

Advocacy Meets Prosecution: The Benefits of a Strong Partnership

The information in this brief applies to cold case sexual assaults as well as current case sexual assaults. Mentions of sexual assault apply to both types of sexual assault cases.

Sexual assault victims may struggle with emotional, social, and physical problems as a result of the crime committed against them. They may be hesitant to engage with the criminal justice system for various reasons. Collaboration between advocates and prosecutors throughout the investigation encourages a victim's participation in their case.

Offering support to victims is especially important (a) when DNA does not identify evidence or a suspect; (b) when, despite the investigation, the prosecutor decides not to proceed with the case; or (c) with any combination of these scenarios. Certain additional core partners play a critical role in this collaborative response; these partners belong to what is commonly known as a multidisciplinary team (MDT) or sexual assault response team (SART).¹ Team members typically include prosecutors, law enforcement officials, advocates, and medical professionals who work together to provide a holistic response to victims' needs and communicate with each other about relevant aspects of the criminal justice response. Each partner, however, has their own duties and responsibilities. This National Sexual Assault Kit Initiative (SAKI) resource discusses the unique, and sometimes diverging, roles of the MDT's prosecution and advocacy members.

Unique but Complementary Roles

Prosecutors are tasked with holding offenders legally accountable for their actions and achieving justice for victims. Prosecutors represent the jurisdiction in all criminal proceedings and provide expertise not only about the law but also its application to the evidence. Prosecutors are responsible for

- ♦ advising and approving charging decisions,
- ♦ offering insight to law enforcement about the evidence necessary to advance the case,
- ♦ collaborating with experts regarding the significance of evidence, and
- ♦ presenting evidence to a jury.

Many prosecution strategies focus on overcoming jury misperceptions about victims, offenders, and the dynamics of these offenses. Prosecutors request victims' input before making any key decisions (e.g., plea offers) and work closely with advocates and other multidisciplinary professionals to support victims throughout the case.

Advocates^a focus on victims' needs, providing crucial assistance to help prosecutors and victims build trust with each other; advocates also work together with prosecutors to move a case forward. Advocates can provide prosecutors with additional insights into how trauma affects the victim and can help integrate that understanding into the prosecution's response. There are multiple types of advocates—including systems-based, community-based, and legal advocates—all of whom have a different focus and different protections with respect to their communications with victims.

Systems-based advocates serve as liaisons for victims when they interact with prosecutors and other criminal justice professionals, including members of law enforcement. They support victims throughout the legal process, and help prosecutors and law enforcement communicate sensitively with these individuals about sexual assault kit (SAK) testing and the case. Systems-based advocates are bound by the prosecutors' discovery obligations, which restrict their ability to serve as a confidential resource for victims. They provide support to victims through the adjudication process, and work alongside—and can make referrals to—community-based advocates.

Community-based advocates provide confidential support for victims throughout the legal process. Much like systems-based advocates, they can serve as liaisons

^a Victims can find additional support from civil/legal attorneys who represent victims; these attorneys can also provide comprehensive legal support and protection on issues that are relevant to the case but may be outside of the prosecutor's role. Legal advocates work to enforce victims' rights, often in collaboration with prosecutors, but sometimes in opposition to the prosecution's position. Legal advocates have access to unique civil legal tools to secure restitution, and can bring civil tort cases in addition to any pending criminal case or when criminal charges are not being pursued. For more information, see National Crime Victim Law Institute at <http://bit.ly/NCVLI> (last visited June 14, 2018).

among law enforcement personnel, prosecutors, and victims.^b Additionally, community-based advocates support victims outside of the criminal justice system—regardless of whether victims seek adjudication or not. They may also work with systems-based advocates to identify and secure services for victims, including assisting with restitution requests.

By working with advocates, prosecutors gain a better understanding of victims' history, vulnerabilities, and experience of the crime, as well as their lives in the aftermath of the assault. Advocates can also help facilitate trust-building between prosecutors and victims, increasing the likelihood that victims will remain engaged with the criminal justice system. As prosecutors gain more trust from victims, prosecutors create an environment in which victims feel comfortable providing additional information, such as how the offender exploited the victim's vulnerabilities to commit the assault (e.g., a pre-existing relationship, the victim's engagement in criminal behavior, alcohol or drug use). These details will be helpful to the case going forward by assisting prosecutors with strategizing the victim's direct testimony at trial and conveying the victim's full experience to the jury.

Close collaboration between prosecutors and advocates will also benefit victims. By communicating with the prosecutor about victims' needs and the assault,^c prosecutors will be able to take steps to minimize or avoid victim retraumatization; these steps include planning for victim interviews when convenient for the victim and advocate, and taking breaks during the interviews based on the victim's needs. A trauma-informed approach to interacting with victims gives them the space they need to heal. Prosecutors and advocates should also engage in meaningful communication outside of cases to identify relevant emerging legal issues, recognize areas of need for victims, and spot ways for the MDT/SART to build stronger relationships to improve the response to sexual assault.

Given the unique relationship that community-based and legal advocates have with victims, it is important to remember that these advocates have professional, ethical, and sometimes legal considerations that limit their ability to share information about victims with prosecutors. These limitations include the confidentiality and/or privilege surrounding communications with victims.² In addition, these advocates may decide that pressing charges is not in a victim's best interest because of (1) the potential adverse

effects of a criminal case on any potential civil case and/or (2) the victim's wishes. An advocate's opinions can risk confrontation among MDT/SART partners. However, when each discipline takes the time to understand the other's role and to listen to the other's concerns, they may be able to address or even eliminate issues that prevent victims from engaging in the criminal justice process.

Working Together for Victims' Best Interests

By working together throughout the process, advocates and prosecutors improve their responsiveness and reinforce victims' support systems—facilitating trust and helping victims stay engaged with the criminal justice process. This meaningful, coordinated response leads to better communication with victims and stronger cases overall, while helping victims to heal emotionally and regain their lost sense of safety and autonomy.

Improving Victim Notification Practices

MDT members must work together to establish and implement an appropriate victim notification protocol for their jurisdiction. A strong relationship between advocates and prosecutors based on consistent, ongoing communication between these parties will help prosecutors better understand victims' experiences—including their feelings related to the assault, as well as their feelings at the time of notification. Prosecutors' considerations of victims' feelings help victims anticipate and prepare for the potential of a renewed investigation and prosecution. Strong relationships also prepare advocates to answer victims' most critical questions following notification, such as questions about what happens next.

When preparing for and conducting victim notification, prosecutors and advocates should work closely together to address (1) the impact of SAK testing and (2) the potential for victims' anxiety and emotions to be triggered by the decision about whether to move the case forward. A number of possible scenarios may exist at the time of notification, including the following:

- ◆ DNA was not found.
- ◆ DNA is present but no Combined DNA Index System (CODIS) hit has been made yet.
- ◆ DNA is present and there is a CODIS hit.³

In each of these scenarios, prosecutors may have already determined whether further legal action will be taken, or the discussion may be ongoing. In a cold case, the statute of limitations may have expired—thus ending the possibility of renewing the immediate case; however, an expired statute of

^b To learn more about the differences between these two types of advocates, read the SAKI brief *Community- and Systems-Based Advocates* at http://bit.ly/cbas_sbbs.

^c Community-based advocates must receive the victim's consent before disclosing information about the victim to any third party.

limitations may raise questions about the inclusion of victims as “other acts” witnesses in different cases.⁴ Before notifying victims in any of these scenarios, prosecutors and advocates should discuss the status of each case and the available options so they are prepared to offer clear explanations and strong support to victims. Some specific practices may include the following:

- ◆ Helping a victim deal with their frustration and disappointment after learning
 - that no DNA was discovered in their kit,
 - that the passage of time has created additional hurdles to obtaining justice, or
 - that the case cannot be prosecuted.
- ◆ Discussing with a victim how they may be involved in bringing the offender to justice even when their case may not be chargeable. For example, by participating in another case as an “other acts” or 404(b) witness.⁵
- ◆ Ensuring that the prosecutor’s decisions are communicated respectfully and comprehensively to victims.^d
- ◆ Being prepared as team members to work through instances when (1) a victim wants to proceed but the prosecutor declines the case for prosecution and/or (2) scenarios in which the prosecutor wants to charge the cases, but a victim is unable or unwilling to participate.

Prosecutors and advocates may not always agree at every stage; however, demonstrating a strong working relationship to the victim is important—especially when notifying victims of SAK testing results and about the status of the case. Building a strong working relationship will better prepare prosecutors and advocates to support victims by addressing victims’ anxieties and instilling trust in the criminal justice process. By providing appropriate information to victims, any questions and concerns can be better acknowledged and more accurately addressed.

Ensuring Victim Safety

Together and within their respective roles, prosecutors and advocates can employ practices that ensure victim safety at all stages of the criminal justice process. Throughout the case, victims may need advocates’ help to provide confidential crisis intervention; support; and referrals for counseling, housing, and developing safety plans. Victims need advocates’ help to develop their individual safety plan; sharing the finalized safety plan with the prosecutor is beneficial because they may be able to assist with implementing the plan (e.g., pursuing criminal protection, no-contact orders, and/or specific bail conditions).⁶ Prosecutors should understand the full range of services that

advocates provide and encourage victims to contact their advocates for any needs that arise during case preparation.

Advocates can further help victims by being aware of the protections that prosecutors can pursue during the criminal prosecution, such as requesting conditions of bail that include no-contact orders, and counseling victims about these protections.^e Having a well-established relationship can expedite the provision of such services, leading to greater victim safety. If charges against the offender are still pending, then prosecutors and advocates should determine whether a civil sexual assault protection order is available; if the victim doesn’t have a civil attorney,⁷ an advocate can assist with petitioning for the protective order.

Promoting Victim Privacy

Interactions between victims and advocates will require consideration of confidentiality and privilege laws, and a determination of which communications, if any, between these parties may be subject to discovery. Many jurisdictions provide for a statutory victim-advocate privilege that shields these communications from disclosure.⁸ A jurisdiction’s confidentiality laws may also protect the disclosure of victims’ records. The victim-advocate privilege does not extend to systems-based advocates operating out of a prosecutor’s office.⁹ Prosecutors have a duty to disclose all material exculpatory information to the defense,¹⁰ including exculpatory information disclosed by victims to systems-based advocates. In cases in which it is unclear if the information needs to be disclosed, prosecutors may want to file a motion with the court requesting an *in camera* review to determine whether the information is something that needs to be disclosed and is discoverable.

Whether legal protections exist or not, the defense may attempt to subpoena communications between victims and advocates. Prosecutors and advocates can both take steps to protect victims’ privacy. Advocates should be familiar with what information is covered by their jurisdiction’s privilege and confidentiality laws, and take steps to preserve those laws when engaging with victims in the presence of third parties—including the prosecutor. When applicable, prosecutors should also be prepared to file motions to quash defense subpoenas that require confidential victim counseling/advocacy records to be provided.¹¹ Additionally, legal advocates can move on behalf of victims to protect records and information appropriately.¹²

^d See *The Decision to Prosecute* at http://bit.ly/decision_prosecute.

^e At the charging stage, prosecutors should seek a criminal protection order, if available, or they should be prepared to request a no-contact order as a bail condition. See *Nine Tips for Conducting Victim-Centered Prosecution in Cold Case Sexual Assaults* at http://bit.ly/nine_tips.

It is crucial for prosecutors as well as systems-based, community based, and legal advocates to clearly explain to victims the differences in protections around their communications. Prosecutors and advocates should also collaborate to ensure victims understand the differences in confidentiality that apply to the various types of advocates and prosecutors. This will help ensure respect for victims' privacy and autonomy.¹³

Offering Support Before, During, and After Trial

Victim advocates and prosecutors should work together to ensure the protection of victims' rights during court proceedings.^f Advocates and prosecutors should also be mindful of the victim's emotional state prior to and during court hearings. Identifying a separate waiting area and/or designated space for victims and advocates to communicate can reduce anxiety and make victims feel more comfortable when prosecutors are in the courtroom. Assessing if or when the victim needs a break from the court hearing allows advocates the opportunity to provide crisis intervention and decrease a victim's angst while testifying. By keeping abreast of the victim's well-being and requesting appropriate court measures when necessary, prosecutors and advocates will

- ◆ keep the victim engaged in the hearing,
- ◆ alleviate any potential fears of testifying, and
- ◆ reduce the risk of retraumatization.

Advocates work with victims who have exhibited a wide range of responses to trauma—responses that jurors may not easily understand. Prosecutors can enlist the help of experienced victim advocates to understand certain aspects of victims' trauma as well as behaviors that may appear to be counterintuitive. Victim advocates who have not worked with the victim in a specific case or who do not work for an organization that has provided services to the victim can often explain this behavior and discuss expert testimony at trial. Such expert witnesses cannot comment on a particular victim's credibility, or the defendant's guilt or innocence; however, the advocate's testimony can assist jurors in more accurately assessing the facts of the case by providing general information about victim behavior that can clarify myths and misinformation. Identifying an expert who has substantial experience working with victims is important; however, this expert must not have worked directly with the victim in the particular case for which they plan to testify. Ideally the expert should be an advocate from another jurisdiction. Prosecutors who build a professional network of local, regional, and national criminal justice professionals

and advocates will be able to draw upon a sizeable pool of experts. Prosecutors should be mindful of their jurisdiction's court rules and requirements for offering expert testimony, the standards for qualifying experts, and the admissibility of expert testimony.⁹

Community and systems-based advocates, as well as prosecutors, should work together to ensure that victims are connected to necessary community resources that can provide specialized counseling/therapy after the verdict; counseling/therapy is often vital to victims' continued support and healing. The prosecutor and advocate should discuss the anticipated verdict with victims and address questions, such as whether they wish to be present in the courtroom. The prosecutor—with the advocate and victim present—should explain the verdict, the recommended sentence, and the victim's right to not only be present at sentencing but also to speak or have the prosecutor or advocate read an impact statement on their behalf.

Victim advocates can help victims prepare their impact statement, which allows them to express how the assault has affected them emotionally, physically, and psychologically. Encouraging a victim to be present during the sentencing hearing can display their determination to hold the offender accountable and can provide closure.

Both advocates and prosecutors should ensure that victims understand their rights going forward—including the right be notified of the defendant's probation or parole, if applicable.^h If the defendant contacts the victim while in the penal system, the prosecutor should be informed and take appropriate steps to notify the responsible officials.

^f Victims' legal rights vary by jurisdiction and are often encapsulated in a state's criminal code or in its constitution. Examples of rights include the right to (1) have a victim advocate; (2) be notified of the arrest or detention of the offender; (3) be informed of and attend all scheduled court proceedings; (4) receive notice of substantial delay in prosecution; (5) minimize contact with the defendant; (6) make a statement at sentencing (often called a "victim impact" statement); (7) seek restitution from the offender; (8) seek compensation from a state's crime victim compensation fund; and (9) be notified of appeals, the defendant's incarceration, and the defendant's release date. For additional information on victims' rights, see NCVLI's Victim Law Library (NCVLI) at http://bit.ly/NCVLI_VLL (last visited June 6, 2018).

⁹ The requirements for qualifying an expert vary from jurisdiction to jurisdiction. The standard for admitting expert testimony also varies. Most jurisdictions utilize the standard first articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). A minority of jurisdictions hold that expert testimony is admissible if it is based on a scientific technique that is "generally accepted in the scientific community." See *Frye v. United States*, 293 F. 1013 (D.C. Ct. App. 1923).

^h The victim should be notified that they can usually obtain information from the Department of Corrections or other jurisdictional equivalent regarding the defendant's prison placement and potential release date.

Regardless of the verdict, the prosecutor should encourage the victim to report any instances of threats, harassment, or other types of intimidation from the defendant's family or friends.¹ Advocates can also assist victims with seeking restitution from the defendant as part of the sentencing process or applying for compensation from the state's crime victim compensation fund.

The end of the trial is also a time to revisit the victim's safety plan. Any safety plan developed with the victim earlier on in the case may change, depending on the verdict. If the defendant is found not guilty and subsequently released from jail, the prosecutor and advocate will want to take steps to ensure the offender stays away from the victim (e.g., by filing a protection order if one hasn't already been filed).

Conclusion

Collaboration between prosecutors and advocates is critical at each stage of a sexual assault investigation. Advocates have insights that are crucial for prosecutors to consider in building a strong, evidence-based argument in sexual assault cases. Armed with the knowledge and expertise of each discipline, prosecutors and advocates can ensure that victims' needs are met, safety protected, and privacy respected. A strong working relationship built on honesty allows prosecutors and advocates to pursue their joint and independent goals. By working together, advocates and prosecutors can help victims move forward with healing from the crime.

References:

1. AEquitas, Justice Management Institute & Urban Institute. (2017). *Model Response to Sexual Violence for Prosecutors*, pp. 31–33 (2017); see generally SAKI Toolkit, <https://sakitta.org/toolkit/> (accessed June 7, 2018).
2. Kristiansson, V. (2013, May). *Walking A Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions, Parts I and II, 9/10 Strategies* (Retrieved from T. Garvey, Criminal Meets Civil: Coordinating Our Response (Webinar recorded on November 30, 2015).
3. RTI, *12 Key Questions to Guide Victim Notification Protocols, SAKI Victim Notification Guide*, http://bit.ly/12_key_questions_victim_notification.
4. AEquitas. (2017, May). *Evidence of Other "Bad Acts" in Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions*, 31 Strategies in Brief.
5. *Id.*
6. Wash. Rev. Code Ann. § 790.020. See also American Bar Association Commission on Domestic and Sexual Violence, *Sexual Assault Civil Protection Orders (CPOs) by State* (Apr. 2015).
7. See, e.g., National Crime Victim Law Institute, <http://bit.ly/NCVLI> (last visited June 14, 2018); Victim Rights Law Center, www.victimrights.org (last visited June 14, 2018).
8. For more on implications relating victim confidentiality and privilege, see Kristiansson, V. (2013 May), *Walking A Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions, Parts I and II, 9/10 Strategies*; see also Confidentiality and Privilege Statutory Compilation, AEquitas (2017). (Available upon request from AEquitas ta@aequitasresource.org or at 202.558.0040.)
9. *Id.*
10. See *Brady v. Maryland*, 373 U.S. 83 (1963).
11. Garvin, M., Wilkinson, A., LeClair, S. (2014, September). Protecting victims' privacy: Moving to quash pretrial subpoenas duces tecum for non-privileged information in criminal cases. *National Crime Victim Law Institute Violence Against Women Bulletin*. Retrieved from http://bit.ly/NCVLI_victim_privacy (accessed June 28, 2018).
12. See, e.g., National Crime Victim Law Institute, <http://bit.ly/NCVLI> (accessed June 14, 2018); Victim Rights Law Center, www.victimrights.org (accessed June 14, 2018).
13. Contact AEquitas for consultation, research, and motion drafting support at ta@aequitasresource.org or at 202.558.0040. See also Kristiansson, *supra* note 2.

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¹If the defendant is found not guilty, any criminal protection order would likely be terminated, and it may be more difficult for the victim to obtain a civil protection order. Depending on the jurisdiction and if the offender has harassed the victim post verdict, civil attorneys or advocates may be able to assist the victim with obtaining a civil anti-harassment order. Contact AEquitas at ta@aequitasresource.org or at 202.558.0040 for technical assistance on this issue.