

# The Decision to Prosecute

Sexual assault is a traumatizing and life-altering crime that violates not only a victim's body, but also their sense of personal security and trust. As a prosecutor, your decisions about what related crimes to investigate and charge—and whether to prosecute these crimes—contribute to a victim's overall experience of the assault.

Charged crimes give a name to the source of the victim's trauma and suffering, as well as a roadmap for justice and safety. When a crime goes uncharged or is charged but does not include the most highly graded felony sexual assault crime possible, a victim may think that the criminal justice system does not consider the assault to be a serious offense. Because sexual violence crimes target personal autonomy, safety—both for the victim and the community—becomes jeopardized in these cases. Your responsibility to pursue justice for the victim is paramount.

You have wide discretion in making charging decisions; the rules of professional ethics and relevant case decisions that outline your role as a prosecutor guide that discretion. Ethical charging decisions based on the factors enumerated under the rules of professional responsibility include

- ♦ consulting with a victim and
- ♦ analyzing admissible evidence and applicable laws.

This National Sexual Assault Kit Initiative (SAKI) resource discusses strategies to encourage communication with a victim in a way that builds or, as often occurs in cold cases, *rebuilds* a victim's foundation of trust in the criminal justice process. Some of these strategies involve approaches that will help you discuss with victims (1) the nature of charges and (2) the importance of working with community- and systems-based advocates at the earliest stages. Finally, this resource examines how to discuss the charging decision with a victim in a respectful, trauma-informed way.

## Building a Foundation of Trust with Meaningful Communication

During your first meeting with a victim, focus on building rapport and talking about the assault; do not focus on

making charging decisions at this time. During this meeting, you should

- ♦ explain your role in the process;
- ♦ clarify your position as someone who represents the victim as well as the community; and
- ♦ emphasize that you do not have a legal, privileged relationship with the victim.

At this meeting, you should also determine whether the victim is already working with a community-based advocate. If the victim has not previously connected with a community-based advocate, then take time to explain the benefits and types of support an advocate can offer. Provide an advocate's contact information if the victim requests this information. During the meeting, you may also want to offer the name and contact information for the victim-witness personnel within the prosecutor's office.

Meet with a victim early and maintain regular contact— involving victim-witness specialists when necessary—to summarize the nature of the process, answer questions, and communicate procedural issues that may arise. Maintaining regular contact is especially critical in cold cases; these cases often require you to renew the victim's confidence in the criminal justice system. Such communication is not only a preferred practice but may be a constitutionally or statutorily guaranteed victim right.<sup>1</sup>

Inform the victim when further follow-up interviews and investigation (e.g., locating witnesses) are required; additionally, the victim should be given an accurate estimate of the timeframe for making a charging decision. However, there may be prudent reasons to avoid discussing the substance of any additional investigation.

Inform a victim that an advocate may accompany them to any meetings or interviews.<sup>2</sup> However, the victim must understand that the confidentiality and privileges they have with their advocate will not exist in the presence of a third party, such as yourself; reminding the victim of this before the meeting begins is a good idea. Some victims may wish to be accompanied by a friend or relative (i.e., an "outside" support person). In such instances, focus your

discussions only on the case's procedural matters. The victim and support person need to understand that discussing any substantive evidentiary matters could create unintended consequences if that outside support person testifies at the trial. The most notable risk is that witness testimony will be challenged by allegations of taint if witnesses are present for a victim interview that covers any substantive evidentiary issues. A more substantive interview can always be conducted later, in a more structured setting.

Communication with and among your criminal justice and community partners is also critical. In some situations, input about the charging decision from the sexual assault response team (SART) or another multidisciplinary team may be beneficial to you and other prosecutors. Sharing that decision with SART members and discussing the evidentiary basis for the decision, along with any other relevant considerations, accomplishes the following:

- ◆ Helps establish regular and meaningful communication
- ◆ Acknowledges partners' investigative and advocacy efforts
- ◆ Demonstrates respect for the partners and provides valuable information to enable them to improve their practice.

## Communicating the Decision to Prosecute

When deciding whether to prosecute a cold case sexual assault, your ultimate responsibilities are to determine (1) whether sufficient evidence exists to support the elements of a charge and (2) whether the decision to charge—or the crime charged—is in accordance with applicable ethical considerations and guidelines.<sup>3</sup> Prosecutorial decisions are based on the applicable statutory and case laws to determine whether sufficient evidence exists to prove the elements of the crime beyond a reasonable doubt.<sup>4</sup> This determination is not speculation; rather, the determination is grounded in a judge's or jury's analysis of the applicable law, as well as a fair and accurate evaluation of all admissible evidence. This determination should not include mention of the potential for jurors to be biased by myths and misinformation.

You should use all legitimate means to bring about justice.<sup>5</sup> Explore all potential avenues of investigation or evidentiary resources before making a conclusion about whether to proceed. Additionally, be cautious about any gaps in your own capacities to accurately analyze the available evidence and determine whether it meets the elements of the applicable statutes and case decisions. Expert input can be helpful in many cases (e.g., in situations in which the victim was intoxicated).<sup>6</sup>

The decision to prosecute should be timely and explained in plain language, understandable to the victim and to the community. Statute titles and terms used in the statutes may be unfamiliar to victims; these terms often have definitions that differ from their everyday meanings. As a result, victims may become confused, distrustful, and ultimately disengaged if information is not clearly explained to them. The victim may believe that a lesser charge means that the prosecutor does not consider the assault to be serious. Prosecutors can help counter this perspective by explaining the elements required by the different laws and the analyses they conducted.

Explain to the victim that prior to any binding plea offer, the potential resolution will be discussed with them<sup>7</sup> to solicit their input. A plea offer conversation should include a measured, though candid, discussion of considerations for a potential negotiated resolution (e.g., evidentiary issues that may affect meeting the burden of proof) while also acknowledging and respecting the victim's position and feelings. Inform the victim that although the decision to plead a case lies solely with the prosecutor's office, the victim still has a right to be heard. If the victim disagrees with the resolution of the charges, explain that there will be an opportunity to inform the court of this during the scheduled plea and sentencing date.<sup>8</sup> An advocate may assist a victim in these conversations by offering support that may be critical to helping the victim come to terms with a resolution—even one that, from their perspective, is not satisfactory.

## Communicating the Decision Not to Prosecute

A decision not to charge may be based on insufficient evidence, witness unavailability, ethical considerations, and/or other reasons. No matter the reason(s), notify the victim of your intent to make this decision and offer to meet with the victim before finalizing the decision. Every victim deserves the courtesy of an explanation and such a conversation is consistent with the prosecutor's obligation to respect the victim's right to be informed.

If the decision not to charge is primarily an evidentiary issue, then explaining the analysis to the victim—including the elements of the crime—is critical; statute and even jury instructions can be used to illustrate the evidentiary burden. Inform the victim that each element of the offense must be proven beyond a reasonable doubt. Conveying the legal standards as such is important, being careful not to blame the victim for deficiencies in the evidence. You may also choose to explain that if a jury acquits the defendant due to insufficient evidence, double jeopardy would prevent any

future prosecution if additional evidence should later be revealed.<sup>9</sup> If the statute of limitations prevents prosecution, then inform the victim that there may still be an opportunity for them to testify to “other bad acts” if pending charges involve other victims.<sup>10</sup>

Always convey empathy for the victim’s experience and respect for the victim’s concerns. Any shortcomings in the investigation should be candidly and diplomatically discussed. If charging is declined, you may advise the victim of potential civil remedies. You should communicate that these difficult decisions are made with considerable care and a commitment to ethical considerations in mind, as well as with the interests of the victim and the community.

When you acknowledge each victim’s individual experience and engage with them in a manner that respects that experience, you can build a victim’s trust in the entire criminal justice system. Providing a victim with the opportunity to convey the experience of their assault through interviews and trial testimony, and at sentencing recognizes that sexual violence crimes have far-reaching consequences beyond the visible injuries or physical evidence. Additionally, you can show respect for the unique impact that a crime has on a victim when you explain the charging decision to the victim and provide an opportunity for them to offer feedback about that decision before it is final.

#### References:

1. See, e.g., Rights of Victims in Criminal Prosecutions and Delinquency Proceedings, Or. Const. Art. I, § 42 (2008); Rights of Crime Victims and Witnesses, N.J. Stat. Ann. § 52:4B-36 (West 2008); Rights of victims and witnesses to be informed during the criminal justice process, Wyo. Stat. Ann. § 1-40-204 (Michie 2001).
2. See, e.g., Cal. Penal Code § 868.5 (West Supp. 1989). Supporting person; attendance during testimony of prosecuting witness; specified offenses.
3. National District Attorneys Association. (2010). *National prosecution standards, Third edition*. Retrieved from [http://bit.ly/NDAA\\_prosecution](http://bit.ly/NDAA_prosecution); American Bar Association. (2015). *ABA Standards for Criminal Justice: Prosecution and Defense Function* (4th Ed.). Retrieved from [http://bit.ly/aba\\_cjspf](http://bit.ly/aba_cjspf); AEquitas, Justice Management Institute & Urban Institute. (2017). *Model Response to Sexual Violence for Prosecutors (RSVP): An Invitation to Lead*. Retrieved from [http://bit.ly/model\\_rsvp](http://bit.ly/model_rsvp)
4. AEquitas, Justice Management Institute & Urban Institute. (2017). *Model Response to Sexual Violence for Prosecutors (RSVP): An Invitation to Lead*. Retrieved from [http://bit.ly/model\\_rsvp](http://bit.ly/model_rsvp)
5. Berger v. United States, No. 544, 295 U.S. 78, 88 (1935).
6. For additional information on alcohol- and drug-facilitated sexual assault, see [www.bit.ly/alcohol\\_drug\\_sa](http://www.bit.ly/alcohol_drug_sa).
7. See, e.g., Rights of Victim During Investigation, Prosecution, and Disposition of the Crime, Idaho Code Ann. § 19-5306 (1)(f) (1985).
8. See, e.g., Idaho Code Ann. § 19-5306 (1)(e); see also Winbush, K. J. (2016). *Admissibility of Victim Impact Evidence in Noncapital State Proceedings*. [Annotation]. 8 A.L.R.7th Art. 6 (2016).
9. See, e.g., *Double Jeopardy*, 46 Geo. L.J. Ann. Rev. Crim. Proc. 525 (2017).
10. See, e.g., AEquitas. (2017, May). Evidence of Other Bad Acts in Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions. *Strategies in Brief*, 31. Retrieved from [http://bit.ly/evidence\\_oba](http://bit.ly/evidence_oba); SAKI TTA. (2018). *Admitting Evidence of Other Bad Acts in Cold Case Sexual Assaults*. LINK TO COME.

#### Author:

AEquitas, The Prosecutors’ Resource on Violence Against Women