

Taking a Process-Oriented Approach to Domestic Violence Prosecutions

BY JENNIFER GENTILE LONG AND VIKTORIA KRISTIANSSON¹

All prosecutors are united by the duty to pursue justice.² As experienced prosecutors know, pursuing justice means more than obtaining convictions. Prosecutors are responsible for conducting thorough and thoughtful investigations, making accurate charging decisions, aggressively and ethically litigating cases, safeguarding defendants' rights, and advocating for appropriate sentences that hold offenders accountable and keep communities safe. In domestic violence cases, achieving justice includes all of the duties just described as well as identifying and addressing the collateral consequences victims face as a result of domestic violence. Many savvy abusers recognize that the collateral consequences facing domestic violence victims are as strong a deterrent to their victims' cooperation in a prosecution as intimidation or physical force. Left unaddressed, these issues can devastate a victim and her family by leaving them unsupported and financially insecure long after a conviction is secured.

In its policy on domestic violence prosecutions, the National District Attorneys Association (NDAA) wrote: "[T]he encouragement, education, and support of victims of domestic violence partnered with thorough investigations, the utilization of physical evidence, and, expert testimony, when appropriate, during trial are the most efficacious means of resolving such cases."³ This policy reinforces what experienced domestic violence prosecutors already understand: domestic violence cases are different than other criminal cases because of the intimate relationship between defendants and their victims. This intimate relationship transforms

the normal assault case with an adversarial victim-assailant relationship into a much more serious case that involves complex and frightening choices for the victim about issues that are often life-threatening and always life-changing. Therefore, close attention must be paid to issues arising as a consequence of the assault.⁴

This focus on justice and caring for the victim on all levels—rather than a focus on the verdict itself—is called the “process-oriented” approach. A process-oriented approach to domestic violence prosecutions is one that recognizes that a domestic violence incident and its related prosecutorial decisions uniquely impact the victim. The approach applies the following five principles to domestic violence prosecutions: (1) collaborate with advocates and agencies; (2) understand and explain the context of an issue; (3) assess lethality; (4) litigate the case without alienating the victim; and (5) resolve the case in order to balance victim safety and offender accountability.

COLLABORATE WITH ADVOCATES AND AGENCIES

Unlike a victim of a random crime, a domestic violence victim's involvement with the criminal justice system may put her⁵ at risk of:

- losing her housing (e.g., if her abuser is the primary household wage-earner);
- losing her employment (e.g., if she repeatedly misses work in order to attend the numerous court appearances that may accompany the criminal

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- nal and civil hearings related to her abuse); losing custody of her children (e.g., if the state feels she is unable to protect or provide for her children);
- losing financial support for herself and her children (e.g., if her abuser loses his job once he is convicted or sent to prison);
- losing her immigration status (e.g., if she is unable to qualify for a visa under VAWA provisions);⁶ and
- being prosecuted (e.g., if her attempts to protect herself or her children are not recognized as self-defense).

Prosecutors must identify and form relationships with community advocates and agencies to address and attempt to resolve the collateral problems domestic violence victims face as a result of their abuse. Prosecutors alone are not able to provide victims with the attention, advocacy, and resources required to address and resolve the victim's needs. By working with community advocates, prosecutors can help victims procure counseling, create a safety plan, obtain assistance with childcare, secure or maintain housing, and receive vocational training or assistance with a current employer.

Community advocates can also help safeguard a victim's privacy. Commonly, defense attorneys seek access to victims' medical and psychological history. In addition to the embarrassment victims suffer when this information is exposed, the mere threat of exposure often is enough to dissuade a victim's cooperation. Depending upon the laws of the jurisdiction where the case is pending, the prosecutor may not have standing to protect the victim against defense attempts to access this history. In these jurisdictions, community legal advocates are critical to protecting the victim's privacy.⁷

Supported victims—ones whose concerns are being addressed—are more likely to cooperate in the prosecution of their abusers, since many of the risks and fears that normally would act as obstacles to their participation will be erased upon the prosecutor's collaboration with other support agencies. Providing victims with the counsel

and support they need to deal with their abuse helps ensure offender accountability by increasing the number of victims who are able and willing to cooperate in their abuser's prosecution. When victims are empowered through education and support, and offenders are prosecuted in a system that recognizes victims' needs, the chances of re-victimization should decrease. As a result, the entire community becomes safer because this process creates informed citizens as well as offenders who are held accountable. This process achieves success beyond the conviction itself. From the viewpoint of both victims and society, this is justice.⁸

UNDERSTAND AND EXPLAIN THE CONTEXT OF AN INCIDENT⁹

The term "context" refers to the circumstances surrounding an incident as well as the intent of the perpetrator's use of violence. Prosecutors must determine the context in which a domestic violence incident occurred in order to accurately identify the predominant aggressor, as well as to fairly analyze, charge, try, and dispose of the case. Further, properly assessing the context of a domestic violence incident helps prosecutors more effectively anticipate and fight defense motions as well as prepare and litigate victim protection motions.

Certain information is critical to understanding the context of an incident. It is important to identify: (1) the events that typically precede the violent incidents; (2) the frequency of the violence; (3) the perpetrator's use of violence; and (4) the effect of the violence on the victim.¹⁰ Understanding these factors is critical to determining the intent of the perpetrator's violence and, specifically, whether he acted aggressively or in self-defense.

Prosecutors can explain the context of an incident to the jury by introducing evidence of a perpetrator's other bad acts.¹¹ The introduction of other bad act evidence can reveal a perpetrator's intent with respect to the

incidents for which he is currently on trial. Other act evidence may also be relevant to demonstrate the perpetrator's common plan, scheme, and design to control his victim. In many jurisdictions, prosecutors can introduce other charged or uncharged acts (even those that result in an acquittal) to demonstrate a perpetrator's intent in using violence in the present case.

Prosecutors should also remember that defendants may try to distort the context of a particular incident by introducing evidence of a victim's other bad acts which are irrelevant. Prosecutors, therefore, must be ready to respond to these attempts by filing motions *in limine* to exclude all irrelevant or overly prejudicial evidence. Prosecutors should consider that this evidence may be excludable under other grounds, such as privacy. They should also remember that subpoenas for records may be quashed under privacy laws and Health Insurance Portability and Accountability Act of 1996 (HIPAA), among other rationales.

LETHALITY FACTORS¹²

- homicide or suicide attempts or threats
- availability of weapons
- extreme jealousy and obsession with victim/feeling of ownership of victim
- betrayal and abandonment fears
- centrality of the victim to the batterer's survival
- stalking
- attempts at strangulation
- recent escalation of violence (especially at separation)
- escalation in severity of violent acts
- depression
- forced sex
- assaulted while pregnant
- threatened children
- past law enforcement contact/avoidance of arrest
- unemployed
- belief that the defendant is capable of killing
- abuse of alcohol or drugs
- hostage taking

ASSESS LETHALITY

Assessing the historical and existing dynamics between the perpetrator and the victim will allow the prosecutor to more accurately determine the perpetrator's risk to the victim, including his risk of lethality, i.e., the risk of his killing the victim. Lethality assessments are critical to requesting and obtaining appropriate bail; accurately charging a case; crafting and imposing effective sentences; and, where appropriate, setting probation or parole conditions.

When conducting a risk/lethality assessment, the prosecutor should: (1) conduct an in-depth interview of the victim; (2) examine the discovery and any paperwork generated as a result of the defendant's current arrest, especially any statements the defendant made to police; (3) look at the defendant's criminal history; (4) speak to friends and family of both the victim and the defendant; and (5) speak to the victim advocate. The source with the greatest knowledge is the victim. Even though victims often underestimate their own risk overall, they are generally accurate reporters of specific risk factors.¹³

Risk and lethality assessments should never be conducted in a vacuum. Prosecutors should collaborate with victim advocates to ensure that safety plans are created for victims in order to protect them from the dangers presented by the abuser.

LITIGATE THE CASE WITHOUT ALIENATING THE VICTIM

One of the most important tenets of the process-oriented approach involves the prosecutor's support of the victim throughout the case. When meeting the victim, the prosecutor must clearly communicate that the goals are: (1) holding the offender accountable for his actions; (2) trying to rehabilitate the offender, if possible; and (3) helping the victim and keeping her safe. The prosecutor must let the victim know that her concerns and feelings are an important part of the process even if the prosecutor ultimately disagrees with the victim's opinion about the prosecution of her abuser.

After reviewing all discovery and meeting with the victim, the prosecutor must first consider the impact on the victim before proceeding with a criminal prosecution. A victim may be hesitant to proceed with prosecution for several reasons, and may refuse to testify. If the victim is fearful because she has been intimidated by the defendant and/or his family or friends, the prosecutor should ensure that police

evidence that her failure to appear was caused by the abuser, the prosecutor must be prepared for a forfeiture hearing. During this hearing, the prosecutor can introduce the history of abuse between the defendant and the victim; prior charges filed, even if they were later withdrawn; testimony from bond hearings; testimony from prior cases; evidence from police, a prior prosecutor, family or friends about the victim's fear of the defendant; evidence about the victim's fear of testifying in prior cases; and anything else that shows that the defendant did something to prevent the victim from testifying. Hearsay is permissible at a forfeiture hearing. If the prosecution is successful at the forfeiture hearing, the defendant cannot raise objections to the introduction of either a victim's testimonial or, in the majority of jurisdictions, hearsay statements.¹⁵

If, however, the prosecution loses the forfeiture hearing, the state may still be able to proceed with an evidence-based prosecution by utilizing other evidence, such as testimony from other witnesses who may have heard or witnessed the domestic violence, 911 phone call tapes and transcripts, police officers who responded to the scene and may have observed a home or crime scene in disarray or observed a victim with injuries, medical records if the victim received treatment as a result of her injuries, and other out-of-court statements made by the victim. If the witness is unavailable, the prosecutor must anticipate a defense objection to this evidence on grounds that some of the evidence will contain "testimonial" statements, thus triggering an analysis pursuant to the United States Supreme Court cases *Crawford v. Washington*¹⁶ and *Davis v. Washington*.¹⁷

Crawford held that testimonial statements of an unavailable witness can be admitted at trial only when the defendant has had a prior opportunity to cross-examine that witness; to do otherwise would violate the Confrontation Clause. Statements made to government agents for the primary purpose of receiving assistance in an ongoing emergency are



reports are generated and the intimidators are arrested. This will not only prevent the perpetrators from having access to the victim, but will show the victim that the prosecutor is supporting the victim through all aspects of the prosecutorial process.

The prosecutor should try to secure the victim's cooperation through methods other than coercion. Prosecutors who are familiar with community resources and who work closely with community advocates and other support systems will improve the likelihood of a victim's cooperation.¹⁴

If the victim is unavailable at the time of trial, and the prosecutor has

SAMPLE VOIR DIRE¹⁹

A prosecutor can ask:

- Do you understand that a victim of domestic violence may have reasons for not participating in prosecuting her batterer, such as promises or apologies from the batterer, or harassment by or fear of the batterer? Do you understand that those reasons may even lead a victim to actively oppose the prosecution?
- Does anyone believe that if a person uses alcohol or drugs, then she deserves what happens to her—including becoming a crime victim?
- How many people think that it is possible for an abused victim to believe that she did something to deserve being battered?

nontestimonial. Statements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁸ By analyzing the evidence carefully, the prosecutor should be able to overcome defense *Crawford* objections.

The treatment of the victim during the trial itself is also critical to preventing a victim's alienation from the criminal justice system. This principle applies even to victims who are not cooperative. The prosecutor can prepare the jurors for the particular facts of the case as well as educate them about common dynamics of domestic violence.

During jury selection, the prosecutor should structure voir dire questions according to case-specific factors, such as including whether or not the victim will testify and how the victim's testimony or lack thereof would affect a juror's ability to weigh the evidence. Further, the prosecutor must address jurors' stereotypes and myths about domestic violence.

Cross-examination of the victim is the trial stage during which the prosecution runs the greatest risk of juror

dislike of the victim and victim alienation from the criminal justice system. It is not uncommon for experienced domestic violence prosecutors to employ the same aggressive cross-examination tactics on uncooperative victims as they do with defendants. This strategy is usually more likely to result in the jury disliking the victim than the jury understanding the reasons behind the impeachment of the victim. The most successful cross-examination of an uncooperative victim impeaches the victim without vilifying or degrading her. Some recommended techniques include using a gentler tone, using non-leading questions or allowing the victim to speak about her relationship with the defendant outside of this incident. Oftentimes, this approach allows the victim to relay seemingly benign information that effectively demonstrates the defendant's dangerous behavior and his attempts to control her. In addition, this method is consistent with a process-oriented approach, as it respects the victim's circumstances and pressures, educates the jury about domestic violence, illustrates the context in which the incident occurred, and encourages victims to reach out to the criminal justice system in the future. This process increases the likelihood of a conviction at the end of trial.

Sample Cross-Examination

Crafting cross-examination questions in the following areas can illuminate for the jury the reasons for a victim's lack of cooperation without making jurors dislike the victim.²⁰

- living arrangements
- financial dependence
- determining the dominant partner
- prior arguments
- history of violence (by introducing other acts, if possible)
- incident
- physical size difference
- impeachment
- discussion about pending charges
- attitude/feeling about testifying

RESOLVE THE CASE IN ORDER TO BALANCE VICTIM SAFETY AND OFFENDER ACCOUNTABILITY

Prosecutors must pursue dispositions that will enhance victim safety and offender accountability. In order to further this goal, it is important to consult with the victim regarding the potential impact of the offender's sentence. As set forth above, victims of domestic violence may be dependent upon defendants in ways that are complicated and unique from violent crimes that are committed by strangers. In certain cases, a defendant's conviction or incarceration may have serious negative consequences for a victim, including the loss of her home or possibly her immigration status. It is a prosecutor's job, therefore, to recognize and weigh these consequences when seeking sentences that aim to keep victims safe and hold offenders accountable. Where conviction and incarceration are necessary to achieve these goals, it is critical to link victims with resources and community agencies that can help them. By contrast, failing to recognize and address these consequences undermines justice and weakens victim and community safety.

Prosecutors also should request sentencing conditions that address an abuser's manipulative, controlling, and abusive behaviors. For example, incarcerated defendants should be required to attend batterer intervention programs while in custody, if available; defendants on probation also should be mandated to attend such programs. In addition, prosecutors should work with probation and parole officers to ensure that offenders follow their probation/parole conditions and are held accountable when they do not.²¹

The process-oriented approach to domestic violence prosecution mandates the prosecutor's involvement with the case from inception through disposition. It includes preparing victims for life after the defendant's sentence is imposed. Almost always, a domestic violence assault is not an isolated event; usually, by the time the police become involved in a domestic violence situation, incidents have occurred

repeatedly. There is always a danger, therefore, that domestic violence may continue after disposition.

As a result, the prosecutor must do whatever possible to help the victim understand that the outcome of the criminal case can be used as a vehicle for victim safety and offender accountability, as these are the ultimate goals of the process-oriented approach to prosecution.

CONCLUSION

The process-oriented approach to domestic violence prosecutions helps prosecutors work with the community to assist victims in a manner that enhances their safety and enables them to help hold their offenders accountable. Luckily, many jurisdictions have strong community relationships between the prosecutor and community resources and already

take a process-oriented approach to domestic violence prosecutions. Prosecutors must be proactive in developing relationships in their communities and fostering the practices described above to implement a process-oriented approach to domestic violence cases. These efforts will result in safer victims, safer communities and the attainment of justice. ■



FOOTNOTES

- ¹ Jennifer Gentile Long is the Director of the National Center for the Prosecution of Violence Against Women (NCPVAW) at the American Prosecutors Research Institute, the research and development division of the National District Attorneys Association. Viktoria Kristiansson is a Senior Attorney at NCPVAW. The authors wish to thank the faculty of the National Institute on the Prosecution of Domestic Violence, a national training developed through collaboration with the Battered Women's Justice Project (BWJP) and the Office on Violence Against Women, for their input in the development of this prosecutorial theory.
- ² NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL PROSECUTION STANDARDS § 1.1, (2nd Ed. 1991) (stating, "The primary responsibility of prosecution is to see that justice is accomplished"); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating, a prosecutor's interest "in a criminal prosecution is not that [he or she] shall win a case but that justice shall be done").
- ³ NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION'S POLICY POSITIONS ON DOMESTIC VIOLENCE, at 7 (adopted October 23, 2004).
- ⁴ *Id.* (stating, "It is important to note that in cases of domestic violence, unlike most other types of crimes, there will be times when differences will arise between prosecutors and victims of domestic violence because victims are often conflicted about their roles in the criminal justice system").
- ⁵ See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004), <http://www.ojp.usdoj.gov/bjs/intimate/offender.htm>. In 2004, 96.9% of victims of intimate partner violence were female where the offender was male. See also U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004), <http://www.ojp.usdoj.gov/bjs/intimate/table/women.htm> (indicating that in 75.3% of cases in 2004, offenders of intimate partner violence were male, regardless of the victim's gender.) For this reason, the author will use "she" when referring to the victim and "he" when referring to the perpetrator or defendant. For additional information about this survey, please contact Chuck Rainville at NDAA's Office of Research and Evaluation.
- ⁶ For more information on immigration issues, see Battered Women's Justice Project, Assisting Victims of Domestic Violence (available at http://www.bwjp.org/Article_Database/immigration.pdf) (last visited December 11, 2006); Advanced Special Immigrant Survivors Technical Assistance (<http://www.asistaonline.org/>) (last visited December 11, 2006); and Legal Momentum Immigrant Women's Rights Program (<http://www.legalmomentum.org/legalmomentum/programs/iwp/>) (last visited December 11, 2006).
- ⁷ For prosecutors who practice in a jurisdiction in which the prosecutor lacks standing to file a motion in *limine* to protect a victim with respect to the disclosure of personal and possibly protected information, e.g., Health Insurance Portability and Accountability Act of 1996 (HIPAA) or counseling records not in the prosecutor's possession, a civil attorney can assist the victim with the preparation and litigation of the appropriate motion.
- ⁸ For additional information on state resources for victims of domestic violence, please visit the following Web sites: U.S. DOJ Office on Violence Against Women (<http://www.usdoj.gov/ovw/statedomestic.htm>) (last visited January 9, 2007); Battered Women's Justice Project (http://www.bwjp.org/services_index.htm) (last visited January 9, 2007), National Crime Victim Law Institute (<http://www.lclark.edu/org/ncvli/>) (last visited January 9, 2007), and ABA Commission on Domestic Violence (<http://www.abanet.org/domviol/>) (last visited January 9, 2007).
- ⁹ Special thanks to Loretta Frederick, Legal Counsel, Battered Women's Justice Project (BWJP); Michael Paymar, Resource Specialist, BWJP; and James Henderson, Jr., Domestic Violence Probation Officer, 15th District Court, Ann Arbor, MI, for their discussions on the importance of understanding the context in which a violent incident occurs in order to appropriately evaluate a domestic violence case.
- ¹⁰ Prosecutors also must determine if the victim and/or perpetrator have mental health issues.
- ¹¹ See, e.g., Fed. R. Evid. 404(b). Before preparing and filing motions pursuant to 404(b), prosecutors should consult the rules and case law governing the admission of other act evidence in their jurisdictions.
- ¹² Please note that a perpetrator with few of these characteristics may still be dangerous. See, Jacquelyn C. Campbell, *Danger Assessment Tool* (2003).
- ¹³ "[A]most half the murdered women studied did not recognize the high level of their risk." Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NATIONAL INST. OF JUST. J. 250, 16 (2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250e.pdf> (last visited December 12, 2006).
- ¹⁴ For a discussion of the dangers surrounding the arrest of uncooperative domestic violence victims, please see Erin Gaddy, *Why the Abused Should Not Become the Accused*, THE VOICE, Volume 1, Number 8.
- ¹⁵ Colorado v. Vasquez, 2006 Colo. App. LEXIS 1999.
- ¹⁶ Crawford v. Washington, 541 U.S. 36 (2004).
- ¹⁷ Davis v. Washington, 126 S. Ct. 2266 (2006).
- ¹⁸ *Id.*
- ¹⁹ Contact NCPVAW for additional sample voir dire questions.
- ²⁰ Contact NCPVAW for additional sample cross examination questions.
- ²¹ Individuals interested in receiving information regarding the creation of effective batterer intervention programs and effective probation programs should contact NCPVAW.

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