

Model Response to Sexual Violence for Prosecutors (RSVP Model)

Appendices



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Appendix A. Office- and Case-Level Checklists

The two checklists below are intended for use in improving the response to sexual violence cases at the office level and case level. Although the phrasing may differ slightly, these checklists mirror the practices in the RSVP Model. 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, that should 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 steps to be taken in that process and the special considerations for each. 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 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 your 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 — places where victimization 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 competence and humility
		<input type="checkbox"/> Elevate communication between disciplines <input type="checkbox"/> Improve identification of sexual assault in co-occurring crimes <input type="checkbox"/> Incorporate cross-training into professional development education <input type="checkbox"/> Ensure all professionals understand the role of each multidisciplinary team member <input type="checkbox"/> Engage, for trainings, survivors willing to share their perspectives and experience

CASE-LEVEL CHECKLIST

Review, Evaluate, and Charge the Case

- Review all reports in a timely manner**
- Consider all relevant legal and non-legal research when reviewing the initial report**
 - Communicate regularly and meaningfully with investigators
- Make charging decisions consistent with research and ethics**
 - Corroboration — often not a legal requirement but always valuable
 - Consult statutes, case law, social science, medical, and other relevant research

- Request bail amounts reflecting seriousness of the offense**
 - Request no-contact orders
 - Safeguard victim privacy and safety
- Oppose unnecessary delay**
- Build a case that engages victims and makes effective use of all probative evidence**
 - Conduct trauma-informed interviews of victim
 - Review DNA and forensic evidence
 - Prevent and respond to witness intimidation
 - Review *all* of the evidence

Thoroughly Prepare the Case

- Work with experts to understand evidence in case and help factfinder understand evidence**
- File motions to shield victims and expose defendants**
 - Use rape shield laws to exclude irrelevant and prejudicial evidence
 - Introduce evidence of other crimes and bad acts where relevant
 - Guard victim privacy and dignity through other available motions in limine
- Prepare to proceed to trial with a nonparticipating victim**
- Craft offender-focused case theme and theory**

- Anticipate and prepare to overcome predictable defenses resting on victim blame and shame**
 - 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
- Where plea offer is appropriate, ensure agreement reflects the seriousness of the assault**

Try the Case

- Final pretrial conference: review charges, jury instructions, any special considerations**
- Maintain focus on offender and defend against strategies designed to prejudice jury against the victim – satisfy the elements**
- Educate jury panel and select unbiased jury**
- Open by advocating for justice**

- Use direct testimony, witness order, introduction of evidence, and trial strategy to recreate reality of the sexual assault for jury**
- Plan cross-examination strategy**
- Where appropriate, introduce expert testimony to enable jury to decide the case fairly**
- Deliver compelling closing argument**
- Review and submit final jury instructions**

Post-Verdict Considerations

- Guilty verdict/guilty plea**
 - Move to revoke bail
 - File a detailed sentencing memorandum
 - Present victim impact statement
 - Argue for an appropriate sentence

- Acquittal**
 - Communicate verdict to the victim
 - Ensure continuing safety
- Post-trial debrief**

Appendix B. Core Competencies for Prosecuting Sexual Violence¹

The essential qualities of a specialized unit or prosecutor are built on a 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 the skill set that enables prosecutors to make informed decisions at every stage of 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 sex crime prosecution. Prosecutors must also be familiar with the most recent research related to sexual violence perpetration, victim behavior, medical and psychological health, forensics, and other relevant scientific developments. This will inform the evaluation, preparation, and litigation of current cases and better prepare prosecutors to incorporate new knowledge into their future work. Prosecutors must understand not only the applicable law, 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, as well as any new or evolving research.

Training Topics

What is Sexual Violence?

This training will discuss the prevalence and incidence of sexual violence; the goals of prosecution; the general elements of sexual assault statutes; how to implement a victim-centered, offender-focused, trauma-informed approach; offender-victim dynamics; the portrayal and minimization/mischaracterization of sexual violence in popular media as it impacts case prosecutions; and how sexual violence impacts one's 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 rape and sexual assault case prosecution;
- 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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- Nancy Ritter, *Down the Road: Testing Evidence in Sexual Assault Kits*, NAT'L INST. JUST. (June 2016), <https://www.ncjrs.gov/pdffiles1/nij/249805.pdf>.
- 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 offender characteristics (e.g., appearance, behavior, use of weapons) and why nonstranger rapists, who do not meet these expectations, are those who frequently elude reporting and prosecution. The presenters will also discuss underserved populations and cultural considerations. The presentation will include video clips of offender interviews to facilitate discussions about issues raised by the videos, including the language used by perpetrators in describing their acts, and how those issues have manifested in the 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, from investigation through sentencing, on the offender's predatory behavior.
- Develop strategies to educate judges, juries, and their communities about offender characteristics, thereby overcoming societal myths and misconceptions.

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The Link Between Victim Behavior and Neurobiology of Trauma in Sexual Assault

Popular notions of how victims should respond to physical and emotional trauma often conflict with the way victims actually behave. These misconceptions can significantly impact a factfinder's assessment of victim credibility and, ultimately, the outcome of the case. Victims have individual responses to trauma that are often

counterintuitive to public expectations; 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 training topics 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 popular notions 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 the victim's experience during jury selection.
- Counter defense strategies that challenge victim credibility by exploiting popular misconceptions.
- Apply information about the neurobiology of trauma to the analysis of facts and evidence in their cases.
- Conduct direct examination that recreates the reality of the crime at trial.

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Understanding DNA and its Impact on Sexual Violence Investigations and Prosecutions

Rape cases are admittedly some of the most difficult to prosecute; cold cases present great 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 sexual violence prosecution.
- Use forensic evidence to identify defendants, link them to other crimes, and introduce other-acts evidence.
- Develop and implement practices that reduce or eliminate untested kits.
- Anticipate and overcome legal challenges relevant to cold case prosecution.

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Working with Experts to Counter Myths, Explain Victim Behavior

The public has deeply-rooted beliefs about sexual violence and about how victims of sexual assault should behave. The realities of sexual violence are quite different. Experienced professionals familiar with dynamics of sexual violence understand 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 to doubt 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 the 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 introduce expert testimony at trial.
- Use experts to explain victim behavior and counter defense attempts to use a victim's behavior and responses to trauma to undermine their credibility.

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Evaluating Sexual Assault Reports

When first made aware of a sexual assault report, prosecutors 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* admissible evidence, including specialized knowledge that can be provided by experts, and assume 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 resulting from assaults historically considered less than “real rape.” Prosecutors should talk with law enforcement about the reasons behind decisions and accentuate the value of thorough investigation and research-informed decision-making. Ultimately, it is the prosecutor’s ethical duty to exercise appropriate charging discretion 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 for determining both the relevance and the admissibility of evidence at trial. Sexual assault cases provide unique opportunities to re-examine the accepted analysis of many of the rules and to rethink their underlying purpose. 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 of this rule in the caselaw is rarely informed by the research revealing the irrelevance of such evidence to consent and credibility. Other examples include Federal Rules of Evidence 404, 413, and 414, which govern the admissibility of a defendant's prior "bad acts" and/or propensity to commit sexual assault. Proper admission of such evidence requires careful identification and articulation of the proper purpose for which it is offered.

Finally, in many cases, fear, shame, a relationship with the perpetrator, the actual or perceived stigma of victimization, or other factors can interfere with the ability or willingness of victims to participate in the prosecution. In such cases, prosecutors must determine whether the case can proceed without the victim. A solid understanding of the rules of evidence, particularly the rules concerning hearsay, is crucial to success in proving a case without the victim's testimony. Also critical is a thorough understanding of *Crawford v. Washington* and its progeny, the dynamics of and legal remedies for witness intimidation, and the doctrine of 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, other-acts evidence, and out-of-court statements.
- Argue for the admissibility or exclusion 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 impact 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 their decision-making and interactions with victims 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 explore techniques to overcome them. The presenter will focus on how effective interviewing skills and goals encompass more than a traditional fact-finding focus of prosecution, and emphasize integrating a trauma-informed response. The presenter will also identify various forms of questions that may be employed in 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, 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 the 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 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 SANEs as independent and objective health care providers.
- Utilize appropriate medical-forensic language and anatomical terms.
- Provide or elicit effective direct examination testimony related to medical evidence.
- Educate judges and juries about medical evidence and the process of medical examinations.
- Qualify the 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, effects 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 sexual assault prosecution where alcohol is present.
- Collaborate with allied professionals to promote a victim-centered response that incorporates offender-focused strategies.
- Identify cases appropriate for expert testimony to explain effects of alcohol.

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Technology-Facilitated Sexual Assault

The ways we interact with technology continue to increase and evolve as we rely on computers, smart phones, and other digital devices to complete many of our daily activities. As technology becomes more integral to modern life, offenders increasingly misuse it to facilitate crimes against women and assert power and control in intimate-partner relationships. When technology is used to perpetrate crimes, investigators and prosecutors can identify, preserve, and present digital evidence to strengthen cases, support victims, and hold offenders accountable for the full range of their criminal abuse.

This training will demonstrate how cyber investigations can reveal evidence of criminal activity, as well as evidence of the power and control dynamics in 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 ways offenders 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 dynamics of the crime – particularly when assessing offender 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 victimization to multiple professionals over the course of their 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 victim privacy 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 protect 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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- Recording by Jane Anderson & Meg Garvin, *Safeguarding Victim Privacy in a Digital World: Ethical Considerations for Prosecutors*, <https://gcs-vimeo.akamaized.net/exp=1575080887~acl=%2A%2F756667832.mp4%2A~hmac=cee36b5fcd55ad158495a469939d88baf8475a0110fa3ee79c70c643cc55cd54/vimeo-prod-skyfire-std-us/01/3640/8/218200340/756667832.mp4> (recorded on May 18, 2017).
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Violence Against Sexually Exploited Persons

Almost all sexually exploited women, whether involved trafficking victims or commercial sexual exploitation, experience some degree of violence – regardless of the venue or type of activity in which they find themselves. 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 trafficked or not, 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 such crimes – treating them as distinct crimes, rather than ones which overlap and co-occur. Gaps in the system’s response too often result in failures to identify and protect sexually exploited women who are or may become violent crime victims.

This training will focus on the importance of collaboration among prosecutors and allied professionals with expertise working in violent crimes against women; organized crime, narcotics, and gangs; and to address the legal and advocacy needs of victims. In addition, the presentation will discuss pathways to, and public health effects of, sexual exploitation; the identification of victims and perpetrators; resources available to them through 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 victims of sexual exploitation and trafficking.
- Identify health risks and consequences of sexual exploitation and trafficking.
- Establish partnerships with governmental and non-governmental agencies to create a victim support network.
- Collaborate with allied professionals to more effectively investigate and prosecute cases of sexual exploitation and trafficking.

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- Recording by Viktoria Kristiansson, *Tina Frundt & Bill Woolf, Interviewing Victims of Human Trafficking and Sexual Exploitation: Techniques and Tactics*, available at <https://aequitasresource.org/resources/> (recorded on Dec. 13, 2013).

Prosecuting Sexual Assault Cases

This presentation will address how a sexual assault case is prosecuted. Participants will present and argue previously assigned pretrial motions, openings, closings, direct/cross examinations, and other trial scenarios.

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- Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES (July 2010), <https://aequitasresource.org/wp-content/uploads/2018/09/EducatingJuriesInSexualAssaultCasesPart1.pdf>.
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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.”² 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 addresses the ethical considerations outlined above in the context of trial publicity, charging decisions, immunity, and prosecutor’s investigative function. Hypothetical case scenarios will challenge prosecutors to evaluate their decision-making with regards to ethical principles.

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

- Identify legal obligations in the prosecution of sexual violence.
- Articulate ethical responsibilities at each stage of the criminal justice process.
- Navigate challenges related to prosecutorial discretion, recantation, and evidence disclosure.
- 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 them, and this person they 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.³ Such reactions are attempts to 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 can rekindle a light of wellness that radiates out from the helper and enables user/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 for 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 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 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 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 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 it 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.⁴

Trauma mastery 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 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,

“[i]ronically, 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 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 one that may spark reflection on how your work affects you in both personal and professional situations. We encourage you to read this list with no judgments; we all cope with emotional situations to the best of our ability. However, 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 to engage in your work without harm to self or others, and which amplify our sense of resiliency and hope associated with doing work in a traumatic field.

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 when commuting
- Physical pain throughout the day like 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, like 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.
- Asking questions like, “*Is any of this effective?*” and “*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.
- Avoiding work, relationships, responsibilities.
- Dreading activities that used to be positive or neutral.
- Using behaviors to escape (eating, alcohol/drugs, caffeine, TV, shopping, work).

Relationship changes:

- Not separating personal and professional time, being the helper in every relationship.
- Viewing other people not involved in your field as less important.
- Difficulty relating to other people's daily experiences without comparing them to yours or those you serve.
- Absence of a personal life that is not connected to your work.
- Seeing danger everywhere and being hypervigilant regarding the safety of your loved ones.
- 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 believe 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.

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

Individual Solutions

We at Joyful Heart recognize the importance of each person's individual health in the here and now, and encourage each individual to prioritize their own health each and every day. By ensuring our daily 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 aligned 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 individually. This path is different for everyone and will only be effective if it is informed by 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, 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 is doable — devoted just to ourselves and our own well-being. This can take many forms: journaling on the ride home from work,⁵ cooking a healthful meal, practicing yoga,⁶ meditation or mindfulness,⁷ going for a run, or taking an exercise class. As much as you can, try to make your space away from work a peaceful one⁸ — 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, or 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. These practices will enhance your life and the lives of those around you, and will make it more likely for you to find and sustain your voice during difficult times where it might be hard to hear.⁹

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.”¹⁰

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 a memoranda of understanding or agreement [MOU/MOA]),¹¹ regular collaborative processes, and broad active membership from diverse stakeholder groups.¹² According to the research, SART composition varies by office, with an average of 12 organizations involved in a team.¹³ SARTs improve experiences of victims seeking help, lead to more successful legal outcomes, and promote sexual assault prevention/education.¹⁴ Research suggests that the most successful SARTs follow these promising practices:¹⁵

- Prosecutors fully support and regularly participate in the SART, including attendance at all SART meetings;¹⁶
- 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 obligations regarding confidentiality, privilege, and discovery.¹⁷ Prosecutors must determine how information will be shared and ensure 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, and gang-related crimes). There also must be a formal mechanism to ensure that information related to co-occurring crimes is shared.

The role and responsibilities of prosecutor's office victim-witness personnel¹⁸ 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.¹⁹

Law enforcement participation helps 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 decline to charge. Collaboration also enhances the ability to uncover and respond to co-occurring crimes, as successful collaborative responses include cross-training on indicators of such criminal behaviors. In order to build a strong, evidence-based case, trainings and protocols should include the use of trauma-informed interviewing techniques and 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, and representation of 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.²⁰

Appendix E. Charging Tool

The chart below is intended as a guide to assist with compiling the complex evidence commonly present in sexual assault prosecutions. This tool will assist in analyzing evidence for each element of the crime and identifying gaps requiring follow-up. This tool should be adapted as needed, and used to identify and assess all relevant evidence and 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 to explain evidence and educate 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. Experts who are unavailable or unsuitable for a particular case may be able to suggest others who can assist. The insight of an expert can assist in:

- 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 adequately explained at trial.
- Improving the prosecutor's or investigator's rapport with victims based on a 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 the risk an offender poses, for purposes of arguing bail conditions or sentencing.

The chart below lists some areas of expert expertise which may be helpful or necessary in prosecuting cases of sexual violence, as well as suggestions for finding a suitable expert.

The chart includes the following areas of expertise:

- [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>.²¹ 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 are not available for trial, <i>Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford</i>,²² provides suggested strategies to avoid or minimize the risk presented by confrontation issues 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 • Significance of results • Interpretation when there are multiple DNA contributors in a sample • Inability to test • Contamination issues • Quantity of sample needed for testing • Explanation for non-testing; significance of lack of DNA evidence • Touch DNA 	<ul style="list-style-type: none"> • State lab • Private DNA lab • Molecular biology department of college or university (regarding various techniques or other issues not specific to the actual test at issue)
Forensics	
Trace Evidence (hair, fiber); Firearms and Toolmark Identification (comparing bullets, cartridges and shells to firearms); Ballistics	
<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 fingerprints, blood spatter, handwriting, tire marks, shoe prints, and bite marks 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

Medical	
<ul style="list-style-type: none"> • Significance of injury/absence of physical injury • Details of SAFE/SANE exam • Purpose of various steps in exam • Significance of any findings or absence of findings (<i>e.g.</i>, 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 (<i>e.g.</i>, ligature marks, impressions from jewelry, knife injuries) • Strangulation injury signs, symptoms, mechanism • Strangulation lethality risk • Homicide (whether victim was 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 (<i>e.g.</i>, medical school)
Offender Behavior	
<p>Note: Experts can be of assistance in understanding the dynamics surrounding the victim/offender relationship or in understanding how the crime occurred, as well as for purposes of imposing bail conditions or sentencing. “Profile” testimony is generally inadmissible at trial but prosecutors should check their jurisdiction’s rules of evidence and case decisions for the parameters relating to testimony about offender behavior.</p>	
<ul style="list-style-type: none"> • Explanation of victimization techniques (<i>e.g.</i>, “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 (<i>e.g.</i>, 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 the role of any technology used before, during, or after the crime (<i>e.g.</i>, video recording of the assault, unauthorized dissemination of consensual or nonconsensual intimate photographs, cyberbullying following assault) • Victim reactions to the trauma of tech-facilitated sexual assault • Authentication of digital evidence • Source of communication (linking communication to offender) • Interpretation of results of forensic exam of devices • Interpretation of records maintained by service provider or social media platform 	<ul style="list-style-type: none"> • Trained/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 (<i>e.g.</i>, AT&T, Comcast) • Social media providers (<i>e.g.</i>, 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 (<i>e.g.</i>, 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

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 (<i>e.g.</i>, sociology, psychology, women's studies) • Psychologist/psychiatrist with expertise in trauma and sexual violence • SANE/SAFE • Trained/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 of a person with 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 cognitive 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/Intoxication²³

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, and talkativeness. Increased self-confidence, decreased inhibitions, diminution of attention, judgment, and control. Beginning of sensory-motor impairment, and loss of efficiency in finer performance tests.
0.09 - 0.25	Excitement	Emotional instability, and loss of critical judgment. Impairment of perception, and memory and comprehension. Decreased sensory response, and increased reaction time. Reduced visual acuity, peripheral vision, and glare recovery. Sensory-motor incoordination, and impaired balance. Drowsiness.
0.18 – 0.30	Confusion	Disorientation, mental confusion, and dizziness. Exaggerated emotional states. Disturbances of vision and of perception of color, form, and motion and dimensions. Increased pain threshold. Increased muscular incoordination, staggering gait, and slurred speech. Apathy and 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, and sleep or stupor.
0.35 - 0.50	Coma	Complete unconsciousness, depressed or abolished reflexes, subnormal body temperature; incontinence, impairment of circulation and respiration, and possible death.
0.45 +	Death	Death from respiratory arrest.

Appendix H. Witness Intimidation Checklist²⁴

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).²⁵ Motions to sever such charges for trial can be opposed, moreover, on the grounds that such evidence *would* be admissible under that evidence rule, as evidence of the defendant's purpose, intent, or consciousness of guilt.²⁶ Charging 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 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 and 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-participation 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 safety risks for 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),²⁷ the Spousal Assault Risk Assessment Guide (SARA),²⁸ MOSAIC,²⁹ and the Danger Assessment.³⁰ 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 either members of the same gang or a rival gang.³¹ Next in the risk hierarchy are victims and witnesses who reside within or near the gang’s territorial boundaries.³² These victims or witnesses may face intimidation pressure not only from the offender and 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 neighborhood, are at significantly lower risk of intimidation.³³

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 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, 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, alcohol, or mental health issue?
- Is there a history of dropped charges, restraining orders, or dismissal of cases due to the victim's or witnesses' failure to appear?
- Does the defendant (or 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, group home – or organizational setting – such as the church, military, or other community-based association)?
- How fearful is the victim or witness? What is that fear based upon?³⁴
- How serious are the crimes with which the defendant has been charged, and what is the potential sentencing exposure?³⁵

- **Create (or Adjust) the Safety Plan**

Safety plans should be constantly re-evaluated throughout the proceedings. Changes in circumstances — in the threat level, or in the needs or concerns of the victim or witness — 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:

- Implementing bail conditions prohibiting contact between defendant and the witness, prohibiting 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.
- Practicing 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 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 against 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 the witness's children) 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, places, and routes for shopping or other personal errands.

- Increasing police patrols of the witness’s neighborhood, with officers paying special attention to any suspicious vehicles or activity around the witness’s home.
- Using protective custody or transfer of incarcerated witnesses. If your case involves witnesses who are incarcerated, be sure the institution where they are confined is aware of the case and witness’s role, so it can take appropriate measures to protect the witnesses and ensure they are not transported for court appearances alongside the defendant or the defendant’s associates.³⁶
- Utilizing witness relocation — even if informally. 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 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 – 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 than a 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.³⁷
- Employing an advanced witness protection program. 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 is comfortable and familiar. Moreover, such programs tend to be very costly. In appropriate cases, however, witness relocation programs provide very effective protection to participating witnesses.

- **Educate 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 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 of intimidation or manipulation.

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 maintain a contemporaneous record (such as a logbook) of dates, times, and details of any intimidation attempts, they should also 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 concluding the witness was acting as an agent of law enforcement and consequently suppressing the evidence.³⁸

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 them 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 illegally recording 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 the witness acted on behalf of law enforcement, the recording may be suppressed for violating the defendant’s 6th Amendment rights.³⁹ Therefore, advise victims and witnesses not to record conversations with defendants or 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.⁴⁰

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 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 said investigator or prosecutor as soon as practicable, regardless of whether criminal complaints are issued for the intimidation. This way, acts of intimidation will not be overlooked, or independently disposed of by a different court or prosecutor, which will preclude the act of intimidation from being tried 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 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 log details concerning any suspicious incidents – including date, time, a description of the incident, and any witnesses.⁴¹

- **Discuss with Witnesses What to Do If Contacted by the Defense**

Explain to witnesses that the defense attorney or investigator has the right to contact them for an interview, and that nothing is improper about such contacts. Also explain that it is up to them whether to speak with a defense attorney or investigator, *just as it is up to them whether to speak with the prosecutor or prosecutor’s investigator*.⁴² Explain that witnesses have a right to know with whom they are speaking, and what kind of identification investigators from your office can present upon request.⁴³ You can also tell the witness that regardless of whether they decide to speak with the defense, you would appreciate notification about any such contacts or interviews – stressing again that this is strictly voluntary. Although there is nothing improper about defense attempts to interview witnesses, a few defense attorneys employ investigators who conduct the 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.⁴⁴

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 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 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 when setting bail amount, danger to the victim or 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 presents a risk of not obeying court orders or appearing for trial when ordered to do so, and that a high bail is therefore warranted to secure his or her 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. While the victim's wishes should always be an important consideration, the ultimate responsibility for making a recommendation lies with 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, *e.g.*, gang violence cases, they should be prohibited from associating with those individuals as a condition of bail.

In some jurisdictions, electronic monitoring may be available as a condition of release on bail. These systems may vary widely in their effectiveness protecting 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 system's effectiveness to protect the victim and witnesses.

Other appropriate conditions may include a prohibition on weapons possession, alcohol use, or drugs consumption, and require compliance with 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 be a measure of deterrence against intimidation.

- **Ask the Court to Admonish the Defendant at Arraignment**

In any case where there is a risk of witness intimidation, request the judge admonish the defendant, preferably at 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 arraignment. A warning from the bench may discourage some would-be intimidators from engaging in those tactics. Defendants should be cautioned that any attempt to influence or dissuade witnesses from testifying truthfully will not only subject them to possible prosecution, but may be used against them in their criminal cases. If the court declines to give such an admonishment, the prosecutor can do so when putting other matters on the record. For example, he or she can state, "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 them in the criminal proceedings in this case."

- **Prepare for the Possibility that Witness Participation May End**

Despite the best efforts of the criminal justice system, some attempts at intimidation inevitably succeed. Consequently, some victims and witnesses who are initially willing to participate in the

process may become reluctant to do so as time goes by. 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 assist in contacting or locating them in the future. If the witness is produced at trial — even as a hostile or defense witness— there will be no Confrontation Clause violation if prior statements are admitted under hearsay exceptions. If the witness cannot be located, any motion or attempt to admit hearsay — either under the forfeiture doctrine or as testimonial statements 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.⁴⁵ The State will therefore have to present evidence that it made all reasonable efforts to produce the witness at trial.⁴⁶

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 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.⁴⁷ 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 or preliminary probable cause hearing, when given subject to cross-examination by defense counsel, can be admitted at trial without violating the Confrontation Clause – provided the witness is unavailable for trial.⁴⁸

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 the defendant had a full and fair opportunity for cross-examination.

- **Open a “Forfeiture File” for Witnesses Who May Not Appear at 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 rule⁴⁹ – 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

A 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 a willing participant one day becoming unwilling the next. 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 participating 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, speak to, or meet with the witness. This record of contacts, including refusals or unsuccessful attempts, may be critical in establishing all reasonable efforts were made to secure the witness’s attendance at trial – which in turn 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 for intimidated victims and witnesses to recant their statements or previous reports to law enforcement, downplay the seriousness of the crime, or 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 incredulous and brief they may be, must be documented and turned over to the defense as exculpatory evidence pursuant to *Brady v. Maryland*.⁵⁰

- **Interview Family and Friends**

Family and friends of the victim, and even employers or landlords,⁵¹ 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 support a motion to admit hearsay under the forfeiture doctrine.

Family and friends are also a good source for nontestimonial statements by the victim, who may have confided in them about the abusive relationship or source or circumstances of injuries they have received. If these statements fall within an exception to finding of forfeiture by wrongdoing, their admission 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 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 it provides can be invaluable and very powerful when presented at trial. Perhaps your office has interns or volunteers who can 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 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.⁵²

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 restricted or prohibited, some inmates are able to gain full access by using 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, as they 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 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.⁵³

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 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 their contents 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.⁵⁴ 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, Twitter, or a blog, can be saved as a "web archive"⁵⁵ and can be the basis for a search warrant or other process for the website's hosting service.

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 issuance 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 process they require to be followed 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 a 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.⁵⁶ 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.⁵⁷

Even if the investigation reveals that an intimidating message or post originated from a public computer, such as one in a library, the facility may keep a log of users or have a security video proving 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 safety risk to a 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, 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 for cross-examination. 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 the defense may attempt to introduce personally embarrassing information about the witness that has no legal relevance to the case or the witness’s credibility. Some defendants routinely threaten that if a case goes to trial, the defendant will testify, for example, that the victim had an abortion or was sexually abused as a child, for the sole purpose of discouraging their testimony. 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, and certain other, cases where the defendant has a number of allies and supporters 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 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 defendant’s presence, a motion to permit the witness to testify via closed-circuit television may be an appropriate solution.⁵⁸ Expert testimony is necessary to establish the harm the witness is likely to suffer if required to testify in the defendant’s presence. If the court finds 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 regarding 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, and thus 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 an interlocutory appeal of the adverse ruling.⁵⁹ 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 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, like when the witness is deceased or 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.⁶⁰ 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 beginning of jury selection. If the witness fails to appear after being properly served with a subpoena, or appears but 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 being arrested will cause the victim additional harm and 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*,⁶¹ 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.⁶² If no resolution by plea is possible and the only way to prove the case is to arrest the victim, the best course may be to dismiss the case. If jeopardy has not yet attached (in a jury trial, this is once the jury has been sworn in), 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 they can be held “unavailable.”⁶³ 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. If the trial judge decides to punish the victim for contempt — a matter within the trial court’s discretion — again, it is almost always a 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 them 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.⁶⁴ 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,⁶⁵ Maryland,⁶⁶ and New York⁶⁷), (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.⁶⁸

- **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.⁶⁹ 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 understand how such seemingly innocuous acts are used by abusers to control their victims, which will enable the court to find 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 instigated or acquiesced in the intimidating conduct. 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 available online.⁷⁰

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.”⁷¹

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.”⁷²

Responsibility Towards Victims

Information Conveyed to Victims

Victims of violent crimes, serious felonies, or actions likely to make the victim an object of physical or other form of retaliation, should be informed of all important stages of the criminal justice proceedings – including, but not limited to:

- Acceptance or rejection of the case by the prosecutor’s office, the return of an indictment, or the filing of criminal charges;
- A determination of defendant’s pre-trial release;
- Any pre-trial disposition;
- The date and results of trial;
- The date and results of sentencing;
- Any proceeding within the knowledge of the prosecutor which does or may result in the defendant 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
- Any other event within the knowledge of the prosecutor, which may put the victim at risk of harm or harassment.⁷³

Victim Orientation

To the extent feasible, and when deemed appropriate by the chief prosecutor, the prosecution should provide a criminal justice process orientation to crime victims and explain their prosecutorial decisions, including the rationale used to reach them. Special orientation should be given to child and spousal abuse victim and their families, whenever practicable.⁷⁴

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 crime victims – including, but not limited to the following:

- Assistance in obtaining the return of property held in evidence;
- Assistance in applying for witness fees and compensation if provided for by law or local rule;
- Assistance in obtaining restitution orders at the sentencing;
- Assistance in appropriate employer intervention concerning required court appearance;
- Assistance with necessary transportation and lodging arrangements;
- Assistance in reducing the time the victim has to wait for any court appearance to a minimum; and
- 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.⁷⁵

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:⁷⁶

- 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 always display proper respect and consideration for the judiciary, without forgoing 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 witness testimony, 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 those 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 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.”

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.”⁷⁷

Immunity

The problem is one of immunity, or more precisely lack of it. The prosecutor is given absolute immunity for functions “intimately associated with the judicial phase of the criminal process” including “initiating the prosecution and in presenting the State’s case.”⁷⁸ Absolute immunity works to defeat a lawsuit at its inception.

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.⁷⁹ 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.”⁸⁰

The commentary to the NDAA Standards recognizes this important distinction: “[f]urthermore, 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.”⁸¹

What kinds of things have been ruled as “intimately associated” with the judicial phase?

- Drafting legal documents.
- Determining probable cause to proceed.
- Deciding to file charges.
- Presenting information.
- Motions to the court.

What kinds of things are not?

- Attesting to the truth of facts in support of an arrest warrant or signing a search warrant affidavit.⁸²

Interviewing witnesses

- Rule 3.7(a) of the ABA Model Rules of Professional Conduct states, in the pertinent part, “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.”⁸³ Unless a prosecutor is prepared to become an impeaching witness in a case, a police officer, investigator, or other reliable third party should 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.”⁸⁴

Section 4-2.4 of the NDAA National Prosecution Standards states, “[t]he prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:⁸⁵

- The nature of the offense, including whether the crime involves violence or bodily injury;
- The probability of conviction;
- The characteristics of the accused relevant to his or her blameworthiness or responsibility, including their criminal history;
- Potential deterrent value of a prosecution to the offender and to society at large;
- The value to society of incapacitating the accused in the event of a conviction;
- The willingness of the offender to cooperate with law enforcement;
- The defendant’s relative level of culpability in the criminal activity;
- The status of the victim, including the victim’s age or special vulnerability;
- Whether the accused held a position of trust at the time of the offense;
- Excessive costs of prosecution in relation to the seriousness of the offense;
- Recommendation of the involved law enforcement personnel;
- The impact of the crime on the community; and
- Any other aggravating or mitigating circumstances.”

Other Charging Considerations

- Prosecutors must consider the effect of *Crawford v. Washington*⁸⁶ on their case when making charging and other decisions.
- Prosecutors have sole, but not unlimited, discretion in deciding whom and what to charge. Obviously, the charging decision cannot be based on race, religion, or other invidious classification.⁸⁷

To Determine Whether to Charge

- Assess the defendant’s factual guilt.
 - Consider the victim’s ability to testify;
 - Competency
 - Credibility
 - Ability to recollect and relate details
 - Consider the defendant’s version of events, denials, and/or alibis; and
 - Review any medical records and/or physical evidence.
- Examine the legal sufficiency of the evidence.
 - Consider all possible legal issues that may rise; and
 - Consider potential appellate issues.

- Charge the appropriate crime(s).
 - Label the conduct appropriately and accurately;
 - Charge the most serious crime(s) supported by the evidence;
 - Charge co-occurring crimes; and
 - Charge offenses related to intimidation.

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.”⁸⁸

The Supreme Court has, of course, weighed in on the prosecutor’s duty to disclose information. Some of the applicable decisions are listed below:

- *United States v. Ruiz*, 536 U.S. 622 (2002).
- *Strickler v. Greene*, 527 U.S. 263 (1999): An “open file” policy means the defendant can rely on the file to contain 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.
- *Kyles v. Whitley*, 514 U.S. 419, 4237 (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.”
- *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.
- *United States v. Bagley*, 437 U.S. 667 (1985): “Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule.”
- *United States v. Agurs*, 427 U.S. 97, 107 (1976): There is a duty to disclose *Brady* information even without defense request.
- *Giglio v. United States*, 405 U.S. 150, 154 (1972): Evidence that affects the credibility of a witness whose testimony may impact the defendant’s guilt or innocence is required to be disclosed.
- *Brady v. Maryland*, 373 U.S. 83, 87 (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.”

Determining Whether to Disclose

Rather than disclosing sensitive information and then filing a motion *in limine* to preclude its admission at trial, the better course when dealing with confidential and privileged records – or other such information – is to file a motion for a protective order to determine the necessity, timing, and manner of disclosure to the defense.

*Additional Considerations*⁸⁹

- Mandatory versus discretionary disclosure.
 - Generally, the prosecutor and police do not serve as investigators for the defendant. However, it is problematic to decline to pursue evidence because, if true, it might harm the case.
- The attorney work product privilege applies to prosecutors.

PLEA NEGOTIATIONS AND PLEA AGREEMENTS

Office Policy

- “No drop” policies should, at most, represent a presumption against dismissal of charges. For good cause, including developments concerning availability of sufficient admissible evidence and the interests of the victim (including victim safety), the policy should permit dismissal after careful review.
- Other policies
 - Individual judges may have principles they adhere to regarding the circumstances under which they will accept or approve of plea agreements.
 - Common practice within an office or jurisdiction may dictate general principles and policies regarding plea offers.

Know Your Adversary and Be Consistent

“Similarly situated defendants should be afforded substantially equal plea agreement opportunities.”⁹⁰

The National Prosecution Standards state that prior to negotiating a plea agreement, the prosecution should consider the following factors:⁹¹

- The nature of the offense(s);
- The degree of the offense(s) charged;
- Any possible mitigating circumstances;
- The age, background, and criminal history of the defendant;
- The expressed remorse or contrition of the defendant, and his or her willingness to accept responsibility for the crime;
- Sufficiency of admissible evidence to support a verdict;
- Undue hardship caused to the defendant;
- Possible deterrent value of trial;
- Aid to other prosecution goals through non-prosecution;
- A history of non-enforcement of the statute violated;
- The potential effect of legal rulings made in the case;
- The probable sentence if the defendant is convicted;
- Society’s interest in having the case tried in a public forum;
- The defendant’s willingness to cooperate in the investigation and prosecution of others;
- The likelihood of prosecution in another jurisdiction;
- The availability of civil avenues for victim relief or restitution through criminal proceedings;
- The willingness of the defendant to waive his or her right to appeal;
- The willingness of the defendant to waive (release) his or her right to pursue potential civil causes of action arising from their arrest – against the victim, witnesses, law enforcement agencies/personnel, or the prosecutor and his or her staff/agents;
- With respect to witnesses, the prosecution should consider the following:
 - The availability and willingness of witnesses to testify;
 - Any physical or mental impairment of witnesses;
 - The certainty of their identification of the defendant;
 - The credibility of the witness;
 - The witness’s relationship with the defendant;
 - Any possible improper motive of the witness;

- The age of the witness; and
- Any undue hardship to the witness caused by testifying.
- With respect to victims, the prosecution should consider those factors identified above in addition to the following:
 - The existence and extent of physical injury and emotional trauma suffered by the victim;
 - Economic loss suffered by the victim; and
 - 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.”⁹²

Conditions of the Plea Offer

- Make the offer in writing.
- Set a deadline and stick to it.
- “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:⁹³
 - The defendant’s acceptance of the offer within a specified time period that would obviate the need for extensive trial preparation;
 - The defendant’s waiver of certain pre-trial rights, such as the right to discovery;
 - The defendant’s waiver of certain pre-trial motions such as a motion to suppress or dismiss; or
 - The defendant’s waiver of certain trial or post-trial rights, such as the right to pursue an appeal.”

Communications⁹⁴

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.”⁹⁵

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)."

Appendix J. Overcoming the Blackout vs. Pass-Out Defense⁹⁶

Overcoming the Blackout vs. Pass-Out Defense

The second way that the defense can argue the consent defense is to try to prove the victim consented to the intercourse, but does not remember due to a 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, he or 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 he or she behaved promiscuously and possibly even the initiated sexual contact.

Some defense attorneys bolster this argument by calling an expert witness to say the victim blacked out. They may use a toxicologist, pharmacologist, emergency doctor, or someone with expertise in blackouts. The blackout defense is particularly common in cases where the victim was unconscious at the time of the rape. However, there are a number of steps that can be taken when this defense is raised. First, if expert testimony is to be proffered, the prosecutor should ask the judge to hold the defense to discovery rules and mandate release of the current curriculum vitae of their experts. Prosecutors must make sure that the proposed expert is qualified to testify on the topic. If not, object.⁹⁷ Prosecutors should also request a written report from the expert.

Second, 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 testimony that will support the introduction of the blackout testimony. Unless the witness can diagnose the victim as having suffered from a 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.⁹⁸ 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 what occurred was actually 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 does and does not remember. 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, they are unconscious, correct?
 - When a person blacks out, they are conscious, correct? A blackout is simply when a person cannot remember what happened during a time period because their brain was not recording memories during that time, isn’t that true?

- If a person blacked out, they would know they “lost time” right? In other words, they were not recording any memories during the black out, correct? If that person passed out, they were not observing anything because they were basically asleep, correct?
- Assume that a person experienced a blackout. During the time period of the blackout, they were 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 not distracted.”⁹⁹
 - 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.¹⁰⁰
- *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.”¹⁰¹
 - 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.”¹⁰²
 - 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).¹⁰³ 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.¹⁰⁴
 - 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.”¹⁰⁵ 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.”¹⁰⁶
 - 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.”¹⁰⁷
 - 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.”¹⁰⁸ “Thus, even during a blackout, a person should be aware that what he is about to do is wrong.”¹⁰⁹

- *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).¹¹⁰
 - 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.”¹¹¹ “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.”¹¹²
 - The plausibility of a blackout claim at a BAC less than 250 mg/mL is doubtful.¹¹³ One study estimated peak BACs during the night of a blackout to be thirty percent for men and thirty-five percent for women.¹¹⁴
 - 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.”¹¹⁵
 - “Until recently, much of the information we had about behavior exhibited while in a blackout state was derived from members of Alcoholics Anonymous.”¹¹⁶ 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.¹¹⁷

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.”¹¹⁸

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, etc.
 - Use of interpreters
 - Two if victim uses sign language
 - 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
 - Consider the time of day of victim’s testimony and take 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 capabilities¹¹⁹
 - Lay witnesses can testify about victim's abilities¹²⁰

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*, available at <https://vod-progressive.akamaized.net/exp=1575676347~acl=%2A%2F721334641.mp4%2A~hmac=02f777f4a68e057f5ca3b0e0ef0b97d5cbcbe67a5bed0f6aada3a8f194db0a4f/vimeo-prod-skyfire-std-us/01/2089/8/210447028/721334641.mp4> (recorded on May 29, 2015).
- AEQUITAS, THE PROSECUTORS' RESOURCE ON SEXUAL VIOLENCE CASES INVOLVING VICTIMS WITH INTELLECTUAL DISABILITIES (2019), available at <https://aequitasresource.org/resources/>.

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*.¹²¹ 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.

- Did you feel respected? Safe?
- Did you receive sufficient and accurate information? At the right time?
- Were you asked what you needed? Did you receive the services you needed in a timely manner?
- Did you understand the processing of your case, including the timing of processing and the length of time it took?
- Did you feel justice was done?
- Do you have any suggestions for improvement?

Appendix M: Sample Case Review Protocol

The purpose of the case review is to extract documented and verifiable information from case files that will be used to analyze similarities in case processing and case outcomes. It is important that all persons reviewing cases to complete the tracking form, follow the instructions below to ensure reliability and validity of the data. **Please note that the ideal reviewer is not familiar with the case(s) to ensure that the information recorded is based on documentation in the file, and not subjective familiarity with the case. Anticipated average review time for each case is 2.5 hours.**

General Instructions

1. When marking items on the tracking form, please use an “X” in the checkbox.
2. If you mistakenly place an X in the wrong box, please strike through the whole item (box and text) to indicate that the X was placed in error.
3. If no information is available for the element on the tracking form (*e.g.*, age, characteristics, etc.), mark unspecified.
4. Only record information that is contained in the case file. The intent is draw from the information that was available in the case file to the prosecutor. Do not make assumptions or guesses based on knowledge of the case. For example, if the file does not indicate the victim has a history of mental illness, but you recall that she was on psychotropic medications in an earlier case, you would **not** check the box next to mental health history. If there is a statement from the victim indicating she had not taken any of her psychotropic medications since the assault, then you **would** check the box next to mental health history.
5. In situations where there is conflicting information (*e.g.*, suspect is identified as Hispanic and then later as African American), leave the field blank. This scenario is different from cases in which there is no information indicated (*e.g.*, if suspect race is unidentified). If the conflict is resolved (*i.e.*, information verified in the file), enter the verified information. For example, if the victim claims to not have been under the influence of drugs or alcohol at the time but medical records from the emergency room visit immediately after the assault has a blood alcohol level reading and witness confirm drinking at a bar, check the box next to voluntary ingestion of alcohol by victim.

Victim Information

1. For gender – select only one option based on self-definition by the victim.
2. For race/ethnicity – select only one option based on self-definition or race/ethnicity identified in the originating report. Do not guess based on appearance or last name.
3. Victim age at time of assault – enter the age of the victim, in years, at the time of assault. If there is more than one reported assault, enter the age of the victim at the time of the most recent assault. If necessary, age may be calculated from birth year to assault year.
4. Victim age at time of report – enter the age of the victim, in years, at the time of the police report (if more than one report, enter the age at the time of the most recent report). Age may be calculated by subtracting report year from birth year.
5. Victim characteristics – mark all indicated in the file as present at the time of the assault.

- a. Mental health history — report of diagnosis or treatment for mental health issues, including use of prescribed medicines as part of a diagnosis.
 - b. No permanent address — specific report victim has no fixed or permanent address; if there is no indication of a whether victim has an address, leave the field blank.
 - c. Limited English proficiency — report that victim does not speak or understand English proficiently and/or requires the use of a translator.
 - d. College/university student — victim was enrolled in and attending a college or university at the time of the assault.
 - e. Military — victim was in the military at the time of the assault.
 - f. Incarcerated/detained/institutionalized — victim was housed in a secure setting at the time of the assault and not free to leave.
 - g. Resident facility — victim resides in a residential facility such as a nursing home, hospice, half-way house at the time of the assault.
 - h. Prior reports of sexual violence — victim has made reports of past sexual violence against the current suspect or others; includes both official reports made to law enforcement and disclosures of past sexual violence as part of current investigation.
 - i. Physical/cognitive disability — victim has observable or documented impairments that impact daily functioning; may include physical disabilities as well as emotional and learning disabilities.
 - j. Consensual sexual activity (prior) — victim reports there had been consensual sexual activity with the suspect prior to the assault.
 - k. Consensual sexual activity (after) — victim reports there has been consensual sexual activity with the suspect after the assault occurred.
 - l. Involved in commercial sexual activity/commercially sexually exploited — includes victim or witness statement of involvement in commercial sexual activity or exploitation at the time of the assault; commercial sexual activity extends to exotic dancing as well as exchange (whether voluntary or involuntary) of sexual activity for something of value.
 - m. History of involvement in commercial sexual activity/sexually exploited — includes victim or witness statement of past involvement in commercial sexual activity or exploitation; extends to exotic dancing as well as exchange (whether voluntary or involuntary) of sexual activity for something of value
 - n. Abuse or addiction to drugs or alcohol — victim admission to drug or alcohol abuse or addiction historically or at the time of the assault; documentation of current or prior abuse or addiction.
 - o. Victim does not participate — includes unreturned contacts from the victim that preclude further investigation/prosecution; statements from victim about willingness, ability, or availability to participate; statement from advocates about victim’s willingness, ability, or availability to participate.
 - p. Victim criminal history — includes prior arrests and/or convictions of criminal offenses.
 - q. History of domestic violence (victims) — includes victim statements about domestic abuse or violence; documentation of prior domestic violence; includes information about victimization.
 - r. History of domestic violence (perpetrators) — includes statements about domestic abuse or violence perpetration; documentation of allegations of domestic violence perpetration.
 - s. None of these apply — check this box if there is no evidence that any of the prior characteristics apply.
6. Drug/alcohol use by victim
- a. Voluntary ingestion of alcohol/drugs — includes victim or witness statements regarding the ingestion of alcohol or drugs in the time period leading up to the assault.

- b. Involuntary ingestion of alcohol/drugs — includes victim or witness statements regarding impaired behavior without voluntary ingestion of alcohol or drugs and, if available, medical documentation of the presence of drugs or alcohol in the victim’s system at the time of the assault.
 - c. Mistaken/misrepresentation of ingestion of drugs — includes victim and witness statements about the voluntary ingestion of drugs and the type of drugs that are later documented as being of a different type (*e.g.*, victim thought s/he was taking MDMA and tests later reveal it was Rohypnol).
 - d. No drug/alcohol ingestion — documentation indicates that alcohol or drugs were not ingested by the victim.
 - e. Unspecified — no information contained in the report about alcohol or drug ingestion at the time of the assault.
7. Victim physical injury — generally includes medical documentation of physical injury with the following additional guidance:
- a. Other serious physical injury — includes observation of and/or documentation of injury that would typically require medical care, whether or not the victim seeks such care, including broken bones, cuts requiring stitches, internal injury, petechial, etc.
 - b. Minor physical injury — includes observation of and/or documentation of injury that would typically not require medical care such as bruises, minor cuts, scrapes, abrasions.
8. Medical-forensic examination conducted — generally documentation that services were or were not provided.
9. Relationship with suspect(s) — mark all that apply if there is more than one suspect; if there is only one suspect, mark the relationship identified by the victim.

Suspect Information

- 1. Number of suspects – enter the number of suspects reported by the victim; if victim stated number is unknown, enter unknown. If there is no indication of how many suspects, mark unspecified.
- 2. Suspect gender – mark all that apply and indicate how many suspects within each gender category.
- 3. Suspect race/ethnicity – mark all that apply and indicate how many suspects within each category. Determination of race/ethnicity should be made in one of two ways:
 - a. Victim description of race/ethnicity; or
 - b. Suspect(s)’ racial/ethnic identification. If the suspect is identified in the investigation and notation of race/ethnicity is documented, enter the documented race/ethnicity.
- 4. Suspect age – mark the age category of the suspect(s) and indicate the number of suspects in each category.
- 5. Characteristics of suspect – mark all that apply to one or more suspects.
 - a. No permanent address — specific report that suspect has no fixed or permanent address; if there is no indication of a whether suspect has an address, leave the field blank.
 - b. Limited English proficiency — report that suspect does not speak or understand English proficiently and/or requires the use of a translator.
 - c. College/university student — suspect was enrolled in and attending a college or university at the time of the assault.
 - d. Military — suspect was in the military at the time of the assault.
 - e. Incarcerated/detained/institutionalized — suspect was housed in a secure setting at the time of the assault and not free to leave; includes suspects who work in such facilities.
 - f. Resident facility — suspect resides in a residential facility such as a nursing home, hospice, half-way house at the time of the assault; includes suspects who work in such facilities.

- g. Physical/cognitive disability — suspect has observable or documented impairments that impact daily functioning; may include physical disabilities as well as emotional and learning disabilities.
 - h. History of mental health — report of diagnosis or treatment for mental health issues, including use of prescribed medicines as part of a diagnosis.
 - i. History of abuse/addiction — suspect admission or witness testimony to drug or alcohol abuse/addiction historically or at the time of the assault; documentation of current or prior abuse/addiction.
 - j. History of domestic violence (victims) — includes victim statements about domestic abuse/violence; documentation of prior domestic violence; includes information about victimization.
 - k. History of domestic violence (perpetrators) — includes statements about domestic abuse/violence perpetration; includes documentation of prior allegation of domestic violence.
 - l. None of these apply — check this box if there is no evidence that any of the prior characteristics apply.
6. Drug/alcohol use by suspect — if witness or defendant statements or medical information indicates drug/alcohol use at the time of the assault, mark suspect under the influence. If it is documented that there was no known drug/alcohol use, then mark no known use by suspect. If no information exists, mark unspecified.
7. Criminal record of suspect(s) — mark all that apply for each suspect and if multiple suspects are involved also mark multiple suspects.

Case Characteristics

- 1. Sexual acts involved — mark all that apply.
- 2. Characteristics of assault — mark all that apply.
 - a. Perpetrated using force or threats — allegations or documentation of physical force, such as the use of restraints by hand, verbal threats, or other means.
 - b. Weapon used or threatened — allegation or documentation of a weapon used during the attack or the implied presence of a weapon during the perpetration of the assault.
 - c. Perpetrated against victim with impaired motor skills — victim suffered from impaired motor skills resulting from physical disability, injury, drugs, or alcohol.
 - d. Perpetrated against victim with impaired communication skill — victim suffered from impaired communication skills due to disability (*e.g.*, deafness, muteness, cognitive disability), or impaired speech due to alcohol or drug use.
 - e. Perpetrated against victim who is unconscious/moving in and out of consciousness — victim was unconscious or in the state of entering/exiting unconsciousness.
 - f. Perpetrated against victim with severe physical or cognitive disability — victim suffered from disability that impact day-to-day functioning that can include autism, severe mental illness, developmental delays, paralysis, etc.
 - g. Perpetrated against a victim who is institutionalized — victim was in an institutional setting at the time of the assault including a correctional facility, care facility, assisted living facility, group home, halfway house, etc.
- 3. Completed vs. attempted assault — based on the highest charge considered by prosecutor or presented to the Grand Jury for each suspect; include the number of suspects in each category.
- 4. Time between assault and police report — if not explicitly stated in the case file, calculated by subtracting the assault date (most recent, if there were multiple assault dates) from the police report date.

5. Case processing — calculated by subtracting the date case was received from law enforcement from the date of Grand Jury presentment; select N/A if the case was not presented to the grand jury.
6. Total case processing — calculated by subtracting the date case was received from law enforcement to disposition or sentencing; includes cases in which the disposition was no charges filed, no True Bill, dismissal, or nolle prosequi.
7. Case disposition — mark only one disposition type
 - a. If case was rejected or disposed by guilty plea for a lesser charge (either lesser sexual or non-sexual offense), mark all reasons that apply.

Appendix N: Sample Case Data Tracking Sheet¹²²

SAACase # _____ Law Enforcement Agency/Report #: _____

Complete for all felony sexual violence offenses, both attempted and completed. If there are multiple victims involved in a single incident, complete a separate victim information sheet for each. If multiple defendants, complete a separate suspect information sheet for each.

VICTIM INFORMATION:		
<p>Victim Gender <i>(mark only one, based on self-definition by the victim)</i></p> <p> <input type="checkbox"/> Female <input type="checkbox"/> Male <input type="checkbox"/> Transgender <input type="checkbox"/> Gender Non-Conforming <input type="checkbox"/> Unspecified </p>		
<p>Victim Race/Ethnicity <i>(please mark only one, using self-identification by victim)</i></p> <p> <input type="checkbox"/> Asian/Pacific Islander <input type="checkbox"/> Caucasian/White <input type="checkbox"/> Native American/Native Alaskan <input type="checkbox"/> African American/Black <input type="checkbox"/> Hispanic/Latino <input type="checkbox"/> Biracial/Multi-racial <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Unspecified </p>		
<p>Victim Age at the Time of the Assault: <i>(in years, at the time of the assault, or most recent assault if more than one)</i></p> <p><input type="checkbox"/> Unspecified</p>		
<p>Victim Age at the Time of the Police Report: <i>(in years, at the time of the original police report)</i></p> <p><input type="checkbox"/> Unspecified</p>		
<p>Characteristics of the Victim <i>(please mark all that apply)</i></p> <table style="width: 100%; border: none;"> <tr> <td style="vertical-align: top; width: 50%;"> <ul style="list-style-type: none"> <input type="checkbox"/> Mental health history <input type="checkbox"/> No permanent address <input type="checkbox"/> Limited English proficiency <input type="checkbox"/> College/university student <input type="checkbox"/> In the military <input type="checkbox"/> Incarcerated/detained/institutionalized (at the time of the crime) <input type="checkbox"/> Resident facility <input type="checkbox"/> Prior reports of sexual violence <input type="checkbox"/> Physical/cognitive disability (serious impairment of daily functioning) <input type="checkbox"/> Consensual sexual activity with the suspect prior to the assault <input type="checkbox"/> Consensual sexual activity with the suspect subsequent to the assault </td> <td style="vertical-align: top; width: 50%;"> <ul style="list-style-type: none"> <input type="checkbox"/> Involved in commercial sexual activity or exploitation (at the time of the crime) <input type="checkbox"/> History of commercial sexual activity/commercially sexually exploitation <input type="checkbox"/> Abuse or addiction to drugs or alcohol <input type="checkbox"/> Victim does not participate in investigation/prosecution (unable, unwilling, or unavailable) <input type="checkbox"/> Victim criminal history <input type="checkbox"/> History of domestic violence (victim) <input type="checkbox"/> History of domestic violence (perpetrator) <input type="checkbox"/> None of these apply <input type="checkbox"/> Unspecified </td> </tr> </table>	<ul style="list-style-type: none"> <input type="checkbox"/> Mental health history <input type="checkbox"/> No permanent address <input type="checkbox"/> Limited English proficiency <input type="checkbox"/> College/university student <input type="checkbox"/> In the military <input type="checkbox"/> Incarcerated/detained/institutionalized (at the time of the crime) <input type="checkbox"/> Resident facility <input type="checkbox"/> Prior reports of sexual violence <input type="checkbox"/> Physical/cognitive disability (serious impairment of daily functioning) <input type="checkbox"/> Consensual sexual activity with the suspect prior to the assault <input type="checkbox"/> Consensual sexual activity with the suspect subsequent to the assault 	<ul style="list-style-type: none"> <input type="checkbox"/> Involved in commercial sexual activity or exploitation (at the time of the crime) <input type="checkbox"/> History of commercial sexual activity/commercially sexually exploitation <input type="checkbox"/> Abuse or addiction to drugs or alcohol <input type="checkbox"/> Victim does not participate in investigation/prosecution (unable, unwilling, or unavailable) <input type="checkbox"/> Victim criminal history <input type="checkbox"/> History of domestic violence (victim) <input type="checkbox"/> History of domestic violence (perpetrator) <input type="checkbox"/> None of these apply <input type="checkbox"/> Unspecified
<ul style="list-style-type: none"> <input type="checkbox"/> Mental health history <input type="checkbox"/> No permanent address <input type="checkbox"/> Limited English proficiency <input type="checkbox"/> College/university student <input type="checkbox"/> In the military <input type="checkbox"/> Incarcerated/detained/institutionalized (at the time of the crime) <input type="checkbox"/> Resident facility <input type="checkbox"/> Prior reports of sexual violence <input type="checkbox"/> Physical/cognitive disability (serious impairment of daily functioning) <input type="checkbox"/> Consensual sexual activity with the suspect prior to the assault <input type="checkbox"/> Consensual sexual activity with the suspect subsequent to the assault 	<ul style="list-style-type: none"> <input type="checkbox"/> Involved in commercial sexual activity or exploitation (at the time of the crime) <input type="checkbox"/> History of commercial sexual activity/commercially sexually exploitation <input type="checkbox"/> Abuse or addiction to drugs or alcohol <input type="checkbox"/> Victim does not participate in investigation/prosecution (unable, unwilling, or unavailable) <input type="checkbox"/> Victim criminal history <input type="checkbox"/> History of domestic violence (victim) <input type="checkbox"/> History of domestic violence (perpetrator) <input type="checkbox"/> None of these apply <input type="checkbox"/> Unspecified 	

Drug/Alcohol Use by Victim *(please mark all that apply)*

- Voluntary ingestion of alcohol by victim
- Voluntary ingestion of drug(s) by victim
- Involuntary ingestion of drug(s)/alcohol by victim (administered covertly, without knowledge or consent of victim)
- Mistaken/misrepresented ingestion of drug(s) by victim (victim takes voluntarily, but is misled regarding the actual drug taken or the effects it will have)
- No drug or alcohol ingestion by victim
- Unspecified

Victim Physical Injury *(please mark only one, based on the most serious level of injury)*

- Other serious physical injury (typically requiring medical care)
- Vaginal injury
- Anal injury
- Oral injury
- Penile injury
- Minor physical injury (such as bruises, minor cuts, scrapes, or abrasions)
- No known physical injury (other than the sexual violence itself)
- Unspecified

Did the victim receive any forensic / medical services? *(please mark all that apply)*

- No forensic/medical services received *(please specify why):*
- Yes, a forensic medical examination
- Yes, medical services other than a forensic examination
- Unspecified

Did the victim receive any social / behavioral health services?

- Office's advocacy unit
- External
- Unspecified

Relationship (if any) with the Suspect(s) *(please mark all that apply, if more than one suspect)*

- Stranger (never met)
- Brief encounter (met and assaulted within 24 hours)
- Family member
- Non-stranger (known more than 24 hours, and not in any other category)
- Current or former intimate partner (includes current or former spouses, boyfriends, girlfriends, romantic partners, or domestic partners)
- Professional relationship *(e.g., suspect is a public official, medical professional, counselor, clergy member, etc.)*
please specify:

- Unspecified

SUSPECT INFORMATION:	
Number of Suspects <i>(as indicated or estimated by the victim)</i>	<input type="checkbox"/> Unspecified
Suspect(s) Gender <i>(indicate number of each)</i>	
<input type="checkbox"/> Female	<input type="checkbox"/> Male
<input type="checkbox"/> Transgender	<input type="checkbox"/> Gender Non-Conforming
<input type="checkbox"/> Unspecified	
Suspect(s) Race/Ethnicity <i>(indicate number of suspects within each category, using best estimate)</i>	
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Caucasian/White
<input type="checkbox"/> African American/Black	<input type="checkbox"/> Hispanic/Latino
<input type="checkbox"/> Other, please specify:	<input type="checkbox"/> Native American/Native Alaskan
<input type="checkbox"/> Unspecified	<input type="checkbox"/> Biracial/Multi-racial
Suspect(s) Age <i>(indicate number of suspects in each age category, based on estimate at the time of the assault)</i>	
<input type="checkbox"/> 16-20:	<input type="checkbox"/> 21-25:
<input type="checkbox"/> 26-35:	<input type="checkbox"/> 36-50:
<input type="checkbox"/> 51-65:	<input type="checkbox"/> Over 65:
<input type="checkbox"/> Unspecified	
Characteristics of the Suspect(s) <i>(please mark all that apply, for any of the suspects if more than one)</i>	
<input type="checkbox"/> No permanent address	<input type="checkbox"/> Physical/cognitive disability (serious impairment of daily functioning)
<input type="checkbox"/> Limited English proficiency	<input type="checkbox"/> History of mental health
<input type="checkbox"/> In the military	<input type="checkbox"/> History of abuse/addiction of controlled substances
<input type="checkbox"/> College/university student	<input type="checkbox"/> History of domestic violence
<input type="checkbox"/> Incarcerated/detained/institutionalized (at the time of the event)	<input type="checkbox"/> None of these apply
<input type="checkbox"/> Resident facility	
<input type="checkbox"/> Unspecified	
Drug/Alcohol Use by Suspect(s) <i>(please mark only one)</i>	
<input type="checkbox"/> No known drug/alcohol use by suspect(s)	
<input type="checkbox"/> Suspect(s) under the influence of alcohol/drugs	
<input type="checkbox"/> Unspecified	
Criminal Record of Suspect(s) <i>(please mark all that apply, if multiple incidents are involved)</i>	
<input type="checkbox"/> Involved in at least one prior investigation of a sex offense that did not lead to an arrest	
<input type="checkbox"/> Arrested for at least one prior sex offense that did not lead to a conviction	
<input type="checkbox"/> Convicted for at least one prior sex offense	
<input type="checkbox"/> Arrested or convicted for a prior crime other than a sex offense (includes pleas to violations)	
<input type="checkbox"/> Documented domestic violence history	
<input type="checkbox"/> No documented criminal record for suspect(s)	
<input type="checkbox"/> Multiple suspects	
<input type="checkbox"/> Unspecified	

CASE CHARACTERISTICS:**Sexual Acts Involved** *(please mark all separate sexual acts that apply)*

- Penetration of vagina by penis
- Penetration of anus by penis
- Penetration of vagina or anus by anything other than a penis (*e.g.*, finger, foreign object)
- Penetration of mouth by penis; penetration of vulva or vagina by mouth; penetration of anus by mouth
- Contact of mouth by penis; contact of vulva or vagina by mouth; contact of anus by mouth and/or penis
- Contact only of any intimate part or parts of body
- Other, please describe:
- Unspecified

Characteristics of Assault *(please mark all that apply)*

- Perpetrated using force or threats
- Weapon used or threatened
- Perpetrated without force without consent
- Perpetrated against victim with impaired motor skills (*e.g.*, difficulty walking, standing; could be due to drugs, alcohol, or other reasons)
- Perpetrated against victim with impaired communication skills (*e.g.*, difficulty speaking; could be due to drugs, alcohol, or other reasons)
- Perpetrated against victim who is unconscious/moving in and out of consciousness
- Perpetrated against victim with severe physical or cognitive disability
- Perpetrated against victim who is institutionalized (*e.g.*, ward, arrestee, prisoner, resident of a care facility)
- Other, please describe:

- Unspecified

Completed vs. Attempted Assault *(please mark only one based on the highest charge considered by prosecutor or presented to Grand Jury if applicable)*

- Completed Assault
- Attempted Assault
- Unspecified

Time Between (most recent) Assault and Police Report *(please mark only one)*

- Same day (1 to 23 hours)
- 24 to 96 hours (1 to 4 days)
- 5-6 days (more than 96 hours but less than 7 days)
- 1-4 weeks (7 days or more, up to 1 full month)
- 1-12 months (more than 1 month, less than 12 full months)
- Years (12 full months or more)
- Unspecified

Case Processing *(time between receiving the case and charging or Grand Jury)*

- Days (less than 7 days)
- Months (more than one month, but less than 12 full months)
- Weeks (7 days or more, up to 1 full month)
- Years (12 full months or more)
- N/A
- Unspecified

Case Processing *(time between receiving the case and sentencing/final disposition)*

- Days (less than 7 days)
- Weeks (7 days or more, up to 1 full month)
- Months (more than one month, but less than 12 full months)

Type of Trial *(please mark only one)*

Bench trial

Jury trial

Unspecified

Primary Defense Strategy *(please mark only one)*

Identification (“you’ve got the wrong suspect”)

Credibility/Consent (e.g., “the victim wanted it,” “the victim is lying”)

Credibility/Other (“victim is lying”)

Elements not met (please describe):

Intoxication

Psychiatric Defense

Other, please describe:

Unspecified

Sentencing *(please mark only one)*

Non-custodial/conditional sentence (e.g., fine, probation, discharge; *if probation, please indicate duration in months*):

Incarceration *(please indicate duration in month)*

Probation in addition to incarceration *(please indicate duration in months)*:

Unspecified

Closing memo has information not contained in the documentation within the case file.

Yes

No

Appendix O: Sample Case Review Timeline

The below timeline provides projected review time for 100-200 cases, assuming an average 2.5 hours to review per case. The anticipated timelines for such a review are:

- 40 hours a week is 16 cases per week: 12.5 weeks
- 30 hours a week is 12 cases per week: 16.5 weeks
- 25 hours a week is 10 cases per week: 20 weeks

Build in time for quality assurance (QA) review which would be the following:

- 20 hours a week is 8 cases per week: 12.5 weeks
- 15 hours a week is 6 cases per week: 16.5 weeks
- 12.5 hours a week is 5 cases per week: 20 weeks

QA should be conducted weekly to ensure cases are being reviewed in a timely manner. The QA process should be guided by the case review protocol to verify accuracy of coding. QA should also be used to identify inconsistencies in coding across different individuals who are conducting the review (*i.e.*, two cases, same victim characteristics and one person codes it one way, and another does something different). If any major issues come up, reviewers should be provided with necessary feedback and/or training to prevent consistent errors with coding.

Please note that this timeline is only a sample. The schedule can be revised considerably, depending on the number of cases to be reviewed and the personnel available to review them.

Week	Case Review (20 weeks) 25 hours per week	Case Review (17 weeks) 30 hours per week	Case Review (12.5 weeks) 40 hours per week	Quality Assurance (percentage of cases completed)	Notes
Week 1	10 cases	12 cases	16 cases	50%	
Week 2	10 cases	12 cases	16 cases	50%	
Week 3	10 cases	12 cases	16 cases	50%	
Week 4	10 cases	12 cases	16 cases	50%	
Week 5	10 cases	12 cases	16 cases	50%	
Week 6	10 cases	12 cases	16 cases	50%	
Week 7	10 cases	12 cases	16 cases	50%	
Week 8	10 cases	12 cases		50%	
Week 9	10 cases	12 cases		50%	
Week 10	10 cases	12 cases		50%	
Week 11	10 cases			50%	
Week 12	10 cases			50%	
Week 13	10 cases		16 cases	50%	
Week 14	10 cases			50%	
Week 15	10 cases			50%	
Week 16	10 cases			50%	
Week 17	10 cases	12 cases		50%	
Week 18	10 cases			50%	
Week 19	10 cases			50%	
Week 20	10 cases			50%	

- ¹ These core competencies were adapted from the curriculum from the law school field practicum course, *Prosecuting Sexual Violence: Applying Research to Practice*, taught annually by AEquitas CEO Jennifer Long at Georgetown University Law Center.
- ² *Berger v. United States*, 295 U.S. 78, 88 (1935).
- ³ *Identifying Vicarious Trauma*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/learn/vicarious-trauma/identifying-vicarious-trauma> (last visited December 5, 2019).
- ⁴ 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 Lipsky with Connie Burk.
- ⁵ *Journaling & Expressive Writing*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/programs/our-approach/mind-body-spirit/journaling-expressive-writing> (last visited December 5, 2019).
- ⁶ *Yoga*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/programs/our-approach/mind-body-spirit/yoga-therapy> (last visited December 5, 2019).
- ⁷ *Mediation for a Mindful Existence*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/reunion/meditation-mindful-existence> (last visited December 5, 2019).
- ⁸ *DIY Wellness: 10 Easy Steps to Creating a Peaceful Home Retreat*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/reunion/diy-wellness-10-easy-steps-creating-peaceful-home-retreat> (last visited December 5, 2019).
- ⁹ *Resources*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/learn/vicarious-trauma/resources#footnote> (last visited December 5, 2019).
- ¹⁰ *The Vicarious Trauma Toolkit*, OFFICE FOR VICTIMS OF CRIME, <https://vtt.ovc.ojp.gov/about-the-toolkit> (last visited May 22, 2017).
- ¹¹ 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).
- ¹² 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).
- ¹³ See 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).
- ¹⁴ 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).
- ¹⁵ 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 MED. TRAINING CTR. 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).
- ¹⁶ 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).
- ¹⁷ See 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 https://aequitasresource.org/wp-content/uploads/2018/09/Issue_9_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_I_May_2013.pdf and https://aequitasresource.org/wp-content/uploads/2018/09/Issue_10_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_II_May_2013.pdf.

¹⁸ See AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (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).

¹⁹ 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.

²⁰ For discussion on victim's rights attorney roles, see M. Garvin & D.E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*. OHIO ST. J. OF CRIM. LAW, 67-88. 21 (2015).

²¹ 132 S. Ct. 2221 (2012). For an in-depth discussion of these considerations, see Teresa M. Garvey, *Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford*, 11 STRATEGIES (June 2013), available at <https://gcs-vimeo.akamaized.net/exp=1574298615~acl=%2A%2F722183941.mp4%2A~hmac=ac0302098e5a47480d7142ca4314a7f92ccdf5f83d610be5244fad170865b867/vimeo-prod-skyfire-std-us/01/2125/8/210626104/722183941.mp4>.

²² *Id.*

²³ Kurt M. Dubowski, The University of Oklahoma, Department of Medicine, *Stages of Acute Alcoholic Influence/Intoxication* (2006).

²⁴ Excerpted from *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS (March 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>.

²⁵ 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.

²⁶ 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).

²⁷ *Risk Assessments (ODARA) In Spousal/Partner Violence Cases*, NOVA SCOTIA PUBLIC PROSECUTION SERV., http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/ODARA%20RISK%20ASSESSMENTS%20IN%20SPOUSALPARTNER%20CASES%20ALL.pdf.

²⁸ *Spousal Assault Risk Assessment Guide (SARA)*, MULTI-HEALTH SYSTEMS, <https://link.springer.com/article/10.1023/A:1005430904495>.

²⁹ *What is Mosaic?* MOSAIC THREAT ASSESSMENT SYSTEMS, <https://www.mosaicmethod.com/>.

³⁰ DANGER ASSESSMENT, <http://www.dangerassessment.org/>.

³¹ 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).

³² *Id.*

³³ *Id.*

³⁴ Victims are often accurate judges of how dangerous the offender is to them, and what is likely to escalate the violence or threatening conduct.

³⁵ Defendants with more at stake may be more desperate to avoid criminal consequences, and thus more likely to resort to intimidation.

³⁶ 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), <https://aequitasresource.org/wp-content/uploads/2018/09/Prosecutors-Resource-on-Sexual-Abuse-in-Confinement.pdf>; and Viktoria Kristiansson, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, 26 STRATEGIES IN BRIEF (2015), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Identifying-Investigating-and-Prosecuting-Witness-Intimidation-in-Cases-of-Sexual-Abuse-in-Confinement-Issue-26.pdf>.

³⁷ For more details about relocation strategies for witness protection, see Peter Finn & Kerry Murphy Healey, *Preventing Gang- and Drug-Related Intimidation*, NAT'L INST. JUST. 22-38 (Nov. 1996), <https://www.ncjrs.gov/pdffiles/163067.pdf>; and Kerry Murphy Healey, *Research and Action, Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT'L INST. JUST 6-8 (Oct. 1995), <https://www.ncjrs.gov/pdffiles/witintim.pdf>.

³⁸ See, e.g., *Maine v. Moulton*, 474 U.S. 159 (1985).

³⁹ *Id.*

⁴⁰ See, e.g., *State v. K.W.*, 214 N.J. 499 (2013).

⁴¹ 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.

⁴² 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.

⁴³ Unfortunately, it is not unusual for some defense investigators to identify themselves as investigators, without identifying themselves as investigators for defense counsel.

⁴⁴ 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.

⁴⁵ See FED. R. EVID. 804(b)(6); *Ohio v. Roberts*, 448 U.S. 56, 74-77 (1980).

⁴⁶ See *Roberts*, 447 U.S. at 74-77; *Barber v. Page*, 390 U.S. 719 (1968); and *Hardy v. Cross*, 132 S.Ct. 490 (2011).

⁴⁷ See *California v. Green*, 399 U.S. 149 (1970).

⁴⁸ 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); and *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.

⁴⁹ AEquitas has produced sample briefs to admit evidence under the doctrine of forfeiture by wrongdoing, which may be obtained on request.

⁵⁰ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵¹ 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.

⁵² 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.

⁵³ 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.

⁵⁴ 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. *SEE Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, OFF. LEGAL EDUC., EXECUTIVE OFF. U.S. ATTORNEYS (2009), <http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf>.

⁵⁵ A web archive is a file that contains all of the information, including embedded text and images, of a particular web page.

⁵⁶ *See, e.g., Electronic Crime Scene Investigation: A Guide for First Responders, Second Edition*, NAT’L INST. JUST. (2008), <https://www.ncjrs.gov/pdffiles1/nij/219941.pdf>.

⁵⁷ 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).

⁵⁸ 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*. *See also United States v. Yates*, 438 F.3d 1307, 1312-18 (11th Cir. 2006).

⁵⁹ 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.

⁶⁰ 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.

⁶¹ *Brady*, 373 U.S. 83.

⁶² 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.

⁶³ *See, e.g., State v. Byrd*, 967 A.2d 287, 304 (N.J. 2009).

⁶⁴ *See United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009).

⁶⁵ *State v. Mason*, 160 Wash. 2d 910 (2007).

⁶⁶ MD. CODE ANN., CTS. & JUD. PROC. §10-901 (West 2011).

⁶⁷ *People v. Geraci*, 85 N.Y.2d 359, 649 (1995).

⁶⁸ See FED. R. EVID. 804(b)(6). Some States have additional requirements, such as the requirement of a showing that the statement to be admitted is reliable. See also *State v. Byrd*, 967 A.2d 285, 304 (N.J. 2009).

⁶⁹ See, e.g., *People v. Byrd*, 855 N.Y. S.2d 505 (2008) (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).

⁷⁰ *The Prosecutors’ Resource on Witness Intimidation*, AEQUITAS 38 (March 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>.

⁷¹ §1-1.1 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁷² §1-1.2 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁷³ §2-9.1 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁷⁴ §2-9.2 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁷⁵ §2 9.3 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁷⁶ §1-2.1 NDAA National Prosecution Standards, 3rd Ed. 2010

⁷⁷ §2-5.6 Legal Advice NDAA National Prosecution Standards, 3rd Ed., 2010.

⁷⁸ *Imbler v. Pachtman*, 424 U.S. 409, 429-31 (1976).

⁷⁹ *Id.*

⁸⁰ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁸¹ Commentary to § 2-5.6, NDAA National Prosecution Standards, 3rd Ed. 2010.

⁸² *Kalina v. Fletcher*, 522 U.S. 118 (1997).

⁸³ MODEL RULES OF PROF’L CONDUCT r. 3.7(a), (AM. BAR ASS’N 2019)

⁸⁴ MODEL RULES OF PROF’L CONDUCT r. 3.8(a), (AM. BAR ASS’N 2019)

⁸⁵ §4-2.4 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁸⁶ 541 U.S. 36 (2004).

⁸⁷ *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975).

⁸⁸ MODEL RULES OF PROF’L CONDUCT r. 3.8(a), (AM. BAR ASS’N 2019)

⁸⁹ See Sec. 9: Discovery, NDAA National Prosecution Standards, 3rd Ed., 2010.

⁹⁰ §5-1.4 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁹¹ § 5-3.1 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁹² §5-3.2 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁹³ §5-1.3 NDAA National Prosecution Standards, 3rd Ed. 2010.

⁹⁴ *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.*

⁹⁵ §2-14.1, 14.2 NDAA National Prosecution Standards, 3rd Ed., 2010.

⁹⁶ *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.

⁹⁷ 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.

⁹⁸ *Id.*

⁹⁹ See 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).

¹⁰⁰ *Id.*

¹⁰¹ Robert P. Granacher, Jr., MD, *Commentary: Alcoholic Blackout and Allegation of Amnesia During Criminal Acts*, 32 J. AM. ACAD. PSYCHIATRY L. 371-72 (2004).

¹⁰² 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).

¹⁰³ 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).

¹⁰⁴ White, *supra* note 99.

¹⁰⁵ 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.*

¹⁰⁶ 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.*

¹⁰⁷ White, *supra* note 99.

¹⁰⁸ van Oorsouw, *supra* note 106, at 365.

¹⁰⁹ *Id.*

¹¹⁰ Aaron M. White et al., *Experiential Aspects of Alcohol-Induced Blackouts Among College Students*, 30(1) AM. J. OF DRUG & ALCOHOL ABUSE 205 (2004).

¹¹¹ White, *supra* note 99.

¹¹² 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).

¹¹³ van Oorsouw, *supra* note 106, at 370.

¹¹⁴ White et al., *supra* note 110, at 216.

¹¹⁵ Jennison & Johnson, *supra* note 112, at 23-24.

¹¹⁶ *Id.* AT 26.

¹¹⁷ van Oorsouw, *supra* note 106, at 369.

¹¹⁸ 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).

¹¹⁹ See *Commonwealth v. Thomson*, 449 Pa. Super. 159 (1995); and *Georgina Stobbs & Mark Rhys Kebbell, Jurors' Perception of Witnesses with Intellectual Disability and the Influence of Expert Evidence*, 16 J. APPLIED RES. INTELL. DISABILITIES 112 (2003).

¹²⁰ See *Weir v. Chao*, 364 Pa.Super. 490 (1987).

¹²¹ *What do Victims Want? Effective Strategies to Achieve Justice for Victims of Crime*, INT'L ASS'N CHIEFS POLICE 21-22 (May 2000), <http://www.theiacp.org/portals/0/pdfs/WhatDoVictimsWantSummitReport.pdf>.

¹²² There are many case data tracking forms for sexual violence case reviews that are available for public dissemination and use. This form was adapted from case tracking materials developed by End Violence Against Women International (EVAWI) as part of the Making a Difference (MAD) project (see <http://www.evawintl.org/mad.aspx>), as well as data collection forms developed by researchers Melissa Morabito, Linda Williams, and April Pattavina for a study on decision-making and case attrition in sexual violence cases. See Morabito, Williams, and Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.* (2019), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf>.