Acknowledgments

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<table>
<thead>
<tr>
<th>Table of Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CHAPTER ONE: UNDERSTANDING DOMESTIC VIOLENCE</strong></td>
</tr>
<tr>
<td><strong>CHAPTER TWO: WASHINGTON DOMESTIC VIOLENCE LAWS</strong></td>
</tr>
<tr>
<td>1. The Legislature’s Intent to Protect Domestic Violence Victims</td>
</tr>
<tr>
<td>2. Definitional Statutes</td>
</tr>
<tr>
<td>a) Domestic Violence</td>
</tr>
<tr>
<td>b) Family or Household Members</td>
</tr>
<tr>
<td>c) Dating Relationship</td>
</tr>
<tr>
<td>d) Victim</td>
</tr>
<tr>
<td>e) Primary Aggressor</td>
</tr>
<tr>
<td><strong>CHAPTER THREE: VICTIM ADVOCACY</strong></td>
</tr>
<tr>
<td><strong>CHAPTER FOUR: POLICE INVESTIGATION</strong></td>
</tr>
<tr>
<td>1. Scene</td>
</tr>
<tr>
<td>2. Arrests</td>
</tr>
<tr>
<td>3. Follow-Up Investigation</td>
</tr>
<tr>
<td><strong>CHAPTER FIVE: CASE REVIEW AND CHARGING</strong></td>
</tr>
<tr>
<td>1. Filing Procedures and Standards</td>
</tr>
<tr>
<td>1. Victim Wishes and Rights</td>
</tr>
<tr>
<td>3. Evaluation of the Evidence</td>
</tr>
<tr>
<td>4. Charging Decision</td>
</tr>
<tr>
<td>5. Special Topics in Case Review and Charging</td>
</tr>
<tr>
<td><strong>CHAPTER SIX: BAIL AND NO CONTACT ORDERS</strong></td>
</tr>
<tr>
<td>1. Bail</td>
</tr>
<tr>
<td>2. No Contact Orders</td>
</tr>
<tr>
<td><strong>CHAPTER SEVEN: DISCOVERY AND PRETRIAL PREPARATION</strong></td>
</tr>
<tr>
<td>1. Discovery: The Prosecutor’s Duty</td>
</tr>
<tr>
<td>a) Meet and Greet</td>
</tr>
<tr>
<td>b) The Victim’s Address</td>
</tr>
<tr>
<td>c) Shielding Harmful or Embarrassing Information</td>
</tr>
<tr>
<td>d) Limiting Defense Interviews of Prosecution Witnesses</td>
</tr>
<tr>
<td>e) Work Product</td>
</tr>
<tr>
<td>f) Domestic Violence Advocates</td>
</tr>
<tr>
<td>g) DV Programs and Counseling Records</td>
</tr>
<tr>
<td>h) Depositions</td>
</tr>
<tr>
<td>i) Medical Records</td>
</tr>
<tr>
<td>□ Obtaining Medical Records</td>
</tr>
<tr>
<td>□ Medical Records and Victim’s Statements</td>
</tr>
<tr>
<td>□ Causation v. Fault Statements</td>
</tr>
<tr>
<td>j) Requesting Discovery From Defense Counsel</td>
</tr>
<tr>
<td>2. Pretrial Preparation</td>
</tr>
<tr>
<td>a) The Scope of the Confrontation Clause</td>
</tr>
<tr>
<td>b) The Test</td>
</tr>
<tr>
<td>c) 911 Tapes</td>
</tr>
<tr>
<td>d) Statements to Those Other Than Law Enforcement</td>
</tr>
<tr>
<td>e) Forfeiture by Wrongdoing</td>
</tr>
<tr>
<td>f) Jail Phone Calls</td>
</tr>
<tr>
<td>f) Should an Expert Be Used to Explain Domestic Violence and Victim Behavior</td>
</tr>
</tbody>
</table>
CHAPTER EIGHT: WITNESSES .................................................................................. 77
A) REASONS WHY VICTIMS RECAT OR DO NOT COOPERATE ................................................. 77
B) WORKING WITH THE UNCOOPERATIVE, RECANTING, OR HOSTILE VICTIM OR WITNESS ........ 80
C) LEGAL IMPLICATIONS OF A RECANTING VICTIM .................................................................. 81
D) MATERIAL WITNESS WARRANTS ......................................................................................... 84
E) CHILDREN AS WITNESSES .................................................................................................... 85
F) COMPETENCY ........................................................................................................................ 86
F) EXPERT WITNESSES .............................................................................................................. 87
H) BATTERED WOMEN’S SYNDROME ...................................................................................... 88
I) CRIMES AGAINST VULNERABLE ADULTS ............................................................................. 89
J) WORKING WITH REFUGEE/IMMIGRANT COMMUNITIES ....................................................... 89
K) WORKING WITH LGBTQ COMMUNITIES ............................................................................. 92
L) WORKING WITH MILITARY AND VETERAN DV COMMUNITIES ........................................... 92

CHAPTER NINE: EVIDENTIARY ISSUES ............................................................................. 94
A) INTRODUCTION ...................................................................................................................... 94
B) EVIDENCE RULE 404(B): OTHER CRIMES, WRONGS, OR ACTS .................................................... 94
C) EVIDENCE RULE 803(A)(5) RECORDED RECOLLECTION ......................................................... 97
D) SMITH AFFIDAVITS (PRIOR INCONSISTENT STATEMENT – ER 801(D)(1)(I)) .................................. 98
E) STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT – 803(A)(4) ................................. 99
F) PRIOR CONSISTENT STATEMENT BY WITNESS ..................................................................... 100
G) PRIOR TESTIMONY – ER 804(B)(1) ............................................................................................ 100
H) PUBLIC RECORDS EXCEPTION .............................................................................................. 101
I) PRIVILEGES .......................................................................................................................... 102
1. SPOUSAL OR DOMESTIC PARTNER PRIVILEGE ..................................................................... 102
2. DOMESTIC VIOLENCE ADVOCATE ....................................................................................... 103

CHAPTER TEN: SENTENCING ......................................................................................... 104
A) INTRODUCTION ...................................................................................................................... 105
B) CEREMONY ............................................................................................................................ 105
C) FELONY MECHANICS ............................................................................................................. 109
D) AGGRAVATING FACTORS ..................................................................................................... 113
E) MISDEMEANOR DEFERRED PROSECUTIONS ............................................................................ 114
F) STIPULATED ORDER OF CONTINUANCE (SOC) OR PRE-TRIAL DIVERSION ............................ 115
G) COMPROMISE OF MISDEMEANOR ......................................................................................... 115
H) AFFIRMATIVE TREATMENT CONDITIONS ........................................................................... 116
I) DOC SUPERVISION ............................................................................................................... 120
J) CONCURRENT AND CONSECUTIVE SENTENCES .................................................................. 120
K) CONFINEMENT ..................................................................................................................... 120
L) LEGAL FINANCIAL OBLIGATIONS (LFOs) ............................................................................. 121
J) RESTITUTION .......................................................................................................................... 122

APPENDIX .......................................................................................................................... 124
Domestic violence is a pattern of behavior that one person in a relationship uses to gain power and control over their current or former spouse, intimate partner, girl/boyfriend or family/household member. Domestic Violence is a broad category that includes behaviors ranging from seemingly trivial to lethal, inflicted mostly upon women. Domestic violence (DV) is one of the most prevalent and serious crimes handled by prosecutors across the country.1 Approximately 1 in 4 women will experience DV in her lifetime and 1.3 million women are victims of DV each year (National Coalition Against DV). DV is complex in that it is entrenched in a greater context of gender, racial and social inequity that has unfairly shaped societal attitudes about how and why it happens as well as who it happens to. 2 The late King County Prosecutor Norm Maleng called domestic violence the most serious criminal justice issue communities face and called domestic violence a "crime against the human spirit."

Prosecuting DV requires a different mindset than prosecuting other areas of criminal law. Seeking justice in DV includes weighing goals of victim safety and offender accountability and rehabilitation. There are multiple areas to consider: history and context of violence between offender and victim; seriousness of injures and/or level of fear expressed by the victim; ways children have been used as part of abuse and violence; and the possible negative or beneficial impact of aggressive pursuit of convictions or the impact of less aggressive approaches to a case.3 Most DV prosecutions focus on a single event of violence, but it is critical to understand these acts of violence are often part of a pattern of coercion, intimidation, and harm. Prosecutors should work to understand the reality of a victim’s experience of abuse, and focus on prevention of chronic and escalating violence.

**Offenders:** Domestic violence is a pattern of learned behaviors. People from any age, race, religion, educational background or socio-economic status can be victims

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2 For more supplemental information on DV see the National Coalition Against Domestic Violence [www.ncadv.org](http://www.ncadv.org); Washington State Coalition Against Domestic Violence [www.wscadv.org](http://www.wscadv.org); (King County) Coalition Ending Gender-based Violence [www.endgv.org](http://www.endgv.org); Minnesota Center Against Violence and Abuse [www.mincava.org](http://www.mincava.org)

3 See Blueprint for Safety, CH 5– Long and Kristiansson (2007, p.1-6.)
or offenders of domestic violence, although the criminal justice system tends to see cases from marginalized communities. DV offenders do share some commonalities. The Power and Control Wheel illustrates common ways domestic violence defendants manipulate, tamper with/intimidate, and coerce victims.

In addition to the tactics reflected on the Power and Control Wheel, DV offenders aim to diminish or demean victims. Given this, our counter-message to a victim needs to be “we respect you, we are concerned for your safety and we are here to help.”

Research has shown DV offenders in Washington State have the highest rates of criminal recidivism.⁴ DV offenders are far more violent than the general offender population; DV convictions are the greatest criminal predictor of future criminal acts,

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Chapter One: Understanding Domestic Violence

and the greatest predictor of future violent crime.\(^5\)

**Victims:** The prevalence and impact of domestic violence on victims and their children is significant.\(^6\) Most victims of DV try many times to leave the relationship before successfully freeing themselves. Some live with offenders because the alternatives upon leaving are bleaker and more precarious to their overall wellbeing than conditions in the relationship.\(^7\) For example, victims may recant or minimize the abuse to avoid further violence, poverty, living in a shelter, or homelessness. In fact, the majority of homeless women are victims of domestic violence.\(^8\) Economic issues are a major issue in domestic violence, and evidence shows that rates of violence against women decline as household income increases. “In recent years, more than 95 percent of violent incidents happened in households with incomes of less than $75,000. Rates of violence in the lowest income households are almost 15 times higher than in those with the highest incomes. The risk of a woman being killed by her intimate partner is eight times higher in households with guns, and 20 times higher when there is a history of domestic violence.\(^9\)

It is common in DV prosecution for victims to be reluctant or unwilling to participate in prosecution. The victim may refuse to provide a statement to police, or later refuse to talk with prosecutors, or recant.\(^10\) A victim may also minimize the

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5. Barnoski, R., and Drake, E. (2007). Washington’s Offender Accountability Act: Department of Corrections’ Static Risk Assessment. Olympia: Washington State Institute for Public Policy; Hamilton, Z., Kirgeral, A., Campagna, M., Barnoski, R. The Development and Validation of the STRONG-R Recidivism Risk Assessment, Criminal Justice and Behavior, 1-34, 201X, Vol. XX, No. X, Month 2015, 1–34, DOI: 10.1177/0093854815615633. See also email conversation between Prof. Zachary Hamilton and NOVO foundation for creation of NY Times Op-Ed “To Stop Violence, Start at Home” February 3, 2015: “With regards to the STRONG-R, due to supplant/replace the SRA later this year, Violence is predicted separately for males and females. For both males and females the two best predictors of violent recidivism are “Age” and “Time since last conviction”. With regards to criminal history items, for male “Felony domestic violence offenses” followed by “Misdemeanor domestic violence offenses” and “Felony weapons offenses” are the top three predictors. However, for women the top three criminal history predictors are “Misdemeanor domestic violence offenses”, “Felony assault offenses”, and “Felony domestic violence offenses”. Email to David Martin from Dr. Zachary Hamilton January 28, 2015.

6. According to a recent survey regarding domestic violence by The Centers for Disease Control and Prevention (CDC): On average, 24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States, based on a survey conducted in 2010. Over the course of a year, that equals more than 12 million women and men. Those numbers only tell part of the story—more than 1 million women are raped in a year and over 6 million women and men are victims of stalking in a year. These findings emphasize that sexual violence, stalking, and intimate partner violence are important and widespread public health problems in the United States.

7. See the Blueprint for Safety, CH 5 endnote 6 – “From a study of women’s responses to battering, Campbell et al. report that severity of abuse was only one factor in women’s decisions to remain in a violent relationship (1998 p.757)

8. Adapted from The Blueprint for Safety.


10. Although the victim is referred to as a woman and the batterer is referred to as a man throughout this manual, domestic violence takes many forms, including female batterers against their male partners as
domestic violence by denying that it happened, or say the violence was her fault. There are a myriad of valid reasons why a victim may recant or minimize domestic violence, and recantation is often due to criminal influence by the defendant.\textsuperscript{11} Some working with minimizing or recanting victims make the mistake of treating the case less seriously, but the reality is minimization and recantation are often by-products of highly sophisticated manipulation by DV offenders. Research shows that abuse which exists before arrest continues after arrest when offenders continue "to use abusive strategies... along with other sophisticated emotional manipulation (e.g. sympathy appeals) to erode victim's agency and achieve their goal of getting out [the charge, jail]."\textsuperscript{12} The reality for many DV victims is that recantation is often the safest and most prudent course of action. One author noted the many challenges that face a DV victim, and the reasons a victim may not cooperate with police or prosecutors:

[I]n order to leave her abuser, a victim must walk away from her primary source of income and any family savings. If a victim is employed, departing the local area to escape the violent situation safely may force a victim to give up her job and risk her children's welfare. Even if a victim can avoid moving and maintain her job, a batterer can inflict additional economic harm on the victim by harassing her at work or at home until she is fired or evicted. Half of battered women who choose to leave their abusive partner drop below the poverty line. A victim may also recant based on the well-founded fear that her batterer will retaliate. One study shows that 73\% of battered women who seek medical help received injuries after leaving their abuser. Two-thirds of those killed by intimate partners were separated from their batterer prior to their death. Because a batterer knows where the victim's friends and relatives live and shelters are routinely filled to capacity, a victim often has no safe place to hide.\textsuperscript{13}

Despite a victim's recantation or reluctance to participate, a prosecutor has many tools available to successfully prosecute domestic violence cases. In fact, a prosecutor should be able to use the reasons for the victim's behavior as part of the central theme in the trial. Prosecutors should expect victims to recant or minimize from the outset to avoid experiencing implicit judgment or disappointment that could negatively impact case management.

Prosecutors and advocates have known for years that witness tampering and intimidation is a significant problem in DV cases, and victims recant and/or refuse

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\textsuperscript{11} For an article discussing the reasons many victims recant, see Amy E. Bonomi, et al., "Meet me at the hill where we used to park": Interpersonal processes associated with victim recantation, 73 Social Science and Medicine 1054-1061 (2011).

\textsuperscript{12} Amy E. Bonomi, et al., “Meet me at the hill where we used to park”: Interpersonal processes associated with victim recantation, 73 Social Science and Medicine 1054-1061 (2011).

prosecution due, in part, to perpetrators’ manipulation and threats. As recognized by the U.S. Supreme Court, “This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial.” *Davis v. Washington*, 126 S.Ct. 2266, 165 L Ed.2d 224, (2006). DV victims recant as a survival skill to protect themselves or their families. DV victims face serious issues when having to talk to prosecutors about what happened, give an official statement, or testify. “Will the system let me down? How long will he really be in custody? I love him, we have kids together, and I just want the violence to stop, won’t testifying make it worse? If I testify I know one day he will get out and kill me, isn’t it better for me and my family if I just say it didn’t happen? If he is convicted he will lose his job and we will lose our home and income, why should I help?”

Because offenders often establish a pattern of abusive behavior prior to police intervention, a DV crime is rarely fully resolved with the first intervention. For offenders who have much to lose from prosecution, a single case may be enough to deter further violence. For others the violence will not end until there are repeated interventions. For offenders with long and violent DV histories, sanctions may have little impact.

The patterned nature of abuse and fact that DV is a crime associated with high recidivism rates means that contact with a victim or offender will likely continue over time. If a victim is reluctant or refuses to participate, how we respond matters. As an investigator explained:

> *If I treat her with respect and let her know I’m concerned the first time I meet her, when it happens again she is more likely to take my call, or even call me. If I get frustrated and angry because I need her in order to get to him and I throw up my hands, saying ‘fine, you want to live that way go ahead,’ then I’m just one more person slapping her in the face.*

**Trauma informed:** To produce a more meaningful response we must work with victims in ways that acknowledge the nature of DV as a chronic, patterned offense that can induce trauma. This means becoming “trauma informed”

1. Treat each interaction with the victim as an opportunity to build a relationship
2. Actively listen to a victim’s story, regardless of its relevance to the incident at hand.
3. Be mindful of the complex and often dangerous implications for a victim working with prosecutors and police.
4. Be aware that battering means an offender is trying to control what the victim says, thinks, feels, and does.

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14 See Bennett, Goodman, & Dutton, 1999; Ellison, 2002; Hart, 1993; Meier, 2006.
Chapter One: Understanding Domestic Violence

e) Talk with your victim; treat them with respect.

f) Avoid unintentionally reinforcing the abuser’s actions: offer a clear alternative to messages that the victim is crazy, at fault, unbelievable, and unable to make decisions, and that the abuser is unstoppable.

g) Be patient and kind. Victims do not need you to be their friend. They need a professional prosecutor.

Each encounter with a victim is an opportunity to interrupt the actions and patterns that sustain DV. Regardless of the case, prosecutors are in a position to send powerful messages to DV victims that you respect them, are concerned for their safety and want to help. Prosecutors are also in a position to send a powerful message to offenders about accountability, consequences and opportunity for change. Every encounter is an opportunity to follow Washington’s law on DV “as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide..., previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.”

Developing Cultural Competency: Prosecutors serve victims in communities from isolated rural areas to suburban and urban centers. Victims come from every walk of life, group, orientation, class, and status. The reality is most of the victims in the criminal justice system are from marginalized communities. The cultures and languages presented to prosecutors’ offices small and large are complex and require special care. To best serve victims it is critical to not only understand the risks they face, but the needs they have. Providing culturally aware and responsive services promotes engagement in and access to the criminal justice system, better holds offenders accountable, and preserves public safety.

Culture is not just about norms and values of particular racial or ethnic groups, but often how the norms and values are expressed or thought about depending upon the socio-economic position, immigration status, sexual orientation or any number of other axes. For purposes of this manual, we will provide considerations for cultural competency specific to victims of domestic and sexual violence; and considerations for working with immigrant, LGBTQ, youth/teen and military/veteran communities. As always, reach out to local cultural community resources to learn of issues in your community.

Cultural competency has to be developed at in order to have success in keeping victims safe and holding offenders accountable and begins with:
a) Being aware of one’s own biases, prejudices, and knowledge about a person. Be willing to challenge your assumptions and implicit biases you may hold about a person’s culture, class, race, status, education, sexual orientation, etc.
b) Listening to victims with patience and without judgment. Let them tell their story on their terms
c) Getting a sense of how they view their culture, e.g. “what is it like for you to talk about this problem in your community?”
d) Recognizing perceived or existing power differentials (e.g., professional, language, prosecutor-victim dynamic, etc.) by using appropriate and non-judgmental language and tone. For some, prosecutors may be seen as a threat and special care must be taken to overcome that perception.
e) Validating their strengths; for example, thank them for sharing and acknowledge what they have done to get support and be safe
f) Developing connections with culturally appropriate resources in the community and provide appropriate referrals.
g) Collaborating with different communities and encourage contradictory and diverse perspectives from a variety of people and resources. One voice should not have to represent any particular group of people.
h) Culture cannot and should not be used as an excuse for domestic and sexual violence.\textsuperscript{16}

For more information:

- National Coalition Against Domestic Violence
- Washington State Coalition Against Domestic Violence
- (King County) Coalition Ending Gender-Based Violence
- Minnesota Center Against Violence and Abuse
- Aequitas Strategies
- Northwest Network
- National Resource Center on Domestic Violence
- National Domestic Violence Prosecution Best Practice Guide

\textsuperscript{16} For more information see Dr. Sujeta Warrior on Engaging Culture in DV and SA cases at http://www.ncdsv.org/images/Warrier_EngagingCultureInDomesticAndSexualViolenceCases.pdf
The Legislature’s Intent to Protect Domestic Violence Victims

Washington’s DV laws are found throughout the Revised Code of Washington (RCW) and serve to protect the victims and treating DV as a serious crime. A historical overview of the policies and laws in Washington is found in Danny v. Laidlaw Transit Services, 165 Wn.2d 200 (2008). The Supreme Court in Danny outlined the legislature’s intent to protect domestic violence victim. In addition, briefing provided by Legal Voice17 outlines Washington’s longstanding intent to protect DV victims and hold offenders accountable.18

The State of Washington has a well-defined and judicially recognized public policy to treat DV as a serious crime, to protect victims, and to hold abusers accountable. See e.g., RCW 10.99.010 (declaring the “importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide”) and other related statutes including but not limited to RCW 26.50.030, RCW 43.70.610, RCW 50.20.050, RCW 59.18.570, and RCW 9.94A.030.

Washington’s Legislature declared the purpose and intent of its DV legislation as embodying the important public policy of protecting both individual victims and society as a whole from the ravages of DV. The Legislature has enacted comprehensive protections for DV victims through no-contact orders, criminal prosecution, shelter services, transitional housing, DV education, health services and more. DV is not simply a private wrong. It is a serious threat to the public and to the social fabric of Washington State. The Washington Legislature has repeatedly and forcefully enunciated the public policy of protecting victims and society from domestic violence.

Definitional Statutes

The following terms are applicable to all domestic violence cases, including those involving protection orders issued by a non-Washington state court. See generally RCW

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17 http://www.legalvoice.org/about/
26.52.010.

a) Domestic Violence

“Domestic violence” includes, but is not limited to the following crimes when committed by one family or household member against another:

- Assault 1st through 4th
- Reckless Endangerment
- Coercion
- Burglary 1st, 2nd
- Trespass 1st, 2nd
- Malicious Mischief 1st, 2nd, 3rd
- Kidnapping 1st, 2nd
- Drive-by Shooting
- Unlawful Imprisonment
- Rape 1st, 2nd
- Stalking
- Interference with the Reporting of DV
- Violation of a Restraining Order
- Violation of a Protection Order
- Violation of a No Contact Order
- Residential Burglary

RCW 10.99.020(3).

"Domestic violence" also means:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members;
(b) sexual assault of one family or household member by another;
(c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1).

b) Family or Household Members

"Family or household members" includes:

- Spouses;
- Former spouses;
- State registered domestic partners;
- Former state registered domestic partners;
- Child in common, regardless of marriage or have lived together;
- Adult persons related by blood or marriage;
- Adult persons who are presently residing together or who have resided together in the past;
- Persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have had a dating relationship;
- Persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship;
• Persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(1); RCW 10.99.901; RCW 26.50.010(2).

c) Dating Relationship

A dating relationship is a social relationship of a romantic nature. Factors that the court may consider in making the determination include:

• The length of time the relationship has existed;
• The nature of the relationship;
• The frequency of interaction between the parties.

RCW 26.50.010(3).

d) Victim

“Victim” means a family or household member who has been subjected to domestic violence.

RCW 10.99.020(8).

e) Primary Aggressor

The “primary aggressor” is defined as the person who is the most physically aggressive. RCW 10.31.100(2)(c). This is not necessarily the person who struck first. In making the determination of who is the primary aggressor, consideration must be given to:

• which person is in the greatest need of protection;
• the intent to protect victims of domestic violence under RCW 10.99.010;
• the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and
• the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.
Prosecutors handling domestic violence cases should work closely with victim advocates. Most jurisdictions have access to community-based advocates, and many have system-based advocates who are employed by either the prosecutor’s office or police agency. Sometimes system-based advocates are referred to as victim-witness specialists, liaisons or coordinators. Working with an advocate who has an ongoing relationship with the victim greatly facilitates communication between the prosecutor and the victim, can bring about more meaningful participation and support for victims, and results in cases with better outcomes for all involved. Victim advocates also can provide important background information about the victim, the offender, and the family circumstances.

Given that many offenders recidivate, advocates help significantly with continuity of communication from case to case. Case handling, plea negotiations, and trials should include victim advocates as a partner in the criminal justice process. It is also important to recognize DV victims and their advocates may not always share the same goals as prosecutors, as safety and accountability can conflict. In supporting victims, advocates may have their own objectives separate and distinct from those of the prosecutor. Prosecutors should value the input of proactive advocacy and acknowledge that a healthy tension between prosecutors and advocates leads to better victim support, decision-making and outcomes.

Types of advocates working on DV cases:

**Community-based DV advocates:** employed mainly by non-profit agencies. They provide voluntary and confidential services to DV and sexual assault victims, which may include crisis intervention, emergency shelter, transitional housing, and other programs. Community-based DV advocates work with adult and teen DV victims (community-based advocates use the term “DV survivor” as opposed to “victim”). The function of a community--based DV advocate’s role may vary from one community agency to another. Typically, community-based advocates do limited outreach; rather, victims seeking help contact them for services.

The following describes the roles and functions of community--based advocates.

a) Limited to working with DV victims who are help seeking and request services, including victims who are defendants in criminal cases.

b) Provide voluntary advocacy services when requested by DV victims.
c) Have a strong belief in victim self-determination, and tailor services based on what the client or their children identify as needs.

d) Provide advocacy-based counseling to DV victims including DV education, support, information, referral to resources, and safety planning.

e) Offer support groups, and 24-hour crisis line. Provide specialized services for children and teens. Assist in accessing resources and services such as housing, financial assistance, employment training, childcare, counseling, and legal assistance. Collaborate with legal, medical, police, social service and health agencies, and participate in relevant community task forces.

f) Provide support, legal information, and referrals for civil legal services.

**System-based DV advocates:** System-based DV advocates – sometimes referred to as victim-witness specialists, liaisons or coordinators – may be employed by prosecution agencies, police agencies, Department of Corrections, or cities. They provide advocacy services to DV victims who are involved in the legal system. They may provide education about court processes, accompany DV victims in court, and make referrals to community services. Their specific role varies by their employer. Information that DV victims discuss with system-based advocates is not protected; it may be subject to discovery.  

Generally speaking, system-based DV advocates roles and services are as follows:

a) Provide support and case management to DV victims during criminal proceedings, but cannot provide services to victims who are arrested.

b) Assess and address victims’ safety needs and other concerns related to prosecution;

c) Provide crisis support and ongoing safety planning;

d) Explain legal processes, options and potential outcomes to DV victims;

e) Work cooperatively with community-based DV advocates and advocacy programs;

f) Convey DV victim input to all system-based professionals;

g) Ensure victims’ rights are understood and honored (RCW 7.69.030)

h) Accompany DV victims to joint interviews, defense interviews, and court hearings;

i) Consult closely with prosecutor on victim issues and case concerns;

j) Provide advocacy for children similarly involved in the DV criminal case.

**Prosecutor/Advocate Case Staffing:** A regular meeting to discuss cases is useful for prosecutors and advocates to review, consult, and consider courses of action at the pre-trial stage. Case staffing is an important feature of a collaborative approach where advocates provide victim’s perspectives, concerns and context and prosecutors in turn consider best possible legal options. Case staffing promotes efficiency, case continuity and prosecutor-advocate collaboration, and also serves an important “checks and balances” function in the weighing of victim safety and accountability prosecution goals.

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For more information:

- Battered Women Justice Project Resource Center
- Minnesota Center on Violence and Abuse Electronic Clearinghouse
- Office of Crime Victim Advocacy (OCVA)
- Washington State Coalition Against Domestic Violence
- Coalition Ending Gender-based Violence (King County) [http://www.endgv.org](http://www.endgv.org)
- Jill Davies': Advocacy Beyond Leaving
Chapter Four: Police Investigation

➢ Scene
➢ Arrests
➢ Follow-Up Investigation

The successful prosecution of a DV offense starts with a careful and complete investigation as well as a comprehensive victim-centered approach. Special concerns in DV investigations include victim safety and preserving the ability to hold the batterer accountable for his or her actions regardless of whether the victim is willing or able to cooperate with the prosecution. DV incident responses/investigations require time and good interpersonal skills. Establishing rapport is also important as police routinely respond more than once to a particular household. Finally, a solid understanding of domestic violence dynamics is essential to avoid overlooking critical risk factors and to appreciate that victims may be reluctant to participate in investigation or prosecution.

The responding patrol officer or deputy is often in the best position to see and hear what is really going on in the privacy of violent homes. For a responding officer, the patrol report is one of a dozen he or she might write in a shift. In a DV prosecution, however, it is the most important document. The patrol report lays the foundation for how each subsequent intervener thinks about and acts on the case. Its attention to specific details either helps or hinders each practitioner’s efforts to maximize victim safety and offender accountability. 20

The twin goals of victim protection and offender accountability are furthered by RCW 10.99.030, which mandates that every officer responding to a domestic violence complaint shall:

a) Arrest the offender in accordance with RCW 10.31.100 if the officer has probable cause to believe that a crime has been committed;

b) Take a complete offense report, including the officer’s disposition of the case, which shall be forwarded to the appropriate prosecutor within 10 days of the incident if there is probable cause to believe that an offense has been committed, unless the case is under active investigation. Prosecutors must also review cases quickly. Failure to abide by these guidelines has led to civil liability for police and

20 Adapted from The Blueprint for Safety.
others.\textsuperscript{21}

c) Use the Language Line when an interpreter is needed and document in the incident report. Avoid using English-speaking children or witnesses.

d) Notify the victim of the victim’s right to request that charges be filed if the officer has not arrested or cited the offender (RCW 10.99.030(7));

e) Advise the victim of all reasonable means to prevent further abuse, including advising the victim of the availability of advocacy, shelter or other services in the community and the availability of an order for protection from domestic violence; and

f) Facilitate transportation for the victim to a hospital for treatment or to a place of safety or shelter.

The failure to fulfill the above obligations may result in civil liability if the failure results in injuries to or the death of the victim. \textit{See Roy v. City of Everett, 118 Wn.2d 352 (1992).}

1. \textbf{Scene}

a) \textbf{Establishing Probable Cause:} Once contact is made with the victim or the individual who made the initial request for assistance, the officer must conduct an investigation to determine whether a crime has been committed. The investigation should be conducted with an eye toward enabling the prosecution to go forward regardless of whether the victim is available at the time of trial. Police agencies that use a Domestic Violence Supplemental Form submit more thorough and useful incident reports that result in more prosecutions and more convictions.

b) \textbf{Physical Appearance:} The officer should describe the victim's location upon arrival and describe the victim’s appearance, including any injuries, marks, redness, disheveled clothing, lack of clothing, smeared makeup, etc. The officer should also note the victim’s height and weight. This information will allow the officer to present a picture to the jury, regardless of whether photos were taken. It should be standard practice to take photos of the victim at the scene to document appearance and demeanor.

c) \textbf{Description:} The officer should describe the scene of the incident with as much detail as possible, especially if the scene reveals evidence of what happened. Example; "I noticed that the living room coffee table was overturned, the phone

\textsuperscript{21} \textit{Washburn v. City of Federal Way, 178 Wn.2d 732 (2013).} Police serving an anti-harassment order have a duty to the victim to serve it with reasonable care—that includes taking reasonable steps to guard the victim. (Here, an officer served the order on a man known to have a history of assaults, while the man was in the V’s home, with her. The officer left. The man killed the V.)
cord was unplugged from the wall and a broken vase lay on the floor in the kitchen."

d) **Physical and Electronic Evidence:** The officer should take into evidence any weapons or objects used in the assault or any objects that corroborate the incident. For example, if the door was forced open document in photographs. If threats were texted document (by photograph, screen shot, or other means). This type of corroborating evidence is critical for juries to convict.

Electronic Evidence: Cell phones and other electronic devices are commonly used to threaten, harass or stalk. The officer should ask the victim about any messages, calls, emails, texts or posts that may have been involved before, during, or after the incident. If possible, take into evident any cell phone, computer or other electronic devices used during the incident. At the very least, take a photograph, screen shot, or have the victim forward the electronic communications and social media information.

e) **Demeanor:** The officer should describe the victim's emotional state. Adjectives should be used to describe her demeanor, with special attention to whether the victim was affected by what happened, i.e. crying and any other body language exhibited by the victim. Record demeanor even if it is not what one would expect as trauma impacts people differently. (Examples: “The victim was breathing hard and crying. She was holding her head with her hand, complaining of pain. She flinched as the defendant was led past her.” OR “The victim showed no emotion, stared straight ahead, and said nothing.”)

- This information could provide the foundation for the officer to testify to the victim’s “excited utterances”. “Excited utterances” are a “firmly rooted” exception to the hearsay rule that may be admitted as substantive evidence at trial regardless of whether the victim is available as a witness. See, e.g., ER 803 (a)(2); State v. Robinson, 44 Wn. App. 611, 722 P.2d 1379 (1986).
- The officer should write down direct quotes from the victim indicating his/her state of mind and her feeling of pain. (Example: As I entered the apartment, the victim rushed to me and exclaimed, "oh, my God, he’s going to kill me.")

f) **Relationship and Violence History:** The officer should get a history of the relationship between the victim and the suspect. The history should include:

- length, type and status of relationship;
- any other communities/states the couple has resided in;
- if one of the parties has ever tried to end the relationship;
- any past incidents of violence or abuse and the nature of it, reported or unreported;
- if past or ongoing violence, frequency and severity (see Risk/Lethality Factors);
- the existence of any court orders restraining the defendant from contacting
the victim, including when possible: (i) type of order; (ii) jurisdiction order was entered; (iii) whether the defendant was present when the order was entered; (iv) any prior violations of the order; and (v) whether the victim has a copy of the order in his or her possession22; and

- whether the suspect has ever been charged with a crime in the past and, if so, what charges were filed, where the prosecution was conducted, and was the suspect ever convicted of the charges.

- **g) Risk and Lethality Factors:** Many agencies in WA State have adopted DV Supplemental Forms or other protocols to conduct risk assessment.23 Patrol should ask about a number of research-based factors* that point to risk for re-offense or even lethality. Risk factors include:
  
a. Current or past strangulation incidents  
b. Current or past threats, harassment or stalking  
c. History of threats to kill  
d. Suicidal ideation or threats  
e. Presence or use of firearms, weapons  
f. Involvement of children or history of harming children  
g. History of forced or coerced sex  
h. History of preventing victim from reporting DV  
i. Chronic substance abuse  
j. Victim’s concern about future assault  
k. History of jealously or obsessiveness  
l. History of controlling victim’s activities  
m. Disregard for court orders  
n. Barriers to victim support (e.g. no phone)  
o. Violence against others  
p. Violence increasing in severity or frequency over time

- **h) Photos:** The officer should take photos of the scene and the victim. If no camera is available, a rough diagram can still provide corroboration of the victim’s original version of events. The description/diagram/photographs will also help the officer to remember the scene at the time of trial.

- **i) Injuries:** The officer should record the victim’s injuries, regardless of how “insignificant”. Photos should be taken by responding patrol officers and follow up detectives. If follow up is not available then the victim should be encouraged to take additional photographs as bruising appears. If a camera is not available, the officer should draw a body diagram, illustrating the victim's injuries. If the victim requires medical treatment, the officer should attempt to obtain a signed medical release at the scene. The victim’s statements to a doctor or nurse or

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22 If the victim has a copy of the order but it is the victim’s sole copy, the officer should not deprive the victim of it.

social worker about the abuse as well as the identity of the perpetrator, are admissible at trial.\textsuperscript{24} Officers should not be present when victims are treated by medical personnel either at the scene or at a medical facility as per \textit{State v. Hurtado} as the officer’s presence can render any victim statement to medical personnel “testimonial” and thus inadmissible at trial.

- **A note about Strangulation:** Strangulation is a high-lethality type of assault that often does not result in immediately visible injuries. As such, incidents involving strangulation need to be identified and thoroughly assessed. Signs and symptoms of strangulation should be identified and documented, as well as prior incidents of strangulation. Aid should be called if strangulation is alleged, regardless of whether or not injuries are present. For more information on documenting strangulation incidents, consult the [Training Institute on Strangulation Prevention](#), webinar.

j) **911 Caller, Neighbors and Children:** The officer should always ascertain who called 911. If anyone other than the victim called, a statement should be obtained from that person, or at least their name and number for the follow-up detective. Find out what they heard and saw. If possible, talk to neighbors or children who likely would have heard something; get their name and phone number for the detective. Find out what the children or neighbors have heard in the past.

k) **Children:** The following are guidelines for responding to DV where children are present at the scene:\textsuperscript{25}

- Identify any children that are present at the DV scene;
- Determine where the children were and what happened to the children during the DV incident;
- Evaluate safety risks posed to the children and if there is any evidence of child abuse/neglect;
- Identify if children were a victim or witness of the DV incident;
- Determine if emergency medical evaluation is needed for identified child injuries;
- Identify if there is a need to place children in protective custody;
- Determine if Children’s Administration Intake should be notified, if a Children’s Administration referral is required, or if no CA action is needed;\textsuperscript{26}
- Document what happened to the children and any physical evidence on DV supplemental form;
- Provide information on rights under state law and available DV resources to DV victims and witnesses;
- Determine if there is a need for a child interview specialist by follow up detectives or per department policy and procedure.


\textsuperscript{25} Id. King County Child Maltreatment Guideline (2015).

\textsuperscript{26} Adapted from the \textit{Domestic Violence and Child Maltreatment Coordinated Response Guideline}. 

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The fact that a child was present during the incident may provide grounds for a longer sentence if the suspect is convicted and may help encourage the court to order treatment for the offender.

**k) Names of Witnesses:** The officer should always find out if anyone else was present when the incident occurred or if the victim has spoken to anyone about the incident. The witnesses’ names, addresses, and phone numbers should be obtained so that a statement can be obtained.

- **Civilian Witnesses:** The victim’s excited utterances to civilians are admissible under the same conditions as excited utterances to an officer, but even better, statements to civilians can be admissible even if the victim does not attend the trial. The statement, therefore, should contain the witnesses’ observation of the victim’s demeanor and exact quotes. The witnesses’ relationship to the victim and the suspect should also be noted.

- **Obtain Alternative Contact Information for the Victim:** The officer should always attempt to get an alternative phone number – a number of someone who can always reach them – for the victim such as a parent’s or best friend’s phone number. The officer should also ask for the victim’s social media handle (Facebook, Instagram, snapchat, twitter, etc...). This information will assist the prosecutor to locate the victim when a case is ready to go to trial if the victim is hiding from the offender.

- **Signed Statement/Smith Affidavit:** In many cases there are no independent witnesses to a DV incident and the only witness to the violence is the victim.

For many reasons, a victim of DV may not wish to proceed with prosecution. In the weeks or months between an incident and a trial, the offender may have tampered with or intimidated the victim. The passage of time may have allowed the offender to exercise a number or tactics of power and control to dissuade the victim from going forward. The victim may be in hiding, be afraid to confront the offender in court, or simply still care for the offender and be unwilling to cooperate, minimize, or recant.

Despite these challenges, it may be possible to present a victim’s initial account of a DV incident at trial, if the responding officer obtained a recorded statement from the victim under penalty of perjury. The statement can be admitted as substantive evidence if she claims not to remember or recants the incident. .See **ER 803(a)(5)**.

Ideally, the written statement should take the form of a “Smith affidavit”. Named after recognized **State v. Smith, 97 Wn.2d 856**, 651 P.2d 207 (1982), is
a sworn victim statement taken for the purpose of determining the existence of probable cause. Such a statement will be admissible for substantive evidence if the victim testifies inconsistently at trial. It may not be used in lieu of live testimony from a victim, but it may be used to fill substantive evidentiary gaps at trial. Traditionally, a Smith affidavit was a written statement signed under penalty of perjury by the victim, but today many victim’s statements are recorded. If so, the officer should include the Smith affidavit language in the recording and have the victim sign a document reflecting the penalty of perjury (see State v. McComas, 186 Wn.App 307(2015)).

See the Appendix for a sample Smith Affidavit form.

1) **Suspect Investigation:**

- **Appearance:** The officer should study the suspect for injuries. Photograph the injuries if possible and determine whether the suspect needs medical attention. The description of the defendant’s appearance should also include the defendant’s height and weight and whether the defendant’s clothing is disheveled. The description of the suspect and type or lack of injuries is important to rebut a potential self-defense argument. Finally, the officer should document mental health history and any indications of suicidal ideation or substance abuse and level of impairment.

- **Gone on Arrival:** In cases where the suspect is gone on arrival and probable cause exists, the officer should take measures to locate the suspect and remain on the scene until the likelihood of imminent violence has been eliminated. If the suspect has fled the area, the officer should ask the victim for a photograph of the suspect and for a description of his size and of any injuries. The photo forecloses a possible identification issue at trial.

- **Statements:** The officer should record any statements by the suspect. The suspect must be given Miranda warnings upon arrest. If the defendant is willing to answer questions after receiving his constitutional rights, the following information should be obtained:
  
  - Ask the suspect what happened and why he was/is angry.
  - Ask the suspect to describe his relationship with the victim.
  - Ask the suspect how long the relationship has lasted.
  - Ask the suspect if police officers have ever come to his or her house in the past in response to a “family matter”.
  - Ask the suspect if there are any court orders that prohibit him or her from contacting the victim. If the suspect says no, follow-up questions about any orders the victim has told the officer about. If the suspect says yes, ask the suspect if he knows about the order.

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28 Adapted from *The Blueprint for Safety.*
- Try to obtain a written or taped statement as to his or her side of the story.

*See the Appendix for the Domestic Violence Patrol Report Checklist.*

2. **Arrests**

a) **Mandatory Arrests:** The Legislature has mandated that an arrest **shall** be made upon probable cause to believe certain offenses have been committed. Furthermore, 10.99 requires that officers forward reports where there is probable cause to believe that a domestic violence crime has occurred within 14 days to the prosecutor.

- **Assaults:**

A mandatory arrest is required pursuant to [RCW 10.31.100(2)(c)](https://leg.wa.gov/laws/cw/default.aspx) when the following factors are present:

- suspect is 16 years or older;
- suspect assaulted a “family or household member” within the preceding 4 hours; and
- the officer believes that: (a) a felony assault occurred; (b) an assault has occurred which has resulted in bodily injury to the victim, regardless of whether it is observable; or (c) physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury is defined as “physical pain, illness or an impairment of physical condition”.

- **Primary Aggressor:**

An officer is not required to arrest family or household members when there is probable cause to believe they have both assaulted the other. Fortunately, mutual or dual arrests are an increasingly rare occurrence in Washington and strongly disfavored by policy and practice. In making the determination of who is the primary aggressor, consideration must be given to:

- which person is in the greatest need of protection;
- the intent to protect victims of domestic violence under [RCW 10.99.010](https://leg.wa.gov/laws/cw/default.aspx);
- the comparative extent of injuries inflicted or serious threats creating fear of physical injury (e.g. who used the most force in this incident? Who appears to be the most afraid of the other or especially afraid of future injury?); and
- the history of domestic violence of each person involved, including whether the conduct was part of an **ongoing pattern of abuse, e.g.:**
- who appears to use the highest level of violence in the relationship?
- what is each party’s intent in using violence? (e.g. to self-protect or control the other’s aggression, or place the other in fear?)
- How did the violence affect the other party (e.g. did it scare or hurt them? Or are they annoyed more than afraid?)
• who has a history of past DV incidents, protection or harassment orders from the other party or from other victims?


• **Violation of Court Orders:**

A mandatory arrest is required pursuant to RCW 10.31.100(2)(a) and (b) for violations of certain provisions of orders issued under RCW 7.92, 7.90, 9A.46, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34.

Mandatory arrest is also triggered by a violation of any provision in a foreign protection order. Full faith and credit provides that foreign protection orders are to be enforced as they would in their originating jurisdiction, regardless of where the violation occurred.

**b) Warrantless Entry Into Victim's Home**

A person subject to a domestic violence no-contact order has no standing to challenge his warrantless arrest in the victim’s home, even where the victim has specifically declined to authorize the entry. Raised voices heard from outside the home did not justify warrantless entry based on the emergency aid exception to requirement for a warrant.

**c) Discretionary Arrests**

Even when arrest is not mandated by statute, a police officer who has probable cause to believe that a person has committed or is committing a felony has the authority to arrest the person without a warrant. RCW 10.31.100.

A police officer may also arrest a person without a warrant for committing a misdemeanor or gross misdemeanor when:

- the offense is committed in the presence of the officer;
- the offense involves physical harm or threats of harm to any person or property;
- the offense involves the unlawful taking of property;
- the offense involves criminal trespass under RCW 9A.52.070 or 9A.52.080; and

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30 Adapted from Chapter 4 of the DV Manual for Judges, Washington State Administrative Office of the Courts.
• the offense is a knowing violation of a chapter 10.14 RCW anti-harassment order.

RCW 10.31.100(1) and (8).

3. **Follow-Up Investigation**

Detective follow-up in DV cases is crucial and should include the following wherever possible.

- Obtain the 911 tape.
- Re-interview of the victim if necessary.
- Take photos of injuries if none are taken at the scene; follow up photos taken several days after the abuse may show the injuries even better.
- Obtain alternative phone numbers of victim’s close friends or relatives to help locate victim down the line.
- Interview other witnesses including witness to the actual abusive event or witnesses who can provide corroboration to the abuse or the victim's injuries, etc.
- Obtain medical release form from the victim if on scene officers did not. If medics responded to scene, order trip report, which likely includes admissible statements by the victim.
- Locate prior DV case reports involving the suspect and forward them to the prosecutor.
- Obtain a *Smith* affidavit if the officer at the scene did not. However, note that this may only be done before charging.
- Order a certified copy of the court order, a certified copy of all of the documents demonstrating service, and a certified copy of the court order.
- Interview children who were present if necessary
- In car videos of suspect or victim are always helpful
- Because prosecution of DV cases utilize jail phone calls, it is also important for officers to obtain primary phone numbers of the victim and defendant and obtain any alternate phone numbers for the parties.
For most prosecutors, police reports will be submitted for review prior to charging. There are some cities where police officers file charges directly with the court. A thoughtful charging decision is critical in DV cases—not just because of the requirements in the RCWs, RPCs, office filing and disposition standards, and case law—but because the decision will impact victim safety. A prosecutor should strive to review cases for the filing of DV charges efficiently with as few unnecessary delays as possible. Delay diminishes the quality of DV cases as it sends a message to victims and courts that the case is not a priority. Delay provides additional opportunities for the defendant to tamper, intimidate, or harm the victim. Delay also means the risk and lethality factors present in so many DV cases are not mitigated by prosecutorial action. Avoid accumulating a backlog of cases, consistently apply prosecutor standards, work closely with advocates when available, and make sure that victim safety is considered in every case.

Prosecution should be centered on victim safety, but not be victim-dependent. The Crawford case and its progeny, as well as focus on forfeiture by wrongdoing, make it critical that prosecutors approach DV cases and direct evidence-gathering in ways that minimize dependence on the victim, maximize other sources of evidence, and stay mindful of intimidation and coercion directed at victims to prevent their participation in the prosecution process. 31

31 Adapted from The Blueprint for Safety.
Prosecutors should not assume, for the purpose of charging, that the victim will be unavailable. Nor should the victim’s testimony, when obtainable, be discounted. The uncorroborated testimony of a victim may be sufficient to proceed with the case.

### 1. Filing Procedures and Standards

- **a) Getting the case from law enforcement:** [RCW 10.99.030](http://example.com) requires law enforcement forward the offense report to the appropriate prosecutor within ten days of making such report if there is probable cause to believe that an offense has been committed unless the case is under active investigation.

- **b) Filing Standards:** Critical in DV cases because of the unpredictable safety issues that flow from a decision to file or not to file charges, the dynamic nature of the evidence, and the consequences to victim. The conduct of the offender in the police report you are reviewing is the most important source of information about that offender in determining your charging decision.

- **c) History:** Prosecutors must review DV arrest, charging, and conviction history, protection order history, and other violent history, before making a charging decision. Review protection order petitions when possible and consider risk instruments. History may aid in the charging decision. See [RCW 10.99.045](http://example.com).

- **d) Early Contact:** Making early contact with victims of DV is essential to good charging decisions and successful prosecution. Prosecutors’ offices, in consultation with law enforcement, should establish guidelines for early victim contact to inform the victim of procedures and decisions, procedures for early contact should include those advocates. Prosecutors should expect defendants to tamper with victims and witnesses as DV cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that he/she does not testify at trial."

- **e) Statutory Obligations:** Filing procedures should comply with the statutory requirements for notifying victims of charging decisions. [RCW 10.99.060](http://example.com), requires victims be notified of the filing decision within five days, and, prior to making that decision shall advise the victim, upon the victim’s request, of the status of the case.
f) **Victim wishes and rights:** The wishes of the victim should be taken into consideration, but should not control the decision. It may not be safe for victims to support prosecution in situations where they do truly wish for charges to be filed. Offenders may tamper with victims and instruct them to "drop the charges" or "take back or change statements." The requests may be evidence that the offender is attempting to reassert control after the victim has reported to police.

2. **Victim Wishes and Rights**

Felony victims in Washington have specifically enumerated constitutional rights. Failure to comply with these requirements is a violation of the victim’s constitutional rights, the statute governing all victims’ rights, and may be an RPC violation. 32

   a) **The constitutional rights of felony victims** *(Art. 1, sec. 35)* include the right:
      - to be informed of and attend court proceedings
      - to speak at sentencing

   b) **The statutory rights of victims** *(RCW 7.69.030)* include the right:
      - to receive a written statement of rights (victims of violent or sex crimes)
      - to be informed of the final disposition of the case
      - to be informed when a proceeding to which they have been subpoenaed will not occur
      - to receive protection from harm and be informed of the level of protection available
      - to be provided with a secure waiting area
      - to have personal property expeditiously returned
      - to have employer intercession services
      - to have a victim advocate (victims of violent or sex crimes)
      - to be present at trial
      - to be informed of the sentencing date (felony victims)
      - to submit a victim impact statement

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32 See Attorney Grievance Commission of Maryland v. Bruce Michael Smith, COURT OF APPEALS OF MARYLAND 2015 Md. LEXIS 29, indefinite suspension imposed on a former Assistant State’s Attorney who failed to communicate at all with the victim or victim’s representative in a child sexual abuse case to which he was assigned, with the result that (1) his office failed to comply with its constitutional and statutory obligations toward the victim, (2) he provided incorrect information to the Circuit Court in connection with a request to postpone the trial, (3) the sentencing court did not have the benefit of a victim impact statement at the time of sentencing, and (4) the child victim and victim’s foster mother were not aware of the prosecution or of the probation condition requiring the defendant to have no contact of any kind with the victim. The ASA’s conduct was found to violate MLRPC 1.3 and 8.4(a) & (d). Washington’s ethics rules are substantially the same as Maryland’s ethics rules.
o to restitution

These rights apply to the victim or the victim’s representative if the victim is deceased, incompetent or a minor.

c) Victim Safety

When an in-custody case is submitted, a filing decision should be made within 72 hours before the suspect is released. Offenders booked for investigation of domestic violence should rarely be released before the court makes a finding of PC and has the opportunity to issue a no contact order.

The filing decision, especially a decision NOT to file and to release the offender, MUST be communicated to the victim before the offender is released so the victim can plan accordingly.

If an out of custody referral is delayed, the victim may be back in contact or even living with the offender. If a case is filed and the offender is sent notice in the mail to appear in court without someone warning the victim, she could be in danger. Every effort must be made to ensure the victim knows before the offender. It is often better to file and execute an arrest warrant when possible.

d) Victim history

A victim's criminal, arrest, and order history should be reviewed when making a charging decision, especially when there is a possible self-defense claim to the facts of the referral. A review of this history will help avoid filing on so-called victim/defendants and will give the prosecutor valuable information about the dynamics of the relationship. Wherever possible, prior police reports involving the victim and suspect should also be reviewed.
3. **Evaluation of the Evidence**

a) **Evidence at the time of filing:** It is best practice to have the 911 call, photos, witness and officer statements, and medical records before making a filing decision. This evidence informs the filer of whether the case can be proven if the victim becomes unavailable to testify. However, delaying a charging decision in order to obtain all evidence may not be desirable or safe to the victim.

- Determination of whether to file should be based on evaluation of the available evidence with an assumption that the victim will testify at trial. A victim's level of cooperation is fluid and an unreliable guide to filing decisions.
- Prosecutors’ offices should develop policies that discuss how to make a charging decision when all the evidence is not available to the filing prosecutor. These policies should take into account the history of the offender, the safety of the victim, and gravity of the instant offense. Filing prosecutors must be trained in the rules of evidence as applied to DV cases in order to make good charging decisions.
- Police should be informed of what information is required to be submitted for a filing decision to be made, especially in in-custody cases, so that the filing decision is not delayed by requests for additional evidence required for the decision.
- Police should make every attempt to interview suspects prior to filing where allowed by law.

b) **Evidence to be developed**

When a case is charged, in most cases the filing prosecutor should request to the detective or officer that additional evidence be submitted. Special attention should be given to preserving evidence such as 911 calls, photos, cell phone, social media, and in-car videos.

If the victim has given a written or recorded statement already, careful consideration should be given to whether and why a subsequent statement should be taken. It is not usually helpful to have multiple statements about the same event. However, a subsequent statement might be taken to memorialize history of DV or other unreported events. If a victim wishes to recant, then it is preferable for law enforcement to take a statement documenting the new story. Remember exculpatory information must be disclosed to any court making a determination of probable cause.
Prosecutors should consider asking for statements from victims' friends or family to whom the victim may have made statements about the incident or about prior abuse. Prior police reports should be requested if not submitted at filing.

If a child witnesses the event and is old enough to give a statement, consider asking law enforcement to interview the child using child interviewing specialists or police trained to interview children.

4. Charging Decision

When making a filing decision, it is important to have as much information as possible without unduly delaying the charging decision. In addition to the police report, prosecutors should make an effort to review the following:

- 911 tapes, photos, medical records, and other incident reports when available
- **RCW 10.99.045** mandates that the prosecutor shall provide for the court’s review (i) The defendant’s criminal history, if any, that occurred in Washington or any other state; (ii) If available, the defendant’s criminal history that occurred in any tribal jurisdiction; and (iii) The defendant’s individual order history.
- Past or current petitions for protection order. The petitions can often serve as Smith affidavits, and provide important information about the history of domestic violence with the victim and potentially other victims.
- Any contact made by an advocate. Note that some jurisdictions have an advocate make victim contact before making a filing decision. During this time, police may obtain a Smith Affidavit.  
- If the case involves allegations of sexual assault then a joint interview (JI) should be considered. The JI should occur prior to filing where possible.

a) Charging the offense that can be proven under your case's and your victim's particular circumstances

Consider what charges are easiest to prove under the circumstances of your case. For example, if a defendant commits an FVNCO and an Assault 2, but you expect your victim will not be able to testify and you can prove only the FVNCO that may be the best charge to file. Other examples include Felony harassment/telephone harassment based on prior v. threat to kill and FVNCO v. Stalking.

b) Charging the offense that carries the consequences desired

33 Under Evidence Rule 801(d) (1), a prior inconsistent statement “given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition” is admissible. The Washington Supreme Court has determined that sworn statements given to police officers may be admissible under this rule on a case-by-case analysis. *State v. Smith*, 97 Wn.2d 856, 861 (1982).

34 Some counties have special protocols to conduct joint interviews. To view the King County Special Assault Protocol, visit [http://depts.washington.edu/hcsats/pro_guidelines.html#](http://depts.washington.edu/hcsats/pro_guidelines.html#).
• **Length of confinement**: If the defendant has no prior felonies, the court can impose 12 months for an assault 4 and only 9 months for an assault 2. **Know the scoring rules** for domestic violence felonies: many DV felonies will double and DV misdemeanors will score.

• **Length of NCO**: A felony crime may result in a longer NCO term than a misdemeanor conviction

• **Charging an aggravating factor** may allow a NCO to be issued to protect the children witnessing the violence

• **Community Supervision**: Changes in DOC supervision of DV cases are frequent. It is possible that charging a case in municipal or district court may provide supervision where not available in superior court.

• **Probation length**: Courts of limited jurisdiction can impose up to five years of probation, which is more than any felony supervision. This may affect the decision of where to file a case.

c) **In-custody and out of custody filing**

Courts have two goals in setting the conditions under which a defendant will be released prior to trial: (1) ensure that the defendant will make future court appearances and (2) protect the community, the victim, and any other person. Because of the unique circumstances of domestic violence-related cases, in which victims may be especially vulnerable to coercion and intimidation, the goal of protecting victims requires specific attention to victim safety and the defendant’s risk of causing further harm to the victim.

The following elements reinforce victim and community safety and address the high rate of re-abuse in domestic violence cases.

- Contact a victim as soon as possible, in ways that respect her or his fear and circumstances.
- Determine whether the victim is afraid and if so, in what ways. Follow up on responses to the risk questions documented in the patrol report and in the investigators report.
- Tell the victim that in DV cases the prosecutor generally requests a no-contact order to shield the victim from retaliation or intimidation from the suspect.
- Ask if a no-contact order might have some negative consequences and probe to fully understand those consequences.
- Ask about changes in injuries or new symptoms from the incident.
- Provide information about likely pre-trial conditions and answer the victim’s questions.

35 Adapted from *The Blueprint for Safety.*
• Use all available sources of background information (e.g., patrol report, criminal history records, History of Domestic Violence Summary, and databases, order for protection records) to ascertain the danger that a defendant poses to a victim.
• Review responses to risk assessment questions and results of risk assessment tools when considering appropriate conditions of release.36
• Put conditions of release in writing and provide a copy to the victim as soon as possible.
• Enter pre-trial release conditions into law enforcement information systems and notify local agencies.
• If the victim requests contact, consider each request on an individual basis, evaluating the risk to the victim if a no contact order is not issued and the difficulty faced by the victim if it is ordered. In most cases, request a no-contact order.
• Take prompt action on violations of release conditions. Under 3.2(i) a warrant may be obtained for violations of conditions of release.

d) In-custody defendants

In custody defendants generally have bail set before the case is referred by police for charging. Check your local rules for bail requirements. It is generally advisable to attempt to keep in custody defendants in custody as they generally meet the criteria in CrR 3.3 of being a risk to commit a violent offense and, especially in cases of violation of court orders, likely to interfere with the administration of justice. A defendant arrested for DV shall be required to appear in person before a magistrate within one judicial day after the arrest. As a result, bail can be refused between booking and first appearance.

First appearance is a critical decision point for DV cases. Bail set at first appearance can impact victim safety and case viability. Always be mindful that the judge setting bail or releasing a defendant at the first appearance may not have had complete information for making a determination of bail or release. If there is new information, consider whether to ask for an increased bail or an arrest warrant for victim safety. Be familiar with your local procedures on executing arrest warrants in court or having defendants remanded. Develop protocols for arrest with your local law enforcement partners.

e) Filing with an arrest warrant

This is often the safest way to file charges against out of custody defendants who may be in contact with victim. Develop protocols with your local law enforcement partners for executing arrest warrants in ways that maximize victim and police safety.

5. Self Defense and Victim-Defendants

Chapter Five: Case Review and Charging

Prosecutors should have standards and model analysis for claims of self-defense to prevent the filing of cases against victim defendants. This protocol should include consideration of statements made by the suspect at the scene, who called 911, the nature and location of the injuries, prior police reports involving the suspect and victim, prior reports involving the victim with others, the order history and criminal history of the victim, and information from witnesses familiar with the individuals. 37

The issue of self-defense and victim defendants is a critical area for any prosecutor handling DV. Enormous damage can be done by mistakenly charging a victim who has used self-defense, not to mention the significant risk to the victim and their family. Establishing a protocol, even just discussion of the case with another prosecutor, is important. See primary aggressor section and article on victim defendants.

6. Plead and Prove Checklist

Make sure your charging documents have all the appropriate language. The penalties and supervision requirements for domestic violence felons have changed significantly since 2011.

In order to take advantage of these changes, the Legislature requires assistant city attorneys and county prosecutors to "plead and prove" the domestic violence relationship. Plead and prove means the domestic violence relationship in RCW 10.99.020 must be set forth in the charging document, and proven to a jury or judge beyond a reasonable doubt. A checklist was created to help prosecutors make sure their jurisdiction is taking the necessary steps to include proper language in charging and disposition documents. See the following webinar for more information: https://cc.readytalk.com/cc/playback/Playback.do?id=dtpene

7. Special Topics in Case Review and Charging

a) Stalking

Stalking is a particularly concerning behavior that is all too often undetected, or overlooked. Stalking prevalence and lethality rates are alarmingly high: Research indicates that approximately 1 in 10 women nationwide have been stalked by an intimate partner. Eighty-one percent of these women have also been assaulted by an intimate partner. Intimate partner stalkers are also more likely to reoffend, approach the victim physically, escalate behavior rapidly, and use weapons. Seventy-six percent of women killed by an intimate partner had at least one incident of stalking prior to being killed.38

37 See Meg Crager, Merril Cousin, and Tara Hardy, Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region (April 2003), available at http://www.mincava.umn.edu/documents/victimdefendant/victimdefendant.html.
38 Adapted from the Stalking Resource Center.
Stalking involves a pattern of behaviors, not simply one incident. Stalking may take place over a long period of time and may appear at first to be trivial or harmless behavior. Often the stalking behavior is frightening to the victim but not to others. Therefore, **context is critical** in identifying and prosecuting stalking cases. It is critical that prosecutors conduct a thorough contextual investigation before declining to file a stalking case. Additionally, documentation is critical to a stalking case. Today, it is rare NOT to have some form of electronic/digital.tech evidence associated with a stalking investigation. All evidence of stalking, such as text messages or emails, must be preserved. 39

While stalking occurs regularly in the context of domestic violence, it is often perpetrated by acquaintances or strangers. While the legal DV relationship definition may not apply in these situations, the dynamics can be similar. Recent changes in WA State law have provided prosecutors with more tools to respond to stalking. RCW 7.92 – the Jennifer Paulson Stalking Protection Order Act (named after a Tacoma elementary school teacher who was killed by an acquaintance stalker) outlines these recent changes:

- Stalking Protection Orders and No Contact Orders are now available
- Stalkers can be ordered to surrender firearms
- Stalkers have to pay victims’ court fees
- Stalking is now an aggravator
- Victim advocates are allowed to assist with protection orders

RCW 9A.46.110(5)(b) outlines the conditions in which stalking is considered a Class B felony. Stalking and the crime of harassment can be similar but should not be confused. Stalking is a **pattern** of repeated unwanted behavior directed at a specific person that would cause a reasonable person to feel fear whereas harassment is typically considered an isolated incident. See RCW 9A.46 for more on the crime of harassment.

There are several helpful resources available for victims of stalking:

- [www.stalkingprotectionorder.org](http://www.stalkingprotectionorder.org) – for information on how to file for a stalking protection order in WA State; safety considerations and resources. Stalking Protection Order forms can also be found at [www.courts.wa.gov](http://www.courts.wa.gov)
- **Stalking and Harassment Assessment Risk Profile** (to help victims of stalking understand their risk factors and safety plan) –
- **Stalking Resource Center** – for comprehensive educational and legal materials related to stalking
- **National Network to End Domestic Violence** – for tech safety information

39 Adapted from the PowerPoint presentation: *Advanced Stalking Investigations* by the Stalking Resource Center.
b) Strangulation

Strangulation is one of the most lethal forms of violence. Strangulation is defined as an external blockage of the airway or blood vessels that results in asphyxia, a loss of blood flow to the brain. Victims killed by strangulation rarely die from a loss of air, but instead die from a loss of blood flow to the brain, which causes brain damage and a loss of brain function, which in turn, causes death. Because blood and oxygen to the brain flow directly through the neck, the neck is the most vulnerable part of the body.  

Studies show that it takes less manual pressure to open a can of soda or shake a hand than it takes to obstruct the blood flow to the brain. Death by strangulation can occur in a matter of minutes and without any visible external marks. Research indicates that approximately 50% of victims of strangulation have no visible external signs of injury. Instead, hoarseness, sore throat, difficulty breathing, difficulty swallowing, and neck pain are the most common symptoms of strangulation. Some victims of strangulation may suffer petechiae as a result of the rupturing of capillaries, which appear as red spots, often on the face and in and around the eyes.

Police incident report DV supplemental forms should include a section on strangulation with a checklist of signs and symptoms to investigate, as this is the most crucial opportunity to gather relevant and accurate information from the victim. Research indicates that victims of strangulation are seven times more likely to be killed by their intimate partner, and strangulation is often a perpetrator’s last act before murdering an intimate partner. However, a San Diego study of 300 strangulation cases showed that only 3% of the strangulation victims sought medical attention. Since the experience and immediate symptoms can be short-lived, victims of strangulation may not realize the potentially severe medical implications. Injuries related to strangulation can have delayed onset or can be internal. Because of the limited physical evidence and lack of medical treatment, juries may minimize the seriousness of strangulation. Therefore, it is recommended that an expert on strangulation such as a specially trained police officer, nurse, or doctor testify at trial to educate the jury on the lethality of strangulation, as well as the frequent lack of visible external injuries.

For more information on strangulation:

- See the Appendix for questions and a documentation chart that are helpful when investigating a strangulation case.
- http://www.strangulationtraininginstitute.com/

40 Adapted from the Minnesota Judicial Training Update by Hon. Alan F. Pendleton, Anoka County District Court.
• “A Guide to Understanding and Documenting Strangulation” – Dr. Richard Harruff, King County Chief Medical Examiner

c) Intimate Partner Sexual Violence

Prosecutors should always be aware of potential Domestic Violence Sexual Assault, or Intimate Partner Sexual Violence (IPSV). IPSV occurs in many cases yet is often not reported. In fact, studies from the Center for Disease Control indicate that nearly 1 in 10 women nationwide have been raped by an intimate partner. Force sex in a relationship is considered a risk factor for lethality – 75% of women who survived an attempted murder by an intimate partner had been raped by an intimate partner previously (Campbell DA stat).

The Washington Coalition of Sexual Assault Programs has been a leader in this area nationally and produced extensive materials on their website, see http://www.wcsap.org/intimate-partner-sexual-violence. Below is a basic checklist on how to handle potential IPSV cases:

• **Document everything.** Corroboration is key to attacks on victim credibility.
  o The circumstances and context under which the report occurred;
  o What precipitated the report;
  o What each party said;
  o Demeanor of the witness;
  o Who was present during the report.

• **Early Preservation of Evidence.**
  o Search warrants
  o Documentation and processing of crime scenes and other evidence
  o Trace evidence
  o Biological evidence (including evidence from the suspect’s body)
  o Interview of corroborative and alibi witnesses
  o Document relevant injuries of all parties
  o Obtain medical records

• **Suspect and Witness Interviews**
  A complete and detailed interview shall be conducted of any person to whom the initial report of sexual abuse was made to determine facts relevant to the investigation.

• **Victim concerns and Investigation:** Many victims of IPSV may not cooperate or may be reluctant to talk about it for many reasons:
  o They may perceive the “system” as unable to protect them.
  o They may fear getting blamed or been seen as having “consented.” Past consent should not dictate views on consent in present incident.
They may have rigid views on gender, religion or culture that deter seeking help.
They may have fears about retaliation, money, living arrangement, and children.
They may not view it as “rape.”

- **Victim interview:**
  - Always involve an advocate – this is a victim’s right
  - Consider using a trauma-informed interview approach such as the Forensic Experiential Trauma Interview technique.
  - Obtain version of events from the victim – as detailed as possible within a trauma-informed framework (e.g. open-ended questions, less reliance on chronology and more reliance on sensory recall)
  - Assess strength of potential defense responses to questions re: victim credibility and potential case problems;
  - Conduct the interview in an environment where victim feels safe
  - Keep victim informed about decision making processes regarding case filing, the criminal justice system, and timelines for decision making – this is a victim’s right.

- **Joint Interview (JI):** A joint interview involves the victim, victim advocate, prosecutor and assigned detective and is designed to inform the charging decision and is always conducted prior to charging. Goals of the JI:
  - Provide a victim-centered environment and response.
  - Meet with the victim in-person to both evaluate the case and to share information.
  - Work in a coordinated and collaborative fashion with law enforcement, and victim advocates.
  - Take into account the victims input throughout the process
  - Conducted in a thorough and open-minded way, and in a manner that enhances free recall. The interviewer should maximize the use of techniques that will elicit reliable information.
  - Encourage specialization for prosecutors and facilitate vertical prosecution.

- **JI Practicalities:**
  - A joint interview should be conducted when feasible in all DV sexual assault cases. These interviews should be conducted at the prosecutor's office. An advocate must be present.
  - Detective is responsible for documentation of the interview and will include the detailed summary in the case file, to be reviewed by the prosecutor.
  - **Documentation of Interviews:** Documentation of all interviews shall be accurate and complete. Interviews will be documented and recorded in audio, videotape, or digital electronic formats or near verbatim.
For more information on intimate partner sexual violence and sexual coercion:

- [https://www.legalmomentum.org/materials/publications-resources](https://www.legalmomentum.org/materials/publications-resources)
- [http://ovc.ncjrs.gov/sartkit/focus/resources-checklist.html](http://ovc.ncjrs.gov/sartkit/focus/resources-checklist.html)
- FETI Webinar Part I
- FETI Webinar Part II

**d) Human/Sex Trafficking**

Prosecutors should also be aware of the nexus between human/sex trafficking and DV. Research shows that the average age of entry into commercials sexual exploitation is 14 and approximately 90% have a prior history of abuse, neglect or sexual trauma. Human/sex trafficking, promoting prostitution and domestic violence often overlap. In fact, most exploiters will start out as “boyfriends.” Like most DV relationships these relationships will begin with romance and charm but will transition to exploitation, violence and entrapment. One of the greatest barriers is widespread judgment and stigmatization victims experience due to involvement in the sex industry, where assumptions that prostitution is a “victimless crime” or a “choice” run rampant. A best practice is to vertically prosecute cases involving both DV and trafficking components. When you suspect that a victim may be sexually exploited, start with a framing statement first like “Some victims I work with have gotten pressured into doing sexual things. I will not judge you or anything you tell me. I’m here to listen if you ever want to talk or want support getting out.” Then state, “Sometimes people trade sex for money or because they don’t have a choice.” Ask, “Has that ever happened to you?” If they indicate a problem, ask, “What kind of support do you need?”

When interviewing DV victims, prosecutors can also look for signs for sexual exploitation and connect the victim to appropriate referrals.

For more information see:

- [CSEC Fact Sheet](#)
- [CCYJ WA State Model Protocol for CSEC](#)
- [Organization for Prostitution Victims](#)
- [King County CSEC Task Force](#)

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41 Adapted from YouthCare.
42 Adapted from the PowerPoint presentation: The Nexus Between Domestic Violence & Human Trafficking by Sarah Buel, Clinical Professor of Law.
e) Mandatory Reporting

Domestic violence (DV) and child maltreatment are public health issues that permeate every community in Washington State. If at any point you have reasonable cause to believe a child has suffered abuse or neglect, as a prosecutor, you **must** report this child abuse to law enforcement or CPS pursuant to **RCW 26.44.030 (1)(a)** within 48 hours. According to **RCW 26.44.080**, “every person who is required to make, or to cause to be made, a report pursuant to RCW **26.44.030** and **26.44.040**, and who knowingly fails to make, or fails to cause to be made, such report, shall be guilty of a gross misdemeanor.”

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43 King County has an active Domestic Violence and Child Maltreatment Oversight Committee. This multidisciplinary committee develops guidelines and informs best practices for identifying and responding to children exposed to domestic violence or at risk for abuse in the context of domestic violence, and working with the non-offending caregiver.
Chapter Six: Bail and No Contact Orders

- **Bail**
  - Relevant Factors to Consider (Risk Assessment)
  - Conditions of Release
  - Denial of Bail
  - Release Delayed
  - Amending or Revoking Bail Orders

- **No Contact Orders**
  - Time of Entry
  - Form of No Contact Orders
  - Duration of Orders
  - Recall of No Contact Orders
  - Termination of No Contact Orders
  - Children and No Contact Orders
  - Surrender of Firearms and Other Deadly Weapons

Special considerations for bail and no contact orders should be taken into account in domestic violence cases. Domestic violence escalates in frequency and severity over time, domestic violence escalates when the victim leaves the relationship, and domestic violence escalates when the batterer is arrested.\(^4^4\) Victim safety should be the paramount concern during charging or arrest. Bail and No Contact Orders (NCO) are two useful tools prosecutors can use to promote victim safety. In many jurisdictions, bail and conditions of release (NCO, etc.) are requested in nearly every DV case.

Across the United States, intimate partner homicides consisted of 11% of all homicides between 1976 and 2005. Intimate partner homicides made up approximately one third of all female homicides, and 3% of all male homicides.\(^4^5\) From 1997 to June 2010, 2,566 people were killed in Washington State domestic violence–related


fatalities. These include the children, friends, co-workers, and family of the abused women, as well as four law enforcement officers who intervened.

The victim is especially vulnerable to retaliation or threats by the defendant during the pretrial period.

Multiple prosecution and arrest studies broadly concur that abusers who come to the attention of the criminal justice system who re-abuse are likely to do so sooner rather than later.

The research demonstrates that a history of DV is the most reliable indicator that further violence will occur. In addition, the victim may be particularly vulnerable to re-assault during attempts to leave or to sever the relationship. Data from the U.S. Department of Justice indicates divorced or separated persons were subjected to the highest rates of intimate partner violence. According to one report, separation from an abuser increased the risk of fatality seven times.

Various studies have found that women’s perception of risk is important in determining risk of re-assault by an intimate partner, and in particular, that victim’s prediction of re-assault was a strong predictor of re-assault. The victim is especially vulnerable to retaliation or threats by the defendant during the pre-trial period. Multiple prosecution and arrest studies broadly concur that abusers who come to the attention of the criminal justice system who re-abuse are likely to do so sooner rather than later.

The research arm of the Washington legislature, the Washington Institute for Public Policy, studied 155,000 offenders and their analysis was used as the basis for a NY Times Op-Ed “To Stop Violence Start at Home.” WSIPP found:

- Domestic violence offenders commit approximately 30,000 misdemeanor DV offenses every year in WA, and 5000-6000 felonies.

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47 Adapted from Chapter 4 of the DV Manual for Judges, Washington State Administrative Office of the Courts.


49 The Washington State Institute for Public Policy found that compared to other offenders, domestic violence offenders have higher rates of domestic violence recidivism than non-domestic violence offenders. For example, for offenders with a current domestic violence offense, 18% were convicted for a new domestic violence felony or misdemeanor within 36 months compared to 4% of non-domestic violence offenders. Drake, L. Harmon, & M. Miller, “Recidivism Trends of Domestic Violence Offenders in Washington State” Washington State Institute for Public Policy, Report No. 13-11-1901, November 2013.

50 S. Catalano, Intimate Partner Violence in the United States, supra, at note 1.


52 Adapted from Chapter 4 of the DV Manual for Judges, Washington State Administrative Office of the Courts.
• Domestic violence is the single greatest criminal predictor of future criminal acts, and the single greatest predictor of future violent crime. Someone convicted of a felony DV offense is significantly more likely to commit future violent crime than someone who has been convicted of kidnapping or robbery (see WSIPP static risk studies 2007 and 2013, 2015).
• Domestic violence offenders have more criminal history compared with all other criminal offenders (when measured as felonies or misdemeanors).
• Domestic violence offenders have much higher rates of criminal recidivism for general crime than non-domestic violence offenders with a recidivism rate—almost 20% higher.
• Domestic violence offenders as a whole appear to be 4x more likely to be a high violent offender than the rest of the criminal population
• Domestic violence offenders have significantly higher recidivism rates for domestic violence (4 to almost 5 times greater) than all other offenders.
• All of the sixteen recidivism measures indicate that domestic violence offenders have consistently higher recidivism rates than all other offenders
• Misdemeanor Domestic violence cases have significantly higher rates of violent recidivism than DUI cases.

Prior domestic violence and access to firearms are the strongest and most consistent risk factors for domestic violence homicide, with estrangement, a stepchild living in the home, and unemployment also strongly implicated. Although violence outside of the home and alcohol abuse are also implicated in male-perpetrated domestic violence homicide, they seem to be less strong risk factors than for other types of homicide. Female perpetrators are far less likely to have had a history of perpetrating any kind of violence. Firearms, estrangement, and prior mental health problems in the form of depression or suicidality are particular risk factors for domestic violence murder-suicide. Other aspects of the intimate partner relationship, such as abuse during pregnancy and stalking, have also been implicated as risk factors.

1. Bail

a) Factors to consider in setting bail:

• Criminal history - CrR 3.2 (C)(6); CrR 3.2(e)(1); RCW 10.99.045(3)(b); and CrRLJ 3.2 requires the prosecutor to provide the courts with the defendant’s criminal history, from within and outside Washington.

• The defendant’s individual order history (or history of domestic violence orders in Washington) also must be provided to the court.
  o Note, (IOH) is not just statutorily required, but is also a source of critical risk information in cases. IOH keeps a record of all domestic violence orders issued either against or on behalf of an individual. Knowledge of these prior court orders is important to understand the history of DV (protection orders detail prior acts of domestic violence against the same victim or other victims), as well as additional facts about the crime that are sworn under penalty of perjury (qualifying as a Smith affidavit). Note: the
Petitions from the listed POs are very valuable—try to use the associated court number to review the petition for risk information.
  o Prosecutors must make sure to consult the IOH as part of their regular practice. See the Appendix for directions on obtaining an IOH from DISCIS.

- Nature of current offense - CrR 3.2(c)(8); CrR 3.2(e)(3); RCW 10.21.050(1)
  o Violence or threats beyond what is reflected in charge, or prior threats - CrR 3.2(e)(5)
  o Weapons or prior use/threat of weapons - CrR 3.2(e)(8)
  o Large financial loss beyond what is reflected in the charge
  o Sophistication/planning beyond what is reflected in the charge
  o Number of victims
  o Vulnerability of victims

- Failure to Appear (FTA) History (look at the number of FTAs and the underlying charges) - CrR 3.2(c)(1); RCW 10.21.050(3)(a)

- Criminal history that demonstrates lack of respect for court orders - CrR 3.2(c)(1); CrRLJ 3.2; RCW 10.21.050(3)(a)
  a. Includes: attempting to elude, NCO, Protection Orders, bail jumping, escape, and failures to comply with court probation or supervision. See RCW 10.99.045(3)(b)

- Lack of ties to community - CrR 3.2(c)(3), (5); CrRLJ 3.2

- Detective comments suggesting a particular need to keep defendant in custody

- Defendant's status at time of crime: RCW 10.21.050(3)(b)
  a. On community custody
  b. On warrant status
  c. Pending cases
  d. Rapid recidivism

- Number of counts currently charged - (In general add the presumptive bail amounts above)
  o Or number of incidents alleged that due to conservative filing policy we did not charge

- Enhancements (DW or FA) or statutory Aggravating Factor filed up front

- Accused's reputation, character and mental condition, including alcohol and drug abuse - CrR 3.2(c)(4); CrR 3.2(e)(4); CrRLJ 3.2; RCW 10.21.050(3)(a)

- Accused's attempts to hide his/her conduct
• The protracted nature of the crime - activity that has spanned a significant amount of time

• The weight of the evidence against the defendant – RCW 10.21.050(2)

Risk and Lethality Factors to consider in setting bail for DV Offenses:

1. Advocate input - DV Unit advocates will have critical victim input, please make sure to coordinate with the first appearance advocate.

2. Criminal and Individual Order history - CrR 3.2 (C)(6); CrR 3.2(e)(1); RCW 10.99.045(3)(b) focused on domestic violence.

Prior criminal convictions in DV are critically important. Washington Department of Corrections Static Risk Assessment studies of hundreds of thousands of offenders found certain convictions far more predictive of future violence than others. The leading predictors of violence are Felony Domestic Violence convictions followed by misdemeanor Domestic Violence and weapons offenses for all crimes, while Felony Drug offenses have minimal use in predicting future violence.

RCW 10.99.045(3)(b) requires we provide the defendant’s Individual Order History (IOH) from OAC. IOH keeps record of all DV orders issued either against or on behalf of an individual and is a source of critical risk information in all DV cases as Pretrial Risk studies in King County found protection orders to be just as valuable in predicting an offender’s future violence as prior felony convictions. Petitions from POs are valuable—if possible review the petition in ECR for risk information. Check the person screen in PbK for PO information linked to ECR.

3. Firearms and Concealed Pistol License (CPL)

More than half of all women murdered with guns are killed by partners or family members. People with a history of DV are five times more likely to murder their partner if a gun is in the house. State law provides authority to temporarily remove firearms and CPL from defendants when a no contact order that protects an intimate partner or child of intimate partner is issued. We will seek surrender of firearms and CPL in every qualifying DV, sexual assault, and stalking case. A defendant must comply by either surrendering all firearms and CPL or filing a declaration of non-surrender. The failure to comply (declare a response) is a misdemeanor, possession of a firearms during a qualifying NCO is a UPFA 2. See RCW 9.41.800.

**Seek a review hearing at 2nd Appearance to determine whether defendant has complied with Order to Surrender as directed.

4. Victim’s fear or perception of harm from offender in the future.

5. History of DV including reported and unreported acts of DV with the victim or with other victims including assault, threats, strangulation, sexual assault, and stalking or a history of coercive/controlling behavior. See RCW
9.44A.535 Aggravating Circumstances (3)(h)(i): The offense involved DV and was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

6. Threats to harm/kill towards victim or children during incident.

7. Presence of children during DV, and whether children were subject to violence or threats. See RCW 9.44A.535 Aggravating Circumstances (3)(h)(ii) The offense involved DV and occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years.

8. Whether victim was pregnant at the time of the event, and whether the pregnancy was a focus or subject of the DV. See RCW 9.44A.535.

9. Strangulation or suffocation.

In written bail paragraph or to the court, include the following statement in every strangulation filing case summary: Strangulation is a very serious indication of potential lethality in intimate partner cases. Victims who have been non-fatally strangled are 8 times more likely to become a subsequent victim of homicide at the hands of the same abusive partner. When a victim is strangled, loss of consciousness can occur in as little as 7 seconds, and death in can occur within several minutes. When a person loses consciousness, or reports lightheadedness or dizziness, this is a medical indication that the brain has lost function due to the reduction of oxygen being delivered to the brain through the blood (LOC) or is lacking oxygen due to restriction of the blood flow to the brain (lightheaded/dizzy). If the oxygen supply to the brain is not restored, the brain progressively loses more function, and permanent damage develops. Injuries related to strangulation can be serious, and not necessarily apparent. Symptoms such as sore throat, raspy voice, difficulty swallowing, swelling of the neck/throat, or neck pain can indicate possible internal injuries to the structures within the neck.

10. Whether violence against victim has recently increased in severity or frequency.

11. Whether victim and defendant have recently separated or ended the relationship.

12. Whether offender used, or threatened to use, a gun, knife, or other weapon against victim, and whether the offender has access to firearms.

13. Whether the victim was confined during the incident.

14. **Indicia of Stalking** including harassing conduct or following, keeping under surveillance, cyberstalking or using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim, the victim’s children, or members of the victim’s household.

15. **Suicidal ideation** by the offender including prior suicide attempts.

For more information:
- See the Appendix for Minnesota Legislature’s Blueprint for Safety Risk Assessment Tool.
- Danger Assessment
- http://dvfatalityreview.org/

**b) Conditions of Release**

Whenever the court releases a suspect, the court is entitled to impose conditions of release. The conditions of release must be in writing and must advise the defendants that a violation of the conditions of release may result in the immediate issuance of a warrant for the defendant’s arrest. **RCW 10.21.070.**

**Permissible conditions of release include:**

- electronic monitoring (However remember that, pursuant to *State v. Speaks*, 119 Wash.2d 204, 209, 829 P.2d 1096 (1992) (“SRA affords sentence credit for time spent in electronically monitored presentence home detention”)
- placing the accused in custody of a supervising person or organization
- placing restrictions on the accused’s travel, association or place of abode
- requiring the accused to execute a bond or cash bail
- requiring the accused to return to custody during specified hours
- prohibiting the accused from approaching or contacting certain persons
- prohibiting the accused from possessing weapons, possessing or consuming alcohol or nonprescription drugs and may be required to submit to testing to determine compliance with this condition
- requiring the accused to report to and submit to supervision of certain persons or agencies
- prohibiting the accused from committing any violations of law
- any other conditions “reasonably necessary” to assure court appearances by the accused and noninterference with the trial, as well as reduce danger to others or the community

See **RCW 10.99.045(3)(a); RCW 10.21.030; CrR 3.2(b) and (d); CrRLJ 3.2(b) and (d).**

**c) Denial of Bail**
Chapter Six: Bail and No Contact Orders

Washington Const. article I, section 20 authorizes a court to deny bail:

- When a person is charged with a capital offense when the proof is evident or the presumption is great.
- When a person is charged with an offense punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons. See also RCW 10.21.040.
- The procedure for denying bail to a person charged with a non-capital offense may be found in chapter 10.21 RCW.

d) Release Delayed

CrR 3.2(f) and CrRLJ 3.2(d) authorizes a delay of up to 24 hours after preliminary appearance if a mental health interview is necessary or the person is intoxicated and release will jeopardize safety to the accused or others.

e) Amending or Revoking Bail Orders

CrRLJ 3.2(h) authorizes the court to impose additional or different conditions of release based upon a “change of circumstances, new information or showing of good cause.” See also CrR 3.2(L), which allows for a warrant before a hearing when there are facts before the court that find a violation of conditions of release. The court will issue a bench warrant if the facts are supported by a motion and certification. CrR 3.2 (L) (2) allows a law enforcement officer to arrest without a warrant based on probable cause and belief that the defendant, who is pending trial for a felony, has violated a condition of release under circumstances when obtaining a warrant is impractical (See CrRLJ 3.2(K)(2) and CrR 3.2 (L)(2)-no warrantless arrest in non-felony cases).

Utilizing CrR 3.2(L) is particularly important technique for prosecutors because an offender who is out of custody and violating conditions of release poses a safety risk to the victim and should be arrested as soon as possible.

2. No Contact Orders

One of the most critical aspects of a domestic violence case is the issuance of a no-contact order. A no contact order may be entered by a court at any point in time, and is common as part of pretrial release. RCW 10.99.040-.044 authorizes the court to issue a no contact order (“NCO”) prior to or at arraignment. The NCO may include conditions related to possessing or surrendering firearms and other dangerous weapons pursuant to RCW 9.41.800.

A no contact order should be entered when the victim requests a no contact order. No prosecutor should rely upon expressions of the victim’s wishes from the defendant, defense counsel or others related to the defendant. Victim advocates and/or the victim can often give an informed opinion. It is better to err on the side of caution and request issuance of an order if you have not had any contact with the victim and/or are unsure of whether an order is needed to protect the victim or the victim’s children. If the victim
appears and does not want a no contact order a prosecutor must give the victim access to the court to address the NCO. Consider risk factors in deciding whether to object including the nature of the case, the history of violence, both reported and unreported, or if there is any indication that the victim is being coerced, intimidated or influenced on the issue of the no contact order.

It is important to advise the victim that ANY violations of the order, regardless of how minor they may seem to the victim, should be immediately reported by calling 911. Also advise the victim that she should keep copies of the order in her house, car and purse so that the officer responding to a 911 call will have grounds to arrest the suspect on the spot.

If the victim lives or works outside of Washington d explain how the victim can obtain full faith and credit for the order in another state.

f) Time of Entry

- The determination of a NCO should be made at the first court appearance. Normally, the first appearance is the day after arrest, or if the defendant has been charged but not arrested, the day of arraignment. These court appearances are mandatory and cannot be waived. RCW 10.99.045.

- RCW 10.99.040 (3) provides that “At the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed. If a no-contact order is issued or extended, the court may also include in the conditions of release a requirement that the defendant submit to electronic monitoring. If electronic monitoring is ordered, the court shall specify who shall provide the monitoring services, and the terms under which the monitoring shall be performed. Upon conviction, the court may require as a condition of the sentence that the defendant reimburse the providing agency for the costs of the electronic monitoring.”

- If a no-contact order has previously been entered, the court, at arraignment, must determine whether the order should be extended. RCW 10.99.040(3).

56 See Washington Courts model policy on victims requesting rescission or modification of NCOS: http://www.courts.wa.gov/programs_orgs/pos_genderandjustice/ModelPolicyForVictims.pdf
57 Adapted from Chapter 4 of the DV Manual for Judges, Washington State Administrative Office of the Courts.
A NCO must substantially comply with the pattern form developed by the administrative office of the courts (AOC). RCW 10.99.040(2)(c). The AOC form contains the warnings mandated by RCW 10.99.040(2)(c).

The Court is required to make a finding regarding the defendant’s relationship to the victim. A finding of “intimate partner” will subject the defendant to federal firearm restrictions and will preclude the defendant from obtaining a concealed weapons permit. See 18 U.S.C. § 922(g)(8) and (g); Laws of 2011, Ch. 294, amending RCW 9.41.070 (eff. July 22, 2011). “Intimate Partner” includes former/current spouses, parents of common child, or former/current cohabitants as intimate partners. 18 U.S.C. § 921(a)(32). Prosecutors should discourage the court from adding additional language to the no contact order.

The form is currently available at: www.courts.wa.gov/forms/documents

Note: The order may be issued by telephone if there is no outstanding restraining or protective order already prohibiting the defendant from contacting the victim. A telephone order must be reduced to writing as soon thereafter as possible. RCW 10.99.040(2).

See the Appendix for a comparison of all court orders in Washington State created by the Washington State Coalition against Domestic Violence for the Judges Manual.

h) Duration of Orders

• Pre-trial orders

A pre-trial no-contact order remains in effect until the expiration date specified in the order or until dismissal or acquittal. RCW 10.99.040(3). Where a written valid pre-trial domestic violence order is incorporated by reference into the judgment and sentence, it is enforceable up until the expiration date on the order, even though the court had not entered a formal post-conviction order. State v. Schulz, 146 Wn.2d 541, 560-1, 48 P.3d 301, 310 (2002).

• Post-conviction orders

A no-contact order issued in a felony case may be imposed for the maximum possible sentence, regardless of the standard range. Unless otherwise ordered by the sentencing court, the order remains in effect even after a certificate of discharge has been issued. RCW 9.94A.637(5). A post-discharge violation remains completely enforceable.

58 Id.
In a misdemeanor or gross misdemeanor domestic violence case, the maximum term is five years from the date of conviction.  

RCW 3.66.067; RCW 3.66.068; RCW 35.20.255

**i) Recall of No Contact Orders**

No contact orders are typically recalled in two situations: (1) when the court chooses not to issue a no contact order at sentencing; and (2) when the victim requests that the no contact order be terminated. If the court chooses not to issue a no contact order at sentencing, the prosecutor must complete a recall order. If the victim requests the no contact order be recalled, the process is slightly more complicated. Each court is required to establish a procedure by which the victim may seek modification or termination of a no contact order.  

RCW 10.99.040(7). Because victims are not parties to the criminal matter, the procedure may simply direct the victim to contact the prosecuting attorney or the defense attorney. Some courts will authorize victims to file a motion to modify or terminate the no contact order in the criminal case. Pattern forms for victim initiated motions may be found on the AOC’s website.

**j) Termination of No Contact Orders**

Pre-trial no contact orders will expire when charges are dismissed or the defendant is acquitted.  

See State v. Anaya, 95 Wn. App. 751 (1999); RCW 10.99.040(3). A pre-trial no contact order will also expire on the date specified in the order. This date is not extended by a defendant’s fugitive status.

A victim may wish to apply for a chapter 26.50 RCW protection order while the defendant is in custody awaiting his first appearance or arraignment. A chapter 26.50 RCW can provide the victim with protection even if the charges are dismissed or the defendant is acquitted.

See the following information on the statewide model policy for rescission or termination of a No Contact Order at [http://www.courts.wa.gov/programs_orgs/gjc/](http://www.courts.wa.gov/programs_orgs/gjc/).

**k) Children and No Contact Orders**

At the time of filing, and in pretrial proceedings, a court may enter no contact orders with children who have been a victim or witness to DV. At the time of sentence, unless there is a stipulation between the parties, there are legal restrictions on no contact orders with children: Because there is a fundamental right to parent recognized within the constitution, courts may not impose no-contact orders between a defendant and his or her own children without explicitly conducting an analysis. No matter how obvious it might be that further contact with the defendant would be harmful to the children, the record must reflect that the sentencing court conducted this analysis. Any restriction on the right to parent can only be imposed with a finding by the trial court that the restriction is "reasonably necessary to prevent harm to the children."  

650, 653, 27 P.3d 1246 (2001). The court must also justify the length of the restriction with a greater showing of necessity required for a no contact order for years than one for months. *In re Personal Restraint of Rainey*, 168 Wn. 2d 367, 381-82, 229 P. 3d 686 (2010).

### 1) Surrender of Firearms and Other Deadly Weapons

Prior to December 1, 2014, prosecutors sought surrender and forfeiture of firearms in domestic violence on a case-by-case basis. Beginning on December 1, 2014, a defendant in a domestic violence, sexual assault, or stalking case ordered to surrender firearms, other dangerous weapons and concealed pistol license under [RCW 9.41.800](https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.800) must file proof of compliance with the order using forms developed by the Administrative Office of the Courts. See [RCW 9.41.802](https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.802) and [RCW 9.41.804](https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.804). The change results from the passage of [HB 1840](https://app.leg.wa.gov/bill/default.aspx?Session=2013&Bill=1840) which created a new felony crime for possession of a firearm when subject to a protective/no contact order that protects an intimate partner or child of intimate partner. The new change and penalties means prosecutors should seek the surrender of firearms in every qualifying domestic violence, sexual assault, and stalking case.

**Domestic Violence and Firearms – Quick Stats:**

- Guns are by far the most common weapons used in domestic violence homicides—more than all other weapons combined. In Washington State, 55% of all domestic violence homicides and 85% of murder-suicides are committed with firearms. (Source: Washington State Domestic Violence Fatality Review, February 2013)
- Defendant’s access to guns increases the lethality of domestic violence and makes it more difficult for friends, family, and law enforcement to safely intervene.
  - A domestic violence victim is 5 times more likely to be killed when there’s a gun around. (Source: Campbell, Webster, Koziol-McLain, et al, “Risk Factors for Femicide in Abusive Relationships: Results From a Multi-Site Case Control Study,” American Journal of Public Health, 2003)
  - 32% of police officers killed by guns were killed in domestic violence-related incidents. (Source: Washington State Domestic Violence Fatality Review, June 2013)
- Two out three women who are killed with a gun in the U.S. are killed by a spouse or intimate partner. (Source: Violence Policy Center, 2012)
- More than half of mass shootings in the U.S. are acts of domestic or family violence. At least a quarter of those offenders had a prior DV charge. (Mayors Against Illegal Guns, 2013)

**Enforcement is Key to Prevention**

- In reviews of domestic violence homicides, the Washington State Domestic Violence Fatality Review has consistently identified removing firearms from convicted DV offenders and respondents to Protection Orders as a priority.
- In nearly all jurisdictions in our state, courts and law enforcement have no protocols in place to enforce restrictions on firearms, and simply rely on abusers’ voluntary
compliance with the law.

- Lack of enforcement of firearm provisions undermines the effectiveness of all protection orders and increases the danger for all victims. The reality that abusers prohibited from having guns are allowed to have them anyway fuels the public perception that a protection order is “just a piece of paper” and cannot be enforced.
- Domestic violence homicides are preventable. Removing firearms from the most dangerous abusers is key to preventing these tragedies.

For more information on firearm surrender in domestic violence cases, see the Appendix.

**Firearms violations and domestic violence protective orders**

<table>
<thead>
<tr>
<th>Possible offenses &amp; penalties:</th>
<th>Contempt of Court (civil)</th>
<th>Contempt of Court (criminal)</th>
<th>Misdemeanor firearms violation</th>
<th>Unlawful possession of a firearm 2nd degree</th>
<th>Federal firearms violation</th>
</tr>
</thead>
<tbody>
<tr>
<td>RCW 7.71.050</td>
<td>RCW 7.71.040</td>
<td>RCW 9.41.804, 9.41.510</td>
<td>RCW 9.41.040</td>
<td>18 USC §922(d)</td>
<td></td>
</tr>
<tr>
<td>Court may impose remedial sanctions</td>
<td>Court may impose punitive sanctions</td>
<td>Any violation of any provision of RCW 9.41</td>
<td>Class C felony. Max penalty 5 years and/or $10,000</td>
<td>Max penalty 10 years and/or $25,000</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Who can take action?</th>
<th>Court of Protected Party</th>
<th>County/State Prosecutor</th>
<th>Federal Prosecutor</th>
</tr>
</thead>
<tbody>
<tr>
<td>How did the respondent violate the protective order?</td>
<td>Possession of a firearm while subject to a qualifying court order.</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Failure to surrender weapons or failure to comply with specific instructions in the order to surrender.</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Failure to file receipt and proof of surrender with the court within 5 days.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>
Chapter Six: Bail and No Contact Orders

When does Washington law require surrender of firearms with a protection order or restraining order?

Are ALL of these true of the court order?
- Protected person is the respondent's intimate partner or child of an intimate partner.
- The order was issued after a hearing, of which the restrained person had actual notice and opportunity to participate.
- The order restrains the person from harassing, stalking, or threatening.
- The order prohibits the use, attempt, use, or threatened use of physical force.
- The court finds that the restrained person represents a credible threat to the physical safety of the intimate partner or child.

NO

Did any court make AT LEAST ONE of these findings in a court order?
- The restrained person has used, displayed, or threatened to use a firearm or other dangerous weapon in a felony.
- The restrained person has committed an act that would make him/her ineligible to possess a firearm under RCW 9.41.040.

NO

Did the court find that possession of a firearm by the restrained person presents a serious and imminent threat to public health or safety, or the health or safety of any individual?

NO basis for prohibiting weapons under RCW 9.41.800

YES

The court SHALL
- require surrender of firearm & concealed pistol license
- prohibit from obtaining or possessing a firearm or concealed pistol license

by clear and convincing evidence

NO

The court MAY
- require surrender of firearm & concealed pistol license
- prohibit from obtaining or possessing a firearm or concealed pistol license

by preponderance of the evidence

Source: RCW 9.41.800

Can the court order immediate surrender of firearms without a hearing?

The court MAY order temporary surrender of firearms without notice to the respondent.

Did the court find that that irreparable injury could result if an order is not issued immediately?

YES

The court may order surrender of weapons only AFTER a hearing.

NO
Chapter Seven: Discovery and Pretrial Preparation

➢ The Prosecutor’s Duty
  ▪ Working with victims
    ▪ Professionalism, Ethics, and Duty
    ▪ Meet and Greet
  ▪ Discovery
  ▪ The Victim’s Address
  ▪ Shielding Harmful or Embarrassing Information
  ▪ Limiting Defense Interviews of Prosecution Witnesses
  ▪ Depositions
  ▪ Work Product
  ▪ Work Product and Public Disclosure
  ▪ Domestic Violence Program and Counseling Records
  ▪ Domestic Violence Advocates
  ▪ Medical Records and Victim Statements
    ▪ Obtaining Medical Records
    ▪ Medical Records and Victim’s Statements
    ▪ Causation v. Fault Statements
  ▪ Requesting Discovery From Defense Counsel

➢ Pretrial Preparation
  ▪ Scope of Confrontation Clause
  ▪ The Test
  ▪ 911 Tapes
  ▪ Statements to Friends, Family, Good Samaritans, and Medical Records
  ▪ Forfeiture by Wrongdoing
  ▪ Jail Phone Calls
  ▪ Experts

1. The Prosecutor’s Duty: Victims and Witnesses

a) Meet and Greet

If possible the prosecutor should work with the advocate to meet with the victim. Prosecutors frequently have high caseloads, and it is challenging to have in person meetings with every victim, but finding a way to have a relationship with the victim through the advocate is critical. Connecting with the victim, dispelling myths about the criminal justice system, discussing what the victim can expect, and having an opportunity to express care for who the victim is, what they have gone through, and
where they come from leads to better justice. Victims and witnesses want to know that prosecutors care about the case and about what happened to them. If the prosecutor does not find a way, even with a significant case load, to express care and concern for the case and those involved then why should anyone else?

The expression of care can be simple measures, adhering to the victim bill of rights—sending a letter/email about the status of the case—to finding times to speak with the victim (on the phone or in person) to see how they are doing or discuss disposition. Care also means being prepared before speaking with a victim. Knowing the case, knowing the issues, and being able to communicate about what happened. This can be most important when victims are recanting or minimizing the event and attempting to have the case reduced or dismissed. The expression of care gives a way to work with victims who are opposed to prosecution by communicating that they matter, the case matters, and what happened matters. This is a powerful approach for all victims, but especially so when victims are marginalized and may believe they do not matter.

In the course of meeting with victims it may become necessary to resolve issues were not covered by patrol or a detective. This provides greater understanding of the scope and depth of DV and increases the likelihood of success. However, there should also be sensitivity to making a victim relive the DV experience. It can be difficult for victims to disclose the abuse they are experiencing. It is important for interactions to be done in consultation and partnership with the advocate. Any meeting should validate and support the victim with statements such as:

- “I believe you”
- “I am concerned about your safety and well-being.”
- “I imagine this situation must be very difficult for you.”
- “You are not alone.”
- “Thank you for telling me.”
- “I am concerned about the safety of your children.”

An advocate or other support person should be present with the victim during the meeting or interview if possible.

The Forensic Experiential Trauma Interview Technique (FETI - Russell Strand) offers helpful guidelines for interviewing a victim of trauma, such as DV or sexual assault. Essentially, the technique aligns with the science of memory recall involving trauma and stresses the importance of asking open-ended questions focusing on sensory recall rather than chronology of events. An interviewer should gather as much information as possible about the crime and the history between the parties, including:

- Police reports (past and present)
- Charging documents

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59 Adapted from the Domestic Violence and Child Maltreatment Coordinated Response Guideline.
• Photographs
• 911 tapes
• Medical Records
• Protective Orders
• Past unreported incidents including dates and other witnesses
• Friends & family members who saw the DV or who the victim confided in
• Digital/cell/social media history?

Meet and Greet: Interviews

If necessary to conduct an interview, and not just meet the victim, make sure to address any of the victim’s concerns or questions. The interviewer should also attempt to gain trust and build rapport with the victim, and consider the following:

• Is the witness cooperating or recanting?
  o Should also have a 3rd party present during the interview that you could call to testify or recording made of the interview.

• Put incident into context by evaluating the following:
  o History of the relationship
  o Facts of the crime
  o Written statement
  o Pre-Trial contact from defendant, including letters, notes, answering machine messages, and contact from other friends or family
  o A prosecutor should avoid interviewing a victim alone, as this may give rise to a disqualifying conflict. See State v. Schmitt, 124 Wn. App. 662, 102 P. 3d. 856 (2004).
  o Lethality and Risk Assessment:
    ▪ Separation Violence: Often, the most life-endangering violence occurs when DV perpetrators believe their partner intends to leave or has left the relationship.
    ▪ Suicidality: DV perpetrators who threaten or fantasizes suicide or who threaten to kill partners, children, and other family members are extremely dangerous.
    ▪ Escalating Violence (Frequency and/or severity): DV perpetrators who escalate violence tactics such as strangulation, rape, or severe physical assault can pose significant risks to all the family members. DV victims or their children’s use of violence to intervene or protect themselves or others can also be indicative of escalating violence.

60 Adapted from Dr. Jaqueline Campbell’s Danger Assessment. See also Ontario Domestic Assault Risk Assessment (ODARA).
Chapter Seven: Discovery and Pretrial Preparation

- **Unemployment:** With fatality reviews, unemployment of DV perpetrators can be a factor in DV homicides.
- **Fear of Perpetrator:** DV victims can be aware of escalating danger. When DV victims express fear that the DV perpetrator will kill her/him, their children, or others providers should recognize the severity of this and work on immediate safety plans.
- **Extreme Jealously/Possessiveness:** DV perpetrators who have pervasive obsessions, or extreme jealousy, or excessive controlling behaviors, or indicate an unwillingness or inability to live without their partner, or believes they have full entitlement to their partner, are likely to be life threatening. This thinking can be manifested in statements like "You belong to me," or "If I can't have you no one will," or "You will die before you get a divorce."
- **Lack of Consequences:** When DV perpetrators begin to take more risks without regard to legal or social consequences, such as stalking the victim at their workplace, stalking the children at school, or abusing the victim in public locations the risk of lethal assault increases with their intimate partners, children, or other family members.
- **Access to Weapons:** DV perpetrators who possess weapons and have used them or threatened to use them in the past, increases potential for lethal assault for DV victims and their children. DV perpetrators can also use fire as a lethal weapon.
- **Co-Occurring Conditions:** When DV perpetrators are committing violent acts, and are under the influence of drugs and/or alcohol, there can be an increased level of severity with their assaults. DV perpetrators with acute depression, paranoia or psychosis and they see little hope for moving beyond their depression or mental illness, they are at increased risk of committing suicide and/or homicide.

**Questions on DV Perpetrator’s Abuse Tactics:**

- Does your partner ever act jealous or possessive?
- Has your partner ever prevented you from going to work/school/church?
- Has your partner ever prevented you from seeing friends or family?
- Have you ever felt afraid of your partner? In what ways?
- Has your partner ever followed you?
- Has your partner ever tracked you by phone, computer or other electronic means?
- Has your partner forced you to use alcohol or drugs?
- Has your partner forced you to perform sexual acts or interferes with your use of birth control?
- Has your partner behaved violently in public or with others?
- Has your partner destroyed your family’s possessions, such as your clothes, photographs, or furniture?
• Has your partner engaged in reckless behavior, like have they driven too fast with you and the children in the car?
• Has your partner prevented you from calling 911 or other help?
• Has your partner threatened to kill you, or their self, or your children, or other family members?
• Has your partner hurt your family pets?
• Has your partner ever pushed, pulled, slapped, punched, kicked, or burned you?
• Has your partner ever choked/strangled you?
• Has your partner hurt you during pregnancy?
• Has your partner threatened you, your children or other family members with a weapon?
• Has your partner used a weapon on you, your, children, family or friends?

Questions about Level of Risk of Children:

• Have you ever been afraid for the safety of your children?
• Has your partner threatened to take children from your care?
• Has your partner called, or threatened to call, a child protection agency?
• Has your partner hurt you in front of the children?
• Has your partner assaulted you while you were holding your children?
• Has your partner forced your children to participate in or watch their abuse of you?
• Has your partner hit your children with belts, straps or other objects?
• Has your partner ever touched your children in a way that made you feel uncomfortable?
• Has your partner ever threatened to hurt or kill your children?

Questions about Effects of DV on their Children:

• Has your child been fearful of leaving you alone?
• Is your child having trouble eating or sleeping?
• Is your child having problems in school or day care or in the neighborhood? Has your child behaved in ways that remind you of your partner?
• Has your child tried to protect you or stop the violence?
• Has your child physically hurt you or other family members?
• Has your child hurt themselves or pets?

For more information on interviewing victims of trauma, see Russell Strand’s presentation on The Forensic Experiential Trauma Interview (FETI).

The Prosecutor’s Duty: Discovery

While the court rules, CrRLJ 4.7 and CrR 4.7, provide for reciprocal discovery to ensure that neither party is provided with an unfair advantage, prosecutors have a constitutional obligation to disclose all material exculpatory and impeaching evidence to
the defense. See generally Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). The basic rule is “if it hurts turn it over, if it hurts bad turn it over faster.”

b) The Victim’s Address

RCW 10.99.040(1)(c) requires the court in domestic violence cases to waive disclosure of the victim’s address to anyone except defense counsel “if there is a possibility of further violence.” The court is also given the discretion to prohibit defense counsel from disclosing the address to the client. See also CrR 4.7(h)(3) and (4) (custody of materials and protective orders); CrRLJ 4.7(g)(3) and (4) (same).

In addition, under RCW 26.50.250 courts are prohibited from ordering that the confidential addresses of domestic violence programs be disclosed in court proceedings unless the court finds by clear and convincing evidence that disclosure is necessary, after considering the safety and confidentiality concerns of other residents of the program, as well as the victim before the court, and other alternatives to disclosure.61

In preparing documents for disclosure, the best practice is to redact the victim’s address from all police reports, medical records, and other documents that are provided to defense counsel. If defense counsel wishes to interview the victim, a contact phone number may be provided to counsel separately to facilitate the interview or the prosecutor’s office may agree to serve as an intermediary through a victim advocate or the prosecutor.

If a prosecutor’s office agrees to act as intermediary in arranging interviews the office must act diligently to obtain the victim’s presence at all scheduled interviews or face sanctions such as exclusion of testimony or dismissal of charges. See, e.g. State v. Wilson 149 Wn. 2d 1, 65 P.3d 657 (2003).

c) Shielding Harmful or Embarrassing Information

The court rules provide a number of mechanisms for protecting a victim or other witnesses from harassment or intimidation. See CrRLJ 4.7(e)(2) and CrR 4.7(e)(2) (restricting disclosure of information not covered by CrRLJ 4.7(a), (c), and (d) or CrR 4.7(a), (c), or (d)); CrRLJ 4.7(h)(5) or CrRLJ 4.7(g)(5) (excision of information contained in discovery covered by CrRLJ 4.7(a), (c), and (d) or CrR 4.7(a), (c), or (d)); CrRLJ 4.7(g)(4) and CrR 4.7(h)(4) (providing for delayed disclosure of information governed by CrRLJ 4.7(a), (c), and (d) or CrR 4.7(a), (c), or (d)). Filing a motion and submission of the discovery for in camera review triggers all of these protective mechanisms. When submitting documents for in camera review, it is critical to include one non-redacted version and two redacted versions (one for the appellate record and one for the court to provide to the defendant).

61 Adapted from Chapter 4 of the DV Manual for Judges, Washington State Administrative Office of the Courts.
d) Defense Interviews of Prosecution Witnesses

CrRLJ 4.7(g)(1) and CrR 4.7(h)(1) prohibit an attorney from advising witnesses to refrain from discussing a case or showing relevant material to opposing counsel. In domestic violence cases, prosecutors should routinely advise victims of their right to have a prosecutor present at a defense interview, but the prosecutor must be careful not to give the victim the impression that the prosecutor wishes the victim to refuse an interview unless the prosecutor is present. See generally State v. Hofstetter, 75 Wn. App. 390, 878 P.2d 474, review denied 125 Wn. 2d 1012 (1994). In addition to advising the victim that she has the right to have a prosecutor, advocate or support person present for the interview, it is proper to advise victims that they are in control of the time and place for a defense interview. The victim should also be advised of her right to refuse to have the interview taped, State v. Mankin, 158 Wn. App. 111, 241 P.3d 421 (2010), review denied 171 Wn. 2d 1003 (2011), and of her right to refuse to have the defendant present during the interview. The prosecutor should offer a secure setting for the defense interview, whenever possible.

e) System Based Domestic Violence Advocates and Discovery

Advocate Notes: It is common for advocates employed by a prosecutor's office or police department to keep notes. Those notes are not confidential under RCW 5.60.060, but they are frequently non-discoverable under CrR 4.7. Victim's advocates must be trained to disclose all Brady material, but the lack of privilege does not expand the State's duty under CrR 4.7 or create an entitlement to materials in the advocate file that defense would not be entitled to if they were in the prosecutor's file.

f) Work Product

CrRLJ 4.7(f)(1) and CrR 4.7(f)(1) exempt an attorney’s work product from disclosure. Work product includes “legal research of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusion of investigating or prosecuting agencies,” except for reports of expert witnesses as provided for in subsection (a)(1)(iii). Work product does not include a prosecutor’s notes of a witness’s statements made during an interview. See generally State v. Garcia, 45 Wn. App. 132, 137-38, 724 P.2d 412 (1986).

Case Assignment and Work Product Protocol:

- Contacting the victim as soon as possible following prosecutor case assignment.
- Explaining they are acting at the direction of the prosecutor, contents of the interaction will be shared with the prosecutor, and purpose of the interaction is to gather information in order to assist in prosecution.
• Notifying the victim of her rights under the state constitution and to victim compensation. Providing required victim notification pursuant to state law and assisting the victim in exercising their rights under the law.
• Assisting with applications for crime victims’ compensation and other financial aid.
• Asking questions to provide insight into the domestic violence the victim is experiencing.
• Assisting with safety issues and safety planning.
• Providing information about legal remedies, victim rights and community referrals.
• Explaining the legal processes, options and potential outcomes.
• Engaging in case staffing/reviews/consultations/meet and greet/joint interviews/defense interviews/court hearings to assist the prosecutor.
• Recording impressions and opinions of the victim in notes where the prosecutor records their impressions, conclusions, opinions, and legal theories of the case.
• Documenting discoverable work-product such as victim recantation and Brady material separately under the advocate Brady protocol.
• Staying in contact with the victim throughout the court process, providing her/him with pertinent case, subpoena, and trial information.

g) Community DV Program and Counseling Records

Records maintained by a domestic violence program are non-discoverable absent a court order. RCW 70.123.075 and 70.123.076 governs records of domestic violence programs. An in camera review is required to determine relevance and whether the probative value is outweighed by the victim’s privacy interest. Specifically, whether the “records are relevant and whether the probative value of the records is outweighed by the victim’s privacy interest in the confidentiality of such records taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records.” RCW 70.123.075(1)(c). Before the hearing proceeds, make sure the defense gave proper notice of the hearing to the victim and program records custodian. Note, SHB 2363 effective July, 2012, creates additional protections for programs: provides restrictions relating to requiring a domestic violence victim in revealing confidential information about her or his address, employer, or school, and provides address confidentiality participants enhanced protections against disclosure of their addresses. See RCW 26.50.250.
h) Depositions

Unlike in civil cases, the parties to a criminal case must secure the permission of court before noting a deposition. CrR 4.6 gives the superior court broad discretion to order a deposition of a witness upon a showing of “good cause.” This replaces the previous requirement that the witness had to refuse to discuss the case with either counsel, or be unavailable for trial, before the court could order a deposition. A witness may seek a protective order as provided in the civil rules.

i) Medical Records

- Obtaining Medical Records
- Medical Records and Victim’s Statements
- Causation v. Fault Statements

The victim’s statements to medical professionals and mental health professionals for purposes of diagnosis and treatment (as opposed to forensic purposes) are admissible under ER 803 (a)(4) and the Confrontation Clause. See State v. Beadle, 173 Wn.2d 97, 265 P.3d 863 (2011) (victim’s out-of-court statements to family members and therapist were admissible).

• Obtaining Medical Records

The easiest method of obtaining the victim’s records is to obtain a medical release from the victim. If a release is obtained, the prosecutor has an obligation to obtain the records and to disclose the records to the defense unless a protective order is obtained.

If the prosecutor is unable to obtain a release, or if a release is not available, medical records can be obtained through the procedures set forth in RCW 70.02, which requires advance notice to the health care provider and to the victim or the victim’s attorney. Note: a search warrant for medical records is the preferred method of obtaining medical records by the Washington Hospital Association. See http://www.wsha.org/files/62/HIPAA_Guide_2010.pdf. A search warrant also avoids continuing HIPAA involvement. Finally, in a pending case, medical records may also be obtained pursuant to CrR 4.7.

Medical records are admissible as business records pursuant to RCW 5.45.020. State v. Garrett, 76 Wn. App. 719 (1995). The physician preparing the statement OR “one who has custody of the record as a regular part of his work or has supervision of its creation” may testify as to its contents. Id. Certain statutes, moreover, have been adopted in response to HIPAA.

• Medical Records and Victim’s Statements

The victim’s statements to medical professionals for the purpose of medical diagnosis or treatment are admissible regardless of whether the victim testifies. See ER
803(a)(4); State v. Ackerman, 90 Wn. App. 477, 484 (1998) Such statements are considered reliable on the basis that the declarant will be truthful in order to obtain beneficial medical treatment. See, e.g., State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997); State v. Sims, 77 Wn. App. 236, 239-40, 890 P.2d 521 (Div. 1, 1995) (statements made by victim to social worker and physician were admissible over hearsay objections as statements for the purpose of medical diagnosis or treatment). The admission of statements to medical personnel will generally not run afool of the confrontation clause. See State v. O’Cain, 169 Wn. App. 228, 279 P.3d 926 (2012). Medical reports created for treatment purposes are not testimonial under the confrontation clause and are admissible as business records. State v. Doerflinger, COA 66694-1 J, __ Wn. App. __ (Sep. 17, 2012). However, the presence of a police officer in the examining room of the emergency room made the victim’s statements to the ER nurse testimonial, although made for treatment and diagnosis purposes. See State v. Hurtado, 173 Wn. App. 592, 294 P.3d 838, review denied (2013)

- **Causation v. Fault Statements**

  Although “causation statements” are allowed (i.e. — I was hit), “fault statements” are generally disallowed (i.e. — John hit me). In re Penelope B., 104 Wn.2d 643, 656 (1985). However, there are exceptions for domestic violence and child abuse. In State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995), the court recognized that “a statement attributing fault to an abuser can be reasonably pertinent to treatment in domestic sexual assault cases involving adults.” Citing, United States v. Joe, 8 F.3d 1488 (10th Cir. 1993), the court noted that “...for example the treating physician may recommend special therapy or counseling or instruct the victim to remove herself from the dangerous environment by leaving home and seeking shelter elsewhere...” Id. Statements as to fault may therefore be admissible under Sims if the prosecution has evidence that treatment of referrals for treatment would be different for domestic violence victims. It should be noted, however, that the court in Sims declined to address the confrontation clause issue or whether the motive for such statements was for treatment purposes and therefore inherently reliable because such issues were not raised at the trial court level. Similarly, a child abuse victim’s statement attributing fault to a household member is a recognized exception to this general rule because it is “relevant to the prevention of recurrence of injury.” State v. Butler, 53 Wn. App. 214, 221 (1989).

  j) **Requesting Discovery from Defense Counsel**

  Prosecutors should request discovery from the defense. In order to avoid inadvertent failures to make such requests, the request should be contained in a form letter to the defense at the time the prosecution's discovery is forwarded to the defense. If the defense does not provide discovery in compliance with CrR 4.7(b) or CrRLJ 4.7(b), the prosecutor may file a Motion to Compel Discovery.

  The defense will occasionally attempt to avoid producing discovery on the grounds of "work product." The courts, however, have narrowly construed the work product privilege. See, e.g., State v. Hutchinson, 135 Wn.2d 863, 876-77, 959 P.2d 1061
67

(1998) (Defendant who asserts a diminished capacity or insanity defense waives the work product privilege as to all defense obtained evaluations and must submit to a State examination); State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997) (same); State v. Yates, 111 Wn.2d 793, 765 P.2d 291 (1988) (Defense notes of witness interviews may be discoverable if the author of the notes is called to impeach the witness. The court, however, must conduct an in camera review of the notes prior to turning them over.); State v. Strandy, 49 Wn. App. 537, 540, 745 P.2d 43 (1987), review denied, 109 Wn.2d 1027 (1988) (Defense counsel’s taped interview of a prosecution witness was not work product).

A defendant’s refusal to comply with lawful discovery orders or a delay in making required disclosures may result in a continuance beyond the speedy trial period, in a contempt finding with incarceration, or in the suppression of evidence. State v. Hutchinson, 135 Wn.2d 863, 881-82, 959 P.2d 1061(1998) (Capital defendant’s mental expert’s testimony was properly suppressed after the defendant repeatedly refused to participate in a State examination and no other sanction would have been effective); State v. Nelson, 14 Wn. App. 658, 545 P.2d 1061 (1975) (Defendants found in contempt and incarcerated for refusing to provide discovery); State v. Grant, 10 Wn. App. 468, 519 P.2d 261 (1974). Speedy trial is appropriately tolled while the court waits for the defendant to purge the contempt finding. See State v. Miller, 74 Wn. App. 334, 873 P.2d 1197 (1994) (Tolling of defendant’s court rule speedy trial rights during 14 month incarceration under order of civil contempt for her failure to provide handwriting exemplar to prosecution was proper). See generally State v. Yates, 111 Wn.2d 793, 798-99, 765 P.2d 291 (1988).

2. Pretrial Preparation

**Can the prosecution be done without the victim? The Modern Confrontation Clause and D.V. Prosecution after *Michigan v. Bryant*:**

Victims in DV cases are frequently reluctant to testify and some may not appear at all. There are many legitimate reasons for that reluctance or non-appearance: fear of retaliation by the defendant, prior bad experiences with the legal system, the defendant’s response (repeat violence escalates over time), and dependence on the defendant through children/family/culture/faith/financial reasons.

Over the past several years, prosecutors’ ability to proceed in DV cases without the victim (known as “victimless” or “evidence based” prosecutions) has changed significantly. What was once a question of whether a statement qualified as an “excited utterance” is now a question in whether the statement was made in response to police questioning, what was the primary purpose of the police questioning, and whether the totality of the circumstances indicated an ongoing emergency. Though the number of victimless cases has narrowed, the courts have recently begun to expand this area and have provided new tools, that when properly understood, allow for victimless prosecutions. The law in this area begins with the Sixth Amendment to the United States Constitution:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(Emphasis added; Confrontation Clause in bold).

Every case should be evaluated for whether it can be proved and how it can be proved if:

1. The victim does not or refuses to appear for trial
2. The victim recants
3. The victim minimizes or says she/he does not remember
4. The victim is cooperative

Unlike a standard case, a DV case is not necessarily better if the victim is cooperative. Often the most compelling and successful cases in front of a jury involve a recanting/minimizing victim or a completely uncooperative one.

1. The victim does not or refuses to appear for trial

It is common in DV cases for victim’s to be uncooperative and refuse to appear for trial. Review the material witness warrant policy carefully. Generally, it is unlikely that a material witness warrant would be appropriate.

As such, you need to be familiar with the Confrontation clause and what evidence you can present without the victim.

Michigan v. Bryant, 131 S.Ct. 1143 (2011) is the currently controlling case on when the confrontation clause applies and what types of statements are considered non-testimonial. The Bryant case specifics that:

When, as in Davis, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation Clause]. But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.
Chapter Seven: Discovery and Pretrial Preparation

Bryant, 131 S.Ct. at 1155 (citing Davis v. Washington, 547 U.S. 812, 823, n. 2, 126 S.Ct. 2266 (2006)). Thus, the confrontation clause only applies to those statements made during police interrogation where the "primary purpose" is to create an out-of-court substitute for trial testimony. Id.

Typically, statements are non-testimonial and admissible if they (a) pass the primary purpose test, and (b) fall into a hearsay exception under ER 803. (ER 804 is a separate subject).

Examples of common types of statements that are often admissible regardless of whether you can secure the victim’s presence:

- 911 Recordings
- Fire/EMT run reports
- Medical Records
- Statements to witnesses at the scene
- Statements to family or friends (particularly calls for help)
- Statements at the scene to Officers

**Tampering and Forfeiture by Wrongdoing:**

Be aware, that tampering with the victim is an extremely common occurrence in DV cases. If tampering occurs and can be proven (look at WPIC 115.81 and RCW 9A72.120), amend the information to add tampering charges and consider whether or not you may be able to offer all of the victim’s statements under ER 804(b)(6) Forfeiture by Wrongdoing and State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2008). This rule allows you to admit all the victim’s statements against the defendant regardless of the confrontation clause or other potential hearsay issues.

**ID of your victim and defendant, their relationship, and VNCOs:**

You will likely find yourself having to prove the identification of the victim and/or the defendant. This often involves proving that the victim is indeed the protected person in an NCO and that the defendant is indeed restrained by the NCO. However, it can arise in other circumstances. The photos and identifying information in driver’s licenses, State identification cards, and booking photos can all be used for these purposes. Certified copies of these records are all admissible as a certified copy of a public record without testimony of a records custodian under RCW 5.44.040, ER 902. See State v. Mares, 160 Wn. App. 558, 248 P.3d 140 (2011) (Driver’s Licenses) and for booking photos see State v. Iverson, 126 Wn. App. 329, 339-40, 108 P.3d 799 (2005); State v. Hines, 87 Wn. App. 98, 100-01, 941 P.2d 9 (1997).

Consider how would prove the DV relationship if the victim will not testify. It may be possible to establish the relationship using certified marriage certificates, certified birth certificates of children in common, Facebook or other social media records, prior jail calls, prior DV convictions where the relationship may have been
admitted or proven, through a relative (parents of victims can often be helpful), or other means.

2. The victim recants

DV victims often recant and claim that the charged incident never happened or was a misunderstanding. This does not necessarily make your case worse. The question is: What substantive evidence do you have to prove the case? Statements of the victim that are only offered for impeachment are not substantive evidence. However, victims often provide a statement to the police or petitioned for a protection order and that statement can be offered as substantive evidence as a Smith Affidavit under ER 801(d)(1) and State v. Smith, 97 Wn.2d 856, 861, 651 P.2d 207 (1982). You should also carefully consider what evidence you have from independent sources (other than the victim) and what hearsay exceptions may apply to other statements of the victim.

3. The victim minimizes or says she/he does not remember

Minimization can often be dealt with in the same manner as recantation; careful direct examination and Smith Affidavits. However, there can be some differences. Victims will often claim that they cannot remember what happened due to being drunk or high. If such a situation were to arise, be prepared to offer prior statements of the victim as a Recorded Recollection.

ER 803(a)(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Remember that you do not have to lay the foundation for a recorded recollection through the victim. It can be done through the officer who took the statement, or another witness.

4. The victim is cooperative

While it may appear that a cooperative victim case could be easily proven with the victim’s testimony, a victim’s continued cooperation can never be relied on. Additionally, cooperative victim cases can often do not present well to a jury. Juries often dislike cooperative victims and are highly suspicious of any victim who appears “out to get” a defendant. These issues should be carefully considered in any case with a cooperative victim.

a) The scope of the Confrontation Clause
• The clause applies to witnesses. When is someone a witness? When they are "bearing testimony" against the accused. Testimony is "a solemn declaration or affirmation made with the purpose of establishing or proving some fact." *Crawford v. Washington*, 124 S. Ct. 1354, 1364; 158 L. Ed. 2d 177 (2004). If a declarant is doing "precisely *what a witness does* on direct examination" then he is a witness. *Davis v. Washington*, 126 S. Ct. 2266, 2278 (2006); 165 L. Ed. 2d 2241 (italics in original; discussing Hammon).

• Only some hearsay is prohibited by the Confrontation Clause; most hearsay exceptions deal with non-testimonial statements because they "rest on the belief that certain statements are...made for a purpose other than prosecution..."

• The Confrontation Clause is implicated by testimonial statements, i.e. those that look and feel like testimony.

• Not all interrogations by law enforcement produce testimonial statements; it is necessary to determine the "primary purpose" of the interrogation.

• "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."...because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not [apply]...This logic is not unlike that justifying the exited utterance exception in hearsay law."

• When the "primary purpose" of the interrogation is to respond to an ongoing emergency, the statements are outside the Confrontation Clause (because the purpose is not to create a record for trial).

  **b) The Test**

• Whether the "primary purpose" of an interrogation is to enable police (or fire or medics) to meet an ongoing emergency is an objective inquiry.

• The totality of the circumstances and the statements and actions of the participants are objectively evaluated. The subjective (actual) purpose of the people involved is not part of the inquiry. The court will use a reasonable person standard to evaluate the statement(s).

• The contents of both the answers and the questions during the interrogation.

• The "emergency" is considered, not in hindsight, but as it would have appeared to a reasonable person at the time.
Chapter Seven: Discovery and Pretrial Preparation

- A situation can evolve from emergency to non-emergency; statement then goes from nontestimonial to testimonial. See *State v. Reed*, 168 Wn. App. 553, 278 P.3d 203 (Div. 1, 2012) (Inquiry guided by four relevant factors: (1) timing of statements relative to when the described events occurred, (2) nature of what was asked/answered and purpose, (3) threat of harm posed by situation as judged by “reasonable listener”), and (4) evaluate level of formality of the interrogation.

- Private dispute vs. more general public threat? Whether the threat is limited to the victim or extends to others. Targeted crime vs. random crime. D.V. has "narrower zone of potential victims" *Bryant*, at 1158.

- Was a weapon used? Fists / Firearm / knife? Does the weapon suggest a broader threat to the public?

- The severity of a victim’s injury (severe injuries suggest questioning needed to resolve emergency; minor injuries, no such need; seriously injured "reasonable" person is not "bearing testimony;" severity of injury might also suggested greater public threat)

- Whether location of suspect is known. If so, perhaps less need to question.

- The extent to which "the elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past."

1. The existence of an ongoing emergency alone does not determine the primary purpose of the interrogation; the court must assess the informality of the encounter between the police and the victim.

- "...the situation was fluid and somewhat confused..." vs. stationhouse interview or *Hammon* interview.

- Although the Confrontation Clause may not bar a hearsay statement, a Due Process violation could arise when wholly unreliable evidence is admitted contrary to hearsay rules.

  **c) 911 Tapes**

  The key in many victimless prosecutions is the admissibility of the 911 tape. If admissible pursuant to *Davis v. Washington*, *supra* discussion, 911 tapes will often accurately reflect the victim’s fear and demeanor at the time of the incident and can often be used to persuade a recanting victim that the incident was more serious than the victim has now come to believe. 911 tapes should be promptly ordered and reviewed because many jurisdictions destroy the tapes after 90 days.

  A 911 recording is admissible at trial as a business record under *RCW 5.45.020* if “the custodian or other qualified witness testifies to its identity and the mode of its
preparation, and if it was made in the regular course of business, at or near the time of the . . . event, and if, in the opinion of the court, the sources of the information, method and time of preparation were such as to justify its admission.” See State v. Ross, 42 Wn. App. 806, 810 (1986). The contents of the tape may also be admissible under ER 803(a)(2) as an excited utterance or ER 803(a)(1) as a present sense impression.

d) Statements to those other than law enforcement: friends, family, good Samaritans, and medical records.

Victimless prosecutions can also be presented by independent evidence. Although a victim's statements to law enforcement may not be admissible, in full or in part, other statements may be admissible. A victim may call friends or family before reporting to law enforcement, a victim may flee a scene and tell a neighbor what happened, or a victim may disclose what occurred in medical records. Each instance provides important evidence for a prosecutor to put on a victimless case.

e) Forfeiture by Wrongdoing

The confrontation clause of the Sixth Amendment to the United States Constitution protects an accused person’s right to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266 (2006). However, the right of confrontation is subject to forfeiture. The doctrine of forfeiture by wrongdoing holds that a criminal defendant waives his Sixth Amendment confrontation rights if the defendant is responsible for the witness's absence at trial. State v. Mason, 160 Wn.2d 910, 924, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008). The doctrine stems from the principle that a defendant who has wrongfully procured the unavailability of a witness cannot profit from that wrongdoing by asserting the right to confront the witness:

“[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in Crawford: that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’ That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” Davis, 547 U.S. at 833, quoting Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

• Forfeiture motion should be conducted at pre-trial hearing in which rules of evidence do not apply and trial court may consider wide array of information, including hearsay, in making its ruling. See ER 104; Davis, 547 U.S. at 833.
• State needs to prove by clear, cogent, and convincing evidence that (1) defendant engaged in wrongdoing with the specific intent to prevent witness's testimony at trial, and (2) defendant's wrongdoing caused witness's absence at trial. See State v. Fallentine, 149 Wn. App. 614, 620, review denied 166 Wn.2d 1028, 215 P.3d 945 (2009) (Held testimonial statements under forfeiture doctrine are admissible only when evidence shows the wrongdoing was intended to prevent the testimony).

• Wrongdoing does not just mean threats or intimidation. Intent can be reasonably inferred from the totality of the defendant's actions. Do you have evidence that the defendant is manipulating the victim? (E.g. using emotional appeals, apologies, bribes, promises to change, or inducing guilt, etc.) Is the defendant repeatedly violating the pre-trial no-contact order? Is the defendant using his network of family/friends to pressure the victim?

• Court may also consider prior acts of DV within the relationship, as prior DV can be relevant to forfeiture inquiry. See State v. Dobbs, 167 Wn. App. 905, 914, review granted ___ Wn. 2d ___ (October 10, 2012), 276 P.3d 324 (2012) (Evidence showed that defendant engaged in repeated and persistent acts of violence against the victim that had escalated over time). The Dobbs Court relied on USSC decision in Giles v. California, 554 U.S. 353, 377, 128 S.Ct. 2678 (2008) (Court suggests that a DV relationship is highly relevant to forfeiture determination because “[a]cts of [DV] often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”)

• If the court finds that the defendant forfeited his confrontation rights, then the court should also find that the defendant has forfeited his right to hearsay objections regarding evidence presented under the doctrine. See Dobbs, 167 Wn. App. at 917-18, review granted, ___ Wn.2d ___ (Oct. 10, 2012), (Dobbs Court's rationale taken from Giles v. California, 554 U.S. at 365-67). A proposed amendment to ER 804 will exempt from the hearsay rule statements offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. This proposal was approved by the WSBA Board of Governors. It is expected that the Washington Supreme Court will publish the proposal for comment in 2013.

f) Jail Phone Calls

Jail calls have become important evidence in DV prosecutions. Many jurisdictions in Washington utilize a digital phone system that records all outgoing inmate calls from its institutions, with the exception of calls to defense lawyers. The calls have become a critical part of proving domestic violence cases and show what is well known among prosecutors and victim advocates: witness tampering is a significant problem in DV cases. A study of jail calls in DV cases in Washington State showed sophisticated efforts by defendants to undermine the DV prosecution:

A victim’s recantation intention was influenced by the perpetrator’s minimization of the abuse and appeals to her sympathy through descriptions of his suffering from mental and physical problems,
intolerable jail conditions, and life without her...Once the victim arrived at her decision to recant, the couple constructed the recantation plan by redefining the abuse event to protect the perpetrator, blaming the State for the couple’s separation, and exchanging specific instructions on what should be said or done.

Direct threats were rarely used to influence victims...While the threat of further violence may have been present in all couples, the detained perpetrators in our study used other sophisticated strategies to persuade their victim, namely, minimization.......The perpetrator’s use of sympathy appeals through descriptions of his suffering from mental and physical problems, intolerable jail conditions, and impending life without the victim and their children were highly successful in manipulating the victim’s emotional state shifting her from a place of maintaining her agency in moving forward with prosecution to resuming caretaking of the perpetrator. See Bonomi, A. E., et al., “Meet me at the hill where we used to park”: Interpersonal processes associated with victim recantation, Social Science & Medicine (2011), doi:10.1016/j.socscimed.2011.07.005

Making jail calls a key part of pretrial preparation will result in greater accountability for offenders and safety for victims.

**Jail Calls and Interpreters:**

With the proliferation of digital media and jail calls, the prospect of having written or recorded evidence in a foreign language increases. There are special evidentiary issues that must be considered when such evidence is being offered in court. The translation of a foreign language conversation is treated as expert opinion evidence at trial, unless there is a stipulation to its accuracy. The accuracy of a translation may become a contested question of fact for the jury to decide, with opposing expert testimony. Unlike the transcript of a conversation in English, which is normally used only as a listening aid, the transcript of a translated conversation is itself the substantive evidence. For this reason, questions may arise as to whether the recording of the conversation should be played for the jury at all. A good article that reviews these issues is Clifford S. Fishman, Recordings, Transcripts, and Translations As Evidence, 81 Wash. L. Rev. 473 (2006).

**g) Should an expert be used to explain domestic violence and victim behavior?**

Evidence Rule 702 permits experts to testify if such testimony would be helpful to the trier of fact. Evidence Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
Experts can be used to educate your jury. Prosecutors should evaluate their case to determine if a witness, including a detective or officer, can testify as an expert about the case and domestic violence. Sample questions for your expert are listed below:

- Name
- Educational background
- Occupation – how long, duties?
- Training – literature, hours
- How many victims of DV do you think you’ve counseled in your career?
- Can you explain what domestic violence is?
- Is domestic violence a common phenomenon in our culture? Statistics?
- Why might a victim of domestic violence stay in an abusive relationship?
- Do all victims of DV report it? Statistics?
- Why might a victim of domestic violence either delay reporting it or not report it at all?
- Why might victims of domestic violence be unwilling to cooperate with prosecuting their batterer?
- Is it common for victims of domestic violence to minimize any instances of abuse?
- Is it common for victims of domestic violence to think that the abuse is their own fault?
- Does domestic violence have an effect on children whose parents engage in domestic violence?


Take care not to ask your expert for opinions that encroach on the province of the jury. Do not ask your witness to assess the victim’s credibility, such as by asking if he or she believed the victim. See [ER 608(a)](https://www.law.cornell.edu/codes/text/er/608).
Chapter Eight: Witnesses

- Reasons Underlying Victim Recantation or Non-Cooperation
- Working with the Uncooperative, Recanting, or Hostile Victim or Witness
- Legal Implications of Recanting Victim
- Children as Witnesses
- Competency
- Expert Witnesses
- Battered Women’s Syndrome
- Crimes against Vulnerable Adults
- Working with Refugee/ Immigrant Communities
- Working with LGBTQ Communities
- Working with Military and Veteran DV Communities

a) Reasons why victims recant or do not cooperate

Recantation is formally defined as to take back or to withdraw a statement that has been made, to repudiate.\(^62\) In practice recantation takes many forms. Victims may recant by minimizing the domestic violence, by denying that it happened, saying the violence was her fault, or simply stop participating with prosecution.\(^63\) Victim recantation is a ubiquitous problem in domestic violence (DV) cases and occurs in as many as 80% of DV criminal cases.\(^64\) Recantation, minimization, and non-participation in prosecution impacts criminal conviction rates in DV misdemeanors and felonies. Washington State’s Administrative Office of the Courts assessed DV statewide from 1999-2010, and found conviction rates for DV decreased significantly over ten years beginning in 2004.\(^65\) This corresponds to the US. Supreme Court decision in a case from Washington state, Crawford v. Washington, 124 S.Ct. 1354 (United States, 2004) which limited prosecutor’s ability to pursue DV cases without the victim testifying.

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\(^63\) Although the victim is referred to as a woman and the batterer is referred to as a man, domestic violence takes many forms, including female batterers against their male partners as well as same-sex domestic violence. See Satoko Harada, Additional Barriers to Breaking the Silence: Issues to Consider When Representing A Victim of Same-Sex Domestic Violence, 41 U. BALT. L.F. 150 (2011).


Much judgment is placed on the “failure” of victims to follow through with the prosecution of their loved ones. There are a myriad of important reasons why a victim may recant, minimize, or not participate in prosecution.66 Victim recantation and non-participation in prosecution has been found to be associated with victims’ financial dependence on the offender; their psychological vulnerability; their perceptions of an unsympathetic criminal justice response and poor access to advocates; and their emotional attachment to the offender.67 Factors such as family, cultural and religious pressure to remain with their abuser, shame or embarrassment, fear of deportation, and feelings of guilt may prevent a victim from leaving the abuser and fully cooperating with law enforcement and the prosecution.68 Victims may recant or minimize the abuse to avoid further violence, poverty, living in a shelter, or homelessness.69 Other factors involve beliefs that the family must remain together, that children need to be raised by both parents, that the victim must remain faithful to the abusive spouse, or that it is the victim’s responsibility to make the relationship work.70

In addition to intimidation, victims of DV are reluctant to testify for many of the same reasons as other violent crime victims have. These include:

- A feeling of shame/guilt that their behavior caused the abuse
- Desire to put the whole incident behind them and try to forget that it occurred

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67 Id.


70 Nevada Domestic Violence Resource Model, The Urban Group, LLC (Fall, 2000).
• Denial, ambivalence, withdrawal, panic, anxiety and other emotional reactions which are a result of being a victim of severe trauma

These reasons are often heightened for victims of DV by the following realities:

• The defendant may be living with the victim, be familiar with her daily routine, and have on-going access to the victim.

• The victim’s past efforts to leave the offender, or to seek protection from the justice system, may have resulted in further violence. The victim has learned that the offender will follow through with threats of retaliation for the victim’s efforts to leave or to seek help from the justice system.

• The victim and defendant may have children together. The perpetrator may have continuing access to the victim through arrangements for child visitation and could be using the children to manipulate her.

• The victim and/or children may be dependent on the defendant for economic support. The possibility that criminal justice intervention may result in incarceration could also mean the loss of economic support.

• The court must be aware that a victim’s fear is not simply theoretical. In most cases, the incident before the court has followed a history of escalating violence. Thus, there is a real basis for the victim’s fears that she/he or the children will be harmed if the victim appears in court and testifies.

• The perpetrator may be maintaining coercive control over the victim through alternating displays of affection and threats or acts of violence if the victim testifies.

The victim may worry that she will be blamed for what happened if the focus shifts to her behaviors (mental health, substance abuse, etc.).

• The defendant may be dependent on the victim for economic support, thus increasing the likelihood of further acts of intimidation by the defendant.

• The victim’s community and family supports who have provided protection in the past from the abuse may be threatening to withdraw their support and protection if the victim testifies.

• The victim may believe that the intervention of the criminal justice system will not be effective in stopping the violence, or in protecting the victim and children. This belief may be a result of past experience where the system did indeed fail to prevent the violence, and/or it may be based on the perpetrator’s ability to convince the victim that “nothing will stop him.”
There are practical and relational problems for victims in cooperating with prosecution such as exposure to retaliation, escalating violence, forced separation, the financial hardship of an arrest. Victims face serious issues when having to talk to prosecutors about what happened or to give an official statement or to testify. The reality for many victims is that recantation often seems to be the safest and most prudent course of action.

Prosecutors and advocates know witness tampering and intimidation is a significant problem, and victims recant and/or refuse prosecution due to perpetrators’ manipulation and threats. As recognized by the U.S. Supreme Court, “This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial.” Minimization and recantation are often by-products of highly sophisticated manipulation by IPV offenders. A study of audiotaped telephone conversations between domestic violence offenders and their victims found a multi-stage process associated with victim recantation. The study showed how manipulation can produce recantation in domestic violence cases; researchers analyzed recorded telephone calls from jailed defendants to their victims, who ultimately agreed to recant their report of the crime. Research showed abuse that exists before arrest continues afterwards when offenders continue "to use abusive strategies... along with other sophisticated emotional manipulation (e.g. sympathy appeals) to erode victim’s agency and achieve their goal of getting out [the charge, jail].” Most of the victims eventually succumbed to the defendants’ appeals with their descriptions of their suffering in jail, and the prospect of their relationships ending.

b) Working with the Uncooperative, Recanting, or Hostile Victim or Witness

It is not necessarily bad for the case when a victim or witness is uncooperative, recants, or is “hostile”. A victim or witness is not defined by cooperation, but by their factual or equitable contribution to the case. Difficult witnesses are often the most

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77 Id.
meaningful to the case outcome. Although recantation can legally end some prosecutions, it can improve the equities and evidence in a DV case. Jurors are able to see recantation honestly and understand that it is a reasonable decision by a person in a bad situation that is often the result of the defendant’s past or current criminal behavior.

A victim may need to recant for rational reasons, but it does not mean she will do it well or wants to do it at all, or that it cannot be exposed on examination. In many ways a recantation limits the issues in a criminal prosecution and allows the prosecutor to focus on disproving the recantation. Many jurors take a logical approach: if the prosecutor shows the recantation is false, then the underlying charges must be true. Also, as a result of popular culture the recantation case meets many jurors’ expectations of domestic violence in ways a cooperative victim never would.

Recantation must prompt additional analysis and inquiries:

- What is the source of the lack of cooperation?
- When did this lack of cooperation start to happen?
- Where did lack of cooperation occur?
- How is it happening?
- Why is this happening?
- Does lack of cooperation end the case?
- Does lack of cooperation force case reduction?
- Does lack of cooperation improve the case?
- What does it mean? What could it mean?

Recantations should not be accepted at face value. There has been research finding that recantation is a byproduct of sophisticated actions and strategies of offenders (e.g. sympathy, appeals). As such, any time a recantation happens, prosecutors be on guard and should double his or her efforts to hold offenders accountable.

Many victims will testify once ordered to do so by the court. Many feel considerable relief at being able to tell the defendant that the decision to testify is out of their hands, as they have been ordered to do so by the court. This reinforces to the defendant that the court, not the victim, controls the proceedings, and that any attempt to manipulate or intimidate the victim in an effort to avoid criminal prosecution will be unavailing.

No matter the circumstance a prosecutor must adhere to the victim’s bill of rights: the Rights of Victims RCW 7.69.030 and in felony cases, RCW 7.69.030(12)

c) Legal Implications of a Recanting Victim

How to Prepare for Trial
• Have a thorough and objective understanding of your case in the context of the big picture.
• Prepare for or expect a recanting or hostile victim. Remember:
  o Do not be frustrated. Remember it can help more than it hurts.
  o Do not judge. Save it for the defendant.
  o Be objective and analytical.
  o Look hard for tampering and intimidation.
  o Determine how you can put conduct in context.
  o Support the victim. Recantation is a normal part of domestic violence.
• Prepare impeachment and refreshing recollection materials
• Prepare for use of ER 404(b) evidence
• Prepare to present the case to the jury within this context (step back from the incident itself and paint the picture of the broader context/circumstance)
• Research – know applicable case law and evidence rules. Evaluate case from all sides (prosecution, defense, and bench) to minimize surprises.
• Understand that cooperation is fluid. Sometimes it just depends on a person’s mood or perception of consequence to alter the degree and level of cooperation

A recanting or uncooperative victim/witness can be powerful evidence of guilt. When people are trying to hide things or prevent a jury or judge from finding out what really happened, their uncooperative actions and statements will often prove the crime.

**Trial Strategy & Considerations**

1. **Trial Brief.**
   • In your trial brief, notify the judge of the status of each witness.

2. **Manage Jury Expectations.**
   • *Voir dire* - talk about the issues related by your witness challenges to prospective jurors. Opening statements - vague, open-ended opening may be necessary. Be candid and talk about your witness challenged to the jury. Begin embracing your challenges and turn them into strengths.
   • Make the jury care for your witness or make them understand that victim testimony is not necessary to hold the defendant accountable. Confront the elephant in the room (i.e., unlikable victim, victim who is uncooperative, victim who still loves the defendant, etc.).

3. **Testimony.**
   • Let the victim or witness tell their story with **limited interruption** - they have to recant/minimize before you can impeach/confront.
   • Do not be afraid of silence
   • Use cross to prove your case (bias, demeanor, inconsistent statements, implausible accounts, inconsistent behavior). Prove your (equitable) (legal) case via cross.
• Impeach/confront with respect and earnestness. Rarely (if ever) ask the court for help or ask to treat the witness as "hostile." You have already lost if this is what you need to do.
• Demeanor: polite, persistent

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**Recanting Witness**

**Question?**

I don’t remember.

**Refresh Recollection – ER 612**
- writing itself is not evidence

**Memory Refreshed?**

Yes?

**Done.**

No?

**Impeach – ER 613**
- prior inconsistent statement
- not substantive evidence
- defense may request limiting JII

**Prior Inconsistent Statement – ER 801(d)(1)(i)**
- not hearsay
- substantive evidence
- no Confrontation Clause
- issue b/c declarant in court

**Issue: whether prior statement qualifies under rule?**

See State v. Smith, 97 Wn.2d 856 (1982) (includes sworn complaints given to police);
State v. Nelson, 74 Wn. App. 380 (Div. 1, 1994) (affidavit, signed under penalty of perjury, held to be sufficiently reliable to be admissible)

“If witness testifies about events in question but claims to have forgotten certain details or claims to have forgotten making certain out-of-court statements, impeachment by prior inconsistent statement is proper.”

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For more information on legal implications of recanting victims, including uses of ER 404(b), ER 803(a)(5), and ER 801(d)(1)(i), see Chapter Nine: Evidentiary Issues.

**An Unexcused Witness:**

The “unexcused absence of a subpoenaed witness is not good cause for a continuance...” State ex rel. Nugent v. Lewis, 93 Wn.2d 80, 84, 605 P.2d 1265 (1980). However, the Washington Supreme Court has granted a continuance when the prosecutor exercised due diligence in attempting to secure a co-participant’s attendance and there was no prejudice to the defendant in the delay. State v. Nitschke, 33 Wn. App. 521, 524-25, 655 P.2d 1204 (Div. 1, 1982). A trial court’s decision to not grant a continuance and to dismiss charges pursuant to CrR 8.3(b) and CrRLJ 8.3(b) will be reviewed under an abuse of discretion standard. See, e.g. City of Kent v. Sandler, 159 Wn. App. 836, 247 P.3d 454 (2011) (dismissal affirmed when subpoenaed trial witness twice failed to appear at scheduled time); City of Seattle v. Lewis, 159 Wn. App. 842, 247
P.3d 449 (2011) (affirming the denial of a motion to dismiss when subpoenaed witness
did not appear as directed). The witness must be available within a reasonable time,
though the “availability within reasonable time” condition is relaxed when the witness is
absent due to illness. See, e.g., State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (Div. 1,
1997) (Trial judge abused his discretion by dismissing case when key prosecution
witness became ill with the flu the day before trial and the prosecution did not know
when the witness would become available).

d) Material Witness Warrants

It is our goal as prosecutors to try to protect DV victims, keep them involved in
and informed about their cases, and restore some of their sense of control over their
own lives. Because issuance of material witness warrants for our victims has serious
equity concerns, will alienate victims and deprive them of any sense of control, and can
re-victimize them, there use is disfavored. Balanced against that concern is our duty
and responsibility to preserve public safety and offender accountability. A warrant may
be necessary when case facts or the history of the victim and defendant indicates that
the victim’s life or her children's lives are in serious danger. When warrants do issue all
efforts should be made to structure service to avoid jailing the victim if at all possible.

Prosecutors should have a policy on use of Material Witness Warrants. These
tools are controversial and some states have limited use of material witness warrants in
cases of DV or sexual assault. Prosecutors should only consider using the tool on
serious charges when there is no other option and there is are significant risk factors:

- suicidal or homicidal acts or threats or
- use or implied use of a deadly weapon or
- need to protect a child, e.g., child witnessed the violence, intervened, or
  has been threatened through words or acts or
- a defendant with a significant criminal history or
- stalking behavior or
- uniquely egregious conduct e.g., sadism, torture, lengthy imprisonment

• Have standards and process for MWW continued:
  – Written standards
  – Formal process
  – Seek out disagreement
  – Seek out alternatives
  – Do not compromise advocacy/witness coordinator
  – Have community advocate, legal services, and police dialogue on issue.

• Avoid/Prevent victim going into custody:
  – Direct warrant to court not jail
  – Timing
  – Online v. offline
  – Use experienced and sensitive law enforcement
  – If you don’t have experienced and sensitive law enforcement give clear
    instructions (do not go a long).
  – Utilize process for quashing warrant
  – Make provisions for children
– Consider alternatives to confinement such as EHD, GPS, and other tools.

- When warrant served, you must notify your jurisdiction’s public defender office to get witness/victim a lawyer.

See the Appendix for more information on material witness warrants in domestic violence cases.

**Extradition**: A material witness warrant is not a crime so it cannot be classified as a felony. Because it is not a crime we cannot enter these warrants on NCIC because that is a promise to extradite. Extradition is only for criminal charges. The only other recourse to secure the attendance of out-of-state material witnesses is the Uniform Act. However, the Uniform Act requires that you know where the witness is located and work with the prosecutor in that jurisdiction.

**Quashing the Material Witness Warrant**

- Key action is quashing the warrant—the point is not having the witness custody, but in having the witness appear in court.
- Utilize warrant so as not to put your witness/victim in custody (how do you think they will be on the stand?). Set up time for them to appear to quash, write conditions of release, use it to sustain relationship, not destroy it.
- Utilize their lawyer to help gain cooperation. Let witness know that your goal is to get them into court. It is the witness’ decision what they will say. Remember, the witness/victim is likely not cooperating because she/he feels that is the best way to stay safe.

**e) Children as Witnesses**

The possibility of a child’s testimony in a DV case raises several issues. On one hand, children are often present during the violence, so their testimony may have great probative value. On the other hand, the child may suffer trauma from testifying and may be subject to great stress from other family members for “taking sides.” See *Children and Domestic Violence: Challenges for Prosecutors*, (NCJ 185355; grant 99–WT–VX–0001) [https://www.ncjrs.gov/pdffiles1/jr000248b.pdf](https://www.ncjrs.gov/pdffiles1/jr000248b.pdf) for a good primer on children in DV cases.

**Children’s Statutory Rights:**

In addition to the statutory rights granted to all witnesses, children are given special statutory rights tailored to their needs. *RCW 7.69A.030* states that these special rights are not “substantive rights,” but that “there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section.”
Of particular significance in DV cases are a child’s right to a secure waiting area, the right to have an advocate or support person present, and the right to a measure of privacy with respect to names and addresses.

The Washington statute expressly authorizes the child’s advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child and to provide the court with information “to promote the child’s feelings of security and safety.” RCW 7.69A.030(2).

f) Competency

RCW 5.60.050(2) prohibits testimony by “[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.” Both children and adults are presumed competent until proved otherwise by a preponderance of the evidence. State v. Brousseau, 172 Wn. 2d 331, 341, 259 P. 3d 209 (2011).

The following factors are to be considered in evaluating competency:

• The child’s understanding of the obligation to speak the truth on the witness stand;
• The child’s mental capacity, at the time of the events in question, to receive an accurate impression of the events;
• Whether the child’s memory is sufficient to retain an independent recollection of the events;
• Whether the child has the capacity to express in words his or her memory of the events; and
• Whether the child has the capacity to understand simple questions about the events.

Each case must be judged on its own facts and on the trial court’s judgment as to the competency of the particular child involved.

• Procedure for determining competency

The party objecting to the child’s competency bears the burden of proof. The challenger is not entitled to a competency hearing as a matter of right, but must instead make a threshold showing of incompetency. State v. Brousseau, 172 Wn. 2d at 343-45. Age alone is insufficient to trigger a competency hearing. The child is not required to testify at a pretrial competency hearing.

• Relationship to hearsay rules

A child might be too overwhelmed by the courtroom setting to testify accurately, and yet the child’s out-of-court statements might seem reliable. Thus, as a general rule,

**NOTE:** *RCW 9A.44.120* – the “Child Hearsay Statute” – was amended in 1995 to broaden its scope to include physical as well as sexual abuse of a child. The statute is not available for use when the child is testifying as a non-victim witness. The statute operates only in criminal proceedings. See *In re the Dependency of Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985). The constitutionality of the statute was upheld in *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984).

g) Expert Witnesses

*Evidence Rule 702* permits experts to testify if such testimony would be helpful to the trier of fact. *Evidence Rule 702* states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

. When an expert testifies, “testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” *ER 704*. However, this rule has a limitation in a criminal trial when expert testimony is introduced in a trial where the batterer is the defendant. Under no circumstances may an expert opine that, in the opinion of the expert, the defendant committed the act for which he or she is charged. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12, 19 (1987) (rape trauma syndrome). Particular care must be exercised in not admitting “criminal profile” evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426, 430 (1994) (drug sales case).

Experts can be used to educate your jury. Prosecutors should evaluate their case to determine if a witness, including a detective or officer, can testify as an expert about the case and DV. Sample questions for your expert are listed below:

- Name
- Educational background
- Occupation – how long, duties?
- Training – literature, hours
- How many victims of DV do you think you’ve counseled in your career?
- Can you explain what domestic violence is?
- Is domestic violence a common phenomenon in our culture? Statistics?
Chapter Eight: Witnesses

- Why might a victim of domestic violence stay in an abusive relationship?
- Do all victims of DV report it? Statistics?
- Why might a victim of domestic violence either delay reporting it or not report it at all?
- Why might victims of domestic violence be unwilling to cooperate with prosecuting their batterer?
- Is it common for victims of domestic violence to minimize any instances of abuse?
- Is it common for victims of domestic violence to think that the abuse is their own fault?
- Does domestic violence have an effect on children whose parents engage in domestic violence?

Experienced prosecutors conflict on whether or not experts should be called. Some prosecutors believe that experts should be called anytime you can call them while other prosecutors believe that experts should be used sparingly. See http://www.ndaa.org/pdf/the_voice_vol_1_no_4_2006.pdf. Take care not to ask your expert for opinions that encroach on the province of the jury. Do not ask your witness to assess the victim’s credibility, such as by asking if he or she believed the victim. See ER 608(a).

h) Battered Women’s Syndrome

The collection of specific characteristics and effects of abuse on battered women is known as the battered woman syndrome – it is sometimes also referred to as the battered person syndrome. The battered woman syndrome results in a victim’s decreased ability to respond effectively to the violence. Victims may appear traumatized, withdrawn, and non-responsive. They may suffer from lowered self-esteem and may have developed coping behaviors to increase their personal safety. They may minimize and deny the danger they have endured, and at times, may rely on alcohol or drugs to cope with the severity of the violence. Testimony addressing these characteristics may be of considerable assistance to the trier of fact.

When it is the abuser who is charged with assault or homicide, the courts have not been receptive to evidence of the battered woman syndrome. The evidence is not admissible to corroborate the victim’s allegation of abuse because the expert would simply be stating an opinion on the ultimate issue of the defendant’s guilt and would thus invade the province of the jury. State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) (rape trauma syndrome). In State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609, 612 (1996), the court upheld the admissibility of evidence of past acts of DV perpetrated by the defendant against the victim and expert testimony intended to explain the victim’s conduct. Specifically, the expert was permitted to give an opinion as to why the victim continued to see the defendant even after a “no-contact” order had been issued and why she minimized the extent of the violence in conversations with defense counsel. As the court stated, “[t]he jury was entitled to evaluate [the victim’s] credibility with full knowledge of the dynamics of a relationship marked by DV and the effect such a

f) Crimes against Vulnerable Adults

There are similar mandatory reporting requirements for crimes against vulnerable adults pursuant to *RCW 74.34.020*. Vulnerable adults include persons over the age of 59 who are unable to care for themselves, and adults of any age with a developmental disability. Like children, these people are vulnerable to abuse, neglect, financial exploitation or abandonment, and are likely unable to speak for themselves or assert their rights as victims of crime. Prosecutors should be vigilant if evidence of a crime against a vulnerable adult comes to light during a case.

Here is the link to the DSHS website for reporting abuse or neglect of a child or vulnerable adult: Report Abuse and Neglect | Washington State Department of Social and Health Services.

Practice Considerations:

When having conversations about DV, recognize that a slower pace is needed with this population due to their cognitive/sensory impairments. Vulnerable victims may need extra time to process questions. They may also need additional assistance to reach out to and engage in resources/supports. Many victims do not think of their partner as being abusive or controlling; therefore, avoid using terms like DV or abuse as some victims may not feel comfortable with these words or may not understand them. Rather, talk about stress of the situation and how it affects his/her life. Focus more on their stress and how they manage it rather than their cognitive problems or other limitations when bringing up DV experiences. 79

For more information and support on working with vulnerable adults:

- Senior Information and Assistance
- National Clearinghouse on Abuse in Later Life
- Violence Against Women With Disabilities
- Mincava
- Domestic Violence Disability
- Report Abuse and Neglect | Washington State Department of Social and Health Services

79 Adapted from the Domestic Violence and Child Maltreatment Coordinated Response Guideline.

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of deportation, fear of losing their children, and confusion or fear of law enforcement and the legal system.

a) **Cultural Differences:** Refugee/Immigrant women and their families face pressures of changing family roles and values in the U.S. due to the traditional role of women in many cultures. Refugee and immigrant battered women may not consider the violence a crime, may not report it to authorities, and may prefer to deal with the problem within the family. Moreover, recognize that DV is shame-laden in many cultures. Many groups have strong taboos against disclosing violence to outside individuals. In some cultures, there is no concept or understanding of partner abuse or domestic violence. It is important to communicate in terms that are meaningful to their culture. Community advocates and interpreters can be very helpful in how best to communicate.

b) **Service Access Barriers:** Refugee/Immigrant women often lack knowledge about or fear the legal system and available resources. They also encounter many difficulties in gaining information due limited access to information in their native languages and many have very limited literacy. The lack of bicultural services in institutions may also discourage a refugee/immigrant woman to report or follow through with DV supports and services.

c) **High Risk Status:** Many refugee/immigrant women and their families are at high risk for DV. They often are isolated and lack support network such as extended family members or friends. Refugee/immigrant women often are completely dependent on their spouses for economic support and any connections to their greater communities.

d) **Immigration Status:** Undocumented women who do not have permanent resident status may be reluctant to report DV to authorities or services providers. Recognize that they may not follow through on DV reports and court services due to fear and threat of deportation.

**Language and Interpretation:**

Language and access to appropriate interpretation has to be addressed when attempting to increase accessibility to services and systems in immigrant communities. It is important to acknowledge how difficult it is to talk about abuse and provide support. Communicate that, while they may feel ashamed, that you are there to support them and communicate that the abuse was not their fault. It is essential to have an interpreter:

a) When the victim asks for one.
b) If there is any doubt about communicating.
c) If you feel that there are problems in being understood or understanding what is being said.

It is important to know the prospective interpreter in order to assess their views and biases on a variety of topics. In the context of domestic violence, this is essential because of the very real possibility of collusion with the perpetrator or the community that may be opposed to prosecution. It is important not to expect or place the
interpreter in the role of cultural advisor, informant, assistant, broker or confidant. It is not appropriate to ask their opinion on the matter being discussed. An interpreter should be trained on domestic and sexual violence and there should be clear protocols and policies on accountability if there is any evidence of collusion.

Practice pointers when working with an interpreter:

b) Know the interpreter and make sure they have a good reputation working on sensitive cases.
c) Communication is between you and the client, not the interpreter.
d) Arrange seating in a way that allows you to talk to the victim, not the interpreter.
e) Use simple, clear language with short sentences.
f) Allow for pauses, which will enable the interpreter to interpret.
g) Always speak to the victim, not the interpreter.
h) Be patient.
i) Do not use relatives or children to interpret.

There may be times when circumstances do not allow you to find or have an interpreter. In these cases, the following can be helpful:

- Be polite.
- Pay attention.
- Be patient.
- Avoid speaking loudly and using slang language.
- Be careful when pantomiming as certain actions, especially around physical violence, can trigger reactions.
- Use simple language.
- Give instructions in the sequence you want them to follow, e.g. look at the form, answer the questions, and then take the form and so on.
- Avoid using negatives—“He has been stalking you, hasn’t he?” Replace with “Has John been stalking you?”
- Avoid asking leading questions; ask them to use their own words.
- Record things as they are said.

**U-Visa and other VAWA remedies:**

In 2000, the Victims of Trafficking and Violence Protection Act created the U-Visa to provide much needed protection to immigrant victims and to promote immigrant victims’ cooperation with law enforcement. Many immigrant victims were reluctant to cooperate with law enforcement out of fear of deportation. Now, U-Visas are available to victims of domestic violence who are willing to participate in the investigation or prosecution of the case. U-Visas provide a variety of benefits to victims including: (1) “nonimmigrant” status for four years; (2) eligibility for green card after three years; (3) protection from deportation; and (4) employment authorization.
Chapter Eight: Witnesses


For training materials on U-Visa see the National Immigrant Women’s Advocacy Project.

h) Working with LGBTQ Communities

Most experts agree DV in lesbian, gay, bisexual, transgender, and queer (LGBTQ) relationships occur with the same frequency and severity as in heterosexual relationships. However, DV in the LGBTQ community contains unique factors and characteristics that often relate to the anti-LGBTQ bias within society. Under the 2013 reauthorization of the federal Violence against Women Act (VAWA), the definition of Domestic Violence was amended to explicitly include “intimate partners” as well as spouses. It also added civil rights provisions that prohibit discrimination based on a person’s sexual orientation or gender identity. Washington State’s DV laws do not distinguish between heterosexual and LGBTQ relationships and provide equal protection to LGBTQ DV victims. Working and Communicating with LGBTQ DV Victims:

  a) Do not tolerate derogatory remarks made about a party’s sexual orientation or gender identity by any staff, court personnel, or witnesses
  b) Do not force a victim to “out” himself or herself in the case;
  c) Do not assume that LGBTQ DV is “mutual combat”
  d) Use the same terms to describe the relationship that the victim uses, such as spouse or partner;
  e) Ask transgender victims what pronouns to use that conform to the victim’s gender identity;

For more info on working with LGBTQ communities surviving abuse, visit the Northwest Network.

i) Working with Military and Veteran DV Communities

The media portrays service members returning from war zone deployments as aggressive and violent; however, most do not return from deployments to become abusive and violent towards their family members. In relationships where abuse and violence were present before deployment, abuse and violence may worsen upon their return home. In other situations abuse and violence may co-occur with psychiatric and/or medical conditions secondary to military experiences. When DV is present,

80 The sections on working with LGBTQ communities, military, and veterans are taken from the King County Domestic Violence and Child Maltreatment Coordinated Response Guideline (2015).
82 See King County Maltreatment Guideline (2015).
victims may be both fearful of service members or veterans while also assuming responsibility for his/her care if psychiatric or medical conditions exist. In many ways, military DV perpetrators and DV victims have many commonalities with the non-military community; although, some unique differences may exist including:

a) The concentration of young men, ages ranging from 18 – 29 years, in the military is high, which is also within the age range for the highest risk of DV;
b) Frequent moves and deployments, coupled with separation from family and friends further isolates DV victims from their support systems:
c) Fear about loss of rank or a career, and thus loss of financial support and benefits for the family is a barrier to reporting DV in the military;
d) Many aspects of military life are stressful for military-families, with combat deployment as being one of the most stressful;
e) Returning home from a combat deployment involves a period of adjustment. Most service members do not return home with psychiatric or medical problems, however, they may still experience problems with sleeping and possibly nightmares. They may startle easily with loud or unexpected noises, and may become easily irritated with non-life-threatening stress invoking situations; and
f) Some couples may experience an increase in conflict as they reestablish roles and routines within their relationship and family. These conflicts do not usually become physically violent or life threatening.
a) Introduction

Prosecutors in DV cases must become well versed in the evidentiary rules, including the use of medical testimony, forensic testimony, use of non-victim witnesses, exceptions to the hearsay rule, and laying the foundation for the introduction of a host of documents. They must become well versed with strategies to deal with strangulation, victimless prosecution, or victim recantation. Prosecutors should also put a high priority into the briefing and admissibility of prior acts of DV and chow to bring prior acts of DV before the court when charging, making bail recommendations, prosecuting, and sentencing DV-related crimes.

b) Evidence Rule 404(b): Other Crimes, Wrongs, or Acts

Issues concerning the admissibility of other acts of misconduct perpetrated by the defendant against the victim frequently arise in DV cases. Such evidence is not admissible to show that the defendant had the propensity to commit acts of violence against the victim. It may, however, be admissible for other purposes such as credibility of the victim, res gestae, rebut recantation or minimization (as above), showing absence of accident, intent, to show the victim’s “reasonable fear,” or motive.

When deciding whether to admit ER 404(b) evidence, “the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.” State v. Kilgore, 147 Wn.2d 288, 295, 291-93, 53 P.3d 974(2002). This balancing must occur on the record. State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245
Chapter Nine: Evidentiary Issues


The court is not required to hold an evidentiary hearing to determine whether the proponent of the testimony can establish the existence of the prior bad act by a preponderance of the evidence, even where prior acts are specifically challenged, when the finding can be made on the offer of proof. State v. Kilgore, 147 Wn.2d at 295; State v. Barragan, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000).

**Domestic Violence Victim's Credibility**

In State v. Grant, 83 Wn. App. 98, 107-09, 920 P.2d 609 (Div. 1, 1996), evidence of the defendant’s prior assaults was admissible under ER 404(b) because it was relevant and necessary to assess a DV victim’s credibility as a witness and accordingly to prove the crime of assault actually occurred. See State v. Magers, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008) (Court adopted rationale in Grant holding prior acts of DV, involving the same defendant and victim, are admissible in order to assist the jury in judging the credibility of a recanting victim). Evidence of prior assaults against a DV victim showed why she minimized and recanted the degree of violence subsequent to charged assault. However, admissibility of prior DV has recently been expanded to include cases of any inconsistency requiring additional context in assessing victim credibility. See State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270 (Div. 1, 2011)(Full knowledge of the dynamics of the relationship requires context of all inconsistencies, even absent a recantation). Typically a Baker analysis becomes appropriate when defense attacks the credibility of the victim thereby opening the door, e.g. victim delays reporting of assault or victim consents to contact despite no-contact order protecting the victim.

See also State v. Gunderson, 337 P.3d 1090 (2014). Prior incidents of domestic violence were improperly admitted under ER 404(b) in a prosecution for a felony violation of a court order, as the victim did not recant or contradict any of her prior statements when she testified in court. "[T]he mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness’s testimony is unreliable." The probative value of the evidence was outweighed by its prejudicial effect. The majority advises, however, that "[t]his opinion should not be read as confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness. We are inclined to agree with the dissent that it may be helpful to explain the dynamics of domestic violence when offered in conjunction with expert testimony to assist the jury in evaluating such evidence."

**To Explain Delay in Reporting**

In State v. Wilson, 60 Wn. App. 887, 808 P.2d 754, review denied, 117 Wn.2d 1010 (1991), evidence of defendant’s prior assaults on the victim was admissible in a statutory rape and indecent liberties trial to establish the victim’s fear of the defendant and the reason for the delay in reporting the crime. Again, putting conduct in context.
Absence of Mistake or Accident

When the defendant concedes committing the act but claims accident or mistake, the State may rebut with evidence of past misconduct (akin to rebutting a material assertion). This principle is particularly appropriate in child-abuse cases and in recanting DV cases. See State v. Toennis, 52 Wn. App. 176, 758 P.2d 539 (1988). Defendant claimed the child's injuries were from falls, not beatings. This concept has been broadly applied, but make sure there is evidence of mistake or accident because outright denial does not invoke this provision. See also State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986), the court found that evidence of defendant pushing the victim one month earlier was admissible to show that she had not accidentally fallen down stairs, as claimed by defendant in his assault trial.

Self-Defense

Self-defense allows admission of a defendant's first person knowledge of bad acts by victim as they go to defendant's subjective belief of need for force. At the same time, this material assertion, defendant's fear, is subject to rebuttal by defendant’s past conduct involving victim. Therefore, if there is a claim of self-defense, either the victim stating that she caused the act, or the defendant making a similar claim, the knowledge of the past becomes critical.

Harassment and Reasonable Fear

If you have some concern over admission of bad acts, remember that can be remedied by a charge of harassment, or by simply charging the acts themselves (if joinder issue can be overcome). In cases of harassment, the courts have held that evidence of prior bad acts by a defendant who threatens a victim is admissible to prove that victim’s reasonable fear. State v. Ragin, 94 Wash.App. 407 (1999). The court in Ragin held the jury was entitled to know what (the victim) knew at the time Ragin threatened him to decide whether a reasonable person knowing what (the victim) knew would believe Ragin could carry out the threats. Again putting conduct in context, the State was allowed to use the frightening stories Ragin revealed to Dahl to prove its case. Further, evidence of prior bad acts may be admissible in a harassment prosecution to prove that the victim’s fear was reasonable. State v. Barragan, 102 Wash.App. 754, 9 P.3d 942 (2000). In State v. Binkin, 79 Wn. App. 284, 290, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996), the defendant was charged with harassment for threatening to kill his wife over the phone. Defendant had previously threatened to kill her unborn child. The court held that "evidence of the prior threat was probative of and necessary to prove the victim's state of mind in order to establish that her fear that he would carry out the threat was reasonable."

Motive

Although motive is not generally an element of a crime, evidence of past misconduct is admissible to show motive, especially when the defendant's identity as the perpetrator of the crime is at issue. State v. Gaines, 144 Wash. 446, 453, 258 P.2d 508, cert. denied, 277 U.S. 81 (1927). For example, evidence regarding the volatility of the
defendant's relationship with the victim was admissible to prove that the defendant had a motive to kill the victim and therefore was likely the guilty party. *State v. Terranova*, 105 Wn.2d 632, 716 P.2d 295 (1986).

**Res Gestae**

Evidence concerning defendant’s conduct that immediately precedes or follows the charged crime can be introduced. Res gestae evidence is used "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff’d, 96 Wn.2d 591 (1981). Res gestae is relevant in self-defense cases to show hostility towards other individuals immediately preceding the act charged. *State v. Thompson*, 47 Wn. App. 1 (1987), see also *State v. Powell*, 126 Wn. 2d 244 (1995) (allowing evidence of defendant’s prior assaults and threats against murder victim to complete the context of the murder – as “res gestae”). The probative value of the res gestae evidence increases when the prior incidents are proximate in time. *State v. Brunn*, 149 Wash. 522, 271 P.2d 330 (1928). Res gestae evidence of defendant’s actions towards witnesses and others after the crime is similarly probative of the defendant’s mental state at the time of the charged crime. In *State v. McGhee*, 57 Wn. App. 457 (1990). This is usually not a focus in DV cases in which we look further back than the day of the incident, but this is an important concept to combat suspect legal analysis by defense.

**Proving Elements of the Charged Crime**

Evidence of past misconduct is clearly admissible to prove a disputed element of the charged crime (ex: two priors on FVNCO and prior conviction prong of felony harassment). An issue sometimes arises, however, as to whether, given the nature of the defense, an element of the charged crime is actually in dispute. Even if it is unclear if the defendant will dispute an element of the crime, it is proper for the State to present evidence of that element in its case-in-chief. Note: do not stipulate to admission of the priors, which diminishes importance in the eyes of the jury.

**Opens the Door**

When the defendant raises the issue of his past conduct, the state may question the defendant about this conduct on cross-examination and may introduce extrinsic evidence of this past conduct in rebuttal. This allows the State to "complete the story" about the matter partially raised by the defense. See generally *State v. Bennett*, 42 Wn. App. 125, 708 P.2d 1232 (1985); *State v. Beel*, 32 Wn. App. 437, 442-43, 648 P.2d 443 (1982); *State v. Griggs*, 33 Wn. App. 496, 656 P.2d 529 (1982); Washington Practice, *Evidence*, supra § 120, at 432. This can be a hard sell with many judges during trial. Some judges do not understand the concept while others are reluctant to create an appellate issue. The defense knows that—make sure to bring this up in pretrial.

c) **Evidence Rule 803(a)(5) Recorded Recollection**
ER 803(a)(5) is a hearsay exception that allows the following type of evidence to be admissible as substantive evidence: A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable to witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly is admissible as an exception to the hearsay rule. If admitted the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

In a DV case the ability to use a recorded recollection is an especially important skill in prosecuting a DV case with a recanting or minimizing victim. The recorded recollection provides the prosecution with additional substantive evidence in certain situations. It is common for recanting or hostile victims to respond to a question with the response, “I do not remember.” After exhausting the prosecutor’s ability to refresh the victim’s memory (see ER 612), the prosecutor might be able to lay the foundation for a recorded recollection. Even if the victim says that she does not remember if she gave an accurate statement at/near the time of the event, the foundational requirements can still be satisfied. See State v. Alvarado, 89 Wn. App. 543, 552-53, 949 P.2d 831 (Div. 1, 1998) (Court said foundation should be deemed sufficient “when sufficient indicia of reliability exists under a totality of circumstances test.”); State v. Derouin, 116 Wn. App. 38, 45-47, 64 P.3d 35 (Div. 1, 2003) (Alvarado test used in DV prosecution with a recanting victim).

d) **Smith Affidavits (Prior Inconsistent Statement – ER 801(d)(1)(i))**

In State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982), the court held that a witness’ sworn statements to investigating officers as a prior inconsistent statement is admissible as substantive evidence pursuant to ER 801(d)(1)(i) if there is sufficient evidence of reliability. In a later case, the Washington Court of Appeals held that the reasoning of the decision in Smith applies to un-sworn statements certified under penalty of perjury as well as affidavits. Admissibility requires the following:

- The victim must testify and be subject to cross-examination;
  - Note: A Smith Affidavit may not be allowed as a witness substitute. The witness must recant his or her prior statement before the Smith Affidavit may be used. In other words, the attendance of the victim at trial is still needed.
- The statement must be voluntarily written by the victim or by another in the victim’s own words;
- The statement must be sworn under oath with penalty of perjury; and
- The statement must be taken as part of a standard procedure in one of four legally permissible methods for determining the existence of probable cause (i.e. it resulted in the filing of an information, a complaint before a magistrate, a grand jury indictment or an inquest proceeding).
  - Note: This means that the Smith rule does not extend to all affidavits and
certified statements. Only those taken before a charging decision is made, and used in making the probable cause determination, are technically *Smith* Affidavits. Consequently, not only the indicia of reliability, but also the timing of the statement, are key.

In order to lay a foundation at trial, the officer must be able to testify about the date, time, place and circumstances of the statement, whether the victim understood the perjury language or read it, and that she was not coerced into writing the statement. While a declaration that complies with RCW 9A.72.085, should be sufficient, some courts demand a notarized statement.

Many police departments are now moving to oral or recorded *Smith* affidavits, in which the victim provides a statement through an audio or video recording. The admissibility requirements outlined above still apply. However, instead of a written statement, victims must provide an oral statement that they understand that their statement is sworn, under oath, and subject to the penalty of perjury. Courts have not addressed whether or not oral *Smith* affidavits are sufficient.

If the prosecution is unable to satisfy all of the criteria for admission of a *Smith* affidavit, the prior inconsistent statement can be used for impeachment alone (not substantive evidence) pursuant to ER 613(b). If the evidence is solely admissible under ER 613(b), the defendant is entitled, upon request, to a limiting instruction. See *State v. Thorne*, 43 Wn.2d 47, 53, 260 P.2d 331 (1953); *State v. Johnson*, 40 Wn. App. 371, 378, 699 P.2d 221 (1985). The victim may not, however, be called by the prosecution solely for the purpose of impeachment. See, e.g., *State v. Lavaris*, 106 Wn.2d 340, 345, 721 P.2d 515 (1986).

e) Statements for Medical Diagnosis or Treatment – 803(a)(4)

Under ER 803(a)(4), statements made for the purpose of, and reasonably “pertinent to,” medical diagnosis or treatment are not objectionable as hearsay. This exception is “firmly rooted.” *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046, 1069 (2001) (internal citation omitted). Unlike the hearsay exception for state of mind (above), the rule is not limited to statements describing the declarant’s present symptoms. The instant rule is much broader and includes statements of past symptoms as well as statements of medical history.

The rule is based upon the assumption that a person making such a statement is motivated to be truthful by the hope for an accurate diagnosis and successful treatment. The rule is not limited to statements made to physicians. Statements made to hospital employees including social workers, EMT’s, and the like are included so long as the requirements of the rule are met. *In re Welfare of J.K.*, 49 Wn. App. 670, 675, 745 P.2d 1304, 1307 (1987), review denied, 110 Wn.2d 1009 (1988).

In a DV case, the rule has many potential applications. Prosecuting attorneys have succeeded in using this exception to introduce statements by victims of assault or sexual
f) Prior Consistent Statement by Witness – ER 801(d)(1)

A statement is not hearsay if it is consistent with the declarant’s testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. By its terms, the rule applies only when the declarant is present and has already testified as a witness. ER 801(d)(1).

Because the rule applies only to prior statements by a witness, the rule is unavailable to the prosecution in a DV case if the victim refuses altogether to testify. The rule, however, may be useful to the prosecution when the defense claims the victim/witness is biased or has fabricated the allegations against the defendant. Furthermore, the rule may be useful with a recanting victim, who gave a prior statement that qualifies under the rule.

g) Prior Testimony – ER 804(b)(1)

When a declarant is unavailable for trial, prior sworn testimony of the declarant may be admissible. ER 804(a) sets forth under what situations a declarant is unavailable. These include:

(1) A witness who has been exempted from testifying on the grounds of privilege;
(2) A witness who persists in refusing to testify despite an order of the court;
(3) A witness who testifies to a lack of memory concerning the subject of the proposed testimony;
(4) A witness who is unable to be present because of “death or then existing physical or mental illness or infirmity;”
(5) A witness who is absent from the hearing and the proponent has been unable to prosecute his attendance by “process or other reasonable means.”

The proponent must establish that a “good faith” effort has been made to secure the presence of the witness. State v. Dictado, 102 Wn.2d 277, 287, 687 P.2d 172, 188 (1984), rev’d on other grounds, 244 F.3d 724 (9th Cir. 2001). The mere issuance of a subpoena is not enough. State v. Rivera, 51 Wn. App. 556, 560, 754 P.2d 701, 703 (1988). In State v. Hobson, 61 Wn. App 330, 338, 810 P.2d 70, review denied, 117 Wn.2d 1029 (1991), the court stated that under the facts of that case the State need not have moved for a material witness warrant for the now-absent witness in order to establish a “good faith” effort to secure his presence at trial.

Medical unavailability requires more than a showing of inconvenience to the witness. The medical condition must make appearance of the witness “relatively impossible.” State v. Young, 129 Wn. App. 468, 481, 119 P.3d 870 (2005).

ER 804(b)(1) states:
Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

**h) Public Records Exception**

RCW 5.44.040 creates a statutory exception to the hearsay rule for public records. In State v. Phillips, 94 Wn. App. 829, 836, 972 P.2d 932 (1999), the Court of Appeals affirmed a conviction for violation of a DV protection order. The trial court had admitted a return of service, which had been filed in the court file during the protection order proceeding to establish that the respondent/defendant had been served with a copy of the protection order and thus had knowledge of its existence. The Court of Appeals concluded that this was admissible.

In Phillips, the return of service was admitted to corroborate defendant’s admission and to establish independent proof of the corpus delicti. However, there is no reason to believe that the ruling is limited to this situation. It appears that, so long as the return of service had been filed in the court file in the protection order proceeding and otherwise meets the requirements of RCW 5.44.040 (no expertise or opinion), the return of service is admissible as substantive evidence in a subsequent criminal prosecution.

The confrontation clause is not an issue here if the certification simply attests to the authenticity of the attached document:

In sum, the Court considered any document prepared for use in a criminal proceeding to be testimonial. It observed one exception: “a clerk’s certificate authenticating an official record—or copy thereof—for use as evidence.” Id. Yet, the Court stressed that at common law, “a clerk's authority in that regard was narrowly circumscribed. He was permitted 'to certify to the correctness of a copy of a record kept in his office,' but had 'no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.' “ Id. at 2538–39). Thus, “[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against the defendant.” Id. at 2539, 75 So. 95. See State v. Jasper, 174 Wn.2d 96, 115-16, 271 P.3d 876 (2012) (Violation of Confrontation Clause because DOL representative prepared documents solely for purpose of prosecution).
i) Privileges

Washington has a wide variety of privileges, some of which are potentially applicable in a DV case. A partial catalog of privileges can be found in ER 501, by way of illustration, and not by way of limitation. The following are examples of privileges recognized in this state:

1. Spousal or Domestic Partner Privilege

Washington has two spousal privileges, both defined in RCW 5.60.060(1), spousal and domestic partner. Both privileges apply to spouses and to state registered domestic partners. The first protects confidential communications between husband and wife, forbidding one spouse or domestic partner from testifying about confidential communications without the consent of the other. The second prevents one spouse or domestic partner from testifying against the other spouse, regardless of whether the testimony relates to a confidential communication. Neither privilege applies to quasi-marriage or meretricious relationships. State v. Cohen, 19 Wn. App. 600, 608-9 576 P.2d 933, 938, review denied, 90 Wn.2d 122 (1978). An actual marriage license, however, may not actually be required. State v. Denton, 97 Wn. App. 267, 983 P. 2d 693 (1999).

- When may the spousal or domestic partnership privilege be asserted?

The confidential communication applies to communications made during the marriage and bars a former spouse from testifying concerning the content of such communications even after the marriage is terminated. State v. Thorne, 43 Wn.2d 47, 56, 260 P.2d 331, 336 (1953).

In contrast, the testimonial bar applies only during the pendency of a valid marriage or domestic partnership. Legal status is determinative. The privilege, if applicable at all, applies even after a petition for dissolution has been filed so long as the marriage has not yet been legally terminated. State v. Moxley, 6 Wn. App. 153, 491 P.2d 1326 (1971) (overruled on other grounds, State v. Thornton, 119 Wn.2d 578 (1992). The testimonial privileges do not prevent third party testimony about extrajudicial statements. See State v. Burden, 120 Wn. 2d 371, 841 P. 2d 758 (1992).

- The “personal violence” limitation


- **Comment on the exercise of spousal privilege**


2. **Domestic Violence Advocate**

“A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.” [*RCW 5.60.060(8)*].

For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of DV and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor’s office, or the child protective services section of the department of social and health services as defined in [*RCW 26.44.020*].

Also confidentiality provisions in [*RCW 70.123*] and the Violence Against Women Act (VAWA), 2005, provide protections against release of information by domestic violence programs.
a) Introduction

Domestic violence is embedded in the customs of people and social institutions and stopping it requires changing both behaviors and belief systems. Such change does not occur quickly. Perpetrators are more likely to change when they have several experiences of being held accountable. It is not arrest alone, or prosecution alone, or conviction alone, or counseling alone that brings about change. It is a combination of these experiences. DV is learned through a variety of experiences and stopping it requires a variety of experiences. Abusers tend to minimize, deny, or rationalize their behavior. Often they blame others for their abusive behavior. They tend not to be internally motivated to recognize their destructive patterns nor to seek change. They are more apt to change their abusive behavior when there is external motivation for change.

Too often, victims are told to just leave the situation, to stand up for themselves, to protect the children from the batterer, to go to marriage counseling, etc. This advice is given in the hope that somehow these actions will provide the consistent motivator the batterer needs to make changes. Expecting the victim to take this role not only puts her/him in further danger, but also ignores the reality that domestic violence victims are in severe crisis and may be unable to be consistent. Instead of expecting the victim to be the consistent motivator for the perpetrator, the community, through the criminal justice system, must play that role.
b) Ceremony

DV sentencing presents an opportunity to demonstrate our commitment to safety and fairness to a community that is closely watching. For case participants and other interested audience members, DV sentencing is a significant and symbolic event. Therefore instead of treating it as a bench proceeding centered on the Judge, focus more on how the presentation is best received by the others in attendance. Our manner of decorum and dress symbolize the prosecutor’s role similarly to an appearance before a jury. Our technical proficiency with the mechanics of sentencing reinforces this image. Long into the future, DV sentencing attendees may reflect on our sincere interest in their wellbeing even if we disagreed about outcomes on sentencing day.

A. Working the Room: Arrive a few minutes early to “work the room” – The Advocate may have already covered much of this so the sentencing DPA can safely follow the lead of the Advocate who already has an established rapport. However, there are a lot of people competing for advocacy services on sentencing afternoons and the DPA should remain prepared to work the room in the following manner for people not already engaged by the Advocate.

Greeting the Gathering: Offer a friendly greeting to the individuals or small groups who gather in the audience area.

1. Ask, “Which case are you here for?”
2. Ask how they are connected to the case:
   a. If they are the victim or with the victim:
      i. Introduce yourself, thank them for coming to the hearing, and explain that the Advocate will be there soon to assist.
      ii. Answer any quick questions about how the hearing will work.
      iii. Advocate will likely already have:
         (a) Asked if the victim will want to speak to the Judge, have something said by Advocate or DPA on victim’s behalf, or at least want to be identified in the courtroom to the Judge.
         (b) Explained that victims are supposed to address comments to the Judge rather than to the defendant. But this is a good time to just say that it is a “court rule” everyone has to follow.
   b. If the person in the audience is there for the defendant:
      i. Be sure that you have clearly identified yourself as the prosecutor.
      ii. Offer to point out the defense attorney for their case when that person arrives (very often arrives later than the DPA).
iii. Importantly in DV cases, the people who show up to support an offender may return in a future case as victims or otherwise important witnesses. Therefore this is an opportunity to impress them with how sincerely interested we always are in safety and fairness.

B. Prosecutor’s Presentation:
   1. Introduction: Defendant’s name, case number, attorneys present, victim (if present and wishing to speak or be identified), and Advocate.
   2. Prosecutor’s Recap and Sentence Recommendation: Acknowledge that you “appreciate that the Court has reviewed the written plea agreement and State’s recommendation which were filed with the Clerk” and then still go ahead and highlight the following details anyway:
      a. “Real Facts” – The “Real Facts” box is nearly always checked in our standard plea agreement. See details below in Mechanics section II.
      b. State the charges (and standard ranges for felonies),
      c. Ask defense counsel to confirm the Plea Agreement term stating that the Appendix B Criminal History and Offender Score are correct. If there is a disagreement, see scoring disagreement details in Mechanics section II below.
      d. State whether confinement or an alternative to confinement is recommended and why.
      e. Recite Community Custody or Probation conditions requested (or say when charges will not get any such supervision). See further details in Mechanics section II below on Domestic Violence Batterer’s Treatment (DVBT), Cognitive Behavior Therapy (CBT), and Moral Reconation Therapy (MRT).
   3. Presenting the Victim and/or Advocate: The DPA should always be closest to defense counsel with victim and/or Advocate on the DPA’s opposite side. When court acknowledges being ready to hear from victim, the Advocate will normally invite her forward around the opposite side of the courtroom from the defendant. For in-custody defendants, Jail staff will insist on this path.
      a. Ask the victim to please say her full name for the recording, and then invite her to tell the Judge what she wants to say about the case.
      b. Always have the tissue box within reach just in case the victim needs it.
      c. The victim may:
         i. Speak contemporarily,
         ii. Read a statement,
iii. Hand a statement forward for the court to read. Significantly, the consequences of handing a statement to the court is that the document will be filed and a copy must be furnished to defense. So victims who prefer not to let the defendant leave with such a document should be encouraged to speak, read, or have their Advocate address the court.

d. When the Advocate will address the court on the victim’s behalf, the Advocate may speak, read a statement, or hand something forward. The victim may or may not be in attendance and will sometimes prefer to remain in the audience area.

4. Prosecutor’s Position on NCO:
   a. If victim agrees and wants an NCO (or has not disagreed), then the sentencing DPA routinely requests an NCO.
   b. If victim disagrees, then acknowledge that the victim is asking the court not to impose the NCO, but normally still ask for the NCO with the understanding that the defendant is welcome to return to court later and request to recall the NCO after providing proof of completion of the conditions that the court orders him to work on. Interestingly, in instances where the court has no authority to impose Community Custody or Probation, this may present a different opportunity for the court to prompt the defendant to complete something such as substance abuse treatment before the court considers recalling the NCO.
   c. In select cases, the NCO is deliberately not part of the State’s sentencing recommendation. Common examples include the cases of drug addicted or mentally ill adult children who have pawned some of their parents’ personal property. These parents/crime victims are often very actively involved in the defendant’s continued care and engagement in community based mental health treatment or addiction recovery. Consequently, the State’s agreement not to seek an NCO may be a term of the negotiated plea.

5. Protecting the victim while supporting the plea agreement: The sentencing Judge may ask why charges were reduced. Remember at this point that our response will be closely listened to by a wider audience than just the Judge. This listening audience may include victims and defendants from the case at hand and also from other cases with participants waiting in the courtroom. Sometimes all we can say is that the case was negotiated by a different DPA. The downside to this non-explanation is that defense counsel may exploit this as an opportunity to criticize the victim’s credibility and reliability. This can be demoralizing to crime victims while at the same time emboldening to defendants. The following alternative
explanations acknowledge challenges to the case without conceding victim credibility faults:

a. “The DPA who filed this case reviewed all the investigation and exhibits provided such as 911 audio that justified the original charges as described in the Prosecutor’s Summary document at filing. However, the EPU negotiator had a further opportunity to review mitigating factors and thought this was a fair compromise - which the court accepted during the plea colloquy at an earlier hearing.”

b. “Defense counsel and the trial DPA conducted witness interviews and came away with different opinions about how a jury would receive the testimony. While we still disagree on some of these matters, we have agreed that this is a fair compromise under the circumstances including jury uncertainty.”

c. In some instances, “The crime victim still really loves the defendant and cares about what happens to him despite his criminal conduct at issue here today. Reaching this compromise was more just then enforcing a Material Witness Warrant against the crime victim who was already wronged by the defendant’s conduct.”

6. Others wishing to speak on the victim’s behalf: The court does not have to listen to others besides the attorneys, the Advocate, the victim and the defendant. However, some Judges will nonetheless listen to multiple other speakers. This may be at the request of the relative of a crime victim, such as a parent. The danger of requesting that the court hear from victim supporters (other than the Advocate) is that it encourages the court to then also entertain defendants’ supporters. If another person does speak, remind them to be brief and to address their comments to the Judge rather than to the defendant.

C. Defense attorney’s presentation – Usually the DPA does not have an opportunity to respond to the defense presentation. However, occasional objections may still be necessary. The following are some examples:

1. Correct an egregiously wrong statement about the plea agreement, such as the State’s recommendation or the inclusion of “real facts” in the plea agreement.

2. Object to blatant victim bashing.
   a. Defense Attorney: When the defense presentation devolves to name calling such as “liar”, the objection is worth making even if the court appears unlikely to take control because at least the crime victim hears the objection being made. In instances where the Judge’s attention has lapsed during a long defense statement, the objection queues the Judge to return attention to monitoring the rambling speaker.
Defendant’s Supporters: When permitted to speak, defendant family members or supporters are especially likely to say negative things about the victim. This seems to occur most frequently with private defense counsel who may actually be paid by the speaking family member. Regardless of whether the objection seems likely to be sustained, make sure to state it in a manner that the crime victim will understand as a challenge to what was being said. Because there is no jury present, a talking objection may be enough pushback against the speaker that they lose the initiative to continue on a blatant victim bash. The following example of a talking objection may be effective: “My objection, your Honor, is that the defendant’s mother’s personal opinion of the woman he is convicted of assaulting in this case does not help inform the Court about mitigation but instead is only offered to get back at an injured person who is not before the court for any crime.”

c. Defendant – A sustained objection during the defendant’s allocution risks appellate remand for re-sentencing with the defendant’s allocution unimpeded. However, defendant victim bashing during allocution usually just makes the defendant appear more deserving of punishment.

D. Judge orally sentences the defendant: While the court is making the oral ruling, take notes necessary to complete any blanks in the J & S and other forms left incomplete when the documents were earlier prepared at your desk. When the Judge finishes stating the sentence, questions from the DPA may still be necessary to:
   1. Complete the Judgment and sentence forms. See details in the Mechanics section II below; and
   2. Complete the terms of the NCO. See details in the Mechanics section below.

E. Thank the victim for attending – Before calling up the next case for sentencing, briefly step away from the bar and take a moment to personally acknowledge and thank the victim and those supporting her. This is a meaningful moment to victims in agreement with the prosecution. For victims who opposed the prosecution, a non-judgmental expression of continued concern for their safety and fair opportunity to participate can lay some of the groundwork for a better working relationship for future cases.

c) Felony Mechanics

A. Correcting known plea errors: When a known plea error is brought to our attention before sentencing, it can sometimes be cured at the beginning of the sentencing hearing. Please check with a supervisor
first. Examples include incorrect statements of maximum penalty and whether an offense qualifies for Community Custody. In these instances, begin the record by describing what the error was and then ask the court to permit a brief colloquy with the defendant to confirm their understanding of the correction and intention to still honor their plea. Memorialize that agreement by filling out a blank order form that offers the correction to the Judge along with a finding that, “with the correction, the defendant’s plea continues to be knowing, voluntary, and intelligent.” Then proceed with the sentencing.

B. “Real Facts” - The court can consider the facts in the Certification and the Prosecutor’s Summary and Bail Request documents while determining the sentence. The Real Facts Doctrine RCW 9.94A.530(2) states:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by a plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgement includes not objecting to information stated in the pre-sentence reports. Where defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

2) Scoring disagreements:

1. Sometimes a scoring disagreement was contemplated in the plea negotiations and deliberately left for the sentencing Judge to decide. However, this disagreement should have been identified in advance.

2. Occasionally defense raises a scoring disagreement for the first time during the sentencing.
   a. If it is an easy issue to argue and let the court decide at the moment and the victim is present, consider making the argument and getting a decision from the Court rather than protracting the case to an unnecessary additional sentencing hearing for the victim to attend.
   b. If it is something requiring more research, ask the court to set over the sentencing to a future Friday. Note that the sentencing DPA is responsible to keep the assignment and do the research. If the victim cannot return, ask the court to hear from the victim on the day she has appeared.

D. Defendant’s Allocution - Make sure it happens: In all cases, the defendant has the right, but no requirement, to address the court. All of the Judges know this. But occasionally during a crowded calendar, the court starts to
skip past defendant allocution and begins orally ruling on the sentence. This is a reversible error if not immediately corrected. The remedy for such an error, however, is remand for a new sentencing hearing rather than a reversal of the entire conviction. Nonetheless, if the court begins to articulate the sentence before offering the defendant the opportunity to allocate, go ahead and interrupt. One technique is to apologize for having missed hearing the defendant’s decision about speaking and ask on the record if that is something the defendant has waived.

E. Completing the J and S. forms:

a) Non-Felony J & S:
   (i) Probation (regardless of whether supervised)
       • Suspended for most defendants. Typical conditions are NCO, no law violations, substance abuse related conditions if relevant to the case, etc.
       • Deferred for defendants on less egregious crimes with no prior convictions including no deferred sentences. Same types of conditions as a suspended sentence.
   (ii) Without any probation period (or “straight time”) - When there is not going to be any sort of supervision, a sentence to complete confinement or confinement alternatives may be the agreed recommendation. This is most frequently done when:
       • Other concurrent felonies will already keep the defendant confined for a long period of time;
       • The plea agreement was for a sentence recommendation to ECCAP with participation in a CBT program; or
       • Credit for time served would be at or near 364 days already.

b) Non-DOSA Felony J & S is the same as other non-DV sentencing documents used throughout our office with the addition of NCO forms, Firearm Prohibition, and some possibility of DV related treatment (CBT, MRT, and DVBT are described in subsection 4 below) as conditions of:
   (i) First Time Offender Waivers for eligible cases (9.94A.650 – See quick Reference Sheet in 2013 SRA Manual on page 209); or
   (ii) Community Custody conditions for eligible cases. For Community Custody Eligibility see the quick reference sheet on page 219 of the 2013 SRA Manual.

c) DOSA (Drug Offender Sentencing Alternative) Felony J & S:
   (i) Residential DOSA under one year:
       • Requires an evaluation.
       • Our standard request is to withhold the release from jail until the bed date/transportation to ADOTSA. This is because gaps between jail release and treatment offer an unnecessary risk of substance abuse binging. Try encouraging the court to tighten the gap by saying, “This is an opportunity I sincerely hope is successful for the defendant. Releasing him more directly to treatment will help ensure his success.”
       • 3 to 6 month inpatient treatment: Encourage the sentencing Judge to make the treatment term “3-6” months. The Judge in Drug
Court (“Drug Court” includes alcohol dependency) will review the defendant’s treatment progress in 3 months and decide whether to release or extend towards the 6-month limit based on treatment progress. This provides further incentive for the defendant to participate positively.

Drug Court Return dates: At the time of sentencing, future hearings are set on the Drug Court’s DOSA Review calendar which is held on Friday mornings at 9:00 am. These are easier to calculate during preparation time in the office than on the fly during a sentencing hearing. While doing so, keep an eye out for avoiding known court holidays.

1. Review hearing is set at 9:00 am in the Drug Court on the Friday 90 days after the date of sentencing; and
2. Termination hearing set at 9:00 am in the Drug Court on the Friday prior to the last 90 days of the term on Community Custody. 24 months of DOSA Community Custody begins at the sentencing. So the Termination hearing should be set on a Friday 24 – 3 = 21 months after the sentencing date.

Prison Based DOSA Over a year - DOC handles Prison based DOSA. So no need to calculate return dates to the Drug Court calendars. However, DV related treatment (CBT, MRT, and DVBT are described in subsection 4 below) may still be available as conditions of Community Custody.

(DOSA-like) “Parenting Alternative” – This newer sentencing alternative is sort of fashioned after a DOSA and is not a good fit for DV cases at all. If defense is requesting a Parenting Alternative to incarceration, the State’s response should be separately briefed after reviewing the situation with the DV Unit Vice Chair. If defense first springs this request on the day of the sentencing, ask the Judge for a continuance to a future Friday to provide the State with the opportunity to review and brief the court on our position.

F. Completing the NCO:

1. Duration:
   a. NCO length is limited to statutory maximum confinement: Usually our request is for the maximum length NCO which matches the statutory maximum for felony charges and is a maximum of two years for non-felonies.
   b. Why no 5 year NCOs on non-felonies? Be prepared to remind the Judge that only a Court of Limited Jurisdiction can impose a 5-year NCO for a non-felony. RCW 3.66.068(1)(a) provides the 5-year NCO authority for District Courts and RCW 35.20.255(1) provides it to Municipal Courts. There is no such statute providing 5-year NCO authority to Superior Court for post-sentencing NCOs on non-felonies.

2. Caveats for some contact: Discourage caveats designed by the court. Exceptions Courts may add to NCOs such as “3rd party contact permitted to facilitate child exchange as permitted by
parenting plan” may be inevitably ordered. However, the more exceptions there are to an NCO, the less understandable it is to law enforcement whose data system will not include the nuances the Judge had in mind. Caveats also complicate future prosecution for violations.

d) Aggravating Factors

The legislature adopted a number of potential aggravating and mitigating factors and limited the court to considering only those factors in determining the sentence. In addition, some of the factors are to be found by the court and some to be found by the jury. RCW 9.94A.537 sets out the procedures to be followed. Statutory grounds for an exceptional up are contained in RCW 9.94A.535(2)(3). A list of those statutory factors most likely to apply in a DV prosecution are found in RCW 9.94A.535(3). Aggravated exceptional sentences have become a more common practice in felony DV cases, especially with the advent of the multiple DV Victims (MDV) sentencing aggravator adopted under ESHB 2777. Below are sample Domestic Violence Exceptional Sentence Guidelines:

The Domestic Violence Prevention Act mandates that victims of DV shall receive "the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010. Towards this end, the Prosecuting Attorney's Office recognizes the substantial and harmful impact upon society, families, children and the victims of offenses committed within a domestic relationship. We further recognize the continuing nature of DV, and the lasting trauma caused by such violence. We find that the prevention of DV and the proper punishment for such offenses is a compelling state interest that requires the recommendation of enhanced sanctions for certain DV offenders who are not otherwise adequately punished by the imposition of a "Standard Sentence Range" under the Sentencing Reform Act (SRA).

- The aggravating factor for history of domestic violence requires the current offense involve "DV, as defined in RCW 10.99.020, and the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim or multiple victims (for crimes occurring after June 10, 2010 per ESHB 2777, but applying to all prior DV history) manifested by multiple incidents over a prolonged period of time." RCW 9.94A.535. The following standards shall be utilized for the aggravating factor for history of DV:
  - The underlying offense is a felony assault, felony violation of a no contact order (assault), burglary, felony harassment, stalking, any sex crime, unlawful imprisonment, or other crime where the defendant used force or threats of force against the victim; and
  - There is evidence that the defendant has a significant history of DV with the same victim or multiple victims (for crimes occurring after June 10, 2010). For example, the defendant has three or more prior convictions for DV assault
from separate incidents, or multiple prior felony DV convictions, or a significant pattern of abuse across multiple victims; or

- There is evidence that the defendant has a significant history of unreported DV or significant history of arrests on DV charges with the same victim or multiple victims (for crimes occurring after June 10, 2010); or

- The defendant's history of DV involves extremes of violence, sexual assault, or stalking behavior; or

- The defendant's history of DV involves witness tampering or intimidation.

**Benefits of Use:**

1. Allows for a much more substantial sentence for serial DV offenders, particularly in Assault in the Second Degree cases, and can be very easy to prove – certified copies of prior convictions alone can be enough.
2. The effect on the jury, court, and community.

**Practical Considerations:**

- Can you prove it?
- First, the current offense must qualify as a form of psychological, physical, or sexual abuse to use the aggravator at all. Consensual VNCOs will likely not qualify.
- To be safe, you will probably need at least 3 prior incidents spread out over a sufficient period of time (more than a few weeks).
- It will be easiest to prove the MDV aggravator using the prior convictions of the defendant.
- Your trial will/must be bifurcated on the issue of this aggravator.

**Unresolved Issues:**

- Is there a minimum number of victims?
- Is there a minimum number of prior incidents?
- Can we use prior Protection Orders issued against the defendant as evidence of the Aggravator?

**e) Misdemeanor Deferred Prosecutions**

Deferred prosecutions are provided for in **Chapter 10.05 RCW. Chapter 10.05 RCW** provides for a structured two-year program of treatment when it has been established that the wrongful conduct was caused by alcoholism, drug addiction, or mental illness. Deferred prosecutions are available only for misdemeanors and gross misdemeanors. A defendant who successfully completes a deferred prosecution program is entitled to have his or her case dismissed.

Although alcoholism, drug abuse, or mental illness may exacerbate the violence, DV is not caused by any one of these factors and does not stop when these factors are resolved. The Domestic Violence Task Force has recommended that deferred
prosecutions not be granted in cases of DV.

f) **Stipulated Order of Continuance (SOC) or Pre-trial Diversion**

A Stipulated Order of Continuance (SOC) or Pre-trial Diversion Agreement (PDA) is a specialized form of a dispositional continuance. In an SOC, the defendant agrees to complete a structured DV treatment program and other conditions in return for eventual dismissal of the charge. In an SOC, in return for completion of a number of conditions, a case is dismissed at the end of the monitored program. Such programs require careful screening by prosecutor and are inappropriate when the crime in question is particularly serious.

SOC programs allow for continued control of the offender and are designed to assist the repentant perpetrator in stopping the violence. The SOC program allows the court to exercise some control over the defendant but avoid the time of a trial. Note: the court is not a party to an SOC. The court’s role is typically limited to (1) granting the continuance, (2) deciding whether there has been a breach of the terms (but not what the consequences of the breach should be) see *State v. Kessler*, 75 Wn. App. 634, 879 P.2d 333 (1994), and (3) whether to grant the dismissal motion made by the prosecutor.

**Consideration should be given to eligibility criteria for SOC.** The following list is adopted in part from the Washington State Gender and Justice Commission Domestic Violence Manual for Judges (2015):

- **a)** Current offense did not take place within sight of sound of a minor child.
- **b)** Current offense did not involve weapons.
- **c)** Current offense did not result in injuries that required medical treatment.
- **d)** No prior sex misdemeanor or felony, or violent felony offenses, no matter how old, in the defendant’s criminal history, as defined in RCW 9.94.030(6) and (41).
- **e)** No pending felony cases, but other pending misdemeanors will be examined on a case-by-case basis.
- **f)** The referral has a moderate or less score on the ODARA DV risk assessment. ODARA scores will only be accepted from individuals who have ODARA certification.
- **g)** Referral has a moderate or less history of DV (e.g. as detailed in available records such as the individual order history, police reports not resulting in conviction, or report by the victim).
- **h)** Victim is supportive of SOC.

**g) Compromise of Misdemeanor**

A compromise of misdemeanor is not available for DV cases. See RCW 10.22.010 (4).

h) Affirmative Treatment Conditions

In order to appropriately and effectively intervene with DV offenders close attention needs to be paid to the services that are offered or ordered. A description of what services are actually available within the community is important. This section focuses on those key areas.

Participation in any service that increases the potential risk for further abuse or injury to DV victims and their children are not recommended. Any service that blames DV victims for the abuse, does not hold DV perpetrators accountable for their abusive behaviors, and does not hold DV perpetrators accountable for changing their abusive behaviors, should be avoided. Couples counseling, mediation, family group counseling, and anger management programs for DV perpetrators in intimate partner violence cases are strongly disfavored as many believe they increase the level of danger to adult DV victims and children. These services are contraindicated if the abuser has not engaged in and successfully completed counseling to address their violent or abusive behavior.

1. Anger Management

However, anger management can be considered in certain non-intimate violence or family violence cases or some cases of malicious mischief cases. The overall philosophy behind anger management treatment is to help a person navigate through their anger in a given situation. In many ways, these programs assume that the anger the participant is feeling has come from a reasonable place (e.g.: someone cut them off on the road placing them in physical danger, someone said something negative or hurtful, they were goaded into a dispute, etc.). The idea behind anger management is to give people tools so they are able to avoid inappropriate reactions to an event.

Anger Management courses are not therapeutic. They are classes and are referred to as such. Most of these programs are 16-hour classes. Many programs also offer condensed, one-day (8 hour) classes. The intent of this program is not to delve into an individual's life experiences, thoughts or concerns; but rather to teach ways to avoid irrational responses to conflict.

Note:
- There is no contact with the victims
- No requirements that the course instructor be aware of the underlying incident
- No follow-up classes
- No standardized curriculum - anything goes

2. Batterer Intervention Programs:

Batterer's Intervention Programs (also known as Domestic Violence Batterer's Treatment) begin with the philosophy that the offender is engaging in abusive and unhealthy behaviors that are caused and controlled by the offender. These programs subscribe to the idea that batterers employ power and control over individuals in their lives, and the curriculum utilized is designed to combat those behavior patterns,
recognizing these behaviors could exist even in the therapeutic setting. The programs are intensive, and typically last up to a year for successful completion. Batterer’s Intervention is considered therapy and consists of both one-on-one as well as group settings.

Participants must be confronted with their crime(s) and must admit to their role. They are also required to understand the impact of their behaviors on their partners and/or children before being able to graduate from the program. These programs recognize that the victims are not to blame nor do they imply that the offender simply needs to change how they react to perceived wrongs.

Many of the BIPs recognize the occurrence of "reciprocating violence" or "victim defendants". These programs specifically screen potential victim defendants to determine if, in fact, they have committed violence out of retaliation or fear. Those offenders are then routed to a more victim-focused program. This is only recommended for victims who have been court ordered into BIP and, therefore, must provide proof of compliance. Otherwise, a better referral is always a DV victim support agency.

Batterer Intervention Program (BIP) Limitations:

- BIP treatment is most effective with first time misdemeanor level DV batterers who do not have serious mental health, chemical dependency or sexual deviancy issues.
- The effectiveness of BIP for other offenders is controversial.
- BIP treatment may not be effective for individuals with repeat or felony level DV incidents; chronic chemical dependency; chronic mental illness, sociopath personalities; or individuals with an absence of motivation to change. For these individuals, BIP treatment may increase the risk to DV victims by providing these DV perpetrators with vocabulary and new tactics to control their partners. See WAC 388-60.

3. Moral Reconation Therapy (MRT)

Moral reconation therapy is a cognitive behavior program aimed at reducing recidivism. King County Community Corrections has created a specific moral reconation therapy program for DV offenders. The cognitive behavioral method used is a social learning approach that assumes that DV and power and control behaviors are learned—and that they can be unlearned. This is repeatedly stressed during extensive training that is required before facilitating the program. The MRT-DV program includes the following features:

- MRT-DV groups should have a maximum of 15 participants. Ideally, participants

should all be at different stages in the intervention. Giving older members the opportunity to mentor younger group members is an important component of this intervention.

- MRT–DV consists of a series of chapters, each focusing on a specific topic. Each chapter contains several exercises designed to test a participant’s understanding of the topic.
- To complete the MRT-DV program, each participant must satisfactorily complete every exercise in the workbook. While this typically takes about six months, it can take less or more time depending on the individual. MRT-DV will be conducted by Sound Mental Health staff at CCAP who has completed the required training on MRT-DV.
- If circumstances warrant it, the facilitator may, at his/her discretion, require a participant to redo a prior chapter or chapters that pertain to the specific violation. (i.e. if a participant lies inside or outside of the group, that individual might be required to re-do the chapter on honesty)

4. Other DV perpetrator’s Services:

- **Cognitive Behavioral Therapy:** See [http://nacbt.org/whatiscbt.aspx](http://nacbt.org/whatiscbt.aspx)
- **Individual Psychotherapy:** Psychotherapy should not be considered an appropriate substitute for participation in a BIP, except in cases where the abuser is too acutely impaired or disruptive to function in a group setting. Some abusers may have additional mental health issues that require psychotherapy, concurrent with their participation in a BIP. Any individual psychotherapist working with an abuser should be familiar with the dynamics of battering relationships, safety planning for DV victims, and safe behavior planning for abusers. Individual psychotherapists must be willing to obtain a release of information from their client to provide information to the appropriate entities involved in the case, such as CA, the courts, other treatment agencies, and DV victims. Training, experience, and understanding regarding DV vary among psychotherapists.
- **Chemical Dependency Treatment:**
  - Chemical dependency program staff should be knowledgeable about DV. Some chemical dependency programs use strategies that may inadvertently endanger DV victims, such as requiring family sessions, implying that victims’ survival strategies are “enabling” the chemically affected person’s addiction, or indicating that either DV victims or DV perpetrators’ chemical dependency caused the DV.
  - An appropriate chemical dependency program should also maintain close contact with the BIP. A batterer may need to address chemical dependency issues prior to being able to successfully complete BIP, and there must be discussion with treatment providers as to whether concurrent treatment is recommended. A perpetrator may need to address chemical dependency issues prior to entering or completing DV perpetrator treatment.
  - When a substance abuse evaluation determines that in--- patient treatment is recommended, the client must successfully complete the
requirement before entering the BIP. When intensive outpatient treatment is recommended, a BIP may want the client to complete the first phase of substance abuse treatment and progress toward sobriety before starting the BIP.

- A relapse into substance abuse is often synonymous with a relapse into violent behavior and violence under the influence of drugs or alcohol, and is often associated with more serious injury.

**Parenting Classes:** Some BIPs offer parenting components within the context of DV. These BIP parenting components are ideal. An abuser is most likely to benefit from participation in a parenting class when they have made significant progress with their underlying abuse issues. Without having made such progress, an abuser is likely to view their parenting as above reproach. Therefore, it is unlikely that an abuser will make major parenting improvements without participation in a BIP combined with experiences of structure, monitoring, and consequences. The parenting program provider for abusers should be knowledgeable about DV.

### 5. Services Not Recommended for DV Perpetrators:

1. **Anger Management:** Anger management is not an appropriate substitute for participation in a BIP. Most anger management programs are brief interventions, typically 8 to 16 hours, and these programs do not address the underlying belief systems that support abusive behavior and entrenched patterns of abusive tactics. In addition, anger management programs do not have protocols for DV victim contact, and do not have procedures for ongoing lethality assessments.

2. **Victim Impact Panels (VIP):** VIPs were first developed for Driving Under Intoxication (DUI) panels so that DUI perpetrators would understand the impact of their criminal behavior on victims, families and friends. VIPs do not translate well to cases involving DV. VIPs are not an appropriate substitute for participation in a BIP. The importance of addressing the power and control dynamics of DV is best accomplished in a BIP program that provides educational tools and offers an experience similar to a VIP, but is tailored to address the unique characteristics of DV. It is not recommended to use of VIP for batterers, and VIP cannot replace BIP treatment as mandated in WAC 388-- - 60.

3. **Couples or Family Counseling:** *Traditional couples or family counseling should not be recommended when the battering continues or has recently ceased.* Couples counseling is based on the assumption that partners, who possess equal amounts of power, can negotiate a conflict. In abusive relationships, there is an unequal balance of power between DV victims and batterers, as well as a fear of physical violence or coercive attacks when batterers feel challenged. Couples counseling may be appropriate in the future when DV victims feel they have regained control over their life, and batterers have completed a BIP and have demonstrated commitment to stopping all violence/reducing controlling tactics.
i) DOC Supervision

For eligibility for DOC supervision, see DV Scoring and Supervision form in Appendix.

The only DV misdemeanors that will be supervised are Assault 4 and MVCNO and then only if the defendant has a prior conviction for one of the following offenses:

- Violent Offense
- Sex Offense
- Crime against a Person
- Assault 4
- MVNCO

If this is the case, then the court SHALL impose supervision. Unless the court orders a jail-only 12-month sentence, the court must order supervision. Otherwise, there will be no supervision on misdemeanors. Additionally, it is critical that prosecutors specify the length of supervision; otherwise, no DOC supervision will be provided.

j) Concurrent and Consecutive Sentences

It is common practice for misdemeanor suspended sentences to run consecutively to felony sentences. In this case, the prosecutor must check the box on both of the felony and misdemeanor J&S. If the misdemeanor sentence is run consecutively with the felony sentence, then the defendant will not get credit for time served on that consecutive portion. The consecutive sentence does not begin until the first sentence is over. Therefore, the prosecutor should mark “0 days credit” on the misdemeanor J&S. If two misdemeanors sentences are run consecutively, the prosecutor should write in "45 days cfts on count I and 0 days cfts on count II" on the J&S.

If a defendant is under a sentence for a felony when he commits a new felony, the sentence for the new felony must be consecutive to the current sentence. In that case, a concurrent sentence is an illegal sentence and a basis for the defendant to withdraw his plea. However, if a defendant commits a new misdemeanor while under a misdemeanor sentence, a concurrent sentence for the new misdemeanor would be legal.

k) Confinement

There are three types of confinement: total confinement, partial confinement, and home detention. Total confinement is confinement inside the physical boundaries of a facility of institution operated or utilized under contract by the state or any other unit of government for 24 hours a day. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

Partial confinement may be imposed when the following conditions are met:

- Sentences under one year;
- For Non-violent offenses, up to 30 days can be converted to community service;
• For nonviolent offenders, the J&S must state the reason that alternatives to total confinement were not used.

**Home Detention** may **not** be imposed for offenders convicted of the following offenses:

• A violent offense
• Any sex offense
• Any drug offense
• Reckless Burning 1 or 2
• **Assault Third Degree**
• Assault of Child 3
• **Harassment** 9.94A.734 (1)

1) **Legal Financial Obligations (LFOs)**

Non-Waivable:

a. Victim Penalty Assessment
b. DNA fee in cases where DNA collection applies
c. Restitution85 –
   i. Restitution often includes payment for lost or damaged property, lost wages, or medical bills. Restitution does not include compensation for pain or emotional distress.86
   ii. The court may require proof of economic loss. It is important that prosecutors or victim advocates inform victims to document all economic loss including, but not limited to: (1) photographs of injuries or damaged property; (2) damaged property’s value or repair cost; (3) records of missed work as a result of the crime; and (4) documentation of health care costs as a result of the crime.
   iii. If the crime victim is at sentencing and the Victim Assistance Unit indicated that restitution is unknown, take a moment aside from the court to ask if there really is any restitution to be claimed. If not, note of the J & S that restitution in not ordered. If there will still be a future claim, encourage the defendant to waive his presence at the future restitution hearing. Reassure the defendant that they can still receive notice but that attendance is optional for them if they waive.

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85 Adapted from WOW ESS Prosecutors Sector Guide”.
d. Additional Crime-specific fines and fees may be outlined in the Statement on Plea of guilty form. Most commonly these are for crimes related to Prostitution and to DUI.

Waivable: These are not typically agreed to by defense, rarely imposed by the court, and emerging research indicates that more burdensome LFOs increase the likelihood of recidivism. Therefore, seeking waivable LFOs is not in the safety interest of DV victims. Waivable LFOs include:

   a. Court Costs,
   b. Recoupment of defense attorney fees,
   c. Miscellaneous other fees; and
   d. Clerks’ fees and interest.

j) **Restitution**

When may restitution be ordered?

Restitution is an independent element of the sentence that may be ordered regardless of the determinate sentence imposed by the court. The decision on whether to order restitution is not dependent upon the seriousness level, the offender score, or the sentencing range.

When must restitution be ordered?

Restitution must be ordered whenever an offender is convicted of an offense resulting in injury to any person or loss/damage to property unless extraordinary circumstances exist, which, in the court’s judgment, makes restitution inappropriate. In those cases the court must set forth the circumstance in the record. RCW 9.94A.753.

What losses are compensable?

Restitution must be based on easily ascertainable damages, actual expenses incurred, or lost wages. Thus, in *State v. Lewis*, 57 Wn. App. 921, 926, 791 P.2d 250 (1990) (see also *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 793–795 291 P.3d 939 (2013), the court held that future earning losses were not compensable because they were neither “easily ascertainable damages” nor lost wages. Exact accounting is not, however, required. Where the amount of loss is not specifically provable, restitution may still be ordered so long as the record provides a reasonable basis for the court to estimate loss so that the award of restitution is not based on “mere speculation.” *State v. Fleming*, 75 Wn. App. 270, 275, 877 P.2d 243 (1994) (internal citation omitted) (overruled on other grounds by *State v. Griffith*, 164 Wn.2d 960, 195 P.3d 506 (2008). An award of restitution may include an obligation to pay damages that flowed from the

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crime, even if such loss were not foreseeable. *State v. Enstone*, 137 Wn.2d 675, 682-3, 974 P.2d 828 (1999).

Restitution may include payment for both public and private costs. Costs of counseling reasonably related to the offense may be ordered as a part of restitution. However, restitution may not include reimbursement for mental anguish, pain and suffering, or other intangible losses. **RCW 9.94A.753(3).**

Thus, in a DV case, compensable items might include:

- Lost wages
- Medical bills, including ambulance and emergency room fees
- Destroyed clothing, automobiles, or other property
- Replacement of locks
- Transportation expenses related to medical treatment for injuries related to the violence
- Motel or hotel bills
- Moving expenses
- Counseling for the victim and children

The amount may not exceed double the amount of the defendant’s gain or the victim’s loss. **RCW 9.94A.753(3).**

**Enforcement of the restitution order**

**RCW 9.94A.753(4)** establishes the enforcement period for restitution obligations.

For offenses committed prior to July 1, 2000, the defendant remains under the court’s jurisdiction for up to ten years after the imposition of sentence, or release from confinement, regardless of the expiration of the defendant’s term of supervision and regardless of the statutory maximum for the crime. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction for an additional ten years.

For offenses committed after July 1, 2000, the offender remains under the court’s jurisdiction until the restitution obligation is satisfied, regardless of the expiration of the term of supervision and regardless of the statutory maximum for the crime.88

*See the Appendix for example scoring forms.*

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Appendix

➢ Domestic Violence Patrol Report Checklist
➢ Domestic Violence Supplemental Form
➢ Minnesota Legislature’s Blueprint for Safety Risk Assessment Tool
➢ Questions to Ask When Investigating a Strangulation Case
➢ Documentation Chart for a Strangulation Case
➢ Directions on Obtaining an IOH from DISCIS
➢ Comparison of Court Orders
➢ Smith Affidavit Form
➢ Firearm Surrender in DV cases
➢ Material Witness Warrants in DV cases
➢ Scoring Forms

a. Domestic Violence Patrol Report Checklist

<table>
<thead>
<tr>
<th>Background and officers’ actions:</th>
<th>For each witness and party involved:</th>
<th>Information from the victim, including history of violence and stalking and contact information:</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Time of officers’ arrival and time of incident</td>
<td>☐ His/her account of events and responses to follow-up questions</td>
<td>☐ Responses to the risk questions:</td>
</tr>
<tr>
<td>☐ Relevant 911 information, including specific details about any violence or threats in the 911 call</td>
<td>☐ Officer observation related to the person’s account of events</td>
<td>1. Do you think he/she will seriously injure or kill you or your children? What makes you think so? What makes you think not?</td>
</tr>
<tr>
<td>☐ Immediate statements of either party and any witnesses at the scene</td>
<td>☐ Identification, address, and means of locating the person for follow-up, including:</td>
<td>2. How frequently and seriously does he/she intimidate, threaten, or assault you? Is it changing? Getting worse? Getting better?</td>
</tr>
<tr>
<td>☐ A complete description of the scene</td>
<td>☐ Home address and phone number</td>
<td>3. Describe the time you were the most frightened or injured by him/her.</td>
</tr>
<tr>
<td>☐ Note any existing protection or no-contact orders, probation, warrants, prior convictions</td>
<td>☐ Place of employment, work address and phone number</td>
<td>☐ Threats to the victim for seeking help, particularly from law enforcement or courts, and stalking behaviors Name and phone numbers of someone who can always reach the victim (NOTE: Record victim contact information in the confidential section of the report and on the Victim Information Form.)</td>
</tr>
<tr>
<td>☐ Summarize actions taken by responding officers (e.g., entry, arrest, non-arrest, use of force, attempts to locate, transport, advocacy contact and referrals, victim notification, seizing firearms, rationale for self-defense or primary aggressor determination)</td>
<td>☐ Cell phone number(s)</td>
<td>☐ Inform the victim that every effort will be made to protect this information, but that it is possible that the suspect could gain access via court order</td>
</tr>
<tr>
<td>☐ Account of evidence collected (e.g., pictures, statements, weapons, other)</td>
<td>☐ Relationship to other parties</td>
<td></td>
</tr>
<tr>
<td>☐ Presence of risk factors described in Appendix 1A: Practitioners’ Guide to Risk and Danger in Domestic Violence Cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>☐ If an arrest was not made, the reason why</td>
<td></td>
<td></td>
</tr>
<tr>
<td>☐ When possible, issue a squad pick-up and hold on GCA suspects that are on probation.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Additional information related to the suspect:</th>
<th>Additional information related to the case:</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ GCA: details about where the suspect might be and where he/she stays when not at the address of the incident; physical and vehicle descriptions; aliases</td>
<td>☐ Details regarding presence, involvement, and welfare of children at the scene</td>
</tr>
<tr>
<td>☐ Suspect’s county and state of residence during the past ten years</td>
<td>☐ Existence of language, communication, or cognition barriers</td>
</tr>
<tr>
<td>☐ Whether Miranda is given and/or request for attorney and when this occurred</td>
<td>☐ Medical help offered or used, facility, and medical release obtained with victim’s SSN and appropriate boxes checked</td>
</tr>
<tr>
<td>☐ Whether a custodial taped interview of the suspect was conducted</td>
<td>☐ Presence or involvement of elderly people or people with disabilities</td>
</tr>
<tr>
<td>☐ Any spontaneous statements given by the suspect after the arrest</td>
<td></td>
</tr>
</tbody>
</table>
## b. Domestic Violence Supplemental Form

<table>
<thead>
<tr>
<th>Suspect Information</th>
<th>Domestic Violence Supplemental Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Last Name</td>
<td>First Name</td>
</tr>
<tr>
<td>Demeanor</td>
<td></td>
</tr>
<tr>
<td>Document in narrative any other notable observations of physical appearance</td>
<td></td>
</tr>
<tr>
<td>Injured?</td>
<td>Yes</td>
</tr>
<tr>
<td>If yes, describe in narrative/diagram</td>
<td></td>
</tr>
<tr>
<td>Status</td>
<td>Booked</td>
</tr>
<tr>
<td>Mental Health Medications? Past Hospitalizations? Suicidal?</td>
<td></td>
</tr>
<tr>
<td>Under the Influence of Alcohol/Drugs?</td>
<td>Yes (describe)</td>
</tr>
</tbody>
</table>

## Victim Information

<table>
<thead>
<tr>
<th>Last Name</th>
<th>First Name</th>
<th>MI</th>
<th>DOB</th>
<th>Sex</th>
<th>Race</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td>City</td>
<td>State</td>
<td>Zip</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Work #</td>
<td>Home #</td>
<td>Email</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cell #</td>
<td>Language Line/Communication method used</td>
<td>Who called 911?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Who can always reach victim?</td>
<td>Phone #</td>
<td>Another contact</td>
<td>Phone #</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Demeanor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Document in narrative any other notable observations of physical appearance (eg. torn clothing)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under the Influence of Alcohol/Drugs?</td>
<td>Yes (describe)</td>
<td></td>
<td>No</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Pregnant?</td>
<td>Yes</td>
<td>No</td>
<td>If yes, how long?</td>
<td>Does suspect know victim is pregnant?</td>
<td>Yes</td>
</tr>
<tr>
<td>Injured?</td>
<td>Yes</td>
<td>No</td>
<td>Abrasions</td>
<td>Bruises</td>
<td>Lacerations/Bleeding</td>
</tr>
<tr>
<td>If yes, describe in narrative/diagram</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Status</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior incidents of strangulation?</td>
<td>Yes</td>
<td>No</td>
<td>If yes, how many and describe</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Treatment?</td>
<td>N/A</td>
<td>Refused</td>
<td>At hospital</td>
<td>At scene</td>
<td>Who provided on-scene treatment?</td>
</tr>
<tr>
<td>Threats</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harassment</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stalking</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Photos taken of Victim?</td>
<td>Yes</td>
<td>No</td>
<td>Electronic/Physical Evidence recovered?</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

## Relationship History and Risk Assessment

<table>
<thead>
<tr>
<th>Spouse</th>
<th>Former Spouse</th>
<th>Formerly Resided Together</th>
<th>Child in Common</th>
<th>Parent/Child</th>
<th>Other (describe):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estranged Spouse</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adults Residing Together</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dating/Engaged</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Former Dating</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Length of relationship</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Past incidents where suspect caused</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>History</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has he/they controlled victim's activities?</td>
<td>Yes</td>
<td>No</td>
<td>Getting worked</td>
<td>No</td>
<td>不限定</td>
</tr>
<tr>
<td>Haunted</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has suspect prevented victim from reporting/</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has victim's view of future DV assault?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td># Prior Reported Incidents</td>
<td># Unreported Incidents</td>
<td>Date of last incident</td>
<td>Police Agencies Involved in Past</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix

Domestic Violence Supplemental Form

Children

- Child(ren) within sight/sound of incident: [ ] Yes, [ ] No, [ ] Unknown
- Child(ren) assaulted/injured during incident: [ ] Yes, [ ] No, [ ] Unknown
- Statement taken from children: [ ] Yes, [ ] No, [ ] N/A
- Photos taken of children: [ ] Yes, [ ] No
- CPS referral made: [ ] Yes, [ ] No
- Prior CPS involvement: [ ] Yes, [ ] No, [ ] Unknown

Child’s Name (Last, First, Middle) | Sex | DOB | Child’s Location During Incident | Officer’s Observation of Child | Suspect’s Relationship to Child

<table>
<thead>
<tr>
<th>Child's Name</th>
<th>Sex</th>
<th>DOB</th>
<th>Location</th>
<th>Observation</th>
<th>Relationship</th>
</tr>
</thead>
</table>

Court Order Information

- Current court order: [ ] Yes, [ ] No, [ ] Unknown
- Two or more court order violations/convictions: [ ] Yes, [ ] No, [ ] Unknown

Firearms/Weapons

1. Does suspect possess, own, or have access to firearms/weapons? [ ] Yes, [ ] No, [ ] Unknown
2. Does suspect have a Concealed Pistol License (CPL)? [ ] Yes, [ ] No, [ ] Unknown
3. Has suspect ever been court-ordered to surrender firearms/weapons? [ ] Yes, [ ] No, [ ] Unknown
4. Where are the firearms/weapons (e.g., residence, vehicle, with suspect, with friend or relative)? [ ]
5. Were firearms/weapons used in current incident? [ ] Yes, [ ] No, [ ] Unknown
6. Has suspect used/threatened to use firearms in the past against victim or others? [ ] Yes, [ ] No, [ ] Unknown
7. Does victim or others in the home have access to firearms? [ ] Yes, [ ] No, [ ] Unknown
8. Are there any firearms that should be temporarily removed for safety? [ ] Yes, [ ] No
9. If firearms used in current incident, were they recovered? [ ] Yes, [ ] No, [ ] Placed into evidence?

Description of any firearms or weapons owned/possessed/registered by suspect:

<table>
<thead>
<tr>
<th>Description</th>
<th>Removed?</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

*If valid NO/Protection Order or suspect has prior DV conviction, firearm possession prohibited per Federal/State law*

Injuries/Pain Diagram

Officer to mark the location of any injuries, complaint of pain or unwanted contact and describe in detail

Have victim initial:

<table>
<thead>
<tr>
<th>Victim</th>
<th>Victim</th>
</tr>
</thead>
<tbody>
<tr>
<td>V.</td>
<td>V.</td>
</tr>
</tbody>
</table>

“I declare under penalty of perjury under the laws of the state of Washington that the above statements are true and correct.”

Victim Signature | Officer Signature | Location (City, State) | Date

Victim [ ] Provided recorded statement. [ ] Provided written statement. – See continuation page for written/signed statement.
[ ] Refused to provide written/recorded statement. Document all victim statements in incident report.
c. Minnesota Legislature’s Blueprint for Safety Risk Assessment Tool

Using this risk guide

- Each Blueprint protocol includes specific instructions for documenting and responding to risk. Practitioners should also read Appendix 18: Training Memo—Risk and Dangerousness.
- Elicit and document the risk factors contained in this guide. Whenever possible, talk with the victim; engage in a discussion about danger rather than just asking if these things have happened. Victim perceptions and interpretations are important.
- Communicate risk factors to other intervening practitioners in a timely manner.
- Be attentive to the factors in a given case; use experience, common sense, and training to make judgments about the level of danger that both the offender and the set of circumstances pose.
- Adjust the response to each case based on the level of risk and dangerousness.
- Protect the victim from retaliation when soliciting or using safety and risk information.
- Link victims with risk factors to an advocate.
- Stay alert; the level and type of risk will likely change over time and as circumstances change. Determining and managing risk is an ongoing process.
- A victim’s attempt to terminate the relationship is a major change that poses increased risk.
- Victims’ perceptions of high danger are typically accurate; their perceptions of low danger are often not.

Acts or threats of violence associated with risk & lethality

Factors listed in italics are particularly associated with lethal violence

- Stalking
- Strangulation; attempts to “choke”
- Threats to kill the victim
- Threats to kill that the victim believes or fears
- Threats to kill that are conveyed to others
- Threats of suicide
- Forced sex or pressuring for sex even when separated
- Serious injury to the victim
- Carries, has access to, uses, or threatens with a weapon
- Violence outside of the home
- Aggression toward interveners
- Violence or threats to family, coworkers, victim’s new partner
- Animal abuse or killing pets
- Damages victim’s property
- Violent during pregnancy or shortly after birth
- Hostage-taking; restraint
- Acts exhibiting extreme hostility toward the victim

Coercion

Violence with a pattern of coercion is a serious marker of high risk violence. Coercion may be displayed as control of children, finances, or activities; sexual aggression; intimidation; hurting pets; or isolating the victim from support systems.

Risk is higher when the violence is accompanied by:

- An increase in frequency, severity, or type of violence over recent months
- Almost daily Impairment by alcohol or drugs
- The victim attempting a permanent break
- Estrangements, separations, and reunions
- Failure of prior interventions to affect the offender
- A victim who expresses fear of threats to kill
- A victim making no attempt to leave despite severe abuse
- Prior arrests, law enforcement calls, and/or protection order(s)
- Isolation of victim (physical or social)
- A victim seeking outside help in the past year
- A victim has a child who is not the offender’s
- An abuser leaves before law enforcement arrives; eludes warrants

- An abuser’s:
  - Lack of remorse
  - Mental health issues
  - Financial difficulty, unstable housing
  - Generalized aggression or violent acts
  - Ongoing efforts to take children from their mother
  - History of violence in multiple relationships
  - First act of violence is life-threatening or brutal
  - Obsessive control of victim’s daily activities
  - Obsessive jealousy
  - Significant and harmful use of a child
  - Drawing others into the abuse (e.g., children, family, friends)
  - Non-compliance with probation or pre-trial release conditions

Homicide-Suicide (for male offenders) accounts for 27-32% of the lethal domestic violence incidents

Predominant risk markers include: guns, patterns of estrangement and reunion and offender’s poor mental health. Additional risk markers are:

- Obsession or jealousy
- Alcohol impairment (23 to 38% of perpetrators)
- History of domestic violence
- Suicide attempts or threats
- Personality disorder
- Depression of offender (46%)

Women who kill male partners

Predominant risk markers include: severe, increasingly frequent, and recent violence by male partner against the defendant, a defendant who is isolated and has few social resources. Additional risk markers are:

- Access or prior use of weapons
- More than 10 violent incidents in the last year at the hands of the person killed
- Law enforcement intervention in one or more episodes of domestic violence in past year
- Prior strangulation by person killed
- Traditional relationship (married, children, lengthy relationship)
- Trapped and isolated in violent relationship
- Defendant sought help

(Note: The absence of any of these factors such as “defendant sought help” should not lead to a conclusion that there is no risk. These are not absolute correlations.)

d. Questions to Ask When Investigating a Strangulation Case

Questions to ASK: Method and/or Manner:

How and where was the victim strangled?

☐ One hand (R or L) ☐ Two hands ☐ Forearm (R or L) ☐ Knee/Foot

☐ Ligature (Describe):

☐ How long? ______ seconds ______ minutes ☐ Also smothered?

☐ From 1 to 10, how hard was the suspect's grip? (Low): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)

☐ From 1 to 10, how painful was it? (Low): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)

☐ Multiple attempts: ______________ ☐ Multiple methods: ______________

Is the suspect RIGHT or LEFT handed? (Circle one)

What did the suspect say while he was strangling the victim, before and/or after?

Was she shaken simultaneously while being strangled? Straddled? Held against wall?

Was her head being pounded against wall, floor or ground?

What did the victim think was going to happen?

How or why did the suspect stop strangling her?

What was the suspect's demeanor?

Describe what suspect's face looked like during strangulation?

Describe prior incidents of strangulation? Prior domestic violence? Prior threats?

MEDICAL RELEASE

To All Health Care Providers: Having been advised of my right to refuse, I hereby consent to the release of my medical/dental records related to this Incident to law enforcement, the District Attorney's Office and/or the City Attorney's Office.

Signature: ___________________________ Date: _______________________

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e. Documentation Chart for a Strangulation Case

Documentation Chart for Attempted Strangulation Cases

Symptoms and/or Internal Injury:

<table>
<thead>
<tr>
<th>Breathing Changes</th>
<th>Voice Changes</th>
<th>Swallowing Changes</th>
<th>Behavioral Changes</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difficulty Breathing</td>
<td>Raspy voice</td>
<td>Trouble swallowing</td>
<td>Agitation</td>
<td>Dizzy</td>
</tr>
<tr>
<td>Hyperventilation</td>
<td>Hoarse voice</td>
<td>Painful to swallow</td>
<td>Amnesia</td>
<td>Headaches</td>
</tr>
<tr>
<td>Unable to breathe</td>
<td>Coughing</td>
<td>Neck Pain</td>
<td>PTSD</td>
<td>Fainted</td>
</tr>
<tr>
<td>Other:</td>
<td>Unable to speak</td>
<td>Nausea</td>
<td>Hallucinations</td>
<td>Urination</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Vomiting</td>
<td>Combative ness</td>
<td>Defecation</td>
</tr>
</tbody>
</table>

Use face & neck diagrams to mark visible injuries:

- [Diagram showing visible injuries on the face and neck]

<table>
<thead>
<tr>
<th>Face</th>
<th>Eyes &amp; Eyelids</th>
<th>Nose</th>
<th>Ear</th>
<th>Mouth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Red or flushed</td>
<td>Petechiae to R and/or L</td>
<td>Bloody nose</td>
<td>Petechiae (external and/or ear</td>
<td>Bruising</td>
</tr>
<tr>
<td>Pinpoint red spots</td>
<td>eyeball (circle one)</td>
<td></td>
<td>canal)</td>
<td>swollen tongue</td>
</tr>
<tr>
<td>(petechiae)</td>
<td>Petechiae to R and/or L</td>
<td>Broken nose (ancillary finding)</td>
<td>Bleeding from ear canal</td>
<td>swollen lips</td>
</tr>
<tr>
<td>Scratch marks</td>
<td>eyeball (circle one)</td>
<td></td>
<td></td>
<td>Cuts/abrasions (ancillary finding)</td>
</tr>
<tr>
<td></td>
<td>Bloody red eyeball(c)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under Chin</td>
<td>Redness</td>
<td>Redness</td>
<td>Redness</td>
<td>Petechiae (on scalp)</td>
</tr>
<tr>
<td></td>
<td>Scratch marks</td>
<td>scratch marks</td>
<td>Scratch marks</td>
<td>Ancillary findings:</td>
</tr>
<tr>
<td></td>
<td>Bruise(s)</td>
<td>Bruise(s)</td>
<td>Finger nail impressions</td>
<td>Hair pulled</td>
</tr>
<tr>
<td></td>
<td>Abrasions</td>
<td>Abrasions</td>
<td>Bruise(s)</td>
<td>Bump</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Swelling</td>
<td>Skull fracture</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Ligature mark</td>
<td>Concussion</td>
</tr>
</tbody>
</table>

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f. Directions on Obtaining an IOH from DISCIS

In order to obtain an IOH you need to use DISCIS. Begin by running a DCH history for your offender:

Once you have the DCH then enter the letters IOH on the upper left hand corner:
After you have entered IOH press return and you will see a list of the orders. Remember that DEF indicates the party is a criminal defendant, RSP indicates respondent on civil PO and antiharassment orders (which can also be DV), and that petitions for POs are very valuable.

Once in IOH then enter an “x” on an order line and it will pull up details of the order:
## g. Comparison of Court Orders

<table>
<thead>
<tr>
<th>Kind of Order</th>
<th>Sexual Assault Protection Order</th>
<th>Domestic Violence Protection Order</th>
<th>No-Contact Order</th>
<th>Restraining Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who may obtain order?</td>
<td>A person who is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident, (who does not qualify for a domestic violence protection order) may petition for a civil order. Minors under age of 16 with parent or guardian. The court may initiate issuance on behalf of victims of sex offenses when criminal charges are filed.</td>
<td>A person who fears violence from a &quot;family or household member&quot; (10.99.020), or who has been the victim of physical harm or fears imminent physical harm, or stalking from a &quot;family or household member&quot;, (includes dating relationships). Petitioners 13 or older in a dating relationship with a Respondent, 16 or older, or minors aged 13-16 with a parent, guardian, guardian ad litem, or next friend.</td>
<td>Incident must have been reported to the police. Criminal charges must be pending. Judge must consider issuance pending release of defendant from jail, at time of arraignment, and at sentencing.</td>
<td>Petitioner who is married to respondent or has child in common.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>District, Municipal, or Superior Court. See RCW 26.50.020(5). Telephonic hearings available pursuant to court rule and in limited circumstances.</td>
<td>Telephonic hearings available in limited circumstances.  • EPO–District, Municipal, or Superior Court.  • PO–limited to Superior Court if Superior Court has family law action pending, or if case involves children or order to vacate home.</td>
<td>District, Municipal, or Superior Court.</td>
<td>Superior Court only.</td>
</tr>
<tr>
<td>Cost to Petitioner</td>
<td>No filing or service fees.</td>
<td>No filing or service fees.</td>
<td>None.</td>
<td>Same as dissolution. Filing fee waived if indigent.</td>
</tr>
<tr>
<td>How does the respondent receive notice?</td>
<td>Notice of civil order served on the respondent. Notice of criminal order given to defendant verbally and in writing when order is entered.</td>
<td>Notice served on the respondent. Notice by certified mail, or publication authorized in limited circumstances.</td>
<td>Verbal and written notice given at bail hearing, arraignment, or sentencing</td>
<td>Notice served on respondent or respondent's attorney.</td>
</tr>
<tr>
<td>Consequences if order is knowingly violated</td>
<td>Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endergenement, otherwise Gross Misdemeanor.</td>
<td>Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.</td>
<td>Mandatory arrest. Release pending trial may be revoked. Additional criminal or contempt charges may be filed. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.</td>
<td>Mandatory arrest. Gross Misdemeanor. Possible criminal charges or contempt.</td>
</tr>
</tbody>
</table>

Comparison of Court Orders for Washington State
Many Tribal Courts have similar civil and criminal court orders. Check with your local Tribal Court for details.

REVISED May 2010. This information does not constitute legal advice. Laws change both as a result of legislative and court decisions.
**Kind of Order**

<table>
<thead>
<tr>
<th>Maximum duration of order</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SEXUAL ASSAULT PROTECTION ORDER</strong></td>
</tr>
<tr>
<td>• Temporary civil SAPO—14 days with service.</td>
</tr>
<tr>
<td>• Full civil SAPO—Designated by court up to two years.</td>
</tr>
<tr>
<td>• Criminal orders—Designated by court.</td>
</tr>
<tr>
<td>• Post-sentencing provision may last up to two years following imprisonment, or community supervision, conditional release, probation or parole.</td>
</tr>
<tr>
<td><strong>DOMESTIC VIOLENCE PROTECTION ORDER</strong></td>
</tr>
<tr>
<td>• EPO—14 days with service.</td>
</tr>
<tr>
<td>• EPO—24 days certified mail or with service by publication.</td>
</tr>
<tr>
<td>• PO—Designated by court, one year, or permanent.</td>
</tr>
<tr>
<td><strong>NO-CONTACT ORDER</strong></td>
</tr>
<tr>
<td>Until trial and sentencing are concluded. Post-sentencing provision lasts for possible maximum of sentence in Superior Court or two years in District or Municipal court.</td>
</tr>
<tr>
<td><strong>RESTRaining ORDER</strong></td>
</tr>
<tr>
<td>• TRO—14 days.</td>
</tr>
<tr>
<td>• Preliminary injunction—dependency of action.</td>
</tr>
<tr>
<td>• RO in final decree—permanent unless modified.</td>
</tr>
</tbody>
</table>

---

**Kind of Order**

<table>
<thead>
<tr>
<th>Nature of Proceeding</th>
<th>Anti-Harassment Order</th>
<th>Vulnerable Adult Protection Order</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Civil, under RCW 10.14.</strong></td>
<td>Civil, Under RCW 74.34.110 and RCW 26.50.</td>
<td></td>
</tr>
<tr>
<td><strong>Petitioner who has been seriously alarmed, annoyed or harassed by a conduct which serves no legitimate or lawful purpose. Parties generally are not married, have not lived together, and have no children in common.</strong></td>
<td>A vulnerable adult, or an interested person on behalf of a vulnerable adult, who has been abandoned, abused, subject to financial exploitation, or neglect or threat thereof. The Department of Social and Health Services may also obtain an order on behalf of a vulnerable adult.</td>
<td></td>
</tr>
<tr>
<td><strong>District Court. Limited provisions for referring cases to Superior Court. Municipal, District, or Superior for enforcement.</strong></td>
<td>Superior Court.</td>
<td></td>
</tr>
<tr>
<td><strong>No filing or service fees for stalking, sexual assault or domestic violence victims.</strong></td>
<td>No filing fees.</td>
<td></td>
</tr>
<tr>
<td><strong>Notice served on respondent.</strong></td>
<td>Notice served on the respondent. Notice by certified mail, or publication authorized in limited circumstances.</td>
<td></td>
</tr>
<tr>
<td><strong>Gross Misdemeanor. Possible criminal charges or contempt.</strong></td>
<td>Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.</td>
<td></td>
</tr>
<tr>
<td><strong>EAHO—14 days. PAHO—1 year or permanent.</strong></td>
<td>EPO—14 days with personal service. EPO—24 days certified mail or with service by publication. PO—Designated by court, for a fixed period not to exceed 5 years.</td>
<td></td>
</tr>
</tbody>
</table>

---

**GLOSSARY**

- **EAHO** Emergency Anti-Harassment Order
- **EPO** Emergency Protection Order or Temporary Order for Protection
- **PAHO** Permanent Anti-Harassment Order
- **PO** Order for Protection
- **RO** Restraining Order
- **SAPO** Sexual Assault Protection Order
- **TRO** Temporary Restraining Order

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REVISED May 2010. This information does not constitute legal advice. Laws change both as a result of legislative and court decisions.

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133
h. Smith Affidavit Form

Seattle Police Department

Smith Affidavit form for a sworn statement.

I declare under the penalty of perjury under the laws of the State of Washington, that the following is true and correct:

Check the box that applies to this statement:

☐ 1. I wrote this statement in my own handwriting.

☐ 2. I orally provided the officer with this statement and the officer wrote down what I said.

    I have read, or have had read to me, each page of this statement which consists of _____ pages.

    I have signed each page of the statement and placed my initials next to any corrections I have made.

☐ 3. I orally provided the officer with this statement and the officer made a recording of what I said. I gave the officer permission to record the statement.

I understand that this statement may be used in a court of law and may be used by a judge in determining the existence of probable cause for any charges that may be filed as a result of the described incident.

This statement is truthful and accurate; and was made voluntarily, knowingly, and intelligently, without any threats or promises of any kind.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED this _____ day of ________________, 20______.

__________________________
Print Name of Declarant

__________________________
Signature of Declarant

__________________________
Signature of Witness to Statement
i. Firearm Surrender in DV cases

Investigation, Prosecution, and FAQs when Courts order firearm surrender in domestic violence criminal and civil cases

Beginning December 1, 2014, a defendant in a domestic violence, sexual assault, or stalking case ordered to surrender firearms, other dangerous weapons and concealed pistol license under RCW 9.41.800 must file proof of compliance with the order using forms developed by the Administrative Office of the Courts. See RCW 9.41.802 and RCW 9.41.804. The change results from the passage of HB 1840 which creates a new felony crime for possession of a firearm when subject to a protective/no contact order that protects an intimate partner or child of intimate partner. The new change and penalties means we will seek surrender in every qualifying domestic violence, sexual assault, and stalking case.

Implementation and enforcement of this law has been slowed by numerous issues. The regional domestic violence task force between KCPAO and the DV community, the Domestic Violence Initiative, has been addressing the issue since the bill was enacted. Recently, elected officials gathered to recognize the longstanding issues with implementation and seek money to promote a better response. See story on King 5 news and release from Seattle City Council.

FAQ:

When Courts issue RCW 10.99 no contact and RCW 26.50 protection orders are they ordering surrender of firearms? Yes, after a slow start it has now become common for courts to issue NCOs and POs with a finding that the defendant or respondent is a credible threat and issue corresponding orders to surrender firearms and CPL. There are still gaps with court’s ordering surrender on sexual assault and stalking orders.

Are Courts reviewing whether defendants and respondents are complying with Court orders to surrender firearms and CPL? Sometimes. In criminal cases it is common for Courts to hold a review hearing 5 business days after order surrender of firearms (as per the statute). In civil cases, King County Superior Court recently began a firearm surrender review calendar on protection order cases. In King County District Court, no such review hearings are being held on civil cases, but are being held on criminal cases.

Who runs CPL/Gun permit check? This issue is being addressed by DOL, which maintains the statewide database. On criminal cases this check should be run as part of standard background check during all DV criminal investigations. KCPAO and the Seattle City Attorney request that all DV cases referred for filing of charges contain a CPL/Gun permit check.

On civil cases, the Court will not investigate whether a respondent has a CPL/Gun permit. KCPAO is working with DOL to gain access to the firearm database for civil cases to be able to provide information to the court.
What happens when a Court finds that the defendant or respondent is not in compliance on a criminal or civil case? In criminal cases, defendants claim compliance by filing a declaration of non-surrender (i.e., they declare that they have no firearms or CPL to surrender). If a court finds non-compliance, it will increase an offender’s bail or remand him or her into custody. In civil cases, a respondent may also claim compliance by filing a declaration of non-surrender, but also may just not show up to a review hearing and orally present his or her compliance or lack thereof. King County Superior Court will make findings of compliance or non-compliance but take no further action on the case. KCPAO is currently monitoring the review calendar for cases of non-compliance and referring to law enforcement.

What are the legal options when a defendant or respondent fails to comply with the court order to surrender firearms?

- If defendant or respondent fails to appear for a review hearing as directed: bail jumping for criminal defendant, bench warrant, and a charge of misdemeanor violation of RCW 9.41.800/810. For civil respondents the charge of misdemeanor violation of RCW 9.41.800.810.
- If defendant or respondent does not file a declaration of surrender or non-surrender with court: increase in bail for criminal defendant and a charge of misdemeanor violation of RCW 9.41.800/810. For a civil respondent the charge of misdemeanor violation of RCW 9.41.800/810. For civil respondents a charge of misdemeanor violation of RCW 9.41.800/810.
- If defendant or respondent files an untrue declaration of surrender or non-surrender:
  - Known firearms not surrendered (DOL record)- Perjury 2
  - Known CPL not surrendered (DOL record)- Perjury 2
  - Petitioner or other alleges firearm not surrendered, police investigation reveals firearm- Perjury 2 and UPFA 2.
  - Can also file misdemeanor violation RCW 9.41.800/810.

Bottom line:

- There needs to be regular information sharing between civil protection order courts and prosecutors to report non-compliance with DV firearms surrender to law enforcement.
- Law enforcement needs to initiate criminal investigations for non-compliance and submit the case to prosecutors for charging.
- Prosecutors need to aggressively pursue non-compliance to assure implementation of the new DV firearm surrender law.

Failing to Comply Scenario #1 (failure to appear):
King County Superior Court issues civil protection order and orders respondent to surrender firearms to Seattle Police Department. Court sets review hearing 5 days later per statute to determine compliance. Respondent does not appear at review hearing. Court enters finding that respondent failed to appear. What should happen?
KCPAO Protection Order program monitors Superior Court civil firearm compliance calendar and sends finding of non-compliance to Law Enforcement Agency (LEA) where surrender was ordered: Seattle Police. SPD initiates investigation to determine whether RCW 9.41.800 has been violated, checks whether respondent has CPL/gun registered, determines whether there is basis for search warrant. If finds respondent had notice and willfully failed to appear, LEA refers misdemeanor violation of RCW 9.41.800 to Seattle City Attorney. LEA may decide appearance was not willful and direct respondent to comply with order.

**Failing to Comply Scenario #2 (lying about guns)**
King County Superior Court issues civil protection order and orders respondent to surrender firearms to King County Sheriff. Court sets review hearing 5 days later per statute to determine compliance. Respondent appears at review hearing and files declaration of non-surrender (i.e. no guns or cpl). Petitioner alleges declaration of non-surrender is not true and respondent has guns/cpl. What should happen?

KCPAO Protection Order program sends dispute to Law Enforcement Agency (LEA) where surrender was ordered. King County Sheriff. Sheriff initiates investigation, reviews petition for protection order, and takes statement from petitioner or other witnesses about existence of firearms/cpl. Sheriff determines there is sufficient credible evidence to support a search warrant and recovers gun from respondent’s home. Case referred to KCPAO for filing of felony charges of UPFA 2, Perjury 2, and violation of RCW 9.41.800.

**Failing to Comply Scenario #3 (failure to file paperwork)**
King County Superior Court issues civil protection order and orders respondent to surrender firearms to Bellevue Police. Court sets review hearing 5 days later per statute to determine compliance. Respondent does not appear at review hearing. Court enters finding that respondent failed to appear. Police investigate, finds respondent had notice and willfully failed, refers misdemeanor violation of RCW 9.41.800 to Bellevue City Attorney or KCPAO DV unit.

Prosecutor reviews case and files the misdemeanor charge of failure to comply with order to surrender firearms

*Did knowingly/willfully fail to surrender any firearm or other dangerous weapon or CPL in violation of the terms of a court order issued under chapter [7.92 RCW] [RCW 7.90.060] [RCW 9A.46.080] [RCW 10.14.080] [RCW 10.99.040] [RCW 10.99.045] [RCW 26.09.040] [RCW 26.09.600] [RCW 26.10.040] [RCW 26.09.115] [RCW 26.26.130] [RCW 26.50.060] [RCW 26.50.070] [RCW 26.26.590];

*Contrary to RCW 9.41.800 and RCW 9.41.810, and against the peace and dignity of the State of Washington.*
Did knowingly [willfully] fail to comply with the terms of a court order to surrender firearms issued under 9.41.800 by: [failing to appear at a court ordered review hearing]; [failing to file with the clerk of the court a proof of surrender and receipt form or a declaration of nonsurrender form within five judicial days of the entry of the order to surrender firearms;

Contrary to RCW 9.41.800, 9.41.804, and RCW 9.41.810, and against the peace and dignity of the State of Washington.

Prosecution response:
Case proven by obtaining certified court documents of the order to surrender firearms and the "Findings and Order on Review (Firearm Surrender)" filed by King County Superior Court following the review hearing. Prosecutor also needs a certification from the agency to which the defendant/respondent was required to surrender declaring that they searched their records and found no record of the defendant surrendering his firearms.
j. Material Witness Warrants in Domestic Violence Cases

I. Basic Principles

It is our goal as prosecutors to try to protect domestic violence victims, keep them involved in and informed about their cases, and restore some of their sense of control over their own lives. Because issuance of material witness warrants for our victims has serious equity concerns, will alienate victims and deprive them of any sense of control, there use is disfavored. Balanced against that concern is our duty and responsibility to preserve public safety and offender accountability. A warrant may be necessary when case facts or the history of the victim and defendant indicates that the victim's life or her children's lives are in serious danger. Material witness warrants should never be discussed with any domestic violence victim, however, unless there have been internal consultations in advance which, at a minimum, include the responsible deputy's supervisor and the victim advocate. When warrants do issue, it is the policy of this office to structure their service to avoid jailing the victim if at all possible.

All of the following factors, A through E, should be present before a warrant will issue for a victim in a domestic violence case.

- Case Characteristics
  - There must be a history of domestic violence (including prior reports of domestic violence without convictions and unreported history)
  - And, the case must also involve
    - suicidal or homicidal acts or threats OR
    - use or implied use of a deadly weapon OR
    - need to protect a child, e.g., child witnessed the violence, intervened, or has been threatened through words or acts OR
    - a defendant with a significant criminal history OR
    - stalking behavior OR
    - uniquely egregious conduct e.g., sadism, torture, lengthy imprisonment.
  - The assigned Deputy Prosecutor and a Senior must agree in documented form that the case cannot be proved without the victim.
  - All other efforts to obtain the victim's presence must have failed
  - The victim advocate and victim advocate supervisor must be consulted.
  - The DV unit chair must approve issuance of the warrant
The following protocol should be followed in all domestic violence cases in which a material witness warrant issues for the victim.

- The case should be assessed early to determine if the victim is necessary for prosecution.

- Efforts by our office to locate the victim and gain cooperation should be documented. This includes regular contact with the assigned detective for follow-up. Blue notes are critical.

- Advocate input must be solicited. It is important for the prosecution team to understand what reasons may exist to risk dismissal of the case. If dismissal is necessary, the dismissal order should be structured to document the reasons for it.

- A subpoena should if possible be personally served on the victim EXCEPT that subpoenas should never be served at DV shelters.

- A senior's approval of the decision to discuss or obtain the material witness warrant should be documented. All other avenues to avoid final service of an arrest warrant must be exhausted. If the material witness warrant is to be served (victim arrested) or put on-line for service there must be documented final approval of the DV unit chair and consultation with the advocate supervisor.

- The responsible DPA should obtain the necessary forms for issuance of the material witness warrant from their paralegal, and should complete them, including an affidavit on why the victim is necessary to prosecution, the fact that a subpoena has been personally served, and what other efforts have been made to secure the victim’s presence.

- The Office of Public Defense should be contacted to secure an attorney for the victim.

- A judge must sign the material witness warrant. The warrant should must include an expiration date. What expiration date is set should be discussed in advance with a supervisor.

- If at all possible, a detective or officer should be available to take the warrant and serve it.

- Personal service, not on line, of a material witness warrant is preferable if possible.

- If at all possible, the victim should be brought directly to court.

- If our office has any control, victims should be booked into jail only in the following instances:
Appendix

- victim safety concerns (lethality assessment) or victim is very unlikely to reappear
- based on advocate, DPA and senior input
- jail commander is contacted to ensure a "keep separate" order if the offender is in custody

- DPA should check with police regarding care for victim's children.

II. **Material Witness Warrant Protocol for Advocates**

When an Advocate becomes aware that a Prosecutor is considering requesting a Material Witness Warrant, the Advocate should do the following:

- Notify supervisor via email about the request and give a brief history of the events leading up to it
- Call supervisor cell phone to discuss immediately.
- Put, in writing, in a memorandum, any contact with the Victim and set out the Victim’s wishes/concerns/requests
- Forward the memorandum via email to supervisor
- Print a copy of the memorandum and place into Advocate file
k. Scoring Forms

Appendix
Appendix

GENERAL NONVIOLENT OFFENSE
WHERE DOMESTIC VIOLENCE HAS BEEN PLEAD AND PROVEN

NONVIOLENT
OFFENDER SCORING RCW 9.94A.525(21)
CURRENT OFFENSE BEING SCORED:

ADULT HISTORY:
- Enter number of domestic violence felony convictions as listed below*: x 2
- Enter number of domestic violence felony convictions (RCW 9.94A.509)(1) plead and proven after 8/1/11: x 1
- Enter number of other violent felony convictions: x 1

JUVENILE HISTORY:
- Enter number of domestic violence felony convictions as listed below*: x 1
- Enter number of other violent felony convictions: x 1

OTHER CURRENT OFFENSES:
(Other current offenses that do not necessitate the use of any court records to offender's arrest)
- Enter number of domestic violence felony convictions as listed below*: x 2
- Enter number of other violent felony convictions: x 1

STATUS:
- Was the offender on community custody on the date the current offense was committed? (If yes): x 1

The following crimes committed after August 1, 2011, if pled and proven with Domestic Violence Special allegation after August 1, 2011, will score as outlined above:
- Adult DV doubles
  - RCW 9.94A.525(21)(a)
  - RCW 9.94A.525(21)(b)
  - RCW 9.94A.525(21)(c)
- FVNCO
  - FVNCO
  - MFNCO
- Felony Harassment
- Felony Stalking
- Assault 1
- Assault 2
- Assault 3
- Burglary 1
- Kidnap 1
- Kidnap 2
- Unlawful Imprisonment
- Robbery 1
- Robbery 2
- Anxom 1
- Anxom 2

HOW TO QUALIFY FOR A DOSA:

RESIDENTIAL DOSA:
1. Only crimes where the end of the Standard Range is 12 or more
2. If Midpoint of the Standard Range is less than 24 months
   Examples where you can’t get Res DOSA:
   1. Standard range is greater than 17-22
   2. Midpoint is > 24 months

PRISON BASED DOSA:
1. If the Midpoint of the Standard Range is 24 months or more
   Examples: Res Burg, w/ Off Score of 6-15 or 120 (Mid-30m)
   Sent: 19mos DOC; 19mos Comm Cust.

When are you NOT eligible for a DOSA:
1. Any Sex Offense conviction at any time
2. Any violent crime conviction w/in 10 years
3. A’s in subject to deportation
4. A’s current offense is Felony DUI/Phys Cost
5. A’s current offense involves a large quantity of drugs
6. Has been given 1 prior DOSA w/in 10 years

143
Domestic Violence and Violent Felony Offense Scoring Form

Offender Scoring RCW 9.94A.525(21)

Use this form only for Domestic Violence and Violent Felony Offenses

ADULT HISTORY:
Enter number of adult DV doublers (21)(a) ................................................................. x 2 =
Enter number of other serious violent and violent convictions ................................. x 2 =
Enter number of scored DV misdemeanors (21)(c) ..................................................... x 1 =
Enter number of other felony convictions ................................................................ x 1 =

JUVENILE HISTORY:
Enter number of JR DV convictions (21)(b) .............................................................. x 1 =
Enter number of serious violent and violent felony convictions .............................. x 2 =
Enter number of other felony convictions ................................................................ x ½ =

OTHER CURRENT OFFENSES: (Those offenses not encompassing the same criminal conduct)
Enter number of adult DV doublers (21)(a) ................................................................. x 2 =
Enter number of violent convictions ........................................................................... x 2 =
Enter number of scored DV misdemeanors (21)(c) ..................................................... x 1 =
Enter number of other felony convictions ................................................................ x 1 =

STATUS AT TIME OF CURRENT OFFENSES:
If on community custody at time of current offense, add 1 point + 1 =

Total the last column to get the Offender Score
(Round down to the nearest whole number)

STANDARD RANGE CALCULATION

CURRENT OFFENSE BEING SCORED | SERIOUSNESS LEVEL | OFFENDER SCORE | LOW to HIGH STANDARD RANGE
-----------------------------------|------------------|----------------|-------------------

The following crimes committed after August 1, 2011, if pled and proven with Domestic Violence special allegation after August 1, 2011, will score as outlined above:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>FVNCO</td>
<td>FVNCO</td>
<td>MVNCO</td>
</tr>
<tr>
<td>Felony Harassment</td>
<td>Felony Harassment</td>
<td>Harassment</td>
</tr>
<tr>
<td>Felony Stalking</td>
<td>Felony Stalking</td>
<td>Stalking</td>
</tr>
<tr>
<td>Assault 1</td>
<td>Assault 1</td>
<td>Assault 4</td>
</tr>
<tr>
<td>Assault 2</td>
<td>Assault 2</td>
<td></td>
</tr>
<tr>
<td>Assault 3</td>
<td>Assault 3</td>
<td></td>
</tr>
<tr>
<td>Burglary 1</td>
<td>Burglary 1</td>
<td></td>
</tr>
<tr>
<td>Kidnap 1</td>
<td>Kidnap 1</td>
<td></td>
</tr>
<tr>
<td>Kidnap 2</td>
<td>Kidnap 2</td>
<td></td>
</tr>
<tr>
<td>Unlawful Imprisonment</td>
<td>Unlawful Imprisonment</td>
<td></td>
</tr>
<tr>
<td>Robbery 1</td>
<td>Robbery 1</td>
<td></td>
</tr>
<tr>
<td>Robbery 2</td>
<td>Robbery 2</td>
<td></td>
</tr>
<tr>
<td>Arson 1</td>
<td>Arson 1</td>
<td></td>
</tr>
<tr>
<td>Arson 2</td>
<td>Arson 2</td>
<td></td>
</tr>
</tbody>
</table>
## Domestic Violence and Sex Offense Scoring Form

**Offender Scoring RCW 9.94A.525(21)**  
Use this form only for Domestic Violence and Sex Offenses

### ADULT HISTORY:

Enter number of adult DV doublers (21)(a) ................................................................. x 2 =  
Enter number of other sex convictions ................................................................. x 3 =  
Enter number of scored DV misdemeanors (21)(c) ................................................. x 1 =  
Enter number of other felony convictions ..............................................................

### JUVENILE HISTORY:

Enter number of JR DV convictions (21)(b) ........................................................... x 1 =  
Enter number of sex offense convictions ............................................................... x 3 =  
Enter number of serious violent and violent felony convictions ......................... x 1 =  
Enter number of other felony convictions ..............................................................

### OTHER CURRENT OFFENSES: (Those offenses not encompassing the same criminal conduct)

Enter number of adult DV doublers (21)(a) ................................................................. x 2 =  
Enter number of sex offense convictions ............................................................... x 3 =  
Enter number of scored DV misdemeanors (21)(c) ................................................. x 1 =  
Enter number of other felony convictions ..............................................................

### STATUS AT TIME OF CURRENT OFFENSES:

If on community custody at time of current offense, add 1 point  + 1 =  

Total the last column to get the **Offender Score**  
(Round down to the nearest whole number)

<table>
<thead>
<tr>
<th>STANDARD RANGE CALCULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>CURRENT OFFENSE BEING SCORED</td>
</tr>
</tbody>
</table>

The following crimes committed after August 1, 2011, if pled and proven with Domestic Violence special allegation after August 1, 2011, will score as outlined above:

- **Adult DV Doubles**  
  - RCW 9.94A.525(21)(a)  
  - Scored Misdemeanors  
  - RCW 9.94A.525(21)(c)

- **FVNCO**  
  - Felony Harassment  
  - Stalking  
  - Assault 1  
  - Assault 2  
  - Assault 3  
  - Burglary 1  
  - Kidnap 1  
  - Kidnap 2  
  - Unlawful Imprisonment  
  - Robbery 1  
  - Robbery 2  
  - Arson 1  
  - Arson 2

- **MVNCO**  
  - Felony Harassment  
  - Harassment  
  - Assault 4  
  - Assault 3  
  - Burglary 1  
  - Kidnap 2  
  - Unlawful Imprisonment  
  - Robbery 2  
  - Arson 2
Appendix

Domestic Violence and Burglary Offense Scoring Form

Offender Scoring RCW 9.94A.525(21)

Use this form only for Domestic Violence and Burglary Offenses

ADULT HISTORY:

Enter number of adult DV doubles (21)(a) ................................................................. x 2 =
Enter number of other Burglary 1, 2, or Residential Burglary convictions ................. x 2 =
Enter number of scored DV misdemeanors (21)(c) .................................................. x 1 =
Enter number of other felony convictions ............................................................. x 1 =

JUVENILE HISTORY:

Enter number of JR DV convictions (21)(b) ............................................................. x 1 =
Enter number of other Burglary 1 convictions ....................................................... x 2 =
Enter number of other Burglary 2 or Residential Burglary convictions .................. x 1 =
Enter number of serious violent and violent felony convictions ............................... x 1 =
Enter number of other felony convictions ............................................................. x ½ =

OTHER CURRENT OFFENSES: (Those offenses not encompassing the same criminal conduct)

Enter number of adult DV doubles (21)(a) ................................................................. x 2 =
Enter number of other Burglary 1, 2, or Residential Burglary convictions ................. x 2 =
Enter number of scored DV misdemeanors (21)(c) .................................................. x 1 =
Enter number of other felony convictions ............................................................. x ½ =

STATUS AT TIME OF CURRENT OFFENSES:

If on community custody at time of current offense, add 1 point

+ 1 ______ =

Total the last column to get the Offender Score

(Round down to the nearest whole number)

---------------------------------------------------------------

STANDARD RANGE CALCULATION

<table>
<thead>
<tr>
<th>CURRENT OFFENSE BEING SCORED</th>
<th>SERIOUSNESS LEVEL</th>
<th>OFFENDER SCORE</th>
<th>LOW STANDARD RANGE</th>
<th>HIGH STANDARD RANGE</th>
</tr>
</thead>
</table>

The following crimes committed after August 1, 2011, if pled or proven with Domestic Violence special allegation after August 1, 2011, will score as outlined above:

Adult DV Doubles
RCW 9.94A.525(21)(a)

Juvenile Recidivist (JR)
RCW 9.94A.525(21)(b)

FVNCO
RCW 9.94A.525(21)(c)

Felony Harassment
MVNCO

Felony Stalking

Felony Stalking

Assault 1

Assault 1

Assault 2

Assault 2

Assault 3

Assault 3

Burglary 1

Burglary 1

Kidnap 1

Kidnap 1

Kidnap 2

Kidnap 2

Unlawful Imprisonment

Unlawful Imprisonment

Robbery 1

Robbery 1

Robbery 2

Robbery 2

Arson 1

Arson 1

Arson 2

Arson 2
Domestic Violence and Non-Violent Felony Offense Scoring Form

Offender Scoring RCW 9.94A.525(21)

Use this form only for Domestic Violence and Non-Violent Felony Offenses

ADULT HISTORY:

Enter number of adult DV doublers (21)(a)................................................................... x 2 =
Enter number of scored DV misdemeanors (21)(c)..................................................... x 1 =
Enter number of other felony convictions ..................................................................... x 1 =

JUVENILE HISTORY:

Enter number of Jr DV convictions (21)(b)................................................................. x 1 =
Enter number of serious violent and violent felony convictions............................... x 1 =
Enter number of other felony convictions ..................................................................... x ½ =

OTHER CURRENT OFFENSES: (Those offenses not encompassing the same criminal conduct)

Enter number of adult DV doublers (21)(a) .................................................................. x 2 =
Enter number of scored DV misdemeanors (21)(c)..................................................... x 1 =
Enter number of other felony convictions ..................................................................... x 1 =

STATUS AT TIME OF CURRENT OFFENSES:

If on community custody at time of current offense, add 1 point

Total the last column to get the Offender Score

(Round down to the nearest whole number)

STANDARD RANGE CALCULATION

CURRENT OFFENSE BEING SCORED | SERIOUSNESS | OFFENDER LEVEL | LOW | HIGH
----------------------------------|-------------|----------------|-----|-----

The following crimes committed after August 1, 2011, if pled and proven with Domestic Violence special allegation after August 1, 2011, will score as outlined above:

- Adult DV Doublers
  - RCW 9.94A.525(21)(a)
- Juvenile Recidivist (JR)
  - RCW 9.94A.525(21)(b)
- Scored Misdemeanors
  - RCW 9.94A.525(21)(c)
- FVNCO
- Harassment
- Stalking
- Assault 1
- Assault 2
- Assault 3
- Burglary 1
- Kidnap 1
- Kidnap 2
- Unlawful Imprisonment
- Robbery 1
- Robbery 2
- Arson 1
- Arson 2

Appendix