

**Model Response to Sexual Violence for
Prosecutors (RSVP Model):
An Invitation to Lead**

Volume I: Prosecution Practices



AEQUITAS



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FOREWORD

Prosecution of sexual violence is unlike prosecution of other crimes. These crimes pose unique challenges for prosecutors and other professionals in the criminal justice system and often involve uniquely vulnerable victims. The crimes themselves — how they happen, who commits them, who is victimized — are widely misunderstood by those who have not been educated about perpetrator-victim dynamics. And the behavior of victims in response to the trauma of these devastating crimes is often misconstrued. While many criminal justice professionals have educated themselves about these dynamics and behaviors, the general public (including jurors) continue to be influenced by myths and misconceptions. Too often, law enforcement and prosecutors “weed out” the more difficult cases along the way, based on a perception that the cases will prove to be “unwinnable” —that the legal and factual challenges are insurmountable. Disappointingly few cases make it to the courtroom and even fewer result in conviction. Moreover, the problem is self-perpetuating: to the extent that police and prosecutors are not vigorously pursuing more challenging cases, they are not developing and honing the skills necessary to build sexual assault cases that will result in convictions.

However, conviction rates tell only part of the story about whether a prosecutor’s office — or a prosecutor — is successful in handling cases involving sexual violence. If difficult or challenging cases fall by the wayside early in the process, they are generally not factored into the rate of conviction. While there may be a thin veneer of success in terms of conviction rate, the reality is that serial perpetrators,¹ or those who are clever in their choice of victim, escape justice, while victims who have been violated in the most personal and devastating way are left to their own remedies, without the support of the criminal justice system.

If conviction rates are not a reliable measure of success, what is? The answer lies in the quality of the prosecution response. In prosecuting sexual violence, more so than with other crimes, the process is as important as — or more important than — the legal outcome in achieving a just result. The entire process of thorough investigation and meticulous prosecution yields many benefits, regardless of whether any individual case results in conviction:

- Prosecutors and investigators hone skills and refine strategies that increase the likelihood of conviction in future cases.
- Better prepared cases shine a light on the full range of an accused’s conduct, exposing predatory behavior, exploitation, manipulation, and intimidation.
- Serial offenders are identified so that future victimizations can be prevented.
- Evidence is developed that may be admissible in other cases involving the same perpetrator.
- Trauma-informed responses reduce re-traumatization in victims.
- Victims see their cases are taken seriously and obtain a measure of validation and closure.
- Victim safety, privacy, and confidentiality is respected and protected.
- Victims are encouraged to report crimes.
- Community relations are strengthened by consistent messaging from prosecutors in a position of leadership.
- Communities are made safer.

- Jurors and judges are educated in dynamics of sexual assault and how trauma may affect victim behavior.
- Improved coordination and cooperation between criminal justice professionals allows all involved to share information, knowledge, and expertise — streamlining the process for victims and allowing agencies to make the best use of available resources.

The Sexual Assault Justice Initiative (SAJI) is a project developed in partnership among AEquitas, the Justice Management Institute, and the Urban Institute. The Initiative challenges prosecutors to look beyond conviction rates as the primary measure of success or effectiveness in sexual violence prosecutions and to implement, continually evaluate, and refine sustainable prosecution practices that will advance the goals of justice, victim safety, and offender accountability. This document sets forth the **Model Response to Sexual Violence for Prosecutors (RSVP)** — the cornerstone of SAJI’s proposal for improving the prosecution response to sexual violence. The RSVP Model is a collection of **office- and case-level promising practices**, identified through research and the experience of both AEquitas staff and partnered prosecutors, that positively impact case outcomes by using measures of success beyond conviction rates.

The RSVP Model also provides a **performance management system** as a tool for offices and individual prosecutors to measure their effectiveness in achieving intended outcomes. The Model proposes methodical, routine evaluations of prosecution practices that can be refined as necessary in response to evolving research, emerging issues, or changing conditions in a jurisdiction. **It is intended to serve as a comprehensive tool for making decisions on office policy and individual cases of sexual violence.** When implemented, the Model’s policies and practices will allow for all adult sexual assault victims who interact with prosecutors across the United States to benefit from prosecution practices that are trauma-informed, victim-centered, offender-focused, research-informed, and sustainable over the course of changes in administration and personnel.

The Introduction portion of this document, found in [Chapter 1](#), explains in detail the problems that have arisen as a result of overreliance on conviction rates in cases of sexual violence. It identifies the core principles that should inform a model response to these crimes to further the goals of justice — *i.e.*, offender accountability and victim and community safety. It discusses how we can define “success” in the prosecution of sexual violence, and how we can measure our location on that continuum as well as our improvement efforts.

RSVP Volume I is divided into two parts. The [first](#) focuses on office-level leadership, providing information and tools to assess current practices and identify areas for improvement. This chapter is especially directed to chief prosecutors, unit chiefs, or other prosecutors within an office who are responsible for creating, implementing, and promoting policies and practices affecting the prosecution of sexual violence. The [second](#) section is intended for prosecutors handling cases of sexual violence at any level within an office (*e.g.*, grand jury unit, sex crimes unit, trial unit). This section includes specific strategies and tools enabling prosecutors to achieve positive case outcomes at every stage of the prosecution, from initial case review through final disposition and sentencing.

RSVP Volume II, a companion to RSVP Volume I, focuses on performance management. It provides a method to measure improvements in performance as a result of implementing the policies and practices set forth in the Volume I, as well as concrete, easy-to-use tools for doing so. Volume II can be found on AEquitas’ website.

CHAPTER 1. INTRODUCTION

1.1. The Need for a Model Response

“Sexual violence is a deeply traumatic crime that can cause severe damage to survivors’ emotional, spiritual, and psychological well-being.”² Studies estimate that 1 in 5 women and 1 in 71 men have been raped at some point in their lives.³ Sexual assault victimization is both physically and psychologically harmful. In addition to the physical harm, which studies show 1 in 3 female victims and 1 in 6 male victims experience, victims suffer from an invasion of personal autonomy and dignity.⁴ In fact, the largest proportion of crime victims suffering from post-traumatic stress disorder are sexual assault survivors.⁵

A Note on Terminology

Across the United States, sex crimes are named and defined differently. The criminal acts range from sexual penetration to sexual contact or exposure, with additional elements ranging from physical force to lack of consent. This document will use the terms rape, sexual assault, and sexual violence interchangeably when referring to any of these crimes. When referring to specific statutorily-defined crimes, the appropriate term (e.g., “rape,” “sexual battery,” “sexual assault,” “sexual misconduct”) will be used.

Like many other crime victims, sexual assault victims experience anxiety about engaging with the criminal justice system and feel a loss of control as they move through it.⁶ There are, however, many dynamics unique to sexual assault that exacerbate the experience for survivors of these crimes. While we know that the justice system is a critical component of a comprehensive response to sexual violence,⁷ many cases still go unreported. Two-thirds of sexual assault victims do not report their assault to police for reasons that include fear, embarrassment, loyalty towards the perpetrator, or belief that the criminal justice system cannot or will not help them.⁸ Many victims do not view the criminal justice system as an appropriate vehicle for resolving their experiences of violence.⁹

Negative experiences with police or prosecutors discourage many victims from proceeding with the process. Their reports may be viewed with skepticism or outright victim-blaming. Victims may be cross-examined the first time they sit down for an interview, or asked to explain themselves and their actions to the satisfaction of the officer or prosecutor. Why did they go to the attacker’s home? Why did they wait so long to report? Why did they have so much to drink? Any discrepancies in their accounts, even in the wake of deeply traumatic events, may be seized upon and picked apart. They may be accused of not being able to “get their story straight.” Such experiences cause many to feel disbelieved or blamed. Believing that everyone, including a jury, will have the same reaction, many victims conclude it isn’t worth going through the ordeal of a trial. Similarly, a victim’s criminal conduct, whether committed around the time of their assault or long prior — particularly arrests for prostitution-related crimes — may be used as a basis to dismiss their allegations, causing further mistrust of the system. Such grounds for discounting the victim’s report overlook the fact that perpetrators commonly select victims for their particular vulnerabilities, which they then exploit. To the extent perpetrators intentionally target “imperfect” victims, justice is foreclosed for those victims and the attackers escape accountability, remaining free to victimize others.

On the criminal justice side of the equation, there is an evident disparity between the number of sexual assaults reported and the number actually prosecuted. Regardless of our intentions as prosecutors to do good and despite our belief in the strength of our office's response to these crimes, the research, both direct¹⁰ and indirect,¹¹ reveals that reporting rates,¹² arrest rates, prosecution rates,¹³ and conviction rates for crimes of sexual violence are, overall, staggeringly low.¹⁴ In a six-site study, researchers found that between 80 and 89 percent of cases reported to the police were either never referred to the prosecutor's office or were declined for prosecution.¹⁵ Additional research shows that "[o]ne of the most enduring realities of sexual assault is that very few cases result in arrest, prosecution, and conviction of [perpetrators]."¹⁶

What causes this gap between reports of sexual assault and actual prosecutions? Is law enforcement failing to investigate or refer cases for prosecution? Are officers "exceptionally clearing" these cases¹⁷ based on perceptions about downstream decision-making?¹⁸ Are cases being referred for prosecution but then declined based on inadequate or inaccurately analyzed investigations? Are triable cases being declined for some other reason? Answers to these questions can be gleaned from attrition studies,¹⁹ reports from untested sexual assault kits,²⁰ investigative reports,²¹ victim feedback,²² and anecdotal evidence, such as multidisciplinary participant feedback at trainings. Among the likely explanations are uninformed credibility assessments of victims (*e.g.*, those who are intoxicated, substance abusers, or involved in commercial sexual exploitation are unworthy of belief);²³ lack of information and training about sexual violence perpetration, victimization, and trauma; agency resource shortages; and concerns over conviction rates.²⁴ Collectively, these factors paint an unacceptable picture of the criminal justice response to sexual assault — a picture that is likely distressing and discouraging for the countless prosecutors dedicated to justice and victims and community safety. Improving the response to sexual violence will not only increase the number of cases investigated and prosecuted, but will encourage more survivors to report their assaults, and reduce the occurrence of these crimes as communities identify more perpetrators.

Our dedication to seeking justice can make it difficult to see and accept our failures. When we hear survivors say that they feel ignored or abandoned by the system, our defenses kick in. We stubbornly insist that survivor perceptions are not accurate — not in our jurisdictions. However, a better response is to hear survivors' feedback, review the research, acknowledge the fact that our approach to prosecuting sexual violence may not be fully achieving its goal of protecting victims and communities, and revise our strategies accordingly.

AEquitas has partnered with the Justice Management Institute and the Urban Institute in an effort to improve the response of prosecutors to sexual violence committed against adult victims.²⁵ SAJJ²⁶ challenged prosecutors to look beyond conviction rates as the primary measure of success or effectiveness and identified other factors that serve as the hallmarks of an effective criminal justice response. In celebrating the culmination of our pilot initiative, we are re-releasing the Model Response to Sexual Violence for Prosecutors (RSVP Model), now rebranded as the RSVP Model Volume I: Prosecution Practices. This Model, along with Volume II on performance management, provides the foundation for implementation, continual evaluation, and refinement of sustainable prosecution practices that will advance the prosecution goals of justice, victim safety, and offender accountability.

RSVP Volume I is a collection of office- and case-level promising practices, identified through the research and experience of AEquitas staff and partnered prosecutors and allied professionals, to produce more positive case outcomes.²⁷ It links specific prosecution practices to outcomes identified as consistent with, and integral to, prosecution goals. RSVP Volume II provides performance management systems with a tool for offices and individual prosecutors to measure their effectiveness in achieving intended outcomes, and proposes a methodical, routine evaluation of prosecution practices that can be refined as necessary in response to evolving research, emerging issues, or changing conditions in a jurisdiction. Performance management can

help us understand the extent to which prosecutors are employing promising practices (*e.g.*, the use of expert testimony to explain victim behavior at trial; litigating motions *in limine* to exclude irrelevant evidence of the victim's past sexual conduct), and whether the resulting outcomes (*e.g.*, an increase in percentage of cases charged, increase in victim satisfaction with the criminal justice process) correlate with improved victim safety and offender accountability.

The RSVP Model is intended to serve as a comprehensive tool for making decisions on office policy and individual cases of sexual violence. When implemented, the policies and practices described will allow for all **adult** sexual assault victims who interact with prosecutors across the United States to experience prosecution practices that are trauma-informed, victim-centered, offender-focused, informed by research, and sustainable over the course of changes in administration and personnel.

1.2. Core Principles

A prosecutor's duties are to seek truth and justice, protect victims and hold offenders accountable, and ensure that guilt does not escape nor innocence suffer.²⁸ These duties, combined with our position in the criminal justice system, make us perfectly situated to assume a leadership role in the effort to improve our criminal justice system's response to sexual violence as a whole. In furtherance of our mission as prosecutors in these cases, we collaborate with law enforcement, healthcare providers, victim advocates, and allied professionals (who may be part of a multidisciplinary team) to coordinate efforts and close gaps in the system. We also leverage specialized resources and training opportunities, and implement promising new practices while refining established ones.

EXHIBIT 1-1

Core Principles Guiding Best Practices in Sexual Assault Prosecutions²⁹

TRAUMA-INFORMED	Fully acknowledging that trauma is an individual response to physically or emotionally harmful events, we interact with victims in a manner that minimizes re-traumatization and maximizes their engagement with the criminal justice system. ³⁰ This approach recognizes the offender’s responsibility for the victim’s trauma, aids in identifying and interpreting of evidence, and assists juries in understanding the effects of trauma.
VICTIM-CENTERED	Appreciating the central role victims play in the judicial process, we consider their needs throughout the process. The best possible case outcomes holds the offender responsible and accounts for the victim’s history, experience, and perspective, as well as the impact of the criminal justice process on them and their family, school or workplace, and community.
OFFENDER-FOCUSED	Recognizing that offenders purposefully, knowingly, and intentionally target victims whom they believe they can assault and impugn in an effort to avoid the consequences of their conduct, we persistently focus on the offender’s actions and intent and oppose defense tactics to deflect the focus on to the victim. An offender-focused approach is driven by an accurate and unbiased analysis of a case and applicable law, and a thorough understanding of offender conduct and offender-victim dynamics. The rights of crime victims are always protected to the best of the prosecutor’s ability.
MULTIDISCIPLINARY	Research has shown that a system working collaboratively to provide a coordinated response will encourage more victims to access services and participate in the process, more effectively hold offenders accountable, and help improve victim and community safety. Collaboration enables prosecutors and allied professionals to share resources, educate one another, evaluate and refine their practices on a continual basis, adapt in response to emerging issues, and ensure the sustainability of their practices.
SPECIALIZED PROSECUTION	Prosecutors must understand offender-victim dynamics in various types of sexual assault cases, as well as assumptions and misconceptions widely held by both laypeople and professionals. Specialized investigative practices provide enhanced knowledge and require greater skill to uncover relevant and probative evidence, while keeping victims engaged throughout the process. Specialized trial expertise provides enhanced knowledge and requires greater skill to explain common gaps in evidence and counter deeply entrenched myths and assumptions about victim credibility – including how victims respond to trauma and what victimization looks like. Specialized prosecution units promote the development of such expertise, provide access to focused training, and present opportunities for collaboration with law enforcement and community partners. ³¹

RESEARCH-INFORMED	Prosecutorial decisions must be driven by the most current and accurate scientific, sociological, and legal research. Innovative practices to improve responses to sexual violence must be research-informed and implemented to determine their true value. Where effective, these practices should be sustained, reevaluated, and refined for improvement and ongoing relevance to changing conditions.
PERFORMANCE-DRIVEN	Improving the overall response to sexual violence requires the assessment of key elements of our practice through performance management. How do we determine if a best practice is truly effective? How can we measure our own progress in improving our practice? While conviction rates have historically been used as the primary measure of “success,” they are neither a reliable nor meaningful measure of it. A performance management system that tracks the implementation of best practices, solicits victim feedback, views case outcomes through the lens of case complexity, analyzes and reports data, and measures progress against performance targets ensures that prosecutors’ offices are meeting victim and community needs and achieving justice.

1.3. Defining and Measuring Success

How do we know whether we are succeeding in efforts to improve our handling of sexual assault cases? How do we measure our progress? Historically, conviction rates have been used as the primary measure of “success” for law enforcement and prosecutors³² because they represented the only readily accessible data. Conviction rates alone, however, are inadequate indicators of the success of a jurisdiction’s response to these crimes. When difficult or complex cases are “weeded out” before trial or even arrest or charging, the result is a deceptively high conviction rate.³³ For example, jurisdictions with high conviction rates may be rejecting cases perceived to be too difficult or complex, whereas jurisdictions with lower conviction rates may be taking such cases to trial —perhaps losing some of them, but affording victims a forum for justice and prosecutors an opportunity to refine and improve their trial skills. This pre-emptive “weeding out” process is rarely the result of conscious or callous disregard for victim and community safety, but rather of office policies and practices that direct the declination or dismissal of sexual violence cases characterized by “difficult”, albeit common factors, including: alcohol use by the victim and/or perpetrator, a current or former relationship between the perpetrator and the victim, lack of physical force, lack of physical injury, lack of victim participation in the prosecution, lack of corroboration, etc.³⁴

However, conviction rates do not capture the more elusive, yet measurable, factors related to the **quality of justice**. A successful response to complex sexual assault cases may appear daunting, but the characteristics of these cases, when broken down and understood, can be effectively addressed. These building blocks are: 1) thorough, offender-focused investigations; 2) collaboration with multidisciplinary professionals, including experts; 3) an understanding of victimization and the effects of trauma; 4) the education of colleagues, allied professionals, factfinders, and the community on victimization and the effects of trauma; and 5) a solid understanding of the law, with a willingness to promote change in the law where appropriate. When prosecutors, law enforcement, medical, and advocacy professionals all understand their roles in relation to the larger response, they are better able to overcome perceived challenges and to support victims throughout the reporting, investigative, and prosecutorial processes.

Indicators of success in prosecution include:

- Reduced reliance on myths and generalizations in decision-making.

- Protection of victim privacy and safety consistent with justice.
- Support of victims throughout the process.
- Trial strategies that expose predatory behavior.
- Trial strategies that educate the factfinder.
- Pleas or convictions litigated to the most appropriate charge and degree.
- Sentences that account for the nature of the crime, offender’s behavior, and victim impact.
- Reduced incidence of sexual violence.
- Increased reporting of sexual violence.
- Increased referral rates from law enforcement.
- Increased prosecution rates.
- Increased trust in the criminal justice system.
- Identification of serial sexual offenders.
- Meaningful collaboration with allied professionals.
- Solicitation and respectfully consideration of victim input.
- Introduction of all relevant and probative evidence.

1.4. The RSVP Model: The Two Facets of Progress

The RSVP Model is divided into two volumes as depicted in [Exhibit 1.2](#), below. Each volume is fully described in the pages to follow. There is also a separate Appendices which houses the tools discussed in both volumes.

EXHIBIT 1-2
The RSVP Model

Volume I: Prosecution Practices

Office-Level Leadership: The Prosecutor’s Role to Seek Justice addresses the office-level response to sexual violence. It provides information and tools to assess current practices, establish effective office philosophies and practices, support prosecutors, meaningfully collaborate with allied professionals, promote community engagement, utilize the latest data and technology, and sustain promising practices throughout changes in administration and personnel. A conceptual model links the office-level practices to intended outputs, outcomes, and performance management, and ensures a clear and logical relationship between all elements.

Case-Level Leadership: The Prosecutor’s Duty to Achieve Justice provides promising practices that can be implemented in the litigation of individual sexual violence cases. This section includes specific strategies and tools for prosecutors to employ to achieve positive case outcomes at each stage of the prosecution, beginning with the initial case review all the way through pretrial, trial, sentencing, and post-conviction considerations. A conceptual model maps the case-level practices to intended outputs, outcomes, and performance management.

Volume II: Performance Management

Performance Management provides a comprehensive system to track the practices in Volume I of the Model, which will help offices better understand their progress in responding to sexual assault. Performance management “outlines critical objectives (outcomes) associated with prosecution goals and identifies performance measures that may be used to track progress. This framework provides a useful tool for assessing strategies and practices that contribute to desired outcomes.” (Dillingham, Nugent & Whitcomb 2004). The tools contained in Volume II are intended to examine and improve prosecution performance and should be used regularly.

CHAPTER 2. OFFICE-LEVEL LEADERSHIP: THE PROSECUTOR’S ROLE TO SEEK JUSTICE³⁵

“[The prosecution’s] interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [the prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer ... But, while [the prosecutor] may strike hard blows, [the prosecutor] is not at liberty to strike foul ones. It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”³⁶

These oft-quoted words from the United States Supreme Court, most frequently cited in connection with the prosecutor’s duty in the courtroom, are equally descriptive of the prosecutor’s role in the community. “Local police and prosecutors are the gatekeepers to the criminal justice system”³⁷ and are responsible for implementing a comprehensive response to sexual violence in accordance with applicable law and an informed understanding of sexual violence dynamics. Even with imperfect and varied laws across the country, there are few insurmountable legal obstacles to holding offenders accountable, in most cases, for the full range of their criminal behavior. Gaps in knowledge, however, often pose barriers to realizing the law’s potential, because victim characteristics and fact patterns perceived as “problematic” too often cause criminal justice professionals to hastily dispose of such cases. Institutional structures and policies must be implemented to dissolve these barriers and promote an operational understanding of laws and their enforcement³⁸ that encompasses the growing body of relevant social science, medical, scientific, and technological research to close the gap between law-on-the-books and law-in-action.

2.1. Assess Current Practice in Your Jurisdiction³⁹

Current attrition studies have revealed that certain victim, assault, and perpetrator characteristics are associated with case attrition in sexual violence cases – *i.e.*, cases that don’t process through the criminal justice system. This suggests a gap in access to justice exists for many victims of sexual violence. What is the attrition rate in your jurisdiction? What the reasons for attrition in your jurisdiction? And why is this information important in order to improve practices?

The difference between the number of sexual violence cases reported and the number prosecuted reflects individuals who have reported a crime of sexual violence but on whose behalf no justice was sought. Documenting the number of cases that don’t proceed to prosecution is an important measure of an office’s responsiveness. However, this number only tells the “what,” *i.e.*, of the X number of sexual assaults referred to prosecution, Y are prosecuted.

Further insight can be gained by documenting the characteristics of cases that aren’t prosecuted. For instance, by identifying cases in which the victim was voluntarily intoxicated during the sexual violence incident, one can determine how many cases with such victims have progressed through the criminal justice system. This information does not by itself identify why certain types of cases are not commonly prosecuted, but it can provide a foundation for deeper analysis. For example, there may be legitimate problems with available and admissible evidence, or extralegal reasons for declining charges – suggesting a need for enhanced strategies and training.

Obtaining a clear picture of the problem’s scope requires us to assess, regularly and often, the incidence of sexual assault and the quality of the criminal justice response. Accurately calculating the prevalence of sexual assault in one’s jurisdiction, as well as the rate and causes of attrition (“the rate at which cases are lost or dropped”⁴⁰), is a huge undertaking — one that requires partnership with researchers. Although the results of such an undertaking would be invaluable, few jurisdictions have the resources to commit to an evaluation this comprehensive.⁴¹ It is very possible, however, for any jurisdiction to obtain rough estimates for purposes of developing a very general, big-picture view of the extent and sources of attrition. A short summary of the process by which prosecutors can capture case attrition is provided below; a more comprehensive explanation can be found in RSVP Volume II, Chapter III.

2.1-A. What Does Attrition Look Like in Your Jurisdiction?

- **Capture prevalence.**
 - Determine the best sources for data on the incidence of sexual assault.
 - These may include data from law enforcement, victim advocacy organizations, medical providers, child welfare agencies, schools, mental/behavioral health agencies, and the department of corrections.
 - Other federal and state agencies can also be a source for this critical data.⁴²
 - Data might include reports to police, calls to crisis hotlines, hospital visits for medical forensic exams, etc. Another way to collect relevant data may be to partner with local or state sexual assault coalitions to conduct victim surveys. See RSVP Volume II, Chapter X for additional information on obtaining feedback and outcome information from victims.
 - Estimate the number of sexual assaults occurring within the jurisdiction.⁴³
- **Capture reports to law enforcement.**
 - Identify the total number of incidents reported to law enforcement (to compare to the total number of incidents estimated in the previous step assessing prevalence).
- **Capture reports referred for prosecution.**
 - What is the total number of cases referred by law enforcement agencies to the prosecutor’s office? Does the prosecutor’s office have access to the total number of reports or only those that are referred?
- **Identify the existing gaps in reporting and referring cases for prosecution.**
 - Once the data is collected, the Performance Management tools in RSVP Volume II can be used to identify existing gaps in reporting, referral for prosecution, and prosecution of those cases (including disposition by way of plea). Over time, periodic evaluation will allow for assessments of progress regarding these outcomes.

2.1-B. Identify, Review, and Link Prosecution Policies and Practices to Specific Outcomes

- **Review existing office policies on responses to sexual assault crimes, from initial reporting through final disposition.**
 - Where no written policies exist, capture office practices — even informal, unwritten practices — and map them so they can be reviewed.

- Does your protocol ensure the prosecutor’s office is notified of every report made to law enforcement in your jurisdiction?
- Is there a method for tracking each report to ensure that appropriate follow-up investigation, if necessary, is conducted?
- Develop and implement standardized and periodic reviews of office policies.
- **Track cases through the criminal justice system.**
 - Develop a system for case tracking, if one does not already exist.
 - Track cases as they proceed from initial police report, to referral to prosecutor or “exceptional clearance,”⁴⁴ to the prosecutor’s charging decision, to conclusion of trial or entry of guilty plea, and finally to sentencing.
 - Determine how long it takes for each phase of the case to conclude and identify any roadblocks to timely advancement. Do cases with vulnerable victims (*e.g.*, persons with disabilities) progress significantly slower or experience greater delays in the justice system?
- **Review and evaluate charging decisions standards, whether initial charges are made by law enforcement or prosecutors.**
 - Is this a written, formal standard (including a standard required by law or court rule) or is it informal/tacitly understood?
 - What is the standard for charging or approving charges? Probable cause, reasonable probability of conviction, or something else?
 - If the standard includes the probability of conviction, how is probability defined?
- **Analyze impact of office policies and practices on the number of cases referred from law enforcement or other sources.**
 - Assess how prosecution practices — even promising ones — may negatively impact other aspects of the office response to sexual violence.
 - For example, does vertical prosecution come at the expense of an office’s ability to charge the maximum number of cases referred to it? Might it lead to inappropriate pleas to reduced charges or non-sex crimes because of inadequate resources to handle case volumes?
- **Analyze data collected at each stage of the prosecution** of sexual assault cases to identify strengths and weaknesses in current practice and determine which procedures and practices will best improve prosecution rates.⁴⁵ Such data may include:
 - Number of reports to police.
 - Victim participation rates.
 - In collecting data on victim participation rates, note all the criminal justice processes in which the victim engaged before deciding to disengage, to see if the reason(s) for non-participation can be narrowed down.
 - Rate of referral from law enforcement for prosecution.
 - Prosecution attrition data (*i.e.*, number of referred cases declined for prosecution, administratively dismissed or nolle prossed, etc., as well as the reason).

- Number of cases pled to sexual-assault-related charges with an agreement for a low end sentencing range.
- Number of cases pled to non-sexual-assault-related charges.
- Data collected from victim surveys.
- **Assess salient case characteristics** (e.g., victim’s use of alcohol/drugs; perpetrator’s use of alcohol/drugs; victim-offender relationship; victim age; victim’s involvement in commercial sexual exploitation; and victim behaviors, such as delayed reporting, that might be misunderstood) to determine how they affect whether a case moves forward. More information on assessing reasons for case attrition can be found in RSVP Vol II, Chapter III.
- **Review other criminal reports for indicators of sexual assault.** Professionals⁴⁶ responding to domestic violence, child abuse, gang violence, or human trafficking crimes may fail to recognize that victims of those crimes may also have been sexually assaulted.
- **Conduct candid case evaluations** for declined or dismissed cases to learn what factors led to those decisions. Are triable cases being inappropriately weeded out?
- **Assess the practices of multidisciplinary partners for their impact on the overall investigative and prosecution process.** Where appropriate, advocate for partners to improve practices or respectfully challenge practices that adversely affect the quality of cases or victim safety and well-being.

2.1-C. Capture Case Complexity

Despite the fact that conviction rates are an unreliable measure, standing alone, of the success of prosecution responses to sexual assault cases, conviction is not without meaning. Prosecution of any case implies the perpetrator should be convicted. But the complexity of a criminal case has an obvious bearing on the weight that the legal outcome should be given. A high number of acquittals in relatively less-complex cases may be more indicative of the need for improvement in practices than acquittals in highly complex, more challenging cases.

Overreliance on conviction rates creates an incentive to avoid prosecution of complex cases. Prosecutors should not be penalized or blamed for assuming the risk of a lowered conviction rate by advancing the cases that are more challenging to prosecute. Sexual assault cases are often described as the most difficult cases to prosecute — and the greatest source of that difficulty is the enormity and breadth of myth and misunderstanding prosecutors are forced to overcome. This Model proposes a strategy that accounts for case complexity and credits, not penalizes, prosecutors for taking difficult cases to trial.

Common factors that contribute to case complexity include:

- Intoxicated victims
- Intoxicated offenders
- Relationship between offender and victim
- Multiple offenders
- Victim is a sexually exploited person
- Victim has substance abuse problems
- Lack of physical injury
- Perceived risk-taking by victim
- Presence of cognitive disability (in either victim or offender)
- Immigration status of victim or offender

- Technology used to facilitate or perpetuate victimization
- Victim/witness intimidation
- Victim’s post-assault behavior did not meet common expectations

Not all sexual assault cases are the same, but the factors that contribute to the complexity of a case are common; where one or more of those factors are present, the level of case difficulty increases. This means that legal outcomes for cases with these factors should be assessed accordingly. While overall conviction rates may go down (initially, at least), other measures of success — victim participation, increased reporting rates, victim experience surveys, increased community confidence/trust in the criminal justice system — provide important counterweights. Outcome assessments for each case should thus be linked to their complexity. For more on case complexity, see RSVP Vol. II, Chapter 5.

2.1-D. Routinely Capture, Analyze, and Communicate About the Data

Offices should regularly collect, analyze, and report on performance outcomes that account for case difficulty and encourage continuous improvement. For resources to support self-assessment, see RSVP Vol. II, Chapter II, which describes sources of data for victim-centered performance measurement.⁴⁷

Assessment should be ongoing, as discussed below under “[Share Information and Expertise](#).” Following each performance report, hold a “How Are We Doing?” meeting with allied professional partners to discuss highlights of the report and what actions or policy changes should be implemented to alleviate apparent problems or concerns. Prosecutors must critically examine their own practices and frankly acknowledge at such meetings any areas requiring improvement. Doing so will encourage similar transparency on the part of allied partners.

2.1-E. Properly Allocate Resources to Address Sexual Violence

First, assess the office’s current allocation of resources — including dedicated, specially trained staff — and identify areas of need. Consider options for obtaining necessary resources, such as borrowing or reassigning staff from other prosecutorial units or seeking some forms of assistance from the private sector.⁴⁸ Nearby law schools or criminal justice programs might be able to provide interns to assist with some tasks, such as listening and transcribing to jail phone calls or collating data.

Dedicate line items in your budget for appropriate resources, such as victim-witness assistance expenditures; prosecutorial, investigative, clerical, and support staff funding (*e.g.*, paralegal assistance); expert witness expenses;⁴⁹ victim-witness accommodation and accessibility costs; and software fees for case tracking (which could be as simple as excel or similar spreadsheet software), file maintenance, or surveys.⁵⁰ Be prepared to argue for sufficient appropriations from your jurisdiction.

Many federal agencies offer grants to sex assault prosecutors, but local foundations are another source of potential funding. These funding opportunities should be identified and aggressively pursued.⁵¹ There may be specific programs that support specialized training for prosecutors or salaries for victim-witness personnel. Local partners or national organizations may also be able to provide assistance or services at no cost.

2.2. Build Capacity

2.2-A. Within the Office

Sex crimes prosecutions, like other gender-based violent crimes, have long relied upon individual champions within an office, including chief prosecutors, unit supervisors, or individual prosecutors. Some ways these champions influence positive case outcomes include:

- Prioritizing crimes of sexual violence, as one would other serious crimes like homicide, by allocating or advocating for appropriate resources, including specialized training for staff.
- Assigning appropriately trained, proactive, ethical leaders to supervise specialized units.
- Specially recruiting, training, and mentoring prosecutors to handle these cases.
- Providing opportunities to participate in or present at trainings and community outreach events that advance the office's mission.
- Specially assigning prosecutors to serve on one or more coordinated multidisciplinary working groups or sexual assault response teams (SARTs) and/or providing a mechanism for information sharing related to these groups or teams.
- Recognizing crimes that commonly co-occur with adult sexual violence, including human trafficking, intimate partner violence, gangs, commercial-sexual-exploitation-related offenses, and child abuse or neglect, and ensuring information is shared among those handling these types of cases.
- Personally committing to trying complex cases.
- Encouraging the development of promising practices and mentoring colleagues.

Champions share certain philosophies that can be sustained at the office level in the ways discussed below.

2.2-A-1. Develop and Instill Core Principles⁵²

The Core Principles identified in [Exhibit 2-1](#), below, are integral to a model prosecution response to sexual violence.

2.2-A-2. Develop Specialized Units and Prosecutors⁵³

Offices can become specialized by implementing targeted hiring, assignment, and training processes that identify and develop prosecutors with the skills necessary to successfully litigate sexual violence cases. In offices with fewer staff or resources, only one prosecutor need be designated as the primary prosecutor on these and related cases⁵⁴ and provided with specialized training. This prosecutor can serve as the point person for all sexual assault cases, ensure appropriate follow-up investigations and case preparations are conducted, and mentor subsequent prosecutors working on these cases. Prosecutors who have performed well in litigating general crimes, crimes against persons, or violent crimes, and who have the desire and disposition to develop and apply the necessary expertise and attention to these cases, are good candidates for specialization. They bring with them a wealth of perspective and knowledge gleaned from other cases involving substantial victim contact.

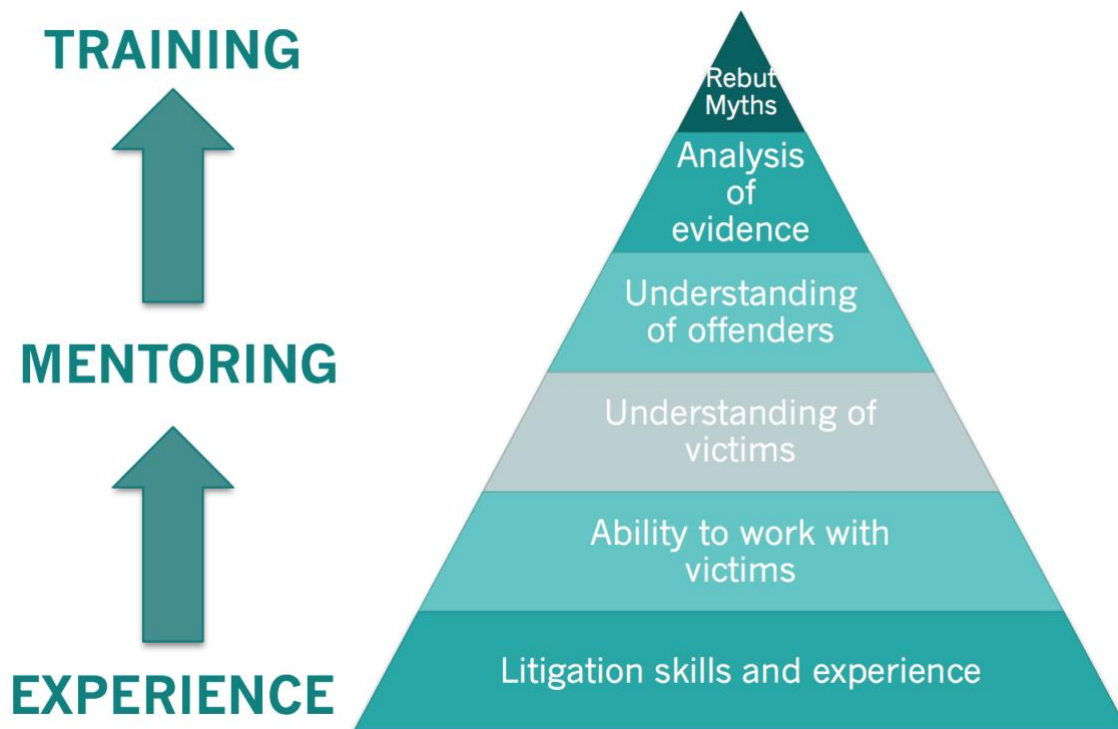


EXHIBIT 2-1

Qualities of a Successful Prosecutor⁵⁵

Adapted from Teresa Scalzo, Former Director of the National Center for the Prosecution of Violence Against Women and former sexual assault prosecutor

Specialization involves developing the core competencies of prosecutors handling sex crime cases, as outlined in Appendix B. Experience, mentorship, and training regarding issues specific to sexual assault prosecution also builds the skills and capabilities (illustrated in [Exhibit 2-1](#)) needed to successfully litigate these cases. Offices can promote specialization by:

- **Providing continuing, advanced training** for sex crimes prosecutors to improve their knowledge and skills regarding legal issues; forensic, psychological, medical, scientific and technological issues; trial strategies; sexual assault dynamics; culture; and improving law enforcement responses to underserved populations.⁵⁶
- **Supporting and participating in multidisciplinary training** and cross-training efforts involving all partners.⁵⁷
- **Training and working closely with appellate experts.** Whether appeals are handled by a specialized unit in the prosecutor’s office, the Attorney General’s Office, or the prosecutor who tried the case, trial prosecutors need to be conversant with current case law and developments on key trial issues relating to sex crimes prosecution. Familiarity with these laws and legal issues is critical during trial to avoid the need to re-try cases due to reversal on appeal. Moreover, a close working relationship with appellate experts can help to identify areas of the law that are ripe for change through strategic litigation and appellate practice. This is a reciprocal relationship and should allow for

appellate attorneys to better understand dynamics of sexual violence; research related to medical, forensic, psychological and technological issues; and the existence of co-occurring crimes. A more nuanced understanding of these dynamics will make for stronger appellate briefs and arguments.

- **Identifying and consulting with experts.** Experts may be consulted or retained to advise on specific cases, assist with screening and preparing cases for trial, and provide expert testimony on issues not readily understood by jurors. Prosecutors and experts in fields such as disabilities, medical evidence, toxicology, victim behavior, digital evidence, technology, relevant cultural issues, and forensics should train each other to improve the quality of their working relationships and effectiveness at trial. Experts should play a key role in coordinated community response, and can provide training on working with victims with mental health issues, cognitive disabilities, and substance abuse/addiction. These community members are most at risk of sexual assault because of vulnerabilities created by their conditions, as well as widely-held perceptions about their credibility — stereotypes that are generally inaccurate but readily exploited by the defense.
- **Developing and maintaining a motion and brief bank.** A readily accessible bank of adaptable briefs addressing various legal issues will assist prosecutors in filing timely motions and aid judges in applying the law to specific case facts. Well-crafted briefs will encourage the court to rely upon current scientific and social science research as well as legal precedent and sound reasoning.⁵⁸
- **Building a framework for identifying, analyzing, and incorporating relevant non-legal research into prosecution practice.**⁵⁹ Examples of such research are: medical research on the significance of genital injury or lack thereof; toxicology research; social scientific and psychological research; and research pertaining to serial offending.
- **Arranging for periodic data analysis of the performance management process to identify trends and patterns of sexual assault incidents.** This includes identification of any differences in outcomes for various subgroups based on specific victim characteristics or circumstances. For more detail, see RSVP Vol. II, Chapter IV.

Prosecutors in specialized units must have the Qualities of a Successful Prosecutor as described in [Exhibit 2-1](#).

- **Sufficient litigation skills and experience.** Prosecutors handling sexual violence crimes should have substantial trial experience preparing and carrying out: direct and redirect examinations of law enforcement, experts, witnesses, and victims; cross-examination of defendants, defense witnesses (including character witnesses), and experts; motions practice for search and seizure, rape shield, other crimes and bad acts; motions *in limine* to exclude irrelevant or non-probative evidence; specific and well-supported trial objections; and opening statements, closing arguments, and rebuttals. This depth of experience ensures prosecutors can present cases in a manner which recreates the sexual attack for the jury, while maintaining focus on the offender by exposing their dangerousness and attempts to manipulate the victim, witnesses, and even the system.
- **An ability to work with victims.** Compassion, patience, and flexibility are important qualities for prosecutors working with sexual violence victims. They should be skilled in communicating with witnesses and trained in the elements of a trauma-informed response, including use of specialized interview techniques.⁶⁰
- **Understanding victims.** Understanding how victims respond to sexual violence trauma can be one of the most challenging and significant barriers to prosecution,⁶¹ because lapses in this area can cause prosecutors to inaccurately assess victim credibility and underestimate their ability to prove

the case. Prosecutors handling these cases should be familiar with research on the neurobiology of trauma, range of common victim behaviors in response to trauma,⁶² and influence trauma has on the expectations these victims have regarding their cases. Decisions should be based on an informed assessment of whether the crime happened and the existence of admissible evidence to prove it – not on an uninformed assessment of the victim’s behavior before, during, or after the assault.

- **Understanding of offender characteristics and tactics.** Prosecutors must recognize the common and nontraditional weapons used by rapists (*e.g.*, alcohol, drugs, manipulation, and compliance — particularly against disabled victims).⁶³ They must look for evidence of purposeful offender behavior, including efforts to access to potential victims, grooming, isolation, perpetration, cover-up, and prior acts of sexual assault.
- **Astute case investigation and facilitation of accurate evidence analyses.** Trial skills and experience are important, but are only part of the necessary foundation for success in charging these crimes. Prosecutors should also understand how these crimes differ from other violent crimes; be open to collaboration with and feedback from other prosecutors and allied professionals; be prepared to spend more time with victims; understand the need to spend more time in trial laying out the details and [theme and theory of the case](#); be prepared to conduct a more careful and thorough *voir dire* for jury selection; and understand the importance of re-creating the reality of the act of sexual violence for the jury.
- **Channeling knowledge and skill to rebut common victim stereotypes and make accurate prosecution decisions.** Research has shed light on many commonly-misunderstood aspects of sexual assault perpetration and victimization, including victim behavior during and after the assault.⁶⁴ Accurate prosecutorial decisions require, at a minimum, that sexual assault prosecutors routinely consult the research related to victim behavior, sexual violence perpetration, intoxication and toxicology, medical evidence, technology, forensics, and juror perceptions of factual issues that arise in these cases.⁶⁵ This social science and scientific research often runs contrary to the rationales that underlie longstanding legal precedents on issues such as the relevance of sexual history to the issues of consent or victim credibility, or the significance of injury or absence of injury in determining the use of force. Connecting the legal, scientific, and social science research to specific practices and decisions improves case evaluation, preparation, and litigation of sexual violence cases.⁶⁶

In addition, prosecutors should understand their role in a collaborative multidisciplinary team. They should have the ability and willingness to work with experts from law enforcement, healthcare, advocacy, and forensic disciplines. They should have the ability to understand and explain the role these experts play in responding to sexual violence and, in turn, help the experts understand the role and needs of prosecutors. The ability to understand and respect the work and specialization of others is a key element of a successful team effort.

2.2-A-3. Understand How the Rules of Professional Responsibility Govern Decision-Making⁶⁷

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁶⁸

Charging decisions in sexual violence cases are difficult and mark one of the most common points of attrition.⁶⁹ Prosecutors often weed out charges that they speculate a jury may not convict on – and given the prevalence of myths around sexual violence and routinely disappointing verdicts, it is easy to understand how speculation could dictate decisions.⁷⁰

*Given the paucity of social science research regarding the willingness of juries to convict in the absence of corroboration and/or evidence of physical resistance, or in cases where the complainant engaged in risk-taking behavior or is perceived by prosecutors to have a blemished moral character, it is difficult to evaluate the accuracy of these skeptical prosecutors' claims.*⁷¹

The research on case attrition suggests that decisions not to prosecute may be based on a lack of training or misinformation about sexual violence dynamics, ethical charging standards, or the proper meaning of “reasonable likelihood of conviction.”⁷²

According to the American Bar Association’s Model Rules of Professional Responsibility and the rules of ethics or professional responsibility in various jurisdictions, a decision to file a criminal charge must be based upon **probable cause to believe the defendant has committed the crime**.⁷³ The law of some jurisdictions may provide additional guidance or may focus predominantly on the **reasonable likelihood of conviction** – one of the 13 charging factors set forth in professional standards promulgated by the American Bar Association⁷⁴ and the National District Attorneys Association.⁷⁵ The appropriate question to ask when deciding whether to prosecute a case should be: “Given the evidence that will likely be admissible at trial, and the likely evidence and arguments of the defense, *should* a jury find that every element of the offense has been proven beyond a reasonable doubt?”⁷⁶ Ethical standards guide us to make charging decisions based on what a reasonable factfinder *should* conclude when weighing all available admissible evidence, not on probabilities dictated by the misgivings of jurors who rely on sexual violence myths.⁷⁷

2.2-A-4. Recognize and Address the Impact of Vicarious Trauma⁷⁸ on Staff

Vicarious trauma is “a human response to the experience of coming face-to-face with the reality of trauma and the difficulties of the human experience.”⁷⁹ Confronting vicarious trauma at an office level is critical to creating an atmosphere where prosecutors acknowledge and address secondary trauma. This will lead to more effective practices and positive case outcomes, as well as reduced staff turnover due to “burnout.”

Establish office policies that promote awareness of vicarious trauma and the need for good work/life balance,⁸⁰ encouraging staff to connect and debrief after difficult cases to relieve the intensity and pressures of the job.⁸¹ This can be done by:

- **Being aware of vicarious trauma in staff and intervening when needed.** “Regular interaction with trauma can take a toll ... on members of the legal system who strive to administer justice.”⁸² Historically, acknowledging the impact of vicarious trauma and seeking assistance was seen as weakness, and thus, hiding or working through the pain alone has become the accepted response. However, trauma and burnout must be de-stigmatized – staff should understand their feelings are not signs of weakness or lack of commitment to the job, but normal reactions to working in this excruciatingly difficult and taxing field. Unit supervisors should become familiar with signs of burnout or vicarious trauma in themselves and staff, and proactively address them with available Employment Assistance Program resources, such as counseling and training.⁸³

- **Encouraging and supporting employee work/life balance.** Establish policies that allow for self-care and personal time after difficult trials. Additionally, some offices may allow or even encourage prosecutors to rotate out of the unit after a certain time to mitigate burnout. Nevertheless, such a rotation should be voluntary. Ideally, turnover will remain low in sexual assault units or among specialized prosecutors, as the greater experience and training a prosecutor has, the better they will respond to these cases.⁸⁴
- **Creating opportunities for staff to connect and debrief after difficult cases.** Evaluating cases following disposition — within the office and multidisciplinary teams — is helpful. It allows prosecutors to understand and refine their practices and provides a way to process the emotional effects of their work, particularly after especially difficult cases.
- See Appendix C, located in a separate document, for signs and symptoms of vicarious trauma and specific practices to identify and ease its impact on prosecutors.⁸⁵

2.2-B. Within the Community

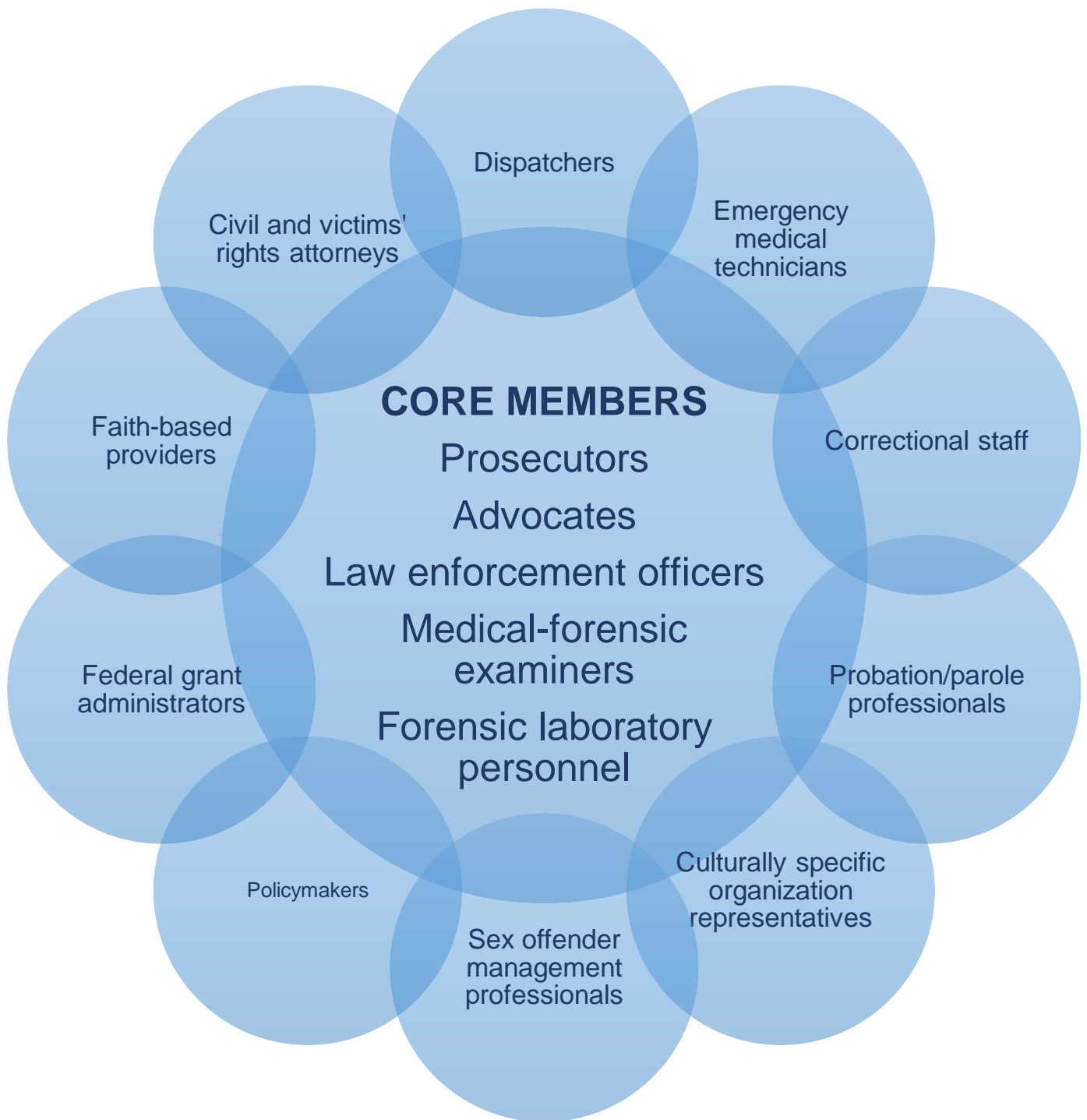
2.2-B-1. Multidisciplinary Collaboration

Sexual Assault Response Teams (SARTs) “[e]nsure justice and create a more compassionate and streamlined response, [allowing] service providers [to] intervene in a way that speaks to the context of each victim’s circumstance and respects the unique roles of the different professionals involved in responding to sexual assault.”⁸⁶

A SART “is a community-based team that coordinates the response to victims of sexual assault.”⁸⁷ SARTs are an invaluable resource for prosecuting sexual violence crimes. SART team members typically include several “core” members but may also include additional disciplines.

EXHIBIT 2-2

SART Core and Additional Members



SARTs or multidisciplinary teams often pursue two primary goals. The first is to afford regular contact among disciplines to promote the best first response to, and ongoing discussion of, individual cases. This allows allied professionals involved in a case to ensure a holistic response to victim needs, as well as communicate with each other regarding relevant aspects of the criminal justice response.⁸⁸ The second goal is to improve the broader community response by identifying gaps victim services, mapping existing networks of support and expertise, raising concerns and offering solutions to better integrate and improve existing practices, developing new sustainable practices (adapting best practices from other jurisdictions where appropriate), and developing a plan for receiving and responding to feedback.

Prosecutors should take a leadership role in creating SARTs in their communities or engage with existing teams. Where no SART exists, consider convening a sexual assault task force to initiate the process. Where resources may be unavailable to start a formal SART, a pre-existing multidisciplinary team or similar coordinated community response team also may advance SART goals.⁸⁹ These team members may already handle sexual violence cases through co-occurring crimes.

The core members of a SART or other multidisciplinary team are prosecutors, advocates, law enforcement officers, medical forensic examiners (including sexual assault nurse examiners (SANES⁹⁰)), and forensic laboratory personnel. Other allied professionals may also participate in SARTs, depending upon the resources and needs of the jurisdiction. Prosecutors should identify and encourage collaboration with leading experts in these multidisciplinary fields to better understand victim experiences and develop deeper insight into sexual assault case evidence.⁹¹

Finally, the wealth of research supporting SARTs' effectiveness should inform policy and practices.⁹²

2-B-2. Identify and Utilize Data and Technology

Communicate with Partners and the Community to Obtain Their Feedback

Prosecutors participating in SARTs should create a mechanism for receiving and responding to feedback from their community partners, including advocacy organizations and community-based service providers. A similar system should be established to process feedback from sexual assault victims who have reported, and those who choose to remain anonymous or decide not to report. Feedback from victims who have opted out of the criminal justice system can be obtained via a hotline (perhaps one established within the crime victim rights and compensation office) or from victim's rights organizations, civil attorneys, or community-based service providers, all of which interact with survivors in the aftermath of an assault. (For more on obtaining victim feedback, see RSVP Volume II, Chapter 9.)

Prosecutors should also interact with members of the public in the course of legislative advocacy efforts, policy development, and in public forums to discuss issues concerning sexual violence within the community. Such community outreach should include coordination with colleges and universities regarding their response to sexual assault and their compliance with Title IX. Outreach efforts communicate to the public that prosecutors take sexual violence seriously and pursue offenders aggressively, which can encourage victims to come forward and trust in the criminal justice system.⁹³

Data and technology can provide tools for investigation, case preparation, assessment, and performance management. Connecting the data available in cases within a jurisdiction's caseload can reveal serial perpetrators, co-occurring crimes, polyvictimization, and open cases in other jurisdictions.⁹⁴ Evolving technology provides tools that better connect the dots contained in the wealth of available information and helps reduce gaps in the response to sexual violence. Investigative tools include:

- Crime data statistics
- VICAP⁹⁵
- Listservs
- Digital evidence investigative tools⁹⁶
- Training
- Technology
- Case management systems

Case evaluation and preparation can also benefit from data sharing and technology.⁹⁷ Identify and utilize available and emerging technology to help improve the effectiveness of prosecution responses, including consistent development of databases to store and review information. For more information, see the resources listed under "Technology-Facilitated Sexual Assault" in Appendix B – Core Competencies for Prosecuting Sexual Violence.

2.2-B-3. Share Information and Expertise

The RSVP Model encourages specialization in responding to sexual violence because it promotes positive outcomes. However, it can also pose challenges for coordination among departments. Siloing⁹⁸ – working in isolation without communication – inhibits the sharing of information and knowledge.

“Silos are cultural phenomena, which arise out of the systems we use to classify and organize the world.... [H]umans tend to organize the world around them into mental, social, and organizational boxes, which can often turn into specialist silos. When these are rigid, they often cause people to behave in foolish or damaging ways; silos can also make people blind to opportunity and dangerously unaware of risks.”⁹⁹

In prosecutor’s offices, units with a high degree of specialization can easily morph into silos with the risk the concept implies. Nevertheless, silos are not inevitable. “Institutions are just gigantic collections of people and one of the most basic steps that we can make to fight the risks of silos starts not with a leadership committee or organizational chart or grand strategy plan, but inside our heads.”¹⁰⁰ When information and knowledge guarded by isolated entities is disseminated and shared, silos are deconstructed; the effort to open clear lines of communication and coordination among specially tasked organizations neutralizes their effect.

SARTs are one way to coordinate such efforts to ensure that no opportunities are missed to provide services for victims, pursue justice, or improve the system’s overall response to sexual violence.¹⁰¹ SARTs promote the sharing of beneficial information and practices within and among agencies,¹⁰² divisions, staff, and partners.¹⁰³

Offices can develop and implement an action plan to identify and de-construct the silos that may be inhibiting their ability to work collaboratively. Create a plan for communication and cross-training in and outside of the office, with clearly delineated methods for accessing information and institutional knowledge. Within an office, communication between units and individuals prosecuting crimes that often co-occur with sexual assault is essential to ensure sexual assault victims are identified and best practices are shared. Where there are legitimate legal restrictions or professional obligations protecting certain communications or information from disclosure to unauthorized parties outside of the office (*e.g.*, information possessed by or communicated to victim advocates, social workers, civil attorneys, schools), sharing may be appropriately limited. Protocols may, however, be created to permit disclosure with the informed consent of the victim.

Offices and prosecutors seeking support and assistance in formulating and implementing their efforts to improve collaboration and eliminate the siloing effect can turn to national technical assistance providers such as AEquitas.¹⁰⁴

What is Law Enforcement Doing?

There are many ways to work with local law enforcement to better understand their policies and practices. The Women’s Law Project has been working with Philadelphia Police since 1999 to review sexual violence complaints at the Philadelphia Police Department’s Special Victims Unit (SVU). Together, the Women’s Law Project and the Police “assess the thoroughness and outcome of each investigation, raise questions, and provide feedback.”¹⁰⁵

*2.2-B-4. Develop an Effective Strategy for Communicating with the Community About Sexual Violence*¹⁰⁶

Prosecutors must clearly communicate to the public the prevalence of sexual violence in their community, gap between occurrence and reporting, services available for victims, prioritization of these crimes by the office, and prevention efforts in which the office is involved.¹⁰⁷ In addition, prosecutors should be prepared to discuss information about how cases are analyzed and processed with the media and the public. Providing the community with transparent and accurate information about prosecution rates, factors that impact prosecutorial decision-making, noteworthy successes, challenges and disappointments, and the methods employed to measure prosecutorial effectiveness, will promote confidence in the office’s commitment to timely and evenhanded justice in sex crimes prosecutions. The importance of these public talking points – reflecting the office’s research and expertise on these crimes and issues – cannot be overstated.

Develop a public communication strategy, consistent with rules of professional ethics,¹⁰⁸ to address the incidence of sexual assault in the community. Communications can disclose and explain, in a general, non-case-specific way, such issues as the prosecution or allied partner response, considerations in prosecutorial decision-making, prosecution rate, case outcomes, and performance management.¹⁰⁹ Develop a public communication strategy for reporting significant developments in specific cases in a manner consistent with the rules regarding professional conduct and victim privacy. If individual prosecutors are authorized to speak publicly about their cases, they should receive proper training on the responsibilities of doing so. There are significant constraints on the public discussion of any case. Typically, public comment is limited to matters of public record and governed specifically by the jurisdiction’s rules of professional responsibility. A good working relationship with the media is important, not only to educate the public on issues pertaining to the prosecution of sexual violence, but also to gain insight from media questions that may further inform communication strategy.

2.2-B-5. Improve Community Relations by Promoting Cultural Humility

For victims deciding whether to engage with the justice system, and for community members longing to have faith in that system, the depth and sincerity of prosecutor engagement may make all the difference. Mistrust often originates in the actual or perceived disparate treatment of victims and offenders based their characteristics. Offices and prosecutors should work closely with local advocates to develop insight into the various cultures represented in the community in order to better understand the victim’s experience of trauma as well as the potential reasons for their reluctance to engage the system.

“Given the complexity of multiculturalism, it is beneficial to understand cultural competency as a process rather than an end product. From this perspective, competency involves more than gaining factual knowledge — it also includes our ongoing attitudes toward both [victims] and ourselves.”¹¹⁰ This attitude has been termed cultural humility. Victims with varying backgrounds – encompassing socioeconomic, racial, ethnic, gender identification, sexual orientation, religious, age, disability, and other differences – may diverge in their perception of law enforcement and the criminal act itself, as well as the availability of resources for safety and healing.¹¹¹ Cultural humility replaces barriers with bridges, increasing the level of trust and understanding on both sides of the conversation. It enhances the ability and willingness of victims to engage and stay engaged with the system and results in positive case outcomes. It facilitates prosecutorial interaction across cultures with an appreciation of concerns specific to the diverse populations within the local community.¹¹²

Improving victim engagement is important for encouraging the reporting of sexual assault crimes and enhancing the criminal justice system’s response. Offices can take the following steps:

- Assume a leading role in community outreach.¹¹³
- Assess cases for indicators of bias to ensure that the system is fair to all victims and defendants.¹¹⁴
- Provide regular reports to the community on outcome measures that may indicate law enforcement or prosecutor bias. Do not hide bad outcomes or provide weak excuses, but listen to the public’s concerns and explain plans for alleviating problems and improving future outcomes.
- For guidance on collecting data related to victim and offender demographics, see RSVP Vol. II, Chapter IV – Identifying Victim Demographic Subgroups.¹¹⁵

2.2-B-6. Encourage and Facilitate Formal and Informal Cross-Training

Research demonstrates that sexual violence cases are frequently screened out by law enforcement and prosecutors due to the very factors that make them unique:¹¹⁶ rare third-party witnesses; intoxicated, sexually exploited, disabled, or otherwise vulnerable victims who are often targeted by offenders; and attacks involving persons known to the victim. Historically, these characteristics have resulted in cases going uninvestigated (*e.g.*, sexual assault kit backlogs across the country)¹¹⁷ and dangerous serial perpetrators continuing to commit sexual assaults.¹¹⁸

An early line of defense to the often-uninformed concerns regarding credibility in cases with these common characteristics is cross-training specialized sex-crimes prosecutors and other specialized units, law enforcement officers, and allied professionals who are a part of the initial response to sexual assault. Participation by survivors, as well as their advocates, reminds law enforcement and prosecutors of the ongoing imperative to support victims and respond to their collateral needs, keeping them safe and engaged in the system. Advocates can also provide valuable input based on their work with victims who do not report their crimes. Other community-based professionals and national experts should also be involved in training efforts to improve their ability to work effectively with prosecutors and their partners, including:

- Medical professionals (including SANEs) to explain the significance of injury or lack thereof, victim behavior, etc.

- Toxicologists to explain the impact of alcohol and drugs, and the science involved in their evaluations.
- Experts on human trafficking and violence against sexually exploited women to explain trafficking dynamics as well as the long-term negative effects of this form of victimization.
- Experts on the neurobiology of trauma, *i.e.*, the impact of trauma on the victim’s ability to remember and to discuss the assault, as well as other issues related to interviews (*e.g.*, inconsistencies; delayed reporting; victim demeanor).¹¹⁹
 - Criminal justice professionals should consult with experts in this area to enhance their understanding of trauma’s effects on the brain, but prosecutors should not introduce expert testimony on the neurobiology of trauma at trial. This area of science is continuing to evolve and true experts in neurology are hard to come by, and experts like advocates or academics in sex crimes generally do not meet the legal standards for expert testimony in this specialized field. Introducing this evidence may invite a “battle of the experts” or the examination of the victim by a defense expert. Moreover, the neurobiology of trauma does not explain all victim responses to sexual violence — there may be other, non-biological explanations for many victim behaviors the jury may struggle to understand. Finally, there is the risk that expert testimony on neurobiology may too easily cross the line into an assessment of victim credibility, improperly invading the province of the factfinder.
- Various experts of different types to offer general expert testimony interpreting victim behavior that does not meet common juror expectations.¹²⁰
- Domestic violence advocates to illustrate victim-offender dynamics in cases involving intimate partner sexual violence.¹²¹
- Disability experts to facilitate dialogue with the victim on the stand and to explain the impact of a disability on one’s ability to consent, communicate, consent, and/or engage in other verbal or physical functions.

Cross-training improves the overall response to sexual assault by promoting communication and fostering trust among disciplines, increasing the likelihood of identifying sexual assault in co-occurring crimes, analyzing and acting on emerging problems and issues, and strengthening the jurisdiction’s core competencies.¹²² Cross-training can be encouraged by providing professional continuing education credits for participation. For law enforcement, roll-call trainings are an option.

2.3. Office-Level Conceptual Model

How do we ensure that the promising practices described above really work — that they actually promote sustainable improvement of a jurisdiction’s sex crime response? One way is to link specific practices to their intended outcomes using a map, and to analyze whether aims can be reconciled with achievements. The conceptual model, which is essentially a graphic representation of the connection between practices and their intended outputs, helps ensure a clear and logical relationship between all elements.

The conceptual models shown on the following pages portray the RSVP Model at the office level. Specifically, they map the practices described above and illustrated their immediate intended outputs. If these are produced, the office should expect to see prompt results that ultimately lead to long-term outcomes. Long-

term outcomes form the basis for a series of performance management measures that can be used as indicators for a local policymaker's or practitioner's continuous monitoring and assessment of their response to sexual assault. See RSVP Volume II for more on performance management.

EXHIBIT 2-3
RSVP Conceptual Model

The RSVP Model assumes change occurs at multiple levels for the prosecution — namely at the office and case processing levels. Office-level policies emphasize leadership in prosecuting sexual assault and laying the foundation for effective case processing. They encourage case processing practices consistent with best practices, and as shown on the next page, those based on the RSVP Model lead to data-driven, victim-centered, trauma-informed, and offender-focused case processing practices. These practices produce specific measurable performance outcomes that in turn inform future office policies.



EXHIBIT 2-4
Office Policy & Practice Conceptual Model¹²³

Effective responses to sexual assault must be driven by the establishment of office-wide practices that allow prosecutors to provide leadership to their staff and partner agencies involved in the investigation and prosecution of sex crimes. The model below has three main elements: policy and practice, outputs, and outcomes. The information in the “policy and practice” box describe actions that office leadership should take to ensure effective responses to sexual assault. Each policy or practice should produce a specific and immediate result (the output). For example, the regular analysis of attrition, sexual assault prosecutions, and outcomes (the policy/practice) will produce a better understanding of prosecution rates and case outcomes. The outputs indicate whether progress is being made toward achieving the general outcome of improving the office’s overall response to sexual assault. RSVP Volume II provides more detail about how these outcomes are measured.

POLICY AND PRACTICE

- Identify trends and patterns in attrition, prosecution practices, and case outcomes.
- Capture case complexity factors.
- Assess and adjust resource allocation.
- Implement organizational structures and hiring practices that support specialization.
- Implement research-informed decision-making policies.
- Provide training and mentoring.
- Adjust personnel evaluation criteria.
- Implement and routinely track office-level performance.
- Participate in or coordinate collaborative efforts with partners.

OUTPUTS

- Understanding of prosecution rates and case outcomes.
- Implementation of office policies that are researched, data-driven, victim-centered, and trauma-informed.
- Prosecutors trained in victim-centered, trauma-informed, and offender-focused responses.
- Victims' access to or connection with services.
- Policies/practices adopted that maximize collaborative approaches to investigation and prosecution.
- Performance metrics implemented and used to improve case outcomes.

OUTCOMES

- Increased transparency and community trust.
- Reduced number of sexual assaults (over a long period of time).
- Increased likelihood of reporting sexual assault/identifying victims in reports of co-occurring crimes.
- Victim safety/rights preserved.
- Increased prosecution rates.
- More effective multidisciplinary partner responses to sexual assault.
- More effective communication to public regarding prevalence of and response to sexual assault.

CHAPTER 3. CASE-LEVEL LEADERSHIP: THE PROSECUTOR’S DUTY TO ACHIEVE JUSTICE

A significant majority of sexual assaults are never reported, often because survivors fear police and prosecutors will blame them or unfairly challenge their credibility.¹²⁴ Of those assaults that *are* reported, varied research on case processing,¹²⁵ untested sexual assault kits,¹²⁶ prosecutorial decision-making,¹²⁷ and investigative reports¹²⁸ demonstrates that few cases are accepted for prosecution¹²⁹ and even fewer proceed to trial.¹³⁰ Survivor accounts, sadly, mirror the research. It is as painful to hear that survivors and communities believe “that prosecutors just don’t want to take hard cases”¹³¹ as it is to face the reality that their perception may be accurate. Regardless of how effectively we think our offices handle sex crimes, data and anecdotal evidence paint a different picture; even the most effective jurisdictions have room for improvement. Failure to bring all of our resources to bear when responding to these devastating crimes is a failure to fulfill our mission to achieve justice.

While the reality may be discouraging, dedicated prosecutors across the country are working to change the narrative. Even with the imperfect and varied laws across our country, there are few insurmountable legal obstacles to justice in most cases. Rather, decisions not to pursue prosecution tend to rest on judgments about the facts of the case or the characteristics of the victim. Research and experience show that the factors most common in sexual violence cases – alcohol use by the victim or perpetrator, a current or former relationship between the victim and perpetrator, and a lack of physical force, physical injury, victim participation in the prosecution, and corroboration – are the same factors most often relied upon when deciding to decline prosecution due to perceived problems bringing the case.

Experienced prosecutors acknowledge that high conviction rates often mask high attrition rates. “*If you don’t lose a few cases every now and then — you’re not trying enough cases.*”¹³² We also know that the more frequently we try hard cases, the more successful we become at winning them, and the more educated our communities, judges, and juries become. Rather than defining a prosecutable case from the perspective of the lowest common denominator (the least informed factfinder), we need to ensure that every case decision, from referral for charging through final disposition, is supported by the [core principles](#) articulated in Chapter 1 and informed by research and experience.¹³³

3.1 Review, Evaluate, and Charge the Case

3.1-A. Review All Reports in a Timely Manner

Jurisdictions may differ in how sexual assault cases are investigated and charged. In some jurisdictions, virtually all investigative activities are conducted by local police agencies; other prosecutor’s offices have investigators within the office who conduct significant follow-up investigation after the initial police response. In some jurisdictions, local police may file the initial charges; in others, prosecutors make the initial charging decisions. Regardless of the division of investigative and charging responsibilities,

prosecutors should be accessible at all stages of the investigation for consultation and review to ensure important evidence is collected and documented and investigations proceed without unreasonable delay.¹³⁴

Delay can cause irreparable harm in sex crime cases. Crucial evidence may be lost. Victims may become less willing to participate in the prosecution — as they lose faith in the system, offenders have more opportunities to engage in intimidation and manipulation. Communities remain vulnerable to continued attacks by perpetrators.

Colocation and Collaboration: A South African Model

First developed in the early 2000s in response to the sexual violence epidemic in South Africa, Thuthuzela Care Centres represent a comprehensive, collaborative, and integrated model for responding to sexual violence crimes. As one-stop facilities for victims and survivors, the Centres offer a wide variety of services, including a medical examination, short-term counseling and long-term counseling referrals, housing arrangements where necessary, and a consultation with a specialist prosecutor. The Thuthuzela are located in close proximity to a specialized Sexual Offences Court, staffed by prosecutors, social workers, investigating officers, magistrates, health professionals, and police. While early studies have noted gaps in healthcare provision to victims,¹³⁵ the Centres have reportedly enhanced the quality of justice in sexual violence cases. According to USAID officials in 2011, conviction rates for sexual violence have increased from 7 percent to 58-60% for cases going through the Centres;¹³⁶ reporting rates have gone up in some parts of South Africa; and case processing times have drastically improved.¹³⁷

3.1-B. Consider Law, Policy, and Relevant Research

The prosecutor's initial review of a case should be informed by research, experience, and training. Prosecutors should have a thorough knowledge of all applicable sexual assault statutes and their underlying public policy, as well as the case law interpreting them.¹³⁸ Knowledge of the law alone, however, will be insufficient to ensure success. The written law may not account for all current scientific, technological, and social science research that may implicate a case. A thorough understanding of this research will facilitate an accurate assessment of the evidence and enable the prosecutor to recognize gaps requiring further investigation. The research identified in Appendix B will support an accurate and data-driven assessment of the case and supporting evidence.

Review of initial case reports should include:

- A careful reading of incident and summary reports; review of any recorded statements,¹³⁹ crime scene video, and photographs; review of any notes in the file, including notes by any previously assigned investigators or prosecutors; and identification of corroborating or conflicting statements. For victims with disabilities or primary languages other than English, shorter police reports may indicate that an interviewer's difficulty in understanding the victim impacted the information recorded in the interview. If police reports appear to contain inconsistent or incomplete information, seek clarification and request supplemental reports correcting misstatements, explaining the discrepancy, and stating the supplemental report was requested by the prosecutor. If the reports accurately reflect what the officers observed or were told, no changes should be made – but sometimes a report will inaccurately paraphrase a witness's statements. Such

inaccuracies may result from poor report-writing or misunderstandings — of the witness regarding the question, or officer regarding the answer. If a report needs to be corrected for accuracy later, take a new statement, clearly laying out of reasons for the new statement.

- Note any statements in **reports suggesting the investigator may have formed a judgment about the victim’s credibility or blameworthiness** for the assault and prematurely stopped further investigation.
 - Some reports contain clear value judgments about the victim and her/his behavior, while others use more subtle language, *e.g.*, using “claims” or “alleges” in recounting the victim’s statements, as opposed to the more accurate and neutral terms, “reports” or “states.” Similarly suspect reports are devoid of direct quotes except for isolated words or phrases that describe force or lack of consent.
 - These examples are not exhaustive but raise red flags for three reasons: 1) if the victim felt “judged” by the officer, it may impact their willingness to stay engaged with the case; 2) such reports indicate a likelihood that leads, including available evidence and identified witnesses, may not have been investigated; 3) such reports may create issues during the officer’s cross-examination at trial. (“Isn’t it true that you had your doubts about this supposed victim’s account?”) In addition to requesting follow-up investigation to the extent necessary for a complete investigation, prosecutors who receive such reports should take appropriate steps to encourage officers to communicate with victims using trauma-informed interviewing techniques and improve their report-writing. Enlist the assistance of an advocate to reach out to victims and assure them that their case is receiving appropriate attention.
- Analyze reports for **relevant and material evidence supporting the elements** of the offense. Where appropriate, seek input from fellow prosecutors, supervisors, and experts¹⁴⁰ for their thoughts about the case and the kinds of evidence that might strengthen it. Look for evidence:
 - **Corroborating** the accounts of the victim or witnesses.¹⁴¹
 - Suggesting the assault was drug- or alcohol-facilitated, and showing the **effects of those substances**.¹⁴²
 - Supporting the **elements of force or lack of consent**, particularly where evidence of these is subtle or nuanced.¹⁴³
 - Reports should be written in the language of an assault (*e.g.*, a victim’s description of forcible penetration should not be documented as victim “had sex” with the perpetrator). Again, issues of report-writing should be discussed with the reporting officer in the interest of improving investigation and report-writing skills. Reports should avoid inadvertently victim-blaming by emphasizing what actions the victim did not take (*e.g.*, “victim did not resist”) but instead should explain what actions the victim did take and what the victim experienced (*e.g.*, “victim reported that they stopped moving and were ‘frozen’”; “victim reported that they started to cry”).
- Analyze reports for indications of **co-occurring crimes** (image exploitation crimes, stalking, harassment, intimate partner violence, violence against sexually exploited persons, hate crimes, etc.).¹⁴⁴ Unless prosecutors and allied professionals are equipped to recognize signs of co-occurring crimes and use trauma-informed interviewing techniques¹⁴⁵ to obtain relevant information from victims, such crimes may go unnoticed with all attention focused on the “presenting problem” —

the criminal offense for which law enforcement was summoned. Victims may be fearful or ashamed of volunteering information about other crimes (particularly sex crimes or image exploitation), may not recognize the offender’s related conduct as criminal (*e.g.*, stalking or intimidation), or may fear being prosecuted themselves (*e.g.*, where gang members use violence or coercion to involve victims in criminal activity or where the victim has been intimidated by immigration-related threats). Challenges to identifying co-occurring crimes are heightened when victims live in underserved communities, culturally competent services are not available, and public trust in law enforcement is low (*e.g.*, inner-city communities or those with a significant immigrant population). Early identification helps connect victims with all appropriate services to address the full range of victimization at the earliest possible stage, helps investigators obtain evidence while it is still available and fresh, and allows prosecutors to make appropriate initial charging decisions and arguments regarding bail conditions.

- Analyze reports for any indication of **intimidation**, however subtle, so you can follow up with the victim or witness for additional information and take measures to address it. Be alert for circumstances creating opportunities for intimidation.¹⁴⁶
- Identify and secure all potential sources of **digital evidence**.¹⁴⁷ Work with law enforcement personnel trained in digital extraction and cyber investigations. Search warrants for cell phones should be obtained and executed quickly to preserve evidence before it is destroyed; consider current issues regarding compelling defendants to provide their passcode and searches of cell-site location data.¹⁴⁸ Preservation letters should be sent to internet service providers (ISPs) or social media platforms pending service of subpoenas, warrants, or court orders to obtain records maintained by those entities.¹⁴⁹ Remember that victims or witnesses can generally consent to the release of records relating to their own internet accounts, but the information still must be promptly preserved. When reviewing digital evidence obtained from the victim, be mindful of current sociological and psychological research on communications between internet users, particularly in dating-app facilitated sexual violence cases.¹⁵⁰ Anticipate defense discovery requests of the victim’s digital records and protect the victim’s privacy to the extent possible – see [Section 3.1-D-2](#) for more on victim privacy.¹⁵¹
- Consider the relevant **statute of limitations**.¹⁵² Prosecution of a sexual assault may be delayed for any number of reasons — inability to identify a perpetrator, inadequate investigation, subsequent technology improvements allowing for the development of new leads many years after a crime, or the survivor’s inability to report the crime until significant time has passed. When the perpetrator is finally identified or enough evidence is developed, the lapse of time can still pose a significant legal obstacle to prosecution. The law often limits the time for bringing charges against a perpetrator. These limitations vary widely across the United States and are rapidly changing in response to technological advances and increased understanding about sexual assault and the effects of trauma. Even where an assault is barred by the statute of limitations, it may still be admissible at trial against the same offender for another assault that *is* within the relevant statute of limitations as “other acts evidence.”¹⁵³ Consider filing a “John Doe” complaint and seeking an indictment or information that describes a perpetrator based on the DNA profile extracted from sexual assault kit samples. The suspect can then be brought to trial under a timely-filed charging instrument.¹⁵⁴
- Closely review the evidence in the **sexual assault kit (SAK)** in all cases in which it is available, regardless of whether the offender was known to the victim or the defendant admits the act while asserting a consent defense.

- SAK evidence can lock in the perpetrator’s identity, foreclosing a denial defense; corroborate certain aspects of the victim’s account of the assault (*e.g.*, injury, anal penetration, or ejaculation elsewhere on the victim’s body); and ultimately link the perpetrator to other crimes that may be admissible as “other acts evidence” to prove issues such as intent, lack of mistake, common scheme or plan.
- Victims have a strong interest – and in some jurisdictions a codified right – in being informed about the status of their kits.¹⁵⁵
- Review medical evidence and, where necessary, consult with a medical expert or the examining physician to understand the inferences that can be drawn from any observations or conclusions.¹⁵⁶
- Ensure the chain of custody is well-documented and the kit is sent to the crime laboratory in a timely manner.
- Arrange to track the testing of evidence in the kit and provide the victim with updates on its progress.¹⁵⁷ Find out from the lab the estimated timeline for testing and when results should be expected.
- If the lab states the samples will be consumed during testing, notify the defense and schedule any necessary hearings to resolve issues concerning defense access to the testing process.¹⁵⁸

3.1-B-1. Communicate Regularly and Meaningfully with Investigators

The prosecution-law enforcement partnership is critical to success in these cases. A good working relationship requires meaningful communication on a regular basis, which will foster honesty and candor based on trust and mutual respect. Create open lines of communication that permit discussion of any questions or problematic issues, such as report-writing skills or evidence-collection practices. Explain the reasons for any additional investigation requested — this will put the request in context and increase the likelihood of a helpful response. Fostering this type of relationship will reduce the number of cases declined for prosecution and improve the ability to identify serial offenders and co-occurring crimes.¹⁵⁹

In your interactions with law enforcement, encourage officers and investigators to keep the following in mind.

- Sexual violence cases are complicated. They require more in-depth and nuanced investigation than other crimes; only rarely is there the type of third-party witness testimony and evidence typically available in other criminal cases. Once evidence is lost, obtaining a conviction is made even more difficult. **Collect and preserve evidence at the very beginning of the case** to provide the strongest chance of identifying and successfully prosecuting a perpetrator.
- Work on **establishing rapport** with victims before you talk to them about the crime committed against them. You’re dealing with victims of traumatic assaults who are still recovering from the experience, and who are being asked to talk about very personal, private matters to a stranger — not an easy thing to do. Find out as much as you can about the crime from other sources before sitting down to talk with the victim.

- **Follow the evidence where it leads.** When a victim reports being assaulted at home, then the home is a crime scene; if it happened in a car, then the car is a crime scene. Gather, document, and preserve the evidence at the scene. Follow up on any leads, and look for evidence that corroborates any details of what the victim has told you.
- **Never decide “this case is going nowhere” and stop investigating** because the victim or suspect was drunk or using drugs, is a sexually exploited person, was in a relationship with the suspect, made a report that doesn’t make sense to you, has trouble processing information or communicating in a traditional manner, or for any other reason that you believe is problematic. Prosecutors have strategies to deal with **any** fact at trial, but only if our evidence was gathered during a thorough investigation. We will decide later, after the investigation is completed, whether we have enough evidence to prosecute a crime.
- **Never give the victim the impression the case will not be prosecuted.** This is a decision for the prosecutor to make after the investigation is completed. When victims are told that their case seems weak, it makes them feel like they are not believed, which only adds to the trauma of what they already experienced. If the victim asks your opinion, just say that you are going to investigate everything so when the time comes for the prosecutor to decide what to do, they have all the necessary information to make that decision.

In addition to the value of a good relationship during the investigative stage, law enforcement can also provide support during trial. A trusted officer can wait with the victim and other witnesses outside the courtroom; transport witnesses to court; identify acts of intimidation in the courthouse; and can be a source of support for victims, particularly where community and other advocates lack capacity.¹⁶⁰ Be careful about complying with sequestration orders; if the officer is transporting the victim or waiting to testify in the same location, they should be cautioned not to discuss their testimony or the facts of the case, and briefed on how to respond at trial to questions about their interactions with the victim.

Regular and meaningful communication should continue after the disposition of a case. Any officers or investigators who did significant work on the case — whether or not they testified at trial — should be advised of the outcome. Prosecutors should debrief law enforcement on significant aspects of success during investigation and trial, any practices or investigative methods that proved problematic, and any evidence that may have been missed. Officers or investigators who did especially outstanding work on a case should be commended in a letter to their chief or superior officer. Similarly, prosecutors should invite feedback from law enforcement about the prosecution/litigation of the case (*e.g.*, pleas, motions filed, arguments, cross and direct) and prosecutorial decision-making. Receive any criticism respectfully and with an open mind, rather than defensively; there is no need to apologize for decisions or actions you are convinced were the right ones, but mistakes should be acknowledged. Although each profession has its own areas of expertise, this open line of communication will build trust and allow for cross-training to improve the performance of both, and highlight gaps in response to be corrected through training or with resources.

3.1-C. Make Charging Decisions Consistent with Research and Ethical Considerations

Jurisdictions vary as to the agency responsible for “filing” charges. Law enforcement may have the legal authority or responsibility for making the initial charging decision, or that role may be assigned to prosecutors. Regardless of the specific process, at some point prosecutors will be responsible for determining whether there is probable cause to charge a crime – the minimum charging standard required by rules of ethics.¹⁶¹ Sometimes office policy requires a higher standard for charging – a reasonable

likelihood of conviction.¹⁶² However, where the ordinary complexities of such cases are transformed into effective barriers to offender accountability, this standard often leads to inappropriate declinations of many sexual assault cases.

Inappropriate declinations tend to rest on two distinct, yet equally problematic practices. The first is the initial — often inaccurate — impression of the case facts or victim. The second is speculation or prediction about the outcome.

Initial impressions (of a case or victim) resulting in declinations are often the product of premature judgments formed before all facts are known. Ironically, often the lack of evidence in an initial report is used to justify decisions not to allocate resources to further investigations. Decisions to forgo full investigations likely flow from an intent to prioritize expenditure of finite resources for crimes perceived as more likely to be substantiated and prosecuted.¹⁶³ The reality, however, is that improved investigations strengthen complex cases and improve the likelihood of positive trial outcomes. ***Results of recent research into untested sexual assault kits should make us consider the devastating consequences decisions have for victims and communities, where a failure to properly investigate permits serial perpetrators to remain free to assault others.***¹⁶⁴ With proper training and collaboration, the criminal justice system's response to these crimes will be far more successful.

Prosecutors should proactively work with law enforcement to identify practices resulting in little or no investigation, or cases not being charged or referred for prosecution. Specialized prosecutors should review all police reports to determine which cases are passed over and identify any common case characteristics.¹⁶⁵ This is an opportunity for dialogue between law enforcement and prosecutors regarding the reasons behind decisions and the importance of research-informed decision-making and thorough investigations. If there aren't enough resources to conduct investigations, this must be stated and resources must be advocated for.

Speculation about likelihood of conviction, also known as predictive or “downstream” analysis, “involves prosecutors in predicting the future decision-making of others, and then using that prediction as the standard for measuring evidential sufficiency *ex ante*. If the person or persons who will make the ultimate decision at trial are unlikely to find the evidence sufficient, then the prosecutor (according to the predictive view) ought to decline prosecution on grounds of evidential insufficiency.”¹⁶⁶ Similarly, law enforcement may not refer cases for prosecution if they believe the prosecutor is unlikely to charge, based on the prosecutor's professed belief that a jury will not convict on a given set of facts. Such speculation is at odds with the proper basis for prosecutorial discretion because it abdicates the critical decision-making responsibility to a hypothetical jury — a jury that is not fully informed about the dynamics of sexual violence and common victim responses to trauma.¹⁶⁷

One articulation of the appropriate charging standard might be this:

Given the prosecution evidence that will likely be admissible at trial, and the likely evidence and arguments of the defense, should a jury find that every element of the offense has been proven beyond a reasonable doubt? In most sexual violence cases, this question will amount to, “Could a reasonable jury believe the victim beyond a reasonable doubt when they testify that they did not consent?” and “Could the jury conclude beyond a reasonable doubt that the defendant knew or reasonably should

have known the victim did not consent?”¹⁶⁸ If the answer to either question is no, then the case should be dismissed. However, if both questions can be answered in the affirmative, then the case should be pursued to trial.¹⁶⁹

Another formulation of a standard for ethical charging states:

[E]vidence is deemed sufficient if “an objective, impartial and reasonable jury . . . properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.”¹⁷⁰

Whether any jury *would* convict is simply beside the point, as it should be.¹⁷¹ Informed prosecutorial discretion and decision-making allows prosecutors to consider *all* admissible evidence, including the specialized knowledge that can be provided by experts, and assume that juries will not be irredeemably tainted by bias and myth. The duty of prosecutors is not only to implement the “law on the books” but to recognize the devastating harm that results from assaults historically considered as something less than “real rape.” Sexual violence laws have been reformed over the last several decades to help ensure the law accounts for the tactics of sexual offenders and the fact that criminal convictions do not depend on how the victim responded to her/his attack. Ultimately, it is part of prosecutors’ ethical responsibility to lead the way in responsible charging that translates the law on the books into action.¹⁷²

In deciding whether and how to charge a case, the following evidence should be reviewed and carefully analyzed:

- Recordings of 911 calls.
- Police reports and interviews, including any in-person meetings with the victim and/or witnesses, and audio or video of all statements.
- Evidence collected from the crime scene, including video or photographs of the scene.
- Digital evidence of communications that might include: text messages, communications via social media (*e.g.*, Facebook, Instagram, Snapchat) or third-party applications (*e.g.*, WhatsApp, KIK, Uber, Lyft), photographs, videos, and information from internet-enabled devices (*e.g.*, fitness trackers).
- Criminal histories of the suspect, victim, and any critical witnesses.¹⁷³
- Additional background about the suspect, including protection orders, school and/or employment records, social media accounts, ex-partners, etc.
- Evidence of collateral crimes commonly associated with sexual assault, such as burglary, domestic violence offenses, trafficking, kidnapping/abduction, image exploitation, stalking, and intimidation-related crimes. Prosecutors should conduct follow-up investigations where necessary and charge all collateral crimes supported by probable cause.
- Evidence related to all culpable parties who should be charged, as appropriate under applicable law, as principals, accomplices, or conspirators.¹⁷⁴
- Evidence from related administrative or criminal cases (*e.g.*, military, campus, internal affairs).¹⁷⁵
- Evidence from SAK or medical examination, if available.
- DNA evidence, if available, although charging generally need not await the results.

Determine whether the defendant has any related open cases that should be combined with the present case, particularly when involving the same victim. Where there has been an ongoing pattern of abuse, there might be other cases open — in the same office, in neighboring jurisdictions within the state, or in a lower court — that might be appropriately combined for prosecution, perhaps as part of a stalking charge. Whether and how that can be accomplished will depend upon local law and court rules, but combining any such related cases is worthwhile where possible.

Identify the elements of every potentially applicable charge and determine whether enough evidence exists to support the elements, using informed discretion to charge multiple counts, enhancements, or aggravated offenses where appropriate. The Charging Tool at Appendix E may be helpful to identify, organize, and assess all the of evidence in the case prior to charging or to identify any areas where follow-up investigation is necessary. Anticipate common issues associated with multiple-defendant trials, such as joinder, severance, and the admissibility of confessions or redacted confessions.¹⁷⁶

When police have filed the preliminary charges, they must be reviewed for propriety and completeness. Request additional investigation where necessary. Add, amend, or reject/dismiss specific charges as appropriate. Discuss charging decisions in detail with law enforcement and explain to the victim the ultimate charges and any significant changes to the preliminary charges. A case should not be declined for prosecution without first consulting with the victim.

Consider whether a pretext phone call, text message, or social media contact with the defendant would be helpful or appropriate, bearing in mind that once the defendant's Sixth Amendment right to counsel has attached, such pretextual communications would violate that right.¹⁷⁷ Some jurisdictions have special procedures that must be followed before a pretext call can be recorded, and failure to strictly comply may result in suppression of the call.¹⁷⁸ A victim should never be compelled to participate in a pretext call, and an advocate should be present to provide support during and after the call.

A Note on Prosecutorial Immunity

Typically, prosecutors enjoy absolute immunity in prosecuting a case, as opposed to the qualified immunity under which investigators operate. Absolute immunity attaches for activities “intimately associated with the judicial phase of the criminal process,”¹⁷⁹ *e.g.*, initiating prosecution, determining probable cause for charging purposes, making charging decisions, drafting legal documents, or litigating the case in court. However, to the extent prosecutors provide advice to law enforcement on their activities, or engage in law-enforcement type activities themselves, *e.g.*, acting as an investigator, attesting to the truth of an arrest warrant, or signing a search warrant affidavit, they are covered by the same qualified immunity that law enforcement officers have.

Qualified immunity provides significant protection against civil liability for actions taken in the course of one’s official duties. The prosecutor is immune from suit for discretionary actions so long as that conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁸⁰

There is nothing wrong with a prosecutor taking off the cloak of absolute immunity to perform activities covered by qualified immunity. However, whether a prosecutor does so depends on office policy, and in its absence, an informed decision. Some offices require prosecutors to advise officers in the performance of their duties, while others limit or prohibit prosecutors from taking action beyond that which is covered by absolute immunity. In the absence of a policy prohibiting it, a prosecutor may choose to give up absolute immunity for the purpose of supporting their law enforcement partners and obtaining better investigations with fewer legal problems arising later.

When deciding whether to break the shield of absolute immunity, you should:

- Be aware of the difference between absolute and qualified immunity.
- Check with your office to see if there is a policy in place.
- Inform your supervisor of your desire to work closely with police on these cases and why.
- Seek guidance from your jurisdiction’s legal representative (whichever entity represents your office in the event of a lawsuit — typically, the City or County Attorney).
- Look for other examples of police/prosecutor collaboration in your jurisdiction or others, *e.g.*, other specialized units or co-located police/prosecutor teams.

3.1-C-1. Corroboration is Valuable but Usually not a Legal Requirement

*Corroborating victims help victims. Any evidence that corroborates the fact a rape occurred, that it was nonconsensual, that it was forcible, that there were injuries –documented by crime scene evidence, photos, or witness interviews – also helps victims. Again, it benefits our cases as well, but if you can send a victim into court knowing the entire case doesn’t rest on their shoulders, but that police and prosecutors conducted a thorough investigation of every aspect of the case, it will ease their minds and reinforce their faith that the system can work the way it is supposed to.*¹⁸¹

Corroboration is valuable, but usually not legally *required*, either for charging a case or for establishing the defendant’s guilt at trial.¹⁸² Investigators should, however, always strive to corroborate as many aspects of the case as possible. Corroborative evidence strengthens a case by providing additional evidence of the crimes charged and supporting the credibility of witnesses. Victims will be gratified by

the thoroughness of the investigation and relieved that the trial's outcome will not rest solely on their testimony. Corroborating evidence — especially important for crimes that happen in private and for which scientific evidence most often is inconclusive on critical issues such as consent — can be found in a variety of sources:

- *Witnesses*
 - There may be witnesses who did not actually observe the assault but nevertheless can testify about events or conditions they saw or heard. A witness may be able to testify to the victim's behavior, demeanor, or physical condition immediately before or after the assault or may be able to testify to the victim's statement to the witness about the assault. Witnesses may be able to testify to their observations regarding the victim's intoxication, the defendant's provision of alcohol or drugs to the victim, the defendant's acts to isolate the victim, or other evidence of predatory behavior. Bartenders, cab drivers or other ride-hailing services, building security guards, and store clerks also often can provide evidence relevant to the charges.
 - Video surveillance cameras, or video recorded by others before or after the assault, can help establish a timeline and document both the victim's and offender's actions. Such evidence should be viewed with caution, as it may provide only a brief snapshot of what occurred; what appears to be a consensual social encounter on video may have been coerced or may later progress into a forcible or coerced act of penetration.
 - Witnesses may also be able to testify to the long-term evidence of trauma following the assault (*e.g.*, friends or family that can say, "before the assault, the victim was outgoing and involved in school clubs and after, she would not go out and stopped returning phone calls from her closest friends.") Please note, however, that not all victims will exhibit indicators of trauma.
- *Physical evidence* that corroborates any details of the allegations. This can include seemingly ancillary details that in and of themselves do not establish a sexual assault took place or a sexual encounter was nonconsensual, but do support the victim's account of the incident. Investigators should strive to corroborate as many details as possible, using physical evidence at the crime scene (including video or photographs) and physical evidence of the victim's and offender's actions before and after the assault (*e.g.*, ATM receipts, bar tabs, and items in the trash).
- *Medical evidence* of injury, victim demeanor, and the victim's medical records can provide some of the strongest corroborative evidence. Medical expert testimony is necessary to explain the presence or absence of injury and to rebut popular misconceptions about sexual assault and victim responses to trauma. In particular, expert medical testimony can educate factfinders about the fact that a lack of genital injury does not prove consent, and that common non-genital injuries – including bruising and abrasions to the wrists, upper arms, inner thighs, and other extremities – are consistent with a victim's account of a struggle, being held down, falling, or being dragged. In addition, medical evidence can describe injuries and observations consistent with strangulation, such as petechiae, hoarse voice, and scratching around the neck; this can also include the absence of visible injury, which is common in strangulation cases.¹⁸³ In lieu of a toxicologist, medical experts can also educate factfinders about toxicology and the disparate effects of alcohol on men and women.

- *Forensic evidence* is seldom dispositive of whether a sexual assault occurred, but research and experience tell us that factfinders will often expect some sort of “CSI evidence” in sexual assault cases.¹⁸⁴ Therefore, even in cases where the defense is consent, investigators should collect and preserve evidence that can be scientifically examined and tested for corroborative forensic evidence, *e.g.*, semen, urine, vomit, fingerprints, and touch or saliva DNA.¹⁸⁵
- *Cyber evidence* is an increasingly likely source of corroboration in cases of sexual assault. Cyber evidence may include text messages, social media posts and comments, digital photographs, online activity, and data from digital devices such as fitness trackers. Investigators should be trained and proficient at identifying, preserving, and securing digital evidence or should consult with others who have the appropriate expertise, either in their own department/agency or another.¹⁸⁶
- *Expert testimony* about victim responses to trauma can be powerful corroborative evidence, explaining victim behaviors that may seem counterintuitive to the lay factfinder. Research shows that common misconceptions about sexual assault and victims of these crimes persist, despite heightened awareness.¹⁸⁷ This kind of expert testimony is designed to educate, allowing the jury to put the victim’s behavior in its proper context — the result of trauma or of the defendant’s actions, rather than a reason to doubt the victim’s credibility.
- *Offender statements* can be important corroborative evidence even if they do not amount to a “confession.” Such statements are valuable when they corroborate details of the victim’s account, even if the offender claims that any sexual contact was consensual. More often than not, the offender’s statement alone will establish at least one element of the offense — that the act of sexual penetration or contact did in fact occur. Furthermore, the offender’s demeanor, attitude, and explanation of the incident at the earliest stages of an investigation can be revealing and enlightening for jurors, who can compare them to the defendant’s carefully prepared appearance and testimony at trial.

3.1-C-2. Consult Statutes, Case Law, Social Science, Medical, and Other Relevant Research

Prosecutors should be skilled in researching applicable statutes, case law, and underlying public policy in preparing their cases. While legal research is, of course, a necessity in the legal profession, it is easy to overlook the value of other types of research documenting advances in medicine, forensic science, and social sciences as they pertain to the prosecution of sexual assault. Judges need this valuable information as well, and it is incumbent on the prosecutor to provide them with all relevant admissible research to support accurate, well-informed judicial decisions.¹⁸⁸ Social science and medical research provide insight into dynamics of assault and victimization relevant to proving the elements of the crime. Prosecutors should connect with experts in relevant fields to learn about the latest developments and ensure they are properly understanding and applying this knowledge. Such consultation can assist in:

- Evaluating certain evidence.
- Understanding victim behaviors that are, in fact, responses to trauma.
- Understanding predatory offender conduct, which may help in the analysis of “other crimes” evidence or in developing the theme and theory of the case.
- Connecting victims with available services.
- Making bail recommendations that adequately address victim and community safety.

- Preparing and litigating pretrial motions.
- Admitting cyber evidence at trial.
- Interviewing and examining victims and witnesses.
- Cross-examining defendants.
- Making sentencing recommendations.

See Appendix F for additional information on how various experts can assist with issues in sexual violence prosecutions.

3.1-D. Request Bail Commensurate with the Seriousness of the Offense

It is important to understand the purpose of bail and pretrial detention are not to punish, but to secure the presence of the defendant at trial and the safety of the victim and community.¹⁸⁹ The specific criteria for setting a bail amount varies from jurisdiction to jurisdiction. There are, however, considerations that are generally consistent across the country. Motions to reduce or increase bail may occur at any hearing, and, therefore, prosecutors must always be prepared.

When making bail recommendations, consider:¹⁹⁰

- Danger to victim and community.
- Seriousness of the crime.
- Likelihood of conviction.¹⁹¹
- Likelihood defendant will appear in court/flight risk.¹⁹²

Additional considerations to bring to the court's attention in making bail recommendations in sexual violence cases include:

- Risk of committing additional crimes against the same victim (*e.g.*, in cases involving intimate partner violence).
- Where investigation suggests potential additional victims, likelihood of re-offense, or serial perpetration, the offender may perceive a greater risk of exposure to incarceration and therefore may be a greater flight risk.¹⁹³
- Evidence of crossover offending (*i.e.*, offenders who assault intimate partners/family members and others with whom they have a more distant/no relationship).¹⁹⁴
- Increased risk of lethality where sexual violence is used in the course of other acts of intimate partner violence and/or strangulation.¹⁹⁵
- Any prior history demonstrating failure of the offender to comply with court directives (*e.g.*, previous bench warrants, contempt findings, probation/parole violations, witness intimidation or retaliation, violations of previous bail conditions). A history of intransience is evidence that the offender may fail to comply with future obligations to appear and/or other non-monetary conditions.

Prosecutors should be prepared for argument when requesting bail. “Seriousness of the offense” and “likelihood of conviction” standards are susceptible to defense arguments suggesting that sexual violence against an acquaintance or while one or both parties were intoxicated is somehow “not serious” or unlikely to result in conviction. Careful preparation and presentation — even to the point of presenting expert testimony — may be necessary to persuade some judges otherwise. Research and court opinions acknowledge that many rapists acquainted with their victims are serial perpetrators and pose an elevated lethality risk for victims who are intimate partners.¹⁹⁶ Prosecutors should emphasize the seriousness and danger inherent in all cases of sexual violence to provide the court with a sound basis for its decision. Prosecutors can also highlight the high penalty (*e.g.*, long prison sentence) the defendant could receive upon conviction as a potential factor contributing to the risk of the defendant failing to appear for future court dates. Arguments about the defendant’s risk to victim and community safety should be based on the evidence, not generalizations or speculation.

Request appropriate bail conditions: *e.g.*, no direct or indirect contact with the victim, including communication through social media, third-parties, and family and friends; conditions to prevent intimidation or stalking conduct, including distance, school and/or workplace restrictions; and other case-specific conditions designed to protect the victim. A good working relationship with law enforcement allows the prosecutor an opportunity to gain additional information regarding the defendant, including flight risk and concerns for community safety. Victims should be immediately advised of the outcome of the bail hearing and notified if the defendant is released on bail.

Remember that bail is subject to ongoing review. Defendants who intimidate victims or witnesses can have their bail increased or revoked. Conversely, prosecutors must be prepared to respond to defense attempts to inappropriately reduce bail or eliminate conditions the defendant finds onerous. The defendant should be required to show a change in circumstances for review of bail or release conditions.

Bail hearings also present an opportunity to communicate to the public the importance of the sexual assault prosecution while preserving the integrity of our system of due process. Any extrajudicial public statements should generally communicate the seriousness with which the prosecution treats cases of sexual violence, while carefully avoiding inappropriate comment that might taint potential jurors or violate the rules of professional conduct.

A Note on Intimate Partner Sexual Assault

Perpetrators may establish relationships with victims in order to obtain greater access to them and assert greater control over them through power, coercion, and cyclical violence.¹⁹⁷ These abusive behaviors may include sexual assault of the intimate partner or the partner’s child. Some relationships may be developed for the purpose of grooming the victim. Sexual violence victims who are intimate partners of their rapists often experience self-blame and a profound sense of betrayal, resulting in unique trauma from the assault and additional barriers to reporting it.¹⁹⁸ Those barriers include the victim’s lack of self-identification as a victim, self-blame, shame, fear of not being believed, and fear of physical reprisal. Victims of intimate partner violence who are involved in gangs and those trafficked in commercial sexual activity, face the same barriers, compounded by fear of their own prosecution and reprisals from the offender’s allies.

3.1-D-1. Request No-Contact Orders

Criminal no-contact orders, or civil sexual assault or domestic violence protection orders, provide additional protection to strengthen the victim's sense of safety and security, offering a straightforward basis for enforcement. In some jurisdictions, a criminal no-contact order can be sought in addition to any no-contact conditions of bail,¹⁹⁹ and in others, any victim of sexual assault can seek a civil order of protection. Where the victim is or was in an intimate relationship with the offender, a domestic violence protection order should be available. An advocate or civil attorney can assist the victim with obtaining a civil sexual assault protection order or a domestic violence protection order, as appropriate.

Advise victims that any direct or indirect offender contact (including third-party contact), should be immediately reported to law enforcement and the prosecutor. Where such conduct has occurred, a hearing should be held as soon as possible after giving requisite notice to the defense, so the prosecution can seek revocation, a contempt of court charge, or additional conditions to prevent interference or intimidation by the defendant or others acting at her/his direction. If the offender is in jail, protection orders can still be enforced or new charges for witness tampering considered.²⁰⁰

3.1-D-2. Safeguard Victim Privacy and Safety

In the early stages of the case, prosecutors should act to protect victim privacy and security:

- Familiarize yourself with your jurisdiction's statutory and case law related to privacy, confidentiality, and privilege.²⁰¹
- Collaborate with the civil attorney representing the victim's interests where appropriate or necessary to avoid issues with standing.²⁰²
- Work with agencies to ensure appropriate redactions are made to any discoverable documents, ensuring all original documents are maintained.
- Redact cyber evidence, including forensic examination reports (*i.e.*, "phone dumps" or "phone downloads") and non-public social media records to include only material, relevant, and exculpatory evidence; notify the court of any redactions made.²⁰³
- Collaborate with advocates to support victims, ensuring victims understand the differences in confidentiality applicable to community advocates versus victim-witness advocates employed by the prosecutor's office. Staff or community partners working with persons with disabilities should have specialized training.
- Keep victims informed of any motions seeking disclosure of personal information.
- Move to quash subpoenas to compel production of confidential victim counseling/advocacy records or other privileged communications.
- Move for *in camera* review of victim's records.²⁰⁴
- Move for orders restricting the defense from disseminating reports or other sensitive materials to outside parties (*e.g.*, the media). For especially sensitive evidence (*e.g.*, intimate photos — including those from the SAK exam — or video of the victim), seek an order permitting the materials to be viewed by the defense (or defense-retained expert) under restricted conditions,

rather than providing a copy for discovery purposes. The court may also enter an order prohibiting defense counsel from providing copies of documents containing the victim's personal information to the defendant.

- Understand and anticipate public requests for copies of police reports or other evidence under the applicable Public Records Act.

3.1-E. Oppose Unnecessary Delay

The prospect of having to testify about sexual violence can be all-consuming for victims. While the delay that accompanies most judicial proceedings is frustrating for any victim, it is especially harmful to victims of sexual violence, who long for closure so they can resume the healing process and go on with their lives.²⁰⁵ Delay also provides more opportunities for offenders who are so inclined to engage in manipulation or intimidation. While some requested continuances may be reasonable and necessary, unnecessary delay should be vigorously opposed. Ask the court to prioritize these cases in its calendaring, and request that any scheduled trial date be preemptory — not to be continued absent the most unavoidable reason. For the prosecution's position on the urgency of these cases to have any credibility, however, it is necessary for the prosecutor to make every effort to expedite the prosecution's own efforts to prepare the case for trial.

See also, [3.1-A. Review All Reports in a Timely Manner](#).

3.1-F. Build a Case that Engages Victims and Makes Effective Use of All Probative Evidence

After the charging decision is made, there is still much work to be done before the case is ready for trial. This includes follow-up investigation to strengthen the proofs, fill in any gaps in the evidence, and address any unanswered questions. Although the victim's disclosure alone, if believed, is usually sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt, continue to seek corroboration to make the strongest case possible.²⁰⁶

Ongoing investigation should include:

- Regular communication with victim and witnesses throughout the pretrial period; provide the victim with regular updates on the case and any important developments.²⁰⁷
 - If a victim or witness suddenly stops returning phone calls or becomes reluctant to talk with the investigator or prosecutor, this may be an important indicator that intimidation is occurring.²⁰⁸ Inquire about any phone calls or other contact by the defendant or their allies. Check jail phone records and visitor logs to see whether contact is occurring, and obtain recordings of any calls to the victim from the jail.
 - Check in with the victim and witnesses on a regular basis to learn whether anything has changed or happened in terms of evidence, safety concerns, or suspicious incidents seemingly too minor to report.²⁰⁹ Because trauma affects memory, victims may also recover memories over time.²¹⁰ These conversations should also serve to build on the rapport and trust developed during earlier contact with the victim.
 - It is important to remember that common responses to the trauma of sexual assault may include minimizing, denying, self-medicating, withdrawing from others, returning to normal life, etc. Connecting victims with appropriate support can help mitigate negative responses.

- Be sure the assigned investigator maintains a careful record of all contact with victims and witnesses, including unsuccessful attempts to locate or speak with the witness.
 - This record of contacts, including refusals or unsuccessful attempts, may be critical to establishing all reasonable efforts were made to secure the witness’s attendance at trial, which will be necessary to establish “unavailability” of the witness if it is necessary to introduce out-of-court statements under the doctrine of forfeiture by wrongdoing.²¹¹
 - Material witness warrants to ensure the victim’s appearance at trial are strongly discouraged; arrest of an already-traumatized victim can cause irreparable harm and is inconsistent with principles of justice. See “[Avoid Coercive Practices](#)” below.
 - Monitor social media sites to identify any evidence of the crime(s) charged and/or intimidation of the victim.²¹²
- Evaluate the results of the sexual assault kit and other evidence testing, which may suggest the need for additional interviews or investigation.
- Review the entirety of the relevant medical record for patient intake information, medical history, assault history, physical examination, findings, and aftercare/safety planning. Determine whether there is any irrelevant and/or prejudicial information that should be redacted or the subject of a motion *in limine* before trial (*e.g.*, notation about a previous abortion, history of drug abuse).
- Investigate any relationship between the victim and perpetrator. Evidence about the relationship may help explain how the assault was committed and support the victim’s credibility at trial. For example, a perpetrator may use the relationship with the victim to gain access to the victim, exploit the victim’s trust, or exploit other known vulnerabilities to facilitate the assault or to undermine the victim’s credibility (*e.g.*, the offender assumes that a drug addict will not be believed). Revealing and explaining these dynamics at trial will allow the jury to more accurately assess the victim’s credibility and to understand how the crime occurred.
- Obtain search warrants, seek court orders, and issue subpoenas for relevant digital devices, social media accounts, telephone and/or cell site data.²¹³ Review results and provide relevant, material, and exculpatory records to defense counsel.²¹⁴

3.1-F-1. Conduct Trauma-Informed Interview of the Victim to Reveal Evidence of the Crime

[P]rosecutors who conduct thoughtful and effective interviews will be better able to explain victim behavior to their multidisciplinary *professional colleagues and partners, and ultimately, to judges and juries.*²¹⁵

Trauma-informed interviews are not only essential to victim-centered prosecution, they provide a vital opportunity for the victim to describe the experience of the sexual assault. Research and clinical experience with the neurobiology of trauma suggest several important considerations for interviewing victims impacted by trauma. There are varying interview protocols and this section does not attempt to set forth a protocol but rather to highlight important considerations.

Victims may be unable to recall the precise chronology of events and some parts of the experience may be too painful to recall. Asking the victim, “What are you able to remember about—?” is a helpful way to encourage the victim to talk about what happened without pressuring them to recount a sequence of events. This question also conveys to victims that the prosecutor recognizes the trauma they have experienced.

- The interview should focus on *obtaining available evidence of the victim’s experience* of the sexual assault. Ask about the victim’s sensory experience — what the victim saw, felt, heard, tasted, smelled. Descriptions of sensory perceptions, as well as the victim’s thoughts and emotions as the crime unfolded, may suggest additional leads for corroboration — the defendant’s physical appearance at the time of the assault or details concerning the crime scene and surrounding area. These types of memories can also connect the victim’s experience with the jury. Jurors can relate to the specific feelings and therefore find the statement and the account more credible (*e.g.*, when a victim says she felt the seam of the couch cushion pushing into her back).

The victim might be asked, for example, whether she was able to see the offender’s eyes as he moved toward her. If she recalls that the offender’s eyes were angry, terrifying, or mean, ask how that made her feel. The victim’s response might be that she was scared, her heart was pounding, or she felt like she couldn’t breathe.

- *One of the keys to success in these cases is to get to the whole truth.* Victims may be reluctant to reveal details that might invite judgement upon them – disbelief about the sexual violence or legal charges of their own. Investigators and prosecutors should encourage victims to be entirely truthful and open about everything they tell us. Remind victims the defense will already know about any “unfavorable” details. Assure them that if we know about those details, we can either keep them out of trial or explain them so the jury can judge the case fairly. But we can do little to address those details if we hear about them for the first time in court. Be prepared for every interview by *reviewing all relevant evidence, reports, and updates from law enforcement*. Check with the assigned detective before the interview to discuss the investigation’s status and any recent developments. Focus on insightful questions that will help develop an understanding of the victim’s experience and assist in overcoming potential defenses. Interviews also help prepare the victim for the types of questions they may be asked throughout the legal process. A well-prepared interview helps build a trusting relationship between the victim and the prosecutor.
- There are many *logistical considerations* necessary to conducting a trauma-informed interview. The setting of a victim interview communicates a great deal to the victim about how the crime is viewed by the prosecutor’s office. A cold, stark interrogation room sends the message that the victim is under suspicion or has done something wrong. A quasi-public space in an open office cubicle or in a room with office traffic sends the message that the victim’s privacy is not respected or that the interview is not too important to interrupt. Ensure that the interview

environment is comfortable, neutral, quiet, and private. Allow the victim to choose their own seating arrangement, if possible, and provide water or food, if available, to help create an environment that is welcoming and calm.

- *Building trust.* The prosecutor should explain her/his role and responsibilities to the victim at the beginning of the meeting. Express appreciation for the information that the victim has already provided and for coming in to provide more. Demonstrate your comfort discussing the difficult and private subject matter of sexual assault by explaining you have worked with victims of these kinds of crimes for a long time and understand these matters are difficult to talk about. Be open and listen carefully to the victim's account. Understand that trauma, as well as social and emotional factors, often result in delayed reporting.²¹⁶ Balance clinical objectivity with sensitivity. Refrain from overtly or subtly conveying doubt or judgment and let the victim know you are there to help. Listen fully to responses and ask appropriate follow-up questions.
- Pay attention to the victim's responses and demeanor during the interview — they may provide indicators of trauma or dissociation that might require the explanation of an expert witness at trial. Take breaks when necessary or requested. Discuss with the victim and their advocate (if present)²¹⁷ the advantages of participating in the criminal justice process, including:
 - The ability to retake control of what happened.
 - The possibility to speak the truth and describe the victimization and its effects.
 - The availability of resources to support healing.
 - The chance to achieve a sense of closure.
 - The opportunity to secure justice by holding the offender accountable.
 - The capability to prevent the offender from victimizing others.
- Remember that victims are the best judges of what will promote their personal healing. For some, testifying in court and having their voices heard is a critical part of that healing. For others, not reporting the crime or declining to participate in the proceedings is the safest choice. Those personal feelings should always be respected.
- Though ***prosecution should not be coerced, it should be respectfully encouraged.*** Remember the importance of going forward with prosecution in these cases whenever possible; avoid inadvertently suggesting that the adversity of trial is too difficult to bear. Prosecutors should candidly explain the trial experience, while expressing confidence in the prosecution, the system's commitment and ability to support the victim throughout the process, and the victim's ability to proceed.
- Once a hearing or trial date is firmly set, prepare the victim to testify, including direct examination, objections, cross-examination,²¹⁸ and redirect. Discuss courthouse and courtroom safety with the victim. Work with victim-witness professionals and advocates to ensure safety and support for the victim while waiting to testify and during testimony.

Avoid Coercive Practices

Arresting sexual assault victims to force them to testify is widely recognized as an undesirable practice that compromises victim safety; it is rarely or never seen in jurisdictions with specially trained and experienced prosecutors. Whether the arrest of victims perceived as “uncooperative” is based on prosecutor frustration with the victim’s behavior or on a misguided sense of professional obligation, experience has shown that arresting victims for failure to appear is counterproductive. Such arrests compound the trauma victims have already experienced, result in serious collateral consequences for them, and undermine prosecution efforts to build trust and cooperation with their allied partners and with the community at large.²¹⁹ The overall negative costs far outweigh the minimal benefit of producing a reluctant (and — thanks to the arrest — probably frightened and angry) victim in court.

There are many alternatives to the use of coercive tactics. First and foremost is to provide the kind of support, from the earliest stages of the case, that will reduce the burden on victims having to testify. This means providing advocacy from the time of the initial police response. Another helpful strategy is to train officers on the importance of obtaining strong evidence (including corroborative evidence and nontestimonial statements of the victim that will be admissible under *Crawford*), which — in rare circumstances — may enable prosecutors to prove their cases without victim testimony. Moreover, victims may be more willing to testify when they do not perceive their testimony to be the linchpin of the case.²²⁰

OVW requirements prohibit arresting victims as a practice.²²¹ There is nothing prohibiting such a response in the very rare case in which it might be appropriate and necessary. For example, it’s possible to imagine a case against an extraordinarily dangerous rapist in which the ONLY way to prove the case is to put the victim, who is adamant in her refusal to testify, on the stand. For those very rare cases, there are ways to mitigate the negative collateral consequences for the victim, *e.g.*, making sure that the judge/jury is prepared to hear the victim’s testimony immediately, making sure that care is available for any children or others for whom the victim might be responsible, and providing an advocate for ongoing safety planning. The act of arresting a victim should be considered only as the very last resort and in only the most extraordinary of circumstances.

3.1-F-2. Review DNA and Forensic Evidence to Corroborate the Victim’s Testimony²²²

DNA is an ever-developing field of science with many testing resources for prosecutors. Within the last decade, thousands of backlogged and untested sexual assault kits have been identified, tested, analyzed, with numerous resulting prosecutions initiated. Studies regarding the factors contributing to the backlog have revealed that common myths about sexual violence dynamics and victims, as well as erroneous beliefs about what makes a case prosecutable, resulted in the literal shelving of countless cases. With advances in technology, more options for testing, and an enhanced understanding of the perpetration of sexual violence, we are better positioned than ever before to take full advantage of this form of evidence to hold more offenders accountable — including the many serial offenders who can now be

identified by testing SAKs, regardless of whether they were known to the victim. Even in cases where the victim and offender were acquainted, or had a prior consensual sexual relationship, DNA evidence can be helpful, as previously explained.²²³

When cases are linked through a CODIS hit, the details of the other crime — the victim’s accounts of the assault and other characteristics of the offense — should be scrutinized for helpful leads to corroborative evidence. In some instances, evidence from the other case may be admissible in this one.²²⁴ Regardless of admissibility, the other case may shed light on useful information — such as details about the offender’s activities, social circle, tactics of victimization and manipulation, or dangerousness.

*3.1-F-3. Prevent and Respond to Witness Intimidation*²²⁵

Witness intimidation can affect the criminal prosecution at any time during the case, including at trial. Most often, the source of intimidation is the defendant or the defendant’s allies, including friends, family, or criminal associates. Sometimes the victim or witness’s own family or friends, or the community itself, will actively discourage the victim from cooperating or testifying.

Intimidation should be understood to include not only acts of force or coercion (fear-based intimidation) but also subtle forms of psychological or emotional manipulation, when that manipulation is intended to induce silence or false testimony.

Prevention of, and effective response to, witness tampering or intimidation requires the concerted effort of multidisciplinary professionals in the criminal justice system as well as community-based advocates. Steps to prevent and respond to intimidation include:

- Recognize and reduce opportunities for witness intimidation.
- Educate victims about intimidation — what it is, how to preserve evidence, and how to make immediate reports to police in a manner that ensures prosecutor notification.
- Charge acts of intimidation where appropriate, preferably in the same charging instrument.
- File for contempt of court where the defendant has violated a stay-away or no contact order, or a condition of bail. Violations of court orders may also amount to stalking or other specific crimes.²²⁶
- Discuss with the victim the defendant’s right to be present during trial testimony and prepare law enforcement and victim advocates to monitor for any intimidation efforts in the courtroom and surrounding areas.
- Ensure the courthouse and courtroom are zero-tolerance zones for intimidation.
- Bring any acts of intimidation to the attention of the court, as well as any concerns about courthouse safety.
- Present intimidation evidence at trial to show consciousness of guilt and, when necessary, to introduce statements under the doctrine of forfeiture by wrongdoing.

3.1-F-4. Review All of the Evidence and Begin to Put the Pieces of the Case Together

The Charging Tool at Appendix E has been provided as a resource to use when putting the pieces of your case together. This tool — originally developed by Teresa P. Scalzo, former Director of the National Center for the Prosecution of Violence Against Women, Deputy Director at the Navy Judge Advocate General (JAG) Trial Assistance Program, and sexual assault prosecutor — has been adapted for this model.²²⁷ The Charging Tool is a simple table that has proven useful in assisting prosecutors and law enforcement in identifying and analyzing the evidence necessary to satisfy the elements of a charge. Completing the chart encourages law enforcement and prosecutors to look at *each* piece of evidence and *each* witness statement, and then to ask the following four questions:

- 1) What does the evidence tell us?
- 2) Whom does it connect?
- 3) What else should we be looking for?
- 4) Does it help establish an element of a crime?

The process of completing the chart also helps to identify corroborating evidence (*e.g.*, multiple sources of witness testimony), as well as any gaps in evidence, which may require follow-up investigation, or evidence that may be the subject of a defense motion to suppress or otherwise exclude, and, therefore require identifying additional corroborating evidence to support the same element of the charge.

Completing the chart can help identify particular issues related to the individual pieces of evidence/testimony and will assist you in incorporating the evidence into a cohesive case theme/theory and anticipating how the defense may respond to each element of the charge. The sections that follow provide strategies for incorporating the individual pieces of evidence into the preparation and trial of the case.

3.2. Thoroughly Prepare the Case

3.2-A. Work with Experts to Understand and Explain the Evidence

Consider which experts, if any, will assist you in understanding the significance of the evidence and explaining it to the jury. Experts can help the prosecutor understand the results of a SAK examination or other medical reports, toxicology results, or forensic evidence (*e.g.*, DNA or the results of a forensic examination of a cell phone). They can also help explain issues commonly misunderstood by juries — victim behavior, the effects of trauma, offender tactics, cultural factors impacting victimization, etc. Expert testimony can assist the jury in reaching an informed verdict based on the evidence rather than myths or misconceptions.

Early consultation with experts ensures your case is prepared with as much information and context as possible. Consultation is useful even if expert testimony is not anticipated. In considering whether expert *testimony* may be necessary, consider the following:

- Medical, forensic/technical, or toxicology evidence will usually require expert testimony —for example, jurors should not speculate what a .3 blood alcohol content (BAC) means for a person’s ability to consent, perceive/recall events, or engage in other activities. Nor should they be asked to

conclude on their own whether injuries are consistent with the victim’s account of the attack. See Appendix F on Considerations for Working with Experts and Appendix G on Stages of Acute Alcohol Influence/Intoxication.

- How effectively can the victim explain his or her own behavior during and after the assault? How understandable would the explanation sound to someone untrained in sexual assault dynamics and victim responses to trauma?
- Are there other factors that jurors might find confusing or troubling, such as an absence of visible physical injury? Were there tests, examinations, or analyses not performed because they were deemed unlikely to produce any useful information? The significance of the absence of certain types evidence should be explained by an expert to avoid jury speculation.
- Also consider whether an expert is appropriate for a specific case and/or jury as well as the costs of retaining an expert.²²⁸

Meet with potential expert witnesses in person, well in advance of trial, to discuss their qualifications, the content of their proposed testimony, the scientific foundation for their opinions if necessary, and the content of any mandatory expert report.²²⁹ Obtain the expert’s most recent C.V., which should be provided to the defense.

File appropriate and timely motions to introduce expert testimony.²³⁰ See [below](#) for tips regarding the introduction of expert testimony at trial. Provide appropriate notice to the defense and the court so any disputed issues can be resolved well in advance of trial.

Become familiar with your jurisdiction’s evidentiary rule on expert testimony²³¹ as well as any case law governing the admissibility of expert testimony on victim behavior, SAKs, toxicology, DNA, etc. The admissibility of expert testimony to explain victim behavior varies widely across jurisdictions; in conducting legal research on the caselaw, search for cases involving both child and adult victims of sexual assault, as well as victims of domestic violence – including cases involving the admissibility of expert testimony on the behalf of defendants who raise battering or abuse as a defense. Another analogous type of expert testimony is that of specially trained or experienced police officers who testify about drug distribution or gang activity. Determine whether the admissibility of a specific type of expert testimony is governed by *Daubert* or *Frye*.²³² Absent authority (statutory or caselaw) from your jurisdiction, research other jurisdictions with similar evidence rules that may have persuasive caselaw.

Discuss with your expert how to respond to defense requests for an interview.²³³ The expert, like any other witness, is free to agree or refuse an interview by the defense, but refusal may result in defense suggestions of bias when the expert is cross-examined at trial. You can ask the expert to let you know if the defense contacts them and what was discussed, which may provide some insight into defense strategy or possible weaknesses that should be addressed with the expert before trial.

It is advisable to be familiar with the proposed expert’s social media activity. The defense is likely to research the expert’s online activity, and any posts regarding specific cases or sexual assault allegations are usually fair game for cross-examination — for example, to support a claim of bias. Any troublesome posts should be discussed with the expert so you both are prepared to respond to such questioning at trial.

The defense may be planning to present expert testimony, as well, either to rebut or undermine the testimony and conclusions of the prosecution's expert(s) or to support a defense such as intoxication or mental disease/defect.

- If the defense is presenting expert testimony in support of a defense, you will usually want to present your own expert in rebuttal. Find one and prepare that expert as you would one called in your case in chief.
- The defense is required to provide pretrial notice of an intent to present expert testimony. If you have not received notice of intent to call an expert, inquire on the record during a pretrial conference or hearing whether the defense will be calling any experts. If the answer is "no," then any attempt to present expert testimony during trial should be barred. If the answer is "yes," insist upon a deadline, well in advance of trial, for production of the expert's C.V. and a report or summary of the proposed testimony.
- Consult with your expert to review the report or summary from the defense expert.
 - Use your expert's suggestions to prepare for an interview of the defense expert.
 - Review the defense expert interview with your expert afterwards, and follow up with the defense about any unresolved issues.
- If the defense expert refuses to meet with you, prepare to cross the expert on that issue (assuming, of course, that your own expert was responsive to the defense's request).
- Carefully inquire of the defense expert the basis for their opinion, *i.e.*, the information or authorities relied upon. Was the expert provided with only selected reports or statements? Does the opinion rely solely on the defendant's version of what occurred? Does the expert accept the authority of widely recognized experts in the field?
- Prepare to challenge the defense expert's qualifications prior to trial. Research the defense expert's professional history and training, and find out from other prosecutors, including those in nearby jurisdictions, whether they are familiar with this expert and their qualifications. For example, a general medical doctor with no specific training or experience in sexual assault forensic exams would lack the requisite expertise to provide an opinion concerning the significance of absence of physical injury.
- If the challenge is unsuccessful, prepare a cross-examination to highlight the defense expert's deficiencies in expertise, unfamiliarity with the area's wide scope of literature, and degree to which the opinion contradicts scientific consensus on the issue. Your expert should be able to suggest areas for cross-examination of the defense expert at trial.

The below sections briefly discuss the types of issues that will arise in a case and how experts can help prepare the case and provide testimony at trial. See Appendix F to help identify experts who can assist with specific issues that may arise in a case.

3.2-A-1. *Victim Behavior*²³⁴

Public perceptions about how victims *should* respond to physical and emotional trauma often conflict with their actual responses, and such misconceptions can significantly impact juror assessment of victim credibility. Victims have individual responses to trauma; different victims could survive the same attack and have very different reactions. It is important to communicate to the jury that there is no "typical"

response. Consider whether a victim behavior expert witness would be beneficial in your case, given the facts and the victim's ability to explain her/his own behavior. Remember, too, that identifying an expert and putting that expert on your witness list does not commit you to presenting that expert testimony; you can make the final determination about the need for expert testimony after the victim testifies. Professionals you might consider calling as experts in victim behavior include:

- Advocates
- Counselors
- Therapists
- Psychiatrists and psychologists
- Law enforcement
- Healthcare professionals (*e.g.*, SANE)
- Scholars

Experts in victim behavior should not be asked to provide an opinion as to whether the victim in this case was sexually assaulted, a victim of trauma, or truthful in their report or testimony; this applies to defense experts as well, and prosecutors should object to any attempts to introduce this type of testimony. Rather, they should be used to educate the factfinder by describing, in general, the varied responses to trauma during and after a sexual assault. To maintain victim privacy and the integrity of the case, do not use a victim behavior expert who has been working with the victim – such as the victim's own advocate, counselor, or therapist. Doing so would blur the lines between the experts' testimony on victim behavior and an assessment of the victim's credibility; it would also open the door to defense requests to examine the victim's counseling records.

Most jurisdictions have clear rules or caselaw permitting expert testimony to explain victim behavior, but it is still important to carefully review statutes and caselaw to determine what type of experts are permitted to testify and the scope of that testimony.²³⁵ Like any other expert, victim behavior experts must be qualified, but their qualifications may be accepted largely on the basis of their training and experience, rather than by standards more strictly applicable to scientific evidence.²³⁶

A Note on Neurobiology of Trauma

Many aspects of victim behavior that make a sexual assault case challenging for jurors (and, thus, for prosecutors and police) — delayed reporting, piecemeal disclosure, gaps in recall, inconsistencies in the victim’s account — may be attributable to the neurobiology of trauma. Studies by neuroscientists indicate that memories of traumatic events may be fragmented, inaccessible, or less readily retrieved than other memories. Chemical changes in the brain during traumatic events affect the ability of victims to recall and recount details of the event.

It is important for first responders, investigators/detectives, and prosecutors to have at least a rudimentary understanding of this phenomenon, so they do not draw erroneous conclusions about victim credibility and so they can interview the victim using trauma-informed techniques that will elicit as much detail as possible. However, expert testimony at trial on neurobiology of trauma should be approached with great caution. Qualified experts (*i.e.*, neuroscientists with a background in the dynamics of sexual assault) may be difficult to identify and costly to retain. Moreover, to show that a victim’s memory was affected in this manner is likely to be difficult or impossible. Neurobiology of trauma is only one factor that may contribute to victim behavior in the wake of a sexual assault. Other experts — advocates, scholars, or practitioners in the fields of psychology and psychiatry, or medical professionals — can likely provide adequate explanation for the behavior without the potential risk of this more highly-specialized and technical evidence.

3.2-A-2. Medical Evidence

The absence of physical injury can present difficulty for criminal justice professionals — either because they lack training about its prevalence or significance (causing them to doubt the victim’s report) or because they believe jurors will refuse to convict in a sexual violence case without injury. Review the victim’s medical records with a medical professional (*e.g.*, SANE or trained ER physician) and discuss the findings and documentation to ensure a thorough and accurate understanding.²³⁷

Treating medical professionals (provided they have sufficient training and experience) or others may be qualified as experts in the area of sexual assault and associated medical treatment and findings.²³⁸ Expert medical testimony is important evidence, as jurors often mistakenly believe that sexual violence victims will invariably have serious vaginal and other injuries.²³⁹ On the contrary, research has shown that in cases of sexual assault involving adult female victims, vaginal and other physical injuries are the exception rather than the rule.²⁴⁰ In cases of alcohol-facilitated sexual assault, expert witnesses can testify that incapacitated patients are statistically significantly less likely to have genital and non-genital trauma than patients who were not incapacitated at the time of the assault.²⁴¹ A medical expert can also explain the relevance of anatomy to the likelihood of genital injury and, where helpful, the fact that the most common type of non-genital sexual violence injury is bruising to the arms and legs.²⁴²

During the case in chief, the prosecutor’s job is to establish all the elements of the crime, which may include penetration. An expert can testify about available research on injuries associated with sexual assault, and explain that a lack of physical trauma is generally not inconsistent with this crime.²⁴³ Expert

testimony explaining the significance of injury or lack thereof can make the difference between a verdict of guilty or not guilty. In addition, you must understand your law’s definition of “penetration,” as usually the slightest degree is sufficient.²⁴⁴ However, even if only slight penetration is required, if the victim describes full or complete penetration, absence of injury should be explained lest the jury conclude the victim is untruthful or exaggerating.

In addition to questions about injury, elicit testimony to address the general consistency of the victim’s account with the findings, describe unfamiliar anatomical or medical terminology, and (where relevant) explain the significance of sexually transmitted infections (STIs).

As with all experts, you will need to qualify them prior to testimony. It is crucial to emphasize a medical expert’s training and experience in the examination and treatment of sexual assault victims, including in the effects of emotional trauma. Finally, make sure any medical testimony is easy for the jury to comprehend by having your medical expert use terms and examples easily understood by the average juror.²⁴⁵

3.2-A-3. Toxicology

Research shows that alcohol and drugs are commonly used to facilitate sexual assault.²⁴⁶ Because of the prevalence of intoxication in both victims and perpetrators, it is important to understand the effects of alcohol and drugs on behavior (before, during, and after an assault) and on memory.²⁴⁷ One should also consider the effect of alcohol or drugs on the memory of any witnesses.²⁴⁸ Consult with experts on toxicology in order to properly analyze cases where the victim, offender, or witnesses are intoxicated.

Testimony by toxicologists can help establish elements of the crime, such as a lack of capacity to consent.²⁴⁹ A toxicologist can explain the effects of alcohol or specific drugs on memory²⁵⁰ and psychomotor skills, extrapolate blood alcohol content (BAC)²⁵¹ to the approximate time of the offense, and review evidence to suggest further investigations that may be helpful. Toxicologists can also help rebut defense claims regarding the intoxication of the victim, offender, or witnesses.²⁵²

3.2-A-4. Technology

Technology has changed how individuals interact with the world around them. Smartphones, digital tablets, and computers are constantly used to stay connected with friends, family, and colleagues. Criminals likewise are using technology to commit crimes or to communicate with others, leaving trails of digital evidence.²⁵³ In a sexual assault case, technology may become a factor in several ways. There may be video recordings or digital photos of the crime itself, as well as messages and posts about the crime that can be found on cell phones or posted to social media.

Prosecutors must be familiar with the following:

- Crimes may be perpetrated, recorded, and documented using technology.²⁵⁴
- Victims may be traumatized by the dissemination of intimate photos or videos, whether created consensually or not.
- Digital evidence can be preserved and obtained for trial.

- Victim privacy can be protected by carefully redacting cyber evidence to provide defense counsel with only the exculpatory information, relevant and material to the case. Any redactions should be clearly noted.
- Prosecutors can protect victim privacy and safety during the discovery process by moving to limit access to intimate photos or video.²⁵⁵
 - In some jurisdictions, prosecutors may be permitted to fulfill their discovery obligations by permitting the defense to view the evidence under supervised conditions rather than providing a digital copy.
 - If a copy must be provided (*e.g.*, for purposes of review by defense expert), the prosecutor should obtain a protective order prohibiting copying or further dissemination of the copy and requiring its return to the prosecutor at the conclusion of the case.
- Digital evidence can be admitted at trial through testimony of a witness, a forensic examiner, or custodian of business records (or by a business records affidavit).²⁵⁶

3.2-A-5. DNA and Forensics

Juries may expect DNA and other forensic evidence to be presented at trial and may be skeptical about the quality of the investigation when it is not. Prosecutors should understand the relevant science to inform their decisions about whether and how to present such evidence. Carefully consider what questions should be asked of the experts to best explain the relevance or significance of test or comparison results. If certain tests or examinations were not performed, consider having the expert explain why — whether the sample was inadequate or compromised in some way, or whether testing was deemed unnecessary for some reason. Jurors should feel confident, at the conclusion of the case, that all appropriate investigation was conducted.²⁵⁷

With DNA testing, there are numerous steps involving multiple lab technicians who may participate in the testing of a single sample. Failure to call to the stand all the technicians involved in the testing may result in a defense objection to the testimony of the analyst who interpreted the raw data to reach a conclusion about the contributors to any samples collected from the victim. The defense may contend that the defendant has a right to confront each of the technicians involved in the testing. The United States Supreme Court considered this issue in *Williams v. Illinois*,²⁵⁸ but the plurality opinion in that case reached no definitive conclusion. Similar issues have been decided, with disparate results, since *Williams* in 2012. Prosecutors should be aware of the potential issue and carefully consider which witnesses must, or should, be called for trial.²⁵⁹

Similar confrontation issues may exist for cold case prosecutions in which the original expert is no longer available for trial. Courts — and prosecutors — continue to grapple with these issues, with varying outcomes around the country. Seek guidance from your appellate unit, your state Attorney General's Office, or AEquitas for assistance in proceeding in such cases.²⁶⁰

Be familiar with statutory requirements for the admission of DNA evidence in your jurisdiction, such as notice to the defense, production of the results, and response to discovery requests for other materials related to the testing/lab protocols.

3.2-B. File Motions to Shield Victims and Expose Defendants

In its quest to undermine the victim's credibility, the defense may seek to introduce irrelevant evidence of past sexual behavior, gain access to private medical and mental health records, attack the victim's character, and more. Defendants and their allies may engage in subtle or overt intimidation to prevent the victim from testifying.²⁶¹ Prosecutors should proactively protect victim privacy and the integrity of the prosecution by filing appropriate pretrial motions. This section will discuss the most common motions that arise in sexual assault prosecutions.²⁶²

3.2-B-1. Use Rape Shield Laws to Exclude Irrelevant and Prejudicial Evidence²⁶³

Rape Shield laws exist in every jurisdiction in the country.²⁶⁴ Their purpose is to exclude irrelevant evidence of a victim's sexual history and behavior.²⁶⁵ Whether codified in the jurisdiction's rules of evidence or in its criminal code, all such provisions require the exclusion of the victim's sexual history unless the evidence comes within a specified exception.

The most common exceptions to Rape Shield laws are:

- Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- Evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- Evidence whose exclusion would violate the defendant's constitutional rights.²⁶⁶

A common defense tactic is to attempt to introduce this evidence under one of these three exceptions, often relying on the third and final catchall for evidence whose exclusion would violate the defendant's constitutional rights. In responding to motions to admit such evidence, research the relevant case law in your jurisdiction, but do not overlook the value of research demonstrating the tenuous relevance of such evidence on issues of consent and credibility.

While the defense has the obligation to seek the court's approval before introducing evidence covered under rape shield, it is best to inquire on the record whether the defense anticipates introducing such evidence. If you are aware of prejudicial and irrelevant evidence that the defense may seek to introduce at trial, proactively file a motion to preclude it. There is little likelihood of revealing information that will be "news" to the defense, and it is far better to obtain a ruling in advance than to object after the harmful question has already been asked at trial or harmful answer elicited.

Some helpful strategies for filing, or responding to, rape shield motions include:

- Identify and familiarize yourself with the evidence in your case.
- Determine whether your statute applies only to victims or to other witness as well.²⁶⁷
- Be aware of the time requirements for defense motions and proactively inquire on the record whether the defense plans to introduce such evidence, specifying any evidence you are aware of that the defense might attempt to introduce.
- Litigate the admissibility of rape shield evidence in advance of trial whenever possible.

- If the defense disclaims any intention of introducing rape shield evidence, request an appropriate order prohibiting the defense from referring — during jury selection, opening statement, examination of witnesses, or otherwise — to the victim’s alleged sexual history or other conduct.
- If the court chooses to defer ruling on the evidence based upon a need for additional testimony, request that a hearing be scheduled without delay. If the court indicates its reluctance to decide the issue until the case has been more fully developed at trial, request an order that the defense not refer to the disputed evidence until the court has ruled on its admissibility.
- Be sure to prepare your trial witnesses (and appropriately redact exhibits such as medical history) to avoid references to evidence the court has ruled inadmissible. You do not want to inadvertently open the door to this evidence.
- File a rape shield motion whenever the prosecution wishes to introduce a victim’s/witness’s prior sexual history, if it is relevant to some issue in the case (*e.g.*, in a human trafficking case with collateral sexual assault charges).
- In cases where the victim is a sexually exploited person, determine whether that sexual history is relevant to any issue in the case and where not relevant, proactively file a motion *in limine* to exclude the history of commercial sexual exploitation.
- It is important to recognize that there may be cases in which you decide, after consulting with the victim, to introduce evidence that could be excluded under rape shield. The wisdom and desirability of presenting such evidence should be considered on a case-by-case basis after careful consultation with the victim.²⁶⁸ Remember to evaluate the significance of apparently consensual sex in a relationship characterized by intimate partner violence. What may appear to be consensual sexual activity may have been coerced in the context of the violent relationship. Such acts may be evidence supporting similar coercion in the present case.

3.2-B-2. Introduce Evidence of Other Crimes and Bad Acts Where Relevant ²⁶⁹

Federal Rule of Evidence 404 and equivalent state, tribal, or military evidence rules²⁷⁰ prohibit the introduction of evidence of a crime, wrong, or other act to prove a person’s character in order to show that that the person acted in conformity with that character trait on a particular occasion. In the criminal context, this translates to a general prohibition on evidence tending to show that the defendant has a propensity to commit a particular crime.²⁷¹ The rule, however, is often considered to be one of inclusion rather than exclusion; in particular Federal Rule of Evidence 404(b) permits evidence of such acts to prove matters other than propensity — issues such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The listed purposes are not exclusive; generally, any legitimate issue relevant to proof of the crime or of the defendant’s guilt (*e.g.*, consciousness of guilt) can be grounds for admitting such evidence. Sometimes referred to as other bad acts, such evidence can consist of uncharged or unreported acts, prior convictions, or possibly prior acts for which the defendant was acquitted of any crime.²⁷² Some jurisdictions, however, explicitly do allow propensity evidence in sexual violence cases.²⁷³

Evidence of other bad acts can be a valuable tool in sexual violence prosecutions, as it can demonstrate the predatory aspects of the defendant's acts and present a more complete picture of their criminal culpability. Prosecutors can employ the following strategies to identify and admit this evidence:

- Check your jurisdiction's law to determine the categories of other acts evidence specified in their rules of evidence (or other statutory provisions) and how those categories, and other permissible purposes for which the evidence may be introduced, have been analyzed by the courts. Especially note whether your jurisdiction permits evidence of propensity.²⁷⁴
- Review police reports, interviews, and criminal histories — and obtain the files from other cases, whether adjudicated or not — to search for relevant evidence of defendant's prior crimes or bad acts that may be applicable to the proofs in your case.
- Find out whether the victim has knowledge of others who may have been victimized.
- Some relevant bad acts may have been committed by the offender subsequent to the sexual assault. These acts may be evidence of consciousness of guilt or, when charged, substantive evidence of stalking, witness tampering, violation of court orders, etc.
- Working with law enforcement and advocates, identify witnesses to any relevant acts involving victims unrelated to the current case.
- Comply with notice provisions required by your rules of evidence, including providing discovery to the defense.
- Identify all purposes for which the evidence might be admissible.
- Be prepared to show that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.²⁷⁵
- Research the applicable case law to determine the appropriate standard of proof of the other act²⁷⁶ and the procedural requirements for a motion (*e.g.*, whether an offer of proof is sufficient or whether testimony is required).
- Consider drafting a proposed limiting instruction to be given at the time the evidence is admitted and again at the conclusion of the case. The instruction should specify the purpose(s) for which the evidence may be considered and should specifically instruct the jury not to consider it as evidence of the defendant's character or propensity to commit similar acts (unless, of course, your jurisdiction permits evidence of propensity). Providing the proposed instruction at the time of your motion may help to persuade the judge that admission of the evidence will not be unfairly prejudicial.

Ensure that the judge articulates the legal reasoning and analysis supporting a decision to permit admission of the evidence. Request that the court address each of the proffered purposes in the alternative. This can be done orally on the record or by written decision.

Here are a few examples of circumstances where other crimes evidence may be useful and probative.

3.2-B-2-A. Provide Context for Sexual Violence as Part of Broader Abusive Conduct

Acts of sexual violence are often a feature of other types of criminal conduct: intimate partner violence, human trafficking, or gang activity. In such cases, the broader course of criminal activity places the act of sexual violence in a specific context — to terrorize or control and intimate partner; maintain subjugation of a trafficking victim; punish an errant gang member or intimidate others as

part of gang activity. The overall context of the violence is important to understanding why the act was committed, its intended impact on the victim or others, and effect on victim behavior. Evidence the offender engaged in stalking, although often overlooked, may often precede, follow, or co-occur with a sexual assault.

3.2-B-2-B. Expose Perpetrator's Intent, Purpose, and Plan

In sexual violence cases, defendants will commonly raise a consent defense. Evidence of other acts can help overcome this defense by, for example, establishing the perpetrator's plan, intent, or preparation for the assault. In some cases, a defendant's methods of carrying out the assault will be so distinctive that previous assaults can be used to identify, or support the identification of, the defendant; see [3.2-B-2-E](#) below.

Other acts may help to prove the defendant's intent or plan. For example, assaults involving the same plan to offer an intoxicated victim a ride home after friends have left the victim alone at a bar helps show that this was part of a predatory plan.

3.2-B-2-C. Establish a Motive

Prior assaults of sexually exploited persons, featuring derogatory statements toward the victims, could help to prove this defendant was motivated by hatred for sexually exploited persons or the need to punish them.

3.2-B-2-D. Challenge a Claim of Mistake or Accident

Repeated accusations of assault upon a victim who was incapacitated due to intoxication would help to prove the offender was not mistaken about this intoxicated victim's ability to consent.

3.2-B-2-E. Proof of Identity

Where identity of the perpetrator is at issue, evidence of "signature crimes" may be admissible. If, for example, the defendant is on trial for an incident of sexual violence in which he abducted his victim in a public park at night, asking for help finding his lost dog, and then released the victim after apologizing and saying she reminded him of his first girlfriend, then evidence of another incident of sexual violence with those same elements, in which the defendant was positively identified, could prove he was responsible for the present assault as well. This prong of 404(b) is the most difficult to establish, and the most vulnerable to attack on appeal, because it requires the similarities be sufficiently unusual to amount to a "signature" – making it unlikely that anyone other than the defendant was the perpetrator; mere similarity and common features between the crimes are not sufficient.²⁷⁷

3.2-B-3. Proceeding to Trial on a Case with a Nonparticipating Victim

The challenges presented in the course of investigating and prosecuting sexual violence cases can be daunting. Among the most difficult of these obstacles is the inability or unwillingness of victims to participate in the process. This reluctance may be based upon a variety of factors, including the effects of trauma and/or victim's fear, shame, distrust of law enforcement, or poor treatment by the system. Though not impossible, it is extremely rare to proceed to trial without victim testimony because the

prosecution must prove that the victim did not, or was unable to, consent. Typically, this evidence of nonconsent comes in the form of the victim's testimony. Sexual violence prosecutors proceeding without the victim's testimony should consider impact of *Crawford*,²⁷⁸ potential applicability of forfeiture by wrongdoing,²⁷⁹ and the efficacy of trying the case without the victim's participation.

3.2-B-4. Guard Victim Privacy and Dignity Through Other Available Motions in Limine

Exclude prejudicial evidence:

- Work to identify potential defenses suggested by the discovery, preliminary hearings, plea negotiations, victim interview, defense interviews with fact and expert witnesses, and police investigation.
- Anticipate common defenses or defense strategies related to victim's character or intoxication.
- Move to preclude irrelevant attacks on the victim's character based upon specific acts or general reputation.

3.2-B-5. Other Potential Motions

- Consider whether to oppose a defense request for pretrial access to a crime scene that is now occupied by the victim or a third party. If access is permitted, ask the court to impose strict limitations on access. For example, law enforcement should be present to supervise the visit; scheduling should be at the convenience of the occupant (who should be able to decide whether to remain present); access should be limited to one defense attorney and one investigator, with the defendant not permitted to be present; photos and video should be prohibited; sketches or information gathered in the course of the visit should be restricted from public dissemination.
- Unless the suspect consents to any necessary physical examination or collection of biological samples, move for an order to submit to such examination or collection as soon as possible after charging.
- Oppose any defense motions for psychological or physical examination of victim.
- Litigate motions to join/sever counts relating to separate victims, multiple incidents, or multiple offenders as early as possible.
- Litigate motions related to any victims or witnesses with disabilities (*e.g.*, motion for presence of support object/animal/person; motion governing manner of cross-examination).²⁸⁰
- Where the defendant elects to proceed *pro se*, file a motion to appoint counsel for purposes of conducting cross-examination of the victim. If the motion is denied and the defendant is permitted to personally cross-examine the victim, move for limits on the conduct of the defendant during cross (*e.g.*, prohibiting the defendant from approaching the victim on the stand).
- Oppose any defense motion for production of private records or other attempts to pierce confidentiality, including victim's immigration file and application for a U Visa, where relevant.
- Move for any necessary amendments to the charging instrument not affecting the defendant's substantive rights (*e.g.*, typographical/scrivener's errors; correct language but wrong subsection specified; misspellings of names; minor corrections to dates or locations). If there is

insufficient evidence to support one or more of the counts, move to amend to a lesser-included charge or to dismiss, as appropriate. If you determine that proofs on a peripheral count are legally sufficient but weak, consider dismissing such counts if dismissal will better support your overall trial strategy.

- Submit proposed jury instructions where statutory language is untested or where special instructions are anticipated, including instructions about 404(b) evidence. See section 3.3-J below on [Final Jury Charges and Verdict](#) Sheet.

3.2-C. Construct a Compelling Case Theme and Theory That is Offender-Focused

The theme and theory are what tie the case together; they capture the hearts and minds of the factfinder, and should be woven throughout every aspect of the case from jury selection to verdict. In sexual violence prosecutions, juror expectations often demand more than the law requires. Most sexual violence laws do not require corroboration or proof of resistance, but jurors expect such evidence. In planning your trial, prepare to meet those expectations with appropriate evidence or an explanation for its absence.

“The theme [of the case] is the story’s critical element, the overarching idea that ties the other elements of the story together.”²⁸¹ A compelling theme can recreate the reality of the crime for the jury and help them connect with the victim’s experience. For a cold case, the theme might be, “For us, this might be what we call a ‘cold case,’ but *for Jane Doe, the case has never gone cold*—she has lived with this crime for every day since it happened.” Or, “*Life can turn on a dime*. On October 1, 2010, Jane was a happy and successful college student. After the events of that night, it took her five years to make sense of what happened and to trust anyone enough to tell them.”

The theory of the case is the prosecution’s version of what occurred — the events surrounding the crime and the acts and mental states (motives, reasons, thought processes) of the offender, victim, and any others involved in the case. A good case theory should leave jurors, after hearing all of the evidence, with a real sense of what happened — who did what, and why. They should *understand* the case. Unanswered questions or puzzling facts are often translated, in the deliberation room, into reasonable doubt. A good theory should account for all important facts the prosecution intends to present during trial. The case should be presented in a manner that advances the prosecution’s theory and supports it in every respect. It is important that the theory remain consistent throughout the case, and not adjusted mid-stream, in response to evidence elicited during cross-examination or the defense case; jurors will sense that the strategy has changed and may begin to doubt the prosecution’s case.

An important aspect of the theory in many sexual violence prosecutions is **victim selection**. Why did *this* offender choose to assault *this* victim? Was the victim vulnerable because of intoxication? Did the victim have emotional vulnerabilities that the offender was able to exploit? Did the offender assume, because of the victim’s personal circumstances (*e.g.*, commercial sexual exploitation, suffering from addiction or mental health issues), that the victim’s complaint would be disbelieved? Was the victim readily accessible (*e.g.*, an employee supervised by the offender)? How was the assault planned? Did the offender arrange to isolate the victim? Is there evidence of grooming behavior to gain trust, or stalking to learn when the victim would be alone?

Frankly **acknowledge facts that the defense will exploit** as unfavorable to victim — *e.g.*, willingness to exchange money for sex prior to sexual violence, the victim’s level of intoxication — and weave it into your theory of the case. Those same facts make the victim an ideal target for a sexual assault.

Anticipate the defense theory of the case, which may or may not be disclosed in the course of pretrial proceedings or the opening statement. Most often, the defense theory will, in some fashion, posit the notion that the victim’s own behavior is responsible for what occurred, and the offender is the *true* victim — of injustice. While such defense strategies are hardly original, they have become classics because of their effectiveness in distracting the jury from evidence of the offender’s purposeful conduct. A revived public awareness (*e.g.*, #MeToo movement) of the prevalence of sexual violence, perpetration tactics, and inaccuracy of many of the foundations of victim blaming has led to some reports of a dampening of the effectiveness of these attacks. Whether this will be sustained is unclear and prosecutors must not yet dismiss these defense strategies as outdated or ineffective.

During jury selection, ask questions and elicit a discussion about jurors’ understanding of, or willingness to accept expert testimony about, issues that are important to your theory of the case. Furthermore, plan to incorporate the theme and theory of your case into your opening statement. Instead of merely reciting the sequence of events, repaint for the jury the detailed, truthful account of what happened. If the victim was excited and flattered to go out with the defendant, who was captain of the football team, describe her excitement. Describe how the defendant managed to get the victim alone. Describe how the defendant reacted when the victim told him, “No — I don’t want to sleep with someone I just met.” Or describe how he kept encouraging her to drink more as he continued to flatter her. Talk about her emotional reaction the next morning — how she kept trying to make sense of what happened. Talk about how she tried to rationalize it, push it out of her mind, and go about her daily activities with memories constantly intruding, until she finally talked to a friend who persuaded her to make a report.

Provide support for the theory of the case through direct and cross-examination of witnesses.

Closing is the last opportunity to impress upon the jury the case theory. Remember, the goal is not only to remind the jury of the evidence they have heard — including the all-important corroboration of as many details as possible — but to help them make sense of it all.

3.2-D. Anticipate and Overcome Predictable Defenses Resting on Victim Blame and Shame

The typical defenses in sexual assault cases are predictable and rest on the dual strategy of distorting the significance of victim behavior — using it as a means of undermining credibility — while portraying the perpetrator’s behavior as accidental, normal, nonviolent, or welcomed. The prosecutor must carefully prepare to meet all potential defenses and defense strategies. It helps for the prosecutor to possess a certain mental flexibility to adjust trial strategy (though not the theory of the case) as the evidence unfolds in whatever way that it does. The following sections will address defenses commonly encountered in sexual assault prosecutions and strategies to overcome them.

3.2-D-1. Consent Defense

Cases of sexual violence involving the consent defense are among the most difficult a prosecutor will try. Consent is always an issue in sexual assault prosecutions even when not an available defense, or included as an element of the law.²⁸² You must be prepared to identify and introduce testimony, evidence of the victim’s words or behavior, and other circumstances that cumulatively prove the victim did not consent to the sexual conduct at issue.

Determine how consent is defined in your jurisdiction by consulting statutes and caselaw. Review reports and statements of victim and witnesses, including the defendant and defense witnesses, which provide evidence of victim's verbal and nonverbal behavior inconsistent with consent. In some jurisdictions, there are specific statutory provisions invalidating expressions of consent induced by coercion, fraud, or intoxication.

The defense strategy will be to discredit the victim's memory or perception of events (typically where alcohol is involved) or directly challenge her/his credibility, portraying the victim as having "buyer's remorse" — someone who later regrets a voluntary act. The defense may attempt to prove a motive to fabricate, question the victim about prior consensual sex with the perpetrator, pierce the rape shield, or present other evidence to impugn the victim's character for the purpose of making the jury dislike the victim. Another defense strategy is to minimize evidence of force by focusing on the victim's prior consensual acts with the perpetrator, characterizing any injury as trivial or an accidental byproduct of "rough sex." To the extent that defense strategies rely on improper evidence, they can be opposed with pretrial motions. Victim-blaming strategies not involving improper evidence can be effectively countered at trial through carefully planned testimony and argument. For example, prosecutors can ask victims to describe how they felt during SAK examinations or interviews with the responding officer, and then ask the jury why the victim would endure that humiliating process to punish someone for being merely insensitive or inconsiderate. While it is never proper for the prosecutor to express a personal belief in the victim's truthfulness, it is important to always project confidence in the victim's veracity and reality of the harm suffered.

Remind the jury that no one asks a robbery or burglary victim what they did to bring on the crime. No one would ever suggest that making a charitable donation means that one's property is free for the taking. No one would contend that allowing a plumber or house painter into the home to make repairs means that one's home can be entered at will. Unfortunately, sexual consent is somehow perceived differently. But as the examples make clear, individuals retain the right to decide whether, and under what circumstances, they allow someone to take their property or enter their homes. Consent under one set of circumstances does not imply to consent on another occasion under similar or different circumstances.²⁸³

3.2-D-2. Refute an Intoxication Defense

Even where intoxication is not a legal defense, the defendant's intoxication is almost *always* found to be relevant. The best strategy is to focus on the defendant's claim of intoxication and whether it is viable. It is also important to clearly distinguish the victim's level of intoxication from the defendant's. A person's gender, physical size, quantity of alcohol consumed, individual tolerance, and any food that was consumed are all important factors assessing the potential effects of alcohol. Consultation with a toxicologist – or with a law enforcement officer having experience assessing levels of intoxication, such as one assigned to handle impaired driver crimes – may assist in understanding the degree of intoxication resulting from drinking. Expert testimony, along with witness observations of behavior, may help to establish the extent of impairment from intoxication.²⁸⁴

Where the defendant's intoxication is at issue, present any available evidence of the defendant's purposeful acts and cognitive ability. Could the defendant drive a car, undress the victim, physically support the victim, carry on a coherent conversation? Does the defendant recall other critical details of the events surrounding the incident? Carefully review investigative reports and witness statements.

Who was buying the drinks? Did the defendant sign a bar tab? Compare signature with handwriting exemplar or other available signatures of the defendant. Did the defendant play pool, darts, or other games which require a degree of physical coordination?

Alcohol Absorption²⁸⁵

Alcohol is absorbed by passing into the blood from the small intestine; it travels through the bloodstream to get to the brain in order to have its intoxicating effect. Absorption is impacted by a variety of factors, including:²⁸⁶

- Body size
- Food
- Amount and type of alcohol
- Duration of drinking
- Fatigue
- Tolerance rates
- Combination with other drugs

All the above factors are important for investigators to consider, but the reality is that alcohol tends to have significantly different impacts on males and females.²⁸⁷ This is because alcohol is hydrophilic; it loves water. The average male is 68% water, and has a higher proportion of muscle than women.²⁸⁸ The average female is 55% water, and has a higher proportion of fat than men.²⁸⁹ These disparities have a devastating impact on rates of intoxication; a female’s blood alcohol content (BAC) is often going to be much higher than a male’s, as seen below.²⁹⁰

Table 1. Impact of Sex on Alcohol’s Absorption Rate²⁹¹

Assume each male and female in the below scenarios consume six 12-oz. beers over two hours:

Male/Female Weights	BAC	Comparative Results
140-lb. male	M = .14 – .15	Female has potentially a 20-35% higher BAC.
140-lb. female	F = .18 – .19	
190-lb. male	M = .09 – .11	Female has potentially double the BAC.
125-lb. female	F = .19 – .21	

3.2-D-3. Distinguish Between Intoxication to the Point of Blackout and Pass-Out

Blackouts are alcohol-induced periods of memory loss that occur when the brain’s ability to form long-term memories from short-term memories is destroyed.²⁹² Blackouts are not predicted by BAC only.²⁹³ They are more likely to occur when one’s BAC rises rapidly as opposed to slowly by, for example, consuming shots of liquor, or, quickly drinking a glass of wine or champagne .²⁹⁴ Generally speaking, a

person who blacks out will be showing visible signs of gross intoxication and will be drowsy or sleepy. It is critical for investigators to interview individuals who interacted with the victim at a time near the assault.

“Passing out” is alcohol-induced unconsciousness. Sedation occurs as a result of the depression of the central nervous system, and resembles the state of sedation associated with surgery. Unconsciousness can last for hours, and the groggy-sedated feeling can linger for 24 hours.²⁹⁵

Strategies for analyzing the difference between these defenses and overcoming them are in Appendix J on Overcoming the Blackout vs. Pass Out Defense.

3.2-D-4. Debunk the Mistake-of-Fact Defense by Demonstrating How the Victim Communicated Lack of Consent

Where an offense requires a particular mental state, such as knowledge or purpose, an honest and reasonable belief that precludes a defendant from forming or maintaining that mental state will preclude conviction.²⁹⁶

Mistake-of-fact defenses are grounded in the belief that if a defendant did not know, at the time of penetration or contact, that the victim had not consented to the act – and therefore the defendant should not be convicted of sexual violence.²⁹⁷ This defense is available in more than half of U.S. jurisdictions; even where the formal defense is unavailable, the court may still allow a jury instruction to that effect.²⁹⁸ The defense requires that the mistaken belief exist in the mind of the defendant at the time of the act and that the mistake be a reasonable one.²⁹⁹

Mistake-of-fact defenses often cause concern among professionals responding to sexual assault crimes because it appears to allow perpetrators a sure way to escape accountability. These fears are not entirely unfounded, because the defense has been used with a measure of success. However, prosecutors can overcome this defense by demonstrating the unreasonableness of the defendant’s professed belief (*e.g.*, extreme intoxication of the victim leading to difficulty walking or even moving), in addition to looking for evidence that discredits the honesty of the belief. For example, did the defendant say anything before or after the assault to demonstrate that he knew the victim had not consented or could not consent (*e.g.*, “She was so wasted she couldn’t even remember her own name!”). Highlighting such evidence not only overcomes the defense but also creates stronger cases. Understand the law of your jurisdiction as it applies to mistake-of-fact defenses and be prepared to rebut such defenses when advanced.

3.2-D-5. Reinforce Victim Credibility

Victim credibility is always critical, but is even more heavily scrutinized by factfinders in sexual violence cases; it is important to impress on the jury all the reasons the victim’s report and that his or her testimony should be believed.

Where the facts permit, emphasize that the victim has nothing to gain in this criminal case; the victim is not a party to the case, the state is. Further, although civil avenues are open to the victim, if the defendant is of modest means, how much is a victim likely to recover even if they were to sue? Where

the defendant has resources, explaining the financial and emotional costs of the victim pursuing a criminal and even civil case can help demonstrate how unlikely it would be for a victim to endure the litigation process unless their claim was valid.

Stress the details that corroborate the victim’s account — demeanor at the time of the report, during the SAK exam, and/or on the stand; photos of injuries,³⁰⁰ details of medical reports, prior consistent statements to other witnesses, absence of motive to fabricate (which can be contrasted with the defendant’s motive to lie to the police or while testifying). Likely, the defendant’s own statements and testimony, even those that are self-serving, will corroborate many details of the victim’s account. These details should be emphasized. If the victim acknowledges unflattering or embarrassing details, their willingness to do so supports credibility.

Contrast the plausibility of the victim’s testimony with the defendant’s version of what occurred, highlighting aspects of the defendant’s account that do not make sense or are contradicted by other evidence. Eliciting sensory details during the victim’s testimony — what the victim felt, smelled, or was thinking at the time of the assault — gives the testimony a ring of truth.

3.2-E. Where Plea Offers are Appropriate, Ensure the Agreement Reflects the Seriousness of the Assault

Following charging, prosecutors have an ethical obligation to be available to engage in plea negotiations.³⁰¹ There is no legal or ethical obligation, however, to offer a particular defendant a plea agreement of any kind in a criminal case. As part of a plea agreement, a prosecutor may commit to recommending a particular sentence, including, where applicable, conditions of probation or release.³⁰² In some cases, there is no agreement on a specific sentencing recommendation, but only to the charge(s) to which the defendant will plead guilty, with the other charges to be dismissed. Significantly, the prosecutor cannot commit to the imposition of a particular sentence; only the court has the power to impose sentences.³⁰³ At the time of a plea, the court will question the defendant to ensure that they understand the charges, their rights, and is voluntarily entering a plea. Whether a defendant must provide a factual statement in support of a guilty plea varies from one jurisdiction to another.³⁰⁴ A defendant may be permitted to withdraw a guilty plea before sentencing; in some jurisdictions the plea can be withdrawn at any time before sentencing, while others impose time limits, which may or may not be strictly enforced.³⁰⁵

Before engaging in plea negotiations, and especially before an agreement is finalized, discuss the possibility of a plea with the victim to determine their position on it.³⁰⁶ Some victims wish to avoid testifying if at all possible, while others believe the opportunity is of paramount importance and would prefer the risk of trial to the certainty of a plea, regardless of the offer. Ultimately the decision to offer a plea agreement is the prosecutor’s, but they should always consider the victim’s wishes in making that decision. In discussions with the victim, it is important to communicate your continued belief in the case, and willingness to go to trial if an appropriate agreement cannot be reached. It is also important to assure the victim that any agreement will still permit the victim to speak at sentencing about the impact the assault had on them.

Victims with mental health concerns may be advised by their doctor, family, or friends not to testify, leading the prosecutor to consider a plea to a lesser offense. In this situation, first explore alternative means to reduce stressors by requesting accommodations in the courtroom (*e.g.*, a support person,

object, or animal) to ease the victim’s anxiety and distress. In extreme cases, where there is a risk of serious emotional harm to the victim as a result of testifying, the most appropriate disposition is the one that ensures victim safety – the top priority.

Plea negotiations can occur at any time after arraignment and, technically, up until the return of a verdict. Defendants are frequently reluctant to plead guilty to sex offenses because of the collateral consequences, including registration requirements, so it is not unusual for these defendants to offer to plead guilty to a non-sexual offense (such as kidnapping or aggravated assault), even for a lengthy prison term. Such pleas are often perceived as contradictory to the prosecutor’s mandate to seek justice and protect the public, which has a strong interest in exercising maximum control over individuals who have committed sex crimes. Sometimes the prosecutor will determine that only a trial will satisfy the interests of justice in a particular case. In such circumstances, a defendant who wanted to avoid a trial could plead guilty to all of the charges without a recommendation as to sentence. If there is a recommended sentence, it is important to note that courts are not bound by plea negotiations and may determine the recommended sentence is either inappropriately lenient or severe. The court has the power to “undercut” the agreement, but not impose a greater sentence; if the court believes the sentence is too lenient and is unwilling to impose it, the defendant has the right to withdraw the plea.³⁰⁷

A plea in a sexual assault case can be appealing where evidence is scarce or so complex that the prosecutor is concerned about juror perceptions. Plea agreements may be appropriate as a means of conserving finite resources, *provided that an appropriate outcome can be achieved* without a trial. It is important, however, for prosecutors to examine their motives — particularly where the agreement under consideration involves a plea to a non-sex offense or a sentence significantly lower than what could be achieved after conviction at trial. It is important to ensure that the reasons for considering such a plea are not attributable to causes that can be remedied by meticulous preparation; increased efforts to understand the evidence or engage the victim; additional investigations; further consultation with experts, technical assistance providers (such as AEquitas), or colleagues who can provide mentoring with regard to gaps in trial skills or techniques; supplementary review of the relevant research (both legal and non-legal), and a continued willingness to explore alternative strategies to prove the case. Most of the problems encountered at trial, and their solutions, are addressed within this RSVP Model.

It is important to be consistent across various office units with regard to what is considered an acceptable outcome — one that ensures community safety and satisfies the need for general and specific deterrence as well as the victim’s wishes. Making informed and responsible plea offers allows resources to be expended on cases where no such resolution can be reached. Recognize the value to the victim and the community in trying complex cases versus pleading them for charges/sentences substantially less than the crime warrants.

A Note on Pleading Down Cases Involving Victims with Mental Health Concerns

As set forth above, victims with mental health concerns may be advised by their doctor, family, or friends not to testify, leading the prosecutor to seek a plea for a lesser offense. If this occurs, first explore alternative means to accommodate and reduce stressors to the victim, such as requesting a closed courtroom or a support person. Another option may be to argue that the victim is unavailable and seek to admit evidence of prior statements through *Crawford* and under an existing hearsay exception. In all circumstances, prosecutors should foremost consider the victim's safety and make decisions in consultation with experts and collaboration with service providers.

3.3. Try the Case

3.3-A. Final Pretrial Conference: Review Charges, Jury Instructions, Any Special Considerations

The final pretrial conference is the time to address any final issues before jury selection.

- Be sure all counts and language of the charging instrument are accurate.
- Provide the court with any requested jury instructions, along with a short trial brief to explain the basis for your requests. Be sure to review any model or pattern jury instructions to be sure the language is appropriate for your case and propose any necessary changes or new instructions you would like for the court to give at the conclusion of the case.³⁰⁸
- Confirm with the defense and with the court any stipulations agreed to, and decide how they should be communicated to the jury.
- Review any courthouse security concerns and request that the court enter any appropriate orders to prevent or address intimidation during the trial.
- Review witness lists for both the prosecution and the defense.
- Advise the court of any concerns regarding scheduling, particularly to avoid lengthy waiting times for any experts who may have demanding schedules, and the victim.

Immediately before trial, ensure that all exhibits are present, and personally examine any items such as clothing to ensure that the condition and contents of exhibits are as they should be. The jury should not encounter anything unanticipated when the exhibits are taken back to the jury room (*e.g.*, an overlooked baggie of drugs in the pocket of a jacket).

Assign an investigator or advocate to keep the victim informed about the daily progress of the case, being careful to observe sequestration concerns by not disclosing details about evidence or testimony.

3.3-B. Keep the Focus on the Offender and Defend Against Strategies Designed to Prejudice the Jury Against the Victim

At trial, it is important to paint the reality of the crime. Imagine yourself painting a picture or creating a movie scene to show the jury how the events unfolded. Images — photos and diagrams of the crime scene — help to make it real for the jury. Suppose a victim reports they allowed the offender to come in to use the bathroom. A diagram showing the location of the front door, the bathroom, and the furniture will help

the jury to understand that when the offender walked in the opposite direction from the bathroom to assault the victim in the living room, his intention all along was not to use the bathroom but to assault the victim.

Take the victim step by step through the events leading up to the assault. For example, if the victim met the offender at a party that night, have the victim describe how they met, what they talked about, what the victim noticed about the offender — nice smile, engaging personality, funny, attentive. Ask if the victim liked the offender. Ask whether that feeling changed at some point during the evening. When did it change? At some point, the offender became frightening and powerful. A great question to ask is, “When did you realize you were in danger?”

Some jurors may be inclined to think, “Well, she was drunk, she went to his room, what did she think would happen?” It is important for all jurors to understand that what the victim *thought* would happen was that she was going to get to know him better and have a nice time, but not that he would commit sexual violence. No one has ever been assaulted because they got drunk. People are assaulted because there was a rapist who was looking to take advantage of someone who was drunk, unconscious, or incapable of walking, talking, or moving. Some drunk people get sick or need help; rapists will go through the motions of appearing to help these people, but are actually isolating the victim in order to assault them.

Additionally, throughout the trial, consider and uphold victims’ statutory rights, which may include (but are not limited to) the rights to fairness, dignity, and respect. These rights should be emphasized throughout trial and when filing motions *in limine* to mitigate defense attempts to unfairly characterize the victim.³⁰⁹

3.3-B-1 Satisfy the Elements

See [Appendix E](#) for the Charging Tool to ensure all the elements of the charged crime are satisfied.

3.3-C. Educate the Jury Panel and Select an Unbiased Jury

The jury selection process is the first opportunity for a prosecutor to begin educating jurors in a sexual violence case and allows prosecutors to identify and strike jurors whose biases will interfere with their ability to follow the law and render a fair verdict. Using deliberate and thoughtful language when explaining the facts of the case, providing context for victim behavior, and inquiring about jurors’ life experiences can help prosecutors dispel myths and counter the defense strategies that seek to exploit them.³¹⁰

Jury selection and juror education are critical to success in these cases. There are so many myths and misunderstandings about sexual violence, rapists, and sex assault victims that everyone has heard and some have embraced. Even with increased public awareness around sexual violence, many people still believe that most rapists are strangers and use deadly weapons and/or inflict serious physical injuries upon their victims. The truth, of course, is that most rapists are known to the victim and the weapons of choice are betrayal of trust, careful planning, and alcohol or drugs. Jurors must be educated about this not only during *voir dire*, but throughout that course of the trial. A good *voir dire* sets the stage for empanelling a jury ready to listen, with open minds, to the prosecutor’s evidence and arguments.

*Successful juror education begins with voir dire, continues throughout the entire trial, and culminates with a strong closing argument. An appreciation of the facts about sexual violence is key to that success. A skillful jury selection is only the initial step in an effective prosecution strategy that will yield the best possible result in prosecuting these difficult cases.*³¹¹

Practices surrounding jury selection vary among jurisdictions. In most, the prosecutor can ask questions, speaking directly to the prospective jurors. In some jurisdictions, only the judge is permitted to question members of the panel, though the parties are permitted to submit requests that the court ask certain questions. Be familiar with the number of peremptory challenges permitted to each side.

There may be sexual violence survivors on the panel. Protect their privacy and have an advocate on hand, or at least know where to refer survivors, if anyone needs to talk to one after being excused.³¹²

- Select jurors who are open-minded, free of bias, and committed to listening to evidence — those who will be fair to both sides.³¹³
- Be familiar with the judge’s practice regarding peremptory challenges and those for cause.
- Challenges for cause should be based on the record and stated respectfully, particularly if made in the presence of the panel.
- Be familiar with jurisdictional case law concerning the qualifications to serve and grounds for excusing jurors for service (*e.g.*, criminal convictions, illness, personal business).
- The defendant should be present and permitted to listen to any sidebar discussions.
- Select jurors who will render a verdict based on the evidence, applying the law as instructed.
- Craft jury questionnaires or submit questions that seek to uncover bias if *voir dire* is limited.
- Prepare the jury for your theme and theory of the case.
- Ask questions based upon common experiences to lay the groundwork for evidence to be offered at trial, like delayed disclosure or inconsistent statements (*e.g.*, “Have you ever experienced something that caused trauma, embarrassment, or shame? Did you want to tell people right away?”).
- If the defense challenges for cause a panelist you would like to retain, request the opportunity to rehabilitate.
- Know the law concerning impermissible peremptory challenges under *Batson* and its progeny.³¹⁴ Be prepared to defend your own challenges and oppose any improper challenges by the defense that result in the impermissible exclusion of potential jurors.
- Observe nonverbal cues or body language, noting them to support a challenge for cause or to defend exercise of a peremptory challenge.³¹⁵
- If jury position determines who will be the foreperson of the jury, make a special effort to ensure that a favorable juror exhibiting leadership qualities is selected for that position.

3.3-D. Open Your Case Advocating for Justice

Craft a compelling opening statement that addresses the reality of the crime, including the most significant facts, with a focus on what the offender did to perpetrate the crime.

- The opening should be a general roadmap, not an itinerary with details of every roadside stop. Your goal is to give the jury an overview of where they are headed, not turn-by-turn directions.
- The opening is also not the place for argument; save that for summation.
- Introduce your theme and preview the State’s theory of the case, as well as the kinds of evidence you anticipate to introduce at trial.
- Highlight evidence that merits special attention so the jury will not miss its significance during testimony.
- Place the crime and the evidence with which you intend to support it in context (by describing the setting or how the victim and the perpetrator first made contact).
- Describe evidence honestly as part of the reality of the crime, including any evidence which may be viewed as negative.
- Be cautious in predicting exactly how your victim will testify. A general statement to the effect that the victim will tell you, in their own words, what they experienced that day is enough.
- Where relevant and permissible, discuss the anticipated substance of expert testimony in connection with evidence — for example, “You will hear the testimony of Judy Advocate, who has worked with hundreds of sexual violence victims over the past fifteen years, to explain that victims have very individual responses to a traumatic event like sexual violence, and that it takes many of them time to process what happened to them before they are able to tell anyone.”
- Remind the jury that at the end of the trial, you will have the opportunity to review the evidence with them to think about how it all fits together. Express your confidence that, after hearing the court’s final instructions on the law, the jury will return a verdict finding the defendant guilty of the charged offense(s).

3.3-E. Use Direct Testimony, Witness Order, Introduction of Evidence, and Trial Strategy to Recreate the Reality of the Sexual Assault for the Jury

Develop a strategy for witness order, based on facts and circumstances of the case, allowing for the needs of the victim and other witnesses. Calling the victim early in the case may reduce the anxiety of waiting to testify. It may be useful to first call one or two other witness to provide brief testimony setting the scene — perhaps the first responding officer, a witness who was with the victim during the events leading up to the incident of sexual violence, or one to whom the victim made an excited utterance immediately after sexual violence. Where you anticipate the victim may exhibit behaviors linked to their trauma – such as a flat affect or giggling during testimony – you may want to consider putting on your victim behavior expert first so that the jury will view the victim’s testimony through a trauma-informed lens.

Direct examination of the victim is the lifeblood of the case. Carefully prepare the victim to testify, and corroborate their testimony with evidence from secondary witnesses. Remember to elicit sensory details about the sexual violence, as well as the victim’s emotional and physiological responses. This evidence

helps forge a powerful connection with the jury, who can relate to the victim’s reactions based upon their own knowledge of human experience. A useful approach to the examination is to first cover the basic chronology of events, then make a second pass going into significant details, and finally return to summarize the most important points.

Avoid asking questions that sound accusatory — “Why didn’t you scream?” “Why did you wait till the next day to tell anyone what happened?” “Why didn’t you leave when he became aggressive?” Instead, ask the victim to describe the situation, and what they were thinking about, or concerned about, when certain things happened. “How loud was the music at the party?” “What was going through your mind when you got up the next day?” “How did you feel when he grabbed you by the arm and pulled you toward him?” Ask questions that mirror your trauma-informed interview with the victim; *e.g.*, “Are you **able** to tell the jury what happened after he got you alone in the back room?”

Remember, there are no “bad facts” in these cases. The truth is the truth, and there is great power in the truth. The fact that the victim was drinking, or was using drugs, is part of the reality of the case. It enables you to emphasize the offender’s choice of victim — that he selected someone who was significantly impaired — suggesting planning and premeditation on his part.

Pay attention during the victim’s testimony for especially powerful phrases about what the victim experienced, or what the offender did, that effectively cut through all the defense arguments about motive to lie. Use those quotes in your summation.

Be mindful of the psychological and emotional toll that testifying in court will have on the victim. Be sure that a support person is available and request a break if the victim is becoming overwhelmed or exhausted. It is also important to coordinate with the judge and court staff to identify and address any attempts to intimidate the victim inside the courtroom.

Be careful to request limiting or curative instructions, where appropriate (*e.g.*, in connection with “other bad acts” evidence or the inadvertent eliciting of improper evidence), even if the defendant fails to do so. Reversals and retrials are very difficult for victims and witnesses, particularly in sexual violence cases. Allowing significant defense errors to go uncorrected can result in reversal — perhaps years later — on a petition for post-conviction relief based on ineffective assistance of counsel. That serves neither justice nor the victim.

Preparing the Victim for Trial

Thoroughly prepare the victim for direct and cross-examination prior to trial. Explain the significance of the questions you’ll be asking the victim (*e.g.*, to help establish an element of a crime or convey the victim’s experience of the crime to the jury), and express the importance of truthful and complete answers. In preparing victims for cross-examination, it is important to emphasize that the prosecutor’s office believes the victim and the purpose preparation is to ensure that the victim is not caught off guard by the defendant’s attorney during trial. Instead of preparing the victim for cross by asking, “Why did you do ‘X’?” ask, “If the defense were to ask ‘X,’ how would you respond?”

3.3-F. Plan Cross-Examination Strategy

If the victim has been properly prepared for cross-examination, this portion of the victim’s testimony should not present any surprises. If any questions are objectionable, make the objections promptly. If it appears that the questions are approaching areas that have been the subject of a pretrial ruling precluding such evidence, request a sidebar to remind the court, and counsel, of the order. If the victim is becoming distressed or upset by the questioning, determine whether the questions or tone are objectionable, or whether the victim is simply reacting to proper attempts to challenge credibility. In the latter case, a short break might give the victim an opportunity to regroup.

After cross is completed, consider whether it left any erroneous impressions requiring clarification on re-direct. If not, excuse the victim. Remember, any re-direct allows further cross-examination to the extent of areas covered on re-direct. There is no point in having the victim recount the same testimony and be subjected to another round of cross.

Regarding defense witnesses, formulate a cross-examination strategy that supports the theory and theme of your case. Listen carefully to the testimony of defense witnesses, particularly the defendant. Focus on internal inconsistencies or implausible testimony, as well as inconsistencies with prior statements.

Defense witnesses can be impeached by showing they have deficient personal knowledge, impaired memory,³¹⁶ a lack of opportunity to observe, or bias in favor of the defendant. Listen carefully to nuances in the testimony suggesting any hesitation or discomfort and follow those up with further questions. Determine what the goal of witness testimony is, as it relates to the defense, and focus your cross on undermining that goal.³¹⁷

Observe the demeanor of defense witnesses, particularly the defendant, and comment during summation on any evident evasiveness or hostility — unless, of course, the victim also exhibited problematic demeanor during cross. In that case, it is probably best to avoid comment on demeanor.

3.3-G. Where Appropriate, Introduce Expert Testimony to Enable the Jury to Decide the Case Fairly

Strategize about the optimal time for the expert(s) to testify, considering the most effective point in the case and the expert’s schedule. To the extent possible, avoid calling successive expert witnesses; you do not want to overwhelm the jury with too much expert testimony at once. Refuse any defense offers to stipulate to qualifications; you want the jury to hear the details about the expert’s qualifications and extensive expertise.

Take the time to allow the expert to explain the theory underlying the testimony, and the process involved in testing lab samples. Use of charts or exhibits, such as anatomical models or diagrams of a DNA molecule, can be useful to help the jury more clearly understand what the expert is telling them. If asking for an opinion on a hypothetical question, be sure the elements of the hypothetical are supported by evidence admitted at trial.

There are several areas of expert testimony that must be avoided and are considered a ***danger zone*** because they can result in mistrials or overturned convictions. These include prohibitions against:

- Opinions as to the veracity of victim or witness statements.
- Opinions about defendant’s guilt or innocence.
- “Profile” testimony — whether the defendant or the victim exhibits the characteristics of a perpetrator or victim.
- Testimony about statistics (in some jurisdictions).³¹⁸
- Testimony about statistics on false reports of sexual violence (in all jurisdictions).

Determine whether it is appropriate to recommend a cautionary instruction on the expert’s testimony, informing the jury about the purpose of expert testimony, and reminding the jury that it is free to accept or reject all or any part of the expert’s testimony. Many model or pattern jury charges include such an instruction, which may be given at the time the expert testifies and again at the conclusion of the case.

Before Resting Your Case

Before resting your case, ensure all exhibits to be admitted have been admitted. Inquire on the record (outside the presence of the jury) whether the defense intends to seek an “adverse inference” instruction telling the jury it may draw an adverse inference from the State’s failure to call a particular witness. If so, resolve that issue, requesting a brief continuance to produce the witness if the court is inclined to give such an instruction.

3.3-H. Protect the Record for Appeal

“Obtaining a conviction in a sexual assault ... case is usually a hard-won victory, whether by guilty plea or by trial. Having finally achieved a measure of justice in such a case, the last thing the prosecutor wants is to be forced back to the drawing board to re-try (or to re-negotiate) the case due to reversal on appeal. During the months or years it takes for a case to wind its way through the appellate process, evidence loses its freshness, memories fade, and witnesses who were cooperative during the initial proceedings may now be difficult to locate or reluctant to testify a second time. A reversal on appeal can be devastating to the victim, who may have been progressing in their recovery not only from the act of violence itself, but from the stress and uncertainty that accompany the criminal trial process.”³¹⁹

3.3-I. Deliver a Compelling Closing Argument

The structure of your planned closing argument should be in mind before you begin jury selection. Every piece of evidence should contribute to the argument you intend to advance. The summation should pull together all the pieces of evidence from the exhibits and testimony of various witnesses, in a way that will ultimately makes sense to the jury. Jurors should walk into the deliberation room with a sense that they finally understand how the pieces of the puzzle fit together, and now understand what happened and why. Continually return to the theme and theory of your case — these provide the framework within which you want to have the jury consider the evidence. You may decide to utilize technology, such as PowerPoint or a similar platform, if it enables you to present your argument in a succinct and effective format.

Remind the jury that the case is entitled “State [or People] v. John Doe.” It is not a private dispute between the victim and the defendant, nor is the victim on trial. The entire purpose of the trial process is to determine whether *this defendant* has violated the law under criminal statutes.

Whether members of the jury approve of everything the victim did, or would behave in the same way, is not the issue. Whether the jury “likes” the victim is not the issue, either. The only question the jury needs to consider about the victim is whether they believe the victim was truthful about what happened. Address victim characteristics that you believe may cause jurors to judge or dislike the victim or their lifestyle by inviting jurors to consider whether these are the very characteristics that led the defendant to believe the victim could be assaulted without consequences — that the defendant was *counting* on the prospect that no one would listen to this victim, take this victim seriously, or care what happens to this victim. This type of argument helps to put the jury in the position of viewing the victim as an underdog — someone unjustly victimized and deserving of protection.

Return to the question of whether the victim was truthful and should be believed, and recount the evidence supporting and corroborating various aspects of their testimony. Talk about the inherent plausibility of the victim’s testimony, the ring of truth as the victim described a terrifying and traumatizing experience. If the victim used any particularly memorable statements while testifying, this is the place to quote them.

Avoid merely repeating what each witness testified to; the jury heard the testimony and can request a read-back if there is anything they do not remember. The prosecutor’s job is to put this mountain of evidence in some kind of order so it makes sense.

Be precise, succinct, and organized in your summation. Try not to be repetitious, though a repeated refrain or phrase related to your theme can be an effective rhetorical device. Point out inconsistencies, contradictions, inherently unbelievable aspects of the testimony of defense witnesses, and defense statements inconsistent with the physical evidence.

Focus on the legal elements and talk about reasonable doubt. The defense will undoubtedly make reasonable doubt the centerpiece of its closing argument. Reasonable doubt is not “beyond all doubt.” Find out how your model jury charges define “reasonable doubt” and talk about your case in those terms. Express confidence that after the judge has instructed them on the law and they have considered all of the evidence proving the elements of the offense, they will reach the correct verdict of “guilty.”

- Avoid any expressions of personal opinion. Use rhetorical questions to accomplish the same goal. “Does it make sense that the defendant would...?” “Why would the victim...?”
- Avoid injecting your own training and expertise into summation. Summation must be based on evidence admitted at trial and reasonable inferences that can be drawn therefrom.
- Do not compare the defendant to an animal or disparage the defense as relying on “trickery.”
- Do not ask the jurors to put themselves in the shoes of the victim; rather, ask them to imagine how this victim must have felt, as it pertains to the victim’s thoughts, acts, or behavior.
- Do not suggest that an acquittal would endanger the victim or others.

3.3-J. Final Jury Charges and Verdict Sheet

- Resolve any final issues with the proposed jury charges, including any proposed by the defense.
- Instructions to consider lesser-included offenses should be given if the evidence arguably would support a finding of not guilty on the greater offense and guilty on the lesser charge.³²⁰
- Review the proposed verdict sheet. Are any special interrogatories (*e.g.*, special sentencing enhancement factors) necessary? Are all lesser-included offenses included? Are the instructions on the verdict sheet (*e.g.*, if not guilty on this count, proceed to consider the next count) easy to follow?

Be sure the victim is advised when the testimony is drawing to a close, in the event the victim wishes to be present for closing argument. The prosecutor and advocate should carefully discuss options with the victim to help inform the victim's decision. Some victims want to be present for argument; others might find it distressing to listen to the defense argument. Regardless of whether the victim wishes to attend summations, find out whether the victim would like to be present when the verdict is returned. Find a way to contact the victim for the verdict, and ascertain how much time travel time would be needed for the victim to come to court. Determine if the court is willing to accommodate a brief delay in return of the verdict to allow the victim to be present; otherwise, the victim may have to wait at the courthouse if they wish to be present.

3.4 Post-Verdict Considerations

3.4-A. Guilty Verdict/Guilty Plea

- Move to revoke bail and set a date for sentencing with sufficient time to conduct the pre-sentence investigation and any necessary sex-offender evaluation.
- Spend time with the victim to explain the plea or verdict, answer questions, and express appreciation for victim's participation. Close collaboration with victim witness personnel or victim advocates are key to providing support where a victim experiences a myriad of emotional responses to moving into this phase of the response.
- Explain the range of potential sentences and provide a realistic idea of where in that range the court is likely to sentence. The victim should not have unrealistic expectations of a lengthy prison term if the court is likely to order probation or the minimum prison term in light of the absence of prior convictions. Assure the victim that there will be an opportunity at sentencing to tell the court about the impact of the crime on the victim, as well as any preferred outcome.
- The prosecutor or advocate can assist with preparing a victim-impact statement, including requests for restitution.
- Prepare the victim to be interviewed in regards to the pre-sentence investigation if they consent.
- Review and re-evaluate victim protection considerations.
- Explain what the victim must do to ensure notification of any appeals, change in custodial status, or probation/parole proceedings.

3.4-A-1. File a Detailed Pre-Sentence Memorandum

- Review statutory provisions regarding sentencing.
- Highlight any aspects of the case supporting statutory aggravating factors. Explain why mitigating factors do not apply.
- Cite any applicable caselaw pertaining to sentencing.
- Note any mandatory penalties and the applicability of any special sentencing provisions pertaining to sex offenses (e.g., mandatory evaluation or treatment; registration requirements).
- Allow the victim an opportunity to speak or have their statement to the court read at sentencing. Advise the court whether the victim wishes to speak at sentencing or to submit a statement in writing.³²¹
- Prepare the victim for the defendant's allocution. What the defendant will say cannot be predicted. Some are tearful and apologetic; some are angry and continue to insist on their innocence. Assure the victim that whatever the defendant says will not undo the verdict. Explain that courts often do not look kindly on defendants who refuse to accept the jury's verdict. The victim can simply consider the source — this is the same person who committed sexual violence against the victim.
- In the event a probationary sentence is a possibility, propose any appropriate conditions that will support victim safety and offender accountability.

3.4-A-2. Argue for an Appropriate Sentence

Review the pre-sentence report for inaccuracies or omissions, bringing any errors to the court's attention. At sentencing, do not repeat every detail of your sentencing memorandum, but summarize the factors the court should consider, emphasizing the most important. Request that the court impose the specific sentence you have recommended. If the victim is present and wishes to speak, ask for the court's permission to do so. Be sure that the court does not inadvertently fail to ask the defendant whether they wish to speak before sentencing; failure to permit the defendant to speak can result in a remand for a new sentencing proceeding.

3.4-B. Acquittal

3.4-B-1. Communicate Verdict to the Victim:

With a not-guilty verdict, or a guilty verdict on a lesser charge, explain that such a verdict does not necessarily mean that the jury disbelieved the victim; it simply means the jury had a reasonable doubt, based on all of the evidence in the case, about some element of the crime as defined in the statutes. This is a message that should be communicated throughout the course of the case. Allow the victim to express any anger, frustration, or disappointment they might be feeling. Answer any questions about what can be done to assure the victim's continued safety.

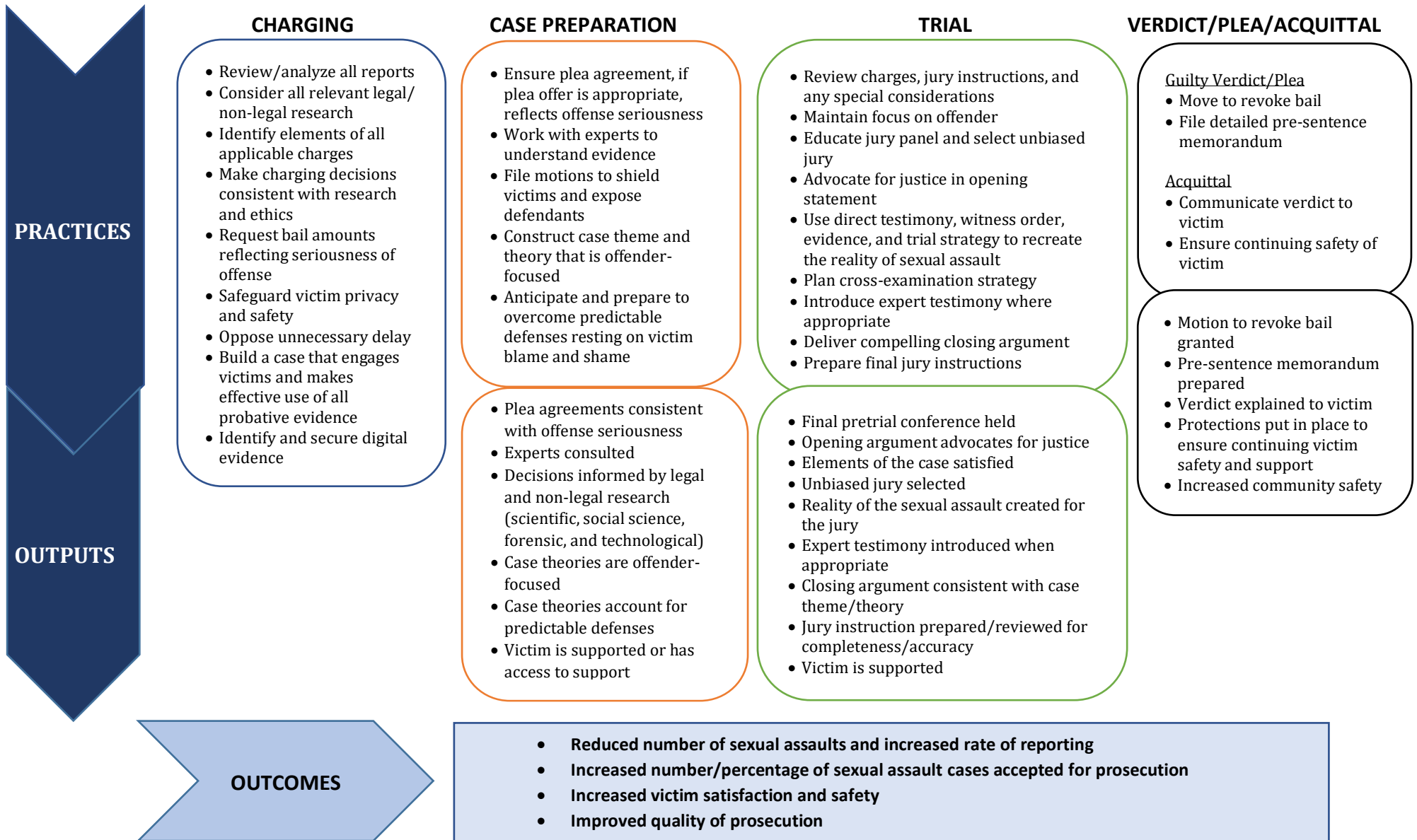
The verdict should not affect any civil orders of protection and even if one was not in place previously, the victim may now be able to obtain one. If the victim has a civil attorney, coordinate with that attorney to follow up with any necessary proceedings.

Express your appreciation for the victim’s courage in participating in the process all the way through to the end. Explain that if the defendant has other open cases, depending on the specific rules of the jurisdiction where the trial is pending, the victim in this case may still be a potential “other crimes” witness in the other cases. Also remind the victim that the trial itself may help to deter the defendant from future offending and that the evidence uncovered in this case may help to identify other victims the defendant may have previously assaulted.

3.4-C. Post-Trial Debrief

Large and medium-sized offices should encourage selected case debriefs throughout the year. Prosecutors should debrief with colleagues on significant aspects of the case — from the first point of engagement with the victim through the final disposition — to identify and discuss any evidence missed, and any interaction, interview, investigation practice, or litigation method that was problematic. Prosecutors should consider both adverse and successful aspects of the proceedings and prosecutorial decision-making to learn from mistakes, identify emerging issues, and share successful strategies. Receive any criticism respectfully and with an open mind, rather than responding defensively; there is no need to apologize for decisions or actions you are convinced were the right ones, but mistakes should be acknowledged. In smaller offices, it may be necessary to seek prosecutors in your larger network with whom to debrief as a way of improving your practice. Debriefing with national technical assistance providers, like AEquitas, is also helpful to sharing information and lessons learned with the larger field.³²²

EXHIBIT 3-1
Case-Level Conceptual Model 323



References

- ¹ Studies of the results of backlogged sexual assault kit testing in Cleveland, Memphis, and Detroit have revealed over 1,250 suspected serial rapists, in those three cities alone, who have been linked to assaults occurring in at least 40 states and the District of Columbia. *Test Rape Kits. Stop Serial Rapists.*, END THE BACKLOG, <http://www.endthebacklog.org/backlog-why-rape-kit-testing-important/test-rape-kits-stop-serial-rapists> (last visited June 8, 2017).
- ² Bea Hanson, *The Importance of Understanding Trauma Informed Care and Self-Care for Victim Service Providers*, OFFICE OF VIOLENCE AGAINST WOMEN: BLOG (July 30, 2014), <https://www.justice.gov/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.
- ³ See Michele C. Black, et al., *National Intimate Partner and Sexual Violence Survey, 2010 Summary Report*, CTR. FOR DISEASE CONTROL (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.
- ⁴ See PATRICIA TJADEN AND NANCY THOENNES, *EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY*, NAT'L INST. JUST. (Jan. 2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.
- ⁵ See Rebecca Campbell & Sharon Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20(1) J. INTERPERSONAL VIOLENCE 127-131 (2005).
- ⁶ See *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME (2012), <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization> (last visited Mar. 29, 2017).
- ⁷ See Jennifer Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, 12 STRATEGIES (Apr. 2014), available at: <https://aequitasresource.org/wp-content/uploads/2018/09/beyond-conviction-rates.pdf>; Jennifer Long, et al., *LEGAL ISSUES IN SEXUAL ASSAULT FROM A PROSECUTOR'S PERSPECTIVE*, AEQUITAS (GLENN Whaley 2015) (unpublished comment). See also Viktoria Kristiansson & Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 STRATEGIES (Feb. 2015), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Integrating-A-Trauma-Informed-Response-In-VAW-and-HT-Strategies.pdf>.
- ⁸ See Amy Cohn, et al., *Correlates of Reasons for Not Reporting Rape to Police: Results from a National Telephone Household Probability Sample of Women with Forcible or Drug-or-Alcohol Facilitated/Incapacitated Rape*, 28(3) J. INTERPERSONAL VIOLENCE 455-73 (2013).
- ⁹ See SUSAN HERMAN, *PARALLEL JUSTICE FOR VICTIMS OF CRIME* (Nat'l Ctr. for Victims of Crime 2010).
- ¹⁰ Attrition studies show that many cases are not investigated or are declined for prosecution because they are perceived to be too difficult to prosecute or unlikely to result in a conviction. These perceptions are seldom based on the legal standards for charging, but rather are grounded—consciously or unconsciously—on sexual violence myths such as those about victim credibility, the relationship (if any) between victim and offender, and the age, race, and socioeconomic status of the victim or offender. See generally, Rodney Kingsnorth, et al., *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecution and Sentencing*, 26(5) J. CRIM. JUST. 359-71 (1998); Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48(2) SOC. PROBLEMS 206-35 (2001); and Sharon Murphy, et al., *Pathways To Justice: Movement Of Adult Female Sexual Assault Cases Across The New Hampshire Criminal Justice System*, Univ. N.H. (Jan 2012).
- ¹¹ See generally, Joseph Peterson, et al., *Sexual Assault Kit Backlog Study: Final Report*, NAT'L INST. JUST. (Mar. 2012); Mark Nelson, *Making Sense of DNA Backlogs—Myth Versus Reality*, 226 NAT'L INST. JUST. J., 20-25 (May 2010).
- ¹² See TJADEN & THONNES, *supra* note 4.
- ¹³ See Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y Rev. 461 (2005).

¹⁴ See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited August 12, 2019).

¹⁵ See Rebecca Campbell, et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, 20(5) VIOLENCE AGAINST WOMEN 607-25 (2014), available at <https://vaw.msu.edu/wp-content/uploads/2014/06/Violence-Against-Women-2014-Campbell-607-25.pdf>.

¹⁶ CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM 101 (2014).

¹⁷ Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18(2) VIOLENCE AGAINST WOMEN 160-192 (2012).

¹⁸ See April Pattavina, Melissa Morabito & Linda Williams, *Examining Connections Between the Police and Prosecution in Sexual Assault Case Processing: Does the Use of Exceptional Clearance Facilitate a Downstream Orientation*, 11(2) VICTIMS & OFFENDERS (2016). Downstream decision-making occurs where criminal justice professionals decide not to investigate or refer a case for prosecution, based upon their perception that a particular type of case will be declined by prosecutors or by their prejudgment of the merits of the case — that a jury will not convict. See also MELISSA MORABITO, LINDA WILLIAMS, & APRIL PATTAVINA, DECISION-MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. (February 2019), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf>.

¹⁹ For review of literature on attrition rates in sexual assault cases, see AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017).

²⁰ For review of literature on the backlog of untested sexual assault kits, see AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017).

²¹ See, e.g., T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, THE MARSHALL PROJECT & PRO PUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>; and Alison Knezevich & Catherine Rentz, *Maryland Lawmakers Call for Uniform Police Standards on Rape Kits*, BALTIMORE SUN (Dec. 9, 2016), <http://www.baltimoresun.com/news/maryland/politics/bs-md-rape-kits-reaction-20161209-story.html>.

²² For review of literature on performance measures, see AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017); and MARTIN WOOD, ET AL., VICTIM AND WITNESS SATISFACTION SURVEY, CROWN PROSECUTION SERVICE (Sept 11, 2015).

²³ Please note that sexually exploited persons may not self-identify as victims of sexual violence. See Colleen Owens, et.al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, URBAN INSTITUTE (Apr. 2012), available at <http://www.urban.org/publications/412592.html>.

²⁴ See LONG & NUGENT-BORAKOVE, *supra* note 7; and Rebecca Campbell, et al., *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP)* (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf>.

²⁵ While the RSVP Model is written for sexual violence cases involving adult victims, parts of it may be relevant to cases involving child, adolescent, and elder victims.

²⁶ *Sexual Assault Justice Initiative: Promoting and Measuring Success in Sexual Assault Prosecutions*, AEQUITAS, <https://aequitasresource.org/singleinitiative/?initiativeId=%204> (last visited Apr. 7, 2017). In an effort to address the issues raised by the limited research available, AEQUITAS convened a Roundtable on Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases. Prosecutors and experts representing other allied professions were brought together to discuss the elements of effective prosecution and the limitations of using conviction rates as the sole measure of success in sexual assault cases. See AEQUITAS, *Valuing Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases: Summary of a Roundtable Discussion* (2014).

²⁷ “Outcomes reflect the long-term change that is envisioned (*i.e.*, what will be different as a result of the activities).” See LONG & NUGENT-BORAKOVE, *supra* note 7. Positive case outcomes in sexual violence cases include a broader sense of safety and justice for the victim as well as offender accountability, punishment/retribution, deterrence, rehabilitation, and restoration. See also AEQUITAS, *supra* note 26.

²⁸ See *Berger v. United States*, 295 U.S. 78 (1935).

²⁹ These principles can be promoted formally, through use of written protocols, or informally, by simply incorporating them into practice and promoting them through informal training and mentoring of newly-assigned prosecutors.

³⁰ See VIKTORIA KRISTIANSOON, AEQUITAS, CAMPUS-RELATED CRIMES OF SEXUAL VIOLENCE: TRIAL PACKET FOR PENNSYLVANIA JUDGES 18 (2016) (citing Rebecca Campbell, et al., *Responding to Sexual Assault Victims’ Medical and Emotional Needs: A National Study of the Services Provided by SANE Programs*, 29(5) RES. IN NURSING & HEALTH 384 (2006)).

³¹ See Jennifer Long & John Wilkinson, *The Benefits of Specialized Prosecution Units in Domestic and Sexual Violence Cases*, 8 STRATEGIES IN BRIEF, 1 (December 2011). available at: https://aequitasresource.org/wp-content/uploads/2018/09/Benefits_of_Specialized_Prosecution_Units_in_Domestic_and_Sexual_Violence_Cases_Issue_8.pdf.

³² See LONG & NUGENT-BORAKOVE, *supra* note 7.

³³ ERIC RAMUSEN, ET AL., CONVICTIONS VERSUS CONVICTION RATES: THE PROSECUTOR’S CHOICE (Dec. 31, 2008), available at: <https://kelley.iu.edu/riharbau/RePEc/iuk/wpaper/bep2008-16-rasmusen-raghav-ramseyer.pdf>.

³⁴ For guidance on accounting for case complexity, see RSVP Volume II, Chapter 5.

³⁵ See NAT’L DISTRICT ATTORNEYS ASSOC’N, NATIONAL PROSECUTION STANDARDS, (3RD ED. 2009), available at <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Edition-Updated-Commentary.pdf>.

³⁶ *Berger v. United States*, 295 US 78 (1935).

³⁷ OWENS, ET AL., *supra* note 23 at 9.

³⁸ See *id.* at 11; Ryken Grattet & Valerie Jenness, *The Law-in-Between: The Effects of Organizational Perviousness on the Policy of Hate Crimes*, 52 (3) SOC. PROBLEMS, 37-59 (2005).

³⁹ See BEICHNER & SPOHN, *supra* note 13; Anthony V. Salvemini, et al., *Integrating Human Factors Engineering and Information Processing Approaches to Facilitate Evaluations in Criminal Justice Technology Research*, 39(3) EVALUATION REVIEW 308-38 (2015); and AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017) (on performance measures, generally).

⁴⁰ Jean Gregory & Sue Lees, *Attrition in Rape and Sexual Assault Cases*, 36 THE BRIT. J. OF CRIMINOLOGY 1 (1996).

⁴¹ See *Grant Programs*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/grant-programs> (last visited June 14, 2017).

⁴² See, e.g., DATA.GOV, <https://www.data.gov> (last visited May 18, 2017); and *Violent Crime*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=31> (last visited May 18, 2017).

⁴³ The number of assaults known to non-law-enforcement sources still do not reflect the actual prevalence within a jurisdiction, since so many sexual assaults are never reported to *any* agency. For more information on underreporting of sexual assault, see Rebecca Campbell, et al., *Understanding Rape Survivors’ Decisions Not to Seek Help from Formal Social Systems*, 34(2) HEALTH SOC. WORK 127-36 (May 2009); and Arnold S. Kahn, *Calling it Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape*, 27 PSYCHOL. WOMEN Q. 233-42 (2003).

⁴⁴ See, e.g., Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20(6) LAW AND HUMAN BEHAVIOR 607-28 (1996); Regina A. Schuller & Anna Stewart, *Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication*, 24(5) LAW AND HUMAN BEHAVIOR 535-51 (2000); Vivian B. Lord & Gary Rassel, *Law Enforcement's Response to Sexual Assault: A Comparative Study of Nine Counties in North Carolina*, 11(1) WOMEN & CRIMINAL JUSTICE 67-88 (2000); Jan Jordan, *Beyond Belief? Police, Rape and Women's Credibility*, 4(1) CRIMINAL JUSTICE 29-59 (2004); and Cassia Spohn & Katharine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office*, NAT'L INST. JUST. (Feb. 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf>.

⁴⁵ See AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017) (on performance measures, generally).

⁴⁶ Agencies serving specific populations may also be a source for information (e.g., disability service providers).

⁴⁷ Guidance for basic data analysis and reporting is available through Technical Assistance from the SAJI partners.

⁴⁸ For example, some jurisdictions use part-time prosecutors engaged in private practice.

⁴⁹ Note that some experts may not require payment, which may be factored in to office/case strategy and resource allocation.

⁵⁰ These are helpful to putting together a specialized response; however, if resources are tight, these things can be done individually.

⁵¹ Funding opportunities to support specialized prosecutorial units and programs are available from the Office of Violence Against Women, Bureau of Justice Administration, and the Office on Victims of Crime. Where possible, seek opportunities to develop partnerships with community-based organizations to improve access to care through victim services — partnerships may make grantors more open to funding new programs, increasing the likelihood of funding approval.

⁵² Specific practices are set forth below in [Case-Level Leadership](#).

⁵³ The research around the impact of this specialization suggests that a specialized unit, in and of itself, will not improve prosecution rates unless the prosecutors are specially trained, aggressive, informed, and skilled trial attorneys, who understand that they need to measure performance by looking beyond conviction rates. See BEICHER & SPOHN, *supra* note 13. A complex world needs silos to create order out of complexity. Silos and discrete specialization are necessary to a functional society, but without integrating the silos, isolation of information can be self-limiting and reduce effective responses to issues. See also GILLIAN TETT, *THE SILO EFFECT: THE PERIL OF EXPERTISE AND THE PROMISE OF BREAKING DOWN BARRIERS*, 14 (Simon & Schuster 2016).

⁵⁴ Sexual assault, domestic violence, child physical and sexual abuse, human trafficking, witness intimidation, and gang-related crimes (e.g., racketeering).

⁵⁵ See, e.g., Domestic Violence, AMERICAN PROSECUTORS RESEARCH INSTITUTE (1997); and Sean Mcleod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCHOLOGY (2016), <http://www.simplypsychology.org/maslow.html> (last visited Apr. 10, 2017) (consider how the needs motivation fits into the necessary skills of prosecutor). For help integrating logical and scientific data into your prosecution practice at 202-558-0040 or info@aequitasresource.org.

⁵⁶ See Appendix B. Core Competencies for Prosecuting Sexual Violence.

⁵⁷ *Id.*

⁵⁸ For sample briefs, research, and review of motions and briefs, contact AEQUITAS at (202) 558-0040 or info@aequitasresource.org.

⁵⁹ Contact AEQUITAS for guidance on integrating sociological and scientific data into your prosecution practice at 202-558-0040 or info@aequitasresource.org.

⁶⁰ See Integrating a Trauma-Informed Response and Interviewing Victims in Appendix B for guidance on Core Competencies for Prosecuting Sexual Violence and further detail on training.

- ⁶¹ See, e.g. Sandra L. Bloom, *Understanding the Impact of Sexual Assault: The Nature of Traumatic Experience*, in *SEXUAL ASSAULT: VICTIMIZATION ACROSS THE LIFESPAN 405-32* (A. Giardino, E. Datner & J. Asher, Eds., GW Medical Publishing 2003); Saba Masho & Anika Alvanzo, *Help-Seeking Behaviors of Men Sexual Assault Survivors*, 4(3) *AM. J. MÉS. HEALTH* 237-42 (Sept. 2010); and KRISTIANSSON & WHITMAN-BARR, *supra* note 7.
- ⁶² See, e.g., Rebecca Campbell, *The Neurobiology of Sexual Assault: Implications for First Responders in Law Enforcement, Prosecution and Victim Advocacy*, NATIONAL INSTITUTE OF JUSTICE (transcript) (Dec. 3, 2012), available at <http://www.nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx> [hereinafter *The Neurobiology of Sexual Assault*]; and Alifair S. Burke, *Rational Actors, Self Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 *N.C. L. REV.* 211 (2002).
- ⁶³ See Teresa Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, NAT'L DISTRICT ATT'Y ASS'N. (Aug. 2007); Antonia Abbey, et al., *Alcohol and Sexual Assault*, 25(1) *ALCOHOL RES. & HEALTH* 43 (2001); and Antonia Abbey, et al., *Review of Survey and Experimental Research that Examine the Relationship Between Alcohol Consumption and Men's Sexual Aggression Perpetration*, 15(4) *TRAUMA, VIOLENCE, & ABUSE* 265-82 (Oct. 2014).
- ⁶⁴ See AEQUITAS, *LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE* (2017).
- ⁶⁵ See Louis Ellison & Vanessa Munro, *Complainant Credibility & General Expert Witness Testimony in Rape Trials: Exploring and Influencing Mock Juror Perceptions*, UNIV. NOTTINGHAM & UNIV. LEEDS, (2009); and Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 *BRIT. J. CRIMINOLOGY* 202 (2009).
- ⁶⁶ For sources of specific research, see AEQUITAS, *Sexual Assault Justice Initiative Annotated Bibliography* (2017).
- ⁶⁷ See [Section 3.1-C. Making Charging Decisions Consistent with Research and Ethical Considerations](#).
- ⁶⁸ AMERICAN BAR ASSOCIATION, *MODEL RULES OF PROFESSIONAL CONDUCT*, PREAMBLE, available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").
- ⁶⁹ See SPOHN, BEICHNER & DAVIS-FRENZEL, *supra* note 10.
- ⁷⁰ See Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31(3) *L. & SOC'Y REV.* (1997); and Jeffrey W. Spears & Cassia C. Spohn, *The Genuine Victim and Prosecutorial Charging Decisions in Sexual Assault Cases*, 20(2) *AM. J. CRIM. JUST.* (1996).
- ⁷¹ Michelle Madden Dempsey, *Prosecuting Violence Against Women: Toward a "Merits-Based" Approach to Evidential Sufficiency*, *VILL. U. SCH. L.* (2016) (citing Joanne Archambault & Kimberly Lonsway, *The Justice Gap for Sexual Assault Cases: Future Directions for Research and Reform*, 18 (145) *VIOLENCE AGAINST WOMEN PAGES* (2012)). Much of the difficulty in securing reliable social science research can be attributed to the failure of police and prosecutors to maintain systematic records of cases reported.
- ⁷² BEICHNER & SPOHN, *supra* note 13.
- ⁷³ See *CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION* (AM. BAR ASS'N, 4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.
- ⁷⁴ See NAT'L DISTRICT ATT'Y ASSOC'N, *supra* note 36.
- ⁷⁵ See Appendix I – Ethical Considerations.
- ⁷⁶ See DEMPSEY, *supra* note 71.

⁷⁷ See *id.*

⁷⁸ “Vicarious trauma focuses on the cognitive schemas or core beliefs [of the person exposed to accounts of a victim’s trauma]... and the way in which these may change as a result of empathic engagement with the [victim] and exposure to the traumatic imagery presented by clients. This may cause a disruption in the therapist’s view of self, others, and the world in general.” TED BOBER & CHERYL REGHER, STRATEGIES FOR REDUCING SECONDARY OR VICARIOUS TRAUMA: DO THEY WORK? *available at*: <https://tspace.library.utoronto.ca/bitstream/1807/80997/1/Regehr%20strategies%20for%20reducing%20secondary%20or%20vicarious%20trauma.pdf> (citing I.L. McCann & L. A. Pearlman *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3(1) J. TRAUMATIC STRESS, 131–149 (1990)). See also R. Sabin-Farrell & G. Turpin, *Vicarious Traumatization: Implications For The Mental Health Of Health Workers?* 23 CLINICAL PSYCH. REV., 449–480 (2003).

⁷⁹ JOYFUL HEART FOUNDATION, *Vicarious Trauma*, <http://www.joyfulheartfoundation.org/learn/vicarious-trauma>.

⁸⁰ See Peter Jaffe, et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54(2) JUV. & FAM. CT. J. 6 (Fall, 2003) (“...exposure to the graphic evidence of human potential for cruelty exacts a high personal cost.”).

⁸¹ See Molly Wolf, et al., “We’re Civil Servants,” *The Status of Trauma Informed Care in the Community*, 40 J. SOC. SERV. RES. 111-120 (Dec. 12, 2013).

⁸² Joyful Heart, *supra* note 80. See also Tina Mattinson, *Vicarious Trauma: The Silent Stressor*, INST. CT. MGMT. (May 2012), <http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2012/vicarious%20trauma.ashx>.

⁸³ See Linda Albert, *Keeping Legal Minds Intact: Mitigating Compassion Fatigue Among Government Attorneys*, 20(1) PASS IT ON (Fall 2012), http://www.americanbar.org/content/dam/aba/publications/pass_it_on/PIO_F12.authcheckdam.pdf. For staff training on addressing vicarious trauma, see *Developing Resiliency and Addressing Vicarious Trauma in Your Organization*, OFFICE OF VICTIMS OF CRIME, TECHN. AND TRAINING ASSISTANCE CTR., <https://www.ovcttac.gov/views/TrainingMaterials/dspCompassionFatigueTraining.cfm>; and *Vicarious Trauma Toolkit*, NE. U, INST. ON URB. HEALTH RES. AND PRAC. (Spring 2017), <http://www.northeastern.edu/iuhrp/projects/current/vicarious-trauma-toolkit-vtt/>.

⁸⁴ Some jurisdictions may rotate prosecutors who are handling sexual violence cases to prevent burnout, but the practice poses a risk to consistent best response practices. *Daring to Fail, First Person Stories of Criminal Justice Reform*, CTR. FOR COURT INNOVATION (2010), http://www.courtinnovation.org/sites/default/files/Daring_2_Fail.pdf (“[w]hen departments rotate officers to keep things fresh and responsive, there’s a critical loss of institutional memory and momentum”). Prosecutors who consistently handle sexual violence cases will succeed more and see the impact of their work, not only in trial but in the system as a whole. They will become part of the coordinated team, will be sought out by team members and colleagues and will be able to engage the community more taking their role beyond the courtroom. Where rotation is necessary, the negative effects can be mitigated by staggering the timing of rotations and carefully selecting skilled and knowledgeable replacements.

⁸⁵ See Laurie Anne Pearlman & Lisa McKay, *Understanding & Addressing Vicarious Trauma*, HEADINGTON INST. 19-20 (2008), http://www.headington-institute.org/files/vtmoduletemplate2_ready_v2_85791.pdf; and *Compassion Fatigue/Vicarious Trauma*, OFFICE FOR VICTIMS OF CRIME TRAINING AND TECHNICAL ASSISTANCE CTR., <https://www.ovcttac.gov/views/TrainingMaterials/dspCompassionFatigueTraining.cfm> (last visited Mar. 31, 2017).

⁸⁶ *What is a SART?* SART TOOLKIT, <https://ovc.ncjrs.gov/sartkit/about/about-sart.html> (last visited Mar. 4, 2017) (convening a sexual assault task force to discuss the potential formation of a SART/MDT is an initial step – it takes some time to discuss and agree upon MOUs and confidentiality agreements).

⁸⁷ RAPE ABUSE INCEST NATIONAL NETWORK (RAINN), *WHAT IS A SANE/SART?* *available at* <https://www.rainn.org/articles/what-sanesar>.

⁸⁸ See AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017).

⁸⁹ For various perspectives on SART development see AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017).

⁹⁰ Some jurisdictions may refer to SANEs or to sexual assault forensic examiners (FNEs). For the purposes of this publication, the authors have used the term SANE.

⁹¹ See Rebecca Campbell, et al., *Adolescent Sexual Assault Victims and the Legal System: Building Community Relationships to Improve Prosecution Rates*, 50(1-2) AM. J. COMMUNITY PSYCHOL. 141-54 (2011); Rebecca Campbell et al., *Prosecution of Adult Sexual Assault Cases: A Longitudinal Analysis of the Impact of a Sexual Assault Nurse Examiner Program*, 18(2) VIOLENCE AGAINST WOMEN 223-44 (2012); and AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017).

⁹² See Appendix D for further discussion of the components of SARTs and the roles and responsibilities of team members.

⁹³ For more guidance on soliciting feedback to improve prosecution response, see RSVP Volume II, Chapter 9.

⁹⁴ See, e.g., TODD LANDMAN ET. AL, CODE 8.7: CONFERENCE REPORT (United Nations U., 2019), available at https://collections.unu.edu/eserv/UNU:7313/UNU_Code8.7_Final.pdf. The Regional Intelligence and Investigative Center (RIIC) of Lehigh County, PA; along with Lehigh University, AEQUITAS, and The Why, is developing an artificial intelligence application to mining police report narratives to identify potential human trafficking victims and perpetrators.

⁹⁵ See *Violent Criminal Apprehension Program, Homicides and Sexual Assaults*, FED. BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/wanted/vicap/homicides-and-sexual-assaults> (last visited June 15, 2017).

⁹⁶ See Recording by Jane Anderson, #Guilty: Identifying, Preserving, and Presenting Digital Evidence, <https://gcs-vimeo.akamaized.net/exp=1574288366~acl=%2A%2F884497848.mp4%2A~hmac=8361ca1a9ff292a8a9f27a73f97b89210542585ce5d16de8e5025788cf390dad/vimeo-prod-skyfire-std-us/01/2059/8/210299223/884497848.mp4> (recorded November 28, 2017).

⁹⁷ See International Association of Chiefs of Police, *Intelligence-Led Community Policing, Community Prosecution, and Community Partnerships*, CMTY. ORIENTED POLICING SERVS., (2016) (study on community policing that provides insight into the assessment of police response, the necessity of working with community and criminal justice partners, and the importance of action steps to improve community safety).

⁹⁸ See, e.g., Elaine Borakove, et al., *From Silo to System: What Make a Criminal Justice System Operate Like a System?* JUSTICE MGMT. INST. (Apr. 2015), available at: http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/07/From-Silo-to-System-30-APR-2015_FINAL.pdf; and Rolf Pendall, *Can Federal Efforts Advance Federal and Local De-Siloing*, URBAN INST., 2 (May 17, 2013), <http://www.urban.org/sites/default/files/publication/23626/412820-Can-Federal-Efforts-Advance-Federal-and-Local-De-Siloing-Full-Report.PDF>.

⁹⁹ TETT, *supra* note 53 at 142.

¹⁰⁰ *Id.*

¹⁰¹ See Megan R. Greeson & Rebecca Campbell, *Sexual Assault Response Teams (SARTs): An Empirical Review of Their Effectiveness and Challenges to Successful Implementation*, 14(2) TRAUMA VIOLENCE ABUSE 83-95, 84 (Dec. 2012).

¹⁰² Cases may also be multijurisdictional (e.g., Indian Country where there can be concurrent tribal/federal jurisdiction).

¹⁰³ See PENDALL, *supra* note 98.

¹⁰⁴ See, e.g., *id.* at 20.

¹⁰⁵ *Sexual Violence*, Women's Law Project, <http://www.womenslawproject.org/sexual-violence/> (last visited May 22, 2017); see also Women's Law Project, *Advocacy to Improve Police Response to Sex Crimes*, Policy Brief (Feb. 2013), http://www.womenslawproject.org/wp-content/uploads/2017/02/Policy_Brief_Improving_Police_Response_to_Sexual_Assault.pdf.

¹⁰⁶ See Janine Zweig & Martha Burt, *Effects of Interactions Among Community Agencies on Legal System Responses to Domestic Violence and Sexual Assault in STOP-Funded Communities*, 14(2) CRIM. JUST. POL'Y REV. 249-72 (2003).

¹⁰⁷ See Marilyn Strachan Peterson, et al., *California SART Report: Taking Sexual Assault Response to The Next Level - Research Findings, Promising Practices & Recommendations*, CALIFORNIA CLINICAL FORENSIC MED. TRAINING CTR. 101 (Jan. 2009), http://www.calcasa.org/wp-content/uploads/2010/01/SART-Report_08.pdf (highlighting the importance of the participation of SART members, particularly law enforcement and prosecutors, in community education and outreach efforts to encourage victim reporting and inspire trust in the criminal justice system).

108 Please refer to your state's specific ethics rules regarding public statements, in addition to reviewing the American Bar Association's professional standards for further guidance. See CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION (AM. BAR ASS'N, 4th ed. 2015).

109 For additional guidance on developing a public communication strategy, see RTI INTERNATIONAL, SEXUAL ASSAULT KIT INITIATIVE (SAKI) MEDIA RELATIONS: KEY CONSIDERATIONS FOR PARTNERING WITH THE MEDIA, available at <https://www.sakitta.org/resources/docs/SAKI-Media-Relations-Key-Considerations-for-Partnering-with-the-Media.pdf>.

110 Amanda J. Waters & Lisa Asbill, *Reflections on Cultural Humility*, AM. PSYCHOLOGICAL ASS'N (Aug. 2013), <http://www.apa.org/pi/families/resources/newsletter/2013/08/cultural-humility.aspx> (last visited Mar. 19, 2017).

111 See WATERS & ASBILL, *supra* note 110.

112 See, e.g., NAT'L CHILDREN'S ALL., STANDARDS FOR ACCREDITED MEMBERS 16-18 (2017).

113 See NAT'L CHILDREN'S ALL., *supra* note 112.

114 See, e.g., *A Prosecutor's Guide for Advancing Racial Equity*, VERA INST. OF JUSTICE, (March 2015), <https://www.vera.org/publications/a-prosecutors-guide-for-advancing-racial-equity>; and *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault*, DEP'T OF JUSTICE (Dec. 2015), available at: <https://www.justice.gov/opa/file/799366/download>. Although this assessment is important in all cases, it is particularly relevant in the response to victims sexual and intimate partner violence.

115 See ZWEIG & BURT, *supra* note 106.

116 See, e.g., Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38(2) SOCIAL PROBLEMS 213-26 (May 1991); FRAZIER & HANEY, *supra* note 44; SPOHN & TELLIS, *supra* note 16; Megan A. Alderden & Sarah Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18(5) VIOLENCE AGAINST WOMEN 525-51 (2012); Sharon Murphy, et al., *Exploring Stakeholders' Perceptions of Adult Female Sexual Assault Case Attrition*, 3(2) PSYCHOL. VIOLENCE 172-84 (2013); Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases Frequently? Rape Survivors Seek Answers*, REWIRE (Mar. 11, 2016), <https://rewire.news/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-see-answers/>; PATTAVINA, MORABITO & WILLIAMS, *supra* note 18; Melissa Schaefer Morabito, et al., *It All Just Piles Up: Challenges to Victim Credibility Accumulate to Influence Sexual Assault Case Processing*, INTERPERSONAL VIOLENCE, 1-20 (2016).

117 See *The Sexual Assault Kit Initiative*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/about/> (last visited May 22, 2017); REBECCA CAMPBELL, ET AL., *supra* note 15; *Why the Backlog Exists*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited May 22, 2017).

118 See, e.g., *id.* SEXUAL ASSAULT KIT INITIATIVE, *supra* note 117; David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14(4) SEXUAL ASSAULT REP. 49-64 (Mar./Apr. 2011), available at www.middlebury.edu/media/view/240951/original/.

119 Prosecutors should work with experts to understand the theory underlying the neurobiology of trauma, although expert testimony on this topic may not be appropriate for trial. Contact AEQUITAS to discuss further, at (202) 558-0040 or info@aequitasresource.org.

120 See AEQUITAS, INTRODUCING EXPERT TESTIMONY IN SEXUAL VIOLENCE CASES (webinar), available at <https://aequitasresource.org/resources/>.

121 See *id.*

122 Prosecutors should also be aware of the availability of U Visas for victims of sexual violence. For more information and training opportunities on U Visas, see THE NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, <https://www.wcl.american.edu/impact/initiatives-programs/niwap/> (last visited June 13, 2017).

123 See RSVP Volume II for an office-level logic model incorporating performance management. A logic model is a visual roadmap to connect the problem, the ultimate intended outcome or solution, and the supporting steps to get to the solution.

¹²⁴ See Melissa Schaefer Morabito, et al., *supra* note 116.

¹²⁵ See Cassia Spohn & Jeffrey Spears, *The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions*, 13(4) JUST. QUARTERLY, 649-79 (1996).

¹²⁶ See REBECCA CAMPBELL, ET AL., *supra* note 24.

¹²⁷ See BEICHNER & SPOHN, *supra* note 13.

¹²⁸ See, e.g., *Capitol Offense Police Mishandling of Sexual Assault Cases in the District of Columbia*, HUMAN RIGHTS WATCH (Jan. 24, 2013), <https://www.hrw.org/report/2013/01/24/capitol-offense/police-mishandling-sexual-assault-cases-district-columbia>.

¹²⁹ See, e.g., BEICHNER & SPOHN, *supra* note 13; and SPOHN, BEICHNER & DAVIS-FRENZEL, *supra* note 10.

¹³⁰ See BEICHNER & SPOHN, *supra* note 13.

¹³¹ RESNICK, *supra* note 116.

¹³² DEMPSEY, *supra* note 71 (citing Bill Gaston, 1st Assistant State's Attorney, Champaign County, Illinois).

¹³³ There can be formal or informal adherence to these principles, ranging from written protocols to informal practices followed and passed down in the office.

¹³⁴ See, e.g., *Thuthuzela: Turning Victims Into Survivors*, NAT'L PROSECUTING AUTHORITY OF S. AFR. (2009), https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf; and Recording by Christopher Mallios & John Wilkinson, Ethical Considerations for Prosecutors in Sexual Violence Cases, <https://gcs-vimeo.akamaized.net/exp=1574291424~acl=%2A%2F721471601.mp4%2A~hmac=2e195e117d59dd7177bc580859b6e35b8cef0d8d630e5119723934bd690749b2/vimeo-prod-skyfire-std-us/01/2095/8/210475187/721471601.mp4> (recorded Aug. 2, 2013) (regarding considerations of prosecutorial immunity).

¹³⁵ USAID SOUTH AFRICA PROGRAM IN SUPPORT OF PEPFAR: THUTHUZELA CARE CENTERS FY06 (July 31, 2007), available at https://pdf.usaid.gov/pdf_docs/PNADT749.pdf

¹³⁶ Jules Verdone, *South Africa Initiative Flourishes 11 Years On*, 18 JUST' CAUSE 3 (2011), available at http://archive.vera.org/sites/default/files/resources/downloads/Just_Cause_summer_2011_.pdf.

¹³⁷ *Thuthuzela Care Centres*, UNICEF.ORG, available at https://www.unicef.org/southafrica/protection_998.html.

¹³⁸ See *Resources*, AEQUITAS, <https://aequitasresource.org/resources/>. Statutory compilations and case law summaries are available upon request. See also *State Law Database*, RAINN, <https://www.rainn.org/public-policy-action> (last visited May 18, 2017).

¹³⁹ With respect to recording statements, in the last several years, offices have adopted the use of video/audio recording to capture statements, including the use of body worn cameras. These can be powerful tools to capturing victim statements, however, some concerns around their use have been raised. See, e.g., *Police Body-Worn Cameras: Where Your State Stands*, URBAN INST., <http://apps.urban.org/features/body-camera/> (last visited July 13, 2016); Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, OFFICE OF JUSTICE PROGRAMS, DIAGNOSTIC CENTER (2014), <https://cops.usdoj.gov/RIC/Publications/cops-p289-pub.pdf>; *Implementing a Body-Worn Camera Program Recommendations and Lessons Learned*, OFFICE OF CMTY. ORIENTED POLICING SERV. & POLICE EXEC. RESEARCH FORUM (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>; *Strengthening CBP with the Use of Body-Worn Cameras*, AM. CIVIL LIBERTIES UNION (June 2014), https://www.aclu.org/sites/default/files/assets/13_10_25_aclu_one_pager_re_body-worn_cameras_for_cbp_final.pdf; and John Wilkinson, *To Record or Not To Record: Use of Body-Worn Cameras During Police Response to Crimes of Violence Against Women*, 29 STRATEGIES IN BRIEF (2017), available at <https://aequitasresource.org/wp-content/uploads/2018/09/To-Record-or-Not-To-Record-Use-of-Body-Worn-Cameras-During-Police-Response-to-Crimes-of-Violence-Against-Women-SIB29.pdf>

¹⁴⁰ See [Section 3.2-A-1](#) on working with experts on victim behavior and Appendix F Considerations for Working with Experts.

- 141 Recognize corroborative evidence in reports, including observations and statements. Corroboration may include evidence of serial perpetration; other crimes, wrongs, or acts; evidence of threats or intimidation; evidence of planning (access, isolation, grooming, concealment of the crime).
- 142 Be aware of intoxication and its impact on the investigation as well as during the prosecution and presentation of evidence. See AEQUITAS, SEXUAL ASSAULT JUSTICE INITIATIVE LITERATURE REVIEW (2017) (sections on Criminalistics, Toxicology, and Alcohol-Facilitated Sexual Assault); and SCHULLER & STEWART, *supra* note 44.
- 143 See *Force and Consent Statutory Compilation and Case Law Digest*, AEQUITAS (draft current as of 2019) (available upon request).
- 144 See AEQUITAS, SEXUAL ASSAULT JUSTICE INITIATIVE LITERATURE REVIEW (2017) (sections on Image Exploitation, and Witness Intimidation and Forfeiture by Wrongdoing); AEQUITAS, ANNOTATED BIBLIOGRAPHY: SEX TRAFFICKING (July 2016).
- 145 See Section 3.1-F-1 on Conducting Trauma-Informed Interview of the Victim to Reveal Evidence of the Crime.
- 146 See Appendix H for strategies for identifying and responding to victim and witness intimidation; and AEQUITAS, FIELD GUIDE TO WITNESS INTIMIDATION: A REFERENCE FOR IDENTIFICATION (January 2018), available at https://aequitasresource.org/wp-content/uploads/2018/09/Field_Guide_to_Witness_Intimidation_3.19.18.pdf.
- 147 See, e.g., Anderson, *supra* note 966; Jane Anderson & Supriya Prasad, *Prosecuting Image Exploitation* 15 STRATEGIES (Mar. 2015), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Image-Exploitation-Strategies15.pdf>; *Police Body-Worn Cameras: Where Your State Stands*, *supra* note 136; WHITE, *supra* note 139; OFFICE OF CMY. ORIENTED POLICING SERV. & POLICE EXEC. RESEARCH FORUM, *supra* note 136; and AM. CIVIL LIBERTIES UNION, *supra* note 136.
- 148 See, e.g., Riley v. California, 134 S. Ct. 2473, 2477 (2014) (holding a warrant was required to search the contents of the cell phone belonging to an individual who has been arrested); State v. Diamond, A15-2075, 2017 WL 163710 (Minn. Ct. App. Jan. 17, 2017) (holding that the Fifth Amendment right against self-incrimination was not violated when defendant was ordered to provide fingerprint to unlock cell phone); and Carpenter v. United States, 138 S. Ct. 2206 (2018) (holding that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell site location information, and that the government must generally obtain a search warrant supported by probable cause before acquiring cell site location information from a wireless carrier). Please contact AEQUITAS for additional research and information and for sample search warrant affidavits at (202) 558-0040 or info@aequitasresource.org.
- 149 See *Social Media Evidence—How to Find It and How to Use It*, ABA SECTION ON LITIGATION (2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/aba-annual-2013/written_materials/15_1_social_media_evidence.authcheckdam.pdf. Please contact AEQUITAS for sample search warrant affidavits and additional resources at (202) 558-0040 or info@aequitasresource.org.
- 150 See, e.g., MONICA T. WHITTY & GARRY YOUNG, CYBERPSYCHOLOGY: THE STUDY OF INDIVIDUALS, SOCIETY, AND DIGITAL TECHNOLOGIES 26 (2017); Adam N. Johnson, *Self-Disclosure in Computer-Mediated Communication: The Role of Self-Awareness and Visual Anonymity*, 31 EUR. J. SOC. PSYCHOL. 177 (2001); John A. Bargh, Katelyn Y. A. McKenna & Grainne M. Fitzsimons, *Can You See the Real Me? Activation and Expression of the 'True Self' on the Internet*, 58 J. SOC. ISSUES, 33 (2002); and Noam Lapidot-Lefler & Azy Barak, *The Benign Online Disinhibition Effect: Could Situational Factors Induce Self-Disclosure and Prosocial Behaviors?*, 9 CYBER PSYCHOL.: J. OF PSYCHOSOCIAL RES. ON CYBERSPACE (2015).
- 151 Contact AEQUITAS at (202) 558-0040 or info@aequitasresource.org to further discuss privacy concerns related to victim information and property.
- 152 See *Statute of Limitations Statutory Compilation*, AEQUITAS & JOYFUL HEART FOUNDATION (2017).
- 153 AEQUITAS, *Evidence of Other "Bad Acts" in Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions*, 31 STRATEGIES IN BRIEF (2017), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Image-Exploitation-Strategies15.pdf>.
- 154 For more on John Doe arrest warrants, see AEQUITAS AND AMY JEANGUENAT, UNDERSTANDING THE USE OF JOHN DOE ARREST WARRANTS IN COLD CASE SEXUAL ASSAULTS FOR PROSECUTORS (RTI International, 2018).

¹⁵⁵ See, e.g., Sexual Assault Victims' DNA Bill of Rights, CAL. PENAL CODE § 680; *Sexual Assault Kit Testing Initiatives and Non-investigative Kits*, OFFICE ON VIOLENCE AGAINST WOMEN (Jan. 2017), <https://www.justice.gov/ovw/page/file/928236/download>; and *Victims' Rights and Sexual Assault Kits*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/our-programs/dna-resource-center/untested-sexual-assault-kits/victims'-rights-and-sexual-assault-kits> (last visited May 21, 2017).

¹⁵⁶ See, e.g., Jenifer Markowitz, *A Prosecutor's Reference - Medical Evidence and the Role of Sexual Assault Nurse Examiners in Cases Involving Adult Victims*, AEQUITAS (2010), available at https://aequitasresource.org/wp-content/uploads/2018/09/Prosecutor_Reference_Medical_Evidence.pdf; Jenifer Markowitz, *Absence of Anogenital Injury in the Adolescent/Adult Female Sexual Assault Patient*, 13 STRATEGIES IN BRIEF (Sept. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/Absence_of_Anogenital_Injury_in_the_Adolescent_Adult_Female_Sexual_Assault_Patient_Issue_13.pdf; and AEQUITAS, SEXUAL ASSAULT JUSTICE INITIATIVE LITERATURE REVIEW (2017).

¹⁵⁷ See e.g., *Sexual Assault Kit Tracking System*, QUETEL, <https://www.quetel.com/products/sexual-assault-kit-tracking-system/> (last visited June 13, 2017); *Navigating Notification: A Guide to Re-engaging Sexual Assault Survivors Affected by the Untested Rape Kit Backlog*, JOYFUL HEART FOUNDATION (2016), available at <http://www.endthebacklog.org/information-survivors/victim-notification>; *12 Key Questions to Guide Victim Notification Protocols*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/resources/docs/SAKI-Victim-Notification-Guide.pdf>; and Rebecca Campbell, Giannina Fehler-Cabral & Sheena Horsford, *Creating a Victim Notification Protocol for Untested Sexual Assault Kits: An Empirically Supported Planning Framework*, J. OF FORENSIC NURSING (2017).

¹⁵⁸ For additional information and resources on DNA for investigation and prosecution, see Practitioner Resources, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/resources/> (last visited June 13, 2017); and Section 3.2-A-5 [DNA and Forensics](#).

¹⁵⁹ See *Investigating Sexual Assaults: Model Policy*, INT'L ASS'N OF CHIEFS OF POLICE (2005); *Improving Police Response to Sexual Assault*, HUMAN RIGHTS WATCH (2013), https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf.

¹⁶⁰ In cases of intimidation, detectives can document incidents and notify prosecutors. In the rare circumstance where additional information is disclosed by the victim, detectives should document the statement and review it with the prosecution so that where discovery rules require, it is passed on to the defense.

¹⁶¹ Check your individual jurisdiction's rules of professional responsibility. See *Berger v. United States*, 295 US 78, 88 (1935); *National Prosecution Standards*, NAT'L DISTRICT ATT'Y ASS'N (3d ed., 2010); MODEL RULES OF PROFESSIONAL CONDUCT (AM. BAR ASS'N); and CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION (AM. BAR ASS'N, 4th ed. 2015).

¹⁶² See, e.g., BEICHNER & SPOHN, *supra* note 13.

¹⁶³ Training both law enforcement and prosecutors in the core competencies identified in Appendix B and fostering multidisciplinary collaboration can help with appropriate decision-making.

¹⁶⁴ See, e.g., R. Lovell et. al, *Offending patterns for serial sex offenders identified via the DNA testing of previously unsubmitted sexual assault kits*, 52 J. CRIM. JUSTICE 68-78 (2017), available at <https://doi.org/10.1016/j.jcrimjus.2017.08.002>; and Rebecca Campbell et. al, *Tested at last: How DNA Evidence in Untested Rape Kits Can Identify Offenders and Serial Sexual Assaults*, 33(24) J. INTERPERSONAL VIOLENCE 3792-3814 (Dec. 2018), available at <http://journals.sagepub.com/doi/abs/10.1177/0886260516639585>.

¹⁶⁵ For more on conducting sexual violence case reviews, see Appendix M on Sample Case Review Protocol, Appendix N on Sample Case Data Tracking Sheet, and Appendix O on Sample Case Review Timeline.

¹⁶⁶ DEMPSEY, *supra* note 71.

¹⁶⁷ *Id.*

¹⁶⁸ See *Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences*, CROWN PROSECUTION SERVICE, <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-sexual-offences-act-2003-principal-offences-and> (for a definition of "Rape").

¹⁶⁹ That is, assuming that prosecution is in the public interest. A “prosecutor may...consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.” STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (AM. BAR ASS’N. 3d ed. 1993) (para. 3-3.9(b)). In cases where prosecutors decline to pursue charges on grounds of supposed evidential insufficiency, however, the further question of the public interest never arises. In addition, this underscores the importance of well-trained, experienced prosecutors who will not be analyzing the evidence through the lens of bias and myth. See DEMPSEY, *supra* note 71 (citing ANDREW ASHWORTH & MICHAEL REDMAYNE, *THE CRIMINAL PROCESS* (OUP 4th ed. 2010)).

¹⁷⁰ DEMPSEY, *supra* note 71 at 6 (citing R. (on the application of Gujra) v. Crown Prosecution Service, [2013] 1 A.C. 484 (Baroness Hale)).

¹⁷¹ See DEMPSEY, *supra* note 71 at 6.

¹⁷² See DEMPSEY, *supra* note 71 at 6; and OWENS, ET AL., *supra* note 23 at 9.

¹⁷³ Prior arrests and convictions should be reviewed for similarities in perpetration and other relevant facts and circumstances. Criminal histories may also provide information about the suspect’s presence or absence from the jurisdiction, as well as a timeline of convictions or police contacts which may be helpful in cold cases of sexual assault for tolling the relevant statute of limitations. However, victims’ criminal histories *should not* be used as the basis for credibility concerns regarding the victim’s account of sexual violence, absent extremely rare circumstances.

¹⁷⁴ For more on the prosecution of multidefendant or witnessed sexual violence, see Webinar recording by John Wilkinson, Challenges Multiplied: Multi-Defendant Rape and Witnessed Rape, available at <https://gcs-vimeo.akamaized.net/exp=1574293802~acl=%2A%2F720677131.mp4%2A~hmac=9b7ba3c8837988a9f2f467a8b8286125ed98e0c576a0a10b40de5d8a2ac5eb2a/vimeo-prod-skyfire-std-us/01/2061/8/210305493/720677131.mp4> (recorded on Dec. 15, 2016).

¹⁷⁵ See *Garrity v. New Jersey*, 385 U.S. 493 (1967) (administratively compelled statements made by officers during internal affairs investigation cannot be used against them in subsequent criminal trial).

¹⁷⁶ See *Bruton v. United States*, 39 U.S. 123 (1968).

¹⁷⁷ See #574 – Pretext Phone Calls, INT’L ASSOCIATIONS OF CHIEFS OF POLICE (2004), <https://www.theiacp.org/resources/training-key/574-pretext-phone-calls>; and *Sexual Assault Investigation Ideas: A Series of the Sexual Violence Justice Institute, Pretext or Covert Call*, MINNESOTA COALITION AGAINST SEXUAL ASSAULT.

¹⁷⁸ See *State v. K.W.*, 70 A.3d 592 (N.J. 2013) (upholding suppression of recorded pretext phone call for failure to strictly comply with the requirements of state Wiretap Act).

¹⁷⁹ *Imbler v. Pachtman*, 424 U.S. 409 (1976).

¹⁸⁰ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

¹⁸¹ Webinar recording by Christopher Mallios, Overcoming the Consent Defense: Identifying, Investigating, and Prosecuting the Non-Stranger Rapist, available at <https://gcs-vimeo.akamaized.net/exp=1574294293~acl=%2A%2F721591276.mp4%2A~hmac=e20456aff72615a9641e525ff5a2e1723950fe4c11b2f64bebab254475ff59f2/vimeo-prod-skyfire-std-us/01/2099/8/210498449/721591276.mp4> (recorded on Apr. 18, 2014).

¹⁸² See Vitauts M. Gulbis, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4th 120 (2017).

¹⁸³ See DJ Smith et. al, *Frequency and Relationship of Reported Symptomology in Victims of Intimate Partner Violence: The Effects of Multiple Strangulation Attacks*, 21(3) J. EMERG. MED. 323-329 (2001); and Maureen Funk and Julie Schuppel, *Strangulation Injuries*, 102(2) WISCONSIN MED. J. 41-45 (2003).

¹⁸⁴ Murphy, et al., *supra* note 116.

¹⁸⁵ More information on the utilization of forensic evidence for sexual assaults can be found at sakitta.org, a project on which AEquitas is a partner. See, e.g., RTI International, *Prioritizing Cold Case Hit Follow-Up: Strategies for Sexual Assault Investigators*, available at <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Prioritizing%20Cold%20Case%20CODIS%20Hit%20Follow%20Up.pdf>; and RTI Forensic Technical Center of Excellence, *In Brief Report Series: Beyond DNA – Sexual Assault Investigations Parts I, II, and III*, available at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=274799>.

¹⁸⁶ See Anderson, *supra* note 96.

¹⁸⁷ See Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53(5/6) *SEX ROLES* 385 (Sept. 2005); ELLISON & MUNRO, *supra* note 65; Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 *Brit. J. Crim.* 363 (2009); Kim Lonsway & Louise Fitzgerald, *Rape Myths in Review*, 18 *PSYCHOL. WOMEN Q.* 133-64 (1994); and Jennifer Gentile Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, Nat'l District Att'y Ass'n (2007), https://www.forensichealth.com/wp-content/uploads/2016/10/pub_introducing_expert_testimony.pdf.

¹⁸⁸ See, e.g., *Berger*, 295 U.S. at 88.

¹⁸⁹ See WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, *Pretrial Release Procedures* in *CRIMINAL PROCEDURE* 4, § 12.1(b) (2d ed.) (2012); WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, *Pretrial Release Procedures* in *CRIMINAL PROCEDURE* 6, § 22.3(a) (3d ed.) (2014).

¹⁹⁰ *Id.*

¹⁹¹ See Section 3.1-C on [Making Charging Decisions Consistent with Research and Ethical Considerations](#) and counter defense arguments that play into myths.

¹⁹² Support for this argument may include the defendant's lengthy or serious criminal history (including failure to appear); violation of no-contact orders; and violation of probation or parole, suggesting that a defendant will disregard court orders to appear.

¹⁹³ See, e.g., *Why Testing Rape Kits Matters*, END THE BACKLOG, <http://endthebacklog.org/backlog/why-testing-matters> (last visited May 21, 2017); and *Test Rape Kits. Stop Serial Rapists*, *supra* note 1.

¹⁹⁴ Studies show a "'crossover effect' of sex offenders admitting to multiple victims and offenses atypical of criminal classification. Specifically, studies have shown that rapists often sexually assault children and incest offenders often sexually assault children both within and outside their family. These findings are consistent among populations (e.g., community, prison, parole, probation) and methodologies (e.g., guaranteed confidentiality, polygraph testing). This section reviews the evidence of crossover offending, which challenges the validity of traditional sex offender typologies (those that are based on a known victim type)." Dominique Simons, *Chapter 3: Sex Offender Typologies*, *SEX OFFENDER MGMT. ASSESSMENT AND PLANNING INITIATIVE*, https://www.smart.gov/SOMAPI/sec1/ch3_typology.html (last visited June 9, 2017) (internal citations omitted).

¹⁹⁵ See Jacquelyn C. Campbell, *Danger Assessment* (2001), www.ncdsv.org/images/dangerassessment.pdf (forced sex has been found to be a lethality indicator when conducting risk assessments of domestic violence victims).

¹⁹⁶ "Sexual assault occurred repeatedly within these intimate relationships—almost 80 percent of sexually assaulted women reported more than one incident of forced sex." Lauren Taylor & Nicole Gaskin-Laniyan, *Sexual Assault in Abusive Relationships*, NAT'L INST. OF JUST., www.nij.gov/journals/256/sexual-assault.html (last visited June 2, 2017 (referencing McFarlane, J., and A. Malecha, *Sexual Assault Among Intimates: Frequency, Consequences, and Treatments* (2005), www.ncjrs.gov/pdffiles1/nij/grants/211678.pdf).

¹⁹⁷ See Jennifer G. Long, & Jenifer Markowitz, *Intimate Partner Sexual Violence: Prosecution and Medical Issues* in *VIOLENCE AGAINST WOMEN: CONTEMPORARY EXAMINATION OF INTIMATE PARTNER VIOLENCE* (2015).

¹⁹⁸ See FINKELHOR & KERSTI YLLO, *LICENSE TO RAPE: SEXUAL ABUSE OF WIVES* (N.Y. Free Press 1985); and D.E.H. RUSSELL, *RAPE IN MARRIAGE* (Ind. U. Press. 1990).

- ¹⁹⁹ In the event the victim objects to the issuing of a protection order, see Jennifer Long, Christopher Mallios, & Sandra Tibbetts Murphy, *Model Policy for Prosecutors and Judges on Imposing, Moving, and Lifting Criminal No-Contact Orders*, AEQUITAS (2010), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Model-Policy-for-Prosecutors-and-Judges-on-Imposing-Modifying-and-Lifting-Criminal-No-Contact-Orders.pdf>.
- ²⁰⁰ Develop a strategy where the victim and offender live or receive care in the same group home or facility.
- ²⁰¹ See *Victim Privilege Statutes by Practitioner*, AEQUITAS (2011) (available upon request); and *State Law Database*, RAINN, <https://apps.rainn.org/policy/> (last visited May 18, 2017).
- ²⁰² See Recording by Teresa Garvey, Criminal Meets Civil: Coordinating Our Response, <https://gcs-vimeo.akamaized.net/exp=1574296004~acl=%2A%2F720677334.mp4%2A~hmac=4165a8787723e66c212880449c6f609783dda2d1f431783b2467217e777396af/vimeo-prod-skyfire-std-us/01/2061/8/210305578/720677334.mp4> (recorded Nov. 30, 2015); and NATIONAL CRIME VICTIM LAW INSTITUTE, <https://gcs-vimeo.akamaized.net/exp=1574296106~acl=%2A%2F756667832.mp4%2A~hmac=778ed846f04910b8b44ffdb35450776b2aa80522bd2e3aa8389046c1006ed0d/vimeo-prod-skyfire-std-us/01/3640/8/218200340/756667832.mp4> (last visited May 21, 2017).
- ²⁰³ See Jane Anderson & Meg Garvin, Safeguarding Victim Privacy in a Digital World: Ethical Considerations for Prosecutors, <https://aequitasresource.org/resources/> (recorded on May 18, 2017).
- ²⁰⁴ Generally, defendants have to meet a certain threshold showing of relevance and materiality of a victim's records before an *in camera* review is appropriate.
- ²⁰⁵ Persons with disabilities, especially those with communication and cognitive difficulties, are particularly vulnerable to the harms resulting from defense delay tactics.
- ²⁰⁶ See Gulbis, *supra* note 182.
- ²⁰⁷ See *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS (Mar. 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>.
- ²⁰⁸ Recognize that caretakers or employees of agencies caring for individual with disabilities may engage in intimidation.
- ²⁰⁹ See, e.g., *id.*
- ²¹⁰ See THE NEUROBIOLOGY OF SEXUAL ASSAULT, *supra* note 62.
- ²¹¹ See *The Prosecutors' Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.
- ²¹² See *Safety Net Project*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/safety-net/> (last visited May 21, 2017).
- ²¹³ See Anderson, *supra* note 96.
- ²¹⁴ See *id.*
- ²¹⁵ KRISTIANSSON & WHITMAN-BARR, *supra* note 7. For information on how law enforcement's trauma-informed interviewing practices can positively impact the victim's experience in the criminal justice process, see Patrick Meacham, Trauma Informed Investigation of Adult Sexual Assault Cases, presented at West Virginia University (Apr. 20-21, 2016) (citing D. Patterson, *The Impact of Detective's Manner of Questioning of Rape Victims' Disclosure*, 17(11) VIOLENCE AGAINST WOMEN (2012)).

216 See THE NEUROBIOLOGY OF SEXUAL ASSAULT, *supra* note 62; Rebecca Campbell et al., *Preventing the “Second Rape:” Rape Survivors’ Experiences with Community Service Providers*, 16(2) J. INTERPERSONAL VIOLENCE 1239-59 (Dec. 2001), <http://jiv.sagepub.com/content/16/12/1239.short?rss=1&ssource=mfc> (majority of sexual violence survivors who reported their assault to the legal or medical system did not receive needed services. This study suggests that the trauma of sexual violence extends far beyond the assault itself, as negative community responses can significantly elevate distress); and Courtney E. Ahrens, et al., *Deciding Whom to Tell: Expectations and Outcomes of Rape Survivors’ First Disclosures*, 31 PSYCHOL. WOMEN 38-49 (2007) (qualitative analysis revealed that nearly 75% of first disclosures were to informal support providers (friends and family), and over one third of the disclosures were not initiated by the survivors themselves. Survivors who disclosed to informal support providers had a more positive experience and when survivors sought out formal support providers had more negative experiences).

217 For implications to victim confidentiality and privilege when communications to victim advocate are made in front of third parties, see Viktoria Kristiansson, *Walking A Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions, Parts I and II*, 9/10 STRATEGIES (May 2013), available at https://aequitasresource.org/wp-content/uploads/2018/09/Issue_9_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_I_May_2013.pdf and https://aequitasresource.org/wp-content/uploads/2018/09/Issue_10_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_II_May_2013.pdf.

218 Where possible, have a colleague conduct the mock cross-examination to preserve the relationship.

219 See Erin S. Gaddy, *Why the Abused Should Not be the Accused*, 1(8) THE VOICE (2006), http://www.ncdsv.org/images/NDAA_WhyAbusedShouldNotBecomeAccused_TheVoice_vol_1_no_8_2006.pdf (summarizing the impact of arresting victims).

220 See *The Prosecutors’ Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf; *The Prosecutors’ Resource on Crawford*, AEQUITAS (Oct. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Crawford.pdf (another tool that can be used to introduce a witness’s or victim’s out of court statements where the defendant has procured their unavailability for trial in order to prevent them from testifying); and YOU HAVE OPTIONS PROGRAM, SEXUAL ASSAULT REPORTING, <http://www.reportingoptions.org> (last visited May 22, 2017) (focuses on supporting victims in a way that is believed to ultimately increase their ability to participate in the criminal justice system).

221 The Department of Justice, Office on Violence Against Women (OVW) deems it a sufficiently dangerous practice that the routine arrest of victims may result in a loss of federal funding. Two of the primary grant programs under the Violence Against Women Act to improve criminal justice response to intimate partner violence have identified forced testimony by victims of domestic violence against their abuser as an “activit[y] that compromise[s] victim safety and recovery.” See *OVW Fiscal Year 2016 STOP Formula Grant Solicitation*, OFFICE ON VIOLENCE AGAINST WOMEN 5-6 (Apr. 2016), <https://www.justice.gov/ovw/page/file/839466/download>; and *OVW Fiscal Year 2016 Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program*, (also known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program), OFFICE ON VIOLENCE AGAINST WOMEN 7-8 (Jan. 2016), <https://www.justice.gov/ovw/page/file/1124261/download> (Disapproving “[p]rocedures that would penalize victims of violence for failing to testify against their abusers or impose other sanctions on victims. Instead, procedures that provide victims with the opportunity to make an informed choice about whether to testify are encouraged”). These same considerations weigh against charging victims with perjury or false swearing as a result of recantation on the stand.

222 See *The Sexual Assault Kit Initiative*, *supra* note 117; *Why Testing Rape Kits Matters*, *supra* note 193; *Test Rape Kits. Stop Serial Rapists*, *supra* note 1.

223 See *Why Testing Rape Kits Matter*, *supra* note 193.

224 See Section 3.2-B-2 on [Introducing Evidence of Other Crimes and Bad Acts where Relevant](#).

²²⁵ This section has been adapted from two AEQUITAS resources: Teresa M. Garvey, *Witness Intimidation: Meeting the Challenge*, AEQUITAS (2013), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>; and *The Prosecutors' Resource on Witness Intimidation*, AEQUITAS (March 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>. These resources provide strategies that can be employed by everyone involved in the criminal justice system throughout the investigation and prosecution of a case, as well as during post-conviction incarceration and supervision, to prevent intimidation and to respond effectively when it occurs. The monograph emphasizes the benefits of a cooperative and collaborative approach to the problem. For more information on witness intimidation, see AEQUITAS' special initiative on Combating Witness Intimidation (CWI), funded by the U.S. Department of Justice Bureau of Justice Assistance (BJA), <https://aequitasresource.org/singleinitiative/?initiativeld=%201>; and Appendix H – Witness Intimidation Checklist.

²²⁶ See, e.g., FLA. STAT. ANN. § 741.29(6).

²²⁷ See Scalzo, *supra* note 63 at 8.

²²⁸ For assistance with identifying experts, contact AEQUITAS at (202) 558-0040 or info@aequitasresource.org.

²²⁹ Many experts do not prepare reports. If a report is not prepared, provide the defense should with a summary of the expert's proposed testimony.

²³⁰ Contact AEQUITAS for sample motions to introduce expert testimony at (202) 558-0040 or at info@aequitasresource.org.

²³¹ See, e.g., FED. R. EVID. 702.

²³² See *Daubert v. Merrell Dow, Pharmaceuticals*, 509 U.S. 579 (1993); *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); and Jennifer G. Long, *Introducing Expert Testimony in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATT'Y ASS'N (Aug. 2007), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1040>.

²³³ You will also want to prepare the victim in jurisdictions that use depositions for discovery purposes in criminal cases.

²³⁴ See Appendix F – Considerations for Working with Experts; LONG, *supra* note 184; and AEQUITAS, SEXUAL ASSAULT JUSTICE INITIATIVE LITERATURE REVIEW (2017).

²³⁵ For additional information on introducing this type of expert testimony, see *Victim Behavior Case Law Digest*, AEQUITAS (2011) (available upon request from AEQUITAS); and LONG, *supra* note 184.

²³⁶ See Webinar recording by Viktoria Kristiansson, *Introducing Expert Testimony in Sexual Violence Cases*, available at <https://gcs-vimeo.akamaized.net/exp=1574297265~acl=%2A%2F722128122.mp4%2A~hmac=7b70aef38359351a29ebe736518a6452a8648fb0d42e74b2ac76a661310e280e/vimeo-prod-skyfire-std-us/01/2122/8/210614534/722128122.mp4> (recorded March 3, 2016).

²³⁷ See David R. Englert, Ashleigh Diserio & Kate M. Ryan, *The Prosecutor's Guide to Mental Health Disorders*, 1(10) THE VOICE (2007), http://www.ncdsv.org/images/NCPVAW_ProsguideMentalHealthDisorders_vol_1_no_10_2007.pdf

²³⁸ See, e.g., *Testimony by Experts*, N.J. R. EVID. 702; and *Basis of Opinion Testimony by Experts*, N.J. R. EVID. 703.

²³⁹ See ELLISON & MUNRO, *supra* note 187; ELLISON & MUNRO, *supra* note 65.

²⁴⁰ See Jenifer Markowitz, *Absence of Anogenital Injury*, *supra* note 156 (“How the patient is examined impacts reported injury rates in the literature”). See also Iain McLean, et al., *Female Genital Injuries Resulting From Consensual and Non-Consensual Vaginal Intercourse*, 204 FORENSIC SCIENCE INT'L 27-33 (2011); N.F. Sugar, D.F. Fine, & L.O. Eckert, *Physical Injury After Sexual Assault: Findings of a Large Case Series*, 190 AMER. J. OBSTETRICS AND GYN. 71-76 (2004); and Catherine White & Iain McLean, *Adolescent Complaints of Sexual Assault; Injury Patterns in Virgin and Non-Virgin Groups*, 13 J. CLINICAL FORENSIC MED. 172-80 (2006).

²⁴¹ See ANDRE ROSAY & TARA HENRY, FINAL REPORT: ALASKA SEXUAL ASSAULT NURSE EXAMINER STUDY (Oct. 2008), <http://www.ncjrs.gov/pdffiles1/nij/grants/224520.pdf> (the study of incapacitated patients revealed that 38% of incapacitated patients had genital injury and 44% had nongenital injury. Such patients were statistically significantly *less* likely to have genital and nongenital trauma than patients who were not incapacitated at the time of the assault. Incapacitated patients were also *less* likely to have genital bruising and lacerations and *less* likely to have injury to their fossa, fourchette, vaginal walls, anus, and rectum than those not incapacitated.). See also Dean Kilpatrick, et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study*, NAT'L CRIME VICTIMS RES. & TREATMENT CTR. (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> (in a study of 5,001 women, victim injury was more common in cases of forcible sexual violence (52%) than in drug-facilitated or incapacitated violence (30%)).

²⁴² See ROSAY & HENRY, *supra* note 241.

²⁴³ See Commonwealth v. Miner, 562 Pa. 46, 753 A.2d 225 (2000); *State v. Presley*, No. 02AP-1354, 2003 WL 22681425 (Ohio Ct. App. Nov. 13, 2003); see also *State v. McMillian*, NO. C-950523, 1996 WL 233866 (Ohio Ct. App. May 8, 1996).

²⁴⁴ See Jennifer G. Long, Viktoria Kristiansson & Charlene Whitman-Barr, *Establishing Penetration in Sexual Assault Cases*, 24 STRATEGIES IN BRIEF (Jan. 2015), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Establishing-Penetration-in-Sexual-Assault-Cases-SIB24.pdf>. In states that have statutes that do not specify the degree of penetration as "slight," relevant caselaw may interpret the statutory requirement of penetration; treatises also provide examples and further guidance. No jurisdiction's law requires ejaculation. "Slight" penetration usually means entry of the labia majora. In many states no more than slight penetration is required. See also *Rape and Sexual Assault Analyses and Laws*, AEQUITAS (2019) (available upon request).

²⁴⁵ For additional information on the role of SANEs and working with medical experts, see JENIFER MARKOWITZ, A PROSECUTOR'S REFERENCE, *supra* note 156. "Vaginal penetration occurs, under the law, when the penis, other body part, or object enters the vulva or between the labia majora, which is the outermost part of the female genital organ." LONG, KRISTIANSSON & WHITMAN-BARR, *supra* note 244 (citing James L. Rigelhaupt, Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R. 3d 163, § 3 (1977)).

²⁴⁶ See S. Kerrigan, *The Use of Alcohol to Facilitate Sexual Assault*, 22(1) FORENSIC SCI. REV. (Jan. 2010); ABBEY, ET AL., *supra* note 63; and Scalzo, *supra* note 63.

²⁴⁷ See Heather D. Flowe, et al., *Alcohol and Remembering A Hypothetical Sexual Assault: Can People Who Were Under The Influence of Alcohol During The Event Provide Accurate Testimony?*, 24(8) MEMORY 1-20 (Sep. 2016).

²⁴⁸ See *id.*

²⁴⁹ See Jennifer Long, Charlene Whitman-Barr & Viktoria Kristiansson, *Alcohol and Drug-Facilitated Sexual Assault: A Survey of the Law*, STATUTES IN REVIEW (August 2016), available at https://aequitasresource.org/wp-content/uploads/2018/09/Alcohol-Facilitated-Sexual-Assault-A-Survey-of-the-Law_SIR1.pdf. See also *See Force and Consent Statutory Compilation and Case Law Digest*, AEQUITAS (available upon request).

²⁵⁰ Flowe, et al., *supra* note 247 (finding that peripheral memories of the assault were less accurate than central details).

²⁵¹ For a discussion of considerations related to the collection of blood samples in alcohol and drug-facilitated sexual assaults, see *A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents* 2d ed., OFFICE ON VIOLENCE AGAINST WOMEN (2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf> ("[t]here is some controversy related to if and when to collect toxicology samples and test patients for drug and/or alcohol use. Some jurisdictions only collect these samples if drug-facilitated sexual assault is suspected or if a medical need arises. They seek to minimize patients' discomfort and avoid collecting unnecessary items. Other jurisdictions collect toxicology samples from every patient (with permission) and analyze these samples as case facts and jurisdictional policy dictate. In addition to cases of suspected drug-facilitated assault, some jurisdictions may request a toxicology sample if there is indication that patients voluntarily used drugs and/or alcohol prior to the assault. One rationale for such a policy is that prosecutors will want all information on drug and alcohol use to prepare for the case. When developing jurisdictional policy about when and if to collect toxicology samples, involved professionals should consider the perspective of patients and the criminal justice system and make thoughtful, victim-centered decisions.").

252 For additional information on alcohol-facilitated sexual assault, see Scalzo, *supra* note 63; Appendix G - Stages of Acute Alcohol Influence/Intoxication; and Webinar recordings by Jane Anderson and Patti Powers, Alcohol-Facilitated Sexual Assault: Who Needs Force When You Have Alcohol? Parts I & II, available at <https://aequitasresource.org/resources> (Recorded Jan. 29, 2016 and Feb. 11, 2016).

253 See Jane Anderson & Kaofeng Lee, *The Internet and Intimate Partner Violence: Technology Changes, Abuse Doesn't*, 16 STRATEGIES (Jan. 2017), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Internet-and-Intimate-Partner-Violence-Technology-Changes-Abuse-Does-Not-Issue16.pdf>.

254 See IACP Center for Social Media, INT'L ASSOCIATION OF CHIEFS OF POLICE, <http://www.iacpsocialmedia.org/resources/tools-tutorials/law-enforcement-investigative-guides/> (last visited May 22, 2017).

255 See Anderson & Garvin, *supra* note 203.

256 See Anderson, *supra* note 96.

257 Comprehensive resources providing guidance on conducting direct examination of law enforcement who collected and maintained evidence as well as the direct and cross examination of forensic expert have been developed by AEquitas and are available at <https://www.sakitta.org/toolkit/index.cfm?fuseaction=topic&topic=17>. Please reach out to AEquitas for additional assistance.

258 132 S. Ct. 2221 (2012).

259 See Teresa M. Garvey, *Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford*, 11 STRATEGIES (June 2013), available at <https://gcs-vimeo.akamaized.net/exp=1574298615~acl=%2A%2F722183941.mp4%2A~hmac=ac0302098e5a47480d7142ca4314a7f92ccdf5f83d610be5244fad170865b867/vimeo-prod-skyfire-std-us/01/2125/8/210626104/722183941.mp4>.

260 See *id.*

261 See Section 3.1-F-3 on *Preventing and Responding to Witness Intimidation*.

262 AEquitas has sample motions on file and available upon request to support prosecutors and is also able to provide research and peer review of motions. Contact AEquitas (202) 558-0040 or info@aequitasresource.org.

263 Rape shield is typically a motion the defense is required to file if they intend to introduce evidence of the victim's sexual history. See Michelle Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002); Heather D. Flowe, et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations*, 31 LAW & HUMAN BEHAVIOR 159 (Apr. 2007); and Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013). AEquitas has developed a number of rape shield resources as well, including a statutory compilation and case law digest, available upon request. Prosecutors should also consider appellate challenges and legislative reform regarding prior and subsequent activity with the defendant, given the prevalence of nonstranger sexual assault.

264 See *Statutory Compilation of Rape Shield Laws*, AEQUITAS (Feb. 2013); *Case Law Digest on Rape Shield*, AEQUITAS (Feb. 2013); and *Rape Shield Statutes*, AEQUITAS (Feb. 2013) (chart of the various elements required in rape shield laws across the united states) (all resources available upon request).

265 Sexual history and behavior are umbrella terms in rape shield jurisprudence covering numerous examples of specific evidence deemed related to a victim's sexual activity. Please check your jurisdiction's specific rules and law for additional information.

266 See FED. R. EVID. 412.

267 *E.g.*, witnesses to testify as to other crimes, wrongs, or acts. FED. R. EVID. 404(b).

268 See *Portillo v. State*, 211 So.3d 1135 (Fla. Dist. Ct. App. 2017).

²⁶⁹ See AEQUITAS, *Evidence of Other “Bad Acts”*: In Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions, 31 STRATEGIES IN BRIEF (2017), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Evidence-of-Other-Bad-Acts-In-Intimate-Partner-Violence-Sexual-Violence-Stalking-and-Human-Trafficking-Prosecutions.pdf>; *Untested Evidence in Sexual Assault Cases*, NATIONAL INSTITUTE OF JUSTICE, <https://nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx> (last visited May 22, 2017); and *Why Testing Rape Kits Matters*, *supra* note 193.

²⁷⁰ Prosecutors should check their jurisdiction’s law to determine the categories of “other acts” evidence specified in their rules of evidence (or other statutory provisions) and how those categories, and the permissible purposes for which the evidence may be used, have been analyzed by the courts.

²⁷¹ The listed purposes are not exclusive; generally, any legitimate issue relevant to proof of the crime or of the defendant’s guilt (e.g., evidence of consciousness of guilt) can be a permissible purpose.

²⁷² See *Dowling v. United States*, 493 U.S. 342 (1990) (holding that the Fifth Amendment’s protection against double jeopardy did not prohibit the prosecution from introducing evidence of a crime for which the defendant was acquitted); and *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977) (holding that FED. R. EVID. 404(b) is an inclusionary rule, permitting evidence of prior drug acquittal to prove knowledge and intent in subsequent prosecution). Many jurisdictions bar such evidence of acquittals, however. See, e.g., *State v. J.M., Jr.*, 137 A.3d 490 (N.J. 2016) (holding that evidence of crime for which defendant was acquitted may not be admitted at trial for subsequent crime). Even if evidence of an act for which the defendant is acquitted is admissible, it may be necessary for the court to permit the defendant to introduce evidence that the charge resulted in an acquittal.

²⁷³ As of 2017, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Nebraska, Oklahoma, and Wisconsin allow propensity evidence in sexual violence cases generally. Colorado has adopted a relaxed standard for admission of evidence of other sex crimes for purposes other than propensity. Michigan, Missouri, Texas, Utah, and Virginia allow evidence of propensity only in cases of child sexual abuse. Alaska, California, Illinois, Louisiana, Michigan, and Wisconsin allow propensity evidence in domestic violence cases. See generally, Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Domestic Violence Cases*, 47 SANTA CLARA L. REV. 157 (2007). For further information on jurisdiction-specific issues contact AEQUITAS for technical assistance.

²⁷⁴ See *id.*

²⁷⁵ See FED. R. EVID. 403.

²⁷⁶ Some jurisdictions require “clear and convincing” evidence of the other act; some require a preponderance of the evidence; some require no specific quantum of evidence.

²⁷⁷ See, e.g., *State v. Jones*, 450 S.W.3d 866, 898-99 (Tenn. 2014) (discussing the distinction between crimes with similar characteristics and “signature” crimes); compare *State v. Sempsey*, 358 A.2d 212 (N.J. Super. App. Div. 1977) (allowing evidence of other sexual violence incident where in both cases the attack occurred at night; the defendant had previously worked in the victim’s apartment; the victim’s eyes were covered with tape; the assailant wore peculiar head gear, a dark jacket and pants; the assailant possessed a gun; the assailant instructed the victims to count when he left or he would shoot; the assailant smelled of grease, was unable to obtain an erection and forced the victims to perform oral sex) with *State v. Thang*, 41 P.3d 1159 (Wash. 2002) (holding that numerous similarities between crimes were insufficiently distinctive to admit evidence on issue of identity).

²⁷⁸ See *The Prosecutors’ Resource on Crawford and its Progeny*, AEQUITAS (Oct. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Crawford.pdf.

²⁷⁹ See *The Prosecutors’ Resource on Forfeiture by Wrongdoing*, AEQUITAS (Oct. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf

²⁸⁰ See Recording by Viktoria Kristiansson & Kathryn Walker, Prosecuting Cases Involving Victims with Developmental Disabilities: A Focus on Sexual Assault, <https://gcs-vimeo.akamaized.net/exp=1574298920~acl=%2A%2F721334641.mp4%2A~hmac=afac641eb5b4334168a8999d90b7193f8e8a3132a2554d6ffd8e33b4146c5ba8/vimeo-prod-skyfire-std-us/01/2089/8/210447028/721334641.mp4> (recorded May 29, 2015).

281 C. Palmer Gene Vance II and Madonna E. Schueler, *Ten Tips for Developing Your Case Theme*, 31(5) GP SOLO (Sept./Oct. 2014), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2014/september-october/ten_tips_developing_your_case_theme/.

282 Absence of consent is an element of certain sexual assault offenses in some jurisdictions; in others, consent is an affirmative defense that must be raised by the defense and disproved by the state. The defense may be codified as part of the criminal code pertaining to sex crimes or may be codified in general provisions applicable to the code as a whole. Contact AEquitas for additional information on consent laws across the United States.

283 *See generally* Anderson, *supra* note 263.

284 *See* Appendix F - Considerations for Working with Experts; and Appendix G - Stages of Acute Alcohol Influence/Intoxication; *see also* Scalzo, *supra* note 63.

285 Excerpted from Viktoria Kristiansson, *Prosecuting Alcohol-Facilitated Sexual Assault: a Substantive Article for Allied Professionals*, 20(2) SEXUAL ASSAULT REPORT 17-36 (2016).

286 *See, e.g.*, *Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers*, AMERICAN PROSECUTOR RESEARCH INSTITUTE 8 (July 2003), https://ndaa.org/wp-content/uploads/drug_toxicology_for_prosecutors_04.pdf ; and Scalzo, *supra* note 63.

287 *See Alcohol Alert: Alcohol and Women*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <https://pubs.niaaa.nih.gov/publications/aa10.htm> (last visited Aug. 21, 2016); and M. Frezza, et al., *High blood alcohol levels in women: The role of decreased gastric alcohol dehydrogenase activity and first-pass metabolism*, 322(2) THE NEW ENGLAND J. OF MED. 95-99 (1990).

288 *Frezza, supra* note 287.

289 *See id.*

290 *See id.*

291 *See id.*

292 *See* Aaron M. White, *What Happened? Alcohol, Memory Blackouts and the Brain*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (July 2004), <https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> (last visited June 15, 2017).

293 *See id.*

294 *See id.*

295 *See id.*

296 Marlene A. Attardo, Annotation, *Defense of Mistake of Fact as to Victim's Consent in Rape Prosecution*, 102 A.L.R. 5th 447 (2002).

297 *See id.* at 1.

298 *See id.*

299 *See e.g.*, *United States v. Goodman*, 70 M.J. 396 (C.A.A.F. 2011).

300 To the extent possible, protect victim privacy where injuries are present on genitalia or other intimate body parts; restrict photographs to the injury itself and limit full body photographs.

301 *See* CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION, Standard 3-3.2 (AM. BAR ASS'N, 4th ed. 2015).

302 In some circumstances, a plea offer is conditioned upon the offender agreeing to take part in a restorative justice conference. Prosecutors should carefully weigh the unique considerations presented by sexual violence cases when determining whether to utilize a restorative justice model. For more information, please contact AEquitas.

303 See CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION, Standard 3-7.2, 7.3 (AM. BAR ASS'N, 4th ed. 2015).

304 See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (July 2003).

305 See, e.g., *Withdrawal of Plea of Guilty or Nolo Contendere*, PA. R. CRIM. P. RULE 591.

306 Some jurisdictions require the prosecutor's office to consult with or inform the victim prior to offering a plea deal. See, e.g., 18 U.S.C. § 3771(9) ("[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement"); and 11 Del. Code § 9405 ("[c]onsistent with the duty to represent the interests of the public as a whole, the prosecutor shall confer with a victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion.") Even in jurisdictions where consulting with victims is not required, a victim-centered prosecution should take into account the victim's position on a possible plea.

307 See, e.g., *Commonwealth v. Rodriguez*, 461 Mass. 256 (2012).

308 Contact AEquitas for assistance with new and untested statutes at (202) 558-0040 or info@aequitasresource.org.

309 See NCVLI's Victim Law Library, NCVLI, http://law.lclark.edu/centers/national_crime_victim_law_institute/professional_resources/ncvli_library/ (last visited June 15, 2017).

310 Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES 6 (2010), <https://aequitasresource.org/wp-content/uploads/2018/09/EducatingJuriesInSexualAssaultCasesPart1.pdf>.

311 *Id.*

312 In jurisdictions where this is permitted, allow panelists the opportunity of answering questions in questionnaire and discussing in open court with parties present, but outside the presence of the panel. See Nat'l Crim. Victim Law Inst., *Protecting the Rights of Survivors When They Are Called to Participate in Jury Service* (Nov. 2014), <https://law.lclark.edu/live/files/18336-final-version-2victim-law-position-paperoregon>.

313 See e.g., *State v. Delgado*, 223 Wis. 2d 270 (1999) (holding juror's failure to disclose her sexual assault as a child supported a finding of inferred bias).

314 See *Batson v. Kentucky*, 476 U.S. 79 (1986); see also *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

315 If possible, have someone assist in note taking during *voir dire*. This will allow the prosecutor to have more time engaging with the jury and less time noting juror numbers and your thoughts about that juror.

316 If the witness was impaired by alcohol, use caution if your victim, whom you want the jury to believe, was similarly impaired. If the victim was drinking but able to remember significant details, it may be dangerous to suggest a defense witness cannot be believed because the witness was drinking.

317 Destructive cross is cross-examination designed to attack the witness's testimony on direct examination. Convention wisdom is that you first obtain any helpful information on cross-examination before proceeding with destructive cross.

318 Whether an expert can or cannot testify to certain types of statistics will vary by state. See *Victim Behavior Case Law Digest*, AEQUITAS (2011) (available upon request from AEquitas); LONG, *supra* note 184.

319 Teresa M. Garvey, *Making it Stick: Protecting the Record for Appeal* 12 STRATEGIES 1 (Apr. 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/Making_it_Stick_Protecting_the_Record_for_Appeal_Issue_12.pdf.

³²⁰ In some jurisdictions, charges on lesser-included offenses must be given even over defense objection based on strategic considerations (*i.e.*, where the defense prefers the jury to decide the case on an all-or-nothing basis, with no option for a compromise verdict). *See, e.g., People v. Anderson*, 141 Cal. App. 4th 430 (Cal. Ct. App. 2006); *State v. Simms*, 369 N.J. Super. 466 (N.J. Super. Ct. App. Div. 2004); and Michael Hoffheimer, *The Future of Constitutionally Required Lesser Offenses*, 67 U. OF PITT. L. REV. 585 (2006).

³²¹ Either a written or oral statement — or both — should be acceptable.

³²² *See Grantees*, TA2TA, <https://www.ta2ta.org/grantees.html> (last visited June 11, 2017).

³²³ A case-level logic model for prosecuting sexual violence is available in RSVP Volume II. A logic model is a visual roadmap to connect the problem, the ultimate intended outcome or solution, and the supporting steps to get to the solution.