

## **Best Practices for Prosecution**

### **Vertical Prosecution**

Vertical prosecution is recommended in all sexual assault cases. Vertical prosecution of sexual assault cases means the same prosecutor, who has specialized training in sensitive crime issues, is assigned to the case from beginning to end. With vertical prosecution, victims are able to work with the same prosecutor and investigator from the time potential charges are first reviewed through the sentencing of the offender. Vertical prosecution has shown to improve conviction rates, reduce victim trauma, and provide more consistent, appropriate sentencing. It is therefore considered best practice.

### **Meeting with the Victim/Advocacy Presence**

It is recommended that prosecutors meet with the victim prior to making a determination about whether or not to charge the offender. Meeting with the victim gives prosecutors a feel for the case they cannot get just reading reports. Meeting with the victim is also part of being victim centered and demonstrates to the victim that the prosecution is taking the case seriously.

If the prosecutor's office has a policy of meeting with the accused prior to charging or declination, the prosecutor should always meet with the victim prior to meeting with the defendant or defense attorney. It is necessary that a law enforcement witness be present during any interviews with the victim if any facts of the case will be discussed. Failure to have a witness present could result in the prosecutor becoming a witness. In addition, law enforcement personnel will memorialize for purposes that include mandated discovery any factual assertions by the victim that may need to be disclosed to the defense in a prosecution. Prosecutors should determine who will attend the meeting so that all individuals present will aid in the investigation and prosecution of the case and secure the presence of a witness who can testify at any hearing, and at trial concerning information disclosed by the victim during meetings.

Meetings with victims should include an advocate whenever possible. An advocate can provide emotional support to the victim and encourage the victim to share details that are important to reviewing and potentially charging the case.

Meetings with victims should include a community based advocate whenever possible. An advocate can provide emotional support to the victim and encourage the victim to share details that are important to reviewing and potentially charging the case. Advocates maintain a privilege not to disclose communication between the advocate and the client. Advocates, therefore, can not be used by the prosecutor as a witness to document the facts discussed by the victim during meetings.

Interviewing the victim provides an opportunity to review the case from the victim's perspective, explain the process, uncover details that may have been overlooked in the initial investigation, and determine what outcome the victim is seeking. Creating a safe environment for the victim to explain all relevant facts and her/his perspective regarding the sexual assault is essential to obtaining a full picture of the case. In order to do this, prosecutors should attempt to establish rapport by:

- Allowing adequate time for the interview
- Conducting the interview in a place where the victim feels safe and able to speak freely
- Ensuring that the defendant is not present or in the vicinity
- Adopting a "seeking to understand" perspective in questioning the victim
- Reviewing the victim's rights and explaining the victim's role in the prosecution process, including the rape shield law, preliminary hearing, plea, trial, potential settlement, etc
- Inquiring about any threats suspects have made toward victims, and respecting and supporting the victim's efforts to maintain their safety

A victim centered approach also means that prosecutors should support victims who choose not to cooperate in moving the case forward.

### **Collaboration with Law Enforcement**

Victim disclosure about a sexual assault is not an event, it is a process. Prosecutors who meet with victims may learn new information that can be used to strengthen a case against an offender or that may weaken a case and that must be taken into account as part of a successful prosecution effort. For these reasons, prosecutors should review the investigator's report carefully to identify incomplete information or gaps in the evidence. It is equally important for the prosecutors to meet with the law enforcement investigator as well as the victim to discuss the investigation prior to making a charging decision. Prosecutors should work closely with law enforcement to collect the evidence needed to substantiate a case for charging the offender. The sooner this process begins, the more likely that supporting evidence will be obtained.

### **Making Charging Decisions**

Prosecutors play a pivotal role in the outcome of sexual assault complaints. They decide who will be charged, what charge will be filed, and whether plea negotiations will be considered. Prosecutors typically also recommend the offender's sentence. Although each of these decisions is important, none is more critical than the decision to prosecute or not to prosecute. Prosecutors have broad discretion in making charging decision.

The prosecutor has an ethical obligation to prosecute sexual assault cases that the prosecutor knows are supported by sufficient admissible evidence. That includes the obligation to assess how the entire case is likely to appear to a jury based on all reasonable inferences arising from the admissible evidence. Prosecutors have an obligation to recognize the danger that in some cases they may focus too narrowly on what appear to be negative victim characteristics or conduct. Instead, an offender focused approach to the case is the best practice, carefully considering all offender conduct, behaviors and characteristics. This includes the frequent offender practice of targeting as victims persons who are vulnerable and who may not report the crime or may appear unsympathetic or not credible. Any history of sex offenses or other predatory or abusive conduct by the offender is highly relevant in all prosecutorial decision making.

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Gathering the information needed to make a charging decision in a sexual assault can be a time consuming process. Prosecutors can support victims by:

- Making decisions in as timely a manner as possible
- Keeping victims apprised of the investigation and explaining delays
- Addressing the need for victim and community safety including whether or not the assailant is in custody during the pendency of the case
- When appropriate, explaining in accurate detail to the victim potential barriers to charging and/or obtaining a conviction

### **Notifying the Victim**

A victim centered response to sexual assault takes into account the potentially lifelong impact that charging decisions have on victims. Victims of sexual assaults that are not charged are likely to feel re-traumatized because the pathway to achieve closure through the justice system has been closed for them.

*It is the prosecutor's responsibility to notify a victim of sexual assault that a decision has been made not to charge the case.* The notification should occur promptly and if possible, before the defendant is notified. This will prevent the victim from hearing the disposition from the defendant or other people first. The best practice is to make notification in person or by phone whenever possible. Notification should include an honest explanation of the reasons for the decision not to charge.

### **Preparing the Victim and Family**

The victim centered approach recognizes that the victim is the center of the investigation. First, the victim is the person most affected by the crime. Second, in the majority of sexual assaults, the only witness to the assault is the victim herself. For these reasons, the investigation starts with the victim whose cooperation is necessary throughout the process to ensure a successful prosecution of the suspect. Preparing family members or other loved ones the victim wants to have involved is equally critical to ensuring the victim's continued participation with prosecution.

When a decision is made to charge the offender, prosecutors must support victims and family members for the next steps in the justice process. Prosecutors can do this by:

- Understanding the victim's limits emotionally, cognitively and psychologically
- Educating victims about the steps in the process of the investigation and prosecution
- Educating victims about attendance at court proceedings
- Educating victims on the estimated timeline of the case
- Preparing victims for testimony and estimating the amount of time they will be spending on the stand
- Preparing victims and family members for disclosure of traumatic information in the trial (e.g. 911 tapes, photos, etc.)
- Informing victims about the presence of potential for media in the court room and rules regarding the limitations on publicity regarding the victim
- Cautioning victims about potential consequences of discussing the case with others outside the criminal justice system
- Preparing victims on how to respond to inquiries from defense attorneys, investigators and the media

### **Protecting Victim Safety**

Ensuring the physical and emotional safety of victims during the prosecution phase is critical. In some cases, victims may be subject to intense pressure and harassment from the assailant and/or his friends and family members to recant. To support victim safety, prosecutors should:

- Advocate for bail conditions that consider the safety of the victim and the community.
- Ensure that no contact orders are written and not oral.
- Inform victims about the terms of bail conditions for the offender.
- Seek information about and educate victims about the potential risk of retaliation or harassment by the defendant and/or the defendant's family members and friends.
- Assist victims to develop a safety plan in the event of retaliation or harassment.

- Be mindful of the need to separate victims and defendants during any events that occur at the courthouse.

### **Interactions with Victims and Others in Presence of Victim**

As much as with any other type of prosecution, it is critical that members of the prosecution team behave appropriately at all times when interacting with victims and their supporters and interacting with others in the presence of the victim or their supporters. This includes efforts to avoid either of the following:

- Joking or unnecessary familiarity with the defendant or defense counsel at any time. What may seem like friendly courthouse banter to a member of a prosecution team could be easily misunderstood and cause pain to a victim.
- Unnecessary references by any member of the prosecution team to unrelated personal or professional obligations that are interfering with the handling of the victim's case. Delays can be objectively explained honestly, but victims should not be subjected to complaints about prosecution workloads.

### **Initial Court Appearance**

The initial appearance in court is a frightening experience for victims. In some cases, it may be the first time the victim and assailant meet face to face after the assault. Undoubtedly, it will be an affirmation that the offender is being held accountable for his actions. Because of this, it is not uncommon for offenders to attempt to intimidate the victim. A victim centered response recognizes that this is a critical emotional juncture for the victim, and that the outcome may influence her/his decision to move forward. To support victims prosecutors should:

- Discuss the advantages and disadvantages of victim attendance at court proceedings.
- Be informed about the facts of the case if stepping in for another prosecutor.
- Plan ahead about where the victim will be waiting prior to and during all court proceedings.
- Attempt to stagger when the victim and the assailant enter the courtroom.

### **The Preliminary Hearing**

The prosecutor conducting the preliminary hearing must prepare the victim for what to expect in the courtroom. As part of that process, the prosecutor must be informed about the facts of the case in advance of the preliminary hearing. The prosecutor must be knowledgeable about rape shield laws and other applicable law that limit the defendant's ability to cross-examine a victim about past sexual behavior and credibility. Victims must also be informed that they may generally be asked about their use of alcohol and any other substances around the time of the assault that may have affected their ability to accurately perceive events, or recall them later. Victims should also be prepared for the fact that prosecutors must ask graphic questions to

establish the elements of the offense and that defense attorneys are permitted under the law to cover the same topics in cross examination.

Prosecutors should avoid asking a victim to point to any part of her body or to use any kind of self demonstration during questioning because this risks subjecting the victim to further trauma. Instead, a drawing or diagram should be used where necessary.

The victim has the right, by statute (Statute 970.03 (4)), to request through the prosecutor that the court commissioner or judge close the preliminary hearing to the public to avoid further embarrassment or trauma. Defense counsel often do not oppose these motions. When the courtroom is closed, both the defendant and the victim are entitled to have a few support people in the courtroom.

### **Trial Preparation**

A victim centered approach recognizes the need to fully prepare victims for the realities of the trial process. This means educating victims about the timeline, what is expected of them, what support the prosecution team can provide, and where they can go for additional help. Keeping victims informed about continuances and other delays is important. Involving victims in preparing the prosecution's case will empower them and improve their testimony. To prepare victims for trial, prosecutors should:

- Provide the victim with advance notice of pre-trial motions.
- Provide advance notice to the victim about trial dates.
- Ask the victim if there are dates that need to be avoided.
- Ensure that the victim is fully prepared and as comfortable as possible.
- Encourage the victim to report to police and keep a log of violations of no contact orders.
- Consider the use of an expert witness - Interview them in advance and prepare them for testimony.
- Issue timely subpoenas to victims and witnesses.
- Prepare the victim for all testimony and anticipated cross examination - Normalize their fear; let victims know they can ask to take a break and clarify questions that are confusing or that the victim does not understand.
- Explain that a witness is required to simply answer questions, and is not allowed to give narrative answers or raise new topics.
- Remind the victim that what she shares with family and friends is not privileged information and is subject to subpoena. Explain the right of privilege held by advocates and encourage the victim to use advocates for emotional support.

- Advise the victim of the potential for misuse of trial subpoenas as a strategy sometimes used to remove support from the victim during court proceedings.
- Explain to the victim that the courtroom is open during the trial.

### **Victims Who Choose Not To Participate in Prosecution**

Victims assume tremendous risks during the prosecution phase of a sexual assault. For some victims, the stress of the trial process and the trauma they endure in re-living the assault can become overwhelming. Victims who make a decision to not participate in the prosecution may well not be “recanting.” They may be simply stating that from their view the potential risk of self harm has become greater than the risk of the defendant avoiding responsibility for the crime. Victims who are unable to participate in the prosecution of a case should be treated with the same dignity and respect as victims who are able to fully participate in the prosecution of a case.

Because recantation is used by victims in an attempt to halt criminal justice involvement, it should never be viewed, in and of itself, as an indication of a false report.

### **False Reporting and Victims Who “Recant”**

A false allegation is a reported crime of sexual assault to a law enforcement agency that an investigation factually proves never occurred. Early estimates of false reports artificially exaggerated the percentage of false allegations, as high as 94%. They have since been largely refuted for faulty study methods and for equating recantation with false reporting. While there are no definitive studies, a recent report estimates the rate of false allegations between 2-8%.<sup>11</sup>

A false allegation or false report should be distinguished from a mere mistake or faulty memory. Innocent mistakes or inaccuracies are part of any human activity. The intentional false allegation of a witness is and should be treated differently than a decision to recant or withdraw a complaint.

Victim Recantation is a retraction or withdrawal of a reported sexual assault. **Because recantation is used by victims to halt criminal justice involvement, it should never be viewed, in and of itself, as an indication of a false report.**<sup>12</sup> Many factors may influence a victim’s decision to recant:

<sup>11</sup> Lonsway, K, Archambault, J, Lisak, D. (2009) False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault. *The Voice: Helping Prosecutors Give Victims a Voice*. Published by the National Center for the Prosecution of Violence Against Women, 3:1. Available online at: [http://www.ndaa.org/publications/newsletters/the\\_voice\\_vol\\_3\\_no\\_1\\_2009.pdf](http://www.ndaa.org/publications/newsletters/the_voice_vol_3_no_1_2009.pdf).

<sup>12</sup> False Allegations, Case Unfounding and Victim Recantations in the Context of Sexual Assault. Oregon Attorney General’s Sexual Assault Task Force. Available online at: [http://www.oregonsatf.org/resources/docs/LE\\_Rec\\_Practice\\_False\\_Reports\\_Unfounding.pdf](http://www.oregonsatf.org/resources/docs/LE_Rec_Practice_False_Reports_Unfounding.pdf).

- Victims may not have initially realized the toll that a criminal investigation and trial would take on them mentally, emotionally, physically and financially, and later decide to end their involvement with the legal process.
- Victims may face tremendous pressure from family, friends and the community not to report or participate in prosecuting the offender. This is especially true when the assailant is known to the victim.
- Victims may withdraw their participation because they have grown tired of lengthy investigative delays, slow court dockets, or when they feel uninformed about, and uninvolved in, the decision making process.

A victim centered response necessitates that prosecutors and police investigate whether a recantation is a result of a system failure, witness tampering or other factors that are outside the control of investigators or responders. While recantations present challenges for the criminal justice system, they should not deter prosecutors from considering the viability of the case. In the event that a recantation is the result of duress the victim experienced, prosecutors may be able to successfully educate the judge and jury on the causes of the recantation.

### **Jury Selection**

Jury selection, as in any other criminal case, is critical to the outcome of a sexual assault trial. Potential jurors bring with them their own personal experiences and beliefs about sexual assault and a host of myths and misperceptions. Some jurors may have personally experienced a sexual assault. Some may know a family member or loved one who has been the victim of sexual abuse or assault. Others may know someone who has been accused. Jurors are also exposed to dramatized and/or wholly fictional accounts of sexual assaults in various media which often bear no relationship to reality. Identifying the potential impact of juror's experiences and beliefs about sexual assault is essential in the jury selection process. Strategies to strengthen the jury selection process include:

- Collect useful questions from other prosecutors who have prosecuted sexual assaults.
- Consider asking another prosecutor to participate in jury selection, especially someone who is experienced in sexual assault jury trials.
- Consider requesting the court to send out a questionnaire to prospective jurors in advance to determine whether they know anyone who has been accused of a sexual assault, anyone who is a victim, and issues related to the case. Judges frequently agree to a questionnaire.

### **Victim Sequestration and Courthouse Management**

A victim centered response places the highest priority on protecting the victim's personal and emotional safety. For this reason courthouse management and the need to keep victims separate

from defendants should be a team responsibility. Everyone on the prosecution team should support the following:

- Make sure that the victim has a support person who will be at their side during court appearances.
- Plan ahead about where the victim will be during breaks and lunches.
- Plan ahead about what the victim can do during the waiting period while the jury is making a decision.
- Encourage the victim to enlist support from community advocates or victim witness personnel.
- Caution the victim to be careful about what she/he shares with others before, during and after the trial, with special emphasis on not speaking with anyone in a public place, such as a courthouse restroom, or any other place where potential jury members or others may be present.
- Discuss with the victim whether or not she/he wants to be present during closing arguments.
- Prepare the victim for the various possible outcomes of the trial.

### **Settlement Discussions**

A victim centered response prioritizes the participation of victims in deciding the state's recommendations for potential outcomes. A victim centered response includes explaining the rationale for seeking a settlement and asking victims for their feedback when settlement options are being considered. Minimally, prosecutors should:

- Educate the victim about the impact that defendant's decision to plead other than not guilty would have on the process and the potential outcome.
- Discuss settlement options with the victim and solicit his/her feedback about what the prosecution is seeking.
- Keep the victim informed about what settlement(s) is/are being offered to the defendant before any settlement offer(s) are made.
- Advocate including a sex offender registry designation in a settlement agreement when appropriate.
- Educate the victim on the process of plea negotiations and sentencing options available to Wisconsin judges.

A settlement offer should never be presented to a defendant without first attempting to contact the victim.

### **Sentencing**

Sentencing can be an especially traumatic experience for victims and their family members. The opportunity to face the assailant and to share publicly the impact that the sexual assault has had on them can be both liberating and intimidating. To prepare victims for the sentencing phase of a trial, prosecutors should:

- Ask the victim in advance if she/he wants to be present in the courtroom and honor her/his decision not to be present.
- Prepare the victim in advance about how to address the court.
- Prepare the victim for any evidence or argument by the prosecution or defense that may be shocking or disturbing.
- Offer to help the victim create a victim impact statement.
- Ensure that family members and friends are on hand to support the victim.
- Insist that a no contact is included in sentencing, if desired by the victim.

### **Outcomes**

Regardless of the outcome of a sexual assault case, prosecutors who want to sharpen their skills are wise to convene a team meeting to review the case and discuss what went well and what could be improved in the future. Including expert witnesses and advocates in these discussions will broaden the level of feedback received. Surveying jurors after trial proceedings have concluded will provide additional insight about how to improve the prosecution's presentation of sexual assault cases in the future.

### **Public Statements Regarding Declination of Sexual Assault Charges**

It is not uncommon for prosecutors to be asked by media outlets why they are declining to file criminal charges on a referred sexual assault case, or why they are filing charges at a level different from that referred by law enforcement (for example, fourth degree sexual assault instead of third degree sexual assault). In addition to considering the ethical prohibition against "convicting in the media" an accused person, prosecutors who respond to such inquires should also avoid making any public statement that has the effect of disparaging or criticizing the victim. For example, a public statement suggesting that the victim's conduct would have made her an unappealing or untrustworthy witness would be inappropriate, and traumatizing, not only for the particular victim referred to but to other victims of sexual assault. Remember that sources cannot control the manner in which their comments are quoted by media. Where public comment is necessary, consider providing a very carefully worded written statement that has been reviewed by the victim, if possible.

*Wisconsin Adult Sexual Assault Response Team Protocol* (pp. 22-30) by Wisconsin Coalition Against Sexual Assault, 2011. Retrieved from [https://www.wcasa.org/file\\_open.php?id=203](https://www.wcasa.org/file_open.php?id=203)  
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