

## Keeping Doors Open: Domestic Violence and COVID-19<sup>1</sup>

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There may be no greater tools for domestic abusers to control, harm, and intimidate their victims than isolation and increased dependence. As social distancing remains the chief strategy to manage and flatten the curve of COVID-19, social and economic support systems, such as school; work; counseling; public services; and family, friend, and community connections are interrupted, enhancing opportunities for domestic abuse. At the same time, criminal justice professionals upon whom victims rely for emergency intervention are compromised and operating at reduced capacity, disrupting important lifelines for victims and implicating offender accountability and public safety. All of these recent and abrupt changes have left domestic violence victims, who already may be hesitant or unwilling to seek help or to participate in the criminal justice system - due to witness intimidation, dynamics of power and control, or feelings of love and loyalty toward the perpetrator - more vulnerable to the cycle of violence.<sup>3</sup> The challenges that have arisen during this time, however, are by no means insurmountable. System professionals can still work to protect victims and hold offenders accountable by adapting current investigation, prosecution, and advocacy strategies to be responsive to the context of the current pandemic. As public servants of our communities, criminal justice professionals have the awesome responsibility to uphold justice and ensure public safety during this unprecedented moment in history.

### The Impact of COVID-19 on Domestic Violence Dynamics

It remains true today—as it did yesterday and will tomorrow-- that domestic violence is caused by offenders asserting power and control over their victims. Experts have long recognized that physical abuse and co-occurring crimes such as stalking and sexual assault are often lagging indicators of broader abusive relationships in which offenders are continuously seeking to exert psychological, economic, and other types of control over their partners. Although natural disasters<sup>4</sup> and economic recessions<sup>5</sup> do not create abusers in a vacuum, increased reports of abuse during such crises suggest that they exacerbate violence in relationships already characterized by domestic abuse. The COVID-19 pandemic has the characteristics of both an economic downturn and a natural disaster. As such, it is unsurprising that increased rates of domestic violence were observed after COVID-19 outbreaks in places including, but not limited to: China;<sup>6</sup> Paris, France;<sup>7</sup> Seattle, Washington;<sup>8</sup> Charlotte, North Carolina;<sup>9</sup> and San Antonio, Texas.<sup>10</sup> While there may be no single variable that explains the correlation between increased abuse and COVID-19, the current environment may:

- Expand perpetrators' access to victims as they socially distance or shelter in place;
- Intensify offenders' frustration over personal and financial circumstances, which is then projected onto victims; and
- Increase victims' vulnerability due to social isolation, financial hardships including job layoffs, and reluctance to access health care providers.

Given these factors, time may well show that the current increase in rates of domestic violence is actually understated. Accordingly, while the unique dynamics of domestic violence crimes have always required system professionals to be adaptable and think outside the box, the suddenness and uniqueness of COVID-19's impact on these crimes will call upon the exercise of these qualities to a much greater degree.

## **Social Distancing: Impact on and Opportunities for Bail and Early Release Decisions**

While domestic violence cases are increasing at a rate not yet fully known or appreciated, prosecutor's offices are required to make unprecedented decisions to balance public health needs (*i.e.*, avoiding crowded jails and prisons) with the safety of victims and communities. For some offenders arrested for domestic violence offenses, prosecutors can argue to the courts that, notwithstanding the public health risks presented by jails and prisons, monetary bail and bond are still necessary for ensuring that they return for later court appearances and for mitigating opportunities for victim intimidation. In fact, the unpredictability of the COVID-19 crisis and concomitant length of social distancing measures leads to uncertainty about the timing of future court dates, making bail and bond even more critical than they were pre-pandemic. Thorough risk assessments should precede every bail and bond decision, and strict supervisory and reporting conditions, as well as protective/stay-away orders - which should be routine in these cases - should also be made part of any release. Many prosecutor's offices have amplified their pre-COVID-19 collaborative efforts with courts, the defense bar, correctional institutions, and probation/parole to identify low-risk and truly non-violent offenders for release and furlough to alleviate COVID-19 risks in jails and prisons. However, a calibrated approach is not synonymous with a categorical one. Taking proactive positions on non-violent offenders may enhance prosecutors' credibility to advance arguments about the continuing appropriateness for strict bail and bond conditions for truly violent offenders. Even outside the possibility of monetary bail/bond conditions, prosecutors should continue to advance argument for non-monetary conditions that can advance victim safety, such as no-contact orders, offender reporting requirements, and increased remote probation and parole supervision. The need for strict enforcement of these conditions is underscored by domestic violence victims' limited opportunities to report violations or to access support services electronically, as abusers often have control over cell phones and computer records.<sup>11</sup>

The rationales surrounding bail and bond considerations should also guide discussion concerning early release of offenders in a post-conviction posture. Prosecutors should work closely with Department of Corrections professionals to assess the potential effects of early release on victim and public safety.

## **Social Distancing: Impact on and Opportunities for Investigations and Case Processing**

COVID-19 and social distancing measures have hampered ideal conditions for full and comprehensive domestic violence investigations and corresponding victim support services. Law enforcement has limited ability to conduct in-person interviews of victims and witnesses and to process evidence. Meanwhile, domestic violence medical-forensic exams may be impacted by medical professionals' overburdened schedules and victim reluctance to present at medical facilities for needed care. Investigative limitations, court delays, and limited service provision for victims may increase opportunities for offenders to effectively intimidate their victims and dissuade them from participating in the criminal justice process. Prosecutors and allied professionals can take immediate and proactive measures to address these challenges.

Prosecutors can work closely with law enforcement partners to establish criteria for triaging cases for investigation and prosecution. When resources are limited, criminal justice professionals generally agree to prioritize homicide – but even though homicide can be the tragic end of continuing and escalating abuse against an intimate partner, domestic

violence cases are routinely minimized. Prosecutors and detectives can work closely with advocates to assess lethality and should prioritize serial perpetrators and those who present high lethality risk.

Where law enforcement agencies maintain social distancing measures for non-emergency police contacts, prosecutors should help develop policies and protocols for interviewing witnesses telephonically or through video conferences. Policies should anticipate legal and practical considerations, including but not limited to strategies for maintaining victim privacy and confidentiality; implications for discovery; and methods for ensuring trauma-informed interviewing practices. When interviews are not in person, prosecutors should take special care to institute protocols for preventing, virtually detecting, and addressing witness intimidation, which is widespread in domestic violence cases.<sup>12</sup>

Prosecutors can also support victims of domestic violence by increasing public awareness about the support services that are still available in an environment of shut-downs. Many courts remain open for essential functions such as issuing protective orders and ensuring they are enforced, but victims may not always be aware of the availability.<sup>13</sup> Where in-person medical-forensic services are not an option, prosecutors can educate victims about opportunities for telehealth, as well as the medical and legal limitations of such approaches. Prosecutors also have a preexisting platform to advertise the continuing availability of services to support victims' collateral needs, including advocacy services, which can support victims' pursuit of financial support, housing, tele-counseling, and more. Prosecutors should ensure that these advertisements are accessible to individuals at all reading levels, as well as to persons who are deaf/hard of hearing, have limited English proficiency, or have other vulnerabilities.

## **Social Distancing: Impact on and Opportunities for Court Hearings**

Closed circuit testimony and teleconference technology have already proven to be critical tools for many courts and prosecutor's offices to keep cases moving in the midst of social distancing.<sup>14</sup> Sometimes these previously underutilized assets are being deployed to the limit of what was already allowed by pre-existing rules. In other instances, the current pandemic has made apparent the need for expanded use of teleconferencing and court rules and statutes that support the utilization of those options. To the extent that pre-trial proceedings, negotiated pleas, and other court hearings can be accomplished virtually, prosecutors can avoid bottlenecks when courts are fully reopened, and victims and other witnesses can retain confidence in the responsiveness of the criminal justice system. If teleconferencing options are available, prosecutors should:

- Consider the desirability of teleconferencing in light of the seriousness of the case and the overall prosecutorial strategy;
- Be aware of and take steps to mitigate existing privacy and security risks inherent in the particular platform being utilized;<sup>15</sup> and
- Ensure the preservation of testimony and the protection of the record on other matters, including notice due to victims under the jurisdiction's victims' right statute and any waivers of defendants' rights.

Despite the best of efforts, some cases may languish while courts are partially closed and less available during the pandemic. Case delays often lead to attrition as victims become frustrated or exhausted with the process and as offenders have more opportunities to intimidate their victims. The possible silver lining of court closures, however, is that the absence of hectic court schedules for prosecutors can create a surplus of "office" time, enabling opportunities for enhanced case preparation and victim outreach.<sup>16</sup> These can include:

- ***Maintaining regular contact with victims in an appropriate, socially-distanced manner.*** Regular contact will enable prosecutors to develop better rapport with victims. It can also provide an opportunity for prosecutors to educate victims about the dynamics of victim/witness intimidation, assess for signs of intimidation, and help coordinate the response to intimidation if and when it occurs, including filing motions to revoke bond, adding intimidation charges, filing forfeiture by wrongdoing motions, or admitting instances of intimidation as evidence of consciousness of guilt or the offender's method of control in the underlying case.
- ***Thoroughly investigating and preparing motions for admitting evidence to hold offenders accountable for the full extent of their activity, regardless of whether the victim ultimately participates in the prosecution.*** This may involve conducting pretext phone calls (where appropriate); monitoring phone calls of defendants in custody; thoroughly examining correspondence between the offender and the victim, including all available digital evidence; interviewing additional witnesses; and developing the historical background to litigate the offender's full course of conduct, which may include sexual assault, stalking, or 404(b)/"prior bad acts" evidence. Prioritize the documentation of information critical to overcoming hearsay or confrontation objections to the absent victim's out-of-court statements.

In many states that have declared judicial emergencies in the wake of COVID-19, the courts of last resort or trial courts have suspended rules relating to speedy trial rights. Some courts have also tolled existing statutes of limitation during this period. However, the unspecified right to a speedy trial is one of constitutional dimension, so nothing prevents a defendant from asserting the right when courts are once again fully open. Prosecutors may preemptively deploy strategies for responding to such claims, including written motions or notices detailing the current pandemic's impact on criminal justice case processing. Such measures can establish that a force majeure prevents a specific case from going forward rather than any lack of diligence by a prosecutor. However, the benefits of this strategy should always be balanced against the risk of introducing an issue where it had not previously existed.

## **Social Distancing: Considerations While Planning for Future Operations** <sup>17</sup>

Prosecutors and allied professionals are likely preoccupied with adapting their responses to meet social distancing measures brought on by the current crisis – and rightfully so. At some point, however, offices will reopen, courts will resume, and society will adapt to a new kind of "normal." Offices should start to consider now how to minimize or prevent bottlenecks caused by the combination of backlogged cases delayed by COVID-19 and newer cases. These bottlenecks will be most readily apparent in overwhelmed courts, but may also implicate law enforcement investigative efforts, forensic testing, and witness availability. As suggested earlier, some of this pressure can be alleviated by taking advantage of the current lack of day-to-day court proceedings and overpreparing cases to ensure they can proceed immediately when courts reopen.

The COVID-19 pandemic presents a multitude of considerations for future operations beyond bottlenecks and backlogs. The major challenge for prosecutors in preparing for a new "normal" is the lingering uncertainty of it all: we simply cannot anticipate when social distancing measures will be lifted or modified, nor can we anticipate every challenge that will arise when they are. Prosecutors should use this time to prepare an adaptable plan as best as possible.<sup>18</sup> Questions that should be considered include:

- If courts reopen next Monday, how does the office respond? Do all staff members come in? Some staff members? How are partners and the public notified?
- How does the office handle or prepare for another potential outbreak several months from now?
- What has the shutdown revealed about the office's capabilities for remote working and/or teleconferencing? Is additional technology needed?
- Which pending cases need to be and can be prioritized? Are those cases efficiently distributed to staff? If particular types of cases, such as domestic violence, have increased during the pandemic, should additional attorney staff be assigned to that area? During a judicial emergency, can such staff be brought up to speed on the current research related to victim behavior, offender perpetration, medical/health issues, forensic science, and psychological/mental health issues? Moreover, can reassigned prosecutors understand the common challenges that arise when investigating and prosecuting these crimes?
- Do conversations need to occur with the courts, court staff, and the defense regarding jury panels and jury trials? Even if official recommendations on social distancing are reduced or removed, should accommodations be made for community members who are not comfortable with the configurations of jury boxes and assembly areas?

Ideally, approaches to these and other issues should be developed following an open discussion with a spectrum of key staff members and other stakeholders in the criminal justice system.

The unprecedented impact of the COVID-19 pandemic has exacerbated previously existing domestic violence dynamics and has hindered the ability of prosecutors and law enforcement to fully respond to these crimes. However, domestic violence cases have always presented unique challenges - the current circumstances have only amplified them. Prosecutors, law enforcement, and advocates are certainly up to the task of overcoming these challenges and responding to these offenses with the care and consideration they deserve. With thoughtfulness, adaptability, and proactivity, prosecutors have the opportunity to rededicate themselves to a victim-centered and offender-focused practice and thereby emerge better able to serve victims and their communities.

## Endnotes

- 1 This article is reprinted with permission from the Civic Research Institute and was originally developed for the Institute's Domestic Violence Report. The article is scheduled for publication in the Domestic Violence Report's June/July 2020 issue.
- 2 Jonathan Kurland is an Attorney Advisor at AEquitas and Holly Fuhrman is a Senior Associate Attorney Advisor at AEquitas. The development of this resource was supported by Grant No. 2017-TA-AX-K043 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women. This article would not be possible without the insight gained from Sherry Boston, District Attorney of DeKalb County, Georgia; Ed McCann, First Assistant District Attorney in Montgomery County, Pennsylvania; and Nancy O'Malley, District Attorney of Alameda County, California during preparation and presentation of the remote panel discussion, *Justice in the Time of COVID-19: Strategic Responses*. To watch the recorded panel, please visit <https://aequitasresource.org/resources/>
- 3 Many organizations have developed guidelines for supporting survivors of domestic-violence during COVID-19 through various means. *See, e.g.*, CALLING ALL FAMILY MEMBERS AND FRIENDS OF FAMILIES EXPERIENCING VIOLENCE AT HOME (Futures Without Violence, 2019), available at [https://www.futureswithoutviolence.org/wp-content/uploads/Futures\\_Resources-1.pdf](https://www.futureswithoutviolence.org/wp-content/uploads/Futures_Resources-1.pdf). *See also* COVID-19 RESOURCES FOR LEGAL SERVICES AND VICTIMS' RIGHTS (National Crime Victim Law Institute), available at [https://law.lclark.edu/live/news/43063-covid-19-resources-for-legal-services-and-victims?mc\\_cid=88727193e9&mc\\_eid=a308e89299](https://law.lclark.edu/live/news/43063-covid-19-resources-for-legal-services-and-victims?mc_cid=88727193e9&mc_eid=a308e89299).
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- 10 Mariah Medina, *San Antonio police see 21% increase in family violence call volume compared to this time last year*, KENS5 (March 26, 2020), available at <https://www.kens5.com/article/news/health/coronavirus/san-antonio-police-see-21-increase-in-family-violence-call-volume-compared-to-this-time-last-year/273-723e22ce-15f5-449d-8e97-e591b9c330c1>.
- 11 Kaitlyn Wells and Thorin Klosowski, *Domestic Abusers Can Control Your Devices. Here's How to Fight Back*. THE WIRECUTTER, April 6, 2020, available at <https://thewirecutter.com/blog/domestic-abusers-can-control-your-devices-heres-how-to-fight-back/>.
- 12 For more on witness intimidation, *see* The Prosecutors' Resource On Witness Intimidation (AEquitas, March 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>; Teresa M. Garvey, *Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing*, 17 STRATEGIES (December 2018), available at <https://aequitasresource.org/wp-content/uploads/2018/12/Legal-Jiu-Jitsu-for-Prosecutors-in-IPV-Cases-Forfeiture-by-Wrongdoing-2.pdf>; and FRANKLIN CRUZ AND TERESA GARVEY, IMPROVING WITNESS SAFETY AND PREVENTING WITNESS INTIMIDATION IN THE JUSTICE SYSTEM: BENCHMARKS FOR PROGRESS (AEquitas and Justice Management Institute, 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Benchmarks-for-Progress.pdf>.
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- 14 *See, e.g.*, Letter from the California District Attorneys Association to the Presiding Judges and Presiding Judge Committee (March 26, 2020), available at <https://www.cdaa.org/wp-content/uploads/CDAA-LETTER-BRIEF-TO-CA-PJs.pdf>.
- 15 David Nield, *How to Keep Your Zoom Chats Private and Secure*, WIRED, April 5, 2020, available at <https://www.wired.com/story/keep-zoom-chats-private-secure/>.
- 16 The current climate may present opportunities for prosecutors to participate in webinar trainings on best practices for the investigation and prosecution of domestic violence and stalking cases. For currently recorded AEquitas webinars and other resources, visit <https://aequitasresource.org/resources/>. To request a customized training, visit <https://aequitasresource.org/trainings/>.

- 17 For an informed discussion on prosecutorial approaches and strategies for adapting to the current crisis, see the archived panel discussion, *Justice in the Time of COVID-19: Strategic Responses*, which was recorded on April 9, 2020 and is available for viewing at <https://aequitasresource.org/resources/>.
- 18 Some offices, including the Dekalb County, Georgia District Attorney's Office, have already instituted remote office operations plans for current and future use. For more information, reach out to AEquitas at [info@aequitasresource.org](mailto:info@aequitasresource.org).

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