

# STATE OF NEVADA COMMITTEE ON DOMESTIC VIOLENCE AND NEVADA DISTRICT ATTORNEY'S ASSOCIATION



## DOMESTIC VIOLENCE PROSECUTION BEST PRACTICE GUIDELINES

As adopted by the Committee on Domestic Violence  
And approved by the Nevada District Attorney's Association  
May 30, 2018

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## I. INTRODUCTION

### A. Purpose of Guidelines

The purpose of these guidelines is to provide a set of best practices for all levels of domestic violence prosecutions for the State of Nevada in the hope that they will be adopted in whole or in part by all agencies which have the prosecution of crimes of domestic violence as part of their duties to the community.

These guidelines are based upon the premise that domestic violence is criminal conduct. Prosecutors have the responsibility to prosecute these cases as aggressively as they do any other violent crimes. The public has a critical interest in reducing the number of incidents of domestic violence, as domestic violence tends to escalate in severity and frequency, and, unchecked, can lead to homicide.

Successful prosecution of crimes of domestic violence requires specialized techniques designed to protect the victim from retaliation by the perpetrator, allay the victim's fears of the criminal justice system, and to encourage her cooperation with the prosecution.<sup>1</sup>

Adherence to these guidelines should help prosecutors to be more effective and ultimately further the goals set forth below.

### B. Goals of Prosecution

The goals of prosecution in domestic violence cases are:

1. To protect the victim from additional acts of violence committed by the perpetrator;
2. To reduce the exposure and/or possible injury to children or other family members from domestic violence;
3. To deter the perpetrator from committing continued acts of violence in the community and hold him accountable for his actions;
4. To create a general deterrence to domestic violence in the community; and
5. To serve justice<sup>2</sup>

**NOTE:** Victims and advocates may not necessarily share all these goals, and may have their own objectives separate and distinct from those of the prosecutor. For example, a victim may want the violence to stop, but to continue in a relationship with the perpetrator, while the prosecutor may want the perpetrator incarcerated.

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<sup>1</sup> Throughout these guidelines, the victim is referred to in the feminine gender, because of the fact that in the overwhelming majority of domestic violence cases, the victim is female and the perpetrator is male. These policies should apply equally to male victims.

<sup>2</sup> These guidelines are not intended for prosecution of domestic violence victims who injure or kill their abusers in self-defense. Prosecutors should be extremely careful in assessing batteries on men by their female partners to determine if the woman was acting in self-defense based on the circumstances surrounding the incident and any past history of violence against her.

Prosecutors should take care to elicit the victim's objectives and to take them into consideration so as to formulate appropriate goals for each individual prosecution.

### C. Definition of Domestic Violence

Domestic violence is defined by the relationship of the victim to the perpetrator, not by the acts committed. These relationships generally include current or former family or other household members, individuals who are related by blood or by shared biological parenthood, their own minor child, the child of one of the persons described above, or a child in the care or custody of the persons described above, sexual or intimate partners (including same-sex partners), and any qualified dating relationship. See NRS 33.018.

Although the prosecutor may be facing a single incident, such as domestic battery, domestic violence generally represents a pattern of behavior. This pattern can take many forms, all of them involving physical violence or threats of physical violence. The pattern almost always includes emotional, sexual, and economic abuse as well. The perpetrator's goal in committing these crimes is to obtain and maintain power and control over the victim. The violence may be accomplished with the use of hands, feet, weapons, or other objects. Injuries inflicted on the victim may be as serious as those inflicted in violent felonies. Some examples of felonies committed in a domestic violence context include assault with a deadly weapon, battery with a deadly weapon, battery causing substantial bodily injury, aggravated stalking, kidnapping, child endangerment, sexual assault, robbery, burglary, and murder. Some examples of misdemeanors commonly committed in a domestic violence context include assault, battery, brandishing a deadly weapon, harassment, stalking, false imprisonment, violation of a temporary protective order, destruction of property, and disturbing the peace. See NRS 33.018.

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

- The vast majority of adult victims of domestic violence are women;
- Domestic violence occurs in every racial and socio-economic group;
- Perpetrators use violence as a tool to achieve power and control over their partners and children;
- Violence often increases in severity and frequency at the time of separation and thereafter;
- Most of the men who abuse their partners abuse their children as well;
- Victims of domestic violence and their children are often compelled to return to relationships with perpetrators for many reasons, including economic concerns, threats to abduct children or obtain physical custody of them, and threats of death or other harm to victims and their families.

## II. CORE STRATEGIES

### A. Specialization

Specialization results in a higher conviction rate of domestic violence perpetrators. Therefore, ideally, prosecutors should establish domestic violence units in large offices, or create specialists in smaller offices, in order to permit vertical prosecution and the enhancement of expertise on domestic violence

cases. Specialization can help avoid situations in which domestic violence cases are afforded insufficient preparation or attention in favor of cases perceived as being bigger, more important, or less trouble.

Absent the ability to specialize, periodic training is encouraged to insure that all prosecutors understand the issues of domestic violence and are familiar with appropriate resources and referrals in the community.

In order to promote willing victim participation in the prosecution of cases, victims should be provided with emotional support, information regarding the criminal justice system, and referrals to social service and legal assistance organizations. In order to effectively perform these functions, it is suggested that the prosecutor's office utilize a victim advocate and/or establish and maintain a close working relationship with local battered women's programs. The relationship should be characterized by the ability to make informed referrals rather than an expectation that advocates will support every decision of the prosecutor's office.

#### B. Early and Consistent Contact with Victims

Early, consistent contact with victims and immediate referral to appropriate support services is critical to preserving a case. If at all possible, initiate all protocols related to victim safety and victim interview during the first 12 critical hours following the arrest of the perpetrator. The prosecutor's office should utilize available resources to create a dialogue with the victim to address their joint or individual concerns.

#### C. Evidence-Based Prosecution

Due to the unique and complex dynamics of domestic violence, the victim may be unwilling or unavailable to cooperate at any point in the prosecution process. The burden of prosecuting domestic violence cases should be placed on the prosecutor and not the victim. Prosecutors should always expect the unexpected and be prepared for an evidence-based prosecution using evidence independent of the victim's testimony.

#### D. Speedy Prosecution

It is essential to the successful prosecution of domestic violence cases that trials occur as rapidly as possible. The victim is often more willing to cooperate immediately after the incident, rather than later, when the abuser may have had a chance to reassert control over her. Additionally, delays in proceeding to trial increase the opportunity for additional offenses before resolution of the initial case. Therefore, prosecutors should strenuously object to any unnecessary continuances.

#### E. Working with Victim Advocates

Prosecutors handling domestic violence cases should work in close conjunction with victim advocates whenever possible and practical. Working with an advocate who has an ongoing relationship with the victim greatly facilitates communication between the prosecutor and the victim, making it more likely that the victim will continue to cooperate in the case and will provide the prosecutor with information helpful to protect her safety during the proceedings. Victim advocates can provide important background information about the victim, the perpetrator, and the family circumstances which is helpful in the prosecution of the case and at sentencing.

When hiring a victim advocate, priority should be given to survivors of domestic violence, or those experienced in working with domestic violence programs.

#### F. Coordinated Community Response

The prosecutor's office should work closely with law enforcement agencies, domestic violence groups, and other community resources. Although prosecution is just one component of a coordinated community response to domestic violence, prosecutors are in a unique position to spearhead efforts to improve the criminal justice system's handling of domestic violence cases. Examples of a coordinated community response may include referral relationships, liaisons, task forces, inter-agency agreements, and multi-disciplinary training.

#### III. FILING CHARGES

In determining whether to file charges, which crimes to charge, and whether to charge them as misdemeanors, gross misdemeanors, or felonies, with or without enhancements, the prosecutor should consider and weigh a number of different factors.

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

- Existence and seriousness of the injuries and/or threats;
- Use of a weapon (including furniture or other household objects);
- Any history of violence by either party;
- Vulnerability of the victim;
- Presence and proximity of children at the location of the violence;
- Careful determination of the identity of the "primary physical aggressor" (dominant aggressor), if any (See Appendix A);
- Potential lethality in the context of the relationship as a whole (See Appendix B);
- Strength of the case and the ability to prove the case beyond a reasonable doubt.

Where probable cause exists, the filing of criminal charges must be considered. In the filing determination, prosecutors should, at a minimum, take into account the existence of any of the following types of corroborating evidence:

- Any evidence of physical injury, including photographs;
- Any evidence of a party seeking medical attention, including medical records of injuries;
- Witnesses who observed the incident or the injuries, including competent children;
- Witnesses who heard sounds indicating that violence was taking place, i.e., screams, pounding noises, furniture being thrown, windows breaking;
- Witnesses who had contact with the victim or suspect contemporaneous with or immediately after the incident;
- Audio recordings, including 911 tapes, voice messages, monitored jail telephone calls;

- Physical evidence, i.e., weapons, broken furnishings, torn clothing;
- Admissions or other statements by the perpetrator;
- The existence of a timely report by the victim, or reasons for delay;
- Photographs of the crime scene;
- Spontaneous utterances by any person;
- Demeanor of all persons;
- Flight of either party;
- Presence or absence of written statements.

When a basis for filing charges exists, the prosecutor should determine whether to charge a felony or misdemeanor. As domestic violence incidents often constitute felonies, the prosecutor should charge accordingly. The prosecutor should also consider charging crimes, previous or concurrent, committed against the same victim if they occurred within the applicable statute of limitations. Careful consideration should be given to charging stalking, harassment, or aggravated stalking charges if there is a pattern of behavior which supports such charges.

Prosecutors of domestic violence cases will undoubtedly experience unique situations involving issues of double jeopardy and should acquaint themselves with recent and varied case law on the subject. They must be aware of and able to identify troublesome situations before they develop into a bar to a prosecution of another, perhaps much more serious charge. In order to take advantage of this situation, a defendant may rush to plead guilty to a misdemeanor domestic battery as soon as the prosecutor, unaware of the defendant's two prior convictions, files the complaint.

Multiple prosecutions in family court, justice court and municipal court may exist simultaneously stemming from the same incident, filed by three separate prosecutors. Thus, different prosecuting agencies should communicate and be mindful of the effect of one proceeding, if any, on another possibly more serious prosecution.

The crimes of stalking and aggravated stalking, for example, require a course of conduct over a period of time which may encompass the commission of multiple criminal offenses, perhaps the subject of another prosecution(s). However, a defendant cannot be punished twice for exactly the same criminal act(s). Violations of protection orders also customarily involve separate prosecutions in civil and criminal courtrooms and may involve double jeopardy if sanctions or punishments are being sought in each case.

#### IV. PROCEDURE

##### A. Review of Arrest Cases

In all cases in which an arrest has been made and prosecution is warranted, a criminal complaint and/or indictment should be filed in a timely manner. As a matter of policy, the victim should not be expected to sign a criminal complaint in cases of domestic violence. Too often, a defendant will pressure a victim to drop the charges. This policy sends a consistent message to both victims and perpetrators that domestic violence is a crime against the community and not a private dispute.

If, after reviewing and weighing the factors set forth in Section III above, the prosecutor elects not to file charges, he or she should document the reasons why charges were not filed.<sup>3</sup>

B. Review of Nonarrest Cases

The prosecutor's office should establish a mechanism to review all domestic violence cases in which arrests were not made for the possible filing of charges. The decision to seek an arrest warrant should be based upon the factors set forth in Section III above. If charges are filed, a warrant should be sought, rather than a summons, since NRS 171.137 mandates arrest for domestic violence. Furthermore, NRS 171.1229 requires that subjects arrested for domestic violence be fingerprinted by law enforcement.

If charges are not filed, and the prosecutor observes deficiencies in the investigation, the prosecutor should inform the law enforcement agency of the deficiencies. Where prosecutors observe that law enforcement agencies are not making arrests when appropriate, the prosecutor should encourage and train agencies to upgrade arrest practices in domestic violence cases to conform to NRS 171.137.

V. CASE PREPARATION

CAVEAT: DIRECT PARTICIPATION BY A PROSECUTOR IN THE INVESTIGATION OF A CASE OR IN THE COLLECTION OF EVIDENCE CAN TURN THE ATTORNEY INTO A WITNESS, UNABLE TO PROSECUTE THE CASE, AND CAN STRIP THE ATTORNEY OF PROSECUTORIAL IMMUNITY.

Allowing for available resources, preparation of a domestic violence case for trial involves a thorough investigation which should include the following:

A. Ascertain Victim's Whereabouts

Victims of domestic violence are often forced to move with little or no notice, due to attempts to hide from abusers. In all cases the victim's whereabouts should be kept current. The prosecutor's office should establish relationships with any agencies providing victim shelter services and understand their respective processes for the release of information.

When the victim is first contacted, the prosecutor or victim/witness staff should stress the importance of keeping the office informed of any address changes. Addresses and phone numbers of close friends, coworkers or relatives who can serve as contact persons should be obtained in case the victim has to move suddenly and is unable to notify the prosecutor's office. Additional resources for locating victims may be available through animal control or other licensing authorities, utility or cable companies, felon registration authorities, traffic and other court records, DMV records, credit history records, school records, internet addresses, and businesses frequented by the victim.

INFORMATION REGARDING THE VICTIM'S WHEREABOUTS OR CONTACT PERSONS SHOULD BE KEPT CONFIDENTIAL.

B. Document Victim's Injuries and Signs of Physical Contact

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<sup>3</sup> Every jurisdiction should implement a process wherein an immediate attempt is made to notify the victim in the event charges are not filed.



The victim's injuries should be photographed at the first opportunity, a signed medical release should be obtained, and all medical records should be obtained. Statements should be obtained from witnesses who observed the injuries when fresh. Subsequent photographs of the injuries, taken at certain intervals (e.g., 24 hours, 72 hours and one week) after the battery, are useful to show the severity of the attack. Photos are to be collected according to local procedures of evidence collection. Additionally, prosecutors should encourage the use of a body diagram for documentation of un-photographable injuries; for example, a knot on the head, broken bones, internal injuries, complaints of pain, or injuries which may not be apparent with flash photography.

C. Build on Police Investigation

Obtain and review any police reports immediately for accuracy and detail. Obtain any 911 tape that may exist for its potential evidentiary value, including: impeachment of recanting victims, identification of additional witnesses, and admissions, threats, or other excited utterances. If the investigation by the police was incomplete, request follow-up investigation in writing to obtain additional information, including: witness statements and contact information, photographs, and information on responding medical personnel. Explain why the information is needed to prosecute the case. This will serve to complete the pending case and to train the officer for future investigations.

Obtain information from the victim as to the identity and location of any corroborating witnesses. Be mindful that matters of evidentiary value may exist on social media platforms (e.g., Facebook, Instagram, Snapchat, Twitter, Tumblr, etc.), text messages (SMS), MMS, and voicemails).

D. Statements of Witnesses

Obtain statements from any witnesses to the incident itself, including those witnesses who heard crying, screaming, gun shots, etc. Obtain statements of any witnesses who can document the relationship and the state of mind of the victim or the defendant immediately after the incident. Do not overlook children who are in the home at the time of the incident. Obtain supplemental statements as necessary.

E. Physical Evidence

The victim and any witnesses should be questioned closely about any physical evidence such as torn, wet or bloody clothing, weapons used in the incident, damaged property, or of answering machine tapes, voicemails, text messages, or any social media posts containing statements of the defendant, threats, harassment, or potential admissions. To preserve physical evidence for trial, immediately have an investigator or police obtain items of physical evidence not originally obtained by law enforcement. Consider asking an investigator or police to take photographs of the scene to show the violent nature of the incident or of the defendant, or to corroborate victim or witness statements.

F. Pleadings and Transcript From Protection Order Proceedings

If a request for a Temporary or Extended Protection Order was made, review the pleadings for supplemental information and to evaluate if any additional charges should be filed. Find out if there were hearings on a request for a Temporary or Extended Protective Order, or on contempt proceedings for violation of the Protective Order. Obtain transcripts which may contain admissions of the defendant, material for impeachment or cross-examination, or descriptions of the incident or past incidents of violence. Most courts throughout Nevada utilize Justice AV Solutions (JAVS) for digital recordings of all legal proceedings. Obtain copies of JAVS recordings from the TPO or EPO hearings.

Beware: There may be double jeopardy implications in pursuing contempt sanctions and criminal charges simultaneously if such actions arise out of the same transaction or occurrence.

Every office should set a policy regarding prosecution of Protection Order violations, and should do so with close communication with the issuing court.

G. Ascertain Defendant's Criminal History and/or History of Domestic Violence

Whether or not the defendant has any prior convictions, he may have a lengthy history of acts of domestic violence against the present victim or other victims, which may include prior Protection Orders against him. This information is important for the purpose of enhancement, for determining the potential lethality of the present charge, and for proposing appropriate sentences to the court. The prosecutor should seek admission of this information at trial or sentencing as applicable. In contemplation of the introduction of prior bad act evidence at trial, a prosecutor should review NRS 48.045 and relevant case law.

VI. PRETRIAL ISSUES

A. Arrest /Bail Conditions

In some jurisdictions, prosecutors may not routinely appear at arraignments in domestic violence cases. The best practice is to ensure that a prosecutor attends all initial appearances and arraignments in domestic violence cases. In either case, it is critical that a prosecutor know the 10 statutory factors considered by the court in determining bail as set forth in NRS 178.4853, and to review each domestic violence case in light of NRS 178.498 and 178.499 to determine if a bail increase is appropriate. In addition to the statutory considerations, the prosecutor should recommend the following conditions for any release where appropriate:

- A prohibition on any contact with the victim and/or her children and relatives either in person or by telephone, including contact through a third party;
- An order barring the defendant from approaching the victim's residence, school or place of employment;
- A prohibition on the defendant destroying or disposing of the victim's property or property held in common;
- A prohibition on drugs, alcohol or weapons;
- In jurisdictions with a Department of Alternative Sentencing (DAS) created pursuant to NRS Chapter 211A, an order placing the defendant under the supervision of DAS and subject to search and seizure without a warrant for the possession of prohibited drugs, alcohol or weapons;
- An order that the defendant wear an alcohol monitoring device;
- An order that the defendant wear a GPS monitoring device;
- An order that the defendant must provide his current address and phone number to court pretrial services, DAS, or as otherwise ordered, and must notify that agency within 24 hours of any change in address or phone number;
- Any other conditions necessary for the victim's safety.

In most circumstances, release of the defendant on his own recognizance should be opposed based on the continued risk of danger posed in domestic violence situations. NRS 178.4851 *et seq.* provides for conditions of release without bail, and should be considered in recommending conditions to protect victims.

B. Body Cams

Agencies throughout Nevada will soon be implementing the use of body cams. Each department will need to implement policies and procedures regulating their use, including among other legal issues, how long recorded video must be retained both for purposes of discovery and for potential civil litigation, under what circumstances the camera must be turned on or off and whether the body cams can film inside a person's home. Each prosecuting agency should contact their individual law enforcement agencies regarding the use and implementation of body cams.

VII. PROTECTING THE VICTIM

The prosecutor, in conjunction with the victim advocate, should make every effort during the pendency of the case to protect the safety of the victim. These efforts should include, but are not limited to the following:

A. Confidentiality of the Victim's Address

Pursuant to NRS 174.234(5), the prosecutor should zealously protect the confidentiality of any change of the victim's address and telephone number and this information should be redacted from police reports, witness statements, and all other discovery materials provided to the defense. In court, prosecutors should never ask for the victim to disclose her current address, should advise victims to refrain from giving an address when testifying to avoid inadvertent disclosure, and should object to requests for such information when made in the course of questioning by the defense.

If filed with the court, victims' addresses should not be placed on subpoenas or returns of service, or any other public document, to avoid disclosure of their locations to defendants.

B. Personal Service of Subpoenas

In the absence of an oral promise to appear, any subpoena going to the victim should be personally served to avoid the possibility of the defendant intercepting it in the mail.

C. Transportation to Court

The prosecutor's office should facilitate safe transportation for the victim to and from court, which could include police escort and the use of separate entrances at the courthouse. If the defendant is released following a court appearance, court officers should be directed to hold the defendant for a period of time sufficient to allow the victim to leave safely. Secure parking should be promoted, as should escort to and from parking facilities.

D. Designated Waiting Areas in Court

NRS 178.5696 requires that the court provide separate and secure waiting areas for victims so they are not subject to harassment or intimidation by the defendant immediately prior to testifying. If this mandate is not being met, the prosecutor should bring this requirement to the court's attention.

#### E. No Contact Orders

If appropriate, the prosecutor should request no contact orders as a condition of a defendant's release on bail, and should request revocation of bail for any violation of such orders. In addition, the prosecutor's office should advise the victim of the availability of Protective Orders, and explain the merits of such orders. NRS 200.591 provides for both pre-trial and post-conviction "stay away" orders in stalking and harassment cases; violation of such an order is a gross misdemeanor.

#### F. Child Custody Considerations

Prosecutors need to be aware of the unique danger faced by domestic violence victims in the child custody context. One characteristic which distinguishes domestic violence from other crimes is that the victim and perpetrator frequently have children together.

Thus, perpetrators often have long term, court-sanctioned access to victims pursuant to child custody orders which give them partial custody or visitation rights. New crimes are often committed as a result of this ongoing contact. Alternatively, if no custody order is in effect, the perpetrator has as much access to the children as their mother, and may use the threat or actuality of taking them to assert control over the victim.

Protection Orders can also be obtained to protect the victim and give her temporary custody of her children, and can impose protective conditions such as third party or supervised visitations, or supervised exchanges of custody.

#### G. Domestic Strangulation

Under Nevada law, Domestic Battery by Strangulation is controlled by NRS 200.481 (1)(h), which states that "strangulation" "means intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person in a manner that creates a risk of death or substantial bodily harm." While a typical domestic battery is punishable as a misdemeanor in Nevada, a domestic battery by strangulation is categorized as a Category C felony, punishable by 1-5 years in the Nevada State Prison and a fine of up to \$15,000. While NRS 193.130 states that the maximum fine for a Category C felony is a fine of up to \$10,000, NRS 200.485(2) grants a fine of up to \$15,000. Furthermore, NRS 200.481(2)(g)(2) states that if a domestic battery by strangulation is committed by a probationer, then the action is punishable by a Category B felony with a penalty of 2-15 years in the Nevada State Prison.

While not all domestic batteries that involve choking or grabbing by the neck may rise to a felony level offense, the misdemeanor prosecutor is often the initial attorney to evaluate a case for the proper level of prosecution. Therefore, there is an important responsibility of City Attorneys to properly evaluate an offense and decide whether it needs to be referred to the county District Attorney for prosecution as a felony case.

Problems arise with this obligation, as "strangulation" is not always apparent at the time of arrest as compared to a misdemeanor battery that involves grabbing around the throat or neck area. According to a study performed by the City of San Diego in the late 1990s, there were few visible injuries to corroborate a strangulation case. Therefore, the San Diego study concluded, many strangulation cases were not given the proper level of prosecution.

While visible injuries were noticeable in a small percentage of the cases at arrest, they were often too subtle to photograph and identify at the time of emergency intervention in the case. Thus, it becomes important for the misdemeanor prosecutor to seek follow-up evidence to support a felony prosecution of an offender.

Typical symptoms of a strangulation are as follows: (1) Difficulty in swallowing or breathing: Although breathing changes may seem minor at the time of police intervention, underlying injuries may cause severe problems, up to and including death, up to 36 hours after the initial attack. (2) Visible injuries: The injuries would include scratches, abrasions, scrapes or bruising. These can be caused both by the assailant's actions or the victim's actions in trying to fight off the attacker. Issues arise because bruising and redness may not be immediately noticeable, or may be minor in comparison with the actual damage that was inflicted. Bruising from strangulation may not appear for hours or days after an attack, and may be light-colored bruises compared to a bruise that would occur from a punch or more direct injury to the body. It is also important to look for abrasions on the chin, as a victim of a choking will often instinctively lower their chin to protect the neck, resulting in scrapes against the chin caused by the assailant's hands. (3) Petechiae: Petechiae are red marks caused by the rupture of small blood vessels called capillaries. Petechiae may be seen in the eyes, often under the eyelid. However, in more severe cases, it may be seen around the eyes in the orbital region or other areas of the face. (4) Swelling: Swelling may take several hours to appear based on trauma to the underlying muscle structure of the throat and neck. (5) Lung Damage: victims may suffer from damage caused by aspiration of vomit during the strangulation episode which can cause damage to lining of the throat and lungs, along with edema (lungs filling with fluid) caused by trauma to the respiration systems.

Therefore, it is important for misdemeanor prosecutors to perform follow-up investigation when there is any indication of choking or strangulation in a domestic battery case. This information can be gathered from both medical professionals and the victim themselves. If subsequent injuries are apparent, or symptoms of the initial injury become more severe, prosecutors should consider referring a misdemeanor case to the District Attorney for consideration of treating the offense as a felony, rather than a simple misdemeanor domestic battery.

#### VIII. VICTIMS' RIGHTS

Prosecutors should be familiar with victims' statutory rights, which are especially important in a domestic violence context. These rights include:

- Right, upon written request, to notice of any release of defendant from pre-trial custody, amount of bail, and disposition of charges [NRS 178.5698];
- Right to secure waiting areas at court separate from those used by jurors, defendants and their families [NRS 178.5696(1)];
- Right to an attendant to provide support in court during testimony [NRS 178.571];
- Right to notice of the date of sentencing [NRS 176.015(4)] and to be heard at sentencing after the defendant and/or his counsel speaks [NRS 176.015(3)];
- Right to notice of the disposition of harassment and stalking cases [NRS 200.601(1)] and a certified copy of any no contact order imposed as a condition of sentencing [NRS 200.601(2)];
- Right to notice within 30 days of the defendant's conviction under NRS 205.980 and resulting civil liability for damage to the victim's property [NRS 205.980(3)]; and
- Right, upon written request, to notice of the date of any meeting to consider the defendant for parole and to submit documents and be heard at the meeting [NRS 213.130(4)].

Prosecutors should also be aware that Senate Joint Resolution (SJR) 17 was approved by the Nevada Legislature in 2015 and again in 2017. SJR 17 is Nevada's version of Marsy's Law and is a proposed constitutional amendment expanding the rights of crime victims. Marsy's Law will appear on the general election ballot on November 6, 2018. It is anticipated that Marsy's Law will pass and the new victims' bill of rights will be set forth in Section 23 of Article 1 of the Nevada Constitution as follows:

Sec. 23. 1. Each person who is the victim of a crime is entitled to the following rights:

- (a) To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment and abuse, throughout the criminal or juvenile justice process.
- (b) To be reasonably protected from the defendant and persons acting on behalf of the defendant.
- (c) To have the safety of the victim and the victim's family considered as a factor in fixing the amount of bail and release conditions for the defendant.
- (d) To prevent the disclosure of confidential information or records to the defendant which could be used to locate or harass the victim or the victim's family.
- (e) To refuse an interview or deposition request, unless under court order, and to set reasonable conditions on the conduct of any such interview to which the victim consents.
- (f) To reasonably confer with the prosecuting agency, upon request, regarding the case.
- (g) To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.
- (h) To be reasonably heard, upon request, at any public proceeding, including any delinquency proceeding, in any court involving release or sentencing, and at any parole proceeding.
- (i) To the timely disposition of the case following the arrest of the defendant.
- (j) To provide information to any public officer or employee conducting a presentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant.
- (k) To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant and the release of or the escape by the defendant from custody.
- (l) To full and timely restitution.

- (m) To the prompt return of legal property when no longer needed as evidence.
- (n) To be informed of all postconviction proceedings, to participate and provide information to the parole authority to be considered before the parole of the offender and to be notified, upon request, of the parole or other release of the offender.
- (o) To have the safety of the victim, the victim's family and the general public considered before any parole or other post-judgment release decision is made.
- (p) To have all monetary payments, money and property collected from any person who has been ordered to make restitution be first applied to pay the amounts ordered as restitution to the victim.
- (q) To be specifically informed of the rights enumerated in this section, and to have information concerning those rights be made available to the general public.

In addition, the prosecutor should consider responding to the victim's needs as follows:

A. Recommended Notification

The prosecutor's office should be responsible for assisting the victim in creating an account with NV VINE via the website: [vinlink.com](http://vinlink.com), phone number: 888-268-8463 or the mobile app VINELink and putting a watch on their offender so the victim can be notified in a timely fashion of developments in the case, including, but not limited to, the following:

- Nature and type of charges filed;
- *Any* changes in the defendant's custodial status, including any short term release;
- Date, in advance, of any court hearing in which the victim may have an interest, including bail hearings and sentencing; and
- Outcome of all court appearances at which the victim was not present, including continuances, bail hearings, and motions.

B. Victim Input

The prosecutor should actively seek victim input throughout the pendency of the case. In particular, victim impact statements which emphasize the continuing risk of harm to the victim and her family should be utilized. In those cases, the prosecutor should make sure the victims' opinions are solicited and considered at sentencing. Further, after hearing statements from the defense counsel at sentencing, NRS 176.015(3) requires the court to provide the victim the opportunity to provide testimony reasonably expressing any views concerning the crime, the person responsible, the impact of the crime on them, and the need for restitution.

Prosecutors should be aware that even in the most serious cases, the victim may try to minimize the violence. While the victim should be listened to with compassion, prosecution of the case should never be dismissed or deferred based solely upon her assessment of the violence.

### C. Crime Victim Compensation/Restitution

The prosecutor should seek restitution wherever available, should notify the victim of the availability of crime victim compensation under NRS chapter 217, and make appropriate referrals for assistance in obtaining it.

NRS 176.033 requires a sentencing court, *in any case where imprisonment is required or permitted by statute*, to set an amount of restitution for each victim in cases where restitution is appropriate. There is no requirement that any portion of the sentence be suspended to order restitution in such cases.

Under NRS 205.980, a person convicted of any crime involving damage to property is civilly liable for the amount of damage done to the property, and an order of restitution signed by the judge in whose court the conviction was entered shall be deemed a judgment against the defendant for the purpose of collecting damages.

### IX. VICTIM/PROSECUTOR CONTACTS

A member of the prosecutor's office, preferably a victim advocate, should attempt to contact the victim at the earliest possible opportunity (preferably during the first 12 critical hours following the perpetrator's arrest) to discuss any concerns and orient the victim to the process and available resources.

Different methods of contact offer different benefits:

- Face-to-face - This method offers the best opportunity to establish a rapport with the victim, determine the victim's potential impact on the case and assess the potential future risk and lethality of the situation.
- Telephonic - This method also offers an opportunity to dialogue with the victim if face-to-face contact is not possible.
- Written -Although one-sided, this method allows information on the process and available resources to be conveyed in a consistent, comprehensive manner.

The prosecutor should determine on a case-by-case basis which method of contact is most appropriate.

The prosecutor's office should explain that the ultimate responsibility for prosecuting a case lies with the prosecutor, not the victim, and that the case may proceed without her cooperation. It is important that this message be communicated as it may relieve pressure to drop charges. The prosecutor's office should also carefully explain the sentencing alternatives, negotiated pleas, and provisions for the victim's protection during the pendency of the case.

In the event the victim is reluctant to participate, prosecutors should keep in mind the goals of prosecution set forth in Section I.

### X. VICTIMLESS PROSECUTION

In the frequently occurring domestic battery scenario, a couple gets into an argument which escalates into a physical confrontation. When police respond, an upset victim recounts the incident to police. However, as time passes the couple makes amends or the defendant persuades the victim to not cooperate with the prosecution. The victim, no longer willing to participate in prosecution, disappears, forcing the prosecutor to make the determination as to whether he/she can proceed with prosecution victimless. However, with the thoughtful use of hearsay and confrontation clause exceptions, such



cases may be proveable.

The Sixth Amendment Confrontation Clause has been the subject of much litigation, particularly since the 2004 case of *Crawford v. Washington*, 541 U.S. 36. In *Crawford*, the Court held that testimonial statements are inadmissible at trial against the accused unless (1) the witness is unavailable and (2) the Defendant had a prior opportunity to cross-examine the witness (*Id.* at 68). “Unavailability” requires that the proponent of the evidence demonstrate that he or she was unable to procure the attendance of the witness at trial, despite reasonably diligent efforts (*See, e.g. Christian v. Rhode*, 41 F.3d 461, 467 (9<sup>th</sup> Cir. 1994)). “Prior opportunity” to cross-examine generally means that the defendant must have had a prior chance to develop the witness’s testimony. (*See United States v. Yida*, 498 F.3d 945, 950 (9<sup>th</sup> Cir. 2007)). However, there are several avenues that a prosecutor may use to overcome the confrontation clause barrier.

#### A. Forfeiture by Wrongdoing

Where the defendant causes the victim to not appear at trial and where the prosecutor can prove the defendant caused the victim to evade the subpoena, the prosecutor may invoke the principal of “forfeiture by wrongdoing.” If the defendant has engaged in conduct with the intent to prevent the victim’s attendance at trial, the defendant loses the safeguard created by the confrontation clause. (*Giles v. California*, 554 U.S. 353 (2008); *Reynolds v. U.S.*, 98 U.S. 145 (1879)). As a result, the defendant forfeits the ability to object to the victim’s testimonial hearsay statements and, by the defendant’s own actions, eliminates the opportunity to cross-examine those statements.

Forfeiture by wrongdoing may present itself in multiple facets — jail calls, pictures, letters to the victim or her family, journal entries, emails, voicemail messages, postings on social media, interactions between the victim and advocate, or interviews between police and the victim or the victim’s family or friends. Prior to admitting the victim’s statements at trial the prosecutor should proffer to the court, or prove up through witness testimony, that the victim is unavailable; proffer the due diligence used in trying to obtain the victim’s presence for court; call witnesses and present evidence that the defendant’s actions were responsible for the victim’s unavailability at trial.

#### B. The “Ongoing Emergency”

Where the victim is unavailable for court, the two most common objections a prosecutor must overcome in admitting a victim’s statement are hearsay and the invocation of the defendant’s right of confrontation. However, there are exceptions to both hearsay and the confrontation clause which may make the admissibility of the victim’s statement feasible.

##### 1. Overcoming Hearsay—Excited Utterance (NRS 51.095)

Oftentimes, well trained officers and prosecutors will anticipate the hearsay objection and are prepared to lay the appropriate foundation for excited utterance to admit some or all of the victim’s statements at trial.

NRS 51.095 defines excited utterance as a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In domestic battery cases, excited utterances generally take form in the victim’s 911 call or initial statements made to law enforcement on-scene. In analyzing whether a statement falls under the excited utterance exception several factors should be evaluated:

- The contents of the 911 call. Is there a battery in progress, is the victim in immediate need of assistance, is the victim’s safety otherwise in jeopardy?

- The amount of time which has elapsed between when the 911 call is received and when law enforcement makes contact with the victim. Clearly, the more time which has elapsed the less likely that the victim's statements will be admitted under excited utterance.
- The demeanor of victim. Is the victim crying, hysterical, short of breath? The more the victim appears to be influenced by the stress of the event, the more likely that her statements will fall under excited utterance.
- The physical condition of the victim. Is the victim actively injured, bleeding, holding her face, huddled in the corner? Injuries that tend to prove recency of the event are more likely to make accompanying victim statements admissible.

## 2. Confrontation Clause—Victim's 911 call and Statements to Police On-Scene

Once a prosecutor has overcome the hearsay hurdle, the defense attorney will surely invoke his/her client's right of confrontation. However, recent developments in this area of law may provide prosecutors a route to admit the victim's statements, whether made during the course of a 911 call or to the police on-scene.

In *Davis v. Washington*, 547 U.S. 813 (2006), a 911 operator received information from the victim that she was actively being battered by her former boyfriend. During the initial portion of the 911 call, the suspect was on scene, but as the call progressed the suspect fled. Officers made contact with the victim within four minutes of the 911 call being placed. They observed the victim to have what appeared to be fresh injuries and was shaken and frantic. The victim failed to appear for trial, but the Court allowed the portion of the 911 recording where the defendant was present to be admitted at trial. In upholding *Davis*' conviction, the United States Supreme Court distinguished between testimonial and non-testimonial statements saying that "statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purposes of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Supreme Court ruled that the conversation between the 911 operator and the victim, prior to the suspect leaving the scene were non-testimonial and therefore admissible.

Since *Davis*, the Court has further clarified what was meant by "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." In *Michigan v. Bryant*, 562 U.S. 344 (2011), police were dispatched to a gas station where they found the victim mortally wounded. Prior to perishing, law enforcement inquired into "what happened, who had shot him, and where the shooting had occurred". The victim told law enforcement that he had been shot by the Defendant and where the incident occurred. The United States Supreme Court held that the description of the shooter and the location of the shooting were not testimonial statements because the "primary purpose" was "to enable police assistance to meet an ongoing emergency" and therefore did not violate the confrontation clause.

*Bryant* went on to state that the primary purpose determination is highly context specific and should objectively take into account all of the relevant circumstances. Moreover, while the existence of an "ongoing emergency" at the time of the encounter is the most important factor informing the interrogation's primary purpose, there may be other circumstances in which a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.

Specifically, *Bryant* found the following factors persuasive in determining the primary purpose of the interrogation:

1. A victim's medical condition—a victim's injuries may be so debilitating as to prevent her from thinking sufficiently clearly to understand whether the statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution;
2. Existence and magnitude of a continuing threat to the victim and the public—the suspect was armed and at large. However, *Bryant* did distinguish the typical domestic violence case which often have a narrower zone of potential victims than cases involving threats to public safety;
3. Informality of the encounter between victim and law enforcement (e.g. hasty fact gathering at scene of violence versus formal interview at police station)—formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency;
4. Context of the questions posed by law enforcement—elicited statements may be necessary to be able to resolve the present emergency, rather than simply to learn what had happened in the past;
5. Statement and actions of both the declarant and the interrogators provide objective evidence of the primary purpose of the interrogation (e.g. law enforcement arrives on scene within minutes versus hours later; victim describing events as they are unfolding versus past criminal acts now being investigated; victim was seeking help for a current danger; victim frantic and shaken versus calm and collected).

Practically speaking, there are typical scenarios a prosecutor may encounter when faced with a confrontation clause issue:

Situation #1: Law enforcement responds to a 911 call, upon arrival the victim is visibly upset and the defendant has fled the scene.

- *Bryant*: “The Michigan Supreme Court erroneously read *Davis* as deciding that the statements made after the defendant stopped assaulting the victim and left the premises did not occur during an ongoing emergency.” (*Id.* at 363).
- Key factors: 911 call, visibly upset victim, potentially injured victim, defendant's location is unknown posing possible danger to kids, family members or victim should defendant return.

Situation #2: Law enforcement responds to 911 call, parties involved in altercation are *not* separated, visibly upset and/or injured victim responds to “what happened” question by law enforcement.

- *Bryant*: “we consider the informality of the situation and the interrogation...the situation was fluid and somewhat confused: the officers arrived at different times” indicating that the primary purpose remained responding to an ongoing emergency. (*Id.* at 377).
- Officers' immediate concern is securing the scene to eliminate threats to the victim, officers and the public.
- The typical “what happened” question is the exact type of question necessary for law enforcement to figure out what caused the emergency and to determine what action should be taken to prevent further harm.
- Key factors: 911 call, distressed and/or injured victim, ascertaining victim's safety, potential for other suspects or victims, informality of interrogation.

Situation #3: Law enforcement responds to a 911 call, parties involved in altercation are

separated, visibly upset and/or injured victim responds to “what happened” question by law enforcement.

- Separation is part of the response to the emergency, for law enforcement to ascertain what the emergency is and to get honest and complete answers from all parties involved.
- Primary purpose is to neutralize a potentially dangerous situation.
- Key factors: 911 call, distressed and/or injured victim, establishing victim’s safety, potential other suspects or victims, informality of interrogation.

Situation #4: Law enforcement responds an hour later to reported “domestic disturbance”, parties involved in altercation are separated and no objective need for medical attention.

- Statements by victim are likely testimonial.
- *Hammon*, 547 U.S. 813, 814-15 (2006)—Since there was no emergency in progress at the time law enforcement arrived on-scene, the primary purpose of the investigation was to investigate a possible crime.

#### C. Victim’s Statements to Family and Friends

A testimonial statement is defined as a statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not (*Crawford* at 51).

A victim’s friends or family members are oftentimes very useful to prosecution as they may have physically present with the parties during the altercation, they may have been on the phone with the victim as the altercation was occurring or they may have observed the victim immediately following the altercation. These witnesses can usually identify the respective parties (or their voices’ on a 911 call) and their relationship, describe the demeanor of the victim in person or over the phone during the altercation, describe the victim’s demeanor immediately following the incident or detail the physical injury which resulted and evolved in the days following the incident.

#### D. Victim’s Statements to Medical Personnel

Medical records also provide an avenue for proving domestic violence cases where a victim is unavailable for trial. Certified medical records are generally admissible pursuant to the business records exception to the hearsay rule. (NRS 51.135). Furthermore, medical personnel who made firsthand observations of the victim’s physical condition may testify about their observations. Likewise, the confrontation clause is not implicated because statements made to a medical professional for treatment are not testimonial.

The AMA Guidelines dictate that “it is imperative that physicians inquire about the battered woman’s safety” and that a “plan for the woman’s safety should be discussed before she leaves the physician’s office”. Further, the American College of Emergency Physicians state that it is imperative that emergency personnel assess the patients for domestic violence and routinely inquire as to “what happened, when, where and whom”.

Where this becomes a bit more problematic is proving the attackers identity. However, there exists a growing body of authority upholding the introduction of medical records and testimony from treating physicians regarding the victim’s identification of the attacker in domestic violence cases. The rationale is that such information is necessary for diagnosis or treatment insofar that it bears on advice to seek counseling or therapy. (see e.g., *United States v. Peneaux*, 432 F.3d 882 (8<sup>th</sup> Cir. 2005)).

## XI. DISPOSITIONS

### A. Negotiated Pleas

NRS 200.485 prohibits plea bargains for a battery that constitutes domestic violence pursuant to NRS 33.018 unless it is determined that the charge is not supported by probable cause or cannot be proved at the time of trial. Before negotiating any plea, the prosecutor should consider the following factors:

- Realistic assessment of the possibility of successful prosecution without a plea;
- Seriousness of the offense;
- Prior criminal history of the defendant;
- Victim's input;
- Any history of violence in the relationship and the probability of recurrence; and
- Any other relevant circumstances.

### B. Sentencing

The prosecutor's sentencing recommendations should be commensurate with sentences for other violent crimes. In some cases, it may be argued that sentencing should be in the higher range of the sentencing limits due to the relationship between the victim and defendant. In no event should the prosecutor ever recommend or stipulate to less than the mandatory minimum provisions of the sentencing statute.

As set forth in Section VII, the victim has a right to be heard at sentencing, generally referred to as the victim's impact statement. The sentencing hearing is also an opportunity to have the victim testify about past violent incidents that were not admissible at trial, but are admissible at the sentencing stage. Offering additional witnesses, including experts, should also be considered. The prosecutor should stress the pattern of abusive behavior, along with any violations of previous court orders, so the court can evaluate future risk to the victim and sentence accordingly. Be prepared, as even in the most serious cases the victim may try to minimize the violence.

#### 1. Suspended Sentences

NRS 200.485 provides that a court shall not grant probation to and, except as otherwise provided in NRS 4.373 and 5.055, a court shall not suspend a sentence for a battery that constitutes domestic violence pursuant to NRS 33.018.

The defendant's behavior while on a suspended sentence should be carefully monitored and conditioned upon strict compliance with conditions carefully tailored to protect the victim and community.

A credible threat of incarceration must exist to ensure compliance. If not ordered by the court, the prosecutor should ask for status reviews to monitor compliance. The prosecutor should appear at such status reviews and any probation violation proceedings.

#### 2. Counseling and Treatment Programs

NRS 200.485 mandates counseling for a battery that constitutes domestic violence pursuant to NRS 33.018. In addition, prosecutors should recommend the following programs for the defendant when

appropriate:

- Substance abuse counseling;
- Parenting classes; and/or
- Mental health evaluations.

Studies have shown that couples therapy is *not* appropriate and is often dangerous to the victim. In a couple's environment, the defendant's control over the victim is reinforced and the victim is intimidated from speaking candidly and honestly.

NRS 5.055 (Municipal Court) and NRS 4.373 (Justice Court) provide for suspended sentences, and counseling as a condition thereof in the courts of limited jurisdiction.

The prosecutor should request that the court require the defendant, as a condition of sentencing, to provide the police narrative report to the court-ordered counseling program. Any report provided by the prosecutor's office should comply with any policies regarding the confidentiality of information.

### 3. Diversion

Diversion is generally defined as an action that suspends criminal justice case processing of a domestic violence charge, with one or more of the following results: 1) charges not filed, 2) charges dismissed, and/or 3) sealing of records. Diversion, in other words, offers an alternative to a criminal conviction. The goal of diversion in domestic battery cases is to modify a defendant's behavior by providing treatment to address domestic violence, mental health conditions and/or substance use, while at the same time, providing eligible offenders the opportunity to have a domestic battery charge dismissed and/or sealed.

In Nevada, domestic battery diversion is limited by statute. For example, a criminal offender who is found to be addicted to either drugs or alcohol may be eligible for diversion under NRS 458.300, but a person charged with domestic battery, even if deemed an addict, is specifically excluded from NRS Chapter 458 diversion eligibility. Additionally, as of October 1, 2017, justice courts and municipal courts are required to consider, prior to entry of plea, whether an offender is eligible for a NRS Chapter 174 pre-prosecution diversion program. Domestic battery offenders are also specifically excluded from this program.

On the other hand, domestic battery offenders are eligible for diversion if they participate and successfully complete a NRS 176A.250 mental health court program. An offender is eligible for admission, if, among other requirements, the offender is diagnosed with a serious mental illness and the prosecuting authority stipulates to the offender's participation. Upon successful completion of the mental health court program, a domestic battery offender may be eligible for a dismissal of the proceedings. A dismissal upon completion of the program, under NRS 176A.290, is not considered a conviction for any private or public purpose, but is considered a conviction for a second or subsequent conviction.

Additionally, domestic battery offenders may be eligible for diversion upon participation and successful completion of a NRS 176.280A veteran's court program. To be eligible for a veteran's court program, the domestic battery offender must, among other requirements, suffer from a mental illness, alcohol or drug abuse, or posttraumatic stress disorder, and the prosecuting authority must be willing to stipulate to the offender's participation in the program. As with mental health court, in accordance with NRS 176.290, successful completion of the program may result in the dismissal of the domestic battery proceedings, but the charge is considered a conviction for enhancement purposes.

It is important to note that domestic battery offenses charged in municipal court are eligible for diversion through mental health court or veteran's court participation if jurisdiction of the case is transferred pursuant to NRS 5.050. NRS 5.050 gives municipal courts authority to transfer original jurisdiction of a domestic battery charge to a district court for the purpose of assigning a domestic battery offender to either mental health court or veteran's court.

#### 4. Veteran's Court

Veteran's courts are a creature of statute envisioned by the Legislature to provide for diversionary treatment of cases involving veterans or members of the military. NRS 176A.208 grants authority to district courts, justice courts and municipal courts to establish a program for treatment for veterans or members of the military who also suffer from mental illness, alcohol or substance abuse, posttraumatic stress disorder or a traumatic brain injury which appear to be related to military service, including readjustment to civilian life. Assignment to such a court is also available for those who appear to suffer from military sexual trauma, which includes psychological trauma related to sexual harassment or an act of sexual assault that occurred while the veteran or member of the military was serving active duty, active duty for training, or inactive duty training.

Historically, the Nevada Legislature only permitted district courts to establish Veteran's treatment courts. However, in the 2017 legislative session, the Legislature granted authority to municipal and justice courts to enact their own veteran's courts. Several lower jurisdiction courts now have active Veteran's courts. NRS 176A.285 permits lower jurisdiction courts which do not yet have active Veteran's courts to transfer original jurisdiction to the district court for treatment through that jurisdiction's Veteran's Court.

To be eligible for veteran's court the defendant must be a veteran or member of the military who appears to suffer from: (1) mental illness, alcohol or drug abuse, post-traumatic stress disorder or a traumatic brain which appears to be related to military service; or (2) Military sexual trauma, as defined in NRS 176A.280. Additionally, an eligible defendant is one who would benefit from assignment to the program and has not previously been assigned to such a program. Finally, except under extraordinary circumstances, a veteran must not have been discharged under dishonorable conditions.

Eligible offenders assigned to veteran's court are required to participate in the treatment court for not less than 12 months and will undergo treatment related to the individual issue(s) that brought them in contact with the criminal justice system. Veteran's courts work in collaboration with the Veteran's Administration both in identifying possible candidates as well as assisting with connecting the veteran with appropriate treatment, housing, education, mental health services and other recovery support services.

Assignment to a veteran's treatment court is discretionary but the Legislature did not appear to place limits on the types of crimes eligible for assignment to these courts. Indeed, the only limitation on assignment to such a court is regarding crimes of violence. If the crime committed by the offender involved the use or threatened use of force or violence, or if the offender was previously convicted of a felony that involved the use or threatened use of force or violence, a court may not assign an offender to the program unless the prosecuting attorney stipulates to the assignment.

Eligible offenders charged with the crime of domestic battery may be assigned to veteran's court upon stipulation of the prosecuting attorney and also be eligible for diversionary treatment of the case. When an offender charged with domestic battery successfully completes the program of treatment, the court will conditionally dismiss the charge for purposes of restoring the offender to the status occupied prior to the arrest but remains a conviction for purpose of additional penalties imposed for second or

subsequent convictions or for the setting of bail in future cases.

#### 5. Restitution

If allowable by law, the prosecutor should seek restitution for expenses resulting from the crime. The prosecutor should request payment be made prior to payment of fines or court costs, and that payment be made according to a specific, short timetable.

NRS 176A.430 requires that a court *shall* order restitution as a condition of probation or suspension of sentence, or the court is required to set forth the circumstances upon which it finds restitution impracticable.

NRS 5.055 (municipal court) and NRS 4.373 Justice court) provide for suspended sentences, and restitution as a condition thereof in the courts of limited jurisdiction.

NRS 213.126 requires that, unless complete restitution was made during a parolee's incarceration, the board *shall* impose such as a condition of parole.

#### C. Parole Hearings

If the defendant commits a felony and he is ultimately convicted and sentenced to prison, eventually he will come up for parole while serving his sentence. The State Board of Parole Commissioners, upon receiving an application from the defendant, will hold a periodic meeting to consider the application. The victim is entitled to submit documents to the board and may testify before the board at the meeting held to consider the application. No application for parole may be considered until the board has notified the victim of her rights and she is given an opportunity to exercise those rights, if she so requests in writing and provides a current address [NRS 213.130].

The prosecutor may request to be heard at a meeting to consider the application of the defendant. The prosecutor may also submit his or her name to the parole board and obtain the name and address of the victim for this purpose at the close of the case and notify the victim of any parole consideration meetings regarding the defendant when the prosecutor is notified.

#### D. Dismissals

Dismissal is a last resort. In most cases, delay dismissal until the time of trial. This gives the prosecution one last chance to persuade a reluctant victim to go forward or to otherwise develop sufficient evidence. In addition, it ensures that the defendant appears in court so that the seriousness of the domestic violence charge may be impressed upon him.

Note: Dismissal of felony charges at the time of trial acts as a dismissal with prejudice [NRS 178.554 and NRS 178.562(1)]. Unfortunately, it also may confirm in the defendant's mind his power over the victim or that she does not view the offense as being serious. Thus, it should be made clear on the record that the prosecutor, not the victim, has made the decision to dismiss.

#### E. Future Prosecutions

When a dismissal is granted, the prosecutor should advise the victim that the dismissal will not be held against her and that the office of the prosecutor stands ready to assist and prosecute any future domestic violence crimes.

#### F. Data Collection and Evaluation



The prosecutor's office should collect and evaluate data concerning domestic violence prosecutions to facilitate system improvement. The prosecutor's office should also engage local victim advocates in a continuing process of evaluation of its policies, procedures and performance with regard to domestic violence prosecution.

## **APPENDIX A - Determining the “Primary Physical Aggressor” (Dominant Aggressor)**

In situations where more than one domestic violence incident may have occurred, the "primary physical aggressor" is the person determined to be the dominant aggressor, not necessarily the first person to use force or violence. In making this determination, and in conformity with NRS 171.137(2), peace officers shall consider:

1. Prior domestic violence involving either person;
2. The relative severity of the injuries inflicted upon the persons involved;
3. The potential for future injury;
4. Whether one of the alleged batteries was committed in self-defense; and
5. Any other factor that may help the peace officer decide which person was the primary physical aggressor.

While not codified by statute, the following is a non-exhaustive list of “any other factor” that may help the peace officer or the prosecutor decide who was the primary physical (dominant) aggressor:

1. The comparative extent of the injuries between the persons involved;
2. Any serious threats creating a fear of physical injury to the person;
3. The comparative sizes and/or vulnerabilities of the parties involved;
4. The demeanor of the parties involved, including their emotional state and any excited utterances;
5. Any weapons used or threatened for use by either party;
6. Any claims of self-defense, defense of others, defense of property, coercion or trespass;
7. The presence of defensive wounds, which may include scratches to the suspects, face, arms and hands or to the victim's neck in cases involving strangulation;
8. Any witness statements;
9. Whether there was an excessive response to the other parties' actions and/or time delay between domestic violence incidents;
10. Whether there was a time delay between domestic violence incidents; or
11. The environment in which the violence occurred.

## APPENDIX B - Lethality Assessment

Conduct a lethality assessment by considering, without limitation, the following factors in the context of the relationship as a whole:

1. Is there a history of domestic violence?
2. Does the perpetrator have obsessive or possessive thoughts?
3. Has the perpetrator threatened to kill the victim?
4. Does the perpetrator feel betrayed by the victim?
5. Is the victim attempting to separate from the perpetrator?
6. Have there been prior calls to the police?
7. Is there increasing drug or alcohol use by the perpetrator?
8. What is the prior criminal history of the perpetrator?
9. Is the perpetrator depressed?
10. Does the perpetrator have specific "fantasies" of homicide or suicide?
11. Does the perpetrator have access to or a fascination with weapons?
  - a. Has the perpetrator abused animals/pets?
12. Has the perpetrator demonstrated rage or hostile behavior toward police or others?
13. Has there been an increase in the frequency or severity of the violence (whether documented or not)?
14. Has the perpetrator been violent toward children?
15. Has there been strangulation involved and how often?
16. Is there a history of stalking behavior?