



Chapter 5

Prosecuting Attorney

PROSECUTING ATTORNEY—CHARGING DECISIONS

FRAMEWORK: CHARGING DECISIONS IN DOMESTIC VIOLENCE-RELATED CRIMES

Prosecutors play a key role in the Blueprint approach to intervention. They are in a central position to integrate the foundational principles into the resolution of every case. Because they have broad discretion in deciding whether and what to charge in any particular case, they hold the key to applying the principle of adjusting the response to severity and context.¹ In that same capacity they are best positioned to act affirmatively to avoid unintended consequences of state intervention. Every court appearance affords the prosecutor the opportunity to make the violence visible and to send powerful messages to victims and offenders.

In every case, a prosecutor must evaluate the likelihood of conviction. At the same time, a prosecutor is charged to act in service to justice rather than to achieving convictions.² Seeking justice in domestic abuse-related cases includes weighing the goals of victim safety and offender accountability and rehabilitation. Domestic violence cases introduce several additional factors to consider in exercising the discretion to charge, including: (1) the history and context of violence between the defendant and the victim; (2) the seriousness of injuries and/or the level of fear expressed by the victim; (3) ways in which children have been used as part of a pattern of abuse and violence; and (4) the possible negative or beneficial impact of aggressive pursuit of convictions and enhancement or the impact of less aggressive approaches to a case.³ The standard for charging varies across jurisdictions along a continuum from probable cause to substantial likelihood of success at trial. When evaluating domestic violence-related cases that present a high risk of harm or lethality to the victim, a prosecutor may charge a case in the absence of optimal facts or evidence and request additional investigation.

In any criminal case, the decision whether to charge and what to charge depends heavily on the information gathered by law enforcement's initial response and evidence-gathering and subsequent follow-up investigation. The more closely prosecutors and law enforcement are linked, the more likely it is there will be

sufficient information available to prosecutors to make timely decisions under deadlines for charging or releasing a suspect.⁴ In many domestic violence cases, sure and swift consequences are the most effective way to reduce further abuse. Prosecutors can contribute to that deterrence by issuing the highest level charge possible within the framework of ethical practice and the goals of victim safety and offender accountability and rehabilitation.

Most domestic violence cases coming to the attention of the criminal justice system are part of an ongoing pattern of intimidation, coercion, and violence (i.e., battering) that began prior to the specific incident and arrest that brought the case to the prosecutor's office.⁵ While most criminal domestic violence cases do involve this pattern of abuse, some cases are clear exceptions requiring different intervention approaches. Offenders who are mentally ill and use a more generalized, less targeted form of violence, are not deterred by the same interventions as a batterer. While many batterers are also addicted to alcohol or drugs and will use violence regardless of their dependency status, some offenders only use violence when under the influence and do not engage in a pattern of coercion. They can be stopped by discontinuing the substance abuse. A final exception involves cases in which the victim of ongoing abuse uses violence against the abuser. These cases involving victims/defendants are addressed throughout the Blueprint and are also discussed at length in *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*.

In cases of battering (ongoing pattern of coercion, intimidation and violence), the violence is likely to continue beyond closure of that specific case, particularly if there is no coordinated, interagency response. It may take repeated interventions to control the behavior of a defendant who is engaging in ongoing intimidation, coercion, and violence. Each intervention should be seen as part of a continuing effort to contain the abuser's violence. Most victims of domestic violence try multiple times to leave the relationship before successfully freeing themselves. Some victims live with abusers because the alternatives for them and their children upon leaving are bleaker and more precarious to their overall well-being than conditions in the relationship.⁶ As a result, prosecutors will often be working with a victim who is entrapped in the relationship.

Many victims of battering face intense pressure to oppose prosecution,⁷ whether or not they want the criminal legal system to impose consequences for the harm they have experienced. The fundamental purpose of battering, which characterizes the majority of domestic violence criminal cases, is to control what

the victim says, thinks, feels, and does.⁸ Victims are rarely in a position to 'tell all' and cooperation with interveners often creates concerns for them⁹ and has complex and dangerous implications. Prosecutors can work in collaboration with victims in ways that acknowledge that reality, minimize the victim's need to confront the offender,¹⁰ and protect victims from retaliation (see sample policy in supplemental materials on when to compel a victim to testify).

Prosecution should be centered on victim safety, but not be victim-dependent. The Crawford case and its progeny make it critical that prosecutors approach domestic violence cases and direct evidence-gathering in ways that minimize dependence on the victim, maximize other sources of evidence, and stay mindful of intimidation and coercion directed at victims to prevent their participation in the prosecution process. See *Appendix 5A: Training Memo—Implications of Crawford and Davis for Prosecution of Domestic Abuse Cases*.

In the past decade, many prosecutors have adopted "evidence-based prosecution"—building a case with multiple sources of evidence that reduces reliance on the victim's participation in the case. An evidence-based approach that builds on as many non-victim sources as possible, however, does not mean that a prosecutor assumes at the charging stage that the victim will be unavailable to testify and thus declines the case as unwinnable. Prosecutors should not assume, for the purpose of charging, that the victim will be unavailable. Nor should the victim's testimony, when obtainable, be discounted. The uncorroborated testimony of an available victim may be sufficient to proceed with the case.

Pursuing the widest range of charges supported by probable cause, as described in these policies and protocols, can provide avenues for sanctioning and supervising domestic violence offenders that are less reliant on direct victim testimony: for example, charges stemming from a defendant's actions after officers arrive at the scene,¹¹ either directed at officers or exhibited in front of officers, engaging in witness tampering through calls from the jail or being in possession of firearms in violation of the law. Such behavior demonstrates the defendant's willingness to continue dangerous or abusive behavior even when independent authority figures are present or the defendant is confined. Charging such crimes offers the potential to utilize law enforcement witnesses, which may lessen the need for the victim to testify. Thorough attention to the range of possible charges can also help illuminate crimes of strangulation and stalking. Because stalking is a patterned crime and strangulation does not always manifest

visible injuries, they can be easy to overlook.¹² Both are markers of serious danger to the victim¹³ (see *Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases* and *Appendix 1B: Training Memo—Risk and Dangerousness*).

Effective prosecution requires strong linkages between prosecutors and law enforcement in order to produce thorough investigations, reports and evidence-collection that clearly substantiate each charge. Multiple charges must not be pursued as a form of harassment against a particular defendant, however, but as a legitimate means of strengthening public safety and accountability for the harm done. There are times when charging misdemeanor crimes along with one or more felony crimes can weaken a prosecutor's case by giving the defense attorney and jury the opportunity for a compromise verdict. Prosecutors must consider the possibility of lesser charges having this effect in some cases.

While the approach of charging all crimes supported by the evidence generally enhances victim safety and offender accountability, there may be situations where safety considerations and justice require a more limited range of charges, particularly in responding to defendants who are victims of ongoing abuse. In prosecuting cases involving victims of ongoing abuse who have used illegal violence against their abusers, the prosecutor must consider the safety needs of both the victim of the immediate offense and the defendant in the case.

Maximizing safety for a defendant who is a victim of ongoing domestic violence (or "**victim defendant**") requires careful appraisal of the ways in which multiple charges may adversely affect her or his safety. Pursuing multiple charges may unintentionally reinforce the batterer's control via such actions as threats to make reports to law enforcement or probation or to use the charges against the defendant to influence child custody decisions.¹⁴

Law enforcement discourages dual arrests and directs officers to arrest the predominant aggressor when both parties use illegal violence. When officers are skilled in making self-defense determinations and apply the predominant aggressor arrest policy properly, most victim defendants are screened out of the system.¹⁵ Prosecutors may decide that a case was more likely than not self-defense and further screen victims of abuse from the criminal justice system.

Nevertheless, cases will be presented to the prosecutor when the victim defendant was clearly the predominant or only aggressor in the instant offense. Such cases present prosecutors with a number of complex questions in determining who should be protected from whom and in what ways. Criminal

justice policy reforms, such as mandatory arrest and no-drop prosecution, do not preclude prosecutors from exercising judgment and discretion. Rather, fairness requires that prosecutors continue to make distinctions when particular factors are present in order to ensure a just approach that meets the goals of victim safety and offender accountability and rehabilitation.

The prosecutor's decision to charge can send powerful messages of help and accountability to victims and defendants on behalf of a community that recognizes domestic violence as serious and unacceptable.

To victims: *You have the right to live without violence and no one has the right to abuse or hurt you. The criminal justice system will intervene to stop the violence and place controls on abusive behavior. If you are a victim of ongoing abuse and have used illegal violence in response, that violence is not acceptable; there are alternatives and we will act in ways that maximize your safety and connect you with those alternatives.*

To defendants who have engaged in intimidation, coercion, and violence toward an intimate partner: *You are not entitled to abuse another person; the criminal justice system will hold you accountable and there will be consequences for the harm you have caused, along with opportunities for you to change your behavior.*

POLICY: CHARGING DECISIONS

These policies and protocols are generally applicable to domestic violence cases. However, there may be instances in which, due to the circumstances and facts of the case, another course of action may be required to better serve the goals of victim safety, community safety, and offender accountability. All of these policies and protocols should be reviewed by supervisory personnel on a yearly basis. Every agency within the criminal justice system, including the Prosecuting Attorney's Office, should have a comprehensive, robust, and effective language access plan that is widely distributed throughout the agency as well as regular training and oversight.

In addition to adhering to general agency policy, prosecutors will take the following actions in making decisions about whether to charge and what to charge in domestic abuse-related cases, using the protocols and training memos referenced and included as part of this policy.

1. Utilize the widest possible range of information sources, including the History of Domestic Violence Summary (see *Appendix 1E: History of Domestic Violence Summary*), when available and request additional evidence as needed to evaluate the case and make the charging decision, in accordance with **Protocol 1: Charging Decisions**.
2. Review the following considerations as they apply to the circumstances of the case:
 - a. History and context of violence between the parties involved (see *Appendix 1E: History of Domestic Violence Summary*)
 - b. Seriousness of injuries and/or level of fear expressed by the parties
 - c. Use of children as part of the pattern of abuse
 - d. Consequences of no intervention or less aggressive intervention on the potential lethality in the case
 - e. Whether in cases involving people with Limited English Proficiency (LEP) or who are Deaf or Hard of Hearing (HOH) law enforcement obtained the assistance of interpreters at the scene and in follow-up investigations to ensure accuracy of the statements of the parties or witnesses (See *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*).
3. File charges that reflect all crimes committed in the case as supported by the evidence, except where considerations of victim safety, including the safety of a victim defendant would warrant otherwise.
 - a. If the defendant is engaging in a patterned use of intimidation, coercion, and violence toward the victim, file all charges that will likely result in a disposition that places controls on the defendant's behavior, holds the defendant accountable for the behavior, enhances safety of the victim, and allows for the possibility of rehabilitation, as appropriate.
 - Charging documents should include specific information about the use or attempted use of force by the defendant as well as a description of the relationship with the victim, including elements required for federal firearms prohibition.
 - b. If the defendant is a victim of ongoing domestic violence ("victim defendant"), consider whether charging the widest range of crimes or the most severe crime furthers the goal of enhancing the victim/defendant's

safety or whether, given the circumstances of the case, less severe charges or no charges should be brought.

4. Approach each case with an understanding that the victim may be unavailable to testify while recognizing that at the charging stage the availability of victim testimony may not be known.
 - a. Request that evidence-gathering be done in a way that minimizes dependence on the victim and maximizes the sources of evidence.
 - b. Stay alert to intimidation and coercion directed at victims to prevent participation in the prosecution process.
5. In setting priorities, give precedence to those cases appearing to present the greatest risk, based on the evidence and the victim's responses to risk questions.
 - a. Prioritize cases where the offender is out of custody or gone-on-arrival (GOA) according to the same risk evaluation as in-custody cases.
 - b. Charge GOA cases within 30 days even if an interview with the suspect has not been obtained.
 - c. In those cases where the defendant is not in custody and there is high risk, if the prosecutor determines that charges should be filed, prosecutors will request a warrant.
6. In evaluating cases for charging, pay particular attention to charges that may have been historically underutilized but are characteristic of domestic violence cases, such as:
 - a. Illegal behavior that occurs after officers arrive on the scene
 - b. Prohibited persons in possession of firearms
 - c. Strangulation
 - d. Harassment/Stalking
 - e. Terroristic threats
 - f. Sexually aggressive behavior
 - g. Pattern of harassing conduct
 - h. Witness tampering

7. Evaluate prior recent incidents to determine whether the offender engaged in prior criminal conduct against the same victim. If so, consider charging those incidents where there is sufficient evidence. In cases involving victims or defendants with LEP or who are Deaf/HOH, consider whether language access was provided in previous incidents to evaluate the accuracy and clarity of the information provided and the appropriateness of resulting decisions.
8. Evaluate prior convictions to determine if they allow enhancement of the current offense with additional penalties.
 - a. Where possible and appropriate, use the enhancement to support more flexibility in negotiating a resolution that serves both victim safety and offender accountability.
 - b. Enhancements, even when available, should not be utilized automatically. They are intended to further the goals of offender accountability, victim safety, and justice. Avoid using enhancement when those goals are not met.
9. In the following circumstances, transfer the case immediately to the appropriate prosecuting authority and promptly inform law enforcement of the case transfer and reason for the transfer:
 - a. If prosecutors at the felony level determine not to charge a case and misdemeanor/gross misdemeanor charges may be possible
 - b. If prosecutors at the misdemeanor/gross misdemeanor level determine that the case may be appropriate for felony-level charges
10. Work in collaboration with victims in accordance with **Protocol 2: Victim Engagement Guidelines**.
11. Be responsive and provide information to community domestic violence advocates' inquiries and consult with community-based domestic violence advocates as consented to by the victim.
12. Inform the investigator, the victim, and others designated in **Protocol 1: Charging Decisions** once a final determination has been made whether or not to charge the case. Communicate in the victim's preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.
13. Supervising prosecutor will take the following actions to implement and maintain this policy and related procedures:

- a. Review three files per prosecutor semiannually for policy and protocol compliance. Include periodic review of cases involving people from marginalized communities, including people of color, LGBTQ community members, and people with LEP or who are Deaf/HOH.
- b. Meet quarterly with law enforcement, the supervisor of the victim/witness program, the supervising attorney of the other prosecuting jurisdictions, and community-based advocates to discuss cases that have been declined and the thoroughness of investigations.
- c. Be available to meet with law enforcement as requested to review individual cases that have been declined for prosecution.

The following appendices are included as a part of the charging decisions policy:

- *Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases*
- *Appendix 1B: Training Memo—Risk and Dangerousness*
- *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*
- *Appendix 1D: History of Domestic Violence Summary Instructions and Sample*
- *Appendix 1E: History of Domestic Violence Summary*
- *Appendix 1G: Training Memo: Enhancing a Coordinated Response to the Intersection of Domestic Violence Crimes and Access to Firearms*
- *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*
- *Appendix 3I: Training Memo—How a Defense Attorney Reads a Police Report*
- *Appendix 3J: Training Memo—How a Prosecutor Reads a Police Report*
- *Appendix 5A: Training Memo—Implications of Crawford and Davis for Prosecution of Domestic Abuse Cases*
- *Appendix 5B: Training Memo—The Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Cases*

- *Appendix 5C: Training Memo—Use of Expert Witnesses in Domestic Violence Cases*
- *Appendix 5D: Sample Policy Language—When to Compel a Victim to Testify*
- *Appendix 5F: Training Memo—Addressing Uncharged Sexual Abuse in Domestic Abuse Cases*
- *Appendix 8A: Training Memo—Use of No-Contact Orders in Domestic Violence Criminal Cases*

See the Blueprint Supplement for appendices referenced in the policy and protocols. All training memos are based on Minnesota law. Other jurisdictions should make modifications as necessary.

Protocol 1: Charging Decisions

1. Charging decisions should further the multiple goals of controlling an offender's behavior, holding the offender accountable for his or her behavior, providing rehabilitation services to appropriate offenders, deterring future violence, and enhancing the safety of victims of the offense and possible future victims of the defendant.
2. Approach domestic violence–related cases in ways that minimize dependence on the victim and maximize other sources of information. Stay mindful of intimidation and coercion directed at victims to prevent participation in prosecution.
 - a. Know the implications of the Crawford and Davis decisions and strategies to maximize non-victim sources of information in light of those decisions.
 - b. Know the doctrine of forfeiture by wrong-doing and strategies for applying it in domestic violence cases, including training law enforcement on needed evidence gathering.
 - c. Expand the focus of attention to illegal behavior after officers' arrival.
 - d. Develop access to multiple sources of information in addition to the victim.

- e. Hold quarterly meetings with law enforcement, the supervisor of the victim-witness program, the supervising prosecutors from relevant prosecutorial jurisdictions, and community-based advocates to review the thoroughness of investigations, discuss declined cases, and address any concerns that either investigators or prosecutors identify as needing resolution. Include periodic review of cases involving people from marginalized communities, including people of color, LGBTQ community members, and people with LEP or who are Deaf/HOH.
 - f. Periodically, select five cases at random and complete a case review with law enforcement, supervising prosecutor, community-based advocates, and the law enforcement officer and prosecutor responsible for each reviewed case.
 - g. Work with local law enforcement to train law enforcement on relevant legal issues and investigation techniques that support minimizing dependence on victims of domestic violence.
3. Use the following sources of information as available and provided by law enforcement to evaluate the case and decide whether and what to charge:
- a. Law enforcement reports of the current offense
 - b. Past law enforcement reports involving this suspect
 - c. Summary of the presentence investigation on offenders previously convicted (see *Appendix 1D: History of Domestic Violence Summary Instructions and Sample*)
 - d. Evidence collected at scene, e.g., photographs, firearms and other weapons, broken phones, ripped clothing, other damaged property
 - e. 911 tapes and CAD reports
 - f. Jail phone call recordings or other related documents
 - g. Past and current protective orders or orders for protection (hereinafter OFP) and harassment restraining orders (hereinafter HRO) pleadings, including affidavits
 - h. E-mail, voice mail, text messages, letters, and other communication
 - i. Arrests and convictions, including all available data bases, and firearms and concealed carry permit registries

- j. Victim's responses to dangerousness or risk assessment questions in current and past law enforcement reports
 - k. Communication with victim, either direct or (with victim consent) via community advocate or victim/witness specialist
 - l. Defendant's behavioral history in relation to possible harassment/stalking charges
 - m. Medical records
 - n. Family court files
4. Re-evaluate the case for additional charges or amend charges as additional evidence is gathered and developed.
- a. In order to meet legally imposed deadlines, all information may not be available at the time of initial charging.
 - b. Additional charges could include harassment/stalking, strangulation, or enhancement of charges.
5. Request further investigation rather than decline cases that might be charged with additional information.
- a. Focus especially on additional investigation related to charging strangulation, harassment, stalking, and terroristic threats.
 - b. In requests to law enforcement, specify what additional information is needed, including obtaining information from other jurisdictions.
6. Evaluate the nature and history of violence between the parties involved in the case to understand the context of the violence, fully inform prosecutorial decision-making, and advance the goals of victim safety and offender accountability and rehabilitation. Ask:
- a. To what extent is there a pattern of ongoing intimidation, coercion, and violence?
 - b. Who is perpetrating any such pattern, and against whom?
 - c. What is the severity of the violence?
 - d. What is the frequency of the violence?
7. Evaluate the seriousness of injuries and/or level of fear expressed by the parties. Ask:

- a. Who has been injured and how?
 - b. Who is afraid of whom and in what ways? Note: include fear of losing children, homelessness, loss of family, job, etc.
 - c. What kind of threats have been made or coercion used to dissuade the victim from participating in the prosecution?
 - d. Who is most vulnerable to ongoing intimidation, coercion, and violence?
- 8.** If children are involved, evaluate whether they have been present, were themselves assaulted, or were used as an instrument of abuse by the party engaging in ongoing intimidation, coercion, and violence against the other. Ask:
- a. Has the abusive party physically harmed the children? If so, in what ways?
 - b. Has the victim been threatened that the children will be harmed? If so, in what ways?
 - c. What is the status of any family court action?
 - d. Does the victim fear that the abuser will take the children in retaliation for cooperation?
 - e. Was the victim assaulted during pregnancy or shortly after giving birth?
- 9.** If the defendant is engaging in a patterned use of intimidation, coercion, and violence toward the victim in this case, file charges that will likely result in a disposition that will place controls on the defendant's behavior, enhance victim safety, and allow for the possibility of rehabilitation, as appropriate.
- a. In cases where potential charges include a non-domestic-related felony and a domestic-related misdemeanor that is not pursued, discuss the domestic-related elements of the case with the probation presentence investigation (PSI) writer, either directly or through the victim witness specialist to ensure that recommendations for conditions of probation consider adequate domestic violence-related programming.
- 10.** If the defendant is a victim of ongoing domestic violence (victim defendant), use a course of action that will help place controls on the person's continued use of violence without making her or him more vulnerable to ongoing battering or abuse. Use the options presented in *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*.

Specifically, consider whether charging the widest range or most severe crime furthers the goal of enhancing victim safety or whether, given the circumstances of the case, charges that do not trigger the full range of domestic violence consequences or filing no charges may be appropriate.

- 11.** File charges that reflect the broad range of crimes committed in the case, except where considerations of victim safety, including the safety of victim defendants, warrant otherwise. As it applies to the circumstances of the case, consider the impact of no intervention or less aggressive intervention on potential risk and lethality as well as charging all crimes committed.
 - a. Evaluate the risk and lethality factors evident or suggested in the case (see Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases and Appendix 1B: Training Memo—Risk and Dangerousness).
 - b. Assess the possible consequences or benefits of charging all crimes, filing fewer charges or deciding not to charge the case.
- 12.** Consider but do not limit charges to the following:
 - a. Interference with emergency call
 - b. Harassment/stalking
 - c. Violation of an OFP/HRO or a domestic abuse no contact order (hereinafter DANCO) if available in your jurisdiction
 - d. Strangulation
 - e. Assaults on witnesses
 - f. Terroristic threats
 - g. Disorderly conduct
 - h. Criminal damage to property
 - i. Assaults on responding officers
 - j. Witness tampering
 - k. Sexual assault
 - l. Burglary
 - m. Trespassing
 - n. Depriving another of custodial or parental rights
 - o. Coercion

- p. Identity theft
 - q. Interference with privacy
 - r. Animal abuse
 - s. Prohibited person in possession of a firearm
- 13.** Prepare charging documents to reflect elements required for firearm prohibition, specifically use or attempted use of force and qualifying relationship between the parties.
- 14.** When a decision is made to decline charges, promptly communicate that decision to law enforcement. If the law enforcement officer believes there is merit to the case, discuss the case with the officer to determine if additional evidence can be gathered to support a charge.
- 15.** Make information regarding the charging decision available to the following individuals and agencies, as applicable:
- a. Arraignment attorney
 - b. Victim/witness personnel
 - c. Victim and community-based victim advocate
 - Communicate in the victim's preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.
 - Children and other family members and friends of the victim are not qualified interpreters. Avoid using an advocate as interpreter.
 - Provide written notification in the victim's preferred language. Provide sight translation to those with LEP if translated versions are not available in the victim's preferred language. Do not assume Deaf/HOH individuals are fluent in written English. (See *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*)
 - d. Pre-trial release personnel
 - e. Investigator
 - f. Arresting officer (in cases where there is no further investigation)

- g. Probation officer (if defendant is currently on probation)
- 16. In cases where both parties have used illegal violence, neither party has engaged in self- defense, and the predominant aggressor has been arrested, review the case and consider whether to charge the second party in addition to the predominant aggressor.

Protocol 2: Victim Engagement Guidelines

1. Work in collaboration with victims, cognizant of the principles of “continuing engagement”:
 - a. Communicate in the victim’s preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.
 - b. Minimize the victim’s need to confront the offender.
 - c. When using information provided by the victim, attempt to protect her or him from retaliation.
 - d. Treat each interaction with the victim as an attempt to build collaboration over multiple criminal justice system interventions.
 - e. Be mindful of the complex and often dangerous implications of a victim’s collaboration with interveners.
 - f. Be aware that the fundamental purpose of battering, which characterizes the majority of domestic violence criminal cases, is to control what the victim says, thinks, feels, and does. Victims are rarely in a position to “tell all,” although they may do so in unguarded moments. Take great care to not endanger victims with what they have shared about their lives subject to constitutional constraints and rules of discovery.
 - g. Engage in dialogue with the victim, thereby avoiding inadvertently treating her or him as simply an information source.
 - h. In order to avoid unintentionally replicating or reinforcing the actions of the abuser, offer a clear alternative to messages that the victim is crazy, at fault, unbelievable, and unable to make decisions and that the abuser is unstoppable.

2. Act in ways that prioritize safety and respect a victim's precarious circumstances and fear of the offender's aggression. The prosecutor or the victim/witness specialist acting on the prosecutor's behalf should:
 - a. Provide information about likely pre-trial release conditions and answer the victim's questions.
 - b. Consider requests for no contact order individually. (See *Appendix 8A: Training Memo—Use of No-Contact Orders in Domestic Violence Criminal Cases*).
 - Request a no-contact order upon request of the victim and in the absence of information about the victim's desires related to contact.
 - If the victim requests contact or opposes the state's request for no-contact, explore and consider the victim's reasons for doing so:
 - Determine whether a prolonged no-contact order may result in hardship for the victim.
 - Attempt to determine whether the victim's position is the result of intimidation or coercion by the defendant.
 - Consider honoring the victim's request for contact or tailoring the no-contact order to maximize its benefits and minimize its burdens for the victim.
 - c. When a defendant is not held in custody, request pre-trial supervision when there is indication of escalating violence or a serious concern by a victim or interagency partners about the probability of continued harassment and harm.
 - d. Answer questions about the risks and benefits of testifying and the risks and benefits of not testifying.
 - e. When talking directly with victims do so accompanied by an investigator, paralegal, or other third party. Having a third party present resolves the concern of the prosecutor becoming a witness in the case.

NOTE: Because of the nature of the relationship with the victim, a community-based advocate would not be an appropriate third party although it is appropriate to have a community advocate present as a

support person upon the request of the victim. A community-based advocate should not be relied upon to provide interpreter services. (See *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*)

- f. Do not threaten to or place a victim in custody to ensure witness availability. However, in some extremely limited circumstances, it may be advisable to send a patrol officer or investigator to the victim's residence to facilitate the victim's appearance at trial. In very rare cases, if the community or children are at high risk of serious or lethal harm, consider requesting a warrant, keeping in mind that there is a reasonable likelihood that the perpetrator may use severe violence on the victim in retaliation for testifying. A warrant may not be requested unless the prosecutor has obtained the approval of the supervising prosecutor.

NOTE: In almost every case, requesting a warrant to force a victim's testimony will be counterproductive and inconsistent with Blueprint victim engagement guidelines. For a more detailed explanation of the policies and procedures to follow concerning the issuance of a witness warrant for domestic violence victims see *Appendix 5D: Sample Policy Language—When to Compel a Victim to Testify*.

3. Respond to domestic violence crimes in ways that are victim safety-centered but not victim-dependent.
 - a. Approach each case with an understanding that the victim may be unavailable to testify or may recant.
 - b. Utilize all available sources of evidence that support charges independent of a victim's direct testimony.
 - c. Seek charges stemming from a defendant's actions after officers' arrival on the scene, witness tampering from jail, prohibited person in possession of a firearm and violations of pre-trial release conditions.
 - d. If requested by the victim or victim's advocate, ask the court to order that the victim's address and phone number remain confidential or be restricted to defendant's attorney only.
 - e. Consider whether to ask the court to order the suspect to surrender firearms, based on information in the investigative file, the suspect's history and conversations with the victim.

- f. Protect victims from retaliation because of their participation in prosecution.
- g. Pursue possible charges that can be prosecuted independent of a victim's direct testimony.
- h. Emphasize at every opportunity that it is the prosecutor's decision on behalf of the community and the state to pursue charges, and not the victim's decision.
- i. Stay alert to intimidation and coercion directed at victims to prevent their participation.
- j. Be prepared to take prompt action for witness tampering by the defendant and utilize the doctrine of forfeiture by wrongdoing (see *Appendix 5B: Training Memo—The Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Cases*).

As many as half

of domestic violence victims may be threatened with retaliation for cooperation with prosecutors.

— *R. Davis, et al. (1990)*

PROSECUTING ATTORNEY—BAIL AND PRE-TRIAL RELEASE

FRAMEWORK: BAIL AND PRE-TRIAL RELEASE RECOMMENDATIONS IN DOMESTIC VIOLENCE-RELATED CRIMES

Courts have two primary goals in setting the conditions under which a defendant will be released prior to trial: (1) ensure that the defendant will make future court appearances and (2) protect the community, the alleged victim, and any other person. Because of the unique circumstances of domestic violence-related cases, in which victims may be especially vulnerable to coercion and intimidation, the goal of protecting victims requires specific attention to victim safety and the defendant's risk of causing further harm to the victim.¹⁶ Many jurisdictions require that both goals be taken into account when setting bail and pre-trial release conditions. For example, Minnesota law specifically requires that the judge determines whether the release of someone arrested for domestic abuse-related offenses poses a threat to the alleged victim, another family or household member, or public safety.¹⁷ Minn. Stat. § 629.72 requires this determination when setting conditions of release for an arrest for domestic abuse, harassment, or violations of an order for protection or a domestic abuse no-contact order.

Building sound pre-trial release practices involves paying increased attention to safety at the front end of the criminal justice process,¹⁸ both in the specific conditions of release and through the wider interagency response. Elements in the interagency response include expanding victim/witness support, expediting access to orders for protection (which can provide broader, longer-lasting restrictions than pre-trial release conditions alone), prompt revocation of pre-trial release for new acts or threats of violence, and aggressively pursuing witness tampering and intimidation.

In an interagency effort to establish and enforce specific conditions of release for domestic violence crimes, the following elements, as part of an interagency response, involving the pre-trial release agency and the court, as well as the prosecutor's office, reinforce victim and community safety and address the high rate of re-abuse in domestic violence cases.

- Contact a victim as soon as possible, in ways that respect her or his fear and circumstances.

Communicate in the victim's preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.

- Determine whether the victim is afraid and if so, in what ways.
- Follow up on responses to the risk questions documented in the patrol report and in the investigators report.
- Tell the victim that in domestic abuse related cases the prosecutor generally requests a no-contact order to shield the victim from retaliation or intimidation from the suspect.
- Ask if a no-contact order might have some negative consequences and probe to fully understand those consequences.
- Ask about changes in injuries or new symptoms from the incident.
- Ask about the defendant's access to, use of and experience with firearms.
- Provide information about likely pre-trial conditions and answer the victim's questions.
- Use all available sources of background information (e.g., patrol report, criminal history records, History of Domestic Violence Summary, firearms and concealed carry registries, and order for protection records) to ascertain the danger that a defendant poses to a victim.
 - When reviewing reports involving people with LEP or who are Deaf/HOH, determine whether interviews were conducted with the use of a qualified interpreter to evaluate the accuracy and clarity of the information provided and the appropriateness of resulting decisions.
- Review responses to risk assessment questions and results of risk assessment tools when considering appropriate conditions of release.
- Consider requesting an order for surrender of firearms to protect the victim and the community.
- Put conditions of release in writing and provide a copy to the victim as soon as possible. Provide written materials in the victim's preferred language. Provide sight translation to those with LEP if translated versions are not available in the victim's preferred language. Do not assume Deaf/HOH individuals are fluent in written English.

- Enter pre-trial release conditions into law enforcement information systems and notify local agencies.
- If the victim requests contact, consider each request on an individual basis, evaluating the risk to the victim if a no contact order is not issued and the difficulty faced by the victim if it is ordered. In most cases, request a no-contact order.
- Take prompt action on violations of release conditions.
- Require pre-trial supervision of defendants where there is indication of escalating violence or serious concern by a victim or interagency partners about the probability of continued harassment and harm to the victim or children.
- Request that bail be set at an appropriate amount to not only ensure the defendant's appearance but to enhance the safety of the victim and the public.

Prosecutors are in a distinct position to articulate the nature of any threat and the related safety needs of the victim and others to the court and to make recommendations for conditions of pre-trial release that fit the circumstances of the case. They also have a distinct role in establishing and reinforcing an interagency response to develop guidelines for bail and conditions of release in domestic abuse cases. Additionally, the prosecutor plays a key role in ensuring that violations of conditions of release are handled promptly and that the consequences for violations are sure and swift.

POLICY: BAIL AND PRE-TRIAL RELEASE RECOMMENDATIONS

These policies and protocols are generally applicable to domestic violence cases. However, there may be instances in which, due to the circumstances and facts of the case, another course of action may be required to better serve the goals of victim safety, community safety, and offender accountability. All of these policies and protocols should be reviewed by supervisory personnel on a yearly basis.

In addition to adhering to general agency policies, including a general language access policy, prosecutors will take the following actions in recommending conditions of bail and pre-trial release in domestic abuse-related cases, using the protocols and appendices referenced and included as part of this policy.

4. Utilize the widest possible range of sources of information to determine bail and pre-trial release conditions that will best meet the safety needs of the victim and others, in accordance with **Protocol 3: Bail and Pretrial Release Recommendations**.
 - a. Investigate and document the suspect's access to firearms including firearm and concealed carry registries.
 - b. Determine whether the defendant is required to surrender firearms pursuant to tribal, state or federal law.
5. Seek and consider input from the victim and/or the victim's community-based advocate to assist in determining the circumstances of the case, the context and severity of the offense, and the bail and pre-trial release conditions that are most likely to ensure the victim's safety and the safety of others involved and the public.
 - a. Recognize the importance of effective communication with victims, including communicating in the victim's preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.
 - b. Consider each no-contact order individually and avoid requesting a no-contact order automatically in every case (see *Appendix 8A: Training Memo—Use of No-Contact Orders in Domestic Violence Criminal Cases*). Request a no-contact order be issued upon request of the victim or when the prosecutor has no information about the victim's preference. If the victim wishes to have contact, consider the request keeping in mind that in some cases a no-contact order may result in hardship for the victim.
 - c. Consider the risk to the victim, if any, if a no contact order is not issued and the difficulty, if any, faced by the victim if it is ordered.
 - d. Work in collaboration with victims in accordance with **Protocol 2: Victim Engagement Guidelines**.
6. Use the factors included in **Protocol 3: Bail and Pretrial Release Recommendations** and *Appendix 5E: Guide to Bail Setting, Conditional Release and Enforcement* to determine the nature of the threat that the defendant presents to the victim and other persons and the related safety needs.

7. Make recommendations to the court for bail and conditions of pre-trial release that reflect the context and severity of the offense, the danger that the defendant poses, and the safety needs of the victim and the public, in accordance with **Protocol 3: Bail and Pretrial Release Recommendations**.
 - a. If there is information to strongly suggest that the defendant is engaging in an ongoing patterned use of intimidation, coercion, and violence toward the victim, consider the full range of conditions of release that will likely result in placing controls on the defendant's behavior and enhance victim safety during the pre-trial period, including surrender of firearms.
 - b. If the defendant reasonably appears to be the victim of ongoing domestic violence consider whether requesting the full range of conditions of release in domestic violence cases is appropriate. Utilizing *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*, consider whether more limited conditions will meet the goal of victim and public safety and prevent the defendant from becoming more vulnerable to abuse.
8. In recommending bail and pre-trial release conditions, describe in detail to the court the violence that has occurred in this incident, the history of violence between the parties, the danger posed by the suspect to the victim and others based on this incident, the responses to the risk questions in the law enforcement reports, and the history between the suspect and the victim.
9. Take prompt action upon notice of a defendant's violation of conditions of pre-trial release to ensure sure and swift consequences. If defendant's violation is an act of violence, threat of violence, coercion, intimidation, or presents an increased risk to the victim, consequences shall include but not be limited to, forfeiture of bail and revocation of conditions.
10. Unless undertaken by an interagency partner, keep the victim informed of bail and pre-trial release conditions and procedures for reporting violations. Communicate in the victim's preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.
11. Supervising prosecutors will conduct a quarterly review of a random sample of cases to ensure that bail amounts and conditions of pre-trial release account

for the context and severity of the offense, the danger that the defendant poses to the victim, and the safety needs of the victim and the public.

12. The review will also involve violations of conditions of bail to ensure that sure, swift and appropriate consequences for violations have been requested.

The following appendices are included as part of the bail and pre-trial release policy:

- *Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases*
- *Appendix 1B: Training Memo—Risk and Dangerousness*
- *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*
- *Appendix 1E: History of Domestic Violence Summary*
- *Appendix 1G: Training Memo: Enhancing a Coordinated Response to the Intersection of Domestic Violence Crimes and Access to Firearms*
- *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*
- *Appendix 5E: Guide to Bail Setting, Conditional Release and Enforcement*

See the Blueprint Supplement for appendices referenced in the policy and protocols. All training memos are based on Minnesota law. Other jurisdictions should make modifications as necessary.

Protocol 3: Bail and Pre-trial Release Recommendations

1. Use the following sources of information as available to determine bail and pre-trial release conditions that best meet the safety needs of the victim and others.
 - a. Law enforcement reports of the current offense
 - b. 911 tapes and CAD reports
 - c. Past law enforcement reports involving this defendant

- d. Portions of previous PSIs written on this offender [See *Appendix 1E: History of Domestic Violence Summary*]
 - e. Arrests and convictions, including firearm and concealed carry registries and all other available databases
 - f. Input from victim or victim's community-based advocate
 - g. Probation status and compliance
2. Consider the risk factors related to the current offense and past actions in determining the nature of the threat the defendant presents to the victim and other persons and the related safety needs (see *Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases* and *Appendix 5E: Guide to Bail Setting, Conditional Release and Enforcement*).

NOTE: Evaluating dangerousness to the alleged victim as a basis for setting bail and imposing certain conditions of release may generate controversy. The defense bar and some judicial officers might consider it inappropriate to inquire into these factors at the pre-trial stage since the defendant is presumed innocent and such inquiries might bias the court. However, it is now well recognized in policy and statute that in order to fashion conditions of release the judicial officer should take into account the safety of the community, the alleged victim, and any other person. See e.g., ABA Standard 10-1.2; Bail Reform Act of 1984, 18 USC §§ 3141-3150; Minn. Stat. § 629.72 (2006).

- a. Information obtained from domestic violence-specific risk assessment questions
- b. Severity of the assault, how frequent and how recent
- c. Serious injury in this or prior assaults
- d. History and nature of past violence toward this victim and others
- e. Whether the parties are recently separated
- f. Specific attention to strangulation and stalking
- g. Threats to harm the victim or the children
- h. Threats of homicide or suicide
- i. Intimidation of the victim if she/he seeks help
- j. Indicators of extreme jealousy, controlling behavior

- k. Sexual aggression and coercion
 - l. Violence towards pets
 - m. Criminal history and current probation status or other pending charges
 - n. Access to firearms and their use or threatened use
 - o. Current and past protection or harassment order, obtained by this or other victims
 - p. Excessive alcohol or drug use and its impact on defendant's actions
 - q. Mental health concerns and impact on defendant's actions
3. In recommending bail and pre-trial release conditions, describe to the court in detail the:
- a. Violence and coercion that has occurred in this incident
 - b. History of violence and coercion used by the defendant in this and other relationships
 - c. Danger posed by the suspect to the victim and others based on this incident
 - d. Responses to the risk questions in the law enforcement reports
 - e. History of abuse between the suspect and the victim
 - f. Defendant's access to or possession of a firearm, and whether the defendant is required to surrender firearms pursuant to tribal, state or federal law
4. Determine which standard and domestic violence-specific conditions of bail and pre-trial release best fit the circumstances of the case, the context and severity of the offense, the danger the defendant poses to the victim, and the safety needs of the victim and the public. Some risk factors and conditions to consider:

Misdemeanors and Gross Misdemeanors

Low Risk: Conditional release or lower bail; little or no supervision

- No injury or harm
- No history of abuse
- Victim credibly expresses no fear
- Little or no risk of future harm

- No criminal history

Misdemeanors, Gross Misdemeanors, and Felonies

High Risk: High bail & extensive conditions; close supervision

- Severe injury, harm, or extreme violence
- History of ongoing abuse and violence
- Likely risk of future harm
- Criminal history
- History of non-appearance in court

Conditions of pre-trial release in domestic abuse cases

Standard conditions:

- No act prohibited by state, federal, or local law, even if it is not charged as a crime or does not result in a criminal conviction
- Remain law-abiding
- Make all court appearances

Domestic abuse–specific conditions:

- No contact with victim or victim's family, direct or indirect, or through a third party (subject to considerations noted in the protocol)
- No contact with or appearance at the victim's residence, home, place of employment, school, or other designated locations
- If the parties live together, a provision permitting the defendant to return to the residence to obtain personal belongings only if accompanied by an officer
- Weekly in-person reporting to pre-trial supervision staff or supervising probation agent
- No firearms possession and/or surrender of firearms
- No use of alcohol or mood-altering chemicals not prescribed by a doctor
- Periodic alcohol and drug testing
- If applicable, contact with children to be supervised and defendant must obtain a family court order

- In stalking and other appropriate cases, restrictions on offender's movement and communication with or about the victim
- 5. Obtain and consider input provided by the victim or victim's community-based advocate to establish the following in relation to bail and pre-trial release recommendations:
 - a. Nature and impact of the current offense
 - b. Context and history of past violence
 - c. Consequences of imposing specific conditions of bail and pre-trial release, with particular attention to no-contact orders (as noted in number 6)
 - d. Conditions of bail and pre-trial release that are most likely to meet the victim's safety needs
- 6. Request a no-contact order upon request of the victim or if the victim's wishes are not known. If the victim requests contact, consider the following in making recommendations regarding no-contact orders:
 - a. Consider whether a no-contact order could impose significant hardship for the victim, particularly economic hardships which may increase risk given the victim's particular life circumstances.
 - b. Obtain information from the victim about the implications of a no-contact order for the victim and her or his family.
 - c. Evaluate each case in the context and totality of the circumstances involved, taking into account: victim opposition; offender intimidation; victim fear; economic impact; and dangerousness of the offender.
 - d. Consider options that allow contact under limited conditions in cases that do not involve high risk, the victim has requested contact, and there is no evidence of coercion. Such conditions might include:
 - Allow contact but prohibit assaultive, harassing, threatening or stalking behavior.
 - Impose active pre-trial supervision.
 - Request pre-trial conditions such as counseling, weapons restrictions, and random drug and alcohol testing.
 - Allow contact by e-mail, phone or only in public places.

- Request a time limitation on the no-contact order, e.g., until enrolled in and attending domestic abuse counseling.
 - Allow contact but exclude the offender from the victim's residence.
7. Attend the arraignment to ensure that the prosecutor's position on conditions of release is relayed to the judge.
 - a. Inform the judge when the prosecutor is requesting a no contact order over the objection of the victim.
 - b. Ensure the defendant is advised of conditions of release, including firearms prohibitions, both verbally and in writing.
 8. Unless undertaken by interagency partners, keep the victim informed of the status and enforcement of bail and pretrial release conditions. Communicate in the victim's preferred language and method of communication in accordance with agency policy and *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*.
 9. If defendant's violation is an act of violence, threat of violence, coercion, intimidation, or presents an increased risk to the victim, request forfeiture of bail and revocation of conditions.

PROSECUTING ATTORNEY—PLEA AGREEMENTS & SENTENCING

FRAMEWORK: NEGOTIATED PLEA AGREEMENTS AND SENTENCING RECOMMENDATIONS

Negotiated plea agreements and sentencing recommendations are critical to furthering the goals of enhancing victim safety, holding offenders accountable for their behavior with a sure and swift response, and providing opportunities for rehabilitation. Prosecutors are in a position to reach agreements and emphasize consequences that reflect the context and severity of the offense, the danger that the defendant poses to the victim(s), and the safety needs of the victim and the public. In so doing, prosecutors help set the basis for the behavioral controls that the criminal justice system can place on defendants' future conduct. The plea agreement and sentencing recommendations are the foundation for future action by a number of others, including:

Probation

The plea agreement and sentencing recommendations set the outside parameters and framework within which probation creates its plan for services and supervision of the defendant.

Victim

The plea and sentence set the framework within which the victim and offender have or do not have contact and provide controls on offender behavior that enhance victim safety.

Law Enforcement

The plea and sentence determine, in some cases, whether officers can arrest and hold for future enhanced charges and signals the relative dangerousness of the offender in future calls.

Prosecutor

The plea and sentence affect the ability to charge an enhanced crime and/or to pursue a probation violation if a violation or a new case occurs and determine whether the defendant will be prohibited from possessing firearms.

Family Court

The sentence affects decisions related to custody, visitation, and access to children.

The resulting sanctions and consequences can influence whether there is a subsequent arrest or incidence of violence. One researcher indicates that *“more rigorous sentences, including jail, work release, electronic monitoring, and/or probation, significantly reduce re-arrest for the domestic violence over the less intrusive sentences of fines or suspended sentences without active probation.”*¹⁹ Dispositions that address risk factors and impose appropriate sentences, including incarceration, firearms surrender and supervised probation, can reduce the severity of ongoing abuse.

The type of violence and its context and severity are central factors in determining the terms of a plea agreement or sentencing recommendation that will best reflect the circumstances of the offense, the danger the defendant poses to the victim, others, and the victim's safety needs.²⁰ When the defendant's actions are part of an ongoing pattern of intimidation, coercion and violence, requiring a plea to the most serious charge and a more severe sentence is appropriate.²¹ When the defendant is a victim of ongoing violence who has used illegal violence in return (a “victim defendant”), an appropriate disposition may be a plea to a lesser offense and/or an agreement to a stay of imposition with probationary conditions that include support services that will aid in reducing the likelihood of the victim defendant using violence in the future.

A prosecutor is presented with a unique set of circumstances when negotiating a plea agreement with a victim defendant or making sentencing recommendations in such cases. Safety concerns and risk factors apply to both the victim in the current case and the victim defendant. While the statutory crime charged might be the same, there are significant differences *between the violence a victim defendant is using in response to abuse, and the violence they are experiencing* by this ongoing abuse.²² In these cases, it is not a question of treating like cases alike, but rather of treating dissimilar cases differently.

Prosecutors and probation should operate from a shared framework when determining appropriate sentencing recommendations. Blueprint Communities should use or adapt *Appendix 5G: Framework for Recommending Time to Serve and Length of Probation* and *Appendix 5H: Sentencing Guidelines Departure in Domestic Violence Cases*. Prosecutors may not have all the information in the plea negotiations that probation gathers when developing the presentence

investigation (PSI). The probation officer should not feel constrained by the plea agreement and in appropriate cases shall argue that a plea agreement suggests too little time served for the severity and context of the crime.

POLICY: NEGOTIATED PLEA AGREEMENTS AND SENTENCING RECOMMENDATIONS

These policies and protocols are generally applicable to domestic violence cases. However, there may be instances in which due to the circumstances and facts of the case, another course of action may be required to better serve the goals of victim safety, community safety, and offender accountability. All of these policies and protocols should be reviewed by supervisory personnel on a yearly basis.

In addition to adhering to general agency policies, including general language access policy, prosecutors will take the following actions in negotiating plea agreements and making sentencing recommendations in domestic abuse–related cases, using the protocols and appendices referenced and included as part of this policy.

1. Utilize the widest possible range of sources of information to reach a negotiated plea or make sentencing recommendations that best meet the victim's safety needs, in accordance with **Protocol 4: Negotiated Plea Agreements and Sentencing Recommendations**.
2. Obtain input from the victim, the victim's community-based advocate, or victim/witness specialist to assist in determining the negotiated plea agreement or sentencing conditions that best reflect the circumstances of the case, the context and severity of the offense, and the victim's safety needs. Ensure that victims with Limited English Proficiency (LEP), who are Deaf/Hard of Hearing (HOH) or who prefer to communicate in a language other than English are able to participate fully in the discussion by utilizing qualified interpreters and using the victim's preferred method of communication. Work in collaboration with victims in accordance with **Protocol 2: Victim Engagement Guidelines**.
3. Ensure that the victim has the necessary information and that processes are in place to secure victim's rights as required by law.
4. Negotiate plea agreements and make sentencing recommendations to the court that reflect the context and severity of the offense, the danger that the defendant poses to the victim, and the safety needs of the victim and the

public, in accordance with **Protocol 4: Negotiated Plea Agreements and Sentencing Recommendations**.

- a. If there is information to strongly suggest that the defendant is engaging in an ongoing patterned use of intimidation, coercion, and violence toward the victim, generally require a plea to the most serious charge(s) and recommend a more severe sentence as a means of placing controls on the defendant's behavior and enhancing victim safety [see *Appendix 5G: Framework for Recommending Time to Serve and Length of Probation*, *Appendix 5H: Sentencing Guidelines Departure in Domestic Violence Cases* and *Appendix 1E: History of Domestic Violence Summary*].
 - b. If the defendant reasonably appears to be the victim of ongoing domestic violence, consider a plea to a lesser offense, an agreement to a stay of imposition with probationary conditions that include support services, or a dismissal that will aid in reducing the likelihood of the victim defendant using violence in the future and preventing her or him from becoming vulnerable to more abuse. (See *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*.)
5. Review the presentence investigation and at sentencing support the imposition of conditions recommended by probation. Alternatively, support and argue for different or additional conditions if in the prosecutor's judgment the PSI does not contain complete and appropriate conditions in light of the context and severity of the offense, the danger that the defendant poses to the victim, and the safety needs of the victim and the public.
 6. Appear at any proceedings that address violations of sentencing conditions, including admit or deny hearings, and argue for imposition of more severe consequences in all cases involving new threats or acts of abuse. If the violation involves an act of violence, threat of violence, coercion, intimidation, or firearms violation, take immediate steps to revoke probation.
 7. Supervising prosecutors will provide or arrange for training as applicable to prosecutors, law enforcement, probation, and the judiciary on topics related to successful intervention in domestic violence-related cases, in accordance with **Protocol 4: Negotiated Plea Agreements and Sentencing Recommendations**.
 8. Supervising prosecutors will conduct a quarterly review of negotiated pleas in domestic abuse-related cases to ensure that they account for the context and

severity of the offense, the danger that the defendant poses to the victim, and the safety needs of the victim and the public.

9. Supervising prosecutors will conduct a quarterly review of sentencing recommendations in domestic abuse-related cases to ensure that they account for the context and severity of the offense, the danger that the defendant poses to the victim, and the safety needs of the victim and the public.
10. Supervising prosecutors will conduct a quarterly review of cases in which a violation of probation involved violence, threat of violence, intimidation or coercion to ensure that immediate steps were taken to revoke the defendant's probation.

The following appendices are attached to and included as part of the plea agreements and sentencing policy:

- *Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases*
- *Appendix 1B: Training Memo—Risk and Dangerousness*
- *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*
- *Appendix 1E: History of Domestic Violence Summary*
- *Appendix 1G: Training Memo: Enhancing a Coordinated Response to the Intersection of Domestic Violence Crimes and Access to Firearms*
- *Appendix 1H: Training Memo: Building Language Access for the Deaf Community into the Criminal Legal System Response to Domestic Violence*
- *Appendix 5G: Framework for Recommending Time to Serve and Length of Probation*
- *Appendix 5H: Sentencing Guidelines Departure in Domestic Violence Cases*

See the Blueprint Supplement for appendices referenced in the policy and protocols. All training memos are based on Minnesota law. Other jurisdictions should make modifications as necessary.

Protocol 4: Negotiated Plea Agreements and Sentencing Recommendations

1. Negotiated pleas and sentencing recommendations should further the multiple goals of controlling offenders' behavior, providing rehabilitation services to appropriate offenders, deterring future violence, and enhancing the safety of victims.
2. Use the following sources of information available to the prosecutor to evaluate the case and determine the conditions of the negotiated plea and sentencing recommendations:
 - a. Pre-trial evaluation and summary of compliance with conditions of release
 - b. Law enforcement reports of the current offense
 - c. Past law enforcement reports involving this suspect
 - d. Past history of violence portion of the presentence investigation on offenders previously convicted
 - e. Summary sheets from probation on offenders previously convicted
 - f. Evidence collected at scene, e.g., photographs, broken phones, ripped clothing, other damaged property
 - g. 911 tapes and CAD reports
 - h. Jail phone call recordings or other related documents
 - i. Past and current DANCO; OFP and HRO pleadings, including affidavits
 - j. E-mail, voice mail, text messages, letters, and other communication
 - k. Arrests and convictions, including all available data bases
 - l. Firearms and concealed carry registries
 - m. Victim's responses to dangerousness or risk assessment questions
 - n. Communication with victim, either direct or (with victim consent) via community-based advocate or victim/witness personnel
 - o. Defendant's behavioral history in relation to possible stalking charges
 - p. Medical records
 - q. Family court files
 - r. Child protection records

3. Obtain input from the victim, the victim's community-based advocate, or victim/witness specialist to establish the following in relation to the terms of the negotiated plea and/or sentencing recommendations:
 - a. Nature and impact of the current offense
 - b. Context and history of past violence
 - c. Sanctions that are most likely to meet the victim's safety needs
 - d. Victim's relationship with the criminal justice system and its impact on her or his reaction to and support for prosecution
4. Ensure that the victim has the necessary information and that processes are in place to secure the following victim's rights as applicable in your jurisdiction:
 - a. Right to submit a victim impact statement (Minn. Stat § 611A.038). The impact statement may be presented to the court orally or in writing, at the victim's option. If the victim requests, the prosecutor must orally present the statement to the court. Request that proper court decorum be maintained while the impact statement is being communicated to the court.
 - b. Right to restitution. (Minn. Stat §§ 611A.04; 045).
 - c. Right to notice of plea agreement, final disposition, any appeal, and expungement. (Minn. Stat §§ 611A.03, 0385; 039; 06)
5. Consider the following risk factors related to the current offense and past actions in determining the terms of the plea agreement and sentence, as obtained from a domestic violence-specific risk assessment, patrol and investigation reports, and other sources of information, e.g., a community-based advocate (see *Appendix 1A: Practitioners' Guide to Risk and Danger in Domestic Violence Cases*):
 - a. Type and severity of assault; how frequent, how recent
 - b. Serious injury in this or prior assaults
 - c. History and nature of past violence toward this victim and others
 - d. Current or recent separation between victim and defendant
 - e. Specific attention to strangulation and stalking
 - f. Threats to harm the victim or the children
 - g. Threats of homicide or suicide

- h. Intimidation of the victim if she/he seeks help
 - i. Indicators of extreme or obsessive jealousy or controlling behavior
 - j. Sexual aggression and coercion
 - k. Violence towards pets
 - l. Criminal history and current probation status or other pending charges
 - m. Access to firearms and their use or threatened use in the current offense or past incidents
 - n. Current and past protection or harassment orders, obtained by this or other victims
 - o. Alcohol or drug use and its impact on defendant's actions
 - p. Mental health concerns and impact on defendant's actions
6. Establish the nature and history of violence and coercion between the parties involved in the case in order to understand the context of the violence, fully inform the plea negotiation and sentencing recommendations, and advance the goals of victim safety and offender accountability and rehabilitation. Ask:
- a. To what extent is there a pattern of ongoing intimidation, coercion, and violence?
 - b. Who is perpetrating any such pattern, and against whom?
 - c. What is the severity of the violence?
 - d. What is the frequency of the violence?
7. Establish the seriousness of injuries and level of fear expressed by the parties. Ask:
- a. Who has been injured and how?
 - b. Who is afraid of whom and in what ways?
 - c. (Note: include fear of losing children, homelessness, loss of family, job, etc.)
 - d. What kind of threats have been made or coercion used to dissuade the victim from participating in the prosecution?
 - e. Who is more vulnerable to ongoing intimidation, coercion, and violence?

8. If children are involved, establish whether they have been present and/or used as an instrument of abuse by the party engaging in ongoing intimidation, coercion, and violence against the other. Ask:
 - a. Has the abusive party physically harmed the children? If so, in what ways?
 - b. Has the victim been threatened that the children will be harmed? If so, in what ways?
 - c. What is the status of any family court action?
 - d. Does the victim fear that the children will be taken by the abuser (abducted or via custody) in retaliation for participating in the prosecution?
 - e. Was the victim assaulted during pregnancy or shortly after giving birth?
9. Take the following factors into consideration in negotiating a plea agreement
 - a. Victim input
 - b. Severity and extent of harm to the victim
 - c. Difficulties with evidence that constrain the likelihood of success at trial
 - d. The need for active supervision of the defendant; in most cases request the maximum period of probation supervision
 - e. Opportunity for rehabilitation and offender's likely compliance
 - f. Sufficient stayed time to be a deterrent to continued wrongful conduct
 - g. A combination of time to serve and stayed time, appropriate to the severity of the crime and the harm caused (see Appendix 5G: Framework for Recommending Time to Serve and Length of Probation and Appendix 5H: Sentencing Guidelines Departure in Domestic Violence Cases).
 - h. Whether a defendant in custody at the time of a plea should remain in jail pending sentencing
 - i. Whether a defendant who will be released pending sentencing should be placed under supervised release
 - j. Whether the proposed plea agreement would require the defendant to surrender firearms. When considering a plea that would **not** require surrender of firearms, consider including surrender as a separate condition of probation (see *Appendix 1G: Training Memo: Enhancing a Coordinated Response to the Intersection of Domestic Violence Crimes and Access to Firearms*).

- k. For felonies, sentencing guidelines applicable to your jurisdiction, including, where appropriate, factors supporting departure
10. If there is information to strongly suggest that the defendant is engaging in an ongoing patterned use of intimidation, coercion, and violence toward the victim, generally require a plea to the most serious charge(s) and recommend a more severe sentence as a means of placing controls on the defendant's behavior and enhancing victim safety.
 11. If the defendant reasonably appears to be a victim of ongoing domestic violence, consider a plea to a lesser offense and/or an agreement that will help place controls on the person's continued use of violence without making her or him more vulnerable to ongoing battering or abuse. Using *Appendix 1C: Training Memo—Intervention with Victims of Battering as Suspects or Defendants*, consider whether a plea to the widest range and/or most severe crime furthers the goal of enhancing the safety of the victim of the ongoing domestic violence and the victim in this offense or whether a plea that does not trigger the full range of domestic violence consequences is instead appropriate.
 12. Take into account the particular circumstances of the victim and defendant and attempt to minimize the potential disparate impact of the plea agreement, with specific attention to the following:
 - a. No-contact orders and consideration of when a no contact order should be cancelled or modified based on risk factors and possible adverse impact related to economic support, isolating victim from her or his cultural community, and impact on children. Given the potential adverse impact on the victim and the effect on the victim's willingness to be supportive of probation supervision and enforcement of probation conditions; except in rare circumstances, probationary no-contact orders should not be imposed over the objection of the victim.
 - b. When requesting a no-contact order, ask the court to make findings regarding the relationship between the victim and the defendant to ensure the defendant will be subject to federal firearms restrictions when applicable.
 - c. Fines and costs of mandated programs, probation supervision, and incarceration on economic well-being of victim and children
 - d. A defendant who is the victim of ongoing violence

- e. A victim with a disability who is reliant on the perpetrator for ongoing care
- 13.** Ensure the defendant has counsel or has knowingly waived his or her right to counsel when entering a plea.
 - a. Ensure the plea colloquy includes all offense elements required for firearm prohibition, if applicable
 - b. Communicate in the defendant's preferred language and method of communication. Provide written information in plain language and in the defendant's preferred language. If written material is not available in the defendant's preferred language, provide for sight translation by a certified interpreter. Do not assume Deaf/HOH individuals are fluent in written English.
- 14.** Disseminate information regarding the negotiated plea and sentencing to the following individuals and agencies, as applicable:
 - a. Victim
 - Communicate in the victim's preferred language and method of communication.
 - Provide written information and resources in plain language and in the victim's preferred language. If written material is not available in the victim's preferred language, provide for sight translation by a certified interpreter before clearing the scene. Do not assume Deaf/HOH individuals are fluent in written English.
 - b. Community advocate
 - c. Victim/witness personnel
 - d. Probation
 - e. Investigator
 - f. Arresting officer (in cases where there is no further investigation)
- 15.** Provide the Probation PSI writer with information already obtained by the prosecutor, e.g., past and current DANCOS, OFP and HRO pleadings, including: affidavits, arrests and convictions; pre-trial evaluation; medical records (when appropriate); and all current and past domestic violence-related law enforcement reports.
- 16.** Take an active role in recommending conditions of probation and responding to violations.

- a. Work with probation to craft conditions of probation that are clear, concrete, and enforceable.
 - b. Be prepared to request specific and additional consequences in the event of a defendant's violation of a condition of probation. If the violation involves an act of violence, threat of violence, coercion, or intimidation, take immediate steps to revoke defendant's probation.
 - c. Review the presentence investigation prior to sentencing and prepare to argue that conditions recommended by probation be imposed, if in agreement with the conditions.
 - d. Argue for different and/or additional conditions if in the prosecutor's judgment the PSI does not contain complete and appropriate conditions in light of the context and severity of the offense, the danger that the defendant poses to the victim, and the safety needs of the victim and the public.
 - e. Consider recommending a requirement that the defendant either be prohibited from possessing or surrender their firearms if the plea does not include this requirement.
 - f. Appear at any proceedings that address violations of sentencing conditions, including admit or deny hearings and argue for consequences that account for the egregiousness of the violation, impact on the victim's safety and other circumstances, and impact on public safety.
- 17.** Provide training as applicable to prosecutors, law enforcement, probation, and the judiciary on the following topics related to successful intervention in domestic violence-related cases:
- a. Risk factors
 - b. Role of thorough and complete investigation in establishing a sufficient evidentiary base to negotiate an appropriate plea agreement
 - c. Case preparation and evidence-gathering that reduces dependence on the victim
 - d. Presentence investigations that include thorough consideration of risk

CHAPTER 5 ENDNOTES

1. Vorenberg, (1981, pp. 1521, 1555).
2. National Prosecution Standards (§ 1.1 NDAA, 2nd Ed. 1991), asserting that the primary responsibility of prosecution is to see that justice is accomplished.
3. Long and Kristiansson (2007, p. 1-6).
4. Police report writing and investigation are important to successful evidence-based prosecution and convictions (Buzawa- et al., 2003, p. 22; Worden, 2003, p.).
5. Asmus et al. (2005, p. 115); Dutton and Goodman (2005).
6. From a study of women's responses to battering, Campbell et al. report that severity of abuse was only one factor in women's decisions to remain in a violent relationship (1998, p. 757).
Victims weigh safety and extralegal realities such as finances or housing against the potential for effective treatment and cessation of violence from the criminal justice system's intervention. (Worden, 2003, p. 4).
7. For victim ambivalence regarding prosecution, see: Buzawa, Hotaling, and Byrne (2003); Buzawa et al. (2000); Ford and Breall (2000).
8. Dutton and Goodman (2005) and Johnson and Ferraro (2000).
9. See discussion of threatened retaliation and re-assault under Hart in Chapter 1, endnote #6.
10. Belknap and Sullivan (2003); Buzawa, et al. (2003); Ford and Breall (2000); Goodman and Epstein, (2008).
11. McFarlane, et al. (2002): 51-68; Strack and McClane (1999).
12. McFarlane, et al. (1999); Campbell, et al. (2003).
13. Ford and Breall (2000).

14. In addressing issues related to defendants who are victims of ongoing abuse, prosecutors are encouraged to read Mary Asmus, *At a Crossroads: Developing Duluth's Prosecution Response to Battered Women Who Fight Back* (2004, Rev. 2007).
15. Johnson and Ferraro (2000) use the term violent resistance to differentiate acts that do not necessarily meet the legal standards for self-defense.
16. Prosecutor's Toolkit published by the National Center for the Prosecution of Violence Against Women of the American Prosecutors Research Institute. Available at: http://www.ndaa.org/apri/programs/vawa/vaw_home.htm. Long and Kristiansson (2007).
17. Required under Minn. Stat. § 629.72 when setting conditions of release for an arrest for domestic abuse, harassment, or violations of an order for protection or a domestic abuse no-contact order.
18. This discussion and list of pre-trial release practices that maximize safety for victims of domestic violence has been adapted from Sadusky (2006).
19. Klein (2008, Part II, p. 40).
20. Dutton and Goodman (2005); Johnson and Ferraro (2000).
21. Erskine (1999) argues that when high-risk markers are visible, additional charges of coercion, intimidation, harassment, or stalking present a more complete picture of the nature and harm done to the victim.

Hofford (1991; pp. 12-17) promotes maximum supervision of domestic violence offenders. She argues that "the risk of recidivism is extremely high; felonious assaults are frequently reduced to misdemeanors in these cases; the community is at risk of future violence; a great majority of offenders have substance abuse problems. In addition, it is likely that perpetrators of family violence have committed the crime a number of times in the past; these offenders typically rationalize their criminal behavior; they know and have easy access to their victims."

Buzawa et al. (2003, p. 20) suggest that prosecutors “strive to file felony charges as opposed to misdemeanor charges, especially in very serious cases with hardcore offenders.” Also see Ford and Breall (2000).

22. Johnson (2008, p. 10) discusses defendants who are also victims of domestic violence. He points to a pattern that is visible in these relationships where one partner uses violence but not coercive control and the other partner uses both physical violence and coercive control.