



Elimination of Bias

Alternative Practices & Procedures for Material Witness Petitions & Bench Warrants Protocol

Kathleen Nolan, *Senior Attorney*

Disclaimer

- The following is not intended to constitute legal advice.
- Always consult your local prosecutor or attorney for guidance.

Contact Information

- Kathleen Nolan, *Senior Attorney*
 - kathleen@zeroabuseproject.org
- Alison Feigh, *Director, Jacob Wetterling Resource Center*
 - alison@zeroabuseproject.org



Kathleen Nolan, Senior Attorney
Kathleen.Nolan@zeroabuseproject.org

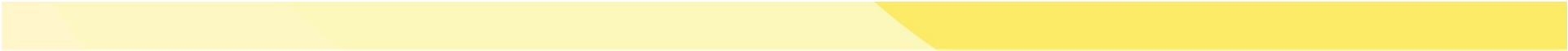
This project was supported by Award #15PJDP-22-GK-03979-JJVO awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this program are those of the author(s) and do not necessarily reflect those of the Department of Justice.

How do we become Trauma Informed?



Agenda

- Unique issues faced by survivors of partner-violence crimes.
- Pre-Trial Challenges
- Eliminating Bias through Trauma-Informed Trial Prep
- Picking up the Pieces



Unique Challenges

Terminology

- **Victim vs. Survivor**
- “We appreciate the wisdom shared by survivor advocates, explaining they live in a space of duality, feeling both victorious by surviving child sexual abuse, yet continuously victimized by the memorialization and distribution of their child sexual abuse material”
 - National Center for Missing and Exploited Children (2020)

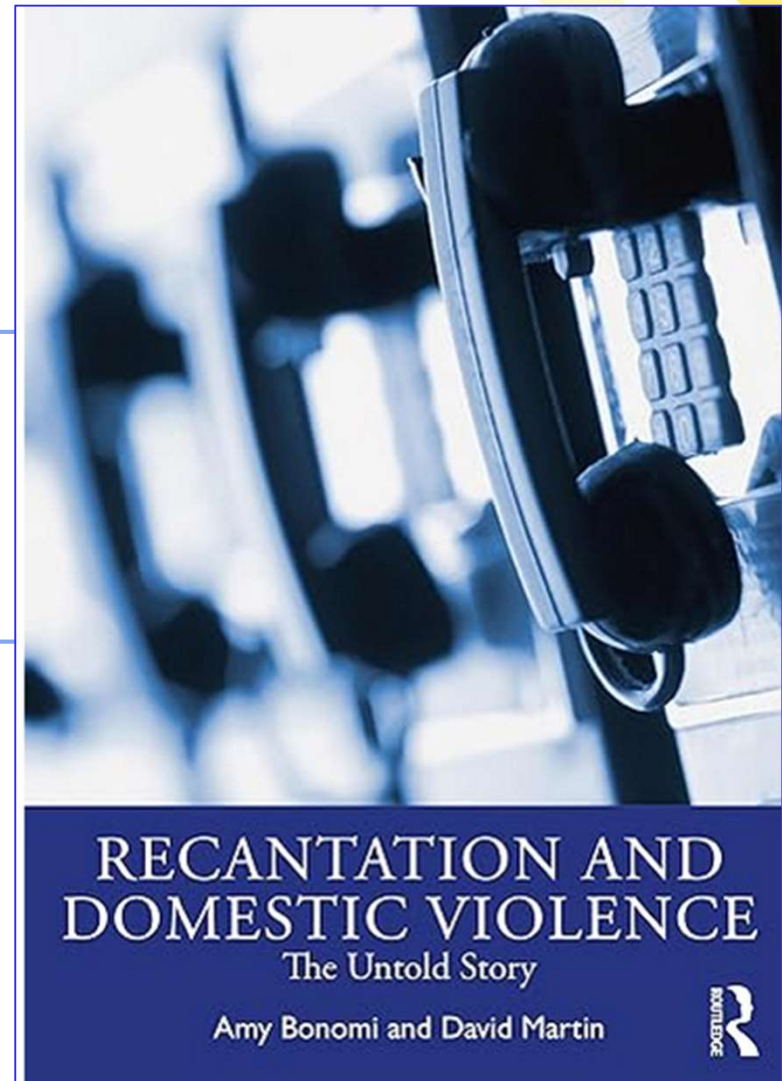
Types of Abuse

- Verbal/Emotional Abuse
- Physical Abuse
- Sexual Abuse

Use of Power and Control



How Recantation / Absence Works



Jail Call Study: 2011

“Meet me at the hill where we used to park”: Interpersonal processes associated with victim recantation

Amy E. Bonomi ^{a,*}, Rashmi Gangamma ^a, Chris R. Locke ^b, Heather Katafiasz ^a, David Martin ^c

^a The Ohio State University, United States

^b Auburn University, United States

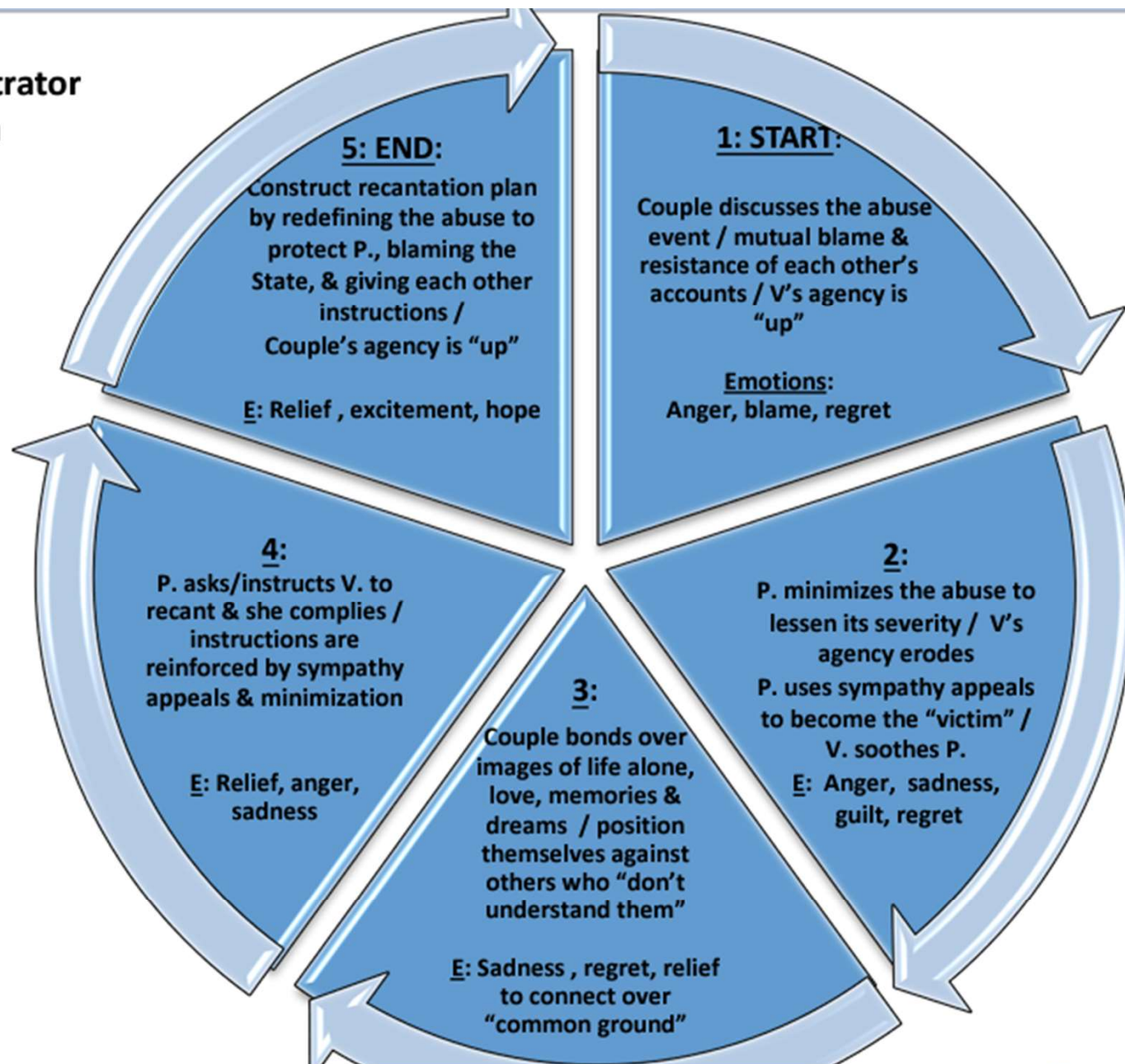
^c King County Prosecuting Attorney, United States

- A victim's recantation intention was foremost influenced by the **perpetrator's appeals to the victim's sympathy** through descriptions of his suffering from mental and physical problems, intolerable jail conditions, and life without her.

Why DV Victims Recant

- Love for abuser
 - Fear of abuser
 - Financial dependence
 - Poor access to advocates / help
 - Fear of consequences of prosecution
-
- Study: emotional attachment to perpetrator

P=Perpetrator
V=Victim



First Key Take-away

- Recantation (as described in study) was dependent upon offender's ability to communicate with victim pre-trial
 - Legally or illegal

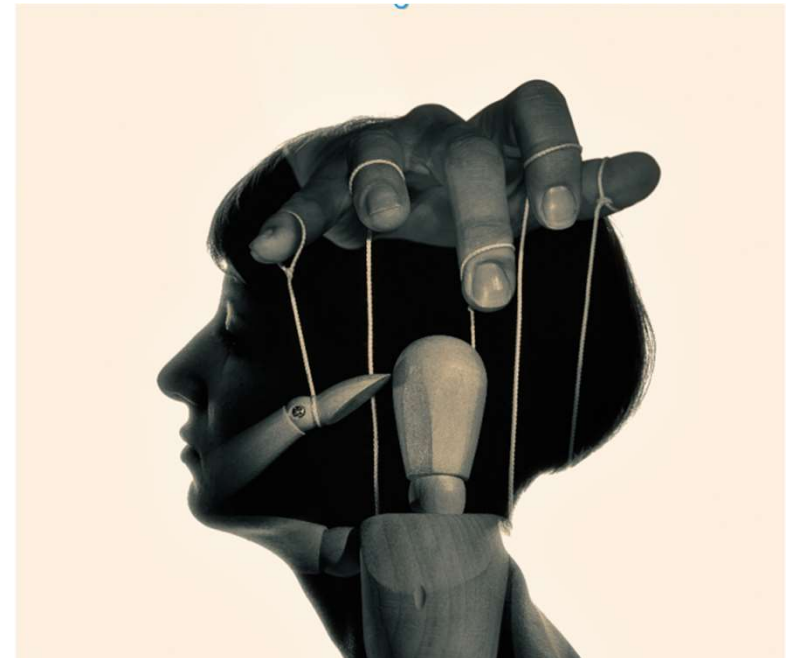
Direct threats were rarely used to influence victims; in only one couple did the perpetrator directly threaten the victim: *“If you go against me on this one, it’s gonna’ be the worst mistake you ever make in your whole life.”* While the threat of further violence may have been present in all couples, the detained perpetrators in our study used other sophisticated strategies to persuade their victim, namely, minimization (Eisikovits & Winstok, 2002; Pence & Paymar, 1993) and descriptions of their suffering; these strategies successfully triggered sadness, guilt and sympathy in their victim, which served to strengthen the case for changing her story to protect him.

2nd Key Take-away

- Recantation isn't about fear of perp: it's about the perp's ability to manipulate the victim
 - Victim starts strong
 - “Abuser”
 - Truthful account in calls with perp

How Manipulation Occurs

- Manipulation
 - Perp minimizes abuse event
 - *I didn't push you like you think I did*
 - Perp appeals to sympathy
 - *It's so bad in here - can't live without you*
 - Appeals to the couple's need to keep relationship and family intact
 - *Me and you vs. the world*



Effect of Manipulation

How does offender manipulate?

- Minimizes abuse
 - Not allowing victim to talk about abuse
 - Resisting responsibility
 - Denying credibility of victim's account
 - Reminding victim that she was to blame

"Do you realize that before anything happens, I just try to go and you don't allow that? I came in peace. I didn't say anything. You were drinking."

I'm charged with "felony assault" – do you really think I deserve a felony?

Constructing Recantation Plan

- Both perp and victim offered instruction on what to say
 - Perp instructed victim to say she lied

P: *"You know I love you?"*

V: *"Mmm ..."*

P: *"'Cause like, you know, but they might give you five or ten days (i.e., give you five or ten days in jail if you said you lied to police), but that's better than me doing sixty to ninety days."*

V: *Me?!*

P: *"Yeah but they, but they, babe, that's better than me doing sixty to ninety days ... I just spent five days in the hole. You can't do five days for me? Would you rather me sit in here for sixty to ninety?"*

Sexual Assault & Consent

- Permission
- Agreement
- Acknowledgement
- Approval
- Recognition
- Considerate
- Okay
- Evaluating
- Pressure
- Threats
- Intimidation
- Guilt
- Control
- Preventing
- Blocking
- Ignoring

CONSENT

A clear agreement between people to engage in an activity (sexual or otherwise)

Consent ...



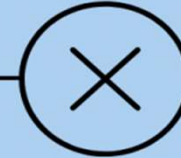
IS clear
and enthusiastic



IS NOT forced



IS required
each time



MAY NOT be
present if someone
is drunk or high

Consent can be expressed by words or actions everyone can understand. If in doubt, ask!

If someone feels pressured, intimidated, or afraid, they do not consent.

Getting consent in the past or for a different activity is not enough.

Consent requires everyone to be fully conscious and not too drunk or too high.

Boundaries



Business relationships are tricky. While a handshake may not always seem enough, a hug is always too much.

Spectrum of Prevention

THE SPECTRUM OF PREVENTION



Behaviors/Actions/Feelings



Abusive

Controlling

Healthy

Sexual Abuse/Harm

- Any sexual words or actions that are harmful and/or unwanted
- Looking/Watching/Invasion of Privacy
- Words
- Touch
- Sexually Explicit Materials
- Exploitation
- Assault/Forced Penetration

*When there is fear,
there is no consent.*

But within Family Violence Cases

- Sometimes, victims and witnesses “take it back”
- Sometimes, they don’t come to Court.
- Sometimes they remember nothing.

The first step is acceptance



- Domestic violence cases involve human beings and feelings
- These feelings affect willingness / ability to participate

Pre-Trial Challenges

Pre-Trial Challenges

- #1 Rule: Trust.
- Start building trust immediately.



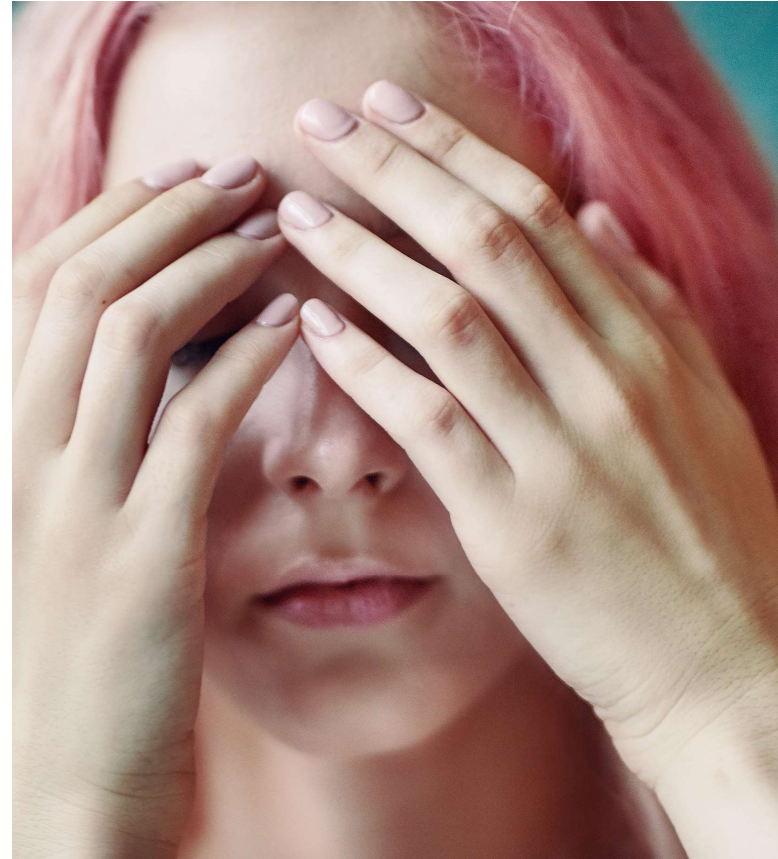
Pre-Trial Challenges



- Use this as an opportunity to build trust.
- Establish early on that you are working for the best interests of the victim.
- Start working with a team from the start.
- Trust = Success

Pre-Trial Challenges

- Victim cooperation is often the biggest obstacle to Pre-Trial preparation for human trafficking cases.



Victim Participation

Is victim absent?

Is victim recanting?

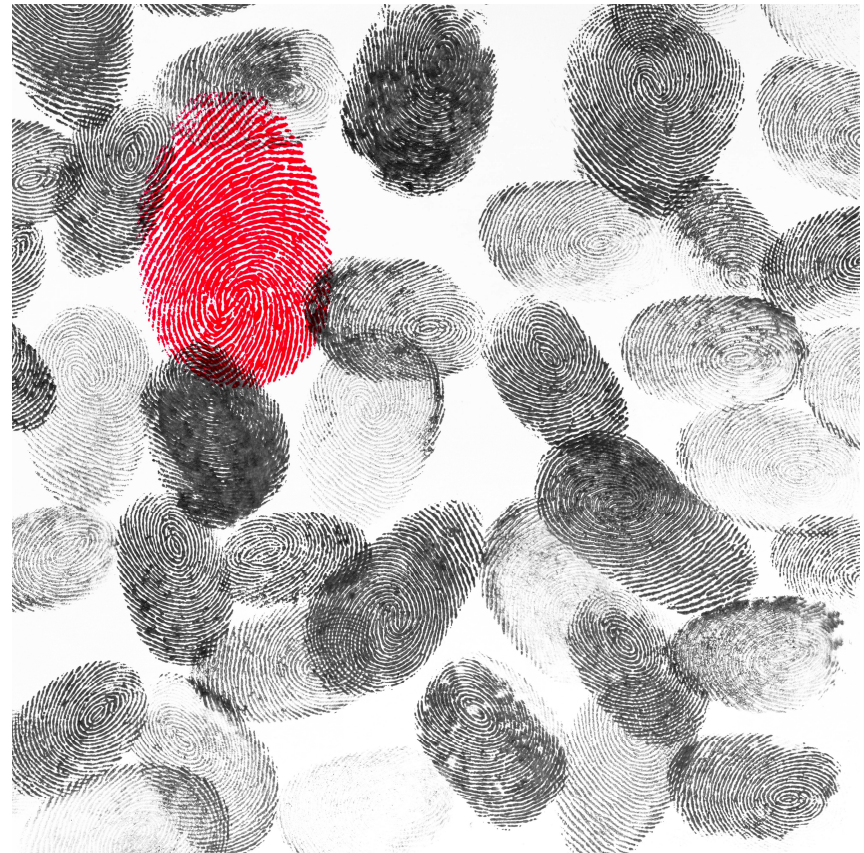
Is victim minimizing?

Strategy

- Write out your direct examination for victim as though the victim was going to testify truthfully.
 - Now knowing what you know about victim participation / recantation / minimization, what questions on that list will victim still answer truthfully, or can you ethically ask?
 - Gaps you need to fill are highlighted by questions you can no longer ask

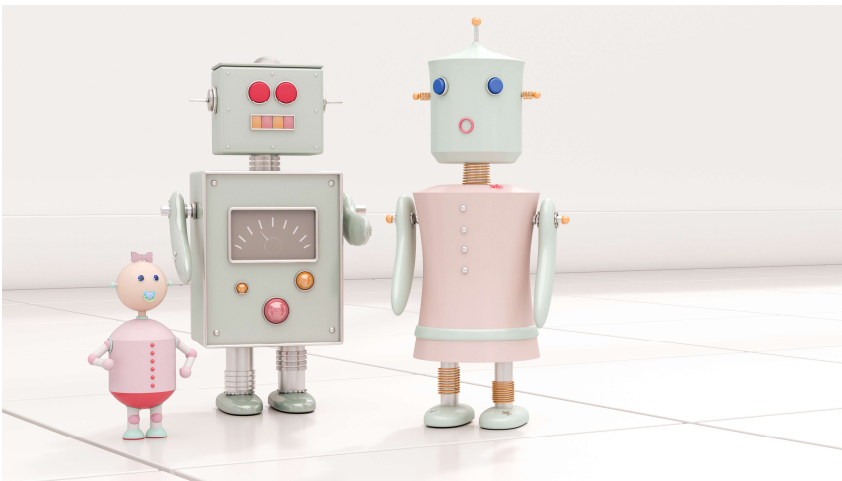
Examples

- Victim may still give you
 - Identity
 - Victim was there
 - Witnesses were there
 - Police were there
 - Defendant identification
 - Defendant in court is person ID'd in charges
 - Def is person victim ID'd on scene



Examples

- Victim may still give you
 - Family / household member
 - Victim and defendant have predicate relationship



Examples

- Victim may still give you
 - Identification of photos
 - That's me in photos
 - That photo accurately shows how I looked on that day
 - Medical records
 - These records relate to me
 - I went to the hospital right after I spoke to police



Examples

- Victim may still give you:
 - Videos
 - That's my husband in the police body cam footage
 - Messages
 - These are messages between me and my wife
 - Voice ID?
 - That's me in the jail calls



Time for Candid Assessment

- Can you *actually* fill the gaps?
 - Domestic violence is inherently private
 - Most assaults have no witnesses
 - Outside of the family
 - Many accounts involve delayed disclosures
 - You may have no obvious evidence beyond victim disclosure and some circumstantial evidence

Pre-Trial Challenges



- Be conscious of mental health struggles.
- Work cooperatively with community service providers and mental health advocates.
- Understand that online exploitation victims face a long journey to acceptance and recovery.

Pre-Trial Motions

- Motion in Limine on prior abuse
 - Rape shield
 - Abuse by another perpetrator
- Motion in Limine on relationship evidence (*Spreigl*)
- Motion in Limine regarding mental health issues
- Motion in Limine barring subpoenas
 - Requests for school records
 - Requests for medical records
 - Requests for CPS records
- Motion in Limine to bar irrelevant testimony
 - Witness opinions
 - Testimony regarding victim's ability to be truthful
 - Specific acts of bad conduct

Pre-Trial Motions

- Consider an Expert
- And by consider, I mean get an expert.





Eliminating Bias through Trauma Informed Trial Prep

Trauma Informed Trial Prep

- #1 Rule: Trust.
- If the family and victim do not trust you, it will be incredibly difficult to achieve our goal.
- Start building trust immediately.



The Prosecutors Role



The Prosecutors Role

- *“Research and experience show that there are many serious and legitimate concerns that prevent victims from participating in the prosecution of their perpetrators. There is often a risk of retaliation by offenders or their allies. Many victims fear the invasion of their privacy...Many are repelled by the prospect of recounting, in a public setting, the intimate and humiliating details of an assault.”*

“Next Level Compulsion of Victim Testimony in Crimes of Sexual and Intimate Partner Violence: Prosecutorial Considerations Before Using Bench Warrants/Body Attachments and Material Witness Warrants”. Strategies: The Prosecutors/ Newsletter on Violence Against Women. Aequitas, Issue #21 (January 2023).

The Prosecutors Role

- Develop a protocol
- All witnesses are served with subpoenas.
 - As soon as a firm court date is established.
 - Best practice is involve the prosecutor in a conversation with witness/victim to explain the subpoena.
 - Regardless of age and cooperation.



The Prosecutors Role



- Enforcement of subpoena?
- Procedures for securing a bench warrant/material witness warrant.

The Prosecutors Role

- Assessing case in light of potential non-cooperation
 - Evidence based prosecution practices
- Negative effect on community perception of victims?
- Hostile feelings towards prosecution/the process.
- Creation of risk to victim.
 - Family, children, pets?



Factors Causing Court-Related Stress

- Do your best to understand where they are coming from.
 - Family relationships
 - Financial relationships
 - Distrust of the system
 - Shame

Experiences and Perceptions of Sexually Abused Children as Participants in the Legal Process: Key Conclusions From a Scoping Literature Review, Field, N. & Katz, C. *Trauma, Violence, & Abuse* Vol. 24(4)2758-2771 (2023).

Factors Causing Court-Related Stress

- Explore things that they are worried about.
- May be a fact or circumstance victim believes will negatively impact the case or their credibility.
 - Dinners, gifts, “consensual” acts.
 - Continued feelings of attachment.

Allowing Comfort Items and Support Animals



Research Supporting Support Animal

- Seventeen states have laws in place to allow the use of an animal for witness support.
- In February, 2021 the American Bar Association passed a resolution urging the passage of statutes and laws allowing facility dogs for witness support.
- The resolution states “The American Bar Association urges federal, state, local, territorial and tribal governments and foreign governments to enact laws authorizing courts to allow specially trained dogs (called facility dogs) to assist victims/vulnerable witnesses in their participation at any stage of the criminal justice system, including during their testimony in any judicial proceedings, and, to ensure the health and well-being of the facility dogs”.

Picking up the Pieces

Resources

- National District Attorneys Association: ndaa.org
 - “Recommendations in Dealing with Warrants Amid Domestic Violence Cases
- Aequitas Resource: aequitasresource.org
 - “Next Level” Compulsion of Victim Testimony in Crimes of Sexual and Intimate Partner Violence: Prosecutorial Considerations Before Using Bench Warrants/Body Attachments and Material Witness Warrants.

Final Question

- If, despite your efforts, the abuse continues, will the victim pick up the phone again?
 - Will the victim be relieved to see you or afraid?
 - Will the victim expect respectful treatment?

Final Question

- How are you part of the victim's journey to safety?

Questions and Comments?

Training Opportunities



Explore upcoming Trainings & on-demand Webinars
www.zeroabuseproject.org/trainings



Subscribe to Emails
www.zeroabuseproject.org/join



Contact Us
www.zeroabuseproject.org/contact



Kathleen.Nolan@zeroabuseproject.org

www.zeroabuseproject.org