

Model Response to Sexual Violence for Prosecutors (RSVP)

An Invitation to Lead




 **ÆQUITAS**
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Executive Summary

Prosecution of sexual violence is unlike prosecution of other crimes. These crimes pose unique challenges for prosecutors and other professionals in the criminal justice system and often involve uniquely vulnerable victims. The crimes themselves—how they happen, who commits them, who is victimized—are widely misunderstood by those who have not been educated about perpetrator-victim dynamics and the behavior of victims in response to the trauma of these devastating crimes is often misconstrued. While many criminal justice professionals have educated themselves about these dynamics and behaviors, the general public (including jurors) continue to be influenced by myths and misconceptions. Too often, law enforcement and prosecutors “weed out” the more difficult cases along the way, based on a perception that the cases will prove to be “unwinnable”—that the legal and factual challenges are insurmountable. Disappointingly few cases make it to the courtroom and even fewer result in conviction. Moreover, the problem can be self-perpetuating: to the extent that police and prosecutors are not vigorously pursuing the more challenging cases, they are not developing and honing the skills necessary to *build* sexual assault cases that will result in conviction.

However, conviction rates tell only part of the story about whether a prosecutor’s office—or a prosecutor—is successful in handling cases involving sexual violence. If difficult or challenging cases fall by the wayside early in the process, they are generally not factored into the rate of conviction. While there may be a thin veneer of success in terms of conviction rate, the reality is that serial perpetrators,ⁱⁱ or those who are clever in their choice of victim, escape justice, while victims who have been violated in the most personal and devastating way are left to their own remedies, without the support of the criminal justice system.

If conviction rates are not a reliable measure of success, what is? The answer lies in the quality of the prosecution response. In the prosecution of sexual violence, more than with most crimes, *the process is as important as—arguably, more important than—the legal outcome* in achieving a just result. The entire process of thorough investigation and meticulous prosecution provides many important benefits, regardless of whether any individual case results in conviction:

- Prosecutors and investigators hone skills and refine strategies that will increase the likelihood of conviction in future cases

- Better prepared cases will shine a light on the full range of an accused’s conduct, exposing them as a sexual offender.
- Serial offenders can be identified so that future victimizations can be prevented
- Evidence can be developed that may be admissible in other cases involving the same perpetrator
- A trauma-informed response reduces re-traumatization in victims
- Victims see that their cases are taken seriously and obtain a measure of validation and closure
- Victim safety, privacy, and confidentiality are respected and protected
- Victims are encouraged to report crimes
- Community relations are strengthened with consistent messaging from prosecutors in a position of leadership
- Communities, as a whole, are made safer
- Jurors and judges are educated in the dynamics of sexual assault and how trauma may affect victim behavior
- Improved coordination and cooperation between professionals within the criminal justice system

The **Sexual Assault Justice Initiative (SAJI)** is a project developed in partnership among AEquitas, the Justice Management Institute, and the Urban Institute. The Initiative challenges prosecutors to look beyond conviction rates as the primary measure of success or effectiveness in sexual violence prosecutions and to implement, continually evaluate, and refine sustainable prosecution practices that will advance the goals of justice, victim safety, and offender accountability. The present document sets forth the **Model Response to Sexual Violence for Prosecutors (RSVP)**, the cornerstone of SAJI’s proposal for improving the prosecution response to sexual violence. The RSVP Model is a collection of **office- and case-level promising practices** that have been identified through research and experience—of both AEquitas staff and the prosecutors with whom we partner—to result in positive case outcomes, using measures of success that extend beyond conviction rates. The RSVP Model also provides **a performance management system** with a tool for offices and individual prosecutors to measure their effectiveness in achieving the intended outcomes, and proposes a method of routine evaluation of prosecution practices that can be refined as necessary in response to evolving research, emerging issues, or changing conditions in a jurisdiction. **The RSVP Model is intended to serve as a comprehensive tool for making decisions on office policy and individual cases of sexual violence.** If implemented, the Model’s policies and practices will allow for all adult sexual assault victims who interact with prosecutors across the United States to experience prosecution practices that are trauma-informed,

victim-centered, offender-focused, informed by research, and sustainable over the course of changes in administration and personnel.

The [Introduction](#) portion of this document, found in [Chapter 2](#), explains in detail the problems that have arisen as a result of overreliance on conviction rates in cases of sexual violence. It identifies the core principles that should inform a model response to these crimes to further the goals of justice—offender accountability and the safety of victims and the community. It discusses how we can define the meaning of “success” in the prosecution of sexual violence, and how we can measure where we are on that continuum as well as our progress in our efforts to improve.

The Model itself is divided into three parts. The [first](#) focuses on office-level leadership, providing information and tools to assess current practices and identify areas for improvement. This section is especially directed to chief prosecutors and unit chiefs or other prosecutors within an office who are responsible for creating, implementing, and promoting policies and practices affecting the prosecution of sexual violence. The [second](#) section is intended for prosecutors handling cases of sexual violence at any level within an office (*e.g.*, grand jury unit, sex crimes unit, trial unit). This section includes specific strategies and tools enabling prosecutors to achieve positive case outcomes at every stage of the prosecution, from initial case review through final disposition and sentencing. The [third](#) section focuses on performance management, providing a method to measure improvements in performance as a result of implementing the policies and practices set forth in the first two sections.

RSVP Introduction

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2.1. THE NEED FOR A MODEL RESPONSE

“Sexual violence is a deeply traumatic crime that can cause severe damage to survivors’ emotional, spiritual, and psychological well-being.”³ Recent studies estimate that 1 in 5 women and 1 in 71 men have been raped at some point in their lives.⁴ Sexual assault victimization is both physically and psychologically harmful. In addition to the invasion of personal autonomy and dignity, one-third of female victims and one-sixth of male victims sustain physical injuries during assaults.⁵ Indeed, the largest proportion of those suffering from post-traumatic stress disorder are sexual assault survivors.⁶

A Note on Terminology

Across the United States, sex crimes are named and defined differently. The criminal acts range from sexual penetration to sexual contact or exposure, with additional elements ranging from physical force to nonconsent. This document will use the terms *sexual assault* or *sexual violence*, interchangeably, to refer to any of these crimes. Where appropriate, in referring to specific statutorily-defined crimes, the appropriate term (*e.g.*, “rape,” “sexual battery,” “sexual assault,” “sexual misconduct”) will be used.

Like many other crime victims, sexual assault victims experience anxiety about engaging with the criminal justice system and feel a loss of control as they move through it.⁷ There are, however, many dynamics unique to sexual assault that exacerbate the experience for survivors of these crimes. While we know that the justice system is a critical component of a comprehensive response to sexual violence,⁸ many cases still go unreported. Two-thirds of victims of sexual assault do not even report their assault to police for reasons ranging from fear, embarrassment, loyalty towards the perpetrator, or belief that the

criminal justice system cannot or will not help them.⁹ Many victims do not view the criminal justice system as an appropriate vehicle for resolving their experiences of violence.¹⁰

Our dedication can make it difficult to see and accept our failures. When we hear survivors say that they feel ignored or abandoned by the system, our defenses kick in. We can stubbornly insist that survivor perceptions are not accurate—not in *our* jurisdictions. Or we can *hear* survivors’ feedback, review the research, and acknowledge the fact that our approach to prosecuting sexual violence may not be achieving its goal of protecting victims and communities. There are several possible reasons for this—promising practices are not being used, they are being used but only by specific champions in an office, or they currently are being used comprehensively but are vulnerable to organizational and personnel changes.

When the assault *is* reported, negative experiences with police or prosecutors discourage many victims from proceeding with the process. Their reports may be viewed with skepticism or outright victim-blaming. Victims may be cross-examined the first time they sit down for an interview, asked to explain themselves and their actions to the satisfaction of the officer or prosecutor. Why did they go to the attacker’s home? Why did they wait so long to report? Why did they have so much to drink? Any discrepancies in their accounts, in the wake of deeply traumatic events, may be seized upon and picked apart. They may be accused of not being able to “get their story straight.” Such experiences cause many to feel disbelieved or blamed. Believing that everyone, including a jury, will have the same reaction, many victims conclude it isn’t worth going through the ordeal of a trial.

On the criminal justice side of the equation, there is an evident disparity between the number of sexual assaults that *are* reported and the number actually prosecuted. Regardless of our intent to do good as prosecutors and our belief in the strength of our office’s practice, research, both direct¹¹ and indirect,¹² reveal that reporting rates,¹³ arrest rates, prosecution rates,¹⁴ and conviction rates for crimes of sexual violence are, overall, staggeringly low.¹⁵ In a six-site study, researchers found that between 80 and 89 percent of cases reported to the police were either never referred to the prosecutor’s office or were declined for prosecution.¹⁶ Additional research shows that “[o]ne of the most enduring realities of sexual assault is that very few cases result in arrest, prosecution, and conviction of [perpetrators].”¹⁷

What are the causes of this gap between reports of sexual assault and actual prosecutions? Is law enforcement failing to investigate or refer cases for prosecution? Are officers “exceptionally clearing”

these cases¹⁸ based on perceptions about downstream decision-making?¹⁹ Are cases being referred for prosecution but then declined based on inadequate or inaccurately analyzed investigations? Are triable cases being declined for some other reason? Answers to these questions can be gleaned from attrition studies,²⁰ reports from untested rape kits,²¹ investigative reports,²² victim feedback,²³ and anecdotal evidence, such as multidisciplinary participant feedback at trainings. Among the possible explanations are uninformed credibility assessments of victims (*e.g.*, those who are intoxicated, are substance abusers, or are involved in commercial sexual exploitation)²⁴; lack of information and training about sexual violence perpetration, victimization, and trauma; agency resource shortages; and concerns over conviction rates.²⁵ Collectively, these factors paint an unacceptable picture of the criminal justice response to sexual assault—a picture that is likely distressing and discouraging for the countless prosecutors dedicated to justice and safety for victims and their communities. Improving the response to sexual violence will not only increase the number of cases investigated and prosecuted, but will encourage more survivors to report their assaults, and reduce the occurrence of sexual assault as communities identify more perpetrators.

AEquitas has partnered with the Justice Management Institute and the Urban Institute in an effort to improve the response of prosecutors to sexual violence committed against **adult** victims.²⁶ The Sexual Assault Justice Initiative (SAJI)²⁷ challenges prosecutors to look beyond conviction rates as the primary measure of success or effectiveness and identifies other factors that indicate an effective criminal justice response. In preparation to launch this Initiative, we introduce the **Model Response to Sexual Violence for Prosecutors (RSVP Model)**. This Model provides the foundation to implement, continually evaluate, and refine sustainable prosecution practices that will advance the prosecution goals of justice, victim safety, and offender accountability. The RSVP Model is a collection of office- and case-level promising practices that have been identified through research and experience—of both AEquitas staff and the prosecutors with whom we partner—to produce more positive case outcomes.²⁸ It links specific prosecution practices to outcomes identified as consistent with, and integral to, the prosecution goals. The RSVP Model also provides a performance management system with a tool for offices and individual prosecutors to measure their effectiveness in achieving the intended outcomes, and proposes a method of routine evaluation of prosecution practices that can be refined as necessary in response to evolving research, emerging issues, or changing conditions in a jurisdiction. The RSVP Model is intended to serve as a comprehensive tool for making decisions on office policy and individual cases of sexual violence. If implemented, the policies and practices described will allow for all **adult** sexual assault victims who interact with prosecutors across the United States to experience prosecution practices that are trauma-

informed, victim-centered, offender-focused, informed by research, and sustainable over the course of changes in administration and personnel.

2.2. CORE PRINCIPLES

The prosecutor’s duties are to seek truth and justice; to protect victims and hold offenders accountable; to ensure that guilt does not escape nor innocence suffer.²⁹ These duties, combined with our position in the criminal justice system, make us perfectly situated to assume a leadership role in the effort to improve the criminal justice system’s response to sexual violence as a whole. In furtherance of our mission as prosecutors in these cases, we collaborate with law enforcement, healthcare providers, victim advocates, and allied professionals (who may be part of a multidisciplinary team) to coordinate efforts and close gaps in the system. We also leverage specialized resources and training opportunities, and implement promising new practices while refining established ones.

FIGURE 1. CORE PRINCIPLES GUIDING BEST PRACTICES IN SEXUAL ASSAULT PROSECUTION³⁰

TRAUMA-INFORMED	Fully acknowledging that trauma is an individual response to physically and emotionally harmful events, we interact with victims in a manner that minimizes re-traumatization and maximizes their engagement with the criminal justice system. ³¹ This approach recognizes the offender’s responsibility for the victim’s trauma, aids in the identification and interpretation of evidence, and assists juries in understanding the effects of trauma.
VICTIM-CENTERED	Appreciating the central role victims play in the judicial process, we consider their needs throughout that process. The best possible case outcomes hold offenders accountable and also take into account a victim's history, experience, and perspective, as well as the impact of the criminal justice process on the victim and the victim's family, school or workplace, and community.

FIGURE 1. CORE PRINCIPLES GUIDING BEST PRACTICES IN SEXUAL ASSAULT PROSECUTION³⁰

OFFENDER-FOCUSED	Recognizing that offenders purposefully, knowingly, and intentionally target victims whom they believe they can assault and impugn in an effort to avoid the consequences of their conduct, we persistently focus on the offender’s actions and intent and oppose defense tactics to deflect and push focus to what the victim did or did not do. This approach is driven by an accurate and unbiased analysis of a case and a thorough understanding of offender conduct and offender-victim dynamics as well as the applicable law. The rights of crime victims are protected at all times, to the best of the prosecutor’s ability.
MULTIDISCIPLINARY	Research has shown that a system working collaboratively to provide a coordinated response encourages more victims to access services and participate in the process, more effectively holds offenders accountable, and improves the safety of victims and communities. Collaboration enables prosecutors and allied professionals to share resources, educate one another, evaluate and refine their practices on a continual basis, adapt in response to emerging issues, and ensure the sustainability of their practices.
SPECIALIZED PROSECUTION	Prosecutors must understand the offender-victim dynamics in various types of sexual assault cases, as well as the assumptions and misconceptions widely held by both laypersons and professionals. Specialized investigative practices provide greater knowledge and skill to uncover relevant and probative evidence and keep victims engaged throughout the process. Specialized trial expertise provides greater knowledge and skills to be able to explain common gaps in evidence and to counter deeply entrenched myths and assumptions about victim credibility, including how victims respond to trauma and what victimization looks like. Specialized prosecution units promote the development of such expertise, provide access to focused training, and opportunities for collaboration with law enforcement and community partners. ³²

FIGURE 1. CORE PRINCIPLES GUIDING BEST PRACTICES IN SEXUAL ASSAULT PROSECUTION³⁰

RESEARCH- INFORMED	Prosecutorial decisions must be driven by the most current and accurate scientific, social science, and legal research. Innovative practices to improve the prosecution response to sexual violence must be research-informed and implemented to determine their true effectiveness. Where effective, these practices should be sustained and routinely evaluated and refined for improvement and ongoing relevance to changing conditions.
PERFORMANCE- DRIVEN	Improving the overall response to sexual violence requires the assessment of key elements of our practice through performance management. Prosecutors should be willing to constantly reexamine and refine their practices to best serve the communities, as well as the victims, on whose behalf they seek justice. Identification of performance targets, and measuring progress against those targets, ensures that prosecutors' offices are meeting victim and community needs and achieving justice. Regular analysis and reporting of performance data are critical elements of a performance based system.

2.3. DEFINING AND MEASURING SUCCESS

How do we know whether we are succeeding in our efforts to improve our handling of sexual assault cases? How do we measure our progress? Historically, conviction rates have been used as the primary measure of "success" for law enforcement and prosecutors³³ because they represented the only readily accessible data. Conviction rates alone, however, are inadequate indicators of the success of a jurisdiction's response to these crimes. When difficult or complex cases are "weeded out" before trial and sometimes even before arrest or charging, the result is a deceptively high conviction rate for representing only the few cases that survive pretrial proceedings and can even be deceptive.³⁴ For example, a jurisdiction with a high conviction rate may be rejecting cases perceived to be too difficult or complex, whereas jurisdictions with lower conviction rates may be taking and winning such cases. This is rarely the result of conscious or callous disregard for victim and community safety. Rather, policies and practice may be leading to sexual violence cases being declined or dismissed where there are "difficult" but very common factors, including alcohol use by the victim and/or perpetrator, a current or former relationship between the perpetrator and the victim, lack of physical force, lack of physical injury, lack of

victim participation in the prosecution, lack of corroboration.³⁵ Conviction rates simply do not capture the more elusive – but still measurable – factors related to the *quality of justice*.

A successful response to complex sexual assault cases may appear daunting, but the characteristics of these cases, when broken down and understood, can be effectively addressed. The building blocks for achieving a successful outcome are (1) thorough, offender-focused investigations; (2) collaboration with multidisciplinary professionals, including experts; (3) an understanding of victimization and the effects of trauma; (4) the education of colleagues, allied professionals, fact finders, and the community on the victimization and the effects of trauma; and (5) a solid understanding of the law, with a willingness to promote change where appropriate. When prosecutors, law enforcement, medical, and advocacy professionals all understand their roles in relation to the larger response, they are better able to overcome perceived challenges and support victims throughout the reporting, investigative, and prosecutorial processes.

Indicators of success in prosecution include:

- Reduced reliance on myths and generalizations in decision-making
- Increased reporting
- Increased referral rates from law enforcement
- Increased prosecution rates
- Increased trust in the criminal justice system
- Identification of serial offenders
- Meaningful collaboration with allied professionals
- Victim input solicited and respectfully considered
- Introduction of all relevant and probative evidence
- Exclusion of irrelevant evidence
- Protection of victim privacy and safety consistent with justice
- Support of victims throughout the process
- Trial strategies that expose predatory behavior
- Trial strategies that educate the factfinder
- Plea or litigated conviction to the most appropriate charge and degree
- Appropriate sentences accounting for the seriousness of the crime, the offender’s behavior, and impact to the victim.
- Reduced incidence of sexual violence

2.4. THE RSVP MODEL: THREE FACETS OF PROGRESS

The RSVP Model is divided into three parts, as depicted in *Figure 2*, below. Each of the parts is more fully described in the pages to follow. [Appendix A](#) includes two checklists for improved response at the office level and case level—which can be used as a reference to the various policies and practices proposed here.

Figure 2. The RSVP Model

1

Office-Level Leadership: The Prosecutor’s Role to Seek Justice addresses the office-level response to sexual violence. It provides information and tools to assess current practices, establish effective office philosophies and practices, support prosecutors, meaningfully collaborate with allied professionals, promote community engagement, utilize the latest data and technology, and sustain promising practices throughout changes in administration and personnel. A conceptual model links the office-level practices to the intended outputs, outcomes, and performance management. The conceptual model helps to ensure that there is a clear and logical relationship between all of these elements.

2

Case-Level Leadership: The Prosecutor’s Duty to Achieve Justice provides promising practices that can be implemented in the litigation of individual sexual violence cases. This section includes specific strategies and tools for prosecutors to employ to achieve positive case outcomes at each stage of the prosecution, beginning with the initial case review all the way through pretrial, trial, sentencing, and post-conviction considerations. A conceptual model maps the case-level practices to intended outputs, outcomes and performance management.

3

Performance Management provides measures that correspond to the practices in the other two parts of the model, which will help offices better track their progress in responding to sexual assault. Performance management “outlines critical objectives (outcomes) associated with prosecution goals and identifies performance measures that may be used to track progress. This framework provides a useful tool for assessing strategies and practices that contribute to desired outcomes.” (Dillingham, Nugent & Whitcomb 2004). The tool is intended to improve performance and should be used regularly.

Office-Level Leadership: The Prosecutor's Role to Seek Justice³⁶

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“[The prosecution’s] interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [the prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer ... But, while [the prosecutor] may strike hard blows, [the prosecutor] is not at liberty to strike foul ones. It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 US 78, 88; 79 L.Ed.1314 (1935).

These oft-quoted words from the United States Supreme Court, most frequently cited in connection with the prosecutor’s duty in the courtroom, are equally descriptive of the prosecutor’s role in the community. “Local police and prosecutors are the gatekeepers to the criminal justice system”³⁷ and are responsible for implementing a comprehensive response to sexual violence in accordance with applicable law and with an informed understanding of the dynamics of sexual violence. Even with the imperfect and varied laws across the country, there are few insurmountable *legal* obstacles to holding offenders accountable, in the vast majority of cases, for the full range of their criminal behavior. Gaps in knowledge, however, often pose barriers to the realization of the law’s potential, as victim characteristics and fact patterns perceived as “problematic” too often cause criminal justice professionals to hastily dispose of such cases. Institutional structures and policies must be put in place to break down these barriers and to promote an operational understanding of laws and their enforcement³⁸ that takes into account the growing body of relevant social science, medical, scientific and technological research to begin to close the gap between law-on-the-books and law-in-action.

3.1. ASSESS CURRENT PRACTICE IN YOUR JURISDICTION³⁹

Obtaining a clear picture on the scope of the problem requires us to assess the incidence of sexual assault and the quality of the criminal justice response regularly and often. Accurately calculating the incidence and prevalence of sexual assault in one’s jurisdiction, as well as the rate and causes of attrition (“the rate at which cases are lost or dropped”),⁴⁰ is a huge undertaking—one that requires partnership with researchers. Although the results of such an undertaking would be invaluable, few jurisdictions have the resources to commit to an evaluation this comprehensive.⁴¹ It is very possible, however, for any jurisdiction to obtain rough estimates for purposes of obtaining a very general, big-picture view of the extent and sources of attrition.

3.1-A. What Does Attrition Look Like in Your Jurisdiction?

➤ Capture prevalence

- Determine the best sources for data on the incidence of sexual assault.
 - These may include data from law enforcement, victim advocacy organizations, medical providers, child welfare agencies, schools, mental health/behavioral health agencies and the department of corrections.
 - Federal and state agencies can also be a source for this critical data.⁴²
- Data might include reports to police, calls to crisis hotlines, presentations at hospitals to obtain medical forensic exams, etc. Another way to collect reliable and relevant data may be to partner with the local or state sexual assault coalition to conduct victim surveys. See below for additional information on [obtaining feedback and outcome information from victims](#). This is not an exhaustive list; be creative about what sources may have information on reports of sexual assault.
- Estimate the number of sexual assaults occurring within the jurisdiction.⁴³

➤ Capture reports to law enforcement

- Identify the total number of incidents reported to law enforcement (for comparison to the total number of incidents identified or estimated in the previous step assessing prevalence).

➤ Capture reports referred for prosecution

- What are the total number of cases referred by law enforcement agencies to the prosecutor’s office? Determine whether the prosecutor’s office has access to the total number of reports or only those that are referred.

➤ **Identify the existing gaps in reporting and referring cases for prosecution**

- Once the data are collected, the Performance Management tools in [Chapter 5](#) can be used to identify the existing gaps in reporting, referral for prosecution, and prosecution of those cases (including disposition by way of plea). Over time, periodic evaluation will permit an assessment of progress toward improvements in these outcomes.

3.1-B. Identify, Review, and Link Prosecution Policies and Practices to Specific Outcomes

➤ **Review existing office policies** on the response to crimes of sexual assault, starting from initial report to police through final disposition of a case.

- Where no written policies exist, capture office practices—even informal, unwritten practices—and map them so they can be reviewed.
- Does your protocol ensure you are notified of every report made to law enforcement in your jurisdiction?
- Do you have a method for tracking each report to ensure that appropriate follow-up investigation, if necessary, is conducted?
- Develop and implement standardized and periodic reviews of office policies.

➤ **Track cases through the criminal justice system**

- Develop a system for tracking, if one does not already exist.
- Track cases as they proceed from the initial police report, to referral to the prosecutor or “exceptional clearance,”⁴⁴ to the prosecutor’s charging decision, to conclusion of trial or guilty plea, and finally to sentencing.
- Determine how long it takes for each phase of the case to conclude and identify any roadblocks to timely advancement. Do cases with vulnerable victims (*e.g.*, persons with disabilities) progress significantly slower or experience greater delays in the justice system?

➤ **Review and evaluate the standards for charging decisions**, whether initial charges are made by law enforcement or prosecutors.

- Is this a written, formal standard (including a standard required by law or court rule) or is it informal and tacitly understood?
- What is the standard for charging or approving charges? Probable cause, reasonable probability of conviction, or something else?
- If the standard involves the probability of conviction, how is that standard defined?

- **Analyze the impact of office policies and practices** on the number of cases referred from law enforcement or other sources.
 - Assess how prosecution practices—even promising ones—may negatively impact other aspects of the office response to sexual violence.
 - For example, does vertical prosecution come at the expense of an office’s ability to charge the maximum number of cases referred to it? Might it lead to inappropriate pleas to reduced charges or non-sex crimes because of inadequate resources to handle the volume of cases?
- **Analyze data collected at each stage of the prosecution** of sexual assault cases to identify strengths and weaknesses in current practice and to determine which procedures and practices will best improve prosecution rates.⁴⁵ Such data may include:
 - Number of reports to police
 - Victim participation rates
 - In collecting data on victim participation rates, note all of the criminal justice processes in which the victim engaged before deciding to disengage, to see if the reason(s) can be isolated.
 - Rate of referral from law enforcement for prosecution
 - Prosecution attrition data (*i.e.*, number of cases declined for prosecution, administratively dismissed or *nolle prossed*, etc., as well as the reason)
 - Number of cases pled to sexual-assault-related charges with an agreement for low end of sentencing range
 - Number of cases pled to non-sexual-assault-related charges
 - Data collected from victim surveys
- **Assess salient case characteristics** (*e.g.*, victim’s use of alcohol/drugs; perpetrator’s use of alcohol/drugs; victim-offender relationship; age; victim’s involvement in commercial sexual exploitation; victim behaviors, such as delayed reporting, that might be misunderstood) to determine how they affect whether a case moves forward.
- **Review other criminal reports for indicators of sexual assault.** Professionals⁴⁶ responding to domestic violence, child abuse, gang violence, or human trafficking crimes may fail to recognize that victims of those crimes may also have been sexually assaulted.
- **Conduct candid case evaluations for declined or dismissed cases** to learn what factors led to those decisions. Are triable cases being inappropriately weeded out?

- **Assess the practices of multidisciplinary partners** for their impact on the overall investigative and prosecution process. Where appropriate, advocate for partners in their efforts to improve practices or respectfully challenge practices that adversely affect the quality of cases or victim safety and well-being.

3.1-C. Capture Case Complexity

Despite the fact that conviction rates are an unreliable measure, standing alone, of the success of prosecution response to sexual assault cases, conviction is not without meaning. Prosecution of any case implies that the perpetrator *should* be convicted. But the complexity of a criminal case has an obvious bearing on the weight that the legal outcome should be given. Sexual assault cases are often described as the most difficult cases to prosecute—and the greatest source of that difficulty is the enormity and breadth of myth and misunderstanding prosecutors are forced to overcome.

Overreliance on conviction rates creates an incentive to avoid prosecution of complex cases. Prosecutors should not be penalized or blamed for assuming the risk of a lowered conviction rate by advancing the cases that are more challenging to prosecute. This Model proposes a strategy that accounts for case complexity—to credit, not penalize, prosecutors for doing the right thing by taking the difficult cases to trial.

Common factors that contribute to case complexity are:

- Intoxicated victims
- Intoxicated offenders
- Relationship of offender to victim
- Multiple offenders
- Victim is a sexually exploited person
- Victim has substance abuse problems
- Lack of physical injury
- Perceived risk-taking behavior by victim
- Presence of cognitive disability
- Immigration status of victim or offender
- Technology used to facilitate or perpetuate victimization
- Victim/witness intimidation
- Victim's post-assault behavior did not meet common expectations

Not all sexual assault cases are the same but the factors that contribute to the complexity of a case are common; where one or more of those factors are present the level of case difficulty increases. This means that legal outcomes for cases with these factors should be assessed accordingly. While overall conviction rates may go down (initially, at least), other measures of success—victim participation, increased reporting rates, victim experience surveys, increased community confidence/trust in the criminal justice system—provide important counterweights. Outcome assessments, therefore, for each case should be linked to their complexity. See [Chapter 5: Accounting for Case Complexity](#), below.

3.1-D. Routinely Capture, Analyze, and Communicate About the Data

Offices should regularly collect, analyze, and report on performance outcomes that take into account case difficulty and encourage continuous improvement. For resources to support self-assessment, see [Chapter 5 on Performance Management](#), which identifies and describes sources of data for measurement of victim-centered performance.⁴⁷

Assessment should be ongoing, as discussed below under [“Sharing Information and Expertise.”](#) Following each performance report, hold a “How Are We Doing?” meeting with allied professional partners to discuss highlights of the report and what actions or policy changes should be implemented to alleviate any apparent problems or concerns.

3.1-E. Properly Allocate Resources to Address Sexual Violence

First, assess the office’s current allocation of resources—including dedicated, specially trained staff—and identify areas of need. Consider options for obtaining necessary resources, such as borrowing or reassigning staff from other prosecutorial units or seeking some forms of assistance from the private sector.⁴⁸ Nearby law schools or criminal justice programs might be able to provide interns to assist with some tasks, such as listening and transcribing to jail phone calls or collating data.

Dedicate line items in budgets for appropriate resources, such as victim-witness assistance; prosecutorial, investigative, clerical, and support staff (*e.g.*, paralegal assistance); expert witness expenses;⁴⁹ costs for accommodation and accessibility for victims and witnesses; and software for case tracking (which could be as simple as excel or similar spreadsheet software), file maintenance, or surveys.⁵⁰ Be prepared to argue for sufficient appropriations from your jurisdiction.

Many federal agencies offer grants benefiting prosecutors responsible for sexual assault cases. Local foundations are another source of potential funding. These funding opportunities should be identified and aggressively pursued.⁵¹ There may be specific programs that support specialized training for prosecutors or salaries for victim-witness personnel. Local partners or national organizations may also be able to provide assistance or services at no cost.

3.2. BUILD CAPACITY

3.2-A. Within the Office

Prosecutions for sexual assault, like other gender-based violence crimes, have long relied upon individual champions in a particular office, including chief prosecutors, unit supervisors, or individual prosecutors. Some of the ways these champions influence positive case outcomes include:

- Prioritizing crimes of sexual violence, as one would other serious crimes like homicide, by allocating or advocating for appropriate resources, including specialized training for staff.
- Assigning appropriately trained, proactive, ethical leaders to supervise specialized units.
- Specially recruiting, training, and mentoring prosecutors to handle these cases.
- Providing opportunities to participate in or present at trainings and community outreach events that advance the mission of office.
- Specially assigning prosecutors to serve on one or more coordinated multidisciplinary working groups or sexual assault response teams (SARTs) and/or providing a mechanism for information sharing related to these groups or teams.
- Recognizing crimes that commonly co-occur with adult sexual violence, including human trafficking, intimate partner violence, gangs, commercial sexual exploitation-related offenses, and child abuse or neglect, and ensuring information is shared within and among prosecutors or units handling those types of cases.
- Personally committing to trying the most complex cases charged in your jurisdiction.
- Encouraging promising practices and mentoring colleagues.

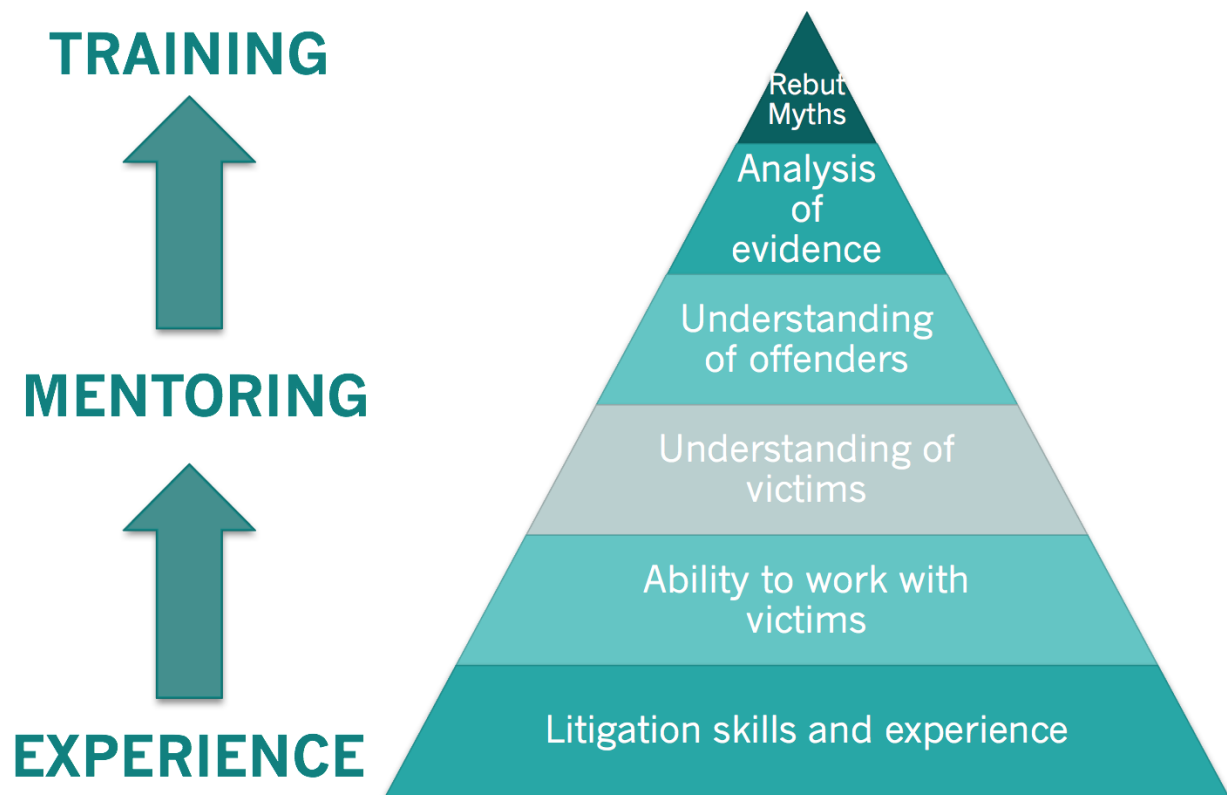
Champions share certain philosophies that can be made sustainable at the office level in the ways discussed immediately below.

3.2-A-1. Develop and Instill Core Principles⁵²

The [Core Principals](#), identified above in *Figure 1*, are integral to a model prosecution response to sexual violence.

3.2-A-2. Develop Specialized Units and Prosecutors⁵³

Offices can become specialized by implementing hiring, assignment, and targeted training processes that identify and develop prosecutors with the skills necessary to succeed in prosecuting sexual violence cases. In offices with fewer staff or resources, one prosecutor can be designated to be the primary prosecutor on these and related cases⁵⁴ and provided with specialized training. This prosecutor can serve as the point person for all sexual assault cases, including ensuring that the appropriate follow-up investigation and case preparation is conducted. In turn, the specialized prosecutor can provide mentoring and assistance to any other prosecutors who will be taking the case further. Prosecutors who have performed well in general crimes, crimes against persons, or violent crimes, who have the desire and disposition to develop the necessary expertise and to give these cases the attention they deserve, are good candidates for specialization sexual violence cases. They bring with them the perspective and breadth of knowledge from other cases involving substantial victim contact to their work on these uniquely challenging cases.



*Figure 3. Qualities of a Successful Prosecutor⁵⁵
Adapted from Teresa Scalzo, Former Director of the National Center for the Prosecution of Violence Against Women and former sexual assault prosecutor*

Specialization includes developing core competencies for *all* prosecutors handling these cases, as outlined in [Appendix B](#). Experience, mentorship, and training on issues specific to prosecuting sexual assault also serve as the foundation to developing the skills and capabilities illustrated in *Figure 3*, that make up the qualities needed for a prosecutor handling these cases. Offices can promote specialization by:

- **Providing advanced and continuing training** to prosecutors handling these cases to improve knowledge and skills on legal issues, forensic, psychological, medical, scientific and technological issues, trial strategies, sexual assault dynamics, culture, and improving the response to underserved populations.⁵⁶
- **Supporting and participating in multidisciplinary training and cross-training** efforts for all partners.⁵⁷
- **Training and working closely with appellate experts.** Whether appeals are handled in a specialized unit in the prosecutor’s office, by the Attorney General, or by the prosecutor

who tried the case, trial prosecutors need to be conversant with current case law and other developments on key trial issues relating to prosecution of sex crimes. Familiarity with the case law and legal developments is critical during trial to avoid the need to re-try cases due to reversal on appeal. Moreover, a close working relationship with appellate experts can help to identify areas of the law that are ripe for change through strategic litigation and appellate practice. This is a reciprocal relationship and should allow for appellate attorneys to better understand dynamics of sexual violence, research related to medical, forensic, psychological and technological issues, and the existence of co-occurring crimes that will make for stronger appellate briefs and arguments.

- **Identifying and working with experts.** Experts may be consulted or retained on specific cases, assisting the prosecutor in screening and preparing the case for trial, as well as providing expert testimony at trial for issues not readily understood by lay jurors. Prosecutors and experts in fields such as disabilities, medical evidence, toxicology, victim behavior, digital evidence, technology, and forensics should cross-train each other to improve the quality of their working relationships and their effectiveness at trial. Experts should play a key role in coordinated community response, and can provide training on working with victims with mental health issues, cognitive disabilities, and substance abuse/addiction. These community members are most at risk of sexual assault because of vulnerabilities created by their conditions and widely held perceptions about their credibility, which are often inaccurate and exploited by the defense.
- **Developing and maintaining a motion and brief bank.** A readily accessible bank of briefs addressing various legal issues will enable prosecutors to adapt and file motions with the court to aid judges in applying the law to the facts of their cases, and to encourage the court to rely upon current scientific and social science research as well as legal precedent and reasoning. For samples, research, and review of motions and briefs, contact AEquitas at (202) 558-0040 or info@aequitasresource.org.
- **Developing a framework for identifying, analyzing, and incorporating relevant non-legal research into prosecution practice.**⁵⁸
- **Arranging for periodic analysis of data from the performance measurement process to identify trends and patterns of sexual assault incidents.** This includes identification of any differences in outcomes for various subgroups based on specific victim

characteristics or circumstances. See [Reviewing Outcome Data by Victim Characteristics or Circumstances](#), below.

Prosecutors in specialized units must have the [Qualities of a Successful Prosecutor, represented Figure 3](#):

- **Sufficient litigation skills and experience.** Prosecutors handling sexual violence crimes should have substantial trial experience in preparing and conducting direct and redirect examinations of law enforcement, experts, witnesses, victims, as well as cross-examination of defendants, defense witnesses, and experts; motions practice for search and seizure, rape shield, other crimes and bad acts, motions *in limine* to exclude non-probative evidence; making specific and well-supported objections; and preparing and delivering opening statements, closing arguments, and rebuttals. This depth of experience will ensure that prosecutors have the ability to present cases in a manner that re-creates the reality of the sexual violence for the jury, while maintaining focus on the offender by exposing the offender’s dangerousness or attempts to manipulate the victim, witnesses, and even the system.
- **An ability to work with victims.** Compassion, patience, and flexibility are important qualities for prosecutors working with sexual violence victims. They should be skilled in communicating with witnesses and trained in the elements of a trauma-informed response, including use of specialized interview techniques. See [Integrating a Trauma-Informed Response & Interviewing Victims](#) in [Appendix B. Core Competencies for Prosecuting Sexual Violence](#) for further detail on training.
- **Understanding of victims.** Understanding how victims respond to the trauma of sexual violence can be one of the most challenging and significant barriers to prosecution,⁵⁹ because failures in this area can cause prosecutors to inaccurately assess victim credibility and underestimate their ability to prove the case. Prosecutors handling these cases should be familiar with the research on neurobiology of trauma, victim response to trauma and the range of common behaviors in its wake,⁶⁰ and the way trauma influences the expectations of victims in these cases. Decisions should be based on an informed assessment of whether the crime happened and whether it can be proved, not on the basis of an uninformed assessment of the victim’s behavior before, during, or after the assault.

- **Understanding of offender characteristics.** Prosecutors must be able to recognize the common and nontraditional weapons (*e.g.*, alcohol or drugs, manipulation and compliance in cases involving victims with disabilities) used by rapists, as well as recognizing and understanding the role of manipulation in perpetrating these crimes.⁶¹ They must look for evidence such as efforts to gain access to potential victims, grooming, isolation, perpetration, cover-up, prior acts of sexual assault, etc.
- **Astuteness in sexual violence case investigation and preparation to facilitate an accurate analysis of the evidence.** Trial skills and experience are important, but these provide only part of the necessary foundation for success in these crimes. Prosecutors also should understand how these crimes are different from other violent crimes; be open to collaboration with and feedback from other prosecutors and allied professionals; be prepared to spend more time with victims; understand the need to spend more time in trial laying out the details and [theme and theory of the case](#); be prepared to conduct a more careful and searching *voir dire* for jury selection; and understand the importance of re-creating the reality of the sexual violence for the jury.
- **Sufficient knowledge and skill to rebut myths and make accurate decisions related to the prosecution of the case.** Research has shed light on many commonly-misunderstood aspects of sexual assault perpetration and victimization, including victim behavior during and after the assault.⁶² Accurate prosecutorial decisions require, at a minimum, that sexual assault prosecutors routinely consult the research related to victim behavior, sexual violence perpetration, intoxication and toxicology, medical evidence, technology, forensics, and juror perceptions of factual issues that arise in these cases.⁶³ This social science and scientific research often runs contrary to the rationales that underlie longstanding legal precedents on issues such as the relevance of sexual history to the victim's credibility or the conclusive effect of injury or absence of injury in determining the use of force. Connecting the legal, scientific, and social science research to specific practices and decisions improves case evaluation, preparation, and litigation of sexual violence cases. For sources of specific research, see *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

In addition, prosecutors should understand their role in a collaborative multidisciplinary team. Prosecutors should have the ability and willingness to work with experts from law enforcement, healthcare, advocacy, and forensic disciplines. They should have the ability to understand and explain the roles of these experts in the multidisciplinary response and, in turn, to help the experts understand the role of prosecution. The ability to respect the roles of others is a key element of a successful team effort.

3.2-A-3. Understand How the Rules of Professional Responsibility Govern Decision-Making⁶⁴

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁶⁵

Charging decisions are difficult in sexual violence cases and also are one of the most common points of attrition.⁶⁶ Prosecutors often weed out charges that they speculate a jury may not convict on, and given the prevalence of myths around sexual violence and routine disappointing verdicts, it is easy to understand how speculation could overtake this decision.⁶⁷

Given the paucity of social science research regarding the willingness of juries to convict in the absence of corroboration and/or evidence of physical resistance, or in cases where the complainant engaged in risk-taking behavior or is perceived by prosecutors to have a blemished moral character, it is difficult to evaluate the accuracy of these skeptical prosecutors' claims.⁶⁸

The research on case attrition suggests that decisions not to prosecute may be based on lack of training or misinformation about sexual violence dynamics or may be based on a misunderstanding of the ethical standards for charging or the proper meaning of “reasonable likelihood of conviction.”⁶⁹

According to the American Bar Association’s Model Rules of Professional Responsibility and the rules of ethics or professional responsibility in the various jurisdictions, a decision to file a criminal charge must be based upon probable cause to believe the defendant has committed the crime.⁷⁰ The law of some jurisdictions may provide additional guidance or may focus predominantly on the **reasonable likelihood of conviction**, one of the 13 charging factors set forth in professional standards promulgated by the American Bar Association⁷¹ and the National District Attorneys

Association.⁷² The appropriate question to answer when deciding whether to prosecute a case should be: “Given the evidence that will likely be admissible at trial, and the likely evidence and arguments of the defense, *should* a jury find that every element of the offense has been proven beyond a reasonable doubt?”⁷³ Ethical standards guide us to make charging decisions based on what a reasonable factfinder *should* conclude when weighing all of available admissible evidence, not to make those decisions based upon probabilities dictated by the misgivings of the uninformed.⁷⁴

3.2-A-4. Recognize and Address the Impact of Vicarious Trauma⁷⁵ on Staff.

Vicarious trauma is “a human response to the experience of coming face-to-face with the reality of trauma and the difficulties of the human experience.”⁷⁶ Confronting vicarious trauma at an office level is critical to creating an atmosphere where prosecutors are able to acknowledge and address secondary trauma. This will lead to more effective practice and positive case outcomes, as well as reduce staff turnover due to “burnout.”

Establish office policies that promote awareness of vicarious trauma and the need for good work/life balance,⁷⁷ encouraging staff to connect and debrief after difficult cases to relieve some of the intensity and pressures of the job.⁷⁸ This can be done by:

- **Being aware of the presence of vicarious trauma in staff and taking action.** “Regular interaction with trauma can take a toll ... on members of the legal system who strive to administer justice.”⁷⁹ Historically, acknowledging the impact of vicarious trauma and seeking assistance might have been seen as a sign of weakness; hiding or working through the pain may have become the expected and accepted response. The effects of trauma and burnout can be de-stigmatized – staff should understand they are not signs of weakness or lack of commitment to the job, but normal experiences for anyone working in this difficult field of law. Unit supervisors should become familiar with signs of burnout or vicarious trauma in both themselves and staff. Proactively address vicarious trauma with available Employment Assistance Program resources, such as counseling, and/or training.⁸⁰
- **Encouraging and supporting employee work/life balance.** Establish policies that allow for self-care and calendaring for personal time off after difficult trials. Additionally, some offices may allow or even encourage prosecutors to rotate out of the unit after a certain time to mitigate burnout. Such rotation should be voluntary. Ideally, turnover will remain

low in sexual assault units or among specialized prosecutors because the greater experience and training a prosecutor has the better s/he will respond to these cases.⁸¹

- **Creating opportunities for staff to connect and debrief on difficult cases.** Evaluation of cases following disposition – within in the office as well as the multidisciplinary team – is beneficial. It allows prosecutors to more deeply understand and refine their practices and provides a way to process the emotional effects of their work, particularly after especially difficult cases.
- See [Appendix C](#) for signs and symptoms of vicarious trauma and specific practices to identify and ease the impact on prosecutors.⁸²

3.2-B. Within the Community

3.2-B-1. Multidisciplinary Collaboration

Sexual Assault Response Teams (SARTs) “[e]nsure justice and create a more compassionate and streamlined response, [allowing] service providers [to] intervene in a way that speaks to the context of each victim's circumstance and respects the unique roles of the different professionals involved in responding to sexual assault.”⁸³

A SART “is a community-based team that coordinates the response to victims of sexual assault.” SARTs are an invaluable resource for prosecuting sexual violence crimes. SART team members typically include a number of “core” members but may also include some additional disciplines as well.

Figure 4. SART Core Members and Additional Members



SARTs or multidisciplinary teams often pursue two primary goals. The first is to afford regular contact among disciplines to promote the best first response to, and ongoing discussion of, individual cases. This allows the allied professionals involved in a case to ensure they are responding holistically to victim needs, as well as communicating with each other on relevant aspects of the criminal justice response.⁸⁴ The second goal is to improve the broader community response by identifying gaps in services to victims, mapping existing networks of support and expertise, raising concerns and offering solutions to better integrate and improve existing practices, developing new sustainable practices (adapting best practices from other jurisdictions where appropriate), and developing a plan for receiving and responding to feedback.

Prosecutors should take a leadership role in creating a SART in their community or by engaging with an existing team. Where no SART exists, consider convening a sexual assault task force to initiate the process. Where resources may be unavailable to start a formal SART, a pre-existing

multidisciplinary team or similar coordinated community response team also may advance these goals.⁸⁵ These team members may already be handling sexual violence cases through co-occurring crimes. The core members of a SART or other multidisciplinary team are prosecutors, advocates, law enforcement officers, medical forensic examiners (including sexual assault nurse examiners (SANEs⁸⁶)), and forensic laboratory personnel. Other allied professionals may participate in the SART as well, depending upon the resources and needs of the jurisdiction. Prosecutors should identify and encourage collaboration with leading experts in these multidisciplinary fields in order to better understand the victim's experience and to develop deeper insight into the evidence in a sexual assault case.⁸⁷

The wealth of research supporting the effectiveness of SARTs should inform policy and practices. See [Appendix D](#) for further discussion of the components of SARTs and the roles and responsibilities of team members.

Communicate with Partners and the Community and Obtain Their Feedback

Prosecutors participating in SARTs should create a mechanism for receiving and responding to feedback from their community partners, including advocacy organizations and community-based service providers. A similar system should be established to receive feedback from sexual assault victims who have reported, or those who choose to remain anonymous and decide not to report. Feedback from victims who have opted out of the criminal justice system can be obtained via a hotline (perhaps one established within the crime victim rights and compensation office) or from victim's rights organizations, civil attorneys, or community-based service providers, all of which interact with survivors in the aftermath of an assault.

Prosecutors should also interact with members of the public in the course of legislative advocacy efforts, policy development, and in public forums to discuss issues concerning sexual violence within the community. Such community outreach should include coordination with colleges and universities on their response to sexual assault and their compliance with Title IX. Outreach efforts communicate to the public that prosecutors are taking sexual violence seriously and pursuing offenders aggressively, which can encourage victims to come forward and instill trust in the criminal justice system.

3.2-B-2. Identify and Utilize Data and Technology

Data and technology can provide tools for investigation, case preparation, assessment, and performance management. Connecting the data available in cases within a jurisdiction's caseload can reveal serial perpetrators, co-occurring crimes, polyvictimization and open cases in other jurisdictions. Evolving technology provides tools for better connecting the dots in this wealth of

available information to reduce gaps in the response to sexual violence. Some investigative tools are:

- Data-Crime Statistics
- VICAP⁸⁸
- Listservs
- Digital Evidence Investigative Tools⁸⁹
- Training
- Technology
- Case management systems

Case evaluation and preparation can also benefit from data sharing and technology.⁹⁰ Identify and utilize available and emerging technology to help improve effectiveness of prosecution response, including consistent development of databases to store and review information.

3.2-B-3. Share Information and Expertise

The RSVP Model encourages specialization in the response to sexual violence because it promotes more positive outcomes. Specialization, however, can raise challenges for coordination among departments. Siloing⁹¹ – working in isolation and without communication – inhibits the sharing of information and knowledge. “Silos are cultural phenomena, which arise out of the systems we use to classify and organize the world.”⁹² “[H]umans tend to organize the world around them into mental, social, and organizational boxes, which can often turn into specialist silos. When these are rigid, they often cause people to behave in foolish or damaging ways; silos can also make people blind to opportunity and dangerously unaware of risks.”⁹³ In prosecutor’s offices, units with a high degree of specialization can easily morph into silos with the risk that concept implies.

Silos are not inevitable, however. “Institutions are just gigantic collections of people and one of the most basic steps that we can make to fight the risks of silos starts not with leadership committee or organizational chart or grand strategy plan, but inside our heads.”⁹⁴ When information and knowledge—otherwise guarded by isolated entities—is disseminated and shared, silos are deconstructed. When we make the effort to open clear lines of communication and coordination among organizations with specialized missions, the silo effect is neutralized.

SARTs are one way to coordinate such efforts to ensure that no opportunities are missed to provide services for victims, pursue justice, or improve the system’s overall response to sexual violence.⁹⁵ SARTs promote the sharing of beneficial information and practices within and among agencies,⁹⁶ divisions, staff, and partners.⁹⁷

Offices can develop and implement an action plan to identify and de-construct the silos that may be inhibiting the efforts to work collaboratively. Create a plan for communication and cross-training within office and outside of the office, with clearly delineated methods for accessing information and institutional knowledge. Within an office, communication between units and individuals prosecuting crimes that often co-occur with sexual assault is essential to ensure that victims of sexual assault are identified and that best practices are shared. Where there are legitimate legal restrictions or professional obligations protecting certain communications or information from disclosure to unauthorized parties (*e.g.*, information possessed by or communicated to victim advocates, social workers, civil attorney, universities), sharing may be appropriately limited. Protocols may, however, be created to permit disclosure with the informed consent of the victim.

Offices and prosecutors seeking support and assistance in formulating and implementing their efforts to improve collaboration and eliminate the silo effect can turn to national technical assistance providers such as AEquitas.⁹⁸

What is Law Enforcement Doing?

There are many different ways to work with local law enforcement to better understand their policies and practices. The Women’s Law Project has been working with Philadelphia Police Department since 1999 to review rape and sexual assault complaints at the Philadelphia Police Department’s Special Victims Unit (SVU). Together, the Women’s Law Project and the Police “assess the thoroughness and outcome of each investigation, raise questions, and provide feedback.”

Sexual Violence, WOMEN’S LAW PROJECT, <http://www.womenslawproject.org/sexual-violence/> (last visited May 22, 2017); Women’s Law Project, *Advocacy to Improve Police Response to Sex Crimes*, POLICY BRIEF (Feb. 2013), http://www.womenslawproject.org/wp-content/uploads/2017/02/Policy_Brief_Improving_Police_Response_to_Sexual_Assault.pdf.

*3.2-B-4. Develop an Effective Strategy for Communicating with the Community About Sexual Violence*⁹⁹

Prosecutors must clearly communicate to the public about the prevalence of sexual violence in the community, the gap between occurrence and reporting, the services available for victims, the prioritization of these crimes by the office, and prevention efforts in which the office is involved.¹⁰⁰ In addition, prosecutors should be prepared to discuss case processing with the media and with members of the community. Providing the public with transparent and accurate data and information about prosecution rates; the factors that impact prosecutorial decision-making; noteworthy successes, challenges and disappointments; and the methods employed for measuring prosecutorial effectiveness will promote public confidence in the commitment of the office to timely and evenhanded justice in the prosecution of sexual violence. The importance of these talking points reflecting research and expertise of the office on these crimes and issues cannot be overstated.

Develop a public communication strategy, consistent with rules of professional ethics,¹⁰¹ to address the incidence of sexual assault in community. Communications can disclose and explain, in a general non-case-specific way, such issues as prosecution response, allied partner response, considerations in prosecutorial decision-making, prosecution rate, case outcomes, and performance management. Develop a public communication strategy for reporting significant developments in specific cases in a manner consistent with the rules of professional responsibility and victim privacy. If individual prosecutors are authorized to speak publicly about their own cases, they should receive proper training on their responsibilities in doing so. There are significant constraints on the public discussion of any case. Typically, public comment is limited to matters of public record and governed specifically by the jurisdiction's rules of professional responsibility. A good working relationship with the media is important, not only to educate the public on issues pertaining to the prosecution of sexual violence, but also to gain insight from media questions that may further inform communication strategy.

3.2-B-5. Improve Community Relations by Promoting Cultural Humility

For victims deciding whether or not to engage with the justice system, and for community members longing to have faith in that system, the depth and sincerity of prosecutor engagement may make all the difference. Mistrust often originates in the actual or perceived disparate treatment of victims and offenders based on victim and offender characteristics. Offices and prosecutors should work

closely with community advocates to develop insight into the various cultures represented in the community in order to better understand the victim’s experience of trauma as well as the potential reasons for reluctance to engage the system.

“Given the complexity of multiculturalism, it is beneficial to understand cultural competency as a process rather than an end product. From this perspective, competency involves more than gaining factual knowledge — it also includes our ongoing attitudes toward both [victims] and ourselves.”¹⁰² This attitude has been termed cultural humility. Victims with different backgrounds, including socioeconomic, racial, ethnic, gendered, sexual orientation, religious, age, disability, and other characteristics, may differ in their perception of law enforcement and the crime itself, as well as the availability of resources for safety and healing.¹⁰³ Cultural humility replaces barriers with bridges, increasing the level of trust and understanding on both sides of the conversation. It enhances the ability and willingness of victims to engage and stay engaged with the system and results in more positive case outcomes. It facilitates prosecutorial interaction across cultures with an appreciation of the concerns specific to the diverse populations within the local community.¹⁰⁴

Improving victim engagement is important for encouraging the reporting of sexual assault crimes and enhancing the response. Offices can take the following steps:

- Assume a leading role in community outreach.¹⁰⁵
- Assess cases for indicators of bias to ensure that that the system is fair to all victims and defendants.¹⁰⁶
- Provide regular reports to the community on the outcome measures related to bias. Do not hide bad outcomes or provide weak excuses, but do explain plans for alleviating the problems and improving future outcomes.¹⁰⁷

3.2-B-6. Encourage and Facilitate Formal and Informal Cross-Training

Research demonstrates that cases of sexual violence are frequently screened out by law enforcement and prosecutors for the very factors that make these cases unique:¹⁰⁸ there are rarely third-party witnesses to a sexual assault; intoxicated victims, those who have been sexually exploited, victims with disabilities, and other vulnerable victims, are often targeted by offenders; and most victims are attacked by someone they know, not by a stranger. Historically, these

characteristics have resulted in cases going uninvestigated (e.g., sexual assault kit backlogs across the country)¹⁰⁹ and allowed dangerous perpetrators to continue committing sexual assaults.¹¹⁰

An early line of defense to the often uninformed concerns over credibility in cases with these common characteristics involves cross-training for specialized sex-crimes prosecutors and those in other specialized units, along with law enforcement officers and other allied professionals who may be among the first to respond to a sexual assault. Participation by survivors, as well as advocates, will remind law enforcement and prosecutors of the ongoing need to support victims and respond to their collateral needs, keeping them safe and engaged in the system. Advocates can also provide valuable input based on their work with victims who will never report their crimes. Other community-based professionals and national experts should also be involved in training efforts to improve their ability to work effectively with prosecutors and other partners:

- Medical professionals (including SANEs) to explain the significance of injury or lack thereof, victim behavior, etc.
- Toxicologists to explain the impact of alcohol and drugs, and the science involved in their work.
- Experts on human trafficking and violence against sexually exploited women, to explain the dynamics as well as the long-term negative effects of this form of victimization.
- Experts on the neurobiology of trauma to explain the impact of trauma on the victim's ability to remember and to discuss the assault, as well as other issues related to interviews (e.g., inconsistencies, etc.)¹¹¹
- Domestic violence advocates to explain the dynamics of intimate partner violence.
- Disability experts to facilitate communication with the victim and explain the impact of disability on an individual's ability to consent, communicate consent, and/or other verbal or physical functions.

Cross-training improves the overall response to sexual assault by promoting communication and fostering trust among disciplines, increasing the likelihood of identifying sexual assault in the context of co-occurring crimes, identifying and acting on emerging problems and issues, and strengthening the jurisdiction's core competencies.¹¹² Cross-training can be encouraged by providing professional continuing education credits for participation. For law enforcement, roll-call trainings are an option.

3.3. OFFICE-LEVEL CONCEPTUAL MODEL

How do we ensure that the promising practices described above really work—that they actually promote sustainable improvement in the response to sexual assault in a particular jurisdiction? One way is to link the specific practices to their intended outcomes, using a map, and to analyze whether the practices achieve the outcomes. The conceptual model, which is essentially a graphic representation of the connection between practices and their intended outputs and outcomes, helps to ensure that there is a clear and logical relationship between all of these elements.

The conceptual models shown on the following pages portrays the RSVP Model at the office-level. Specifically, they map the practices that have been described above and then show what immediate outputs should be produced. If these outputs are produced, the office should expect to begin seeing immediate outcomes that ultimately lead to long-term outcomes. The long-term outcomes form the basis for a series of performance management measures that can be used as indicators for local policymakers and practitioners for continuous monitoring and assessment of their response to sexual assault. See [Chapter. 5. Performance Management](#).

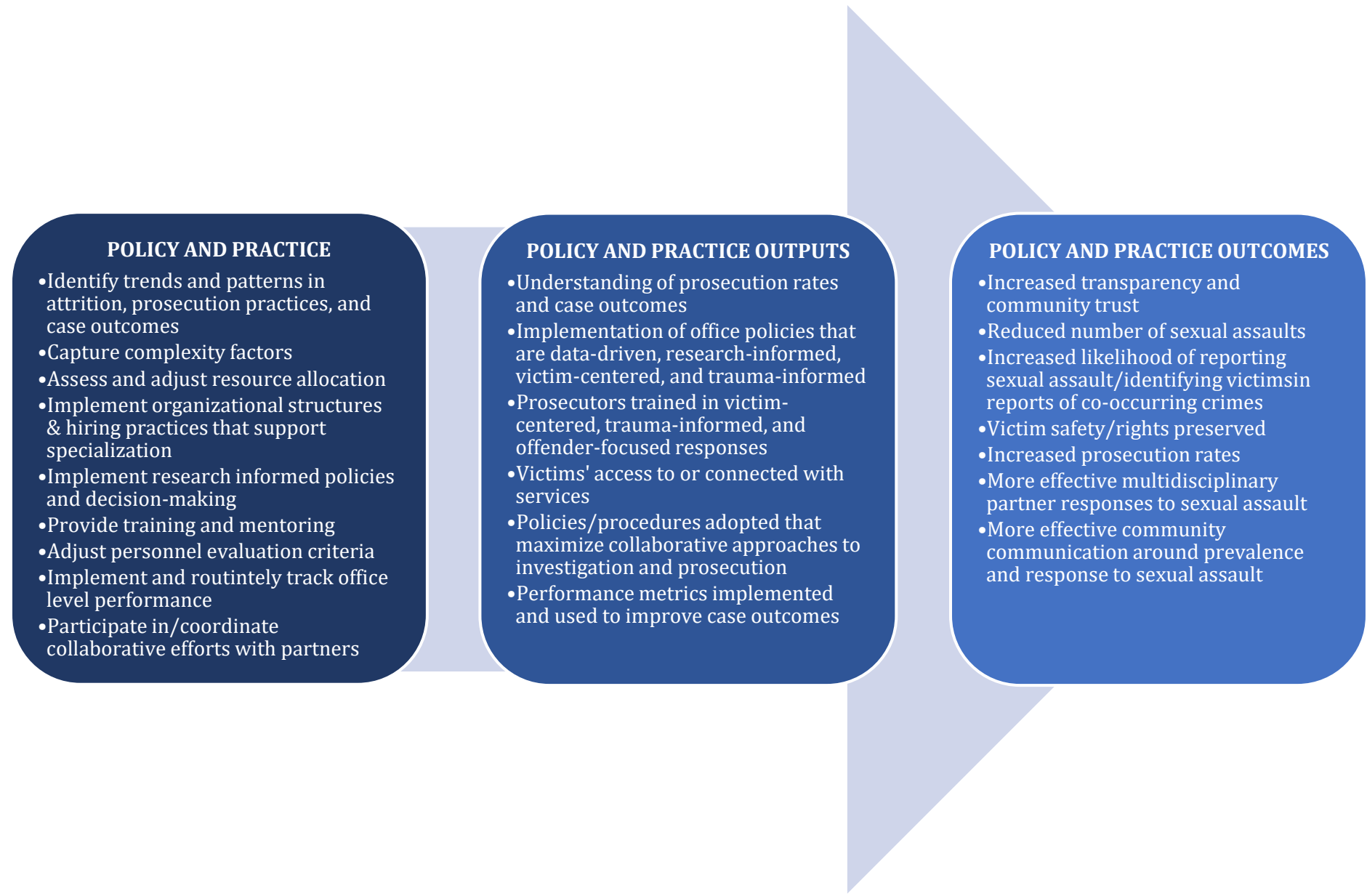
Figure 5. RSVP Conceptual Model

The RSVP Model assumes that changes occur at multiple levels within prosecution—notably at the office level and the case processing level. At the office level, the emphasis is on leadership in sexual assault prosecution and providing a foundation for effective case processing. The policies and practices at the office level encourage case processing practices that are consistent with best practices. As shown in the model below, office policy and practice that are based on the RSVP Model lead to data-driven, victim-centered, trauma-informed, and offender-focused case processing practices that produce specific measurable outcomes for performance measurement. Management of performance then informs future office policy and practice.



Figure 6. Office Policy & Practice Conceptual Model

Effective responses to sexual assault must be driven by the office leadership through the establishment of policy and office-wide practices that allow prosecutors to provide leadership to both to their staff and to partner agencies involved in the investigation and prosecution of sexual assault. The model below has three main elements: policy and practice, outputs, and outcomes. The information in the policy and practice box describe the actions to be taken by office leadership to ensure effective responses to sexual assault. Each of the policy and practices should produce a specific and immediate result (the output). For example, the result of regular analysis of attrition, sexual assault prosecutions, and outcomes (the policy/practice) will produce a better understanding of prosecution rates and case outcomes. The outputs are indicators that progress is being made toward achieving the general outcomes of improving the office's overall response to sexual assault. [Chapter 5](#) provides more detail about how these outcomes are measured.



Case-Level Leadership: The Prosecutor’s Duty to Achieve Justice

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A significant majority of sexual assaults are never reported, often because survivors fear that police and prosecutors will blame them or unfairly challenge their credibility. Of those assaults that *are* reported, varied research on case processing,¹¹³ untested rape kits,¹¹⁴ prosecutorial decision-making,¹¹⁵ and investigative reports¹¹⁶ demonstrates that few cases are accepted for prosecution¹¹⁷ and even fewer proceed to trial.¹¹⁸ Survivor accounts, sadly, mirror the research. It is as painful to hear that survivors and communities believe “that prosecutors just don’t want to take hard cases”¹¹⁹ as it is to face the reality that their perceptions may be accurate. Regardless of how effectively we think our offices are handling cases of sexual violence, data and anecdotal evidence paint a different picture; even the most effective jurisdictions have room for improvement. Failure to bring all of our resources to bear on these devastating crimes is a failure to fulfill our mission to achieve justice.

While the reality may be discouraging, *dedicated prosecutors across the country are working to change the narrative*. Even with the imperfect and varied laws across our country, there are few insurmountable *legal* obstacles to justice in the vast majority of cases. Rather, decisions not to pursue a prosecution tend to rest on judgments about the facts of the case or the characteristics of the victim. Research and experience show that the factors *most common* in sexual violence cases – alcohol use by the victim or perpetrator, a current or former relationship between the perpetrator and the victim, lack of physical force, lack of physical injury, lack of victim participation in the prosecution, lack of corroboration – are the same factors most often relied upon to support a decision to decline prosecution due to perceived problems with credibility or in securing a conviction at trial.

Experienced prosecutors acknowledge that high conviction rates often mask a high attrition rate. “*If you don’t lose a few cases every now and then—you’re not trying enough cases.*”¹²⁰ We also know that the more frequently we try hard cases, the more successful we become at winning them, and the more educated

our communities, our judges, and our juries become. Rather than defining a prosecutable case from the perspective of the lowest common denominator (the least informed factfinder), we need to ensure that every case decision, from referral for charging through final disposition, is supported by the core principles articulated in Part 1, informed by research and experience.¹²¹

4.1 REVIEW, EVALUATE, AND CHARGE THE CASE

4.1-A. Review All Reports in a Timely Manner

Jurisdictions may differ in how sexual assault cases are investigated and charged. In some jurisdictions, virtually all investigative activities are conducted by local police; other offices have investigators within the office who conduct significant follow-up investigation after the initial police response. In some jurisdictions, local police may file the initial charges; in others prosecutors make the initial charging decisions. Regardless of the division of investigative and charging responsibilities, prosecutors should be accessible at any stage of the investigation for consultation and review, to ensure that important evidence is collected and documented, and that investigations proceed without unreasonable delay.¹²²

Delay can cause irreparable harm in these cases. Crucial evidence may be lost. Victims may become less willing, over time, to participate in the prosecution—they lose faith in the system and offenders have more opportunity to engage in intimidation and manipulation. Communities remain vulnerable to continued attacks by perpetrators.

4.1-B. Consider Law, Policy, and Relevant Research

The prosecutor's initial review of a case should be informed by research, experience, and training. Prosecutors should have a thorough knowledge of all applicable sexual assault statutes and their underlying public policy, as well as the case law interpreting them.¹²³ Knowledge of the law alone, however, will be insufficient to ensure success. The written law may not account for all of the current scientific, technological, and social science research that may have implications for proving the case. A thorough understanding of this research will facilitate accurate assessment of the evidence and enable the prosecutor to recognize gaps that call for further investigation. The research identified in

[Appendix B](#). will support an accurate and evidence-based assessment of the case and the supporting evidence.

Review of initial case reports should include:

- A careful reading of incident and summary reports, review of any recorded statements,¹²⁴ crime scene video, and photographs, and review of any notes in the file, including notes by any previously assigned investigators or prosecutors, and identification of corroborating or conflicting statements. For victims with disabilities, shorter police reports may indicate that an interviewer's trouble understanding a victim impacted the information recorded in the interview. If police reports appear to contain inconsistent information, seek clarification and request supplemental reports correcting any misstatements, along with an explanation of the discrepancy and the fact that the supplemental report was requested by the prosecutor.¹²⁵
- Note any statements of opinion or language in ***reports suggesting the investigator may have formed a judgment about the victim's credibility or blameworthiness*** for the assault and prematurely stopped further investigation.
 - Some reports contain clear value judgments about the victim and her/his behavior, while others use more subtle language, *e.g.*, using “claims” or “alleges” in recounting the victim’s statements, as opposed to the more accurate and neutral terms, “reports” or “states.” Similarly, suspect are reports devoid of direct quotes except for isolated words or phrases that describe force or lack of consent.
 - These examples are not exhaustive but raise red flags for three reasons: 1) if the victim felt “judged” by the officer, it may impact the victim’s willingness to stay engaged with the case. 2) Such reports indicate a likelihood that leads, including available evidence and identified witnesses, may not have been investigated. 3) Such reports may create issues during cross-examination of the officer at trial. (“Isn’t it true that you had your doubts about this supposed victim’s story?”) In addition to requesting follow-up investigation to the extent necessary for a complete investigation, prosecutors who receive such reports should take appropriate steps to encourage officers to communicate with victims using trauma-informed interviewing techniques and to improve their report-writing. Enlist the assistance of an advocate to reach out to the victim to assure him or her that the case is receiving appropriate attention.

- Analyze reports for **relevant and material evidence supporting the elements** of the offense. Where appropriate, seek input from fellow prosecutors, supervisors, and experts¹²⁶ for their thoughts about the case and the kinds of evidence that might help to make it better. Look for evidence:
 - To **corroborate** the accounts of the victim or witnesses.¹²⁷
 - Suggesting that the assault was drug- or alcohol-facilitated, and for evidence showing the **effects of those substances**¹²⁸
 - Supporting the **elements of force or lack of consent**, particularly where evidence of these is subtle or nuanced¹²⁹
 - Reports should be written in the language of assault (e.g., a victim’s description of forcible penetration should not be documented as victim “had sex” with the perpetrator). Again, issues of report-writing should be reviewed with the officer in the interest of improving skills in that area.
- Analyze reports for any indication of **co-occurring crimes** (image exploitation crimes, stalking, harassment, intimate partner sexual assault, violence against sexually exploited persons, hate crimes, etc.).¹³⁰ Unless prosecutors and allied professionals are equipped to recognize signs of co-occurring crimes, and to use trauma-informed interviewing techniques¹³¹ to obtain relevant information from victims, such crimes may go unnoticed, with attention focused only on the “presenting problem”—the criminal offense for which law enforcement was summoned. Victims may be fearful or ashamed of volunteering information about some crimes (particularly sex crimes or image exploitation), may not recognize the offender’s related conduct as criminal (e.g., stalking or intimidation), or may fear being prosecuted, themselves (e.g., where gang members use violence or coercion to involve victims in criminal activity or where the victim has been intimidated by immigration-related threats). Challenges to identification of co-occurring crimes are heightened when victims are living in underserved communities, when culturally competent services are not available, or in communities where there is distrust of law enforcement (e.g., inner-city communities or those with a significant immigrant population). Early identification helps to connect the victim with all appropriate services to address the full range of victimization at the earliest possible stage, helps investigators to obtain evidence while it is still available and fresh, and allows prosecutors to make appropriate initial charging decisions and arguments regarding bail conditions.

- Analyze reports for any indication of **intimidation**, however subtle, so you can follow up with the victim or witness for additional information. Be alert for circumstances creating opportunities for intimidation.¹³²
- Identify and secure all potential sources of **digital evidence**.¹³³ Work with law enforcement personnel trained in digital extraction. Search warrants for cell phones should be obtained and executed quickly to preserve evidence before it is destroyed; consider current issues involving compelling defendants to provide their passcode.¹³⁴ Preservation letters should be sent to Internet service providers (ISPs) or social media platforms pending service of subpoenas, warrants, or court orders to obtain records maintained by those entities.¹³⁵ Remember that victims or witnesses can generally consent to release of records relating to their own their own Internet accounts, but the information still must be promptly preserved.¹³⁶
- Consider the relevant **statute of limitations**.¹³⁷ Prosecution of a sexual assault may be delayed for any number of reasons—inability to identify a perpetrator, inadequate investigation, improvements in technology that allow new leads to be developed many years after the crime, or the survivor’s inability to report the crime until significant time has passed. When the perpetrator is finally identified, or sufficient evidence finally developed, the lapse of time since the crime can still pose a significant legal obstacle to prosecution. The law often limits the period of time for bringing charges against the perpetrator. These limitations vary widely across the United States and are rapidly changing in response to technological advances, as well as increased understanding about sexual assault and the effects of trauma. Even where the statute of limitations may bar filing charges, previous assaults may still be admissible at trial as “other acts evidence.”¹³⁸
- Closely review the evidence in the **sexual assault kit (SAK)** in all cases, regardless of whether the offender was known to the victim and regardless of whether there is the potential for a consent defense to be asserted.
 - SAK evidence can lock in identity, foreclosing a denial defense; corroborate certain aspects of the victim’s account of the assault; link the perpetrator to other crimes that may be admissible to prove issues such as intent, lack of mistake, common scheme or plan.
 - Victims have a strong interest – and in some jurisdictions a codified right – in being informed about the status of their kits.¹³⁹

- Review medical evidence and, where necessary, consult with a medical expert or the examining physician to understand the inferences that can be drawn from any observations or conclusions.¹⁴⁰
- Ensure chain of custody is well documented and that the kit is sent to the crime laboratory in a timely manner.
- Arrange to track the testing of evidence in the kit and to provide the victim with updates on its progress.¹⁴¹ Find out from the lab the estimated timeline for testing and when results should be expected.
- If the lab states that the samples will be consumed during testing, notify the defense and schedule any necessary hearings to resolve issues concerning defense access to the testing process.
- For additional information and resources on DNA for investigation and prosecution, see *Practitioner Resources*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/resources/> (last visited June 13, 2017). See also [DNA and Forensic](#), below.

4.1-B-1. Communicate Regularly and Meaningfully with Investigators

The prosecution-law enforcement partnership is critical to success in these cases. A good working relationship requires meaningful communication on a regular basis, which will foster honesty and candor based on trust and mutual respect. Create open lines of communication that permit discussion of any questions or problematic issues, such as report-writing skills or evidence-collection practices. Explain the reasons for any additional investigation requested—this will put the request in context and increase the likelihood of a helpful response. Fostering this type of relationship will reduce the number of cases declined for prosecution and improve the ability to identify serial offenders and co-occurring crimes.¹⁴²

In your interactions with law enforcement, encourage officers and investigators to keep the following in mind.

- Rape cases are complicated. They require more in-depth investigation because there are so many ways rapists can escape justice. And once evidence is lost, obtaining a conviction is made even more difficult than it already is. ***Collect and preserve evidence at the very beginning of the case*** to provides the strongest chance of identifying and successfully prosecuting a perpetrator.

- Work on ***establishing rapport*** with victims before you talk to them about the crime that was committed against them. You're dealing with victims of traumatic crimes who are still recovering from those crimes, and who are being asked to talk about very personal, private matters to a stranger—not an easy thing to do. Find out as much as you can about the crime from any other sources you might have, before sitting down to talk with the victim.
- ***Follow the evidence where it leads.*** When a victim reports being raped at home, then the home is a crime scene; and if it happened in a car, then the car is a crime scene. Gather the evidence, document the evidence, and preserve the evidence. Follow up on any leads, and look for evidence that corroborates any details of what the victim has told you.
- ***Never decide “this case is going nowhere” and stop investigating*** because the victim was drunk or using drugs, the suspect was drunk or using drugs, the victim is a sexually exploited person, the victim and suspect were in a relationship, the victim's story doesn't seem to make sense to you, the victim has trouble processing information or communication in a traditional manner or any other facts that you see as problematic. We have strategies to deal with **any** fact at trial, but only if we have the evidence gathered during a thorough investigation. We will decide later, after the investigation is completed, whether we can prosecute.
- ***Never give the victim the impression that the case will not be prosecuted.*** That's a decision for the prosecutor to make after the investigation is completed. When victims are told that it sounds like a weak case, it makes the victim feel like they are not believed, which just adds to the trauma of what has already happened. If the victim asks your opinion, just say that you are going to investigate everything so when the time comes for the prosecutor to decide what to do, the prosecutor has all the necessary information to make that decision.

In addition to the value of a good relationship during the investigative stage, law enforcement can also provide support during trial. A trusted officer can wait with the victim and other witnesses outside the courtroom, transport witnesses to court, identify acts of intimidation in the courthouse, and can also be a source of support for victims, particularly where community and other advocates lack capacity.¹⁴³

Regular and meaningful communication should continue after the disposition of a case. Any officers or investigators who did significant work on the case—whether or not they testified at trial—should

be advised of the outcome. Prosecutors should debrief with law enforcement on significant aspects of success during the investigation and trial, any practices or investigative methods that proved problematic, and any evidence that may have been missed. Officers or investigators who did especially outstanding work on a case should be commended in a letter to their chief or superior officer. Similarly, prosecutors should invite feedback from law enforcement about the prosecution/litigation of the case (*e.g.*, pleas, motions filed, arguments, cross and direct) and prosecutorial decision-making). Receive any criticism respectfully and with an open mind, rather than responding defensively; there is no need to apologize for decisions or actions you are convinced were the right ones, but mistakes should be acknowledged. *Although each profession has its own areas of expertise, this open line of communication will build trust and allow for cross-training to improve the performance of both professionals or highlight gaps in response that can be corrected through training or resources.*

4.1-C. Make Charging Decisions Consistent with Research and Ethical considerations

Jurisdictions vary as to the agency responsible for “filing” charges. Law enforcement may have the legal authority or responsibility for making the initial charging decision or that role may be assigned to prosecutors. Regardless of the specific process, at some point prosecutors will connect with a case file and be responsible for determining whether there is probable cause to charge a crime, the minimum standard required by rules of ethics.¹⁴⁴ Sometimes office policy requires a higher standard for charging—a reasonable likelihood of conviction.¹⁴⁵ However, where the ordinary complexities of such cases are transformed into effective barriers to accountability, this standard often leads to the inappropriate declination of many sexual assault cases.

Inappropriate declinations tend to rest on two unique, yet equally problematic practices: The first is the initial—often inaccurate—impression of the case facts or victim. The second is speculation or prediction about the outcome.

Initial impressions (of a case or victim) that result in declination are often the product of premature judgments formed before all of the facts are known. Ironically, it is often the lack of evidence in an initial report that is used to justify a decision not to allocate resources to a further investigation. Decisions to forgo full investigations likely flow from an intent to prioritize expenditure of finite resources for those crimes perceived as most likely to be substantiated and prosecuted.¹⁴⁶ The reality,

however, is that improved investigations strengthen complex cases and improve the likelihood of a positive trial outcome. ***Results of recent research into untested sexual assault kits should cause us to consider the devastating consequences these decisions have for victims and communities, where failure to properly investigate has permitted serial perpetrators to remain free to assault others in the same manner.*** With proper training and collaboration, the criminal justice system's response to these crimes will be far more successful.

Prosecutors should proactively work with law enforcement to identify practices that result in little or no investigation and to cases not being charged or referred for prosecution. Specialized prosecutors should review all police reports to determine which cases are being passed over and identify any common case characteristics. This is an opportunity for a dialogue between law enforcement and prosecutors to discuss the reasons behind decisions and to communicate the importance of research-informed decision-making and thorough investigations. If there aren't sufficient resources to conduct investigations, this needs to be stated and resources need to be advocated.

Speculation about likelihood of conviction, also known as predictive analysis, “involves prosecutors in predicting the future decision-making of others, and then using that prediction as the standard for measuring evidential sufficiency *ex ante*. If the person or persons who will make the ultimate decision at trial are unlikely to find the evidence sufficient, then the prosecutor (according to the predictive view) ought to decline prosecution on grounds of evidential insufficiency.”¹⁴⁷ As a result, law enforcement may not refer cases for prosecution if they believe the prosecutor is unlikely to charge, based on the prosecutor's professed belief that juries will not convict on a given set of facts. Such speculation is at odds with the proper basis for prosecutorial discretion because it abdicates the critical decision-making responsibility to a hypothetical jury—and one that is not fully informed, at that.¹⁴⁸

One articulation of the appropriate charging standard might be this:

Given the prosecution evidence that will likely be admissible at trial, and the likely evidence and arguments of the defense, should a jury find that every element of the offense has been proven beyond a reasonable doubt? In most rape cases, this question will amount to, “Should the jury believe the victim when she testifies that she did not consent?” and “Should the jury conclude that the defendant knew or reasonably should have known the victim did not consent?”¹⁴⁹ If the answer to either question is no, then the case should be dismissed. However, if both questions can be answered in the affirmative, then the case should be pursued to trial.¹⁵⁰

Another formulation of a standard for ethical charging states:

*[E]vidence is deemed sufficient if “an objective, impartial and reasonable jury . . . properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.”*¹⁵¹

Whether any jury *would* convict is simply beside the point, as it should be.¹⁵² Informed prosecutorial discretion and decision-making allows prosecutors to consider *all* of the admissible evidence, including the specialized knowledge that can be provided by experts, and to assume that juries will not be irredeemably tainted by bias and myth. The duty of prosecutors is not only to implement the “law on the books” but to recognize the devastating harm that results from assaults that have historically been considered as something less than “real rape.” Rape and sexual assault laws have been reformed over the last several decades to help ensure the law takes into account the tactics of sexual offenders and that criminal convictions do not depend on how the victim responded to her/his attack. Ultimately, it is part of prosecutors’ ethical responsibility to lead the way in responsible charging that translates the law on the books into action.¹⁵³

In deciding whether and how to charge a case, the following evidence should be reviewed and carefully analyzed:

- Recordings of 911 calls
- Police reports and interviews, including any in-person meetings with the victim and/or witnesses, and audio or video of all statements that were taken
- Evidence collected from the crime scene, including video or photographs of the scene
- Digital evidence that might include: text messages, communications via social media (*e.g.*, Facebook, Instagram, Snapchat) or third-party applications (*e.g.*, WhatsApp, KIK, Uber, Lyft), photographs, videos, and information from internet-enabled devices (*e.g.*, fitness trackers)
- Criminal histories of the suspect, victim, and any critical witnesses¹⁵⁴
- Additional background of the suspect, including restraining orders, school and/or employment records, social media accounts, ex-partners, etc.
- Evidence of collateral crimes commonly associated with sexual assault, such as burglary, domestic violence offenses, trafficking, kidnapping/abduction, stalking, and intimidation-related crimes; conduct follow-up investigations where necessary, and charge all collateral crimes supported by probable cause

- Evidence related to all culpable parties who should be charged, as appropriate under applicable law, as principals, accomplices, or conspirators
- Evidence from related administrative or criminal cases (*e.g.*, military, campus, internal affairs¹⁵⁵)
- Evidence from SAK examination or medical examination, if available
- DNA evidence, if available, although charging generally need not be delayed until results are complete

Determine whether there the defendant has any related open cases that should be combined with the present case, particularly when they involve the same victim. Where there has been an ongoing pattern of abuse, there might be other cases open in the same office, in neighboring jurisdictions within the state, or in lower courts that might be profitably combined for prosecution, perhaps as part of a stalking charge. Whether and how that can be accomplished will depend upon local law and court rules, but combining the cases is often worthwhile where possible.

Identify the elements of every potentially applicable charge and determine whether sufficient evidence exists to support the elements, using informed discretion to charge multiple counts, enhancements, or aggravated offenses where appropriate. The Charging Tool at [Appendix E](#). may be helpful to identify, organize, and assess all the of evidence in the case prior to charging or to identify any areas where follow-up investigation is necessary. Anticipate common issues associated with multiple-defendant trials, such as joinder, severance, and the admissibility of confessions or redacted confessions.¹⁵⁶

When police have filed the preliminary charges, they must be reviewed for propriety and completeness. Request additional investigation where necessary. Add, amend, or reject/dismiss specific charges as appropriate. Discuss charging decisions in detail with law enforcement and explain to the victim the ultimate charges and any significant changes to the preliminary charges. A case should not be declined for prosecution without first consulting with the victim.

Consider whether a pretext phone call, text message, or social media contact with defendant would be helpful or appropriate, bearing in mind that once the defendant's Sixth Amendment right to counsel has attached, a pretext call would violate that right.¹⁵⁷ Some jurisdictions may have special procedures that must be followed before a pretext call can be recorded, and failure to strict comply

may result in suppression of the call.¹⁵⁸ A victim should never be compelled to participate in a pretext call, and an advocate should be present to provide support during and after the call.

A Note on Prosecutorial Immunity

Typically, prosecutors enjoy absolute immunity in their actions to prosecute a case, as opposed to the qualified immunity under which investigators operate. Absolute immunity attaches for activities “intimately associated with the judicial phase of the criminal process,” *e.g.*, initiating a prosecution, determining probable cause for charging purposes, making charging decisions, drafting legal documents, litigating the case in the courtroom. However, to the extent prosecutors provide advice to law enforcement on their activities, or engage in law-enforcement type activities themselves, *e.g.*, acting as an investigator, attesting to the truth in support of an arrest warrant, or signing a search warrant affidavit, they are covered by the same qualified immunity that law enforcement officers have.

Qualified immunity provides significant protection against civil liability for actions taken in the course of one’s official duties. The prosecutor is immune from suit for discretionary actions so long as that conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

There is nothing inherently “wrong” in a prosecutor’s stepping outside the cloak of absolute immunity to perform activities protected by qualified immunity. However, whether the prosecutor does so depends upon office policy and, in the absence of policy, an informed decision. Some offices may require prosecutors, as part of their jobs, to provide legal advice to officers in the performance of their duties. Some offices may limit or prohibit prosecutors from engaging in activities beyond those covered by absolute immunity. In the absence of a policy prohibiting it, a prosecutor may choose to give up absolute immunity for the purpose of supporting their law enforcement partners and obtaining better investigations with fewer legal problems arising later.

Guidance for making this determination include:

- Be aware of the difference between absolute and qualified immunity.
- Check with your office to see if there is a policy in place.
- Inform your supervisor of your desire to work closely with police on these cases and why.
- Seek guidance from your jurisdiction’s legal representative (whichever entity represents your office and its employees in the event of a lawsuit—typically, the City or County Attorney)
- Look for other examples of police/prosecutor collaboration in your jurisdiction or others, *e.g.*, other specialized units, any co-located police/prosecutor teams.

4.1-C-1. Corroboration is Valuable but Usually not a Legal Requirement

Corroborating victims helps victims. Any evidence that we can find that corroborates the fact that a rape occurred, that it was nonconsensual, that it was forcible, that there were injuries, whatever evidence there is – crime scene evidence, photos, witness interviews – that also helps victims. Again, it helps our cases as well, but if you can send a victim into court knowing that the entire case doesn’t rest on the victim’s shoulders, but that the police and prosecutors did a thorough job investigating every aspect of these cases, it really is helpful knowing that the system

*worked the way it was supposed to, and that there is other evidence to corroborate what they're saying.*¹⁵⁹

Corroboration is valuable, but usually not legally *required*, either for charging a case or for establishing the defendant's guilt at trial.¹⁶⁰ Investigators should, however, always strive to corroborate as many aspects of the case as possible. Corroborative evidence strengthens a case by providing additional evidence of the crimes charged and by supporting the credibility of witnesses. Victims will be gratified by the thoroughness of the investigation and relieved that the trial's outcome will not rest solely on their testimony. Corroborating evidence—especially important for a crime that happens in private and for which scientific evidence most often will be inconclusive on critical issues such as consent—can be found in a variety of sources:

- *Witnesses*
 - There may be witnesses who did not actually observe the assault but nevertheless can testify about events or conditions they have seen or heard. A witness may be able to testify to the victim's behavior, demeanor, or physical condition immediately before or after the assault or may be able to testify to the victim's statement to the witness about the assault. Witnesses may be able to testify to their observations of the victim's intoxication, the defendant's providing alcohol or drugs to the victim, the defendant's acts to isolate the victim, or other evidence of predatory behavior. Bartenders, cab drivers or other ride-hailing services, building security guards, and store clerks often can provide evidence relevant to the charges.
 - Video surveillance cameras, or video recorded by others before or after the assault, can help establish a timeline and document both the victim's and the offender's actions. Such evidence should be viewed with caution, as it may provide only a brief snapshot of what occurred; what appears to be a consensual social encounter may have been, in fact, coerced or may have later progressed from a consensual encounter to a forcible or coerced act of penetration.
 - Witnesses may also be able to testify to the long-term evidence of trauma following the assault (*e.g.*, friends or family that can say, "before the assault, victim was outgoing and involved in school clubs and after victim would not go out and stopped returning phone calls from her closest friends." Please note, not all victims will exhibit indicators of trauma.
- *Physical evidence* that corroborates any details of the allegations. This can include seemingly ancillary details that in and of themselves do not establish that a sexual assault

took place or that a sexual encounter was nonconsensual, but do support the victim's account of the incident. Investigators should strive to corroborate as many details as possible, using physical evidence at the crime scene (including video or photographs) and physical evidence of the victim's and offender's actions before and after the assault, *e.g.*, ATM receipts, bar tabs, and items in the trash.

- *Medical evidence* of injury, victim demeanor, and the victim's medical records can provide some of the strongest corroborative evidence. Medical expert testimony is necessary to explain the presence or absence of injury and to rebut popular misconceptions about sexual assault and victim response to trauma. In particular, expert medical testimony can educate factfinders that the lack of genital injury does not prove consent and that common non-genital injuries, including bruising and abrasions to the wrists, upper arms, inner thighs, and other extremities are consistent with a victim's account of a struggle, being held down, falling, or being dragged. In lieu of a toxicologist, medical experts can also educate factfinders about toxicology and the disparate effects of alcohol on men and women.
- *Forensic evidence* is seldom dispositive of whether a sexual assault occurred, but research and experience tell us that factfinders will often expect some sort of "CSI evidence" in sexual assault cases.¹⁶¹ Therefore, even in cases where the defense is consent, investigators should collect and preserve evidence that can be scientifically examined and tested for corroborative forensic evidence, *e.g.*, semen, urine, vomit, fingerprints, and touch or saliva DNA.
- *Cyber evidence* is an increasingly likely source of corroboration in cases of sexual assault. Cyber evidence may include text messages, social media posts and comments, digital photographs, online activity, and data from digital devices such as fitness trackers. Investigators should be trained and proficient at identifying, preserving, and securing digital evidence or should consult with others who have the appropriate expertise, either in their own department/agency or another.¹⁶²
- *Expert testimony* about victim responses to trauma can be powerful corroborative evidence, explaining victim behaviors that may seem counterintuitive to the lay factfinder. Research shows that common misconceptions about sexual assault and victims of these crimes persist, despite heightened awareness.¹⁶³ This kind of expert testimony is designed to educate and allows the jury to put the victim's behavior in its proper context—the result

of trauma or of the defendant’s actions, rather than a reason to doubt the victim’s credibility.

- *Offender statements* can be important corroborative evidence even if they do not amount to a “confession.” Such statements are valuable when they corroborate details of the victim’s account, even if the offender claims that any sexual contact was consensual. More often than not, the offender’s statement alone will establish at least one element of the offense—that the act of sexual penetration or contact did in fact occur. Furthermore, the offender’s demeanor, attitude, and explanation of the incident at the earliest stages of an investigation can be revealing and enlightening for jurors, who can compare them to the defendant’s carefully prepared appearance and testimony at trial.

4.1-C-2. Consult Statutes, Case Law, Social Science, Medical, and Other Relevant Research

Prosecutors should be skilled in researching applicable statutes, case law, and underlying public policy in preparing their cases. While legal research is, of course, a given necessity in the legal profession, it is easy to overlook the value of other types of research documenting advances in medicine, forensic science, and social sciences as they pertain to the prosecution of sexual assault. Judges need this valuable information, as well, and it is incumbent on the prosecutor to provide the judges making decisions in these cases with all of the relevant admissible research to support accurate, well-informed judicial decisions.¹⁶⁴ Social science and medical research provide insight into the dynamics of assault and victimization relevant to proving the elements of the crime. Prosecutors should connect with experts in the relevant fields to learn about the latest developments and to ensure they are properly understanding and applying this knowledge. Such consultation can assist in:

- Evaluating certain evidence
- Understanding victim behaviors that are, in fact, responses to trauma
- Understanding predatory offender conduct, which may help in the analysis of “other crimes” evidence or developing case theory
- Connecting victims with available services
- Making bail recommendations that adequately address victim and community safety
- Preparing and litigating pretrial motions
- Admitting cyber evidence in trial
- Interviewing and examining victims and witnesses

- Cross-examining defendants
- Making sentencing recommendations

See [Appendix F](#) for additional information on how various experts can assist with issues in sexual violence prosecutions.

4.1-D. Request Bail Commensurate with the Seriousness of the Offense

It is important to understand that the purpose of bail and pretrial detention are not to punish, but to secure the safety of the victim and community and the presence of the defendant at trial.¹⁶⁵ The specific criteria for setting a bail amount varies from jurisdiction to jurisdiction. There are, however, considerations that are generally consistent across the country. Motions to reduce or increase bail may occur at any hearing, and, therefore, prosecutors must always be prepared.

When making bail recommendations, consider:¹⁶⁶

- Danger to victim and community
- Seriousness of the crime
- Likelihood of conviction¹⁶⁷
- Likelihood defendant will appear in court/flight risk¹⁶⁸

Additional considerations to bring to the court’s attention in making bail recommendations in sexual violence cases include:

- Risk of committing additional crimes against the same victim (*e.g.*, in cases involving intimate partner violence)
- Where investigation suggests potential additional victims, likelihood of re-offense or serial perpetration¹⁶⁹
- Evidence of crossover offending¹⁷⁰
- Increased risk of lethality where sexual violence is used in the course other acts of intimate partner violence and/or strangulation¹⁷¹

Prosecutors should be prepared for argument when requesting bail. “Seriousness of the offense” and “likelihood of conviction” are susceptible to defense arguments suggesting that rape of an acquaintance or while one or both parties were intoxicated is somehow “not serious” or unlikely to

result in conviction. Careful preparation and presentation—even to the point of presenting expert testimony—may be necessary to persuade some judges otherwise. Research and court opinions acknowledge that many rapists acquainted with their victims are serial perpetrators and pose an elevated lethality risk for victims who are intimate partners.¹⁷² Prosecutors should emphasize the seriousness and danger inherent in all cases of rape, to provide the court with a sound basis for its decision. Arguments about the defendant’s risk to victim and community safety should be based on the evidence, not generalizations or speculation. Request appropriate bail conditions (*e.g.*, no direct or indirect contact with the victim, including communication through social media, third-parties, including family and friends; and other conditions to prevent intimidation or stalking conduct, including distance, school and/or workplace restrictions, and other case-specific conditions designed to protect the victim). A good working relationship with law enforcement allows the prosecutor an opportunity to gain additional information regarding the defendant, including flight risk and concerns for community safety. Victims should be immediately advised of the outcome of the bail hearing and notified if the defendant is released on bail.

A Note on Intimate Partner Sexual Assault

Perpetrators may establish relationships with victims in order to obtain greater access to them and to assert greater control over them through power, coercion, and cyclical violence.¹⁷³ These abusive behaviors may include the sexual assault of the intimate partner or the partner’s child. Some relationships may be developed for the purpose of grooming the victim. Rape victims who are intimate partners of their rapists often experience self-blame and a profound sense of betrayal, resulting in unique trauma from the assault and additional barriers to reporting it.¹⁷⁴ Those barriers include the victim’s lack of self-identification as a victim, self-blame, shame, fear of not being believed, and fear of physical reprisal. Victims of intimate partner violence who are involved in gangs, and those who are trafficked in commercial sexual activity, face the same barriers, compounded by fear of their own prosecution and reprisals from the offender’s allies.

Remember that bail is subject to ongoing review. Defendants who intimidate victims or witnesses can have their bail raised or revoked. Conversely, prosecutors must be prepared to respond to defense attempts to inappropriately reduce bail or eliminate conditions the defendant finds onerous. The defendant should be required to show a change in circumstances for review of bail or release conditions.

Bail hearings also present an opportunity to communicate to the public the importance of the sexual assault prosecution while preserving the integrity of our system of due process. Any public

statements should communicate generally the seriousness with which the prosecution treats cases of sexual violence while carefully avoiding inappropriate comment that might taint potential jurors or violate the rules of professional conduct.

4.1-D-1. Request No-Contact Orders

Criminal no-contact orders, or civil sexual assault or domestic violence protection orders, provide additional protection to strengthen the victim's sense of safety and security, offering a straightforward basis for enforcement. In some jurisdictions, a criminal no-contact order can be sought in addition to any no-contact conditions of bail;¹⁷⁵ in some jurisdictions any victim of sexual assault can seek a civil order of protection. Where the victim is or was in an intimate relationship with the offender, a domestic violence protection order should be available. An advocate or civil attorney can assist the victim with obtaining a civil sexual assault protective order or a domestic violence protective order, as appropriate.

Advise victims that any direct or indirect offender contact (including third-party contact), should be immediately reported to law enforcement and to the prosecutor. Where such conduct has occurred, a hearing should be held as soon as possible after giving requisite notice to the defense, so the prosecution can seek revocation, a contempt of court charge, or additional conditions to prevent interference or intimidation by the defendant or others acting at her/his direction. If the offender is in jail, protective orders can still be enforced or new charges for witness tampering considered.¹⁷⁶

4.1-D-2. Safeguard Victim Privacy and Safety

In the early stages of the case, prosecutors should act to protect victim privacy and security:

- Familiarize yourself with your jurisdiction's statutory and case law related to privacy, confidentiality, and privilege.¹⁷⁷
- Collaborate with civil attorney, representing the victim's interests, where appropriate or necessary to avoid issues with standing.¹⁷⁸
- Work with agencies to ensure appropriate redactions are made to any discoverable documents, ensuring that all original documents are maintained.

- Redact cyber evidence, including forensic examination reports (*i.e.*, “phone dumps” or “phone downloads”) and non-public social media records to include only material, relevant, and exculpatory evidence; notify the court of any redactions made.¹⁷⁹
- Collaborate with advocates to support victims, ensuring that victims understand the differences in confidentiality applicable to community advocates versus victim-witness advocates employed by the prosecutor’s office. Staff or community partners working with persons with disabilities should have specialized training.
- Keep victims informed of any motions seeking disclosure of personal information.
- Move to quash subpoenas to compel production of confidential victim counseling/advocacy records or other privileged communications.
- Move for *in camera* review of victim’s records.
- Move for orders restricting the defense from disseminating reports or other sensitive materials to outside parties (*e.g.*, the media). For especially sensitive evidence (*e.g.*, intimate photos or video of the victim), seek an order permitting the materials to be viewed by the defense (or defense-retained expert) under restricted conditions, rather than providing a copy for discovery purposes. The court may also enter an order prohibiting defense counsel from providing copies of documents containing the victim’s personal information to the defendant.
- Understand and anticipate public requests for copies of police reports or other evidence under applicable Public Records Act.

4.1-E. Oppose Unnecessary Delay

The prospect of having to testify about being raped can be all-consuming for victims. While the delay that accompanies most judicial proceedings is frustrating for any victim, it is especially harmful to victims of sexual violence, who long for closure so they can resume the healing process and go on with their lives.¹⁸⁰ Delay also provides more opportunities for offenders who are so inclined to engage in manipulation or intimidation. While some requested continuances may be reasonable and necessary, unnecessary delay should be vigorously opposed. Ask the court to prioritize these cases in its calendaring, and request that any scheduled trial date be peremptory—not to be continued absent the most unavoidable reason. For the prosecution’s position on the urgency of these cases to have any

credibility, however, it is necessary for the prosecutor to make every effort to expedite the prosecution's own efforts to prepare the case for trial.

See also, [Review All Reports in a Timely Manner](#).

4.1-F. Build a Case that Engages Victims and Makes Effective Use of All Probative Evidence

After the charging decision is made, there is still much work to be done before the case is ready for trial. This includes follow-up investigation to strengthen the proofs, fill in any gaps in the evidence, and address any unanswered questions. Although the victim's disclosure alone, if believed, is usually sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt, continue to seek corroboration to make the strongest case possible.¹⁸¹

Ongoing investigation should include:

- Regular communication with victim and witnesses throughout the pretrial period; provide the victim with regular updates on the case and any important developments.¹⁸²
 - If a victim or witness suddenly stops returning phone calls or becomes newly reluctant to talk with the investigator or prosecutor, that may be an important indicator that intimidation is occurring.¹⁸³ Inquire about any phone calls or other contact by the defendant or his/her allies. Check jail phone records and visitor logs to see whether contact is occurring, and obtain recordings of any calls to the victim.
 - Check in with the victim and witnesses on a regular basis to learn whether anything has changed, in terms of evidence or safety concerns, or whether there have been any suspicious incidents that may have seemed too minor to report.¹⁸⁴ Because trauma affects memory, victims may also recover new memories over time.¹⁸⁵ These conversations should also serve to extend the rapport and trust developed during earlier contact with the victim.
 - It is important to remember that common responses to the trauma of sexual assault may include minimizing, denying, self-medicating, withdrawing from others, returning to normal life, etc. Connecting victims with appropriate support can help mitigate negative responses.

- Be sure the assigned investigator maintains a careful record of all contacts with victims and witnesses, including unsuccessful attempts to locate or speak with the witness.
 - This record of contacts, including refusals or unsuccessful attempts, may be critical in establishing that all reasonable efforts were made to secure the witness’s attendance at trial, which will be necessary to establish “unavailability” of the witness in the event it is necessary to introduce out-of-court statements under the doctrine of forfeiture by wrongdoing.¹⁸⁶
 - Material witness warrants to ensure the victim’s appearance at trial are strongly discouraged; arrest of an already-traumatized victim can cause irreparable harm and is inconsistent with the principles of justice. See [Avoid Coercive Practices](#) below.
 - Ask about any acts of intimidation, harassment, or stalking that should be thoroughly investigated.
- Investigate other incidents, such as allegations of harassment or stalking by the perpetrator or third parties on perpetrator’s behalf, and conduct follow up as necessary.
 - Monitor social media sites to identify any evidence of the crime(s) charged and/or intimidation of the victim.¹⁸⁷
- Evaluate the results of the rape kit and other evidence testing, which may suggest the need for additional interviews or investigation.
- Review the entirety of the relevant medical record for patient intake information, medical history, assault history, physical examination, findings, and aftercare/safety planning. Determine whether there is any irrelevant and/or prejudicial information that should be redacted or the subject of a motion *in limine* before trial (*e.g.*, notation about a previous abortion, history of drug abuse).
- Investigate any relationship between the victim and perpetrator. Evidence about the relationship may help to explain how the assault was committed and may support the victim’s credibility at trial. For example, a perpetrator may use the relationship with the victim to gain access to the victim, to exploit the victim’s trust, or to exploit other known vulnerabilities to facilitate the assault or to undermine the victim’s credibility (*e.g.*, the offender assumes that a drug addict will not be believed). Revealing and explaining these dynamics at trial will allow the jury to more accurately assess the victim’s credibility and to understand how the crime occurred.

- Execute search warrants, seek court orders, and issue subpoenas for relevant digital devices, social media accounts, telephone and/or cell site data.¹⁸⁸ Review results and provide relevant material, and exculpatory records to defense counsel.¹⁸⁹

4.1-F-1. Conduct Trauma-Informed Interview of the Victim to Reveal Evidence of the Crime

[P]rosecutors who conduct thoughtful and effective interviews will be better able to explain victim behavior to their multidisciplinary professional colleagues and partners, and, ultimately, to judges and juries.¹⁹⁰

Trauma-informed interviews are not only essential to victim-centered prosecution, they provide a vital opportunity for the victim to describe the experience of the sexual assault. Research and clinical experience with the neurobiology of trauma suggest several important considerations for interviewing victims who have been impacted by trauma. There are varying interview protocols and this section does not attempt to set forth a protocol but rather to highlight important considerations.

Victims may be unable to recall the precise chronology of event and some parts of the experience may be too painful to recall. Asking the victim, “What are you able to remember about—?” is a helpful way to encourage the victim to talk about what happened without pressuring him or her to recount a sequence of events. This question also conveys to victims that the prosecutor recognizes the trauma they have experienced.

- The interview should focus on *obtaining available evidence of the victim’s experience* of the sexual assault. Ask about the victim’s sensory experience—what the victim saw, felt, heard, tasted, smelled. Descriptions of sensory perceptions, as well as the victim’s thoughts and emotions as the crime unfolded, may suggest leads for further corroboration—the defendant’s physical appearance at the time of the assault, for example, or details concerning the crime scene or the surrounding area. These types of memories can also serve as visceral connections with the jury (*e.g.*, a victim felt the seam of the couch cushion pushing into her back). Jurors can relate to the specific feelings and therefore find the statement and the account more credible.

The victim might be asked, for example, whether she was able to see the offender’s eyes as he moved toward her. If she recalls that they were angry, terrifying, or mean, ask how that made her feel. Her response might be that she was scared, or that her heart was pounding, or that she felt like she couldn’t breathe.

- *One of the keys to success in these cases is to get to the whole truth.* Victims may be reluctant to reveal details that might cause them to be judged, to be disbelieved about the rape, or to get them in some kind of trouble. Investigators and prosecutors should encourage victims to be entirely truthful and open about everything they tell us. Remind victims that the defense will already know about any “unfavorable” details. Assure them that if we know about those details we can either keep them out of the trial or explain them so the jury can judge the case fairly. But we can do little to address those details if we hear about them for the first time in court.
- Be prepared for every interview by *reviewing all relevant evidence, reports and any updates from law enforcement.* Check with assigned detective before the interview to discuss the status of investigation and any recent developments. Focus on insightful questions that will help develop an understanding of the victim’s experience and possibly assist in overcoming potential defenses. Interviews also help to prepare the victim for the types of questions they may be asked throughout the process. A well-prepared interview will help to build a trusting relationship between the victim and the prosecutor.
- There are many *logistical considerations* necessary to conducting a trauma-informed interview. The setting of a victim interview communicates a great deal to the victim about how the crime is viewed by the prosecutor’s office. A cold, stark interrogation room sends the message that the victim is under suspicion or has done something wrong. A quasi-public space in an open office cubicle or in a room with office traffic sends the message that the victim’s privacy is not respected or that the interview is not too important to interrupt. Ensure that the interview environment is comfortable, neutral, quiet, and private. Allow victim to choose her/his own seating arrangement, if possible, and provide water or food, if available, to help create environment that is welcoming and calm.
- *Building trust.* The prosecutor should explain her/his role and responsibilities to the victim at the beginning of the meeting. Express appreciation for the information that the victim has provided and for coming in to provide further information. Demonstrate your comfort with discussing the difficult and private subject matter of sexual assault by explaining that you have had the privilege of working with victims of these kinds of crimes for a substantial period of time and understand that these matters may be difficult to talk about. Be open and listen carefully to the victim’s account. Understand that trauma, as well as social and emotional factors, often result in delayed reporting.¹⁹¹ Balance clinical objectivity with

sensitivity. Refrain from overtly or subtly conveying doubt or judgment and let the victim know you are there to help. Listen fully to responses and ask appropriate follow-up questions.

- Pay attention to the victim’s responses and demeanor during the interview, which may provide indicators of trauma or dissociation that might require the explanation of an expert witness at trial. Take breaks when necessary for victim’s needs or requests. Discuss with victim, as well as the victim’s advocate (if present),¹⁹² the advantages of participating in the criminal justice process, including:
 - The ability to retake control of what happened
 - The opportunity to speak the truth—to describe the victimization and how it affected the victim
 - The availability of resources to support healing
 - To achieve a sense of closure
 - To secure justice by holding the offender accountable
 - To prevent the offender from victimizing others
- Remember that victims are the best judges of what will promote their personal healing. For some, testifying in court and having their voices heard is a critical part of that healing. For others, not reporting the crime or declining to participate in the proceedings is the safest choice. Those personal feelings should always be treated with respect.
- Though ***prosecution should not be coerced, it should be respectfully encouraged.*** Remember the importance of going forward with prosecution in these cases whenever possible; avoid inadvertently suggesting that the adversity of trial is too difficult to bear. Prosecutors should candidly explain the trial experience, while expressing confidence in the prosecution, in the system’s commitment and ability to support the victim throughout the process, and in the victim’s ability to proceed.
- Once a hearing or trial date is firmly set, prepare the victim to testify, including direct examination, objections, cross-examination,¹⁹³ and redirect. Discuss courthouse and courtroom safety with the victim. Work with victim-witness professionals and advocates to ensure safety and support for the victim while waiting to testify and during testimony.

Avoid Coercive Practices

Arresting sexual assault victims to force them to testify is widely recognized as an undesirable practice that compromises victim safety; it is rarely or never seen in jurisdictions with specially trained and experienced prosecutors. Whether the arrest of victims perceived as “uncooperative” is based on prosecutor frustration with the victim’s behavior or on a misguided sense of professional obligation, experience has shown that arresting victims for failure to appear is counterproductive. Such arrests compound the trauma victims have already experienced, result in serious collateral consequences for them, and undermine prosecution efforts to build trust and cooperation with their allied partners and with the community at large.¹⁹⁴ The overall negative costs far outweigh the minimal benefit of producing a reluctant (and—thanks to the arrest—probably frightened and angry) victim in court.

There are many alternatives to the use of coercive tactics. First and foremost is to provide the kind of support from the earliest stages of the case that will reduce the burden on victims having to testify. That means providing advocacy from the time of the initial police response. Another helpful strategy is to train officers about the importance of obtaining strong evidence (including corroborative evidence and nontestimonial statements of the victim that will be admissible under *Crawford*), which – in rare circumstances – may enable prosecutors to prove their cases without the victim’s testimony; moreover, victims may be more willing to testify when they perceive that their testimony is not the linchpin of the case.¹⁹⁵

OVW requirements prohibit arresting victims as a *practice*.¹⁹⁶ There is nothing prohibiting such a response in the *very* rare case in which it might be appropriate and necessary. For example, it’s possible to imagine a case against an extraordinarily dangerous rapist in which the *ONLY* way to prove the case is to put the victim, who is adamant in her refusal to testify, on the stand. For those very rare cases, there are ways to mitigate the negative collateral consequences for the victim, e.g., making sure that the judge/jury is prepared to hear the victim’s testimony immediately, making sure that care is available for any children or others for whom the victim might be responsible, providing an advocate for ongoing safety planning. Coercion of this type should be considered only as the very last resort, and in only the most extraordinary of circumstances.

4.1-F-2. Review DNA and Forensic Evidence to Corroborate the Victim’s Testimony¹⁹⁷

DNA is an ever-developing field of science with many testing resources for prosecutors. Within the last decade, thousands of backlogged and untested rape kits have been identified, tested, and analyzed and numerous resulting prosecutions initiated. Studies of the factors that contributed to the backlog have revealed that common myths about sexual violence dynamics and victims, as well as erroneous beliefs about the factors that make a case prosecutable, resulted in the literal shelving of countless cases. With advances in technology, more options for testing, and better understanding of the perpetration of sexual violence, we are better positioned than ever before to take full advantage of this form of evidence to hold more offenders accountable—including the many serial offenders who can now be identified by testing all rape kits, regardless of whether the perpetrator

was known to the victim. Even in cases where the victim and offender were acquainted, or had a prior consensual sexual relationship, DNA evidence can be helpful, as previously explained.¹⁹⁸

When cases are linked through a CODIS hit, the details of the other crime—the victim’s accounts of the assault and other characteristics of the offense—should be scrutinized for potentially helpful leads to corroborative evidence. In some instances, evidence from the other offense may be admissible in this one.¹⁹⁹ Regardless of admissibility, the other case might shed light on useful information such as details about the offender’s activities, social circle, tactics of victimization and manipulation, or dangerousness.

4.1-F-3. Prevent and Respond to Witness Intimidation²⁰⁰

Witness intimidation can affect the criminal prosecution at any time during the course of the case, including at trial. Most often, the source of the intimidation is the defendant or the defendant’s allies, including friends, family, or criminal associates. Sometimes even the victim or witness’s own family or friends, or the community itself, will actively discourage a victim or witness from cooperating or testifying.

Intimidation should be understood to include not only acts of force or coercion (fear-based intimidation) but also subtle forms of psychological or emotional manipulation, when those manipulations are intended to induce witnesses to remain silent or to testify falsely.

Prevention of, and effective response to, witness tampering or intimidation requires the concerted effort of multidisciplinary professionals in the criminal justice system as well as community based advocates. Steps to prevent and respond to intimidation include:

- Recognize and reduce opportunities for witness intimidation.
- Educate victims about intimidation—what it is, how to preserve evidence, and how to make immediate reports to police in a manner that ensures prosecutor notification of any incidents.
- Charge acts of intimidation as a crime where appropriate.
- File for contempt of court where defendant has violated a court ordered stay away order or a condition of bail. Violations of restraining orders may also amount to stalking or other specific crimes.²⁰¹

- Discuss with the victim the defendant’s right to be present during trial testimony and prepare law enforcement and victim advocates to monitor for any intimidation efforts in the courtroom.
- Ensure the courthouse and courtroom are zero tolerance zones for intimidation.
- Bring any acts of intimidation to the attention of the court, as well as any concerns about safety in the courthouse.
- Present intimidation evidence at trial to show consciousness of guilt and, when necessary, to introduce statements under the doctrine of forfeiture by wrongdoing.

4.1-F-4. Review All of the Evidence and Begin to Put the Pieces of the Case Together

The Charging Tool at [Appendix E](#). has been provided as a resource to use when putting the pieces of your case together. This tool was originally developed by Teresa P. Scalzo, former Director of the National Center for the Prosecution of Violence Against Women, former Deputy Director at the Navy Judge Advocate General (JAG) Trial Assistance Program, and former sexual assault prosecutor and has been adapted for this model.²⁰² The Charging Tool is a simple table, which has proven useful in assisting prosecutors and law enforcement in the identification and analysis of evidence necessary to satisfy the elements of a charge. Completing the chart encourages law enforcement and prosecutors to look at *each piece* of evidence and *each witness* statement and then ask the following four questions:

1. What does the evidence tell us?
2. Who does it connect?
3. What else should we be looking for?
4. Does it establish an element of a crime?

The process of completing the chart also helps to identify corroborating evidence to satisfy the elements, (*e.g.*, multiple sources of witness testimony) as well as any gaps in evidence, which may require follow-up investigation.

Completing the chart can help identify particular issues related to the individual pieces of evidence/testimony and will assist you with incorporating the evidence into a cohesive case theme/theory and anticipating how the defense may respond to each element of the charge. The

sections that follow provide strategies to take the individual pieces of evidence and to thoroughly prepare and try the case.

4.2 THOROUGHLY PREPARE THE CASE

4.2-A. Work with Experts to Understand and Explain the Evidence

Consider which experts, if any, will assist you in understanding the significance of the evidence in the case and be helpful in explaining that evidence to the jury. Experts can help the prosecutor understand the results of a SAK examination or other medical reports, toxicology results, or forensic evidence (*e.g.*, DNA or the results of a forensic examination of a cell phone). They can also help to explain issues commonly misunderstood by juries—victim behavior, the effects of trauma, offender tactics, cultural factors impacting victimization, etc. Expert testimony can assist the jury in reaching an informed verdict based on the evidence rather than myths or misconceptions.

Early consultation with experts ensures that your case is prepared with as much information and context as possible. Consultation is useful even if expert testimony is not anticipated. In considering whether expert *testimony* may be necessary, consider:

- Medical, forensic/technical, or toxicology evidence will usually require expert testimony—for example, jurors should not speculate what a .4 BAC means for a person’s ability to consent, to perceive/recall events, or engage in other activities, nor should they be asked to conclude on their own whether injuries are consistent with the victim’s account of the attack. See [Appendix F. on Considerations for Working with Experts](#) and [Appendix G. Stages of Acute Alcoholic Influence/Intoxication](#).
- How effectively can the victim explain his or her own behavior during and after the assault? How understandable would the explanation sound to someone untrained in sexual assault dynamics and victim response to trauma?
- Are there other factors that jurors might find confusing or troubling, such as absence of visible physical injury? Were there tests, examinations, or analyses not performed because they were deemed unlikely to produce any useful information? Lack of evidence should be explained by an expert to avoid jury speculation.

- Also consider whether an expert is appropriate for a specific case and/or jury as well as the costs to obtaining an expert. For assistance with identifying experts, contact AEquitas at (202) 558-0040 or info@aequitasresource.org.

Meet with potential expert witnesses in person, well in advance of trial, to discuss the requirements for qualification as an expert, the content of their proposed testimony, the scientific foundation for their opinions if necessary, and preparation of any necessary expert report.²⁰³ Obtain the expert's most recent C.V., which should be provided to the defense.

File appropriate and timely motions to introduce expert testimony.²⁰⁴ See [below](#) on introducing expert testimony at trial. Provide appropriate notice to the defense and to the court so any disputed issues can be resolved well in advance of trial.

Become familiar with your jurisdiction's evidence rule on expert testimony²⁰⁵ as well as any case law governing the admissibility of expert testimony on victim behavior, SAFE kits, toxicology, DNA, etc. The admissibility of expert testimony on victim behavior varies widely across jurisdictions; in conducting legal research in the case law, search for cases involving both child and adult victims of sexual assault, as well as victims of domestic violence, including cases involving admissibility of expert testimony on behalf of defendants who raise battering or abuse as a defense. Additionally, determine whether the admissibility of a specific type of expert testimony may be governed by *Daubert* or *Frye*.²⁰⁶ Absent statutory or case law from your jurisdiction, research other jurisdictions with similar evidentiary standards that may have persuasive case law.

Discuss with your expert how to respond to defense requests for an interview.²⁰⁷ The expert, like any other witness, is free to agree to an interview or to refuse to talk to the defense, but refusal may result in defense suggestions of bias when the expert is cross-examined at trial. You can ask the expert to let you know if the defense contacts him or her and what was asked or discussed, which may provide some insight into defense strategy or possible weaknesses that should be addressed with the expert before trial.

The defense may be planning to present expert testimony, as well, either to rebut the conclusions of the prosecution's expert(s) or to support a defense such as intoxication or mental disease/defect.

- If the defense is presenting expert testimony in support of a defense, you will usually want to present your own expert in rebuttal. This is the time to find one and to prepare that expert as you would one that you call in your case in chief.
- The defense is required to provide pretrial notice of intent to present expert testimony. If you have not received notice of intent to call an expert, inquire on the record during a pretrial conference or hearing whether the defense will be calling any experts. If the answer is “no,” then any attempt to present expert testimony during trial should be barred. If the answer is “yes,” insist upon a deadline, well in advance of trial, for production of the expert’s C.V. and a report or summary of the proposed testimony.
- Consult with your own expert to review the report or summary from the defense expert.
 - Using your own expert’s suggestions to prepare, interview the defense expert.
 - Review defense expert interview with your expert afterwards and follow up with defense again on any unresolved issues.
- If defense expert refuses to meet with you, prepare to cross the expert on that issue (assuming, of course, that your own expert was responsive to the defense’s request).
- Carefully inquire of defense expert the basis for his/her opinion—the information or authorities relied upon. Was the expert provided with only selected reports or statements? Does the opinion rely solely on the defendant’s version of what occurred? Does the expert accept the authority of widely recognized experts in the field?
- Prepare to challenge the defense expert’s qualifications prior to trial. Research the defense expert’s professional history and training, and find out from other prosecutors, including those in nearby jurisdictions, whether they are familiar with this expert and his/her qualifications. For example, a general medical doctor with no specific training or experience in sexual assault forensic exams would lack the requisite expertise to provide an opinion concerning the significance of absence of physical injury.
- If challenge is unsuccessful, prepare a cross-examination that will highlight deficiencies in expertise, unfamiliarity with wide scope of literature in the area, and the degree to which the opinion contradicts scientific consensus on the issue. Your expert should be able to suggest fruitful areas for cross-examination of the defense expert at trial at trial.

The below sections briefly discuss the types of issues that will arise in a case and how experts can help prepare the case and provide testimony at trial. See [Appendix F](#) to help identify experts who can assist with specific issues that may arise in a case.

4.2-A-1. Victim Behavior²⁰⁸

Public perceptions of how victims *should* respond to physical and emotional trauma often conflict with their actual response; such misconceptions can significantly impact juror assessment of victim credibility. Victims have individual responses to trauma; different victims could survive the same attack and have very different reactions. It is important to communicate to the jury that there is no “typical” response. Consider whether a victim behavior expert witness would be beneficial in your case, given the facts and the victim’s ability to explain her/his own behavior. Remember, too, that identifying an expert and putting that expert on your witness list does not commit you presenting that expert testimony; you can make the final determination about the need for expert testimony after the victim testifies.

Professionals you might consider calling as experts in victim behavior include:

- Advocates
- Counselors
- Therapists
- Psychiatrists/psychologists
- Law enforcement
- Healthcare professionals (*e.g.*, SANE)
- Scholars

Experts in victim behavior should not be asked to provide an opinion as to whether the victim in this case was sexually assaulted, a victim of trauma, or truthful in their report or testimony. Rather, they should be used to educate the fact-finder by describing, in general, the varied responses to trauma during and after a sexual assault. To maintain victim privacy and the integrity of the case, do not use a victim behavior expert who has been working with the victim, such as the victim’s own advocate, counselor, or therapist.

Most jurisdictions have clear rules or case law permitting expert testimony to explain victim behavior but it is still important to carefully review statutes and case law to determine what type of experts are permitted to testify and the scope of their testimony.²⁰⁹ Like any other expert, victim behavior experts must be qualified, but their qualifications may be accepted largely on the basis of their training and experience, rather than the standards more strictly applicable to scientific evidence.

For additional information on introducing this type of expert testimony, see Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATT'Y ASS'N, (Aug. 2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

A Note on Neurobiology of Trauma

Many aspects of victim behavior that make a sexual assault case challenging for jurors (and, thus, for prosecutors and police)—delayed reporting, piecemeal disclosure, gaps in recall, inconsistencies in the victim's account—may be attributable to the neurobiology of trauma. Studies by neuroscientists indicate that sensory impressions of traumatic events are more readily processed, stored, and later accessed than details such as exact sequence of events or actual words that were uttered during the incident. Chemical changes in the brain during traumatic events affect the ability of victims to recall and recount details of the event.

While it is important for first responders, investigators/detectives, and prosecutors to have at least a rudimentary understanding of this phenomenon, so they do not draw erroneous conclusions about the victim's credibility and so they question the victim using trauma-informed techniques that will elicit as much detail as possible, expert testimony at trial on neurobiology of trauma should be approached with great caution. Qualified experts (i.e., neuroscientists) may be difficult to identify and costly to retain. Moreover, to show that a particular victim's memory was affected in this manner is likely to be difficult or impossible. Neurobiology of trauma is only one factor that may contribute to victim behavior in the wake of a sexual assault. Other experts—advocates, scholars or practitioners in the fields of psychology and psychiatry, or medical professionals—can likely provide adequate explanation for the behavior without the potential risk of this more highly-specialized and technical evidence.

4.2-A-2. Medical Evidence

The absence of physical injury can present difficulty for criminal justice professionals—either because they lack training about its prevalence or significance (causing them to doubt the victim's report) or because they believe jurors will refuse to convict in a rape case without injury. Review

the victim's medical records with a medical professional (*e.g.*, SANE or trained ER physician) and discuss the findings and documentation to ensure a thorough and accurate understanding.²¹⁰

Treating medical professionals (provided they have sufficient training and experience) or others may be qualified as experts in the area of sexual assault and associated medical treatment and findings.²¹¹ Expert medical testimony is important evidence, as jurors often mistakenly believe that rape victims will invariably have serious vaginal and other injuries.²¹² On the contrary, research has shown that in cases of sexual assault involving adult female victims, vaginal and other physical injuries are the exception rather than the rule.²¹³ In cases of alcohol-facilitated sexual assault, expert witnesses can testify that incapacitated patients are statistically significantly less likely to have genital and non-genital trauma than patients who were not incapacitated at the time of the assault.²¹⁴ A medical expert can also explain the relevance of anatomy to the likelihood of genital injury and, where helpful, the fact that the most common type of non-genital rape injury is bruising to the arms and legs.²¹⁵

During the case in chief, the prosecutor's job is to establish all the elements of the crime, which may include penetration. An expert can testify about the available research on injuries associated with sexual assault, and can testify that a lack of trauma is generally not inconsistent with sexual assault.²¹⁶ Expert testimony to explain the significance of injury or lack thereof can make the difference between a verdict of guilty or not guilty. In addition, be certain you understand your law's definition of "penetration"—only the slightest penetration is required.²¹⁷ Even if the law requires only slight penetration, however, if the victim describes an act of full or complete penetration, absence of injury should be explained lest the jury conclude the victim is untruthful or exaggerating.

In addition to questions about injury, elicit testimony to address the general consistency of the victim's account with the findings, to explain unfamiliar anatomical or medical terminology, and (where relevant) to explain the significance of sexually transmitted infections (STIs).

As with all experts, you will need to qualify the expert prior to testimony. It is important to emphasize the medical expert's training and experience in the examination and treatment of sexual assault victims, including expertise in the effects of emotional trauma.

For additional information on the role of SANEs and working with medical experts, see Jenifer Markowitz, *A Prosecutor's Reference - Medical Evidence and the Role of Sexual Assault Nurse Examiners in Cases Involving Adult Victims*, AEQUITAS (Dec. 2010), available at www.aequitasresource.org/library.cfm.²¹⁸

4.2-A-3. Toxicology

Research shows that alcohol and drugs are commonly used to facilitate sexual assault.²¹⁹ Because of the prevalence of intoxication in both victims and perpetrators, it is important to understand the effects of alcohol and drugs on behavior (before, during, and after an assault) and on memory.²²⁰ Consider also the effect of alcohol or drugs on the memory of any witnesses.²²¹ Consult with experts on toxicology in order to properly analyze cases where the victim, offender, or witnesses are intoxicated.

Testimony by toxicologists can help to establish elements of the crime, such as a lack of capacity to consent.²²² A toxicologist can explain the effects of alcohol or specific drugs on memory²²³ or on psychomotor skills, extrapolate blood alcohol content (BAC)²²⁴ to the approximate time of the offense, and review evidence to suggest any further investigation that may be helpful. Toxicologists can also help rebut defense claims regarding the intoxication of victim, offender, or witnesses.

For additional information on alcohol-facilitated sexual assault, see Teresa Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, NAT'L DISTRICT ATT'Y ASS'N. (Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf; [Appendix G. Stages of Acute Alcohol Influence/Intoxication](#).

4.2-A-4. Technology

Technology has changed how individuals interact with the world around them. Smartphones, digital tablets, and computers are constantly used to stay connected with friends, family, and colleagues. Criminals are likewise using technology to commit crimes or to communicate with others, leaving digital trails of evidence.²²⁵ In a sexual assault case, technology may become a factor in a number of ways. There may be video recordings or digital photos of the crime itself, as well as messages and posts about the crime that can be found on cell phones or posted to social media.

Prosecutors must be familiar with how:

- Crimes are perpetrated using technology and may be recorded/documentated with technology.²²⁶
- Victims may be traumatized by the dissemination of intimate photos or videos, whether created consensually or not.
- Digital evidence can be preserved and obtained for trial.
- Protect victim privacy by carefully redacting cyber evidence as to only provide defense counsel with that information with is relevant and material to the case and that is exculpatory.
- They can protect victim privacy and safety during the discovery process by moving to limit access to intimate photos or video.²²⁷
 - In some jurisdictions, prosecutors may be permitted to fulfill their discovery obligations by permitting the defense to view the evidence under supervised conditions rather than providing a digital copy.
 - If a copy must be provided (*e.g.*, for purposes of review by defense expert), the prosecutor should obtain a protective order prohibiting copying or further dissemination of the copy and requiring its return to the prosecutor at the conclusion of the case.
- Admit digital evidence at trial through testimony of the witness, forensic examiner, or custodian of business records (or business records affidavit).²²⁸

4.2-A-5. DNA and Forensics

Juries may expect DNA and other forensic evidence to be presented at trial and be skeptical about the quality of the investigation when it is not. Prosecutors should understand the relevant science to inform their decisions about whether and how to present such evidence. Carefully consider what questions should be asked of the experts to best explain the relevance or significance of test or comparison results. If certain tests or examinations were not performed, consider having the expert explain why—whether the sample was inadequate or compromised in some way, or whether testing was deemed unnecessary for some reason. Jurors should feel confident, at the conclusion of the case, that all appropriate investigation was conducted.

With DNA testing, there are numerous steps involving multiple lab technicians who may participate in the testing of a single sample. Failure to call to the stand all of the technicians involved in the testing *may* result in a defense objection to the testimony of the analyst who interpreted the raw data to reach a conclusion about the contributors to any samples collected from the victim. The defense may contend that the defendant has a right to confront each of the technicians involved in the testing. The United States Supreme Court considered this issue in *Williams v. Illinois*,²²⁹ but the plurality opinion in that case reached no definitive conclusion. Similar issues have been decided, with disparate results, since *Williams* was decided in 2012. Prosecutors should be aware of the potential issue and carefully consider which witnesses must, or should, be called for trial.²³⁰

Similar confrontation issues may exist for cold-case prosecutions in which the original expert is no longer available for trial. Courts—and prosecutors—continue to grapple with these issues, with varying outcomes around the country. Seek guidance from your appellate unit, your state Attorney General’s Office, or AEquitas for assistance in proceeding in such cases.²³¹

Be familiar with statutory requirements for the admission of DNA evidence in your jurisdiction, such as notice to the defense, production of the results, and response to discovery requests for other materials related to the testing/lab protocols.

4.2-B. File Motions to Shield Victims and Expose Defendants

In its quest to undermine the victim’s credibility, the defense may seek to introduce irrelevant evidence of past sexual behavior, gain access to private medical and mental health records, attack the victim’s character, and more. Defendants and their allies may engage in subtle or overt intimidation to prevent the victim from testifying.²³² Prosecutors should proactively protect victim privacy and the integrity of the prosecution by filing appropriate pretrial motions. This section will discuss the most common motions that arise in sexual assault prosecutions.²³³

*4.2-B-1. Use Rape Shield laws to Exclude Irrelevant and Prejudicial Evidence*²³⁴

Rape Shield laws exist in every jurisdiction in the country.²³⁵ Their purpose is to exclude irrelevant evidence of a victim’s sexual history and behavior.²³⁶ Whether codified in the jurisdiction’s rules of evidence or in its criminal code, all such provisions require the exclusion of the victim’s sexual history unless the evidence comes within a specified exception.

The most common exceptions to Rape Shield are:

- Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- Evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- Evidence whose exclusion would violate the defendant's constitutional rights.²³⁷

A common defense tactic is to attempt to introduce this evidence under one of these three exceptions, often relying on the third and final catchall for evidence whose exclusion would violate the defendant's constitutional rights. In responding to motions to admit such evidence, research the relevant case law in your jurisdiction, but do not overlook the value of research demonstrating the tenuous relevance of such evidence on issues of consent and credibility.

While the defense has the obligation to seek the court's approval before introducing evidence covered under rape shield, it is best to inquire on the record whether the defense anticipates introducing such evidence. If you are aware of prejudicial and irrelevant evidence that the defense may seek to introduce at trial, proactively file a motion to preclude it. There is little likelihood of revealing information that will be "news" to the defense, and it is far better to obtain a ruling in advance than to object after the harmful question has already been asked at trial or the harmful answer elicited.

Some helpful strategies for filing, or responding to, rape shield motions include:

- Identify and familiarize yourself with the evidence in your case.
 - Determine whether your statute applies only to victims or to other witness as well.²³⁸
- Be aware of the time requirements for defense motions and proactively inquire on the record whether the defense plans to introduce such evidence, specifying any evidence you are aware of that the defense might attempt to introduce.
- Litigate the admissibility of rape shield evidence in advance of trial whenever possible.
- If the defense disclaims any intention of introducing rape shield evidence, request an appropriate order prohibiting the defense from making reference—during jury selection,

opening statement, examination of witnesses, or otherwise—to the victim’s alleged sexual history or other conduct.

- If the court chooses to defer ruling on the evidence based upon a need for additional testimony, request that a hearing be scheduled without delay. If the court indicates its reluctance to decide the issue until the case has been more fully developed at trial, request an order that the defense not make reference to the disputed evidence until the court has ruled on its admissibility.
- Be sure to prepare your trial witnesses (and appropriately redact exhibits such as medical history) to avoid references to evidence the court has ruled inadmissible. You do not want to inadvertently open the door to this evidence.
- File a rape shield motion whenever the *prosecution* wishes to introduce a victim’s/witness’s prior sexual history, if it is relevant to some issue in the case (*e.g.*, in a human trafficking case with collateral sexual assault charges).
- In cases where the victim is a sexually exploited person, determine whether that sexual history is relevant to any issue in the case and where not relevant, proactively file a motion *in limine* to exclude the history of commercial sexual exploitation.
- It is important to recognize that there may be cases in which you decide, after consulting with the victim, to introduce evidence which could be excluded under rape shield. The wisdom and desirability of presenting such evidence should be considered on a case by case basis after careful consultation with the victim.²³⁹ Remember to evaluate the significance of apparently consensual sex in a relationship characterized by intimate partner violence. What may appear, on the surface, to be consensual sexual activity may have been coerced in the context of the violent relationship. Such acts may be evidence supporting similar coercion in the present case.

*4.2-B-2. Introduce Evidence of Other Crimes and Bad Acts Where Relevant*²⁴⁰

Federal Rule of Evidence 404 and equivalent state or tribal evidence rules²⁴¹ prohibit the introduction of evidence of a crime, wrong, or other act to prove a person’s character in order to show that that the person acted in conformity with that character trait on a particular occasion. In the criminal context, this translates to a general prohibition on evidence tending to show that the defendant has a propensity to commit a particular crime.²⁴² The rule, however, is often considered to be one of inclusion rather than exclusion; in particular Federal Rule of Evidence 404(b) permits

evidence of such acts to prove matters other than propensity—issues such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The listed purposes are not exclusive; generally, any legitimate issue relevant to proof of the crime or of the defendant’s guilt (*e.g.*, consciousness of guilt) can be grounds for admitting such evidence. Sometimes referred to as *other bad acts*, such evidence can consist of uncharged or unreported acts, prior convictions, or possibly prior acts for which the defendant was acquitted of any crime.²⁴³ Some jurisdictions, however, explicitly *do* allow propensity evidence in sexual violence cases.²⁴⁴

Evidence of other bad acts can be a valuable tool in sexual violence prosecutions, as it can demonstrate the predatory aspects of the defendant’s perpetration and present a more accurate and complete picture of the defendant’s criminal culpability. Prosecutors can employ the following strategies to effectively identify and admit this evidence:

- Check your jurisdiction’s law to determine the categories of other acts evidence specified in their rules of evidence (or other statutory provisions) and how those categories, and other permissible purposes for which the evidence may be introduced, have been analyzed by the courts. Especially note whether your jurisdiction permits evidence of propensity.²⁴⁵
- Review police reports, interviews, and criminal histories—and obtain the files from other cases, whether adjudicated or not—to search for relevant evidence of defendant’s prior crimes or bad acts.
- Find out whether the victim has knowledge of others who may have been victimized.
- Look for evidence of other bad acts committed by the offender subsequent to the sexual assault. These acts may alternatively be admitted as evidence of consciousness of guilt, or when charged, as substantive evidence of stalking, witness tampering, violation of court orders, etc.
- Identify witnesses to any other acts, working with law enforcement and advocates when reaching out to victims unrelated to the current case.
- Comply with any notice provisions required by your rules of evidence, including providing discovery to the defense.
- Identify all purposes for which the evidence might be admissible.
- Be prepared to show that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.²⁴⁶

- Research the applicable case law to determine the appropriate standard of proof of the other act,²⁴⁷ and the procedural requirements for a motion (*e.g.*, whether an offer of proof is sufficient or whether testimony is required).

Ensure that the judge articulates the legal reasoning and analysis supporting a decision to permit admission of the evidence. Request that the court address each of the proffered purposes in the alternative. This can be done orally on the record or by written decision.

These are just a few examples of circumstances where other crimes evidence may be useful and probative.

4.2-B-2-A. Provide Context for Sexual Violence as Part of Broader Abusive Conduct

Acts of sexual violence are often a feature of other types of criminal conduct: intimate partner violence, human trafficking, or gang activity. In such cases, the broader course of criminal activity places the act of sexual violence in a specific context—to terrorize or control and intimate partner; to maintain subjugation of a trafficking victim; to punish an errant gang member or to intimidate others as part of gang activity. The overall context of the violence is important to understanding why the act was committed, its intended impact on the victim or others, and the effect on victim behavior.

4.2-B-2-B. Expose Perpetrator’s Intent, Purpose, and Plan

In sexual violence cases, defendants will commonly raise a consent defense. Evidence of other acts can be helpful to overcoming this defense by, for example, establishing the perpetrator’s plan, intent or preparation for the assault. In some cases, a defendant’s methods of carrying out the assault will be so distinctive that previous assaults can be used to identify, or support the identification of, the defendant; see [Proof of Identity](#) below.

Other acts may help to prove the defendant’s intent or plan. For example, assault involving the same plan to offer an intoxicated victim a ride home after friends have left the victim alone with the defendant at a bar helps to show that this was part of a predatory plan.

4.2-B-2-C. Establish a Motive

Prior assaults of sexually exploited persons, featuring derogatory statements toward the victims, would help to prove that this defendant was motivated by hatred for sexually exploited persons or to punish them.

4.2-B-2-D. Challenge a Claim of Mistake or Accident

Repeated accusations of assault upon a person who was incapacitated due to intoxication would help to prove that the offender was not mistaken about this intoxicated victim's ability to consent.

4.2-B-2-E. Proof of Identity

Where identity of the perpetrator is at issue, evidence of "signature crimes" may be admissible. If, for example, the defendant is on trial for a rape in which he abducted his victim after approaching her in a public park at night, asking for help finding his lost dog, and then released her after apologizing and saying she reminded him of his first girlfriend, then evidence of another rape with those same elements, in which the defendant was positively identified, could be introduced to prove the same defendant was responsible for the present rape as well. This purpose is the most difficult to establish, and the most vulnerable to attack on appeal, because of the requirement that the similarities be sufficiently unusual to amount to a "signature;" mere similarity and common features are not sufficient. "Signature crime" as a basis for admitting evidence of another crime is probably the most difficult to establish, and the most vulnerable to attack on appeal, because of the common requirement that the similarities be sufficiently unusual to amount to a "signature," making it unlikely that anyone other than the defendant was the perpetrator.²⁴⁸

4.2-B-3. Proceeding to Trial on a Case with a Nonparticipating Victim

The challenges presented in the course of investigating and prosecuting sexual violence cases can be daunting. Among the most difficult of these obstacles is the inability or unwillingness of victims to participate in the process. This reluctance may be based upon a variety of factors, including the effects of trauma and/or the victim's fear, shame, distrust of law enforcement, or poor treatment by the system. Though not impossible, it is extremely rare to proceed to trial without victim testimony because the prosecution must prove that the victim did not, or was unable to consent. Typically, this evidence comes in the form of the victim's testimony. Sexual violence prosecutors proceeding

without the victim's testimony should consider impact of *Crawford*,²⁴⁹ applicability of forfeiture by wrongdoing,²⁵⁰ and the efficacy of trying the case without the victim's participation.

4.2-B-4. Guard Victim Privacy and Dignity Through Other Available Motions in Limine

Exclude prejudicial evidence:

- Work to identify potential defenses suggested by the discovery, preliminary hearings, plea negotiations, victim interview, defense interviews with fact and expert witnesses, and police investigation.
- Anticipate common defenses or defense strategies related to victim's character or intoxication.
- Move to preclude irrelevant attacks on victim's character based upon specific acts or general reputation.

4.2-B-5. Other Potential Motions

- Consider whether to oppose a defense request for pretrial access to a crime scene that is now occupied by the victim or a third party. If access is permitted, ask that the court impose strict limitations on access. For example, law enforcement should be present to supervise the visit; scheduling should be at the convenience of the occupant (who should be able to decide whether to remain present); access should be limited to one defense attorney and one investigator, with the defendant not permitted to be present; photos and video should be prohibited; sketches or information gathered in the course of the visit should be restricted from dissemination.
- Prepare to litigate motions for suspect exam/suspect biological samples as early as possible after charging in the event that consent is not obtained.
- Oppose defense motion for psychological or physical exam of victim.
- Litigate motions to join/sever counts relating to separate victims or multiple offenders as early as possible.
- Litigate motions related to persons with disabilities (e.g., motion for presence of support object/animal/person); motion governing manner of cross-examination.²⁵¹
- Where the defendant elects to proceed *pro se*, file a motion to appoint counsel for purposes of conducting cross-examination or place appropriate limits on the conduct of the

defendant during cross (e.g., prohibiting the defendant from approaching the victim on the stand).

- Oppose defense motion for production of private records, and other attempts to pierce confidentiality, including victim’s immigration file and application for U Visa, where relevant.
- Move for any necessary amendments to the charging instrument not affecting the defendant’s substantive rights (e.g., typographical/scrivener’s errors; correct language but wrong subsection specified; misspellings of names; minor corrections to dates or locations). If there is insufficient evidence to support one or more of the counts, move to amend to a lesser-included charge or to dismiss, as appropriate. You may determine that proofs on a peripheral count are legally sufficient but weak; consider dismissing such counts if dismissal will better support your overall trial strategy.
- Motion to determine jury instructions where statutory language is untested or where special instructions are anticipated, including instructions about 404(b) evidence. See section 4.3-J below on [Final Jury Charges and Verdict Sheet](#).

4.2-C. Construct a Compelling Case Theme and a Theory That is Offender-Focused

The theme and theory are what tie the case together; they capture the hearts and minds of the factfinder. Theme and theory should be woven throughout every aspect of the case from jury selection to verdict. In sexual violence prosecutions, juror expectations often demand more than the law requires. Most rape laws do not require corroboration or proof of resistance, but jurors expect such evidence. In planning your trial, prepare to meet those expectations with appropriate evidence or an explanation for its absence.

“The theme [of the case] is the story’s critical element, the overarching idea that ties the other elements of the story together.”²⁵² A compelling theme can help recreate the reality of the crime for the jury and help them connect with the victim’s experience. For a cold case, the theme might be, “For us, this might be what we call a ‘cold case,’ but *for Jane Doe, the case has never gone cold*—she has lived with this crime for every day since it happened.” Or, “*Life can turn on a dime*. On October 1, 2010, Jane was a happy and successful college student. After the events that happened later that night, it took her five years to make sense of what happened to her and to trust anyone enough to tell them.”

The theory of the case is the prosecution’s version of what occurred—the events surrounding the crime and the acts and mental states (motives, reasons, thought processes) of the offender, the victim, and any others with involvement in some aspect of the case. A good theory of the case should leave jurors, after hearing all of the evidence, with a real sense of what happened—who did what, and why. They should have a sense that they *understand* the case. Unanswered questions or puzzling facts are often translated, in the deliberation room, into reasonable doubt. A good theory should account for all of the important facts the prosecution intends to present during trial. The case should be presented in a manner that advances the prosecution’s theory, and supports it in every respect.

It is important that the theory remain consistent throughout the case, and not adjusted mid-stream, in response to evidence elicited during cross-examination or the defense case; jurors will sense that the strategy has changed and may begin to doubt the prosecution’s case.

An important aspect of the theory in many sexual violence prosecutions is ***victim selection***. Why did *this* offender choose to assault *this* victim? Was the victim vulnerable because of intoxication? Did the victim have emotional vulnerabilities that the offender was able to exploit? Did the offender assume, because of the victim’s personal circumstances (*e.g.*, commercial sexual exploitation, suffering from addiction or mental health issues), that the victim’s complaint would be disbelieved? Was the victim readily accessible (*e.g.*, an employee supervised by the offender)? How was the assault planned? Did the offender arrange to isolate the victim? Is there evidence of grooming behavior to gain trust, or stalking to learn when the victim would be alone?

Frankly ***acknowledge facts that the defense will exploit*** as unfavorable to victim—*e.g.*, willingness to exchange money for sex prior to a rape, the victim’s level of intoxication—and weave it into your theory of the case. Those same facts make the victim an ideal target for attack.

Anticipate the defense theory of the case, which may or may not be disclosed in the course of pretrial proceedings or the opening statement. Most often, the defense theory will, in some fashion, posit the notion that the victim’s own behavior is responsible for what occurred, while the offender is the *true* victim—of injustice. While such defenses are hardly original, they have become classics because of their effectiveness in distracting the jury from evidence of the offender’s purposeful conduct.

During jury selection, ask questions and elicit discussion about jurors' understanding of, or willingness to accept expert testimony about, issues that are important to your theory of the case.

Plan to incorporate the theme and theory of your case in your opening statement. Instead of merely reciting the sequence of events, tell the jury the story of what happened. If the victim was excited and flattered to go out with the defendant, who was captain of the football team, describe her excitement. Describe how the defendant managed to get the victim alone. Describe how defendant reacted when the victim told him "No—I don't want to sleep with someone I just met." Or describe how he kept encouraging her to drink more, as he continued to flatter her. Talk about her emotional reaction the next morning—how she kept trying to make sense of what happened. Talk about how she tried to rationalize it and push it out of her mind, how she tried to go about her daily activities with memories constantly intruding, until she finally talked to a friend, who persuaded her to make a report.

Provide support for the theory of the case through direct and cross-examination of witnesses.

The closing is the last opportunity to impress upon the jury the case theory. Remember, the goal is not only to remind the jury of the evidence they have heard—including the all-important corroboration of as many details as possible—but to help them make sense of it all.

4.2-D. Anticipate and Overcome Predictable Defenses Resting on Victim Blame and Shame

The typical defenses in sexual assault cases are predictable and rest on the dual strategy of distorting the significance of victim behavior—using it as a means of undermining credibility—while portraying the perpetrator's behavior as accidental, normal, nonviolent, or welcomed. The prosecutor must carefully prepare to meet all potential defenses and defense strategies. It helps for the prosecutor to possess a certain mental flexibility to adjust trial strategy (though not the theory of the case) as the evidence unfolds in whatever way that it does. The following sections will address defenses commonly encountered in sexual assault prosecutions and strategies to overcome them.

4.2-D-1. Consent Defense

Cases of rape or sexual assault involving the consent defense are among the most difficult a prosecutor will ever try. Consent is always an issue in sexual assault prosecutions even where not an available defense or included as an element of the law.²⁵³ You must be prepared to identify and

introduce testimony and other evidence of the victim's words or behavior, or other circumstances, that cumulatively prove the victim did not consent to the sexual conduct at issue.

Determine how consent is defined in your jurisdiction by consulting your statutes and case law. Review reports and statements of victim and witnesses, including defendant and defense witnesses, which provide evidence of victim's verbal and nonverbal behavior inconsistent with consent. In some jurisdictions, there are specific statutory provisions invalidating expressions of consent induced by coercion, fraud, or intoxication.

The defense strategy will be to discredit the victim's memory or perception of events (typically where alcohol is involved) or to directly challenge her/his credibility, portraying the victim as having "buyer's remorse"—someone who later regrets an act that was voluntary at the time. The defense may attempt to prove a motive to fabricate or question the victim about prior consensual sex with the perpetrator. The defense may attempt to pierce rape shield or present other evidence to impugn the victim's character for the purpose of making the jury dislike the victim. Another defense strategy seeks to minimize evidence of force on this occasion by focusing on the victim's prior consensual acts with the perpetrator, characterizing any injury as trivial or an accidental byproduct of "rough sex." To the extent that defense strategies rely on improper evidence, they can be opposed with pretrial motions. Victim-blaming strategies not involving improper evidence can be effectively countered at trial through carefully planned testimony and argument. For example, the prosecutor can ask the victim to describe how he or she felt during the rape-kit examination or the interview with the responding officer. In summation, the prosecutor can ask the jury why the victim would endure that humiliating process to punish someone for being merely insensitive or inconsiderate. While it is never proper for the prosecutor to express a personal belief in the victim's truthfulness, it is important to always project confidence in the victim's veracity and the reality of the harm suffered.

Remind the jury that no one asks a robbery or burglary victim what they did to bring on the crime. No one would ever suggest that making a charitable donation means that one's property is free for the taking. No one would contend that allowing a plumber or house painter into the home to make repairs means that one's home can be entered at will. Unfortunately, sexual consent is somehow perceived differently. But as the examples make clear, we retain the right to decide whether, and under what circumstances, we allow someone to take our property or enter our homes. Consent

under one set of circumstances does not imply to consent on a different occasion under different circumstances.

4.2-D-2. Refute an Intoxication Defense

Even where intoxication is not a legal defense, the defendant's intoxication is almost *always* found to be relevant. The best strategy is to focus on the defendant's claim of intoxication and whether or not it is viable. It is also important to clearly distinguish the victim's level of intoxication from the defendant's. A person's gender, physical size, quantity of alcohol consumed, individual tolerance, and any food that was consumed are all important factors assessing the potential effects of alcohol. Consultation with a toxicologist – or law enforcement with experience assessing levels of intoxication such as those assigned to handle impaired driver crimes – may assist in understanding the degree of intoxication resulting from drinking. Expert testimony, along with witness observations of behavior, may help to establish the extent of impairment from intoxication.²⁵⁴

Where the defendant's intoxication is at issue, present any available evidence of the defendant's purposeful acts and cognitive ability. Could the defendant drive a car, undress the victim, physically support the victim, carry on a coherent conversation? Does the defendant recall other critical details of the events surrounding the incident? Carefully review investigative reports and witness statements. Who was buying the drinks? Did the defendant sign a bar tab? Compare signature with handwriting exemplar or other available signatures of the defendant. Did the defendant play pool, darts, or other games requiring a degree of physical coordination?

Alcohol Absorption

Excerpted from Viktoria Kristiansson, Prosecuting Alcohol-Facilitated Sexual Assault a Substantive Article for Allied Professionals, 20(2) SEXUAL ASSAULT REPORT 17-36 (2016).

Alcohol is absorbed by passing into the blood; it travels through the bloodstream to get to the brain in order to have its intoxicating effect. Absorption is impacted by a variety of factors, including:²⁵⁵

- Body size
- Food
- Amount and type of alcohol
- Duration of drinking
- Fatigue
- Tolerance rates
- Combination of alcohol with other drugs

All of the above factors are important for investigators to consider, but the reality is that alcohol tends to have significantly different impacts on males and females.²⁵⁶ This is because alcohol is hydrophilic; it loves water. The average male is 68% water, and has a higher proportion of muscle than women.²⁵⁷ The average female is 55% water, and has a higher proportion of fat than men.²⁵⁸ These disparities have a devastating impact on rates of intoxication; a female’s blood alcohol content (BAC) is often going to be much higher than a male’s, as seen in Table 1.²⁵⁹

Table 1. Impact of Sex on Alcohol’s Absorption Rate²⁶⁰

Assume each male and each female in the below scenarios consume six 12-oz. beers over 2 hours:

Weight of male and female	BAC	Comparative Results
140-lb. male and 140-lb. female	Male: .14 – .15 Female: .18 – .19	Female has potentially more than 20-35% higher BAC.
190-lb. male and 125-lb. female	Male: .09 – .11 Female: .19 – .21	Female has potentially more than double BAC

4.2-D-3. Distinguish Between Intoxication to the Point of Blackout and Pass-Out

Blackouts are alcohol-induced periods of memory loss that occur when the brain’s ability to form long-term memories from short-term memories is destroyed.²⁶¹ Blackouts are not predicted by BAC only.²⁶² They are more likely to occur when one’s BAC rises rapidly as opposed to slowly by, for example, consuming shots of liquor.²⁶³ Generally speaking, a person who blacks out will be showing visible signs of gross intoxication and will be drowsy or sleepy. It is critical for investigators to interview individuals who interacted with the victim at a time in close proximity to the assault.

“Passing out” is alcohol-induced unconsciousness. Sedation occurs as a result of the depression of the central nervous system, and resembles the state of sedation associated with surgery.

Unconsciousness can last for hours, and the groggy-sedated feeling can linger for 24 hours.²⁶⁴

Strategies for analyzing the difference between these defenses and overcoming them are in [Appendix J. Overcoming the Blackout v. Pass Out Defense.](#)

4.2-D-4. Debunk the Mistake of Fact Defense by Demonstrating How the Victim Communicated Lack of Consent

Where an offense requires a particular mental state, such as knowledge or purpose, an honest and reasonable belief that precludes a defendant from forming or maintaining that mental state will preclude conviction.²⁶⁵

Mistake of fact defenses are grounded in the belief that if a defendant did not know, at the time of penetration or contact, that the victim had not consented to the act, the defendant should not be convicted of rape.²⁶⁶ This defense is available in more than half of the U.S jurisdictions; even where the formal defense is unavailable, the court may still allow a jury instruction to that effect.²⁶⁷ The defense requires that the mistaken belief exist in the mind of the defendant at the time of the act and that the mistake be a reasonable one.²⁶⁸

Mistake of fact defenses often cause concern among those addressing sexual assault crimes because it appears to allow perpetrators a sure way to escape accountability. These fears are not entirely unfounded, because the defense has been used with a measure of success. However, prosecutors can overcome this defense by demonstrating the unreasonableness of the defendant's professed belief (*e.g.*, extreme intoxication of the victim leading to difficulty walking or even moving), in addition to looking for evidence that discredits the honesty of the belief. For example, did the defendant say anything before or after the assault to demonstrate that he knew the victim had not consented or could not consent (*e.g.*, "[]was so blitzed she couldn't even remember her own name!"). Highlighting such evidence not only overcomes the defense but also creates stronger cases.

Understand the law of your jurisdiction as it applies to mistake of fact defenses and be prepared to rebut such defenses when advanced.

4.2-D-5. Support Victim Credibility

Victim credibility is usually critical in these cases, and it is important to impress on the jury all of the reasons the victim's report and testimony should be believed.

Where the facts permit, emphasize that the victim has nothing to gain in this criminal case. It is not a civil case, where the victim stands to benefit financially as the result of the jury's verdict.

Stress the details that corroborate the victim’s account—demeanor at the time of the report, during the SAK exam, and/or on the stand, photos of injuries²⁶⁹, details of medical reports, prior consistent statements to other witnesses, absence of motive to fabricate (which can be contrasted with the defendant’s motive to lie to the police or while testifying). In all likelihood, the defendant’s own statements and testimony corroborate many details of the victim’s account—those details should be emphasized. If the victim acknowledges unflattering or embarrassing details, the victim’s willingness to do so supports credibility.

Contrast the plausibility of the victim’s testimony with the defendant’s version of what occurred, highlighting aspects of the defendant’s account that do not make sense or are contradicted by other evidence. Eliciting sensory details during the victim’s testimony—what the victim felt, smelled, or was going through the victim’s mind—gives that testimony the ring of truth.

4.2-E. Where Plea Offers are Appropriate, Ensure Agreement Reflects the Seriousness of the Assault

Following charging, prosecutors have an ethical obligation to be available to engage in plea negotiations.²⁷⁰ There is no legal or ethical obligation, however, to offer a particular defendant a plea agreement of any kind in a criminal case. As part of the plea agreement, a prosecutor may commit to recommending a particular sentence, including, where applicable, conditions of probation or release. In some cases, there is no agreement on a specific sentencing recommendation, but only to the charge(s) to which the defendant will plead guilty, with the other charges to be dismissed. Significantly, the prosecutor cannot commit to the imposition of a particular sentence; only the court has the power to impose sentences.²⁷¹ At the time of a plea, the court will question the defendant to ensure that s/he understands the charges, his/her rights, and is voluntarily entering a plea. Whether a defendant must provide a factual statement in support of a guilty plea varies from one jurisdiction to another.²⁷² A defendant may be permitted to withdraw a guilty plea before sentencing; in some jurisdictions, the plea can be withdrawn at any time before sentencing and others impose time limits, which may or may not be strictly enforced.²⁷³

Before engaging in plea negotiations, and especially before an agreement is finalized, discuss the possibility of a plea with the victim to determine the victim’s position on a possible plea. Some victims may wish to avoid testifying if at all possible; for others, the opportunity to tell their story in court may be of paramount importance and they would prefer the risk of going to trial to the certainty

of a plea, regardless of the plea offer. Ultimately the decision whether to enter into a plea agreement is the prosecutor's, but the prosecutor should always consider the victim's wishes as an important factor in making that decision. In discussions with the victim, it is important to communicate your continued belief in the case, and willingness to go to trial if an appropriate agreement cannot be reached. Also important is that you assure the victim that an agreement will permit the victim to speak at sentencing to tell the court—and the defendant—about the harm inflicted as a result of the assault.

Victims with mental health concerns may be advised by their doctor, family, or friends not to testify, leading the prosecutor to consider a plea to a lesser offense. In this situation, first explore alternative means to reduce stressors by requesting accommodations in the courtroom (*e.g.*, a support person, object, or animal) to ease the victim's anxiety and distress. In extreme cases, where there is a risk of serious emotional harm to the victim as a result of testifying, the most appropriate disposition is the one that protects the victim's safety, which should take top priority.

Plea negotiations can occur at any time after arraignment and, technically, up until the return of a verdict. Defendants are frequently reluctant to plead guilty to sex offenses because of the collateral consequences, including registration requirements, so it is not unusual for defendants charged with sex offenses to offer to plead guilty to a non-sexual offense (such as kidnapping or aggravated assault), even for a lengthy prison term. Such pleas are often perceived as contradictory to the prosecutor's mandate to seek justice and to protect the public, which has a strong interest in exercising maximum control over individuals who have committed sex crimes. Sometimes the prosecutor will determine that only a trial will satisfy the interests of justice in a particular case. In such circumstances, a defendant who wanted to avoid a trial could plead guilty to all of the charges without a recommendation as to sentence. It is important to note that courts are not bound by plea negotiations and may determine the recommended sentence is either inappropriately lenient or severe. The court has the power to "undercut" the agreement, but not to impose a greater sentence; if the court believes the sentence is too lenient and is unwilling to impose it, the defendant has the right to withdraw the plea.²⁷⁴

A plea in a sexual assault case can be appealing where evidence is scarce or complex and when the prosecutor is concerned about juror perceptions. Plea agreements may be appropriate as a means of conserving finite resources, *provided that an appropriate outcome can be achieved* without a trial. It is

important, however, for prosecutors to examine their motives—particularly where the agreement under consideration involves a plea to a non-sex offense or a sentence significantly lower than what could be achieved after conviction at trial. It is important to ensure that the reasons for considering such a plea are not attributable to causes that can be remedied by meticulous preparation, increased efforts to understand the evidence or engage the victim, additional investigation, consultation with experts or technical assistance providers (such as AEquitas), consultation with colleagues who can provide mentoring with regard to gaps in trial skills or techniques, review of the relevant research (both legal and non-legal), and willingness to explore alternative strategies to prove the case. Most of the problems encountered at trial, and their solutions, are addressed within this RSVP Model.

It is important to be consistent across the various units in an office with regard to what is considered an acceptable outcome—one that satisfies the need for general and specific deterrence, the victim’s wishes, and community safety. Making informed and responsible plea offers allows for more resources to expend on the cases where no such resolution can be reached. Recognize the value to the victim and the community in trying complex cases versus pleading them for charges/sentences substantially less than the crime would warrant.

A Note on Pleading Down Cases Involving Victims with Mental Health Concerns

Victims with mental health concerns may be advised by their doctor, family, or friends not to testify, leading the prosecutor to seek a plea for a lesser offense. If this occurs, first explore alternative means to accommodate and reduce stressors to the victim, such as requesting closed courtroom or support person. Another option may be to they are unavailable and seek to admit evidence of prior statements through *Crawford* or under an existing hearsay exception. Victim safety, however, is the priority and prosecutors should make decisions with that in mind, through consultation with experts, and through collaboration with advocacy for provision of services.

4.3 TRY THE CASE

4.3-A. Final Pretrial Conference: Review Charges, Jury Instructions, Any Special Considerations

The final pretrial conference is the time to address any final issues before jury selection.

- Be sure all of the counts and language of the charging instrument are accurate.
- Provide the court with any requested jury instructions, along with a short trial brief to explain the basis for your requests. Be sure to review any model or pattern jury instructions to be sure

the language is appropriate for your case and propose any necessary changes or new instructions you would like for the court to give at the conclusion of the case. Contact AEquitas for assistance with new and untested statutes at (202) 558-0040 or info@aequitasresource.org.

- Confirm with the defense and with the court any stipulations agreed to, and decide how they should be communicated to the jury.
- Review any courthouse security concerns and request that the court enter any appropriate orders to prevent or address intimidation during the trial.
- Review witness lists for both the prosecution and the defense.
- Advise the court of any concerns regarding scheduling, particularly to avoid lengthy waiting times for any experts, who may have demanding schedules, and for the victim.

Immediately before trial, ensure that all exhibits are present, and personally examine any items such as clothing to ensure that the condition and contents of exhibits are as they should be. The jury should not encounter anything unanticipated when the exhibits are taken back to the jury room (*e.g.*, an overlooked baggie of drugs in the pocket of a jacket).

Assign an investigator or advocate to keep the victim informed about the daily progress of the case, being careful to observe sequestration concerns by not disclosing details about evidence or testimony.

4.3-B. Keep the Focus on the Offender and Defend Against Strategies Designed to Prejudice the Jury Against the Victim

At trial, it is important to paint the reality of the crime. Imagine yourself painting a picture or creating a movie scene to show the jury how the events unfolded. Images—photos and diagrams of the crime scene—help to make it real for the jury. Suppose a victim reports s/he allowed the offender to come in so s/he could use the bathroom. A diagram showing the location of the front door, the bathroom, and the furniture will help the jury to understand that when the offender walked in the opposite direction from the bathroom to assault the victim in the living room, his intention all along was not to use the bathroom but to assault the victim.

Take the victim step by step through the events leading up to the assault. For example, if the victim met the offender at a party that night, have the victim describe how they met, what they talked about, what the victim noticed about the offender—nice smile, engaging personality, funny, attentive. Ask if

the victim liked the offender. Ask whether that feeling changed at some point during the evening. When did it change? At some point, the offender became frightening and powerful. A great question to ask is, “When did you realize you were in danger?”

Jurors may be inclined to think, “Well, she was drunk, she went to his room, what did she think would happen?” It is important for the jury to understand that what the victim *thought* would happen was she was going to get to know someone better and to have a nice time, but not that he would rape her. No one has ever been raped because they got drunk. People are raped because there was a rapist who was looking to take advantage of someone who was drunk, or unconscious, or incapable of walking or talking or moving. Some people get drunk and get sick or need help; the rapist will go through the motions of appearing to help the victim, but instead isolate the victim for the purpose of committing the crime.

Additionally, throughout the trial, consider and uphold victims’ statutory rights.²⁷⁵

4.3-B-1 Satisfy the Elements

See [Appendix E](#) for the Charging Tool to ensure all the elements of the charged crime are satisfied.

4.3-C. Educate the Jury Panel and Select an Unbiased Jury

The jury selection process is the first opportunity for a prosecutor to begin educating jurors in a sexual violence case and allows prosecutors to identify and strike jurors whose biases will interfere with their ability to follow the law and render a fair verdict. Using deliberate and thoughtful language when explaining the facts of the case, providing context for victim behavior, and inquiring about jurors’ life experiences can help prosecutors dispel myths and counter the defense strategies that seek to exploit them.²⁷⁶

Jury selection and juror education are critical to success in these cases. There are so many myths and misunderstandings about rape, about rapists, and about rape victims that everyone has heard and some have embraced. Many people still believe that most rapists are strangers and that rapists use deadly weapons and/or inflict serious physical injuries upon their victims. The truth, of course, is that most rapists are known to the victim and the weapons of choice are betrayal of trust, careful planning, and alcohol or drugs. Jurors must be educated not only during *voir dire*, but throughout that course of the trial. A good *voir dire* sets the stage for empaneling a jury ready to listen, with open minds, to the evidence and argument.

Successful juror education begins with voir dire, continues throughout the entire trial, and culminates with a strong closing argument. An appreciation of the facts about sexual violence is key to that success. A skillful jury selection is only the initial step in an effective prosecution strategy that will yield the best possible result in prosecuting these difficult cases.²⁷⁷

Practices surrounding jury selection vary among jurisdictions. In most, the prosecutor has the opportunity to ask questions, speaking directly to the prospective jurors. In some jurisdictions, only the judge is permitted to question members of the panel, though the parties are permitted to submit requests that the court ask certain questions. Be familiar with the number of peremptory challenges permitted to each side.

Be prepared that there may be survivors on the panel—protect their privacy and possibly have an advocate on hand if anyone needs to talk after being excused.²⁷⁸

- Select jurors with an open mind, free of bias, committed to listen to evidence—those who will be fair to both sides.²⁷⁹
- Be familiar with the judge’s practice regarding taking of peremptory challenges and challenges for cause.
- Challenges for cause should be based upon the record and stated respectfully, particularly if made in the presence of the panel.
- Be familiar with jurisdictional case law concerning qualifications to serve and grounds for excusing jurors for service (*e.g.*, criminal convictions, illness, personal business).
- The defendant should be present and be permitted to listen to any sidebar discussions.
- Select jurors who will render a verdict based on the evidence, applying the law as instructed.
- Craft jury questionnaires or submit questions that seek to uncover bias, if *voir dire* is limited.
- Prepare the jury for your theme and theory of the case.
- Ask questions based upon common experiences to lay the groundwork for evidence to be offered at trial, *e.g.* delayed disclosure or inconsistent statements.
- If the defense challenges for cause a panelist you would like to retain, request the opportunity to rehabilitate.

- Know the law concerning impermissible peremptory challenges under *Batson* and its progeny.²⁸⁰ Be prepared to defend your own challenges, and oppose any improper challenges by the defense that result in impermissible exclusion of potential jurors.
- Observe nonverbal cues or body language, noting them to support a challenge for cause or to defend exercise of a peremptory challenge.²⁸¹
- If jury position determines who will be the foreperson of the jury, make a special effort to ensure a favorable juror exhibiting leadership qualities is selected for that position.

4.3-D. Open Your Case Advocating for Justice

Craft a compelling opening statement that addresses the reality of the crime, including the most significant facts, with a focus on what the offender did to perpetrate the crime.

- Introduce your theme and preview the State’s theory of the case, as well as the kinds of evidence you anticipate to introduce at trial.
- Highlight evidence that merits special attention so the jury will not miss its significance during testimony.
- Place the crime, and the evidence with which you intend to support it, in context.
- Describe evidence honestly as part of the reality of the crime, including any evidence which may be viewed as negative.
- Be cautious in predicting exactly how your victim will testify. A general statement to the effect that the victim will tell you, in her/his own words, what s/he experienced that day is sufficient.
- Where relevant, discuss anticipated substance of expert testimony in connection with aspects of evidence—for example, “You will hear the testimony of Judy Advocate, who has worked with hundreds of rape victims over the past fifteen years, to explain that victims have very individual responses to a traumatic event like a rape, and that it takes many of them time to process what happened to them before they are able to tell anyone.”
- The opening should be a general roadmap, not a travelog with details of every roadside stop. Your goal is to give the jury an overview of where they are headed, not turn-by-turn directions.
- The opening is also not the place for argument; save that for summation.
- Remind the jury that at the end of the trial, you will have the opportunity to review the evidence with them to think about how it all fits together. Express your confidence that, after hearing the court’s final instructions on the law, the jury will return a verdict finding the defendant guilty of the charged offense(s).

4.3-E. Use Direct Testimony, Witness Order, Introduction of Evidence, and Trial Strategy to Recreate the Reality of the Sexual Assault for the Jury

Develop a strategy for witness order, based on facts and circumstances of the case, allowing for the needs of the victim and other witnesses. Calling the victim early in the case may reduce the anxiety of waiting to testify. It may be useful to first call one or two other witness to provide brief testimony setting the scene—perhaps the first responding officer, a witness who was with the victim during the events leading up to the rape, or a witness to whom the victim made an excited utterance immediately after the rape. Where you anticipate the victim may exhibit behaviors linked to their trauma – such as a flat affect or giggling during testimony – you may want to consider putting on your victim behavior expert first so that the jury will view the victim’s testimony through a trauma-informed lens.

Direct examination of the victim is the heartbeat of the case. Carefully prepare the victim to testify, and corroborate that testimony with evidence from secondary witnesses. Remember to elicit sensory details of the rape, as well as the victim’s emotional and physiological responses. This evidence helps forge a powerful connection with the jury, who can relate to the victim’s reactions based upon their own knowledge of human experience. A useful approach to the examination can take the form of first covering the basic chronology of events, then a second pass going into significant details, and finally returning to summarize the most important points.

Avoid asking questions that sound accusatory—“Why didn’t you scream?” “Why did you wait till the next day to tell anyone what happened?” “Why didn’t you leave when he became aggressive?” Instead, ask the victim to describe the situation, and what s/he was thinking about, or concerned about, when certain things happened. “How loud was the music at the party?” “What was going through your mind when you got up the next day?” “How did you feel when he grabbed you by the arm and pulled you toward him?” Ask questions that mirror your trauma-informed interview with the victim; *e.g.*, “Are you **able** to tell the jury what happened after he got you alone in the back room?”

Remember, there are no “bad facts” in these cases. The truth is the truth, and there is great power in the truth. The fact that the victim was drinking, or was using drugs, is part of the reality of the case. It enables you to emphasize the offender’s choice of victim—that he selected someone who was significantly impaired—suggesting planning and premeditation on the part of the defendant.

Pay attention during the victim’s testimony for especially powerful phrases about what the victim experienced, or what the offender did, that effectively cut through all the defense arguments about motive to lie. Use those quotes in your summation.

Be mindful of the psychological and emotional toll that testifying in court will have on the victim. Be sure that a support person is available and request a break if the victim is becoming overwhelmed or exhausted. It is also important to coordinate with the judge and court staff to identify and address any attempts to intimidate the victim inside the courtroom.

Be careful to request limiting or curative instructions, where appropriate (*e.g.*, in connection with “other bad acts” evidence or the inadvertent eliciting of improper evidence), even if the defendant fails to do so. Reversals and retrials are very difficult for victims and witnesses—particularly in these sensitive cases. Allowing significant defense errors to go uncorrected can result in reversals years later on petitions for post-conviction relief based on ineffective assistance of counsel. That serves neither justice nor the victim.

4.3-F. Plan Cross-Examination Strategy

If the victim has been properly prepared for cross-examination, this portion of the victim’s testimony should not present any surprises. If any questions are objectionable, make the objections promptly. If it appears that the questions are approaching areas that have been the subject of a pretrial ruling precluding such evidence, request a sidebar to remind the court, and counsel, of the order. If the victim is becoming distressed or upset by the questioning, determine whether the questions or tone are objectionable, or whether the victim is simply reacting to proper attempts to challenge credibility. In the latter case, a short break might give the victim an opportunity to regroup.

After cross is completed, consider whether the cross left any erroneous impressions requiring clarification on re-direct. If not, excuse the victim. Remember, any re-direct allows further cross-examination to the extent of areas covered on re-direct. There is no point in having the victim recount the same testimony and being subjected to another round of cross.

With regard to defense witnesses, formulate a cross-examination strategy that supports the theory and theme of your case. Listen carefully to testimony of defense witnesses, particularly the defendant.

Focus on internal inconsistencies or implausible testimony, as well as inconsistencies with prior statements.

Defense witnesses can be impeached by showing they have deficient personal knowledge, impaired memory,²⁸² lack of opportunity to observe, or bias. Listen carefully to nuances in the testimony suggesting any hesitation or discomfort and follow those up with further questions. Determine what the goal of witness testimony is, as it relates to the defense, and focus any destructive cross on undermining that goal.

Observe the demeanor of defense witnesses, particularly the defendant, and comment during summation on any evident evasiveness or hostility.

4.3-G. Where Appropriate, Introduce Expert Testimony to Enable the Jury to Decide the Case Fairly

Strategize about the optimal time for the expert(s) to testify, taking into account the most effective point in the case and the expert's schedule. To the extent possible, avoid calling successive expert witnesses; you do not want to overwhelm the jury with too much expert testimony at once. Refuse any defense offers to stipulate to qualifications; you want the jury to hear the details about the expert's qualifications and extensive expertise.

Take the time to allow the expert to explain the theory underlying the testimony, and the process involved in testing lab samples. Use of charts or exhibits, such as anatomical models or diagrams of a DNA molecule, can be useful to help the jury more clearly understand what the expert is telling them. In asking for an opinion on a hypothetical question, be sure the elements of the hypothetical are supported by evidence admitted at trial.

There are several areas of expert testimony that must be avoided and are considered the ***danger zone*** because they can result in mistrials or overturned convictions. These include prohibitions against:

- Opinions as to the veracity of victim or witness statements
- Opinions about defendant's guilt or innocence
- "Profile" testimony—whether the defendant or the victim exhibits the characteristics of a perpetrator or victim
- Testimony about statistics (in some jurisdictions)²⁸³

- Testimony about statistics on false reports of rape (in all jurisdictions)

Determine whether it may be appropriate to recommend a cautionary instruction on the expert's testimony, informing the jury about the purpose of expert testimony, and reminding the jury that it is free to accept or reject all or any part of the expert's testimony. Many model or pattern jury charges include such an instruction, which may appropriately be given at the time the expert testifies and again at the conclusion of the case.

Before Resting Your Case

Before resting your case, ensure that all exhibits to be admitted have been admitted. Inquire on the record (outside the presence of the jury) whether the defense intends to seek an "adverse inference" instruction telling the jury it may draw an adverse inference from the State's failure to call a particular witness. If so, resolve that issue, requesting a brief continuance to produce the witness if the court is inclined to give such an instruction

4.3-H. Protect the Record for Appeal

"Obtaining a conviction in a sexual assault ... case is usually a hard-won victory, whether by guilty plea or by trial. Having finally achieved a measure of justice in such a case, the last thing the prosecutor wants is to be forced back to the drawing board to re-try (or to re-negotiate) the case due to reversal on appeal. During the months or years it takes for a case to wend its way through the appellate process, evidence loses its freshness, memories fade, and witnesses who were cooperative during the initial proceedings may now be difficult to locate or reluctant to testify a second time. A reversal on appeal can be devastating to the victim, who may have been progressing in her recovery not only from the act of violence itself, but from the stress and uncertainty that accompany the criminal trial process."²⁸⁴

For additional information on considerations for appeal, see Teresa M. Garvey, *Making it Stick: Protecting the Record for Appeal* 12 STRATEGIES 1 (Apr. 2012), available at www.aequitasresource.org/library.cfm.

4.3-I. Deliver a Compelling Closing Argument

The structure of your planned closing argument should be in mind before you begin jury selection. Every piece of evidence should contribute to the argument you intend to advance. The summation should pull together all the pieces of evidence from the testimony of various witnesses, and the exhibits, in a way that will ultimately makes sense to the jury. Jurors should walk into the deliberation room with a sense that they finally understand how the pieces of the puzzle fit together and that they now understand what happened, and why. Continually return to the theme and theory of your case—these provide the framework within which you want to have the jury consider the evidence.

Remind the jury that the case is entitled “State [or People] v. John Doe.” This is not a private dispute between the victim and the defendant, nor is the victim the one on trial. The entire purpose of the trial process is to determine whether *this defendant* has violated the law under our criminal statutes.

Whether members of the jury approve of everything the victim did, or whether they would behave in the same way, is not the issue. Whether the jury “likes” the victim is not the issue, either. The only question the jury needs to consider about the victim is whether they believe the victim was truthful about what happened. Jurors can ask themselves whether the same characteristics of the victim, or the victim’s circumstances, that the defense would like them to focus on as a reason to disbelieve the victim—the fact that the victim was drinking or using drugs, the fact that the victim was sexually exploited—are those that would lead the defendant to believe he could get away with assaulting him or her. Because the defendant is *counting* on the idea that no one will listen to this victim or take this victim seriously or care what happens to this victim.

This type of argument helps to put the jury in the position of viewing the victim as an underdog—someone unjustly victimized and deserving of protection—before the defense has the opportunity to co-opt that role for the offender.

Returning to the question of whether the victim was truthful, and should be believed, recount the evidence supporting and corroborating various aspects of the victim’s testimony. Talk about the inherent plausibility of the victim’s testimony, the ring of truth as the victim describe a terrifying and traumatizing experience. If the victim used any particularly memorable statements while testifying, this is the place to quote them.

Avoid merely repeating what each witness testified to; the jury heard the testimony and can request a read-back if there is anything they do not remember. The prosecutor's job is to put this mountain of evidence in some kind of order so it makes sense.

Be precise, succinct, and organized in your summation. Try not to be repetitious, though a repeated refrain or phrase related to your theme can be an effective rhetorical device.

Point out inconsistencies, contradictions, and inherently unbelievable aspects to the testimony of defense witnesses. Point out any testimony inconsistent with the physical evidence.

Focus on the legal elements and talk about reasonable doubt. The defense will undoubtedly make reasonable doubt the centerpiece of its closing argument. Reasonable doubt is not "beyond all doubt." Find out how your model jury charges define "reasonable doubt" and talk about your case in those terms. Express confidence that after the judge has instructed them on the law, and they have had an opportunity to consider all of the evidence proving the elements of the offense, they will reach the correct verdict of "guilty."

- Avoid any expressions of personal opinion. Use rhetorical questions to accomplish the same goal. "Does it make sense that the defendant would...?" "Why would the victim...?"
- Avoid injecting your own training and expertise into summation. Summation must be based on evidence admitted at trial and reasonable inferences that can be drawn therefrom.
- Do not compare the defendant to an animal or disparage the defense as relying on "trickery."
- Do not ask the jurors to put themselves in the shoes of the victim; rather, ask them to imagine how *this* victim must have felt, as it pertains to the victim's thoughts, acts, or behavior.
- Do not suggest that an acquittal would endanger the victim or others.

4.3-J. Final Jury Charges and Verdict Sheet

- Resolve any final issues with respect to the proposed jury charges, including any proposed by the defense.
- Instructions to consider lesser-included offenses should be given if the evidence arguably would support a finding of not guilty on the greater offense and guilty on the lesser charge.²⁸⁵
- Review the proposed verdict sheet. Are any special interrogatories (e.g., special sentencing enhancement factors) necessary? Are all lesser-included offenses there, and are all of the

instructions on the verdict sheet (e.g., if not guilty on this count, proceed to consider next count) easy to follow?

Be sure the victim is advised when the testimony is drawing to a close, in the event the victim wishes to be present for closing argument. The prosecutor and advocate should carefully discuss options with the victim to help inform the victim's decision. Some victims want to be present for argument; others might find it distressing to listen to the defense argument. Regardless of whether the victim wishes to attend summations, find out whether the victim would like to be present when the verdict is returned. Obtain a way to contact the victim for the verdict, and find out how much time travel time would be needed for the victim to come to court. Find out whether the court would be willing to accommodate a brief delay in return of the verdict to allow the victim to be present; otherwise, the victim may have to wait at the courthouse if s/he wishes to be present.

4.4 POST-VERDICT CONSIDERATIONS

4.4-A. Guilty Verdict/Guilty Plea

- Move to revoke bail and set date for sentencing with sufficient time to conduct any necessary sex-offender evaluation and the pre-sentence investigation.
- Spend time with the victim to explain the plea or verdict, answer questions, and express appreciation for victim's participation.
- Explain the range of potential sentences and assure the victim that there will be an opportunity at sentencing to tell the court about the impact of the crime on the victim, as well as any preferred outcome.
- The prosecutor or advocate can provide assistance with preparing a victim-impact statement, including requests for restitution.
- If the victim will be interviewed in connection with the pre-sentence investigation, prepare the victim for that interview.
- Review and re-evaluate victim protection considerations.
- Explain what the victim must do to ensure notification of any appeals, change in custodial status, or probation/parole proceedings.

4.4-A-1. File a Detailed Pre-Sentence Memorandum

- Review statutory provisions regarding sentencing.
- Highlight any aspects of the case supporting statutory aggravating factors. Explain why mitigating factors do not apply.
- Cite any applicable case law pertaining to sentencing.
- Note any mandatory penalties and the applicability of any special sentencing provisions pertaining to sex offenses (e.g., mandatory evaluation or treatment; registration requirements)
- Allow the victim an opportunity to speak or have her/his statement to the court read at sentencing.
- Prepare the victim for the defendant's allocution. What the defendant will say cannot be predicted. Some are tearful and apologetic; some are angry and continue to insist on their innocence. Assure the victim that whatever the defendant says will not undo the verdict. Explain that courts often do not look kindly on defendants who refuse to accept the jury's verdict. The victim can simply consider the source—this is the same person who raped the victim.
- Advise the court whether the victim wishes to speak at sentencing or to submit a statement in writing.²⁸⁶
- In the event a probationary sentence is a possibility, propose any appropriate conditions that will support victim safety and offender accountability.

4.4-A-2. Argue for an Appropriate Sentence

Review the pre-sentence report for any inaccuracies or omissions, bringing any such errors to the court's attention. At sentencing, do not repeat every detail of your sentencing memorandum, but summarize the factors the court should consider, emphasizing the most important. Request that the court impose the specific sentence you have recommended. If the victim is present and wishes to speak, ask for the court's permission to do so. Be sure that the court does not inadvertently fail to ask the defendant whether s/he wishes to speak before sentencing; failure to permit the defendant to speak can result in a remand for a new sentencing proceeding.

4.4-B. Acquittal

4.4-B-1. Communicate Verdict to the Victim:

With not guilty verdicts or guilty verdicts on a lesser charge, explain that such a verdict does not necessarily mean that the jury disbelieved the victim; it simply means the jury had a reasonable doubt, based on the totality of evidence in the case, about some element of the crime as defined in the statutes. This is a message that should be communicated throughout the course of the case. Allow the victim to express any anger, frustration, or disappointment s/he might be feeling. Answer any questions about what can be done to assure the victim's continued safety. The verdict should not affect any civil orders of protection and even if one was not in place previously, the victim may now be able to obtain one. If the victim has a civil attorney, coordinate with that attorney to follow up with any necessary proceedings.

If the defendant has other open cases, depending on the specific rules of the jurisdiction where the trial is pending, the victim in this case may still be a potential "other crimes" witness in the other cases.

Express your appreciation for the victim's courage in sticking with the case all the way through to the end. Also remind the victim that the trial itself may help to deter the defendant from future offending and that the evidence uncovered in this case may help to identify other victims the defendant may have previously assaulted.

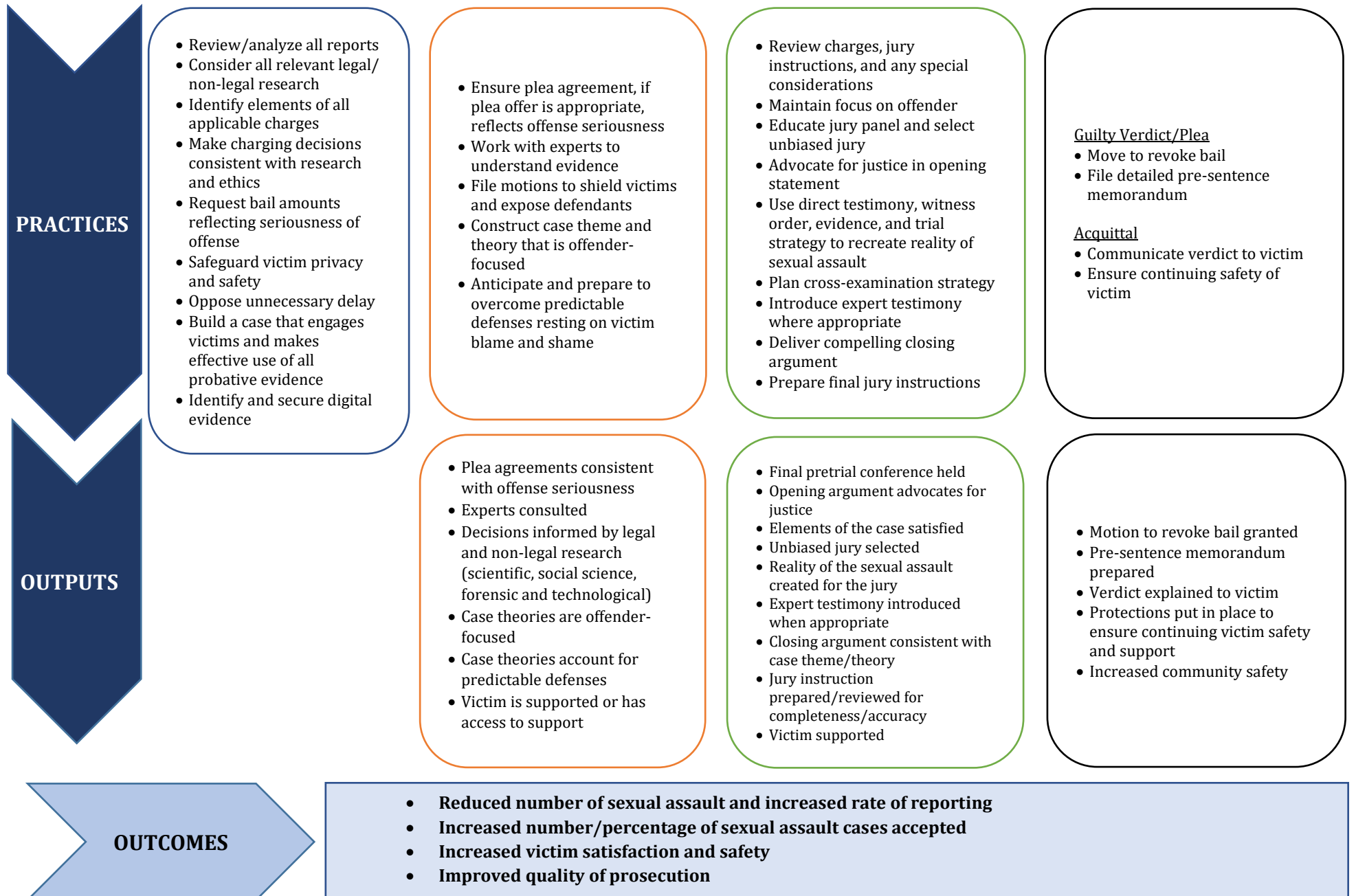
4.4-C. Post-Trial Debrief

Larger and medium-sized offices should encourage case debriefs on selected cases throughout the year. Prosecutors should debrief with colleagues on significant aspects of the prosecution of the case, from the first point of victim engagement with prosecutor through the final disposition, to identify and discuss any aspects of the prosecution during interaction, interviews, investigation and trial, any practices or litigation methods that proved problematic, and any evidence that may have been missed as well as those that were successful. Prosecutors should consider both adverse and successful aspects of the proceedings (*e.g.*, pleas, motions filed, arguments, cross and direct) and prosecutorial decision-making to learn from mistakes, identify emerging issues, and share successful strategies. Receive any criticism respectfully and with an open mind, rather than responding defensively; there is no need to apologize for decisions or actions you are convinced were the right ones, but mistakes

should be acknowledged. In smaller offices, it may be necessary to seek prosecutors in your larger network with whom to debrief as a way of improving your practice. Debriefing with national technical assistance providers, like AEquitas, is also helpful to sharing information and lessons learned with the larger field.²⁸⁷

4.5 CASE-LEVEL CONCEPTUAL MODEL

Figure 7.



Performance Management

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5.1. PERFORMANCE MANAGEMENT TO CONTINUOUSLY IMPROVE THE RESPONSE TO SEXUAL ASSAULT CASES

One of the objectives of the RSVP Model is to identify the primary performance metrics and measurement procedures for continuous improvement of the effectiveness and efficiency of how sexual assault cases are handled. This chapter outlines how to obtain and use these metrics to monitor performance and improve practices. These metrics might be reported on a regular basis (such as quarterly) or at any time when review of the data is called for. Tracking these metrics alerts agencies to existing problems and indicates, over time, the extent to which progress is being made or backsliding is occurring.

Performance measurement encourages stakeholders responding to sexual assault (the prosecutor’s office, law enforcement, health care providers, and victim advocates) to see themselves as partners—each an important component contributing to the success of the effort. Outcome measurement and analytic processes can lead to useful multidisciplinary discussions and improvement strategies; the involvement of key partners influences the values of individual outcome measures. For example, medical forensic examiners collect kit evidence and law enforcement will usually be involved in submission of SAKs to the lab; coordination of those steps is essential.

Our focus here is on the measurement and use of “outcome” measures. Outcome measures represent what prosecutors, with their partners, seek to accomplish, as well as goals important to victims and the public. “Output” measures, by way of contrast, represent the quantity or volume of work done, such as “number of rape kit tests tested.” The focus in the RSVP model is not on outputs but on the *results* of those outputs—the outcomes that occur.

The suggestions here, including both the identification of performance measures and data collection procedures, are by no means definitive. They need to be tested in the field to permit identification and correction of performance measurement problems that inevitably will arise.

TIP: Focus on using the data as a learning tool for improving the effective and efficient handling of sexual assault cases. The primary use of the data should NOT be to assign blame but to learn how to improve practice. A focus on fault-finding is likely to lead to mishandling of the data.

This chapter of the RSVP Model discusses the following major components:

1. **Identifying the basic outcome measures for monitoring sexual assault case processing (Section 5.2, 5.2A, and 5.2B).** These metrics include the estimated number of sexual assault incidents in the community, the disposition of cases at each level of processing, the level of success in prosecutorial outcomes, and victim assessment of their experience with the criminal justice process. This section additionally identifies likely data sources for each measure. Initially, a prosecutor's office may find it feasible to implement only a subset of these measures.

The outcome measures are separated into two categories, primary and secondary outcome measures. Primary outcomes are those that will be of most interest to victims and to the community served; secondary outcomes are those most relevant to review of internal office practices.

2. **Reviewing outcome data by victim characteristics and circumstances (Section 5.2C).** This enables partners to better target practice-related improvements. Examining outcome data by such characteristics as demographic data, disability, previous victimization, etc., can add considerably to the utility of the data.
3. **Reviewing cases based on their complexity (Section 5.3).** This will provide a more accurate and fairer picture of the performance measurement information, particularly conviction rates. When conviction rates are used without accounting for case complexity, there is a disincentive to prosecute complex cases. The section below on accounting for case complexity identifies a list of factors and procedures to consider when assessing complexity.
4. **Obtaining feedback from victims on their experiences with the criminal justice process (Section 5.4).** The quality of victims' experience should be a major concern. Systematically soliciting feedback from victims through surveys may be the most feasible way to obtain reliable data, even with the difficulties involved. A well-crafted survey, properly administered, can provide data of significance for several of the outcome measures.
5. **Establishing a process for analyzing, reporting, and using the performance data (Section 5.5).** Several basic analyses, such as those suggested in this section, are likely to be very helpful to prosecutor's offices and their partners (such as law enforcement, health care, and advocacy

organizations). The raw data, by itself, has limited utility. However, when combined, using basic analytic approaches, the resulting information can be quite useful. Technology can be used to facilitate data analysis with little additional effort by prosecutors or their partners.

6. **Holding regular “How Are We Doing?” meetings with partners (on a monthly or quarterly basis) to discuss the latest sexual assault performance report (Section 5.5.C).** The meetings preferably would include representatives from all partner agencies, allowing them to identify successes and disappointments, discuss what is and is not working, and propose appropriate corrective actions to be undertaken. Progress on these actions could be considered at future meetings.

The primary use of the data generated should NOT be to assign blame but to learn how to improve. A focus on fault-finding is likely to lead to mishandling of the data and missed opportunities with partners. Maintain a focus on learning the best ways to improve for an effective and efficient response to cases of sexual assault.

TIP: Hold a kick-off meeting with representatives from all partner agencies to: (a) discuss the sexual assault performance management process, (b) jointly develop the site’s own logic model, (c) select the desired performance measures, and (d) develop a timeline for implementation.

5.2. IDENTIFYING OUTCOME MEASURES

First, this section will discuss the suggested primary outcome measures. These measures seek to capture overall progress toward the major desired outcomes. Next, it will discuss the suggested secondary outcome measures, which represent important intermediary steps toward progress in improving the primary outcomes. Likely data sources are presented for each measure. A list of all these measures is provided in [Figure 8](#).

5.2-A. Primary Outcome Measures

TIP: Ask key local government officials (such as local government leadership—e.g., mayors and county executives, district attorneys, chiefs of police) to make personal commitments of support to the effort at a preliminary joint meeting.

The following primary outcome measures apply to all jurisdictions, as they are not specific to particular

practices that may be used by partner agencies. These primary outcome measures are grouped under

statements of their objectives. Note that the *data* found for most of these measures can be significantly affected by the activities of more than one partner.

Objective: To reduce the number of sexual assaults and to increase rate of reporting (Measures 1, 2, 3, and 4).

1. Total number and percentage of sexual assaults, both reported and unreported. This is likely to be the most powerful outcome data *but measurement with any degree of accuracy will most likely require use of either a communitywide survey or national survey providing reliable data at the community level, conducted on a regular basis and including questions specific to sexual assault.* Unfortunately, few communities are likely to have such data. If such data becomes available, the percentage of cases reported would be derived from the survey. (Statisticians would likely want to adjust this figure based on community demographic data available from national surveys.) The number of sexual assaults would be estimated by multiplying the percent derived from the survey by the estimated population of the community. (For example, if the percentage is 24 percent and there are 10,000 people in the adult population, the number is 2,400: $.24 \times 10,000 = 2,400$). These would be rough estimates.

Figure 8

List of Outcome Measures	
Primary Outcome Measures	
1.	Total number and percentage of sexual assaults, both reported and unreported.
	1a. Number and percentage of assaults unreported to any agency, public or private.
2.	Number and percentage of sexual assault cases reported to law enforcement, including police departments, sheriff's agencies, and campus/school police.
3.	Number and percentage of sexual assault cases reported by victims to a health or victim service agency, public or private, but not to law enforcement.
4.	Total number of known victims. This is the sum of the number of victims who reported to law enforcement (Measure 2) and the number who had reported the assault to another agency but NOT to law enforcement (Measure 3).
5.	Number and percentage of reported sexual assault cases not referred by law enforcement to the prosecutor's office.
6.	Number and percentage of cases declined by the prosecutor.
7.	Total number and percentage of cases declined, whether by law enforcement or the prosecutor.
8.	Number of persons charged with sexual assault and percentage convicted of that charge (the "conviction rate").
9.	Number and percentage of cases accepted for prosecution with: (a) fully successful outcomes; (b) partially successful outcomes; and (c) fully unsuccessful outcomes.
	9a. Number and percentage of cases rated as resolved satisfactorily by plea.
10.	Percentage of victims who rated their overall experience with the sexual assault case handling as either good or excellent.
11.	Percentage of cases in which the victim was threatened, <i>while the case was pending</i> , by the offender or the offender's allies.
	11a. Threat reported before the conclusion of the case.
	11b. Threat not reported until after the conclusion of the case.
12.	Percentage of cases in which the victim reported being threatened by the offender or the offender's allies, <i>after case disposition</i> .
13.	Ratings of the overall performance of the prosecution of sexual assault cases as either good or excellent.
	13a. Number and percentage of judges who rated the overall performance of the prosecution of sexual assault cases as either good or excellent.

13b. Number and percentage of law enforcement who rated the overall performance of the prosecution of sexual assault cases as either good or excellent.

13c. Number and percentage of advocates who rated the overall performance of the prosecution of sexual assault cases as either good or excellent.

Secondary Outcome Measures

14. Number of cases with victims or witnesses who failed to appear for trial.

15. Average case processing time from initial report to arrest to case resolution/disposition; and/or number and percentage of cases with delays.

16. Number and percentage of cases in which: findings from rape kits were not available in time to be useful for investigatory or prosecutorial purposes; kits were mishandled; or kits were lost.

17. Number and percentage of cases in which the forensic lab required over “Y” days to provide its findings; and/or average lab processing time.

18. Percentage of cases rated satisfactory or fully satisfactory by case reviews of each best practice.

19. Victim ratings of each quality-of-service element with respect to the victim’s experience with medical forensic examiners, responding law enforcement officers, detectives/investigators, prosecutors, and victim advocates.

This outcome measure is included in the RSVP Model because it likely represents the ultimate outcome information sought. While this measure may be impossible to obtain initially, additional sources of data may become available in the future, eventually making this measure feasible. Findings from national surveys and special one-time locality surveys may provide rough indicators, but will be less than useful for assessing changes in incidence that might occur following the introduction of new practices or policies addressing response to sexual assault.

Likely data source(s): The estimate would likely require surveying a (large) sample of adults, with carefully crafted questions and a very specific definition of sexual assault. The most feasible approach might be to add a small number of questions to a community survey already in use, which would greatly reduce the cost of data collection. Another cost-effective option would be to collect such information every other year, or even every third year, though the data would be less timely. With successive surveys, respondents would be asked about sexual assaults occurring during the period since the previous survey.

1a: Number and percentage of assaults unreported to any agency, public or private.

Likely data source: These estimates would be obtained from the survey identified under outcome measurement 1.

2. Number and percentage of sexual assault cases reported to law enforcement, including police departments, sheriff's agencies, and campus/school police. These numbers represent the measure that has commonly been used, in the absence of the above-mentioned population survey data, to indicate the prevalence of sexual assault in a community. The percentage refers to the total number of reports, divided by the most current estimate of the community's adult population (yielding a per capita reported sexual assault rate).

Likely data source: The number of assaults reported to police is available from police records. For the percentage measure, the most current community adult population estimate is likely to be available from census surveys or from the planning department.

3. Number and percentage of sexual assault cases reported by victims to a health or victim service agency, public or private, but not to law enforcement. Such cases would include those in which the

victim requested a sexual assault medical forensic exam at the hospital but declined to report to law enforcement. This measure preferably should be broken out by reasons for declining to report (if recorded by the medical forensic examiner), which would assist in targeting improvement actions. The percentage is calculated by dividing the number of cases in which victims indicated they would not report the assault to the police, by the sum of this number plus the number of cases that were reported to law enforcement (Measure 2). “No reason given” would be one of the possible response options.

Likely data source: The number of sexual assault incidents and number of assaults in which the victim declines to report to the police are not commonly tracked by health or victim service organizations. To use this measure, the site will need to set up a process for routinely obtaining this information from partner agencies in a way that does not compromise victims’ identities. The only data needed for each reporting period here are the number of assaults reported only to medical or victim service agencies and subtotals of the reasons for declining to report to law enforcement. Personal identifying information is not needed.

4. Total number of known victims. This is the sum of the number of victims who reported to law enforcement (Measure 2) and the number who had reported the assault to another agency but NOT to law enforcement (Measure 3). This number may include some double-counting attributable to victims who initially decline to report to law enforcement but later decide to report. When such cases are known to law enforcement, their number should be deducted. When outcome measure 1 is not available, *this may be the best available estimate of the prevalence of sexual assault in the community.* (Note that this measure does not include those incidents for which victims did not report to any of the partner organizations.)

Likely data source: See sources under Measures 2 and 3.

Objective: To increase the number and percentage of cases accepted by: (a) law enforcement; and (b) the prosecutor’s office (Measures 5, 6, and 7).

5. Number and percentage of reported sexual assault cases not referred by law enforcement to the prosecutor’s office. This measure can indicate the need to provide training and/or technical assistance to law enforcement, the need for better communication and coordination among partners,

etc. The percentage is calculated by dividing the number of cases not referred to the prosecutor's office by the number of sexual assault cases reported to law enforcement. This measure may be more helpful if it is broken out by reasons given for not investigating or referring a case, such as insufficient evidence, inability to disprove a claim of consent, victim declined to speak with police, etc.

Likely data source: Law enforcement records.

6. Number and percentage of cases declined by the prosecutor. The percentage is calculated by dividing the number of sexual assault cases declined by the prosecutor by the number of cases referred to the prosecutor from law enforcement. This measure can be considerably more helpful if it is broken out by reasons given for declining to prosecute, such as insufficient evidence, outside the statute of limitations, inability to locate the victim or witnesses, etc.

Likely data source: Prosecutor's office records.

7. Total number and percentage of cases declined, whether by law enforcement or the prosecutor. The percentage is calculated by dividing the total number of reported cases declined by either law enforcement or the prosecutor, by the total number of cases reported to law enforcement.

Likely data source: Law enforcement and prosecutor's office records.

Objective: To improve the number and percentage of sexual assault offenders held accountable (Measures 8 and 9).

8. Number of persons charged with sexual assault and percentage convicted of that charge (the "conviction rate"). This is the outcome measure most often used as the primary measure for assessing sexual assault case outcomes. A considerably more accurate and fairer assessment can be obtained by factoring in the complexity of cases (see [Section 5.3](#)). The overall conviction rate would be supplemented by tabulations of the number and percentage of convictions for each level of complexity.

Likely data source: Prosecutor's office records.

9. Number and percentage of cases accepted for prosecution with: (a) fully successful outcomes; (b) partially successful outcomes; and (c) fully unsuccessful outcomes. Conviction rates, of course, are of major importance in determining success. However, many other case resolutions also occur that indicate varying degrees of success. The conviction rate outcome does not account for cases resulting in dispositions to other charges or for lesser sentences. The conviction might be for a less serious charge (*e.g.*, attempted rape rather than forcible rape). Pleas may be accepted that involve concessions of various kinds. The success level also will likely be affected by case complexity and prosecutors' expectations of what is possible to achieve. This measure seeks to account for these factors.

Standardized operational definitions of each of the success categories will need to be developed. For example, the definition of "fully successful" would likely include guilty pleas or verdicts on the most serious sexual assault count or, in some particularly complex cases, guilty pleas or verdicts on other charges carrying lengthy prison sentences. The definition of "partially successful" might include guilty pleas or verdicts on lesser (but significant) charges. "Fully unsuccessful" might include outright acquittals in non-complex cases, guilty pleas or verdicts on petty charges (such as non-sexual misdemeanors), or no-contest pleas without meaningful penalties.

Careful definitions of each success level are needed, including consideration of the many forms of case resolution that can occur, such as the type of charge for which the defendant was ultimately convicted, length/type of sentence (including conditions), whether the conviction requires sex offender registration, and the degree of complexity of the case. The proposed measure here has three levels of case success. A site might want to vary the levels of success, based on their own needs.

Likely data source: Determination of successful outcomes will inevitably involve a degree of subjective judgment. However, such judgments should be made using objective factors, with specific definitions for each level of success.

This measure is perhaps more suitable for internal evaluations of progress within the prosecutor's office, and perhaps for multidisciplinary discussion, than for public information, at least until the prosecutor's office is satisfied with the utility and validity of its operational definitions of success and the fairness of the procedure.

(A measure of the number of cases subsequently overturned on appeal might be added. However, because convictions can be reversed for a variety of reasons, including unforeseeable changes in law, reversals might better be handled on an ad hoc basis, such as by a note on the performance report when reversals occur.)

9a. Number and percent of cases rated as resolved satisfactorily by pleas. This measure is a subset of Measure 9 and includes pleas that are considered as successful resolutions of a case. For example, a plea to the initial charge may be considered a success, whereas a plea to a reduced charge (to a non-sexual offense) might generally be considered less satisfactory, depending upon other factors. See the previous measure for considerations in determining whether the disposition by a specific plea represents a satisfactory outcome.

Likely data source: See Measure 9.

Objective: To ensure that victim's experience is beneficial, and her/his safety and rights have been preserved (Measures 10, 11, and 12).

10. Percentage of victims who rated their overall experience with the sexual assault case handling as either good or excellent. This measure includes the input from victims themselves, allowing us to understand their perspectives about case handling processes and the resolution of the case.

Likely data source: Surveys of victims conducted soon after disposition. See [Section 5.4](#) for more details on suggested survey content and process.

11. Percentage of cases in which the victim was threatened, *while the case was pending*, by the offender or the offender's allies, broken down as follows:

- a. Threat reported before the conclusion of the case.
- b. Threat not reported until after conclusion of the case (i.e., first reported during follow-up survey).

Likely data sources: [a] Victim statements reported to law enforcement or to any of the other partners. [b] Surveys of victims.

12. Percentage of cases in which the victim reported being threatened by the offender or the offender's allies, after case disposition. The assumption for this measurement is that the prosecutor's office continues to be concerned with the victim's safety.

Likely data source: Surveys of victims perhaps three months after case resolution.

Objective: To maximize the quality of prosecutor performance in the litigation process (Measure 13).

13. Ratings of the overall performance of the prosecution of sexual assault cases as either good or excellent.

Judicial, law enforcement, and advocate evaluations, while enlightening, should be reviewed with an awareness that the judiciary, law enforcement, prosecutors, and allied professionals, as well as the public, may have gaps in their understanding of sexual violence and the principles underlying the RSVP Model. Negative evaluations should be discussed to determine whether they reflect problems in the prosecution response or whether they suggest a need for partner education and training.

13a. Number and percentage of judges who rated the overall performance of the prosecution of sexual assault cases as either good or excellent.

13b. Number and percentage of law enforcement who rated the overall performance of the prosecution of sexual assault cases as either good or excellent.

13c. Number and percentage of advocates who rated the overall performance of the prosecution of sexual assault cases as either good or excellent.

Likely data source: Surveys of judges, law enforcement, and advocates responsible for criminal sexual assault cases during the reporting period. The feedback information should be confidential. This survey would likely be done on an annual basis. The respondents would be asked about the prosecution's handling of sexual assault cases *collectively*. The survey would *not* ask about individual cases or prosecutors. The respondents would be asked to evaluate specific aspects of case processing (possibly specialized to their expertise), such as victim treatment and notification, prosecutor

preparation, direct examination, cross-examination, knowledge of the law, and knowledge of the rules of evidence, as well as asked to provide suggestions for improving the handling of sexual assault cases.

5.2-B. Secondary Outcome Measures

14. Number of cases with victims or witnesses who failed to appear for trial. The number will be considerably more informative if the reasons for declining to participate are sought, tallied, and documented.

Likely data source: Law enforcement and/or prosecutor's office records.

15. Average case processing time from initial report to arrest to case resolution/disposition; and/or number and percentage of cases with delays. Delays should be quantified (*e.g.*, "overdue by X days") and preferably broken down by step where the delay occurred (*e.g.*, submission of rape kit evidence, forensic testing of kit evidence and DNA analysis, receipt of lab reports, referral to prosecutor, trial delay).

Likely data source: Law enforcement and/or prosecutor's office records.

16. Number and percentage of cases in which: findings from rape kits were not available in time to be useful for investigatory or prosecutorial purposes; kits were mishandled; or kits were lost. This measure focuses on the processing time for rape kits, on the assumption that this has been a major source of case delays. This could include delays in submitting kits to labs, as well as delays at the labs or the mishandling of evidence.

Likely data source: Law enforcement and/or prosecutor's office records.

17. Number and percentage of cases in which the forensic lab required over "Y" days to provide its findings; and/or average lab processing time. Some states may have set a legal limit on the amount of time a lab has to test a kit and upload its findings into CODIS. The value of "Y" could then be that amount of time.

Likely data source: Law enforcement and/or prosecutor's office records.

18. Percentage of cases rated satisfactory or fully satisfactory by case reviews of each best practice, as outlined in the RSVP Model. It would be necessary to develop a procedure for rating the extent to which each best practice was followed and to create an algorithm for an overall rating from this set of measures. Such rating procedures are outside the scope of this document.
19. Victim ratings of each quality-of-service element with respect to the victim's experience with medical forensic examiners, responding law enforcement officers, detectives/investigators, prosecutors, and victim advocates. (These ratings are in addition to the assessment of victims' overall satisfaction, described above in the section on [Primary Outcome Measures](#).) A proposed set of quality-of-service elements is provided below. Some of these elements may be sufficiently important to consider their inclusion as part of the Primary Outcome Measures.

Likely data source: Survey of victims.

Many jurisdictions will likely find it very difficult to track all the above outcome measures, at least initially. Measures can be implemented in phases. Initially, stakeholders could determine a prioritized set of measures they would like to track first. They could then focus on implementing systems to track these data and training staff to record them. Other measures could then be added over time.

5.2-C. Reviewing Outcome Data by Victim Characteristics or Circumstances

For many outcomes, the findings will be most useful if the outcomes are reported not only in aggregate but also for subgroups based on specific victim characteristics or circumstances. This additional information provides useful information as to what has worked well with particular groups and what has not worked well, perhaps suggesting the need for different approaches for different victim populations. Information pertaining to different groups also can help indicate the extent to which *equal justice issues* are present. One notable limitation is that the prosecutor's office will not have access to information pertaining to cases not reported to law enforcement.

Individual sites may decide to routinely report on only a small subset of these victim characteristics or circumstances or may wish to add others not included in this list. As long as the information on victim characteristics and circumstances are recorded, the prosecutor’s office can request such tabulations on an ad hoc basis.

1. Age
2. Gender (male, female, transgender/gender non-conforming)
3. Sexual orientation
4. Race/ethnicity
5. Income group
6. Geographical location of the sexual assault (*e.g.*, rural/urban/suburban or specific locations within the jurisdiction of focus)
7. Educational level (*e.g.*, is a student; has or has not completed high school/college)
8. Disability status
9. Employment status
10. Family characteristics, such as number and age of children
11. Presence of cognitive disabilities
12. Past history of alcohol or drug use/abuse or mental health issues
13. Past criminal justice involvement (as a defendant, victim, witness)
14. Previous victim of sexual assault
15. Relationship to the offender
16. Other victim characteristics and circumstances? (This provides sites with flexibility to add characteristics and circumstances important to individual cases.)

The prosecutor’s office most likely can readily access information on each performance measure for each such victim group (to the extent the data has been recorded). The data on outcome measures also can be broken down by such case factors as case complexity (see [Section 5.3](#)).

To avoid overwhelming the prosecutor’s office and its partners with data, the group should select perhaps three key victim characteristics or circumstances for which outcomes on the performance measures would be regularly reported.

It is not essential that data pertaining to any specific characteristic or circumstance be available for every case. However, the number cases where the characteristic is “unknown” should be noted, to provide an indication of the accuracy and reliability of the data. Any substantial data gaps should be identified when reporting the outcome information. It is, of course, always necessary to protect personal identifying data from disclosure.

5.3. ACCOUNTING FOR CASE COMPLEXITY

5.3-A. The Issue

One foundational SAJI premise is that conviction rates are not a fair measure of a prosecutor's performance because conviction rates do not account for case complexity. Prosecutors, and their offices, do not want to be penalized for working with more complex cases that might lower their conviction rate. The use of conviction rates as a measure of success, without accounting for case complexity, creates a perverse disincentive to advance challenging, complex cases.

Another premise is that additional performance measurements, other than conviction rates, are needed to provide fair, comprehensive, and useful information, such as measurements of victim safety and satisfaction with the prosecution process (as pointed out in "Beyond Conviction Rates"²⁸⁸). These additional measurements will be considerably more useful to prosecutors, their partners, policymakers, researchers, and the public if they also can be adjusted to account for case complexity.

5.3-B. How Can Complexity be Measured?

One reasonably straightforward approach to measuring case complexity is to categorize each case by its level of complexity (such as using two, three, or four levels of complexity) and then to report success rates for each level of case complexity, in addition to reporting the success rate for all cases combined. This may be one way to help alleviate prosecutors' natural hesitancy to take on complex cases. It also provides data users with explanations for disappointing overall success rates. ("My overall prosecution success rate decreased because my cases were more complex.")

The outcome for each case should be linked to the complexity rating for that case. This yields a performance measure for each level of complexity, such as "percentage of very complex cases with successful outcomes." This percentage would be reported for each complexity level, as well as overall.

How might cases be rated for complexity?

- The simplest approach is to ask senior attorneys in the prosecutor's office to rate each case as to complexity: very complex, somewhat complex, somewhat uncomplicated, or uncomplicated. Such ratings would be subjective, thereby reducing their reliability. Not all experienced prosecutors would judge the same cases the same way. The problem of subjectivity can be somewhat alleviated by having two or even three prosecutors separately rate each case. This

approach would be strengthened by providing detailed definitions for each complexity category. The definitions could be based on the presence or absence of preselected complexity factors, such as those listed below.

- A second, more involved approach would reduce the subjectivity of the ratings (and thus reducing any perception that the ratings are biased). This approach involves developing a process for obtaining a computerized calculation of complexity for each case. A case would be evaluated for the presence or absence of specific complexity factors, such as those suggested in the list below. The total complexity rating for a case would then be grouped into two, three, or four categories, for example: very complex cases, somewhat complex cases, somewhat uncomplicated cases, or uncomplicated cases. (The second approach increases the feasibility of rating case complexity for small prosecutor's offices—which may or may not have specialized sex crimes or victims' units with multiple attorneys. The second approach allows an individual attorney to plug information about each factor into the complexity algorithm. The first approach relies on an office being sizable, and may be executed more easily in offices with specialized units.)

The computer-calculated rating system is preferable for its reduced subjectivity. Some sites, however, might want to start out with the simpler procedure and then switch to the computer-calculated procedure at a later date.

5.3-C. List of Proposed Complexity Factors

Below is a list of proposed complexity factors.

The list provides a starting point for a prosecutor's office to consider. The factors are listed in random order and though it is long, more factors undoubtedly could be identified. The final set of rating factors selected by a site should be those that the prosecutor's office believes to be most significant for their site.

1. Lack of statement from the defendant.
2. Lack of DNA, especially if the offender was not known to the victim.
3. Lack of physical evidence that the victim was assaulted (e.g., clothing).
4. Lack of third-party witnesses to events or statements before, during, or after the assault.
5. Lack of rape kit evidence.
6. Lack of documented physical injury.

7. Lack of supportive testimony from medical forensic examiner.
8. Lack of other corroborating evidence.
9. Lack of use of a weapon by the offender.
10. Prior sexual relationship between the victim and offender.
11. Offender claim of consent to act.
12. Lack of participation by the victim.
13. Lack of cooperation of witnesses.
14. Victim has a history of mental health issues, alcohol/drug use/abuse, and/or commercial sexual exploitation.
15. Lack of offender history of abuse or other crimes, including felonies and misdemeanors.
16. Victim use of alcohol or drugs at time of assault.
17. Offender use of alcohol or drugs at time of assault.
18. Lack of physical resistance by the victim.
19. Delayed report.
20. Significant forensic and/or digital content in case (requiring major effort and cost).
21. Prominent status of offender or offender's connections/family.
22. Significant political/media attention pressuring prosecution.
23. Unusual elements with which prosecutors have little or no experience.
24. Involvement of multiple offenders.
25. Consensual interactions between offender and victim at, or near, the time of the assault.
26. Victim or offender has a disability.
27. Significant difficulties understanding the victim's or offender's speech.
28. Other important factors? (This option allows additional factors important to individual cases.)

5.3-D. Procedure for Calculation of the Summary Complexity Ratings

A basic procedure for computing case complexity ratings is described as follows.

- a. The prosecutor's office selects a set of case complexity factors, which would be listed on a form. The list of factors suggested above can provide a starting point. For each case, the applicability/inapplicability of each factor would be noted on the form.

For a more precise evaluation, should the office choose to conduct a more sensitive measurement, each factor could be valued according to its significance in a particular case or

as a part of the overall rating system. One such variation would ask raters to estimate the extent to which a factor was applicable to a case on a scale of 1 to 5, rather than only a yes (applicable) or no (inapplicable). Alternatively, each factor could itself be given a range of values based on the degree to which the factor had occurred for a case. For example, witnesses who are unable to participate could be rated as to whether this factor posed a major problem, minor problem, or no problem. A second variation would apply a weight to each factor, with more complicating factors weighted more heavily than others, and the same weight applied across all cases. In this variation, the weighing thus would be built into the process, rather than in each individual case. Weights would be developed by sites and in collaboration with technical assistance and local community partners.

Some sites might feel more comfortable developing a complexity rating procedure with this level of added nuance because of the potential value it affords by accounting for more detail. [Figure 9](#) provides an example of these options for a subset of complicating factors. The first column names a subset of five factors. The second column illustrates a system that would simply rate the applicability/inapplicability of each factor; that is, each factor, if applicable, would get a score of 1 with a total possible case complexity score of 5. The third column illustrates a system where an attorney would rate the extent to which each factor matters for particular cases on a scale from 1-5. The total possible case complexity score would be 25. The last column illustrates a system where factors would be consistently weighted across all cases, with the size of the weight predetermined by sites (and represented in each row). The total possible complexity score for this example using this system would be 7.5. The Figure shows a number for each factor using all three systems for illustrative purposes; however, attorneys may rate a particular factor as zero, meaning not applicable to the case, for the first and third system.

- b. The prosecutor's office determines the cut-off points—the number of complexity factors that need to be present for a case to be categorized into specific levels of complexity. For example, the prosecutor's office might use three categories of complexity levels: Highly Complex, Moderately Complex, and Not Complex. The ranges for each category might be: Not Complex = 0-3 factors; Moderately Complex = 4-6 factors; and Very Complex = 7 or more factors. The ranges for these categories would be different if offices choose to use ratings or weights when scoring a case for complexity.

- c. The prosecutor's office also establishes a procedure for obtaining the information, determining who will make the complexity ratings and the time at which ratings should be determined.

For example, the unit chief might be assigned the responsibility for determining ratings for all cases disposed during the previous month.

Next, calculate the "successful" percentage (and/or "unsuccessful" percentage) of cases resolved during the reporting period that fell into each level of complexity. (The determination of level of case success is discussed above in the [Primary Outcome Measures, Section 5.2-A](#)). This would provide, for the reporting period, outcome measures in the form: "Percentage of moderately complex cases resolved with satisfactory outcomes."

The computer also could provide outcome values for each victim characteristic or circumstance group, such as "Percentage of moderately complex cases, involving a teenaged victim, with satisfactory outcomes."

Figure 9

Methodology Comparison: Case Complexity Factors for a Prosecutor's Office

Complicating Factor	Factors weighted the same	Rating Factors on a scale of 1-5	Weighting factors based extent of complexity
Lack of rape kit evidence	1	A rating from 1-5	1
Prior sexual relationship between victim and offender	1	A rating from 1-5	1.5
Victim use of alcohol or drugs	1	A rating from 1-5	1.5
Lack of participation by the victim	1	A rating from 1-5	2
Delayed report	1	A rating from 1-5	1.5
Total Possible Case Complexity Score	5	25	7.5

- d. When should these case complexity factors be rated? Case complexity could be evaluated: (a) early in the case (e.g., at the time of charging); and (b) after the case is resolved. Certain offices may have varying opinions about the utility of case complexity ratings at each stage of the case, and these opinions should be weighed when determining such timing. For example, early ratings may help the prosecutor estimate the amount of effort and resources the case may require, and encourage the prosecutor and other team members to identify ways to meet the challenges posed by the identified complexity factors. The risk is that such a determination early on may bias the process in favor of a less than optimal disposition because of the perceived difficulty of securing a conviction at trial. Offices might wish to consider not disclosing early complexity ratings until after the case is resolved.

Rating complexity after the case has been resolved will provide a more accurate picture of the complexity factors. The post-resolution case review could encourage prosecutors to identify challenges in future cases as a way to improve their practices.

Ratings at both points—early in the case and after disposition, may be optimal, when feasible. Conducting both early and post-disposition assessments may yield important information, such as how much use of an expert witness aided in securing a favorable outcome, and may challenge the prosecutor’s own pre-conceived ideas about the case. However, each rating of the complexity factors will take extra prosecutor time.

A site might wish to seek some outside assistance to help set up the procedures. Faculty or students from nearby universities and community colleges might be available to help. Once the process has been established, implementing it can become a routine task.

Uniform definitions of complexity factors and complexity levels across prosecution offices would be ideal, facilitating comparisons among prosecutor offices to identify successful (“best”) practices. However, this is unlikely to be immediately feasible. It may be better, at least initially, for each community to select its own definitions and parameters for rating case complexity.

5.4. OBTAINING FEEDBACK AND OUTCOME INFORMATION FROM VICTIMS

This Model proposes another major form of data collection activity—one seldom used at present in most prosecution offices: systematically obtaining feedback from victims on their perceptions of the quality of their experience with various components of the criminal justice process. The victim survey findings can be combined with the outcome data from agency records to provide all partners: (a) a comprehensive picture of progress; (b) problem areas to be addressed; and (c) the extent to which problems are lessening or worsening.

Whatever the final outcome of individual cases, victim satisfaction with the level of respect, dedication, and competence on the part of the professionals handling their cases represents an important outcome for the prosecutor’s office and its partners. In addition, the feedback process itself may be helpful to sexual assault victims by affording them the opportunity to express their feelings and concerns about the

process. Past research has shown that victims who participated in surveys about their assault found the survey experience to be a neutral or positive one, with a small minority reporting it was not a positive experience. Further, a majority of victims reported that had they known in advance what the experience of completing the survey would be like, they still would have agreed to do it.²⁸⁹

This victim survey procedure is proposed regardless of whether a jurisdiction is participating in an in-depth evaluation of its practices. In-depth evaluations would likely require a longer survey or interview, different sampling strategies, and a longer follow-up process than that proposed here.

The survey proposed here would be used to provide regular, ongoing, performance information. It should be short, both to reduce the burden on victims (and on the prosecutor's office) and to maximize the likelihood that victims will complete it.

The first part of this section suggests the content of the questions to ask victims. The data from these questions become outcome measures. The second part of the section provides basic guidance on survey design and procedures.

5.4-A. Proposed Topics for Victim Questions on the Perceived Quality of their Experience

1. Feelings of safety, throughout the process and since case resolution.
2. Threats or intimidation by the offender or the offender's allies, throughout the process and since case resolution.
3. Interactions the victim had with the various agencies or organizations (law enforcement, prosecution, healthcare, and victim service).
4. Timeliness—estimate of the time it took, after the assault was reported, until the victim was provided with: access to medical care and sexual assault medical forensic exams; access to information on the process; continued notifications of case status. In addition, ask about victim perception of the timeliness of various stages of the prosecution, from reporting through final disposition.
5. Whether the victim received continued notification and information about the process, and knew whom to call with any questions.
6. Whether the victim was able to easily obtain answers to any questions or concerns.

7. Supportiveness/respectfulness of key professionals with whom the victim came into contact: responding law enforcement officers, medical forensic examiners, detectives/investigators, prosecutors, community-based advocates, victim/witness advocates, etc.
8. Quality/helpfulness of the various types of assistance the victim received, such as: crisis intervention, emergency housing, physical health care, mental health care, transportation, emotional support, legal advocacy, medical advocacy, trial preparation, etc.
9. Clarity and helpfulness of information provided to the victim, including information and assistance provided in the victim's primary language.

At the end of the survey:

10. Explanations of any negative responses. These narrative responses can provide useful clues as to what corrective actions are needed, particularly where multiple victims identify similar problems.
11. Suggestions for improving the system/services. The suggestions can provide useful clues as to what corrective actions are needed.

For surveys conducted a few months *after* case resolution:

12. (a) satisfaction with the outcome; (b) feeling of safety since case resolution; (c) adequacy of the protective order (if applicable); (d) adequacy of the system's help in obtaining victim compensation; and [e] threats or intimidation by the offender or the offender's allies, throughout the process and since case resolution. (Note that some victims may feel unable/unwilling to revisit the experience months after the criminal case is resolved.)

5.4-B. Victim Survey Procedures

Suggestions about the survey procedure are below. An example of a basic, very brief, questionnaire is provided in [Appendix L](#). Jurisdictions looking to develop victim surveys should contact the SAJI technical assistance partners.

5.4-B-1. Survey Design

- Keep the survey short to reduce respondent burden and encourage responses.
- Elicit ratings from the victims on questions that address issues of interest.
- Elicit the basis for any negative ratings.

- Include a final question that asks victims for their suggestions for improving the process. These responses can be quite informative and can stimulate additional efforts to improve.
- Keep the wording of the questions clear; focus on only one topic per question.
- Make available surveys in languages other than English, if appropriate to the jurisdiction. Victims with limited literacy may need to be interviewed in person or via telephone (possibly by a victim advocate; preferably not by a law enforcement official or staff from the prosecutor’s office).
- Consider what the performance measures for the survey responses might look like: “Percentage of victims that responded favorably (or unfavorably) to ‘X’”. The response categories might include three or four response options, such as scales ranging from fully/very satisfactory to fully/very unsatisfactory; determine where the cutoff will be for “favorable” versus “unfavorable” responses.

5.4-B-2. Survey Process

- Ask each victim to complete a survey shortly after the time the case is resolved. Resolved cases includes any dispositional outcome (*e.g.*, sentencing after guilty plea or trial; trial verdict of not guilty). Ideally, victims would also be re-surveyed about 6-12 months thereafter, to assess the quality of post-resolution services and to reassess the overall experience after some time has passed.
- Guarantee and protect respondent anonymity and/or confidentiality.
- Increase victim participation by working with victim advocates to encourage survey completion. Advocates also could be asked to help administer the survey to victims, with the prosecutor’s office bearing the cost of their assistance. Advocacy assistance also should be sought in designing survey procedures and content, to ensure that the procedure and content is victim-centered and trauma-informed; the findings should prove helpful to advocates, as well.
- Encourage victim participation in the survey by explaining that this is an opportunity for them to confidentially express any complaints or lingering concerns about the process or their experience and that the results will be used to improve the experience for future victims.

TIP: Emphasize to victims the importance of completing the short survey for improving the handling of future sexual assault cases. It would be good if 40% or more of victims provide responses. It is better than most expensive national polls.

- Increase response rates by:
 - Taking advantage of access to reasonably recent contact information probably in the possession of the prosecutor’s office;
 - Notifying each victim, before the case is closed, that they will receive the survey and asking for their participation, along with their latest contact information, including contact information of friends or family likely to know how to get in touch with them;
 - Making the survey brief, easy to understand, and attractively presented;
 - Presenting the prospect of a later, follow-up survey as an after-care service to learn how the victim is doing and whether additional help is needed. (This latter approach is likely to be useful to advocates, perhaps increasing their interest in assisting with the administration of the survey.)
 - Sending out reminders via mail, email, or phone (calls or text); whichever the victim prefers.
- Access help if needed. Setting up the survey process may require a some outside assistance (*e.g.*, to review wording of questions and setting up the tabulation procedures). Faculty or students from nearby universities and community colleges might be available to help. Once the survey process has been established, conducting the surveys can become a routine task. However, for data quality control, ask an outside expert to review the survey process at regular intervals.
- Offer multiple ways to complete the survey. The survey administration method will likely need to be a mixed-mode approach, such as use of a combination of email, regular mail, online, and telephone interviews. Ask victims their preferred mode of survey administration when explaining that they will be contacted. Remember that victims have the right to decline to participate in the survey, and those wishes should be respected. Lack of participation should not affect the ability of victims to access and receive help and services.
- Ask *all* victims for their participation in the survey, rather than only a sample. Certain categories of victim populations may be unavailable for survey, such as those who cannot be located (*e.g.*, migrants, homeless).
- Offer an option for victims to participate in a more in-depth conversation about their experiences. If victims agree, advocates could administer a semi-structured interview guide designed to obtain more detailed feedback about victims’ experiences and suggestions for improvement. If victims choose this option, it would be good to consider some type of

compensation for their time (*e.g.*, a gift card, transportation and child care if the interview is conducted in person, refreshments, etc.).

The surveys can be made even more useful to prosecutors' offices and their partners by adding a few questions, each reporting period, on a special and/or timely topic of interest for which victim feedback would be helpful.

5.5. ESTABLISHING A BASIC ANALYSIS AND REPORTING PROCESS TO MAXIMIZE USEFULNESS

Raw performance measurement data are necessary ingredients, but without processing, they are unlikely to provide much useful information for those managing or handling sexual assault cases. Analysis of the data, and reporting the findings, are what transforms performance measurement into performance management.

This section suggests basic analyses that can likely be undertaken, reported, and profitably used by most sites. Investigation into the underlying causes of problematic responses would, however, require more in-depth studies and evaluations.

5.5-A. Basic Analysis Options

The focus in this Model is on reporting basic, straightforward analysis—something that prosecutor's offices (or their partners) can do without advanced statistical skills. *The primary purpose is to help prosecutor's offices and their partners to continually improve the effectiveness and efficiency of their response to sexual assault.*

Computer technology can aid prosecutor's offices and their partners considerably in interpreting performance information, at minimal cost in time and resources. The prosecutor's office and its partners should be able to identify the extent to which progress has or has not been made—which practices are working well and which are not, and for whom. The prosecutor's office and its partners should be better able to understand and compare progress for various victim groups and for various types of cases.

The data will not tell *why* outcome values have changed, or what needs to be done to improve outcomes. To obtain such information would require in-depth program evaluations, involving more advanced data collection and mathematical techniques. However, basic performance information can provide useful clues—especially if basic analysis steps, drawing from program evaluation, are used. Each basic analysis procedure helps identify patterns, suggesting issues that the partners need to address. The outcome measurement and analysis process also will help to identify potential training and technical assistance needs.

Performance reports should be prepared and reported at regular intervals, such as monthly, quarterly, or annually. (The frequency of reporting may depend on the size of the office. Those with low caseloads may decide to do the analysis less frequently.) The process should be able to provide the latest performance data *at any time, as specific issues arise*.

Below are basic analysis steps likely to be especially useful for identifying problems and guiding program improvements.

1. Examine the latest performance report providing data on each performance measure and identify outcome values that are unexpected, whether the values are disappointing or surprisingly good. These signal the need for attention by the prosecutor’s office or its partners.
2. Compare outcomes for victim groups. This will identify victim groups for whom current practices are working well and those for whom they are not working well, suggesting that practices might need revision. [Figure 10](#) illustrates what such a report might look like. The top three sections of the Figure display one outcome measure for three different victim demographic groups—age, gender, and race/ethnicity.
3. Compare outcome values over time. This will indicate progress, setbacks, and trends. [Figure 11](#) illustrates a simple, basic reporting format that would display the latest data on outcome measures over time. The measures can be organized by particular goals that the prosecutor and partner agencies set and aim to achieve.

4. Compare outcomes for different levels of case complexity. This information will enable prosecutors and others to more realistically and fairly interpret case outcomes. [Figure 9](#) includes an example of a tabulation based on case complexity.
5. Compare the outcomes of cases having different characteristics or using different practices. This comparison can help to assess the relative effectiveness of different practices, such as the implementation of new practices suggested in the RSVP Model. For example, a site might wish to test a different way of processing rape kits (such as submitting kits to private versus public labs) to improve the timeliness of test results. Or the site might want to test the benefit of requiring multiple reviews before a case is cleared by law enforcement as “unfounded.”

[Figure 10](#) illustrates how such comparisons can be observed. The exhibit includes an example of outcomes for one case characteristic (whether the victim knew the offender) and one example capturing a part of the case process (which prosecutor was responsible for the case).

If a site chooses to calculate outcomes by prosecutor, such information should be restricted for internal use only, as it may relate to personnel issues. Remember, any individual prosecutor’s overall case success rate would more appropriately and fairly be considered in context of the complexity of that prosecutor’s caseload, as discussed in [Section 5.3](#).

6. Examine reasons for declining cases documented as part of some of the outcome measurements. The reasons cases did not move forward can be reviewed for patterns (and accuracy) for both the total number of declinations by the prosecutor and the percentage of cases reported to law enforcement but not forwarded to the prosecutor. Examine victims’ suggestions for improving sexual assault response obtained from victim surveys. Victim surveys (and semi-structured interviews, if conducted) can be reviewed for patterns showing where in the process corrective action might be considered. This information could be summarized and discussed with the multidisciplinary team partners for next steps.
7. Assign someone who likes numbers to help develop and implement the analysis process. This would include examination of each performance report, summarizing the findings for the prosecutor’s office and its partners, and highlighting performance results that appear to warrant further attention.

The data calculations for the performance measurement comparisons described above can be obtained using spreadsheet software in which the relevant data on each case are entered and desired tabulations are made. The software can be programmed to format and fill out the tables.

5.5-B. Reporting Results

Performance information should be reported to staff, partners, and the public with reports that convey the essential information clearly, with descriptive labeling, and in an attractive format that is uncrowded, easy to read, and makes use of helpful visuals (charts or graphs). Basic desktop publishing software can be used to create attractive, readable reports.

In the interest of transparency, most of the performance information described in the RSVP model should be reportable to the public. Information about individual cases, of course, continues to be subject to confidentiality. Be sure that the performance information reported does not prematurely and inappropriately release information that might jeopardize individual cases. This might be of greater concern to smaller offices with smaller caseloads, where someone might easily identify a particular case based on specific pieces of data. Such identification might jeopardize the confidentiality of victims who participate in the survey or, if a case is still in process, particular information may lead to a disincentive to proceed with the case.

5.5-C. Using Performance Information

All this work will not be worth the effort if it is not used to help improve the response to sexual assault. As explained throughout this chapter, the findings from the data collection, analysis, and reporting can be used to:

- Help identify progress and trends;
- Identify problem areas that need attention and/or corrective action;
- Assess outcomes that follow from changes in sexual assault case processing policies and practices;
- Encourage coordination with partners;
- Help develop, and subsequently justify, budget and staffing recommendations; and
- Provide data for use in future in-depth studies of policies and practices, such as program evaluations.

An approach that originated in New York City's police department (under the name "CompStat") appears highly appropriate for sexual assault case handling:

Hold regular (such as monthly or quarterly) "How Are We Doing?" meetings with partners to discuss the latest sexual assault performance report. (The performance reports would include the values for all the available outcome measurements.) The meetings preferably would include representatives from all partner agencies and would: (a) identify successes and disappointments; (b) discuss why they had occurred; (c) identify corrective actions needed; (d) by whom; and (e) by when. Progress on these actions should be monitored at future meetings.

Figure 10

Example: Percentage of Victims Reporting Satisfaction with their Experience with the Prosecutor's Office

Characteristic	Number of Cases	Satisfaction (%)	Dissatisfaction (%)
Gender			
Male	31	29	71
Female	43	70	28
Age Group			
21-30	13	54	46
31-39	28	53	47
40-49	24	50	51
50-59	9	55	44
Race/Ethnicity			
African-American	25	52	48
Asian	5	60	40
Hispanic	20	55	45
White/Caucasian	24	50	51
Case Complexity			
Little	13	23	77
Moderate	21	57	43
Substantial	40	61	40
Victim Knew Offender?			
Yes	49	51	49
No	25	56	44
Prosecutor			
Prosecutor A	19	52	47
Prosecutor B	18	50	50
Prosecutor C	18	23	78
Prosecutor D	19	84	16
All Victims	74	53	47

Figure 11

Example: Outcome Measure Summary Report Format

Outcome Measure	Value on *date [Latest value]	Value on *date [Prior value]	Value on *date [Starting value]	Change [Change in value from start to latest dates]	Benchmark Value
Goal A					
1.					
2.					
3.					
4.					
Goal B					
5					
6					
Goal C					
7					
8					

5.6. PUTTING IT ALL TOGETHER

A checklist of the steps that might be used to implement this performance management process is provided in [Figure 12](#). Setting up such a process may appear to be daunting. However, if taken one step at a time, with support from leadership, much can be accomplished. The data obtained will be far from perfect, but even limited information is preferable to working in the dark.

TIP: A basic performance management principle:

It is better to be roughly right than precisely ignorant.

Figure 12

Checklist of Major Performance Management Steps		
<input type="checkbox"/>	1.	Work out with local partner agencies (and the help of SAJI technical assistance team) the overall performance measurement, analysis, and reporting process.
<input type="checkbox"/>	2.	Work with partners to select the initial set of performance measures.
<input type="checkbox"/>	3.	Work with partners to select the victim group characteristics and circumstances by which outcome indicators will be broken out and reported.
<input type="checkbox"/>	4.	Work with partners to arrange for recording and transmitting data to capture the number of sexual assaults reported to the partners (while assuring victim anonymity/confidentiality).
<input type="checkbox"/>	5.	Develop the form for documenting case complexity factors.
<input type="checkbox"/>	6.	Obtain IT help for processing the information being collected.
<input type="checkbox"/>	7.	Work with partners to develop the victim-experience survey process, including: questions to ask each victim at case resolution; the process for administering the survey; and ways to encourage victims to complete it.
<input type="checkbox"/>	8.	Seek internal or external help from an analyst who can advise on setting up the performance management process, such as the victim survey procedures and the analysis and reporting processes. (Sources of low-cost or no-cost help include faculty members, or their students, from a local college or university, or other experts.)
<input type="checkbox"/>	9.	Seek help from IT in developing the process for tabulating the data to be obtained from the victim survey and helping develop user-friendly reporting formats.
<input type="checkbox"/>	10.	Obtain help from an internal analyst to review the results of each performance report and identify the highlights of the data. This help might come from one of the other partners in the system or even one of the prosecutors who enjoys working with numbers.
<input type="checkbox"/>	11.	Establish a process for regular (e.g., quarterly) meetings with the partners to examine the latest data to identify problems and address issues suggested by the data.

APPENDICES

Appendix A. Office- and Case-Level Checklists

The two checklists below are intended to be used to improve the response at the office level and case level, respectively, to sexual violence cases. Although the phrasing may be slightly different, these checklists mirror the practices in the RSVP Model and are hyperlinked to the relevant sections where further detail can be found. Chief prosecutors, unit supervisors, and other individuals responsible for implementing and promoting policies and practices should use the *Office-Level Checklist* as a tool to track, create, review, and refine office policies. The four main tasks identified in this *Office-Level Checklist* provide a guide for an ongoing review process, to be undertaken at regular intervals.

The *Case-Level Checklist* is a tool for individual prosecutors to use in the course of preparing and trying a sexual violence case. The *Case-Level Checklist* sets forth the steps to be taken in that process and the special considerations for each step. Not every step may be appropriate or necessary in every case; their inclusion in the *Checklist* is to ensure that no important steps are overlooked or omitted from consideration. Moreover, the *Case-Level Checklist* is not intended to be exhaustive, but rather a guide to track the steps typically necessary and appropriate for cases involving sexual violence.

OFFICE-LEVEL CHECKLIST

<input type="checkbox"/> Assess Current Practice in Your Jurisdiction	<input type="checkbox"/> Build Capacity Within the Office	<input type="checkbox"/> Performance Management to Continuously Improve the Response to Sexual Assault
<input type="checkbox"/> What does attrition look like in your jurisdiction? <ul style="list-style-type: none"> ○ Capture prevalence ○ Capture reports to law enforcement ○ Capture reports referred for prosecution ○ Identify gaps in reporting and referring cases for prosecution <input type="checkbox"/> Identify, review, and link prosecution policies and practices to specific outcomes <ul style="list-style-type: none"> ○ Review existing office policies ○ Track cases through justice system ○ Review and evaluate standards for charging decisions ○ Analyze impact of policies and practices ○ Analyze data collected at each stage of prosecution ○ Assess case characteristics ○ Consider where victims interact with professionals and may be identified ○ Conduct candid file review and evaluation ○ Assess practices of multidisciplinary partners <input type="checkbox"/> Capture complexity of cases <ul style="list-style-type: none"> ○ Be aware of common factors that contribute to complexity <input type="checkbox"/> Routinely capture, analyze, and communicate about the data <input type="checkbox"/> Properly allocate resources to address sexual violence <ul style="list-style-type: none"> ○ Assess office's current allocation of resources ○ Dedicate line items in budgets for appropriate resources ○ Consider options for obtaining necessary additional resources 	<input type="checkbox"/> Develop and instill core principles <input type="checkbox"/> Develop specialized units and prosecutors <input type="checkbox"/> Implement research-informed decision-making <input type="checkbox"/> Understand how the rules of professional responsibility govern prosecutorial decisions <input type="checkbox"/> Recognize and address the impact of vicarious trauma on staff	<input type="checkbox"/> Identify outcome measures <ul style="list-style-type: none"> ○ Consider primary and secondary outcomes ○ Review outcome data by victim characteristics or circumstances <input type="checkbox"/> Account for case complexity <input type="checkbox"/> Obtain feedback and outcome information from victims <input type="checkbox"/> Establish a basic analysis and reporting process to maximize usefulness <input type="checkbox"/> Continually improve the effectiveness and efficiency of handling sexual assault cases
	<input type="checkbox"/> Build Capacity Within the Community	<input type="checkbox"/> Collaborate through multidisciplinary partnerships <input type="checkbox"/> Identify and employ useful data and technology <input type="checkbox"/> Share information and expertise <input type="checkbox"/> Develop an effective strategy for communicating with the community about sexual violence <input type="checkbox"/> Improve community relations by promoting cultural humility

CASE-LEVEL CHECKLIST

Review, Evaluate, and Charge the Case	<ul style="list-style-type: none"> <input type="checkbox"/> Request bail amounts reflecting seriousness of the offense <ul style="list-style-type: none"> ○ Request no-contact orders ○ Safeguard victim privacy and safety <input type="checkbox"/> Oppose unnecessary delay <input type="checkbox"/> Build a case that engages victims and makes effective use of all probative evidence <ul style="list-style-type: none"> ○ Conduct trauma-informed interview of victim ○ Review DNA and forensic evidence ○ Prevent and respond to witness intimidation ○ Review <i>all</i> of the evidence
Thoroughly Prepare the Case	<ul style="list-style-type: none"> <input type="checkbox"/> Work with experts to understand evidence in the case and to help factfinder understand evidence <input type="checkbox"/> File motions to shield victims and expose defendants <ul style="list-style-type: none"> ○ Use rape shield laws to exclude irrelevant and prejudicial evidence ○ Introduce evidence of other crimes and bad acts where relevant ○ Proceeding to trial in a case with a nonparticipating victim ○ Guard victim privacy and dignity through other available motions <i>in limine</i> <input type="checkbox"/> Construct a case theme and theory that is offender-focused <input type="checkbox"/> Anticipate and prepare to overcome predictable defenses resting on victim blame and shame <ul style="list-style-type: none"> ○ Overcome the consent defense ○ Refute an intoxication defense ○ Distinguish between intoxication to the point of “blackout” and “pass-out” ○ Debunk the “mistake of fact” defense by showing how the victim communicated lack of consent ○ Support victim credibility <input type="checkbox"/> Where plea offer is appropriate, ensure agreement reflects the seriousness of the assault
Try the Case	<ul style="list-style-type: none"> <input type="checkbox"/> Final pretrial conference: review charges, jury instructions, any special considerations <input type="checkbox"/> Maintain focus on the offender and defend against strategies designed to prejudice the jury against the victim – <i>satisfy the elements</i> <input type="checkbox"/> Educate the jury panel and select unbiased jury <input type="checkbox"/> Open by advocating for justice <input type="checkbox"/> Use direct testimony, witness order, introduction of evidence, and trial strategy to recreate the reality of the sexual assault for the jury <input type="checkbox"/> Plan cross-examination strategy <input type="checkbox"/> Where appropriate, introduce expert testimony to enable the jury to decide the case fairly <input type="checkbox"/> Deliver compelling closing argument <input type="checkbox"/> Final jury instructions
Post-Verdict Considerations	<ul style="list-style-type: none"> <input type="checkbox"/> Guilty verdict/guilty plea <ul style="list-style-type: none"> ○ Move to revoke bail ○ File a detailed pre-sentence memorandum ○ Present victim-impact statement ○ Argue for an appropriate sentence <input type="checkbox"/> Acquittal <ul style="list-style-type: none"> ○ Communicate verdict to the victim ○ Ensure continuing safety <input type="checkbox"/> Post-trial debrief

Appendix B. Core Competencies for Prosecuting Sexual Violence

The essential components of a specialized prosecutor or unit are built on the foundation of training, experience, and mentorship, as discussed in the Model Response to Sexual Violence for Prosecutors (RSVP Model). These are core and complementary facets of what makes a prosecutor able to make informed decisions at every stage of the sexual assault prosecution.

Experience, knowledge, and analytical skills are critical to being able to identify and apply the criminal laws, evidentiary and procedural rules, and case law relevant to the prosecution of sex crimes. Prosecutors must also be familiar with the most recent research related to victim behavior, sexual violence perpetration, medical and health, forensics, psychological and scientific relevant to sexual violence cases. This will inform evaluation, preparation, and litigation of cases and will better prepare them for future cases in which they will be involved. Prosecutors must understand not only the applicable laws but also the common challenges that arise when investigating and prosecuting these crimes.

The following training topics have been identified as foundational requirements for handling sexual violence cases. Before a prosecutor is assigned a sexual violence case, they should receive training on these topics and review the accompanying research and any evolving research as well.

Training Topics

What is Sexual Violence?

This training will include a discussion of the prevalence and incidence of sexual violence; discussion of the goals of prosecution; overview of the general elements included in sexual assault statutes; a discussion of the victim-centered, offender-focused and trauma-informed approach and victim and offender dynamics; an examination of the portrayal and minimization/mischaracterization of sexual violence in popular media and its impact on the prosecution of a case; a recognition of the existence of sexual violence across the lifespan, *i.e.*, childhood through later life.

As a result of this training, participants will be better able to:

- Recognize the prevalence and incidence of sexual assault across the United States;
- Articulate the goals of prosecution of a rape and sexual assault case;
- Identify the range of conduct covered by—and typical elements contained in—rape and sexual assault statutes;
- Define victim-centered, trauma-informed and offender-focused prosecution approaches.

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- Review the website and resources found at END THE BACKLOG, <http://endthebacklog.org> (last visited Oct. 27, 2016)

Offender Behaviors: Various Methods of Control

This presentation will provide a comprehensive overview of sex offenders with an emphasis on nonstranger rapists (*e.g.*, motivations and characteristics, myths and misconceptions, serial and crossover offending). It will focus on common misconceptions and false expectations of offenders (*e.g.*, appearance, behavior, use of weapons) and why nonstranger rapists, who do not meet these expectations, are the offenders who are frequently not reported or prosecuted. The presenters will also discuss underserved populations and cultural considerations. In addition, video clips will be shown of offender interviews to facilitate discussions about observations of perpetrators' language and other issues raised by the videos as well as participants' own cases.

As a result of this training, participants will be better able to:

- Identify evidence of offenders' predatory behavior (*e.g.*, force/threat of force, coercion, and exploitation of victim vulnerabilities) to perpetrate their crimes;
- Focus on the offender and their predatory behavior from investigation through sentencing;
- Develop strategies to educate judges and juries as well as communities about offenders, and thereby overcome societal myths and misconceptions.

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The Link Between Understanding Victim Behavior and the Neurobiology of Trauma and Understanding Sexual Assault

Public perceptions of how victims should respond to physical and emotional trauma often conflict with the way victims actually behave and these misconceptions can significantly impact the fact finders' assessment of victim credibility and ultimate case outcome. Victims have individual responses to trauma that are often counterintuitive to public expectations, but prosecutors may be unable or unsure of how to

explain this to the jury. This presentation will provide an overview of victim dynamics in sexual assault and other gender-based violence crimes, including sexual assault, intimate partner violence, and stalking. See also training topic below on [Working with Experts to Counter Myths, Explain Victim Behavior](#).

As a result of this training, participants will be better able to

- Recognize and understand signs and symptoms of trauma;
- Recognize the conflict between public perceptions of how victims should respond to physical and emotional trauma and the way victims actually behave;
- Collaborate with allied professionals to fully integrate a trauma-informed approach;
- Convey victim's experience in jury selection;
- Counter defense strategies to manipulate public's misinformed expectations in order to challenge victim credibility;
- Apply information about neurobiology of trauma to their analysis of case facts and evidence;
- Conduct direct examination and recreate the reality of the crime at trial.

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Understanding DNA and its Impact on the Investigation and Prosecution of Sexual Violence

Rape cases are admittedly some of the most difficult to prosecute; cold cases present even greater challenges due to the passage of time. Technological and strategic innovations, along with well-established investigative and prosecutorial best practices, allow prosecutors to breathe warmth and vitality into even the coldest of cases. To hold offenders accountable for crimes committed years ago,

prosecutors must work collaboratively with allied professionals to overcome the underlying factors that contributed to the delays in the first place. Effective trial strategies can bring a sense of immediacy to the courtroom as the facts unfold at trial.

This training will focus on the unique challenges to investigating and trying cold case rapes involving offenders known and unknown to the victim, providing strategies to overcome those challenges. The presenter will discuss best practices in sexual assault prosecutions as well as promising practices in response to the time-intensified issues in older cases, such as renewed investigations of dormant cases, victim notification, identification of evidence, pretrial proceedings, and trial strategy.

As a result of this training, participants will be better able to:

- Recognize that DNA is an ever-developing field of study with specific nuances and application to the prosecution of sexual violence;
- Use forensic evidence to identify defendants, link them to other crimes, and introduce other acts evidence;
- Develop practices that reduce or eliminate untested kits;
- Anticipate and overcome legal challenges relevant to the prosecution of cold cases.

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Working with Experts to Counter Myths, Explain Victim Behavior

The public has deeply-rooted perceptions about sexual violence and about how victims of sexual assault should behave. The realities of sexual violence are quite different. Experienced professionals familiar with the dynamics of sexual violence understand that victims have individual responses to trauma that are often counterintuitive to public expectations. Without the benefit of a proper explanation, however, jurors may wrongly interpret a victim's actions during and after an assault as reasons not to believe the victim's testimony. Expert testimony to explain victim behavior is often the best way to dispel myths and assist the jury to make an informed decision based on the evidence, viewed in its proper context.

This training will describe the impact of trauma on victims, including cognitive and behavioral reactions, and will discuss the effect of common victim behaviors and responses on factfinders' assessments of victim credibility. It will discuss the law related to the prosecution's introduction of expert testimony on victim behavior and responses to trauma, how to identify experts qualified to testify on this subject, and what the parameters of such testimony should be. See also training topic above on the [Link Between Understanding Victim Behavior and the Neurobiology of Trauma and Understanding Sexual Assault](#).

As a result of this training, the participants will be better able to:

- Recognize victim behaviors that may require explanation at trial;
- Identify and work with experts to prepare a case for trial;
- Educate judges and juries about victim behaviors and dispel myths;
- Apply necessary law in order to be able to introduce expert testimony at trial;
- Use experts to explain victim behavior and counter defense attempts to use a victim's behavior / responses to trauma as evidence of the victim's lack of credibility.

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Evaluating Sexual Assault Reports

When a prosecutor is first made aware of a sexual assault report, s/he should review all police reports to determine what charges may apply and what, if any further investigation should be conducted. To be effective, prosecutorial decisions must be driven by the most current and accurate scientific, social science, and legal research. Informed prosecutorial discretion and decision-making allows prosecutors to

consider *all* of the admissible evidence, including the specialized knowledge that can be provided by experts, and to assume that juries will not be irredeemably tainted by bias and myth. The duty of prosecutors is not only to implement the “law on the books” but to recognize the devastating harm that results from assaults that have historically been considered as something less than “real rape.” Prosecutors should work closely with law enforcement to discuss the reasons behind decisions and to communicate the importance of research-informed decision-making and thorough investigations. Ultimately, it is part of prosecutors’ ethical responsibility to lead the way in responsible charging that translates the law on the books into action.

At the conclusion of this presentation, participants will be better able to:

- Evaluate sexual assault reports through a research-informed lens.
- Identify corroborative evidence to strengthen a case.
- Promote more thorough investigations.

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Understanding and Analyzing Relevant Rules of Evidence

The rules of evidence provide the basic guidelines to determine both the relevance and admissibility of evidence at trial. Sexual assault cases provide unique opportunities to re-examine the accepted analysis of many of the applicable rules and rethink established arguments supporting them. For example, Federal Rule of Evidence 412, commonly referred to as rape shield, excludes evidence related to a victim’s sexual history unless it fits within defined exceptions. The analysis generally employed to this rule of evidence is largely informed by case decisions, but, rarely by the research regarding its relevance to consent and credibility. Other examples, such as Federal Rules of Evidence 404, 413, and 414 govern the admissibility of a defendant’s prior criminal history and/or propensity to commit sexual assaults; two of which are deeply controversial. Finally, in many cases the actual or perceived stigma of the assault, fear, shame, a relationship with the perpetrator and other barriers can interfere with the victims’ abilities or willingness to participate in the prosecution of their perpetrators. When victims are unwilling or unable to participate, prosecutors must determine if they are able to proceed without the victim. There are several rules of evidence critical to this analysis; also critical is a thorough understanding of *U.S. v. Crawford* and its progeny, intimidation, and forfeiture by wrongdoing.

At the conclusion of this presentation, participants will be better able to:

- Evaluate the admissibility of evidence, including rape shield evidence, character evidence, and out-of-court statements.
- Argue for the admissibility of such evidence.

- Build a case that does not depend on the victim’s testimony

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Integrating a Trauma-Informed Response & Interviewing Victims

Trauma is an individual response to a physically or emotionally harmful event or events. Short- and long-term reactions to trauma manifest in a variety of behaviors that may have an impact on a victim's willingness to participate in the criminal justice process. In order to keep victims safe and engaged throughout the process, allied professionals must ensure that their interaction with victims and their decision-making take into account the wide-ranging effects of trauma.

This training will identify barriers to successful interviews in sexual violence and intimate partner violence cases, and will explore techniques for overcoming them. The presenter will focus on how effective interviewing skills and goals encompass more than the traditional fact-finding focus of prosecution, and will place an emphasis on an integrating a trauma-informed response. The presenter will also identify the various forms of questions that may be employed in both the “funnel approach,” which involves a questioning structure that moves from general information to more incident-specific questions, and the “timeline approach,” which involves a more chronological or story-telling approach.

At the conclusion of this training, participants will be better able to:

- Recognize the signs and symptoms of trauma.
- Conduct thoughtful and effective victim interviews.
- Build rapport with victims and encourage them to cooperate in their offender’s prosecution.
- Collaborate with allied professionals to fully integrate a trauma-informed response.
- Explain victim behavior at trial.

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Effectively Using Medical Evidence and Experts

Sexual Assault Nurse Examiners (SANEs) provide extensive medical, psychological, and forensic services for patients who present following sexual assault. Although SANEs strive to effectively coordinate with law enforcement, prosecution, and advocacy partners, the role of the SANE is by definition an independent and objective one, with priorities defined by the needs of the individual patient, rather than the investigation of the reported sexual assault. This concept of the SANE as a healthcare provider is a critical one.

In order to effectively work with SANEs as experts in sexual assault prosecutions, it is important to understand the role of the SANE in providing care, documenting findings, and collecting evidence during the administration of a forensic exam. This training will focus on the content of a medical forensic examination, strengths and limitations of medical evidence, and the use of SANEs as fact and/or expert witnesses.

At the conclusion of this training participants will be better able to:

- Identify and discuss the role of sexual assault nurse examiners (SANEs) as independent and objective health care providers.
- Utilize appropriate medical-forensic language and anatomical terms.
- Provide or elicit accurate and effective direct examination testimony related to medical evidence.
- Educate judges and juries about medical evidence and the process of medical examinations.
- Qualify SANE to provide expert testimony.

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Alcohol-Facilitated Sexual Assault (AFSA)

Alcohol is the most common weapon used to facilitate sexual assault. Offenders use alcohol because it renders victims vulnerable, affects memory, and impairs judgment and physical ability. Its unique toxicological effects, widespread use, and ease of consumption make it ideal for offenders who commit sexual assaults. Of course, some of the same factors that make alcohol such a perfect weapon also present unique challenges for investigators, prosecutors, and other allied professionals in alcohol-facilitated sexual assault (AFSA) cases.

This training will explore common issues and challenges related to the investigation and prosecution of sexual assault cases where alcohol is present. More specifically, it will focus on identifying corroborating evidence, interviewing victims, basic toxicology, the effect of societal attitudes about alcohol on determinations of victim credibility, and trial strategies. In addition, this presentation will promote a victim-centered response that incorporates offender-focused strategies for an effective trauma-informed investigation and prosecution.

At the conclusion of this training, participants will be better able to:

- Develop strategies to investigate sexual assault cases where alcohol is present.
- Overcome challenges related to the prosecution of sexual assault cases where alcohol is present.
- Collaborate with allied professionals to promote a victim-centered response that incorporates offender-focused strategies.
- Identify cases involving the introduction of expert testimony to explain the effects of alcohol.

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Technology-Facilitated Sexual Assault and Multiple Offender Perpetrated Sexual Assault

The way we interact with technology continues to increase and evolve as we rely on computers, smart phones, and other digital devices to complete many of our daily activities. Unfortunately, as technology becomes more integral to our lives, offenders have increasingly misused technology to facilitate crimes against women, and as a means to assert power and control in the course of an intimate partner relationship. Where technology is being used to perpetrate crimes, investigators and prosecutors can identify, preserve, and present digital evidence in order strengthen cases, support victims, and hold offenders accountable for the full range of their criminal and abusive activity

This training will demonstrate how cyber investigations can be used to reveal evidence of criminal activity, as well as evidence of the power and control dynamics of an abusive intimate partner relationship. It will address theories of admission, rules of evidence, and case law using “real life” examples to demonstrate how to properly authenticate and introduce digital evidence in civil and criminal proceedings.

At the conclusion of this training, participants will be better able to:

- Identify how offender misuse technology to perpetrate crimes and assert power and control against intimate partners
- Coordinate with allied professionals to better identify sources of digital evidence that can be used to strengthen prosecutions
- Effectively litigate the admission of digital evidence by analyzing applicable evidence rules, current case law, and underlying theories of admission

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Prosecuting Cases Involving Victims with Developmental Disabilities: A Focus on Sexual Assault

People with developmental disabilities face myriad issues and unique challenges when encountering the justice system. The traumatic impact of sexual assault may further exacerbate already-existing issues. Developmental disabilities may impact a victim's participation in a criminal investigation and testimony at trial. Prosecutors must be prepared to address the impact of the developmental disability on the victim and on the dynamics of the crime, particularly when assessing the offender's behaviors, victim selection, and steps taken to perpetrate the crime.

This presentation prepares prosecutors to anticipate issues and evidence prior to trial; file and argue pretrial motions; develop trial strategies that take into account the victim's intellectual or developmental disabilities, as well as any mental health issues; introduce relevant evidence at trial while excluding the irrelevant; and consider appropriate sentencing options.

At the conclusion of this presentation, participants will be better able to:

- Identify pretrial motions prosecutors can file to support victims with developmental disabilities during trial
- Utilize experts during preparation, trial, and sentencing
- Assess admissibility of corroborative evidence
- Evaluate sentencing options and post-conviction considerations

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Safeguarding Victim Privacy: A Plan of Action For Prosecutors

Victims of gender-based violence often disclose intimate details of their private lives and their victimization to multiple professionals over the course of a case. As prosecutors, we have an obligation to provide to the defense all evidence in the government's possession or control that is material to a defendant's guilt or punishment. How can we fulfill that obligation, while at the same time safeguarding the privacy of victims against unnecessary disclosure? Filing motions for protective orders and vigorously opposing defense demands for irrelevant private information is an important part of trial practice for any prosecutor responsible for these sensitive cases.

This training will identify categories of confidential and/or privileged victim information and records; discuss threshold requirements for defense attempts to obtain such information or for *in camera* review of records, and suggest pretrial and trial strategies that support the protection of victim privacy, including collaboration with allied professionals to safeguard private information.

At the conclusion of this webinar, participants will be better able to:

- Identify information and records that may be confidential and/or privileged.
- Prepare motions to protect victim privacy.
- Successfully respond to defense attempts to obtain confidential records.

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Violence Against Sexually Exploited Persons

Almost all sexually exploited women, whether they are trafficking victims or otherwise involved in commercial sexual exploitation, experience some degree of violence, regardless of the venue or type of activity in which they are connected. Incidents of physical assault, rape, incest, sexual assault, emotional abuse, verbal abuse, stalking, torture, degradation, and humiliation perpetrated by traffickers, pimps, johns, and others are common.

Significantly, violence against sexually exploited women, whether they are trafficked or non-trafficked, often ends in death. Even in jurisdictions where the link between violence against women and sexual exploitation is recognized, criminal justice professionals often adopt a siloed approach to them, rather than understand that they overlap and co-occur. This approach causes significant gaps into which both trafficked and non-trafficked women who are victims of violent crime often fall.

This training will focus on the importance of collaboration among prosecutors and allied professionals with expertise in violence against women crimes, as well as those with expertise in organized crime, narcotics, and gangs, combined with those who work on the civil, legal, and advocacy needs of these victims. In addition, the presentation will discuss pathways to sexual exploitation, the public health effects, identification of victims and perpetrators, existing programs, and ways to more effectively respond to sexual exploitation.

At the conclusion of this training, participants will be better able to:

- Recognize indicators and identify victims of sexual exploitation and trafficking.
- Identify the health risks and consequences of sexual exploitation and trafficking.
- Establish partnerships with governmental and non-governmental agencies to create a support network for victims.
- Collaborate with allied professionals to more effectively investigate and prosecute cases of sexual exploitation and trafficking.

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Prosecuting Sexual Assault Cases

This presentation will address how a sexual assault case is prosecuted. Students will litigate previously assigned pre-trial motions, openings, closings, direct/cross examinations, and other trial exercises.

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Ethical Issues in Sexual Assault Prosecutions

A prosecutor is “the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Achieving justice in sexual violence cases requires prosecutors to have a firm grasp of their legal obligations as well as their ethical responsibilities throughout each stage of the criminal justice process. Sexual violence cases present unique ethical challenges related to victim privacy and confidentiality, prosecutorial discretion, recantation, and disclosure of evidence.

This training will address the ethical considerations outlined above in the context of charging decisions, immunity, trial publicity, and the investigative function of a prosecutor. The presenter will use hypothetical case scenarios to challenge prosecutors to evaluate their decision-making in the context of ethical rules and principles.

At the conclusion of this training, participants will be better able to:

- Identify legal obligations in the prosecution of sexual violence cases.
- Articulate ethical responsibilities at each stage of the criminal justice process.
- Navigate the challenges related to prosecutorial discretion, recantation, and disclosure of evidence.
- Approach charging decisions, immunity, trial publicity, and compulsion of victim testimony within an ethical framework.

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Appendix C. Vicarious Trauma

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About the Issue

It is part of the human condition to be affected by the pain of others, especially if one feels a responsibility to “make things right.” Over time—and as a result of cumulative exposure to suffering—someone experiencing vicarious trauma may have the sense that all the upsetting things they see and hear are slowly seeping in. It may seem as if something has shifted inside and this person could feel fundamentally different from how they did back when they first started helping others.

"It has been decades since I can recall feeling joy in my work. I know I should be happy and filled with gratitude, but it has been just squeezed out of me."

Some people struggle with feelings of depletion, overwhelm, vulnerability and acute sensitivity, while others may construct a set of rigid defenses to keep distressing feelings, images and stories at bay. Such reactions are attempts manage and process an increasingly high volume of traumatic information. They are widespread and even rational reactions to these feelings.

Unfortunately, these responses may inhibit our individual health and wellness, as well as our ability to be our full selves and do our best work.

Thankfully, this work can be done in a sustainable way that protects the health and wellness of those doing it and that benefits the community. We can mitigate the detrimental consequences of vicarious trauma through education, self-awareness and participation in activities to prevent vicarious trauma, compassion fatigue and burnout. As we become educated about the ways we are affected by trauma individually and organizationally and explore strategies that assist in managing trauma, we are able to rekindle a light of wellness that radiates out from the helper and enables her/him to share that light with others.

As vicarious trauma develops as a field of study, more information is available about what contributes to an individual experiencing—or being at risk to experiencing—these negative consequences. Having multiple risk factors does not mean you will definitely experience vicarious trauma. It does, however, indicate that you would likely greatly benefit from creating proactive strategies in your life and work environment to promote sufficient and significant time away from work and ensure your body and mind have ample time to renew themselves on a regular basis.

Think of work engagement as a marathon, not a sprint. And while the very real life and death pressures may push us to sprint, the reality is that we can serve more people over the long term—and serve them better—if we pace ourselves during the marathon and receive support along the way.

Related Terms and Definitions

While vicarious trauma is most commonly used, you may also hear similar experiences referred to in the following terms which hold slightly different meanings. While these terms often overlap, each has unique characteristics as well. Understanding similar terms and the variations in the experience they describe is

helpful as you begin to identify your own personal experience or the experience of someone you care about.

Vicarious trauma is often defined as a change in a person's inner experience or the cumulative effect of bearing witness to the suffering of others on a person. At times, this can result in experiencing similar distressing thoughts, feelings or somatic experiences related to traumatic exposure as those of the people we are serving. Intrusive thoughts and images or avoidance of situations that are related to trauma or the workplace are some common examples.

Compassion fatigue and **secondary traumatic stress** can be described as the deterioration of our ability to empathetically respond to the pain and suffering of others. As we continually offer support and compassion to others—but are not able to nourish ourselves—we can be left feeling depleted of our inner resources. Just as vicarious trauma fills us up with stories, compassion fatigue drains us of energy, vitality and optimism. Compassion fatigue can make us feel resentful towards family, friends and colleagues, and of those we seek to help. This feeling of having nothing left to give can make it difficult to find the compassion necessary to serve the people we intend to serve and to nurture our personal and professional relationships, and, most importantly, ourselves.

Burnout can occur when the demands placed on an individual exceeds available resources. Burnout is related to stressful working conditions that leave the worker with feelings of frustration and powerlessness. When a worker is unsupported and overburdened, the resulting low job satisfaction and sense of being overwhelmed can be characterized as burnout. The condition can make a person more vulnerable to vicarious trauma and compassion fatigue, but is the consequence of the challenging work conditions, not the difficult material, that precipitates burnout.

Trauma exposure response is a general term used to describe all responses to trauma exposure including burnout and compassion fatigue. For more information on trauma exposure response, an excellent resource is *Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others*, by Laura van Dernot Lispky with Connie Burk.

Trauma mastery is a term that refers to the healing from trauma by re-visiting it or recreating situations similar to the incident with the hopes of experiencing a different outcome. The re-visiting of the trauma can occur in different ways. For example, a survivor may remember a repressed memory, which may support his or her recovery process and in this way begin to cope with the feelings surrounding the trauma. Others may become involved with the issue space in hopes of healing. Healers who have experienced a personal trauma may feel the need to support others as a way of contributing to more positive outcomes than what they experienced. Although this can be a constructive way of mastering a personal trauma, it cannot substitute one's own recovery process.

Most of the above terms—vicarious trauma, compassion fatigue and secondary traumatic stress, burnout and trauma exposure response—can be experienced separately or in combination with one another. How each challenge manifests is individual and varies from person to person and circumstance to circumstance. However, any and all manifestations can lead to negative physical, emotional, and relational health outcomes for individuals and organizations and, as the situation escalates, the cycle feeds on itself. Francoise Mathieu explains, "Ironically, helpers who are burned out, worn down, fatigued, and traumatized tend to work more and harder. As a result they go further and further down a path that can lead to serious physical and mental health difficulties."

Identifying Vicarious Trauma Is My Experience Related to Trauma Exposure?

Many books and websites list multiple risk factors where you can learn more about vicarious trauma, compassion fatigue or burnout. However, to start understanding these concepts a little deeper on a personal level the following questions can help you see if taking a closer look into your own experience may be beneficial.

- ***Do I bear witness to the suffering of others on a regular basis?***

This could be a multitude of ways. You might hear someone tell their story, or read a case file or be debriefing with a colleague or supervisee on traumatic material. You also could be reporting on these issues for the media, managing social media content for an organization that does work in this field or answering the phone when crisis calls come in.

- ***Am I in a position where I feel responsible for someone's safety or well-being?***

This could be direct, such as helping a family relocate due to a threat of safety, or indirect, such as pressure to raise enough funds to keep crucial programs running or being involved in a prevention campaign.

If you answered yes to these two questions, learning about way to prevent or address vicarious trauma may be of support in your personal and work environment. The third question asks you to look at how you are feeling now.

- ***Do I intuitively know—even if I'm not ready to say it out loud—that my work is starting to impact my health, life or relationships?***

This is tricky to identify because the toll of vicarious trauma is slow and cumulative. Our worldview changes over time and in such a way that even if we do feel differently towards our health, life and relationships, it seems OK, if not inevitable. Right now, simply ask yourself “have I changed?” and then if so, the next section on the signs of vicarious trauma may be helpful to you as a next step in understanding your experiences.

- ***Do I work harder than is healthy for my mind and body because the issue feels deeply personal to me?***

When a healer has a personal connection to the issue space, it can be natural to feel more invested in the work. However, it is important to do so with responsibility and self-care. As healers, we are continuously exposed to the suffering of others and it is imperative that we have been able to process our own healing. Expecting to find healing through the work can set a healer up to re-experience the impact of our own trauma. In addition, in these moments, our work moves away from being in service to the members of our community, who each have their own unique healing paths.

Signs of Vicarious Trauma

When we are experiencing overwhelming volumes of information—especially information that holds an emotional charge—our bodies, minds and spirit adapt to help us cope. At times, the way we cope may help in the moment but may have longer term negative results. For example, our bodies may give us an extra push of adrenaline to make it through a challenging time period. However the moment we go on vacation, we immediately get sick for the first three days. The adrenaline push that was needed in the moment eventually “catches up” with us and we feel the full effects of pushing ourselves beyond a healthy limit.

The following list is not meant to be an exhaustive catalog of symptoms, but rather information that may spark your own reflections on how your work may affect you in both personal and professional situations. We encourage you to read this list with no judgments attached to the information. We are all coping to the best of our ability. Understanding the costs associated with some coping strategies help us grow closer to solutions. If you notice any of your own experiences in the following list, please remember that solutions exist and there are ways engage in your work not only without harm to self or others, but in a way that actually amplifies our sense of resiliency and hope that are also associated with doing work in the field of trauma.

Exhaustion and physical ailments:

- Constantly feeling tired, even after having time to rest
- Physical tension in the body when its not needed, i.e., sitting at your desk or on your commute home.
- Physical pain throughout the day such as headaches, back pain and wrist pain that you “push through”
- Difficulty falling asleep or excessive sleeping
- Falling sick the moment you are able to rest, such as on a vacation

Emotional shifts:

- Hypersensitivity to emotionally charged material
- Feeling disconnected from your emotions and / or your body
- Guilt for having more resources/opportunities than those you serve
- Feeling like no matter how much you give, it will never be enough
- Feeling helpless or hopeless toward the future
- Increased levels of anger, irritability, resentment or cynicism

Thought patterns:

- Difficulty in seeing multiple perspectives or new solutions
- Jumping to conclusions, rigid thinking, or difficulty being thoughtful and deliberate
- Questioning, *“Is any of this effective? Am I making any difference?”*
- Minimizing the suffering of others in comparison to the most severe incidents or situations
- Intrusive thoughts and imagery related to the traumatic material you have heard / seen

Behavioral shifts:

- Absenteeism and attrition
- Avoidance of work, relationships, responsibilities
- Dread of activities that used to be positive or neutral
- Using behaviors to escape (eating, alcohol/drugs, caffeine, TV, shopping, work)

Relationship changes:

- No separation of personal and professional time, being the helper in every relationship
- Viewing other people as less important who are not involved in your same field
- Difficulty relating to other peoples day to day experiences without comparing them to those your serve or yourself
- Absence of a personal life that is not connected to your work
- Seeing danger everywhere and hypervigilance to the safety of those you care about
- Sense of persecution or martyrdom, holding external forces responsible for personal feelings and struggles
- Isolated self completely from others or only interacting with people who are in your same field or can relate to your experiences

Resources

Organizational Solutions

When we are facing universal challenges, such as striving to meet needs greater than the current resources available, it can be tempting to assume that an organizational culture of stress is inevitable. However, at Joyful Heart, we hold the belief that there is a way to engage in this work without causing harm to ourselves or to others. This may include organization leaders taking a close look at the way we quantify “progress” towards healing and the way we think about what is funded, on what level and how we measure success.

These are all challenging conversations. Nonetheless, they are conversations that are critical to the overall health of the field of prevention and intervention addressing violence. They will likely be the cornerstones of solutions that will create organizational shifts toward wellness and sustainability long term.

Individual Solutions

We at Joyful Heart recognize the importance of each person’s individual health in the here and now, and we encourage each individual to prioritize their own health and well-being each and every day. By ensuring our day-to-day health on an individual basis, we work collectively toward sustainable long-term solutions that span beyond any one organization. The following questions may be helpful in assessing if you are currently aligning with an organizational culture that will be sustainable for you long term.

- Are my daily expectations able to be met without sacrifice to my personal well-being?
- Do I feel able to safely share and seek solutions to the impact of bearing witness to trauma with my supervisors or colleagues?
- Can I imagine keeping my current pace over the course of my career without negative consequences to my personal health and well-being?

“Long-term effective work in [the field] depends on our integrating self-care into our work and our lives.” As we become aware of how contact with trauma and suffering manifests—and of the various strategies for managing those manifestations—it becomes necessary for us to craft a path to sustainability that works for us as individuals. This path is different for everyone and will only be effective if it is informed by the awareness of our individual struggles and opportunities for self-care and resilience. Each of us must create and commit to travel our own path to sustainability.

We can find our direction by looking inside. We all have a place inside us where we keep our deepest knowledge—our truth. That place knows us, and it has a voice. It knows what we need to heal, to be

happy, to accept and give love, to feel at home on this planet and in our world. This place knows what is best for us, how to best find the nurturing and care we all need.

Its voice can sometimes be obscured by depression, anxiety or feelings of guilt and obligation. It may be drowned out by other voices, the voices of “should” and “shouldn't” and other people’s needs. What other people need—what the world needs—is people who honor and respect and nurture themselves.

One big way we can do this is by honoring a regular practice of self-care. It is our belief that each day should contain some time—however much feels right for you and doable—devoted just to ourselves and our own well-being. This can take many forms: journaling on the ride home from work, cooking a healthful meal, practicing yoga, meditation or mindfulness, going for a run or taking an exercise class. As much as you can, try to make your space away from work a peaceful one—one in which you can take refuge, seek clarity, withdraw, be still and relax. This too can take many forms: perhaps limiting or refraining from the use of electronics before bed, adorning a wall with a beautiful piece of art, replacing the television with some soothing music, even simply taking your shoes off when you enter your home.

The more you can integrate wellness practices into your everyday life, the deeper the root they will take. They will enhance your life and the lives of those around you and they will be more likely to sustain—and help you find your voice—during more difficult times where it might be harder to hear.¹

Honor your voice; let it be your guide. You already know the way.

The Vicarious Trauma Toolkit

“In 2013, the U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, awarded a grant to Northeastern University's Institute on Urban Health Research and Practice to work with stakeholders in the field to develop the Vicarious Trauma Toolkit (VTT)—a state-of-the-art repository of nearly 500 resources compiled to assist victim services and first responder agencies and organizations in raising awareness about and addressing vicarious trauma.”

The Vicarious Trauma Toolkit, OFFICE FOR VICTIMS OF CRIME, <https://vtt.ovc.ojp.gov/about-the-toolkit>
(last visited May 22, 2017).

Appendix D. Sexual Assault Response Teams (SARTs)

Effective SARTs have several common characteristics: formalization (written policies for working together on individual cases and larger projects in the form of memoranda of understanding or agreement [MOU/MOA]),²⁹⁰ regular collaborative processes, and broad active membership from diverse stakeholder groups.²⁹¹ According to the research, SART composition varies, with an average of 12 organizations involved in the team.²⁹² SARTs improve the experience of victims seeking help, lead to more successful legal outcomes, and promote sexual assault prevention/education.²⁹³ Research suggests that the most successful SARTs follow these promising practices:²⁹⁴

- Prosecutors fully support and regularly participate in the SART, including attendance at all SART meetings;²⁹⁵
- The chief prosecutor lends political support to the SART and its efforts;
- Review of both open and closed cases within the SART context;
- Sexual Assault Forensic Examiner (SAFE) training is in place to ensure competency for expert testimony in court;
- Prosecutorial involvement in SART is institutionalized via MOU/MOAs incorporated into the SART's policies and procedures.

SARTs should clearly define and understand the different roles and responsibilities of each partner, as well as their respective confidentiality, privilege, and discovery obligations.²⁹⁶ Prosecutors must determine how information will be shared and ensure that personnel will not be overtasked by the responsibilities associated with participating in these groups. This is important because where resources are scarce, even in the largest offices, staff may be assigned to multiple coordinated teams addressing co-occurring crimes (*e.g.*, child abuse, domestic violence, human trafficking, gang-related crimes). There also must be a formal mechanism to ensure that information is shared related to a co-occurring crime committed against the victim or family member or by the perpetrator.

The role and responsibilities of prosecutor's office victim-witness personnel²⁹⁷ must be distinguished from those of community victim advocates assigned to each sexual assault case. Victim-witness professionals should work collaboratively with community-based advocates to respond to victim

questions and appropriately share non-confidential information provided by victims. It is important to determine the extent to which any of this information may be discoverable.²⁹⁸

Law enforcement participation helps to ensure cases are appropriately investigated and subject to prosecutorial review for possible charging. Create a protocol for joint review by law enforcement and prosecutors prior to any decision to “unfound” a report or to decline to charge.

Collaboration also enhances the ability to uncover and respond to co-occurring crimes. Successful collaborative responses include cross-training on indicators of co-occurring criminal behaviors. In order to build a strong, evidence-based case, trainings and protocols should include the use of trauma-informed interviewing techniques and the identification and preservation of evidence relating to the full scope of the offender’s criminal activity. Other specialized units in police departments and prosecutor’s offices (*e.g.*, domestic violence, human trafficking, gang, cybercrimes, or juvenile units) should coordinate resources and share intelligence, expertise, and strategy to improve their response to co-occurring crimes.

Collaboration with civil attorneys enables prosecutors to understand important aspects of civil practice, and the remedies available to victims of sexual violence (*e.g.*, divorce/child custody, protection orders, tort claims, restitution, representation of the victim’s interests in criminal proceedings). If a victim seeks counsel, prosecutors should be open to coordination and communication with the victim’s attorney where appropriate and when such contact does not violate ethical considerations or advocate confidentiality or privilege.²⁹⁹

Appendix E. Charging Tool

The below chart is intended as a guide to assist with compiling the complex evidence commonly present in sexual assault prosecutions. This tool will assist with analyzing the evidence for each element of the crime and for identifying gaps for follow-up. This tool should be adapted as needed and used to identify and assess all relevant evidence and to anticipate potential defenses. For *each suspect and each crime charged*, the items in the below table should be clearly identified.

CRIME: SUSPECT(S) INVOLVED			
Element	Physical Evidence	Witness Testimony	Anticipated Defense

Appendix F. Considerations for Working with Experts

Experts are often helpful, not only for purposes of explaining evidence and educating the factfinder at trial but also in assisting prosecutors with preparing for trial. It is well worth developing a network of experts available for consultation or testimony as needed. Furthermore, experts who are unavailable or unsuitable for a particular case may be able to suggest others who can assist. Experts can assist with:

- Analyzing the case and the evidence
- Assisting the prosecutor in understanding what happened and why
- Identifying evidence or factual scenarios that might be misunderstood by factfinders unless it is adequately explained at trial
- Improving the prosecutor’s or investigator’s rapport with victims based on better understanding of what occurred
- Suggesting avenues of further investigation
- Explaining what scientific testing or medical examinations can and cannot tell you
- Preparing to cross-examine defense experts
- Providing assistance in developing a compelling theme and theory of the case
- Determining offender risk for purposes of bail conditions or sentencing

The below chart suggests some of the experts who may be helpful or necessary in one or more aspects of the prosecution of cases of sexual violence, as well as suggestions for finding a suitable expert. The following issues are addressed

- [DNA](#)
- [Forensics](#)
- [Medical](#)
- [Offender Behavior](#)
- [Technology](#)
- [Toxicology](#)
- [Victim Behavior](#)
- [Victims with Cognitive Disabilities](#)

ISSUE(S)	TYPE OF EXPERT & WHERE TO FIND THEM
DNA	
<p>Note: Every DNA test involves multiple steps and multiple analysts. How many analysts must be called to testify, for purposes of avoiding confrontation issues, is something of an open question after <i>Williams v. Illinois</i>, 132 S. Ct. 2221 (2012).³⁰⁰ Generally speaking, at least the lead analyst for each testing procedure should be called to testify. For suggestions on alternatives where one or more of the original analysts who performed the testing is not available for trial, <i>Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford</i>,³⁰¹ provides suggested strategies to avoid a confrontation issue at trial or on appeal.</p>	
<ul style="list-style-type: none"> • Explanation of science involved in DNA • Explanation of testing procedures • Application of DNA science to the case • Reliability of results 	<ul style="list-style-type: none"> • State lab • Private DNA lab • Molecular biology department of college or university (regarding various techniques or

ISSUE(S)	TYPE OF EXPERT & WHERE TO FIND THEM
<ul style="list-style-type: none"> • Significance of results • Interpretation when there are multiple contributors to DNA • Inability to test • Contamination issues • Quantity of sample needed for testing • Explanation for non-testing; significance of lack of evidence • Touch DNA 	<p>other issues not specific to the actual test at issue)</p>
<p>Forensics</p> <p>Trace Evidence (hair, fiber); Firearms and Toolmark Identification (comparing bullets, cartridges and shells to firearms); Ballistics</p>	
<p>Note: These types of evidence are less reliable than DNA; nevertheless, such evidence may provide helpful investigative leads and may be useful at trial, as long as the expert avoids drawing conclusions suggesting the evidence is more definitive than it is. Forensic expertise on fingerprint, blood spatter, handwriting, tire mark, shoe print, bite mark may also be relevant.</p>	
<ul style="list-style-type: none"> • Significance of findings • Comparison of discharged ammunition cartridges with firearm • Trajectory and distance at the time gun was fired 	<ul style="list-style-type: none"> • State Police lab • FBI • Academics teaching forensic science in criminal justice program at university or college
<p>Medical</p>	
<ul style="list-style-type: none"> • Significance of injury/absence of physical injury • Details of SAFE/SANE exam • Purpose of various steps • Significance of any findings or absence of findings (e.g., where victim has showered or engaged in other activities between time of assault and time of exam) • Effect on SAFE/SANE exam or findings when victim has engaged in consensual sexual activity since assault • Whether wound or impression on skin is consistent with object or weapon used by offender or belonging to victim (e.g., ligature marks, impressions from jewelry, knife injuries) • Strangulation injury signs, symptoms, mechanism • Strangulation lethality risk • Homicide (whether victim assaulted before/ after death) 	<ul style="list-style-type: none"> • SAFE/SANE (in certain circumstances you will want the nurse or health care professional who performed the exam; SAFE/SANE with training in strangulation injury) • ER physician trained in sexual assault and/or strangulation • Forensic pathologist • Gynecologist trained in sexual assault • Medical examiner • Medical member of high-risk DV team • Academic affiliated with college or university (e.g., medical school)

ISSUE(S)	TYPE OF EXPERT & WHERE TO FIND THEM
Offender Behavior	
<p>Note: experts can be of assistance <i>in understanding the dynamics</i> surrounding the victim/offender relationship or <i>in understanding how the crime occurred</i>, as well as for purposes of <i>imposing bail conditions or sentencing</i>. <i>Profile testimony is generally inadmissible at trial but prosecutors should check their jurisdiction's rules of evidence and evolving case decisions for parameters on this type of testimony.</i></p>	
<ul style="list-style-type: none"> • Explanation of victimization techniques (e.g., “grooming” the victim through isolation, promises, gifts, providing drugs or alcohol) • Evidence of prior sexual assault(s) exhibiting similar victimization techniques • Lethality risk associated with intimate partner sexual violence 	<ul style="list-style-type: none"> • Academic affiliated with college or university (sociology; psychology; criminology; women’s studies) • Counselor/ therapist who works with sex offenders or batterers (for intimate partner sexual violence) • DV advocate/ counselor trained in lethality assessment • Member of high-risk DV team
Technology	
<ul style="list-style-type: none"> • Explanation of how the misuse of technology is used to perpetrate the crime (e.g., recording assault, unauthorized dissemination of consensual or nonconsensual intimate photographs, cyberbullying following assault) • Victim reactions to the trauma of tech-facilitated sexual assault • Authentication • Source of communication (linking communication to offender) • Interpretation of results of forensic exam of devices • Interpretation of records maintained by provider or social media outlets 	<ul style="list-style-type: none"> • Experienced law enforcement officer • Counselor/advocate/therapist with experience working with victims of stalking, non-consensual pornography, or other crimes of image exploitation • Forensic technology expert (local or state police, federal law enforcement from FBI, Secret Service, or HSI, or privately retained) • Service providers (e.g., AT&T, Comcast) • Social media providers (e.g., Facebook, Instagram)
Toxicology	
<ul style="list-style-type: none"> • Identification of type of intoxicant (alcohol, particular drugs) • Degree of intoxication of individual (victim, offender, witness) • Effects of intoxicant on body/mind (e.g., ability to consent, ability to obtain/maintain erection, ability to recall, ability to form intent) 	<ul style="list-style-type: none"> • State police lab toxicologist; • Physician with specialized training; • Forensic toxicologist

ISSUE(S)	TYPE OF EXPERT & WHERE TO FIND THEM
Victim Behavior	
<ul style="list-style-type: none"> • Delayed or piecemeal reporting • Recantation/ minimization • Inconsistent statements • Subsequent consensual sexual activity with offender or others • Continued contact with offender • Absence of physical resistance • Rapid return to normal activities • Victim affect (<i>e.g.</i>, laughter, calmness) 	<ul style="list-style-type: none"> • Counselor/advocate/therapist (one not working with victim; possibly from neighboring jurisdiction) • Shelter director (particularly for intimate partner violence) • Sexual violence coalition; • Academic affiliated with college or university (sociology/ psychology/women’s studies) • Psychologist/ psychiatrist with expertise in trauma and sexual violence • SANE/SAFE • Experienced law enforcement officer
Victim with Cognitive Disability	
<ul style="list-style-type: none"> • Competence to testify • Capacity to consent • Sexual knowledge beyond that expected from the victim’s age, experience or cognitive function • Explaining particular disabilities • Identifying accommodations that would allow a witness to testify 	<ul style="list-style-type: none"> • Academia (Professor/Researcher on Disabilities) • Disabilities rights organizations (<i>e.g.</i>, Temple Institute on Disabilities, The Arc) • Speech pathologist • Psychiatrist/psychologist • Social worker

Appendix G. Stages of Acute Alcoholic Influence/Intoxication

BAC (g/100 ml of blood or g/210 l of breath)	Stage	Clinical symptoms
0.01 - 0.05	Subclinical	Behavior nearly normal by ordinary observation
0.03 - 0.12	Euphoria	Mild euphoria, sociability, talkativeness. Increased self-confidence; decreased inhibitions; Diminution of attention, judgment and control. Beginning of sensory-motor impairment; Loss of efficiency in finer performance tests.
0.09 - 0.25	Excitement	Emotional instability; loss of critical judgment. Impairment of perception, memory and comprehension. Decreased sensory response; increased reaction time. Reduced visual acuity; peripheral vision and glare recovery. Sensory-motor incoordination; impaired balance. Drowsiness.
0.18 - 0.30	Confusion	Disorientation, mental confusion; dizziness. Exaggerated emotional states. Disturbances of vision and of perception of color, form, motion and dimensions. Increased pain threshold. Increased muscular incoordination; staggering gait; slurred speech. Apathy, lethargy.
0.25 - 0.40	Stupor	General inertia; approaching loss of motor functions; Markedly decreased response to stimuli; Marked muscular incoordination; inability to stand or walk; Vomiting; incontinence; Impaired consciousness; sleep or stupor
0.35 - 0.50	Coma	Complete unconsciousness; Depressed or abolished reflexes; Subnormal body temperature Incontinence; Impairment of circulation and respiration; Possible death
0.45 +	Death	Death from respiratory arrest

KURT M. DUBOWSKI, THE UNIVERSITY OF OKLAHOMA, DEPARTMENT OF MEDICINE, STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION (2006)

Appendix H. Witness Intimidation Checklist³⁰²

Where intimidation has already occurred

- Add criminal charges for intimidation conduct
- Review old case files and police reports
- Investigate and charge third-party intimidators

Where the victim or witness may be at risk for further intimidation

- Conduct a risk assessment
- Create (or adjust) the safety plan
- Educate victim/witness about intimidation; evidence preservation
- Discuss with witnesses what to do if contacted by the defense
- Secure a high bail with appropriate bail conditions
- Ask court to admonish defendant at time of arraignment
- Prepare for the possibility that cooperation may end

Conduct ongoing investigation/communication

- Document all recantations
- Interview family and friends
- Monitor communications between the incarcerated defendant and the victim/witness or third parties
- Preserve electronic evidence of intimidation
- Adjust the safety plan as necessary

File pretrial motions

- File motions and obtain rulings at the earliest possible time
- Prepare for special considerations requiring a showing of witness unavailability
- Establish forfeiture by wrongdoing, where appropriate
- Request special jury instructions, where appropriate

Where Intimidation Has Already Occurred

➤ **Add criminal charges for intimidation conduct**

When a victim or witness reports that the defendant, or someone acting on the defendant's behalf, has engaged in conduct intended to intimidate the witness, those incidents should be thoroughly investigated. Depending upon the available evidence, and the conduct at issue, consider charging such acts of intimidation as part of the same charging instrument (indictment or information), superseding the original if necessary. Additional charges might include such crimes as witness tampering, subornation of perjury, witness retaliation, obstruction of justice, threats, stalking, criminal mischief/vandalism, or harassment.

By charging such acts as part of the same criminal case that is going to trial, you can avoid the necessity of moving to admit evidence of those acts under Fed. R. Evid. 404(b).³⁰³ Motions to sever such charges for trial can be opposed, moreover, on the grounds that such evidence nevertheless *would* be admissible under that evidence rule, as evidence of the defendant's purpose, intent, or consciousness of guilt.³⁰⁴ Charging the intimidation in the same indictment or information will obviate the need for any limiting instructions that normally would be given in connection with 404(b) evidence, and will also support an argument for consecutive sentences when the defendant is convicted.

➤ **Review old case files and police reports**

Old case files and police reports—particularly those involving the same parties, although some defendants will have previous cases involving other victims (which are also worth reviewing)—may provide a great deal of information relevant to the new case. These prior cases may show a pattern of control and intimidation that might be relevant to a motion on forfeiture by wrongdoing. They may provide clues to the defendant's "style" of intimidation, making it possible to seek appropriate bail with appropriate conditions, to create an effective safety plan for victims and witnesses, and to appropriately monitor the defendant's conduct throughout the adjudication process. They may reveal friends, family, and criminal associates of the defendant who might be involved in intimidation efforts on the defendant's behalf. They may be a source of "other crimes/wrongs" evidence that might be admissible under Rule 404(b) to show motive, intent, or absence of mistake or accident.

These closed cases can often be identified by reviewing the defendant's criminal history or by reviewing family court history. In addition, the victim should be asked whether there were other incidents in which there was a police response, or a protective order issued, but no criminal charges, including incidents that may have occurred in other jurisdictions. Often the police reports or case files relevant to those matters can be obtained with a phone call or written request to the jurisdiction where the incident occurred.

A review of closed cases may also disclose prior incidents that were not prosecuted due to the non-cooperation of the victim. If these incidents are recent enough to still be within the limitations period, and if it appears there may now be sufficient evidence to proceed, consider re-opening those cases, and either adding them to the present case (particularly if they represent an

ongoing pattern of conduct that would survive a motion to sever), or reinstating them as separate cases. Reinstating cases that were closed due to intimidation can be an effective way of deterring that conduct. A defendant facing additional charges, including those for intimidation conduct that can be proved, may be less likely to risk further prosecution for additional acts of intimidation.

➤ **Investigate and charge third-party intimidators**

Friends, family, and criminal associates of the offender may engage in criminal intimidation on behalf of the offender. These individuals should be charged with applicable intimidation crimes, as well. Thorough investigation of these acts (including interviews with the actors) may result in sufficient evidence to link the original defendant to these acts, resulting in charges for conspiracy or accomplice liability. Where the original defendant is shown to be responsible for eliciting acts of intimidation by third parties, it may be possible to negotiate plea agreements with those third parties in exchange for their cooperation against the primary defendant. And, of course, in such circumstances the primary defendant should be charged as well, provided there is sufficient proof of personal involvement.

Where the Victim or Witness May Be at Risk For (Further) Intimidation

➤ **Conduct a risk assessment**

There are several ways of evaluating risks to the safety of victims and witnesses. The method of conducting such evaluation may depend upon the type of case. There are several validated risk-assessment instruments for use with domestic violence victims, including the Ontario Domestic Assault Risk Assessment (ODARA),³⁰⁵ the Spousal Assault Risk Assessment Guide (SARA),³⁰⁶ MOSAIC,³⁰⁷ and the Danger Assessment.³⁰⁸ Most of these instruments are intended to measure lethality risk—the risk that a particular victim will be killed by the abuser. They do not necessarily gauge whether the victim will be subjected to intimidation by the offender. The results of the evaluation, however, may provide important information about the degree of risk faced by a particular victim, and may provide guidance for safety planning. It is important to remember that in domestic violence cases, there is almost always *some* degree of intimidation conduct that can be anticipated.

In gang-violence cases, experienced investigators have noted that the victims and witnesses most likely to be subjected to intimidation tactics are those who have some direct connection to the gang—they are members either of the same gang or of a rival gang.³⁰⁹ Next in the risk hierarchy are victims and witnesses who reside within or near the gang's territorial boundaries.³¹⁰ These victims or witnesses may face intimidation pressure not only from the offender and from the gang, but also from the community at large, which may actively discourage “snitching” to law enforcement. Victims and witnesses who are neither involved in gang activity nor have any other connection with the gang or with the neighborhood are at significantly lower risk of intimidation.³¹¹

In human trafficking cases, as in domestic violence cases, some degree of attempted intimidation can almost always be expected. Some trafficking victims are forced or coerced into trafficking, while others may be emotionally manipulated to lure them in. And intimidation is a common tactic to keep victims enslaved. Traffickers may enlist some “favored” victims to keep the others

under control, resulting in intimidation by one victim against the others. In addition, traffickers may engage in threats or assaults against one victim to serve as a means of intimidating the others.

In any criminal case, the best indicator of risk for intimidation is the prior history of intimidation by the defendant, toward this victim or witness or others, as well as the defendant's prior criminal history. Among the factors to consider:

- Has the defendant previously been charged with crimes of violence or intimidation?
- Does the defendant have access to weapons?
- Does the defendant (or the victim) have a drug or alcohol problem, or mental health issues?
- Is there a history of dropped charges or restraining orders, or dismissal of cases due to the failure of the victim or witnesses to appear?
- Does the defendant (or do allies of the defendant) have any power or authority over the victim or witness (*e.g.*, in an institutional setting such as a school, correctional institution, hospital or group home, or in an organizational setting such as the church, the military, or community-based organization)?
- How fearful is the victim or witness? What is that fear based upon?³¹²
- How serious are the crimes with which the defendant has been charged, and what is the potential sentencing exposure?³¹³

➤ **Create (or adjust) the safety plan**

Safety plans should be constantly re-evaluated throughout the proceedings. Changes in circumstances—in the needs or concerns of the victim or witness or in the level of threat—should result in adjustments to the plan. Central to any safety plan are tight restrictions on the defendant's access to personal contact or communication with the witness. Encourage the witness to take an active role in the safety planning process, and to be completely honest about what safety measures are acceptable to him or her. A plan is only as good as the witness's willingness to comply with its provisions. Measures that will help to enhance witness safety and security include:

- Bail conditions prohibiting contact between the defendant and the witness, prohibiting the defendant from going to certain locations frequented by the witness, or prohibiting contact with criminal associates. Other bail conditions that may reduce the incidence of intimidation or its consequences include restrictions on the possession of weapons, prohibitions on consumption of alcohol or drugs, compliance with recommended substance abuse or mental health treatment programs, and close supervision with regular reporting to a probation officer or other supervisor.
- Internet/social media safety. Caution witnesses against actions that may undermine their own safety, such as talking about the case to others or posting personal information on social networking sites, Internet forums, or blogs. In particular, counsel them against posting anything about the case or about the defendant, since such actions may not only provoke a response from the defendant or others acting on the defendant's behalf, but may also be a source of impeachment or result in defense requests for communications intended to be private. Defendants or third parties may send "friend" requests that will give them access to personal information that could be used in attempts to intimidate the witness. Advise witnesses to maximize the available privacy settings on any personal social networking profiles, and caution them about

- posting personal information that could be used by the offender to stalk, harass, or threaten them.
- Providing the witness’s landlord, employer, and schools (including those attended by children of the witness) with information about the threat posed by the defendant, as well as a photograph and a copy of any orders of protection.
- Changing or adding locks, security lighting, surveillance cameras, or panic alarms for the witness’s home.
- Changing the witness’s routines—times and places for shopping or other personal errands.
- Increased police patrols of the witness’s neighborhood, with officers paying particular attention to any suspicious vehicles or activity around the witness’s home
- Protective custody or transfer of incarcerated witnesses. If your case involves witnesses who are incarcerated, be sure that the institution where they are confined is aware of the case and the role of the witnesses so it can take appropriate measures to protect the witnesses and ensure that they are not transported for court appearances together with the defendant or the defendant’s associates.³¹⁴
- Witness relocation—informal. Witness relocation may be the most comprehensive way to prevent intimidation, but it need not be through a formal witness protection program. Temporary relocation to a shelter or to the home of a distant friend or relative may be sufficient to protect the witness until the defendant is in custody, or during high-risk periods such as the time just before trial or a critical hearing. Permanent relocation to a different housing project or to publicly-subsidized (“Section 8”) housing will make it more difficult for the defendant or any criminal associates to contact the witness, and may provide sufficient protection under the circumstances. Such measures are less stressful and disruptive to witnesses and their families, and less costly for law enforcement, than more comprehensive supervised relocation of the type offered by traditional witness protection programs. To the extent that disruption to their lives is minimized, witnesses are more likely to abide by necessary safety precautions.³¹⁵
- Witness relocation—witness protection programs. Although some states have centralized witness protection programs, the eligibility for participation in such programs may be limited. In addition, such programs are, by far, the most disruptive to the personal lives of witnesses and their families, since participation typically requires isolation from, and bars communication with, friends, family, and locations with which the witness has been comfortable and familiar. Moreover, such programs tend to be very costly. In appropriate cases, however, witness relocation programs provide very effective protection to the participating witness.

➤ **Educate the victim or witness about intimidation and evidence preservation**

Many victims and witnesses may be unaware of what conduct qualifies as intimidation or manipulation. Domestic violence or human trafficking victims, in particular, may be so accustomed to manipulation and intimidation in their day-to-day lives that they fail to recognize it for what it is, and may consequently fail to report it or to preserve evidence of its occurrence. The initial meeting with the witness should include a discussion about what kinds of tactics the witness can expect, how to stay safe from them, and how to document and report any attempts to intimidate or manipulate them.

Although victims and witnesses vulnerable to intimidation should be instructed to preserve evidence (such as voicemails, emails, text messages, Internet postings, cards, or letters), and to maintain a contemporaneous record (such as a logbook) of dates, times, and details of any intimidation attempts, they should be cautioned not to deliberately elicit such evidence on their own. Explain to the witness that such actions on their part might result in the court's concluding that the witness was acting as an agent of law enforcement and consequently suppressing the evidence.³¹⁶

In the same vein, it is not unusual for victims or witnesses to try to record conversations with the offender. If you are in a jurisdiction where voice recording requires the knowledge and consent of both parties to the conversation, it is important to caution the witness that any such recordings may subject the witness to civil or criminal liability. The last thing a victim or witness needs is to be subjected to a criminal complaint or civil lawsuit by the offender for the illegal recording of conversations. Even in jurisdictions with a "one party consent" rule (where recording is legal as long as one participant to the conversation consents), such recording after the right to counsel has attached will be scrutinized for potential law-enforcement involvement. If the court finds that the witness acted on behalf of law enforcement, the recording may be suppressed for violating the defendant's right to counsel.³¹⁷ Therefore, it is best to advise victims and witnesses not to record conversations with defendants or with others, except under supervision of an investigator in the course of a properly authorized consensual intercept of the call. Such consensual intercepts may be subject to strict requirements for authorization, and failure to comply with such requirements may result in suppression of the recording.³¹⁸

The witness should be instructed to notify the assigned investigator or prosecutor immediately in the event of any intimidation attempts so that the incident can be thoroughly investigated. Although emergency situations warrant a call to 911, the witness should be reminded to inform any responding police officers of the pending case and to explain that this is a suspected act of witness intimidation. The witness should also advise the responding officer of the name of the assigned investigator or prosecutor. The witness (and the responding police officer) should inform the assigned investigator or prosecutor as soon as practicable, regardless of whether criminal complaints are issued for the act of intimidation. In this way, acts of intimidation will not be overlooked, or independently disposed of in a different court, or by a different prosecutor, which will preclude the act of intimidation from being tried together with the primary case. The goal should be to have *all* criminal matters related to the primary case referred to the same agency, and ultimately to the same prosecutor, for investigation and ultimate disposition.

If possible, provide witnesses with a brochure reminding them of the proper way to recognize and report intimidation, as well as a log to record details concerning any suspicious incidents, including date, time, a description of the incident, and any witnesses.³¹⁹

➤ **Discuss with witnesses what to do if contacted by the defense**

Explain to witnesses that the defense attorney or a defense investigator has the right to contact them for an interview, and that there is nothing improper about such contacts. Explain also that it is up to the witness whether to speak with a defense attorney or investigator, *just as it is up to the witness whether to speak with the prosecutor or with the prosecutor's investigator.*³²⁰ Explain that the witness has a right to know with whom he or she is speaking, and what kind of identification

investigators from your office can present upon request.³²¹ You can also tell the witness that whether they decide to speak with the defense or not, you would appreciate notification about any such contacts or interviews, stressing again that this is voluntary on the part of the witness, and that there is no obligation to do so. Although there is nothing improper about defense attempts to interview witnesses, a few defense attorneys employ investigators who conduct the defense investigation in a way that amounts to witness intimidation, whether so intended or not. It is best to find out as early as possible if this is an issue so that appropriate corrective action can be taken.³²²

In some cases, where it is crucial to protect the witness's address and contact information, a motion for a protective order to deny or delay discovery of such information, or to restrict its dissemination to defense counsel only, may be appropriate.

➤ **Secure a high bail with appropriate bail conditions**

Where witness intimidation has already occurred, either in this case or in any of the defendant's prior cases, that fact can be argued in support of a high bail. If your jurisdiction allows consideration of public safety as a factor in the amount of bail, danger to the victim or to witnesses should weigh heavily on that factor. If risk assessment data or expert testimony about the defendant's dangerousness is available, be sure that such information is presented to the judge. Even where the only consideration is to secure the defendant's presence at trial, it can be argued that any defendant who intimidates witnesses against him is a poor risk to obey court orders or to appear for trial when ordered to do so, and that a high bail is therefore warranted to secure his presence. Prior arrests or convictions, particularly for crimes of violence (and especially if they are for similar crimes, such as crimes of domestic violence) should also be vigorously argued in support of a high bail.

Appropriate bail conditions are critical. "No contact" conditions should be routine unless the victim affirmatively requests otherwise. Even in those cases, such conditions should sometimes be imposed, regardless of the victim's wishes, when necessary to protect the victim's safety. While the victim's wishes should always be an important consideration, the ultimate responsibility for making a recommendation is the prosecutor's. Bear in mind that sometimes a victim's insistence on contact is the result of the defendant's intimidation.

In cases where the defendant has criminal associates, as in gang violence cases, the defendant should be prohibited from associating with those individuals as a condition of his bail.

In some jurisdictions, electronic monitoring may be available as a condition of release on bail. These systems may vary widely in their effectiveness as a protective measure for victims and witnesses; it is advisable to learn how your particular monitoring system works so that judges do not release dangerous defendants based on a misapprehension of the effectiveness of the system to protect the victim and witnesses.

Other appropriate conditions may include prohibition on possession of weapons, prohibition on consumption of alcohol or drugs, and compliance with any recommended substance abuse or mental health treatment programs. A bail condition requiring the defendant to report on a regular basis to a probation officer may also provide a measure of deterrence against intimidation.

➤ **Ask the court to admonish the defendant at the time of arraignment**

In any case where there is a risk of witness intimidation, request that the judge admonish the defendant, preferably at the time of the first court appearance, about refraining from personally contacting any victims or witnesses (other than his own witnesses) in the case. Often a defendant's allies—friends and relatives—will also be in the courtroom at the time of arraignment. A warning from the bench may discourage some would-be intimidators from engaging in those tactics. The defendant should be cautioned that any attempt to influence or dissuade witnesses from testifying truthfully will not only subject the intimidator to possible prosecution, but may be used against the defendant in his criminal case. If the court declines to give such an admonishment, the prosecutor can do so when putting any other matters on the record: “Your Honor, the State wants to be certain that the defendant understands that we take witness tampering or intimidation very seriously. Any attempts to persuade any witness in this case to testify falsely or avoid coming to court will be investigated, and the individuals responsible will be prosecuted. In addition, if we discover that the defendant was responsible for any such attempts, we will use that against him in the criminal proceedings in this case.”

➤ **Prepare for the possibility that cooperation may end**

Despite the best efforts of the criminal justice system, some attempts at intimidation inevitably will succeed. Consequently, some victims and witnesses who are initially cooperative may, as time goes by, become uncooperative. By taking certain pretrial measures as soon as practicable, you will increase the likelihood of successfully prosecuting your case even if the witness later becomes unavailable to testify at trial.

○ **Obtain witness contact information**

Obtain as much information as possible from the witness that will provide assistance in contacting or locating him or her in the future. If the witness is produced at trial—even as a hostile witness or as a witness for the defense—there will be no violation of the Confrontation Clause if prior statements are admitted under exceptions to the hearsay rule. If the witness cannot be located, any motion or attempt to admit hearsay—either under the forfeiture doctrine or as a testimonial statement where the defendant has had a prior opportunity to cross-examine—will require the trial court to find that the witness is “unavailable” for trial.³²³ The State will therefore have to present evidence that it made all reasonable efforts to produce the witness at trial.³²⁴

Obtain contact information for the witness's home address, home and cell phone numbers, employer or school (including the schools of the witness's children), email address, and contact information for a couple of trusted friends or relatives who can pass a message to the witness if necessary. This information will provide leads that can be followed to make documented attempts to locate and serve the witness, which will be essential if the witness fails to appear for trial. It is good practice to check to be sure this contact information is accurate before there is a need to locate a missing witness. Any contact information not already known to the defendant should be protected from disclosure to the defense as long as possible, through use of a protective order to delay or deny discovery.

- **Preserve testimony of witnesses vulnerable to intimidation by calling them to testify at preliminary hearings**

When a witness is unavailable at trial due to intimidation or for any other reason, the State can present recorded testimony from any proceeding at which the defense had an opportunity to cross-examine the witness.³²⁵ Because cross-examination is essential for purposes of the Confrontation Clause, grand jury testimony of an unavailable witness will not be admissible at trial (absent a successful motion to admit evidence under the doctrine of forfeiture by wrongdoing). However, testimony of a witness at a bail hearing or at a preliminary probable cause hearing, when given subject to cross-examination by defense counsel, can be admitted at trial without violating the Confrontation Clause, provided that the witness is unavailable for trial.³²⁶

These preliminary hearings therefore present the opportunity to preserve the witness's testimony while the witness is still cooperative. To assure the admissibility of such testimony at trial, provide all available discovery to defense counsel prior to the hearing, and do not object to any reasonable adjournments to enable defense counsel to prepare an effective cross-examination of the witness. Objections to questions during cross-examination should be kept to a minimum as well, so that the trial court will be assured that the defendant had a full and fair opportunity to cross-examine.

- **Open a "forfeiture file" for any witnesses who might not appear for trial due to intimidation**

For any witnesses who are vulnerable to intimidation, open a "forfeiture file" in one section of your trial folder or notebook. Maintain this file with any police or investigative reports, statements, or other evidence that would support a finding of the kind of "classic abusive relationship" or other pattern of intimidation that would support a finding that the defendant intended to prevent the witness from testifying. Often you will not know until the day of trial whether an intimidated witness will appear in court. By maintaining a "forfeiture file," perhaps with a draft motion to admit hearsay statements of an absent witness under the forfeiture rule,³²⁷ including copies of any cases upon which you would rely for such a motion, you can be prepared to conduct a forfeiture hearing on short notice, if necessary.

Ongoing Investigation/Communication

Follow-up investigation and regular communication with victims and witnesses should be ongoing throughout the pretrial period. Cases involving intimidation can change rapidly, with a witness who is cooperative one day becoming uncooperative by the next meeting. Victims and witnesses should receive regular updates about the status and any important developments in the case. The investigator or prosecutor should also "check in" with witnesses on a regular basis to see if anything has changed, in terms of evidence or safety concerns, or if there have been any suspicious incidents that may have seemed too minor to report. Any acts of intimidation that may be discovered should be thoroughly investigated.

If a previously cooperative victim or witness suddenly stops returning phone calls or seems reluctant to talk with the investigator or prosecutor, that may be an important indicator that intimidation is occurring. Efforts to maintain regular contact may provide the first indications to the prosecutor that a victim or witness may not appear at trial. If the witness can no longer be found at his or her address, or workplace or school, the investigator can immediately begin attempts to locate the witness.

Be sure that the assigned investigator maintains a careful record of all contacts with victims and witnesses, including unsuccessful attempts to locate the witness, or to speak or to meet with the witness. This record of contacts, including refusals or unsuccessful attempts, may be critical in establishing that all reasonable efforts were made to secure the witness's attendance at trial, which will be necessary to establish "unavailability" of the witness in the event it is necessary to introduce out-of-court statements under the doctrine of forfeiture by wrongdoing.

➤ **Document all recantations**

It is not unusual, of course, for intimidated victims and witnesses to recant their statements or previous reports to law enforcement, to downplay the seriousness of the crime, or to falsely assume responsibility for the crime (*e.g.*, "I was out of control, trying to attack him—he was just trying to calm me down."). Prompt action in the form of an empathetic conversation with the witness can sometimes bring an intimidated witness "back on board," but it is important to document any recantations, even if they are immediately abandoned. All recantations, however incredible they may be, and however brief, must be documented and turned over to the defense as exculpatory evidence pursuant to *Brady v. Maryland*.³²⁸

➤ **Interview family and friends**

Family and friends of the victim, and even employers or landlords,³²⁹ may have important information about the history of the parties' relationship, including prior acts of intimidation, threats, or assaults. Such witnesses can be an important source of evidence of other crimes or "bad acts" evidence that may be relevant to prove the defendant's motive, intent, common scheme or plan, absence of mistake or accident, or consciousness of guilt under Rule 404(b). Evidence of these acts may also help to support a motion to admit hearsay under the forfeiture doctrine. Family and friends are also a good source of nontestimonial statements by the victim, who may have confided in them about the abusive relationship or about the source or circumstances of injuries they have received. If these statements fall within an exception to the hearsay rule, they can be admitted without cross-examination even in the absence of a finding of forfeiture by wrongdoing. Admission of such statements when the victim is unavailable for trial does not offend the Confrontation Clause under *Crawford*.

○ **Monitor communications between the incarcerated defendant and the victim/witness or third parties**

Many jails now routinely record telephone conversations made from the jail, with the exception of calls from a defendant to defense counsel. Some jails routinely make these recordings available to the prosecution upon request; others may require a subpoena or other process to release the recordings. Communications between incarcerated defendants and victims or witnesses often reveal instructions not to go to court, advice for how to

avoid testifying, or “coaching” of testimony so the defendant can avoid criminal responsibility. While listening to these recordings can be labor-intensive, the evidence they provide can be invaluable and very powerful when presented at trial. Perhaps your office has interns or volunteers who can be enlisted to listen to recordings for the purpose of identifying calls intended to manipulate or intimidate witnesses.

Jails and prisons also may have procedures intended to restrict inmate mail communication, such as requiring outgoing mail (other than legal mail to a court or to an attorney) to be written on postcards or otherwise be made subject to inspection. Alert the institution’s administration of witness intimidation issues so that outgoing written communication can be monitored for intimidation attempts.³³⁰

Visitor logs from the jail may also yield important information, particularly where third-party intimidation is suspected. Security cameras in visitor areas may be a source of evidence where personal contact is used for intimidation purposes.

It is worth keeping in mind, too, that some tech-savvy inmates may devise methods of circumventing restrictions on Internet or telephone communications to contact their victims. Although inmate access to the Internet is generally severely restricted or prohibited, some inmates are able to gain access through the use of smuggled smart phones. In addition, as institutions implement programs that permit limited (and usually closely supervised) access to the Internet for job-training programs or other legitimate purposes, these may present additional opportunities for intimidation by electronic means.

- **Preserve electronic evidence of intimidation**

Evidence of intimidation may also be found in text messages; emails; and postings on social networking sites, blogs, or forums. Avoid relying on printouts of such items—printouts can easily be faked, and it is important to be able to establish their authenticity. It is not unusual for a defendant to forge communications from the victim, to make it appear that the victim is harassing, threatening, or stalking the defendant. These “communications” must, likewise, be carefully investigated so their fraudulent nature can be proved.

It is worthwhile to have at least one investigator in the prosecutor’s office who is thoroughly trained in the proper way to document the content of such messages and to prove their origin so they can be tied to the defendant. If your office does not have an investigator with such expertise, your State Police department most likely has investigators with the necessary training. The U.S. Attorney’s Office also has designated Assistant U.S. Attorneys who can provide assistance in such investigations.³³¹

Any text messages, voicemail messages, emails, or posts on social networking or other websites that are evidence of intimidation must be properly preserved and investigated. The first step should be for the investigator to observe and document the communication *on the victim’s device or computer*. Even if the evidence is later accidentally deleted or if records of the communication cannot be obtained with a subpoena, search warrant, or court order, the investigator can testify to what he or she observed. Text messages on cell phones should be photographed (as it may not be possible to obtain evidence of their content from the wireless provider), and the contents of the phone should be backed up to digital media if possible. Emails should be printed out, with the header information (showing the source of the message in the form of an IP address) included.³³² Although the

victim or witness can print out the information, for purposes of establishing authenticity it is preferable for the investigator to preserve and/or print out such communications after first observing them on the victim's computer or device. Web pages, such as posts on Facebook or Twitter, or on a blog, can be saved as a "web archive"³³³ and can be the basis for a search warrant or other process to the service that hosts the website.

Social networking sites have legal departments that will respond to requests from law enforcement, including requests to preserve the contents of a user's account pending the issuing of formal process such as a subpoena, court order, or search warrant. These departments can explain what information is available, how long it can be preserved, and the form of process they require in order to release it. Data contained in the account of the victim or witness can be obtained with his or her signed consent. In emergencies, where immediate information is necessary to preserve the life or physical safety of the witness, Internet providers and services may waive the requirement of formal legal process. Details about investigations involving electronic communication are beyond the scope of this monograph, but there are several helpful resources to assist investigators in obtaining evidence in such cases.³³⁴ Information obtained from Internet providers and social networking sites can constitute probable cause for a warrant to search the computer used by the defendant. A search of the computer may reveal troves of evidence of intimidation.³³⁵

Even if the investigation reveals that an intimidating message or post originated from a public computer, such as one in a library, the library or other facility may keep a log of users or have security video that will prove the defendant's use of that computer. In addition, even without direct evidence that the defendant was the source of a threatening message, authorship can often be proved by means of traditional circumstantial evidence, including the content and timing of the message.

- **Adjust the safety plan as necessary**
Where investigation reveals that the risk to the safety of the victim or witness has changed, consider whether changes to the safety plan, including temporary relocation, may be necessary.

Pretrial Motions

Cases involving intimidation often will require one or more pretrial motions, particularly motions to determine what evidence will be admissible at trial. Court rules, the rules of evidence, or even the preference of individual judges will frequently dictate the timing of such motions. Whenever possible, file the motion and obtain a ruling at the earliest possible time. The results of motions may sometimes facilitate resolution of cases by guilty plea, since both the State and the defendant will have a clearer idea about the likelihood of success at trial based upon what evidence will be admissible. Even where such motions cannot be determined well in advance of the trial date, it is best to seek a ruling before opening statements so both parties will know what anticipated evidence can be mentioned in their respective openings.

Pretrial motions *in limine* typically include motions to admit evidence of other crimes or "bad acts" pursuant to Rule 404(b), motions to admit evidence pursuant to the doctrine of forfeiture by wrongdoing, motions to admit (subject to exceptions to the hearsay rule) nontestimonial hearsay statements of

witnesses who are not testifying, or motions to admit testimonial hearsay statements of unavailable witnesses where there has been a prior opportunity to cross-examine the witness. Although evidence rulings concerning such *Crawford* issues (other than motions to admit evidence under the forfeiture doctrine) may not *require* a pretrial motion, a motion *in limine* prior to trial is nevertheless good practice because it will clarify what evidence ultimately will be admissible.

A motion *in limine* is also appropriate where there is a risk that the defense may attempt to introduce personally embarrassing information about the witness that has no legal relevance to the case or to the witness's credibility. Some defendants routinely threaten victims that if a case goes to trial, the defendant will testify that the victim had an abortion, for example, or was sexually abused as a child, for the sole purpose of discouraging the victim from testifying. An advance ruling from the court prohibiting any questioning or testimony about such irrelevant matters will make the witness feel safer about testifying, and will provide the court with a basis for punishing the defendant if the order is ignored.

Any special motions concerning security measures during the trial should also be filed early so the court has ample time to consider the available options. In gang-violence cases, and in certain other cases where the defendant has a number of allies and supporters who are willing to engage in witness intimidation, special security measures may be warranted. Such measures might include separate metal detectors at the door of the courtroom or at the entrance to the hallway, prohibition of cell phones in the courtroom, requiring all spectators to provide identification, and extra security staff in the courtroom.

In cases where a witness would suffer serious emotional harm as a result of testifying in the presence of the defendant, a motion to permit the witness to testify via closed-circuit television may be an appropriate solution.³³⁶ Expert testimony is necessary to establish the harm that the witness is likely to suffer if required to testify in the defendant's presence. If the court finds that the witness is likely to suffer such severe emotional harm, the attorneys may be permitted to conduct their examinations of the witness in a separate room, with a live video feed to the courtroom. Remote examinations of this type should not be conducted without a hearing as to the necessity of doing so.

In some cases where there are grounds for a forfeiture motion, some of the hearsay statements might also be admissible (even without the forfeiture motion) because they are nontestimonial statements that fall within an exception to the hearsay rule. In such cases, it is best to file a motion that asks the court to rule on the two grounds of admissibility in the alternative. By having the court rule on both grounds, you will have a complete record for appellate review, potentially avoiding a remand for additional findings or, worse yet, a new trial. Evidence that is admissible under either theory may allow the appellate court to uphold a conviction.

If the court denies a motion to admit hearsay statements of an unavailable witness, consider whether the statements are so critical to your proofs that you cannot prove your case without them. In such a case, it may be worthwhile to seek to take an interlocutory appeal of the adverse ruling.³³⁷ Such appeals are typically discretionary, and you may have to seek leave of the trial court before filing a notice of appeal. Consult your appellate rules, or contact the attorney general's office for guidance on this issue.

This Appendix and Model will not discuss in detail the law governing forfeiture by wrongdoing, nor the nuances surrounding the admissibility of hearsay statements of non-testifying witnesses under *Crawford* and its progeny. AEQUITAS has published *Resources* on both of these topics that discuss the relevant legal issues in detail.

- *The Prosecutors' Resource on Crawford and Its Progeny*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm.

- *The Prosecutors' Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm

➤ **Special considerations for motions requiring a showing of witness unavailability (forfeiture or testimonial statements admitted after opportunity for cross-examination)**

Successfully litigating a motion to admit evidence under the doctrine of forfeiture by wrongdoing, or one to admit testimonial hearsay where there has been a prior opportunity for cross-examination, requires a showing that the witness is unavailable for trial.

Of course, a pretrial motion to admit statements of an unavailable witness presupposes that you *know* that the witness will be unavailable for trial. In some cases, such as one where the witness is deceased, or where the witness has asserted a valid claim of privilege, you will be certain of the witness's unavailability. In other cases, the witness may have simply "disappeared" and evaded all attempts to locate him or her. If all leads have been exhausted, it should be possible for the prosecutor to file, and for the court to rule upon, a pretrial motion. In other cases, such as those where the witness has merely expressed a refusal to testify, or is unresponsive to communications, though the witness's whereabouts are known, the motion may have to be delayed until immediately prior to trial, or even after the trial begins, to see what the witness's response is to a subpoena and/or a direct order from the court to testify.³³⁸ If you have doubts about a witness's willingness to appear for court and to testify, it is good practice to subpoena the witness for the day of the final pretrial conference or the beginning of jury selection. If the witness fails to appear, after being properly served with a subpoena, or appears but states he or she refuses to testify, you can then proceed with a forfeiture motion before the jury is sworn. If the witness does appear, be sure to personally serve the witness with a subpoena for the date the witness is to testify.

If the witness fails to appear in response to a properly served subpoena, but his or her whereabouts are known, you must decide whether to seek a bench warrant to bring the witness to court. It is *not* good practice to arrest a reluctant *victim*. The victim has already been harmed, and arrest only causes the victim additional harm and may cause him or her to avoid reaching out for help in the future. It is important to note that although recantations must be disclosed to the defense as exculpatory evidence pursuant to *Brady v. Maryland*,³³⁹ a witness's refusal to testify is not exculpatory. There is, therefore, no ethical prohibition against negotiating a plea agreement without disclosing to the defense the witness's reluctance or refusal to testify.³⁴⁰ If no resolution by plea is possible, and the only way to prove the case is to arrest the victim, the better course may be to dismiss the case. If jeopardy has not yet attached (in a jury trial, once the jury has been sworn), it may be possible to reinstate the case at a later time if the victim later reconsiders, or if other evidence becomes available.

If the witness agrees to come to court to state his or her refusal to testify on the record, assuming there is no valid privilege, it may be necessary in some jurisdictions for the court to order the witness to testify under threat of contempt before the victim can be held to be "unavailable."³⁴¹ There is no need for the court to actually punish the contempt, but the threat of contempt may still have to be communicated to the witness before the witness is deemed unavailable for trial. If the trial judge decides to punish the victim for contempt—a matter within the trial court's

discretion—again, it is almost always the better course at that juncture to dismiss the case than to criminally punish a reluctant victim for refusing to testify.

Where witness unavailability is based upon an inability to locate the witness, it will be necessary for the State to show that it made all reasonable efforts to produce the witness for trial. This may require testimony by the assigned investigator as to what efforts were made to locate the witness. Unless the prosecution had every reason to believe the witness *would* appear, desultory efforts to locate the witness, or those not made until the eve of trial, may lead the court to conclude that the State has failed to show that the witness is actually unavailable.³⁴² This is why it is critical to document all witness contacts—including those that were unsuccessful—during the pretrial phase.

➤ **Consideration for forfeiture motions**

Forfeiture by wrongdoing generally requires the State to prove, by the applicable standard of proof (a preponderance of the evidence in most jurisdictions; clear and convincing evidence in Washington,³⁴³ Maryland,³⁴⁴ and New York³⁴⁵), (a) that the defendant engaged in wrongdoing or (b) acquiesced in wrongdoing (c) that caused the witness to be unavailable for trial and (d) intended that result. See Fed. R. Evid. 804(b)(6).³⁴⁶

○ **Proving wrongdoing**

“Wrongdoing” is easily proved where the defendant has made threats or otherwise caused criminal harm to a victim or witness. However, “wrongdoing” in the forfeiture context may include more subtle acts of manipulation intended to dissuade the victim from testifying.³⁴⁷ Such acts may include declarations of love, promises to marry, promises to get counseling or treatment for a drug or alcohol problem, or plays for sympathy. The court may need to be educated about the role of this kind of manipulation in abusive relationships. Expert testimony at the forfeiture hearing from an expert in the dynamics of abusive relationships may help the trial court to understand how such seemingly innocuous acts are used by abusers to control the actions of their victims, which will enable the court to make a finding that the defendant has engaged in wrongdoing.

○ **Proving the defendant’s involvement/acquiescence in third-party wrongdoing**

Where the intimidating conduct was actually committed by a third party (a friend, relative, or criminal associate of the defendant), the defendant will have forfeited his right to cross-examine the witness only if the defendant either instigated the intimidating conduct or acquiesced in it. Acquiescence implies both knowledge and approval of the act. Be certain you can prove such knowledge and approval, at least circumstantially.

○ **Proving the defendant’s wrongdoing caused the witness’s unavailability**

Because the forfeiture rule requires that the defendant’s wrongdoing be the cause of the witness’s unavailability for trial, it may be important to show that the witness did not have

reasons of his or her own not to appear for trial. For example, showing that the absent witness left his or her home and employment abruptly, for no apparent reason other than the defendant's wrongful conduct, would probably be sufficient to establish the causation element of forfeiture.

- **Proving the defendant's intention to cause the witness's unavailability for trial**
The majority and concurring opinions in *Giles* indicate that proof of a "classic abusive relationship" in which the victim was intentionally isolated to discourage the victim from reaching out for help, including help from law enforcement, can be used to prove, circumstantially, the defendant's intent in committing an act that caused the victim's unavailability for trial. Thus, evidence of prior acts of violence or coercive control, including isolation from family or friends, threats about what would happen if the victim reported the violence, prior criminal charges that were dismissed for failure of the victim to appear, or prior restraining orders that were dismissed at the victim's request would all tend to show that this type of "classic abusive relationship" existed and, inferentially, that the defendant intended by his conduct to similarly prevent or discourage the victim from reaching out for help by testifying at trial.

- **Jury instructions**

If the court grants the motion to admit the unavailable witness's hearsay statements, a special jury instruction may be appropriate. A suggested jury instruction is provided in *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS 38 (March 2014), available at www.aequitasresource.org/library.cfm.

Appendix I. Ethical Considerations

This Appendix identifies the ethical considerations prosecutors face in sexual violence cases and provides main points and authority on the following:

- Responsibilities of the Prosecutor
- Code of Professionalism
- Investigation
- The Charging Decision
- Discovery
- Plea Negotiations and Plea Agreements
- Communication

RESPONSIBILITIES AS PROSECUTOR

Primary Responsibility

“The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.” §1-1.1 NDAA National Prosecution Standards, 3rd Ed., 2010

Societal and Individual Rights and Interests

A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client. A prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases. A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so. Societal interests rather than individual or group interests should also be paramount in a prosecutor’s efforts to seek reform of criminal laws.” §1-1.2 NDAA National Prosecution Standards, 3rd Ed., 2010

Responsibility Towards Victims

- A. Information Conveyed to Victims - Victims of violent crimes, serious felonies, or any actions where it is likely the victim may be the object of physical or other forms of retaliation, should be informed of all important stages of the criminal justice proceedings to the extent feasible, including, but not limited to, the following:
 - a. Acceptance or rejection of a case by the prosecutor’s office, the return of an indictment, or the filing of criminal charges;
 - b. A determination of pre-trial release of the defendant;
 - c. Any pre-trial disposition;
 - d. The date and results of trial;
 - e. The date and results of sentencing;
 - f. Any proceeding within the knowledge of the prosecutor which does or may result in the defendant’s no longer being incarcerated, including appellate reversal, parole, release, and escape, unless a legal obligation to inform the victim of such proceeding is imposed by law on another governmental entity; and
 - g. Any other event within the knowledge of the prosecutor, which may put the victim at risk of harm or harassment. §2-9.1 NDAA National Prosecution Standards, 3rd Ed., 2010.
- B. Victim Orientation - To the extent feasible and when it is deemed appropriate by the chief prosecutor, the prosecution should provide an orientation to the criminal justice process for

victims of crime and should explain prosecutorial decisions, including the rationale used to reach such decisions. Special orientation should be given to child and spousal abuse victim and their families, whenever practicable. §2-9.2 NDAA National Prosecution Standards, 3rd Ed., 2010.

- C. Victim Assistance - To the extent feasible and unless a legal obligation to provide such assistance is imposed by law on another governmental entity, the chief prosecutor should develop policies and procedures for providing services to victims of crimes, including, but not limited to the following:
- a. Assistance in obtaining the return of property held in evidence;
 - b. Assistance in applying for witness fees and compensation if provided for by law or local rule;
 - c. Assistance in obtaining restitution orders at the sentencing;
 - d. Assistance in appropriate employer intervention concerning required court appearance;
 - e. Assistance with necessary transportation and lodging arrangements;
 - f. Assistance in reducing the time the victim has to wait for any court appearance to a minimum; and
 - g. Assistance in reducing overall inconvenience whenever possible and appropriate.

The prosecutor should be aware of any obligations imposed by victims' rights legislation in his or her particular jurisdiction. §2 9.3 NDAA National Prosecution Standards, 3rd Ed., 2010.

CODE OF PROFESSIONALISM

A prosecutor should always conduct herself/himself in a professional manner. "[T]he prosecutor's code of professionalism should include, among other provisions, the following:

- A. A prosecutor should act with candor, good faith, and courtesy in all professional relations.
- B. A prosecutor should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.
- C. A prosecutor should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances.
- D. A prosecutor should be punctual for all court appearances. When absence or tardiness is unavoidable, prompt notice should be given to the court and opposing counsel.
- E. A prosecutor should conduct himself or herself with proper restraint and dignity throughout the course of proceedings. Disruptive conduct or excessive argument is always improper.
- F. A prosecutor should treat witnesses fairly and professionally and with due consideration. In questioning the testimony of a witness, a prosecutor should not engage in a line of questioning intended solely to abuse, insult or degrade the witness. Examination of a witness's credibility should be limited to legally permitted impeachment techniques.
- G. A prosecutor should avoid obstructive and improper tactics. Examples of such tactics include, but are not limited to, knowingly:
 - i. Making frivolous objections, or making objections for the sole purpose of disrupting opposing counsel;
 - ii. Attempting to proceed in a manner that is obviously inconsistent with a prior ruling by the court;
 - iii. Attempting to ask clearly improper questions or to introduce clearly inadmissible evidence;
 - iv. Engaging in dilatory actions or tactics; and

- v. Creating or taking unlawful advantage of prejudicial or inflammatory arguments or publicity.”

§1-2.1 NDAA National Prosecution Standards, 3rd Ed. 2010

INVESTIGATION

Legal Advice

“Although law enforcement agencies or individual law enforcement officers are not clients in criminal cases or employees of the prosecutor’s office, the prosecutor may provide independent legal advice to local law enforcement agencies concerning specific prosecutions and, when appropriate, the proper interpretation of the criminal laws, the sufficiency of evidence to commence criminal charges or arrest, the requirements for obtaining search warrants for physical evidence and electronic surveillance, and similar matters relating to the investigation of criminal cases. The prosecutor should serve in such an advisory capacity to promote lawful investigatory methods that will withstand later judicial inquiry. The prosecutor should encourage law enforcement officers to seek legal advice as early as possible in the investigation of a criminal case. Where possible, the prosecutor should identify a primary point of contact within the prosecutor’s office to receive and refer legal inquiries from particular law enforcement agencies.” §2-5.6 Legal Advice NDAA National Prosecution Standards, 3rd Ed., 2010.

Immunity

- A. The problem is one of immunity, or more precisely lack of it. The prosecutor is given absolute immunity for functions that are “intimately associated with the judicial phase of the criminal process” including “initiating the prosecution and in presenting the State’s case.” *Imbler v. Pachtman*, 424 U.S. 409, 429-31 (1976). Absolute immunity works to defeat a lawsuit at its inception.
- B. Acting as your own investigator, or giving legal advice to police during investigation of a criminal case is not “intimately associated with the judicial phase of the criminal process” and is granted only qualified immunity. *Id.* Qualified immunity is an objective standard that allows liability only where the official violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)..
- C. The commentary to the NDAA Standards recognizes this important distinction: “Furthermore, the prosecuting attorney may be restricted from any active participation in the police function by the threatened loss of immunity to civil damages in instances where participation is beyond the scope of advisor and, therefore, not an integral part of the judicial process. The prosecutor must always be cognizant that his quasi-judicial immunity afforded by the courts in civil liability suits is limited to actions taken in advancement of the traditional prosecution function.”
- D. What kinds of things have been ruled as “intimately associated” with the judicial phase?
 - i. Drafting legal documents,
 - ii. determining probable cause to proceed,
 - iii. deciding to file charges,
 - iv. presenting information, and
 - v. motions to the court.
- E. What kinds of thing are not?
 - i. Attesting to the truth of facts in support of an arrest warrant or signing a search warrant affidavit. *Kalina v. Fletcher*, 522 U.S. 118 (1997).
- F. Interviewing witnesses

- i. Rule 3.7(a) of the ABA Model Rules of Professional Conduct state, in pertinent part, “A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless”:
- ii. Unless a prosecutor is prepared to become an impeaching witness in a case, a third-party, police officer or investigator be present for interviews with victims and witnesses.

THE CHARGING DECISION

“The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause” Rule 3.8(a), ABA Model Rules of Professional Conduct.

Section 4-2.4 of the NDAA National Prosecution Standards states, “The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

- A. The nature of the offense, including whether the crime involves violence or bodily injury;
- B. The probability of conviction;
- C. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused’s criminal history;
- D. Potential deterrent value of a prosecution to the offender and to society at large;
- E. The value to society of incapacitating the accused in the event of a conviction;
- F. The willingness of the offender to cooperate with law enforcement;
- G. The defendant’s relative level of culpability in the criminal activity;
- H. The status of the victim, including the victim’s age or special vulnerability;
- I. Whether the accused held a position of trust at the time of the offense;
- J. Excessive costs of prosecution in relation to the seriousness of the offense;
- K. Recommendation of the involved law enforcement personnel;
- L. The impact of the crime on the community;
- M. Any other aggravating or mitigating circumstances.

Other Charging Considerations

- A. Prosecutors must consider the effect of *Crawford v. Washington*, 541 U.S. 36 (2004) on their case when making charging and other decisions.
- B. Prosecutors have sole, but not unlimited discretion, in deciding who and what to charge. Obviously, the charging decision cannot be based on race, religion, or other invidious classification. *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975).

To Determine Whether to Charge

- A. Assess the Defendant’s Factual Guilt
 - i. Consider the victim’s ability to testify
 - a. Competency
 - b. Credibility
 - c. Ability to recollect and relate details
 - ii. Consider the defendant’s version of events, denials, and/or alibis
 - iii. Review any medical records and/or physical evidence
- B. Examine the Legal Sufficiency of the Evidence
 - i. Consider all possible legal issues that may rise
 - ii. Consider appellate issues
- C. Charge the Appropriate Crime(s)

- i. Label the conduct appropriately and accurately
- ii. Charge the most serious crime(s) supported by the evidence

DISCOVERY

“The prosecutor in a criminal case shall... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” Rule 3.8(d) of the ABA Model Rules of Professional Conduct.

The **Supreme Court** has, of course, weighed in on the prosecutor’s duty to disclose information. Some of the applicable decisions are listed below:

- A. *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).
- B. *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999): An “open file” policy means the defendant can rely on the file containing all material the prosecutor is obligated to disclose. If the file does not contain all the material the prosecutor is obligated to disclose, the “open file” policy will be no defense to a Brady violation.
- C. *Kyles v. Whitley*, 514 U.S. 419, 4237, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995): “[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”
- D. *Arizona v. Youngblood*, 488 U.S. 51 (1989): A good faith failure to disclose material that is merely potentially useful to a defendant is not a violation of due process.
- E. *United States v. Bagley*, 437 U.S. 667, 105 S.Ct. 3375 (1985): “Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule.”
- F. *United States v. Agurs*, 427 U.S. 97, 107; 49 L.Ed.2d 342; 96 S.Ct. 2392 (1976): There is a duty to disclose Brady information even without defense request.
- G. *Giglio v. United States*, 405 U.S. 150, 154; 31 L.Ed.2d 104; 92 S.Ct. 763 (1972): Evidence that affects the credibility of a witness whose testimony may impact upon the defendant’s guilt or innocence is required to be disclosed.
- H. *Brady v. Maryland*, 373 U.S. 83, 87; 10 L.Ed.2d 215, 218; 83 S.Ct. 1194 (1963): “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution.”

Ethical Issues Related to Discovery

- A. What is “exculpatory evidence?”
- B. What if you believe the evidence is inadmissible, but disclosing its existence is sure to cause a fight, and give the defense lawyer ideas for defenses he would never have come up with on his own?
- C. What obligation do we have to go out and find potentially exculpatory evidence?
- D. What about confidential or privileged information?
- E. Are we under an obligation to disclose that kind of information if we know it’s out there?

Determining Whether to Disclose

It has been suggested that the better course of action when in doubt about whether to turn something over is to turn it over and then file a motion in *limine* to determine the admissibility of the information. When dealing with confidential and privileged records, it is suggested by some

that you should move for a protective order clarifying your duty to disclose or not prior to any disclosure.

Additional Considerations

- A. Mandatory Versus Discretionary Disclosure
- B. Generally, the prosecutor and police do not serve as investigators for the defendant. However, failing to pursue evidence because, if true, it might harm the case, is problematic.
- C. The attorney work product privilege applies to prosecutors.

See Sec. 9: Discovery, NDAA National Prosecution Standards, 3rd Ed., 2010.

PLEA NEGOTIATIONS AND PLEA AGREEMENTS

Office Policy

- A. No drop policies
- B. Other policies
 - i. Individual Judges
 - ii. Common Practice

Know Your Adversary and Be Consistent

“Similarly situated defendants should be afforded substantially equal plea agreement opportunities.” (§5-1.4 NDAA National Prosecution Standards, 3rd Ed., 2010)

§ 5-3.1 NDAA National Prosecution Standards, 3rd Ed., 2010 states that prior to negotiating a plea agreement, the prosecution should consider the following factors:

1. The nature of the offense(s);
2. The degree of the offense(s) charged;
3. Any possible mitigating circumstances;
4. The age, background, and criminal history of the defendant;
5. The expressed remorse or contrition of the defendant, and his or her willingness to accept responsibility for the crime;
6. Sufficiency of admissible evidence to support a verdict;
7. Undue hardship caused to the defendant;
8. Possible deterrent value of trial;
9. Aid to other prosecution goals through non-prosecution;
10. A history of non-enforcement of the statute violated;
11. The potential effect of legal rulings to be made in the case;
12. The probable sentence if the defendant is convicted;
13. Society’s interest in having the case tried in a public forum;
14. The defendant’s willingness to cooperate in the investigation and prosecution of others;
15. The likelihood of prosecution in another jurisdiction;
16. The availability of civil avenues of relief for the victim, or restitution through criminal proceedings;
17. The willingness of the defendant to waive his or her right to appeal;
18. The willingness of the defendant to waive (release) his or her right to pursue potential civil causes of action arising from his or her arrest, against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his or her staff or agents;
19. With respect to witnesses, the prosecution should consider the following:
 - a. The availability and willingness of witnesses to testify;

- b. Any physical or mental impairment of witnesses;
 - c. The certainty of their identification of the defendant;
 - d. The credibility of the witness;
 - e. The witness's relationship with the defendant;
 - f. Any possible improper motive of the witness;
 - g. The age of the witness;
 - h. Any undue hardship to the witness caused by testifying.
20. With respect to victims, the prosecution should consider those factors identified above and the following:
- a. The existence and extent of physical injury and emotional trauma suffered by the victim;
 - b. Economic loss suffered by the victim;
 - c. Any undue hardship to the victim caused by testifying.

Consider the Innocence of the Defendant

"The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged. The prosecutor must satisfy himself or herself that there is a sound factual basis for all crimes to which the defendant will plead guilty under any proposed plea agreement." (§5-3.2 NDAA National Prosecution Standards, 3rd Ed., 2010)

Conditions of the Plea Offer

- A. Make the offer in writing
- B. Set a deadline and stick to it
- C. "Prior to reaching a plea agreement and subject to the standards herein and the law of the jurisdiction, the prosecutor may set conditions on a plea agreement offer, such as:
 - i. The defendant's acceptance of the offer within a specified time period that would obviate the need for extensive trial preparation;
 - ii. The defendant's waiver of certain pre-trial rights, such as the right to discovery;
 - iii. The defendant's waiver of certain pre-trial motions such as a motion to suppress or dismiss; or
 - iv. The defendant's waiver of certain trial or post-trial rights, such as the right to pursue an appeal." (§5-1.3 NDAA National Prosecution Standards, 3rd Ed. 2010)

COMMUNICATIONS

Balance the Rights of a "Fair Trial" and "Free Press"

"The prosecutor should strive to protect both the rights of the individual accused of a crime and the right of the public to know...." and "maintain a relationship to the media that will facilitate the appropriate flow of information necessary to educate the public." §2-14.1, 14.2 NDAA National Prosecution Standards, 3rd Ed., 2010.

Trial Publicity

ABA Model Rule of Professional Responsibility, Rule 3.6.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

This resource was originally created for the National Institute on the Prosecution of Sexual Violence by Teresa Scalzo, former Director of the National Center for the Prosecution of Violence Against Women and former sexual assault prosecutor.

Appendix J. Overcoming the Blackout vs. Pass Out Defense

This Appendix was excerpted from Teresa Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, NAT'L DIST. ATT'Y ASS'N, 35-39 (Aug. 2007),

http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf. This excerpt has been reprinted with permission from the Department of Justice's Office on Violence Against women.

Overcoming the Blackout vs. Pass Out Defense

The second way that the defense can argue the consent defense is to try to prove that the victim consented to the intercourse but does not remember due to her high level of intoxication at the time of the crime. Defendants who make this argument portray the incident as drunken sex, as opposed to rape. This line of attack is palatable to jurors because the victim is not vilified; rather, she is portrayed as being mistaken. The defense will try to make it look as though the victim blacked out and forgot large periods of time.

Often the defendant will testify that the victim does not remember that she behaved promiscuously and possibly even initiated sexual contact with him.

Some defense attorneys bolster this argument by calling an expert witness to say the victim blacked out. They may use a toxicologist, a pharmacologist, an emergency doctor, or someone else with expertise in blackouts. The blackout defense is particularly common in cases where the victim was unconscious at the time of the rape. There are a number of steps that can be taken when this defense is raised. First, if expert testimony is going to be proffered, the prosecutor should ask the judge to hold the defense to the discovery rules. Prosecutors should get the current curriculum vitae of the defense expert. Prosecutors must make sure that the proposed expert is qualified to testify on the topic. If not, object.³⁴⁸ Prosecutors should also request a written report from the expert. Next, prosecutors should object on relevance grounds. Until there is evidence in the record that a blackout occurred, there is no factual basis to admit this testimony. Prosecutors should force the defense to proffer the testimony that will support the introduction of the blackout testimony. Unless the witness can diagnose the victim as having suffered from a black blackout at the time, any expert testimony would only lead the jury to speculate about whether the victim was in an alcoholic blackout. Such speculation would be more prejudicial than probative.³⁴⁹ Prosecutors can file a motion *in limine* to preclude the defense from using the term "blackout" unless there is evidence on the record to show that what occurred was a blackout and not just inconsistencies in the victim's memory or testimony. If a defense expert uses the "blackout defense," the victim must be very clear about what she remembers and what she does not. If she is certain of something for a particular reason, she should explain the reason. The prosecutor must be prepared to cross-examine the expert well. The following questions can be asked when cross-examining the defense expert:

- **Blackout vs. Pass Out**

- Blackouts do not involve a loss of consciousness, correct?
- The conditions blacking out and passing out are mutually exclusive, aren't they?
- When a person is passed out, she is unconscious, correct?
- When a person is blacked out, she is conscious, correct? A blackout is simply when a person cannot remember what happened during a time period because his or her brain was not

recording memories during that time, isn't that true?

- If a person blacked out, she would know that she had “lost time” right? In other words, she was not recording any memories if she were blacked out, correct? If she were passed out, she was not observing anything because she was basically asleep, correct?
- Assume that a person experienced a blackout. During the time period of the blackout, that person was able to perceive what was happening at the time it happened, correct?
 - “Intoxicated subjects are typically able to repeat new information immediately after its presentation and often can keep it active in short term storage for up to a few minutes if they are not distracted.”³⁵⁰
 - Alcohol seems to influence most stages of the process of memory formation, storage, and retrieval to some degree, but its primary effect appears to be on the transfer of information from short-term to long-term storage.³⁵¹
- **Subjective**
 - Your opinion is based upon facts gained by talking to the defense or the defendant, isn't it?
 - “[M]ost of the evidence of a blackout is provided by subjective recall from the accused and so may be of questionable veracity.”³⁵²
 - If the victim's testimony is true, then this theory of blackout would not apply, would it?
- **Scientific issues**
 - There is widespread debate in the medical and scientific communities regarding the evaluation and diagnosis of blackouts, right?
 - Isn't it true that there is no scientific consensus as to what constitutes a blackout? Isn't it true that there is no way to do any scientific tests to determine whether the victim had a blackout?
- If the defense cites any studies, be sure to be familiar with the studies and how they were done. “Although alcohol blackouts have been defined as evidence of both alcohol misuse and alcohol dependence in the majority of formal diagnostic systems, they remain an enigma.”³⁵³
 - What was the purpose of the study? Early research into alcohol induced blackouts began in the 1940s with the work of E.M. Jellinek (1946).³⁵⁴ Jellinek's initial characterization of blackouts was based on data collected from a survey of Alcoholics Anonymous members. Noting that recovering alcoholics frequently reported having experienced alcohol-induced amnesia while they were drinking, Jellinek concluded that the occurrence of blackouts is a powerful indicator of alcoholism.³⁵⁵
 - This research was never intended to analyze the nature of blackouts on the brain; rather, it was intended to determine whether blackouts could serve as a predictor of alcoholism. “For a long time, alcohol induced blackouts were merely studied as predictors of future alcoholism.”³⁵⁶ Moreover, some studies were done on people who were defendants in the

criminal justice system who had raised the issue of having an alcoholic blackout as a defense. Naturally, the subjects in these studies would have a motive to answer questions in a certain way. In these surveys, “strategic goals may motivate blackout claims.”³⁵⁷

- How was the study done? “Most of the research conducted on blackouts during the past fifty years has involved surveys, interviews, and direct observation of middle-aged, primarily male alcoholics, many of whom were hospitalized.”³⁵⁸
- Blackouts only affect memory of events that occurred during the intoxicated state. “Although alcohol impairs short-term memory, which may interfere with storing information about ongoing behavior, remote memory remains intact.”³⁵⁹ “Thus, even during a blackout, a person should be aware that what he is about to do is wrong.”³⁶⁰

- **Intoxication issues**

- If a person drank only beer, it is unlikely that she experienced a blackout, correct?
- In a study conducted by White et al., only one subject indicated (s)he drank beer alone before experiencing a blackout. Most subjects (forty percent) drank either liquor alone or a combination of beer and liquor (forty-two percent).³⁶¹
- When a person is drunk enough to black out, she is extremely intoxicated, correct? What other signs of intoxication would she show? (The prosecutor can then argue that the offender should have known that the victim could not consent.)
- “As the amount of alcohol consumed increases, so does the magnitude of memory impairments.”³⁶² “There is agreement that the en block type of blackout requires the ingestion of large amounts of alcohol; a high blood alcohol level (BAL) is usually a necessary component.”³⁶³
- The plausibility of a blackout claim at a BAC less than 250 mg/mL is doubtful.³⁶⁴ One study estimated peak BACs during the night of a blackout to be thirty percent for men and thirty-five percent for women.³⁶⁵
- If the defense expert states that a person may experience a blackout and may or may not appear to be intoxicated, remember the history of research into blackouts. “Clinical research has focused primarily on cognitive impairments and memory deficits among alcoholics.”³⁶⁶
- “Until recently, much of the information we had about behavior exhibited while in a blackout state was derived from members of Alcoholics Anonymous.”³⁶⁷ An alcoholic is likely to have a higher tolerance for alcohol and is less likely to exhibit signs of being intoxicated. Several studies show that the average number of drinks before blackout was approximately fifteen in four hours.³⁶⁸

Appendix K. Prosecuting Sexual Assault of Victims with Intellectual and Developmental Disabilities

“Prosecutors should be aware that developmental disabilities manifest themselves on a variety of levels, depending on the severity of the disability as well as other factors. The term “developmental disability” refers to: a diverse group of severe chronic conditions that are due to mental and/or physical impairments. People with developmental disabilities have problems with major life activities such as language, mobility, learning, self-help, and independent living. Developmental disabilities begin any time during development up to 22 years of age and usually last throughout a person’s lifetime... [S]ome developmental disabilities ... will not directly affect intellectual ability, but may cause challenges for the victim on the witness stand.”

William Paul Deal & Viktoria Kristiansson, *Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault*, 1(12) THE VOICE 1 (2007)(internal citations omitted), http://www.ndaa.org/pdf/the_voice_vol_1_no_12_2007.pdf.

Checklist for preparing and trying cases involving victims with disabilities

- ✓ **What is the disability and how may it impact the victimization?**
 - Verbal communication
 - Physical maneuverability
 - Reliance on others for certain needs
 - Perceived or actual vulnerability
 - Victim’s perception of self
 - Victim’s ability to make a prompt complaint to anyone (e.g., based on communication limitations or limited access to a neutral or safe party)
 - Ability or decision to report
 - Professionals’ receipt of the report
 - Medical treatment
 - Access to victim advocates
 - Access to law enforcement and availability of specialized interview equipment
 - Access to forensic interviewer and availability of specialized interview equipment
 - Access to prosecutor
 - Access to courthouse
 - Ability of prosecutor or courtroom to meet victim’s needs

- ✓ **Are there special considerations for ensuring the victim can communicate with others?**
 - Use of communication aids
 - iPad, software, picture communicators, talk-talk devices
 - Use of interpreters
 - Two if victim deaf
 - Revoicer
 - Work with professionals who already work with victim
 - Work with family members who can communicate with victim

- ✓ **Consider the victim's disability when making charging decisions.**
 - Did the offender target the victim due to her/his disability?
 - Specific crime against victim with disability
 - Does the disability impact the victim's ability to consent (as an element of the crime)?
 - Aggravating factor in charging and/or sentencing
 - Stay-away order as condition of bail
 - Protective order issued, if one is available in the jurisdiction

- ✓ **What pretrial motions should be filed to protect the victim during the criminal prosecution?**
 - Advocate in room/next to victim
 - Confidential victim advocate
 - Support person from disability organization
 - Victim's personal assistant
 - CCTV
 - Support dog
 - Rape shield
 - Motion to prevent victim submission to psychological examination

- ✓ **Anticipate defense motions**
 - Challenging victim's competence
 - Alleging taint
 - Seeking victim's mental health records
 - Introducing victim's "bad" character evidence under 404(a)
 - Piercing rape shield

- ✓ **Prepare the victim**
 - Prosecutor must meet with victim and develop understanding of victim's abilities
 - Explain process to the victim
 - Ask victim about his/her concerns
 - Take victim to the courtroom
 - Bring tissues, food, and water to court
 - Have item of comfort, such as blanket or teddy bear (not visible to jury)
 - Ensure victim has glasses or other items s/he needs
 - Ensure room temperature is comfortable for victim and/or have victim bring extra sweater
 - Time of day of victim's testimony and breaks during testimony to accommodate victim's eating, medication, or other schedule
 - Explain role of judge and jury
 - Explain role of prosecutor and questions victim will be asked
 - Explain role of defense attorney and questions victim will be asked

✓ **Trial considerations.**

- Voir dire to determine whether the victim's disabilities will affect the juror's assessment of victim's credibility
- Do certain charges require expert testimony to prove?
- What can laypersons testify to?

✓ **Consider the following when making sentencing recommendations.**

- Nature of and gravity of the crimes
- Impact on the victim
- Defendant's reaction to verdict (acceptance, remorse, etc.)
- Defendant's criminal history
- Defendant's characteristics
- Education
- Employment history
- Community support
- Familial support
- Victim Impact Statement
- Restitution

✓ **Identify experts in your community and/or develop them within the office**

- Work with experts who represent the community members most at-risk of sexual assault, both because of the actual vulnerabilities as well as the perception of their credibility, oftentimes inaccurate and exploited by the defense.
 - Expert can testify about victim's mental and physical capabilities³⁶⁹
 - Lay witnesses can testify about victim's abilities³⁷⁰

Trainings and Other Resources

- TEMPLE UNIVERSITY INSTITUTE ON DISABILITIES, <http://disabilities.temple.edu>.
- THE ARC FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, <http://www.thearc.org>.
- Recording by Viktoria Kristiansson & Kathryn Walker, Prosecuting Cases Involving Victims with Developmental Disabilities: A Focus on Sexual Assault, <http://www.aequitasresource.org/trainingDetail.cfm?id=120> (recorded on May 29, 2015).

Appendix L. Example of a Brief Victim Survey

The following is a brief sample questionnaire extracted from the report, *What Do Victims Want? Effective Strategies to Achieve Justice for Victims of Crime*.³⁷¹ This report was developed from the 1999 International Association of Chiefs of Police Summit on Victims of Crime.

While this questionnaire was not focused on sexual assaults, the questions could be readily adapted to sexual assault crimes, and topics asked of respondents. To encourage responses from victims, it is wise to keep the survey short, limiting it to no more than the equivalent of two sides of a sheet of paper. The survey information would be considerably enhanced if respondents who rated items as unsatisfactory were asked to provide additional details.

1. Do you feel respected? Safe?
2. Did you receive sufficient and accurate information? At the right time?
3. Were you asked what you needed? Did you receive the services you needed in a timely manner?
4. Did you understand the processing of your case, including the timing of processing and the length of time it took?
5. Did you feel justice was done?
6. Suggestions for improvement?

ENDNOTES

- ¹ The following AEquitas staff contributed to this Model: Jennifer Long, CEO; Jane Anderson, Teresa Garvey, Viktoria Kristiansson, Patricia Powers, and John Wilkinson, Attorney Advisors; Charlene Whitman-Barr, Senior Associate Attorney Advisor; and Mary Katherine Burke, Associate Attorney Advisor.
- ⁱⁱ Studies of the results of backlogged rape kit testing in Cleveland, Memphis, and Detroit have revealed over 1,250 suspected serial rapists, in those three cities alone, who have been linked to assaults occurring in at least 40 states and the District of Columbia. *Test Rape Kits. Stop Serial Rapists.*, END THE BACKLOG, <http://www.endthebacklog.org/backlog-why-rape-kit-testing-important/test-rape-kits-stop-serial-rapists> (last visited June 8, 2017).
- ³ Bea Hanson, *The Importance of Understanding Trauma Informed Care and Self-Care for Victim Service Providers*, OFFICE OF VIOLENCE AGAINST WOMEN: BLOG (July 30, 2014), <https://www.justice.gov/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.
- ⁴ Michele C. Black, et al., *National Intimate Partner and Sexual Violence Survey, 2010 Summary Report*, CTR. FOR DISEASE CONTROL (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.
- ⁵ Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, NAT'L INST. OF JUST. (Jan. 2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.
- ⁶ Rebecca Campbell & Sharon Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20(1) J. OF INTERPERSONAL VIOLENCE 127-131 (2005).
- ⁷ *The Trauma of Victimization*, NATIONAL CENTER FOR VICTIMS OF CRIME (2012), <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization> (last visited Mar. 29, 2017).
- ⁸ Jennifer Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, 12 STRATEGIES (Apr. 2014), available at: <http://www.aequitasresource.org/library.cfm>; Jennifer Long et al., *Legal Issues in Sexual Assault from a Prosecutor's Perspective*, AEQUITAS (Glenn Whaley 2015) (unpublished comment); An effective, responsive, and trauma-informed criminal justice system plays a substantial role in the victim's ability to heal and the community's ability to hold offenders accountable. Viktoria Kristiansson & Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 STRATEGIES (Feb. 2015), available at www.aequitasresource.org/library.cfm.
- ⁹ Amy Cohn, et al., *Correlates of Reasons for Not Reporting Rape to Police: Results from a National Telephone Household Probability Sample of Women with Forcible or Drug-or-Alcohol Facilitated/Incapacitated Rape*, 28(3) J. INTERPERSONAL VIOLENCE 455-73 (2013).
- ¹⁰ SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME (Nat'l Ctr. for Victims of Crime 2010).
- ¹¹ Attrition studies show that many cases are not investigated or are declined for prosecution because they are perceived to be too difficult to prosecute or unlikely to result in a conviction. These perceptions are seldom based on the legal standards for charging, but rather are grounded—consciously or unconsciously—on rape myths such as those about victim credibility, the relationship (if any) between victim and offender, and the age, race, and socioeconomic status of the victim or offender. *See generally*, Rodney Kingsnorth et al., *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecution and Sentencing*, 26(5) J. CRIM. JUST. 359-71 (1998); Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48(2) SOC. PROBLEMS 206-35 (2001); and Sharon Murphy et al., *Pathways To Justice: Movement Of Adult Female Sexual Assault Cases Across The New Hampshire Criminal Justice System*, Univ. N.H. (Jan 2012).

¹² See generally, Joseph Peterson, et al., *Sexual Assault Kit Backlog Study: Final Report*, NAT'L INST. OF JUSTICE (Mar. 2012); and Mark Nelson, *Making Sense of DNA Backlogs—Myth Versus Reality*, 226 NIJ JOURNAL, 20-25 (May 2010).

¹³ TjADEN & THONNES, *supra* note 5.

¹⁴ Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y Rev. 461 (2005)

¹⁵ *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Apr. 7, 2017).

¹⁶ Rebecca Campbell, et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, 20(5) VIOLENCE AGAINST WOMEN 607-25 (2014), <https://vaw.msu.edu/wp-content/uploads/2014/06/Violence-Against-Women-2014-Campbell-607-25.pdf>

¹⁷ CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM 101 (2014)

¹⁸ Cassia Spohn, & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18(2) VIOLENCE AGAINST WOMEN 160-192 (2012).

¹⁹ April Pattavina, Melissa Morabito & Linda Williams, *Examining Connections Between the Police and Prosecution in Sexual Assault Case Processing: Does the Use of Exceptional Clearance Facilitate a Downstream Orientation*, 11(2) VICTIMS & OFFENDERS (2016). Downstream decision-making occurs where criminal justice professionals decide not to investigate or refer a case for prosecution, based upon their perception that a particular type of case will be declined by prosecutors or their prejudgment of the merits of the case—that a jury will not convict.

²⁰ For review of literature on attrition rates in sexual assault cases, see *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

²¹ Fore review of literature on the backlog of untested rape kits, see *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

²² See, e.g., T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, THE MARSHALL PROJECT & PRO PUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>; (Alison Knezevich & Catherine Rentz, *Maryland Lawmakers Call for Uniform Police Standards on Rape Kits*, BALTIMORE SUN (Dec. 9, 2016), <http://www.baltimoresun.com/news/maryland/politics/bs-md-rape-kits-reaction-20161209-story.html>).

²³ For review of literature on performance measures, see *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017). See also, e.g., MARTIN WOOD ET AL., VICTIM AND WITNESS SATISFACTION SURVEY, CROWN PROSECUTION SERVICE (Sept 11, 2015).

²⁴ Please note that sexually exploited persons may not self-identify. Colleen Owens, et.al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, URBAN INSTITUTE (Apr. 2012), available at <http://www.urban.org/publications/412592.html>.

²⁵ See LONG & NUGENT-BORAKOVE, *supra* note 8; and Rebecca Campbell, et al., *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP)* (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf>.

²⁶ While the RSVP Model is written for sexual violence cases involving adult victims, parts of it may be relevant to cases involving child, adolescent, and older victims.

²⁷ *Sexual Assault Justice Initiative: Promoting and Measuring Success in Sexual Assault Prosecutions*, AEQUITAS, <http://aequitasresource.org/Sexual-Assault-Justice-Initiative.cfm> (last visited Apr. 7, 2017). In an effort to address the issues raised by the limited research available, AEQUITAS convened a Roundtable on Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases. Prosecutors and experts representing other allied professions were brought together to discuss the elements of effective prosecution and the limitations of using conviction rates as the sole measure of success in sexual assault cases. AEQUITAS, *Valuing Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases: Summary of a Roundtable Discussion* (2014).

²⁸ “Outcomes reflect the long-term change that is envisioned (*i.e.*, what will be different as a result of the activities).” LONG & NUGENT-BORAKOVE, *supra* note 8. Positive case outcomes in sexual violence cases include a broader sense of safety and justice for the victim as well as accountability, punishment and retribution, deterrence, rehabilitation, and restoration. AEQUITAS, *supra* note 27.

²⁹ See *Berger v. United States*, 295 U.S. 78 (1935).

³⁰ These principles can be promoted formally, through use of written protocols, or informally, by simply incorporating them into practice and promoting them through informal training and mentoring of newly-assigned prosecutors.

³¹ See VIKTORIA KRISTIANSSON, AEQUITAS, *CAMPUS-RELATED CRIMES OF SEXUAL VIOLENCE: TRIAL PACKET FOR PENNSYLVANIA JUDGES 18* (2016) (citing Rebecca Campbell et al., *Responding to Sexual Assault Victims’ Medical and Emotional Needs: A National Study of the Services Provided by SANE Programs*, 29(5) RES. IN NURSING & HEALTH 384 (2006)).

³² Jennifer Long & John Wilkinson, *The Benefits of Specialized Prosecution Units in Domestic and Sexual Violence Cases*, 8 STRATEGIES IN BRIEF, 1 (December 2011). available at www.aequitasresource.org/library.cfm.

³³ See LONG & NUGENT-BORAKOVE, *supra* note 8.

³⁴ ERIC RAMUSEN ET AL., *CONVICTIONS VERSES CONVICTION RATES: THE PROSECUTOR’S CHOICE* (Dec. 31, 2008), available at: <https://kelley.iu.edu/riharbau/RePEc/iuk/wpaper/bepp2008-16-rasmusen-raghav-ramseyer.pdf>.

³⁵ For guidance on accounting for case complexity, see [Section 5.3](#).

³⁶ See NAT’L DISTRICT ATTORNEYS ASSOC’N, *NATIONAL PROSECUTION STANDARDS*, (3RD ED. 2009), available at <http://www.ndaa.org/pdf/NDAANPS3rdEd.wRevisedCommentary.pdf>.

³⁷ OWENS, ET AL., *supra* note 24 at 9.

³⁸ *Id.* at 11; see also Ryken Grattet & Valerie Jenness, *The Law-in-Between: The Effects of Organizational Perviousness on the Policy of Hate Crimes*, 52 (3) SOC. PROBLEMS, 37-59 (2005).

³⁹ See BEICHNER & SPOHN, *supra* note 14; see also Anthony V. Salvemini, et al., *Integrating Human Factors Engineering and Information Processing Approaches to Facilitate Evaluations in Criminal Justice Technology Research*, 39(3) EVALUATION REVIEW 308-38 (2015); see *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017) (on performance measures, generally).

⁴⁰ Jean Gregory & Sue Lees, *Attrition in Rape and Sexual Assault Cases*, 36 THE BRIT. J. OF CRIMINOLOGY 1 (1996).

⁴¹ See *Grant Programs*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/grant-programs> (last visited June 14, 2017).

⁴² See, e.g., DATA.GOV, <https://www.data.gov> (last visited May 18, 2017); *Violent Crime*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=31> (last visited May 18, 2017).

⁴³ The number of assaults known to non-law-enforcement sources still do not reflect the actual prevalence within a jurisdiction, since so many sexual assaults are never reported to *any* agency. For more information on underreporting of sexual assault, see Rebecca Campbell et al., *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, 34(2) HEALTH SOC. WORK 127-36 (May 2009); Arnold S. Kahn, *Calling it Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape*, 27 PSYCHOL. WOMEN Q. 233-42 (2003).

⁴⁴ See, e.g., Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20(6) LAW AND HUMAN BEHAVIOR 607-28 (1996); Regina A. Schuller & Anna Stewart, *Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication*, 24(5) LAW AND HUMAN BEHAVIOR 535-51 (2000); Vivian B. Lord & Gary Rassel, *Law Enforcement's Response to Sexual Assault: A Comparative Study of Nine Counties in North Carolina*, 11(1) WOMEN & CRIMINAL JUSTICE 67-88 (2000); Jan Jordan, *Beyond Belief? Police, Rape and Women's Credibility*, 4(1) CRIMINAL JUSTICE 29-59 (2004); Cassia Spohn & Katharine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office*, NAT'L INST. JUST. (Feb. 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf>.

⁴⁵ See *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017) (on performance measures, generally).

⁴⁶ Agencies serving specific populations may also be a source for information (e.g., disability service providers).

⁴⁷ Guidance for basic data analysis and reporting is available through Technical Assistance from the SAJI partners.

⁴⁸ For example, some jurisdictions use part-time prosecutors from private practice.

⁴⁹ Note that some experts may not require payment, which may be factored in to office/case strategy and allocation.

⁵⁰ These are helpful to putting together a specialized response, however if resources are tight, these things can be done individually.

⁵¹ Funding opportunities to support specialized prosecutorial units and programs are available from the Office of Violence Against Women, Bureau of Justice Administration, and the Office on Victims of Crime. Where possible seek opportunities to develop partnerships with community-based organizations to improve access to care for victim's services as grantors may be more open to funding new programs and increase the likelihood of funding approval with partnerships.

⁵² Specific practices are set forth below in [Case-Level Leadership](#).

⁵³ The research around the impact of this specialization supports that a specialized unit, in and of itself, will not improve prosecution rates unless the prosecutors are specially trained, aggressive, informed and skilled trial attorneys, and understand that they need to measure performance by looking beyond conviction rates. BEICHER & SPOHN, *supra* note 14. A complex world needs silos to create order out of complexity. Silos and discrete specialization are necessary to a functional society, but without integrating silos, isolated siloing of information can be self-limiting and reduce effective responses to issues. (GILLIAN TETT, *THE SILO EFFECT: THE PERIL OF EXPERTISE AND THE PROMISE OF BREAKING DOWN BARRIERS*, 14 (Simon & Schuster 2016).

⁵⁴ Sexual assault, domestic violence, child physical and sexual abuse, human trafficking, and gangs.

⁵⁵ See, e.g., Domestic Violence, AMERICAN PROSECUTORS RESEARCH INSTITUTE (1997); see also Sean Mcleod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCHOLOGY (2016), <http://www.simplypsychology.org/maslow.html> (last visited Apr. 10, 2017) (consider how the needs motivation fits into the necessary skills of prosecutor).

⁵⁶ See [Appendix B. for Core Competencies for Prosecuting Sexual Violence](#).

⁵⁷ See [Appendix B. for Core Competencies for Prosecuting Sexual Violence](#).

⁵⁸ Contact AEquitas for guidance on integrating sociological and scientific data into your prosecution practice at 202-558-0040 or info@aequitasresrouce.org.

⁵⁹ See, e.g. Sandra L. Bloom, *Understanding the Impact of Sexual Assault: The Nature of Traumatic Experience*, in SEXUAL ASSAULT: VICTIMIZATION ACROSS THE LIFESPAN 405-32 (A. Giardino, E. Datner & J. Asher, Eds., GW Medical Publishing 2003); See also Saba Masho & Anika Alvanzo, *Help-Seeking Behaviors of Men Sexual Assault Survivors*, 4(3) AM. J. MES. HEALTH 237-42 (Sept. 2010); KRISTIANSOON & WHITMAN-BARR, *supra* note 8.

⁶⁰ See, e.g., Rebecca Campbell, *The Neurobiology of Sexual Assault: Implications for First Responders in Law Enforcement, Prosecution and Victim Advocacy*, NATIONAL INSTITUTE OF JUSTICE (transcript) (Dec. 3, 2012), available at <http://www.nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx> [hereinafter *The Neurobiology of Sexual Assault*]; Alifair S. Burke, *Rational Actors, Self Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002).

⁶¹ See Teresa Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, NAT'L DISTRICT ATT'Y ASS'N. (Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf; Antonia Abbey et al., *Alcohol and Sexual Assault*, 25(1) ALCOHOL RES. & HEALTH 43 (2001); Antonia Abbey, et al., *Review of Survey and Experimental Research that Examine the Relationship Between Alcohol Consumption and Men's Sexual Aggression Perpetration*, 15(4) TRAUMA, VIOLENCE, & ABUSE 265-82 (Oct. 2014).

⁶² See *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

⁶³ Louis Ellison & Vannessa Munro, *Complainant Credibility & General Expert Witness Testimony in Rape Trials: Exploring and Influencing Mock Juror Perceptions*, UNIV. OF NOTTINGHAM & UNIV. OF LEEDS, (2009); Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202 (2009).

⁶⁴ See [section 4.1-C. Making Charging Decisions Consistent with Research and Ethical Considerations](#), *infra*.

⁶⁵ AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE, available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

⁶⁶ SPOHN, BEICHNER & DAVIS-FRENZEL, *supra* note 11.

⁶⁷ Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31(3) LAW & SOCIETY REVIEW (1997); Jeffrey W. Spears & Cassia C. Spohn, *The Genuine*

Victim and Prosecutorial Charging Decisions in Sexual Assault Cases, 20(2) AMERICAN JOURNAL OF CRIMINAL JUSTICE (1996).

⁶⁸ Michelle Madden Dempsey, *Prosecuting Violence Against Women: Toward a “Merits-Based” Approach to Evidential Sufficiency*, VILLANOVA UNIVERSITY SCHOOL OF LAW (2016) (citing Joanne Archambault & Kimberly Lonsway, *The Justice Gap for Sexual Assault Cases: Future Directions for Research and Reform*, 18 (145) VIOLENCE AGAINST WOMEN PAGES(2012). Much of the difficulty in securing reliable social science research can be attributed to the failure of police and prosecutors to maintain systematic records of cases reported.

⁶⁹ See, e.g., BEICHNER & SPOHN, *supra* note 14.

⁷⁰ CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION (AM. BAR ASS’N, 4th ed. 2015), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

⁷¹ NAT’L DISTRICT ATTORNEYS ASSOC’N, NATIONAL PROSECUTION STANDARDS, (3RD ED. 2009), available at: <http://www.ndaa.org/pdf/NDAANPS3rdEd.wRevisedCommentary.pdf>.

⁷² See [Appendix I. Ethical Considerations](#).

⁷³ DEMPSEY, *supra* note 68.

⁷⁴ *Id.*

⁷⁵ “Vicarious trauma focuses on the cognitive schemas or core beliefs [of the person exposed to accounts of a victim’s trauma]... and the way in which these may change as a result of empathic engagement with the [victim] and exposure to the traumatic imagery presented by clients. This may cause a disruption in the therapist’s view of self, others, and the world in general” TED BOBER & CHERYL REGHER, STRATEGIES FOR REDUCING SECONDARY OR VICARIOUS TRAUMA: DO THEY WORK? available at <http://btci.edina.clockss.org/cgi/reprint/6/1/1.pdf>. (citing I.L. McCann & L. A. Pearlman *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3(1) J. TRAUMATIC STRESS, 131–149 (1990); R. Sabin-Farrell & G. Turpin, *Vicarious Traumatization: Implications for the Mental Health Of Health Workers?* 23 CLINICAL PSYCH. REV., 449–480 (2003).

⁷⁶ JOYFUL HEART FOUNDATION, *Vicarious Trauma*, <http://www.joyfulheartfoundation.org/learn/vicarious-trauma>.

⁷⁷ Peter Jaffe et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54(2) JUV. & FAM. CT. J. 6 (Fall, 2003) (“...exposure to the graphic evidence of human potential for cruelty exacts a high personal cost.”).

⁷⁸ Molly Wolf et al., “*We’re Civil Servants*,” *The Status of Trauma Informed Care in the Community*, 40 J. SOC. SERV. RES. 111-120 (Dec. 12, 2013).

⁷⁹ Joyful Heart, *supra* note 76; See also Tina Mattinson, *Vicarious Trauma: The Silent Stressor*, INST. CT. MGMT. (May 2012), <http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2012/vicarious%20trauma.ashx>.

⁸⁰ See Linda Albert, *Keeping Legal Minds Intact: Mitigating Compassion Fatigue Among Government Attorneys*, 20(1) PASS IT ON (Fall 2012), http://www.americanbar.org/content/dam/aba/publications/pass_it_on/PIO_F12.authcheckdam.pdf; For staff training on addressing vicarious trauma, see *Developing Resiliency and Addressing Vicarious Trauma in Your Organization*, OFFICE OF VICTIMS OF CRIME, TECHNICAL AND TRAINING ASSISTANCE CENTER; <https://www.ovcttac.gov/views/TrainingMaterials/dspCompassionFatigueTraining.cfm>; See also *Vicarious Trauma Toolkit*, NORTHEASTERN UNIVERSITY INSTITUTE ON URBAN HEALTH RESEARCH AND PRACTICE (Spring 2017), <http://www.northeastern.edu/iuhrp/projects/current/vicarious-trauma-toolkit-vtt/>.

⁸¹ Some jurisdictions may rotate prosecutors who are handling sexual violence cases to prevent burnout, but the practice poses a risk to consistent best response practices. *Daring to Fail, First Person Stories of Criminal Justice Reform*, CENTER FOR COURT INNOVATION (2010), http://www.courtinnovation.org/sites/default/files/Daring_2_Fail.pdf (“When departments rotate officers to keep things fresh and responsive, there’s a critical loss of institutional memory and momentum”). Prosecutors who consistently handle sexual violence cases will succeed more and see the impact of their work, not only in trial but in the system as a whole. They will become part of the coordinated team, will be sought out by team members and colleagues and will be able to engage the community more taking their role beyond the courtroom. Where rotation is necessary, the negative effects can be mitigated by staggering the timing of rotations and carefully selecting skilled and knowledgeable replacements.

⁸² See also, Laurie Anne Pearlman & Lisa McKay, *Understanding & Addressing Vicarious Trauma*, HEADINGTON INSTITUTE 19-20 (2008), http://www.headington-institute.org/files/vtmoduletemplate2_ready_v2_85791.pdf; *Compassion Fatigue/Vicarious Trauma*, OFFICE FOR VICTIMS OF CRIME TRAINING AND TECHNICAL ASSISTANCE CENTER, <https://www.ovcttac.gov/views/TrainingMaterials/dspCompassionFatigueTraining.cfm> (last visited Mar. 31, 2017).

⁸³ Convening a sexual assault task force to discuss the potential formation of a SART/MDT is an initial step. It takes some time to discuss and agree upon MOUs and confidentiality agreements. *What is a SART? SART TOOLKIT*, <https://ovc.ncjrs.gov/sartkit/about/about-sart.html> (last visited Mar. 4, 2017).

⁸⁴ See *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

⁸⁵ For various perspectives on SART development see *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

⁸⁶ Some jurisdictions may refer to SANEs or to sexual assault forensic examiners (FNEs). For the purposes of this publication, the authors have used the term SANE.

⁸⁷ Rebecca Campbell et al., *Adolescent Sexual Assault Victims and the Legal System: Building Community Relationships to Improve Prosecution Rates*, 50(1-2) AM J COMMUNITY PSYCHOL 141-54 (2011); Rebecca Campbell et al., *Prosecution of Adult Sexual Assault Cases: A Longitudinal Analysis of the Impact of a Sexual Assault Nurse Examiner Program*, 18(2) VIOLENCE AGAINST WOMEN 223-44 (2012). See *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

⁸⁸ *Violent Criminal Apprehension Program, Homicides and Sexual Assaults*, FEDERAL BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/wanted/vicap/homicides-and-sexual-assaults> (last visited June 15, 2017).

⁸⁹ See Recording by Jane Anderson, #Guilty: Identifying, Preserving, and Presenting Digital Evidence, <http://www.aequitasresource.org/trainingDetail.cfm?id=171> (recorded Oct. 20, 2016).

⁹⁰ International Association of Chiefs of Police, *Intelligence-Led Community Policing, Community Prosecution, and Community Partnerships*, COMMUNITY ORIENTED POLICING SERVICES, (2016) (study on community policing that provides insight into the assessment of police response, the necessity of working with community and criminal justice partners, and the importance of action steps to improve community safety).

⁹¹ See, e.g., Elaine Borakove, et al., *From Silo to System: What Make a Criminal Justice System Operate Like a System?* JUSTICE MANAGEMENT INSTITUTE (Apr. 2015), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/07/From-Silo-to-System-30-APR-2015_FINAL.pdf; Rolf Pendall, *Can Federal Efforts Advance Federal and Local De-Siloing*, URBAN INSTITUTE, 2 (May 17, 2013), <http://www.urban.org/sites/default/files/publication/23626/412820-Can-Federal-Efforts-Advance-Federal-and-Local-De-Siloing-Full-Report.PDF>.

⁹² TETT, *supra* note 53.

⁹³ *Id.* at 142.

⁹⁴ *Id.*

⁹⁵ Megan R. Greeson & Rebecca Campbell, *Sexual Assault Response Teams (SARTs): An Empirical Review of Their Effectiveness and Challenges to Successful Implementation*, 14(2) TRAUMA VIOLENCE ABUSE 83-95, 84 (Dec. 2012).

⁹⁶ Cases may also be multijurisdictional (*e.g.*, Indian Country where there can be concurrent tribal/federal jurisdiction).

⁹⁷ *See* PENDALL, *supra* note 91.

⁹⁸ *See, e.g.*, PENDALL, *supra* note 91 at 20.

⁹⁹ Janine Zweig & Martha Burt, *Effects of Interactions Among Community Agencies on Legal System Responses to Domestic Violence and Sexual Assault in STOP-Funded Communities*, 14(2) CRIM. JUST. POL'Y REV. 249-72 (2003).

¹⁰⁰ *See* Marilyn Strachan Peterson et al., *California SART Report: Taking Sexual Assault Response to The Next Level - Research Findings, Promising Practices & Recommendations*, CALIFORNIA CLINICAL FORENSIC MEDICAL TRAINING CENTER 101 (Jan. 2009), http://www.calcasa.org/wp-content/uploads/2010/01/SART-Report_08.pdf (highlighting the importance of the participation of SART members, particularly law enforcement and prosecutors, in community education and outreach efforts to encourage victim reporting and inspire trust in the criminal justice system).

¹⁰¹ Please refer to your state's specific ethics rules regarding public statements, in addition to reviewing the American Bar Association's professional standards for further guidance. *See* CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION (AM. BAR ASS'N, 4th ed. 2015).

¹⁰² Amanda J. Waters & Lisa Asbill, *Reflections on Cultural Humility*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Aug. 2013), <http://www.apa.org/pi/families/resources/newsletter/2013/08/cultural-humility.aspx> (last visited Mar. 19, 2017).

¹⁰³ WATERS & ASBILL, *supra* note 102.

¹⁰⁴ *See, e.g.*, NATIONAL CHILDREN'S ALLIANCE, STANDARDS FOR ACCREDITED Members 16-18 (2017).

¹⁰⁵ National Children's Alliance, *supra* note 104.

¹⁰⁶ *See, e.g.*, *A Prosecutor's Guide for Advancing Racial Equity*, VERA INSTITUTE OF JUSTICE, (March 2015), <https://www.vera.org/publications/a-prosecutors-guide-for-advancing-racial-equity>; and *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault*, DEPARTMENT OF JUSTICE (Dec. 2015), available at <https://www.justice.gov/opa/file/799366/download>. Although this assessment is important in all cases, it appears particularly relevant in the response to victims sexual and intimate partner violence.

¹⁰⁷ ZWEIG & BURT, *supra* note 99.

¹⁰⁸ *See, e.g.*, Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38(2) SOCIAL PROBLEMS 213-26 (May 1991); FRAZIERY & HANEY, *supra* note 44; SPOHN & TELLIS, *supra* note 44; Megan A. Alderden & Sarah Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18(5) VIOLENCE AGAINST WOMEN 525-51 (2012); Sharon Murphy et al., *Exploring Stakeholders' Perceptions of Adult Female Sexual Assault Case Attrition*, 3(2) PSYCHOL. VIOLENCE 172-84 (2013); Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases Frequently? Rape Survivors*

Seek Answers, REWIRE (Mar. 11, 2016), <https://rewire.news/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-seek-answers/>; PATTAVINA, MORABITO & WILLIAMS, *supra* note 19. Melissa Schaefer Morabito, et al., *It All Just Piles Up: Challenges to Victim Credibility Accumulate to Influence Sexual Assault Case Processing*, J. INTERPERSONAL VIOLENCE, 1-20 (2016).

¹⁰⁹ *The Sexual Assault Kit Initiative*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/about/> (last visited May 22, 2017); Report REBECCA CAMPBELL, ET AL., *supra* note 25; *Why the Backlog Exists*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited May 22, 2017).

¹¹⁰ *See, e.g., Id.*; David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14(4) SEXUAL ASSAULT REP. 49-64 (Mar./Apr. 2011), available at www.middlebury.edu/media/view/240951/original/.

¹¹¹ Prosecutors should work with experts to understand the theory underlying the neurobiology of trauma, although expert testimony on this topic may not be appropriate for trial. Contact AEQUITAS to discuss further at (202) 558-0040 or at info@aequitasresource.org.

¹¹² Prosecutors should also be aware of the availability of U Visas for victims of sexual violence. For more information and training opportunities on U Visas, see THE NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, <http://www.niwap.org> (last visited June 13, 2017).

¹¹³ Cassia Spohn & Jeffrey Spears, *The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions*, 13(4) JUSTICE QUARTERLY, 649-79 (1996).

¹¹⁴ REBECCA CAMPBELL, ET AL., *supra* note 25.

¹¹⁵ BEICHNER & SPOHN, *supra* note 14.

¹¹⁶ *See, e.g., Capitol Offense Police Mishandling of Sexual Assault Cases in the District of Columbia*, HUMAN RIGHTS WATCH (Jan. 24, 2013), <https://www.hrw.org/report/2013/01/24/capitol-offense/police-mishandling-sexual-assault-cases-district-columbia>.

¹¹⁷ *See, e.g.,* BEICHNER & SPOHN, *supra* note 14; *see also* SPOHN, BEICHNER & DAVIS-FRENZEL, *supra* note 11.

¹¹⁸ BEICHNER & SPOHN, *supra* note 14.

¹¹⁹ RESNICK, *supra* note 108.

¹²⁰ DEMPSEY, *supra* note 68 (citing Bill Gaston, 1st Assistant State's Attorney, Champaign County, Illinois).

¹²¹ There can be formal or informal adherence to these principles, ranging from written protocols to informal practices followed and passed down in the office.

¹²² *See, e.g., Thuthuzela: Turning Victims Into Survivors*, NAT'L PROSECUTING AUTHORITY OF S. AFR. (2009), https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf; *see also* Recording by Christopher Mallios & John Wilkinson, Ethical Considerations for Prosecutors in Sexual Violence Cases, <http://www.aequitasresource.org/trainingDetail.cfm?id=99> (recorded Aug. 2, 2013) (regarding considerations of prosecutorial immunity).

¹²³ *See Library*, AEQUITAS, <http://www.aequitasresource.org/library.cfm> (last visited May 18, 2017); (Statutory Compilations and Case Law Summaries); *See also State Law Database*, RAINN, <https://www.rainn.org/public-policy-action> (last visited May 18, 2017).

¹²⁴ With respect to recording statements, in the last several years, offices have adopted the use of video/audio recording to capture statements, including the use of body worn cameras. These can be powerful tools to capturing victim statements, however, some concerns around their use have been raised. *See, e.g., Police Body-Worn Cameras: Where Your State Stands*, URBAN INSTITUTE, <http://apps.urban.org/features/body-camera/> (last visited July 13, 2016); Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, OFFICE OF JUSTICE PROGRAMS, DIAGNOSTIC CENTER (2014), <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>; *Implementing a Body-Worn Camera Program Recommendations and Lessons Learned*, OFFICE OF COMMUNITY ORIENTED POLICING SERVICE & POLICE EXECUTIVE RESEARCH FORUM (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>; Strengthening CBP with the Use of Body-Worn Cameras, AMERICAN CIVIL LIBERTIES UNION (June 2014), https://www.aclu.org/sites/default/files/assets/13_10_25_aclu_one_pager_re_body-worn_cameras_for_cbp_final.pdf; John Wilkinson, *To Record or Not To Record: Use of Body-Worn Cameras During Police Response to Crimes of Violence Against Women*, 29 STRATEGIES IN BRIEF (2017), available at www.aequitasresource.org/library.cfm.

¹²⁵ If the reports accurately reflect what the officers observed or were told, no changes should be made, but sometimes a report will inaccurately paraphrase a witness's statements. Such inaccuracies may be the result of poor report-writing or the result of misunderstanding—the witness's misunderstanding of the question or the officer's misunderstanding of the answer. If a report later needs to be corrected for accuracy, a new statement should be taken with the reasons for the new statement clearly stated on the record.

¹²⁶ See [section 4.2-A-1](#) on working with experts on victim behavior and [Appendix F. Considerations for Working with Experts](#).

¹²⁷ Recognize corroborative evidence in reports, including observations and statements. Corroboration may include evidence of serial perpetration; other crimes, wrongs, or acts; evidence of threats or intimidation; evidence of planning (access, isolation, grooming, concealment of the crime).

¹²⁸ Be aware of intoxication and its impact on the police's investigation, *see* SCHULLER & STEWART, *supra* note 44; as well as during the prosecution and presentation of evidence, *see Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017) (sections on Criminalistics, Toxicology, and Alcohol-Facilitated Sexual Assault).

¹²⁹ *See Force and Consent Statutory Compilation and Case Law Digest*, AEQUITAS (Draft as of 2017) (available upon request).

¹³⁰ *See also Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017) (sections on Image Exploitation, and Witness Intimidation and Forfeiture by Wrongdoing).

¹³¹ *See* Conduct trauma-informed interview of the victim to reveal evidence of the crime.

¹³² *See* [Appendix H](#) for strategies for identifying and responding to victim and witness intimidation.

¹³³ *See, e.g.* ANDERSON, *supra* note 89; Jane Anderson & Supriya Prasad, *Prosecuting Image Exploitation* 15 STRATEGIES (Mar. 2015), available at www.Aequitasresource.org/library.cfm; *Police Body-Worn Cameras: Where Your State Stands*, URBAN INSTITUTE, <http://apps.urban.org/features/body-camera/> (last visited July 13, 2016); WHITE, *supra* note 124; OFFICE OF COMMUNITY ORIENTED POLICING SERVICE & POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124; AMERICAN CIVIL LIBERTIES UNION, *supra* note 124.

¹³⁴ *See, e.g.,* Riley v. California, 134 S. Ct. 2473, 2477 (2014) (holding a warrant was still required to search the contents of the cell phone belonging to an individual who has been arrested); State v. Diamond, A15-2075, 2017 WL 163710 (Minn. Ct. App. Jan. 17, 2017) (holding that the Fifth Amendment right against self-incrimination was

not violated when defendant was ordered to provide fingerprint to unlock cell phone). Please contact AEquitas for additional research and information and for sample search warrant affidavits at (202) 558-0040 or info@aequitasresource.org.

¹³⁵ *Social Media Evidence—How to Find It and How to Use It*, ABA SECTION ON LITIGATION (2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/aba-annual-2013/written_materials/15_1_social_media_evidence_authcheckdam.pdf. Please contact AEquitas for sample search warrant affidavits and additional resources at (202) 558-0040 or info@aequitasresource.org.

¹³⁶ Contact AEquitas at (202) 558-0040 or info@aequitasresource.org to further discuss privacy concerns related to victim information and property.

¹³⁷ *Statute of Limitations Statutory Compilation*, AEQUITAS & JOYFUL HEART FOUNDATION (forthcoming 2017).

¹³⁸ AEquitas, *Evidence of Other “Bad Acts” in Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions*, 31 STRATEGIES IN BRIEF (2017), available at www.aequitasresource.org/library.cfm.

¹³⁹ See, e.g., Sexual Assault Victims’ DNA Bill of Rights, CAL. PENAL CODE § 680; *Sexual Assault Kit Testing Initiatives and Non-investigative Kits*, OFFICE ON VIOLENCE AGAINST WOMEN (Jan. 2017), <https://www.justice.gov/ovw/page/file/928236/download>; *Victims’ Rights and Sexual Assault Kits*, NATIONAL CENTER FOR VICTIMS OF CRIME, <https://victimsofcrime.org/our-programs/dna-resource-center/untested-sexual-assault-kits/victims'-rights-and-sexual-assault-kits> (last visited May 21, 2017).

¹⁴⁰ See, e.g., Jenifer Markowitz, *A Prosecutor’s Reference - Medical Evidence and the Role of Sexual Assault Nurse Examiners in Cases Involving Adult Victims*, AEQUITAS (2010), available at www.aequitasresource.org/library.cfm; See also SAJI Lit Review Medical Evidence; Jenifer Markowitz, *Absence of Anogenital Injury in the Adolescent/Adult Female Sexual Assault Patient*, 13 STRATEGIES IN BRIEF (Sept. 2012), available at www.aequitasresource.org/library.cfm; see also *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

¹⁴¹ See e.g., *Sexual Assault Kit Tracking System*, QUETEL, <https://www.quetel.com/products/sexual-assault-kit-tracking-system/> (last visited June 13, 2017); see also *Navigating Notification: A Guide to Re-engaging Sexual Assault Survivors Affected by the Untested Rape Kit Backlog*, JOYFUL HEART FOUNDATION (2016), available at <http://www.endthebacklog.org/information-survivors/victim-notification>; *12 Key Questions to Guide Victim Notification Protocols*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/resources/docs/SAKI-Victim-Notification-Guide.pdf>; Rebecca Campbell, Giannina Fehler-Cabral & Sheena Horsford, *Creating a Victim Notification Protocol for Untested Sexual Assault Kits: An Empirically Supported Planning Framework*, J. OF FORENSIC NURSING (2017).

¹⁴² *Investigating Sexual Assaults: Model Policy*, INT’L ASS’N OF CHIEFS OF POLICE (2005); *Improving Police Response to Sexual Assault*, HUMAN RIGHTS WATCH (2013), https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf.

¹⁴³ In cases of intimidation, detectives can document incidents and notify prosecutors. In the rare circumstance where additional information is disclosed by the victim, detectives should document the statement and review it with the prosecution so that where discovery rules require, it is passed on to the defense.

¹⁴⁴ Check your individual jurisdiction’s rules of professional responsibility. See also *Berger v. United States*, 295 US 78, 88 (1935); *National Prosecution Standards*, NAT’L DISTRICT ATT’Y ASS’N (3d Ed., 2010); MODEL RULES OF PROFESSIONAL CONDUCT (AM. BAR ASS’N); CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION (AM. BAR ASS’N, 4th ed. 2015).

¹⁴⁵ See, e.g., BEICHER & SPOHN, *supra* note 14.

¹⁴⁶ Training both law enforcement and prosecutors in the core competencies identified in [Appendix B](#). and fostering multidisciplinary collaboration can help with appropriate decision-making.

¹⁴⁷ DEMPSEY, *supra* note 68.

¹⁴⁸ *Id.*

¹⁴⁹ See *Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a09 (See definition of “Rape”).

¹⁵⁰ That is, assuming that prosecution is in the public interest. I take it as given that a “prosecutor may...consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.” STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (AM. BAR ASS’N. 3d ed. 1993) (para. 3-3.9(b)). In cases where prosecutors decline to pursue charges on grounds of supposed evidential insufficiency, however, the further question of the public interest never arises. In addition, this underscores the importance of well-trained, experienced prosecutors who will not be analyzing the evidence through the lens of bias and myth. DEMPSEY, *supra* note 68 (citing ANDREW ASHWORTH & MICHAEL REDMAYNE, *THE CRIMINAL PROCESS* (OUP 4th ed. 2010)).

¹⁵¹ DEMPSEY, *supra* note 68 at 6 (citing *R. (on the application of Gujra) v Crown Prosecution Service*, [2013] 1 A.C. 484 (Baroness Hale)).

¹⁵² DEMPSEY, *supra* note 68 at 6.

¹⁵³ DEMPSEY, *supra* note 68 at 6; OWENS, ET AL., *supra* note 24 at 9.

¹⁵⁴ Prior arrests and convictions should be reviewed for similarities in perpetration and other relevant facts and circumstances. Criminal histories may also provide information about the suspect’s presence or absence from the jurisdiction, as well as a timeline of convictions or police contacts which may be helpful in cold cases of sexual assault.

¹⁵⁵ See *Garrity v. New Jersey*, 385 U.S. 493 (1967) (administratively compelled statements made by officers during internal affairs investigation cannot be used against them in subsequent criminal trial).

¹⁵⁶ See *Bruton v. United States*, 39 U.S. 123 (1968).

¹⁵⁷ See *574 Training Key*, INTERNATIONAL ASSOCIATIONS OF CHIEFS OF POLICE (2004), <http://www.theiacp.org/portals/0/pdfs/574PretextPhoneCalls.pdf>; *Sexual Assault Investigation Ideas: A Series of the Sexual Violence Justice Institute, Pretext or Covert Call*, MINNESOTA COALITION AGAINST SEXUAL ASSAULT, <http://www.mncasa.org/assets/PDFs/website%20pretext%20call.pdf>.

¹⁵⁸ See *State v. K.W.*, 70 A.3d 592 (N.J. 2013) (upholding suppression of recorded pretext phone call for failure to strictly comply with the requirements of state Wiretap Act).

¹⁵⁹ Webinar recording by Christopher Mallios, *Overcoming the Consent Defense: Identifying, Investigating, and Prosecuting the Non-Stranger Rapist*, available at <http://www.aequitasresource.org/trainingDetail.cfm?id=107> (recorded on Apr. 18, 2014).

¹⁶⁰ Vitauts M. Gulbis, *Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense*, 31 A.L.R.4th 120 (2017).

¹⁶¹ Murphy et al., *supra* note 111.

¹⁶² ANDERSON, *supra* note 89.

¹⁶³ See Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53(5/6) SEX ROLES 385 (Sept. 2005); ELLISON & MUNRO, *supra* note 63; Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 Brit. J. Crim. 363 (2009); Kim Lonsway & Lousie Fitzgerald, *Rape Myths in Review*, 18 PSYCHOL. WOMEN Q. 133-64 (1994); Jennifer Gentile Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, Nat'l District Att'y Ass'n (2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

¹⁶⁴ See, e.g., *Berger*, 295 U.S. at 88.

¹⁶⁵ LaFave, W. R., Israel, J. H., King, N. J. & Kerr, O. S. (2014). *Pretrial Release Procedures*. Criminal Procedure, 4, § 12.1(b) (2d ed.); LaFave, W. R., Israel, J. H., King, N. J. & Kerr, O. S. (2014). *Pretrial Release Procedures*. Criminal Procedure, 6, § 22.3 (a) (3d ed.).

¹⁶⁶ *Id.*

¹⁶⁷ See section on charging decisions, *supra*, and counter defense arguments that play into myths.

¹⁶⁸ Support for this argument may include the defendant's lengthy or serious criminal history (including failure to appear); violation of no-contact orders; and violation of probation or parole, suggesting that a defendant will disregard court orders to appear.

¹⁶⁹ See, e.g., *Why Testing Rape Kits Matters*, END THE BACKLOG, <http://endthebacklog.org/backlog/why-testing-matters> (last visited May 21, 2017); *Test Rape Kits. Stop Serial Rapists*, END THE BACKLOG, <http://endthebacklog.org/backlog-why-rape-kit-testing-important/test-rape-kits-stop-serial-rapists> (last visited May 21, 2017).

¹⁷⁰ Studies show a "'crossover effect' of sex offenders admitting to multiple victims and offenses atypical of criminal classification. Specifically, studies have shown that rapists often sexually assault children and incest offenders often sexually assault children both within and outside their family. These findings are consistent among populations (e.g., community, prison, parole, probation) and methodologies (e.g., guaranteed confidentiality, polygraph testing). This section reviews the evidence of crossover offending, which challenges the validity of traditional sex offender typologies (those that are based on a known victim type)." Dominique Simons, *Chapter 3: Sex Offender Typologies*, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE, https://www.smart.gov/SOMAPI/sec1/ch3_typology.html (last visited June 9, 2017) (internal citations omitted).

¹⁷¹ Jacquelyn C. Campbell, *Danger Assessment* (2001) www.ncdsv.org/images/dangerassessment.pdf (forced sex has been found to be a lethality indicator when conducting risk assessments of domestic violence victims).

¹⁷² "Sexual assault occurred repeatedly within these intimate relationships—almost 80 percent of sexually assaulted women reported more than one incident of forced sex." Lauren Taylor & Nicole Gaskin-Laniyan, *Sexual Assault in Abusive Relationships*, NAT'L INST. OF JUST., www.nij.gov/journals/256/sexual-assault.html (last visited June 2, 2017 (referencing McFarlane, J., and A. Malecha, *Sexual Assault Among Intimates: Frequency, Consequences, and Treatments* (2005), www.ncjrs.gov/pdffiles1/nij/grants/211678.pdf).

¹⁷³ Jennifer G. Long, & Jenifer Markowitz, *Intimate Partner Sexual Violence: Prosecution and Medical Issues in VIOLENCE AGAINST WOMEN: CONTEMPORARY EXAMINATION OF INTIMATE PARTNER VIOLENCE* (2015).

¹⁷⁴ FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (N.Y. Free Press 1985); D.E.H. RUSSELL, RAPE IN MARRIAGE (Ind. U. Press. 1990).

¹⁷⁵ In the event the victim objects to the issuing of a protection order, see Jennifer Long, Christopher Mallios & Sandra Tibbetts Murphy, *Model Policy for Prosecutors and Judges on Imposing, Moving, and Lifting Criminal No-Contact Orders*, AEQUITAS (2010), available at www.aequitasresource.org/library.cfm.

¹⁷⁶ Develop a strategy where the victim and offender live or receive care in the same group home or facility.

¹⁷⁷ *Victim Privilege Statutes by Practitioner*, AEQUITAS (2011) (available upon request). See also *State Law Database*, RAINN, <https://www.rainn.org/public-policy-action> (last visited May 18, 2017).

¹⁷⁸ Recording by Teresa Garvey, Criminal Meets Civil: Coordinating Our Response, <http://www.aequitasresource.org/trainingDetail.cfm?id=127> (recorded Nov. 30, 2015); see also NATIONAL CRIME VICTIM LAW INSTITUTE, http://law.lclark.edu/centers/national_crime_victim_law_institute/ (last visited May 21, 2017).

¹⁷⁹ See Jane Anderson & Meg Garvin, Safeguarding Victim Privacy in a Digital World: Ethical Considerations for Prosecutors, <http://www.aequitasresource.org/trainingDetail.cfm?id=178> (recorded on May 18, 2017).

¹⁸⁰ Persons with disabilities especially those with communication and cognitive difficulties, are particularly vulnerable to the harms resulting from defense delay tactics.

¹⁸¹ Vitauts M. Gulbis, *Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense*, 31 A.L.R.4th 120 (2017).

¹⁸² *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS (Mar. 2014), available at www.aequitasresource.org.

¹⁸³ Recognize that caretakers or employees of agencies caring for individual with disabilities may engage in intimidation.

¹⁸⁴ *Id.*

¹⁸⁵ THE NEUROBIOLOGY OF SEXUAL ASSAULT, *supra* note 60.

¹⁸⁶ See *The Prosecutors' Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm.

¹⁸⁷ *Safety Net Project*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/projects/safetynet.html> (last visited May 21, 2017).

¹⁸⁸ See ANDERSON, *supra* note 162.

¹⁸⁹ See ANDERSON, *supra* note 179.

¹⁹⁰ KRISTIANSSON & WHITMAN-BARR, *supra* note 8. For information on how law enforcement's trauma-informed interviewing practices can positively impact the victim's experience in the criminal justice process, see Patrick Meacham, Trauma Informed Investigation of Adult Sexual Assault Cases, presented at West Virginia University (Apr. 20-21, 2016) (citing D. Patterson, *The Impact of Detective's Manner of Questioning of Rape Victims' Disclosure*, 17(11) VIOLENCE AGAINST WOMEN (2012)).

¹⁹¹ THE NEUROBIOLOGY OF SEXUAL ASSAULT, *supra* note 60; Rebecca Campbell et al., *Preventing the “Second Rape:” Rape Survivors’ Experiences with Community Service Providers*, 16(2) J. INTERPERSONAL VIOLENCE 1239-59 (Dec. 2001), <http://jiv.sagepub.com/content/16/12/1239.short?rss=1&ssource=mfc>. (Majority of rape survivors who reported their assault to the legal or medical system did not receive needed services. This study suggests that the trauma of rape extends far beyond the assault itself, as negative community responses can significantly elevate distress); Courtney E. Ahrens, et al., *Deciding Whom to Tell: Expectations and Outcomes of Rape Survivors’ First Disclosures*, 31 PSYCHOL. WOMEN 38-49 (2007) (Qualitative analysis revealed that nearly 75% of first disclosures were to informal support providers (friends and family), and over one third of the disclosures were not initiated by the survivors themselves. Survivors who disclosed to informal support providers had a more positive experience and when survivors sought out formal support providers had more negative experiences).

¹⁹² For implications to victim confidentiality and privilege when communications to victim advocate are made in front of third parties, see Walking a tight rope Viktoria Kristiansson, *Walking A Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions, Parts I and II*, 9/10 STRATEGIES (May 2013), available at www.aequitasresource.org.

¹⁹³ Where possible, have a colleague conduct the mock cross-examination to preserve the relationship.

¹⁹⁴ Erin S. Gaddy, *Why the Abused Should Not be the Accused*, 1(8) THE VOICE (2006), http://www.ndaa.org/pdf/the_voice_vol_1_no_8_2006.pdf. (summarizing the impact of arresting victims).

¹⁹⁵ See *The Prosecutors’ Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm; *The Prosecutors’ Resource on Crawford*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm (another tool that can be used to introduce a witness’s or victim’s out of court statements where the defendant has procured their unavailability for trial in order to prevent them from testifying); YOU HAVE OPTIONS PROGRAM, SEXUAL ASSAULT REPORTING, <http://www.reportingoptions.org> (last visited May 22, 2017) (focuses on supporting victims in a way that is believed to ultimately increase their ability to participate in the criminal justice system).

¹⁹⁶ The Department of Justice, Office on Violence Against Women (OVW) deems it a sufficiently dangerous practice that the routine arrest of victims may result in a loss of federal funding. Two of the primary grant programs under the Violence Against Women Act to improve criminal justice response to intimate partner violence have identified forced testimony by victims of domestic violence against their abuser as an “activit[y] that compromise[s] victim safety and recovery.” See *OVW Fiscal Year 2016 STOP Formula Grant Solicitation*, OFFICE ON VIOLENCE AGAINST WOMEN 5-6 (Apr. 2016), <https://www.justice.gov/ovw/file/839466/download>; *OVW Fiscal Year 2016 Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program*, (also known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program), OFFICE ON VIOLENCE AGAINST WOMEN 7-8 (Jan. 2016), <https://www.justice.gov/ovw/file/811611/download> (Disapproving “[p]rocedures that would penalize victims of violence for failing to testify against their abusers or impose other sanctions on victims. Instead, procedures that provide victims with the opportunity to make an informed choice about whether to testify are encouraged”). These same considerations weigh against charging victims with perjury or false swearing as a result of recantation on the stand.

¹⁹⁷ See, *The Sexual Assault Kit Initiative*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/about/> (last visited May 22, 2017); *Why Testing Rape Kits Matters*, END THE BACKLOG, <http://endthebacklog.org/backlog/why-testing-matters> (last visited May 21, 2017); *Test Rape Kits. Stop Serial Rapists*, END THE BACKLOG, <http://endthebacklog.org/backlog-why-rape-kit-testing-important/test-rape-kits-stop-serial-rapists> (last visited May 21, 2017).

¹⁹⁸ *Id.*

¹⁹⁹ See section, *infra*, on [Introducing evidence of other crime and bad acts where relevant](#).

²⁰⁰ This section has been adapted from two AEQUITAS resources: Teresa M. Garvey, *Witness Intimidation: Meeting the Challenge*, AEQUITAS (2013), available at www.aequitasresource.org/library.cfm; and *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS (March 2014), available at www.aequitasresource.org/library.cfm. These resources provide strategies that can be employed by everyone involved in the criminal justice system throughout the investigation and prosecution of a case, as well as during post-conviction incarceration and supervision, to prevent intimidation and to respond effectively when it occurs. The monograph emphasizes the benefits of a cooperative and collaborative approach to the problem. See also [Appendix H. Witness Intimidation Checklist](#).

²⁰¹ See, e.g., FLA. STAT. ANN. § 741.29(6)

²⁰² Scalzo, *supra* note 61 at 8.

²⁰³ Many experts do not prepare reports. If a report is not prepared, provide the defense should with a summary of the expert's proposed testimony.

²⁰⁴ Contact AEQUITAS for sample motions to introduce expert testimony at (202) 558-0040 or at info@aequitasresource.org.

²⁰⁵ See, e.g., FED. R. EVID. 702.

²⁰⁶ *Daubert v. Merrell Dow, Pharmaceuticals*, 509 U.S. 579 (1993); *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); Jennifer G. Long, *Introducing Expert Testimony in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATT'Y ASS'N (Aug. 2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

²⁰⁷ You will also want to prepare the victim in jurisdictions which utilize depositions in criminal trials.

²⁰⁸ See [Appendix F. Considerations for Working with Experts](#); LONG, *supra* note 206; *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017).

²⁰⁹ *Victim Behavior Case Law Digest*, AEQUITAS (2011) (available upon request from AEQUITAS); LONG, *supra* note 206.

²¹⁰ See also David R. Englert, Ashleigh Diserio & Kate M. Ryan, *The Prosecutor's Guide to Mental Health Disorders*, 1(10) THE VOICE (2007), http://www.ndaa.org/pdf/the_voice_vol_1_no_10_2007.pdf.

²¹¹ See, e.g., *Testimony by Experts*, N.J. R. EVID. 702; *Basis of Opinion Testimony by Experts*, N.J. R. EVID. 703.

²¹² ELLISON & MUNRO, *supra* note 163; ELLISON & MUNRO, *supra* note 63.

²¹³ Jenifer Markowitz, *Absence of Anogenital Injury in the Adolescent/Adult Female Sexual Assault Patient*, 13 STRATEGIES IN BRIEF (Oct. 2012), available at www.aequitasresource.org/library.cfm. ("How the patient is examined impacts reported injury rates in the literature"). See also Iain McLean et al., *Female Genital Injuries Resulting From Consensual and Non-Consensual Vaginal Intercourse*, 204 FORENSIC SCIENCE INTERNATIONAL 27-33 (2011); N.F. Sugar, D.F. Fine, & L.O. Eckert, *Physical Injury After Sexual Assault: Findings of a Large Case Series*, 190 AMER. J. OBSTETRICS AND GYN. 71-76 (2004); Catherine White & Iain McLean, *Adolescent Complaints of Sexual Assault: Injury Patterns in Virgin and Non-Virgin Groups*, 13 J. CLINICAL FORENSIC MED. 172-80 (2006).

²¹⁴ ANDRE ROSAY & TARA HENRY, FINAL REPORT: ALASKA SEXUAL ASSAULT NURSE EXAMINER STUDY (Oct. 2008), <http://www.ncjrs.gov/pdffiles1/nij/grants/224520.pdf> (The study of incapacitated patients revealed that 38% of incapacitated patients had genital injury and 44% had nongenital injury. Such patients were statistically significantly less likely to have genital and nongenital trauma than patients who were not incapacitated at the time of the assault. Incapacitated patients were also less likely to have genital bruising and lacerations and less likely to have injury to their fossa, fourchette, vaginal walls, anus, and rectum than those not incapacitated.); see also Dean

Kilpatrick, et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study*, NAT'L CRIME VICTIMS RES. & TREATMENT CTR. (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> (In a study of 5,001 women, victim injury was more common in cases of forcible rape (52%) than in drug-facilitated or incapacitated rape (30%)).

²¹⁵ *Id.*

²¹⁶ See *Commonwealth v. Miner*, 562 Pa. 46, 753 A.2d 225 (2000); *State v. Presley*, No. 02AP-1354, 2003 WL 22681425 (Ohio Ct. App. Nov. 13, 2003); *State v. McMillian*, NO. C-950523, 1996 WL 233866 (Ohio Ct. App. May 8, 1996).

²¹⁷ Jennifer G. Long, Viktoria Kristiansson & Charlene Whitman-Barr, *Establishing Penetration in Sexual Assault Cases*, 24 STRATEGIES IN BRIEF (Jan. 2015), available at www.aequitasresource.org/library.cfm. In states that have statutes that do not specifically enumerate the requirement that penetration need only be "slight," one must consult the relevant case law for this element; treatises also provide examples and further guidance. No jurisdiction's law requires ejaculation. "Slight" penetration usually means entry of the labia majora. In the following states the fact that no more than slight penetration is required is established in case law: Arizona, Florida, Georgia, Indiana, Maine, Massachusetts, Mississippi, Texas, and Virginia. *Rape and Sexual Assault Analyses and Laws*, AEQUITAS (2014) (available upon request); see also, N.J. STAT. ANN. § 2C: 14-1(c) (which doesn't use the term however slight but clearly states that a specific depth of penetration is not required: "The depth of the insertion shall not be relevant as to the question of commission of the crime"). See, e.g., *State v. Torres*, 105 Ariz. 361 (1970); *Richards v. State*, 738 So.2d 415 (Fla. Dist. Ct. App. 2011); *State v. Pratt*, 309 A.2d 864 (Me. 1973). See, e.g., DEL. CODE ANN. tit. 11, § 761 (g)(1) (2011); 33 LAWS OF PUERTO RICO ANN. § 4771 (2011).

²¹⁸ "Vaginal penetration occurs, under the law, when the penis, other body part, or object enters the vulva or between the labia majora, which is the outermost part of the female genital organ." LONG, KRISTIANSSON & WHITMAN-BARR, *supra* note 217 (citing James L. Rigelhaupt, Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R. 3d 163, § 3 (1977)). See Markowitz, *supra* note 140.

²¹⁹ See S. Kerrigan, *The Use of Alcohol to Facilitate Sexual Assault*, 22(1) FORENSIC SCI. REV. (Jan. 2010); ABBEY ET AL., *supra* note 61; SCALZO, *supra* note 61.

²²⁰ Heather D. Flowe et al., *Alcohol and Remembering A Hypothetical Sexual Assault: Can People Who Were Under The Influence of Alcohol During The Event Provide Accurate Testimony?*, 24(8) MEMORY 1-20 (Sep. 2016).

²²¹ *Id.*

²²² See Jennifer Long, Charlene Whitman-Barr & Viktoria Kristiansson, *Alcohol and Drug-Facilitated Sexual Assault: A Survey of the Law*, STATUTES IN REVIEW (August 2016), available at www.aequitasresource.org/library.cfm; see also *Consent Laws*, RAINN, <https://apps.rainn.org/policy/compare/consent-laws.cfm> (last visited May 18, 2017).

²²³ Flowe et al., *supra* note 220 (finding that peripheral memories of the assault were less accurate than central details).

²²⁴ For a discussion of considerations related to the collection of blood samples in alcohol and drug-facilitated sexual assaults, see *A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents* 2d ed., OFFICE ON VIOLENCE AGAINST WOMEN (2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf> ("There is some controversy related to if and when to collect toxicology samples and test patients for drug and/or alcohol use. Some jurisdictions only collect these samples if drug-facilitated sexual assault is suspected or if a medical need arises. They seek to minimize patients' discomfort and avoid collecting unnecessary items. Other jurisdictions collect toxicology samples from every patient (with permission) and analyze these samples as case facts and jurisdictional policy dictate. In addition to cases of suspected drug-facilitated assault, some jurisdictions may request a toxicology sample if there is indication that patients voluntarily used drugs and/or alcohol prior to the

assault. One rationale for such a policy is that prosecutors will want all information on drug and alcohol use to prepare for the case. When developing jurisdictional policy about when and if to collect toxicology samples, involved professionals should consider the perspective of patients and the criminal justice system and make thoughtful, victim-centered decisions.”).

²²⁵ See Jane Anderson & Kaofeng Lee, *The Internet and Intimate Partner Violence: Technology Changes, Abuse Doesn't*, 16 STRATEGIES (Jan. 2017), available at www.aequitasresource.org/library.cfm.

²²⁶ IACP Center for Social Media, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, <http://www.iacpsocialmedia.org/resources/tools-tutorials/law-enforcement-investigative-guides/> (last visited May 22, 2017).

²²⁷ Anderson & Garvin, *supra* note 179.

²²⁸ ANDERSON, *supra* note 162.

²²⁹ 132 S.Ct. 2221 (2012).

²³⁰ Teresa M. Garvey, *Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford*, 11 STRATEGES (June 2013), available at www.aequitasresource.org/library.cfm.

²³¹ *Id.*

²³² See section, *supra*, on preventing and responding to witness intimidation.

²³³ AEquitas has sample motions on file and available upon request to support prosecutors and is also able to provide research and peer review of motions. Contact AEquitas (202) 558-0040 or info@aequitasresource.org.

²³⁴ Rape Shield is typically a motion the defense is required to file if they intend to introduce evidence of the victim's sexual history. See Michelle Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002); Heather D. Flowe et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations*, 31 LAW & HUMAN BEHAVIOR 159 (Apr. 2007); Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013); AEquitas has developed a number of rape shield resources as well, including a statutory compilation and case law digest, available upon request. Prosecutors should also consider appellate challenges and legislative reform regarding prior and subsequent activity with the defendant, given the prevalence of nonstranger sexual assault.

²³⁵ *Statutory Compilation of Rape Shield Laws*, AEQUITAS (Feb. 2013); *Case Law Digest on Rape Shield*, AEQUITAS (Feb. 2013); and *Rape Shield Statutes*, AEQUITAS (Feb. 2013)(chart of the various elements required in rape shield laws across the united states) (all resources available upon request).

²³⁶ Sexual history and behavior are umbrella terms in rape shield jurisprudence covering numerous examples of specific evidence deemed related to a victim's sexual activity. Please check your jurisdiction's specific rules and law for additional information.

²³⁷ FED. R. EVID. 412.

²³⁸ *E.g.*, witnesses to testify as to other crimes, wrongs or acts. FED. R. EVID. 404(b).

²³⁹ *Portillo v. State*, 211 So.3d 1135 (Fla. Dist. Ct. App. 2017).

²⁴⁰ See AEquitas, *Evidence of Other "Bad Acts": In Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions*, 31 STRATEGIES IN BRIEF (2017), available at www.aequitasresource.org/library.cfm;

Untested Evidence in Sexual Assault Cases, NATIONAL INSTITUTE OF JUSTICE, <https://nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx> (last visited May 22, 2017); *Why Testing Rape Kits Matters*, END THE BACKLOG, <http://endthebacklog.org/backlog/why-testing-matters> (last visited May 21, 2017).

²⁴¹ Prosecutors should check their jurisdiction’s law to determine the categories of other acts evidence provided in their rules of evidence (or other statutory provisions) and how those categories, and the permissible purposes for which the evidence may be used, have been analyzed by the courts.

²⁴² The listed purposes are not exclusive; generally, any legitimate issue relevant to proof of the crime or of the defendant’s guilt (*e.g.*, evidence of consciousness of guilt) can be a permissible purpose.

²⁴³ *Dowling v. United States*, 493 U.S. 342 (1990), held that the Fifth Amendment’s protection against double jeopardy did not prohibit the prosecution from introducing evidence of a crime for which the defendant was acquitted. *See also* *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977), (holding that FED. R. EVID. 404(b) is an inclusionary rule, permitting evidence of prior drug acquittal to prove knowledge and intent in subsequent prosecution). Many jurisdictions bar such evidence of acquittals, however. *See State v. J.M., Jr.*, 137 A.3d 490 (N.J. 2016) (holding that evidence of crime for which defendant was acquitted may not be admitted at trial for subsequent crime). Even if evidence of an act for which the defendant is acquitted is admissible, it may be necessary for the court to permit the defendant to introduce evidence that the charge resulted in an acquittal.

²⁴⁴ Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Nebraska, Oklahoma, and Wisconsin allow propensity evidence in sexual violence cases generally. Colorado has adopted a relaxed standard for admission of evidence of other sex crimes for purposes other than propensity. Michigan, Missouri, Texas, Utah, and Virginia allow evidence of propensity only in cases of child sexual abuse. Alaska, California, Illinois, Louisiana, Michigan, and Wisconsin allow propensity evidence in domestic violence cases. *See generally*, Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Domestic Violence Cases*, 47 SANTA CLARA L. REV. 157 (2007). For further information on jurisdiction-specific issues contact AEQUITAS for technical assistance.

²⁴⁵ *Supra* note 244.

²⁴⁶ *See* FED. R. EVID. 403.

²⁴⁷ Some jurisdictions require “clear and convincing” evidence of the other act; some require a preponderance of the evidence; some require no specific quantum of evidence.

²⁴⁸ *See, e.g.*, *State v. Jones*, 450 S.W.3d 866, 898-99 (Tenn. 2014) (discussing the distinction between crimes with similar characteristics and “signature” crimes); *compare State v. Sempsey*, 358 A.2d 212 (N.J. Super. App. Div. 1977) (allowing evidence of other rape where in both cases the attack occurred at night; the defendant had previously worked in the victim’s apartment; the victim’s eyes were covered with tape; the assailant wore peculiar head gear, a dark jacket and pants; the assailant possessed a gun; the assailant instructed the victims to count when he left or he would shoot; the assailant smelled of grease, was unable to obtain an erection and forced the victims to perform oral sex) *with State v. Thang*, 41 P.3d 1159 (Wash. 2002) (holding that numerous similarities between crimes were insufficiently distinctive to admit evidence on issue of identity).

²⁴⁹ *The Prosecutors’ Resource on Crawford*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm

²⁵⁰ *The Prosecutors’ Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at www.aequitasresource.org/library.cfm.

²⁵¹ See Recording by Viktoria Kristiansson & Kathryn Walker, Prosecuting Cases Involving Victims with Developmental Disabilities: A Focus on Sexual Assault, <http://www.aequitasresource.org/trainingDetail.cfm?id=120> (recorded May 29, 2015).

²⁵² C Palmer Gene Vance II, Madonna E. Schueler, *Ten Tips for Developing Your Case Theme*, 31(5) GP SOLO (Sept./Oct. 2014), http://www.americanbar.org/publications/gp_solo/2014/september-october/ten_tips_developing_your_case_theme.html.

²⁵³ Absence of consent is an element of certain sexual assault offenses in some jurisdictions; in others consent is an affirmative defense that must be raised by the defense and disproved by the state. The defense may be codified as part of the criminal code pertaining to sex crimes or may be codified in general provisions applicable to the code as a whole. Contact AEquitas for additional information on consent laws across the United States.

²⁵⁴ See [Appendix F. Considerations for Working with Experts](#); [Appendix G. Stages of Acute Alcohol Influence/Intoxication](#); and SCALZO, *supra* note 61.

²⁵⁵ See, e.g., *Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers*, AMERICAN PROSECUTOR RESEARCH INSTITUTE 8 (July 2003), http://www.ndaa.org/pdf/toxicology_final.pdf; SCALZO, *supra* note 61.

²⁵⁶ *Alcohol Alert: Alcohol and Women*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/aa10.htm> (last visited Aug. 21, 2016); M. Frezza et al., *High blood alcohol levels in women: The role of decreased gastric alcohol dehydrogenase activity and first-pass metabolism*, 322(2) THE NEW ENGLAND J. OF MEDICINE 95-99 (1990).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Aaron M. White, *What Happened? Alcohol, Memory Blackouts and the Brain*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (July 2004), <https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> (last visited June 15, 2017).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Marlene A. Attardo, Annotation, *Defense of Mistake of Fact as to Victim's Consent in Rape Prosecution*, 102 A.L.R. 5th 447 (2002).

²⁶⁶ *Id.* at 1.

²⁶⁷ *Id.*

²⁶⁸ See e.g., *United States v. Goodman*, 70 M.J. 396 (C.A.A.F. 2011).

²⁶⁹ To the extent possible, protect victim privacy where injuries are present on genitalia or other intimate body parts; restrict photographs to the injury itself and limit full body photographs.

²⁷⁰ CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION, Standard 3-3.2 (AM. BAR ASS'N, 4th ed. 2015).

²⁷¹ CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION, Standard 3-7.2, 7.3 (AM. BAR ASS'N, 4th ed. 2015).

²⁷² See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (July 2003).

²⁷³ See, e.g., *Withdrawal of Plea of Guilty or Nolo Contendere*, PA.R.CRIM.P. RULE 591.

²⁷⁴ See, e.g., *Commonwealth v. Rodriguez*, 461 Mass. 256 (2012).

²⁷⁵ NCVLI's Victim Law Library, NCVLI, http://law.lclark.edu/centers/national_crime_victim_law_institute/professional_resources/ncvli_library/ (last visited June 15, 2017).

²⁷⁶ Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES 6 (2010), www.aequitasresource.org/library.cfm.

²⁷⁷ *Id.*

²⁷⁸ In jurisdictions where this is permitted, allow panelists the opportunity of answering questions in questionnaire and discussing in open court with parties present, but outside the presence of the panel. See Nat'l Crim. Victim Law Inst., *Protecting the Rights of Survivors When They Are Called to Participate in Jury Service* (Nov. 2014), <https://law.lclark.edu/live/files/18336-final-version-2victim-law-position-paperoregon>.

²⁷⁹ See e.g., *State v. Delgado*, 223 Wis.2d 270 (1999) (holding juror's failure to disclose her sexual assault as a child supported a finding of inferred bias).

²⁸⁰ *Batson v. Kentucky*, 476 U.S. 79 (1986).

²⁸¹ If possible, have someone assist in note taking during *voir dire*. This will allow the prosecutor to have more time engaging with the jury and less time noting juror numbers and your thoughts about that juror.

²⁸² If the witness was impaired by alcohol, use caution if your victim, whom you want the jury to believe, was similarly impaired. If the victim was drinking but able to remember significant details, it may be dangerous to suggest a defense witness cannot be believed because the witness was drinking.

²⁸³ Whether an expert can or cannot testify to certain types of statistics will vary by state. See *Victim Behavior Case Law Digest*, AEQUITAS (2011) (available upon request from AEQUITAS); LONG, *supra* note 206.

²⁸⁴ Teresa M. Garvey, *Making it Stick: Protecting the Record for Appeal* 12 STRATEGIES 1 (Apr. 2012), available at www.aequitasresource.org/library.cfm.

²⁸⁵ In some jurisdictions, charges on lesser-included offenses must be given even over defense objection based on strategic considerations (*i.e.*, where the defense prefers the jury to decide the case on an all-or-nothing basis, with no option for a compromise verdict). See, e.g., *People v. Anderson*, 141 Cal. App. 4th 430 (Cal. Ct. App. 2006); *State v. Simms*, 369 N.J. Super. 466 (N.J. Super. Ct. App. Div. 2004). See also, Michael Hoffheimer, *The Future of Constitutionally Required Lesser Offenses*, 67 U. OF PITT. L. REV. 585 (2006).

²⁸⁶ Either a written or oral statement—or both—should be acceptable.

²⁸⁷ *Grantees*, TA2TA, <https://www.ta2ta.org/grantees.html> (last visited June 11, 2017).

²⁸⁸ LONG & NUGENT-BORAKOVE, *supra* note 8 at 4.

²⁸⁹ E.A. Walker et al., *Does the Study of Victimization Revictimize the Victims?*, 19(6) GEN. HOSP. PSYCHIATRY 403-10 (1997).

²⁹⁰ For tools and tips on drafting memorandum of understanding for partners in a SART, see *Protocols and Guidelines for Sexual Assault Response Teams (SART)*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, <http://www.nsvrc.org/projects/sart-protocols> (last visited Mar. 12, 2017).

²⁹¹ Rebecca Campbell et al., *Sexual Assault Response Team (SART) Implementation and Collaborative Process: What Works Best for the Criminal Justice System?*, U.S. DEP'T OF JUST. (Aug. 2013).

²⁹² GREESON & CAMPBELL, *supra* note 95.

²⁹³ Elaine Nugent-Borakove, *Testing the Efficacy of SANE/SART Programs: Do They Make a Difference in Sexual Assault Arrest & Prosecution Outcomes?* (2006); see also Anne Wolbert Burgess et al., *SANE/SART Services for Sexual Assault Victims: Policy Implications*, 1 VICTIMS & OFFENDERS 205-12 (2006).

²⁹⁴ These promising practices were excerpted from Peterson et al., *supra* note 100.

²⁹⁵ Where possible, regularly send the same point person to ensure a fluid and coordinated response. See, e.g., Jennifer Cole, *Victim Confidentiality on Sexual Assault Response Teams (SART)*, 26(2) J. INTERPERS. VIOLENCE 360-76 (Jan. 2011)

²⁹⁶ See KRISTIANSOON, *supra* note 192

²⁹⁷ See *Sexual Assault Justice Initiative Annotated Bibliography*, AEQUITAS (2017) (sections on Promising Practices, Sexual Assault Response Teams (SARTs), Implementing SARTs). See also, Christopher Mallios & Jenifer Markowitz, *Benefits of Coordinated Community Responses in Sexual Assault Cases*, AEQUITAS, 7 STRATEGIES IN BRIEF (Dec. 2011).

²⁹⁸ Prosecutors should be aware of the community-based organizations in their localities that provide direct services to victims, including mental health services for both therapy and group counseling, drug treatment, medical and other basic needs such as clothing, food and shelter. Be prepared with a list of resources for each victim, or make referrals where appropriate. Each interaction with a service provider on a case will require consideration of confidentiality and privilege laws. Keep in mind required disclosures of exculpatory information but, where appropriate, fight in court to keep such information private in the face of a defense request to be provided the information.

²⁹⁹ For discussion on victim's rights attorney roles see M. Garvin & D.E. Belooof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*. OHIO ST. J. OF CRIM. LAW, 67-88. 21 (2015).

³⁰⁰ For an in-depth discussion of these considerations, see Garvey, *supra* note 230.

³⁰¹ *Id.*

³⁰² Excerpted from *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS (March 2014), available at www.aequitasresource.org/library.cfm.

³⁰³ Rule 404(b) governs the admissibility of other crimes or "bad acts" where such acts are relevant to prove some fact at issue, such as the defendant's motive, knowledge intent, absence of mistake or accident, or consciousness of guilt.

³⁰⁴ See, e.g., *State v. Banks*, 347 S.W.3d 31 (Ark. 2009) (evidence that defendant ordered killing of a witness admissible under Rule 404(b) to show consciousness of guilt); *State v. Edwards*, 678 S.E.2d 405 (S.C. 2009) (witness intimidation evidence admissible under Rule 404(b) to show consciousness of guilt).

³⁰⁵ *Risk Assessments (ODARA) In Spousal/Partner Violence Cases*, NOVA SCOTIA PUBLIC PROSECUTION SERVICE http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/ODARA%20RISK%20ASSESSMENTS%20IN%20SPOUSALPARTNER%20CASES%20ALL.pdf.

³⁰⁶ *Spousal Assault Risk Assessment Guide (SARA)*, MULTI-HEALTH SYSTEMS, <http://www.mhs.com/product.aspx?gr=saf&prod=sara&id=overview>.

³⁰⁷ *What is Mosaic?* MOSAIC THREAT ASSESSMENT SYSTEMS, <https://www.mosaicmethod.com/>.

³⁰⁸ DANGER ASSESSMENT, <http://www.dangerassessment.org/>.

³⁰⁹ Rhonda Martinson, Elizabeth Wofford, Marijka Belgum-Gabbert & Sandra Tibbetts Murphy, *Improving the Justice System Response to Witness Intimidation, Pilot Project Report: San Diego, California*, AEQUITAS 30 (2014).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Victims are often accurate judges of how dangerous the offender is to them, and what is likely to escalate the violence or threatening conduct.

³¹³ Defendants with more at stake may be more desperate to avoid criminal consequences, and thus more likely to resort to intimidation.

³¹⁴ Typically such witness safety concerns should be communicated to the Internal Affairs Unit of the institution so that information about the witness's cooperation is kept appropriately confidential to the extent possible. See Viktoria Kristiansson, *Prosecuting Cases of Sexual Abuse in Confinement*, 8 STRATEGIES (Dec. 2012), http://www.aequitasresource.org/Prosecuting_Cases_of_Sexual_Abuse_in_Confinement.pdf. See also Viktoria Kristiansson, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, 26 STRATEGIES IN BRIEF (2015), available at www.aequitasresource.org/library.cfm.

³¹⁵ For more details about relocation strategies for witness protection, see Peter Finn & Kerry Murphy Healey, *Preventing Gang- and Drug-Related Intimidation*, NAT'L INST. OF JUST. 22-38 (Nov. 1996), <https://www.ncjrs.gov/pdffiles/163067.pdf>; Kerry Murphy Healey, *Research and Action, Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT'L INST. OF JUST 6-8 (OCT. 1995), <https://www.ncjrs.gov/pdffiles/witintim.pdf>.

³¹⁶ See, e.g., *Maine v. Moulton*, 474 U.S. 159 (1985).

³¹⁷ *Id.*

³¹⁸ See, e.g., *State v. K.W.*, 214 N.J. 499 (2013).

³¹⁹ The Stalking Resource Center has created a sample log to record stalking incidents, which could easily be adapted to record any incidents of intimidation. See *Stalking Incident and Behavior Log*, STALKING RESOURCE CENTER, http://www.victimsofcrime.org/docs/src/stalking-incident-log_pdf.pdf?sfvrsn=4.

³²⁰ It would be unethical for the prosecution to discourage the witness from speaking with the defense. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2012). However, it is not unethical for the prosecution to remind the witness that

s/he does not have an obligation to speak with anyone, except to respond to a subpoena, which is a court order to appear and testify. Stressing that *all* interviews are voluntary, including those granted to the prosecution, should eliminate any misunderstanding on this point.

³²¹ Unfortunately, it is not unusual for some defense investigators to identify themselves as investigators, without identifying themselves as investigators for defense counsel.

³²² Such corrective action might begin with a letter to defense counsel explaining the problem and requesting that counsel take steps to ensure that the conduct is not repeated. Of course, in the case of actions that are obviously *intended* to intimidate the witness, the response should be escalated accordingly. Depending upon the circumstances, including whether defense counsel was personally involved, possible responses include notifying the court for whatever corrective action is deemed appropriate, moving to sanction or disqualify defense counsel, filing an ethics complaint, or criminal investigation and prosecution.

³²³ FED. R. EVID. 804(b)(6); *Ohio v. Roberts*, 448 U.S. 56, 74-77 (1980).

³²⁴ *Id.*; *Barber v. Page*, 390 U.S. 719 (1968); *Hardy v. Cross*, 132 S.Ct. 490 (2011).

³²⁵ *See California v. Green*, 399 U.S. 149 (1970).

³²⁶ Some jurisdictions also have provisions for depositions to preserve witness testimony when it is anticipated a witness may not be available for trial. *See, e.g.*, FED. R. CRIM. P. 15(a); *United States v. Yida*, 498 F.3d 945, 959-60 (9th Cir. 2007). The availability of such a deposition, and the procedures for conducting it, will vary from one state to another.

³²⁷ AEquitas has produced sample briefs to admit evidence under the doctrine of forfeiture by wrongdoing, which may be obtained on request.

³²⁸ *Brady v. Maryland*, 373 U.S. 83 (1963)

³²⁹ Before reaching out to interview an employer or landlord, it is best to discuss your intention to do so with the victim. The victim may have legitimate fears that such interviews would adversely affect his or her employment or housing situation. It is important to take care that the investigation does not create additional danger to the victim.

³³⁰ Many institutions have “security threat group” coordinators who monitor inmate communications/activities particularly as they relate to gang activity. Such coordinators may be able to provide assistance in restricting or monitoring the communications of suspected intimidators.

³³¹ Each U.S. Attorney’s Office has a designated Computer Hacking and Intellectual Property (CHIP) Attorney, who can provide assistance in obtaining evidence in cyber investigations. In addition, on-call assistance (both general and case-specific) is available from the duty attorney in the U.S. Department of Justice’s Computer Crime and Intellectual Property Section (CCIPS), who can be reached during regular hours at (202) 514-1026, and after hours at (202) 514-5000.

³³² An “IP address” is a three- to nine-digit number, usually expressed in the form xxx.xxx.xxx, that uniquely identifies a computer or network from which the message was sent. In order to identify the source of an email that has been received, it is necessary to determine which Internet provider (*e.g.*, Comcast, Earthlink, etc.) owns the originating IP address, and which customer had leased that IP address at the time the message was sent. Email headers will show the originating and receiving IP address, as well as the exact date and time it was sent. Each email “client” program (*e.g.*, Outlook, Thunderbird, Apple Mail, etc.) will have its own way of displaying header information. Once the header is displayed, the email can be printed out and used as a basis for issuing a subpoena or other process to obtain information about the origin of the email. *Searching and Seizing Computers and*

³³³ A web archive is a file that contains all of the information, including embedded text and images, of a particular web page.

³³⁴ See, e.g., *Electronic Crime Scene Investigation: A Guide for First Responders, Second Edition*, NAT'L INST. OF JUST. (2008), <https://www.ncjrs.gov/pdffiles1/nij/219941.pdf>.

³³⁵ For example, the computer may contain traces of messages or images that were created or sent or searches conducted over the Internet (e.g., searches for surveillance equipment used in stalking or searches for personal information about the victim).

³³⁶ Confrontation via closed-circuit television pursuant to the rule set forth in *Maryland v. Craig*, 497 U.S. 397 (1990), continues to be acceptable after *Crawford*. See also *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005). Note that the circumstances permitting such alternative modes of testimony are strictly circumscribed, and the trial court must make explicit findings of necessity under the test set forth in *Craig*. *United States v. Yates*, 438 F.3d 1307, 1312-18 (11th Cir. 2006).

³³⁷ The potential need to appeal an adverse evidentiary ruling is another sound reason to file motions *in limine* well in advance of the trial date.

³³⁸ As noted previously, the unavailability of the witness may not be apparent until after the trial has commenced; this is the reason for creating the "forfeiture file" in your trial file or notebook as described in Part I of this *Resource, supra*. In such cases the motion cannot be filed until the witness has become unavailable, but the file will ensure that you have the necessary supporting evidence available to go forward with the motion on short notice after the trial has begun.

³³⁹ *Brady*, 373 U.S. 83.

³⁴⁰ There is, however, an ethical obligation not to be untruthful with defense counsel if asked directly about a witness's availability. MODEL RULES OF PROF'L CONDUCT 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Of course, the defense may already be aware of the witness's reluctance or refusal to testify and therefore may insist on going to trial.

³⁴¹ See, e.g., *State v. Byrd*, 967 A.2d 287, 304 (N.J. 2009).

³⁴² *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009).

³⁴³ *State v. Mason*, 160 Wash. 2d 910 (2007).

³⁴⁴ MD. CODE ANN., CTS. & JUD. PROC. §10-901 (West 2011).

³⁴⁵ *People v. Geraci*, 85 N.Y.2d 359, 649 (1995).

³⁴⁶ Some States have additional requirements, such as the requirement of a showing that the statement to be admitted is reliable. See *State v. Byrd*, 967 A.2d 285, 304 (N.J. 2009).

³⁴⁷ See, e.g., *People v. Byrd*, 855 NYS.2d 505 (Supreme Court, App. Div. 2003) (hospital visits and hundreds of phone calls constituted “wrongdoing” in context of abusive relationship); *People v. Santiago*, 2003 N.Y. Slip Op. 51034[U] at *17, 2003 WL 21507176 (2003) (apologies and promises constituted “wrongdoing” in context of abusive relationship).

³⁴⁸ See *Ragsdale v. State*, 23 P.3d 653 (Alaska 2001). In *Ragsdale*, the court held that the proposed defense expert, an outpatient alcohol counselor, was not qualified to give expert testimony on the topic of alcoholic blackouts. The proposed expert did not have expertise in diagnosing whether a person might have been experiencing an alcoholic blackout based upon the individuals’ alcohol consumption or behavior.

³⁴⁹ *Id.*

³⁵⁰ WHITE, *supra* note 261.

³⁵¹ WHITE, *supra* note 261, Figure 1.

³⁵² Robert P. Granacher, Jr., MD, *Commentary: Alcoholic Blackout and Allegation of Amnesia During Criminal Acts*, 32 J. AM. ACAD. PSYCHIATRY L. 371-72 (2004).

³⁵³ Karen M. Jennison & Kenneth A. Johnson, *Drinking-Induced Blackouts among Young Adults: Results from a National Longitudinal Study* 29(1) INT’L J. ADDICTIONS 23, 24 (1994).

³⁵⁴ Elvin Morton Jellinek, *Phases in the Drinking History of Alcoholics: Analysis of a Survey Conducted by the Official Organization of Alcoholics Anonymous* 7(1) Q.J. STUD. ALCOHOL 88 (1946).

³⁵⁵ WHITE, *supra* note 261.

³⁵⁶ Kim van Oorsouw et al., *Alcoholic Blackout for Criminally Relevant Behavior* 32 J. AM. ACAD. PSYCHIATRY L. 364, 365 (2004). Note that later studies show that twenty-five percent of “healthy college students report being familiar with alcoholic blackouts.” *Id.*

³⁵⁷ See VAN OORSOUW, *supra* note 356, at 369.

³⁵⁸ WHITE, *supra* note 261.

³⁵⁹ VAN OORSOUW, *supra* note 356, at 365.

³⁶⁰ *Id.*, at 365.

³⁶¹ Aaron M. White et al., *Experiential Aspects of Alcohol-Induced Blackouts Among College Students*, 30(1) AM. J. OF DRUG & ALCOHOL ABUSE 205 (2004).

³⁶² WHITE, *supra* note 261.

³⁶³ JENNISON & JOHNSON, *supra* note 353, at 25.

³⁶⁴ VAN OORSOUW, *supra* note 356, at 364, 370.

³⁶⁵ WHITE ET AL., *supra* note 361, at 205, 216.

³⁶⁶ JENNISON & JOHNSON, *supra* note 353, at 23, 24.

³⁶⁷ JENNISON & JOHNSON, *supra* note 353, at 26.

³⁶⁸ VAN OORSOUW, *supra* note 356, at 369.

³⁶⁹ Commonwealth v. Thomson, 449 Pa. Super. 159 (1995); see Georgina Stobbs & Mark Rhys Kebbell, *Jurors' Perception of Witnesses with Intellectual Disability and the Influence of Expert Evidence*, 16 J. APPLIED RESEARCH IN INTELLECTUAL DISABILITIES 112 (2003).

³⁷⁰ Weir v. Chao, 364 Pa.Super. 490 (Pa. Super. Ct. 1987).

³⁷¹ *What do Victims Want? Effective Strategies to Achieve Justice for Victims of Crime*, INT'L ASS'N OF CHIEFS OF POLICE 21-22 (May 2000), <http://www.theiacp.org/portals/0/pdfs/WhatDoVictimsWantSummitReport.pdf>.