

Guiding and Supporting a Victim's Choice to Participate in the Prosecution of Sexual Violence

Efforts to eliminate the accumulation of untested sexual assault kits (SAKs) have confirmed what has long been suspected: a significant number of sexually violent perpetrators commit serial crimes—both sexual and otherwise—against multiple victims. Additionally, a high level of crossover offending¹ exists. When crossover offenders face accountability without delay for their crimes, future victimizations may be prevented. Thus, thorough investigation and skillful prosecution practices are essential to identifying and convicting these offenders.

The decision to prosecute requires more than sufficient evidence to demonstrate an offender violated a criminal statute. Prosecutors consider many factors when choosing to prosecute crimes; these factors include the crime's impact on the victim and the community, the extent of the harm caused by the offense, and the victim's willingness to testify or participate in prosecution at all.²

A victim engaging with the criminal justice system is somewhat uncommon because, among other reasons, the criminal justice process can expose sexual violence survivors to unique retraumatization. Multidisciplinary response efforts that are victim-centered and trauma-informed can greatly reduce the level of trauma associated with a survivor's decision to report a sexual assault; however, the reporting process may remain daunting. Victims may find that the various criminal justice components essential to a meticulous and fair prosecution are difficult or distressing, even when these actions are completed with great care; these components may include interviews, evidence collection, public court proceedings, and cross-examination at trial. These components may be perceived as barriers to participation, as well as other case-specific factors (e.g., lack of social support, witness intimidation) may result in some survivors ultimately declining to participate in the legal process, avoiding service of process, or refusing to appear under subpoena.

Victims may be unable to participate in the legal process as a result of their need to prioritize their own healing, recovery,

or needs; when this happens, prosecutors may experience an inherent tension between (1) supporting the victim and their sworn responsibility to uphold the law and (2) serving the public more broadly. Even highly skilled prosecutors may not be able to overcome the legal challenges of a sexual assault case without a victim's testimony.

This is where advocates and other allied professionals can play an important role in supporting victims as they navigate the criminal justice process. This brief will explore strategies that can assist advocates and other allied professionals with seeking to guide and support victims throughout the criminal justice process. These strategies will help ensure that victims are fully informed about their choices and that their interests are protected throughout the process.

The Role of Advocacy

Advocacy can come from a variety of sources and each comes with distinct benefits and limitations. Services most legal advocates can provide include, but are not limited to, the following:

- ◆ Explaining the various components of the criminal justice system and describing the victim's potential role at each step
- ◆ Helping victims make informed decisions about their potential participation
- ◆ Advocating for the victim so that law enforcement, the prosecutor, and/or the court prioritize the victim's concerns and interests
- ◆ Attending meetings and/or court with the victim
- ◆ Obtaining or organizing resources that may better allow the victim to participate (e.g., transportation, childcare, a note for work)
- ◆ Providing general support to the victim as needed

Community-based advocates are those employed external to the criminal legal system and often work for rape crisis centers or other nonprofits. These advocates may support victims navigating the legal system in the ways previously mentioned, but they typically do not have direct access to the victim's case or the individuals (e.g., law enforcement personnel or prosecutors) working on the case. Allied professionals may come from a number of professions

¹ A crossover offender is someone who assaults both strangers and individuals known to them.

² American Bar Association. (2017). Criminal Justice Standards for the Prosecution Function—Standard 3.4. https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

(e.g., social workers, shelter personnel, counselors) and may serve in roles similar to community-based advocates as needed.

Systems-based advocates work for police departments or prosecutor's offices; these individuals assist victims with navigating the investigation and prosecution of their cases. Additionally, these advocates often have greater access to a victim's case and to members of the legal team working on the case.

Implications for Advocate Confidentiality

Community-based advocates often have a legal privilege—either statutory or codified in the Federal Rules of Evidence—to refuse to disclose confidential victim communications. This is also true of many allied professionals. The existence and level of privilege will vary by jurisdiction (in some communities, even privileged communications might be subject to disclosure). Conversely, systems-based advocates typically do not maintain the same level of confidentiality. Because they work within the legal system, they may be obligated to disclose information shared by the victim with law enforcement, prosecution, or—in some situations—the defense team.

When meeting with a victim for the first time, all advocates and allied professionals should clearly explain their role in the process, the extent to which communications with them are confidential/privileged, and the circumstances under which information could or must be disclosed. Advocates and allied professionals should be as specific as possible, for example describing whether the victim's location and contact information are confidential, but other information is not. A clear explanation allows victims to decide whether or how much information they want to disclose to a specific professional.

The Role of Advocates Within a Coordinated Community Response

A coordinated community response (CCR) to sexual violence enables all participating multidisciplinary professionals (e.g., advocates, law enforcement personnel, healthcare professionals) to work together to provide a victim-centered, trauma-informed response. This approach allows advocates and other allied professionals to come together with other disciplines to collaborate on cases; work towards collective goals, such as new legislation; and learn from one another.

Working together, professionals participating in a CCR have the ability to cross-train so that members understand each other's roles, missions, tools, techniques, priorities, challenges, and responsibilities. The disciplines can educate

one another in mutually beneficial ways and, ultimately, enable each other to better serve victims of sexual violence. A truly collaborative CCR team will ensure all members—regardless of discipline—can clearly and accurately explain the various benefits, limitations, and implications of the legal, medical, and psychosocial decisions that victims may need to make as they navigate whether to participate in the criminal legal process.

Importantly, all advocates and allied professionals should understand the importance of the various aspects of the investigation and prosecution, as well as the purposes for which various types of evidence are gathered. Even when police and prosecutors explain why they need certain information, a survivor who is coping with trauma may be unable to retain and process everything that has been explained to them. With this in mind, advocates may be able to fill in these gaps in a trauma-informed way at a later time.

Victims are more likely to remain engaged and empowered throughout the proceedings when they have a clear understanding of the various steps in the process—including what may be asked of them at various stages, their options, and the ways that advocates and allied professionals can assist them. For example, victims may have to testify repeatedly—without explanation—and may feel as though their participation is meaningless. In addition, they may not understand the different procedural events that happen during a criminal case, such as motion hearings that may or may not require their testimony. Both community-based and systems-based advocates can ensure that someone (e.g., the prosecutor, the systems-based advocate) takes the time to explain all hearings—and the victim's role in those hearings—so that victims feel fully informed and capable of maintaining their engagement.

Potential Implications of Survivors Not Participating in the Criminal Justice Process

Advocates—particularly community-based advocates—are uniquely positioned to have victim-centered, trauma-informed conversations about the following topics so that victims can make informed choices about possibly participating in prosecution.

- ◆ Victim testimony increases the likelihood of being able to proceed to trial
- ◆ Challenges related to the statute of limitations
- ◆ Considerations about whether the prosecutor may take next-level measures to secure the testimony if the offender is considered highly dangerous and/or is a known serial offender

Community-based advocates share the most protected communications with survivors; therefore, their conversations may be particularly critical when weighing the costs and benefits of participating in the criminal justice process. Advocates should focus on sharing information that will help victims make informed choices about their participation; advocates should not provide legal advice to victims. For example, advocates can discuss the potential benefits related to participating—such as preventing the offender from committing assaults in the future, should they be convicted—and the potential challenges, including the emotional toll and time commitment. Additionally, advocates may describe the various forms of support that victims may receive throughout the process (e.g., transportation). Community-based advocates can also discuss the potential implications of choosing not to participate in the criminal justice process, as these are often unintended and less obvious (e.g., statute of limitations, restrictions on certain types of assistance).

Overall, having a CCR to sexual violence provides the best opportunity to support victims as they navigate the legal system; assist them in understanding the potential benefits and consequences of participating in prosecution; and provide them with the most helpful services, regardless of whether or not they participate in the criminal legal system.

Considerations for Victims and Advocates During the Criminal Justice Process

The following sections highlight the various stages of the criminal justice process and the related considerations for victims as well as advocates.

The Investigation

Law enforcement personnel and prosecutors typically want to interview the victim and potential witnesses as early in the process as possible. In addition to discussing the sexual assault, investigators will also need to explore what happened before and after the crime. Sharing the traumatic details of a crime is difficult; with this in mind, trauma-informed interviewing techniques can minimize the likelihood and extent of retraumatization.

Advocates should encourage victims to be completely transparent with investigators and prosecutors. Many victims are understandably reluctant to relate details they consider private, shameful, or incriminating. For instance, a victim may deny or minimize their drug or alcohol consumption because they fear punishment. Victims may also omit details, such as having engaged in consensual sexual activity prior to

the assault, if they fear that others will blame them. Victims may also hesitate to correct their original statement because they fear they will be perceived as intentionally lying to law enforcement or prosecutors. However, those with trauma-informed training should understand trauma's impact on memory and should welcome additional details as the victim remembers and is willing to share that information. As such, advocates should encourage victims to update any statements or omissions to their narrative as soon as possible. Advocates should intervene if law enforcement or prosecution personnel respond to these updates in victim-blaming ways.

Sharing full and complete information with the prosecutor before trial will allow their team to explain the circumstances should they come up during the trial. For example, the victim may hesitate to disclose certain details, such as their voluntary intoxication, even though this information may be important evidence that the victim could not provide consent. Often the offender and their legal team are aware of ways to exploit the evidence or the victim's testimony at trial; however, if trial is the first time the prosecutor hears about the crime in detail, they will not be prepared to limit or refute such evidence.

Advanced disclosure to the prosecution may also allow prosecutors to protect the victim from being questioned about sensitive topics at trial. If the details are not legally relevant to the case and would serve only to embarrass or harass the victim at trial, then the prosecutor can file a motion to prohibit such questions.³ Rape shield laws, which exist in every U.S. jurisdiction, preclude the admission of such evidence in most cases. There may be some circumstances in which such evidence is admissible. For example, if the offender is a former consensual partner, then this information may be admissible on the issue of consent. If information cannot be excluded entirely, then the prosecution can prepare to explain the evidence or minimize its significance at trial.

Exceptions to the hearsay rule. Investigators and prosecutors need to know the names of anyone the victim disclosed to immediately after the assault and what details were shared. Any statements made out of court (i.e., when the victim was not under oath and subject to cross-examination) are usually considered to be hearsay and generally inadmissible at trial; however, there are exceptions to the hearsay rule. **Table 1** highlights the most common exceptions.

³ The prosecutor can file a "motion *in limine*," which is a pretrial motion to admit or exclude specific kinds of evidence at trial. One ground for exclusion is when the probative value of the evidence—the extent to which it proves something of legal significance in the case—is outweighed by the likelihood of unfair prejudice, waste of time at trial, or similar considerations.

Table 1. Common Exceptions to the Hearsay Rule

Exception	Example
“Excited utterances,” which are statements about an alarming or traumatizing event made shortly after an assault while the victim is still under the influence of the resulting stress or excitement	The victim may call a friend or family member right after the assault to say, “I was raped!”
Statements made for purposes of medical diagnosis and treatment	Statements made to a sexual assault nurse examiner or an emergency medical technician
Statements representing the state of mind at the time or intention to do something at the time	“I’m meeting up with [the defendant] after work tonight.”
Statements of the victim’s then-existing physical, mental, or emotional condition	“My head hurts,” or, “The way he’s looking at me is making me nervous.”
Statements of present sense impression	“This drink tastes funny.”

When the victim or witnesses can provide details about statements made around the time of the crime (i.e., before, during, and after the assault), the prosecutor will be able to determine whether there is a hearsay exception that might make the statement admissible at trial. Statements that qualify as hearsay exceptions are especially critical if the victim is unable to participate at trial. The absence of victim testimony creates unique legal hurdles in sexual violence cases; therefore, a case is unlikely to be able to proceed without the victim. However, these statements can help further investigative leads; support the credibility of the victim’s testimony; or lend critical proof of an element of the crime, which would support the case if the victim decides to participate later.

Even a statement that comes within a hearsay exception, however, may be inadmissible if the victim does not testify at trial. This is because of the U.S. Constitution’s Confrontation Clause in the Sixth Amendment; this clause states that a criminal defendant has the right to confront the witnesses against them, as interpreted in the Supreme Court’s 2004 decision in *Crawford v. Washington*⁴ and the subsequent cases that elaborate on that decision. Essentially, these cases divided out-of-court statements into the categories of testimonial hearsay and nontestimonial hearsay.

Testimonial hearsay statements (1) are typically those made to law enforcement (e.g., in an interview or formal statement given to police) or (2) are made in a more formal way (e.g., in an affidavit), with the expectation that the contents of the statement might be introduced at trial.

In contrast, nontestimonial hearsay statements are typically those made to friends, family members, acquaintances, or even strangers for purposes *other than* to document information that might be admitted at trial. For example,

a 911 call is usually considered nontestimonial because a person is summoning help to deal with an emergency, *not* to prepare for a criminal case. A statement to a friend or family member about what happened during a sexual assault is usually made to get advice about what to do or to obtain comfort and support, *not* to make a report with legal consequences.

Determining if a statement is testimonial or nontestimonial is significant because if the victim is not testifying at trial (and thus not subject to cross-examination), then a testimonial hearsay statement is admissible *only* if (1) the victim is *unavailable* to testify (e.g., via forfeiture by wrongdoing or cannot be located, cannot be produced at trial,⁵ is deceased or ill, or has a testimonial privilege) and (2) the defendant had a *prior* opportunity to cross-examine the victim (e.g., at a preliminary hearing). On the other hand, nontestimonial hearsay statements are admissible—even if the victim is not testifying—as long as they come within a hearsay exception.

Thus, the prosecutor evaluating any out-of-court statements that the victim made to others is important; if nontestimonial statements were made to others, then those individuals (or any witnesses to those statements) could be called to testify at trial—even if the victim declines to participate. Such evidence may allow the case to move forward regardless of whether the victim testifies, although this is highly unlikely in sexual violence cases involving competent adults. Likewise, prosecutors may call the victim to testify at a preliminary hearing or a bail hearing at which the defense would have the opportunity to cross-examine, thereby preserving the testimony in case the victim is unavailable to testify at trial. Advocates should understand

⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵ Whether a determination of “unavailability” requires the prosecutor to seek to compel an unwilling victim’s testimony by seeking a bench warrant or a material witness complaint is discussed later in this brief.

and be able to explain these procedures, as some victims may want to hear this level of analysis to understand why they are being asked certain questions, why certain decisions are being made, and what the long-term impacts of testifying at a preliminary hearing involve. Advocates should also communicate with the prosecutor about the victim's level of interest in discussing such topics.

Corroborating evidence. Corroborating evidence is also a critical means of supporting a victim's account of what occurred, regardless of whether the victim testifies at trial. Corroborating a victim's account of the crime is rarely a legal requirement; however, the case becomes much stronger if other evidence can corroborate the victim's report. The victim's trial testimony becomes one interconnected piece of evidence in the case rather than the critical linchpin on which the prosecution rests. For example, the following may contribute to corroborating evidence:

- ◆ Details uncovered during a crime scene investigation
- ◆ Observations from other witnesses who saw the victim before and after the crime
- ◆ Statements by witnesses to whom the victim may have disclosed

Victim participation in a thorough investigation (e.g., provision of statements to law enforcement or submission of a SAK, when relevant) may increase the likelihood that a case can go forward without the victim's trial testimony or at least reduce the victim's testimonial burden.

Pretrial

Minimal participation is needed from the victim during this stage because discovery is often passed to the defense and motions are filed; this is also the stage at which delays can begin. Relatedly, it may also be a time where prosecution's communication with the victim can fall off. Advocates should ensure that there are protocols to promote communication around case status and reason for delay during this period of case processing.

As time passes, the victim's loved ones or the offender's network may pressure or intimidate the victim to stop participating in the case. This coercion may be subtle, particularly when the victim and offender are currently or have previously been intimate partners. Advocates who learn about intimidation and have strong relationships with the prosecutor's office may follow protocols to enhance victim safety and—with victim permission—inform the prosecutor.

Prosecutors who become aware of victim intimidation may be able to stop it through various means, such as requesting court orders and bail conditions or filing additional charges. Further, victim statements made to an advocate that establish intimidation may be introduced to support a forfeiture by wrongdoing motion.⁶

Throughout the pretrial phase, advocates should communicate with victims to determine if the victim is doubting their ability to participate at trial and the source of any doubts. With the victim's permission, advocates can speak with the prosecutor about the victim's concerns to see whether the prosecutor can address them. Prosecutors have an obligation to listen to the victim's wishes, even if they decide not to follow them based on their assessment of the case.

The Trial and Victim Testimony

Legal representation for the victim. When requested, advocates should work with victims leading up to and throughout their trial. If a victim shares that they do not wish to participate in prosecuting their offender, then an advocate should discuss the possibility of the victim obtaining their own legal representation. As previously stated, the prosecutor's duty is to represent the jurisdiction; the prosecutor is not the victim's attorney. On the other hand, a victim's own lawyer will be focused solely on the victim's wishes; will be versed in victim rights; and may be able to advocate for the victim's position, even if it is counter to the prosecutor's. If there are legal consequences for choosing not to participate, then the victim may wish to have legal counsel before taking any action. Furthermore, the victim's attorney may be able to negotiate a better outcome with the prosecutor or make a court appeal on the victim's behalf.

Power and Effect of Subpoenas

When prosecutors must bring a witness into court to testify—at a grand jury proceeding, at a preliminary or motion hearing, or at trial—the witness is normally served with a subpoena. Subpoenas are used regardless of the witness's predetermined willingness to testify (i.e., the witness will be subpoenaed even if they have stated they are willing to testify). For example, subpoenas are issued to police officers whose job routinely involves courtroom

⁶ "Forfeiture by wrongdoing is a longstanding exception to a defendant's Sixth Amendment right to confront the witnesses against him. If a defendant causes a witness to be unavailable for trial through his wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior testimonial statements is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution." AEquitas. (2012, October). Forfeiture by wrongdoing. *The Prosecutors' Resource*. https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

testimony, victims who are eager to have their day in court, witnesses who would rather *not* have their lives disrupted, and expert witnesses who are paid for their time.

Subpoenas serve several practical purposes. They provide an orderly means of summoning witnesses, including victims, for court. They also provide a basis for scheduling and establish the prosecutor's diligence in the event a witness unexpectedly fails to appear and a continuance must be requested. They provide witnesses with documentation that may be necessary to excuse the witness's absence from work or from school. They can even afford "cover" for a witness who is subjected to pressure *not* to testify because a subpoena signals that the victim's testimony is not necessarily voluntary but required by law.

Material Witness Warrants Versus Bench Warrants and Body Attachments

- ♦ **Material witness warrant:** Typically sought in advance of trial when there is reason to believe that a witness will either avoid service of process or refuse to comply with a properly served subpoena
- ♦ **Bench warrant/body attachment:** May be used when a witness fails to appear pursuant to a properly served subpoena; such warrants result in the arrest of the witness so they can be brought before the court to testify.

Potential implications of a victim disregarding a subpoena. Subpoenas also have important legal implications. A subpoena is a form of court order. Although the prosecutor may be the one who actually issues it, the subpoena—once properly served—legally requires the attendance of the witness at a particular legal proceeding. Disregarding a properly served subpoena may result in the court issuing a bench warrant. Usually such a warrant is issued only at the request of the party calling the witness to testify; in the case of a victim-witness, the prosecutor is usually responsible for a bench warrant.

Failing to appear in court after being subpoenaed can also lead the court to find an individual in contempt of court, which can be a criminal or civil charge. The criminal conviction may be accompanied by a fine or imprisonment to punish the contempt, and the civil conviction can result in the individual being held in confinement until they testify or the proceeding concludes.

Additionally, a prosecutor with reason to believe that a witness may fail to appear after being subpoenaed may seek a material witness complaint in accordance with applicable procedural rules or statutes. If the court approves

the complaint, then the witness may be arrested and held on bail or other conditions that will assure the witness's appearance at trial.

Mitigating consequences for victims when testimony has been compelled by subpoena. After weighing all relevant considerations and alternatives, the prosecutor may determine that a reluctant victim must be compelled to testify against their wishes; in such a rare circumstance, every effort should be made to minimize the adverse consequences to the victim. An advocate maintaining regular contact with the victim on the case proceedings can help mitigate some of the negative consequences, and the prosecutor will minimize the duration of any restraint.

Advocates should ensure that any material witness warrant served on a victim involves the least restrictive conditions necessary to ensure their appearance at trial; monetary bond or actual confinement should be avoided. Ankle bracelets and other forms of electronic monitoring are restrictive for victims and tend to make the victim look (and feel) like a criminal. As such, electronic monitoring should be considered only when the alternative is actual confinement. If actual confinement is necessary—which is a rare occurrence—seek the least restrictive placement possible. Advocates should demand that victims not be housed with those charged with, or convicted of, crimes.⁷ Instead of these conditions, advocates should press for restricting travel, surrendering a passport, or—if necessary—reporting to probation regularly.

If the victim fails to appear at trial after having been properly served with a subpoena and a bench warrant/body attachment is deemed necessary, then such orders should be executed in a way that minimizes the adverse consequences to the victim. First, whenever possible, an advocate should accompany the officer when the warrant is executed to ensure that any of the victim's immediate needs are addressed. Next, the prosecutor should seek to execute the order at a time when the trial court is in session and be prepared to take the victim's testimony immediately. This will require the trial judge's understanding and cooperation; advocates should remind the prosecutor to ensure that the judge understands the reason for the request (i.e., to minimize the harmful consequences to the victim, who has already been traumatized by the crime). If the victim has young children, advocates should help ensure there is someone available to care for them while the victim is testifying. Additionally, advocates can offer assistance to excuse the victim's absence from work or school, if necessary. Advocates and prosecutors should encourage the

⁷ Electronic monitoring or alternative housing can also be costly; victims should not bear the financial burden of such arrangements.

court to avoid any suggestion that the victim has engaged in wrongdoing (e.g., handcuffing). The prosecutor should support the appointment of counsel to represent the victim's interests in court.

Finally, prosecutors should request that the court not hold the victim in criminal contempt. Contempt generally requires a finding of willful disregard of a court order; as previously discussed, sexual assault victims are faced with myriad obstacles while participating in criminal proceedings. Their unwillingness to testify is a product of the crime that was committed against them, not an act of willful disobedience. Advocates engaged in meaningful collaboration with prosecutors in their jurisdiction can help those prosecutors (1) understand reasons for nonparticipation and (2) advocate for the least compulsive methods of taking victim testimony.

Conclusion

Victims of sexual violence who report the offenses committed against them face several challenges in pursuing justice. For starters, an unfamiliar criminal justice system can be equally empowering and difficult to engage for victims. Not only that, but they must also describe the most personal and traumatic events of their lives to strangers whom they may perceive as asking invasive or irrelevant questions, even though many of these individuals are working to support victims and hold offenders accountable. Victims may also

feel coerced by friends, family members, or the offender to cease participation in the case, or they may feel the burdens of navigating an unclear process while balancing competing responsibilities. Faced with these challenges, anyone can understand why some victims may hesitate to move forward with a criminal case.

Law enforcement, prosecutors, advocates, and allied professionals are in the best positions to mitigate these challenges so that victims feel empowered—rather than devastated—by the criminal justice process. Cross-training and meaningful collaboration are imperative to a victim-centered response. Advocates who know the roles of law enforcement personnel and prosecutors can ensure that victims understand all relevant aspects of a criminal case—including the significance of particular evidence, the factors that affect charging decisions, reasons for delay, and the function of various pretrial hearings. Prosecutors who work closely with advocates can make sure that victims' concerns and interests are central to decision-making. In the rare event that the prosecutor decides that a material witness or bench warrant is in the interest of justice, advocates can work to minimize any adverse collateral consequences to the victim. Through close collaborative relationships, all criminal justice professionals can ensure that the victim's decision to participate is a fully informed one.