

Statewide

Utah Office for Victims of Crime	1-800-621-7444
VINE (Victim Information & Notification Everyday)	1-877-884-8463
Domestic Violence Information Line	1-800-897-LINK

Section One

Box Elder County

Box Elder County Attorney's Office	435-734-3369
Brigham City Police	435-734-6650
New Hope Crisis Center (Shelter)	435-723-5600

Cache County

Cache County Victim Services	435-755-1860
Community Abuse Prevention Services Agency	435-753-2500
Child and Family Support Center	435-752-8880
Family Institute of Northern Utah	435-752-1976

Section Two

Weber County

Your Community Connection (Shelter)	801-394-9456
Ogden City Prosecutor's Office	801-629-8597
Roy City Prosecutor's Office	801-920-6071
Weber County Attorney's Office	801-399-8631

Morgan County

Morgan County Attorney's Office	801-845-6093
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Section Three

Davis County

Safe Harbor (Shelter)	801-444-3191
Davis County Attorney's Office	801-451-4300
Layton City Attorney's Office	801-336-3590

Section Four

Salt Lake County

South Valley Sanctuary (Shelter)	801-225-1095
Utah Crime Victim Legal Clinic	801-746-1204
YWCA of Salt Lake (Shelter)	801-236-3371
Sego Lily for the Abused Deaf	801-590-4920
Family Support Center	801-255-6881
Draper Police Victim Services	801-576-6300
Sandy City Police Victim Services	801-568-4627
South Jordan Police Victim Services	801-254-4708
South Salt Lake Police Victim Services	801-412-3660
Salt Lake City Police Victim Services	801-580-7969
Unified Police Victim Services	385.468.9844
Cottonwood Heights Police Victim Services	801-944-7042
Murray City Police Victim Services	801-284-4201
West Jordan City Prosecutor's Office	801-569-5140
West Valley City Prosecutor's Office	801-963-3223
Utah Attorney General's Office	801-366-0260
University of Utah	801-581-7778

Section Five

Duchesne / Uintah / Daggett Counties

Duchesne County Attorney's Office	435-722-8003
Vernal Police	435-789-4250
Uintah County Attorney's Office	435-781-5434
Dagget County Sheriff	435-784-3154

Section Six

Utah County

Center for Women and Children Crisis	801-374-9351
Orem City Police Victim Services	801-229-7070
Provo City Police Victim Services	801-852-6210
Pleasant Grove Police Victim Services	801-785-3506
American Fork Police Victim Services	801-763-3020
Saratoga Springs Police Victim Services	801-766-6503
Utah County Sheriff	801-851-8364
Payson/Spanish Fork/Salem	801-465-5224
Springville City Attorney's Office	801-491-5545
Utah County Attorney's Office	801-851-8026
Utah County Family Justice Center	801-851-8508



<http://www.crimevictim.utah.gov/>

<http://www.uw.org/211/find-help/resources-by-county/>

Section Seven

Rich / Summit / Wasatch Counties

Peace House	435-647-9161
Park City Attorney's Office	435-615-5025
Wasatch County Attorney's Office	435-654-2909

Section Eight

Tooele County

Pathways (Shelter)	435-843-1645
Tooele City Police Victim Services	435-882-8900
Tooele County Attorney's Office	435-843-3120

Section Nine

Carbon / Emery / Eastern Wayne Counties

Carbon County Sheriff's Office	435-636-3250
Price City Police	435-636-3190

Section Ten

Sanpete / Sevier / Piute / Western Wayne Counties

Sanpete County Attorney's Office	435-835-6381
New Horizons	435-896-9294
Sevier County Attorney's Office	435-896-7574

Section Eleven

Beaver / Garfield / Iron Counties

Beaver County Sheriff	435-438-6494
Canyon Creek Women's Crisis Center	435-867-9411

Section Twelve

Kane / Washington Counties

Kane County Sheriff	435-644-4989
DOVE Center (Shelter)	435-628-1204
Hurricane Police	435-635-9663
St. George City Police	435-627-4301
Washington City Police	435-986-1515

Section Thirteen

Grand / San Juan Counties

Seekhaven	435-259-2229
San Juan County Sheriff	435-587-2237

Section Fourteen

Juab / Millard Counties

Juab County Attorney's Office	435-623-3460
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Utah Prosecution Council
Utah Attorney General's Office
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Salt Lake City, UT 84111
(801) 366-0202

Domestic Violence 101

**A User-friendly Manual
on Domestic Violence
for Police and Prosecutors**

6th Edition

PREPARATION AND PRINTING OF THIS DOCUMENT
FINANCED BY THE U.S. BUREAU OF JUSTICE ASSISTANCE
AND UTAH OFFICE OF CRIME VICTIMS REPARATIONS
GRANT NUMBER 11-VAWA-40

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Domestic Violence 101

6th Edition

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And thank you to the countless unnamed others who have been supportive and constructively critical along the way, to those whose stories and experiences have shaped our laws and perspectives and to those whose deaths continue to haunt us yet compel us to ensure they are not forgotten nor died in vain.

Domestic Violence/Stalking Laws Summary

UTAH

- Cohabitant Abuse Act (Protective Orders) Now in Title 78B, Chapter 7 (Used to be in Title 30, Chapter 6)
- Dating Violence Act 78B-7-403
- Cohabitant Abuse Procedures Act (Police, Prosecutors, & Courts) Title 77, Chapter 36
- Stalking & Criminal Stalking Injunctions §76-5-106.5
- Civil Stalking Injunctions Title 77, Chapter 3a
- Crime of Violating a PO §76-5-108
- Crime of Committing DV in Presence of Child §76-5-109.1
- Divorce, Custody & DV §30-3-10, §30-3-10.2, §30-3-10.10 & URJA 4-903

FEDERAL

- Interstate DV 18 U.S.C. §2261
- Interstate Stalking 18 U.S.C. §2261A
- Interstate Violation of PO 18 U.S.C. §2262
- Possessing Firearm While Subject to PO 18 U.S.C. §922(g)(8)
- Exemption for Police and military With PO 18 U.S.C. §925(a)(1)
- Possessing Firearm After DV Misdemeanor Conviction 18 U.S.C. §922(g)(9)

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Domestic Violence Sentencing Criminal Protective Order

Appendix B..... Authorization to Release and Discuss Medical and
Health Information, Domestic Violence Case Screening Checklist, Strangulation
Supplemental Report, Police Domestic Violence Supplement, Protective Order Chart,
Analysis of Evidence under *Crawford vs. Washington*, Domestic Violence and Related
Laws, Stalking Incident Log

Appendix C..... Lethality Assessment Program Booklet,
Introducing Expert Testimony to Explain Behavior in Sexual and Domestic Violence
Prosecutions, Domestic Violence Rights And Remedies

Introduction

It has been seven years since the last edition of DV 101 was printed. Since that time, according to the statistics reported in “No More Secrets”, Utah Domestic and Sexual Violence Reports from 2009-2012, approximately 84 persons died involving domestic violence: at the hands of a loved one; were collateral deaths by a cohabitant or dating partner; at their own hand after a DV incident; or as the result of third party intervention or self-defense by the DV victim. During that five year period of time, Utah courts issued 16,881 ex parte protective orders and 7,767 protective orders. According to the Incident Based Reporting System which is used by many but not all police departments, there were at least 58,900 reported incidents of violence by cohabitants. The Utah Department of Health, Violence and Injury Prevention Program indicates that 39.8% of the adult homicides in Utah since 2000 are the result of domestic violence. While generally crime statistics have decreased, domestic violence homicide rates did not. (This is CY 2008-2011, still need 2012 from 2013 No More Secrets report)

Training in domestic violence dynamics and laws must be ongoing for all involved in the criminal and civil justice systems. We don't need more laws; we need better enforcement by all involved in the criminal justice system to keep victims safe, stop the violence and hold perpetrators accountable. As state and federal funds diminish, we need to be more creative...work more collaboratively with partners.....focus on the big picture instead of our own little piece as: law enforcement; prosecutors; advocates; probation and parole agents; Board of Pardons; judiciary; Administrative Office of the Courts; victim, children and perpetrator treatment providers; local resource providers; and state and local domestic violence coalitions. We also need to focus on what we CAN do instead what we CAN'T do.

Yes, even in the 21st century, there are still people who believe victims ask for or deserve the abuse. Luckily there are also people who have lived through the abuse and who are willing to publicly express their experiences and understanding to help educate others. The following are two comments submitted to and published by the *Ogden Standard Examiner* on or about October 26, 2012, that demonstrate these two concepts better than any other explanation. The comments were in reaction to an article on an alleged domestic violence homicide of a female cohabitant. The article had chronicled some of the violent history between the female and her cohabitant boyfriend:

Brady•

Sounds like she got what she deserved for making poor choices. I don't understand this kind of behavior, and I believe it is a sign of female inferiority. When I get hurt by something, I do everything I can to avoid the source of that pain in the future. For example, if I burn my hand on the stove, I avoid touching the stove and take caution around it. Despite being abused, this women [sic] chose to return to the source of the abuse. She even dispensed abuse herself. Essentially, she chose her own fate. It's hard to shed a tear for those who actively choose this path

proud son of a Survivor•

@Brady, HAVE SOME DAMN RESPECT! Seriously, where do you get off saying

something some horrible and judgmental about a person that you neither know? I am a man and the son of a mother that was abused by her first husband. My mother neither deserved the abuse that her ex-husband gave her and she was scared to death of him. Do you know what it is like to be beat so severely that you lose all manner of rational thinking? Do know what it is like to not only be abused physically but to be abused emotionally so badly that you actually prefer the beatings to the emotional toll that is going to come every single day for years? I cannot even tell you how angry I am with you for be so disrespectful to this woman, her family, and every single person that has endured the torture of being in an abusive relationship...

I do not know this woman, but I know one that was lucky enough to escape during a night in which her husband held a deer rifle to her head and pulled the trigger several times without it going off. It was loaded and he even reloaded it and attempted to shoot again, but the gun would not fire. When he went into the house to grab another gun to finish the job, that woman got away with her 2 toddler age children. She then ran called a man that she barely knew except through a business. She did not dare call her own family because she knew that her abusive husband would come to their homes and kill them too. She called a large man that she knew her husband would be afraid of physically and whom he would probably not ever find his home. That man came and saved her that night and took her into his home and eventually married her. That man and woman are my father and mother. I am the product of a woman that was blessed to have gotten away from an evil man like [accused]. My mother tried several times to leave her ex-husband, but she was so scared and so insecure from the abuse, that she literally felt like he would find her and kill her.

To say that this woman did not want to leave is completely ignorant. Abuse does not start all at once and the majority of the time it starts subtly as in the case of my own mother's. First they may start with putting his wife down with comments and telling her that she is not doing a good enough job as his wife. Then the comments lead into criticizing every facet of the woman's life and breaking her down with control. He starts controlling everything that she buys, everything that she wears, everywhere she goes, and everyone that she is able to see. The woman has the pressure to hide the emotional abuse out of embarrassment and the desire to portray her marriage as a strong marriage or relationship, but that soon gets to the point that she can't do enough to satisfy his sick demands. Then the abuse goes from emotional and control to sexual abuse. Yes, a married woman can be sexually abused and raped. He starts telling her how awful she is in bed and how she is ugly and not giving him what he wants, so then he takes it. It starts with rough sex and forced sex, but then it turns to literally attacking her and raping her on a daily basis. The emotional abuse and rape causes the woman to then hate herself and become so depressed that she literally wants to die and prays for death. Then the man starts leaving marks and the woman hides it because she is so insecure that she is literally afraid that if he is arrested that she will not be able to take care of herself financially and her children will be taken from her. He tells her that if she calls the police or tells anyone of the beatings that he will hurt or kill her children. He tells her that he will hunt her down and that no matter where she goes, he will follow her and kill her, her children, and her family members. When the family comes around, she hides it all out of fear that if she says anything, she will be beaten when they leave. The beatings now go from being raped, slapped around, to literally being beaten with kicks, fists, and objects. The woman ends up with broken bones in her face, fingers, and arms, but then makes up a story when she is at the hospital so that the man will not kill her and her children.

The story I just told was my own mother's, did she deserve it? She hid her abuse so well that nobody had any idea for over 8 years until my father just could tell something was not right when he met her in the office that he did business in. He was led by a

greater power to tell her that if she ever needed help that she could give him a call, and then gave her his number. He was not trying to pick her up, he could see something that nobody else could and he saved her life by doing it

To all those women that are reading this story and has [sic] already killed you on the inside and you are living in hell, but I promise that you can leave and there is happiness, safety, and an AMAZING life out there for you. You have amazing internal strength even though you may not realize it. You have been using that strength just to survive another day through what you have. I can state without a shadow of a doubt that you can also eventually find love and a husband or partner that will treat you like the queens that you are. It has taken decades for my mother to come to peace and overcome the emotional toll that her abusive EX placed on her, but she has raised over a ton of children, lived a great social life, stayed married to her real man (the first one wasn't a real man) for over 40 years, and given life and hope to a son that loves her with all of his heart. You do not have to live through abuse and you DO DESERVE MORE THAN WHAT HE TELLS YOU THAT YOU DO. My mother and many other woman have been able to escape and turn their tragedies into amazing strengths that have not only helped them, but helped several other women know that they too can follow in their footsteps and put those abusive fools in prison where they belong...

Dynamics of Domestic Violence

- Anger is a natural emotion
- How you deal with anger is a **choice**, not an excuse
- Violence is learned behavior
 - Parental model
 - Family violence
 - Pattern of chosen behavior and passed on to next generation
 - It can be “unlearned”
- Perpetrators CHOOSE
 - When and where violence will take place
 - At home and not workplace
 - Against whom
 - They won’t use violence against other males such as their boss, employer, co-worker, bartender, etc. but will use against partner and children
 - How much violence to use
- It only gets worse without intervention
- Likely escalation in frequency and lethality

Fact Situation

- 911 call
- officers rush to the site of a domestic disturbance
- sobbing victim holds ice pack to her swollen face and claims her husband struck her during an argument
- officer asks offender’s account
- replies that a disagreement had “gotten out of hand” but everything is fine now
- officers arrest the offender and call for a unit to transport him to a holding center
- officer photographs the victim’s injuries and obtains a written statement from her
- other department personnel arrive and provide the victim with the telephone number of a local shelter and with information on securing a protective order against her husband
- also suggest the victim have a doctor examine her injuries
- three days after the assault, the victim calls the station to inform one of the arresting officers she wishes to drop the assault charge
- she tells the officer the dispute had been her fault and that her husband was merely defending himself when he struck her
- police are frustrated, confused, and fed up
- prosecutor is willing to press charges and prosecute
- victim lies, won’t testify, or refuses to show up in court
- prosecutor worries about what the jury will think
- police and prosecutors may adopt the attitude:
 - **If the victim doesn’t care, neither do I**

Questions

- Why do we keep going back to the same house over and over again?
- Why does the victim ask for charges to be dismissed?
 - Why does she stay?
 - Why do they keep fighting?

Result

- Frustration
- Anger toward the victim
- Anxiety over doing their job

Solution

- **Understand the dynamics of domestic violence**
- **Investigate the case properly at the outset; gather all types of evidence, anticipating that no victim will be available to testify at trial; prosecute the case without the victim because you have the evidence**
- **Enforce Utah's domestic violence laws**

Response by Prosecutors and Law Enforcement

- Change our attitude about domestic violence crimes
- Domestic violence is a crime
- Utilize the mandatory arrest statutes and the “no-drop” prosecution philosophy
- Do the kind of investigation that will allow prosecution to proceed without victim’s testimony
- Take the responsibility of prosecution away from the victim
- Meet the needs of the victim and the children
 - advocate support
 - counseling
 - shelter
 - medical attention
- **The more contact the victim has with those in the criminal justice system, the more likely the victim will cooperate with prosecution; advocates can be that contact.**
- Work as a community to ensure that courts have qualified domestic violence treatment providers
 - mandate perpetrator counseling

Cycle of Violence

Three phases of violence

Tension-Building Phase

- little things agitate, irritate
 - drinking
 - messy house
 - kind or timing of meals
 - can be anything
- victim and children are **walking on eggshells**

Violent Episode Phase

- ranges from yelling to homicide
 - continuum of violence
 - ranges from non-violence to most extreme violence

Total → Words, Intimidation → Violent Acts → Most Extreme →

Non-Violence Emotional/Psych. Abuse Hit, Kick, Weapons Violent Act

-
- sometimes victim provokes the violence
 - attempt to control timing of violent episode
 - get through the acute attack so she can get to the honeymoon phase

Honeymoon Phase

- defendant brings victim a bouquet of flowers, and a promise that “nothing like this will ever happen again”
- remorseful
- penitent
- reconciliation
- manipulation

Cycle of violence is learned behavior—and growing up in a violent home is learning to live in a combat zone

Contributing Factors

Family Origin Factors

- parents
 - models of aggression
 - models of poor conflict resolution
- family violence
 - child abuse
 - witnessing the abuse of a parent
 - neglect
 - abuse (*physical, sexual*)
 - abandonment
 - family enables or allows abuser to be violent
 - no responsibility for actions by abuser or by the family
- claim that it is culturally accepted

Social Factors

- models of aggression against women--(*slowly, women are becoming more aggressive--however, the majority of the time, it is still male against female*)
 - TV
 - movies
 - video games
 - music
 - art
 - advertising
 - pornography

Legal Factors

- Historical perspective
- **One Legal Entity Doctrine**
 - husband was the one legal entity recognized by law
 - must have consent of husband to act legally
 - personal property became her husband's
 - if she committed a crime
 - assumed he forced her to do it
 - he was entitled to her earnings
 - at common law considered one person
H. Clark, *The Law of Domestic Relations in the United States*, § 8.1, p. 498 (Practitioner's Ed. 2d ed. 1987).
- **Rule of Thumb Doctrine**
 - husband could beat wife so long as:
 - "rod not thicker than his thumb,"
 - **or** a stick that was not too thick to pass through a wedding ring! United States Commission of Civil Rights, *Under Rule of Thumb: Battered Women and the Administration of Justice 2* (January 1982)
- **STATE V. BLACK**
Supreme Court of North Carolina
60 N.C. 274 (1 Winst. 266) (1864)
 - *A husband cannot be convicted of battery on his wife, unless he inflicts a*

permanent injury, or uses such excessive violence or cruelty, as indicates malignity or vindictiveness: and it makes no difference that the husband and wife are living separate by agreement.

- **Sanctity of the Family**
 - right to privacy
 - family matter
 - police not welcome behind closed doors

Religious Factors

- Historically, wife considered property of her husband
 - not surprising for him to search and find religious and legal approval of his use of physical force against her
- **Rules of Marriage**, Friar Cherubino of Siena, 1475
 - *When you see your wife commit an offense, don't rush at her with insults and violent blows. . . . Scold her sharply and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body. . . . Then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good.* Quoted in T. Davidson, *Conjugal Crime*, 99 (1978).
- Scriptures **do not** condone use of violence, but do encourage principles that can contribute to domestic violence if misconstrued
 - justification by abuser
 - God punishes
 - God is male
 - man made in the image of God
 - man punishes
 - woman made from and for the man, not man for the woman
 - *New Testament*
 - male privilege
 - husband is to rule over her--head of household
 - wife to submit to husband
 - male leadership
 - women to be silent in church--attitude extended to society and home
 - adherence to rigid sex roles
 - man earns bread--provides for the family
 - woman brings forth children
 - family preservation
 - woman should keep the family together

Physical Factors

- **men abuse because they can**
 - basic biological factors contributing to domestic violence
 - men are generally
 - taller
 - larger
 - weigh more
 - stronger
 - more aggressive
 - will resort to physical confrontation to resolve differences
 - familiar with physical combat situations

- generally do not fear female retaliation
- females have more physical challenges than men do
 - vulnerability during pregnancy; women at higher risk for abuse
 - physically disabling
 - female approach to aggression, generally, is expressive--verbal
 - accumulated frustration about intolerable situations, or to discharge built-up tension
- However, women are starting to fight back physically and may be the predominant physical aggressor

Stress Factors

- people are less tolerant during stressful situations
 - not as understanding or loving
 - reaction to irritation higher during
 - school finals
 - unemployment
 - financial difficulty
 - pregnancy
 - problems with children
- however, many men and women who are under incredible pressure still don't resort to violence

Substance Abuse Factors

- doesn't "cause" the violence, but simply lowers the person's inhibitions

Mental Health Issues

- for one or both partners

DOMESTIC VIOLENCE CRIMES ARE ABOUT

- **power**
- **control**
- **domination**
- **fear**

Continuum of Force

manipulation→threat→pushing→hitting→slapping→kicking→breaking→strangulation→killing

- **most dangerous time for a victim is when the victim is leaving**
 - abuser is losing power & control
 - many victims are killed after they seek a protective order
 - victim is gaining some control over own life
 - the law is involved; a judge is now in control
- Once to the end of the continuum
 - common statements
 - I will kill you if you leave
 - If I can't have you, nobody can.
 - I will kill you and then myself
- as victim fights to get control
 - victim may start to fight back
 - cycle escalates
 - victim may have the feeling, that " it is the abuser or me"
 - out of frustration in an intolerable situation victim may kill abuser to be free

Why Victims Stay

- Suffering from Battered Spouse Syndrome/Post Traumatic Stress Disorder
- Caught up in Cycle of Violence
- Learned Helplessness theory/Survivor theory (they become passive and do what it takes to survive)
- “Stockholm Syndrome” (victim starts identifying with abuser as the only one who can protect and the only one who cares for the victim)
- Survival (fear of being killed)
 - 75% higher risk of serious bodily injury or death when victim leaves
- Knows abuse will not stop even if she leaves
- Threats of harm to children, victim or suicide threats
- Victim has high tolerance for abuse due to childhood (including witnessing domestic violence of parents)
- Lacks job skills, financial resources or cannot realize life without batterer
- Religious beliefs
- Self blame, guilt, shame of failed marriage
- Belief that children need to be with father
- Physical injuries or condition prevent leaving
- Batterer’s control analysis
 - Physical and sexual violence, isolation, emotional abuse, intimidation, threats and coercion, economic deprivation, lesser status, manipulation using kids, blame, denial, minimization of abuse.
 - Batterer’s control has definite impact on criminal justice system
 - Emotional abuse→loss of self confidence in victim→victim’s inability to make decision about going forward with case.
 - Isolation→victim losing ability to communicate and/or have interpersonal relationships→ victim’s inability to communicate with police/prosecutors.
 - Using children→makes victim cautious and unable to function in family setting questioning ability to be parent→victim questions everything; weighs how decision will affect kids in custody or divorce case.
 - Threats/coercion→fear and paranoia in victim→victim trusts no one.
 - Financial abuse→dependence of victim and kids on abuser→victim will not go forward with prosecution or minimizes or excuses the conduct because of loss of financial support.
 - Sexual abuse→causes low self esteem and shame in victim→victim not telling police or prosecutor all of the facts
 - “Love” for the abuser; just wants the violence to stop

In December, 2005, Dan Jones & Associates Inc. conducted and published a summary of their Domestic Violence Incidence and Prevalence Study. They had previously done a similar study in 1997. They found FEAR to be the predominant reason for victims not reporting the abuse to authorities: fear what the perpetrator will do to victim and children; hope perpetrators will change; unwilling to break up family; feel isolated and have no one to talk to; afraid of becoming homeless; don’t want abusers to go to jail, just want abuse to stop; don’t have enough money; have limited job skills; afraid won’t be believed; don’t know where to go for help; have history of abuse in family; expect abuse, feel they deserve it; have legal history and fear arrest if police respond; injured perpetrators during assault on victims.

DOMESTIC VIOLENCE IS NOT ABOUT ANGER OUT OF CONTROL--IT IS ABOUT USING ANGER TO GET POWER & CONTROL

VICTIMS *MAY* STAY OR LEAVE AN ABUSIVE RELATIONSHIP FOR THE SAME REASON--THEY WANT TO LIVE--THEY ARE SURVIVORS.

THESE ARE NOT CRIMES OF PASSION, ONLY CRIMES OF POSSESSION!
Gloria Steinem

Law Enforcement

(see Appendix B for a List of DV Related Laws)

Definitions

- **Domestic violence means** (§77-36-1 (4))
 - any criminal offense involving
 - violence
 - physical harm
 - threat of violence or physical harm
 - any attempt, conspiracy, or solicitation to commit a criminal offense involving
 - violence or physical harm
 - when committed by one cohabitant against another

 - **Domestic violence also means commission or attempt to commit** any of the following offenses by one cohabitant against another (§77-36-1(4) (a)-(p)):
 - aggravated assault
 - assault
 - criminal homicide
 - harassment
 - electronic communication harassment
 - kidnapping, child kidnapping, or aggravated kidnapping
 - mayhem
 - sexual offenses under Title 76, Chapter 6, Part 1, including
 - unlawful sexual activity with a minor, sexual abuse of a minor, unlawful sexual conduct with a 16 or 17 year old
 - rape
 - object rape
 - sodomy--forcible sodomy
 - forcible sexual abuse
 - aggravated sexual assault
 - sexual exploitation of a minor
 - stalking
 - unlawful detention or unlawful detention of a minor
 - violation of a protective order (§76-5-108, includes civil and criminal)
 - offenses against property under Title 76, Chapter 6, Part 1, including interruption of a communication device, arson, agg. arson, reckless burning, causing a catastrophe, criminal mischief, burglary, agg. burglary, vehicle burglary, possession of burglary tools, criminal trespass, robbery, agg. robbery.
- NOTE: Theft and fraud are not Domestic Violence offenses**
- possession of a deadly weapon with intent to assault
 - discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle
 - disorderly conduct if conviction is result of plea negotiation from an original DV offense
 - child witnessing DV child abuse

- any other criminal offense involving violence or physical harm (*ie. threat against life or property, vulnerable adult abuse, witness tampering, etc.*)

NOTE: this “DV” designation of offenses **does not** apply to federal statutes for firearms and ammo possession. This is a state designation only. A conviction of a domestic violence misdemeanor for federal firearms/ammo purposes includes only convictions of misdemeanors that contain use or attempted use of physical force or threatened use of a deadly weapon against an intimate partner. Such misdemeanors are: **assault** under §76-5-102(1)(a) or (c), subsection (b) does not qualify under the federal definition; **child abuse**, under §76-5-109 if conviction for infliction of physical injury or serious physical injury on a child contains use or attempted use of physical force or threatened use of a deadly weapon against an intimate partner; and possibly **threatening with or using a dangerous weapon** under §76-10-506.

- **Cohabitant means** (§78B-7-102)
 - emancipated minor (§15-2-1)
 - < 18 years of age and married;
 - arguably also includes person 16 years of age or older but < 18 years who has been emancipated by court declaration (§78A-6-803, 804, 805)
 - **or** a person who is 16 years of age or older and who:
 - is or was a spouse of the other party (*separated, divorced*)
 - is or was living as if a spouse of the other party (*common law marriage, cohabitant*)
 - is related by blood or marriage to the other party (*relative, in-law, elder parent, adult sibling*)
 - has one or more children in common with the other party; or
 - resides or has resided in the same residence as the other party (*roommates, same sex relationships*)
 - is the biological parent of the other’s unborn child
 - **does not include the relationship of natural parent, adoptive parent, or step-parent to a minor or the relationship of minor siblings to each other**

Arrival at the Scene

Duties of law enforcement officers (§77-36-2.1)

A law enforcement officer who responds to an allegation of domestic violence

- **shall use all reasonable means to protect the victim and prevent further abuse**
 - provide for the victim's safety
 - confiscate weapons
 - assist in obtaining emergency housing or shelter
 - provide protection while he or she removes personal effects
 - assist in obtaining medical treatment
 - provide victim with notice of rights, remedies, and services
- **give written notice of rights and remedies** that includes:
 - protective orders available from district court clerk's office and juvenile court clerk's office (adult and child POs)
 - list of shelters, services, and resources together with telephone numbers
 - information about criminal protective orders (no contact orders)
- **At the time an arrest for domestic violence is made**, the arresting officer shall provide the alleged victim with written notice containing:
 - a person may not be released on bail, recognizance, or otherwise prior to the close of the next court day following the arrest, unless as a condition of that release the person is ordered by the court or agrees in writing that until further order of the court, the person will:
 - have no personal contact with the alleged victim
 - not threaten or harass the alleged victim; and
 - not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.
 - notification of the penalties for violation of any jail release court order or any jail release agreement;
 - notification that the alleged perpetrator is to personally appear in court on the next day the court is open for business after the day of the arrest
 - the address of the appropriate court in the district or county in which the alleged victim resides
 - the availability and effect of any waiver of the release conditions; and
 - information regarding the availability of and procedures for obtaining civil and criminal protective orders with or without the assistance of an attorney.

Statewide domestic violence network--Peace officer duties--Prevention of abuse in absence of order--Limitation of liability (§78B-7-113)

Law enforcement, Public Safety, and Administrative Office of the Courts

- shall ensure that peace officers at the scene of an alleged violation of a protective order:
 - have immediate access to information necessary to verify the existence and terms of that order, and other orders of the court
- officers shall use every reasonable means to enforce the court's order
- If officer has reason to believe

- a cohabitant or child of a cohabitant is being abused or
- that there is a substantial likelihood of immediate danger of abuse
 - although no protective order has been issued
- that officer shall use all reasonable means to prevent the abuse, including
 - remaining on the scene as long as there is danger of abuse
 - obtaining emergency housing or shelter care
 - explaining to the victim his or her rights
 - encouraging and assisting the victim to complete a written statement describing incident
 - arresting and taking into physical custody the abuser
- **Officer Immunity**
 - **no civil or criminal liability for performance of or failure to perform any duty so long as that person acted in good faith and without malice**

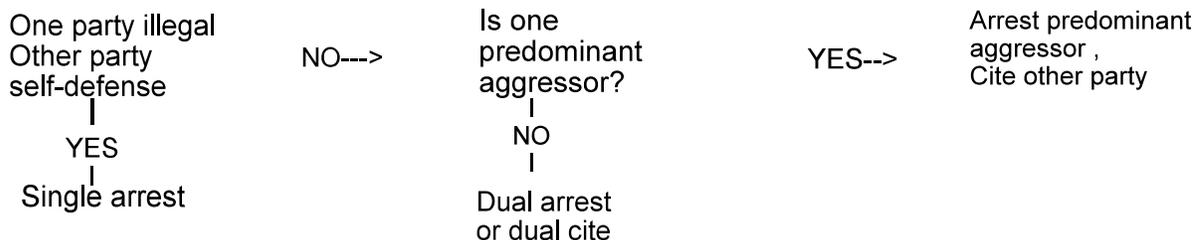
Predominant Physical Aggressor Analysis

Purpose is to reduce number of mutual arrests and avoid arresting DV victims

Officer must determine the **predominant aggressor** using objective standards §77-36-2.2 (3))

- complaints from two or more opposing parties
 - evaluate each complaint separately
- if officer determines that one person was the predominant aggressor
 - **need not arrest the other person** (can cite other party if not self-defense)
- the officer **shall consider**
 - any **prior complaints** of domestic violence
 - the **relative severity of injuries** inflicted on each person
 - the **likelihood of future injury** to each of the parties
 - whether one of the parties acted in **self defense**
 - **Self defense.** (§76-2-402)
 - justified in threatening or using force to the extent that he or she reasonably believes that force is necessary
 - to defend himself or a third person against such other's imminent use of unlawful force
 - justified in using force only if he or she reasonably believes that force is necessary
 - not justified if
 - initially provokes with intent to inflict bodily harm upon assailant
 - may consider
 - nature of the danger
 - immediacy of the danger
 - probability unlawful force would result in death or serious bodily injury
 - prior violent acts
 - patterns of abuse
 - May *not* threaten to arrest both parties to discourage request for police intervention (§77-36-2.2(4))

Preferred Officer Options When Both Parties Use Violence



Six Most Common Areas of Officer Liability

- Failure to take proper actions to protect a citizen
- Failure to appropriately enforce a court order protecting a victim of domestic abuse
- Failure to respond at all or in a timely manner
- Failure to provide information to a victim as required by law
- Arresting a citizen without establishing probable cause
- Exhibiting a pattern of differential treatment or application of the law to domestic violence cases

Officer Immunity §77-36-8

A peace officer may not be held liable in any civil action brought by a party to an incident of domestic violence for making or failing to make an arrest, issuing or failing to issue a citation, for enforcing in **good faith** an order of the court or for acting or omitting to act in any other way in good faith under the Cohabitant Abuse Procedures Act, in situation arising from an alleged incident of domestic violence is immune from civil liability that might result from the officer's action.

👉 Note: Officer may still have liability under federal law for violation of constitutional rights while acting under color of law. See 42 U.S.C. 1983

Constitutional Issues

- No immunity in Federal court for violation of civil rights
 - 42 USC § 1983..every person who, under color of law of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States to the deprivation of any rights, privileges and immunities, secured by the Constitution and law shall be liable to the other party injured in an action at law, suit in equity or other proper proceeding for redress
 - Officer may find him/herself personally liable, not only for damages, but for attorney's fees as well

- **Due Process situations**
 - Police in some way create or increase the danger faced by the victim
 - Police assure victim that abuse in custody and won't be released and abuser is in fact release (victim doesn't take safety measures, relying on police assurance)
 - State grants woman protective order upon which she relies and which the police fail to enforce
 - Police restrain personal liberty of DV victim by arresting victim (w/o going through predominant aggressor analysis and thus arresting wrong person) thereby inhibiting victim's ability to protect herself (through self-defense)

- **Equal protection situations**
 - Police failure to respond to complaints lodged by women in DV cases
 - Discriminatory intent shown by discriminatory application or enforcement of policies, laws, etc.; discriminatory statements by responding officers demonstrating bad attitude against abused women; officers treating DV cases less seriously than other assaults

- **Deliberate indifference situations**
 - Occurs when agent of govt knew of or should have known about a pattern of gross abuse and does nothing about it; public official could be assessed punitive damages

Violation of protective orders--Mandatory arrest. (§77-36-2.4)

- **shall arrest** without a warrant
- **probable cause** to believe violated any provision of
 - ex parte protective order
 - **or** protective order
 - ex parte protective order or protective order means order issued under Title 78B, Chapter 7 (adult civil PO), Title 77, Chapter 36 (crim PO), child protective order issued under Title 78B Chapter 7, or foreign PO under Title 78B, Chapter 7.
- **intentional** violation (*even if invited by petitioner to come on premises*)
 - class A misdemeanor, unless greater penalty provided in Title 77, Chapter 36
 - a domestic violence offense (§77-36-1, 77-36-2.4(2)(a))

DV Arrestee cannot personally contact alleged victim while in jail

- Section 77-36-2.5(1) states that an arrestee cannot personally contact alleged victim prior to release from jail on bail, recognizance or otherwise; Class B misdemeanor for violation

Enhancements on Domestic Violence Offenses §77-36-1.1

ONLY APPLIES TO MISDEMEANORS

- **if commit DV offense within 5 years** after person is convicted of DV offense (felony or misdemeanor, in Utah or outside of Utah) **or person is convicted within 5 years** after conviction of a DV offense (felony or misdemeanor, in Utah or outside Utah), that prior offense can be used to **enhance** the **subsequent misdemeanor** domestic violence charge
- plea in abeyance considered conviction, even if subsequently dismissed
- charge and penalty of subsequent misdemeanor offense enhanced one degree
- highest charge possible is a Class A misdemeanor enhanced to a 3rd degree felony
- see also *State v Hunt*, 906 P2d 311 (Utah 1995) on enhancing drug convictions based on counts charged in the same information

Conditions for Release After Arrest (§77-36-2.5)

- Upon arrest, a person **may not be released** on
 - bail
 - recognizance
 - or otherwise
- **prior to close of next court day** following arrest, **unless** as a condition of release
 - he is ordered by the court *or* agrees in writing that until further order of the court (commonly referred to as the **Jail Release Agreement (JRA) or Jail Release Order (JRO)**)

- will have no contact with victim
- not threaten or harass
- not knowingly enter premises of victim's residence or premises occupied by victim

Victim may waive 2 of the 3 conditions of JRA/JRO, in writing (§77-36-2.5 (5)(a))

- Only “no contact” provision and/or “not coming to victim’s residence” provision of Jail Release Agreement or Order; victim **cannot waive** condition of “no threatening or harassing the alleged victim”.
- **Victim cannot “waive” written provisions of a civil or other criminal protective order– that is a judge’s order...this “waiver provision” applies to Jail Release Agreement or Order only**
- upon waiver, those specific requirements shall not apply
- court may modify requirements (§77-36-2.5(5)(b)) of
 - no contact and/or
 - not knowingly enter premises
 - in writing or on record and
 - good cause must be shown
- person arrested for violating terms of jail no contact agreement or order cannot be released for any reason prior to first judicial appearance (§77-20-1(3)(b))
- **releasing agency shall notify** the arresting agency of (§77-36-2.5(6)(a))
 - release
 - conditions of release
 - arresting agency shall make reasonable effort to notify victim
- when released
 - based on Jail Release Agreement, releasing agency shall (§77-36-2.5(4)(b)(i))
 - transmit information to statewide domestic violence network
 - based upon court order, the court shall (§77-36-2.5(4)(b)(ii))
 - transmit order to statewide network
- does not create or increase liability of a law enforcement officer or agency (§77-36-2.5(6)(c))
 - good faith immunity is applicable
 - probable cause to believe person violated jail agreement or court order (§77-36-2.5(7))
 - warrantless arrest
 - knowingly violates order
 - if original arrest was a felony, violation is a third degree felony
 - if original arrest was a misdemeanor, violation is a class A misdemeanor
 - cannot be released from jail prior to first judicial appearance (§77-20-1(3)(b))
- **City attorneys may prosecute class A misdemeanor violations** (§77-36-2.5(7)(c))

Notice

Duties of law enforcement officers (§77-36-2.1)

A law enforcement officer who responds to an allegation of domestic violence

- **shall use all reasonable means to protect the victim and prevent further abuse**
 - provide for the victim's safety
 - confiscate weapons
 - assist in obtaining emergency housing or shelter
 - provide protection while he or she removes personal effects
 - assist in obtaining medical treatment
 - provide victim with notice of rights, remedies, and services
- **give written notice of rights and remedies to victim** that includes:
 - protective orders available from district court clerk's office and juvenile court clerk's office (adult and child Pos) and addresses of the court
 - list of shelters, services, and resources together with telephone numbers
 - information about criminal protective orders (no contact orders)
- **At the time an arrest for domestic violence is made**, the arresting officer shall:
 - provide the **alleged victim** with written notice containing: see page 82
 - a person may not be released on bail, recognizance, or otherwise prior to the close of the next court day following the arrest, unless as a condition of that release the person is ordered by the court or agrees in writing that until further order of the court, the person will:
 - have no personal contact with the alleged victim
 - not threaten or harass the alleged victim; and
 - not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.
 - notification of the penalties for violation of any jail release court order or any jail release agreement;
 - notification that the alleged perpetrator is to personally appear in court on the next day the court is open for business after the day of the arrest see page 80
- **Provide arrested person with written notification** see page 82
 - you may not be released on bail, recognizance, or otherwise prior to the close of the next court day following the arrest, unless as a condition of that release the person is ordered by the court or agrees in writing that until further order of the court, you will:
 - have no personal contact with the alleged victim
 - not threaten or harass the alleged victim; and
 - not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.
 - notification of the penalties for violation of any jail release court order or any jail release agreement;
 - notification that you are to personally appear in court on the next day the court is open for business after the day of the arrest see page 80
 - you cannot personally contact the alleged victim while in jail; violation is a separate criminal offense, a class B misdemeanor

Statewide domestic violence network--Peace officer duties--Prevention of abuse in absence of order--Limitation of liability (§78B-7-113)

Law enforcement, Public Safety, and Administrative Office of the Courts

- shall ensure that peace officers at the scene of an alleged violation of a protective order:
 - have immediate access to information necessary to verify the existence and terms of that order, and other orders of the court
- officers shall use every reasonable means to enforce the court's order

Bail

Because of the serious nature of domestic violence

- **bail may be denied** (§77-36-2.5(9))
 - *****on DV misdemeanors**** as well as felonies
 - burden of proof is “substantial evidence to support the charge and clear and convincing evidence that the defendant would constitute a substantial danger to the DV victim if released on bail”
 - this provision comports with Art I, Section 8 of the Utah Constitution
 - *All persons charged with a crime shall be bailable except:...persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail*

Appearance by Defendant

Appearance of defendant required--Determinations by court (§77-36-2.6)

- Defendant arrested
 - shall appear in person within one judicial day after arrest
- Defendant charged by citation, complaint or information
 - shall appear in person no later than 14 days after the issuance of the citation or filing of the information
- Court **shall**
 - determine necessity of imposing a criminal protective order
 - other conditions
 - electronic monitoring
 - state findings in writing

Reports

Officer

- **shall prepare incident report including disposition** (§77-36-2.2(6))
 - made available to victim upon request, **at no cost**
 - send copy to prosecutor within 5 days
- officer shall submit detailed, written report (§77-36-2.2(5))
 - if arrested no one; or
 - arrested both parties
- officer who does not arrest shall notify victim of victim's right
 - to initiate criminal proceeding
 - *and* of the importance of preserving evidence
- **agency shall** (§77-36-2.2(7))
 - **make a written record**
 - **maintain records** of all incidents reported to it
 - be identified by agency code for domestic violence

**** From January 1, 2009 until December 31, 2013, any law enforcement officer employed by a city of the first or second class shall also supply the following info, with no personal identifiers, which will be forwarded monthly to the Department of Public safety: marital status of each of the parties involved; social, familial or legal relationship of the suspect to the victim and whether or not an arrest was made (§77-36-2.2(6)) (See Appendix B for DV Report Forms)

Enforcement of the Law

Primary duty of law enforcement

- **protect the victim**
- **enforce the law**

Enforcement of orders. (§77-36-6)

- Each law enforcement agency **shall enforce all civil, foreign and criminal protective orders, jail release agreements, jail release court orders, pre-trial protective orders, and sentencing protective orders**
- Requirements **apply statewide regardless of**
 - **jurisdiction** order was issued
 - **location** of victim or perpetrator

****Full faith and credit for foreign** (*issued by another state, territory, or possession of the United States*) **protective orders.** (§78B-7-302)

Uniform Interstate Enforcement of the Domestic Violence Protection Orders Act (§78B-7-301)

- applies to all foreign protection orders issued by another state tribunal under the domestic violence, anti-stalking or family violence laws of that state. State includes other states, US possessions, the District of Columbia, Puerto Rico and Indian tribes or bands
- validity of order for **judicial enforcement** based upon: (§78B-7-303)
 - identification of petitioner and respondent listed in order
 - order must be currently in effect
 - was issued by a tribunal who had jurisdiction over the parties and subject matter under the laws of the issuing state and
 - prior to issuance, the respondent was given notice and opportunity to be heard before the tribunal or if not, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the issuance
- **non-judicial enforcement** (enforcement by police)(§78B-7-304)
 - if officer has probable cause to believe a valid PO exists and that the order has been violated, shall treat the matter as if it was a Utah PO violation; violation of order subject to same penalties as if violation of Utah order (*class A misdemeanor*)
 - an order, certified or not, in any form, that identifies the parties and is currently valid constitutes PC that a valid PO exists
 - if order not presented, officer can rely on other information to determine whether PC for a valid order exists
 - if officer determines valid order exists but respondent has not been served with order, officer shall advise respondent of existence of order, make reasonable effort to serve it and allow respondent reasonable opportunity to comply before enforcing order

Peace officers' immunity from liability. (§78B-7-306)

- may not be held liable in any civil or criminal action for an act or omission arising from the registration or enforcement of the foreign order or the detention or arrest of the alleged violator of the order if done in good faith

CAVEAT: not immunized against violations of federal civil rights

Responding to a DV Call

- Determine THREAT LEVEL quickly upon arrival and secure the scene
- Determine PROBABLE CAUSE if crime occurred
- Determine PREDOMINANT PHYSICAL AGGRESSOR If crime occurred and there are dual injuries as result of incident or allegations

Responding Officer's Reaction to Recurring Visits for Domestic Violence at the Same Location

Often officers deal with the same victim and the same perpetrator over and over again. They become frustrated, confused and fed up with the fact that the victim does not leave the perpetrator. **Officers should not:**

- threaten to arrest both parties in order to discourage any party's request for police intervention
- let emotions interfere with the investigation
- request that victim make a citizen's arrest
- make any statement that would discourage a victim from reporting an act of domestic violence in the future

Dispatcher Response

The dispatcher is to assess the emergency nature of the call and to dispatch an officer to the location of the incident.

- if warranted, the dispatcher shall treat the call ***like any other life-threatening call***
- dispatch at least **two officers** to the scene
- assign a **priority** to the call based on the seriousness of the injuries or threatened harm, and whether or not the assailant is on the premises
- **listen** for back ground noises that will assist in **evaluating the threat level**
- relay all information to the responding officer, including past call history
- determine whether there is a civil protective order or criminal protective order on file or on statewide network
- radio officer(s) as soon as the **existence or nonexistence of an order** is ascertained
- **stay on the line** with the caller if safety requires or if the caller requests
- **advise victim** of intended department response and use crisis intervention skills as required

The dispatcher is **not** to inquire of the caller whether she intends to press charges or obtain a protective order and shall not lead the caller to believe that police response is contingent upon her agreeing to take further action against the alleged perpetrator.

Responding Officer Arrives at the Scene

The officer should

- avoid use of sirens and emergency lights in the vicinity of the scene
- do not park police unit directly in front of the residence
- question persons encountered while approaching the scene
- observe surroundings before knocking on the door
 - initial contact with occupant(s)
 - identification
 - consent search--must be freely & voluntarily given

- refused entry
 - be persistent
 - request the dispatcher call the complainant
- forced entry
 - probable cause to believe a felony is occurring
 - has just occurred
 - or that life is in danger
- assess present threat of danger to either party or the officer

The officer should assure that the parties are **physically separated** and try to separate parties so each cannot see or hear the other person

The officer should determine whether or not there is a valid PO (Utah or foreign)

- has it been served?
 - If one exists but has not been served, officer should try to obtain copy and serve if valid Utah order ;
 - In the case of a foreign PO, officer shall inform respondent that order exists, make a reasonable effort to serve it and allow respondent reasonable opportunity to comply with order (78B-7-304)
- was it violated?
 - if so, and the suspect is still on the scene, the officer shall arrest the alleged perpetrator for violation of the order
 - if so, and suspect not on scene, should attempt to locate and arrest and/or pursue warrant of arrest. Since a violation of a PO is a mandatory arrest, a citation or a summons is not acceptable

If officer has PC to believe a DV offense has occurred, the officer has two choices: arrest or cite the offender (§77-36-2.2(2)(a)). The officer **may** arrest if officer has probable cause to believe that a domestic abuse assault has been committed even if it did not result in any injury to the victim. Such conducts may include:

- threat to injure or kill the alleged victim
 - don't have to have blood & guts to arrest
- pushing
- throwing an object at the alleged victim which does not hit the victim
- visible injuries are **not** necessary in order to make an arrest
 - look for evidence of head injuries
 - dizziness
 - difficulty concentrating
 - difficulty remembering

Evidence of an assault may include, but is not limited to:

- torn clothing
- disarray in the home
- smeared makeup
- **or** verbal complaints of pain by the victim

The officer **MUST ARREST** and **TAKE** the perpetrator **INTO CUSTODY** if there is also

probable cause to believe:

- there will be **continued violence** or
- perpetrator has **caused serious bodily injury** or
- perpetrator **used a dangerous weapon** or
- perpetrator **violated a protective order**
- if the responding officers determine that an arrest of the perpetrator is warranted, the officers shall seize all dangerous weapons used in the offense (§77-36-2.1(1)(b))
 - consider taking any other weapons for safekeeping if given permission by owner or co-owner
- If an **arrest** has been made, the officer(s) at the jail asks whether or not arrested person is willing to sign a jail release agreement (JRA)
 - victim **may waive** in writing 2 of the 3 conditions listed in the JRA/JRO
- Officer must determine whether the alleged victim is in need of medical attention
 - call for an ambulance or offer to drive the alleged victim to the hospital or make other transportation arrangements
 - if the victim declines medical treatment, the officer shall not force the alleged victim to obtain treatment but should note efforts in report
- Officer shall give written notice to the victim
 - of the programs and/or shelters that serve the victim's area, provide a list of services in the community available for victims of domestic violence
 - of information re: civil and criminal POs and where court is located
 - information re: JRA/JRO conditions, penalties, waiver and the fact that the suspect must appear in court the next court day

No officer shall lead a victim to believe that present or future police intervention is contingent upon the victim making contact with, or receiving services from, a domestic violence program or shelter

- Officer shall explain what a protective order is and inform the victim that they may seek a court order of protection by filing for one at the district court
- before leaving the scene, the responding officers shall provide the victim **written notice** of the victim's rights and remedies
- Officer should interview all parties separately, *i.e.*, victim, suspect, witnesses, children

The following **should not** influence the officer's determination of probable cause to arrest except as they relate to the elements of the crime:

- Whether or not the victim wants to prosecute
- Whether the victim has cooperated with police in past investigations
- Whether the victim stayed with the batterer after calling the police in the past
- Marital status or domestic relationship of suspect and victim
- Whether or not the suspect lives on the premises with the victim
- Existence or lack of protective order
- Victim's preference that an arrest be made or not

- Occupation, community status and/or financial consequences of arrest
 - Complainant's history of prior complaints
 - Verbal assurances that violence will cease
 - Non-visible injuries
 - Complainant's emotional state
 - Speculation that victim may not follow through with prosecution
 - Speculation that case may not result in conviction
 - Assumptions that violence is more acceptable in certain cultures
 - Language abilities or barriers and/or immigration status
 - Sexual preference or orientation of parties
-
- **If you have probable cause that a crime occurred and only one party used violence *not in self-defense*, MUST arrest or cite that person**

Dual Arrests

What if both parties used violence?

- Arrest both? Problems:
 - Rarely appropriate; reality is you may very well be arresting the victim
 - Department may risk lawsuit
 - Children removed from home
 - Victim not protected and batterer gains more power
 - Real victim gets criminal record and cannot receive CVR funds
 - Victim will not call police in future
- Determine if one party acted in self-defense
 - Reasonably believes force is necessary
 - Other's use of unlawful force is imminent
 - Deadly force only if reasonably believes necessary to prevent death or serious bodily injury
 - Not justified if initially provokes the use of force against himself *with the intent to use force as an excuse to inflict bodily harm upon assailant*
- Officer should look at:
 - Was the force reasonable and necessary to prevent harm?
 - What was the harm, actual or imminent?
 - What did the victim believe about the harm about to be perpetrated?
 - Section 76-2-402 Utah Code outlines the following factors to consider in determining self defense:
 - Nature of the danger
 - Immediacy of the danger
 - Probability unlawful force would result in death or serious bodily injury
 - Other's prior violent acts or propensities
 - Patterns of abuse or violence in parties' relationship
- Possible indicators of reasonable force:
 - Bites on chest area where someone's head might have been restrained
 - Scratches on wrists or forearms which someone might inflict if trying to get away from being choked/strangled
 - Fingernail marks deeply gouged into neck or back
 - Disparity of force used between two parties (wife pushes, husband punches or vice versa)
 - Injuries inconsistent with "story"
 - Size disparity and use of weapon by smaller person to repel larger person
- Injuries
 - Never assume how or when an injury happened—**ASK**
 - Always attempt to assess if injury could be defensive in nature
 - Look for injuries on both parties—defensive wounds may be on either party or both
 - Document all injuries in writing and with photographs; document also "no injuries" in writing and photographs
 - Assess if injuries appear consistent with how each party states they occurred
- If valid self-defense, then **MUST** arrest or cite person who used violence not in self-defense
- If not valid self-defense, then **MUST** look at predominant aggressor analysis under Section 77-36-2.2(3)

Predominant Aggressor Analysis - §77-36-2.2

(Used when there appears to be two suspects)

- Purpose of required analysis
 - reduce number of mutual arrests
 - avoid arresting victims of DV
- Use **objective standard** in determination
 - **prior complaints of DV**
 - *History of violence*
 - *Violence in another relationship*
 - *Other violence in general*
 - *Patterns of abuse or violence in the parties' relationship*
 - *Prior incidents of violence even if it did not result in investigation, arrest or conviction*
 - *Victim's statements about prior violence--"This is the last time he is going to hit me."--clue to previous violence*
 - **relative severity of injuries**
 - *Proportional nature of mutual injuries*
 - *Scratch v. Broken Arm*
 - *Push v. Black Eye*
 - *Verbal Abuse v. Verbal Threats v. Physical Abuse*
 - **likelihood of future injury to each person**
 - *Height/weight of parties*
 - *He is 6'5" & weighs 250 lbs.; She is 5'6" & weighs 125 lbs.*
 - *HOWEVER, do not rely upon this factor alone; smaller individuals who weigh less than their victims are highly capable of inflicting injury on a bigger, heavier person*
 - *Logical conclusions*
 - *Threats continue after police arrive*
- **whether one party acted in self-defense**
 - **Self defense.** (§76-2-402)
 - justified in threatening or using force to the extent that he or she **reasonably** believes that force is necessary
 - to defend himself or a third person against such other's **imminent** use of unlawful force
 - justified in using force only if he or she **reasonably** believes that force is necessary
 - **not justified if**
 - initially provokes with intent to inflict bodily harm upon assailant
 - may consider to determine imminence or reasonableness
 - **nature** of the danger
 - **immediacy** of the danger
 - **probability** unlawful force would **result in death or serious bodily injury**
 - **prior violent acts or violent propensities**
 - **patterns of abuse**

- **Not justified if he or she initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the other party**
- Analysis
 - *Was A justified?*
 - *defending self or a third party?*
 - *Was B justified?*
 - *defending self or a third party?*
 - *Injuries offensive/defensive*
 - *Simple scratches on body (probably defensive by other party)*
- Other factors you may consider:
 - Who in the relationship poses the most danger to the other?
 - Who is at most risk of future harm/injury?
 - What is the relative severity of injuries inflicted on each person?
 - What is the likelihood of future harm?
 - Are there prior complaints of DV involving the parties?
 - Are the injuries consistent with the amount of force claimed to have been used by each party?
 - Did one party use unreasonable amount of force in response to the other's actions?
 - Have there been past incidents that would cause one party to react in a manner that caused such injury?
 - Who is the most significant aggressor in the incident?
- Determining predominant aggressor allows officer to arrest the most significant aggressor and take to jail; the other person may just be cited
 - In cases where children present, this leaves one person at home with kids but holds both people accountable for their actions if both used unlawful force or violence against the other person
- Mutual combat or provocation is not the cause of domestic violence
- Verbal provocation, no matter how severe, is never justification for violence
- Failure of batterer to take responsibility for violent behavior and victim's self blame does not justify mutual arrest

Questions by police officer may reveal predominant aggressor

- What will the other party say precipitated the event?

Consequences of arresting the wrong person:

- victim cannot get services under Crime Victim Reparations if they have been accused of being the perpetrator
- many aspects of the system are shut off to the victim once labeled the perpetrator
- possible Federal law ramifications

Children may provide an officer with information that may assist in determining predominant aggressor

- get children's statements, excited utterances, etc.
- get names and ages of children--Crime Victim Reparations will pay for treatment
- children have seen the abuse before

- they **know** who the **predominant aggressor** is in the family
- what are we **teaching** the children if we arrest the wrong person?
 - perpetrator gets away with the abuse
 - victim is abused by the system too
 - law enforcement does not help--doesn't pay to call for help
 - victim must self-protect
 - **or** children must protect self and the victim
- **children will learn violence works**
 - perpetrator gets what he or she wants
 - victim gets punished for not doing what perpetrator wants
 - abuse continues
 - next generation recreates patterns
 - violence multiplies and spreads into schools and communities
 - use violence to get what you want--to resolve differences
- **Law of Probability--non-statutory**
 - Presence or lack of fear in either party
 - *Presence of fear--not likely to be the predominant aggressor (gender reactions different)*
 - *Evidence of fear*
 - *Crying*
 - *Hysterical*
 - *Irrational*
 - *Nervous--won't look you in the eye*
 - *Disoriented & confused*
 - *Apologetic*
 - *Lack of fear*
 - *Angry*
 - *Calm*
 - *Threatening*
 - *Controlling*

Victim Behavior at the Scene

Victim's reactions may be situational. Once an officer comes on the scene, the victim may feel safe to lash out at the perpetrator because she or he has protection. It may appear to the officers at that time that the hysterical victim is the perpetrator, while the perpetrator may sit calmly in the corner. Victim may appear to be uncooperative because priorities shift with appearance of officers--she or he is no longer concerned about safety, but retaliation, children, finances, etc. Also, bizarre or irrational or angry behavior may be the result of a brain injury if victim reports being strangled or having been struck.

Listen

- Look eyeball to eyeball (*unless culturally impermissible--may show lack of respect*)

Note: identify what abuse is--many victims don't realize they are being abused--

physical abuse is a crime--use identifiers such as “slapping” and “kicking” when asking about abuse.

Don't be manipulated by suspect (*doesn't stop you from manipulating suspect to get the story*)

- Let's "talk sports"
- Share military experiences
- "You know how women are;" "She's crazy;" "She pushed my buttons."
- The more alike cop and suspect are, the harder it is for the cop to believe the suspect did what s/he did and the more likely victim will be alienated from criminal justice system

Investigation of Domestic Violence Cases

- IF YOU DIDN'T WRITE IT DOWN, IT DIDN'T HAPPEN
- DO NOT ASSUME THAT ANY STATEMENT WILL BE INADMISSABLE

Investigation of a domestic abuse case begins once the officer(s) arrives on the scene

After assuring that the procedures laid out above have been followed (*e.g., determination of condition of victim, determination of presence of weapons, etc.*), the officer shall

- conduct a thorough investigation and prepare reports of all incidents of domestic violence and all crimes related to domestic violence (§77-36-2.2(6)(a))
- mind-set of responding officer should mirror the philosophy of the prosecutor
 - ***How can we prove this case without the participation of the victim?***
- **do not**, however, neglect the importance of victim safety considerations and referrals for the victim
- mandatory or pro-arrest policies play a critical role in relation to victim safety and thorough case investigation
- arrest not only acknowledges the criminal behavior, but provides immediate safety to the victim and heightens the likelihood of a provable case.

The officer shall:

- interview all witnesses separately, including the victim, suspect, children, neighbors, etc.
- if the victim has no visible injuries, the officer shall ask if the victim has pain anywhere and shall document the presence of pain
- document the parties' condition and demeanor, including torn clothing, smeared makeup, and evidence of injury
- note the size of the victim in relation to the size of the suspect
- record condition of the scene (*e.g., have things been thrown about, is furniture broken, are curtains ripped*)
- if the suspect is taken into custody, the officer shall document spontaneous statements made by the suspect
- keep the suspect and victim separated
- **Miranda** rights will be read to the suspect
- if medical treatment is needed, the officer, after assuring that such treatment is or soon will be provided, should obtain a release of information that complies with HIPAA from the victim in order to obtain the victim's medical records
- document the extent of the injuries and if the injuries are visible
- assure that photographs of the injuries are taken as soon as possible
- record the names(s) of all medical personnel who will be treating the victim
- collect and record all evidence
 - identify perpetrator and exonerate others
 - corroborate the victim's version or discredit the perpetrator's version
 - corroborate the statement of a witness
 - reconstruct the crime if there are no witnesses

- document and prepare an incident report
 - record enough information so that an investigator can later identify/find the suspect
 - record what evidence was found
 - provide sufficient information to find victim and witnesses again
 - tell a story--dates, times, places, people
 - address elements of each crime
 - example: intoxication
 - under the influence of intoxicating liquor
 - in a public place, person is a danger to himself or others
 - in a private place, person is a danger and unreasonably disturbs others
 - **prosecutors will not charge a crime if your report does not address each and every element of that crime**
- take photographs of physical as well as property damage

OVERVIEW OF EVIDENCE TO CONSIDER

Interviews of Witness

- **victim**
- **children**
- **neighbors**
- **suspect**

Out of court statements and hearsay evidence

- Medical (See Appendix B for HIPPA Release form)
 - use to prove injury
 - use to corroborate V's testimony how injury occurred
 - statements to medical personnel for purpose of medical diagnosis, Utah Rules of Evidence (URE) 803(4) (written records; actual witness testimony—paramedics, nurse, doctor, etc.)
 - Statements of physical, mental or emotional condition, URE 803(3)
 - admissible to prove existence of a particular condition after an incident
 - Present Sense Impression, URE 803(1)
 - 911 calls, walking through scene while talking into recorder, statements made to others under these circumstances
 - Excited Utterance, URE 803(2)
 - **OFFICER MUST WRITE DOWN CONDITION OF PERSON SPEAKING AND THEN WRITE DOWN STATEMENTS**
 - Victim, children

Identification of perp

- Perp at scene/ID by officer
- Perp gone/ID by photo from house and excited utterance of victim identifying photo as perp
- Perp gone/excited utterance by victim or medical exception as to who did it and ID in court by someone who knows the perp either by name or relationship to victim

Corroborating evidence

- Photos
 - Victim (at time of incident and days later)
 - House
 - Kids
 - Perp
- 911 tape
- Medical records
- Other witnesses
- Damaged property, torn clothing, etc.
- Prior incidents, URE 404(b)
 - useful to show motive, lack of mistake or accident, plan, intent, preparation, knowledge, identity

Evidentiary Issues

It's important to ask about and note evidence or statements of past violence by the subject against the victim or other family members or even household property or pets. Prosecutors may be able to introduce such prior incidents of domestic violence as evidence in a prosecution of the subject.

POLICE OFFICERS CAN

- **substantially** increase their chances of conviction
- **reduce** likelihood of repeat conduct
- by **arming** prosecutors with knowledge of prior domestic violence
 - even if abuse did not result in investigation, arrest or conviction

Documentation of statements by the victim, the defendant, the children, and witnesses

- gives the prosecutor a weapon against the abuser whose victim recants or refuses to testify

If the prosecutor can show

- logical relevance of prior bad acts
- to **any fact in issue**
 - motive
 - intent
 - preparation
 - plan
 - knowledge
 - identity
 - absence of mistake or accident--*"I fell down the stairs."*
 - or any other reason to help prove an element of the crime
- not offered solely to prove defendant's bad character
 - to show the person acted in conformity therewith
- **evidence of prior bad acts is admissible** (Utah Rules of Evidence 404(b))

Police and prosecutors want to see the cycle of domestic violence broken

- officers who **investigate**, rather than merely report domestic violence case
- and who **document** their investigations
- **arm** prosecutors with the tools to turn an arrest into a conviction

Once the abuser is under the supervision of the court

- good chance of solutions for domestic violence
 - can become a reality, not just a suggestion

Investigation

Gather information from *all* persons who had any knowledge of the matter

- victim
- suspect

- children
- eye witnesses
 - *testify to what they saw*
- other witnesses
 - *testify to what they heard*

DO NOT ASSUME THAT ANY STATEMENT WILL BE INADMISSIBLE!

Hearsay

A statement

- other than one made by the declarant
 - while testifying at the trial or hearing
- offered in evidence
- **to prove the truth of the matter asserted**

Statements which are not hearsay

- even though the statement is introduced by someone other than the declarant of the statement
 - **Prior statements by the witness**
 - defendant tells “A” to the officer at the scene
 - but says “B” while testifying at trial
 - prosecutor can cross-examine on prior statement
 - cross-examination not subject to a hearsay objection
 - **Admission by a party-opponent** (*defendant or legal agent of the defendant*)
 - may be admitted by another witness without a hearsay objection
 - officer testifies that, “Joe told me “A” when I arrived at his house
 - only grounds to attack statement is to claim
 - prior statement was not made by defendant
 - witness’ recollection of the statement is incorrect

Exceptions to Hearsay Rule (officers should look for these kinds of statements)

Present sense impression (URE 803(1))

- statement describing or explaining an event or conditions
- made while the declarant was perceiving the event
 - recording of a child or other witness on a 911 tape
 - tape recording of an officer describing what he sees upon arrival at a crime scene

Excited utterance (URE 803(2))

- statement relating to a startling event
- made while declarant was under
- the stress of excitement caused by the event
 - victim-- "That bastard just kept kicking and kicking me!"
 - suspect-- "You're damned right I kicked her! She deserved it!"
 - child --"I screamed at Daddy to stop kicking Mommy, but he just yelled at me to 'Shut up'!"
 - witness-- "Please get over here! Joe's kicking her so hard he's going to kill her!"
- **record not only what is said**
 - but the emotional state of the declarant
 - **and** what is going on at the time the statement is made
- see *West Valley City v. Hutto* 5P3d1 (Ct App 2000), pre-*Crawford*, but disallowed introduction of victim's statements stating they were not "excited utterances" (NOTE: victim not present to testify)

Then existing mental, emotional, or physical condition (URE 803(3))

- statement of the declarant's **then** existing
 - state of mind
 - emotion
 - sensation
 - or physical condition
 - *such as intent, plan, motive, design, mental feeling, pain, and bodily health*
- may not be a statement of memory or belief of someone who was there
 - He said three times, "I'm going to shoot your damn head off!" (*intent or plan*)
 - Victim to a friend, "Oh, God! It hurts so much when I breath!" (*pain or bodily health*)
 - Victim, "I can tell exactly when he's getting ready to beat me! I bought a gun and I'll use it next time!" (*plan, motive, design*)

Statements for purpose of medical diagnosis or treatment (URE 803(4))

- describing medical history
 - or past or present symptoms, pain, or sensations
- statement from an emergency room physician, a nurse, or EMT, dentist, chiropractor, or any other healthcare provider who may be requesting a medical history from the witness for purposes of medical diagnoses or treatment
 - "She told me that her husband had beat her with a poker and that it was the third time that month he had done it!"
- be sure to obtain medical records to support the witness (requires medical HIPAA release)

- for form, go to: <http://attorneygeneral.utah.gov/cmsdocuments/UtahAuthorizationToDiscloseHealthRecordsToALawEnforcementAgencyForm.pdf>
- for summary of HIPAA and it's application to law enforcement, please go to: <http://attorneygeneral.utah.gov/HIPPA.html>
- **and** make sure the witness' testimony matches what is in the medical record
- use to prove injury or use to corroborate V's testimony how injury occurred

Unavailable Witness Exception (URE 804)

- declarant is exempted by ruling of the court from testifying on the grounds of privilege
 - spouse of the defendant
 - cleric to whom witness confided
 - lawyer
 - doctor (*injury reporting exception*)
 - or mental health therapist
 - there are exceptions to any of the above--be careful anytime you are dealing with any of them
- witness persists in refusing to testify despite an order of the court to do so
- declarant testifies to lack of memory of the subject matter of his or her statement
- is absent because of death or then existing physical or mental illness
- is absent and the proponent of the statement has been unable to obtain the declarant's attendance by process or other reasonable means

***Crawford v Washington*, 541 US 36, 2004**

US Supreme Court held that an out of court statement that is testimonial in nature can be introduced by prosecution only if the declaring witness testifies or is now unavailable and there was a prior opportunity for witness to be cross examined by defendant. The court held that this is a right guaranteed by the Sixth Amendment to defendants to be able to confront the witnesses against them

- this ruling effectively put a stop to many DV prosecutions where prosecutors relied solely on hearsay evidence (such as excited utterances) to prove cases without victims (witness was not available nor subject to prior cross examination as the vast majority of the DV cases are misdemeanors)
- it is the investigating officer's job to gather all kinds of statements and not worry about determining if it's hearsay or testimonial in nature; it is the prosecutor's job to determine what statements are testimonial and what statements are not and what is hearsay and what is not
- what ***Crawford*** means to police is
 - Let victims and witnesses who want to talk, talk - just listen
 - "Testimonial" includes structured police questioning
 - court objectively looks to primary purpose of the declarant in making the statement
 - is it to enable police assistance to meet an ongoing emergency or is it to establish or prove past events potentially relevant to later criminal prosecution?
 - factors the court considers :
 - was declarant describing events as they were actually happening or past events?
 - was declarant facing an ongoing emergency?
 - was the nature of what was asked and answered necessary to resolve present emergency rather than learn about past events?
 - what was the level of formality of the interview?
 - (See *Davis v Washington*, 547 US 813; *State v Martin*, 2008 WL 1837536 (Ind Ct App. 2008))
 - Pay attention to victim's (or witness') emotional and physical state
 - Pay attention to casual, off-handed remarks
 - Police must be proactive to try to encourage victim cooperation
 - if you can show witness' unavailability due to conduct or action of defendant, hearsay may be admissible under the doctrine of *forfeiture* – defendant forfeits right to confront witness against him/her when causes or contributes to witness' failure to appear or be available

CRAWFORD PRACTICE TIPS

For Police Officers

- At the scene of a domestic violence call, separate the parties and speak with victim as soon as possible after safety issues are resolved.
- Ask open-ended questions that call for narrative answers, such as "Tell me everything that happened."

- Record the victim's statement whenever possible. The International Chiefs of Police Model Domestic Violence Policy implemented in 2006 states: "Use recording devices to capture statements made by combatants and witnesses." If a recording is not possible, write down important statements using exact quotes.
- Record the behavior and emotional state of victim and all witnesses.
- Use a domestic violence supplemental report form or other checklist as an aid for gathering admissible evidence.
- Secure a copy of the 9-1-1 call as a part the case investigation.
- Whenever possible, have the victim and any witnesses write a statement that is admissible under URE 1102.

RULE 1102. RELIABLE HEARSAY IN CRIMINAL PRELIMINARY EXAMINATIONS

(a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.

(b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only, reliable hearsay includes:

- (1) hearsay evidence admissible at trial under the Utah Rules of Evidence;
- (2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;
- (3) evidence establishing the foundation for or the authenticity of any exhibit;
- (4) scientific, laboratory, or forensic reports and records;
- (5) medical and autopsy reports and records;
- (6) a statement of a non-testifying peace officer to a testifying peace officer;
- (7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;
- (8) a statement of a declarant that is written, recorded, or transcribed verbatim which

is:

- (A) under oath or affirmation; or
- (B) pursuant to a notification to the declarant that a false statement made therein is punishable; and
- (9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

- (1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or
- (2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

Weapons Seizure

Goals

- Safety
- Compliance with state statutes and with state and federal constitutional requirements re: search and seizure
- Minimize unnecessary exposure to civil liability

Strategies

- Search and seizure issues
- Plain view
 - Consent-express or implied by anyone with lawful authority
 - "Safe-keeping"
 - However, if person lawfully entitled to possess them demands return, police normally required to comply with request
 - Issue of "federal" prohibition on possession
 - contact ATF to seize firearms not used in commission of DV offense
 - Ex: sheriff's office serves PO on respondent and sees guns; if have agreement with ATF, can seize; otherwise, must leave guns and simply notify ATF because it is a federal prohibition to possess firearms or ammunition if subject to a protective order or if person has been convicted of a qualifying DV misdemeanor, not a state prohibition (unless falls under *possession by a restricted person*)
 - NOTE: ex parte order does not qualify for federal firearm prohibition

Investigation of Civil & Criminal Protective Order Violations

- violations of orders (includes Cohabitant PO, Child PO, foreign PO, JRA/JRO, Pre-Trial PO, Sentencing PO)
 - contacted victim
 - didn't stay away from victim, residence, or premises
 - threatened or abused victim
 - other conditions
 - under the criminal provisions of the civil protective order or
 - of the criminal pre-trial protective order or sentencing order
 - under a foreign protective order
- determine if there is an enforceable order in place--check statewide network (*warrant system*)
 - contact court that issued order
 - complaining party should have a copy of order (*unless JRA/JRO which should then be on statewide system*)
 - documents will have names of parties and court file number
 - verification through statewide network can be done by entering the court identifier and the court file number or just the name of the respondent (*try using one of these methods*)
 - if foreign PO, check NCIC as some states, tribes or other jurisdictions list there
- valid order--investigate like any other crime--with one exception
 - ask victim what their feelings, thoughts and reactions were when seeing the suspect/respondent
 - record "how did you feel" information--allows prosecutor to put some emphasis to this case, taking it above just the "technical violation."
 - interview eyewitnesses--takes it above "he said/she said"
 - in report, include
 - case number of the protective order
 - time of the violation
 - if possible, have dispatch print a copy of the order as it is displayed on the computer screen and attach it to your report
- if order in victim/petitioner's possession has not been served, use the forms and serve suspect/respondent if Utah PO; if foreign PO, notify respondent of existence of PO, make reasonable effort to serve order on respondent and give respondent reasonable opportunity to comply, as required by 78B-7-304

Follow-up Investigation

If field officers have done their job, follow-up will probably be limited to gathering documents for them to prepare the formal charge(s)

- prosecution should be provided with certified copies from the protective order file
 - it is recommended that the following be supplied
 - verified petition for protective order
 - ex parte protective order
 - return of service--shows date and time of service and name of process server
 - any extensions/continuances that cover the time of the violation
 - protective order--if has been served and was in effect at time of the violation
- supplemental report should provide a **time line** of the events in the protective order case

- show where the violation fits into the events in the protective order case
- makes series of events clearer for the prosecutor as well as the defense
- witness list must include the person who did service
- know which order was in effect at the time of violation so the correct person is subpoenaed
- properly drawn time line will assist in determining who this is
- violation of a protective order is a domestic violence crime, section 76-5-108
- subject to **enhancement of penalties** (§77-36-1.1)
 - priors can be Utah convictions or convictions from other states

OTHER INFORMATION

Notification of Victim

- APP to notify victim of any DV offense, failure to comply with court imposed conditions and failure to comply with sentencing PO by defendant, section 77-36-5.1(4)
- good faith effort/mailing to last known address

Resources for Victims

Shelters

- There are 16 programs in Utah from Blanding to Logan
- Logan, Brigham City, Ogden, Davis County, 2 in Salt Lake County, Tooele, Provo, Park City, Price, Richfield, Moab, Vernal, Cedar City, St. George, Blanding

Victim advocates

- Division of Family Services--Development and assistance of volunteer network.** (§78B-7-112)
 - develop a statewide network of volunteers and community resources to
 - support, assist
 - advocate on behalf of victims of domestic violence
 - provide assistance to persons seeking orders for protection
 - provide nonlegal assistance on location and availability of shelters and community resources
- victim advocates can be attached to police agencies, shelters or prosecutors' offices and through the Department of Corrections

Division of Child and Family Services

- DV workers; CPS workers

Legal services

- Legal Aid in Salt Lake City handles all protective orders regardless of income
- Utah Legal Services may handle protective orders in many other areas of the state

Other community resources

- Clergy, Faith Leaders
- Healthcare providers
- Workplace Employee Assistance programs
- Private and public mental health providers/programs
- Local DV coalitions
- Specialized police units
- DV resource information and referral line at 800-897 LINK (5465)
- Utah Domestic Violence Council at (801) 521-5544
- Judicial District Victim's Rights Councils; call CVR at 800-621-7444 for specific district info

Children

“The best way to protect the children is to protect their mother”

Seen, But Not Heard

- Children in homes where domestic violence occurs are physically abused or seriously neglected at a rate **1500 percent higher than the national average** in the general population.
- Older children may be **hurt while trying to protect their mother**.
- Children from violent homes have **higher risks** of drug/alcohol abuse and juvenile delinquency.
- Approximately **90 percent of children are aware** of the violence directed at their mother.
- Children are present in 41-55 percent of homes where police intervene in domestic violence calls.

From Domestic Violence—A Guide for Health Care Professionals, State of New Jersey, Department of Community Affairs, March 1990

- The US Advisory Board on Child Abuse suggests that domestic violence may be the single major precursor to child abuse and neglect fatalities in this country (US Advisory Board on Child Abuse and Neglect, US Department of Health and Human Services, *A Nation's Shame: Fatal Child Abuse and Neglect in the United States*; Fifth Report, 1995).
- Research has shown that children who see or hear a parent being battered by someone are traumatized as much as children who themselves are beaten or sexually abused (Petter Jaffe, et. Al, *Children of Battered Women*, 1990).
- These children display emotional and behavioral disturbances as diverse as withdrawal, low self-esteem, nightmares, self-blame and aggression against peers, family members and property (Peled, Inat, et. A, *Ending the Cycle of Violence: Community Responses to Children*”, Sage Publications, 1995).
- In 50-75 percent of households with children where there is domestic violence, the children are abused as well (National Coalition Against Domestic Violence).
- Of boys ages 11-20 who commit homicide, 63 percent murder the man who was abusing their mother (National Coalition Against Domestic Violence).
- Of the children who witness domestic violence, 60 percent of the boys eventually become batterers and 50 percent of the girls become victims (National Coalition Against Domestic Violence).
- Children from violent homes are at a higher risk of truancy and school dropout, emotional distress, guilt, health problems, and delinquency, along with significant long-term effects such as Post-traumatic Stress Disorder, drug and alcohol abuse. These children exhibit six times higher risk for suicide and higher risk for inter-generational abuse as either victims or perpetrators of domestic violence (Edelson, J., *Journal of Interpersonal Violence*, 14, 839-870 “Children’s Witnessing of Adult Domestic Violence.” (1999)

Impact of Violence on Brain Development and Other Effects

Dr. Bruce D. Perry, an internationally recognized authority on brain development and children in crisis, contributed chapter 18 in the *Textbook of Child and Adolescent Forensic Psychiatry*, (Eds., D. Schetky and E.P. Benedek) American Psychiatric Press, Inc. Washington, D.C., pp 221-238, 2001. In that chapter "The neuro-developmental impact of violence in childhood" he explored the impact of persistent fear on the development of a child's brain:

- The home is the most violent place in America (Strauss, 1974)
- Child may be a witness or a direct victim or victim if tries to intervene to protect another family member
- Threat activates the brain's stress-response neurobiology which in turn can affect development of the brain : exposure to unpredictable or chronic stress results in functional deficits and vulnerability to future stressors
- If the neurobiology of the specific response - hyperarousal or dissociation - is activated long enough, there will be molecular, structural and functional changes in those systems (Perry, 1994; Perry et al., 1995; Perry, 1997; Perry & Pollard, 1998)
 - Females are more likely to dissociate; males more likely to display classic "fight or flight" response
 - Impacts emotional, behavioral and cognitive functioning
- Brain grows and organizes from "inside-out" and "bottom-up"
 - Brain stem is part of the lower more primitive and reactive portion of the brain; the sub-cortical and cortical area is the higher, more complex area of the brain that modulates the reactivity and impulsivity of the brain stem
 - Any factors that increase the activity or reactivity of the brainstem (chronic traumatic stress) or decrease the moderating capacity of the limbic or cortical areas will increase an individual's aggression, impulsivity and capacity to be violent

In a study from Stanford, **Dr. Victor Carrion** claims children with PTSD and exposure to severe trauma had smaller brains (published 8/26/07 SFGate.com)

- Study found 9% reduction in size of hippocampus (deals with memory and emotions)

Dr. Barbara Sullivan, from the University of Utah, Utah Addiction Center, in a presentation on May 15, 2008 at the annual Children's Justice Symposium/Utah Prosecution Council DV Conference, explained that research in this area of brain development "is still in its infancy" and that "behavior is the result of complex interactions among individual, environment, genetics, situation, cultural expectations and numerous other factors."

- *"Our interactions with the world 'organize our brain's development' and shapes the person we become" (Shore, 1997)*
- *"Life experiences exert a profound influence on brain architecture"*
- *"Chronic stress, abuse and neglect sensitize certain neural pathways and over-develop certain regions of the brain (limbic region) involved in anxiety and fear. This often results in the underdevelopment of other regions of the brain (frontal lobe)." (citing Perry, 2000)*
- *"Chronic stress from fear, violence, abuse, hunger, pain, etc., focuses the*

*brain's resources on **survival** and other areas of the brain are not 'available' for learning social and cognitive skills."*

- *"Chronic activation of certain parts of the brain involved in the fear response 'hypothalamic-pituitary-adrenal axis' can **wear out** other parts of the brain such as the hippocampus (memory, cognition, communication)."*
- *affects learning and concentration, impulse control,*
- *"shapes person's perception of and response to the environment—indelible perception of the world".*

What we do to children They grow up to do to the world *(Author Unknown)*

Psychological & Generational Effects:

- First two years of life: slower to develop speech and motor skills, have frequent nightmares
- Ages two to five: begin to identify with the role of the abuser or the victim
- Ages six to twelve: manifest behavior patterned after the victim or the abuser
- National Coalition Against Domestic Violence reports 63% of boys ages 11-20 who commit murder, killed the man who abused their mother
- Ages twelve to eighteen have an increased risk of:
 - running away
 - becoming dependent on drugs and alcohol
 - committing suicide
 - becoming pregnant
 - marrying early to escape an abusive family
- Seventy-three percent of male abusers were abused as children, while men who watched their fathers hit their mothers are three times more likely to hit their wives

Types of Trauma:

- Child is the unintended victim when he or she attempts to intervene in an attack on a parent
- Child is accidentally struck by a blow directed at the victim
- Child may not actually witness the abuse--but may hear yelling, screaming, furniture breaking, bodies thrashing against walls, etc.
- Child may hear threats or actually witness the abuser injure a pet
- Child may witness the homicide of a parent

Questioning Children

Acknowledge & Question the Children:

- May provide the officer with information that may assist in determining probable cause and/or primary aggressor
- May provide prosecution with corroborative statements of the incident should the victim recant or alter her story
- Reassure children the incident is not their fault and they are not the only family who has these kinds of things happen--can help lessen the child's fears, embarrassment, and possible guilt
- Can help to show the children that violence is wrong and the law will not tolerate it
- Take the child out of the line of vision of both the suspect and the victim prior to questioning the child
- Establish a rapport with the child
 - Take the child out in the patrol car and let the child flip the lights on and off
 - Explain to the child that the officer's job is to protect people, and you are there to see that your mommy/daddy and you do not get hurt anymore
 - Let the child take and keep a picture of the officer, then take the necessary photos of the victim, crime scene and even the children
 - If age appropriate, give the child a business card with officers phone number and tell the child its okay to call him/her if they have questions or don't feel safe

Suggested Questioning of Children May Include:

- Hi, I am officer _____ and my job is to protect people . . .
- Is _____ your mommy/daddy, stepfather/mother's boyfriend/father's girlfriend etc.?
- Can you tell me what you saw/heard today/tonight?
- Where were you when this happened?
- Does your mom/dad/etc. fight a lot?
- Did you try to help your mommy/daddy? Did you get hurt?
- Did any of your brothers/sisters get hurt?
- Does your mommy/daddy drink, smoke, do drugs? (*Questioning varies depending on age of child*)

Note: It is important to include in the report the state of mind of the children and all names and ages of the children. Crime Victim Reparations provides financial assistance to victims and children for counseling. Providing the names helps speed up the process

- Also, since children who witness domestic violence are victims themselves (§76-5-109.1), you should:
 - **notify CPS (Child Protective Services)** pursuant to Child Abuse Reporting Statute (§62A-4a-403)
 - intervene in the cycle of family violence--it is generational

Victim Advocates:

- Police agencies responding to domestic violence calls are mandated to provide or make available certain services to victims
- Advocates can assist in providing this information and in addition, can provide the emotional support to children who may have, in some way witnessed the incident

- Advocates can be called to respond and assist as soon as the scene has been made safe
 - Spend extra time with children
 - Help them understand that this is not their fault and they are not alone
- Advocates can act as a source of contact between the victim and the follow-up investigator
- Many advocate programs provide counseling referrals for victims and their children and provide safety information for children in the form of coloring books, videos and/or tapes
- Advocates may be also available to prepare children for court should they be required to testify and to assist with child care during court

Protecting Children: Safety Strategies for Children Living in Violent Homes (Community Policing)

We all have a vested interest in protecting children and offering a life line of hope

- children are the hope of the future
- children can't protect themselves
- children model what they see in the home
- children from violent homes often become violent--violence begets violence
- our society is growing more and more violent
- we must intervene in the cycle of violence, protect the children and make them safe

Safety in the Home: Research on domestic violence reveals a range from 45% to 70% of battered women in shelters reporting the presence of some form of child abuse. Even if the more conservative estimate is accepted, these figures still indicate that child abuse is 15 times more likely to occur in families where domestic violence is present (Stacey, W., and Shupe, A. *The Family Secret*, Boston, MA: Beacon Press, 1983). Recent statistics show that roughly 50% of the children witnessing domestic violence are regularly physically abused also. 100% of the children in violent homes are psychologically abused.

Domestic violence service providers must:

- help women to recognize how their children might have been affected by the violence within the home
- make the link between domestic violence and child abuse explicit
- help the woman to place responsibility for the violence with the abuser, or accept the necessity of altering her own parenting if she is abusive with the children

Intervention with battered women takes the form of empowering mothers to seek new ways to protect themselves and their children.

Safety plans for children

- **must be age appropriate**
 - 4 to 6
 - 7 to 11
 - 12 to older
- **parent should be involved**
 - teach children to call 911 or a neighbor
 - use a code word or hand signal so they can call for help
 - use a signal to indicate there is a fight going on or a problem--means check on me, need help or stay away and get help
 - porch light
 - something hanging out the window
 - teach children to make a collect call if they get abducted

- **teach the child how to identify what a fight looks and sounds like**
 - are there patterns that might give clues that a fight is coming on
 - gets drunk every pay day
 - mother could arrange for a child to visit relatives or friends
 - is cruel to animals first
 - is verbally abusive
 - threatens violence
 - use of force during an argument
 - how to recognize an emergency from a non-emergency
- **teach children the difference between physical and emotional abuse**
 - distinguish difference between discipline and abuse
 - based on reasonable person standard--*Appropriate v. Inappropriate*
- **help children realize the limits of their responsibility**
 - child is not responsible for the parent's behavior
 - child is not responsible for the abuse even if the fight is about them
 - children don't have to protect the parent
 - the child is responsible to keep themselves safe
 - older children can help younger children to be safe but older child is not responsible if the younger child gets hurt

Four Step Physical Safety Plan

- **Don't get in the middle of a fight**
 - child can be the unintended victim when he or she attempts to intervene in an attack on the parent
 - child can be accidentally struck by a blow directed at the victim
- **Call 911 and stay on the line**
 - child should be out of abusers view when calling 911
 - abuser could turn on the child for calling 911 or for telling a neighbor
- **Don't get trapped in a small room or a closet**
 - larger rooms give the child a chance to avoid an attack or to become the unintended victim
- **Get to a safe place**
 - go to a bedroom
 - another room in the house
 - go to a neighbors or relatives
 - *do it while the abuser isn't watching*

Four Step Psychological and Emotional Safety Plan

- **Find a safe adult to talk to about the family situation**
 - family violence feeds on secrecy
 - child needs an adult to talk to
 - adult should process the situation with the child
 - adult should reassure the child that abuse is wrong and they are not to blame for their parents behavior
 - the abuse is never the child's fault
 - there is not much the child can do about it

- **Find a healthy adult to use as a role model**
 - family members, friends, neighbors, teachers, church leaders, etc.
 - healthy people do not abuse
 - abuse is wrong--it is not normal
- **Use various coping skills to deal with the situation**
 - emotionally distance self from abuse
 - learn to disassociate
 - learn about the cycle of abuse
 - physically distance self from family
 - leave home when a fight is coming on
 - be involved outside the home
 - become financially independent as soon as possible
- **Set pro-social goals to avoid falling into the same family patterns**
 - to be different from family
 - to learn from the experience and do something about it
 - to develop other talents and gifts
 - sports, musical instruments, school, etc. may give an out or a way to focus on things other than family problems

Safety at School

- Tell the school about the problems at home
 - detection of high risk students and follow through
 - can understand why the child is having trouble concentrating or listening
 - can understand aggressive behavior and talk about violence and abuse
 - may give extra help with assignments or get another student to help
 - can get child into a mentoring program
 - teacher can be a safe adult for the child to talk to about the family situation
 - can help child process home life situation
 - may be able to involve the child in extra-curricular activities
 - can handle the situation with sensitivity
- Tell the school if there is a protective order against the abuser
 - who can and cannot pick up the child from school
 - establish a family code word--only allowed to go with those who know the code word
 - school may arrange for varied times for coming and going if there is fear of abduction
 - watch out for the child
 - protect safety of other children in the school
 - may need to home-school if need arises
- Schools can serve as resources to families trapped in violence
 - send information home with all children
 - education programs on violence prevention
 - self-esteem/well being programs
 - stress and anger management, conflict resolution
 - dating violence/date rape/self defense discussions
 - parenting support groups and classes
 - safety plans for victims
 - safety plans for children

- overall promotion and awareness-building in the community
- Can provide quarterly community public awareness campaigns on the issues of violence and the solutions to violence

Safety in the Community

- Educate the community on the cycle of violence and what it does to children
 - pre-marriage counseling through churches
 - signs of abuse--what characteristics to look for
 - encourage perpetrator counseling before marriage
 - talk out against any type of abuse
 - physical
 - emotional
 - psychological
 - sexual
 - prenatal classes in the hospitals
 - teach about domestic violence
 - most women abused for the first time while pregnant
 - teach about connection between spouse and child abuse
 - provide domestic violence resources
 - parenting/education classes (*teen classes*)
- Adopt **violence free zones** in the community and develop an attitude of **zero tolerance** for any form of family violence--no spouse abuse, child abuse, or elder abuse
 - family members, neighbors and health care providers need to report abuse to law enforcement
 - law enforcement intervention of family violence
 - mandatory arrest
 - determine predominant aggressor--determine who the real victim is
 - refuse to arrest the victim
 - children know who the victim is
 - children know who the predominant aggressor is
 - children don't feel protected if the wrong person is arrested
 - children may self-protect if adults don't protect them
 - children may protect the victim if the law doesn't protect them
 - 63% of the boys ages 11 to 20 in prison are there for killing their mother's abuser. (H. Acherman, *The War Against Women: Overcoming Abuse* 2, Hazelden Foundation, 1985.)
 - officers need to take time to talk to the children
 - teach that violence is wrong
 - not the child's fault
 - tell the child they are there to protect them and the victim
 - tell the child it is okay to call if he or she has a question or does not feel safe
 - no-drop prosecution
 - hold the perpetrator accountable for crime
 - teaches children that violence doesn't work--will be punished for it
 - sentencing for crimes should be tough enough to stop further violence

- Community leaders need to do their job to protect children and make them safe
- All members of the community need to open their doors to the children living in violent homes
 - welcome them to play with your children
 - invite them to stay overnight or come over whenever there is a problem at home
 - invite them to go along on family outings
 - provide them with healthy role models
 - invite them over after school for cookies and milk
 - divorces and working mothers may be a result of domestic violence
 - take the sting away for latch-key kids
 - ease their challenges
 - nurture the children living in violent homes
 - victims may be too depressed to care for their children
 - you may be the only source of warmth this child has

**Remember: a Community is Only as Good as it is
to its Children–We All Rise and Fall Together.
We must Protect the Children and Make Them Safe**

Child Witnessing DV

- Remember to recognize children as witnesses
- Remember to recognize children as victims
- Remember to notify DCFS (child abuse reporting 62A-4a-403 duty of police)
- Remember possible additional criminal offense, Commission of DV in Presence of Child (CDVPC)
- CWDVPC designated as child abuse under section 76-5-109(1)(c)

Commission of Domestic Violence in the Presence of a Child (CDVPC) (§76-5-109.1)

- As used in this section:
 - (a) “Domestic Violence” means the same as that term is defined in §77-36-1
 - (b) “In the presence of a child” means:
 - (i) in the physical presence of a child; or
 - (ii) having knowledge that a child is present and may see or hear an act of domestic violence
- A person is guilty if s/he:
 - commits or attempts to commit criminal homicide against a cohabitant in the presence of a child; or
 - commits aggravated assault against a cohabitant in the presence of a child
 - Violation is a third degree felony
 - or, under circumstances not amounting to homicide, attempted homicide or aggravated assault, commits an act of domestic violence in the presence of a child (felony or misdemeanor)
 - Violation is a Class B misdemeanor
 - And is designated a “DV” offense for enhancement purposes
 - It is a separate offense for each child who witnessed
 - CDVPC charge is separate and distinct from underlying DV charge. Either or both may be filed by prosecutor

Protective Orders

Civil Protective Orders (Adult Cohabitant, Child, Mutual, Foreign)

In 1995, 79% of protective orders obtained by the Legal Aid Society in Salt Lake City, resulted in no reported violations or reports of further abuse. In 1999, the Salt Lake YWCA undertook a study of protective orders issued in the Third Judicial District from September 1, 1998 to March 31, 1999 and found that 70% of the ex parte orders were dismissed, allowed to expire, denied at hearing or otherwise ended. The five major causes for dismissal or expiration were: 31.4% dismissed due to lack of service; 7.3% consolidated into an existing petition for divorce, paternity or other proceeding; 26% dismissed for failure of petitioner to appear at hearing; 28.9% dismissed because petitioner agreed to drop the petition (in 19 of the cases the order was granted and petitioner later returned to court to request dismissal); 4.3% were dismissed due to a lack of evidence. In 2011, Legal Aid in collaboration with Utah Legal Services, conducted a survey which showed that of the clients who completed these follow-up interviews, 86% reported they had not experienced further domestic violence after receiving their protective order; 81% reported feeling safer after obtaining their protective order; 76% of the responding clients had children, with 8 clients reporting abuse of their children prior to the protective order and 3 of them reporting that the abuse of their children stopped once the protective order was in place.

Andrew R. Klein undertook a project to review research done in the area of domestic violence and the impact current justice responses to it and implications of that research on day to day real world responses to domestic violence by law enforcement, prosecutors and judges. With regard to protective orders, he found and published the following in June, 2009:

Although petitions focus on the most recent, discreet incident, the incident rarely fully reveals the nature of the abuse suffered by the petition and risk for future abuse. Post-separation abuse frequently involves stalking behavior, a risk factor for further abuse, even lethality. To obtain more information, judges need to further question victims and/or review respondents' prior criminal and civil history.

- Research agrees that most victims do not request civil orders after the first abuse incident or assault
- Often victims petition courts for POs after failing to stem the abuse through other means such as leaving their abusers at least once, kicking their abusers out of the house, calling police, obtaining counseling, calling a hotline or going to a shelter
- Studies have found that 27% to 50% of the victims were still living with their abusers at the time they requested their PO; 37% to 46% left their abusers before they filed for a PO
- Most victims have suffered several years of abuse with the same abuser before coming to court for the first time
- The incident that prompts victims to seek POs may not be the most serious incident they had experienced at the hand of their abusers. Research finds that

- the seriousness of the incident itself is not predictive of future risk of re-abuse
 - Most incidents used for the basis of the PO involve physical abuse
 - One study showed that 33% had been threatened or injured with a weapon; more than 50% had experienced severe physical abuse; almost 85% experienced mild physical abuse; and almost 99% had been intimidated through threats, stalking and harassment
- **Like arrest of abusers, the issuance of a PO, alone, does not assure the victim's safety. Judges should advise victims of PO limitations.**
 - Violation rates have been found from 23% over 2 years, 35% within 6 months, to 60% within 12 months and 48.8% within 2 years
 - Additionally, PO violation rates may not accurately reflect re-abuse over a specific period of time because many victims do not retain orders or drop them
- **Victims should be encouraged to take out POs and retain them, but also advised that the POs do not deter all abusers and may be more effective when accompanied by criminal prosecution of the abuser.**
 - Studies suggest POs may deter select abusers
 - One study shows that women who had permanent POs were less likely to be physically abused than women without them, but women who only had temporary orders were more likely to be psychologically abused than women who did not obtain orders
 - However, women who did not obtain Pos appeared higher risk for abuse, being more drug and alcohol involved, more likely to have been assaulted and injured and less likely to have been married to the abuser
 - One study suggests that specific stipulations of the Pos may make a difference
 - Victims are more likely to be re-abused if their orders bar abusive contact but not all contact
 - Research consistently finds that victims largely express satisfaction with civil POs, even if they are violated by their abusers
 - Victims reported POs improved their overall well being
 - It may be that while POs do not stop abuse, they reduce the severity of the re-abuse; or although they don't affect re-abuse, they make victims feel vindicated and empowered
 - It appears to be significantly easier for LE to monitor and enforce POs and no contact orders than abuse in general
 - Abusers are significantly more likely to be arrested for PO violations than other common dv offenses

(From Andrew R. Klein, Practical Implications of Current Domestic Violence Research

<http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/welcome.htm>, also from *Part III: Judges, April 2008* <http://www.ncjrs.gov/pdffiles1/nij/grants/222321.pdf>)

Purpose of Civil Protective Orders

- **Provide protection for the victims of domestic violence/ stop the violence**
- Involve civil legal system quickly
 - without a lawyer
 - keep abuser away from
 - home

- employment
- threats/harassment
- contact
- Criminal system involved if order is violated

Differences Between Restraining Orders and Protective Orders

Restraining orders

- anyone can obtain; can restrain anyone
- hire attorney to sue (file a civil cause of action) and ask for a restraining order as part of the relief request; costs \$ to file, serve, etc.
- court enforces
- penalty = civil contempt

Protective orders (See Appendix B for Chart of Protective Orders)

- only cohabitant or person interested in minor child can obtain; can restrain only cohabitant or person abusing or threatening to abuse minor child
- can file it yourself; no \$ to file, serve, etc.
- police can enforce criminal portion and court can enforce civil portion
- penalty = class A misdemeanor for criminal portion/contempt for civil portion

Persons Eligible to Petition for an Adult Protective Order

Must be a Cohabitant

- Any cohabitant who has been subjected to abuse or domestic violence or to whom there is a substantial likelihood of abuse or domestic violence can apply for a PO
- Petition shall be filed in
 - County where petitioner (victim) resides;
 - County where respondent (abuse) resides; or
 - County where abuse took place
- **Cohabitant** means
 - emancipated minor
 - <18 years of age **and** married; may include person 16 years of age or older who has been emancipated by judicial order (§78A-6-801 et seq)
 - **or** a person who is 16 years of age or older and who
 - is or was a **spouse** of the other party
 - is or was **living as if a spouse** of the other party
 - is **related by blood or marriage** to the other party
 - has **one or more children in common** with the other party
 - is the **biological parent** of the other's unborn child
 - **or** has **resided in the same residence** as the other party
 - **does not include** the relationship of natural parent, adoptive parent, or step-parent to a minor or the relationship of minor siblings to each other

Must be a Victim of Abuse or Domestic Violence

- cohabitant has been subjected to abuse or domestic violence or to whom there is a substantial likelihood of abuse or domestic violence
- abuse defined as intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm
- Domestic violence is defined as any criminal offense involving violence, physical harm or threat of violence or physical harm (includes attempts, solicitations or conspiracies to commit) by one cohabitant against another
 - **also means commission or attempt to commit** any of the following offenses by one cohabitant against another
 - aggravated assault
 - assault
 - criminal homicide
 - harassment
 - electronic communication harassment
 - kidnaping, child kidnaping, or aggravated kidnaping
 - mayhem
 - sexual offenses under Title 76, Chapter 5, Part 4 and Title 67, Chapter 5a
 - stalking
 - unlawful detention
 - violation of a protective order or ex parte protective order (§76-5-108 and §77-36-2.4 and §78B-7-114)
 - offenses against property in Title 76, Chapter 6, parts 1, 2 and 3

- possession of a deadly weapon with intent to assault
- discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle
- disorderly conduct if conviction result of a plea negotiation from original DV charge
- child witnessing domestic violence
- any other criminal offense involving violence or physical harm (*ie. threat against life or property, vulnerable adult abuse, witness tampering, etc.*)

Effect

- Court ordered separation
 - feeling of safety for the victim
 - space between parties to evaluate the relationship
 - protection by ordering no contact
- Criminal and civil sanctions: class A misdemeanor for violation of criminal portion and contempt for violating civil portion

Issued by

- District court

Venue

- Petitioner's residence
- Respondent's residence
- Location where incident took place

Enforcement

- Good statewide and nationwide
- mandatory arrest in Utah for violation of criminal portion of civil protective order (§77-36-2.4)

Three Steps of the Civil Protective Order Process

1. Filing of Verified Petition for Protective Order (§78B-7-105)

- explanation of need for protection from abuse or danger of abuse
 - sworn to before court clerk, read by a judge
 - accepted or denied

2. Request for Ex Parte Protective Order

- court decides based on petition; only one party (petitioner) present
- relief available (§78B-7-106)
 - stop the violence
 - prohibit communication
 - order to stay away from premise(s), other places
 - upon finding that respondent's use or possession of weapon poses serious threat of harm to petitioner, can order no weapons
 - possession of automobile and personal effects
 - order police to go with petitioner to residence
 - to safely restore petitioner to possession
 - to supervise removal of petitioner's or respondent's personal belongings
 - temporary custody
 - order appointment of guardian ad litem
 - other relief necessary for safety and welfare
- issued without notice to respondent
- assigns a court date for a hearing on the petition/order, usually within 20 days
 - effective after proper service
 - certified copies
 - ex parte protective order (*two copies if possible*)
 - verified petition for protective order
 - return of service
- **service procedure**
 - sheriff's office, primary responsibility to serve without charge
 - police and constables can also serve without charge
 - verify authenticity of the order
 - certified copies
 - contact party to be served and explain
 - fill in blanks of service stamp
 - person served
 - location served
 - date, time
 - officer
 - agency
 - give respondent the ex parte order and verified petition
 - respondent must adhere to provisions in order
- retain remaining copies of ex parte order and return of service
 - update the statewide system to show the order is served
 - notification of service to agency responsible for service
- deliver documents to the issuing court
- respondent may ask to vacate ex parte order by filing verified motion to vacate and serving petitioner personally with motion and notice of hearing at least 2 days prior

- to the hearing (§78B-7-107(4))
- if court denies request for ex parte order, matter shall be set for hearing with notice to respondent (§78B-7-107(3))

3. Protective Order hearing

- if court does not issue PO at hearing, then ex parte order expires **unless** extended by court (no longer than 180 days from date of initial issuance..see §78B-7-107) because
 - petitioner unable to attend hearing or
 - respondent not served or
 - respondent has had opportunity to present defense or
 - respondent requests extension or
 - exigent circumstances exist
- if respondent given notice of hearing or served with ex parte, court may issue protective order after hearing without presence of respondent (ex parte continues to protect petitioner until respondent is served with PO (section 78B-6- 107(1)(d))
- provides same relief as available in ex parte order (§78B-7-106(2)) plus
 - specify parent-time with child, including supervised visits or deny parent-time
 - support
- order can be granted whether respondent appears or not if there was proper service or notice
 - proper service of ex parte protective order
 - or proper notice of a “hearing” (*no ex parte order issued*)
 - protective order can be granted after just proper notice of hearing
 - order ***in effect only***
 - upon acceptance of the order at the hearing
 - or proper service of order thereafter
 - **no lapse in protection, if court grants the protective order and ex parte order had previously been issued and served (§78B-7-107(1)(d))**
 - **the provisions of the ex parte protective order remain in effect**
 - **until proper service of the actual protective order**
 - covers situations where respondent fails to appear at the hearing
 - **however**, if no ex parte order is initially issued, protective order is not effective until served upon respondent
 - service by sheriff’s office, constable or police at no cost to victim
 - documents needed
 - protective order (*two copies--if possible*)
 - return of service
 - service procedure
 - verify authenticity of the order
 - certified copies
 - contact respondent--follow same procedure as in ex parte protective order
 - suggestion--complete report detailing action you took
 - could be future court matter
- Court can prohibit contact, threats, violence, coming to petitioner’s residence, possession of weapons, etc. (***criminal sanctions - class A misdemeanor***); can award temporary custody, support, and another other order the court deems

necessary to protect petitioner (***civil sanctions - contempt***)

- civil provisions last 150 days unless court otherwise orders
- Criminal provision lasts until a court says otherwise..they do not automatically expire
 - criminal provisions last at least two years* unless petitioner agrees to dismissal or divorce judge finds no need to continue (§78B-7-106(10), §78B-7-115(5))
 - if PO in effect for at least 2 years, court may dismiss pursuant to §78B-7-115(1) **if finds petitioner no longer has a reasonable fear of future abuse and court shall** consider the following factors
 - whether respondent has complied with treatment recommendations issued at time of PO
 - whether PO was violated during time it was in effect
 - claims of harassment, abuse or violence by either party during time PO in effect
 - counseling or therapy undertaken by either party
 - impact on well being on minor children of the parties, if relevant
 - any other factors the court deems relevant
 - *if PO in effect for at least 1 year, court may amend or dismiss PO if court finds
 - basis for PO no longer exists;
 - petitioner has repeatedly acted in contravention of PO provisions to intentionally or knowingly induce respondent to violate PO;
 - petitioner's actions demonstrate petitioner no longer has a reasonable fear of respondent;
 - respondent has not been convicted of PO violation or any crime of violence subsequent to issuance of PO and there are no unresolved charges involving violent conduct still on file with the court
 - court shall enter sanctions against either party if finds either party acted
 - in bad faith; or
 - with intent to harass or intimidate either party
 - if divorce pending between parties, PO shall be dismissed when court issues divorce decree if
 - petitioner in PO is present or has been given notice in both the divorce and protective order action of the hearing and
 - court specifically finds PO need not continue
 - when court dismisses PO, court shall immediately issue order of dismissal and transmit copy to statewide DV network

Dating Violence Protective Order 78B-7-401

- Person is 18 years or older or emancipated
- is or has been in a dating relationship with the other party
 - Dating relationship is defined as a relationship which has romance or intimacy as a goal by one or both parties, regardless of whether the relationship involves sexual intimacy (18 U.S.C. 921)
- may seek a protective order if they have been subjected to:
 - abuse or dating violence
- may seek a PO whether or not the person has taken action to end the relationship
- the PO may include another party in the petition if:
 - the other party is a family or household member of the person seeking the PO and there is a substantial likelihood the other party will be subjected to abuse by the dating partner

Mutual Protective Orders (§78B-7-107)

- **Prohibited** unless
 - each party must file independent petition
 - both petitions must be served
 - each party must show that abuse or DV has been committed by the other person
 - each must demonstrate that the abuse or DV was not self-defense
 - court must document circumstances justifying mutual protective orders
 - FYI - the order should list each party as petitioner and as respondent in order to be criminally enforceable

Foreign Protective Orders

- protective order issued by another state, territory, possession, tribe, Puerto Rico, or Washington DC enforceable in Utah so long as in effect in issuing state (FULL FAITH AND CREDIT, §78B-7-116)
- violation of order subject to same penalties as if violation of Utah order (class A misdemeanor)
- officer can rely upon
 - certified copy of order or
 - statement by petitioner that order still in effect and respondent was served with copy or
 - and consider other information to determine if there is probable cause to believe such an order exists
- petitioner may file certified copy with clerk's office so that it can be put on statewide network (files affidavit)

Child Protective Orders - §78B-7-201 et seq

- Juvenile court has original exclusive jurisdiction (§78A-6-103(1)(d))
- any interested person, having first made a referral to DCFS, may file petition for PO on behalf of a child who has been
 - abused (physically or sexually)
 - or is in imminent danger of being physically abused or sexually abused (§78B-7-2-202)
- ex parte orders
 - if court determines based on evidence and information presented, that minor has been abused or is in imminent danger of being so
 - court may appoint Guardian ad Litem for child
 - schedule a hearing within 20 days
- protective order hearing
 - court shall provide opportunity for any person having relevant knowledge to present evidence or information and court may hear statements from counsel
 - standard of proof is preponderance of evidence
- court may order (in ex parte or in PO) as **criminally enforceable**
 - no threats to commit or commission of abuse
 - prohibit contact, direct or indirect, with minor
 - prohibit coming to school, home, employment, and other place
 - prohibit weapons if court finds respondent's use or possession poses serious threat of harm to minor
 - determine ownership and possession of physical property and direct police to supervise removal
 - **violation - class A misdemeanor, §78B-7-204, and subject to mandatory arrest (§77-36-2.4)**
- court may order as **civilly enforceable**
 - temporary custody of minor
 - denial of parent time
 - parent time by third party
 - child support
 - any other relief deemed necessary
 - **violation - contempt of court**
- Duration §78B-7-205, as long as court says
 - expires 150 days after date of order unless different date set by court; may be extended for add'l 150 days; court must find good cause if wants to extend order beyond 150 days.
 - all orders expire on the minor's 18th birthday unless otherwise ordered by the court. Expiration date must be on the child protective order (§78B-7-204(4)(a))
- order enforceable statewide and nationwide under VAWA full faith and credit provisions
- Service of ex parte PO and PO same as adult orders
- child PO entered onto statewide DV network (§78B-7-206)

How to Terminate a Civil Protective Order

- Petitioner can return to court and request dismissal at any time
- Petitioner can consent to respondent's request for dismissal at any time
- Adult PO - after two years respondent can request dismissal, petitioner can object; after 1 year under certain circumstances; or divorce court judge can dismiss if finds no need to continue
- Child PO - within two years if petitioner personally served and personally appears and specifically consents or submits affidavit consenting to dismissal; otherwise order has specific expiration date listed on order

Criminal Protective Orders

Difference between civil and criminal protective orders is **how the order is obtained**

- no application process
- requirements to obtain an order
 - domestic violence offense committed
 - criminal process initiated
 - **arrest--jail release agreement or jail release order (JRA or JRO)**
 - **prosecution--pretrial protective order**
 - **sentencing--sentencing protective order**
 - last two orders can be requested by the victim or by the prosecutor on behalf of the victim or on the court's own motion

Criminal orders only enforceable for the **period of time** in which the court holds jurisdiction over the arrestee/defendant and **is a separate written order**

- victim supplied with a copy of the pre-trial PO and sentencing PO
- criminal protective order should be part of the criminal file
- **statewide enforcement**/statewide domestic violence network
- should not to be confused with the conditions of sentencing
 - some sentencing orders and conditions of probation can be mistakenly perceived to be a criminal sentencing protective order
 - violation of a condition of probation is a separate matter
 - absent clear issuance of a criminal sentencing protective order (distinct written order separate from probation order)

Jail Release Agreement /Jail Release Order (§77-36-2.5)

- short term—it expires at midnight of the day the arrestee appears in court unless continued by court for good cause.
 - if arrestee 'no shows' the next court day, the agreement/order continues in effect until arrestee does appear in court and then expires at midnight of that day unless extended for good cause by the court
 - if arrestee appears and no criminal charges have been filed, court may continue, for good cause, for up to 3 business days
 - if criminal charges filed within 3 days, then agreement/order continues until midnight of the day when the defendant appear at next court date.
 - if no criminal charges are filed within 3 days, then agreement/order expires at midnight of 3rd business day
- agreement/order issued as a condition of release **following arrest**
 - as a condition of release (*bail, recognizance, or otherwise*), the **court orders or the arrested person agrees** in writing to the following conditions:
 - no contact with the victim
 - not threaten or harass the victim
 - not knowingly enter the premise(s) occupied by victim
 - violation is a **class A misdemeanor** if the underlying arrest was a misdemeanor (§77-36-2.5(7))
 - violation is a **third degree felony** if the underlying arrest was a felony (§77-36-2.5(7))
 - orders entered on the statewide system BY JAIL
 - signed copy actually a printed copy of what is viewed on statewide system
 - signed copy will be retained as per the issuing agency's procedure
 - should be part of case file, **not thrown away**
 - the victim can waive, in writing, only 2 of the 3 release conditions: can waive the "no contact" and prohibition of arrestee coming to residence; **cannot waive the arrestee committing further DV**
 - if defendant arrested for violating this order, may not be released prior to first judicial appearance §77-20-1(3)(b)
 - **mandatory arrest if violated** §77-36-2.4

Pretrial Protective Orders §77-36-2.6(3), §77-36-2.7

- when formal charges involving a DV offense are filed by the prosecutor and defendant is arraigned/initial appearance or defendant appears before the court for arraignment on citation or summons for a DV offense or any time prior to trial of DV offense
- request made by victim **or** by prosecutor or court can make on own motion (section 77-36-2.6(3)(c))
- separate written document and should be entered onto statewide DV network
- court can order
 - defendant to not threaten or commit DV or abuse against victim and any designated family or household member
 - defendant to not harass, phone, contact or otherwise communicate with victim, directly or indirectly
 - remove and exclude defendant from victim's residence and premises
 - order defendant to stay away from designated places frequented by victim
 - order any other relief court deems necessary to protect and provide for safety of victim
- court to provide certified copy to victim
- in effect until suspect is convicted and sentenced or acquitted
- violation is a class A misdemeanor if underlying charge filed is a misdemeanor
- violation is a 3rd degree felony if underlying charge filed is a felony

Sentencing Protective Orders §77-36-5(1)

- when the defendant has been convicted of a domestic violence offense
 - separate written document, not simply a condition of probation agreement
 - must be entered onto statewide DV network
 - prosecutor to provide certified copy of order to victim
 - court can order all of conditions in pre-trial order as well as
 - prohibiting defendant from consuming alcohol or controlled substances
 - prohibit defendant from purchasing, using or possessing a firearm or other specified weapon
 - direct defendant to surrender any weapons s/he owns or possesses
 - direct defendant to participate in and complete to satisfaction of court, a DV treatment program, treatment for alcohol or substance abuse or psychiatric or psychological treatment
 - direct defendant to pay restitution to victim
 - impose any other condition necessary to protect victim and any other designated family or household member or to rehabilitate the defendant
- in effect for as long as the court has jurisdiction over the defendant (*probationary period*)
 - Does not apply if defendant is sent to prison
 - victim or prosecutor or police may contact Board of Pardons requesting that “no contact” with victim be made part of any parole agreement
 - violation is a class A misdemeanor under §76-5-108(1)--may also constitute a probation violation; may also be subject to enhancement with prior DV conviction

Enforcement of Protective Orders

- violation of order is by definition a “**Domestic Violence**” offense (§77-36-1(4)(k) & *subject to enhancement per §77-36-2.4(2)(b)*)
 - **mandatory arrest**
 - a law enforcement officer shall, without a warrant, arrest an alleged perpetrator
 - whenever he has **probable cause** to believe that the alleged perpetrator
 - has violated any of the provision of an ex parte protective order or protective order (§77-36-2.4(1) includes civil and criminal POs)
 - primary elements required to charge (§76-5-108)
 - there must have been an **intentional or knowing** violation
 - *determined by investigation*
 - *prove intent*
 - **and** there must have been proper service
 - *personal knowledge, proof of service*
 - *check statewide warrants system*
 - **intent and proper service--probable cause for an arrest**

Notice of Victims Rights and Remedies

A protective order is an order by the court giving the victim of domestic violence certain protections by preventing the abuser from having contact with you, threatening you, coming to your home, school, workplace along with any other orders the court thinks is necessary to protect you and your family or others living in your home

Civil Protective Orders

1. **Ex Parte Order** can be issued the day you ask for it without the abuser being present. Once the abuser is given a copy of the order, it is effective and enforceable until a court hearing is held, where the abuser is present
2. **Protective Order** is the order issued after a court hearing and after the abuser receives a copy of it and has the opportunity to tell his/her side. The ex parte order continues its protections until the protective order is served on the abuser and lasts as long as the court thinks is necessary.

Civil protective order may be obtained whether or not criminal charges are investigated and/or filed. Forms are available in the district court clerk's office and juvenile court clerk's office (child protective order) in the judicial district where you reside or are temporarily domiciled or on the Utah Court website http://www.utcourts.gov/resources/forms/#Protective_Orders. There is no cost for filing a petition, serving the paperwork on the abuser or for the copies for services. You do not have to hire a lawyer. The court clerk's office should have a list of legal service organizations or victim advocates who can assist you .

Violation of the criminal portion of the civil protective order is a class A misdemeanor, mandatory arrest

Criminal Protective Orders

1. **Jail Release Agreement/Court Order** is issued at the jail when the abuser is arrested for a DV offense and taken to jail. The abuser cannot be released on bail, recognizance or otherwise unless the abuser agrees in writing or is ordered by the court to: have no personal contact with you; not threaten or harass you; or not knowingly enter onto the premises of your home or where you are temporarily staying. This protection lasts until midnight of the day the abuser appears in court and may be extended by the court.
2. **Pre-Trial Protective Order** can be issued at your or the prosecutor's request or on the court's own motion after criminal DV charges have been filed in court. This order will protect you during the course of the criminal proceedings. You should contact the prosecutor or appear in court to tell the judge why you want this order. If granted, you will be given a certified copy of the court order. This order lasts until sentencing if the abuser is convicted or until the abuser is acquitted or the charges are dismissed.
3. **Sentencing Protective Order** can be issued by the court if the abuser is convicted (pleads guilty or no contest or is found guilty) of a DV offense. You may request the court to issue this to continue the protections for you and your family/household members during the abuser's probation.

Any violations of any of these orders should be promptly reported to local law enforcement.

Rights of DV Victims

1. You have the right to ask for a civil protective order, whether or not criminal charges are investigated or filed
2. You have the right to ask for a criminal protective order if criminal DV charges are filed
3. You have the right to ask the prosecuting agency to file criminal charges if your abuser was not arrested or if the police close their investigation without filing criminal charges. Please remember that it is important to preserve any evidence you have! You can contact the local prosecutor to review the case
4. You have the right to request notification by the prosecutor if criminal charges involving DV are or or not filed, and this notice must occur within 5 days of the prosecutor's decision.
5. You have the right to a copy of the police report free of charge
6. You have the right to state in writing that you do not want or need the "no contact" protection or the protection of keeping the abuser away from your home if the abuser is arrested and taken to jail. If you sign that written waiver, those protections will not apply to you and your alleged abuser. However, the law does require that the abuser must agree or be ordered by the court not to threaten or harass you prior to being released from jail
7. Officer shall provide for victim's safety, confiscate weapons, assist in obtaining emergency housing or shelter, provide protection while victim removes personal effects, assist in obtaining medical treatment

Available Services

The following local shelters, advocate, legal, medical and prosecutorial services are available to you in this community: (including phone numbers)

Statewide Toll free
Information line
1-800-897-LINK (5465)

VINE-Victim Information
Notification Everyday
Phone: (877) 884-8463
Website:
www.vinelink.com

Additional Notice

1. The abuser must personally appear in court on the next day the court is open for business after the day of the arrest
2. The arrested abuser cannot personally contact you prior to release from jail; class B misdemeanor for violation; notify police if occurs

Notice of Penalties for Violation of Jail Release Agreement/Court Order (JRA/JRO)

If the alleged abuser violates the JRA/JRO, the alleged abuser may be re-arrested for a 3rd degree felony if originally arrested for a felony or a class A misdemeanor if originally arrested for a misdemeanor

JRA/JRO expires at midnight of the day the abuser appears in court and may be extended by the court

Court and address:

Prosecuting agency and address:

Police report case #:

District Court address:

Juvenile Court address:

Notification to Alleged DV Perpetrator

1. Upon arrest for domestic violence, a person may not be released on bail, recognizance, or otherwise prior to the close of the next court day following the arrest, unless as a condition of that release the person is ordered by the court or agrees in writing that until further order of the court, the person will:
 - (a) have no personal contact with the alleged victim;
 - (b) not threaten or harass the alleged victim; and
 - (c) not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.
2. The Jail Release Agreement or Jail Release Court Order expires at midnight on the day on which the person arrested appears in person or by video for arraignment or an initial appearance
3. If you knowingly violate the Jail Release Agreement/Jail Release Order you may be re-arrested for a 3rd degree felony if originally arrested for a felony or a class A misdemeanor if originally arrested for a misdemeanor
4. You must personally appear in court on the next day the court is open for business after the day of the arrest
5. You cannot personally contact the alleged victim prior to your release from jail; violation of this is a class B misdemeanor.
6. If you fail to personally appear in court as scheduled, the Jail Release Court Order or Jail Release Agreement does not expire and continues in effect until you make the personal appearance in court

Notification to Alleged victim

1. Upon arrest for domestic violence, a person may not be released on bail, recognizance, or otherwise prior to the close of the next court day following the arrest, unless as a condition of that release the person is ordered by the court or agrees in writing that until further order of the court, the person will:
 - (a) have no personal contact with the alleged victim;
 - (b) not threaten or harass the alleged victim; and
 - (c) not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.
2. The Jail Release Agreement or Jail Release Court Order expires at midnight on the day on which the person arrested appears in person or by video for arraignment or an initial appearance
3. If the perpetrator knowingly violate the Jail Release Agreement/Jail Release Order the perpetrator may be re-arrested for a 3rd degree felony if originally arrested for a felony or a class A misdemeanor if originally arrested for a misdemeanor
4. The perpetrator must personally appear in court on the next day the court is open for business after the day of the arrest
5. The perpetrator cannot personally contact the alleged victim prior to your release from jail; violation of this is a class B misdemeanor.
6. If the perpetrator fails to personally appear in court as scheduled, the Jail Release Court Order or Jail Release Agreement does not expire and continues in effect until the perpetrator makes the personal appearance in court

Prosecution

Screening (§77-36-1 et. seq.)

(See Appendix B for Case Screening Checklist)

Report

- Police to get report to prosecutor w/in 5 days after complaint of DV occurs (§77-36-2.2(6)(e))

Prosecutor's Duty

- Notify V w/in 5 days of screening decision if V requests (§77-36-7)
 - must advise V of other alternatives, civil and criminal
- under §77-38-3(1), Rights of Crime Victims Act, prosecutor must notify victim within 7 days of filing felony charges whether V requested notification or not

Elements

- Does it involve "**cohabitant**"? (§78B-7-102)
 - emancipated person (<18 and married or 18 or older, §15-2-1; may include judicial emancipation 78A-6-804, 805?) or person 16 years of age or older **and**
 - is or was **married** to the other party; or
 - is or was **living with/resided with** the other party (*roommates, same sex relationships*); or
 - has **child in common** with other party; or
 - is **related by blood or marriage** to the other party (*relative, in-law, elder parent*); or
 - is the **biological parent** of the other's unborn child.
 - **does not include** relationship of natural, adoptive or step parent to a minor, or the relationship of minor siblings to each other
- Does it involve **DV offense**?
 - **Domestic violence means** (§77-36-1 (4))
 - any criminal offense involving
 - violence
 - physical harm
 - threat of violence or physical harm; or
 - any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm
 - when committed by one cohabitant against another
 - **Domestic violence also means commission or attempt to commit** any of the following offenses by one cohabitant against another (§77-36-1(4) (a)-(p)):
 - list of offenses (§77-36-1):
 - aslt./ agg. aslt
 - homicide (all classifications)
 - harassment/ electronic communication harassment
 - all kidnaping/ unlawful detention
 - mayhem
 - sexual offenses under §76-5-401 et al and §76-5b-102 et al
 - stalking
 - property offenses under §76-6-101 thru 112, §76-6-201 thru 206 and §76-6-

- 301 thru 302
- discharge firearm under §76-10-508;
- child witnessing domestic violence §76-5-109.1; **OR**
- any other criminal offense involving violence or physical harm (consider statutes on vulnerable adult abuse/elder abuse §76-5-111; threat against life or property; witness tampering; etc.); **OR**
- any attempt, conspiracy or solicitation to commit those listed above; **OR**
- protective order violation (§77-36-2.4(2)(a), §76-5-108)
 - verify protective order and service (statewide network, clerk's office or sheriff's office)
 - full faith and credit to other state's orders (§78B-7-116, §76-5-108)
 - if ex parte served but P.O. hasn't yet been served, the ex parte is in effect until PO served (see §78B-7-107(1)(d))

Considerations

- **self-defense**
 - **if not, then look at predominant aggressor**
 - unless you have evidence other than the other party to prove case, you may want to consider filing against only the predominant physical aggressor so the other person can testify at trial
 - predominant physical aggressor is the person
 - *who is most responsible for the violence;*
 - *who uses the higher level of violence;*
 - *who represents the more serious ongoing threat of violence; or*
 - *who has an established history of violence in the relationship*
 - (Tracy Bahm, "DV 101", APRI (2008), http://www.ndaa.org/apri/programs/vawa/dv_101.html)
- **penalty enhancements (§77-36-1.1)**
 - enhance charge and penalty
 - if **commits** DV offense within 5 years after conviction of previous DV offense **or** is **convicted** of DV offense within 5 years after previous conviction; prior DV conviction can be *felony or misdemeanor*
 - **enhance DV misdemeanors only**
 - plea in abeyance = conviction, even after subsequent reduction or dismissal
 - highest charge possible with enhancement is a 3rd degree felony (enhancing a *class A*)
 - see *State v. Hunt*, 906 P2d 311 (Utah 1995) on enhancing charges in same information
- **weapons enhancements on felonies (§76- 3-203.8)**
- include **enhancement** on the information (to meet *notice* requirement)
- any possible federal charges
 - firearms possession, stalking, dv, protective orders, etc. (see section on federal laws)

- **Commission of DV in Presence of a Child** - Section 76-5-109.1
 - add'l charge, 3rd degree felony (DV homicide, DV attempted homicide or DV aggravated assault) or class B misdemeanor (any other DV felony or misdemeanor)
 - this charge is separate and distinct from and in addition to DV charge
 - separate charge for each child present

Protective order violations (*civil and criminal orders*)

- **Civil Orders** - adult and child
 - Ex Parte protective order (§78B-7-106, 78B-7-202)
 - *intentional or knowing violation is criminal offense (§76-5-108)*
 - *continues to protect victim until PO served (§78B-7-107(1)(d))*
 - Protective Order
 - criminal portion of civil PO = class A misdemeanor/ **handled by prosecutor as it is considered a criminal violation** (§78B-7-106(5), §78B-7-204(3))
 - *no threats to commit or commission of DV or abuse*
 - *no harassment, telephone, contact, communication directly or indirectly*
 - *exclusion from residence, premises, school, employment, specified places*
 - *restricts possession, purchase, or use of weapon*
 - *poss. of car, residence, personal property*
 - civil portion of civil PO = OTSC in civil hearing / **handled by party (with or without a private atty) as it is considered a civil matter** (§78B-7-106(5); §78B-7-204(3))
 - *temporary custody of children*
 - *child support, spousal support, visitation*
 - *other relief ordered by the court*
 - Do you charge a victim with violating own PO?
 - recommended response is “**NO**” based upon public policy reasons as well as various legal theories (see C. Ham, *Injustice Defined: Why Battered Women Cannot and Should Not Be Charged with Violating Civil Protection orders That Were Issued at Their Request*, BWJP, October 2003, and can be found on the Battered Women’s Justice Project website and is summarized below)
 - *charging victims with violating their own POs significantly decreases their safety and shifts the responsibility for violence away from the abuser*
 - *charging petitioners as co-conspirators or complicitors in the violation of civil protection orders issued against respondents violates the prohibition against mutual Pos*
 - *see State v Lucas, 795 NE 2d 642 (Ohio 2003)*
 - *charging petitioners with violating civil protection orders issued on their own behalf violates their due process rights*
 - *see City of North Olmstead v Bullington, 744 NE2d 1225 (Ohio App 2000)*
 - *petitioners are members of the protected class sought to be protected by civil POs and therefore cannot be charged as aiders and abettors for violating their own civil Pos*
 - *defendant has remedy for amendment or dismissal under 78B-7-115(2) if PO in effect for at least 1 year and under 78B-7-115(1) if PO in effect for at least 2 years*

- **Criminal Orders**

- **Jail Release Agreement/Jail Release Order (JRA/JRO) (§77-36-2.5)**
 - violation = 3rd degree felony if underlying arrest is felony
 - violation = class A misdemeanor if underlying arrest is misdemeanor
 - If D violates JRA/JRO, cannot be released again from jail until sees judge §77-20-1(3)(b)
- **Pre-trial Protective Order (§77-36-2.7(3))**
 - violation = 3rd degree felony if underlying charge is felony
 - violation = class A misdemeanor if underlying charge is misdemeanor
 - court to provide victim with certified copy and shall transmit to statewide DV network
- **Sentencing Protective Order (§77-36-5(1), 76-5-108)**
 - violation = class A misdemeanor and/or = violation of probation
 - prosecutor shall provide certified copy to victim
 - court shall transmit to statewide DV network

Authority - municipal prosecutors, district attys and county attys

- city atty. can prosecute class A violations of chapter 36, title 77
- class A misdemeanor criminal protective order violations in district court (JRA/JRO violations, pre-trial and sent. orders violations (§77-36-10))
- DV offenses enhanced to class A misdemeanor (§77-36-10) in district court
- violations of civil protective orders which are class A misdemeanors (§78B-7-114) in district court
- general authority of municipal prosecutors re: infractions and misdemeanors (§10-3-928)
- general authority of county and district attys - 17-18-1

Defendant's status

- is D on probation or parole?
 - if parole or formal probation: notify APP, particularly if felony (*affects custody status, i.e. may be "felony on a felony" under §77-20-1(1)*)
 - informal probation: file OTSC (*or notify appropriate prosecuting entity to file*)

Evidence

- V statement(s)
 - written/audio/video
 - excited utterances (URE 803(2)) / statements of physical condition (URE 803(3))
- independent corroboration (*testimonial/physical/demonstrative*)
 - W statements
 - kids/ neighbors/ others
 - what see/what hear
 - medical reports - requires HIPAA consent release
 - current/previous incidents
 - 911 tape (*get immediately as they are regularly destroyed or recycled*)
 - diaries
 - photos

- of victim
 - day of incident
 - and days later
- of scene
- prior reports/ incidents/ history
- D's statements/ admissions/ incriminating statements/ alibis
- Criminal history of D in state and nationwide
- physical evidence seized
(*clothing, blood-stained or broken items, etc*)
- weapons
- diagrams of injuries/ diagrams of scene
- police descriptions of physical condition and demeanor of V, D, and Witnesses
- photos of D (*injuries or lack of injuries*)
- threats prior to, during or after incident
 - contact, direct or indirect after incident
- certified copy of PO and proof of service
- crime lab reports

Meeting with victim as part of screening process

- allows prosecutor to assess V's cooperation/ provides support/ may increase V's cooperation/ avoids surprises at hearing.
- victims say the following impacts their willingness to cooperate
 - the involvement of victim advocates early in the process (investigative stage)
 - giving written as well as verbal information (by police, prosecutor, victim advocate, etc)
 - acknowledging/understanding the victim's concern for children
(*Susan Still, survivor and advocate, presentation at 2008 CJC/UPC DV symposium 2008*)

Can you prove case w/o V?

If so, then FILE!

If you can't, is V cooperative?

If so, then FILE!

Consider whether or not you can obtain sufficient background info/corroborative evidence/ does V have good support system? (because that will certainly help victim through the "system")

**If V is uncooperative but available,
can you still prove your case?**

If so, then FILE!

If not....

DON'T FILE! ...*There will be a next time*

REMEMBER: THE MORE CONTACT THE VICTIM HAS WITH FOLKS IN THE CRIMINAL JUSTICE SYSTEM (ESPECIALLY ADVOCATES), AND HAS POSITIVE EXPERIENCES, THE MORE LIKELY S/HE IS TO COOPERATE IN THE FUTURE

Filing

Arrest

- approving warrant of arrest
 - consider danger to victim
 - did officer or advocate submit dangerousness assessment?
- violation of PO--**ISSUE WARRANT OF ARREST**
 - mandatory arrest per §77-36-2.4, (*mandatory arrest based upon officer's probable cause that a violation of a PO has occurred.....prosecutor files charges based at least upon probable cause*)
- filing after warrantless arrest by police
- **D must appear in person in court w/in 1 judicial day after arrest (§77-36-2.6 (1))- appearance is mandatory, cannot be waived (§77-36-2.6(4))**

Rationale: V has been protected by jail release agreement/jail release order until midnight of the day D makes first appearance...therefore, in order for the V to have those protections extended, the defendant must appear in court so that the V or prosecutor has the opportunity to request a pre-trial criminal PO (PTPO) or court on own motion can impose PTPO.

Citation- **appearance cannot be waived (§77-36-2.6(4))**

- **D must appear in person in court w/in 14 days after the next day the court is in session following the issuance of the citation (§77-36-2.6 (2))**
 - DV cases are fast-tracked because of the nature of the relationship, highly emotional nature of DV crimes, high recidivism rate and demonstrated increased risk of continued acts of violence subsequent to release of offender; prosecutor must consider necessity of requesting a pre-trial protective order (§77-36-2.7(3)(a))

Summons-**appearance cannot be waived (§77-36-2.6(4))**

- **D must appear in person in court within 14 days of filing after the next day the court is in session following the filing of the information (§77-36-2.6 (2))**
 - DV cases are fast-tracked because of the nature of the relationship, highly emotional nature of DV crimes, high recidivism rate and demonstrated increased risk of continued acts of violence subsequent to release of offender; prosecutor must consider necessity of requesting a pre-trial protective order (§77-36-2.7(3)(a))

Information

- note "*Domestic Violence*" on information for court tracking purposes (§77-36-2.7(1)(d))

No drop policy (§77-36-2.7)

- court cannot dismiss charge at request of victim without prosecutor's consent
- legislative intent language for "no drop" policy by prosecutors at time when legislature did a major overhaul of DV laws (1995), but it is not statutory mandate
- good public policy on domestic violence cases as this is a crime involving ramifications to the community as well as to the persons involved

Victims

- Victim's Rights in felony cases
 - prosecutor to send notice to V of crime charged w/in 7 days of filing (§ 77-38-3(1))
 - prosecutor to provide info to V re: requesting further notifications
 - notification of important dates and times (§77-37-3 and §77-38-3 et al)
 - electronically, orally, by telephone, letter or form
- Victim's right in DV case
 - prosecutor shall advise victim, if victim has requested notification, of the status of the case and shall notify victim of decision w/in 5 days after decision has been made
 - if case is declined, prosecutor's notification shall include a description of procedures available to victim in that jurisdiction for initiation of criminal and other protective proceedings
- victim impact statement to V
- if there is a plea negotiation, Rule 35 URCrP requires prosecutor to represent to the court, at time of plea, that victim has been contacted and an explanation of the plea bargain has been provided and if victim requests opportunity to address court, prosecutor shall so inform court; if victim tells prosecutor that victim wants to address the court, the prosecutor shall inform the court
- CVR (*Crime Victim's Reparations*) forms to V
- Victim **does not have a right** to "drop charges"
 - **police**, not victim, responsible for arrest
 - **prosecutor**, not victim, responsible for filing charges
 - **trier of fact**, not victim, responsible for adjudicating the case
 - **judge**, not victim, responsible for sentencing

Bail Issues/Release Conditions

No bail

- **felony**
 - D arrested for DV felony, released and re-arrested for new felony (§77-36-2.5(8) "felony on felony" status, Art. 1. Sec. 8 Utah Constitution)
 - substantial evidence to support new felony charge
 - D arrested (§77-20-1)
 - for capital offense and substantial evidence to support charge (Art. 1 Sec. 8(1)(a) Utah Constitution)
 - for felony committed while on probation or parole and substantial evidence to support new charge (Art. 1 Sec. 8(1)(b) Utah Constitution)
 - for felony while free on bail for previous felony and substantial evidence to support new charge (Art. 1 Sec. 8(1)(b) Utah Constitution)
 - for felony (Art. 1 Sec. 8 (1)(c) Utah Constitution) and
 - **substantial evidence** to support charge **and**
 - court finds by **clear and convincing evidence**
 - D constitutes substantial danger to any other person **or**
 - D constitutes a substantial danger to the community **or**
 - D is likely to flee jurisdiction if released
 - and charged with a felony and the court finds there is substantial evidence to support the charge and it finds by clear and convincing evidence that the person violated a material condition of release while previously on bail.

No Bail for DV felony or misdemeanor (§77-36-2.5(12) , Art. 1 Sec. 8 (1) (c) Utah Constitution)

- legislative intent
 - unique and highly emotional nature of DV crimes
 - high recidivism rate of violent offenders
 - demonstrated increased risk of continued violence after release of offender arrested for DV crime
- Utah Constitution, Art 1 Sec 8
 - all person charged with a crime shall be bailable except persons charged with any other crime, designated by statute as one for which bail may be denied
- requirements (under statute and State Constitution)
 - **substantial evidence** to support charge **and**
 - **clear and convincing evidence** that D constitutes substantial danger to victim

Arrest for violation of jail no contact agreement/order (§77-36-2.5)

- cannot be released prior to first judicial appearance (§77-20-1(3))

Bail or Recognizance

- Any person who may be admitted to bail may likewise be released either on his own recognizance or without posting a bond upon posting bail, on condition that he appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court that will reasonably:
 - (a) ensure the appearance of the accused;
 - (b) ensure the integrity of the court process;
 - (c) prevent direct or indirect contact with witnesses or victims by the accused, if

appropriate; and

(d) ensure the safety of the public.

- DV arrestee cannot be released bail, bond or own recognizance unless signs a Jail Release Agreement or a court issues Jail Release Order; alleged victim can sign a written waiver but is only allowed to waive the “no contact” and “not coming to residence” provisions; arrestee must still agree to sign or be ordered by the court not to threaten to commit DV against the alleged victim (§77-36-2.5(2) &(5))

Electronic monitoring

- court may order as condition of release plus costs (§77-36-2.5(4))

DV Arrestee cannot personally contact alleged victim while in jail

- Section 77-36-2.5(1) states that an arrestee cannot personally contact alleged victim prior to release from jail on bail, recognizance or otherwise; Class B misdemeanor for violation

Considerations when requesting “no bail,” higher bail or restrictions on release

- lethality, risk or dangerousness
 - history of abuse, violence
 - documented by reports, convictions, etc.
 - seriousness of offense
 - frequency of violence, escalation
 - death threats, threats of retaliation to V or children or other support persons of V (parents, siblings, friends, etc)
 - substance abuse
 - use of weapon or threat to use
 - victim’s fears and reasonableness of those fears
 - D’s mental and physical health
 - D’s threats of suicide
 - D’s access to V
 - return to same residence
 - child visitation arrangements (*often overlooked)
 - has D gone to V’s workplace
 - threatened V or co-workers
 - is D a danger to V, family, co-workers, public
 - threats to 3rd party in visitation arrangement
 - D’s prior criminal history
 - D’s history of violence

Bail procedure (§77-20-1)

- conditions of release on “own recognizance” or w/o bond within the discretion of the court
- initial order denying or fixing amount of bail shall be issued by
 - the magistrate or court issuing warrant of arrest **OR**
 - magistrate or court presiding over D’s first judicial appearance
- court may rely upon
 - indictment or information
 - sworn PC statement

- info from pre-trial services agency
- any other reliable record or source
- motion to modify **initial order**
 - may be made by a party
 - at any time
 - with notice to opposing party with sufficient time
 - to prepare for hearing **AND**
 - to notify any V of hearing so can be present
 - may be held in conjunction with PH or other pretrial hearing
 - court may rely upon
 - indictment or information
 - sworn PC statement
 - info from pretrial services agency
 - any other reliable record or source
 - evidence provided at PH or other pretrial hearing
 - as long as each party afforded opportunity to present additional evidence or information relevant to bail
- Subsequent motions to modify
 - ***made only upon showing a material change in circumstances***

Arraignment

Pre-trial criminal protective order (§77-36-2.6(3); §77-36-2.7(3))

- court shall determine necessity for imposition of protective order at any time during criminal proceedings
 - at request of prosecutor or victim or court on own motion may issue pre-trial protective order (§77-36-2.5(3)(c))
- court must state findings and put order in writing
- court provides certified copy to V
- **order shall be put on statewide network** by clerk's office
- prosecutor can request PTPO, even over the objection of the victim, in order to keep defendant from victim during pendency of proceedings

Victim's location (§77-36-2.7(1)(c))

- court can waive disclosure of V's whereabouts except as to D atty
 - court can order D atty not to disclose to client

Dismissal (§77-36-2.7(1)(e))

- **court cannot dismiss at request of V unless**
 - prosecutor stipulates to it
- specific reasons must be recorded in court file (§77-36-2.7(4)) and
- specific reasons must be put on statewide network by court (§77-36-2.7(4))

DIVERSION NOT ALLOWED (§77-36-2.7(6))

Plea in abeyance ((§77-36-2.7(2),§77-2a-1 thru 4)

- eventual dismissal or reduction in charge
- should be used in limited circumstances
- use to fit circumstances
- use for first time offenders, not habitual offenders
 - *consider a lethality assessment first [*see "Negotiations, Considerations" under Pre-trial section],when evaluating appropriateness for plea in abeyance*

Pre Trial (See Appendix A for Example PreTrial Motions)

Prosecution goals

- **stop the violence**
 - uphold and enforce the laws
 - increase likelihood of convictions
 - *use advocates to support V through court process*
 - *use criminal protective orders to shield V from D's influence*
 - *implement "no drop" policy unless insufficient evidence to go forward*
 - *recommend a DV education group to V during court process*
- **protect the victim**
 - discuss all negotiations or dispositions with V (see URCrP 35)
 - be sensitive to V's concerns
 - *emotional ties to D*
 - *victims of DV must deal w/ their experiences in light of their relationship w/ the perpetrator unlike victims of other crimes*
 - *fear of losing relationship*
 - *fear and risk of "retaliation" i.e. losing custody of kids, personal safety of friends or relatives, etc.*
 - obtain pre-trial criminal PO for V
 - **explain** the order to V
- **hold perpetrator accountable**
 - send consistent message to D that violence is not justified
 - *stress level - no excuse*
 - *economic situation - no excuse*
 - *family situation - no excuse*
 - *actions of partner - no excuse*
 - *alcohol/drug abuse - no excuse*
 - *actions of V's relatives or kids or anyone other than D - no excuse*
 - keep **focus on D and D's conduct** throughout judicial process
 - *your focus*
 - *court's focus*
 - *jury's focus (especially in opening and closing statements)*
 - be aware of abuser characteristics
 - *abusers are externally motivated*
 - *they are prone to deny responsibility for behavior*
 - *they minimize the violence*
 - *they intend on establishing control over V*
 - *they are likely to blame V for the violence*
 - *they are likely to increase the use of violence if V seeks to leave or change the relationship*
 - require rehabilitation
 - *it is a long term process*
 - maximize ability of court to place controls on D and to deter continued use of violence
 - **obtain convictions**
 - *avoid pleas in abeyance unless extraordinary circumstances*
 - **proceed w/ as few continuances as possible**
 - *increases likelihood of conviction*

- *decreases opportunity for D to pressure V*
- *the longer it takes to proceed w/ the case, the more likely the victims will perceive the "system" as being indifferent to them and the less likely they are to cooperate*
- ***filing up to prosecutor, NOT VICTIM***
- **consistent uniform response**
 - probability that violence in DV cases will escalate in severity and frequency warrants rigorous effort towards achieving consistency
 - establish community standard of ***zero tolerance of violence***

Negotiations

- considerations
 - *keep prosecutor goals in mind*
 - *stop the violence*
 - *protect the V*
 - *hold D accountable*
 - *V's cooperation or lack of it*
 - *V's needs and desires*
 - *possibility of prosecution w/o V*
 - *How dangerous is D? (Dangerousness assessment)*
 - *length of time in relationship; commitment/ entrenchment*
 - *how long violence gone on/ escalation in frequency and severity*
 - *violence towards others in family or household (including pets)*
 - *animal cruelty*
 - *assaultive behavior towards others*
 - *use of or threats to use weapons*
 - *importance to D of image to outside world*
 - *alcohol and drug problems V & D*
 - *mental health problems V & D*
 - *criminal history of D*
 - *may lessen D's fear of "system" or*
 - *D may not want to go back*

Victim considerations for the prosecutor

- understand the psychology behind the cycle of violence
 - *what victims experience*
 - *patterns of victims' responses to violence*
 - *fear/ retaliation/ resistance/ escape/ avoidance/ etc.*
- learn to prosecute w/o solely relying upon the V..... **focus on D's conduct!**
- V needs to be told
 - *prosecution can proceed w/o cooperation*
 - *responsibility for case is the prosecuting entity's (city, state, county, municipality), not the victim's*
 - *right to prosecute lies with the prosecuting entity (city, county, municipality or state)*
 - *V is **NOT** responsible*
- frequent contact w/ V leads to V's cooperation

- *early contact and support services critical*
- ensure speedy prosecution
 - *delay through continuances puts V at risk of further violence and increases likelihood of becoming reluctant witness*
- explain criminal justice process to V
 - *V should know possible outcomes if convicted*
 - *sentencing options*
 - *plea negotiations*
 - *criminal PO (PTPO and Sentencing PO)*
- be familiar w/ available resources
 - *counseling for V and kids*
 - *Crime Victims Reparations (CVR)*
 - *local shelters*
- notify V if D released from custody/ furloughed/ escaped/ bailed out/ etc.; explain VINE notification system.
 - *crime victims may sign up for notification of inmate release, transfer, escape or death from jail or prison*
 - *877-UT-4-VINE (877-884-8463) or www.vinelink.com*
- notify V of all court dates and outcomes
 - *give V phone number to call to find out*
- perceptual reality vs. actual reality
 - *V must know weaknesses as well as strengths of system*
 - *what the system CAN and CANNOT DO*

Voir Dire

Purpose

- **educate**
 - domestic violence
 - experience, knowledge, attitudes, biases
 - anticipate defenses and head off
 - “extreme emotional disturbance”
 - must be objectively reasonable under the circumstances
 - desire to control another is not reasonable in civilized society
 - explaining victim behavior which may be perceived as “counterintuitive”
 - use victim or may consider using expert
 - anticipate weaknesses in your case and head off
 - purpose of criminal trials is to prosecute crimes....and offenses against spouses are crimes
 - **specific areas to focus on**
 - violence is a deliberate choice of action by batterer--other choices were/are available
 - provocation is no excuse for choice of violence--individual responsible for choice of actions and violence is a choice
 - even though behavior may be impulsive, intent is deliberate and rational
 - why does she stay?
 - “Just World” Theory--people get what they deserve and deserve what they get
 - some people believe this and you need to explain that bad things happen to good people in spite of the “Just World” theory
- **eliminate**
 - Rule 18, URCrP
 - challenge for cause
 - peremptory challenges
 - capital felony - 10 each
 - felony - 4 each
 - misdemeanor - 3 each
 - if more than one D, court may allow defendants additional peremptory challenges; court can permit challenges to be exercised separately or jointly
 - additional peremptory for each side for each alternate juror

Sample Voir Dire Questions

Belief system

- Do you have any religious, social or personal beliefs that men are in a position of control over women---that they have a God given right to rule women?
- Do you have any religious, social or personal beliefs that men are superior to women?
- Do you have a belief or opinion that a woman should not leave a violent relationship for the sake of preserving the family?
- Do you have any religious, social or personal beliefs or opinions that it is the abused person's fault or responsibility for provoking the situation and therefore they deserve what they get?
- Do you believe that an individual is responsible for his/her own actions and behavior?
- Do you believe that violence is an acceptable response to a problem in the relationship?
- With domestic violence being the number one cause of injury to women, do you believe that the (state, city, county) should decide to intervene even if the victim does not want us to?

Experience

- Do you have any personal experience regarding domestic violence? If so, please explain.
- Have you known people who have been involved in domestic violence relationships?
 - as an abuser?
 - as a victim?
 - as children in family?
 - what are your feelings about that?

Choice

- Would you agree that feeling anger from time to time is normal?
 - have you ever been angry with your boss/ your friend/ your kids/ your partner or spouse?
- Would you agree that people can choose to express their anger in different forms?
 - some keep their anger inside and stay silent
 - some go for walks until they cool down and can discuss the problem
 - some yell
- Would you agree that some people choose to express their anger through violence?
- Would you agree that there is a difference between being angry and being violent?
 - that you can be angry without being violent?
- Have you heard of people "losing control" when they get angry?
 - Have you ever considered the fact that they gain "total control" by being so violent?
- Would you agree that violence can be a way to get what you want?
 - power/ self-importance/ respect/ dominion
- Would you agree that some people choose violence as a method of dealing with their problems?
- Have you ever seen a child in a store throw a temper tantrum because the parent said the child couldn't have something?
 - Would you agree that the child throws the tantrum in order to force the parent to

give in and give the child what he/she wants...and that some parents give in...therefore, the tantrum was effective?

- Would you agree that the same can be said about violence...that it can be an effective choice of behavior to get what you want?
- Would you agree that violence is not an **acceptable** choice?

Provocation/Choice

- Do you believe that another person has a right or responsibility to control your behavior?
- Do you believe that it is a woman's responsibility to control her partner's violent behavior?
- Do you believe that a person always has a choice on how to act when provoked?

Rational Thought/ Impulsive Behavior

- Have you ever lied to your parents when you were a kid? You knew you could get caught, but chose to lie instead. That was a deliberate action---the thinking process was quick, but intentional and rational, and the lying behavior was impulsive, but you still took that risk. And when you got caught, you felt ashamed and got punished.
- Would you then agree that a person who chooses to act violently, may be acting impulsively, but has made an intentional and rational choice to engage in that behavior?

Why Does She Stay?

- Would you agree that sometimes people stay in bad situations even though they don't want to or because they think they have to?
- Have you (or have you known anyone who) stayed in a job you didn't like because you needed the income?
 - maybe you had a boss who was difficult to work for, he/she yelled and screamed, the pay wasn't very good and you didn't think you had any other options but to stay and "make the best of things."
 - How did you begin to feel about yourself---worthless, hopeless
 - And if people told you "just quit the job; there are plenty of other jobs out there;" "I wouldn't put up with that hassle from anyone;" "Was it that easy to just quit?"
- Have you ever been in a relationship that eventually "broke up?"
 - was it easy to leave?...was it hard to leave?...did you try to keep the relationship together even though you knew it probably wasn't the best?...why?
 - love, fear of the unknown, hope relationship can change, religion, no place to go, fear of being alone, blame, children, economic reasons, social stigma
- Would you agree that a person in a violent relationship may have those same feelings and concerns?
- Would you agree that some people have learned violence is normal and may not react to it in the same manner you or I would?
- Would you agree the fact that a person has become desensitized or "used" to violence, does not make the use of violence acceptable?
- Would you agree that violence impacts those who are victims as well as those who watch or hear it? Would you agree that the children are also victims in that situation? (For use when children are present and victim may not be cooperative or

- sympathetic)
- Would you agree that it is not the abused person's fault for the violence in a relationship?

“Just World” Theory

- Do you believe that a person gets what he/she deserves and deserves what he/she gets?
- Do you believe that in spite of that belief, sometimes, bad things happen to good people and they don't deserve what they get?
- Do you believe that a person stays in a relationship, he/she **deserves** the violence?
- Do you agree that it is our responsibility to say that violence is not acceptable in homes/families/relationships?
- Do you agree that it is our responsibility to say the violence will not be tolerated?

Adapted in part from N. Kreidman, L. Matsunaga, “Jury Selection--Domestic Violence Homicide”, NCDA Fifth Annual National Conference on Domestic Violence, 1995

Prosecutor's Duty to Disclose Prior Assaultive Conduct of a Victim

State vs. Knight, 734 P2d 913 (1987)

Conviction was reversed because prosecutor failed to disclose statements of witnesses which were in possession of “the prosecution team.” This case is known for the proposition that a prosecutor “must search beyond his own file cabinet.” Items in the files of the prosecution office and the law enforcement agency which was part of the prosecution team in this case must be disclosed. Good faith of the prosecutor's non-disclosure is irrelevant.

State v. Shabata, 678 P.2d 785 (Utah 1984), this Court stated:

At the outset, we stress that we are concerned with more than the prosecutor's state of knowledge.... Information known to police officers working on the case is charged to the prosecution since the officers are part of the prosecution team. Neither the prosecutor nor officers working on a case may withhold exculpatory evidence or evidence valuable to a defendant.

... [T]he good or bad faith of the prosecutor is irrelevant.

Id. at 788 (citations omitted). While constitutional principles imposed the duty to disclose exculpatory evidence in Shabata, whereas the duty to disclose inculpatory evidence in the instant case was assumed voluntarily, the principle stated in Shabata is applicable here: information known to any part of the prosecution team is charged to the prosecutor, and the prosecutor's good faith ignorance does not excuse non-disclosure. If any weight were given to good faith ignorance, it would only encourage after-the-fact

justifications for non-disclosure.

Bottom line: if there is evidence of a victim's past assaultive conduct in the possession of "the prosecution team" that may be relevant to the case and could be argued to "negate guilt" or to "mitigate punishment" under URCP 16, disclosure is mandatory. The Shabata case goes even farther and adds that Prosecutors must disclose evidence that may be "valuable to a Defendant." Prosecutors should err on the side of caution and disclose such reports.

The prosecution has no duty to search every file cabinet of every law enforcement agency in the country, but it does have a duty to search the file cabinets of all agencies on "the prosecution team."

Prosecutor's Duty to Provide Criminal Histories of Witnesses

Prosecutors have a duty to disclose the criminal histories of witnesses. This includes victim's and police.

In Salt Lake City vs. Reynolds, 849 P2d 582 (1993), a conviction was reversed because the prosecution failed to disclose defense requested criminal histories of the victim. In State vs. Mickelson, 848 P2d 677 (1992), the court held that the prosecution must comply with requests for criminal histories of potential witnesses because of the "one-sided access to criminal records" provided to law enforcement agencies in UCA 53-10-101 et. seq. The better practice for the State is to request that the Defendant seek a court order because these are protected records, and then disclose consistent with court order.

Trial Issues

Focus

- on proving crime
- on Defendant's conduct
- prevent focus on V (**common defense strategy*)

Spouse Privileges

Compel to testify (*commonly referred to as Spousal Privilege*)

- *Art. 1 Sec 12 Utah Constitution*
 - a wife shall not be compelled to testify against her husband nor a husband against a wife
 - §77-1-6(2)(d) (statutory enactment of Constitutional provision)
 - Rule 502 URE (language put into rule of evidence)

Privileged communication

- statutory - §78B-1-137(1)(a)
 - spouse, during or after marriage, w/o consent of other spouse, cannot be examined as a witness re: communications made during marriage
 - does not apply to criminal action for crime committed by one spouse against the other (§78B-1-137(1)(b)(ii))
 - or to criminal proceeding for abuse or neglect of child of either spouse (§78B-1-137(1)(b)(iv))
 - or as otherwise specifically provided by law (§78B-1-137(1)(b)(v))
- rule - URE 502-privilege as to communications between husband and wife
 - exceptions:
 - if spouses are adverse parties in civil proceeding
 - if communication made in furtherance of a crime
 - in criminal proceeding where spouse charged w/ crime against the person or property of the other or a child of either or against a person residing in in the household of either or against a third person if committed in the course of committing a crime against the other (or child or household resident)

CRAWFORD V. WASHINGTON

Crawford v Washington, 541 US 36, 2004 (See Appendix B for Crawford Analysis Chart) US Supreme Court held that an out of court statement that is testimonial in nature can be introduced by prosecution at trial only if the declaring witness testifies **or** is now unavailable **and** there was a prior opportunity for witness to be cross examined by defendant. The court held that this is a right guaranteed by the Sixth Amendment to defendants to be able to confront the witnesses against them at trial

This ruling effectively put a stop to many DV prosecutions where prosecutors relied *solely* on hearsay evidence (such as excited utterances) to prove cases without victims (witness was not available nor subject to prior cross examination as the vast majority of the DV cases are misdemeanors). “Firmly rooted hearsay exceptions” are still permitted as long as they meet *Crawford* requirements.

It is the investigating officer’s job to gather all kinds of statements and not worry about determining if it’s hearsay or testimonial in nature; **it is the prosecutor’s job to determine what statements are testimonial and what statements are not and what is hearsay and what is not**

What ***Crawford*** means

- *Crawford* held that testimonial hearsay is admissible ONLY when:
 - Prosecution shows declarant unavailable to testify at trial AND
 - There was a prior opportunity for cross examination
- Consider not only preliminary hearings but also bail hearings, depositions, etc
- Otherwise, witness must be present at trial to testify
- Prosecutor must first determine if statement is “testimonial” in nature
 - Court objectively looks to primary purpose of the declarant in making the statement
 - Is it to enable police assistance to meet an ongoing emergency or is it to establish or prove past events potentially relevant to later criminal prosecution? The former is likely non-testimonial, while the latter is likely testimonial.
 - Factors the court considers :
 - Was declarant describing events as they were actually happening or past events? If the events are actually happening, then it is likely an ongoing emergency.
 - Was declarant facing an ongoing emergency? Examples of “ongoing emergency include:
 - “The existence and duration of an emergency depends on the type and scope of danger posed to the victim, the police and the public.” Officers asked the types of questions necessary to allow the police to “assess the situation, the threat to their own safety and possible danger to the potential victim and to the public.” *Michigan v Bryant*, 131 S.Ct. 1143 (2011)
 - Declarant made statements to a 911 dispatcher while the incident was occurring and for the purpose of seeking protection from immediate danger. Whether 911 statements are testimonial should be determined on a case-by-case basis. *Salt Lake City v. Williams*, 2005 UT App 493, 128 P.3d 47.
 - Declarant provided law enforcement with information necessary to assess the

- current level of dangerousness of the situation. *Commonwealth v. Galicia*, 447 Mass. 737, 857 N.E.2d 463 (Mass. 2006).
- The police officer's first concern was to find out what had happened so that he could decide how to prevent further harm. *People v. Bradley*, 8 N.Y.3d 124, 862 N.E.2d 79, 830 N.Y.S.2d 1, 2006 N.Y. Slip Op. 09501 (N.Y. 2006).
 - The officers had a need to gain control over a "threatening situation." *State v. Ly*, 2006 Minn. App. Unpub. LEXIS 853 (Minn. Ct. App. 2006).
 - The officer's questions about the nature of the assault and why the victim had called were made to assist in securing the scene and apprehending the subject. *State v. Nouaim*, 2006 N.C. App. LEXIS 232 (N.C. Ct. App. 2006).
 - However, "a conversation which begins as an interrogation to determine the need for emergency assistance" can "evolve into testimonial statements," once that purpose has been achieved." Courts should "redact or exclude the portions of any statement that have become testimonial." *Davis v. Washington*, 547 US 813 (2006).
 - Even if there was an initial emergency, it ended when law enforcement separated the victim and the alleged abuser. *State v. Tyler*, 138 Wash. App. 120, 155 P.3d 1002 (2007).
 - Was the nature of what was asked and answered necessary to resolve present emergency rather than learn about past events?
 - What was the level of formality of the interview?
 - If structured police questioning, then it will likely be deemed testimonial.
 - During a 911 call, if the victim is requesting help, not formalizing a statement concerning a crime, then it will likely be deemed as non-testimonial. *Marquardt v. State*, 2005 Md. App. LEXIS 188 (Md. Ct. Spec. App. 2005).
 - The 911 caller's statements were made while the incident was actually in progress and were for the purpose of preventing or stopping a crime as it was actually occurring. They were made without premeditation or afterthought. *Pitts v. State*, 272 Ga. App. 182, 612 S.E.2d 1 (GA Ct of Ap 2005).
 - The statements in an anonymous 911 call were not testimonial because they were made "to enable police assistance to meet an ongoing emergency." *United States v. Robinson*, 2008 WL 5377743 (10th Cir. 2008).
 - However, if the victim's 911 call is to report defendant's violation of an order and to describe him in order to assist in apprehension, rather than protect herself from his return, her statements are testimonial. *State v. Powers*, 124 Wash. App. 92, 99 P.3d 1262 (2004).
 - Preliminary questions when police arrive at a crime scene to assess and secure the scene did not constitute interrogation because they bore no indicia of the formal, structured questions necessary for statements to be testimonial. *Spencer v. State*, 162 S.W.3d 877 (Texas App Houston 14th Dist 2005).(See *Davis v. Washington*, 547 US 813 (2006); *State v. Martin*, 2008 WL 1837536 (Ind. Ct. App. 2008); *Michigan v. Bryant*, 131 S.Ct. 1143 (2011))
 - **If statement is not testimonial in nature, then it is not subject to *Crawford*.**
 - Hearsay evidence at preliminary hearings does not violate *Crawford*, which only

provides the right to confront the witnesses and to cross-examine at trial. *State v. Timmerman*, 2009 UT 58, 218 P.3d 590, *State v. Besic*, 2007 UT App 53, *State v. Rhinehart*, 2006 UT App 517, 153 P.3d 830.

- Prosecutors must be proactive to try to encourage victim cooperation.
 - If you can show witness's unavailability due to conduct or action of defendant, hearsay may be admissible under the doctrine of *forfeiture* – defendant forfeits right to confront witness against him when he causes or contributes to a witness's failure to appear or be available.
 - The State must prove that the witness is unavailable at the trial through wrongful acts by the defendant and that the defendant's acts intended to make the witness unavailable. *State v. Poole*, 2010 UT 25, 232 P.3d 519.
 - A defendant who kills or intimidates a witness does not forfeit his right to confront that witness unless he killed or intimidated the witness with the intent or purpose to prevent the witness from testifying. *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

Prosecutors should contact the Utah Prosecution Council for updates on caselaw regarding *Crawford*.

CRAWFORD PRACTICE TIPS

For Prosecutors

Review all recordings and 9-1-1 calls as a part of screening cases and determine the likelihood of their admissibility at trial.

File pretrial motions under URE 104 to get a ruling on the admissibility of hearsay statements.

Use statements that have been ruled admissible in opening statements and liberally at trial.

Analysis of Evidence under Crawford vs. Washington

The issue of admissibility of evidence is a Preliminary Question under Utah Rule of Evidence 104 to be determined by the court by a preponderance of evidence shown by evidence admissible under the evidence rules. *State v. Poole*, 232 P3d 519 (2010).

1. Is the statement hearsay?

The general rule is that statements made outside the courtroom offered in court

to prove the truth of the matter asserted are hearsay.

So, a statement offered for something other than the truth of the matter asserted is not hearsay, and *Crawford* does not apply. (Note: Defendant may be entitled to a limiting instruction if a statement is admitted for a limited purpose.)

Also, the following such statements are specified as non-hearsay statements by URE 801 (d):

- Prior inconsistent statement of a witness;
- Prior consistent statement of a witness offered to rebut a claim of fabrication;
- Statement of a party when offered by the opponent; and
- Statement of a co-conspirator.

Statements that are not hearsay are not excluded by *Crawford*.

2. Is the statement offered at trial?

The Confrontation Clause rights of a Defendant apply only at trial. At any other court hearing, including preliminary hearings, the Defendant cannot invoke his confrontation rights. *State vs. Timmerman*, 218 P3d 590 (2009).

3. Is the statement testimonial?

According to *Crawford*, the confrontation clause only excludes statements that are “testimonial” in nature.

Statements made to police made for the “primary purpose” of helping to establish or to prove events relevant to later prosecution are testimonial. *Davis vs. Washington*, 547 US 813 (2006).

The “primary purpose test” is an objective test in which a court must determine the purpose that declarants had in speaking with police. Factors to be considered are:

- Location in which statement was made;
- Timing of statement;
- Existence of an ongoing emergency;
- Victim’s medical condition; and
- Informality of the setting.

Note: that there can be several purposes of witnesses in making statements, but the key is determining what the primary purpose is.

Courts should watch for the situation where the primary purpose of a statement changes. For example, when an ongoing emergency ends and police continue to question a witness, then the court should rule that those later statements are excluded

by the confrontation clause. “[Where] a conversation which begins as an interrogation to determine the need for emergency assistance evolves into testimonial statements once that purpose has been achieved, courts should redact or exclude the portions of any statements that have become testimonial.” *Davis v. Washington*, 547 US 813 (2006).

One Utah case, *Salt Lake City v. Williams*, 128 P3d 47 (2005), applies the “primary purpose” doctrine. Williams upheld the admission of two different hearsay statements:

(1) a statement by a victim to a friend of “Oh My God, there’s [Williams]!” was not testimonial because it was made without any awareness that it may be used for a criminal prosecution; and

(2) a statement to a 9-1-1 operator while the crime was in progress was made “for the purpose of seeking protection from immediate danger,” and was therefore admissible. The Williams court opined that the “primary purpose” finding should be made on a case-by-case basis.

4. Has declarant been subject to cross exam?

Where a witness actually testifies at trial and is subject to cross exam, there is no confrontation clause issue. The case law on this issue attempts to sort out various permutations of this scenario.

1) Witness present in court but not called to testify.

The confrontation clause is not satisfied when the witness is present but does not testify. *Melendez-Diaz v. Massachusetts*, 129 S Ct 2527.

2) Witness present but refuses to testify.

A witness who refuses to testify, whether asserting a privilege or not, is not considered “subject to cross exam” and the confrontation clause applies. *Douglas v. Alabama*, 380 US 415 (1965).

3) Witness testifies via closed circuit television.

Confrontation clause is satisfied, so long as Defendant may question witness even though witness is in another room. *Maryland v. Craig*, 497 US 397 (1990)

4) Witness testifies, but has “loss of memory.”

The confrontation clause is satisfied, even though witness claims a loss of

memory. “The confrontation clause guarantees only an “opportunity for effective cross examination, not cross examination that is effective in a particular way and to whatever extent the defense might wish.” *US v. Owens*, 484 US 554 (1988).

5) Witness is uncooperative or evasive.

Similar to the above analysis, the confrontation clause is satisfied even though it does not meet all of the Defendant’s expectations.

6) Witness with mental impairment or other incapacity to testify.

Physical incapacity which does not amount to a total incompetence to testify does not violate the confrontation clause. *Vasquez v. Kirkland*, 572 F3d 1029 (2009).

5. Has the Defendant forfeited his confrontation clause rights?

Forfeiture by wrongdoing is a long-standing exception to the Defendant’s ability to exercise confrontation clause rights. *Reynolds v. US*. This means that if a Defendant causes a witness to be unavailable at trial through his own wrongful acts, he cannot invoke his confrontation clause rights.

In a domestic violence setting, an “ongoing pattern of abuse” can be inferred, in some circumstances, as intent to silence the witness in some cases. *Giles v. California*, 128 S Ct 2678 (2008). “The element of intent [to prevent a witness from testifying] would normally be satisfied by the intent of the domestic abuser in a classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”

Utah law supports the doctrine of forfeiture by wrongdoing. In *State vs. Poole*, 232 P3d 519 (2010), “Utah law recognizes that a Defendant may forgo the right to confrontation through conduct designed to make a witness unavailable at trial.”

Poole requires that a court determination of this issue be done close to trial, and requires a three-prong test:

- 1) The witness must be unavailable;
- 2) The unavailability must have been caused by the wrongful acts of the Defendant; and
- 3) The acts must have been done with an intent to make the witness unavailable.

6. Does an exception to Crawford apply?

A dying declaration has been found to be an exception to the *Crawford* decision, although a black-letter rule was not announced by *Crawford*. In *Crawford*, dicta acknowledged that despite the testimonial character of many such statements, the dying declaration might qualify as a sui generis exception to confrontation rights. *Crawford*, 541 Us at 56, note 6.

Expert Testimony

Disclosure required (§77-17-13)

- applies to both prosecution and defense
- if intend to use at felony trial or any hearing except PH
 - mental health expert
 - crime lab expert
 - any other expert
- notice to opponent 30 days prior to trial / 10 days prior to hearing
 - must include name, address, curriculum vitae and copy of report; or
 - written explanation of expert's proposed testimony and notice that expert available to consult with opposing party on reasonable notice
- testimony of expert at prelim constitutes notice of expert, qualifications-report of proposed testimony
 - party who called expert shall provide expert's curriculum vitae upon request

Foundation

- URE 702
 - qualified as expert by knowledge, skill, experience, training or education
 - formal training or ed. not prerequisite to giving expert opinion
 - a witness may qualify as expert by virtue of experience or training
 - specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue

Educate trier of fact

- myths and misconceptions about DV victims
- provide "context" for juries to evaluate DV victim's behavior and counteract accusations, implied or direct, of victim's dishonesty or incredibility
 - "'counterintuitive behavior' defines public perceptions of victim's behavior and the failure of the public's expectations to match actual victim behavior" (J. Long, *Introducing Expert testimony to Explain Victim behavior in Sexual and Domestic Violence Prosecutions*, August 2007, APRI/NDAA)
 - see *State v Townsend*, 897A2d 316 (NJ 2006); *US v Nixon*, 728 A2d 582 (DC 1999); *People v Taylor*, 552 NE2d 131 (NY); *People v Ellis*, 650 N.Y.S.2d 503; no need for expert see *State v Cook*, 1997 Wash. App LEXIS 1212 (July 1997)
- why they stay
 - Learned Helplessness theory/ Survivor theory
 - repeated abusive episodes and V believes V has no control over what happens ----->leading to
 - a belief of helplessness ----->leading to
 - the perception becoming reality ----->leading to
 - V becoming passive, submissive, helpless
 - Post Traumatic Stress Disorder..this is a specific diagnosis
 - see *US v Winters*, 729 F.2d 602 (9th Cir. 1984)
- Stockholm Syndrome (psychological phenomenon where hostage develops positive feelings for captor)

- see *US v. Peralta*, 941 F2d 1003 (9th Cir. 1991) Ct. affirmed admissibility to explain V's actions or inactions
 - **CAUTION:** prosecutor needs to decide if the benefits of having V examined for expert to testify outweigh the consequences of opening up all of the V's treatment and counseling records to the defense and having the V examined by the defense's own expert. Also, V may not meet diagnostic criteria for this diagnosis and that could open up additional issues and concerns. Prosecutor could avoid this by having expert generally testify on counterintuitive behaviors and let the jury decide if any of those explanations apply to this DV victim
 - expert testifies as to victim responses to trauma, dynamics of DV and DV myths too help explain the victim's behavior to the jury
- Other reasons
 - survival (fear of being killed)
 - 75% higher risk of serious bodily injury or death
 - knows abuse will not stop even if leaves
 - threats of harm to children, V or suicide threats
 - V has high tolerance for abuse due to childhood abuse (including witnessing DV of parents)
 - lack of job skills, financial resources or cannot realize life w/o batterer
 - religious beliefs
 - self blame, guilt, shame of failed marriage
 - belief children need to be with father
 - physical injuries or condition may prevent leaving
 - batterer's control analysis (Ellen Pence, Duluth, MN)
 - physical and sexual violence
 - isolation
 - emotional abuse
 - intimidation, threats, coercion
 - economic deprivation
 - lesser status (male privilege)
 - manipulation by using kids
 - blame, denial, minimization of abuse

Need for expert

- explain to trier of fact why DV victim may stay in abusive relationship
- explain why DV victim may behave in unexpected or conflicting ways (counterintuitive behaviors)
 - hiding abuse, denial, excuses, recants or retracts statements
 - minimizes, reports fewer events than actually occur, failure to report, failure to cooperate with prosecution or investigation, requesting dismissal of charges, testifying for batterer
 - hostility as witness
 - provides alternative explanation for V's behavior for trier of fact to consider
 - victims may not behave in ways the average non-battered adult

behaves nor can the average adult readily understand a DV victim's seemingly contradictory behavior. This type of evidence enables the trier of fact to properly assess V's testimony fairly and the trier of fact can draw its own conclusion as to whether or not V's behavior is consistent with the behavior of other battered women

- expert testimony is only a tool for the trier of fact to understand the V's behavior; it is not to decide the ultimate issue and the jury, particularly, needs to know that is their job, not the expert's.

Other case law re: admissibility of evidence about battered women

- *State v. Ciskie*, 751 P2d 1165 (Wash. 1988)
 - intro'd evidence re: common behavior of battered women
 - intro'd after V testified to rehabilitate
 - V's credibility attacked on cross exam
 - directly
 - indirectly by inconsistencies
 - V 's credibility attacked through cross exam of other prosecution witnesses
 - V's credibility attacked in defense case
- *State v. Bednarz*, 507 NW2d 168 (Wis Ct. App. 1993)
 - cycle of violence testimony used to explain V's recanting---alternative explanation of V's behavior for jury to consider
- *Arcoren v US*, 929 F2d 1235, 49 CrL 1071 (8th Cir 1991)
 - expert testified as to tendency to recant as an alternative explanation of V's statements

For more information on use of experts in DV prosecutions, please refer to Jennifer G. Long's paper in APRI's special topics series *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* in Appendix B.

Victims' Rights Issues

Right to be present throughout trial

- *URE 615*

Victim Fails to Respond to a Subpoena

Check to see if personal service

- can you proceed w/o V?
- request continuance to determine whether V's FTA due to threats, coercion, etc.
 - may be able to determine defendant's threats or actions caused V to avoid service or court and thus may be able to present hearsay statements of V based on the theory of "forfeiture"
- treat FTA by V (several options, no easy answer)
 - same as you would treat non-DV personal crime V's FTA?
 - if file OTSC on those V's or witnesses who FTA on other personal crimes, treat DV FTA's similarly
 - if don't pursue OTSC or pursue on a limited basis depending upon the severity or violence of the crime on non-DV Vs or witnesses, use the same standard for DV V's
 - treat differently because DV case?
 - don't want to re-victimize the victim
 - V has to understand that if a witness is subpoenaed, a witness must appear and testify
 - yet V may truly be acting in a survival mode by avoiding violence which she anticipates but is not able to articulate because it's based upon her experience with the abuser
 - material witness subpoena may be appropriate in rare circumstances, considering the danger to the victim, danger to the community...REMEMBER GOALS: stop the violence, keep the victim safe, hold the perpetrator accountable. In **rare** circumstances it may be necessary to take this extreme action to protect the victim in spite of herself

Preliminary Hearing V. Waiver

Benefits of PH

- preserves testimony (valuable if recants or is absent) and thus admissible under Crawford at trial
- may benefit V to confront D while still hurt and upset (if PH relatively soon after incident, V and D may have not reached "honeymoon stage" yet)
- once D sees V testify in open court, may facilitate negotiations

Benefits of waiver

- V may not be physically or emotionally prepared to testify
- V may have reached "honeymoon stage" and may be resistive to testifying, particularly if has no support services

Prosecutor must evaluate on a case by case basis

Self Defense §76-2-402

Legislative intent

- V's response to pattern of domestic violence or abuse should be considered in determining imminence or reasonableness and that the evidence be considered when useful in understanding perceptions or conduct of V

Statutory considerations not limited to DV situations

Mutual combat defense

- remaining in relationship does not = mutual combat
- entering or remaining in place where you have a right to be does not = mutual combat
- no duty to retreat from place you have a right to be and therefore failure to retreat does not = mutual combat

imminence of danger and **reasonableness of belief of necessity** considerations (§76-2-402(5)(a)-(e))

- nature of the danger
- immediacy of the danger
- probability that unlawful force would result in death or serious bodily injury
- prior violent acts or propensities (with others)
- pattern of abuse or violence in relationship (with V)

If no “self defense”, may need to review under “predominant aggressor” analysis and proceed against only the predominant aggressor so you can have a victim who is able to testify. This supports the goals of prosecution by stopping the violence, protecting the victim (or less culpable person) and holding the perpetrator (the most culpable person) accountable

Evidence

Medical

- use to prove injury
- use to corroborate V testimony how injury occurred
- remember you may have to file “notice of intent to use expert”, (§77-17-13)
- **statements to med. personnel for purpose of med. diagnosis, URE 803(4)**
 - statement must be made for purpose of med. diagnosis or treatment
 - statement must describe or relate med. history, past or present symptoms or pain or sensation or cause
 - statement reasonably related to diagnosis or treatment
 - incl. med. staff, see *State v. Salazar*, 504 NW2d 774; and Fed. Advisory Committee comments to Rule 803(4)
 - applies to psychiatrists or psychologists for purpose of med. diagnosis or treatment (see *State v. Schreuder*, 726 P2d 1215 (UT 1986)
 - sex. aslt..see *US v. Iron Thunder* 714 F2d 765
 - identity of perp included...see *US v. Joe*, 8 F3d 1488 (10th Cir 1993), DV homicide case where V had been in to see doctor earlier re: rape by D; *State v. Moen*, 786 P2d 111 (OR 1990); *U.S. v. Renville*, 779 F2d 430 (8th Cir. 1995); *State v. Sims*, 890 P2d 521 (Wash. 1995).
- CAVEAT: anticipate possible Crawford attack on use of this type of evidence
- **medical record/business record, URE 803 (6)**
 - admit through records clerk
 - see *State v. Torres* 589 P2d 83; *State v. Graham*, 641 SW 2d 102
 - if info in records likely to go to central issue of case, physician usually required to appear
 - foundation (see *State v. Bertul*, 664 P2d 1181 (Ut 1983))
 - record made in regular course of business which keeps record
 - record made at time or in close proximity to occurrence of act, condition or event recorded
 - evidence must support conclusion that document kept under circumstances to preserve its integrity
 - sources of info. from which entry made and circumstances of preparation indicate trustworthiness

Hearsay

Exceptions (always keep Crawford in mind)

Excited Utterance, URE 803(2)

- three prong test (see *West Valley City v. Hutto*, 2000 UT App 188; *State v. Kinross*, 906 P2d 320 (Ut. App 1995); (unpublished opinion, *Salt Lake City v. Hernandez*, 2001 WL 311183 (Ut App))
 - declarant experiences startling event
 - statement made about event while declarant still "startled" by the event
 - lapse of time between event and the declarant's utterance
 - trauma from event can last long after: statement may qualify under theory of "rekindled" excitement.
 - *State v. Smith*, 909 P2d 236, 280 UAR 6 (Ut. Sct. 1995)
 - declarant's state of mind
 - declarant's capacity to fabricate the utterance
 - declarant's statement must relate to the startling event

Present Sense Impression, URE 803(1)

- timing is the key element
 - spontaneous statement made by declarant
 - while participating in or witnessing an event
 - before having time to gather his or her thoughts
 - *State v. McMillan*, 588 P2d 162 (Ut 1978)

Prior Incidents, URE 404(b)

- notice of intent to use prior to trial; motion in limine to use
- rule not limited to criminal convictions
 - see *State v. Kerekes*, 622 P2d 1161, (UT 1980)
- use to prove any material fact except criminal disposition
 - Rule examples illustrative, not exhaustive
 - motive
 - intent
 - preparation
 - plan
 - knowledge
 - identity
 - absence of mistake or accident
 - some purpose other than proof of D's character
 - When a person pleads "not guilty" to a charge, every element of the charge is put into issue
 - see *State v. Teuscher*, 883 P2d 922 (Ut. App. 1994), evidence admitted to show identity and intent of the perpetrator and that the injuries were not the result of an accident or mistake
- excluded only when sole reason offered is to prove bad character or to show person acted in conformity with that character
 - see *State v. O'Neil*, 848 P2d 694 (Ut. App. 1993)
- foundation
 - must show prior misconduct was committed by defendant

- must prove logical relevance
 - evidence of prior bad act makes inference more probable than inference would be without the evidence
- court standard for assessing admissibility
 - see *State v. Taylor*, 818 P2d 561, (Ut App. 1991), "proximity in time combined with similarity in type of crime"
 - court has broad discretion (see Teuscher)
 - URE 402 relevance test
 - URE 403 balancing test
 - may be excluded if " its probative value is **substantially** outweighed by the danger of unfair prejudice" (see Teuscher)
 - two-step analysis
 - past abuse evidence must be unfairly prejudicial **and**
 - substantially outweigh the evidence's probativeness
 - Utah cases: *State v. Holbert* 61 P3d 291 (2002); (*State v. Rees unpublished 2002 WL31387030*); *State v. Nelson-Waggoner* 6 P.3d1120 (2000)

Statements of physical, mental or emotional condition, URE 803(3)

- admissible to prove existence of a particular condition after an incident
 - *physical or mental injury or distress*
- foundation
 - statement made
 - substance of statement
 - statement related to declarant's state of mind or condition at the time the statement was made
 - does not apply to statements of past mental or physical condition (see URE 803(4) for purposes of med. diagnosis)
- see *State v. Able*, 754 P2d 935 (Ut 1988) Because defendant raised defense of self defense and accident, he placed V's state of mind directly in issue. Hearsay statement of V reporting Defendant recently threatened to kill her was admissible; see also *State v. Jaeger* 973 P2d 404 (1999); *State v. Wetzel* 868 P2d 64 (1994)

Statements made for purposes of medical diagnosis, URE 803(4)

***see also outline on Medical evidence above**

- use to establish nature of V's injuries and means of injuries
- may be allowed to use to establish identity
 - see *United States v. Renville*, 779 F2d 430 (8th Cir. 1985)

Residual hearsay exception, URE 807

- reasonable notice to opponent of intent to use
- statement must have circumstantial guarantees of reliability
- must be offered as evidence of a material fact
- statement is more probative on the issue than other evidence which the

proponent has been able to secure through reasonable efforts

- consider *People v. Geraci*, 649 NE2d 817 (NY 1995) where court allowed hearsay evidence when prosecution established by clear and convincing evidence that witness' absence (unavailability) due to intimidation (result of D's misconduct); see also *State v. Webster* 32 P3d 976 (2001); *State v. Nelson* 777 P2d 479 (1989)

Dismissals

- may be appropriate
- court to make final decision, ***Not the victim***
- evidentiary problems/can't prove case
- best interest of V (***should be rarely and wisely used***)
- victim cannot ask the court to dismiss without the prosecutor's concurrence §77-36-2.7(1)(e)
- prosecutor must state the specific reasons for the dismissal so that it can be recorded in the file and transmitted to the state DV network §77-36-2.7(4)

Sentence (§77-36-5; §77-36-5.1)

- aggravating sentencing factors
 - particular vulnerability of V (mental disability/ physical disability/ elderly/ pregnant
 - D does not accept full responsibility for actions
 - weapon was used
 - D has prior DV convictions or violent convictions
 - V was hospitalized
 - DV act was committed in the presence of children
 - D violated court orders (civil or criminal)
 - ongoing harassment of V by D by phone/ mail/ in person/ direct or indirect
- Sentencing Protective Order as part of sentence
 - **must be in writing** (§77-36-5)
 - prosecutor to provide certified copy to V (§77-36-5)
 - **this is an order separate from the standard probation order**
 - **this is to be entered into the statewide DV network by the court**
- assess D
 - V counseling costs
 - **cost for services or treatment provided to abused spouse by DCFS or to contract provider directly mandatory for court to assess** pursuant to §77-36-5
- order
 - no threats
 - no contact
 - stay away
 - no alcohol or controlled substances
 - no firearms or other weapons
 - surrender weapons
 - attend DV licensed perpetrator treatment program, pay costs and satisfactorily complete, §77-36-5(5), unless court finds no licensed program reasonably available or DV treatment or therapy unnecessary
 - important that treatment provider have copy of police reports
 - important for prosecutor to know which programs are effective
 - alc/subst. abuse treatment
 - mental health treatment
 - restitution
 - electronic monitoring
 - incarceration
 - length of time depends upon agg. factors
 - D should spend some incarceration time and then go into treatment w/ the remainder of incarceration time "hanging over D's head" to insure compliance
 - probation
 - time frame (§77-18-1(10)(a)(i))

- up to 36 months w/o violation for felony or class A
- up to 12 months w/o violation for class B, C or infractions
- if more than one charge, ask for consecutive probationary periods (see §76-3-401)
- formal probation to Dept. of Corrections or other agency (§77-18-1(2)(a)(i),(ii))
 - advise V who to contact for info, reporting violations, etc.
- informal probation to the court (§77-18-1(2)(a)(iii))
 - advise V to contact prosecutor for info, reporting violations, etc.
 - prosecutor should ask court to order monthly or quarterly reports including attendance to court w/ copy to prosecutor
- set up notification to V of D's release from incarceration

Recommended Sentence For 1st DV Conviction of Misdemeanor w/ no Agg. Factors

- ***recognized DV program--satisfactorily complete/pay for plus any D/A or M/H treatment***
- ***restitution to shelter, V***
- ***no alcohol/no drugs***
- ***susp. jail sentence assuming D arrested and taken to jail; otherwise, D needs to see the inside of the jail for a couple of days (this is to impress the fact that this is a crime!)***
- ***monthly reports to court***
- ***Sentence PO if requested by V***

RECOMMEND IMPOSITION OF MAXIMUM SENTENCE THEN CAN METE OUT IN INCREMENTS---INCREASING IN LENGTH WITH EACH SUBSEQUENT VIOLATION

Court orders must be followed and enforced essential to effective intervention

Parole

Board of Pardons

- *duty to notify V of hearing and the right to appear (§77-27-9.5)*
 - *duty to notify of release if V requested (§77-27-9.7)*

Duty of prosecutor

- *furnish all pertinent data requested by board (§77-27-13(4))*
- ***to furnish within 30 days from the date of sentence in writing***
 - *all investigative reports*
 - *victim impact statement referring to physical, mental or economic loss suffered*
 - *mitigating or aggravating circumstances or both*
 - *full and complete description of the crime*
 - *written record of any plea bargain*
 - *any other relevant information*
 - ***if want D to have no contact with victim when paroled, must request Board of Pardons to issue as part of parole agreement***

Mandatory Reporting Laws

Prosecutors and Law Enforcement should keep these laws in mind as they could come into play in domestic violence investigations and prosecutions

Healthcare Provider Reporting Act

26-23a-1. Definitions.

As used in this chapter:

(1) "Health care provider" means any person, firm, corporation, or association which furnishes treatment or care to persons who have suffered bodily injury, and includes hospitals, clinics, podiatrists, dentists and dental hygienists, nurses, nurse practitioners, physicians and physicians' assistants, osteopathic physicians, naturopathic practitioners, chiropractors, acupuncturists, paramedics, and emergency medical technicians.

(2) "Injury" does not include any psychological or physical condition brought about solely through the voluntary administration of prescribed controlled substances.

(3) "Law enforcement agency" means the municipal or county law enforcement agency:

(a) having jurisdiction over the location where the injury occurred; or

(b) if the reporting health care provider is unable to identify or contact the law enforcement agency with jurisdiction over the injury, "law enforcement agency" means the agency nearest to the location of the reporting health care provider.

(4) "Report to a law enforcement agency" means to report, by telephone or other spoken communication, the facts known regarding an injury subject to reporting under Section 26-23a-2 to the dispatch desk or other staff person designated by the law enforcement agency to receive reports from the public.

26-23a-2. Injury reporting requirements by health care provider -- Contents of report.

(1) (a) Any health care provider who treats or cares for any person who suffers from any wound or other injury inflicted by the person's own act or by the act of another by means of a knife, gun, pistol, explosive, infernal device, or deadly weapon, or by violation of any criminal statute of this state, shall immediately report to a law enforcement agency the facts regarding the injury.

(b) The report shall state the name and address of the injured person, if known, the person's whereabouts, the character and extent of the person's injuries, and the name, address, and telephone number of the person making the report.

(2) A health care provider may not be discharged, suspended, disciplined, or harassed for making a report pursuant to this section.

(3) A person may not incur any civil or criminal liability as a result of making any report required by this section.

(4) A health care provider who has personal knowledge that the report of a wound or injury has been made in compliance with this section is under no further obligation to make a report regarding that wound or injury under this section.

26-23a-3. Penalties.

Any health care provider who intentionally or knowingly violates any provision of Section 26-23a-2 is guilty of a class B misdemeanor.

Child Abuse Reporting Statute

§ 62A-4a-403. Reporting Requirements

(1)(a) Except as provided in Subsection (2), when any person including persons licensed under Title 58, Chapter 67, Utah Medical Practice Act, or Title 58, Chapter 31b, Nurse Practice Act, has reason to believe that a child has been subjected to abuse or neglect, or who observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect, that person shall immediately notify the nearest peace officer, law enforcement agency, or office of the division.

(b) Upon receipt of the notification described in Subsection (1)(a), the peace officer or law enforcement agency shall immediately notify the nearest office of the division. If an initial report of abuse or neglect is made to the division, the division shall immediately notify the appropriate local law enforcement agency. The division shall, in addition to its own investigation, comply with and lend support to investigations by law enforcement undertaken pursuant to a report made under this section.

(2) Subject to Subsection (3), the notification requirements of Subsection (1) do not apply to a clergyman or priest, without the consent of the person making the confession, with regard to any confession made to the clergyman or priest in the professional character of the clergyman or priest in the course of discipline enjoined by the church to which the clergyman or priest belongs, if:

- (a) the confession was made directly to the clergyman or priest by the perpetrator;
- and
- (b) the clergyman or priest is, under canon law or church doctrine or practice, bound to maintain the confidentiality of that confession.

(3)(a) When a clergyman or priest receives information about abuse or neglect from any source other than confession of the perpetrator, the clergyman or priest is required to give notification on the basis of that information even though the clergyman or priest may have also received a report of abuse or neglect from the confession of the perpetrator.

(b) Exemption of notification requirements for a clergyman or priest does not exempt a clergyman or priest from any other efforts required by law to prevent further abuse or neglect by the perpetrator.

Vulnerable Adult Abuse Reporting Statute

§ 62A-3-305. Reporting Requirements

(1) A person who has reason to believe that a vulnerable adult has been the subject of abuse, neglect, or exploitation shall immediately notify Adult Protective Services intake or the nearest law enforcement agency. When the initial report is made to law enforcement, law enforcement shall immediately notify Adult Protective Services intake. Adult Protective Services and law enforcement shall coordinate, as appropriate, their efforts to provide protection to the vulnerable adult.

(2) When the initial report or subsequent investigation by Adult Protective Services indicates that a criminal offense may have occurred against a vulnerable adult:

(a) Adult Protective Services shall notify the nearest local law enforcement agency regarding the potential offense; and

(b) the law enforcement agency may initiate an investigation in cooperation with Adult Protective Services.

(3) A person who in good faith makes a report or otherwise notifies a law enforcement agency or Adult Protective Services of suspected abuse, neglect, or exploitation is immune from civil and criminal liability in connection with the report or other notification.

(4)(a) A person who willfully fails to report suspected abuse, neglect, or exploitation of a vulnerable adult is guilty of a class B misdemeanor.

(b) A covered provider or covered contractor, as defined in Section 26-21-201, that knowingly fails to report suspected abuse or neglect, as required by this section, is subject to a private right of action and liability for the abuse or neglect of another person that is committed by the individual who was not reported to Adult Protective Services in accordance with this section.

(5) Under circumstances not amounting to a violation of Section 76-8-508, a person who threatens, intimidates, or attempts to intimidate a vulnerable adult who is the subject of a report, a witness, the person who made the report, or any other person cooperating with an investigation conducted pursuant to this chapter is guilty of a class B misdemeanor.

(6) An adult is not considered abused, neglected, or a vulnerable adult for the reason that the adult has chosen to rely solely upon religious, nonmedical forms of healing in lieu of medical care.

Stalking

(See Appendix C for Stalking Brochure)

Statistics

- 6.6 million people are stalked annually in the US
- In 76% of intimate partner femicides, the victim was previously stalked by intimate partner
- 89% of the femicide victims had been stalked in preceding 12 months
- 54% of femicide victims had reported stalking to police before they were killed
- 3 in 4 stalking victims are stalked by someone they know
- 66% of female victims and 41% of male victims stalked by a current or former intimate partner
- 1 in 4 victims reports being stalked through the use of some form of technology
- almost 1/3 of stalkers have stalked before
- 1 in 6 women and 1 in 19 men have experienced stalking during their lifetime

Stalking Resource Center, Nat'l Center for Victims of Crime , www.ncvc.org/src

Crim Stalking Injunctions- Information from Utah Admin. Office of the Courts

- CY 2008 - 13 (Yet 87 cases qualified PIA, PNC or PG or FG)
- CY 2009 - 12 (Yet 60 cases qualified)
- CY 2010 - 4 (Yet 96 cases qualified)
- CY 2011 - 18 (87 cases qualified)
- **CY 2012- 25 (81 cases qualified)**

Civil Stalking Injunction

- CY 2008 - 228 and 34 dismissed
- CY 2009 - 217 issued and 27 dismissed
- CY 2010 - 828 requested and 190 issued
- CY 2011- 926 requested and 495 granted
 - If hearing was requested, 143 dismissed
- **CY 2012- 909 requested and 576 granted**
 - If hearing was requested, 112 dismissed
 - Others were denied, dismissed, dismissed w/ prejudice, dismissed w/o prejudice, no cause of action or transferred

Definitions- §76-5-106.5

"Course of conduct" means two or more acts directed at or toward a specific person, including

- acts in which the stalker follows, monitors, observes, photographs, surveils, threatens, or communicates to or about a person, or interferes with a person's property
 - directly, indirectly, or through any third party and by any action, method, device or means
- or*
- when the stalker engages in any of the following acts or causes someone else to engage in any of these acts
 - approaches or confronts a person
 - appears at a person's workplace or contacts the person's employer or co-workers
 - appears at a person's residence or contacts a person's neighbors or enters property owned, leased or occupied by a person
 - sends material by any means to the person for the purpose of obtaining or dissemination information about or communicating with the person' to a member of the person's family our household, employer, coworker, friend or associate of the person
 - places an object on or delivers an object to property owned, leased or occupied by a person or to the person's place of employment with the intent that the object be delivered to the person
- uses a computer, the Internet, text messaging or any other electronic means to commit an act that is part of the course of conduct

"Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

"Emotional distress" means significant mental or psychological suffering, whether or not medical or other professional treatment or counseling is required

"Reasonable person" means a reasonable person in the victim's circumstances

"Text messaging" means a communication in the form of electronic text or one or more electronic images sent by the actor form a telephone or computer to another person's telephone or computer by addressing the communication to the recipient's telephone number

Crime §76-5-106.5(2),(3)

A person is guilty of stalking who:

- intentionally or knowingly engages in a course of conduct directed at a specific person **and**
- knows or should know that the course of conduct would cause a reasonable person:
 - to fear for the person's own safety or the safety of a third person **or**
 - to suffer other emotional distress

A person is also guilty of stalking who intentionally or knowingly violates

- a civil stalking injunction, **or**
- a permanent criminal stalking injunction issued pursuant to this section.

No Defense §76-5-106.5(4)

- that stalker was not given actual notice that the course of conduct was unwanted **or**
- that the stalker did not intend to cause the victim fear or other emotional distress

Jurisdiction §76-5-106.5(5)

- may be prosecuted in any jurisdiction where one or more of the acts that is part of the course of conduct was initiated or caused an effect on the victim

Penalties §76-5-106.5(6), (7), (8)

- **Class A misdemeanor**
 - if first stalking conviction **or**
 - if offender violated civil stalking injunction
- **Third degree felony**
 - if previously convicted of stalking in Utah or some other jurisdiction **or**
 - has previously been convicted of felony in Utah or other jurisdiction that involved victim of current offense or member of victim's immediate family **or**
 - violated a permanent criminal stalking injunction **or**
 - stalker is or was a cohabitant of the stalking victim
- **Second degree felony**
 - stalker used a dangerous weapon or other means or force likely to produce death or serious bodily injury in the commission of the stalking **or**
 - has previously been convicted of
 - violating a permanent criminal stalking injunction **or**
 - stalking a cohabitant**or**
 - has previously been convicted two or more times for stalking in Utah or some place else **or**

- previously convicted two or more times of felonies involving same stalking victim in Utah or some place else **or**
- has been previously convicted two or more times, in any combination of stalking, in Utah or someplace else or
- has been previously convicted of stalking a cohabitant or
- has previously been convicted of violating a permanent criminal stalking injunction

Permanent Criminal Stalking Injunction §76-5-106.5(9-16)

- **Application**

- A conviction for stalking or a plea accepted by the court and held in abeyance for a period of time serves as an application for a permanent criminal stalking injunction limiting the contact of the defendant and the victim. **(Statistics from the state court administrator's office show these orders are highly underutilized. It is imperative for victim safety that the prosecutor requests this be issued on every case!)**

- **Process**

- A permanent criminal stalking injunction shall be issued at the time of the conviction. The court shall give notice to defendant of right to request hearing.
- If the defendant requests a hearing, it shall be held at the time of the conviction unless the victim requests otherwise, or for good cause.
- If the conviction was entered in a justice court, a certified copy of the judgment and conviction or a certified copy of the court's order holding the plea in abeyance shall be filed by the victim in the district court as an application and request for hearing for a permanent criminal stalking injunction.

- **Relief**

- A permanent criminal stalking injunction shall be issued by the district court granting the following relief, where appropriate:
 - order restraining the defendant from entering the residence, property, school, or place of employment of the victim;
 - requiring the defendant to stay away from the victim **and to stay away from any specified place that is named in the order and is frequented regularly by the victim;
 - an order restraining the defendant from making contact with the victim, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm, including personal, written, or telephone contact with the victim, the victim's employers, employees, fellow workers, or others with whom communication would be likely to cause annoyance or alarm to the victim;
 - any other order the court considers necessary to protect victim and members of victim's immediate family or household.
- ** if victim and defendant have minor children together, court may consider provision re: defendant's exercise of custody and parent-time rights while ensuring the safety of the victim and any minor children. If court issues permanent criminal stalking injunction but declines to address custody and parent-time issues, a copy of the stalking injunction shall be filed in any action in which custody and parent-time issues are being considered and that court may modify the injunction to balance the parties' custody and parent-time rights.

- **Termination**
 - A permanent criminal stalking injunction may be dissolved **only** upon application of the victim to the court which granted the order.
- **Statewide network**
 - Notice of permanent criminal stalking injunctions shall be sent by the court to the statewide warrants network
- **Effective statewide**
 - *(may also be enforceable nationwide... see 18 USC 2266)*
- **Violation**
 - constitutes an offense of stalking, a felony (may be a 3rd degree or 2nd degree felony).
 - Violations may be enforced
 - in a civil action initiated by the stalking victim
 - a criminal action initiated by a prosecuting attorney, or
 - both civil and criminal action.

Stalking is a series of actions that, when taken individually, may be perfectly legal. However, when you show the course of conduct in context of the relationship of the parties as well as the prior bad acts of the defendant involving the victim, the fact finder is better able to determine the reasonableness of the victim's fears as well as the reasonableness of the anticipated or expected harm.

California Coalition Against Sexual Assault

Civil Stalking Injunctions - Title 77, Chapter 3a, Parts 101 through 103

- No cost to file, serve or obtain one certified copy of injunction and one certified copy of proof of service
- Requires corroborating evidence be attached to verified petition (police reports, affidavits, letters, or other evidence to support stalking petition)
- If court finds there is reason to believe stalking has occurred, an ex parte (temporary) civil stalking injunction may be issued
- Must be served on respondent w/in 90 days from date order signed; if not, process must be initiated again
- Court can
 - Prohibit respondent from committing stalking;
 - Prohibit respondent from coming to residence, place of employment or school or other specifically designated places;
 - Prohibit respondent from contacting victim directly or indirectly, including fellow workers, employers, employees or others with whom communication would be likely to cause annoyance or alarm to the victim;
 - Order other relief necessary or convenient for the protection of the victim and other specifically designated persons under the circumstances
 - ** If victim and stalker have minor children, court shall follow provisions of Section 78B-7-106 and take into consideration the stalker's custody and parent-time rights while ensuring the safety of the victim and minor children. If court declines to address custody and parent-time issues, a copy of the stalking injunction shall be filed in any action in which custody and parent-time issues are being considered.
- Effective when served on respondent
- Within 10 days of service, respondent can request, in writing, a hearing. Burden is on petitioner to show by a preponderance of the evidence that stalking occurred and respondent is the stalker
- If burden met, court will issue civil stalking injunction which expires after 3 years from date of service of ex parte injunction.
- If respondent does not request hearing w/in 10 days of service, ex parte order automatically becomes civil stalking injunction w/o further notice to respondent and expires 3 years from date of service of ex parte injunction.
- Respondent still can request, in writing, one hearing on the matter but then has burden to show good cause why should be dismissed
- If ex parte order modified at the hearing, the ex parte order will continue to protect the petitioner until the civil stalking injunction is served on the respondent
- Stalking injunctions are entered onto the statewide network by the court clerk's office
- Petitioner can request dismissal at any time
- **Violation = Class A misdemeanor**; victim can also pursue civil remedies or both civil and criminal action can be taken (§77-3a-103)

- After a hearing with notice to the affected party, court may enter order requiring any party to pay costs of action, including reasonable attorney fees

Mandatory arrest if police have probable cause to believe that either a civil or criminal stalking injunction has been violated (§ 77-3a-103)

Typologies of Stalkers

Simple obsessional:

- involves interpersonal relationships (i.e., ex-boyfriend/girlfriend, ex-husband/wife, co-workers, neighbors, etc.) **stalker seeks to re-establish relationship; if that fails, then revenge and retaliation**
- this is the most dangerous type of stalking case
- cases become more dangerous as they progress from the less personal modes of contact (phone calls, letters) to the more personal forms of contacts (physical stalking, physical approach).
- communicated threats are a significant indicator defining a high-risk case
- prior criminal violations also raise a risk of harm in any particular case
- this is the most common type of stalking
 - Tjaden/Thoennes study for the Center for Policy Research found that stalking lasts 1.8 years on average but stalking by intimate partners lasts twice as long
- many of the stalkers have personality disorders

Love obsessional

- no relationship between parties (i.e., fan/celebrity, unknown apartment tenant, unknown admirer at work) **stalker seeks to establish relationship with target**
- most of a suspect's initial contacts with a victim are via correspondence
- factors which enhance risk include:
 - excessive number of letters
 - stated intention or evidence of directed travel to encounter the victim
 - duration of a year or more
 - stalkers are mostly male
 - longest in duration
 - have major mental disorders

Erotomania

- subject believes he/she is loved by another. Cases can develop between fan and celebrity, or in more ordinary settings such as secretary and superior. **Stalker believes relationship already exists**
 - rare in general population
 - no cure
 - stalkers predominantly female/victims usually older males
 - although these suspects are very resourceful and will engage in a variety of contact behaviors, they are most often reserved and will not normally attempt face-to-face dialogue
 - because they believe they are "loved" by the victim, they are, by their nature, not inclined to harm the victim. A communication which shows a change in "tone," wherein the suspect communicates frustration, anger or intent to harm, should be considered as posing a significant risk to the victim

False victimization

- **stalker (false victim) postures himself/herself as a victim of stalking**
- rare
- stalker, usually female, attempting to re-establish relationship with significant other
- however, other police and prosecuting agencies in Utah who have experience dealing with these kinds of stalkers find these stalkers appear to have a “need for attention” as a common factor; these stalkers are needing/seeking/thriving on the attention of the “authorities” who respond to their complaints (police, victim advocates, prosecutors, etc.)

Vengeance/Terrorism Stalking

Not seeking a personal relationship with target

- Purpose of stalking is to attempt to elicit a particular response or change of behavior from their victims
- Two types
 - Vengeance
 - Seek only to punish for some perceived wrong
 - Most common involves fired employee
 - Political stalker
 - using stalking as a weapon of terror to accomplish a political agenda; force target to engage in or refrain from particular activity
 - Example: anti-abortionists stalking drs. who perform abortions

John Douglas, retired FBI profiler, uses other classifications in his book, *Obsession: The FBI's Legendary Profiler Probes the Psyche of Stalkers and their Victims and Tells how to Fight Back*, Simon & Schuster, 1998

- **Attachment seekers, aka romantic stalkers**– motivated by desire to form relationship with person they stalk
- **Identity seekers**– looking for fame and recognition they can attain through acts
- **Rejection based stalkers** –looking for revenge (most dangerous, more likely to kill their prey)
- **Delusion based stalkers** –believe there is a force heading them to fulfill a mission (hardest to treat, least predictable)

Common Stalking Behaviors

- Violations of any protective order(visits to home or other location, contact, etc.)
- Telephone calls or other electronic communications that are harassing, threatening, obscene or otherwise
- Mail or deliveries (cards, letters, gifts) to victim
- Trespassing
- Burglary or trespass to victim's home (often shows no forced entry because stalker has key)
- Following victim on foot or in vehicle
- Threats: direct; veiled; or conditional
- Vandalism of victim's property, home, pets, vehicles, workplace or vandalism of property of a family member or friend
- Stalkers will unscrew security or outside lights around victim's house or disable the alarm system or disable victim's vehicle
- Stalker monitors victim's cell phone
- Stalker installs "spyware" on victim's computer
- Stalkers sometimes plant listening devices and/or cameras in victim's home
- Stalkers file "Change of Address" forms at Post Office with the victim's info in order to intercept the victim's mail (utility bills, other bills, personal mail, etc.)
- Stalker uses 3rd parties (children, friends, private investigators) to unknowingly stalk victim

All conduct of the suspect should be considered and evaluated to determine if other criminal charges should be filed such as assault, trespass, threat against life or property, electronic harassment, violation of a protective order, criminal mischief, voyeurism, etc.

Note: Utah's stalking statute covers "cyberstalking" - stalking through email or other electronic means. If the electronic communication does not rise to the level of threat but is damaging to the reputation or other thing of value of the victim, federal law may be helpful, (Title 18 USC Sec 875 Interstate Communications).

You may also want to look at federal stalking laws, Title 18 USC 2261A, as well as other federal laws such as tampering with mail. You can contact the US Attorney's Office, the FBI, the Postal Inspector, etc. for assistance.

Suspect Intervention

- **Police contact**
 - In person to give verbal “cease and desist” to alleged stalker
 - by letter giving written notice of “cease and desist” to alleged stalker
 - if arrest, may want to request increased bail based upon stalker’s course of conduct and lethality assessment; request prosecutor to ask court for order as condition of defendant’s release to have no contact with victim
 - utilize “involuntary commitment” procedure if warranted
 - be aware that some stalkers may encourage mental health commitment to avoid responsibility and accountability of actions
- **Victim**
 - tell stalker, one time only, “**NO**” and then have no further contact with stalker; don’t negotiate with stalker and don’t try to “let down easy”.
 - obtain civil stalking injunction against stalker if non-cohabitant ; get protective order if cohabitant
- **Prosecutor**
 - request increased bail based upon stalker’s course of conduct and lethality assessment; ask court for order as condition of defendant’s release to have no contact with victim or other conditions as warranted
 - if DV stalking, consider asking for “no bail” pursuant to Section 77-36-2.5(12) as well as Pre-trial Criminal Protective Order
 - if not DV stalking, request no-contact order for victim as condition of defendant’s release pending trial
 - Also consider if defendant eligible for mental health court as that program has the necessary accountability, monitoring and consistency this type of defendant needs
 - Even on a misdemeanor conviction, minimum sentence request should be **formal probation**, not informal or court probation, with mandatory completion of psychiatric or psychological evaluation and treatment program, as well as substance use monitoring if appropriate. These defendants should be closely monitored by probation. Consider electronic monitoring through private provider, paid for by defendant.

**Stalkers are never
“normal” individuals
even though they may
appear to be so**

Investigative Strategies

Gathering and Developing Evidence

Initial Responders

- Many times police will be called to investigate a violation of a protective order or a minor violation such as trespass involving cohabitants or dating partners. Officers need to be aware that there is a good chance that this incident is not the first such event. Officers need to get more information regarding prior occurrences, were they reported and if so, how the prior cases were adjudicated. Because such crimes are typically one-on-one occurrences, officers need to take time to investigate whether there is any way to corroborate the incident.
- **Questions to Ask the Victim and Witnesses**
 - Have other crimes or threatening behavior occurred? (vandalism, calls, letters). If yes, when where, and how; were there any witnesses?
 - How long has the stalking behavior been going on?
 - Have any prior crime reports been completed? What types? What agencies? What is the status of those investigations?
 - Are there any restraining orders such as protective orders, stalking injunctions or civil restraining orders in effect? When and where were they obtained? Was the suspect served?

Subsequent Investigation (Detective)

- **Victim Interview**
 - Determine if victim has maintained a diary or log of prior events. If not, instruct victim how to keep such a log. Such information is useful in developing evidence to prove the elements of the crime. (See *sample 'stalking incident diary' form to give to victims at end of this chapter*)
 - Instruct victim on what types of evidence are important (i.e., phone tapes, video tapes, use of third party witnesses to corroborate events and dates).
- **Suspect interview.**
 - The suspect should be interviewed whenever possible either during the investigation or subsequent to arrest.

Third Party Interview

- Other potential witnesses such as neighbors, co-workers, relatives, police officers from prior incidents, etc., should be interviewed. The victim is the best source of information to discover other witnesses.

Using Technology as Evidence

- Law enforcement personnel and prosecutors must work with phone companies (cell and LAN line), the post office, etc. They must also be aware

of the various methods of stalking and how to track down evidence linking these items to the suspect.

- Phone/cellular phones. Use consent, search warrants and/or administrative subpoenas to obtain billing statements, telephone service records, toll records. Use bill file records for telephone and cellular phones.
- Facsimile.
 - A fax becomes a hard copy document that has a date and time stamp.
 - If the suspect's machine is seized pursuant to a search warrant, it may have a report that would show numbers dialed.
 - Use search warrants and/or subpoena duces tecum to obtain toll records on the fax number.
- Computer /E-mail/Internet/Texts
 - With a closed E-mail system, signature ID may be left, such as a company fax number, employee ID number, etc.
 - Search warrant to seize suspect computer outside the workplace.
 - Suspect may save messages on his hard drive.
 - victim can give consent to search of own emails, texts sent and received
 - Search warrant for content of suspect's emails, texts; search warrant to seize cell phone or other electronic device

Technology Used by the Stalker

Technology often is outpacing state laws

- Types
 - **Global positioning satellite devices**
 - GPS tracking systems placed in victim's car
 - GPS technology in cell phones
 - **Telephones**
 - Pre-paid cell phones given to V or to kids gives stalker access to billing info (calls made & received)
 - Some cordless phones can still be monitored by police scanners and baby monitors
 - Use of calling cards by stalker: no way to trace
 - TTY - stalkers can impersonate victim so victim needs code word so others know V is really V; also TTY keeps history so V needs to clear
 - Family billing plans: billing records are shared (stalker knows who family is calling and who is calling family)
 - Certain cell phones can be set on "auto answering" and "silent" mode so that when stalker calls V's cell phone, V doesn't hear it ring and cell phone turns into listening device
 - **Cameras**
 - Can be hidden in gifts to v or kids, hidden in V's home; can be activated by remote

- **Internet**
 - “legitimate” sites: sex chat rooms, adult websites where stalker posts personal info on V; can also post messages encouraging others to stalk and harass V
 - Stalker can set up a personal website in victim’s name with personal info; stalker can set up stalker’s own personal website describing obsession
 - There are websites that provide anonymous email services (so stalker can’t be tracked); stalkers can create phony email addresses
 - Websites that gather info on victims for a fee
 - Stalkers networking websites
 - Vendors of stalking products; surveillance products
 - Websites that give advice on how to stalk

- **Spyware**
 - Software installed in victim’s computer that allows stalker to keep track of everything victim does on computer (emails, websites visited); can be installed physically or thru email attachment and some cannot be removed from computer once installed

Administrative Subpoenas

- Section 77-22-2.5 of the Utah Code allows a prosecuting attorney to authorize the issuance of an administrative subpoena to a service provider if a law enforcement agency is investigating the offense of stalking and has reasonable suspicion that an electronic communication system or service or remote computing service has been used in the commission of the offense. This admin subpoena can require the production of the following info:
 - names of subscriber; addresses of subscriber;
 - local and long distance telephone connections;
 - records of session times and durations; length of service, including start date and types of service utilized;
 - telephone or other instrument subscriber numbers or other subscriber identifiers, including any temporarily assigned network address;
 - and means and sources of payment for the service including any credit card or bank account numbers

Use of Search Warrants

- Law enforcement must be able to construct a search warrant to obtain vital evidence linking a suspect to acts of stalking and harassment. Items that should be included:
 - Weapons and ammunition
 - Items belonging to the victim
 - Computers and storage media (disks, CDs, thumb drives, etc)
 - Copies of letters sent to victims
 - Telephone bills
 - Postal receipts for delivery of letters or packages to victim
 - Photographs of the victim
 - Instrumentalities such as fax machines, typewriters, packaging

materials, electronic communication devices, etc.; need search warrant for content of email accounts, other social media accounts, etc.

Areas of Concern

- Types of Problem Situations
 - Ongoing divorce/custody battles.
 - Property litigation
 - Business disputes
 - Workers' compensation claims
 - Partnership litigation
 - Unlawful discharge
 - Neighborhood complaints
 - Zoning
 - Loud dogs, parties, music
 - Mutual Restraining Orders

Be aware that suspects will often utilize the court system to maliciously counter sue or file a PO in an attempt to dissuade or discredit the victim.

Victim Credibility

- Law enforcement personnel and prosecutors need to establish a victim's credibility or lack of credibility:
 - Criminal background check should be run to determine if victim has prior or pending record
 - Emphasize to victim that he/she should be completely honest with investigator and prosecutor, even if it means revealing something private or embarrassing
 - Investigators should be alert to ensure that victim is not reporting false or exaggerated facts to enhance the case or other inappropriate motivations

Long Term Basis

- Detectives and prosecutors must be prepared to handle these cases on a long-term basis:
 - Pre-filing: gathering evidence
 - Post-filing: working together for a successful prosecution
 - Post-conviction: detectives and prosecutors must address the issue of what happens to the victim and others involved in the case when the defendant gets released on probation or parole. **DO NOT FORGET PERMANENT CRIMINAL STALKING INJUNCTION FOR VICTIM!**

Evidentiary Issues Common to Stalking Cases

Reconstruction of Crime, Use of Exhibits Dates/Times/Places

- Stalking by definition involves a pattern of conduct.
- Investigators and prosecutors must work with victim to reconstruct dates/times/ places
- Investigators should try to find witnesses to events, whether helpful or not to the prosecution.
- Consider documentary evidence and other exhibits such as 911 reports, phone or work records that will help identify dates of events.
- Prosecutors and investigators have to account for the lapse of time between the initiation of contact by the defendant and the date of complaint or trial.

Burden of Proof

- State has the burden of proof on such issues as reasonableness of victim's fear or emotional distress (reasonable person standard), identity of the stalker, and defendant's mens rea (state of mind..knew or should have known).
 - Threats:
 - Consider not just words but over gestures or conduct considered in light of prior history between the parties ...context ...context...context.
 - Argue perception of the conduct by a reasonable person in the victim's circumstances.
 - Fear
 - Consider past history of parties when reviewing whether conduct would place reasonable person in fear.
 - Identity
 - Anonymous acts are problematic; Consider how anonymous acts can be tied to defendant.
 - Documentary evidence (e.g., phone records; handwriting expert; credit card bills or clerk in store (e.g., flowers); phone traps; hang-ups.
 - Consider establishing identity through opportunity and notice; fingerprinting (also involves educating victim how to handle evidence); voice exemplars; search warrants (e.g., for typewriter, printer or paper used for note); do not overlook fact that defendant may have used third parties to carry out his/her act -- can help you to find additional witnesses or records.
 - Mens Rea
 - Sometimes defendant's own statements will help prove element of mens rea, but sometimes prosecutor must rely upon circumstantial evidence.

- Past history is significant, helps to characterize the act.

Victim Credibility

- Prosecutor must educate juries on victim dynamics, including ambivalence, recantation, reluctance to testify (especially true in DV cases, often referred to as “counter-intuitive behaviors”).
- Consider using experts to explain dynamics or victim’s responses to trauma
- Any corroborative evidence will help establish victim credibility.
- Any demonstrative evidence or exhibits are helpful.
- Witness preparation is crucial. Prosecutor should be prepared to argue that past history between the parties is relevant to establish whether act constituted a threat or fear to reasonable person in victim’s circumstances.

Prior Acts, Subsequent Acts, Similar Crimes

- With same victim -- prior and subsequent acts establish the pattern of conduct required for conviction; seemingly insignificant or innocent acts become meaningful; establishes identity; motive; mens rea; reasonableness of victim’s fear; establishes threatening nature of an “innocent” act.
- With different victim--prior or subsequent acts establish identity (acts are not being offered to show propensity but identity of anonymous caller/corresponder).

Use of Exceptions to the Hearsay Rule

- Spontaneous exclamations (excited utterances) by victim
 - Most significant hearsay exception in stalking cases, particularly in simple obsessional (DV) stalking case where victim may be reluctant to testify, or invokes privilege not to testify, or for other reason, victim is not available. **Remember Crawford issues and concerns!**
 - Statement made contemporaneously (or near contemporaneously) with event that precipitated the excitement while victim or witness is under stress of exciting event, such that premeditation of fabrication claim is mitigated (“call the police; he just followed me and threatened me!).
 - Police must include statement in police report to negate cross-examination as to why statement is not included in report.
 - Police should also take note of victim’s demeanor when statement is made so that foundation for admissibility (declarant appears to be under stress) can be established by prosecutor.
 - Prosecutor should argue that spontaneous exclamation as exception to hearsay rule was not invented for purposes of stalking/domestic violence cases—it appeared as an exception to the hearsay rule many years ago.
- Prior inconsistent statements
 - Admissible for impeachment purposes if witness is available and testifies.
- Prior testimony (declarant “unavailable,” e.g., asserts marital privilege).

- Consider feasibility at time of arrest of having victim testify at preliminary hearing or bail hearing and offering defendant opportunity to cross-examine so that prosecutor develops prior reported testimony that meets foundational requirements. *Satisfies Crawford concerns*
- Foundation requirements are that declarant is unavailable; statement is made under oath in a proceeding where the issues were substantially the same as in the current proceeding; and the party against whom it is offered (usually the defendant) had opportunity to cross-examine. Need reliable record such as transcript, recording, video tape.
- Defendant's Admissions.
 - No requirement that statement be incriminating, inculpatory, or inconsistent with what he thought his best interests were when made. Admissible whether or not defendant testifies.
 - Both oral and written (e.g., letters) statement are admissible.
 - Testimony given by defendant in prior court proceeding is admissible as an admission, whether or not he testifies in subsequent proceeding.
- Past recollection recorded and present recollection revived.
 - Can be effectively used in stalking cases where events are prolonged and victim has kept diary.
 - Witnesses often can find recalling events difficult.
 - Past recollection recorded: document embodying witness's forgotten knowledge can be admitted for truth of assertions contained in the document. Foundation to be established is that witness once had personal knowledge of facts but has insufficient recollection of them. Reading memorandum does not refresh recollection, but witness can testify that at the time he/she made it, events were fresh and memorandum accurately recorded events. (*Stalking incident diary/Log*)
- Business records.
 - Generally, records kept by any business are admissible if entries were made in good faith, in the regular course of business, before the action was begun, and it was the usual course of business to make the entry at the time of the event recorded or within a reasonable time thereafter.
 - Examples of business records include: invoices, phone records, police records, such as police log indicating what time call was received or report of damage to car.
 - This does not mean that all statements contained in the record are admissible. Each level of hearsay must satisfy an exception to the hearsay rule.
 - Consider: telephone records, hospital records, computer and e-mail records, fax records.
 - Custodian of records or person familiar with how records are

- generated may testify.
 - Also consider also use of defendant’s work or school attendance records to show opportunity or identity.
- Public Records.
 - Official or public records may be admitted as exception to hearsay rule if made by a public officer in the performance of his official duty.
 - This does not mean that second level hearsay statements will necessarily be admitted.
 - For example, assume victim submits affidavit in support of application for PO naming defendant and alleging he assaulted her. Victim later recants. Prosecutor cannot offer affidavit as substantive evidence to establish identity of person who assaulted victim: victim’s statement needs other basis of admissibility in order to satisfy due process, confrontation concern [e.g. Mass. case: *Commonwealth v. Kirk*, 39 Massachusetts App. Ct. 225, 654 N.E.2nd 938 (1995) (victim’s spontaneous exclamation, “my boyfriend did this” was properly admitted, but reversible error to admit application for restraining order and supporting documentation as proof of identity of defendant as “boyfriend” where victim refused to testify)].

Physical Evidence and Authentication

- Telephone calls: authentication involves witness’s identification of voice (prior familiarity; voice “line-up;” recordings; use of experts). Prosecutor does not have to establish that victim and individual have ever met in person, if there are other circumstances that establish identity of speaker.
- Letters: authentication involves identification of handwriting (prior familiarity; search warrant; use of expert for comparison) or of typed document (establish access to certain word processing equipment, for example).

Defenses Common to Stalking Cases

First Amendment

- The right to speak and associate freely is not absolute.
- Sometimes the constitutional right of speech and association has to be balanced against the right of privacy and to be left alone.

Mental Illness

- There are at least two mental issues that can be asserted as a defense: competency and responsibility.
 - Competence.
 - As in any other type of case, if the defendant is not competent to stand trial, the trial cannot proceed. Prosecution is barred.
 - The prosecutor, therefore, must be vigilant at the earliest stages, e.g., at arraignment, to make sure that if competence is an issue, the groundwork is laid for an evaluation.(see §77-15-3).
 - Also, the prosecutor should ensure that notwithstanding any competency evaluation that might precede the defendant's arraignment, there is an appropriate bail order and a speedy arraignment.
 - Otherwise, the prosecutor runs the risk of not being able to put into evidence statements given by the defendant and other evidence generated in the interim (defendant will likely argue that such evidence is fruit of the poisonous tree [the illegal detention]).
 - Responsibility
 - The defendant may be competent but assert mental illness as a defense to responsibility. The defendant must give written notice of intent to assert the defense pursuant to §77-14-4, at time of arraignment or soon thereafter, but no later than 30 days prior to trial. Court will order an examination of the defendant under §77-16a-301.

Alibi

- Stalking, by definition, involves a pattern of conduct.
- If the prosecution is relying on only two acts, however, and the jury believes the defendant's alibi as to one of the acts, the crime has not been proven because no "course of conduct" (two or more acts) has been established.
- The investigator should investigate the alibi claim of the defendant in an effort to meet it. Notice of intent to claim alibi must be filed in writing by the defense so that the prosecution has an opportunity to investigate it and rebut it. (See §77-14-2).
- The investigation will involve an exploration of the relationship between the defendant and the party offering the alibi so as to allow for effective impeachment of the alibi witness.
- Also, investigator should measure distances -- often a witness will be wrong about how long it takes to get from one place to another.

- Remember to explore ways to obtain documentary information or the absence of documentary information: if the defendant indicates s/he bought something in a store, see if invoice can be produced from the store; if the defendant indicates s/he took a taxicab, see if the fare can be located on the log. If s/he indicates he took a bus, check out the route yourself.
- sometimes, alibi witness was with the defendant that day, but not for the time period stated.
- Prosecutor's cross-examination will include not only impeachment on account of bias, but impeachment on account of broadness of alibi.

Anonymity

- One of the hardest issues investigator/prosecutor has to confront is how to attribute "anonymous" conduct to the defendant.
- Anonymous telephone calls, for example, or "hang ups" may in fact be excluded if there is no basis upon which the calls can be attributed to the defendant. Or, the victim may find that his/her property is damaged.
- The success of the prosecution will depend upon the evidence the investigator is able to develop during the investigative stage about each act -
- telephone records; telephone trap and trace; fingerprints; identifying stationery or postmarks; eyewitnesses; computer records, etc.

"He/She never said stop."

- This defense goes to the element of "mens rea" and threat
- Utah's stalking statute was amended in 2008 to address this issue
 - it is **no defense** that the stalker was not given actual notice that the course of conduct was unwanted (§76-5-106.5(4)(a))
- Prosecutor's job is to persuade the jury that even the receipt of flowers, for example, can be meant by the defendant, and perceived by a reasonable person as a threat.

Cultural Behavior

- Prosecutors should be familiar with cultural differences among their victims and be prepared to explain cultural phenomena to the jury that may explain why, for example, victim at first forgave defendant's behavior or did not perceive it as wrong or dangerous.
- may also want to consider use of expert who has dealt with stalking victims to dispel myths, explain reactions or counterintuitive behaviors of victim. Prosecutors should be sensitive to any biases on the part of the individual jurors and may consider submitting questions to be used in a voir dire of the jury.

Countersuits by Defendant

- The defense of countersuit by the defendant should be treated like any other impeachment issue.
- The prosecutor and investigator must ask the victim whether the defendant has any information that can be used to undermine his/her credibility, to show his/her bias or financial interest in the matter, or otherwise to

- undermine an element that the prosecution must prove.
- Generally, courts liberally allow evidence relating to bias or credibility.
- Prosecutor and investigator must check to see whether the victim has a criminal record; whether the victim has falsely claimed victimization before; whether the victim has instituted a civil suit (prosecutor should discuss this with victim at the beginning as to the possible impact, positive or negative, it could have on the criminal case).
- In case of simple obsessional (spouse, girlfriend, child-in-common situation) stalking, prosecutor should prepare victim to handle issues relating to any action pending in family court, e.g., custody of child.
- Prosecutor should not lose control of criminal case to civil attorney.
- Prosecutor also must deal with discovery issues. If a civil case is pursued by the victim against the stalker, the prosecutor must be vigilant as to what information comes from that civil suit: depositions, admissions, etc.

What Victims Often Hear from Police and Prosecutors

- “There’s nothing we can do”.
- “It’s not a crime to drive on a public street past your house...walk on a public sidewalk past your house...be in a public place watching you...etc”.
- “If he’s not actually threatening you, there’s nothing we can do; simply watching you is not enough”.
- “If you didn’t see the person do it (damage to property, etc.) there’s nothing we can do”.

What Police and Prosecutors Can Do

- Know the stalking statute and its elements
- Be willing to spend the time investigating and prosecuting
- Let the victim “help you” investigate by keeping diaries, taking photos, setting up video cameras, getting “Caller ID”, utilizing “Last Call Return”, etc. (See Appendix B for Stalking Report Log)
- review all categories of evidence
 - victim’s conduct
 - suspect’s/defendant’s conduct
 - physical evidence
 - civil witnesses
 - law enforcement witnesses
 - circumstantial evidence
- Always keep an open mind

Strangulation

- In strangulation cases - even where the strangulation results in death - 50 per cent of victims have no external injury and 35 per cent of victims have very minor external injury that cannot be captured by photographs.
- Most domestic violence victims have been strangled multiple times, with victims reporting more than 5 episodes of strangulation.
- Strangulation increases homicide risk. Half of domestic violence victims had been strangled by their perpetrators within 12 months before their death.
- Only 11 pounds of pressure placed on both carotid arteries is necessary to cause unconsciousness.
- Stroke can occur within 15 seconds. Cardiac arrest can occur within 30 seconds. Death can occur after 50 seconds of continuous complete oxygen deprivation.
- Due to damage to internal structures from strangulation, death can occur 36 hours or more after strangulation.
- Mental status changes may manifest soon after strangulation due to brain injury from oxygen deprivation.

Gael B. Strack, J.D., and George McClane, M.D., *Journal of Emergency Medicine*, 2001

Utah investigators and prosecutors are encouraged to prosecute strangulation as felony crimes. The Legislature “urges state and local law enforcement officers and prosecutors to investigate and prosecute as felonies assaults in which the defendant applied force to the neck or throat of the victim.” *Strangulation and Domestic Violence Joint Resolution, 2010.*

In 2010, Utah’s Aggravated Assault statute was changed to remove the requirement that the state prove that the defendant intended to cause serious bodily injury or death. Effective November 2010, the state must prove that the Defendant either: 1) uses a weapon OR 2) uses means or force likely to produce death or serious bodily injury.

Elements of Aggravated Assault, 76-5-103:

- A person commits an assault under 76-5-102, and uses either:
- a dangerous weapon, or
- other means or force likely to produce death or serious bodily injury.

An Aggravated Assault is either:

- A third degree felony, or
- If serious bodily injury is actually caused, a second degree felony.

Unconsciousness from strangulation has been found to be “serious bodily injury” in State vs. Poteet, 692 P2d 760 (1984) and State vs. Peterson, 681 P2d 1210 (1984). It is less clear that strangulation which does not produce unconsciousness is sufficient to sustain an aggravated assault conviction, but is within the “province of the jury” to decide. State vs. Bloomfield, 63 P3d 110 (2003).

VICTIMS RIGHTS

TITLE 77, CHAPTER 37, Utah Code

(See Appendix C for Victims rights manual, and Helping Immigrant Victims Manual)

77-37-1. Legislative intent.

(1) The Legislature recognizes the duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, the essential nature of citizen cooperation to state and local law enforcement efforts, and the general effectiveness and well-being of the criminal justice system of this state. In this chapter, the Legislature declares its intent to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law in a manner no less vigorous than protections afforded criminal defendants.

(2) The Legislature finds it is necessary to provide child victims and child witnesses with additional consideration and different treatment than that usually afforded to adults. The treatment should ensure that children's participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner

77-37-2. Definitions.

In this chapter:

(1) "Child" means a person who is younger than 18 years of age, unless otherwise specified in statute. The rights to information as extended in this chapter also apply to the parents, custodian, or legal guardians of children.

(2) "Family member" means spouse, child, sibling, parent, grandparent, or legal guardian.

(3) "Victim" means a person against whom a crime has allegedly been committed, or against whom an act has allegedly been committed by a juvenile or incompetent adult, which would have been a crime if committed by a competent adult.

(4) "Witness" means any person who has been subpoenaed or is expected to be summoned to testify for the prosecution or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether any action or proceeding has commenced.

77-37-3. Bill of rights.

(1) The bill of rights for victims and witnesses is:

(a) Victims and witnesses have a right to be informed as to the level of protection from intimidation and harm available to them, and from what sources, as they participate in criminal justice proceedings as designated by Section 76-8-508, regarding witness tampering, and Section 76-8-509, regarding threats against a victim. Law enforcement, prosecution, and corrections personnel have the duty to timely provide this information in a form which is useful to the victim.

(b) Victims and witnesses, including children and their guardians, have a right to be informed and assisted as to their role in the criminal justice process. All criminal justice agencies have the duty to provide this information and assistance.

(c) Victims and witnesses have a right to clear explanations regarding relevant legal proceedings; these explanations shall be appropriate to the age of child victims and

witnesses. All criminal justice agencies have the duty to provide these explanations.

(d) Victims and witnesses should have a secure waiting area that does not require them to be in close proximity to defendants or the family and friends of defendants. Agencies controlling facilities shall, whenever possible, provide this area.

(e) Victims may seek restitution or reparations, including medical costs, as provided in Title 63M, Chapter 7, Criminal Justice and Substance Abuse, and Sections 62A-7-109.5, 77-38a-302, and 77-27-6. State and local government agencies that serve victims have the duty to have a functional knowledge of the procedures established by the Crime Victim Reparations Board and to inform victims of these procedures.

(f) Victims and witnesses have a right to have any personal property returned as provided in Sections 77-24-1 through 77-24-5. Criminal justice agencies shall expeditiously return the property when it is no longer needed for court law enforcement or prosecution purposes.

(g) Victims and witnesses have the right to reasonable employer intercession services, including pursuing employer cooperation in minimizing employees' loss of pay and other benefits resulting from their participation in the criminal justice process. Officers of the court shall provide these services and shall consider victims' and witnesses' schedules so that activities which conflict can be avoided. Where conflicts cannot be avoided, the victim may request that the responsible agency intercede with employers or other parties.

(h) Victims and witnesses, particularly children, should have a speedy disposition of the entire criminal justice process. All involved public agencies shall establish policies and procedures to encourage speedy disposition of criminal cases.

(i) Victims and witnesses have the right to timely notice of judicial proceedings they are to attend and timely notice of cancellation of any proceedings. Criminal justice agencies have the duty to provide these notifications. Defense counsel and others have the duty to provide timely notice to prosecution of any continuances or other changes that may be required.

(j) Victims of sexual offenses have a right to be informed of their right to request voluntary testing for themselves for HIV infection as provided in Section 76-5-503 and to request mandatory testing of the alleged sexual offender for HIV infection as provided in Section 76-5-502. The law enforcement office where the sexual offense is reported shall have the responsibility to inform victims of this right.

(2) Informational rights of the victim under this chapter are based upon the victim providing the victim's current address and telephone number to the criminal justice agencies involved in the case.

77-37-4. Additional rights -- Children.

In addition to all rights afforded to victims and witnesses under this chapter, child victims and witnesses shall be afforded these rights:

(1) Children have the right to protection from physical and emotional abuse during their involvement with the criminal justice process.

(2) Children are not responsible for inappropriate behavior adults commit against them and have the right not to be questioned, in any manner, nor to have allegations made, implying this responsibility. Those who interview children have the responsibility to consider the interests of the child in this regard.

(3) Child victims and witnesses have the right to have interviews relating to a criminal prosecution kept to a minimum. All agencies shall coordinate interviews and ensure that they are conducted by persons sensitive to the needs of children.

(4) Child victims have the right to be informed of available community resources that might

assist them and how to gain access to those resources. Law enforcement and prosecutors have the duty to ensure that child victims are informed of community resources, including counseling prior to the court proceeding, and have those services available throughout the criminal justice process.

(5) Child victims have the right, once an investigation has been initiated by law enforcement or the Division of Child and Family Services, to have their investigative interviews that are conducted at a Children's Justice Center, including both video and audio recordings, protected. Except as provided in Subsection (5)(b) and (c), interviews may not be distributed, released, or displayed to anyone without a court order.

(a) The court order:

(i) shall describe with particularity to whom the interview may be released and prohibit further distribution or viewing by anyone not named in the order; and

(ii) may impose restrictions on access to the materials considered reasonable to protect the privacy of the child victim.

(b) Following the conclusion of any legal proceedings in which the recordings or transcripts are used, the court shall order the recordings and transcripts in the court's file sealed and preserved.

(c) (i) The Division of Child and Family Services or law enforcement may distribute a copy of the interview:

(A) to the prosecutor's office;

(B) the Attorney General's child protection division;

(C) to another law enforcement agency; and

(D) to the attorney for the child who is the subject of the interview.

(ii) Any further distribution, release, or display is subject to this Subsection (5).

(d) In a criminal case, the prosecutor may distribute a copy of the interview to the attorney for the defendant or a pro se defendant pursuant to a valid request for discovery. The attorney for the defendant in a criminal case may permit the defendant to view the interview, but may not distribute or release the interview to their client. Any further distribution, release, or display is subject to this Subsection (5).

(e) Pro se defendants shall be advised by the court that an interview received as part of discovery is confidential and may not be distributed, released, or displayed without prior authorization from the court. A court's failure to give this notice may not be used as a defense to prosecution for a violation of the disclosure rule.

(f) Multidisciplinary teams or other state agencies that provide services to children and families may view interviews of children, and families for whom they are providing services, but may not receive copies.

(g) Violation of this section is:

(i) punishable by contempt if distribution, release, or display occurs before the resolution of the case and the court still has jurisdiction over the defendant; or

(ii) a class B misdemeanor if the case has been resolved and the court no longer has jurisdiction over the defendant.

77-37-5. Remedies -- District Victims' Rights Committee.

(1) In each judicial district, the Utah Council on Victims of Crime, established in Section 63M-7-601, shall appoint a person who shall chair a judicial district victims' rights committee consisting of:

(a) a county attorney or district attorney;

- (b) a sheriff;
 - (c) a corrections field services administrator;
 - (d) an appointed victim advocate;
 - (e) a municipal attorney;
 - (f) a municipal chief of police; and
 - (g) other representatives as appropriate.
- (2) The committee shall meet at least semiannually to review progress and problems related to this chapter, Title 77, Chapter 38, Rights of Crime Victims Act, Title 77, Chapter 38a, Crime Victims Restitution Act, and Utah Constitution Article I, Section 28. Victims and other interested parties may submit matters of concern to the victims' rights committee. The committee may hold a hearing open to the public on any appropriate matter of concern and may publish its findings. These matters shall also be considered at the meetings of the victims' rights committee. The committee shall forward minutes of all meetings to the Utah Council on Victims of Crime for review and other appropriate action.
- (3) If a victims' rights committee is unable to resolve a complaint, it may refer the complaint to the Utah Council on Victims of Crime.
- (4) The Utah Office for Victims of Crime shall provide materials to local law enforcement to inform every victim of a sexual offense of the right to request testing of the convicted sexual offender and of the victim as provided in Section 76-5-502.
- (5) (a) If a person acting under color of state law willfully or wantonly fails to perform duties so that the rights in this chapter are not provided, an action for injunctive relief may be brought against the individual and the government entity that employs the individual.
- (b) For all other violations, if the committee finds a violation of a victim's right, it shall refer the matter to the appropriate court for further proceedings consistent with Subsection 77-38-11(2).
- (c) The failure to provide the rights in this chapter or Title 77, Chapter 38, Rights of Crime Victims Act, does not constitute cause for a judgment against the state or any government entity, or any individual employed by the state or any government entity, for monetary damages, attorney fees, or the costs of exercising any rights under this chapter.
- (6) The person accused of and subject to prosecution for the crime or the act which would be a crime if committed by a competent adult, has no standing to make a claim concerning any violation of the provisions of this chapter.

RIGHTS OF CRIME VICTIMS ACT TITLE 77, CHAPTER 38

77-38-2. Definitions.

For the purposes of this chapter and the Utah Constitution:

- (1) "Abuse" means treating the crime victim in a manner so as to injure, damage, or disparage.
- (2) "Dignity" means treating the crime victim with worthiness, honor, and esteem.
- (3) "Fairness" means treating the crime victim reasonably, even-handedly, and impartially.
- (4) "Harassment" means treating the crime victim in a persistently annoying manner.
- (5) "Important criminal justice hearings" or "important juvenile justice hearings" means the

following proceedings in felony criminal cases or cases involving a minor's conduct which would be a felony if committed by an adult:

- (a) any preliminary hearing to determine probable cause;
 - (b) any court arraignment where practical;
 - (c) any court proceeding involving the disposition of charges against a defendant or minor or the delay of a previously scheduled trial date but not including any unanticipated proceeding to take an admission or a plea of guilty as charged to all charges previously filed or any plea taken at an initial appearance;
 - (d) any court proceeding to determine whether to release a defendant or minor and, if so, under what conditions release may occur, excluding any such release determination made at an initial appearance;
 - (e) any criminal or delinquency trial, excluding any actions at the trial that a court might take in camera, in chambers, or at a sidebar conference;
 - (f) any court proceeding to determine the disposition of a minor or sentence, fine, or restitution of a defendant or to modify any disposition of a minor or sentence, fine, or restitution of a defendant; and
 - (g) any public hearing concerning whether to grant a defendant or minor parole or other form of discretionary release from confinement.
- (6) "Reliable information" means information worthy of confidence, including any information whose use at sentencing is permitted by the United States Constitution.
- (7) "Representative of a victim" means a person who is designated by the victim or designated by the court and who represents the victim in the best interests of the victim.
- (8) "Respect" means treating the crime victim with regard and value.
- (9) (a) "Victim of a crime" means any natural person against whom the charged crime or conduct is alleged to have been perpetrated or attempted by the defendant or minor personally or as a party to the offense or conduct or, in the discretion of the court, against whom a related crime or act is alleged to have been perpetrated or attempted, unless the natural person is the accused or appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct or a crime or act arising from the same conduct, criminal episode, or plan as the crime is defined under the laws of this state.
- (b) For purposes of the right to be present, "victim of a crime" does not mean any person who is in custody as a pretrial detainee, as a prisoner following conviction for an offense, or as a juvenile who has committed an act that would be an offense if committed by an adult, or who is in custody for mental or psychological treatment.
- (c) For purposes of the right to be present and heard at a public hearing as provided in Subsection 77-38-2(5)(g) and the right to notice as provided in Subsection 77-38-3(7)(a), "victim of a crime" includes any victim originally named in the allegation of criminal conduct who is not a victim of the offense to which the defendant entered a negotiated plea of guilty.

77-38-3. Notification to victims -- Initial notice, election to receive subsequent notices -- Form of notice -- Protected victim information.

- (1) Within seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter.
- (2) The initial notice to the victim of a crime shall provide information about electing to receive notice of subsequent important criminal justice hearings listed in Subsections 77-

38-2(5)(a) through (f) and rights under this chapter.

(3) The prosecuting agency shall provide notice to a victim of a crime for the important criminal justice hearings, provided in Subsections 77-38-2(5)(a) through (f) which the victim has requested.

(4) (a) The responsible prosecuting agency may provide initial and subsequent notices in any reasonable manner, including telephonically, electronically, orally, or by means of a letter or form prepared for this purpose.

(b) In the event of an unforeseen important criminal justice hearing, listed in Subsections 77-38-2(5)(a) through (f) for which a victim has requested notice, a good faith attempt to contact the victim by telephone shall be considered sufficient notice, provided that the prosecuting agency subsequently notifies the victim of the result of the proceeding.

(5) (a) The court shall take reasonable measures to ensure that its scheduling practices for the proceedings provided in Subsections 77-38-2(5)(a) through (f) permit an opportunity for victims of crimes to be notified.

(b) The court shall also consider whether any notification system it might use to provide notice of judicial proceedings to defendants could be used to provide notice of those same proceedings to victims of crimes.

(6) A defendant or, if it is the moving party, Adult Probation and Parole, shall give notice to the responsible prosecuting agency of any motion for modification of any determination made at any of the important criminal justice hearings provided in Subsections 77-38-2(5)(a) through (f) in advance of any requested court hearing or action so that the prosecuting agency may comply with its notification obligation.

(7) (a) Notice to a victim of a crime shall be provided by the Board of Pardons and Parole for the important criminal justice hearing provided in Subsection 77-38-2(5)(g).

(b) The board may provide notice in any reasonable manner, including telephonically, electronically, orally, or by means of a letter or form prepared for this purpose.

(8) Prosecuting agencies and the Board of Pardons and Parole are required to give notice to a victim of a crime for the proceedings provided in Subsections 77-38-2(5)(a) through (f) only where the victim has responded to the initial notice, requested notice of subsequent proceedings, and provided a current address and telephone number if applicable.

(9) (a) Law enforcement and criminal justice agencies shall refer any requests for notice or information about crime victim rights from victims to the responsible prosecuting agency.

(b) In a case in which the Board of Pardons and Parole is involved, the responsible prosecuting agency shall forward any request for notice it has received from a victim to the Board of Pardons and Parole.

(10) In all cases where the number of victims exceeds 10, the responsible prosecuting agency may send any notices required under this chapter in its discretion to a representative sample of the victims.

(11) (a) A victim's address, telephone number, and victim impact statement maintained by a peace officer, prosecuting agency, Youth Parole Authority, Division of Juvenile Justice Services, Department of Corrections, and Board of Pardons and Parole, for purposes of providing notice under this section, is classified as protected as provided in Subsection 63G-2-305(10).

(b) The victim's address, telephone number, and victim impact statement is available only to the following persons or entities in the performance of their duties:

(i) a law enforcement agency, including the prosecuting agency;

(ii) a victims' right committee as provided in Section 77-37-5;

- (iii) a governmentally sponsored victim or witness program;
- (iv) the Department of Corrections;
- (v) the Utah Office for Victims of Crime;
- (vi) the Commission on Criminal and Juvenile Justice; and
- (vii) the Board of Pardons and Parole.

(12) The notice provisions as provided in this section do not apply to misdemeanors as provided in Section 77-38-5 and to important juvenile justice hearings as provided in Section 77-38-2.

77-38-4. Right to be present, to be heard, and to file an amicus brief on appeal -- Control of disruptive acts or irrelevant statements -- Statements from persons in custody.

(1) The victim of a crime, the representative of the victim, or both shall have the right:

- (a) to be present at the important criminal or juvenile justice hearings provided in Subsection 77-38-2(5);
- (b) to be heard at the important criminal or juvenile justice hearings provided in Subsections 77-38-2(5)(b), (c), (d), (f), and (g);
- (c) to submit a written statement in any action on appeal related to that crime; and
- (d) upon request to the judge hearing the matter, to be present and heard at the initial appearance of the person suspected of committing the conduct or criminal offense against the victim on issues relating to whether to release a defendant or minor and, if so, under what conditions release may occur.

(2) This chapter shall not confer any right to the victim of a crime to be heard:

- (a) at any criminal trial, including the sentencing phase of a capital trial under Section 76-3-207 or at any preliminary hearing, unless called as a witness; and
- (b) at any delinquency trial or at any preliminary hearing in a minor's case, unless called as a witness.

(3) The right of a victim or representative of a victim to be present at trial is subject to Rule 615 of the Utah Rules of Evidence.

(4) Nothing in this chapter shall deprive the court of the right to prevent or punish disruptive conduct nor give the victim of a crime the right to engage in disruptive conduct.

(5) The court shall have the right to limit any victim's statement to matters that are relevant to the proceeding.

(6) In all cases where the number of victims exceeds five, the court may limit the in-court oral statements it receives from victims in its discretion to a few representative statements.

(7) Except as otherwise provided in this section, a victim's right to be heard may be exercised at the victim's discretion in any appropriate fashion, including an oral, written, audiotaped, or videotaped statement or direct or indirect information that has been provided to be included in any presentence report.

(8) If the victim of a crime is a person who is in custody as a pretrial detainee, as a prisoner following conviction for an offense, or as a juvenile who has committed an act that would be an offense if committed by an adult, or who is in custody for mental or psychological treatment, the right to be heard under this chapter shall be exercised by submitting a written statement to the court.

(9) The court may exclude any oral statement from a victim on the grounds of the victim's incompetency as provided in Rule 601(a) of Utah Rules of Evidence.

(10) Except in juvenile court cases, the Constitution may not be construed as limiting the existing rights of the prosecution to introduce evidence in support of a capital sentence.

77-38-5. Application to felonies and misdemeanors of the declaration of the rights of crime victims.

The provisions of this chapter shall apply to:

- (1) any felony filed in the courts of the state;
- (2) to any class A and class B misdemeanor filed in the courts of the state; and
- (3) to cases in the juvenile court as provided in Section 78A-6-114.

77-38-6. Victim's right to privacy.

- (1) The victim of a crime has the right, at any court proceeding, including any juvenile court proceeding, not to testify regarding the victim's address, telephone number, place of employment, or other locating information unless the victim specifically consents or the court orders disclosure on finding that a compelling need exists to disclose the information. A court proceeding on whether to order disclosure shall be in camera.
- (2) A defendant may not compel any witness to a crime, at any court proceeding, including any juvenile court proceeding, to testify regarding the witness's address, telephone number, place of employment, or other locating information unless the witness specifically consents or the court orders disclosure on finding that a compelling need for the information exists. A court proceeding on whether to order disclosure shall be in camera.

77-38-7. Victim's right to a speedy trial.

- (1) In determining a date for any criminal trial or other important criminal or juvenile justice hearing, the court shall consider the interests of the victim of a crime to a speedy resolution of the charges under the same standards that govern a defendant's or minor's right to a speedy trial.
- (2) The victim of a crime has the right to a speedy disposition of the charges free from unwarranted delay caused by or at the behest of the defendant or minor and to prompt and final conclusion of the case after the disposition or conviction and sentence, including prompt and final conclusion of all collateral attacks on dispositions or criminal judgments.
- (3) (a) In ruling on any motion by a defendant or minor to continue a previously established trial or other important criminal or juvenile justice hearing, the court shall inquire into the circumstances requiring the delay and consider the interests of the victim of a crime to a speedy disposition of the case.
(b) If a continuance is granted, the court shall enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays.

77-38-8. Age-appropriate language at judicial proceedings -- Advisor.

- (1) In any criminal proceeding or juvenile court proceeding regarding or involving a child, examination and cross-examination of a victim or witness 13 years of age or younger shall be conducted in age-appropriate language.
- (2) (a) The court may appoint an advisor to assist a witness 13 years of age or younger in understanding questions asked by counsel.
(b) The advisor is not required to be an attorney.

77-38-9. Representative of victim -- Court designation -- Representation in cases involving minors -- Photographs in homicide cases.

(1) (a) A victim of a crime may designate, with the approval of the court, a representative who may exercise the same rights that the victim is entitled to exercise under this chapter.

(b) Except as otherwise provided in this section, the victim may revoke the designation at any time.

(c) In cases where the designation is in question, the court may require that the designation of the representative be made in writing by the victim.

(2) In cases in which the victim is deceased or incapacitated, upon request from the victim's spouse, parent, child, or close friend, the court shall designate a representative or representatives of the victim to exercise the rights of a victim under this chapter on behalf of the victim. The responsible prosecuting agency may request a designation to the court.

(3) (a) If the victim is a minor, the court in its discretion may allow the minor to exercise the rights of a victim under this chapter or may allow the victim's parent or other immediate family member to act as a representative of the victim.

(b) The court may also, in its discretion, designate a person who is not a member of the immediate family to represent the interests of the minor.

(4) The representative of a victim of a crime shall not be:

(a) the accused or a person who appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct, a related crime or conduct, or a crime or act arising from the same conduct, criminal episode, or plan as the crime or conduct is defined under the laws of this state;

(b) a person in the custody of or under detention of federal, state, or local authorities; or

(c) a person whom the court in its discretion considers to be otherwise inappropriate.

(5) Any notices that are to be provided to a victim pursuant to this chapter shall be sent to the victim or the victim's lawful representative.

(6) On behalf of the victim, the prosecutor may assert any right to which the victim is entitled under this chapter, unless the victim requests otherwise or exercises his own rights.

(7) In any homicide prosecution, the prosecution may introduce a photograph of the victim taken before the homicide to establish that the victim was a human being, the identity of the victim, and for other relevant purposes.

77-38-10. Victim's discretion.

(1) (a) The victim may exercise any rights under this chapter at his discretion to be present and to be heard at a court proceeding, including a juvenile delinquency proceeding.

(b) The absence of the victim at the court proceeding does not preclude the court from conducting the proceeding.

(2) A victim shall not refuse to comply with an otherwise lawful subpoena under this chapter.

(3) A victim shall not prevent the prosecution from complying with requests for information within a prosecutor's possession and control under this chapter.

77-38-11. Enforcement -- Appellate review -- No right to money damages.

(1) If a person acting under color of state law willfully or wantonly fails to perform duties so that the rights in this chapter are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual.

- (2) (a) The victim of a crime or representative of a victim of a crime, including any Victims' Rights Committee as defined in Section 77-37-5 may:
- (i) bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities under this chapter;
 - (ii) petition to file an amicus brief in any court in any case affecting crime victims; and
 - (iii) after giving notice to the prosecution and the defense, seek an appropriate remedy for a violation of a victim's right from the judge assigned to the case involving the issue as provided in Section 77-38-11.
- (b) Adverse rulings on these actions or on a motion or request brought by a victim of a crime or a representative of a victim of a crime may be appealed under the rules governing appellate actions, provided that an appeal may not constitute grounds for delaying any criminal or juvenile proceeding.
- (c) An appellate court shall review all properly presented issues, including issues that are capable of repetition but would otherwise evade review.
- (3) (a) Upon a showing that the victim has not unduly delayed in seeking to protect the victim's right, and after hearing from the prosecution and the defense, the judge shall determine whether a right of the victim has been violated.
- (b) If the judge determines that a victim's right has been violated, the judge shall proceed to determine the appropriate remedy for the violation of the victim's right by hearing from the victim and the parties, considering all factors relevant to the issue, and then awarding an appropriate remedy to the victim. The court shall reconsider any judicial decision or judgment affected by a violation of the victim's right and determine whether, upon affording the victim the right and further hearing from the prosecution and the defense, the decision or judgment would have been different. If the court's decision or judgment would have been different, the court shall enter the new different decision or judgment as the appropriate remedy. If necessary to protect the victim's right, the new decision or judgment shall be entered nunc pro tunc to the time the first decision or judgment was reached. In no event shall the appropriate remedy be a new trial, damages, attorney fees, or costs.
- (c) The appropriate remedy shall include only actions necessary to provide the victim the right to which the victim was entitled and may include reopening previously held proceedings. Subject to Subsection (3)(d), the court may reopen a sentence or a previously entered guilty or no contest plea only if doing so would not preclude continued prosecution or sentencing the defendant and would not otherwise permit the defendant to escape justice. Any remedy shall be tailored to provide the victim an appropriate remedy without violating any constitutional right of the defendant.
- (d) If the court sets aside a previously entered plea of guilty or no contest, and thereafter continued prosecution of the charge is held to be prevented by the defendant's having been previously put in jeopardy, the order setting aside the plea is void and the plea is reinstated as of the date of its original entry.
- (e) The court may not award as a remedy the dismissal of any criminal charge.
- (f) The court may not award any remedy if the proceeding that the victim is challenging occurred more than 90 days before the victim filed an action alleging the violation of the right.
- (4) The failure to provide the rights in this chapter or Title 77, Chapter 37, Victims' Rights, shall not constitute cause for a judgment against the state or any government entity, or any individual employed by the state or any government entity, for monetary damages, attorney fees, or the costs of exercising any rights under this chapter.

77-38-12. Construction of this chapter -- No right to set aside conviction, adjudication, admission, or plea -- Severability clause.

- (1) All of the provisions contained in this chapter shall be construed to assist the victims of crime.
- (2) This chapter may not be construed as creating a basis for dismissing any criminal charge or delinquency petition, vacating any adjudication or conviction, admission or plea of guilty or no contest, or for a defendant to obtain appellate, habeas corpus, or other relief from a judgment in any criminal or delinquency case.
- (3) This chapter may not be construed as creating any right of a victim to appointed counsel at state expense.
- (4) All of the rights contained in this chapter shall be construed to conform to the Constitution of the United States.
- (5) (a) In the event that any portion of this chapter is found to violate the Constitution of the United States, the remaining provisions of this chapter shall continue to operate in full force and effect.
(b) In the event that a particular application of any portion of this chapter is found to violate the Constitution of the United States, all other applications shall continue to operate in full force and effect.
- (6) The enumeration of certain rights for crime victims in this chapter shall not be construed to deny or disparage other rights granted by the Utah Constitution or the Legislature or retained by victims of crimes.

77-38-14. Notice of expungement petition -- Victim's right to object.

- (1) The Department of Corrections or the Juvenile Probation Department shall prepare a document explaining the right of a victim or a victim's representative to object to a petition for expungement under Section 77-40-107 or 78A-6-1105 and the procedures for obtaining notice of any such petition. The department or division shall also provide each trial court a copy of the document which has jurisdiction over delinquencies or criminal offenses subject to expungement.
- (2) The prosecuting attorney in any case leading to a conviction or an adjudication subject to expungement shall provide a copy of the document to each person who would be entitled to notice of a petition for expungement under Sections 77-40-107 and 78A-6-1105.

APPENDIX

Appendix A: Motions- Motion for order determining admissibility of evidence of prior domestic violence, Motion for Finding of Forfeiture by Wrongdoing, Domestic Violence Sentencing Criminal Protective Order

Appendix B: Diagrams- strangulation, lethality, screening, police report, hipaa release, overview of law

Appendix C: Booklets- immigrant, expert testimony, victims rights, danger assessment

Appendix A

NAME OF PROSECUTOR (Bar #)
Name of prosecuting agency
Street address
City, Utah zip code
Telephone:

IN THE _____ JUDICIAL DISTRICT COURT
_____ COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DEFENDANT, Defendant.	MOTION FOR FINDING OF FORFEITURE BY WRONGDOING Case No. JUDGE Hearing Requested
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FACTS

While the relevant facts will be elicited at the forfeiture by wrongdoing hearing, the prosecution expects the following facts to be admitted into evidence at that hearing.

ADD RELEVANT FACTS HERE

The State argues below that the facts, if proven by a preponderance of the evidence at a pretrial forfeiture by wrongdoing hearing using trustworthy evidence, constitute forfeiture of defendant's Sixth Amendment right to confront and cross-examine the victim/witness in first case; thus, the State may prosecute this case using trustworthy hearsay evidence which is admissible under the Utah Evidence Code, even though the victim/witness is unavailable and even though defendant has not had a prior opportunity to cross examine her.

FORFEITURE BY WRONGDOING BACKGROUND

The constitutions of both the United States and Utah guarantee criminal defendants the right “to be confronted with the witnesses against him.” U.S. Const. amend.VI; *see also* Utah Const. art. I, § 12. *State v. Poole*, 2010 UT 25, ¶ 10. “[T]he rule of forfeiture by wrongdoing...extinguishes confrontation claims on essentially equitable grounds...[and] the right to confront one’s accuser no longer applies when the defendant has acted to cause a witness to be unavailable.” *Id.* (first alteration in original).

In *Poole*, the Utah Supreme Court “expressly acknowledge[d] the doctrine’s existence under the Utah Constitution and provide[d] guidance for its application in criminal trials.” *Id.* at ¶ 1. “Thus, under Utah law, the out-of-court statements of a witness may be admitted at a criminal defendant’s trial when the witness is unavailable at trial due to the wrongful acts of the defendant, and the defendant’s acts were intended to render the witness unavailable.” *Id.* at ¶ 27. Specifically, “defendants forfeit their right to confront the witnesses against them only after the state has shown (1) the witness is unavailable at trial, (2) the witness’s unavailability was caused by the defendant’s wrongful acts, and (3) the defendant’s wrongful acts were intended or designed to make the witness unavailable.” *Id.* at ¶ 28.

A forfeiture hearing should be “held in close temporal proximity of the trial or where the witness’s unavailability cannot be altered,” *id.* at ¶ 31, and “outside the presence of the jury” if held on the day of trial. *Id.* at ¶ 30. “[T]he prosecution has the burden of proving forfeiture by a preponderance of the evidence and must make the

showing with evidence properly admitted via the Utah Rules of Evidence.” *Id.* at ¶ 33. Sixth Amendment analysis as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to hearings except for trial. *See State v. Timmerman*, 2009 UT 58, ¶ 11 (“We agree with the court of appeals that *Barber*, *Green* and *Ritchie* establish Supreme Court precedent confining the Sixth Amendment Confrontation Clause to trial.”).

Once a defendant is found to have forfeited confrontation rights, the state may introduce hearsay evidence at trial as allowed by the Utah Rules of Evidence. *Crawford v. Washington*, 124 S.Ct. 1354, 1373 (2004) (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”) Utah’s rules of evidence allow for admission of trustworthy hearsay evidence. *See* rule 807, Utah Rules of Evidence.

FORFEITURE BY WRONGDOING APPLIED TO DOMESTIC VIOLENCE

In *Giles v. California*, 128 S.Ct. 2678 (2008), the U.S. Supreme Court held that a defendant who causes the absence from trial of a witness does not forfeit the right to confront and cross-examine that witness absent a showing that the defendant *intended* his conduct to prevent the witness from testifying. *Id.* at 2684 (“The manner in which the rule [of forfeiture by wrongdoing] was applied makes plain that unopposed testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.”) (emphasis in original).

While the Court in *Giles* declined to recognize “a special, improvised, Confrontation Clause for those crimes that are frequently directed against women,” 128 S.Ct. 2693, it did hold a defendant’s intent to dissuade his victim from testifying may be *inferred* from his conduct:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or co-operation in criminal prosecutions. Where such an abusive relationship culminates in murder [or other crime], ***the evidence may support a finding that the crime expressed the intent*** to isolate the victim and to stop her from reporting earlier abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Id. at 2693 (emphasis added) (language contained in Part II-E of opinion).

Justice Souter, whose concurring opinion constitutes the fifth-vote majority opinion on all but Part II-D-2 of the lead opinion, concurred that in a domestic violence circumstance the defendant’s intent to dissuade his victim from testifying may be *inferred*² from his conduct:

[W]hen the evidence shows domestic abuse...the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim [or committed another crime against her], say, in a fit of anger.

² The definitions for “infer” in *Webster’s Third New International Dictionary* (Unabridged 1993) include: “to derive by reason or implication;” “conclude from the facts;” “accept or derive as a consequence, conclusion or probability.” *Id.*

Id. at 2695 (Souter, J., concurring).

The *Giles* dissent agreed that intent to dissuade a victim from testifying may be inferred from a defendant's conduct. Justice Breyer, commenting on Justice Souter's formulation of the doctrine as applied to the domestic violence context, stated:

This seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder [or other crime against] the domestic abuse victim. Doing so, when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying.... Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board.

Id. at 2708 (Breyer, J., dissenting).

Thus, all three *Giles* opinions agree that a defendant's intent to dissuade a victim from testifying may be inferred from his conduct.

FORFEITURE BY WRONGDOING ANALYSIS APPLIED TO THIS CASE

The existence of the first case constitutes "ongoing criminal proceedings at which the victim would have been expected to testify." *Id.* at 2693 (Scalia, J., in part II-E of the four-vote lead opinion, concurred in by Souter, J., making the fifth vote for a majority on this language). The assaultive conduct alleged in the statement of facts above, if shown by a preponderance of the evidence at a forfeiture by wrongdoing hearing, constitutes an "[a]ct of domestic violence...intended to dissuade [the] victim" "from co-operation in [the] criminal prosecution[]" in the first case, "rendering her prior statements" to police, on which the first case is based, "admissible under the forfeiture doctrine." *Id.* The evidence constitutes "evidence [that] may support a finding that the crime expressed the

intent to isolate the victim and to stop her from...cooperating with a criminal prosecution.” *Id.*

Under *Giles* this court may find by *inference* that defendant’s intent was to stop the victim from cooperating/testifying in the first case because “the element of intention would normally be inferred on the part of the domestic abuser,” “which [intent] is meant to isolate the victim from outside help, including...the judicial process.” *Id.*, at 2695 (Souter, J., concurring), And, as Justice Breyer wrote, “a showing of domestic abuse [if shown by a preponderance to have occurred in the second case] is sufficient to call into play the protection of the forfeiture rule” in the first case. *Id.*, at 2708 (Breyer, J., dissenting).

Thus, because of defendant’s conduct, he has “forfeit[ed] [his] right to confront the witness[] against [him]” because there is direct evidence that “(1) the witness is unavailable at trial,” and because there is inferential evidence that “(2) the witness’s unavailability was caused by the defendant’s wrongful acts [in the second case], and (3) the defendant’s wrongful acts were intended or designed to make the witness unavailable.” *Poole*, 2010 UT 25, ¶ 28.

Once this court finds forfeiture has occurred, confrontation analysis as construed in *Crawford* no longer applies, and the state may use hearsay evidence at trial, so long as it is admissible under the Utah Rules of Evidence. *Poole*, 2010 UT 25, ¶ 10. (“[T]he rule of forfeiture by wrongdoing...extinguishes confrontation claims on essentially equitable grounds...[and] the right to confront one’s accuser no longer applies when the defendant

has acted to cause a witness to be unavailable.”) (first alteration in original); *see also*, *Crawford v. Washington*, 124 S.Ct. at 1373 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”) (emphasis added). The victim’s statements, made to police officers when they responded to the call for service, and recorded by the officer, are not excluded by the Confrontation Clause rights of the Defendant.

CONCLUSION

Based on the above facts, points and authorities herein this court should rule that defendant has forfeited his right to confront the witness/victim against him in this case, and the hearsay statements of the victim are admissible at trial herein as allowed by the Utah Rules of Evidence.

Dated this _____ day of _____, 20XX.

Name of prosecutor
Title of Prosecutor

I. ARGUMENT

A. Evidence of the Ongoing Abusive Relationship is Admissible under the Court's Broad Discretionary Power to Admit Relevant Evidence under URE 401 and 402 as outlined below.

In relationships in which there is domestic violence, it is common that violent events are frequent and are a part of a pattern and practice of abuse by one partner upon the other partner. Commonly, there is a cycle of abuse: tension, violent events, and then reconciliation. Without intervention these phases repeat themselves, often increasing in frequency and severity. Most assaultive episodes are not an isolated event, but part of a larger pattern of abuse. All of this is found in the case before the court.

Thus, in a domestic violence case the entire relationship between the Defendant and the victim is relevant and it is critical for the trier of fact to view the crimes charged in the context of the entire relationship.

The State will offer evidence of the entire relationship between the victim and Defendant herein so that the jury can make a fully informed decision. The evidence of the relationship is relevant in at least four ways: 1) Without the context of the prior abuse, the jury may be confused, may be misled or may not view the evidence in its proper context. The lack of this context evidence would create a false picture for the jury: that the Defendant just walked in one day during a perfect, happy and peaceful relationship and began violently assaulting his wife. 2) The prior abuse explains why it was relatively easy for the Defendant to victimize the victim herein. Because of the victim's prior abuse at the hands of the Defendant, she had reason to retreat from him and expected to be

assaulted and then deal with it as a part of her relationship with the Defendant. 3) The victim did not report the assault charged herein immediately. Delayed reporting can only be adequately understood by the jury in the context of the violent relationship. In other words, the victim did not report because she had grown accustomed to being abused and was afraid to report. 4) The prior abuse is probative that these crimes did occur in the method as the victim describes with the current assault.

In *State v. Mead*, 27 P3d 1115 (2001), the Utah Supreme Court affirmed the trial court's admission under URE 402 and URE 404(b) of the Defendant's statements prior to his wife's murder that his wife was about to have "an accident," and that he discussed ways to kill her. All of the statements were relevant to put the Defendant's actions into the correct context and show his feelings toward his wife, and therefore the statements were admissible as probative of the crime of murder.

In *State v. Allen*, 108 P3d 730 (2005), the Utah Supreme Court found that the trial court properly admitted evidence that the Defendant had engaged in credit card fraud in order to save money to hire two men kill his wife. The Supreme Court opined the evidence was admissible because it was clearly relevant.

Even if evidence is offered for a proper, noncharacter purpose, a court must also determine whether the evidence is relevant under Utah Rule of Evidence 402. Nelson-Waggoner, 2000 UT 59 at 19, 6 P.3d 1120. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Here, the district court did not abuse its discretion in determining that the evidence of Allen's fraudulent purchasers was relevant to the question of whether Allen had conspired to kill his wife. As the district court accurately

observed, the evidence of how Allen concealed his payments to Wright corroborated Wrights's account of the events and therefore ultimately supported the State's allegation of Allen's fraudulent purchases made the existence of a conspiracy and the actions taken in furtherance thereof more probable than if the evidence were not admitted. Allen, 108 P3d at 736.

Thus, it is well settled law as established by the Utah Supreme Court that prior bad acts are relevant and admissible to provide a context to the crimes charged and to show that the Defendant took actions in furtherance of his overall pattern and plan to injure the victim.

B. Evidence of the Ongoing Abusive Relationship is Admissible under the Court's Discretionary Power to Admit Evidence of Prior Bad Acts under URE 404(b).

Evidence of prior violent acts may be admitted under URE 404(b), so long as the evidence is not aimed at suggesting action in conformity with bad character. Rule 404(b) allows for evidence of past crimes, wrongs, or other acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. This list is not exhaustive and evidence of prior bad acts may be admitted for "any other purpose" when "not offered to suggest action in conformity with a person's alleged bad character." *State v. Verde*, 296 P. 3d 673, 678 (2013)

The factors courts must consider when determining if the evidence is admissible for a noncharacter purpose are:

"the strength of evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof and the degree to which the

evidence probably will rouse the jury to overmastering hostility.” *State v. Shickles*, 760 P.2d 291, 295 (Utah 1988)

In *State vs. Holbert*, 61 P3d 291 (2002), the *Shickles* factors were applied in a domestic violence case.

Defendant Holbert appeared at the family home, in violation of a protective order, pointed a pistol at his wife’s head and threw her into a bedroom. While in the bedroom the Defendant pointed the gun at her head again and said, “You want a divorce? You are going to die. I'm going to kill you.” He then left the house quickly when the children and a neighbor called the police.

At trial the victim testified about another event which occurred three months earlier where the Defendant picked her up by the neck and strangled her into unconsciousness. Defendant then threw the victim four to five feet into the kitchen. Upon regaining consciousness, the victim realized she was bent over the kitchen table and Defendant was choking her. She blacked out again and awoke a second time on the kitchen floor with Defendant kneeling over her and choking her. The victim then “went into survivor mode” and told Defendant, “Please don't kill me, I wanna [sic] make this marriage work.” Defendant stopped choking Wife but then “held [her] hostage for an hour and a half.” The next day, Wife obtained the protective order, which was later modified. *State v. Holbert*, Id., at 294.

The court held the testimony and other evidence of prior bad acts were admissible because it showed that the Defendant and his victim were experiencing “marital discord”

and to prove defendant's motive to engage in threatening behavior against the victim as a means for coping with the divorce. *Id.*, at 298. The court also held the evidence was material to defendant's intent to commit aggravated kidnaping "*because it shows that defendant had engaged in violent behavior against the victim on a prior occasion and could easily use the same threatening behavior to terrorize the victim in the future.*" *Id.*, at 298. Emphasis added.

In *State v. Atkin*, UT App 155, 135 P.3d 894, 899 (2006), the evidence was introduced to impeach the Defendant. Defendant had testified he had never been subjected to "these kind of charges in his life." Thereafter, the prosecution introduced evidence of instances when defendant had been charged with domestic violence. The court held the evidence of defendant's prior bad acts was used for the purpose of impeaching defendant's credibility and was relevant for a non-character purpose.

In *State v. Northcutt*, UT App 357, 195 P.3d 499, 502 (2008), the court allowed testimony of past abuse from another victim - the Defendant's former spouse. Defendant was charged with aggravated kidnaping and attempted murder and his defense was that the altercation was a misunderstanding. He claimed his wife had a violent outburst and he was trying to restrain her. The prosecution offered evidence from Defendant's former wife about a similar incident two years prior.

The *Northcutt* court held the testimony of the former wife was admissible to prove the defendant had the specific intent to cause the death of his wife and to rebut his claims

of accident or mistake. The court also held most of the Shickles factors supported the admission of the evidence.

Under State v. Verde, 296 P. 3d 673 (2013), evidence of past acts was admissible to prove the *actus reus* in question by rebutting the Defendant's theory that the victim fabricated his testimony. While Verde is a sexual assault case, it is analogous to domestic violence fact scenarios because evidence of prior misconduct "can be relevant under the so-called 'doctrine of chances' ...where prior bad acts can properly be used to rebut a charge of fabrication...[the theory] rests on the objective improbability of the same rare misfortune befalling one individual over and over." The court continued " prior misconduct evidence may tend to prove that the Defendant more likely played a role in the events at issue than the events occurred coincidentally. And because the evidence tends to prove a relevant fact without relying on inference from the Defendant's character, the evidence is potentially admissible."

The Verde court did limit admission of prior bad act evidence "Where intent is uncontested and readily inferrable from other evidence, 404(b) evidence is largely tangential and duplicative." In contrast, this type of evidence is highly relevant in domestic violence cases, where intent to assault the victim is almost always disputed.

The Verde court also held prosecution can introduce evidence of prior bad acts "if a Defendant's preconceived plan...encompasses all of the acts in an overarching design." Evidence of past domestic violence is directly applicable and admissible to illustrate a

plan because the actions of the offenders only make sense when viewing them as “an overarching design” to intimidate, assault and control the victim. The offenders of domestic violence often repeatedly abuse their victims to weaken their resistance and control them.

In the case now before the court, the evidence sought to be admitted by the State shows the plan of the defendant as he abused his wife. Each of the attacks occurred on separate dates and might have slightly different scenarios, but the plan of the Defendant to abuse and control the victim is apparent when shown together.

C. Evidence of the Ongoing Abusive Relation is Admissible under the Court's Discretionary Power to Admit Evidence That is Not Unduly Prejudicial Under URE 403.

Once the evidence has been determined to be relevant and being used for an accepted reason under 404(b), the court must consider whether the evidence is admissible under URE 403, which provides that relevant evidence may be excluded if its probative value is “substantially outweighed” by the danger of unfair prejudice. For evidence to be inadmissible, the evidence must paint an untrue picture or skew the jury’s decision making.

While all the evidence offered against a defendant in a trial for domestic violence is going to be prejudicial to the defendant, this court must focus on the *danger of unfair prejudice* and whether it *substantially outweighs* the probative value (emphasis added). Because of domestic violence’s repetitive nature, the evidence must paint the entire picture of the pattern of abuse, show the intent of the offender to continually control the

victim and commit violence against his target. This includes evidence of past abuse and violence against the victim in order for the finder of fact to be able to fairly evaluate the evidence.

The *Holbert* court held that the testimony of the prior event was admissible under URE 403 because there was strong evidence the event actually occurred, was similar, the interval between the events was minimal. The court also held, “the need for the evidence is significant because the prior assault helps demonstrate a pattern of domestic violence that goes to prove the specific intent element of intending to inflict injury or to terrorize. Without the evidence, the jurors would be left to resolve a “contest of credibility between [D]efendant and [Wife].” *Id.*, at 300.

Here, the evidence the State intends to offer has been limited to only include evidence of the Defendant’s past actions against the victim that are similar in style, refute the Defendant’s testimony, show the pattern of violence and control, and give context to the Defendant’s violent behavior towards the victim. The State is not seeking admission of any evidence that is more inflammatory, gruesome or heinous than the current event. The evidence to be admitted will not arouse the jury to “overmastering hostility” towards the defendant because of its nature because the evidence is just part of the pattern of abuse the Defendant has maintained against the victim, making the evidence highly probative.

CONCLUSION

Based on the above facts and the points and authorities cited herein this court should rule that evidence of the defendant's prior violence against the victim is admissible at trial herein as allowed by the Utah Rules of Evidence.

Dated this _____ day of _____, 20XX.

Name of prosecutor
Title of Prosecutor

_____ **JUDICIAL DISTRICT COURT OF _____**, STATE OF UTAH

__ STATE OF UTAH,	:	
__ CITY OF _____	:	DOMESTIC VIOLENCE
Plaintiff,	:	SENTENCING CRIMINAL
	:	PROTECTIVE ORDER
v.	:	
	:	Case No.
Defendant.	:	Judge: _____

THIS ORDER TAKES PRECEDENCE OVER ANY PRIOR COURT ORDER

<input type="checkbox"/> The defendant is a police officer or is in the military
--

The defendant having been convicted of a domestic violence offense, the Court hereby determines that it is necessary to impose a sentencing criminal protective order for the protection of the victim cohabitant _____ in this case pursuant to § 77-36-5 Utah Code Ann. after having given the defendant an opportunity for hearing on this matter,

The court finds that the defendant presents a credible threat to the physical safety of the victim/cohabitant

IT IS HEREBY ORDERED: (initialed items only)

1. ____ that the defendant is to have no personal contact with the victim/cohabitant.
2. ____ that the defendant is not to threaten the victim/cohabitant.
3. ____ that the defendant is not to knowingly enter onto the premises of the victim/cohabitant’s residence or any premises temporarily occupied by the victim/cohabitant.
4. ____ that the defendant is enjoined from threatening to commit or committing acts of domestic violence or abuse against the victim /cohabitant and the following designated family or household member(s) :

5. ____ that the defendant is prohibited from harassing, telephoning, contacting or otherwise communicating with the victim/cohabitant, directly or indirectly.

6. ____ that the defendant is removed and excluded from the residence of the victim/cohabitant and shall not knowingly go or remain within 500 feet of the victim/cohabitant at any time.

7. _____ that the defendant is to stay away from the residence, school, place of employment of the victim/cohabitant and the following specified place(s) frequented by the victim/cohabitant and any designated family member:

8. _____ the following relief is determined to be necessary to protect and provide for the safety of the victim/cohabitant and any designated family or household member:

This order shall remain in effect during the entire duration of the defendant's probationary period or unless otherwise modified by this Court. This Order is given under the authority of this Court and is directed toward the defendant. The victim cannot waive, alter or dismiss this Order. Only the Court has the authority to enter, modify or revoke this Order.

VIOLATION OF THIS ORDER MAY RESULT IN A CHARGE OF VIOLATION OF A PROTECTIVE ORDER, A CLASS A MISDEMEANOR. VIOLATION OF THIS ORDER MAY RESULT IN A VIOLATION OF YOUR PROBATION.

Upon successful completion of all probationary requirements, Defendant's probation and this Order shall expire on _____ day of _____, _____.

Dated this _____ day of _____, 20____.

JUDGE

Appendix B

**AUTHORIZATION TO RELEASE AND DISCUSS
MEDICAL AND HEALTH INFORMATION**

Name: _____ *Primary Physician:* _____

DOB: _____

SSN: _____ *Insurance Provider:* _____

I, _____, authorize _____ to fully disclose any requested medical and health records and information to the following:

_____ in connection with the investigation and prosecution of a criminal case by the following law enforcement agency: _____

This authorization includes records, reports, and information (including laboratory analyses and radiology), confidential conversations, doctor's notes, recorded observations made by any personnel, and any other information requested by the above specified agencies.

In making this authorization, I understand that:

- This authorization is voluntary—I do not have to agree to it
- This authorization remains in effect for one year or until I revoke it in writing
- At my request, I may inspect or copy my information before it is used or disclosed
- This authorization releases my information from both federal and state protection
- I understand that any disclosure of my information carries some risk of unauthorized re-disclosure and my information may not be protected by privacy rules if that happens

Patient

Today's Date

Domestic Violence Case Screening Checklist

Case No. _____
Suspect: _____ In custody __ NO __ Yes, as of _____

Victim: _____
Cell phone: _____ Other Phone: _____
Address: _____
Other contact person: _____
Email: _____
Initial Meeting Date: _____
Relationship to Perpetrator: _____

Protective Order Issued: _____
Terms: _____

Received and Reviewed:

- | | | |
|--|--|--|
| <input type="checkbox"/> Police Reports | <input type="checkbox"/> 9-1-1 call | <input type="checkbox"/> Recorded Statements |
| <input type="checkbox"/> Photos | <input type="checkbox"/> Witness Statements | <input type="checkbox"/> Court documents |
| <input type="checkbox"/> Medical Reports | <input type="checkbox"/> Defendant Interview | <input type="checkbox"/> Other: |
| <input type="checkbox"/> Miranda form | <input type="checkbox"/> Search warrant | <input type="checkbox"/> Other: |

Brief description of victim's report:

Physical/Corroborating Evidence:

Suspect admissions:

Action to be taken:

- File Charge(s): _____
 Decline case: _____
 Further Investigation Requested: _____

STRANGULATION SUPPLEMENTAL REPORT

1) Description of strangulation in victim's own words:

2) Describe victim's demeanor while making statement:

3) Method/Manner of Strangulation:

- One hand Two hands
- Approached from the front Approached from behind
- Multiple strangulation attempts during incident (how many)

Jewelry on patient's neck during strangulation:

Jewelry on suspect's hands/wrist during strangulation:

-
- Ligature used (describe): _____
 Other (describe): _____

4) During assault episode did any of the following happen:

Loss of consciousness/blacking out/passing out. Number of times:

-
- Loss of Urine
 - Loss of Stool
 - Bleeding (describe)
 - Patient's feet were lifted off the ground. Number of times:

-
- Victim's head was pounded against (describe): _____
 - Victim was smothered in addition to strangled (with what)
 - Victim was unable to breathe

5) On a scale of zero (0) meaning no pressure and ten (10) meaning the worst pressure you can imagine, how hard was the suspect's grip or pressure (circle):
0 1 2 3 4 5 6 7 8 9 10

6) Previous assaults by same perpetrator involved:

- Victim was strangled
- Victim's head was struck/pounded/smashed
- Victim lost consciousness

7) Note any of the following:

■ Small blood vessels burst in:

- Face
- Neck
- Ears
- Eyes

■ Tongue injury

■ Mouth injuries

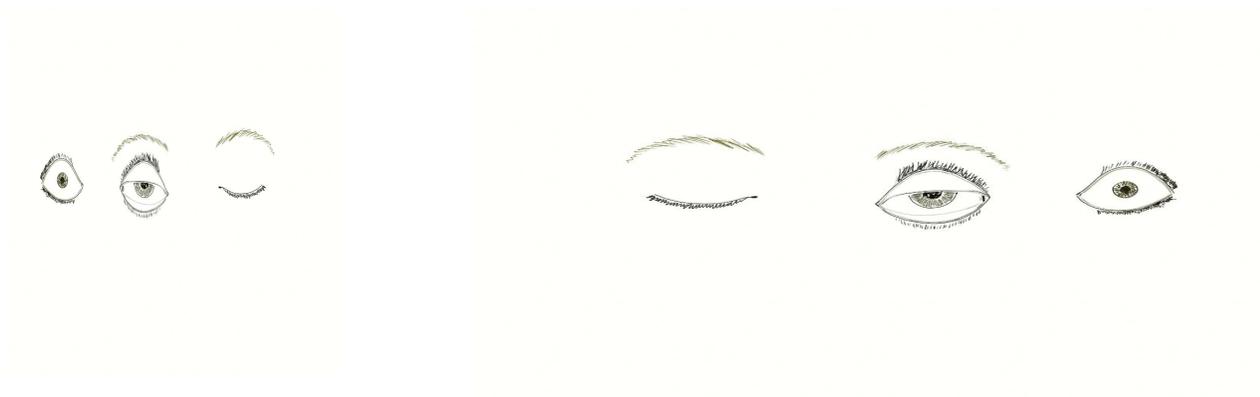
Visible Injury (described on body maps below)

Scratches on victim

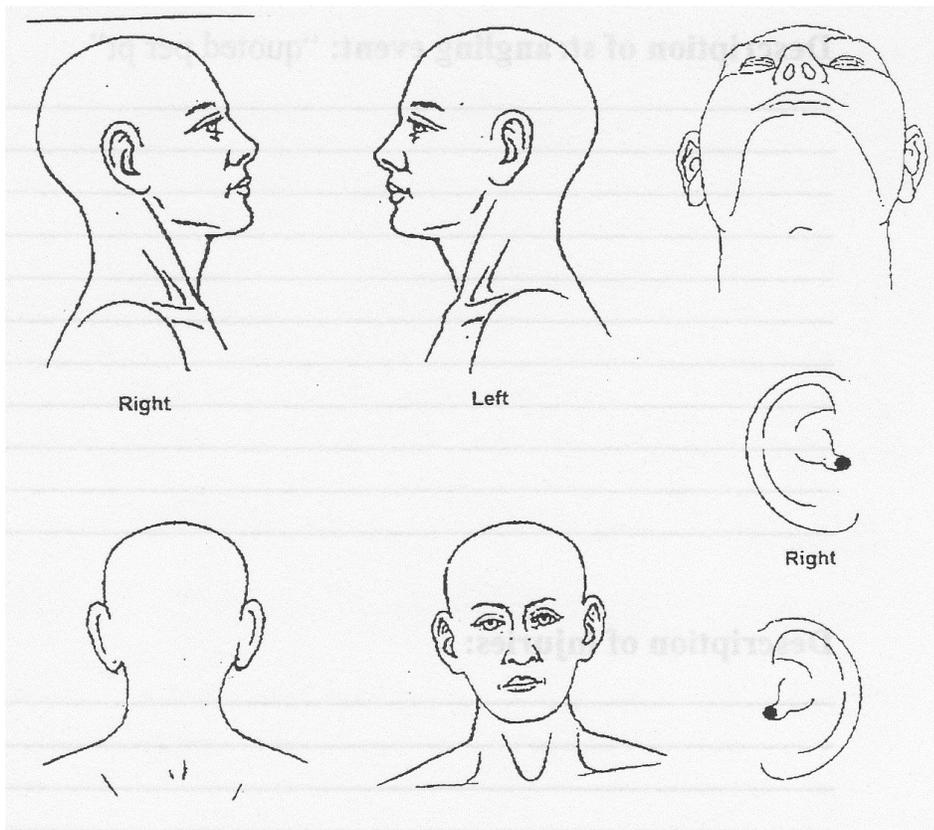
■ Digital photographs taken



RIGHT EYE (above)



LEFT EYE (above)



Officer Signature

_Date

CITY POLICE

Case #:

Page of

DOMESTIC VIOLENCE SUPPLEMENT

Officer:

Date: Time:

Describe All Conditions Observed911 Tape Available: Yes No

Case #:

(Crime scene, Emotional, Physical)

Time Lapse: (Between incident & observation)

Excited Utterances:

VICTIM Name:

SUSPECT Name:

Employer:

Employer:

Address:

Address:

- | | | |
|---|--|--|
| <input type="checkbox"/> Angry | <input type="checkbox"/> Cooperative | <input type="checkbox"/> Abrasions |
| <input type="checkbox"/> Apologetic | <input type="checkbox"/> Irrational | <input type="checkbox"/> Scratches |
| <input type="checkbox"/> Crying/Tearful | <input type="checkbox"/> Nervous | <input type="checkbox"/> Lacerations |
| <input type="checkbox"/> Fearful/Afraid | <input type="checkbox"/> Bruise(s) | <input type="checkbox"/> Drugs/Alcohol |
| <input type="checkbox"/> Hysterical | <input type="checkbox"/> Complaint of Pain | <input type="checkbox"/> Other (explain) |
| <input type="checkbox"/> Calm | <input type="checkbox"/> Threatening/Belligerent | |

- | | | |
|---|--|--|
| <input type="checkbox"/> Angry | <input type="checkbox"/> Cooperative | <input type="checkbox"/> Abrasions |
| <input type="checkbox"/> Apologetic | <input type="checkbox"/> Irrational | <input type="checkbox"/> Scratches |
| <input type="checkbox"/> Crying/Tearful | <input type="checkbox"/> Nervous | <input type="checkbox"/> Lacerations |
| <input type="checkbox"/> Fearful/Afraid | <input type="checkbox"/> Bruise(s) | <input type="checkbox"/> Drugs/Alcohol |
| <input type="checkbox"/> Hysterical | <input type="checkbox"/> Complaint of Pain | <input type="checkbox"/> Other (explain) |
| <input type="checkbox"/> Calm | <input type="checkbox"/> Threatening/Belligerent | |

Notes:

Notes:

RELATIONSHIP BETWEEN VICTIM/SUSPECT (Mark all that apply)

- | | | |
|---|--|--|
| <input type="checkbox"/> Spouse | <input type="checkbox"/> Related by Blood | <input type="checkbox"/> Child in Common |
| <input type="checkbox"/> Cohabitants | <input type="checkbox"/> Former Spouse | <input type="checkbox"/> Related by Marriage |
| <input type="checkbox"/> Parent/Adult Child | <input type="checkbox"/> Former Cohabitant | <input type="checkbox"/> Other (explain) |

--

MEDICAL TREATMENTWas Medical at Scene: Yes No

- | | | |
|--|-------------------------------------|--|
| <input type="checkbox"/> None | <input type="checkbox"/> First Aid | <input type="checkbox"/> Hospital |
| <input type="checkbox"/> Will Seek Own Dr. | <input type="checkbox"/> Paramedics | <input type="checkbox"/> Refused Medical Aid |
| <input type="checkbox"/> Medical Agencies: _____ | | |
| <input type="checkbox"/> EMS Case #: _____ | | |
| <input type="checkbox"/> Hospital Name: _____ | | |

EVIDENCE COLLECTEDEvidence collected from: Crime Scene Hospital Other (explain)Photo's: Yes No Type: 35mm Polaroid DigitalTapes: Audio Video Answering Machine None

Photographs taken by: _____

Victim's injuries: Yes NoSuspect's injuries: Yes NoChildren present: Yes NoWeapon used: Yes NoWeapon recovered: Yes NoFirearm impounded for safety: Yes No N/AFirearm left in residence: Yes No**VICTIM CONTACT INFORMATION**

Victim's home phone: Cell:

V's work phone: email:

V's closest relative(s): Name:

Address:

Phone:

LETHALITY THREAT ASSESSMENT

A 'yes' answer to any bolded question puts the victim at high risk and victim should be put in contact by phone ASAP with Domestic Violence services.

SUSPECT

- Has prior criminal history?** Yes No
- On probation or parole for anything?** Yes No
- Has an outstanding warrant?** Yes No

Uses drugs or alcohol? Both Drugs Alcohol**Unemployed?** Yes No**Fled the scene?** Yes No**Has less than high school education?** Yes No**Is economically disadvantaged?** Yes No**Is not parent of child living in home?** Yes No**Weapons in home? Types** _____ Yes NoHas a mental health history? Yes NoHas threatened suicide? Yes No

Court of Jurisdiction? _____

VICTIM

Length of relationship: ___ years ___ months Date separated: ___/___/___

Is there a divorce pending? Yes NoIs there a child custody case pending? Yes NoIs there a current protective order in place? Yes NoAre you currently pregnant? Yes No**Suspect controls your daily activities?** Yes No**Suspect has stalked you?** Yes No**Suspect has sexually assaulted you?** Yes No**Previous threats to kill or assaults with firearms/weapons?** Yes No**Are there prior incidents of strangulation?** Yes No**Have there been threats to kill you, children or pets?** Yes No**More severe or increasing violence over past year?** Yes No

Case #:	Suspect Information: (Check all that apply)	<input type="checkbox"/> Fled scene	<input type="checkbox"/> On scene	<input type="checkbox"/> Arrested/Booked
Page of		<input type="checkbox"/> Witness statement obtained	<input type="checkbox"/> Not arrested	<input type="checkbox"/> Interviewed
		<input type="checkbox"/> Arrest/Citation	<input type="checkbox"/> Given No Contact order	<input type="checkbox"/> Given No Contact order at jail

Victim given: Domestic Violence Pamphlet Police Case Number Victim Advocacy Contact Information

WITNESSES/CHILDREN PRESENT

Name:	Age:	Name:	Age:	Name:	Age:
Witness statement: <input type="checkbox"/> Yes <input type="checkbox"/> No		Witness statement: <input type="checkbox"/> Yes <input type="checkbox"/> No		Witness statement: <input type="checkbox"/> Yes <input type="checkbox"/> No	
<input type="checkbox"/> Apologetic	<input type="checkbox"/> Cooperative	<input type="checkbox"/> Apologetic	<input type="checkbox"/> Cooperative	<input type="checkbox"/> Apologetic	<input type="checkbox"/> Cooperative
<input type="checkbox"/> Afraid	<input type="checkbox"/> Nervous	<input type="checkbox"/> Afraid	<input type="checkbox"/> Nervous	<input type="checkbox"/> Afraid	<input type="checkbox"/> Nervous
<input type="checkbox"/> Calm	<input type="checkbox"/> Angry	<input type="checkbox"/> Calm	<input type="checkbox"/> Angry	<input type="checkbox"/> Calm	<input type="checkbox"/> Angry
<input type="checkbox"/> Tearful/Crying	<input type="checkbox"/> Threatening	<input type="checkbox"/> Tearful/Crying	<input type="checkbox"/> Threatening	<input type="checkbox"/> Tearful/Crying	<input type="checkbox"/> Threatening
<input type="checkbox"/> Hysterical	<input type="checkbox"/> Injured	<input type="checkbox"/> Hysterical	<input type="checkbox"/> Injured	<input type="checkbox"/> Hysterical	<input type="checkbox"/> Injured

Drawing representative of: Victim Suspect

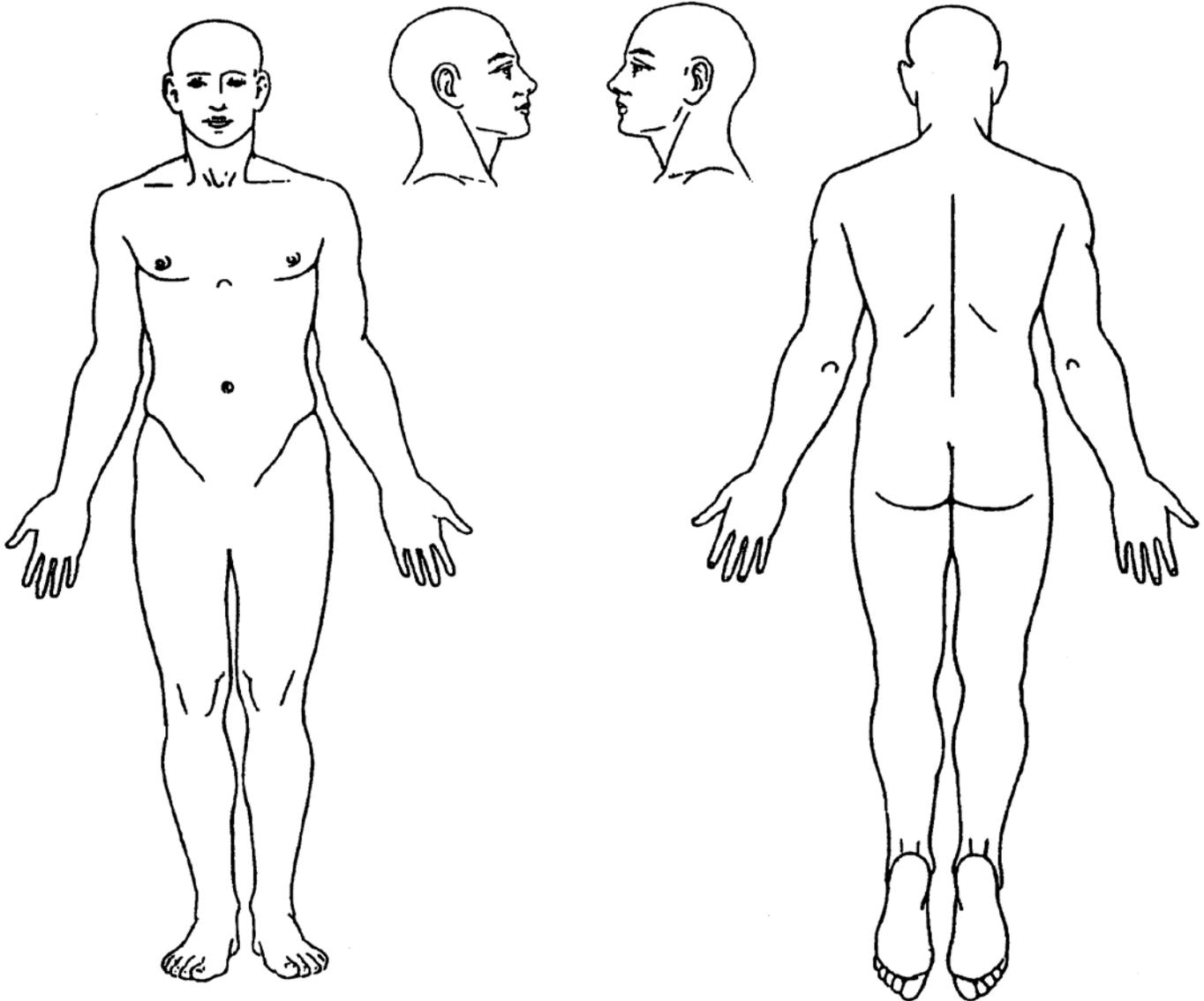


DIAGRAM: Describe each injury documented (i.e., redness, cuts, scratches, bruises, etc.) Use separate diagram for each person described.

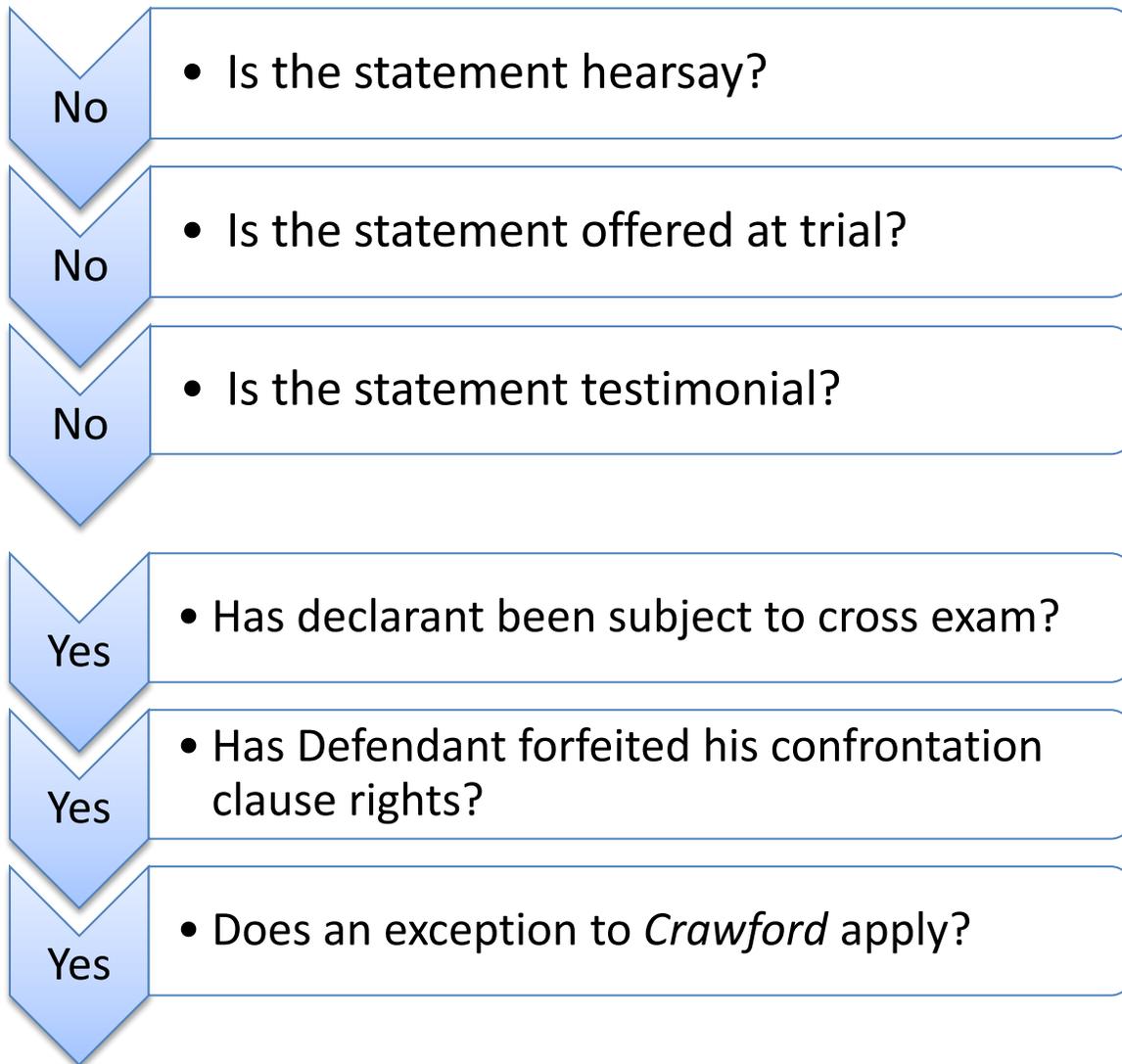
Cohabitant Protective Order (Dating Violence PO)	Criminal Protective Order	Civil Stalking Injunction	Permanent Criminal Stalking Injunctions	Jail Release Agreement/Order
Issued by the Court	Issued by the Court	Issued by the Court	Issued by the Court	Issued by the Jail/ Court
Enforced by Police or Court	Enforced by Police	Enforced by Police	Enforced by Police	Enforced by Police
Cost: No charge	Cost: No charge	Cost: No charge	Cost: No charge	Cost: No charge
<p>Requirements: <u>Must be a "cohabitant;"</u> having one or more of the following:</p> <ul style="list-style-type: none"> • Been married or divorced, • Lived together, • Have child(ren) together, • Have an unborn child together, • Related by blood or marriage, • Resided in the same residence. <p>OR</p> <p>In a "Dating relationship" as defined as 78B-7-401</p> <p><u>Must be a victim of either:</u></p> <ul style="list-style-type: none"> • Actual physical harm; Verbal threats of physical harm ; Attempts or threats to cause physical harm; OR • A designated DV offense 	<p>May be issued by the court as a Pretrial or Sentencing order (as designated by the judge)</p> <p>Requirements: <u>Must be a "cohabitant;"</u> having one or more of the following:</p> <ul style="list-style-type: none"> • Been married or divorced, • Lived together, • Have child(ren) together, • Have an unborn child together, • Related by blood or marriage, • Resided in the same residence. <p><u>Must be a victim of DV offense charged or convicted</u></p>	<p>Requirements: <u>Must be a victim of stalking,</u> which is a course of conduct that causes fear of harm or emotional distress.</p> <p><u>Must provide the court with supporting evidence,</u> such as:</p> <ul style="list-style-type: none"> • A list or journal of contact the stalker has had with victim • Notarized witness statements corroborating list or journal • Police reports documenting stalking activity • Copies of letters or notes; transcripts of messages or things that were 	<p>Requirements: Criminal charge of stalking involving victim was filed against defendant and defendant was either convicted, or a plea in abeyance was entered</p>	<p>Requirements: Arrest for DV offense and booked into jail for a domestic violence crime</p> <p><u>Must be issued one of two ways:</u></p> <ul style="list-style-type: none"> • Jail issues JRA at time of release if arrestee agrees in writing to conditions; OR • Court issues JRO at time of release <p>If arrestee refuses to agree or court does not issue order, arrestee stays in jail until next court appearance</p>

<p>Cohabitant Protective Order (Dating Violence PO)</p> <p>Criminal Charge for Violation: <i>Violation of PO:</i> criminal portion, Class A misdemeanor; police enforce</p> <p>Civil Penalty: Violation of civil portion, contempt; court enforces</p>	<p>Criminal Protective Order</p> <p>Criminal Charge for Violation: <i>Violation of Pre-Trial P O:</i> Class A misdemeanor if originally charged with DV</p> <p>misdemeanor and may be enhanced to a felony if prior DV conviction; 3rd degree felony if originally charged with DV felony;</p> <p><i>Violation of Sentencing PO:</i> Class A misdemeanor</p>	<p>Civil Stalking Injunction</p> <p>Criminal Charge for Violation: <i>Stalking:</i> Class A misdemeanor for first violation, graduated penalties for subsequent violations; if cohabitant, violation is 3rd degree felony for first violation.</p>	<p>Permanent Criminal Stalking Injunctions</p> <p>Criminal Charge for Violation: Stalking, violation of PCSL, 3rd degree felony for first conviction</p>	<p>Jail Release Agreement/Order</p> <p>Criminal Charge for violation: <i>Violation of JRA/JRO:</i> Class A misdemeanor if originally arrested for DV</p> <p>misdemeanor and may be enhanced to a felony if prior DV conviction; 3rd degree felony if originally arrested for DV felony</p>
<p>Length:</p> <ul style="list-style-type: none"> • Civil part – 150 days from date judge signs order • Criminal part –until Court dismisses at request of either party; may be indefinitely • Dating- Automatically Expire at 180 Days <p>Can Include: Criminal portion</p> <ul style="list-style-type: none"> • Order the respondent not to harm the petitioner, the children, or anyone who lives with petitioner 	<p>Length:</p> <ul style="list-style-type: none"> • Pretrial PO – until trial/conviction • Sentencing PO – during probation period 	<p>Length:</p> <ul style="list-style-type: none"> • Three years from date of service • Must file a new petition if stalking is still a problem 	<p>Length:</p> <p>Permanent; can only be dismissed by Court upon request of victim</p>	<p>Length:</p> <ul style="list-style-type: none"> • Until midnight of the day arrestee makes first appearance in Court; Court may extend up to 3 days at request of prosecutor to file charges
<p>Can Include: PTPO:</p> <ul style="list-style-type: none"> • Order Defendant to not threaten or commit DV or abuse against victim' • Not harass, phone, contact or otherwise 	<p>Can Include: Order the respondent (the person who is stalking) to:</p> <ul style="list-style-type: none"> • Not stalk the petitioner, • Not contact or go near the petition, and 	<p>Can Include:</p> <ul style="list-style-type: none"> • Prohibit defendant coming to victim's residence, employment, property or school • Prohibit defendant from contact, direct 	<p>Can Include: The following requirements shall be ordered by a court or must be agreed to, in writing, by the alleged abuser prior to release on bail,</p> <ul style="list-style-type: none"> • The alleged perpetrator will 	

Cohabitant Protective Order (Dating Violence PO)	Criminal Protective Order	Civil Stalking Injunction	Permanent Criminal Stalking Injunctions	Jail Release Agreement/Order
<ul style="list-style-type: none"> Order the respondent to stay away from the petitioner and home, job, vehicle, or school, and not to contact or harass the petitioner in any way Order the respondent to not have any guns or other weapons <p>Civil portion</p> <ul style="list-style-type: none"> Order temporary possession of the home, cars, and essential personal property Order temporary custody, parent-time, and support for the children Order temporary spousal support if married Any other order court deems necessary (may include Order the children not to be removed from Utah) 	<p>communicate, directly or indirectly, with victim</p> <ul style="list-style-type: none"> Remove and exclude defendant from residence and stay away from specific places Any other order court deems necessary to protect victim <p>Sentencing, PO: In addition to PTPD terms listed above, court can also order:</p> <ul style="list-style-type: none"> No purchase or possession of firearms/ weapons Do not consume alcohol or controlled substances Surrender weapons Complete DV treatment or other treatment Pay restitution Any other order court deems necessary for rehabilitation of defendant 	<ul style="list-style-type: none"> Not go near other people listed in the order Any other order the court deems necessary to protect victim Court can deal with custody/visitation if chooses 	<ul style="list-style-type: none"> or indirect. with victim and with 3rd parties that is likely to cause annoyance or alarm to the victim Stay away from victim and any specified place Any other order Court deems necessary to protect victim and family Court can address custody/visitation if so chooses 	<ul style="list-style-type: none"> have no personal contact with the alleged victim; The alleged perpetrator will not threaten or harass the alleged victim; and The alleged perpetrator will not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim. <p>Victim can waive, in writing, the 1st and 3rd conditions but cannot waive 2nd condition. Waiver must be in writing.</p>

Analysis of Evidence under Crawford vs. Washington

All statements can be analyzed under these steps. If any one answer is as listed below, then Confrontation Clause does not prohibit statements from being received as evidence:



If any answer to any one question is as indicated above, then the statement is not excluded by the Confrontation Clause and an analysis must be done under the Utah Evidence code to determine admissibility.

Domestic Violence and Related Laws

For Utah Code: <http://www.le.state.ut.us>; For Federal Code: <http://uscode.house.gov>

Domestic Violence	
UT 77-36	Cohabitant Abuse Procedures Act
UT 78B-7-102	Cohabitant Definitions
UT 77-36-1.1	DV Enhancements
UT 78B-7	Protective Orders (Civil)
UT 76-5-108	Violation of a Protective Order
UT 77-36-2.5	Jail Release Agreements
UT 36-2.7 & UT 77-2a	Plea in Abeyance
UT 76-5-109.1	Commission of Domestic Violence in the Presence of a
UT 77-36-2.2 (6)(d)	Incident Report Available to Victim at no Cost
UT 78B-7-105(3)	Protective Order Assistance- no charges
18 USC 2261 & 2261A	Interstate DV
18 USC 2262	Interstate Violation of a PO
18 USC 2265	Full Faith and Credit re: PO's
18 USC 922(g)(8)	Possessing a Firearm While Subject to a PO
18 USC 925(a)(1)	Limited Exemption for Police and Military with a PO
18 USC 922(g)(9)	Possessing a Firearm After DV Misdemeanor Conviction

Stalking	
UT 76-5-106.5	Stalking Definitions, Jurisdiction, Penalties,
UT 76-5-106.5(9-15)	Permanent Criminal Stalking Injunctions
UT 77-3a (101-103)	Civil Stalking Injunctions
UT 78B-7-401	Dating Stalking Injunctions
18 USC 875 (d)	Interstate Communications
18 USC 2261A	Interstate Stalking

Child Abuse/ Mandatory Reporting	
UT 76-5-109.1	Reporting Requirements (Civil Provisions)
UT 76-5-111	Abuse, Neglect, or Exploitation of a Vulnerable Adult
UT 76-6-111.1	Reporting Requirements (Criminal Provisions)

Miscellaneous	
UT 26-23a-(1-3)	Healthcare Provider Reporting Act
UT 62A-4a-403	Reporting Requirements and Exemptions

IF YOU'RE STALKED

You might:

Feel **fear** of what the stalker will do.

Feel **vulnerable**, unsafe, and not know who to trust.

Feel **anxious**, irritable, impatient, or on edge.

Feel **depressed**, hopeless, overwhelmed, tearful, or angry.

Feel **stressed**, including having trouble concentrating, sleeping, or remembering things.

Have **eating problems**, such as appetite loss, forgetting to eat, or overeating.

Have **flashbacks**, disturbing thoughts, feelings, or memories.

Feel **confused, frustrated, or isolated** because other people don't understand why you are afraid.

These are common reactions to being stalked.

IF SOMEONE YOU KNOW IS BEING STALKED, YOU CAN HELP.

Listen. Show support. Don't blame the victim for the crime. Remember that every situation is different, and allow the person being stalked to make choices about how to handle it. Find someone you can talk to about the situation. Take steps to ensure your own safety.

We can help.

THE NATIONAL CENTER FOR
Victims of Crime

Stalking
resource center

To learn more about stalking, visit the
Stalking Resource Center Web site
www.victimsofcrime.org/src

If you are in immediate
danger, call 911.

This document was developed under grant number 2008-WT-AX-K050 from the Office on Violence Against Women of the U.S. Department of Justice. The opinions and views expressed are those of the authors and do not necessarily represent the official position or policies of the Office on Violence Against Women, U.S. Department of Justice. For more information on the U.S. Department of Justice Office on Violence Against Women, visit <http://www.ovw.usdoj.gov>.

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	wednesday	Thursday	Friday
2 left threatening note on car	3	4 3 e-mails	5 got past security at work
9 followed from work to school	10 4 e-mails	11 3 hang ups	12 called repeatedly, left messages
16 6 hang ups	17 showed up at work	18	19
23 broke car window	24 sent flowers	25	26 4 hang ups

are you
being

STALKED?

Stalking

resource center

Stalking Incident and Behavior Log

If you are a victim of stalking, it can be critical to maintain a log of stalking-related incidents and behavior, especially if you choose to engage with the criminal or civil justice systems. Recording this information will help to document the behavior for protection order applications, divorce and child custody cases, or criminal prosecution. It can also help preserve your memory of individual incidents about which you might later report or testify.

The stalking log should be used to record and document all stalking-related behavior, including harassing phone calls, text messages, letters, e-mail messages, acts of vandalism, and threats communicated through third parties. When reporting the incidents to law enforcement, always write down the officer's name and badge number for your own records. Even if the officers do not make an arrest, you can ask them to make a written report and request a copy for your records.

Important note: Since this information could potentially be introduced as evidence or inadvertently shared with the stalker at a future time, **do not include any information that you do not want the offender to see.**

Attach a photograph of the stalker, photocopies of restraining orders, police reports, and other relevant documents. Keep the log in a safe place and tell only someone you trust where you keep your log.

Documenting stalking behavior can be a difficult and emotionally exhausting task. A local advocate in your community can provide support, information about the options available to you, and assistance with safety planning.

STALKING INCIDENT LOG

Date	Time	Description of Incident	Location of Incident	Witness Name(s) (Attach Address and Phone #)	Police Called (Report #)	Officer Name (Badge #)

ARE YOU BEING STALKED?

Stalking is a series of actions that make you feel afraid or in danger. Stalking is serious, often violent, and can escalate over time.

Stalking is a crime.

A stalker can be someone you know well or not at all. Most have dated or been involved with the people they stalk. About 75 percent of stalking cases are men stalking women, but men do stalk men, women do stalk women, and women do stalk men.

Some things stalkers do:

- Repeatedly call you, including hang-ups.
- Follow you and show up wherever you are.
- Send unwanted gifts, letters, texts, or e-mails.
- Damage your home, car, or other property.
- Monitor your phone calls or computer use.
- Use technology, like hidden cameras or global positioning systems (GPS), to track where you go.
- Drive by or hang out at your home, school, or work.
- Threaten to hurt you, your family, friends, or pets.
- Find out about you by using public records or on-line search services, hiring investigators, going through your garbage, or contacting friends, family, neighbors, or co-workers.
- Other actions that control, track, or frighten you.

You are not to blame for a stalker's behavior.

THINGS YOU CAN DO

Stalking is unpredictable and dangerous. No two stalking situations are alike. There are no guarantees that what works for one person will work for another, yet you can take steps to increase your safety.

If you are in **immediate danger**, call 911.

Trust your **instincts**. Don't downplay the danger. If you feel you are unsafe, you probably are.

Take **threats** seriously. Danger generally is higher when the stalker talks about suicide or murder, or when a victim tries to leave or end the relationship.

Contact a crisis hotline, **victim services agency**, or a domestic violence or rape crisis program. They can help you devise a safety plan, give you information about local laws, refer you to other services, and weigh options such as seeking a protection order.

Develop a **safety plan**, including things like changing your routine, arranging a place to stay, and having a friend or relative go places with you. Also, decide in advance what to do if the stalker shows up at your home, work, school, or somewhere else. Tell people how they can help you.

Don't communicate with the stalker or respond to attempts to contact you.

Keep **evidence** of the stalking. When the stalker follows you or contacts you, write down the time, date, and place. Keep e-mails, phone messages, letters, or notes. Photograph anything of yours the stalker damages and any injuries the stalker causes. Ask witnesses to write down what they saw.

6.6 million people are stalked each year in the United States.

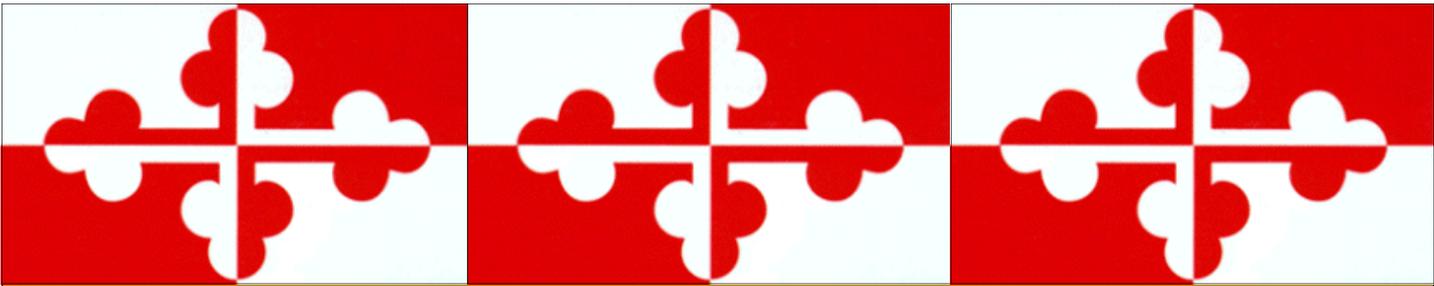
Contact the **police**. Every state has stalking laws. The stalker may also have broken other laws by doing things like assaulting you or stealing or destroying your property.

Consider getting a **court order** that tells the stalker to stay away from you.

Tell **family, friends, roommates, and co-workers** about the stalking and seek their support. Tell security staff at your job or school. Ask them to help watch out for your safety.

Women are stalked at a rate three times higher than men.

Appendix C



Lethality Assessment Program Maryland Model For First Responders

Learning to Read the Danger Signs

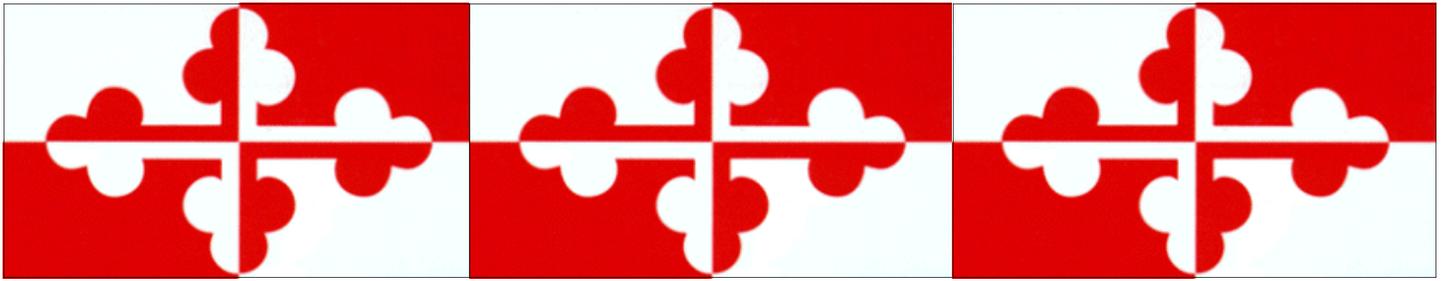


Maryland Network Against Domestic Violence • 6911 Laurel Bowie Road Suite 309 Bowie, MD 20715
Phone: (301) 352-4574 • Toll Free: 1-800-MD-HELPS • Fax: (301) 809-0422 • Email: info@mnadv.org • Website: www.mnadv.org

About the Design of this Packet

The various mastheads used on the pages of the Lethality Assessment Program information packet are to honor the colors, symbols, and heraldry of the Maryland flag. The colors and symbols—alternating quadrants of yellow and black and the red and white bottom cross design—reflect those on the coat of arms of two of Maryland's founding families.



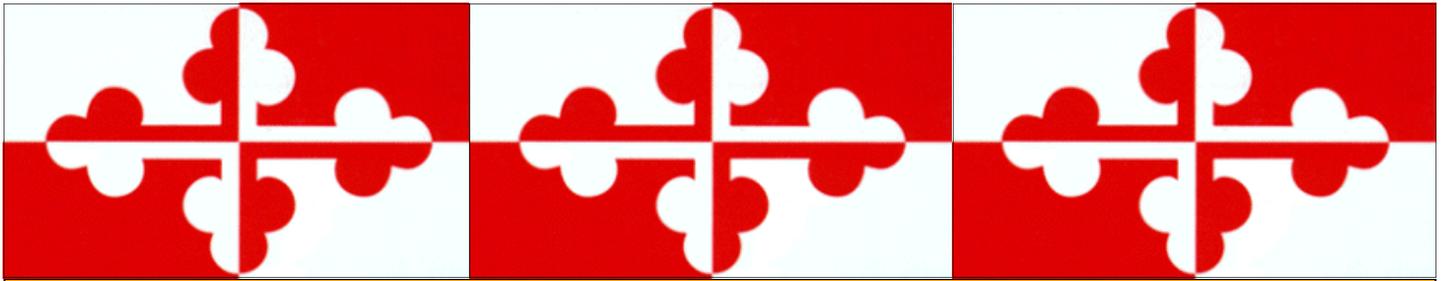


Lethality Assessment Program — Maryland Model

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- ▲ About the Lethality Assessment Program for First Responders
- ▲ Domestic Violence Lethality Screen for First Responders
- ▲ Conducting a Lethality Screen for First Responders: Initiating the Protocol (3x5 card for officer use)
- ▲ Report to the Lethality Assessment Committee Concerning the Pilot of the Lethality Screen for First Responders and the Protocol
- ▲ Maryland Lethality Assessment Statistical and Status Reports
- ▲ Lethality Assessment Program Best Practices
- ▲ Lethality Assessment Newsletters
- ▲ Lethality Assessment Program in the News
- ▲ Lethality Assessment Program: 2010 National Celebrating Solutions Winner of the Mary Byron Project
- ▲ Lethality Assessment Program: A Top 50 Program of the Ash Institute 2008 Innovations in American Government Awards Competition





About the Lethality Assessment Program Maryland Model

The Lethality Assessment Program — Maryland Model (LAP), represents an opportunity born from three bodies of significant research by Dr. Jacquelyn Campbell, of The Johns Hopkins University School of Nursing, spanning 25 years: 1) only 4 percent of domestic violence murder victims nationwide had ever availed themselves of domestic violence program services; 2) in 50% of domestic violence-related homicides, officers had previously responded to a call on the scene; and 3) the re-assault of domestic violence victims in high danger was reduced by 60% if they went into shelter. The goal of the LAP is to prevent domestic violence homicides, serious injury, and re-assault by encouraging more victims to utilize the support and shelter services of domestic violence programs.

The LAP is a two-pronged intervention process that features a research-based lethality screening tool and an accompanying protocol referral that provides direction for law enforcement, medical personnel, clergy, social workers and others to initiate appropriate action based on the results of the screening process.

To illustrate, in the case of police officers, for example: The process begins when an officer arrives at the scene of a domestic violence call. The officer will assess the situation. When the standards that indicate danger are met, the officer will ask the victim to answer a series of eleven questions from the “*Lethality Screen for First Responders*.”

If the victim’s response to the questions indicates an increased risk for homicide, the officer initiates a protocol referral by privately telling the victim she/he is in danger and that in situations similar to the victim’s, people have been killed. The officer makes a phone call to a domestic violence hotline and proceeds with one of two responses to address the immediate safety.

Response #1: When the victim chooses not to speak with the hotline counselor. The officer reviews the factors that are predictive of death so the victim can be on the lookout for them, encourages the victim to contact the domestic violence program, provides the victim with referral information, and may follow other protocol measures designed to address the victim’s safety and well-being.

Response #2: When the victim chooses to speak with the hotline counselor. The officer responds to the outcome of the telephone conversation between the victim and the counselor, and the officer or law enforcement agency may participate in coordinated safety planning with the victim and the counselor. After having spoken to a hotline counselor at their local domestic violence services program, the victim may or may not seek further assistance.

To the best of our knowledge, the LAP is the only lethality assessment program in the nation that makes use of a research-based screening tool and accompanying referral protocol, which “takes the approach to a more sophisticated level of application,” according to Dr. Bill Lewinski, executive director of the Force Science Research Center. It enables law enforcement and domestic violence programs to work hand-in-hand to actively engage high-risk victims who are, otherwise, unlikely to seek the support of domestic violence intervention services.

Similarly, professionals in other disciplines acting as first responders can implement the LAP with their patients, clients, members, and other individuals they come in contact with during the course of their routine work.



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DOMESTIC VIOLENCE LETHALITY SCREEN FOR FIRST RESPONDERS



Officer:	Date:	Case #:
Victim:	Offender:	
<input type="checkbox"/> Check here if victim did not answer any of the questions.		
▶ A "Yes" response to any of Questions #1-3 automatically triggers the protocol referral.		
1. Has he/she ever used a weapon against you or threatened you with a weapon?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
2. Has he/she threatened to kill you or your children?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
3. Do you think he/she might try to kill you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
▶ Negative responses to Questions #1-3, but positive responses to at least four of Questions #4-11, trigger the protocol referral.		
4. Does he/she have a gun or can he/she get one easily?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
5. Has he/she ever tried to choke you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
6. Is he/she violently or constantly jealous or does he/she control most of your daily activities?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
7. Have you left him/her or separated after living together or being married?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
8. Is he/she unemployed?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
9. Has he/she ever tried to kill himself/herself?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
10. Do you have a child that he/she knows is not his/hers?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
11. Does he/she follow or spy on you or leave threatening messages?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> Not Ans.
▶ An officer may trigger the protocol referral, if not already triggered above, as a result of the victim's response to the below question, or whenever the officer believes the victim is in a potentially lethal situation.		
Is there anything else that worries you about your safety? (If "yes") What worries you?		
Check one: <input type="checkbox"/> Victim screened in according to the protocol <input type="checkbox"/> Victim screened in based on the belief of officer <input type="checkbox"/> Victim did not screen in		
If victim screened in: After advising her/him of a high danger assessment, did the victim speak with the hotline counselor? <input type="checkbox"/> Yes <input type="checkbox"/> No		

Note: The questions above and the criteria for determining the level of risk a person faces is based on the best available research on factors associated with lethal violence by a current or former intimate partner. However, each situation may present unique factors that influence risk for lethal violence that are not captured by this screen. Although most victims who screen "positive" or "high danger" would not be expected to be killed, these victims face much higher risk than that of other victims of intimate partner violence.



Conducting a Lethality Screen for First Responders *Initiating the Protocol*

When to Initiate a Lethality Assessment

- When an **intimate relationship** is involved;
AND
- You believe an **assault** has occurred,
- You sense the potential for **danger** is high,
- Names of parties or location are **repeat** names or locations, or
- You simply **believe** one should be conducted.

How to Conduct a Lethality Assessment

- Use *Lethality Screen for First Responders*.
- After asking questions, handle information as follows:
 - Yes to Q.1, 2, or 3 = Protocol Referral
 - No to Q.1-3, but Yes to four of Q.4-11 = Protocol Referral
- “No” responses may still trigger Protocol Referral if first responder believes it appropriate. Ask unnumbered question to help determine whether protocol referral should be triggered.

Not Screened in or Did/Could Not Participate in Assessment

1. Advise of dangerous situation.
2. Advise to watch for signs of danger.
3. Refer to provider.
4. Provide first responder contact information.
5. Prepare report.



Conducting a Lethality Screen for First Responders *Initiating the Protocol*

(continued)

Screened in—

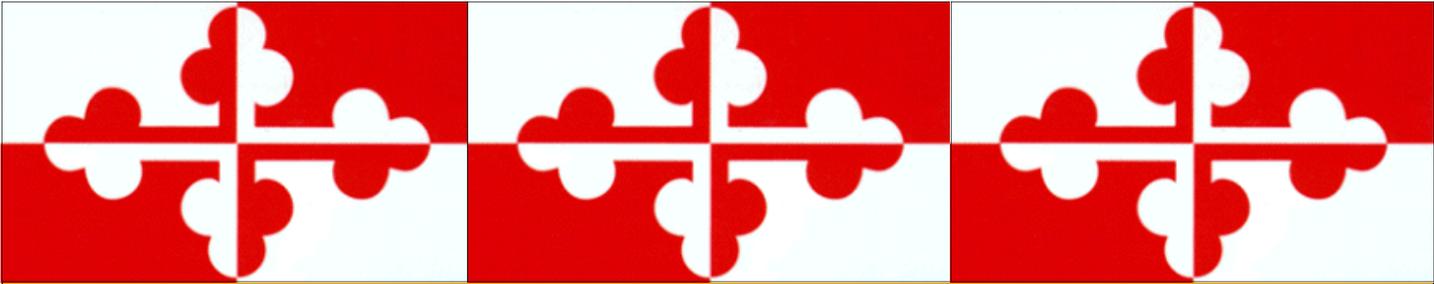
Implementation of the Protocol Referral Process

1. Advise of assessment.
2. Advise that you need to call hotline and you would like for victim to speak with counselor. (*Remember: You are seeking the victim's permission.*)
3. If victim does not want to speak with counselor, tell victim you need to speak with counselor to seek guidance and gently ask victim to reconsider.
4. If victim still does not want to speak with counselor, use same procedures as in first response.
5. If victim wants to leave, arrange for or provide transportation.
6. Assist counselor with safety planning if asked.
7. Notify domestic violence unit or supervisor.
8. Prepare report.

Lethality Assessment Program Principles

- Be Compassionate.
- "Go The Extra Mile."
- Coordinate Efforts.
- Use the Phone!
- Be Aware of the Dangers in All Domestic Violence Situations.
- Trust Your Instincts.
- Recognize That the Victim Is in Charge!

*Simply because of your presence as a law enforcement officer, the victim may feel compelled to speak with the hotline counselor when you ask. Tell the victim whether or not she/he chooses to speak with the counselor, **you are there to help her/him.***



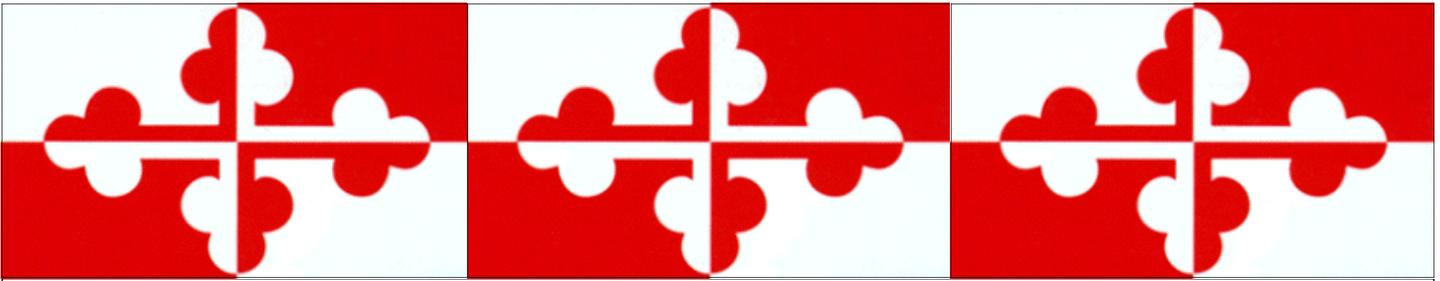
Maryland Network Against Domestic Violence

**Report to the
Lethality Assessment Committee
Concerning the Pilot of the Lethality Screen for
First Responders and the Protocol**

(Pages 7 and 8)

Conducted July 29 to August 28, 2004





Interview Results

Four interviewers conducted 29 interviews (11 counselors, 11 officers, and 7 contacts). The interviews generally lasted 35-45 minutes.

Counselors

Generally, the counselors received the project well. They felt that the screen and protocol were helpful in obtaining additional information from victims so the counselors could make better assessments and in bringing victims to safety and into services. While some thought the screen was not too different from what they already do, they also believed that the screen is a valuable tool that improved their screening methods. One noted that the screen validated advocates' and victims' beliefs about levels of danger and that it made the danger "seem more real." One said that "to see it in black and white is powerful." One felt that the main implication of doing the lethality screen was that the programs needed to be more thoroughly prepared to do safety planning and resource referral. One interviewer wrote that the counselors felt that "it would have taken a lot more nudging to get them (victims) to (come in for services) if they hadn't had the screening tool. The screening tool was effective in working with a client who wanted to run around the truth. It laid a solid foundation for their counseling later. They (counselors) felt so strongly that they now feel at a deficit not having the screen to use."

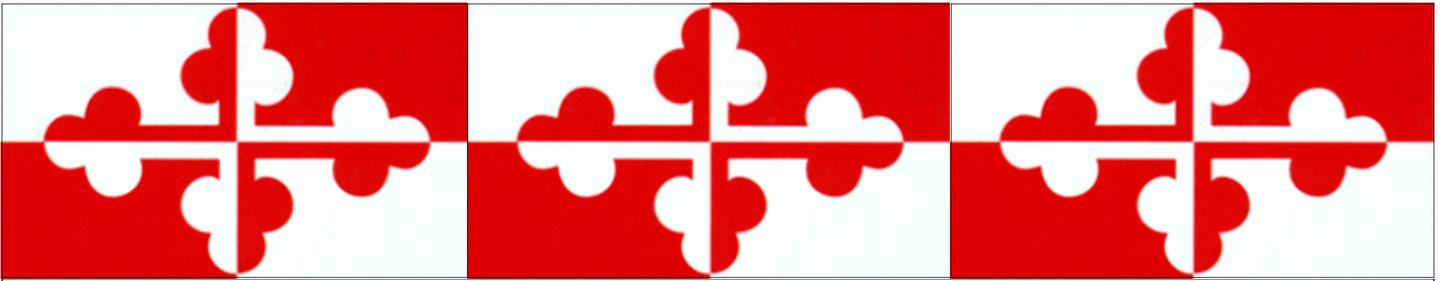
Law Enforcement

The law enforcement officers were generally positive about the project, but in some cases more lukewarm. All except one thought the project was a worthwhile endeavor; the one wasn't sure. There were questions about consolidation of the screen into the current domestic violence form that two agencies use that would make the project more acceptable. Still, most seemed to think the screen was a "great tool," an "appropriate checklist," that enabled officers to ask specific questions. One noted that officers wanted to do a good job and "appreciated" the screen and protocol. One said that the screen was "basic, common sense, straightforward... (and) helps you open your eyes, the way the questions are asked." One said that officers were "surprised with the results." Most thought the screen was user-friendly, some noting that there was some anxiety the first time they used it, but after that it was easy to administer.

Pilot Contacts

The pilot contacts were enthusiastic about the outcome of the pilot and described it generally as "outstanding," going "very well," going "well because officers bought into it," and "exceeded expectations." One said it gave officers another avenue to pursue and rhetorically asked "How many doors did this open (for officers)?" Two noted that the number of questions should be reduced.





All provided substantive responses to the question that asked whether they believed the screen and protocol offered their staffs a different way to treat high danger cases. One noted that it made officers more conscious and thoughtful that “a person is at peril.” Another said that it gave a officers “a focus, a checklist.” Another said that they would have treated a caller in a different way that might not have “gotten to the danger factor earlier.” Another noted telling a victim that in such situations people have been killed was something the police would never have done before, but that they felt comfortable doing it with the screen (backed up by research) and protocol and training they had. One said it was an “eye opener” to the staff.

In response to staffs feeling more confident in dealing with high danger situations because of the screen and protocol, all answered affirmatively. They noted that the screen gave them information with which to effectively evaluate a threat, that the MNADV spent a lot of time with them (making them feel more comfortable and familiar) and that the agency was committed to the project, that it provided an alternative to “walking away and wondering,” that the screen allowed counselors to be “clearer as to where the danger was” and identified a victim as being “on a short list,” and that being able to call the program provided an officer with “reinforcement.”

In response to changes in the protocol, one suggested that programs develop in-house procedures and noted that when a Danger Assessment reaches 10, programs should seek to contact law enforcement to begin developing a coordinated, short-term safety plan. One expressed concern about phones not always being available. One noted that some “yeses” require follow-up questions. One noted that in-the-home safety planning for a victim should be done in anticipation of the abuser returning home from being incarcerated, as an example.

One veteran police officer, in response as to whether the project is a worthwhile project, said that it “provides officers with a way to do their job and provides for the needs of victims as effectively as I’ve seen it done.” Another said: “We think we kept people safe.”

The most significant by-products that were reported were the improved and closer communication and coordination between the programs and law enforcement, and that programs “got to people we wouldn’t have gotten to” because law enforcement “sees different people” than the program (SARC, in this particular case).

In identifying innovative or different than usual approaches, the contacts noted that the phone contact is “as good as you’ll come up with,” the program meeting over cases with law enforcement (with no compromises in confidentiality), an internal team approach to high danger cases, and the decision by one of the programs to dramatically amend its policy so that “we will shelter everyone” despite intoxication and previous disruptive behavior.

In identifying successes, one police contact noted that they now look upon the domestic violence program “in the same way we look at Social Services in child abuse cases.” They are “part of the team.”



Maryland Lethality Assessment Statistical and Status Reports

Maryland Lethality Assessment Statistical Report

2006 - 2009
Estimated Population: 5,672,000

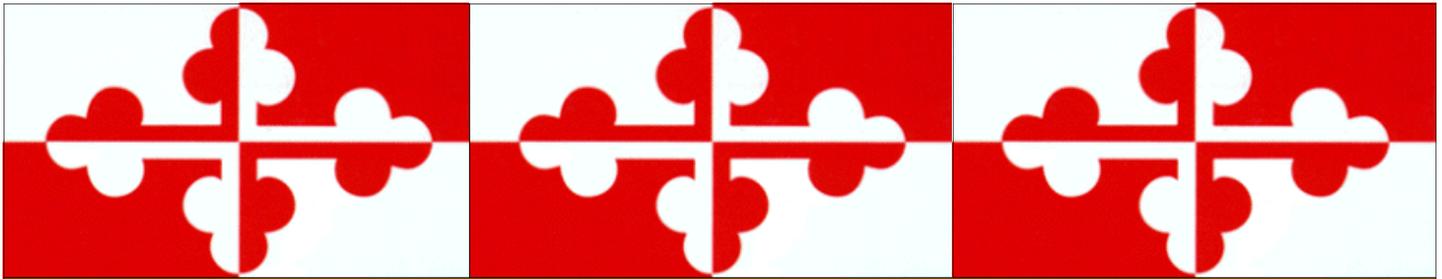
MD Participating -Population & % -Agencies -Year	Lethality Screens	Lethality Screens Per Population Per Day	High Danger	Non-High Danger	Did Not Answer	"Positives" Who Spoke to Counselor	"Spoke to" Who Went for Ser- vices
807,000 (14%) 21 agencies	1,839	1/439 5/day	990 (54%)	698 (38%)	151 (08%)	531 (54%)	158 (30%)
1,725,000 (30%) 43 agencies 2007	3,304	1/521 9.1/day	1,923 (58%)	1,179 (36%)	202 (06%)	1,030 (54%)	263 (26%)
3,198,000 (56%) 68 agencies 2008	6,788	1/471 18.6/day	3,713 (55%)	2,589 (38%)	486 (07%)	2,207 (59%)	621 (28%)
4,288,500 88 agencies 2009	10,497	1/375 28.8/day	5,443 (52%)	4,315 (41%)	739 (07%)	3,322 (61%)	1,030 (34%)
Four-Year Total	22,428	1/452 15.4/day	12,069 (54%)	8,781 (39%)	1,578 (07%)	7,090 (59%) 4.9/day	2,072 (30%) 1.4/day

Maryland Lethality Assessment Status Report

Through September 1, 2010

Participating and committed law enforcement agencies: **106** (92% of 115 agencies)
 Participating domestic violence programs: **20** (100% of 20)
 Involved Counties (including Baltimore City): **24** (100% of 24)
 Total Population Being and to Be Served: **4,607,000** (81% of 5,672,000)





Lethality Assessment Program Best Practices

Certain practices have resulted from the implementation of the Lethality Assessment Program (LAP). They have improved our ability to contact and communicate with high risk victims and to get them into domestic violence services (shelter or intake). The new practices are part of the continuing effort to improve the effectiveness of the LAP in Maryland.

Following up with High Danger Victims.

Most domestic violence service providers in Maryland now follow-up with victims who have been assessed by a law enforcement officer as being at greatest risk of being killed (in “high danger”). They either make home visits (advocate and officer together) or phone calls soon after the incident. In the second and third quarters of 2008, six programs that actively conduct follow-ups doubled the state average of victims going into services (56% compared to 28%).

Assessing Protective Order Petitioners.

In five counties, deputies assess victims immediately after interim and temporary protective order hearings. With high danger victims, deputies either call the domestic violence hotline, as patrol officers do, or have an advocate housed in the same facility respond to speak with the victim. Since beginning in one county in January 2008 through March 2009, 273 of those victims who spoke with a hotline worker or advocate (37%) have gone into local domestic violence programs for services.

Hotline Guidelines for Communicating with High Danger Victims.

The phone conversation that a hotline worker has with a victim from the scene of a police call for service is a new and different type of communication. Time on the phone is short; the victim may not be “ready” to speak with a domestic violence advocate. After two years of implementation, we realized we needed a written guideline to standardize the communication in a way that would provide for immediate safety and better encourage the victim to go into services. In April 2009 the guidelines were published and have been used for training, not only in Maryland, but in all states that participate in the Lethality Assessment Program. We believe the guidelines improve the way we communicate with high risk victims.



Lethality Assessment Program In the News

FEATURED SUBMISSION

Assessing lethality in domestic violence cases

Program helps first responders save lives

By David M. Sargent and Jacquelyn C. Campbell, PhD, RN

According to a 2001 study in the journal *Preventive Medicine*, police officers were called to the scene of 90 per cent of domestic violence homicides. The study also found that only four per cent of domestic violence murder victims had ever used the services of a domestic violence provider. In a different sample of victims who had gone into shelters, the rate of re-assault dropped by a staggering 60 per cent.

As a law enforcement community—and a co-ordinated community—we can respond to these statistics by turning them into opportunities to save the lives of potential domestic homicide victims. In the state of Maryland, we started with the question, "What can we do?"

In 2003, the Maryland Network Against Domestic Violence (MNAADV) received a grant to establish a lethality assessment instrument and accompanying protocol, both of which would help assess the risk that a victim of domestic violence would be killed by his or her partner.

Because lethality assessment is generally applied in a clinical setting, the MNAADV sought to develop an assessment tool for first responders, primarily law enforcement officers. The initiative is called the Lethality Assessment Program (LAP) for First Responders.

To ensure professional methodology, the MNAADV organized a Lethality Assessment Committee comprised of law enforcement officers, criminal justice system practitioners, domestic violence advocates, and researchers—including

the authors. The committee developed an 11-question assessment tool, called the Lethality Screen for First Responders. The screen is based on the professionally respected Danger Assessment for Identifying the danger in domestic violence cases (www.dangerassessment.org). It is a straightforward questionnaire that allows responding officers to predict, with a high degree of accuracy, both the danger and the potential of lethality for victims of domestic violence situations. Responding officers use the screen to ask such questions as "Has he threatened to kill you or your children?" and "Has he ever tried to choke you?"

Instilling a belief in empowering victims with a sense of agency, the committee then developed the LAP protocol, basing its work on the experience of its membership and over 25 years of available research. The protocol encourages victims identified as "high risk" for domestic violence fatalities to seek the services of a domestic violence program. The protocol espouses the victim-defined advocacy model of safety planning and allows a flexible approach to implementing the Lethality Screen.

The hallmark of the protocol is this: the Lethality Screen identifies a victim as being in "high danger"; the police officer making that assessment calls the local domestic violence hotline from the scene.

Although officers traditionally refer victims to domestic violence service providers, the victims seldom make the call.

In the LAP protocol, the officer calls the

hotline to seek advice and—equally important—to encourage the victim to speak to the hotline counsellor. Additionally, the officer tells the victim that he or she is in danger and that people in similar situations have been killed (information that is hopefully eye-opening to the victim). Depending on whether or not the victim chooses to speak to the hotline counsellor, the officer proceeds with one of two responses to promote the immediate safety of the victim.

If the victim chooses to speak to the counsellor, the officer responds to the outcome of that telephone conversation, perhaps becoming involved in co-ordinating a safety plan with the victim and counsellor.

If the victim chooses not to speak to the

hotline, the officer provides safety planning advice to the victim and reviews factors that are predictive of death, so the victim can be on the lookout for those factors in future. The officer encourages the victim to contact a domestic violence program, provides the victim with police contact information, and may take other actions such as advising the victim how to obtain a protection order.

The LAP in action

The Lethality Assessment Committee spent nearly a year developing the Lethality Screen and LAP protocol, and field testing them in three jurisdictions. The primary focus of field testing was to determine whether the screen and protocol were user-friendly for officers on the scene. Eighty-four per cent of officers surveyed reported that the instrument and protocol were "easy" or "fairly easy" to administer, and 69 per cent related that the tools bolstered their confidence.

The committee spent the next year gathering data, holding regional workshops to explain the LAP and obtain additional feedback, adjusting the screen, and producing a training video for police officers.

The MNAADV now co-ordinates the LAP and provides a direct train-the-trainer curriculum for law enforcement agencies. It also offers an in-service curriculum for participating domestic violence service providers. Each agency and program that implements the LAP is asked to voluntarily gather and report Lethality Screen data to the MNAADV on a quarterly basis. To date, all participating agencies have honored this request. The MNAADV then provides all participants with quarterly and annual reports, comments and recommendations.

Each participating agency and domestic violence program appoints a

lethality assessment contact who communicates with the MNAADV co-ordinator and other agency program contacts. All contacts serve on the Lethality Assessment Participants' Committee, which meets annually and communicates frequently via e-mail.

In October 2005, the LAP was voluntarily implemented by four law enforcement agencies and two partner providers in two of Maryland's 24 jurisdictions. Today, 66 police agencies (Maryland State Police included) involving 19 domestic violence programs in 21 jurisdictions have either implemented the LAP, piloted it, received LAP training or committed to go forward.

Though still early in its implementation, there are positive signs that the LAP is affecting domestic homicide statistics in the state of Maryland. The MNAADV reported the following statistics during 2004 and 2007:

- Partner agencies administered 5,143 Lethality Screens across a participating population of 1.7 million.

- 57 per cent of persons screened were assessed as being in "high danger." In those jurisdictions where a police officer and domestic violence program advocate visit "high danger" victims unannounced, up to 50 per cent of stated victim sought services.

- 54 per cent of "high danger" victims spoke on the phone with a domestic violence program counsellor.

- 27 per cent of the victims who spoke on the phone went in for services.

- One screened victim was killed.

In 2007, the number of domestic violence fatalities in Maryland was at its lowest since 1991.

Dr. Neil Wehde of the National Domestic Violence Fatality Review Initiative says that instruments such as the LAP can accomplish several outcomes, including a greater awareness of danger and lethality among victims and the law enforcement community, a greater consideration of proactive interventions, the education of system partic-

FEATURED SUBMISSION



ipants, the opportunity for victims to see their situations through a different lens, and enhanced co-ordination, communication and co-operation. Maryland has recorded success in each of these areas. Participating agencies have performed consistently and have received numerous out-of-state inquiries as well as media and industry attention.

Maryland has created a program that has impacted the lives of domestic violence victims and given the domestic violence service community a proactive, reliable answer to that nagging question, "What can we do?" ■

For more information about the LAP, visit the MNAADV website at www.mnadv.org.

* Campbell, J., et al. *Health Care providers missed opportunities to prevent or resolve* *Preventive Medicine*, Vol. 33, No. 5 (2001), p. 373-385.

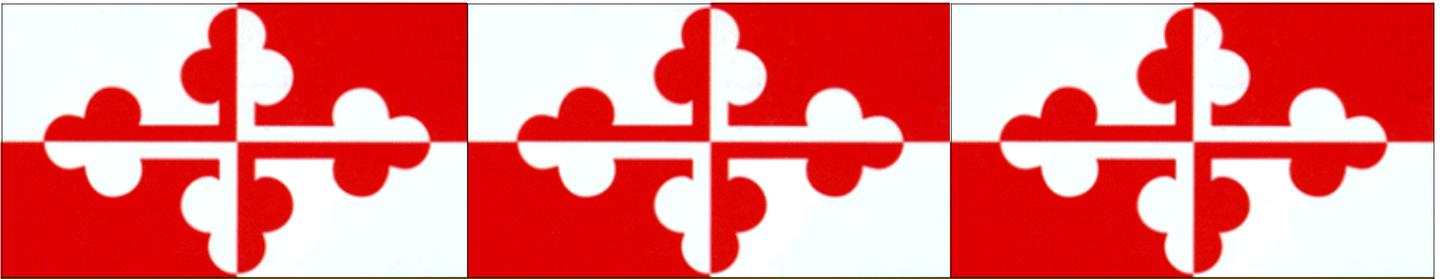
David Sargent served 27 years with the Metropolitan Police Department in Washington, D.C., and has taught domestic violence training courses to more than 7,000 police officers in D.C., Delaware, Pennsylvania, Virginia and Maryland.

Jacquelyn Campbell, BSW, MSW and PhD, is a professor at the Johns Hopkins University School of Nursing and has a joint appointment at the Bloomberg School of Public Health. She has been conducting advocacy, policy work and research in the areas of family violence and health disparities related to trauma since 1981.



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Lethality Assessment Program In the News

"A lot of states are watching what Maryland is doing... They are very interested in seeing the results."

—Cheryl O’Donnell, National Network to End Domestic Violence

(In "Police Tool Assesses Domestic Abuse 'Lethality'")

Identifying those most at risk so they can get help is the aim of an innovative Maryland program that is gaining national attention. **The program is helping to save lives, and that should spur its expansion.**

—Editorial in the Washington Post
(In "Helping Women at Risk: A Maryland Program Aimed at Averting Domestic Violence is Given Deserved Recognition")

"We believe that by getting that victim into services, we have enhanced her chances of survival."

—Dave Sargent, Retired Police Lieutenant and Law Enforcement Coordinator/Trainer at the Maryland Network Against Domestic Violence

(In "Police Tool Assesses Domestic Abuse 'Lethality'")

"Officers have been trained to make somewhat similar inquiries of victims in a number of other jurisdictions... including Duluth (MN) and San Diego, whose police departments have had strategies in place for several years. But the Maryland program takes this to a new level of sophistication."

—Dr. Bill Lewinski, Executive Director, Force Science Research Center

(In "Lethality Assessment" Helps Gauge Danger from Domestic Disputes)

"Now we're going to take it nationwide to save lives nationwide."

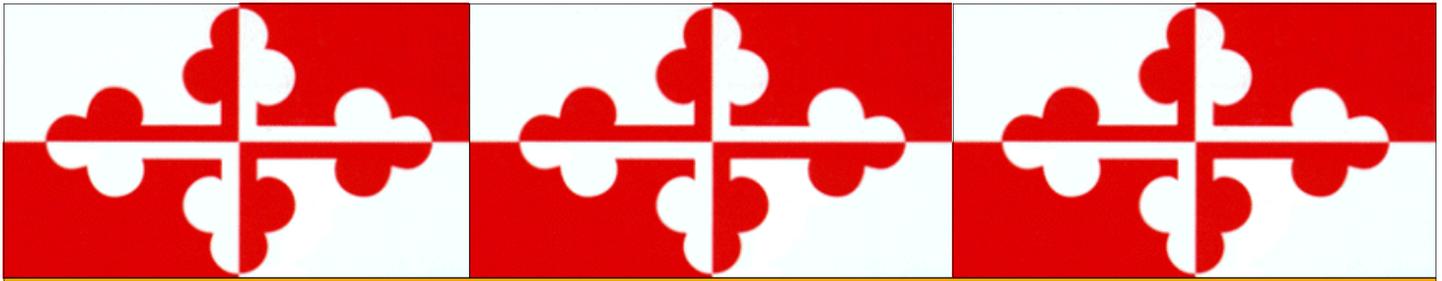
—Senator Barbara Mikulski, announcing the Byrne grant

(In "Grant to Spread Domestic Violence Program to Other States")



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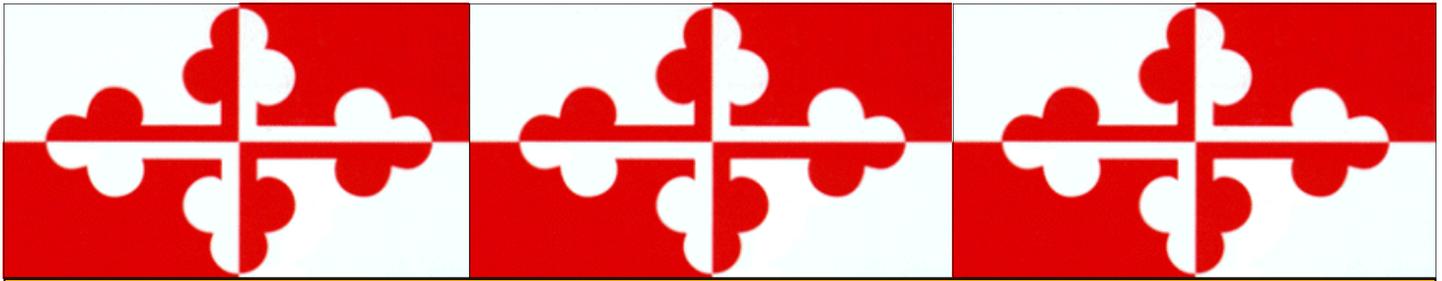
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Lethality Assessment Program In the News

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Lethality Assessment Program-Maryland Model Recognized by the Mary Byron Project

Maryland Network Against Domestic Violence Wins 2010 Celebrating Solutions Award

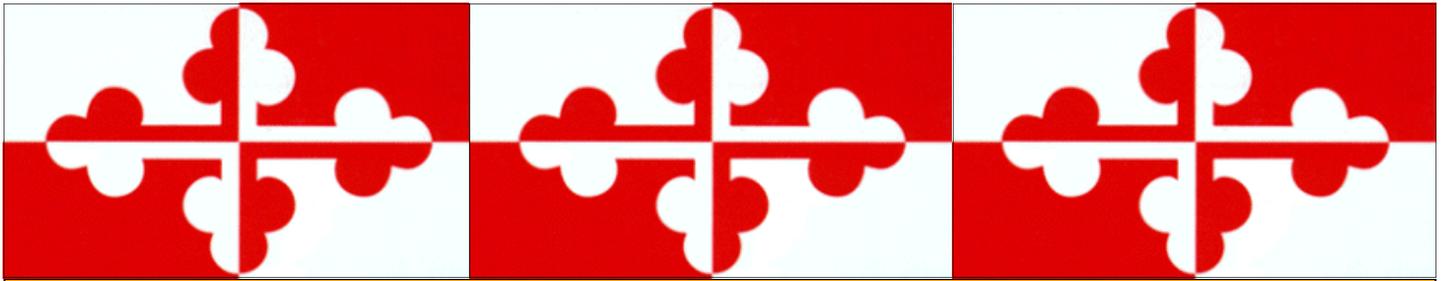
Bowie, MD—The Maryland Network Against Domestic Violence’s (MNADV) Lethality Assessment Program-Maryland Model (LAP) was selected as one of four 2010 national recipients of the prestigious *Celebrating Solutions Award* given annually by the Mary Byron Project. Marcia Roth, Executive Director of the Project, lauded the LAP for its outstanding work. “We received almost 300 applications throughout the United States. Our national review team felt that Maryland’s program shows promise in moving beyond crisis management to provide answers every community should use in ending the epidemic crime of domestic violence. It is an outstanding organization and program.”

The Mary Byron Project created the *Celebrating Solutions Awards* to showcase and applaud local innovations that demonstrate promise in breaking the cycle of violence. They select programs that can serve as models for the nation and offer \$10,000 cash awards in recognition of their pioneering efforts.

The Mary Byron Project was established in 2000 in memory of the young woman whose tragic murder led to the creation of automated crime victim notification technologies. As a nationally recognized thought leader on domestic violence, the Mary Byron Project cultivates and supports efforts that extend beyond crisis management to attack the root causes of this epidemic and help build safer, healthier communities.

“We are deeply honored to have had the LAP showcased as an innovative model for the nation,” said Michael Cohen, MNADV’s Executive Director. “It’s an easy and effective program that identifies victims of domestic violence who are at risk of being seriously injured or killed by their intimate partners and immediately connects them to the domestic violence service provider in their area. The goal of the LAP is to prevent fatalities by increasing the number of victims that access and use domestic violence program services.”

The Lethality Assessment Program-Maryland Model has grown from one participating law enforcement agency and domestic violence service provider in October 2005 to 106 law enforcement programs and 20 domestic violence service providers statewide. Jurisdictions in 11 other states around the country have implemented the LAP.



Lethality Assessment Program: A Top 50 Program of the Ash Institute 2008 Innovations in American Government Awards Competition

The Maryland Network Against Domestic Violence (MNADV) is very proud to announce that our **Lethality Assessment Program** has been selected by the Ash Institute for Democratic Governance and Innovation at Harvard Kennedy School as **one of the Top 50 Programs of the 2008 Innovations in American Government Awards competition**. A portion of the press release is appended below.

**HARVARD KENNEDY SCHOOL'S ASH INSTITUTE
ANNOUNCES TOP 50 INNOVATIONS IN GOVERNMENT**

Innovations in American Government Awards Top 50 Programs to Compete for \$100,000 Award

Cambridge, Mass., – April 15, 2008 – The Ash Institute for Democratic Governance and Innovation at Harvard Kennedy School today announced the Top 50 Programs of the 2008 Innovations in American Government Awards competition. Selected from a pool of nearly 1,000 applicants, these programs represent the best in government innovation from local, county, city, tribal, state, and federal levels.

Established in 1985 at Harvard Kennedy School by the Ford Foundation, the Innovations in American Government Awards Program is designed to improve government practice by honoring effective government initiatives and encouraging the dissemination of such best practices across the country. Over its 20 year history, the Innovations in American Government Program has honored 181 federal, state, and local government agencies.

Many award-winning programs are now replicated across policy areas and jurisdictions, serving as forerunners for today's reform strategies and new legislation. Such programs also inform research and academic study at Harvard Kennedy School and other academic institutions around the world. In the midst of widespread cynicism in government, the Innovations in American Government Awards Program provides concrete evidence that government is working to improve the quality of life of citizens.

Each of the Top 50 programs underwent several rounds of rigorous evaluation from a committee of practitioners and policy experts from Harvard Kennedy School as well as renowned institutions nationwide. Selected programs address a number of important policy areas including health and social services; management and governance; community and economic development; education and training; criminal justice; transportation and infrastructure; and the environment.

Representing a range of jurisdictions from across the country, the Top 50 Programs include seventeen cities/towns, four counties, six federal agencies, three school districts, nineteen states, and one tribal government. Massachusetts, Pennsylvania, Connecticut, and Maine have multiple programs represented in the Top 50.

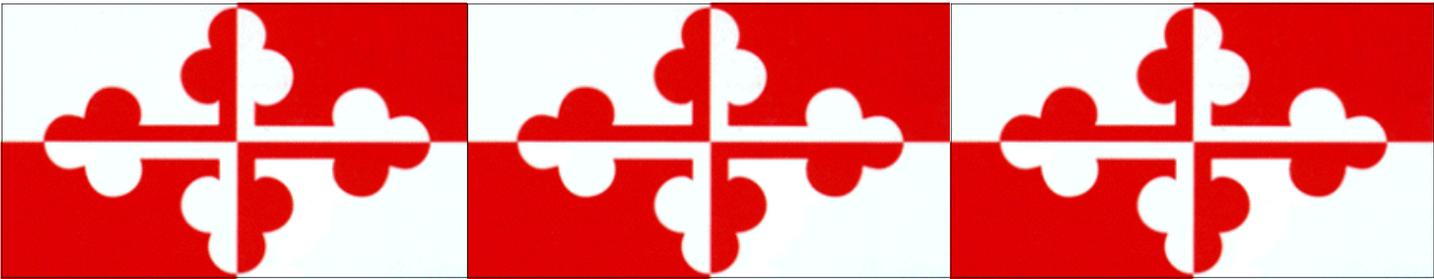
"The 50 best innovations for the 2008 Innovations in American Government Awards demonstrate effective solutions to some of our nation's most pressing issues," said Stephen Goldsmith, director of the Innovations in American Government Awards Program, Harvard Kennedy School. "From child welfare reform and improvements in homicide case review to promotion of our nation's parks, these programs are improving the way we live our daily lives."

"We commend the innovative initiatives of these Top 50 Programs," said Gowher Rizvi, director of the Ash Institute for Democratic Governance and Innovation. "In their path to finding new ways for doing the public's business better, these programs are paving the way for nationwide - and even global - reform strategies."



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American Prosecutors
Research Institute

*Introducing
Expert Testimony
to Explain Victim
Behavior in
Sexual and
Domestic Violence
Prosecutions*



Office on
Violence Against Women

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American Prosecutors Research Institute**

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*Introducing
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August 2007

Jennifer G. Long

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INTRODUCTION

The prevalence of sexual and domestic violence myths causes the public to search for reasons to doubt, rather than reasons to believe, allegations of a domestic or sexual assault. This doubt often is fueled by a focus on the victim's behavior both during and after the assault, which laypeople—who generally are inexperienced and uneducated about common victim responses to trauma—may find puzzling.¹ Frequently, the public's expectations of how victims “should” behave conflict with the way victims actually behave. When this occurs, the public perceives a victim's behavior as “counterintuitive,” and, therefore, compelling evidence of her lack of credibility.³ Mental health experts as well as other professionals who work with domestic or sexual violence victims, however, understand that behavior termed counterintuitive by the public actually represents common victim responses to trauma.

Defense attorneys are eager to capitalize on the public's lack of knowledge and misconceptions about victim behavior. The defense routinely exploits public suspicion of sexual and domestic violence victims, arguing that a victim's behavior is inconsistent with the behavior of a “real” victim.⁴ This often is an effective strategy where there are only two witnesses⁵ to a sexual or domestic assault: the victim and her assailant – a common scenario in sexual and domestic violence prosecutions. These types of sexual and domestic violence cases are often described as “he said, she said,” and the trial unfolds into a focus on the victim's—rather than the defendant's—behavior. The victim's credibility becomes so inextricably linked with her behavior that, left unexplained, it will become the defense's most effective weapon to negate her testimony.⁶

Experienced prosecutors and other allied professionals familiar with victim behavior understand that victims have individual responses to trauma that are often counterintuitive to public expectations, but may be unable or unsure of how to explain this to the jury. Defense attorneys also understand the necessity of introducing expert testimony to explain sexual or domestic violence victim behavior to support an element of an affirmative defense, such as a claim of self-defense. For example, in one

case the defense argued: “Misconceptions regarding battered women abound, making it more likely than not that the average juror will draw from his or her own experience or common myths which may lead to a wholly incorrect conclusion.”⁷ Historically, expert testimony to explain sexual or domestic violence victim behavior was offered primarily by defense attorneys. This testimony often focused on an examination of the defendant as well as a diagnosis or opinion that she suffered from Battered Woman Syndrome (BWS),⁸ “Rape Trauma Syndrome (RTS),”⁹ or that her actions were the results of “Battering and Its Effects.”¹⁰ Eventually, prosecutors realized that explanations of common victim behaviors also would assist jurors in sexual and domestic violence prosecutions by countering the common myths and stereotypes that consistently hampered these prosecutions. Not surprisingly, some prosecutors simply copied the defense’s method of introducing expert testimony on syndromes to explain the behavior of sexual and domestic violence victims. For example, in some jurisdictions, the terms “Battered Woman Syndrome,” “Battering and Its Effects” and “Rape Trauma Syndrome” are offered by both prosecutors and defense attorneys to explain the behavior of sexual and domestic violence victims. The goals of explaining victim behavior in sexual and domestic violence prosecutions, however, are much different from those used by the defense to excuse or justify criminal behavior of sexual and domestic violence victims. As a result, terms and practices that may be well-suited to the defense have been ill-suited when employed by the prosecution.

The protocol for explaining victim behavior during a criminal prosecution depends upon the laws of a particular jurisdiction as well as the specific circumstances of each case.¹¹ Nevertheless, for the reasons set forth in this monograph, practices which include describing victim behavior in terms of a syndrome are not recommended. There are general rules that prosecutors can follow in order to explain victim behavior effectively. This monograph sets forth recommended practices for addressing victim behavior in a sexual or domestic violence prosecution, and providing an accurate context in which a jury can evaluate a victim’s behavior.¹² The first chapter addresses the prevalence of myths surrounding sexual and domestic violence and the impact of those myths on juror assessments of victim credibility as well as verdicts. The second chapter defines “coun-

terintuitive behavior” and other relevant terms used in case law and articles to describe victim behavior that does not comport with public expectations of sexual and domestic violence victims. The third chapter sets forth the recommended practices for introducing expert testimony to explain victim behavior in a sexual or domestic violence prosecution. The fourth chapter discusses the limitations on practices currently used to describe victim behavior. Finally, the appendix includes sample questions for qualifying experts and eliciting testimony on victim behavior. The appendix also includes a list of suggested sources, in addition to those cited in the body of this monograph, to which prosecutors can refer when preparing their case.

THE PREVALENCE AND IMPACT OF SEXUAL AND DOMESTIC VIOLENCE MYTHS ON JURY VERDICTS

The Myths

The prevalence of myths surrounding sexual violence is well-documented¹³ and results in a focus on the victim.¹⁴ “Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning.”¹⁵ One “common myth is that rapists are most often strangers[,] who suddenly attack their victims in a dark alley.”¹⁶ Regardless of whether the defendant is a stranger or someone the victim knows, jurors express victim blame “in several themes: victim masochism (e.g., she enjoyed it or wanted it), victim participation (e.g., she asked for it; it happens only to certain types of women), and victim fabrication (e.g., she lied or exaggerated).”¹⁷

Jurors often believe that a “real” victim would have promptly reported her assault to authorities, particularly in sexual assault cases. “For many years, the legal assumption with regard to rape victims was that they would complain immediately to authorities.”¹⁸ For example, in 1949, the Washington Supreme Court noted:

[The hue and cry] doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant’s omission of any showing as to when she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all, and therefore [sic] that it is more likely that the liberties upon her person, if any, were not offensive and that consequently her present charge is fabricated . . .

Modernly, the inference affects the woman’s credibility generally, and the truth of her present complaint specifically, and consequently, we permit the state to show in its case-in-chief when the woman first made a complaint consistent with the charge.”¹⁹

Ultimately, Washington, along with many other jurisdictions, discredited this doctrine.²⁰ In other jurisdictions, however, the myth that victims immediately report their assaults continues to persist and is reflected in the current law. For example, in Pennsylvania, the jury is instructed that although a victim's failure to promptly report her assault is not conclusive evidence of consent, it should be considered in judging her credibility:

4.13A—FAILURE TO MAKE PROMPT COMPLAINT IN CERTAIN SEXUAL OFFENSES

1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without *[name of victim]'s* consent.

2. The evidence of *[name of victim]'s* [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the *[failure to complain]* *[delay in making a complaint]* should be considered in evaluating *[his]* *[her]* testimony and in deciding whether the act occurred *[at all]* *[with or without [his] [her] consent]*.

3. You must not consider *[name of victim]'s* [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent. *[name of victim]'s* failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of *[his]* *[her]* testimony and must be considered by you in light of all the evidence in the case.²¹

As explained in the Advisory Committee Note, this jury instruction is based upon a Pennsylvania statute reflecting the belief that a victim's failure to immediately report a sexual assault is relevant to her credibility:

The instruction is derived from section 3105 of the Crimes Code.

It is appropriate where the evidence suggests that an alleged victim, otherwise competent and able to do so, did not promptly report a sexual offense. *While lack of a prompt complaint does not defeat the charge, it may, in an appropriate case, have some evidentiary value in assessing the complainant's credibility as to either the actual occurrence of the offense, or the complainant's consent to the act otherwise constituting it.*²²

According to Pennsylvania's "prompt complaint" statute:

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.²³

The prevalence of myths surrounding domestic violence still exists, despite the increased media and political attention that has been focused on this issue. For example, many people still believe:

Domestic Violence is caused by alcohol or drugs.

Domestic Violence is out-of-control behavior.

Domestic Violence is caused by stress.²⁴

Women exaggerate the problem of domestic abuse.

Battered women are masochistic and provoke abuse; they must like it or they'd leave.²⁵

The public's belief in myths is reflected in the case law. One case notes that battered women are "subject to many misconceptions and myths, including the belief that the woman provokes the beatings or likes the beatings ... [when] she neither leaves the batterer nor seeks help."²⁶ Several clinical studies also have documented that the public's belief in "misinformation about domestic abuse [negatively impacts] their evaluation of [a] battering victim's credibility."²⁷ In addition, many law review articles address the admissibility of expert testimony to explain victim behavior and dispel myths.²⁸ For example, in support of her argument for the admission of expert testimony on domestic violence, Alana Bowman writes: "[e]xpert testimony that battering occurs in all cultures, religions,

ances, and economic levels serves to counter the ‘widespread public image’ of a typical batterer.’²⁹

The Impact of Myths on Jury Verdicts

Common victim behaviors are often incomprehensible to laypeople.³⁰ Laypeople, therefore, often rely on myths or substitute their own wrong judgments. Further, “[m]any jurors evaluate a victim’s actions as if she had a wide range of options and support resources available to her, and tend to blame her for staying in abusive relationships [or for her assault.]”³¹ Jurors often regard a victim’s behavior as evidence that she is unreliable. For example, one case notes, “[to] the average juror untutored in the psychological dynamics of domestic violence, the victim’s vacillating behavior towards the defendant—in particular her back and forth attempts to end the relationship—might have seemed counterintuitive and might have even suggested her version of events was inherently unreliable and unworthy of belief.”³² Another case notes “the jury naturally would be puzzled by the complete about-face [the victim] made and would have great difficulty determining which version of [the victim’s] testimony it should believe.”³³ Further, in *People v. Ellis*,³⁴ the court recognized that a victim’s recantation was not self-explanatory and that without a possible explanation for it, jurors’ application of their common sense would likely lead to them to apply their own myths to the behavior.³⁵ As reflected in these decisions, even common victim responses to trauma may undermine a victim’s credibility in jurors’ eyes because jurors perceive the responses as counterintuitive.³⁶ Unfortunately, the resultant misperception of the victim’s credibility often leads to a “not guilty” verdict.

A juror’s substitution of his or her own judgment for the facts of the case can also happen in cases where the juror either has been, or knows, a victim of a domestic or sexual assault. In these cases it is not uncommon for jurors to condemn victims who do not behave as they or their acquaintances behaved. Further, jurors easily become fixated on their expectations of the victim’s as well as the defendant’s behavior.³⁷ If the victim fails to measure up to those expectations, jurors often jump to the conclusion that the victim is incredible and her testimony should not be believed. This misperception also results in not guilty verdicts.

The Necessity of Expert Testimony to Dispel Myths and Provide Context for Victim Behavior

Prosecutors must explain victim behavior to provide jurors with an accurate context in which to evaluate victim behavior so that jurors do not misjudge certain conduct as evidence of a victim's dishonesty and incredibility. Many courts have recognized that expert testimony is necessary to prevent jurors' from misjudging the victim based upon their misperceptions of victims. For example, in *U.S. v. Rynning*,³⁸ a case involving child sexual abuse, the United States Court of Appeals for the Armed Forces noted: "the victim's behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of counterintuitive behavior often occur in sexual abuse cases."³⁹ Prosecutors, therefore, should consult an expert—social worker, therapist, counselor, psychologist or physician, among others—to explain victim behavior to the jury. If the prosecutor does not address and attempt to explain victim's behavior, either through expert testimony or the victim herself, the jury will be left without the proper context in which to evaluate her credibility.

DEFINING “COUNTERINTUITIVE” AND OTHER COMMON TERMS USED TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS

“Counterintuitive” Behavior

The term “counterintuitive” describes the public’s perception of victim behavior as not comporting with its expectations of a “real” victim’s behavior.⁴⁰

Counterintuitive victim behavior refers to:

Actions or statements made by victims in the aftermath of an assault which appear to other people as illogical or poor decisions by the victim.

Behaviors that are not what the average person would “expect” from a victim.

Jurors’ perceptions of victim behavior—rather than the behavior itself—as described by court [sic] and other scholars.⁴¹

The term “counterintuitive behavior” is **not** a psychological term nor does it define a victim’s behavior. Rather, it defines the public’s perception of the victim’s behavior and the failure of the public’s expectations to match actual victim behavior. As a result, it is useful in arguing the necessity and relevance of expert testimony that addresses sexual and domestic violence victim behavior.

Sexual and domestic violence victims behave in individual, multi-faceted, and complex ways. Their behaviors, therefore, cannot be reduced to simple terms. As a result, a prosecutor should not seek to qualify a witness as an expert in “counterintuitive victim behavior” nor should an expert’s experience be qualified as “experience working with counterintuitive victim behavior.”⁴² In several cases involving sexual and domestic violence prosecutions, courts have used the term “counterintuitive” when examining the relevance and admissibility of expert testimony to explain victim behavior. For example, in 1988, the Washington Supreme Court

recognized the disconnect between public expectation of victim behavior and the actual victim behavior by noting that the ongoing nature of relationships in which there is domestic violence is “even more *counterintuitive* and difficult to understand” than the number of women who are victims of domestic violence.⁴³ “The average juror’s *intuitive* response could well be to assume that someone in such circumstances could simply leave her mate, and that failure to do so signals exaggeration of the violent nature of incidents and consensual participation.”⁴⁴ Similarly, the trial court in *State v. Searles*⁴⁵ concluded that the victim’s minimization of her injuries “would have appeared counterintuitive to jurors.”⁴⁶

Other courts have recognized inconsistent statements, recantation, and delayed reporting as “counterintuitive” behaviors.⁴⁷ Even RTS,⁴⁸ a term which is not recommended to describe victim behavior, was described as manifesting itself in “counterintuitive behaviors that rape victims show, such as not leaving the relationship, being calm and composed after the rape, failing to report the rape for days or even months, recanting or giving contradictory testimony, and failing to identify the assailant or remember some of the assault.”⁴⁹

Other Common Terms

Prosecutors who seek to introduce expert testimony relevant to sexual and domestic violence victim behavior do so for different purposes than defense attorneys. Specifically, defense attorneys offer expert testimony to excuse, justify or mitigate their clients’ “criminal” behavior. Prosecutors, on the other hand, seek to introduce expert testimony to dispel myths and misconceptions so that a victim’s puzzling but non-criminal behavior can be fairly evaluated, i.e., to provide an accurate context in which to assess a victim’s behavior.

Historically, evidence explaining sexual and domestic violence victim behavior was introduced by defense attorneys seeking to support self-defense or duress claims raised by female defendants who were battered or sexually abused. This type of evidence traditionally was introduced by defense attorneys as BWS and, less frequently, as RTS. More recently, the term and scope of expert testimony addressing the behavior of battered

women—as both complainants and defendants—has been renamed “battering and its effects,”⁵⁰ a term which was developed to more accurately reflect the scientific and psychological research regarding battered women’s behavior and reactions to long-term abuse.⁵¹ RTS, discussed below, also has been re-evaluated and criticized because the subsequent research has failed to replicate the findings of Burgess and Holstrom. Further, the term has come to encompass several different meanings.⁵²

Notwithstanding the distinct purpose of each type of testimony, when prosecutors began introducing expert testimony to explain victim behavior, they often adopted the terms and methodologies used by defense attorneys. As a result, relevant case law, law review articles, and other scholarly pieces often use the same terms to describe victim behaviors that range from learned helplessness and homicide to a failure to report an assault. Victim behavior is also described in terms of: Battered Woman Syndrome (BWS); Rape Trauma Syndrome; Battering and Its Effects and Posttraumatic Stress Disorder⁵³ in sexual and domestic violence prosecutions as well as legal and psychological literature. Accordingly, the definitions of each term are set forth below. The limitations encountered when using these terms to describe victim behavior that is relevant to a sexual and domestic violence prosecution are addressed in *Limitations on Common Practices of Introducing Expert Testimony to Explain Victim Behavior*.

Battered Woman Syndrome

In the late 1970s, Lenore Walker developed the term Battered Woman Syndrome⁵⁴ (hereinafter “BWS”) to describe “a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged [period] of time.”⁵⁵ The term BWS describes both a pattern of violence against a woman as well as the “measurable psychological changes that occur [in a woman] after exposure to repeated abuse.”⁵⁶ Expert testimony on BWS is “designed to apprise the jurors of certain repeated patterns of behavior on the part of many battered women. . . . [so that] the jurors [are] in a better position to determine whether these patterns of behavior might explain any perceived discrepancy between [the victim’s] words and deeds.”⁵⁷ Traditionally, evidence of BWS was presented by the defense to explain why a woman attacked or killed her alleged abuser.⁵⁸ Gradually,

prosecutors began offering testimony on BWS to explain victim behavior in a domestic violence prosecution.

“Learned helplessness” is a significant feature of BWS and describes a battered woman’s belief that any attempt to escape her abuse is futile.⁵⁹ According to Walker, a battered woman’s experience of random and uncontrollable abuse over time produces a psychological state of “learned helplessness” which manifests itself in her belief that she cannot escape her abuser.⁶⁰ Walker also concluded that a battered woman’s belief in the impossibility of her escape decreases her motivation to avoid her batterer’s violence.⁶¹

The theory of the “cycle of violence”⁶² was originally integral to BWS. The term “cycle of violence” refers to a domestic violence theory that there are three distinct phases included in violent relationships: tension building phase, acute battering phase, and “honeymoon” or loving-contrition phase. Originally, Walker believed that a battered woman must experience at least two “cycles of violence” in order to develop BWS.⁶³ The parameters and definition of BWS, however, have evolved since Walker’s initial definition. Particularly significant to the evolution of knowledge about battered women is the acknowledgement that each battered woman’s experience is different. As a result, it is understood that not all battered women experience a cycle of violence.⁶⁴ Similarly, it is also recognized that the cycle of violence is only one of several theories regarding the dynamics of domestic violence. For example, the theories of “power and control” and “a continuum of violence” are both accepted. “Power and control” describes the physical, psychological, emotional, and financial ways in which a batterer controls his partner in a domestic violence relationship. The theory of a continuum of violence describes intimate partner violence that is constant and is expressed throughout the course of the relationship on a variety of levels, ranging from verbal abuse to low-level violence, through serious assaults, or possibly homicide. Many domestic violence relationships, however, follow no pattern or theory.

Battering and Its Effects

In 1996, the U.S. Department of Justice (USDOJ) released a report entitled *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*.⁶⁵ One of the report’s conclusions was “the term ‘battered

woman syndrome’ is no longer useful or appropriate.”⁶⁶ Although the authors recognized the historical role of BWS in the introduction of expert testimony, they concluded “the term does not reflect the breadth of empirical knowledge now available concerning battering and its effects.”⁶⁷ They noted that:

“the phrase ‘battered woman syndrome’ implies that a single effect or set of effects characterizes the responses of all battered women, a position unsupported by the research findings or clinical experience. . . . They also raise[d] concerns that the word ‘syndrome’ may be misleading, by carrying connotations of pathology or disease, or that it may create a false perception that the battered woman ‘suffers from’ a mental defect. All preferred to refer to evidence or expert testimony on ‘battering and its effects’ and urged the adoption of this terminology as the standard phrase of reference.”⁶⁸

The admissibility of expert testimony on Battering and Its Effects may be authorized by statute.⁶⁹ For example, California Evidence Code § 1107 states the term Battering and Its Effects is used to describe “the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence as well as general victim behavior.”⁷⁰ This term appears to encompass learned helplessness that causes a victim to kill her abuser as well as general testimony on common “non-criminal” victim behavior, such as a delayed report.⁷¹ The definition of this term is so broad, however, that it can be ineffective at accurately describing common domestic violence victim behaviors. Further, since sexual and domestic violence victim behavior is individual and complex, it should not be reduced to a simple term.

Rape Trauma Syndrome

The term “Rape Trauma Syndrome” (RTS) was created by Ann Burgess and Lynda Holmstrom in 1974 to describe recurring patterns of emotional distress in rape victims to explain their healing and coping stages. Based upon their interviews of 600 rape victims, Burgess and Holmstrom defined RTS as “the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape.”⁷² They described RTS as “behavioral, somatic, and psychological reactions . . .

[which are] an acute stress reaction to a life-threatening situation.”⁷³ They further explained RTS as a two-phase response pattern. “[T]he first phase is marked by fear of physical injury, mutilation, and death. The second [phase] begins from two to six weeks after the assault and is characterized by a change in lifestyle, dreams, nightmares, depression, and the development of fears related to the attack.”⁷⁴ Subsequent research findings and clinical experiences, however, do not support this definition.

Posttraumatic Stress Disorder

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)⁷⁵ includes rape as one of the “traumatic events that can lead to the development of [Posttraumatic Stress Disorder].”⁷⁶ Posttraumatic Stress Disorder (PTSD) is the “[d]evelopment of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity.”⁷⁷ “Traumatic events that are experienced directly include . . . sexual assault [and] physical attack.”⁷⁸ During the traumatic event, the individual experiences intense fear, helplessness, or horror.⁷⁹ The symptomatology of the disorder includes “flashbacks, distressing dreams, or reenactments of the traumatic events; persistent re-experiencing and persistent avoidance of stimuli related to the event(s); persistent symptoms of heightened physiological arousal as manifested in, for example, hypervigilance, irritability, or sleep difficulties; and/or a numbing of general responsiveness.”⁸⁰ These symptoms last at least one month and cause significant distress or impairment.⁸¹ Although PTSD “was originally conceived to address the trauma experienced by combat veterans, it was soon recognized that the diagnosis had broad applications to all types of trauma, including “interpersonal stressors such as rape, sexual abuse, and physical battering.”⁸²

RECOMMENDED PRACTICES FOR INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR: A THREE-STEP PROCESS

Prosecutors should follow three steps when determining how to address and explain a victim's behavior. Step one: identify the behavior in the case that jurors will perceive as counterintuitive. Step two: determine if expert testimony explaining victim behavior is admissible in the jurisdiction or if the behavior will have to—or should—be explained in another manner.⁸³ Step three: explain the victim behavior effectively. Prosecutors who introduce expert testimony on victim behavior should be prepared to explain the behavior in a manner that respects the victim's integrity as well as the difficult situation in which she has found herself.

Step One: Identify the Behavior that Jurors Will Perceive as Counterintuitive

The first step in presenting expert testimony to explain victim behavior is to identify the behavior in the case that the jury will not understand. When preparing a case, prosecutors should review all evidence, including police and medical reports as well as witness statements for descriptions of victim behavior that may appear counterintuitive to the jury. Although each domestic violence or sexual assault case presents unique facts, there are common victim behaviors which, if present in a case, may cause jurors or judges to disbelieve the victim.

In *State v. Townsend*,⁸⁴ the New Jersey Supreme Court wrote: “We have no doubt that the ramifications of a battering relationship is still a subject that is beyond the ken of the average juror.”⁸⁵ Specifically, many people expect domestic violence victims to leave their abusers, report the abuse, and testify on behalf of the state in the prosecution of their abusers following the first battering incident. The actual behavior of many domestic violence victims, however, is quite different from the public's expectations. Specifically, victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers. When these behaviors are present in a case, a prosecutor must be ready to address them either through the victim's testimony or an expert.

The behaviors of sexual assault victims—particularly non-stranger sexual assault victims—also frequently conflict with the type of behavior the public expects from a “real” victim. Without explanation, jurors use these behaviors as reasons to doubt a victim’s account of her assault. For example, the public expects sexual assault victims to scream during their rape; to forcefully resist their attackers; to report their rapes immediately; and to remain vigilant following their attacks. Victims, however, often do not scream or resist during a rape; they frequently delay reporting their rape;⁸⁶ and they often do not remain hypervigilant.

Once the prosecutor has identified the relevant behaviors, there are many ways to determine possible explanations for them. The most obvious way is to talk to the victim. Not only may she be able to explain the reasons for her behavior, she also may be able to articulate those reasons to a jury. Sometimes the reasons for her actions will appear rational and will be easy for the jury to accept. Other times, it will be difficult, or impossible, for her to explain her behavior to a jury, and expert testimony will thus be even more important.

Experts who have experience with victims and have observed their varied responses to trauma can assist in evaluating the relevant counterintuitive behaviors that exist in a case and offering possible explanations for them. The assistance of an expert can help a prosecutor develop a case theory or theme, outline direct examination of the victim, and understand cross-examination of the defendant or the victim. Prosecutors should not, however, seek assistance from an expert who has examined the victim or is currently providing treatment or counseling to the victim—except in very rare circumstances.⁸⁷ Examining a victim or using her treatment provider as a witness will erode her privacy interest in any treatment record. Prosecutors must be mindful that sexual and domestic violence victims have privileges and that these must be respected and guarded.⁸⁸ Not only must the privilege itself be respected, but the victim’s feelings must be considered. If a victim’s treatment provider testifies against a victim’s wishes, the victim will have no one to whom she can turn for private support.

Step Two: Determine the Admissibility of Expert Testimony on Victim Behavior**What does the law say?**

In addition to establishing the admissibility of expert testimony on victim behavior in a jurisdiction, case law or statutes will explain why and how expert testimony is admissible in a jurisdiction.⁸⁹ For example, in *State v. Ciskie*,⁹⁰ the Washington Supreme Court explained that “neither logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror’s understanding.”⁹¹ Not all jurisdictions, however, follow this reasoning. Although defendants who are claiming self defense or another affirmative defense on the basis of being sexual or domestic assault victims may introduce expert testimony explaining Battering and Its Effects in all 50 states and the District of Columbia,⁹² only thirty-one states, the District of Columbia, the military, and federal jurisdictions have published cases permitting the *prosecution* to introduce expert testimony on adult victim behavior.⁹³ Significantly, Pennsylvania expressly prohibits the use of expert testimony to explain victim behavior.⁹⁴ Some of the remaining states have excluded the testimony based upon the purpose for which it was admitted or the particular facts of the case. Other states have limited the introduction of expert testimony on victim behavior to child sexual abuse cases. Finally, in some jurisdictions, there are simply no reported cases addressing this issue.⁹⁵

Prosecutors in jurisdictions without case law or a statute that expressly excludes or admits expert testimony describing victim behavior should look to cases involving self-defense claims or child victims for guidance. If there is no analogous case law, prosecutors should prepare to argue the admissibility of expert testimony on victim behavior under their rules of evidence as well as *Daubert*,⁹⁶ *Kumho Tire*,⁹⁷ or *Frye*,⁹⁸ depending upon the jurisdiction’s standard for admitting testimony regarding scientific, technical, or other specialized knowledge.⁹⁹ In some jurisdictions, prosecutors may be able to argue that the testimony is not subject to review under these cases.¹⁰⁰

In order to admit expert testimony, prosecutors must establish that it is relevant, that it represents the proper subject of expert testimony, that the

subject of the testimony meets the reliability requirements of *Daubert* and *Kumho Tire*, is generally accepted in the relevant scientific field as prescribed by *Frye*, or is not subject to a review under these cases, that the probative value of the evidence substantially outweighs its prejudicial value, and that the expert is qualified to testify.

When permissible under the laws of the jurisdiction, experts in sexual and domestic violence should focus their testimony on descriptions of the myths surrounding sexual or domestic assaults, the dynamics of sexual or domestic assaults, and common victim behaviors. This testimony should be based upon the “expert’s own experiences” with victims and observations of the victims’ behaviors.¹⁰¹ “For example, workers at battered women’s shelters, battered women’s advocates, and qualified experts have testified regarding their own observations that most women do not report the first assault, even to friends and family and they rarely report the first assault to police.”¹⁰² “Through the hundreds, even thousands of contacts with battered women resulting from hotline calls and direct-service, workers in shelters are able to closely observe the behavior or women who call daily.” If the expert is familiar with any relevant literature or studies addressing victim behavior, they also should refer to them.¹⁰³

The expert’s testimony also should focus on victim behaviors that are relevant to the case in which they are testifying. Experts should not, however, have reviewed the case file, nor should they give an opinion about the victim’s behavior. Doing so risks exposing the victim to an examination by a defense expert. Further, it risks becoming an excludable commentary on a victim’s credibility rather than admissible testimony about common victim behavior.¹⁰⁴ In addition, since expert testimony about the specific behaviors of a victim is subjective, it is more vulnerable to attack by the defense, who may offer an expert whose subjective opinion may differ. When this happens, the weight of this testimony is greatly diminished.

Admitting expert testimony on victim behavior under the federal rules of evidence

Establishing Relevance—F.R.E. 402 Under the Federal Rules of Evidence, the admissibility of expert testimony is governed by liberal standards, and is first analyzed according to the general rules of relevance.¹⁰⁵

Federal Rule 402 provides that “[a]ll relevant evidence is admissible Evidence which is not relevant is not admissible.”¹⁰⁶ Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.¹⁰⁷

Expert testimony about victim behavior is relevant in sexual and domestic violence cases because the victim’s credibility is inextricably linked to her behavior. Common victim behaviors often are counterintuitive to the public’s expectations. Left without an explanation, a victim’s behavior often becomes compelling evidence to jurors that the victim lacks credibility. The explanation of a victim’s counterintuitive behavior is relevant, therefore, because the jury’s ability to understand a victim’s behavior is intertwined with its ability to judge her credibility.¹⁰⁸

One example of the jury’s common mischaracterization of domestic violence victims is their misunderstanding of a victim’s decision to remain in an abusive relationship as evidence of her complicity in or responsibility for her abuse. In many jurors’ eyes, victims who recant are viewed as liars whose original reports to police were baseless accusations concocted to manipulate the system. Alternatively, they are perceived as pathological women with low self-esteem who enjoy or perhaps deserve their abuse. Either interpretation has devastating consequences, often resulting in a not guilty verdict in a criminal prosecution.

Expert testimony on the general dynamics of domestic violence and common behaviors of domestic violence victims has been ruled relevant to explain a victim’s conduct or testimony to avoid mischaracterizations.¹⁰⁹ In domestic violence prosecutions, expert testimony indicating that it is not uncommon for a victim to later deny or minimize her abusers’ conduct has been ruled relevant to explain the possible reasons for inconsistencies between a victim’s testimony on the stand and her statements to police and prosecutors.¹¹⁰ Many decisions have acknowledged that the public’s beliefs and attitudes about abused women are at odds with experts’ studies.¹¹¹ Some courts have recognized that although witness credibility is routinely judged by the “consistency [of the witness’ statements], willingness to aid the prosecution, and straightforward rendi-

tion of the facts,” abuse victims often lack these qualities for good reason.¹¹² Further, the courts have recognized that this behavior often is attributed to inaccuracy or deception¹¹³ because of “widely held misconceptions . . . and popular myths.”¹¹⁴

The rationale for the admission of expert testimony to explain victim behavior in sexual assault cases is also based upon the negative impact of prevailing sexual assault myths on a jury’s assessment of victim credibility. Specifically, the reactions of rape victims, when contrary to the public’s expectations, are often exploited by the defense to demonstrate a victim’s lack of credibility. Although, statistics demonstrate that few victims report sexual assaults and it is uncommon for sexual assault victims to report their assaults immediately, the public still expects the victim to promptly report her assault.¹¹⁵ As a result, juries require expert testimony to explain how a victim’s fear, shame, and guilt commonly result in her failure to speak of or report her rape. For example, after acknowledging the convention of rape victims’ failure to report, the Colorado Supreme Court wrote: “The lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims.”¹¹⁶

The Subject of the Expert Testimony—F.R.E. 702 Once relevance is established, prosecutors must show that the subject of expert testimony satisfies the requirements of F.R.E. 702. According to F.R.E. 702, if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.¹¹⁷

In sum, the proper subjects of expert testimony are topics beyond the ken and understanding of the average juror. Several decisions have adopted this very language when explaining the necessity of expert testimony to explain victim behavior in sexual and domestic violence cases. For example, in *Nixon v. U.S.*,¹¹⁸ the D.C. District Court determined that

common myths and patterns of battering and common behaviors of battered victims were found to be beyond the ken of the average juror.¹¹⁹ Further, in *People v. Taylor*,¹²⁰ the Court of Appeals of New York recognized: “Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970s, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror.”¹²¹ Further, courts have reasoned that since juries often find victim behavior to be “incomprehensible”¹²² and “counterintuitive”¹²³ prosecutors must explain it.

Prosecutors should note, however, that not all jurisdictions have found victim behavior that may be counterintuitive to jurors to be beyond their understanding. For example, in *Washington v. Cooke*,¹²⁴ the Washington Appellate Court concluded that expert testimony on victim behavior (here, termed battered woman syndrome) was not required to explain a victim’s decision to remain with her abuser when the defense argued that this behavior was inconsistent with a real victim’s behavior. Specifically, the court noted that “[e]xpert testimony is required when an essential element in a case is best established by opinion and the subject matter is beyond the expertise of a lay witness”¹²⁵ The court concluded that expert testimony was not required in this case because the “disputed elements were adequately proved with lay testimony. Personal relationships, even abusive relationships, are within the realm of the jury’s collective experience and common sense. The jurors [therefore] could evaluate the argument in light of human experience.”¹²⁶

The subject of the expert’s testimony should be focused on objective observations from the expert’s experience with, or specialized knowledge about, common reactions of sexual or domestic violence victims. It should also focus on the behaviors and issues related to sexual and domestic violence that are relevant to the case in which they are testifying. Where relevant and admissible, an expert’s testimony may also include a discussion about myths related to sexual and domestic violence. Although expert testimony may include current research or articles related to victim behavior, the most effective qualification often will be an expert’s extensive experience working with or observing sexual or

domestic violence victims. The reliability of this type of testimony, as compared with an expert's subjective evaluation if a victim, rests squarely on the extent of the expert's experience as well as his or her ability to articulate the observations and knowledge gained in the course of his or her experience. Because the expert testimony is objective, cross-examination likely will focus on the expert's honesty, i.e., is he or she truthfully relating his or her experiences; the breadth of the expert's experience, his or her knowledge of the literature; as well as his or her bias towards victims of sexual or domestic violence. In addition, an expert also should discuss his or her training experiences, which can be relevant to victim behavior as well as the public's belief in myths about sexual or domestic violence. Victim advocates, shelter or crisis center directors, social workers, Sexual Assault Nurse Examiners (SANEs), psychologists, and psychiatrists are some examples of experts who will possess the qualifications and experience discussed above.

In many jurisdictions, it is still common practice for expert testimony on victim behavior to be introduced as BWS, RTS, or an evaluation that the victim's behavior is consistent with one of these syndromes. This strategy is both ineffective and vulnerable to attacks that it is unreliable. This is discussed in more detail in *Other Common Terms* as well as *Limitations on Common Practices of Introducing Expert Testimony on Victim Behavior*. Second, using syndromes and disorders to describe victim behavior risks making jurors believe that the victim suffers from a pathology. Finally, since expert's who use these terms often render a subjective opinion about the victim, either directly or through a hypothetical, there opinions are easily countered by a different expert's opinion of the same facts.

These common attacks on expert testimony addressing victim behavior can be avoided by focusing expert testimony on victim behavior on an expert's observations, research, writing, or review of articles or studies which address: (1) a general discussion of sexual or domestic violence; (2) the existence and prevalence of common myths surrounding these types of violence; and (3) common victim responses to trauma or behaviors in these types of cases. This method does not include an expert opinion on whether a victim suffers from a syndrome or disorder, whether her behavior is consistent with an individual who suffers from a syndrome or

disorder, or whether her behavior was caused by a particular event. Accordingly, this method avoids pathologizing the victim. In addition, because the subject of the testimony is objective (facts and observations) rather than subjective (diagnosis and conclusion), it remains effective testimony which is less vulnerable to attack.

Establishing “general acceptance” under *Frye v. United States* and “reliability” under *Daubert v. Merrell Dow and Kumho Tire Co., Ltd.*

v. Carmichael If proposed expert testimony is determined to be relevant and meet the requirements of F.R.E. 402 or the applicable state rules of evidence, the testimony still must be subjected to further scrutiny under a state’s interpretations of novel scientific evidence.¹²⁷ States generally use one of two standards to determine the admissibility of this type of evidence: *Frye v. United States* and *Daubert v. Merrell Dow*.¹²⁸

• **Frye v. United States** In states that apply the traditional standard articulated in *Frye v. U.S.* for the admission of expert testimony, the testimony must be “based on a well-recognized scientific principle or discovery, and the theory from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field.”¹²⁹ Expert testimony addressing victim behavior has been found to be admissible under *Frye* in many jurisdictions. For example, in *People v. Ellis*,¹³⁰ the court cited a 1985 case in support of its conclusion that expert testimony on battered women’s behaviors “had ‘gained a substantial enough scientific acceptance to warrant admissibility.’”¹³¹

The “*Frye* test” bases the admissibility of expert testimony on general acceptance in a particular scientific discipline. One of the difficulties with this test is that it excludes otherwise valid and reliable testimony simply because it is too “new;” that is, it has not yet obtained general acceptance in the field. To rectify this problem, the United States Supreme Court adopted a more liberal test for the admission of novel scientific evidence in *Daubert v. Merrell Dow*.

• **Daubert v. Merrell Dow and Kumho Tire Co., Ltd. v. Carmichael** In *Daubert v. Merrell Dow*,¹³² the Supreme Court ruled that the *Frye* test had been supplanted by the adoption of the Federal Rules of Evidence.

The Court then adopted a validity/reliability test for the admission of expert opinion testimony under F.R.E. 702. The Court held that a trial judge is required to make a preliminary assessment of whether the reasoning or methodology underlying the expert's testimony is scientifically sound (validity), and whether the reasoning or methodology properly applies to the facts at issue (reliability).¹³³ "Subsequently, in *Kumho Tire Co., Ltd. v. Carmichael*,¹³⁴ the Supreme Court held that *Daubert* applies not only to expert testimony based upon 'scientific knowledge' but also to 'technical' and other 'specialized' knowledge covered by F.R.E. 702. The Court noted that the "trial judge has a gatekeeping function in these inquiries to ensure that any and all expert testimony is not only relevant but reliable."¹³⁵ Experts have "testimonial latitude broader than other witnesses on the theory that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."¹³⁶ "In some cases, the reliability determination focuses on the expert's qualifications to render the opinion. . . . In others it might center on the factual basis or data that give rise to the opinion."¹³⁷ In addition, "*Kumho Tire* reiterated the instruction that [*Daubert*] factors 'are meant to be helpful, not definitive'¹³⁸ and emphasized that the factors may or may not be 'pertinent in assessing reliability depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'"¹³⁹

Under *Daubert*, topics admissible through expert testimony are subject to the following criteria: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or has been published; (3) whether the theory or technique has a known or potential rate of error and what it is; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique is generally accepted in the relevant scientific community. As stated above, however, this list is not exhaustive and all factors do not need to be applied.¹⁴⁰

Avoiding Frye and Daubert?¹⁴¹ Some courts have held that expert testimony on victim behavior and similar matters is not even judged by a novel scientific evidence test. For example, in *State v. Borelli*,¹⁴² a case in which the state admitted expert testimony from a sociologist concerning BWS, the Connecticut Supreme Court noted that it "does not apply the

Frye test to all types of expert testimony, even if technical or scientific concepts are involved.”¹⁴³ It continued by recognizing that an application of the *Frye* test is appropriate when “the experimental, mechanical, or theoretical nature of the scientific evidence had the ‘potential to mislead lay jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts, and the fancy devices employed.’”¹⁴⁴ It concluded by stating that “expert testimony need not satisfy the *Frye* test in cases where ‘the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert’s assertions based on his special skill or knowledge. . . . Furthermore, where understanding of the method is accessible to the jury, and not dependent on highly technical or obscure scientific theories, the expert’s qualifications, and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence.’”¹⁴⁵ In *Borelli*, the expert neither examined the victim nor offered any opinion as to whether she was battered or exhibited symptoms similar to other battered women.¹⁴⁶ In addition, he did not “apply any scientific instrument or test to specific evidence in the case, nor did he use battered woman’s syndrome as a diagnostic tool . . . [nor] did he apply any scientific test to a hypothetical question posed by the state.”¹⁴⁷ Rather, the expert’s testimony was “based on his observations of a large group of battered women through the lens of his educational background and experience. [Further, t]he state offered [the expert’s] testimony in order to provide an interpretation of the facts that a lay jury may not have perceived because of its lack of experience with battered women.”¹⁴⁸ In this case, the state offered the evidence “for the purpose of providing a possible explanation for the victim’s recantation and to impeach her subsequent testimony that she had lied” to get the defendant drug treatment.¹⁴⁹

Avoiding the Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time—F.R.E. 403 Even though evidence is relevant, some courts may exclude testimony when they determine the danger of unfair prejudice substantially outweighs its probative value.¹⁵⁰ The final analysis that must be applied to the introduction of expert testimony is whether “its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, possibly misleading the jury,

or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹⁵¹ “A synthesis of the courts’ reasonings in the cases that have allowed expert testimony [on victim behavior] reveals that the key consideration is whether such testimony can help explain seemingly bizarre or puzzling behavior by a witness without undue prejudice to the defendant.”¹⁵²

“There is a kind of weighting or presumption in favor of admissibility built into F.R.E. 403.”¹⁵³ Evidence will not be excluded if the counterweights merely outweigh probativeness; they must ‘substantially outweigh.’ In addition, prejudice alone is not enough; the prejudice must be ‘unfair.’”¹⁵⁴ Generally, courts will focus on the reliability of the theories being expounded by the expert as a critical factor in weighing the probative value of expert testimony.¹⁵⁵ In addition, courts are concerned that the aura of trustworthiness or reliability that automatically attaches to expert opinion will cause a jury to give the evidence from the expert greater weight. This potential impact on the jury makes an unreliable opinion or one based upon an expert’s own *lay judgment* that much more dangerous—as jurors will then be focusing on improper testimony.¹⁵⁶ This analysis further underscores the recommendation that prosecutors focus the expert’s testimony on the expert’s experience and knowledge about common victim behaviors; it should not include an opinion that the victim’s behavior is consistent with that of other victims of assault.

Qualifying the Expert Under F.R.E. 702, an expert must be qualified by “knowledge, skill, experience, training, or education.”¹⁵⁷ Qualifications are defined broadly. Generally, an individual with a reasonable pretense to specialized knowledge may be qualified as an expert based upon his or her clinical experience,¹⁵⁸ education, knowledge of relevant scholarly articles, authorship of articles, prior qualification, or a combination of the factors listed above.¹⁵⁹ “The trial court has discretion in determining the sufficiency of the expert’s qualifications and its decision will be reviewed only for manifest error and injustice.”¹⁶⁰ In addition, courts give much deference to their previous decisions and, therefore, experts who previously have been qualified to testify as an expert typically will be qualified again.¹⁶¹

Many experts who have been qualified to testify about victim behavior

in domestic violence cases have impressive credentials as well as extensive experience in treating battered women or sexual assault victims.¹⁶² Other experts have been qualified based on their extensive clinical experience alone.¹⁶³ There is no single profession, training experience, or body of knowledge that makes one able to testify as an expert about victim behavior that jurors perceive as counterintuitive. The spectrum of experts is varied. Courts have held that “the witness d[oes] not have to be a trained clinician, capable of diagnosing . . . in order for the judge properly to qualify her as an expert concerning the general or typical characteristics”¹⁶⁴

If all else fails and a court does not allow expert testimony, the victim or another witness may be able to testify about a victim’s behavior after the alleged incident.¹⁶⁵ In this scenario, the prosecutor must address the behavior during his or her closing and offer possible explanations for the behavior based upon the evidence introduced during the trial.

• **“Traditional” Expert Qualifications** Traditionally, courts have found licensed clinical psychologists,¹⁶⁶ psychological counselors, and psychiatric nurses all qualified as expert witnesses.¹⁶⁷ For example, in one case, a witness was qualified as an expert in the area of the “general characteristics of battered women,” based upon the witness’s experience with over “200 battered women over a period of years,” a master’s degree in social work, a doctorate in sociology, a tenured and visiting position as a professor, as well as numerous publications.¹⁶⁸ In another case, the court noted that an individual with the proper experience and training as either a psychologist or psychiatrist would be qualified to testify about RTS.¹⁶⁹ Finally, another witness was qualified as an expert in BWS, because she held “a bachelor’s degree in psychology, a master’s degree in counseling, and was at the dissertation level for her Ph.D. in marriage and family counseling”¹⁷⁰ The court did not care that defense showed on cross-examination that she had never published any articles or that she had never before testified as an expert witness.¹⁷¹

• **“Nontraditional” Expert Qualifications** A witness is not qualified as an expert by meeting a fixed set of criteria; the analysis is unique to the witness and the witness’s education, training, and experience. An

expert witness need not reach the highest levels of education, clinical experience, and research conducted in order to be qualified as such. Courts have recognized that “[f]ormal education . . . is not a prerequisite for expert status.”¹⁷² The court in *Commonwealth v. Goetzendanner*¹⁷³ noted that “[t]he witness did not have to be a trained clinician . . . in order . . . [to testify] concerning the general or typical characteristics of BWS.”¹⁷⁴ In this case, the expert was the executive director of the New York State Office for Prevention of Domestic Violence, had over 10 years of experience in domestic violence programming and training, and had a bachelor’s degree in psychology.¹⁷⁵

The following are examples of “nontraditional” experts who have been qualified to testify about victim behavior:¹⁷⁶

- **Victim Advocate** In *Stevenson v. State*,¹⁷⁷ a victim advocate qualified as an expert witness in the area of sexual assault and common victim behavior based on her “fifty hours of sexual assault training[,] . . . work at [a] rape crisis center for over two years[,] . . . counseling] over 100 . . . victims of sexual assault,” publishing one article presented at a seminar, and writing several articles for the center’s newsletter.¹⁷⁸
- **Victim Witness Coordinator** In *State v. Schaller*,¹⁷⁹ a victim-witness coordinator with a degree in social work, who had served as a liaison between victims and prosecutors for a lengthy period of time, was permitted to testify that it was “very common” for domestic violence victims to “later minimize or recant” an earlier assault accusation.¹⁸⁰
- **Rape Crisis Center Counselor** In *State v. Robinson*,¹⁸¹ a Wisconsin court found a worker at a rape crisis center to be qualified as an expert in sexual assault and common rape victim behavior as she “had six years of experience at the rape crisis center and had personally dealt with seventy to eighty victims.”¹⁸² The court reasoned that, under Wisconsin’s equivalent of Federal Rule of Evidence 702, “a witness qualified as an expert by knowledge, skill, experience, training, or education may testify”¹⁸³ This witness was deemed an expert through her experience and was able to testify about misconceptions of rape victims.

- **Shelter Director and State Coalition Director** In the rape case *Thomas v. State*,¹⁸⁴ a director of a rape crisis center testified regarding the number of victims who delay reporting a rape or fail to report at all.¹⁸⁵ In a domestic violence case in Iowa, a shelter director was qualified as an expert in the general characteristics of BWS and was permitted to testify generally about BWS based upon her degree in social work; service as a director in related organizations for over ten years; involvement in counseling approximately 2000 battered women; training; participation on a task force; contribution to a task force publication; and her published article in a medical society.¹⁸⁶ The court noted that her degree in social work and her position as executive director of the Iowa Coalition Against Domestic Violence made her “impressive and easily [able to] qualify.”¹⁸⁷ A program services director of a battered women’s shelter was able to testify about family violence in another domestic violence case.¹⁸⁸
- **Emergency Room Doctor** In *Russell v. State*,¹⁸⁹ the court found that a board-certified doctor in emergency medicine who received training in BWS and who diagnosed patients with BWS was qualified as an expert in BWS in order to refute a defense claim that the victim’s behavior was inconsistent with that of a sexual assault victim.¹⁹⁰ The court also found that “[b]attered woman syndrome is often relevant to the emergency treatment of women, and this diagnosis is often made by emergency room physicians.”¹⁹¹ In *People v. Christel*,¹⁹² the Michigan Supreme Court noted, “simply because [the doctor] never treated complainant or defendant does not disqualify him” because the doctor’s practice included domestic violence victims and he had written on that subject.¹⁹³
- **Sexual Assault Nurse Examiner (SANE)** In *Escamilla v. Texas*,¹⁹⁴ a sexual assault nurse examiner (SANE) explained her role and that “her training and experience made her aware that some children delay reporting [child sexual abuse] for several reasons.”¹⁹⁵
- **Social Worker** In *Simmons v. State*,¹⁹⁶ social workers were qualified as experts on victim behavior in the area of domestic violence and sexual violence based upon their training and experience.¹⁹⁷

- **Law Enforcement Personnel** In *Escamilla*, a case that involved child sexual abuse, an investigator for the Llano County Sheriff's Department was permitted to testify that in her experience a "delayed outcry was normal."¹⁹⁸ Significantly, the court determined that because the witness was testifying about her personal experience, her testimony was not expert testimony. In this case, the expert had a Bachelor of Science degree in criminal justice "several years of experience as a forensic interviewer at a children's advocacy center."¹⁹⁹

Step Three: Explaining the Victim Behavior

Prosecutors should always consult their jurisdiction's law before making a motion to introduce expert testimony on victim behavior. If there is a conflict between the recommendations of this monograph and the rules mandated by a jurisdiction, prosecutors should defer to the specific practices of their jurisdiction. If a prosecutor practices in a jurisdiction that still employs syndrome testimony to explain victim behavior in sexual and domestic violence prosecutions, the prosecutor should consider ceasing this practice and introducing this testimony using accurate terminology and descriptions.

Determine the purpose of the expert testimony

Expert testimony should focus on victim behavior, a discussion of sexual or domestic violence as well as common myths and misconceptions about sexual and domestic violence. Prosecutors know all too well that one of the barriers to the successful prosecution of sexual and domestic violence cases is the perpetuation of myths. The primary purpose of the expert's testimony, therefore, is to dispel these myths. The expert may discuss articles or studies, either reviewed or conducted, as well as personal knowledge gained through delivering or attending trainings. Further, to limit confusion and ensure that the information delivered to jurors is relevant, prosecutors should guide an expert's testimony to ensure that the expert does not spend a great deal of time on issues that may be irrelevant to their case. For example, there are several older domestic violence theories. One such theory is the "cycle of violence." Although it may provide an accurate description of **some** relationships, this theory is not applicable to all domestic violence cases. As a result, experts should devote only minimal time, if any, to a discussion of this theory, unless it

directly applies to the case.²⁰⁰ If this theory is inapplicable, expert testimony that includes more than a recognition of this theory's existence likely will leave jurors with the impression that either a cycle exists or should exist in the current prosecution. As a result, if no evidence of a cycle is introduced, jurors may decide, incorrectly, that an incident did not occur.

After the prosecutor reviews the case file, interviews the victim and other civilian witnesses, talks to the victim advocate, and perhaps consults with an expert, the prosecutor should be able to identify some behaviors exhibited by the victim in the case that the jury may perceive as counterintuitive. The prosecutor should guide the expert's testimony so that it is focused on victim behaviors that are relevant to the case presented. When testifying, experts should briefly discuss common behaviors that they have observed in victims with whom they have worked or about which they have studied or read. Prosecutors, however, should structure their questioning of the experts²⁰¹ to focus on the behaviors that the complainant exhibited, since these will raise the greatest questions in jurors' minds. For example, expert testimony in a sexual assault case where the victim avoids contact with her assailant following her assault should not include a long, essentially irrelevant, discussion of mastery, where victims continue to have contact with their assailant for various reasons including an attempt to regain control over their assault.²⁰²

Decide whether to call an expert in your case

The decision to introduce expert testimony should be based on more than just the law of a particular jurisdiction. Just because expert testimony on victim behavior is admissible does not mean that prosecutors should introduce it. First, prosecutors should decide whether expert testimony is the most effective method of explaining a victim's behavior in a particular case. In some cases, the victim will be able to best articulate the reasons for her behavior. One example might be a case where a victim did not flee from a sexual or physical assault out of fear. The victim's testimony itself may provide a common-sense explanation that is far more compelling than abstract expert testimony.

In other cases, prosecutors may consider calling the victim's friends or family members to testify regarding changes in the victim's behavior pre-

and post-assault. These perceived changes may corroborate the victim's testimony about her feelings and behavior around the time of the assault and thus help to explain her actions to the jury.

Before presenting expert testimony, prosecutors should attempt to evaluate and understand the community in which they are prosecuting, as well as the jury panel and judge in each case. Some communities and some individual jurors may resist testimony from expert witnesses. Judges may have pre-conceived notions and biases as well. Alternatively, a community or judge may be receptive to expert testimony, but may have a bias against the expert available to the prosecutor.

As previously discussed, only in the rare case should a prosecutor offer expert testimony from an expert who has provided the victim with mental health treatment or a psychological examination. In such a case, victim privacy must be an utmost concern for the prosecutor when, as stated earlier, the decision to call this type of expert will expose the victim's mental health records to discovery and intense scrutiny. Since this will likely cause the victim emotional trauma, this practice is disfavored and should be used only after a full consideration of all available alternatives.

Prosecutors also should remember that a decision to use victim advocates as expert witnesses may implicate victim privacy and autonomy. Perhaps more importantly, these issues are implicated even when the advocate whom the prosecutor intends to call is not and has not been affiliated with an organization that has worked with the victim. Particularly in domestic violence cases where a victim is uncooperative with the prosecution, the potential exists that the victim will perceive an advocate's participation as a breach of trust or demonstration of disloyalty to her.

Choose the most effective expert for your case

When choosing an expert, the prosecutor must determine what kind of expert will be most effective based on the law of the applicable jurisdiction as well as the facts of the case. Normally, the prosecutor will have to choose between an academic or "credentialed" expert whose experience is grounded in theory, an "anecdotal" expert whose experience is based upon "in the field" work with victims, or a combination of both. Depending on

the jurisdiction, however, prosecutors may have to consider the expert's profession. For example, if a prosecutor is considering using a current or former member of law enforcement to discuss victim behavior, the prosecutor should consider whether the jurisdiction permits expert testimony from a current or former law enforcement officer; the community's relationship with and attitudes toward law enforcement; and whether that relationship will enhance or counteract the expert testimony.

Prepare the expert to testify²⁰³

Prosecutors must conduct appropriate pretrial preparation with even the most seasoned experts. First, experts should prepare for their qualification by reviewing their curriculum vitae and ensuring that it is current. Prosecutors should explain the necessary qualification requirements under F.R.E. 702. In addition, experts should be prepared for any challenges to their qualification. Prosecutors should be sensitive to the fact that experts may worry that they will not be qualified. This is particularly true when working with an expert who has not been qualified before or is a nontraditional expert, such as a victim advocate, rape crisis counselor, or shelter director. Prosecutors should never acquiesce to a defense request to stipulate to an expert's qualifications. It is important for the judge and the jury to understand the breadth of the expert's qualifications as well as the commonality of the victim behaviors that they may perceive as counterintuitive—as the expert's qualifications relate directly to the expert's credibility.

Expert witness preparation also must include a discussion about the subject matter on which the prosecutor will seek to offer the witness as an expert. Prosecutors should refer to the applicable law in their jurisdictions to determine in what, if any, subject matter a witness is legally required to be an expert in order to offer expert testimony. It bears repeating that although the victim behavior which necessitates the introduction of expert testimony has been described throughout this monograph as “counterintuitive,” prosecutors should **not** offer their expert as an “expert in counterintuitive behavior” (see *Chapter II*). Some examples of areas in which an expert may be qualified are “sexual or domestic violence,” “common sexual or domestic violence myths,” “common victim responses to trauma in sexual or domestic violence cases,” or “common victim behaviors in sexual or domestic violence cases.”

Prosecutors should meet with the expert to go over the purpose and focus of their direct testimony. This is the time to remind the expert about the issues and behaviors that are most critical to the case. Further, when working with a credentialed expert, such as a forensic psychiatrist or psychologist, prosecutors should be clear that a diagnosis or evaluation of the particular victim's behavior is not the intended focus of the expert testimony, unless the expert has been called to testify about the specific victim.²⁰⁴ Finally, prosecutors should prepare the expert for cross-examination. Where possible, this preparation should include a rigorous mock cross-examination.

Overcome common objections

Defense attorneys commonly object to the introduction of expert testimony on victim behavior on the following grounds: (1) relevance; (2) admissibility, including attacks under *Frye* and *Daubert*; (3) need for expert testimony (i.e., “It’s not beyond the ken of the ordinary lay person...”); (4) qualifications of the expert; (5) prejudice or one of the other F.R.E. 403 relevancy counterweights; (6) improper introduction of a defendant’s “uncharged misconduct;” (7) improper bolstering; (8) lack of foundation; (9) legal conclusion (i.e., “You’re saying that she was abused...”); and (10) speculation (i.e., “You have no knowledge of this case, but you are guessing that she was abused”). The first five common objections are discussed in *Step Two* above. Objections 6 through 10 are addressed below.

Improper bolstering

Expert testimony often is offered to rebut defense claims that the victim's behavior is inconsistent with that of a “real” victim. Some courts have ruled that the defendant does not have to attack the victim's credibility before the prosecution can offer expert testimony.²⁰⁵ For example, in *State v. Vance*,²⁰⁶ the Minnesota Court of Appeals ruled that “where the alleged victim's testimony is at issue, the district court may admit testimony . . . during the prosecution's case-in-chief, even if neither party directly attacks the victim's credibility.”²⁰⁷ Typically, however, defense attorneys attack a victim's credibility during their opening statements, thus placing credibility at issue.²⁰⁸ Prosecutors also can introduce expert testimony in rebuttal;²⁰⁹ however, it is not always strategically best to wait until rebuttal to explain the victim's behavior.

The guiding principle regarding introduction of expert testimony is usually whether or not the testimony “is relevant and helpful in understanding an issue in the case.”²¹⁰ Although the applicable issue in sexual and domestic violence cases is credibility, courts differ in their interpretation of how and when the victim’s credibility becomes an issue in a case.²¹¹ Some courts state that certain behaviors, such as recanting, automatically cause credibility to be at issue.²¹² Others have held that prosecutors can explain a victim’s behavior before the defense uses it to attack her credibility.²¹³ It is important, therefore, for prosecutors to understand their jurisdiction’s assessment of when a victim’s credibility has been attacked.

Regardless of the existence or the extent of a defense attack of the victim’s credibility, defense attorneys may object that the prosecution’s introduction of expert testimony to explain the victim’s behavior improperly invades the jury’s function by placing a “stamp of scientific legitimacy” on the victim’s allegations, and, therefore, improperly bolstering her credibility.²¹⁴

Prosecutors may respond by arguing that the “[e]vidence [is] not offered to bolster, . . . but to provide the jury with an explanation for inconsistencies in [the victim’s] testimony.”²¹⁵ Prosecutors also may argue that the defense cross-examination of the victim’s failure to call out for help²¹⁶ necessitates expert testimony in order to debunk the common myth that all victims will cry out for help upon attack. When the defense cross-examined the victim about her silence in *Parrish v. State*, the Georgia Court of Appeals affirmed the trial court’s admission of expert testimony because “the conclusion of the expert is one which . . . is beyond the ken of the average layman.”²¹⁷ The court noted that “the defense opened the door by using the victim’s failure to seek help as evidence of her lack of credibility.”²¹⁸

Defense attorneys also may object that the expert’s testimony improperly comments on the truthfulness of the victim.²¹⁹ The prosecution can respond that the objection lacks merit because “the fact that expert testimony indirectly touches upon a witness’ credibility does not render it inadmissible.”²²⁰ Testimony is offered for a proper purpose; the fact that credibility may come into play does not bar the admission of the testimony.²²¹

Finally, in cases where the victim recants, defense attorneys may object to

the admission of expert testimony on the grounds that since the victim's behavior favors the defendant, and therefore is not being attacked, expert testimony introduced to explain the behavior is improper. The prosecutor can respond to this assertion by arguing that "since it is a witness's puzzling behavior that triggers the need for expert testimony to help the jury assess the evidence before it, its introduction should not be dependent on a defense attack on the witness's credibility. . . . [Some] 'courts have ruled correctly that expert testimony that explains general characteristics to offset common misconceptions is permissible' even where the defense has not attacked the victim's credibility," e.g., where she recants and her testimony favors the defendant.²²²

Introduction of defendant's uncharged misconduct

Prosecutors' introduction of expert testimony on victim behavior frequently implies the existence of other bad acts committed by the defendant. As a result, prosecutors should consider whether any part of the expert's testimony may implicate F.R.E. 404(b). If so, prosecutors should prepare, file, and argue a motion which puts the defense and the court on notice of any other acts the prosecutor seeks to introduce in the case-in-chief. Prosecutors should note that 404(b) may unintentionally be implicated during an expert's discussion of the theories or dynamics of domestic violence, e.g., cycle of violence or power and control, particularly if some factors are not present in the case. Other acts motions are helpful, therefore, to clarify the purpose of discussing these theories – to educate the jury about domestic violence. Alternatively, the court may want to give a limiting instruction to the jury explaining the purpose of the testimony. The prosecutor should ensure that the expert clarifies that he or she is not offering an opinion on the facts of the case or behavior of the victim, just educating the jurors about the expert's knowledge in the area and/or clinical experiences.

Foundation

Another issue frequently raised in connection with the introduction of expert testimony on victim behavior is the failure of the prosecution to lay a proper foundation for the admission of expert testimony. "A proper foundation includes showing that the expert has the requisite knowledge, skill, education, and experience on which to base her opinion and that

the facts upon which the expert testifies have already been placed into evidence.”²²³ In addition, there must be evidence of either a victim’s puzzling behavior, e.g., recantation or reunion with the batterer.²²⁴

Legal conclusion

Prosecutors should be sure to avoid impermissible character evidence. Specifically, evidence of a person’s character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion.²²⁵ This rule applies both to the victim and to the defendant. In addition, experts should never testify about a particular witness’s credibility or whether they believe an assault did or did not happen or a crime occurred. Experts should never testify as to whether they believe the victim is telling the truth or whether they believe the victim was sexually assaulted. “[T]he expert should not be asked to testify that a witness was in fact battered or raped or give any opinion as to the complainant’s truthfulness.”²²⁶ This type of testimony almost always results in a mistrial of the case or the reversal of a conviction on appeal.

Speculation

In one case, an expert asserted that it appeared likely that the alleged victim had truly been raped because she showed symptoms of RTS. Specifically, the expert testified: “In every rape victim I have seen, they exhibit consistent symptoms ... For example, body soreness, guilt, shame, feelings about the trial, nightmares, and flashbacks are all common symptoms that rape victims’ experience. There is a profile for rape victims and [she] fits it.”²²⁷

One article addressing domestic violence victim behavior notes, “to avoid undue prejudice to the defendant, the expert should testify only to the general characteristics of Battering and Its Effects and not whether the complainant exhibits these traits. Prosecutors should also refrain from using hypotheticals that too closely mirror the particular facts of the case at bar, because courts have deemed this technique as merely a tactic to circumvent the prohibition against offering expert testimony on whether the complainant was in fact battered.”²²⁸ For the reasons set forth in this monograph, however, it is recommended that experts avoid labeling a victim’s behavior with a syndrome and instead focus on common issues and behaviors observed in their experience working with victims. In addition, where

INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

relevant and admissible, experts should discuss myths observed in their training, experiences working with victims or through article or research reviews.

LIMITATIONS ON COMMON PRACTICES OF INTRODUCING TESTIMONY ON VICTIM BEHAVIOR

On the surface, the methodology for introducing expert testimony on victim behavior in sexual and domestic violence prosecutions appears analogous to methods employed by defense attorneys in support of a self-defense or duress claim. “Particularly in criminal cases, litigants have sought to introduce expert testimony as to a long list of profiles said to be scientifically constructed or valid. The ‘battered woman syndrome’ has been invoked by women to support pleas of self defense in murder cases, to buttress defenses of duress in cases in which they aided their abusive partners in criminal activity, to explain inconsistencies in a woman’s statements or behavior, and in various other situations. Prosecutors in sexual abuse cases have relied on rape trauma syndrome to negate a claim of consent, to explain conflicting statements or actions of the complainant, to prove criminal sexual penetration, and defendants have introduced evidence that a complainant did not experience the syndrome’s symptoms.”²²⁹

A survey of law review articles and case law reveals the common practice of describing victim behavior in terms of BWS, RTS, “Battering and Its Effects,”²³⁰ “effects of family violence,”²³¹ and PTSD²³² in both sexual and domestic violence cases. Confusion exists because, notwithstanding the specific definitions of each term, the terms are used liberally and sometimes interchangeably by judges, prosecutors, and experts to describe common victim behavior. Further, in criminal prosecutions, where self-defense is asserted by the defendant, the introduction of testimony on BWS is common in support of a self-defense claim and can at times be appropriate. Notwithstanding this practice, sexual and domestic violence prosecutions are different from cases in which a defendant seeks to justify or excuse her behavior.

The relevant case law and articles also demonstrate that prosecutors often copy defense strategies for explaining domestic and sexual violence victim behavior. The purpose of expert testimony, however, is different, depending on whether it is introduced on behalf of a complainant or a defendant in a criminal prosecution. As a result, the methodology employed by defense attorneys to excuse certain behaviors is less helpful

to prosecutors seeking to explain a victim's common, albeit puzzling, behavior. A defendant introduces such testimony to negate an element of the offense or to establish an affirmative defense by justifying or excusing the criminal behavior as that enacted by a "victim." When introduced by prosecutors, however, this evidence is offered to dispel myths and provide an accurate context in which to judge victim behavior. The major practical difference is that when the defense seeks to introduce expert testimony to satisfy an element of the defense or refute an element of the crime, the defendant is typically examined by a psychiatrist or psychologist who then testifies that the defendant did or did not have a psychological condition, for example, BWS. When the prosecution seeks to introduce expert testimony to dispel common juror myths and to provide a proper context for jurors to consider the victim's testimony, the victim should *not* be examined or evaluated by the expert. Instead, the expert testifies generally—allowing the jury to ultimately consider how the expert's testimony relates to the victim's behavior.

Prosecutors should consult with experts and carefully read case law to understand how such expert testimony has been explored in the literature and utilized in criminal prosecutions. For example, a case discussing expert testimony on BWS allegedly present in a female defendant accused of murdering her husband (the alleged batterer) may not be applicable and likely is distinguishable from a domestic violence case where the male defendant is the batterer and the prosecution is seeking to introduce expert testimony regarding victim behavior in its case-in-chief. The methodology used by defendants with the goal of ultimately arguing justification or affirmative defense for a defendant requires critical adjustments in its implementation and in the construct of the arguments if the prosecution seeks to rely on it. Adjustments include utilizing more accurate terms to describe behavior and adjusting the protocol for introducing it. Without these adjustments, prosecutors risk making errors in arguments for admission of such testimony, misusing the expert testimony, diluting the effectiveness of the evidence, and, at worst, introducing objectionable or inadmissible evidence.

Further, "[a]lthough the syndromes . . . may be useful in the clinical context, none of these syndromes are forensically useful because they do not

have diagnostic utility in differentiating between those who have been traumatized by rape, child abuse, or battering, and those who have not.”²³² There are further limitations to the terms and methodologies commonly used to explain victim behavior. These will be discussed below.

Character Evidence—F.R.E. 404

Rule 404(a) of the Federal Rules of Evidence adopts the well-established rule that character evidence is inadmissible to prove that a person acted in conformity with that character. This rule is commonly implicated by prosecutors seeking to introduce a defendant’s uncharged conduct. It is generally thought that this type of evidence is either irrelevant or overly prejudicial. In other words, the prosecutor may not introduce evidence that the defendant is a “bad man” and has committed the current charges because of his bad character. “Bad character” of the defendant may, however, be offered by the prosecution where the defendant has offered evidence of his own good character or has attacked the character of the alleged victim. In the latter case, the prosecution may respond with “bad character” evidence limited to the character trait of the victim that was attacked by the defendant.

“When profile evidence is used defensively (to show good character, to restore credibility, or to prove apprehension in connection with a claim of self-defense), it falls under an exception to the rule against character evidence. Admissibility [in these cases turns on] the extent to which expert testimony would assist the jury viewed in light of the usual counterweights. The [court must consider the] qualifications of the expert, the degree of acceptance of the appropriate scientific community, the reliability and validity of using the profile, the need for the evidence in light of what most jurors know about the behaviors in question, whether the expert crosses the line between the general and the specific or tried to evaluate the truthfulness of the witness or class of witnesses, and, of course, the weight of the evidence.”²³⁴ Expert testimony that is based upon syndrome evidence or a comparison of a specific victim’s behavior to a class of victims, therefore, risks impermissibly commenting on a victim’s credibility. Under 404(a) this type of testimony is both impermissible and suspect.²³⁵ Indeed, the “probative value of character evidence generally is low while

the potential for distraction, time-consumption, and prejudice is high.”²³⁶

Limitations on the Use of BWS Testimony to Explain Victim Behavior

After Lenore Walker introduced the term BWS in 1979, the syndrome was initially used by defense attorneys to justify a defendant’s criminal actions. Later, prosecutors started introducing expert testimony on BWS to explain the victim’s behaviors to jurors. However, “[s]ince the late 1980s, numerous commentators have noted the need for a more representative articulation of the dynamics and effects of domestic violence.”²³⁷ “While later research affirmed many aspects of Walker’s theory, her original BWS model proved to be overly rigid and contained a number of conceptual weaknesses.”²³⁸ Other criticisms have invalidated the syndrome completely as unreliable and unsupported by the research.²³⁹

As described above, there is no “typical” domestic violence victim. Therefore, relying on BWS to explain the behavior of all domestic violence victims is impossible, because not all victims will satisfy the criteria of BWS. Second, the BWS label tends to pathologize a domestic violence victim because it attributes her “counterintuitive” behaviors to psychological conditions, when her behaviors may instead represent common responses to trauma or rational responses to the real pressures and dangers caused by her abuser.²⁴⁰ For example, although some victims may stay with their abuser because they don’t believe they can escape, others might fear a reprisal if they leave.²⁴¹ Some victims may not be able to afford to pay their rents or mortgages or feed their children without their abuser’s salary. Other victims may be isolated from friends and family and thus feel they have nowhere to turn; still others may be pressured by friends and family to stay with the abuser.

Third, since BWS is not found as a recognized diagnosis in the Diagnostic and Statistical Manual of Disorders (DSM-IV-TR),²⁴² its continuing validity is vulnerable to criticism. In addition, opinion testimony that a victim is suffering from BWS may be attacked as overly subjective, especially since there are no standardized criteria for assessing the syndrome. Fourth, BWS is often offered as general testimony by an expert

who has not evaluated the victim. As a result, although the expert is testifying to behaviors exhibited by an individual with BWS, the expert is neither evaluating nor diagnosing the victim. The testimony, therefore, may be attacked as irrelevant or lacking in foundation. Fifth, the symptoms associated with BWS may be caused by incidents other than battering, such as other life threatening experiences. Finally, “restrictive theories, which narrowly define women’s experiences, may harm battered women both in the courtroom and by perpetuating popular and harmful misconceptions in their lives.”²⁴³

Limitations on the Use of “Battering and Its Effects” to Explain Victim Behavior

The biggest issue regarding “Battering and Its Effects” is that it is used to describe two separate things: (1) the psychological effects of battering on an individual; and (2) the common behaviors that victims of domestic violence exhibit which jurors perceive to be counterintuitive. One term, therefore, is used to describe both common *general* behaviors, e.g. recantation, minimization, observed by experts with experience working with domestic violence victims, as well as an *individual* domestic violence victim’s behavior resulting from her abuse, i.e. the victim’s murder of her abuser.²⁴⁴ To the extent that expert testimony on Battering and Its Effects is offered to explain actions that one specific victim took, its introduction may be subject to all of the problems associated with the introduction of BWS evidence. When used to explain general victim behavior, it still may be problematic because experts still rely on the criteria of BWS to describe the victim’s behavior.²⁴⁵

Limitations on the Use of RTS to Explain Victim Behavior

From its inception, admission of testimony regarding RTS has been highly contested. In some jurisdictions, RTS has survived *Frye*, *Daubert*, or other state-specific challenges to the admission of expert testimony on this subject. However, other jurisdictions have not accepted this evidence when offered by the prosecution because it has been found to be unreliable.²⁴⁶

The problems associated with the introduction of expert testimony on BWS evidence also apply to the introduction of expert testimony on

RTS. First, the empirical research does not support an RTS diagnosis.²⁴⁷ Second, the term RTS is confusing because it has come to encompass so many different meanings. Specifically, one article notes that it refers to “the original RTS developed in the 1970s, the more recent and empirically strong studies of reactions to rape, and the diagnosis of PTSD . . . of which RTS is often considered a subset.”²⁴⁸ “These multiple connotations become confusing and problematic in the courtroom because judges, attorneys and even some experts often presume that RTS is a reference only to the original construct and literature developed by Burgess and Holstrom (1974).”²⁴⁹ The expert, however, may be referring to the modern research regarding RTS, sexual assault victim behavior and PTSD.²⁵⁰ Third, “the RTS label tends to pathologize victims of sexual violence when the victims may be exhibiting common, albeit counterintuitive to some laypeople, responses to trauma. This means that instead of looking at the victim’s individual reactions, victims are categorized as generally medically or psychologically “abnormal.”²⁵¹ Fourth, RTS is not found in the DSM-IV-TR, the standard reference for the diagnosis of psychological conditions, and, therefore, its reliability is vulnerable to attack.²⁵² Fifth, RTS is often offered as general testimony by an expert who has not evaluated the victim. As a result, the expert testifies about behaviors exhibited by an individual with RTS, but the expert has neither evaluated nor diagnosed the victim. Consequently, the testimony is then open to attack that the prosecutor failed to lay the proper foundation. Finally, the symptoms associated with RTS may be caused by incidents other than a sexual assault, such as an unrelated life threatening event.

Limitations on the Use of PTSD to Explain Victim Behavior

Prosecutors trying to introduce PTSD to explain victim behavior in a sexual assault or domestic violence case may confront several problems. First, the victim may not meet the DSM-IV-TR diagnostic criteria, i.e., she may not suffer from PTSD. Second, since symptoms must persist for one month, PTSD will not explain a victim’s behavior during the first 30 days following her traumatic experience.²⁵³ Third, as with the other syndromes, ideally, the expert should not examine the victim. However, if the expert does not examine and diagnose the victim, but testifies about a specific syndrome, the jurors may view the expert’s testimony with skepticism.

CONCLUSION

Prosecutors are united in the goal of seeking justice.²⁵⁴ In sexual and domestic violence prosecutions, justice requires that prosecutors introduce evidence and testimony, which seeks to dispel myths and misconceptions about sexual and domestic violence so that jurors may accurately assess a victim's behavior, and, therefore, her credibility. In jurisdictions where expert testimony is admissible to explain victim behavior, prosecutors should consider offering experts to testify about their knowledge of and experience with sexual and domestic violence victims, their observations of common victim behaviors, the potential reasons for these behaviors, and, where appropriate, their understanding that often the reality of victim behavior does not comport with the public's expectations, i.e., common myths. Prosecutors should refrain from using syndrome evidence to capture victim behaviors. Instead, expert testimony should focus on the fact that individuals have responses to trauma which, although at times counterintuitive to a layperson, actually are common responses and reactions to their assaults. Prosecutors who wish to challenge their jurisdictions' established precedents against the introduction of expert testimony on victim behavior must be mindful of their ethical obligations to the court,²⁵⁵ the protocol required to overturn existing law, the strength of their case, the necessity of expert testimony to the obtainment of a just verdict, and the impact that the required trial delay will have on victim safety. Further, even in jurisdictions in which this testimony is inadmissible, prosecutors should still work with experts to prepare their cases. As discussed above, experts can be helpful in identifying issues which may be addressed during direct or cross-examination that will help juries understand the reasons for a victim's behavior. In addition, even where admissible, expert testimony on victim behavior may not be necessary, especially where a victim or her friends or family can articulate effectively the reasons for her behavior.

ENDNOTES

- ¹ See, e.g., *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 243–44 (Mass. App. Ct. 1997); Cynthia Lynn Barnes, *Admissibility of Expert Testimony Concerning Domestic Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 A.L.R.5th 315 (Oct. 2005); Gregory G. Sarno, *Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome*, 42 A.L.R.4th 879 (July 2005).
- ² See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993–2004), available at <http://www.ojp.usdoj.gov/bjs/intimate/offender.htm> (indicating that 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), available at <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); see U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, VICTIMIZATION RATES FOR PERSONS AGE 12 AND OVER, BY GENDER AND AGE OF VICTIM AND TYPE OF CRIME (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf> (indicating that between 1994 and 2005, the average annual percentage of rape and sexual assault offenders who were male was 96.4%, and that a male's risk of suffering rape or sexual assault is statistically 0.0%). For this reason, the pronoun “she” is used when referring to a victim and the pronoun “he” is used to refer to the perpetrator; however, the principles discussed apply regardless of the sex of the victim or the perpetrator.
- ³ See *U.S. v. Rynning*, 47 M.J. 420, 422 (C.A.A.F. 1998) (noting that without expert testimony, a victim's counterintuitive behavior often undermines her credibility); see also Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 235 (1992) (stating “studies document the findings that most people maintain misinformation about domestic abuse, which is detrimental to their evaluation of the battering victim's credibility”).
- ⁴ For example, one county has attempted to raise a contributory fault defense in a civil suit filed by the family of a middle school-aged sexual assault victim, who was sexually assaulted by a sheriff's deputy based upon the girl's attempt to keep the relationship hidden from her parents and the sheriff's department. Andrew Binion, *County Files Appeal in Sex Case Involving Ex-Deputy*, THE KITSAP SUN, Apr. 11, 2007, available at http://www1.kitsapsun.com/bsun/local/article/0,2403,BSUN_19088_5477103,00.html.
- ⁵ This term includes “eye” or “ear” witnesses to the actual assault. It does not cover any individuals who may have observed the victim or defendant prior to or following the assault or any relevant witnesses related to forensic evidence.
- ⁶ See *Rynning*, 47 M.J. at 422 (stating “the victim's behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of [counterintuitive] behavior often occur in sexual abuse cases”) (citation omitted) (quoting *U.S. v. Pagel*, 45 M.J. 64, 68 (C.A.A.F. 1996)).
- ⁷ *Bechtel v. State*, 840 P.2d 1, 8 (1992) (referencing LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1979)).
- ⁸ See *Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* for an explanation of this term. See also *supra* note 8 (although there

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- are several variations of this term used in current case law and articles, e.g., “battered women syndrome” and “battered woman’s syndrome;” the author has chosen to use the term “battered woman syndrome” based upon WALKER, *supra* note 7. See also Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992) (stating “Battered Woman Syndrome is the name given to the measurable psychological changes that occur after exposure to repeated abuse”).
- ⁹ See *Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* for an explanation of this term.
- ¹⁰ *Id.*
- ¹¹ Expert testimony offered by the prosecution to explain victim behavior is not admissible in all fifty states. Therefore, it is imperative for prosecutors to consult the law in their particular jurisdictions before seeking to introduce this type of evidence. The variations among the jurisdictions regarding the admissibility of this type of expert testimony are discussed in detail in *Recommended Practices for Introducing Expert Testimony to Explain Victim Behavior in Your Case*. In addition, prosecutors should refer to *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); see also Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227 (1996-1997); Barnes, *supra* note 1; Sarno, *supra* note 1.
- ¹² See Bowman, *supra* note 3, at 237 (stating “[e]xpert testimony of the wide range of experiences of battered women is also admissible to create a context in which the finder of fact can judge the credibility of the battered woman”).
- ¹³ See Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCHOL. WOMEN Q. 133 (1994); Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE & VICTIMS 271 (1991).
- ¹⁴ See Laura E. Boeschen, Bruce D. Sales, & Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL’Y & L. 414, (stating “[t]his focus on the victim is not surprising because U.S. society has a long history of holding persistent and harmful myths about rape and those who are victimized by it”).
- ¹⁵ Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53(5/6) SEX ROLES 385 (Sept. 2005). For a discussion of rape myth acceptance, see also Bettina Frese, Miguel Moya, & Jesús L. Megía, *Social Perception of Rape: How Rape Myth Acceptance Modulated the Influence of Situational Factors*, 19(2) J. INTERPERSONAL VIOL. 145 (Feb. 2004) (citing Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOCIAL PSYCHOL. 217-230 (1980) (describing rape myth acceptance (RMA) as “the amount of stereotypic ideas people have about rape, such as that women falsely accuse men of rape, rape is not harmful, women want or enjoy rape, or women cause or deserve rape by inappropriate or risky behavior”).
- ¹⁶ Ben-David, *Rape Perceptions*, *supra* note 15, at 386.
- ¹⁷ *Id.*; see also Lonsway, *supra* note 13, at 135 (addressing the myth that only certain types of victims are raped as well as the belief in the number of false claims).
- ¹⁸ *State v. Ciskie*, 751 P.2d 1165, 1171 (Wash. 1988).
- ¹⁹ *Id.* (citing *State v. Murley*, 212 P.2d 801, 804 (1949)).
- ²⁰ See, e.g., *Ciskie*, 751 P.2d at 1165 (noting that the feudal doctrine of hue and cry was discredited in Washington).
- ²¹ Pa. SSJI (Crim.) 4.13A.
- ²² *Id.* (emphasis added).
- ²³ 18 Pa.C.S.A. § 3105 (2006).

ENDNOTES

- 24 Nancy K.D. Lemon, et al., *Expert Witnesses in Domestic Violence Trials: Policy Pros and Cons for Prosecutors* 11 (2001) (unpublished manuscript, on file with the author).
- 25 *Id.* (citing Police Executive research forum, *Community-Oriented Policing and Violence Against Women*, Sec. 2 at p. 5-8 (1998)).
- 26 *People v. Ellis*, 650 N.Y.S.2d 503, 505-06 (1996).
- 27 *See Bowman*, *supra* note 3, at 235. *See also* Charles P. Ewing & Moss Aubrey, *Battered Women and Public Opinions: Some Realities About the Myths*, 4 J. FAM.VIOL. 105-25 (1987); Regina A. Schuller, Vicki L. Smith, & James M. Olson, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCHOL. 316-37 (1994).
- 28 *See, e.g.*, Barnes, *supra* note 1; Matthew P. Hawes, *Removing Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on Battered Woman Syndrome in Ohio*, 53 CLEV. ST. L. REV. 133 (2005-2006); Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998).
- 29 *Bowman*, *supra* note 3, at 243.
- 30 *See, e.g.*, *State v. Searles*, 680 A.2d 612, 615 (N.H. 1996) (citing *People v. Christel*, 537 N.W.2d 194, 202 (Mich.), *rehearing denied*, 539 N.W.2d 504 (1995) (citations omitted) (stating “victim[s] attempts to hide or minimize the effect of . . . & abuse or deni[al] or recant[ation of] the claim of abuse is behavior which is incomprehensible to average people”).
- 31 Nancy Lemon, Rhonda Martinson, & Carlose Monagas, *Expert Witnesses in Domestic Violence Trials: Policy Pros and Cons for Prosecutors*, at 11 (2001).
- 32 *Goetzendanner*, 679 N.E.2d at 243-44.
- 33 *Arcoren v. U.S.*, 929 F.2d 1235, 1240 (8th Cir. 1991).
- 34 *Ellis*, 650 N.Y.S.2d at 503. As noted in *Recommended Practices*, NCPVAW does not recommend that prosecutors offer expert testimony on syndrome evidence.
- 35 *Id.* at 508.
- 36 Terri Spahr Nelson, *Module 7: Expert Witnesses*, in *JUDGE ADVOCATE CURRICULUM ON REPORTING SEXUAL ASSAULT* (forthcoming 2007).
- 37 *See, e.g.*, *Bowman*, *supra* note 3, at 242 (discussing expectations of victim behavior in a battering circumstance); *see also* Ben-David, *supra* note 15 (discussing expectations of defendant behavior).
- 38 *Rynning*, 47 M.J. at 420.
- 39 *Id.* at 422 (citations omitted).
- 40 *See, e.g.*, *supra* notes 13 and 15 (for articles addressing domestic violence myths); *see also supra* note 27 (for articles discussing sexual assault myths).
- 41 Spahr Nelson, *supra* note 36.
- 42 The protocol for introducing this behavior through expert testimony is discussed in detail in *Recommended Practices*.
- 43 *Ciskie*, 751 P.2d at 1171 (emphasis added).
- 44 *Id.*
- 45 *Searles*, 680 A.2d at 612.
- 46 *Id.* at 615.
- 47 *See, e.g.*, *Rynning*, 47 M.J. 420.
- 48 *See Defining “Counterintuitive” and Other Common Terms Used to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* for an explanation of this term.
- 49 Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress*

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- Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE UNIV. L. REV. 453, 461 (Fall 2003).
- ⁵⁰ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE & U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE OF MENTAL HEALTH, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO §40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996), available at www.ncjrs.gov/pdffiles/batter.pdf; see also Cal. Evid. Code § 1107 (2007).
- ⁵¹ See THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, *supra* note 46, at i-ii.
- ⁵² Laura E. Boesch, Bruce D. Sales, & Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL'Y & L. 414.
- ⁵³ For a more detailed discussion of Child Abuse Accommodation Syndrome (CAAS), see MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION: A COMPREHENSIVE REVIEW OF PORNOGRAPHY, PROSTITUTION, AND INTERNET CRIMES, VOL. 2 (2005). For the reasons discussed in this monograph, however, we do not recommend that prosecutors offer expert testimony on syndrome evidence.
- ⁵⁴ LENORE E. WALKER, THE BATTERED WOMAN (1979).
- ⁵⁵ *Ellis*, 650 N.Y.S.2d at 505; see also Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, *supra* note 9, at 326-30 (describing BWS as a subcategory of Posttraumatic Stress Disorder (PTSD)).
- ⁵⁶ Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, *supra* note 9, at 326.
- ⁵⁷ *Nixon v. U.S.*, 728 A.2d 582, 590 (D.C. 1999).
- ⁵⁸ For examples of cases in which defendants sought to introduce evidence about battered woman syndrome in support of their self-defense claims, see *State v. Hennem*, 441 N.W.2d 793 (Minn. 1989); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981).
- ⁵⁹ Lenore E. A. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY: AN INT'L J. 525-34, (1977-78).
- ⁶⁰ *Id.*
- ⁶¹ Alafair S. Burke, *Rational Actors, Self-Defense and Duress, Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 224 (2002).
- ⁶² For a more detailed description of this theory, see LENORE E. WALKER, THE BATTERED WOMAN (1979); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 72 (1997); Burke, *supra* note 56; and Marilyn McMahan, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 PSYCHIATRY, PSYCHOL. & L. 23, 28 (1999).
- ⁶³ See book and articles cited *supra* note 57; see also McMahan, *supra* note 57, at 27.
- ⁶⁴ See MARY ANN DUTTON, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, IMPACT OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS INVOLVING BATTERED WOMEN (May 1996), at <http://www.ojp.usdoj.gov/ocom/94Guides/Trials/Valid/> (discussing the use of BWS in criminal prosecutions since the 1970s) (stating "the 'cycle of violence' is not the only pattern of abusive behavior found in battering relationships").
- ⁶⁵ See THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, *supra* note 50.
- ⁶⁶ *Id.* at vii.
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*

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- ⁶⁹ See, e.g., Cal. Evid. Code § 1107.
- ⁷⁰ *Id.*
- ⁷¹ See also Janet Parrish, *Expert Testimony on Battering and Its Effects*, 11 WIS. WOMEN'S L. J. 75, 82 (Summer 1996).
- ⁷² See State v. Black, 745 P.2d 12, 16 (1987) (citing Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974)).
- ⁷³ *Id.*
- ⁷⁴ State v. Huey, 699 P.2d 1290, 1293 (Ariz. 1985) (citing Paula Wilk, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U. L. REV. 417, 427 (1984)).
- ⁷⁵ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR].
- ⁷⁶ Brett C. Trowbridge, *Expert Testimony*, *supra* note 49, at 461.
- ⁷⁷ DSM-IV-TR at 463. Acute Stress Disorder (ASD) is similar to PTSD except its duration is less than one month and it involves prominent dissociative symptoms. ASD does not significantly vary in symptom presentation from PTSD. If the symptoms persist for more than 2 days, it is acute stress disorder. If symptoms persist for more than 30 days, it is PTSD; see also Boesch, *supra* note 14.
- ⁷⁸ *Id.*
- ⁷⁹ *Id.*
- ⁸⁰ See Trowbridge, *supra* note 49, at 459 (citing DSM IV-TR at 467).
- ⁸¹ *Id.*; see also Dave R. Englert et al., *The Prosecutor's Guide to Mental Health Disorders*, 1(10) THE VOICE (Spring 2007).
- ⁸² Trowbridge, *supra* note 49.
- ⁸³ Experts can be helpful to prosecutors in preparing a case whether or not their testimony is admissible at trial. Experts can provide the benefit of their experience and help prosecutors craft questions on direct examination that will elicit useful information. In addition, experts' assistance may enable prosecutors to craft effective questions of a recanting victim.
- ⁸⁴ State v. Townsend, 897 A.2d 316 (N.J. 2006).
- ⁸⁵ *Id.* at 327.
- ⁸⁶ See generally CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (2002) (discussing rationales behind reporting behavior).
- ⁸⁷ The prosecutor can consider seeking assistance from an expert who has examined the victim if the victim has a developmental or intellectual delay or suffers from a mental health disorder that is relevant to her victimization or the defense has attacked her credibility because of these conditions. See William Paul Deal & Viktoria Kristiansson, *Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault*, 1(12) THE VOICE (Spring 2007); see also Englert et al., *supra* note 76.
- ⁸⁸ See, e.g., Commonwealth v. Agnew, 666 A.2d 1062 (Pa. Super. 1995) (stating that the act of obtaining records by the prosecutor may waive an applicable privilege, in this case records from a sexual assault counselor).
- ⁸⁹ Please contact NCPVAW for a law chart containing relevant case law in your jurisdiction.
- ⁹⁰ See Ciskie, 751 P.2d at 1165.

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- ⁹¹ *Id.* at 1166.
- ⁹² See THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, *supra* note 50.
- ⁹³ Please contact NCPVAW for law charts setting forth cases addressing admission of expert testimony to explain victim behavior. See also Sarah Gibbs Leivick, *Use of Battered Woman Syndrome to Defend the Abused and Prosecute the Abuser*, 6 GEO. J. GENDER & L. 391 (2005) (stating twenty states have permitted the prosecution to admit expert testimony on victim behavior related to domestic violence); see also Parrish, *supra* note 71.
- ⁹⁴ See, e.g., Commonwealth v. Dunkle, 602 A.2d 830, 836 (Pa. 1992) (holding that delays in reporting and omissions in reporting of alleged child sexual assault victims was not beyond the knowledge or experience of the average layman).
- ⁹⁵ See *supra* note 89.
- ⁹⁶ See *supra* note 11.
- ⁹⁷ *Id.*
- ⁹⁸ *Id.*
- ⁹⁹ But see State v. Borrelli, 629 A.2d 1105, 1111 (1993) (holding the *Frye* test inapplicable “where understanding of the method is accessible to the jury, and not dependent on familiarity with highly technical or obscure scientific theories, the expert’s qualifications, and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence”) (citations omitted). This theory will be discussed in further detail in *Admissibility of Expert Testimony under Frye, Daubert, and Kumho Tire*.
- ¹⁰⁰ See e.g., Borelli, 629 A.2d 1105; see also Cal. Evid. Code §1107(b).
- ¹⁰¹ Bowman, *supra* note 3, at 237.
- ¹⁰² *Id.* at 237-38.
- ¹⁰³ *Id.* at 238.
- ¹⁰⁴ Prosecutors must consult the laws of their jurisdictions in order to determine whether expert testimony addressing counterintuitive victim behavior is admissible. NCPVAW has compiled research on this issue. See also, Parrish, *supra* note 71.
- ¹⁰⁵ Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J. L. & SOC. PROBS. 277, 283 (1992).
- ¹⁰⁶ FED. R. EVID. 402 (2006).
- ¹⁰⁷ FED. R. EVID. 401 (2006).
- ¹⁰⁸ See *supra* note 11 (explaining that the admissibility of expert testimony on victim behavior is dependent upon the laws of a particular jurisdiction).
- ¹⁰⁹ *Id.*
- ¹¹⁰ See Barnes, *supra* note 1, at Sec. 3a (discussing abuse victims’ common recantations).
- ¹¹¹ *Borelli*, 629 A.2d at 1112 (discussing jurors’ potential to believe in domestic violence myths); see also Townsend, 897 A.2d at 333-34 (stating “[w]e have no doubt that the ramifications of a battering relationship is still a subject that is beyond the ken of the average juror”).
- ¹¹² See Barnes, *supra* note 1, at Sec. 3a (discussing abuse victims’ common recantations).
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ See JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN’S CONSENT

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- SERIOUSLY (2005) at 4 (stating “[t]he facts in America are that most rapists are not prosecuted because somewhere between 60 and 90 percent of rape victims don’t report the crime”).
- 116 *People v. Hampton*, 746 P.2d 947, 952 (Colo. 1987); *but see* Pa. SSJI (Crim.) 4.13A, *supra* note 21.
- 117 FED. R. EVID. 702 (2006).
- 118 *See Nixon*, 728 A.2d at 582.
- 119 *Id.* at 590-91.
- 120 *Taylor*, 552 N.E.2d at 131.
- 121 *Id.* at 136.
- 122 *Christel*, 537 N.W.2d at 202.
- 123 *Rynning*, 47 M.J. at 422.
- 124 *State v. Cooke*, 1997 Wash. App. LEXIS 1212 (July 1997).
- 125 *Id.* at *5.
- 126 *Id.*
- 127 *Contra* Cal. Evid. Code §1107(b) (stating “[t]he foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on intimate partner battering and its effects shall not be considered a new scientific technique whose reliability is unproven”).
- 128 Georgia, Utah, Virginia, and Wisconsin have adopted their own admissibility standards for novel scientific evidence. The standards in Georgia, Utah, and Virginia, however, are based upon reliability and are generally considered *Daubert* states. *See, e.g.*, Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2006). The standard for admitting expert testimony in Wisconsin is based upon relevance, and therefore is distinct from *Frye* and *Daubert*. *See, e.g.*, *State v. Peters*, 534 N.W.2d 867, 872 (Wis. Ct. of App. 1995).
- 129 *Frye*, 293 F. 1013. (*Frye* states: AZ, CA (*Kelly/Frye*), DC, FL, IL, KA, MD, MN (*Frye/Mack*), MO, NY, ND, PA, and WA). (AL and NJ have not rejected *Frye* in toto while applying *Daubert* factors).
- 130 *Ellis*, 650 N.Y.S.2d 503.
- 131 *Id.* at 505.
- 132 *Daubert*, 509 U.S. 579. (*Daubert* states: AK, AR, CO, CT, DE, HI, ID, IN, IA, KY, LA, ME, MA (*Daubert/Lanigan*), MI, MS (modified *Daubert*), MT, NE, NV, NH, NM, NC, OH, OK, OR, RI, SC, SD, TN, TX, VT, WV, WY, and federal jurisdictions).
- 133 *Id.* at 592-93.
- 134 *Kumho Tire Co.*, 526 U.S. 137.
- 135 *U.S. v. Quintanilla*, 56 M.J. 37, 84-85 (C.A.A.F. 2001) (citations omitted); *see also* Lustre, *supra* note 128 at *2.
- 136 *Quintanilla*, 56 M.J. at 85 (citations omitted).
- 137 *Id.*
- 138 Michele Michelson, *Recent Development, The Admissibility of Expert Testimony on Battering and Its Effects After Kumho Tire*, 79 WASH. U. L.Q. 367, 371 (Spring 2001) (quoting *Kumho Tire Co.*, 526 U.S. at 151).
- 139 *Id.* (quoting Brief for the United States at 19, *Kumho Tire* (No. 97-1709)).

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- 140 See *Kumho Tire Co.*, 526 U.S. at 158.
- 141 See Bowman *supra* note 3, at 239 (discussing that evidence of battering and its effects is not subject to a *Kelly-Frye* review for admissibility).
- 142 *Borelli*, 629 A.2d 1105.
- 143 *Id.*
- 144 *Id.* at 1111 (quoting *State v. Hasan*, 534 A.2d 877, 879 (Conn. 1987)).
- 145 *Id.* (citing *Hasan*, 534 A.2d at 880).
- 146 *Id.* at 1111.
- 147 *Id.*
- 148 *Id.* (In this case, the expert described the victim's behavior in terms of BWS. For the reasons stated in this monograph, we do not recommend this practice.)
- 149 *Id.* at 1110.
- 150 FED. R. EVID. 403 (2006).
- 151 *Id.*
- 152 Rogers, *supra* note 28, at 67, 83.
- 153 PAUL R. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 78 (3d ed. 2007).
- 154 *Id.*
- 155 Murphy, *supra* note 105, at 284.
- 156 *Id.*
- 157 FED. R. EVID. 702 (2006).
- 158 See, e.g., *State v. Robinson*, 431 N.W.2d 165, 169 (Wis. 1988) (citing Wis. Stat. § 907.02, which mirrors E.R.E. 702's requirements for expert qualifications: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"); see also *Townsend*, 897 A.2d at 329 (citing *Rosenberg v. Tavorath*, 800 A.2d 216, 227 (App. Div. 2002) stating "evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience").
- 159 See *Arcoren*, 929 F.2d at 1240 (qualifying an expert "to testify about a victim's behavior based on her degree in psychology from the University of Michigan which is judicially noted as a respected university plus the length of actual time she has had in this general field"); see also *State v. Cababag*, 850 P.2d 716, 720 (Haw. Ct. App. 1993); *State v. Weaver*, 648 N.W.2d 355, 365 (S.D. 2002).
- 160 *Townsend*, 897 A.2d at 328.
- 161 See, e.g., *Townsend* at 328; *Ciskie*, 751 P.2d at 1169; *Borrelli*, 629 A.2d at 1112.
- 162 See *Barnes*, *supra* note 1. (discussing experts qualified to testify about victim behavior in domestic violence cases); see also *Sarno*, *supra* note 1 (discussing experts qualified to testify about victim behavior in sexual violence cases).
- 163 *Id.*
- 164 *Goetzendanner*, 679 N.E.2d at 244.
- 165 *Commonwealth v. Pickford*, 536 A.2d 1348 (Pa. 1987).
- 166 *Ward v. Commonwealth*, 570 S.E.2d 827, 829 (Va. 2002); see also *Odom v. State*, 711 N.E.2d 71 (Ind. App. 1999).

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- 167 *State v. Liddell*, 685 P.2d 918, 922 (Mont. 1984).
- 168 *Borelli*, 629 A.2d at 1112.
- 169 *State v. Huey*, 699 P.2d 1290 (Ariz. 1985).
- 170 *State v. Frost*, 577 A.2d 1282, 1289 (N.J. App. Ct. 1990).
- 171 *Id.*
- 172 *Stevenson v. State*, 612 S.E.2d 521, 526 (Ga. Ct. App. 2005) (citing *Smith v. State*, 210 Ga. App. 451, 452 (1993)).
- 173 *Goetzendanner*, 679 N.E.2d 240.
- 174 *Id.* at 244.
- 175 *Id.* at 243.
- 176 In addition to the experts listed below, at least two states, South Carolina and Colorado, permit law enforcement personnel to testify about common victim behaviors based upon their experience.
- 177 *Stevenson*, 612 S.E.2d 521.
- 178 *Id.* at 525.
- 179 *State v. Schaller*, 544 N.W.2d 247 (Wis. Ct. App. 1995).
- 180 *Id.* at 251. (In this case, experts testified about victim behavior based upon their personal experience working with the victim. For the reasons described in this monograph, this practice should only be used in the rarest of cases.)
- 181 *Robinson*, 431 N.W.2d 165.
- 182 *Id.* at 169.
- 183 *Id.*
- 184 *Thomas v. State*, 521 S.E.2d 397 (1999); *see also Hawaii v. Clark*, 926 P.2d 194 (Haw. 1996).
- 185 *Id.*
- 186 *State v. Griffin*, 564 N.W.2d 370, 374 (Iowa 1997).
- 187 *Id.* at 374.
- 188 *Scagoza v. State*, 949 S.W.2d 360, 361 (Tex. Ct. App. 1997); *see also People v. Brown*, 94 P.3d 574, 576 (Ca. 2004).
- 189 *Russell v. State*, 934 P.2d 1335 (Alaska Ct. App. 1997).
- 190 *Id.* at 1342.
- 191 *Id.*
- 192 *Christel*, 537 N.W.2d 194.
- 193 *Id.* at 202.
- 194 *Escamilla v. Texas*, No. 06-05-00082-CR, 2006 Tex. App. LEXIS 762 (Tex. App. 6th 2006).
- 195 *Id.* at *8.
- 196 *Simmons v. State*, 504 N.E.2d 575 (Ind. 1987).
- 197 *Id.* at 578.
- 198 *Escamilla*, 2006 Tex. App. LEXIS 762 at *4.
- 199 *Id.*
- 200 Prosecutors who offer testimony on the cycle of violence will probably also have to prepare and file 404b motions in order to protect against defense objections or declaration of mistrial.
- 201 Tips for preparing experts to testify will be discussed in further detail below.

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- 202 E-mail from Mr. Russell W. Strand, Chief, Family Law Enforcement Training Division, U.S. Army Military Police School, Fort Leonard Wood, MO (May 4, 2007 09:41:00 EST) (on file with author); *see also*, JOYCE HERMAN, *TRAUMA AND RECOVERY* (1992) at 38–42 (stating “[s]ometimes people reenact the traumatic moment with a fantasy of changing the outcome of the dangerous encounter. In their attempts to undo the traumatic moment, survivors may even put themselves at risk of further harm. . . . Reliving a trauma may offer an opportunity for mastery, but most survivors do not consciously seek or welcome the opportunity”).
- 203 For a more detailed discussion of victim preparations, *see* Teresa P. Scalzo, *Tips for Testifying as a Expert Witness in a Violence Against Women Prosecution*, 1(6) *THE VOICE* (2006).
- 204 Although each case is unique, as stated in this monograph, prosecutors should only call a victim’s treatment provider to testify as an expert in rare circumstances where the patient’s psychological condition is directly relevant to her victimization and where the testimony is absolutely necessary to the ability to prosecute the case. As stated before, the use of a victim’s treatment provider risks opening the victim’s records to discovery and her evaluation by defense experts.
- 205 *See, e.g.*, *State v. Vance*, 685 N.W.2d 713, 719 (Minn. Ct. App. 2004).
- 206 *Id.*
- 207 *Vance*, 685 N.W.2d at 720.
- 208 *See* Jennifer Adler Lifshitz, *Crime and Punishment Law Chapter: Battered Woman Syndrome and Prosecution of Domestic Abuse and Rape Cases*, 5 *GEO. J. GENDER & L.* 149, 162 (2004) (discussing *State v. Grecinger*, 569 NW 2d 189 (Minn 1997)); *see generally* Sarno, *supra* note 1.
- 209 *Christel*, 537 N.W.2d at 202.
- 210 *Id.* at 204.
- 211 Leivick, *Use of Battered Woman Syndrome, supra* note 93 at 400–01 (2005).
- 212 *Id.* at 400–01 (citing *Grecinger*, 569 N.W.2d 189).
- 213 *Id.* (citing *Searles*, 680 A.2d at 615 and *Frost*, 577 A.2d at 1289).
- 214 *See, e.g.*, *State v. Stringer*, 897 P.2d 1063, 1069 (Mont. 1995) (citing *State v. Harris*, 808 P.2d 453, 455 (Mont. 1991)).
- 215 *Id.* at 1069; *see also* *U.S. v. Halford*, 50 M.J. 402 (C.A.A.F. 1999).
- 216 *Parrish v. State*, 514 S.E.2d 458 (Ga. Ct. App. 1999).
- 217 *Id.* at 462 (citing *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981)).
- 218 *Id.* at 463.
- 219 *Id.* at 464 (citing *Jennette v. State*, 398 S.E.2d 734 (Ga. Ct. App. 1990).
- 220 *Id.* (citing *Barlow v. State*, 507 S.E.2d 416 (Ga. 1998).
- 221 *Id.*
- 222 *Rogers, supra* note 28, at 83–84 (1998).
- 223 *Carnahan v. State*, 681 N.E.2d 1164, 1167 (Ind. Ct. App. 1997) (citing *Henson v. State*, 535 N.E.2d 1189, 1191 (Ind. 1989)).
- 224 *Id.* at 1167.
- 225 *FED. R. EVID.* 404 (2006).
- 226 *Rogers, supra* note 28, at 86.
- 227 *Trowbridge, supra* note 49, at 454.
- 228 *Rogers, supra* note 28, at 86.
- 229 *MCCORMICK ON EVIDENCE* 352 (Kenneth S. Brown ed., 6th ed. 2006).

ENDNOTES

- 230 See Parrish, *supra* note 71.
- 231 Searles, 680 A.2d at 615.
- 232 See, e.g., State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982); see also Clark v. Florida, 654 So. 2d 984 (Fla. 1995) (discussing PTSD and RTS, which the court did not admit to prove the assault, but, which, it noted in a footnote, would likely be admissible to counter “myths and misconceptions dealing with rape”).
- 233 See generally David L. Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 2-143 (2002).
- 234 McCORMICK, *supra* note 229, at 353.
- 235 See ROTHSTEIN, *supra* note 153 at 120 (stating “[b]ecause one certainly does not necessarily always act in accord with one’s general predispositions, and because of the inherent risk of prejudice, character evidence is viewed by the law as extremely suspect”).
- 236 McCORMICK, *supra* note 229 at 352.
- 237 Michelson, *supra* note 138, 374 (2001).
- 238 *Id.* at 374.
- 239 See Boesch, *supra* note 14, at 415 (stating “[a]lthough experts can provide important information when testifying, unsubstantiated, nonscientific testimony on . . . RTS can harm not only victims and alleged offenders, but also the field of psychology as a whole. If the field of psychology is to be acknowledged as scientific, then psychologists must operate within the limitations of the empirical research”).
- 240 Burke, *supra* note 56.
- 241 See generally, Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 (1) VIOLENCE & VICTIMS (1993); Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (1999) available at http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_lethality.php (discussing the significance of a separation or attempt to separate by the female party in a domestic homicide); see also Allie Phillips, *The Dynamics Between Animal Abuse, Child Abuse and Domestic Violence: How Pets Help Children*, 38 (5) THE PROSECUTOR, (Sept. – Oct.) (2003) (discussing the interrelationship between domestic violence and pet abuse).
- 242 This fact alone, however, should not be relied upon as evidence of the American Psychological Association’s (APA) disapproval of BWS. The APA has filed amicus briefs in support of BWS in at least two cases: Hawthorne v. State, 408 So.2d 801 (Fla. Dist. Ct. App. 1982) and State v. Kelly, 478 A.2d 364 (N.J. 1984).
- 243 Bowman, *supra* note 3, at 236.
- 244 Parrish, *supra* note 66.
- 245 See, e.g., Carnahan v. State, 681 N.E.2d 1164 (Ind. Ct. App. 1997).
- 246 See generally Sarno, *supra* note 1.
- 247 See Boesch, *supra* note 14, at 427 (stating “[t]here is no clinical diagnosis or solid empirical research on which to base ethical RTS testimony”).
- 248 See Boesch, *supra* note 14, at 416; see also Boesch, *infra* note 250.
- 249 *Id.* at 416.
- 250 *Id.*
- 251 MERRIAM-WEBSTER ONLINE, available at <http://www.m-w.com/dictionary/pathologize>.
- 252 Black, 745 P.2d at 13, 14 (noting that the APA indicates in DSM-IV-TR that “the stress and trauma associated with rape is merely one type of the larger phenomenon known as ‘post-trau-

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- matic stress disorder'). *DSM-IV-TR* 236–38 (3d ed. 1980); *but see* Boeschen, *supra* note 14, at 417 (stating “the term RTS is not found in the *DSM-IV* (1994) nor in any previous editions”).
- 253 *See supra* note 77, discussing ASD; *see also* Boeschen, *supra* note 14 (discussing expert testimony on ASD in sexual assault cases).
- 254 *See* § 1.1 NDAA National Prosecution Standards, 2nd Ed. (1991) (stating “the primary responsibility of the prosecution is to see that justice is accomplished”).
- 255 *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (stating “[a] lawyer shall not knowingly: fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”).

APPENDIX A

Qualifying the Expert

The following questions are examples of questions that may be used to qualify an expert to give testimony about victim behavior in sexual or domestic violence prosecutions. These questions are meant to be modified so that they are relevant to the experience of the expert witness.

A. Occupation

1. What is your occupation?
 - How long have you been employed in that capacity?
 - Describe the responsibilities of your position.
 - How long has the program been in existence?
 - What services does your program offer?
 - Do you supervise?
 - Do you train staff?
 - What is the total number of staff?
2. Shelter Employment/Rape Crisis Center/Other
 - How many contacts do you receive yearly from victims identifying themselves as having experienced abuse?
 - How many crisis calls do you receive yearly?
 - How many residents in your shelter at one time?
 - How many residents yearly? Adults? Children?
 - How long can residents stay?
 - Does your program offer any other services?
3. Counseling/Support Services
 - Are your services solely for victims of sexual assault/domestic violence?
 - Are your services solely for women?
 - How many persons are served by this program yearly?
4. Do you have direct contact with victims of sexual/domestic violence?
 - How many victims do you directly come in contact with yearly?
 - What is the approximate period of time you have contact with an individual victim?

- What is the nature of your contact with victims?
- 5. Do you or your program conduct interviews with victims?
 - What is the purpose of the interviews?
 - Are interviews conducted with both crisis calls and clients?
 - How long do the interviews last?
 - What kind of information do you maintain?
 - Type of assault?
 - Age of victim and assailant?
 - Length of relationship?

B. Previous Occupation (if relevant)

1. What was your previous occupation?
 - How long did you perform those duties?
 - What were your responsibilities?
 - Did you have direct contact with victims of sexual/domestic violence?
 - What was the nature of the contact?
2. Have you had any other relevant job experience with sexual/domestic violence victims?

C. Education (if relevant)

1. What is the highest degree you have obtained?
2. What was your area of concentration?
3. Did you conduct any field work related to sexual/domestic violence?
4. Have you conducted any research in this area?
5. Were the results of your study developed into a paper? Were they published?
6. Are you familiar with articles or studies related to sexual/domestic violence? Please discuss.

D. Professional Affiliations

1. Do you belong to any professional organizations or associations? Any related to sexual/domestic violence?
2. What is the nature and purpose of those organizations?
3. Do you belong to any county, state, or national organizations which specifically address sexual domestic violence issues?

4. What is the purpose of those organizations?
5. Are you involved with any committee work of these organizations?
What is that nature of that committee work?

E. Training

1. When you began your work at your program, did you receive any training in the issues of sexual/domestic violence?
 - Please describe that training.
 - Have you received any additional training in sexual/domestic violence issues?
 - Please describe that training.
2. Have you conducted any trainings yourself?
 - What were the topics of the trainings?
 - For whom did you conduct the trainings?
 - For what purpose were the trainings designed?
 - How many attended the trainings?
 - How often do you conduct such trainings?

F. Conferences

1. Have you attended state or national sexual/domestic violence conferences?
2. Who sponsored the conference?
3. What was the purpose of the conference?
4. When and where was the conference?
5. Did you attend any workshops relevant to domestic violence issues?
6. Have you conducted any workshops or presentations at these conferences?

G. Previous Expert Testimony

1. Have you testified previously in court?
2. Was it a criminal or civil case?
3. How many times?
4. For the defense or the prosecution?
5. Has the defense ever asked you to testify as an expert?
6. If asked, would you do so?

APPENDIX B

Questions for the Expert

The following introductory questions can be used to educate the court and jury about sexual or domestic violence as well as to explain victim behavior.

A. Issues Relevant to Sexual/Domestic Violence

- Based upon your experience, training, education, and work with victims of sexual assault/domestic violence, what are some common issues associated with victims of sexual assault/domestic violence?
- Common theories related to sexual assault or domestic violence (focus on only those relevant to the case).
- Collateral consequences victims face as a result of assault (domestic violence).
- Common nature of non-stranger sexual assault (if permissible).
- Lethality (if permissible).

B. Myths About Sexual/Domestic Violence Held by the Public

- Do you give presentations to civic groups, schools, and other public forums on issues associated with sexual assault/domestic violence, or have other opportunities to talk with members of the public about those issues?
- Have you found the public to be well informed about sexual assault/domestic violence, how it happens, and how victims react?
- Does the public have misconceptions about sexual assault/domestic violence?
- From your experience, how do most people develop these misconceptions?
- Are you familiar with any articles or books (or have you attended any trainings) discussing the myths versus the realities of sexual/domestic violence?

C. Victim Behaviors

- Based upon your experience, training, education, and work with vic-

tims of sexual assault/domestic violence, what are some common victim behaviors/reactions to assault?

- Do all victims behave the same way?
- Through your numerous experiences with sexual assault/domestic victims, have you gathered insight into the reasons why a victim may behave a certain way?
- Based upon your experience, please explain the reasons.

Delayed Report

- In your experience, do victims of sexual assault generally report that they have been sexually assaulted right away?
 - Do some never report or report only years later? Why is that?

Minimization

- Based upon you experience, is it common for a sexual assault victim to minimize the level of violence she has endured?
 - Based upon your knowledge and experience, why does that happen?

Recantation or Reluctance to Testify

- Based upon your experience, is it common for a sexual assault victim to deny violence has occurred as the incident passes in time? Why?
- From you experiences with sexual assault/domestic violence victims, is it common for victims to be reluctant to testify by the time the trial occurs? Why?

Flat Affect or Angry Victims

- Does every victim react to the trauma of rape in the same way?
- Is it uncommon for a victim to show little emotion, or even exhibit seemingly inappropriate emotions, when asked to recount the trauma of rape?
- Do some victims even react angrily?
- What are some of the reasons you have discovered for this behavior?

Continued Contact With Assailant

- Based upon your experience, are you aware of victims who have maintained contact with the individual who allegedly assaulted them?
- What are some of the reasons for this behavior?

D. Knowledge of Present Case

- Have you interviewed the victim in this case? Have you interviewed any witness connected with this case? Are you familiar with the facts of the case?
- Is your testimony today based on your experience, training, education, and work with victims of sexual/domestic assault?

Adapted with permission from Herb Tanner, Jr., Violence Against Women Project Training Attorney Prosecuting Attorney's Association of Michigan.

APPENDIX C

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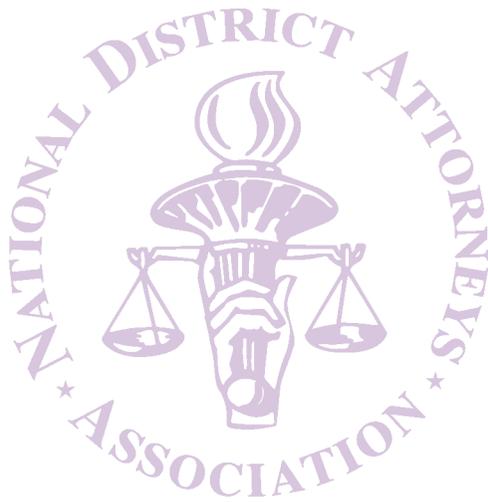
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ABOUT THE AUTHOR

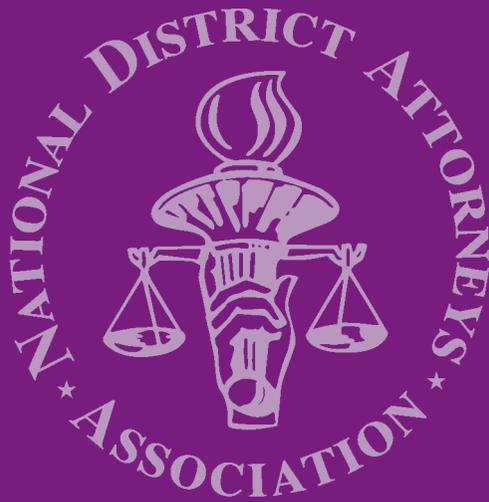
Jennifer Long is the Director of the National Center for The Prosecution of Violence Against Women at the American Prosecutors Research Institute, the research and technical assistance division of the National District Attorneys Association. Ms. Long has traveled across the country lecturing to prosecutors, law enforcement officers, victim advocates and other allied professionals on various issues related to violence against women. She has also provided technical assistance and trial support to criminal justice professionals throughout the nation and has served on a number of national committees dealing with sexual assault and domestic violence. Most recently, she served as a Senior Attorney at the National Center for the Prosecution of Violence Against Women.

Ms. Long served as an Assistant District Attorney in Philadelphia, Pennsylvania, where she prosecuted cases involving: narcotics, firearms, domestic violence, sexual assaults and child physical and sexual abuse. Subsequent to her tenure at the Philadelphia District Attorneys Office, Ms. Long worked at the law firm of Appleby, Spurling & Kempe in Hamilton, Bermuda. While living in Bermuda, she worked as a volunteer advocate in the Women's Resource Center, which provided legal services to victims of domestic violence. After leaving Bermuda, Ms. Long worked as an Associate at Morgan, Lewis & Bockius, LLP in Philadelphia. She also worked as an attorney in the Department of Veterans Affairs in Washington, DC. Ms. Long also served as a child advocate through the Support Center for Child Advocacy in Philadelphia, Pennsylvania.

Ms. Long graduated from Lehigh University with high honors in 1993, with a double major in English and East Asian Studies. She graduated from the University of Pennsylvania Law School and Fels School of Government in 1997. She is a member of the Pennsylvania and New Jersey bars. Ms. Long lives in Washington, DC with her husband, son and two dogs.



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IF YOU'RE STALKED

You might:

Feel **fear** of what the stalker will do.

Feel **vulnerable**, unsafe, and not know who to trust.

Feel **anxious**, irritable, impatient, or on edge.

Feel **depressed**, hopeless, overwhelmed, tearful, or angry.

Feel **stressed**, including having trouble concentrating, sleeping, or remembering things.

Have **eating problems**, such as appetite loss, forgetting to eat, or overeating.

Have **flashbacks**, disturbing thoughts, feelings, or memories.

Feel **confused, frustrated, or isolated** because other people don't understand why you are afraid.

These are common reactions to being stalked.

IF SOMEONE YOU KNOW IS BEING STALKED, YOU CAN HELP.

Listen. Show support. Don't blame the victim for the crime. Remember that every situation is different, and allow the person being stalked to make choices about how to handle it. Find someone you can talk to about the situation. Take steps to ensure your own safety.

We can help.

THE NATIONAL CENTER FOR
Victims of Crime

Stalking
resource center

To learn more about stalking, visit the
Stalking Resource Center Web site
www.victimsofcrime.org/src

If you are in immediate
danger, call 911.

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	wednesday	Thursday	Friday
2 left threatening note on car	3	4 3 e-mails	5 got past security at work
9 followed from work to school	10 4 e-mails	11 3 hang ups	12 called repeatedly, left messages
16 6 hang ups	17 showed up at work	18	19
23 broke car window	24 sent flowers	25	26 4 hang ups

are you
being

STALKED?

ARE YOU BEING STALKED?

Stalking is a series of actions that make you feel afraid or in danger. Stalking is serious, often violent, and can escalate over time.

Stalking is a crime.

A stalker can be someone you know well or not at all. Most have dated or been involved with the people they stalk. About 75 percent of stalking cases are men stalking women, but men do stalk men, women do stalk women, and women do stalk men.

Some things stalkers do:

- Repeatedly call you, including hang-ups.
- Follow you and show up wherever you are.
- Send unwanted gifts, letters, texts, or e-mails.
- Damage your home, car, or other property.
- Monitor your phone calls or computer use.
- Use technology, like hidden cameras or global positioning systems (GPS), to track where you go.
- Drive by or hang out at your home, school, or work.
- Threaten to hurt you, your family, friends, or pets.
- Find out about you by using public records or on-line search services, hiring investigators, going through your garbage, or contacting friends, family, neighbors, or co-workers.
- Other actions that control, track, or frighten you.

You are not to blame for a stalker's behavior.

THINGS YOU CAN DO

Stalking is unpredictable and dangerous. No two stalking situations are alike. There are no guarantees that what works for one person will work for another, yet you can take steps to increase your safety.

If you are in **immediate danger**, call 911.

Trust your **instincts**. Don't downplay the danger. If you feel you are unsafe, you probably are.

Take **threats** seriously. Danger generally is higher when the stalker talks about suicide or murder, or when a victim tries to leave or end the relationship.

Contact a crisis hotline, **victim services agency**, or a domestic violence or rape crisis program. They can help you devise a safety plan, give you information about local laws, refer you to other services, and weigh options such as seeking a protection order.

Develop a **safety plan**, including things like changing your routine, arranging a place to stay, and having a friend or relative go places with you. Also, decide in advance what to do if the stalker shows up at your home, work, school, or somewhere else. Tell people how they can help you.

Don't communicate with the stalker or respond to attempts to contact you.

Keep **evidence** of the stalking. When the stalker follows you or contacts you, write down the time, date, and place. Keep e-mails, phone messages, letters, or notes. Photograph anything of yours the stalker damages and any injuries the stalker causes. Ask witnesses to write down what they saw.

6.6 million people are stalked each year in the United States.

Contact the **police**. Every state has stalking laws. The stalker may also have broken other laws by doing things like assaulting you or stealing or destroying your property.

Consider getting a **court order** that tells the stalker to stay away from you.

Tell **family, friends, roommates, and co-workers** about the stalking and seek their support. Tell security staff at your job or school. Ask them to help watch out for your safety.

Women are stalked at a rate three times higher than men.

Rights of Victims of Domestic Violence

1. You have the right to ask for a civil protective order, whether or not criminal charges are filed.
2. You have the right to ask for a criminal protective order if criminal charges are filed.
3. You have the right to ask the prosecuting agency to file criminal charges if your abuser was not arrested or if the police closed their investigation without filing charges. Please remember that it is important to preserve evidence! You can contact the local prosecutor to review the case. If you request notification of the status of the case, the prosecutor will notify you of his/her decision to file charges within five days of the decision.
4. You have the right to a copy of the police incident report free of charge.
5. You have the right to state, in writing, that you do not want or need the protections available to you (see Notice of No Contact Requirement) after the alleged abuser is arrested. **If you give up those protections, no criminal protective order will be in effect while the alleged abuser is awaiting his/her first court appearance.**

***For questions about domestic violence,
call the Statewide Tollfree Infoline
1-800-897-LINK
Daily, 8:30 a.m. - 9:00 p.m.
In a crisis call 911***

Services for Victims of Domestic Violence

The following local shelters, services, and resources are available to you in this community:

Notice of No Contact Requirement

Information for the Alleged Victim

The following requirements shall be ordered by a court or must be agreed to by the alleged abuser prior to release on bail, recognizance or otherwise:

1. The alleged perpetrator will have no personal contact with the alleged victim;
2. The alleged perpetrator will not threaten or harass the alleged victim; and
3. The alleged perpetrator will not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.

Notice of Penalties for Violation

If the alleged abuser violates this agreement/order, the alleged abuser may be rearrested for a third degree felony if the original arrest was for a felony or a class A misdemeanor if the original arrest was for a misdemeanor.

Agreement/order expires (date and time):

Court and address:

Prosecuting agency and address:

Police report case number:

The District Court is located at

Notice of No Contact Requirement

Information for the Alleged Abuser

The following requirements shall be ordered by a court or must be agreed to by the alleged abuser prior to release on bail, recognizance or otherwise:

1. The alleged perpetrator will have no personal contact with the alleged victim;
2. The alleged perpetrator will not threaten or harass the alleged victim; and
3. The alleged perpetrator will not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim.

Notice of Penalties for Violation

If the alleged abuser violates this agreement/order, the alleged abuser may be rearrested for a third degree felony if the original arrest was for a felony or a class A misdemeanor if the original arrest was for a misdemeanor.

Agreement/order expires (date and time):

Court and address:

An alleged victim may waive, in writing, any or all of the no contact requirements. Such a waiver releases the alleged perpetrator from the designated restrictions.

The District Court is located at

Protective Orders Information for the Alleged Abuser

Civil Protective Orders

Civil protective orders may be obtained whether or not criminal charges are filed. Forms for civil protective orders are available in the district court clerk's office where the alleged victim resides or is temporarily living. There is no cost for filing a petition, serving the papers on the alleged abuser, or for copies for service. The district court clerk's office will help the alleged victim fill out the forms, but they cannot provide legal advice or assistance. These orders may be obtained with or without the assistance of an attorney.

Criminal Protective Orders

Criminal protective orders are available to the alleged victim only if the criminal process begins with

1. an arrest
2. charges being filed with the court;
3. arraignment on a domestic violence offense; or
4. conviction of a domestic violence offense.

A victim or a prosecutor can ask the court to impose a criminal protective order at any time during the court of the proceedings or while the court has the defendant under its jurisdiction. The criminal protective order protects the alleged victim for as long as the defendant is under the jurisdiction of the court or until the court makes a further order.

Protective Orders Information for the Alleged Victim

A protective order is an order issued by the court giving the victims of domestic violence protection by preventing the abuser from having contact with you, threatening you, coming to your home, school workplace and any other order the court thinks is necessary to protect you and your family or others living in your home.

Civil Protective Orders

There are two types of civil protective orders:

1. Ex Parte Order

An ex parte protective order can be issued the day you ask for it without the abuser being present. Once the abuser is given a copy of the order, it is effective until a court hearing is held, where the abuser is present.

2. Protective Order

A protective order becomes effective after the court hearing and after the abuser receives a copy of it. The ex parte order continues its protections until the protective order is served. The protective order is good for as long as the court thinks is necessary.

How Can I Obtain a Civil Protective Order?

Civil protective orders may be obtained whether or not criminal charges are filed. Forms for civil protective orders are available in the district court clerk's office where you reside or are temporarily living. There is no cost for filing a petition, serving the papers on the abuser, or for copies for service. The district court clerk's office will help you fill out the forms, but they cannot provide legal advice or assistance. You do not have to hire a lawyer. However, the clerk's office will provide you with a list of legal service organizations who may represent you if you want a lawyer. You can also hire your own lawyer.

Criminal Protective Orders

There are three types of criminal protective orders:

1. Jail Agreement/Order

The abuser must be arrested and taken to jail in order for a jail agreement/order to be issued. The abuser cannot be released on bail, recognizance or otherwise, unless the abuser agrees in writing or is ordered by the court to

1. Have no personal contact with you;
2. Not threaten or harass you; and
3. Not knowingly enter onto the premises of your home or where you are temporarily staying

This order is good until the close of the next court day. The abuser can be rearrested for violating this order.

2. Pre-Trial Order

Criminal charges must be filed against the abuser in order for a pretrial protective order to be issued. If you want the protections of the jail agreement/order to continue or if you want a criminal protective order to protect you during the course of the criminal proceedings, you should contact the prosecuting attorney's office or appear in court to tell the judge why you want this order to continue or to be issued. If the court decides to issue a pretrial criminal protective order, you will be given a certified copy of it.

3. Sentencing Order

The abuser must be convicted (found guilty, plead guilty, or no contest) of the domestic violence offense in order for a sentencing protective order to be issued. After conviction, you may request the court to continue or issue the criminal protective order. The court can extend or issue a criminal protective order to protect you for as long as the court has the abuser under its authority.

Domestic Violence

Notice of Rights and Remedies

MARK SHURTLEFF
UTAH ATTORNEY GENERAL



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