however is not enough. The training of law enforcement and coordination of efforts among police, shelter, and prosecutor is also necessary in order to have the type of evidence and information necessary to proceed to trial without the victim.

In preparing the domestic violence case for trial the prosecutor should develop a checklist, tracking system, or file system that ensures that the case will be ready for trial. A simple way of accomplishing this is the development of a different type of case file or case sheet that is specific to domestic violence cases. If conscientiously followed this type of system will enable to prosecutor to have a properly prepared case. [See Prosecution Case File Check List.]

Conclusion

Many prosecutors have struggled with the issue what is the best approach on domestic violence cases. It is clear that prosecution alone is not the answer. To be effective, prosecutors need to do more than just enact "no-drop" policies that mandate going forward regardless of

victim participation. Victim safety that is based upon an understanding of the victim's role must be the number one goal of not only the prosecution, but also the entire systems' response to domestic violence.

Domestic Violence Prosecution Case File Information Checklist

The following types of information and evidence will assist the prosecutor's office in preparing a domestic violence case for trial. The actual *format* of the information is not as important as the *substance* if gathered and noted regularly in the prosecutor's case file.

- ✓ **Standard Case Information**
 - ✓ **Offense Date, Court Dates, Police Agency, Charge Issued, Etc.**
- ✓ **Defendant Information**
 - ✓ **Prior Contact with System, Domestic Violence Incidents & Protection Orders**
 - ✓ **Relationship to the Victim**
 - ✓ **Bond Factors [Lethality Indicators]**
- ✓ **Victim Contact Information**
 - ✓ **Secure Message Phone Number**
 - ✓ **Advocate/Shelter Referral**
 - ✓ **Note Whether Victim is Reluctant**
- ✓ **Names**
 - ✓ **Police/Prosecution Interviews?**
 - ✓ **Follow Up Interview?**
 - ✓ **Subpoenaed?**
- ✓ **Type of Abuse?**
 - ✓ **Serious Injury/Medical Treatment or Hospitalization?**
 - ✓ **Slapping Objects Thrown, Beaten up, Kicking/Punching?**
 - ✓ **Weapon Used?**
 - ✓ **Threats?**
- ✓ **Other Witnesses & Children* Witnesses?**
- ✓ **Medical Treatment?**
 - ✓ **Medical Release Signed?**
 - ✓ **Medical Records Received?**
 - ✓ **Medical Witnesses?**
- Names, Contact Numbers, Subpoenas?**
- ✓ **Call to 9-1-1?**
 - ✓ **Tape Ordered?**
 - ✓ **Tape Received?**

Domestic Violence Prosecution Case File Information Checklist-Continued

- ✓ **Photographs?**
 - ✓ **Victim?**
 - ✓ **Follow up Photographs of Injuries?**
 - ✓ **Scene?**
 - ✓ **Children?***
 - ✓ **Defendant?**
- ✓ **Case Notes**
- ✓ **Witness & Exhibit List**
- ✓ **Motions & Pleadings**
- ✓ **Plea Offer/Agreement**
- ✓ **Dismissal-Reason?**
- ✓ **Trial Date**
 - ✓ **Verdict**
 - ✓ **Notes**
- ✓ **Sentence Detail**

***NOTE:** It is important for individuals who work with children who are victims of domestic violence to understand the impact the criminal justice system response can have on a child. It is easy to overlook the needs of children who are witnesses in the rush to get the “facts.” Individuals who work with children should have training or experience in how best to approach the child witnesses of domestic violence. Many jurisdictions make it standard practice to take photographs of children at the scene of a domestic violence incident. As a prosecutor this can be very powerful evidence. This practice may have a devastating impact on the child. It is important to not put the child in an adversary position or to re-victimize the child.