

New Mexico Family Impact Seminar

***Family Violence and Children:
Perspectives for Policy***

Criminal Matters Prosecution in Domestic Violence Cases

by
Sarah Buel

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Department of Extension Home Economics
Department of Family & Consumer Sciences
College of Agriculture and Home Economics
New Mexico State University

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Criminal Matters

Prosecution in Domestic Violence Cases*

Sarah M. Buel, Esq. †

Prosecutors wield tremendous power to improve victim safety and offender accountability. Since a prosecutor's mandate is to ensure public safety, as well as to seek justice, protection of abuse victims must be of the highest priority. Since experts assert that most batterers choose violence as a means of controlling their partners, effective prosecution of domestic violence cases can force batterers to stop their abusive conduct. Evidence-based prosecution has emerged as a means by which a domestic violence case can go forward with or without the victim's testimony. This is accomplished by using hearsay exceptions such as excited utterances, or statements as to physical or mental condition. The practice is premised on law enforcement procuring sufficient evidence at the crime scene and in the course of their investigation to enable the court to focus on the batterer's criminal conduct. By adopting written protocols for evidence-based prosecution, domestic violence case practice can be standardized, resulting in more creative trial strategies, increased conviction rates, and, most importantly, greater victim safety. In a growing number of jurisdictions, prosecutors also are helping to establish Family Violence Coordinating Councils to facilitate communication, collaboration, and improved interventions among a broad range of service providers.

Effective prosecution of domestic violence cases can force batterers to stop their abusive conduct.

Effective Prosecutor Interventions: Laying the Groundwork

- Larger offices should establish a Domestic Violence Unit staffed by experienced, committed prosecutors who can build rapport with victims. Smaller offices should ensure that all prosecutors handling domestic violence cases are fully trained to implement model practices. All protocols should emphasize the effective and timely handling of misdemeanor, as well as felony, matters. Vertical prosecution, in which the initial prosecutor remains with the case even if it changes courts, is strongly recommended.
- Written protocols should cover: (1) the dynamics of family violence, including an explanation of safety planning and obstacles to leaving; (2) cultural competence; (3) a batterer's typical behaviors, including stalking, denial, and intimidation; (4) a list of all relevant social service agencies,

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† Sarah Buel, J.D., is a Clinical Professor at the University of Texas at Austin - School of Law.

with identification of those geared toward serving victims of color, lesbian, gay, and transgendered, elders, disabled, children, teens, immigrants, illiterate, non--English speaking, or otherwise underserved or at high risk.

- Protocols should specify prosecutor obligations when the defendant is a battered person who acted in self-defense or whose case includes other mitigating circumstances. Given that the majority of convicted females are domestic violence victims, it is essential that those handling prostitution, property, and drug crimes, in particular, screen for abuse. The case dispositions should then reflect the female offenders' on-going needs for safety planning, job training, education, housing, child care, etc.

Work Closely With and Train Police

- Law enforcement policy should mandate physical custody arrests when probable cause exists to believe that domestic violence has occurred.[‡]
- State statutes and law enforcement policies should require that an incident report be written in response to every domestic violence call, with an explanation if the accused is not arrested. Whether or not an arrest is made, a copy of the incident report should be forwarded to the prosecutor's office each morning so that an advocate may contact the victim and start safety planning.

Advocacy Throughout the Protection Order and Criminal Court Process

- Utilizing victim-witness advocates, students, and volunteers, prosecutors should ensure that every victim has an advocate's support and guidance in court. The victim should be protected from the defendant and the defendant's family and friends who often accompany him with the specific intent of intimidating the victim. This form of witness tampering should be addressed immediately, with formal charges filed whenever possible.
- Trained volunteers and advocates should conduct briefings for victims thirty minutes prior to the hearings and include an explanation of: (1) civil and criminal process; (2) what to do if an abuser violates the order (call the police); (3) completion of a personalized safety plan; (4) information and referrals, including welfare (Temporary Assistance to Needy Families), Medicaid, Food Stamps, legal services, fuel assistance, support groups, job training, and education access programs, visitation centers, child support enforcement assistance, and child care options. If prosecutors want victim participation in the trial process,

[‡]After domestic violence training was implemented in 1991 by the San Diego Police Department, the rate of domestic violence arrests increased, and the rate of domestic violence related homicides was drastically reduced (by 59 percent). Telephone Interview with Anne O'Dell, Retired Detective Sergeant, San Diego Police Department (June 14, 1996)

State statutes and law enforcement policies should require that an incident report be written in response to every domestic violence call, with an explanation if the accused is not arrested.

then economic, social, and legal empowerment must be addressed.

- Arraignment can be used to set pre-trial conditions for the abuser and to request bail/ bond, if appropriate. Arguments should focus on: (1) history of abuse; (2) threats of retaliation; (3) use or threatened use of weapons; (4) defendant's criminal history; (5) defendant's use of drugs or alcohol; and (6) any other facts relevant to the victim's safety.
- During the pre-trial stage, the victim is vulnerable to manipulation, threats, or violence, both in retaliation for involvement with the criminal charges, and to dissuade the victim from testifying. Prosecutors and advocates should always ask a victim about the batterer's post-arrest conduct – and file obstruction of justice or witness tampering charges when warranted. Bail/bond/release conditions should include: (1) no contact with the victim; (2) a warning that commission of any new offense will result in bail revocation; (3) surrender of all firearms; (4) mental health evaluation; (5) abstinence from use of alcohol or drugs; and (6) warning to abide by all court child support, restraining, and protective orders.
- The victim safety plan should also be reviewed with the victim prior to arraignment if possible. Case or protective order dismissal should not occur at any hearing, arraignment or pre-trial conference without an advocate first reviewing a safety plan with the victim. The request for dismissal usually is the result of the defendant pressuring, threatening and/or coercing the victim to make such a request. By keeping the case open, the court can better protect the victim with pre-trial conditions for the batterer and ongoing safety planning for the victim and her children.
- Prosecutors and/or advocates should conduct victim safety checks throughout the case to ensure that the defendant is not committing the crime of witness intimidation. Although a defendant may abstain from assaulting the victim while the case is pending, he may engage in other abusive, unlawful conduct, such as stealing her belongings and mail, destroying her property, harassing her at work, injuring pets, bribing her to not appear at trial, and/or blackmailing her regarding custody, child support, and family safety.

Evidence-Based Prosecution

- When preparing for trial, prosecutors should assume that the victim will not be able to testify. But regardless of whether she testifies, independent corroboration should be obtained from witnesses, photographs, medical and EMT records, spontaneous statements, 911 or telephone answering machine tapes, physical evidence, telephone bills, and employee records.
- Prosecutors can use pre-trial Motions In Limine to obtain the court's assent regarding admissibility of a definition of abuse, defendant's history of abuse, victim's out of court statements, voir dire questions, and

to preclude inappropriate defense evidence. Jury selection must include voir dire to eliminate biased jurors who lack a basic understanding of domestic violence and thereby blame the victim, believe it is “normal” within intimate relationships, and/or otherwise cannot fairly apply the law[§].

- Direct examination of the victim should include as much detail as possible regarding the nature and extent of the abuser’s power, coercion, control, and abuse in the relationship. This is essential whether the victim has recanted, changed her story, or is fully cooperating with the prosecution. e.g., “Ms. Doe, do you work outside the home? And how much do you take home per week? And how much do groceries cost for you and your children? The rent?”

- When a victim recants or changes her testimony, the prosecutor may want to introduce prior victim statements, including a protection order affidavit, signed police statement, or testimony from a prior proceeding. The prosecutor should discuss this strategy with the victim prior to trial to ensure that victim’s safety is not compromised. The prepared police officer can often make the case by recalling the details, such as spontaneous utterances, description of the crime scene, and demeanor of the victim and children.

- Using hearsay exceptions such as excited utterances, or statements as to physical or mental condition, often allows the prosecutor to bring the case to trial without the victim’s testimony. However, in *Crawford v. Washington*^{**}, the U.S. Supreme Court held that “[w]here testimonial evidence is at Issue. . . the Sixth Amendment demands. . . unavailability and a prior opportunity for cross examination.” There are a number of key distinctions between *Crawford* and most domestic violence cases: (1) *Crawford* involved the admissibility of statements given during a custodial interview by police, not those blurted out by victims at the crime scene; (2) *Crawford* addresses use of hearsay statements against penal interest, not the excited utterances typically presented in domestic violence prosecutions; and (3) since in most domestic violence cases, the batterer has caused the victim’s unavailability, the Doctrine of Forfeiture by Wrong-doing (Fed.R.Evid. 804(b)(6)) should apply: meaning that the defendant loses the right to object to the hearsay statements and the witness’s unavailability because the absence is due to his conduct. Further clarification and analysis of this decision is available on the ABA Commission on Domestic Violence web site.

- Closing arguments provide another opportunity for the prosecutor to emphasize that the defendant chose to abuse his partner and must learn that violence against intimates is as intolerable as that against strangers.

[§]NATIONAL COLLEGE OF DISTRICT ATTORNEYS, DOMESTIC VIOLENCE CONFERENCE MANUAL NOTEBOOK, SAMPLE VOIR DIRE QUESTIONS (Oct. 1993)

^{**}124 S.Ct. 1354 (2004)..

- Sentencing should reflect the far reaching, adverse impact of domestic violence on the victim, her family, and the community as a whole. The prosecutor will also want to argue the factors considered in the bail hearing and work closely with probation to ensure compliance.
- Post-conviction safety planning should include reminders to the victim that she should call the police if the defendant violates any court orders, conditions of probation, or places her in fear.
- Former Seattle Police Chief Norm Stamper aptly summarizes the role of police and prosecutors: “Domestic violence prevention and enforcement was my top priority because I’d come to see the family as the foremost breeding ground of violence in America. Violence in the home or among intimates is a predictable precursor to other forms of social (criminal) violence. The justice system has not only the responsibility to arrest DV offenders and hold them accountable but the opportunity to help end the terror and pain of violence perpetrated against “loved” ones. A police department interested in making life safer for all will focus on domestic violence prevention and enforcement. It will formulate sound policies, assign sufficient numbers of specialized personnel, and deliver extensive training to all employees but particularly to dispatchers, advocates, and first-responders.

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For further information on the New Mexico Family Impact Seminar, contact:

Bruce Jacobs, Ph.D
Extension Specialist
New Mexico State University
Department of Extension Home Economics
MSC 3AEP.O. Box 30003
Las Cruces, NM 88003-0003
(505) 646-4270; Fax: (505) 646-1889
bjacobs@nmsu.edu

or

Charolette Collins, M.S.
Extension Specialist
New Mexico State University
Department of Extension Home Economics
9301 Indian School Road NE, Suite 108
Albuquerque, NM 87112
(505) 332-3765; Fax: (505) 332-3681
collins@nmsu.edu

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