



## Guiding and Supporting the Victim's Choices Regarding Participation in the Prosecution of Sexual and Intimate Partner Violence<sup>1</sup>

The criminal justice process can expose survivors of sexual and intimate partner violence to unique re-traumatization. While multidisciplinary response efforts employing victim-centered and trauma-informed practices have greatly facilitated the reporting and engagement of survivors of sexual and intimate partner violence, the process itself remains daunting. Interviews, evidence collection, public court proceedings, and cross-examination at trial—all of which are essential to a meticulous and fair prosecution—may be difficult and distressing for victims, even with the guidance and support of advocacy and prosecution professionals. As a result of these and other case-specific factors, including witness intimidation and the absence of a personal support system, some survivors ultimately decline to participate, avoiding service of process or refusing to appear under subpoena.

Prosecutors are ultimately responsible for serving not only the interests of individual victims, but also those of the public they are sworn to serve and the laws they are sworn to uphold. Thus, there may be inherent tension between prosecutors seeking to do justice and victims of sexual and intimate partner violence, who also want justice but understandably must prioritize their own best interests as they recover from the trauma of victimization. Advocates and other allied professionals can play an important role in assisting victims in understanding the criminal justice process and what may be asked of them by way of participation in that process:

- They help victims to understand what their options may be in terms of participation and the potential consequences of those options;

- They support victims so they remain engaged and empowered throughout the process;
- They can advocate with the prosecutor and/or with the court to take the victim’s concerns and interests seriously, and to accommodate the victim’s wishes if at all possible; and
- They can assist the victim in ways that will minimize any adverse collateral consequences that could flow from their decision to limit or refuse their participation in the prosecution of the case.

This article explores strategies that will assist advocates and allied professionals in guiding and supporting victims throughout the criminal justice process in ways that will help to ensure that their choices about participation are fully informed and that their interests are protected and advanced at all stages in the process.

### Explaining the Role of the Advocate (or Other Professional) and Confidentiality

The role of systems-based advocates is distinguishable from that of community-based advocates. Generally speaking, systems-based advocates do not have the same level of confidentiality with respect to communications with victim-survivors that community-based advocates do. Community-based advocates often have a legal privilege—either statutory or codified in the rules

of evidence—to refuse to disclose confidential communications between them and the victim using their services. The existence and level of privilege will vary by jurisdiction, as will the circumstances under which even privileged communications might be subject to disclosure (usually to the court, which would then decide whether further disclosure is required). Systems-based advocates, who may be employed by police departments or prosecutors’ offices, play an invaluable role in assisting victims in navigating the investigation and prosecution of their cases but often have obligations to share information with police and prosecutors—who may, in some situations, be obligated to disclose that information to the defense.

One of the first things that advocates—or any professionals working with victims—should clearly explain to the victim is the professional’s role in the process. This includes the extent to which the victim’s communications with that professional (including the victim’s location and contact information) are confidential/privileged, and the circumstances under which information could or must be disclosed. Few victims will understand, without careful explanation, the distinction between their communications with community-based advocates, shelter personnel, counselors, and prosecutor’s office- or law enforcement-based advocates. A clear explanation allows victims to decide how much information they want to disclose to a specific professional.

	Employed by:	Confidentiality: <sup>2</sup>	Privilege: <sup>3</sup>	Scope of services:	Must be participating in a criminal case?
<b>Community-Based Advocates</b>	Non-profit community-based organizations	Yes, in many states	Sometimes yes; level of privilege and exceptions to privilege are highly variable by jurisdiction	Can be extremely broad (e.g., counseling, long—and short-term care, and even court accompaniment)	No. Victims need not report to police to access services
<b>Systems-Based Advocates</b>	Law enforcement or prosecutors	No, and are sometimes required to make disclosures to defense	No	Tends to be narrowly focused on navigating the court process	Due to limited nature of services, often yes — but can make referrals

## Importance of a Multidisciplinary Response

A multidisciplinary response to intimate partner and sexual violence enables professionals to support victims as they navigate their choices. It gives advocates the ability to assist survivors in understanding the potential benefits and consequences of participating in the criminal justice process (or of declining to do so), as well as to provide them with the most helpful support, regardless of whether they participate in a case by testifying in court.

A coordinated community response (CCR) or Sexual Assault Response Team (SART) enables all participating multidisciplinary professionals (advocates, law enforcement, police, healthcare professionals, and others) to provide a victim-centered, trauma-informed response to victims. Working together, professionals have the ability to cross-train each other so that members of each of the disciplines understand the roles, missions, tools, techniques, priorities, challenges, and responsibilities of the others. The disciplines can educate each other in a way that will benefit each of them and, ultimately, enable them to better serve victims of intimate partner and sexual violence.

A truly collaborative team will be able to ensure that each member of a specific discipline clearly understands and explains the legal, medical, psycho-social, and other consequential outcomes of a victim's decision to participate or not participate in a case. Since community-based advocates share the most protected communications with survivors, their conversations may include weighing the costs and benefits of participating in the criminal justice process. While advocates should not attempt to provide legal advice to the survivor, they can discuss the potential negative consequences of declining to participate in the criminal justice process, including:

- The prosecutor's likely inability to proceed to trial without the survivor's testimony,
- The potential that the survivor will later change their mind but the statute of limitations will have tolled, or

- The prosecutor's possible decision to take next-level measures to secure the testimony, if the offender is considered highly dangerous and/or is a known serial offender.

## Importance of Offender Accountability and Public Safety

Efforts to eliminate the accumulation of untested rape kits have confirmed what has long been suspected: a significant number of perpetrators of sexual violence commit serial crimes against multiple victims. In addition, there is a high level of crossover offending, *i.e.*, sexual violence committed by the same perpetrator against victims who are strangers to them as well as against those that they know. When such perpetrators are held accountable for their crimes, future victimizations may be prevented. Thus, thorough investigation and skillful prosecution practices are essential to identify such perpetrators and contain them.

These practices are equally important in domestic violence cases. Given the repeat, cyclical, and often escalating nature of domestic violence, failure to intervene could result in further physical and emotional injury to the victim, strangulation, and even death.<sup>4</sup> Any children who witness violence in the home may be victimized themselves; merely witnessing such violence may lead to developmental delays and elevated risks of chronic physical and mental illness, substance use disorder, and maladaptive behaviors.<sup>5</sup>

The decision to proceed with a prosecution is based upon more than whether there is sufficient evidence to prove that the offender violated a criminal statute. Prosecutors consider many factors, including the impact of the crime on the victim and the community, the extent of the harm caused by the offense, and the victim's wishes to testify.<sup>6</sup> When a victim decides that they do not wish to pursue the case or testify in court, therefore, the prosecutor's obligation to the public may demand that they move forward with the case—sometimes at the expense of the victim's wishes. In rare cases—where the prosecutor feels they do not have the evidence to pursue the case without direct victim testimony, and the case is sufficiently serious that the prosecutor feels duty-bound

to prosecute—they may conclude their only option requires them to compel an unwilling victim to testify. Although some intimate partner violence cases may be able to proceed without the victim's testimony, even highly-skilled prosecutors will generally not be able to overcome the legal challenges of proceeding on a sexual assault case without a participating victim.

## **Importance of Supporting Victims Throughout the Criminal Justice Process**

Many of the obstacles to justice in the prosecution of intimate partner and sexual violence can be attributed to the traumatic effects on victims arising from the crime and from the criminal justice process. Victims are often unable to immediately report these crimes. Many victims question whether what has happened to them was actually a crime; they may feel a sense of shame or self-blame, or they may doubt whether anyone will believe them. Some victims have difficulty recalling what happened to them because they were assaulted while intoxicated—voluntarily or involuntarily—by drugs or alcohol. Victims under the coercive control of their intimate partners may hope or expect that the offender will change, or they may be terrified of what the offender will do if they go to the police. The sheer trauma of the crime makes it difficult for victims who do report their assaults to relate the events and details of the crime in a linear fashion, especially when they are attempting to recount details of abuse that has extended over several days, months, or years. As police and prosecutors become more aware of the effects of trauma and the benefits of trauma-informed interviewing and other practices, more of these criminal justice professionals are able to interview victims in a way that minimizes re-traumatization and more effectively elicits memories and detail. These practices generate additional investigative leads or can lend critical proof of a crime, resulting in better, more prosecutable cases.

To best support a victim in the wake of a reported crime of sexual or intimate partner violence, advocates and allied professionals should understand the importance of the various aspects of the investigation, as well as the purposes for which various types of evidence are

gathered. Even when police and prosecutors explain why they need certain information, a survivor who is coping with the traumatic effects of victimization may be unable to retain and process everything that has been explained to them. To the extent victims have a clear understanding of the various steps in the process—including what may be asked of them at these various stages, their options, and the ways that advocates and allied professionals can assist them—they are more likely to be engaged and empowered throughout the proceedings. For example, victims may have to testify repeatedly in what seems like a never-ending process and, without explanation, may feel like their participation is meaningless. In addition, they may not understand the different procedural events that happen during a criminal case, such as motion hearings that may or may not require the victim's testimony. Community-based advocates should ensure that either the prosecutor or the systems-based advocate take the time to explain upcoming or past hearings—and the victim's role in those hearings—so they are informed, which allows them to maintain their engagement.

## **The Investigation Phase**

Law enforcement and prosecutors typically wish to conduct interviews of the victim and other potential witnesses as early in the process as possible. While relaying the details of a traumatic crime is difficult, trauma-informed interviewing techniques can minimize the likelihood and extent of re-traumatization. In addition to documenting and investigating the specific act of sexual or physical violence, investigators will need to explore what happened before and after the crime. In the case of intimate partner assault, this will typically involve a complex history involving repeating loops of violence, apologies, reconciliation, and more violence.

It is important that victims are encouraged to be completely honest with investigators and prosecutors. Many victims are understandably reluctant to relate details they consider personally embarrassing or those that they fear will expose them to adverse consequences. For instance, a victim may deny or minimize how much they had to drink or drugs they took voluntari-

ly, for fear of punishment by parents, their school, or police. Or they may omit details that cause them to blame themselves or to fear blame from others, such as having engaged in consensual activity prior to a sexual assault. They may feel shame or fear for not having left their partners after the first incident of abuse. They may lie about the presence of children during violent incidents so as not to be seen as a “bad parent” or to avoid investigation by child protective services. Prosecutors can explain any of these circumstances at trial and protect the victim from being questioned on some of them, but only if they know about such facts in advance. Often the offender is very much aware of these “unfavorable” facts and will not hesitate to exploit them at trial; if trial is the first time the prosecutor hears about them, they will not be prepared to limit or refute such evidence. Moreover, some details the victim may hesitate to disclose, such as their voluntary intoxication, may be important evidence that the victim did not consent to a sexual act.

Even when victims are initially less than completely truthful about some details, they should correct any misstatements or omissions as soon as possible. If any “unfavorable” information is widely known or is known to the defendant, it is best for the victim to disclose such history to the prosecutor, who can then take steps to exclude it or to minimize its impact. If the details are not legally relevant to the case and would serve only to embarrass or harass the victim, the prosecutor can file a motion to prohibit such questions at trial.<sup>7</sup> Rape shield laws, for example, exist in every jurisdiction in the U.S. and generally preclude the admission of evidence of the victim’s sexual behavior, with some exceptions.<sup>8</sup> Even if the information cannot be excluded entirely, prosecutors can prepare to explain the evidence or minimize its significance at trial.

Investigators and prosecutors need to know the names of anyone the victim may have talked to immediately after the assault about the crime or the surrounding circumstances, and what they said. Usually, statements made out of court, when the victim was not under oath and subject to cross-examination, are considered to be hearsay and generally inadmissible at trial. There are

exceptions, however, to the hearsay rule. The exceptions most often relied upon include:

- “Excited utterances,” which are statements about an alarming event made soon after it happened, while the victim is still under stress from the event (for instance, calling a friend or family member right after an assault and saying, “I was just raped!”);
- Statements made for purposes of medical diagnosis and treatment (for instance, statements to a Sexual Assault Nurse Examiner (SANE) or to an Emergency Medical Technician (EMT));
- Statements of present state of mind or intention to do something (for instance, “I’m meeting up with [the defendant] after work tonight.”);
- Statements of then-existing physical, mental, or emotional condition (for example, “My head hurts,” or “He’s making me nervous the way he keeps looking at me.”); or
- Statements of present sense impression (for instance, “This drink tastes funny,” or “I’m bleeding.”).

When the victim or other witnesses can provide as much detail as possible about statements made around the time of the offense (before, during, and after the assault), the prosecutor will be able to determine whether there is a hearsay exception that might make the statement admissible at trial. Statements that qualify as exceptions to hearsay are especially critical in intimate partner violence cases in which the victim is unable to participate at trial. Even in cases of sexual violence — where it is highly difficult to proceed without the victim — it is critical for investigators and prosecutors to know about statements the victim may have made following the assault and to whom. These statements can help further investigative leads, support the credibility of the victim’s testimony, or lend critical proof of an element of a crime.

Even if a statement falls within a hearsay exception, it may still be inadmissible if the victim is not testifying at trial. This is because of the Confrontation Clause of

the Sixth Amendment to the U.S. Constitution, which states that a criminal defendant has the right to confront the witnesses against them, as interpreted by the Supreme Court in *Crawford v. Washington*<sup>9</sup> and the subsequent cases elaborating on that decision. Essentially, these cases divided out-of-court statements into two categories: testimonial hearsay and nontestimonial hearsay. Testimonial hearsay statements are typically those made to law enforcement (for instance, in an interview or formal statement given to police) or those that are made in a more formal way (for instance, in an affidavit), with the expectation that the contents of the statement might be introduced at trial. Nontestimonial hearsay statements, in contrast, are typically those made to friends, family members, acquaintances, medical professionals, or even strangers, for purposes *other than* to document information that might be admitted at trial. For example, a 911 call is usually considered nontestimonial because the purpose of the call is to

summon help to deal with an emergency; a statement to a friend or family member about what happened during a sexual assault is usually made to get advice about what to do or to obtain comfort and support, not to make a report with legal consequences.

The significance of determining whether a statement is testimonial or nontestimonial is this: *If the victim is not testifying at trial* (and thus not subject to cross-examination), a testimonial hearsay statement is admissible *only* if (a) the victim is *unavailable* to testify (cannot be located, cannot be produced at trial,<sup>10</sup> is deceased or ill, has a testimonial privilege, etc.) AND (b) the defendant had a *prior* opportunity to cross-examine the victim (for instance, at a preliminary hearing). On the other hand, nontestimonial hearsay statements are generally admissible—even if the victim is not testifying—so long as they come within a hearsay exception.

	Testimonial Statement	Non-Testimonial Statement
Formality	Generally more formal	Generally informal
Purpose of Statement	Made or reasonably expected to be utilized in criminal prosecution	Made for any other reason
Statements Generally Made To...	State actors	Non-state actors (exception: statements made in context of ongoing emergency)
Examples	Statement to law enforcement during interview or formal written statement to police  Affidavit	911 call (purpose is to aid in emergency)  Statement to family or friend (made to obtain comfort, support, or advice)
Admissible at Trial If Victim Doesn't Testify?	No, unless victim unavailable AND defendant had prior opportunity to cross the victim  Exception: forfeiture by wrongdoing <sup>11</sup>	Yes, as long as statement comes within hearsay exception

Thus, it is important for the prosecutor to be able to evaluate any out-of-court statements made by the victim to others; if it turns out that nontestimonial statements were made to others, those individuals (or any witnesses to those statements) could be called to testify at trial even if the victim declines to participate at trial. Such evidence may allow the case to move forward in domestic violence cases, regardless of whether the victim testifies or not; in sexual violence cases involving competent adults, it's highly challenging, and often impossible. Likewise, prosecutors may call the victim to testify at a preliminary hearing or a bail hearing at which the defense would have the opportunity to cross-examine, thereby preserving the testimony in the event the victim is unavailable to testify at trial. Some victims may want to hear this level of analysis in order to understand why they are being asked certain questions and why certain decisions are being made. In these cases, advocates should let the prosecutor know that they need to take the time to explain this in a way the victim will understand.

Corroborating evidence is also a critical means of supporting a victim's account of what occurred, regardless of whether the victim testifies at trial. Although corroboration of a victim's account of the crime is rarely a legal requirement, to the extent the victim's report can be corroborated by other evidence—for example, details uncovered during a crime-scene investigation, observations of other witnesses who can corroborate certain details even if they did not personally observe the crime, statements by witnesses in whom the victim may have confided or who observed the victim before or after the crime—the case becomes much stronger. A thorough investigation, including statements and other evidence obtained as part of a rape-kit examination by a SANE, not only increase the likelihood that a case can go forward without the victim's trial testimony; it also reduces the testimonial burden for the victim who does participate at trial. The victim's trial testimony becomes one piece of a web of evidence in the case, rather than the critical linchpin on which the prosecution rests.

## Pretrial

There is little participation needed from the victim during this phase of the trial, and because it is often the phase where discovery is passed to the defense and motions are filed, delays are commonplace. It may also be a time where communication with the victim can fall off. Advocates who engage in meaningful collaboration with their prosecutors' offices should ensure that there are protocols followed during this period of case processing to promote communication around case status and reason for delay.

As time passes, the victim may experience pressure or intimidation from family and friends of an offender or their allies to stop participating in the case. This intimidation is often subtle, particularly where the victim and perpetrator are engaged in an intimate partner relationship. Advocates who work closely with victims can help educate them about the different methods of intimidation to which they may be exposed. Advocates who learn about intimidation and who have strong relationships with the prosecutor's office may have protocols to follow in order to enhance victim safety.

With permission, advocates can work with the prosecutor to report intimidation, which the prosecutor may be able to stop through various tools, such as requests for court orders and bail conditions or through the filing of additional charges if necessary. Further, victim statements establishing intimidation to an advocate may be introduced to support a forfeiture by wrongdoing motion. "Forfeiture by wrongdoing is a longstanding exception to a defendant's Sixth Amendment right to confront the witnesses against him. If a defendant causes a witness to be unavailable for trial through his wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior testimonial statements is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution."<sup>12</sup> Such intimidation may also be used by a prosecutor at trial to show consciousness of guilt or to establish a pattern of controlling behavior under FRE 404(b) and its local equivalents.

During advocates' communication in this phase, advocates can gauge whether the victim is doubting their ability to participate at trial and can try to determine the source of these doubts. With the victim's permission, advocates can speak with the prosecutor about the victim's concerns to see whether or not the prosecutor can address them. They can also ask the victim's permission to advocate for their wishes with the prosecutor. Prosecutors have an obligation to listen to the victim's wishes even if they decide not to follow them based on their assessment of the case.

## Power and Effect of the Subpoena

When prosecutors must bring witnesses into court to testify—whether at a grand jury proceeding, for a preliminary or motion hearing, or at trial—the witness is normally served with a subpoena. Subpoenas are used regardless of the willingness of the witness to testify. They are issued to police officers (whose job routinely involves courtroom testimony), to victims eager to have their day in court, to reluctant eyewitnesses who would rather not have their lives disrupted to testify about something they had the misfortune to observe, and to expert witnesses who are paid for their time.

Subpoenas serve several practical purposes. They provide an orderly means of summoning witnesses for court. They provide a basis for scheduling and establish the prosecutor's diligence in the event a witness unexpectedly fails to appear and a continuance must be requested. Subpoenas can be beneficial for the witness, as well. They provide witnesses with documentation that may be necessary to excuse the witness's absence from work or from school. They can afford "cover" for a witness who is subjected to pressure *not* to testify—a subpoena signals that the victim's testimony is not necessarily voluntary, but required by law.

Subpoenas also have important legal effects, however. A subpoena is a form of court order—although the prosecutor may be the one who actually issues it, once properly served the subpoena legally requires the attendance of the witness at a particular legal proceeding. Disregard of a properly served subpoena may

result in the court issuing a bench warrant (an order to bring the witness to court, to testify in accordance with the subpoena). Usually such a warrant (also known as a "body attachment" in some jurisdictions) is issued only at the request of the party calling the witness to testify—in the case of a victim-witness, that would usually be the prosecutor. Another potential result of an unexcused failure to appear is the court's finding the witness to be in contempt of court. Contempt can be civil or criminal. A finding of criminal contempt is a criminal conviction, which may be accompanied by a fine or imprisonment to punish the contempt; a finding of civil contempt can result in the witness's being held in confinement until the witness testifies or the proceeding is concluded.

In addition to bench warrants or findings of contempt that may result from a witness's failure to appear in response to a subpoena, a prosecutor with reason to believe a witness may avoid service of a subpoena or may fail to appear once served may seek a material witness complaint in accordance with applicable procedural rules or statutes. If the court grants the application, the witness may be arrested and held on bail or other conditions that will assure the witness's appearance at trial.

## Legal Representation for the Victim

Where a victim does not wish to participate in the prosecution, the advocate should discuss with the victim the process of obtaining legal representation. There may be legal consequences for the choice not to participate, and it's best that the victim be fully advised before taking any action. As stated above, the prosecutor's duty is to represent the jurisdiction; they are not the victim's attorney. A victim's own lawyer, however, will be focused solely upon their wishes, will be versed in victims' rights, and may be able to advocate for their position, even if it is counter to the prosecutor's. Further, it might be possible for the victim's attorney to negotiate a better outcome with the prosecutor or to make an appeal to the court on behalf of the victim.



## Mitigating Consequences for Victims when Testimony Must be Compelled

In the rare circumstance that the prosecutor determines, after weighing all relevant considerations and alternatives, that a reluctant victim must be compelled to testify against their wishes, every effort should be made to minimize the adverse consequences to the victim.

Advocates' maintenance of regular contact with the victim during the case proceedings can help mitigate any negative consequences. They can work with prosecutors to ensure that the warrant is executed immediately before trial begins to minimize the duration of any restraint.

Advocates should ensure that any material witness warrant served on a victim involves the least restrictive conditions necessary to ensure their appearance at trial. Monetary bond or actual confinement should be avoided; instead, advocate for such conditions as restrictions on travel, regular reporting to probation, and surrender of any passport. Electronic monitoring (*e.g.*, ankle bracelets) for victims is not only restrictive, but tends to make the victim look (and feel) like a criminal; its use should be considered only when the alternative would be actual confinement. In the rare case for which actual confinement is necessary, seek the least restrictive placement possible. Advocates should demand that victims not be housed with those charged with, or convicted of, crimes.<sup>13</sup> This is even more critical during the current COVID-19 pandemic, when jails pose a high risk of viral transmission.

If the victim fails to appear at trial after having been properly served with a subpoena, and a bench warrant/body attachment is deemed appropriate and necessary, such orders should be executed in a way that minimizes the adverse consequences to the victim. First, system actors should seek to execute the order at a time when the trial court is in session and prepared to take the victim's testimony immediately. This will require the trial judge's understanding and cooperation; prosecutors will need to ensure that the judge understands the reason for the request in order to minimize the harmful consequences to the victim who has already

been traumatized by the crime. If the victim has young children, system actors should collaborate with advocates to ensure there is someone available to care for them while the victim is testifying. They can also offer assistance to excuse the victim's absence from work or school, if necessary. The prosecutor and the court should avoid any actions that will make it appear as if the victim has engaged in wrongdoing (*e.g.*, handcuffing). An advocate should accompany the officer when the warrant is executed to ensure that any of the victim's immediate needs are addressed. The prosecutor should also support the appointment of counsel to represent the victim's interests in court.

Finally, prosecutors should request the court not to hold the victim in criminal contempt. Contempt generally requires a finding of willful disregard of a court or-

**Material witness warrant petition:** typically sought in advance of trial when there is reason to believe that a witness will either avoid service of process or refuse to comply with a properly served subpoena.

**Bench warrant/body attachment:** may be used when a witness fails to appear pursuant to a properly served subpoena.

der; as previously discussed, victims of sexual assault and intimate partner violence are faced with myriad obstacles in the course of participating in criminal proceedings. Their unwillingness to testify is a product of the crime that was committed against them, not an act of willful disobedience. Advocates engaged in meaningful collaboration with prosecutors in their jurisdiction can help those prosecutors understand reasons for nonparticipation and to advocate for the least compulsive methods of taking the victim's testimony.

## Conclusion

Victims of sexual and intimate partner violence who report the offenses committed against them face an unfamiliar criminal justice system, which can be difficult to navigate. Survivors encounter numerous champions in the process; however, they also are tasked with de-

tailing the most personal and traumatic events of their lives to strangers whom they may perceive as asking invasive or irrelevant questions. They may feel coerced by friends, family members, or the offender and their allies to cease participation in the case, or they may feel the burdens of navigating an opaque process while balancing competing responsibilities. Faced with these challenges, it is understandable why some victims may be hesitant to move forward with a criminal case.

Law enforcement, prosecutors, and allied professionals, including systems- and community-based advocates, are in the best position to mitigate these challenges so that victims feel empowered — rather than devastated— by the criminal justice process. Cross-training and meaningful collaboration are imperative to a vic-

tim-centered response. Advocates who understand the role of law enforcement and prosecutors can ensure that victims understand all relevant aspects of a criminal case, including the significance of particular evidence, the factors that weigh into charging decisions, any reasons for delay, and the function of various pre-trial hearings. Prosecutors who work closely with advocates can make sure that the victims' concerns and interests are central to decision-making. In the rare event that the prosecutor decides that a material witness warrant or bench warrant/body attachment is in the interest of justice, they can collaborate with advocates to minimize any adverse collateral consequences to the victim. Through a close relationship, each system actor can ensure that the victim's decision to participate is a fully informed one.

## ENDNOTES

- 1 Written by Teresa M. Garvey, Patricia D. Powers, Jennifer Gentile Long, Holly Spainhower, and Jennifer Newman, AEQUITAS; Amy Durall, International Association of Chiefs of Police; and Dr. Rebecca Campbell and Dr. Rachael Goodman, Michigan State University. This article was originally written for the Sexual Assault Kit Initiative (SAKI) under Grant No. 2019-MU-BX-K011 awarded by the Bureau of Justice Assistance. The SAKI version of the article can be found at <https://sakitta.rti.org/toolkit/docs/14405SAKIVctmChoiceProsecution.pdf>. The present article has been adapted under Grant No. 15JOVW-21-GK-02220-MUMU awarded by the Office on Violence Against Women (OVW), U.S. Department of Justice (DOJ). The opinions, findings, conclusions, and recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of OVW.
- 2 Please note that jurisdictions' laws and practices are highly variable; there may be unique situations (*e.g.*, community-based advocates co-located in prosecution or police offices) that may impact an advocate's obligation to disclose information or their legal privilege.
- 3 *Id.*
- 4 *See, e.g.*, Anthony Morgan, Hayley Boxall, and Rick Brown, *Targeting repeat domestic violence: Assessing short-term risk of reoffending*, 552 TRENDS & ISSUES IN CRIME & CRIM. JUST. (June 2018), [https://www.aic.gov.au/sites/default/files/2020-05/ti\\_552\\_070618.pdf](https://www.aic.gov.au/sites/default/files/2020-05/ti_552_070618.pdf); Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ JOURNAL 15 (1985), <https://www.ojp.gov/pdffiles1/jr000250e.pdf>.
- 5 *See, e.g.*, Ctrs. for Disease Control & Prevention, *Adverse Childhood Experiences: Preventing early trauma to improve health*, VITALSIGNS (Nov. 2019), <https://www.cdc.gov/vitalsigns/aces/pdf/vs-1105-aces-H.pdf>.
- 6 *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (4th ed.), Standard 3-4.4, [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/).
- 7 The prosecutor can file a motion *in limine*, which is a pretrial motion to admit or to exclude specific kinds of evidence at trial. One ground for exclusion is when the probative value of the evidence—the extent to which it proves something of legal significance in the case—is outweighed by the likelihood of unfair prejudice, waste of time at trial, or similar considerations.
- 8 Occasionally there may be some circumstances in which such evidence is admissible—most commonly, prior sexual history involving the defendant, which may be admissible on the issue of consent.
- 9 *Crawford v. Washington*, 541 U.S. 36 (2004).
- 10 Whether a determination of “unavailability” requires the prosecutor to compel an unwilling victim's testimony by seeking a bench warrant or a material witness complaint is discussed further *infra*.
- 11 *See* discussion on forfeiture by wrongdoing *infra*.
- 12 AEQUITAS, THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING (2012), [https://aequitasresource.org/wp-content/uploads/2018/09/The\\_Prosecutors\\_Resource\\_Forfeiture\\_by\\_Wrongdoing.pdf](https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf).
- 13 Electronic monitoring or alternative housing can also be costly; victims should not bear the financial burden of such arrangements.

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