

THE STATE OF NEW HAMPSHIRE



**GOVERNOR'S COMMISSION ON
DOMESTIC VIOLENCE**

**PROSECUTION:
DOMESTIC VIOLENCE PROTOCOL**

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**Prepared by the
Governor's Commission on Domestic Violence**

GOVERNOR'S COMMISSION ON DOMESTIC VIOLENCE PROTOCOL COMMITTEE

THE CRIMINAL JUSTICE SUB-COMMITTEE

Capt. William Halacy (Co-Chair)
Concord Police Department

Lincoln Soldati, Esquire (Co-Chair)
Strafford County Attorney

Carole Anderson, Superintendent
Merrimack County House of Corrections

The Honorable Arthur Brennan
Superior Court Justice

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Director Field Services
Department of Corrections

Nancy J. Geiger, Esquire
Marital Master

Andrea Goldberg, Administrator
Bureau of Community Corrections & Classification
Department of Corrections

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New Hampshire State Police

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Manchester Police Department

Chief Daniel Libby
Plymouth Police Department

Major Keith Lohmann
Police Standards & Training Council

The Honorable Robert H. Lynn
Superior Court Justice

Sandra Matheson, Director
Office of Victim/Witness Assistance
Department of Justice

Barbara Sweet, Esquire
Merrimack County Superior Court

Lauren Thorn, Esquire
New Hampshire District Courts

George Wattendorf, Esquire
Dover Police Department

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INTRODUCTION

Until recently, domestic violence was viewed as a private family matter. The response of the criminal justice system reflected this view. Police were trained to mediate and abate family “disputes.” Prosecutors saw only the most serious domestic violence cases, and were reluctant to pursue domestic violence cases because of the difficulty presented by these cases and the belief that they would have little success with the prosecution. The courts shared the view that these cases did not belong in the criminal courtroom, and were best handled through mediation, marriage counseling, or civil proceedings. These views were often seen as validated in the frustrations police, prosecutors, and judges faced with the reluctance of victims to “cooperate” and the repeated appearances of the same victims who “never seemed to learn.” These traditional approaches and egocentric views left the victim, the children, and the public unprotected from the devastating consequences of domestic violence.

Ignoring the consequences of domestic violence only ensures that the cycle of violence will continue. It is not only the partners of offenders who suffer the effects of domestic violence; children who witness domestic violence are affected in the same way as children who are physically or sexually abused. Children who grow up in violent homes often commit crimes of violence against others, abuse alcohol and drugs, become runaways, and become the next generation of domestic violence perpetrators.

To end the cycle of violence, a coordinated community response is required. Each part of the community has a role to play: families, the criminal and civil justice systems, medical and mental health professionals, educators, clergy, service agencies, and the media. This protocol is part of a coordinated effort toward stopping that cycle of violence.

PURPOSE

The purpose of this protocol is to provide a model set of policies and procedures for the handling of domestic violence prosecutions in New Hampshire. This protocol is based on the premise that domestic violence is criminal conduct. Prosecutors have the same responsibility to aggressively prosecute these cases as they do with any other violent crimes. The State has a critical interest in reducing the number of incidents of domestic violence, as they tend to escalate in frequency and severity, and all too often result in homicides.

The successful prosecution of domestic violence requires specialized techniques designed to protect the victim from retaliation by the offender, allay the victim’s fears of the criminal justice system and encourage a victim’s cooperation with the prosecution’s efforts. Adherence to this protocol will help prosecutors to be more effective and ultimately increase the number of successful dispositions in domestic violence cases.

GOALS OF PROSECUTION

- To stop the violence;
- To protect the victim from additional acts of violence committed by the defendant;
- To protect the children or other family members from exposure to, or possible injury from, domestic violence;

- To protect the public;
- To deter the defendant from committing continued acts of violence in the community;
- To provide restitution for the victim;
- To rehabilitate the offender;
- To create a general deterrence in the community to acts of domestic violence;
- To uphold the legislative intent to treat domestic violence as serious criminal conduct;
- To vindicate society's interest in holding all criminals accountable for their violent conduct.

NOTE: Victims and advocates will not necessarily share all these goals and may have their own objectives which are separate and distinct from those of the prosecutor. For example, a victim may want the violence to stop but the relationship to continue, while the prosecutor may believe incarceration of the defendant is warranted. Prosecutors must take care to elicit the victim's objectives and take them into consideration so as to formulate appropriate goals for each individual prosecution.

DEFINITION OF DOMESTIC VIOLENCE

Domestic violence is defined by the relationship of the victim to the defendant, not by crime committed. It includes any harmful physical contact, or threat thereof, occurring between current or former family or household members, sexual or intimate partners (including homosexual partners).

Domestic violence generally represents a pattern of behavior rather than a single isolated incident. This pattern can take on many forms, all of them involving physical violence or threats of physical violence. The pattern almost always includes emotional, sexual and economic abuse as well. The defendant's goal in committing these crimes is to obtain power and control over the victim. The violence may be accomplished with the use of hands, feet, weapons, or other objects. Injuries are as serious as, or more serious than, injuries inflicted in 90% of all violent felonies. Some examples of felonies committed in a domestic violence context include: all levels of homicide, attempted murder, first and second degree assault, aggravated felonious sexual assault, felonious sexual assault, kidnapping, robbery, burglary, felony stalking, and witness tampering. Some examples of misdemeanors commonly committed in a domestic violence context include: simple assault, sexual assault, reckless conduct, criminal threatening, stalking, criminal restraint, telephone harassment, and criminal trespass.

Prosecutors should be aware of the following characteristics of domestic violence:

CHARACTERISTICS OF DOMESTIC VIOLENCE

- Ninety-five percent of adult victims of domestic violence are women;
- Domestic violence occurs in every racial, ethnic, religious, and socio-economic group;
- Perpetrators use violence as a tool to achieve power and control over their partner and children;
- Violent behavior often increases in severity and frequency at the time of separation and thereafter;
- Over fifty percent of men who use violence against their partners abuse their children as well;
- Battered women and their children are often economically compelled back into relationships with offenders.

OFFENDER REACTIONS TO COURT

The offender may view the court system as another means of continuing to exercise power and control over the victim. Even within the courtroom an offender will often employ several strategies to exercise control over the victim. The following are a few examples of behaviors that an offender may use to manipulate the criminal justice system and remind the victim that the offender remains in ultimate control.

OFFENDER BEHAVIORS

- Assaulting the victim when going to or from the courthouse, or during the court hearing;
- Threatening further violence if the victim does not “drop charges,” or lie on the witness stand;
- Requesting repeated changes of counsel;
- Forcing the victim to avoid or ignore subpoenas;
- Requesting repeated continuances;
- Threatening other witnesses;
- Accompanying the victim to the prosecutor’s office, the police station, or courtroom;
- Using the proximity to the victim in the courtroom to continue the intimidation and control, e.g., giving the victim notes or looks during the proceedings, following the victim in and out of the courtroom, bringing family or friends to the courtroom to intimidate or threaten the victim, etc.;
- Falsely claiming to be the victim of an assault by the victim.

A prosecutor must communicate that the court, and not the offender or the victim, is in control of the case. During every phase of the prosecution of a domestic violence case the focus must remain on the offender’s criminal behavior. The defendant’s violence is the problem and the defendant is ultimately responsible for controlling that violent behavior. Focusing on the victim’s behavior as an excuse for why the offender was violent undermines the achievement of the goals of prosecution, and results in an escalation of the offender’s violence.

VICTIM RESPONSES TO THE CRIMINAL JUSTICE SYSTEM

A victim of domestic violence who calls the police shares a goal with the officer responding to the call, the prosecutor trying the case, and the court hearing it: *to stop the violence*. While the court may be able to stop the violence in the long run using the legal remedies available, the victim’s behavior during the criminal justice process may be aimed at avoiding the violence in the short term by stopping the offender from carrying out the most recent threat. Using a variety of strategies that may have worked in the past to avoid another physical assault, (such as agreeing with the perpetrator’s denial or minimization of the violence in public, accepting promises that it will never happen again, requesting that the court dismiss the restraining order, or not showing up for court hearings) the victim will again attempt to stop the violence, even if just temporarily.

The criminal justice system will be most effective if it anticipates concerns that the victim may have regarding testifying against the defendant, and provides the support the victim needs to address these concerns. Prosecutors must be aware of these concerns in order to effectively provide necessary support and information to the victim. Referral to a local domestic violence center may help address such concerns.

The reasons given by victims of domestic violence who are initially reluctant to testify are often the same as those given by victims of other types of violent crime. These include:

REASONS FOR VICTIM RELUCTANCE

- Fear of retaliation by the defendant;
- Unwilling to face the assailant again in the courtroom; afraid of the defendant's anger for involving the justice system;
- A feeling of shame or guilt that the victim's own behavior may have caused the attack in some way or that the court may perceive the victim's behavior as causative;
- A desire to put the whole incident behind and move on with life;
- Denial, ambivalence, withdrawal, and emotional swings as a result of being a victim of severe trauma.

In domestic violence cases, the above reasons are often heightened for the victim because of the following realities:

VICTIM REALITIES

- The defendant may be living with the victim, be familiar with the victim's daily routine, and have on-going access to the victim at home, work, or at the home of relatives or friends. The intimate relationship between the defendant and the victim creates a unique vulnerability resulting from the defendant's knowledge of details about the victim's life not found in cases in which they are strangers. Even when formal separations are initiated, the defendant often has access to the victim through child visitation arrangements.
- The victim may have genuine concern or love for the abusive partner. The victim may want the violence to end, but not the relationship.
- The victim may not have a place to stay safe from the defendant.. Leaving home can mean becoming hunted and homeless. A victim may decide life with the defendant is better than the unknown.
- The victim's past efforts to leave the perpetrator or to seek protection from the justice system may have resulted in further violence. The victim has learned that the defendant will follow through with threats of retaliation because of the victim's efforts to leave or seek help from the justice system. *Leaving is often the most dangerous time for a victim of domestic violence.*
- The victim and the defendant may have children together, and may have received threats that the children will be kidnapped if the victim testifies.
- The victim and children may be dependent on the defendant for economic support. This concern may be even greater when the victim is not eligible for public benefits.
- The victim may be under religious, family, or social pressures to support the spouse.
- The victim may believe that the intervention of the criminal justice system will not be effective in stopping the violence, or providing protection, including protecting the children. This belief may be a result of past experience in which the system did indeed fail to prevent violence. A domestic violence victim knows that law enforcement cannot provide constant protection. A victim who leaves the courthouse goes home without around-the-clock protection. The victims know that even if convicted the defendant will someday be released from custody and may find the victim, the victim's children or family.

CHARGING CONSIDERATIONS

The decision on whether to file charges and which crimes to charge is solely the responsibility of the prosecutor. Given the increasing complexity of domestic violence cases, prosecutors charged with this responsibility should be experienced trial attorneys who have previously handled domestic violence cases. They should understand the issues surrounding domestic violence and be familiar with the available resources and referrals in the community.

In deciding whether to bring a specific charge the prosecutor must determine whether there is sufficient admissible evidence to sustain a guilty finding and a reasonable probability of a conviction. The prosecutor should weigh and consider a number of different factors in determining the level of the crime to charge.

First, the prosecutor should review all the facts of the case in light of the following:

FACTS FOR REVIEW

- The elements of the offense under consideration;
- The extent and seriousness of injuries and/or threats;
- The use or threatened use of a weapon (including furniture or other household objects);
- The defendant's criminal history and history of violence toward the victim;
- The potential lethality of the situation;
- The defendant's use of drugs or alcohol;
- The victim's cooperation or reluctance.

As a general rule, when a factual basis exists and there is some corroboration, charges should be filed. A case should not be declined solely on the basis of reluctance expressed by the victim. Rather the decision should be based on the availability of sufficient evidence to prove the case. Corroborating evidence may come from many different sources. Prior to charging the prosecutor should review the following:

CORROBORATING EVIDENCE

- A formal statement from the victim, obtained within 24 hours of the incident whenever possible, preferably tape recorded;
- Statements from all potential witnesses, including children – potential witnesses include witnesses who observed an assault take place as well as those who heard sounds indicating that an assault was taking place (e.g., screams, objects being thrown or broken, etc.);
- Statements made by a suspect – investigators should be strongly encouraged to give the defendant an opportunity to provide a statement;
- Photographs of all the victim's injuries – whenever possible this should be done at the time of the initial report and again a few days later to show the progression of the injuries;
- Photographs of the crime scene, whenever possible and appropriate;
- A recording of the 911 call or other communication with the police or emergency dispatch center with statements made by the victim, witnesses or the defendant;
- Medical records documenting the victim's injuries (releases should be obtained early in the investigation);
- Police reports written at the time of the assault and as follow-up (reports concerning prior assaults may also be helpful);
- A physical description of the defendant and the victim, height, weight, age, etc. (Especially important in cases in which the defendant is claiming self-defense);
- Physical evidence, e.g., weapons, broken furniture, torn clothing, blood stains on clothing or carpets, etc.;
- Copies of any restraining orders or other civil pleadings pending involving the victim and the defendant.

If after reviewing all of the factors set forth above, the prosecutor elects not to file charges, the prosecutor should:

IF NO CHARGES ARE FILED

- Keep a record of the case and the reasons charges were not filed;
- Explain clearly to the victim why filing is not appropriate at the present time;
- Refer the victim to local battered women's shelter or other appropriate social service or legal assistance organizations.

Inform the victim of options other than criminal charges, such as domestic violence petitions and restraining orders.

ARRAIGNMENT AND BAIL

Whenever possible vertical prosecution should be used to ensure that the prosecutor making the initial charging decision will also handle the arraignment, pre-trial, trial, sentencing, and post-conviction aspects of the case. It is especially important that the prosecutor handling the arraignment be familiar with the case facts and history so as to be able to effectively argue bail and pre-trial release issues.

The prosecutor should make a vigorous bail argument, the focus of which should be designed to ensure the victim's safety. Whenever significant cash bail is not being recommended, or when it is likely the defendant will be able to post the required bail, the prosecutor should also consider making the following recommendations as conditions of bail:

BAIL CONDITIONS

- A condition of no contact with the victim, the victim's children and family, by any means, in person, by telephone, or by mail, including contacts through a third party;
- An order barring the defendant from the victim's residence, school, or place of employment;
- A prohibition on the defendant destroying, selling or disposing of the victim's property;
- Any other conditions to help safeguard the victim.

Because of the lethal nature of domestic violence and the recurring and escalating pattern of violence, *release of the defendant on personal recognizance in felony domestic violence cases should rarely, if ever, be agreed to by the prosecutor.* The victim and the local law enforcement agency where the victim resides should be promptly informed of all conditions of the defendant's bail and any change of custody status.

Any breach of condition of bail by the defendant should result in the filing of a motion to revoke bail. Whenever there is reason to believe the defendant will flee or react with violence to the filing of the motion to revoke bail, the motion should be accompanied by an *ex parte* request for a *capias* to issue for the defendant's arrest. The prosecutor should also consider whether the breach of bail conditions also warrant the filing of additional criminal charges, such as witness tampering, telephone harassment, etc.

REDUCTIONS AND NEGOTIATED PLEAS

Charges considered serious enough to warrant felony consideration should not be reduced to diversion-eligible charges for the sole purpose of securing diversion resources. Similarly, felony indictments returned by the grand jury should not be reduced to misdemeanors simply to ensure a disposition by negotiated

plea or to avoid trial. Reduction of felony charges to misdemeanors should only occur when substantial evidentiary problems exist or extraordinary circumstances otherwise support the appropriateness of a misdemeanor disposition.

When negotiating a plea, the prosecutor should consider the following factors:

FACTORS IN NEGOTIATED PLEAS

- The victim's wishes as to disposition;
- The victim's cooperation or lack thereof;
- The possibility of proceeding without the victim's cooperation;
- The seriousness of the offense;
- The defendant's criminal history and history of domestic violence;
- The goals of prosecution.

All of these factors should be considered by the prosecutor in exercising professional judgment as to what is an appropriate disposition in a particular case. Any negotiated plea in a domestic violence case should include, in addition to other appropriate terms and conditions, attendance at, and completion of, an approved offender counseling program. Such counseling may be made a condition of probation or parole, or may be used as a condition for suspending a portion of a committed sentence of incarceration.

Whether pursuant to a negotiated plea or the result of a trial, the prosecutor's sentencing recommendation should be commensurate with sentences for other violent crimes. The victim should be provided the opportunity to address the court at the time of sentencing even if the victim's desires are contrary to the recommendations by the State.

DISMISSALS AND RELUCTANT VICTIMS

Dismissal or *nol prosequi* of charges should not be employed as a trial avoidance strategy. Dismissals may be appropriate in cases in which evidentiary problems preclude the possibility of proving all the elements of the crime charged. Reluctance of the victim should not be the sole factor in deciding to dismiss the case. In some instances, delaying a *nol prosequi* until the trial gives the prosecution one last chance to persuade the victim to go forward or allows time to develop strategies to proceed to trial without the victim. In addition, it ensures that the defendant appears in court and gains an understanding of the seriousness of the assault.

It is important for prosecutors to distinguish between victims who are reluctant to testify, and those who refuse to testify. The majority of victims who are reluctant to testify will do so if provided with adequate support through victim assistance during the criminal justice process. What appears to be reluctance to testify is more often an indicator of the abuser's control over the victim than of the victim's inability to follow through with the case. Providing the victim with support and accurate information will increase the likelihood of the victim testifying.

In situations where a *nol prosequi* is being contemplated due to the reluctance of the victim and where such reluctance may preclude the possibility of proving all the elements of the offense, the prosecutor should take the following steps:

BEFORE DISMISSING A CASE

- The prosecutor should meet with the victim *in person* to discuss concerns;
- The prosecutor should explain that the ultimate responsibility for dismissing a case lies with the State, not with the victim, and that the prosecutor may proceed without cooperation. It is important that this message be communicated to the defendant as well, as it may relieve pressure being applied to the victim to “drop charges;”
- The prosecutor should also carefully explain sentencing alternatives, negotiated pleas and provisions for the victim’s protection while the case is pending, and the possible consequences if the case does not go forward.
- If a case is dismissed or *nol prossed*, the prosecutor should explain that the dismissal will not be held against the victim and that the office of the prosecutor stands ready to assist and prosecute future domestic violence crimes.

PROCEEDING WITHOUT THE VICTIM’S COOPERATION

If the victim refuses to testify, recants prior statements, or fails to appear, the prosecutor must decide whether to proceed with the prosecution without cooperation. The following factors must be weighed before electing to proceed:

FACTORS TO CONSIDER

- The defendant’s criminal history;
- The defendant’s history of violence toward this victim;
- The severity of the offense;
- The risk the defendant poses to third parties or the community at large;
- The risk the defendant poses to the victim if the prosecution proceeds measured against the risks to the victim if the case is dismissed.

Prosecutors must keep in mind that the goal of prosecution is to hold the offender accountable, not to punish the victim. Prosecutors must be convinced that the interest of justice will truly be served by going forward without a victim’s cooperation. If the decision to proceed is made, the victim should not be routinely charged with contempt, assessed costs or detained, and bench warrants should not be routinely sought for failure to appear. Prosecutors should remember that what may appear to a prosecutor to be an act of contempt or defiance, in the eyes of the victim, may be an act of survival!

STRATEGIES FOR DIFFICULT CASES

Prosecutors must recognize that different strategies are necessary in dealing with the various situations of problem cases. The reluctant victim poses a different set of circumstances and possible solutions than a recanting or absent victim. It is important to understand that each strategy has its own strengths, weaknesses, and risks associated with it. There are no guarantees. The difficulty presented by such cases however, should not be the sole reason to forego prosecution.

STRATEGIES FOR RELUCTANT, RECASTING, OR ABSENT VICTIMS:

- **Reassurance**

Fear is the most common reason for a victim's reluctance to go forward. It is essential to assuage the victim's concern by providing honest, straightforward answers to concerns. Many fears are the result of misconceptions of the criminal justice system or past encounters with it that were less than responsive. The prosecutor should respond to the victim's concerns with understanding and candor. The prosecutor should make sure the victim understands the role of the prosecutor. Explaining that the decision to prosecute is the prosecutor's, often relieves the burden or sense of guilt the victim experiences in going forward. Discuss the possibility of providing a subpoena for the victim's appearance. Keep the victim informed at every stage of the proceeding and always follow through with any assurances you make. Most reluctant victims can be persuaded to cooperate. *The importance of victim assistance cannot be overstated in gaining and maintaining the victim's cooperation in these cases.*

- **Impeachment**

A victim who has recanted or is significantly minimizing the seriousness of the offense may be declared a hostile witness and taken on cross-examination under the *N.H. Rules Of Evidence*, Rule 611. If the prosecutor has called the victim to the stand, it is necessary to first establish the hostile nature of the victim's testimony (this can usually be demonstrated by confronting the witness with prior statements or having the victim relate the current relationship with the defendant if one has been re-established.) After the witness is declared hostile the prosecutor may impeach the testimony with prior inconsistent statements and the use of leading questions. If it is possible to establish the elements of the case without calling the victim, a prosecutor should consider the likelihood of the defense calling the victim, thus permitting cross-examination.

- **Prior Recollection Recorded**

If a victim claims to have an inadequate memory of the assault, the prosecutor should attempt to establish the foundation for past recollection recorded under *N.H. Rules Of Evidence*, Rule 803 (5). The prosecutor must establish that the witness's current recollection is inadequate, that the witness's memory is not refreshed when shown the prior statement, that the prior statement was made when the events were fresh in memory and that it was a true reflection of the witness's knowledge at the time it was made. The advantage of this approach is that the prior statement is admitted substantively in contrast to the limited use of impeachment evidence. This also demonstrates the value of obtaining detailed written statements from the victim at the time of the assault.

- **Excited Utterances**

Whether the victim is reluctant, recasting or absent, the use of excited utterances under *N.H. Rules Of Evidence*, Rule 803 (3) can be very compelling evidence. Again the importance of a thorough investigation is key to preserving such evidence. Excited utterances are often obtained from neighbors, responding police officers or other witnesses who have contact with the victim, close in time to the assault and while the victim is still suffering from the stress of the event; 911 tapes are often admitted under this rule, as are statements to EMT's and responding officers.

- **Statements for Medical Diagnosis or Treatment**

If the victim was treated for injuries sustained in the assault, statements made by the victim may be admissible under *N.H. Rules Of Evidence*, Rule 803 (4). Introduction of the statements may be done through the medical records or testimony of the treating personnel. Obtaining medical releases from the victim early in the investigation is often crucial to ensuring access to this type of evidence.

- **Other Exceptions**

N.H. Rules Of Evidence, Rule 803 (24) and 804 (6) provide general exceptions to the hearsay rule which may be very helpful in proper circumstances. Rule 804 (6) applies only when the declarant is unavailable and requires prior notice to opposing counsel of the intention to offer the statement. Each of these general exceptions has specific foundational requirements with which the prosecutor must be familiar. Many courts seem to look upon these general exceptions with disfavor; accordingly, use of either of these general exceptions should be made as an additional or alternative theory to other hearsay exceptions.

- **Use of Experts**

Reluctant or recanting victims often present opportunities for the use of experts in explaining victim behavior. This is especially true when the defense has attempted to suggest improper motives of the victim, relied upon recantations or inconsistencies in statements, or argued that subsequent behavior (such as returning to the defendant) undermines the claim of fear of the defendant. Experts cannot express an opinion about the assault itself or the victim's credibility. However, the expert can testify about the common behaviors of victims of domestic violence in order to explain what may otherwise be viewed as inconsistent or paradoxical to the lay observer. Local mental health centers or battered women's shelters often have individuals who can provide such expert testimony. Prosecutors should develop a working relationship with these agencies and involve them in formulating local policies and protocols for domestic violence cases.

