

Promising Practices: A Checklist for Prosecution Response to Sexual Assault



Sexual Assault in America

Approximately 500,000 women are estimated to be the victims of some form of rape or sexual assault each year.¹ The *National Violence Against Women Survey* estimated that 14.8 percent of adult women in the United States had been raped sometime during their lives and that another 2.8 percent had been victims of an attempted rape.² Friends or acquaintances of victims commit more than half of these crimes; intimate partners commit another quarter. Strangers are responsible for about one in five rapes or sexual assaults.³ Approximately 70 percent of rapes and sexual assaults are not reported to police.⁴

Significant changes designed to improve the treatment of sexual assault victims have occurred in the past 25 years. During the early 1970s, the first community-based sexual assault programs were established. The treatment of victims in the criminal justice system came under scrutiny, and hundreds of laws were passed to protect sexual assault victims in the courts. Rape shield laws were passed in many states to protect the victims and to facilitate their participation in the criminal justice process. Medical protocols were developed and widely implemented.

In 1994, Congress passed the Violence Against Women Act (VAWA), which was designed to help communities enhance their response to sexual assault and other violent crimes against women. The Act was reauthorized in 2000. The Violence Against Women Office, under the U.S. Department of Justice, has supported the publication of this Checklist to offer criminal justice officials examples of promising practices to address these crimes.

Checklist for Prosecution Response to Sexual Assault

This **Checklist for Prosecution Response to Sexual Assault** is one in a series of two publications directed to prosecutors. This publication focuses specifically on sexual assault and provides guidance to prosecution staff on how to effectively enforce the law and prosecute sexual assault cases while being sensitive to the needs of victims. The Checklist is part of a packet that includes a similar prosecutor checklist for domestic violence and stalking, a referral list, and a resource guide. When read together, these publications will help prosecutors develop a clearer sense of the relationships among these crimes.

This Checklist will help practitioners evaluate the effectiveness of policies and practices already in place and identify weaknesses or gaps in their current approach. Fully implementing the Checklist's practices will help prosecution staff safely and sensitively intervene to protect victims and hold sex offenders accountable for their violent actions.

The Importance of Prosecution Response to Sexual Assault

Prosecution staff should be expected to take a serious, victim centered approach to sexual assault cases and to approach these crimes in a manner that restores the victim's dignity and sense of control while decreasing the victim's anxiety. All sexual assault cases, from misdemeanors to felonies, should be treated seriously. Cases involving acquaintances and intimate partners should be pursued as vigorously as those involving strangers.

In an effort to facilitate a more coordinated response to sexual assault cases, many prosecution offices have developed interagency agreements with other justice system personnel and community-based sexual assault service providers² who interact with victims after an assault and during an investigation and prosecution. Many jurisdictions have developed Sexual Assault Nurse Examiner (SANE) programs to conduct forensic examinations and provide crisis intervention. Some jurisdictions have taken additional steps to develop multi-disciplinary specialized sexual assault response teams (SARTs) that promote efficient and effective intervention in sexual assault cases, including coordination with medical providers to maximize evidence collection.

The concerns of sexual assault survivors typically revolve around safety and dealing with the trauma caused by the crime. Victims may view involvement in the criminal justice system as unfriendly and potentially revictimizing. They are often reluctant to report or follow through with prosecution because of pressures placed on them by their communities, family, friends, and the offender (particularly in cases where victims know their assailants). For some sexual assault survivors, their safety, confidentiality, and emotional well-being may make the criminal justice system a less viable option.

Prosecutors must be aware of common reactions to this crime and the barriers victims face in seeking assistance. They should work with victim service providers to find creative ways to encourage victims to seek assistance, while respecting victims' decisions about involvement in the criminal justice system. A sexual assault victim is more likely to choose to participate in criminal justice proceedings when she feels the prosecution staff is doing everything possible to support and protect her. At the same time, prosecutors must respect a victim's decision regarding whether or not to be involved in criminal justice proceedings and be willing to offer continued assistance and referrals even if she decides not to participate. Mechanisms should be in place to ensure that sexual assault victims from underserved populations are able to communicate with prosecutors, and are informed of their legal rights and how the court system can help them.

How to Use This Checklist

This Checklist is divided into sections that correspond with the roles and responsibilities of each prosecution professional involved in the office's overall response to sexual assault. Each section includes a list of specific steps and strategies that should be undertaken to help ensure optimal response to sexual assault cases. Some jurisdictions with more limited resources may find that responsibility for described functions may rest with a smaller number of staff or even a single prosecutor. In such cases, offices may need to set priorities and customize their response in keeping with such limitations.

By comparing the Checklist with current policies and practices, prosecution offices can determine which strategies are being successfully implemented and which represent opportunities for improvement. Individual prosecutor staff can use the Checklist to (1) evaluate their own response during the course of a current case and (2) measure their past performance in sexual assault cases. The Checklist can also be used to train new personnel or provide continuing education to veteran personnel. Supervisors can use the Checklist to evaluate how their staff are performing as individuals and how their unit is responding as a whole. Managers can use the Checklist to determine the entire office's effectiveness in responding to sexual assault and to develop an office action plan to improve response.

The Checklist is not intended to provide prosecution offices with all the detailed information needed to create and implement comprehensive programs, policies, and protocols raised in the assessment process. The packet includes a reference guide to resources that do offer such detailed information and a referral list to organizations and agencies that can provide technical assistance regarding program development and implementation.

Review the points on the following list that are relevant to your role in responding to sexual assault cases. Check off those points that you (or your office) successfully perform. Make note of the remaining items and develop a strategy for addressing them.

Prosecutor Response

Screen Cases:

- Process all cases as quickly as possible.
- Obtain and review all case-related documentation and evidence presently available from law enforcement.
- Assign highest prosecution priority to repeat offenders.
- Recognizing the possible deterrent effect of prosecution, screen in as many cases as possible. Establish clear guidelines and rationale when not charging a case, in accordance with office policy, have a supervisor sign off on all cases where prosecution is declined. (See the supervisor section for office policy concerning the establishment of a formal procedure to record supervisor sign off in such cases.)
- If new circumstances arise or new evidence comes to light in a case where prosecution was previously declined, reevaluate the decision to charge and prosecute.



- Determine if prosecution should go forward with the case, based on whether there is enough evidence to support the charges. Going forward without victim testimony is acceptable, and sometimes preferable, particularly in non-stranger sexual assault cases (e.g., evidence-based prosecution using other witnesses or excited utterances).

- If the decision is made not to proceed, notify the victim immediately and explain the reasons for the decision. Use the victim service specialist and advocates in this process to answer the victim's questions and address her needs.

- Regardless of whether or not the decision is made to go forward without the victim, offer her the same referrals, assistance, protection, and support that would be accorded any victim.

Conduct an Interview with the Victim:

- Evaluate the need for an interpreter for victims who use sign language or languages other than English. Do not ask family members, especially children, to translate for the victim.
- Spend time with the victim to build trust and to understand her experience of the crime. To the extent possible, personally conduct interviews with the victim rather than delegating that function to others. Consult with the victim on a regular basis to inform her of developments and to answer any questions.
- Establish early contact with the victim to explain the process and goals of prosecution.
- Coordinate with law enforcement and victim service providers to reduce the number of times the victim is asked to recount her experience. Advocates, specialists, and/or mental health professionals should be present to provide support during the interview if the victim wishes.
- Before any interview, explain to the victim that anything she says to you, the victim-witness specialist, or other members of the prosecution staff will not necessarily be held in confidence, given the rule requiring prosecutors to turn over any exculpatory evidence to the defendant. Suggest that the victim may be afforded greater confidentiality in communications with community-based victim advocates and counselors than can be offered by system-based victim-witness specialists. Provide referrals to such community-based programs as appropriate.
- Explain to the victim that it may be necessary to ask questions of a very personal and even intimate nature (e.g., whether the victim is sexually active or when she was last involved in a consensual sex act). Avoid questions that imply fault or "victim-blaming" (e.g., "What were you doing there?" or "Why didn't you...?"). Discuss with her the issues she faces as either a stranger or non-stranger victim of sexual

assault. Use checklists where available to help a victim focus on her general and sensory memory associated with the crime.

- [-] Conduct the interview with the victim in private. Communicate respect, understanding, and support for the victim and the issues she faces. Let the victim tell her story through to completion at least once with minimal interruption. Absent clear evidence to the contrary, indicate to the victim that you believe her story. Ask questions of the victim in a supportive and matter-of-fact tone of voice. Listen carefully to the answers. Be calm, direct, and patient.
- [-] Explain the prosecutor's role and responsibilities to the victim. Advise the victim that she will have the opportunity to consult with you as the prosecutor, whether or not it is her right as a matter of statutory law.
- [-] Review relevant case-related issues with the victim, including procedural considerations (e.g., preliminary hearings, motions, trial, sentencing, violations of probation or protection orders) and time sequence of events before, during, and after the assault. Provide follow-up contacts for the victim.
- [-] Explain what role the victim may play in the prosecution. Be realistic about anticipated events, issues, and outcomes. Be as specific as possible to give the victim a clear sense of what to expect. Explain why the victim's participation may be critical to the prosecution of the case. However, fully disclose the possible impact that the victim's participation in the process may have on her own interests before exploring her ability and willingness to participate in the prosecution and to testify during hearings.
- [-] Explore the victim's ability and willingness to testify in court. Prosecutors should consider the victim's wishes as an important, but not necessarily determinative, factor in decisions concerning the filing or dismissing of a charge (see below). Absent a compelling reason to the contrary, the victim's input should be carefully considered as part of the decision-making process. However, victims should be made aware that the final decision concerning case disposition rests with the prosecutor. Do not make promises to the victim that you may not be able to keep (e.g., "He will go to jail for what he did to you").
- [-] Prepare the victim for interviews and depositions. Meet with her to review her statement and anticipate any potential questions. Clarify

conflicting statements by the victim as soon as possible.

- [-] Inform the victim that defense counsel, or some other defense representative, may request an interview before trial. Advise the victim to notify the prosecution staff of all requests for interviews by anyone claiming to represent the defendant or the state. Explain to the victim that she has the right to refuse such interviews or request that the prosecutor be present, if she chooses to accept.
- [-] Stay in contact with the victim throughout the court process. Provide her with pertinent case information (e.g., give her the criminal court docket number to help her track court dates and pending motions). Make sure she is not being intimidated or threatened. Suggest strategies and procedures available to the victim to respond to such threats.
- [-] Instruct the victim not to touch or tamper with any physical evidence she may discover after the crime and to call law enforcement immediately.

Request Pre-trial Release Options:

- [-] Carefully evaluate pre-trial release options. Seek victim input and determine her fear of further assaults by the defendant.
- [-] Request that bail be set based on the nature of the crime, the danger to the victim and/or community (where allowed by law), and the defendant's criminal history, contacts with the community, and potential to maintain contact with his attorney and the court. Provide the court with all evidence available to support a request for denial of bail or high bail.
- [-] Where a systematic risk assessment shows that the danger posed by the defendant to the victim is significant, request holding the defendant in protective custody during court proceedings. If that initial request is rejected, request conditions of release to reduce risk to the victim. Provide the victim with appropriate safety planning.
- [-] Consider making a pre-trial motion that violation of a condition of release will constitute "jumping bail." If the defendant subsequently violates such a condition, include charges for bail jumping in your case-in-chief.
- [-] If request for high bail is denied, request conditions that will maximize the victim's safety (e.g., home arrest, intensive monitoring/supervision, electronic monitoring).
- [-] Request a no contact order at the arraignment or preliminary hearing to enhance victim

- safety. Be sure its provisions cover both direct and indirect contact with the victim. Ask the victim to report violations of orders immediately. Such violations may be used strategically to develop a record in support of an argument for bail revocation and pre trial incarceration.
- Establish a reliable system to allow victims to report violations of protective/no contact orders after hours and on weekends. The system should include the means to facilitate an immediate response by law enforcement.
- Consider legal options regarding threats, harassment, stalking, and confiscation of weapons, particularly as they relate to non-stranger cases.
- Determine whether a mental health evaluation of the defendant is appropriate. Consider taking the steps necessary to initiate an involuntary commitment of the defendant to a mental health facility if circumstances warrant.
- Establish an effective system with appropriate community corrections or detention and/or mental health facilities to afford the victim prompt notification when the defendant is released from incarceration or commitment. Provide the victim with a copy of the order that outlines the conditions of the release. In addition, provide the victim with timely notification of all major developments in the case, including charging decisions, plea agreements, hearing dates, rescheduled dates, and sentencing.
- Request the court to place sexual assault cases on the "calendar priority" or "fast track" where this option is available.

File or Charge Offenses:

- Seek out other information on the defendant's history to establish the basis for additional charges. Prior violations against the same victim, if provable and within the statute of limitations, may be charged as separate crimes.
- Make sure charges reflect all crimes committed (e.g., kidnapping, stalking, domestic violence). Consider the advisability of charging lesser included offenses for purposes of plea negotiations.
- Determine whether there was a restraining order in effect at the time of the offense and charge accordingly (crimes that violate such an order may constitute separate crimes and may qualify the case for sentencing enhancements).

- Strongly discourage police use of a polygraph on victims, and refuse to consider the results of such polygraphs in the prosecution process.
- In the case of serial sex offenders, charge crimes committed against as many victims as possible to help ensure offender accountability and to entitle all the offender's victims to the full range of rights and services under the law. Consider charging a serial sex offender under habitual offender statutes.
- If available, consider whether the defendant meets the criteria of the state's sexual predator law. If so, charge and sentence accordingly.
- Avoid listing information that would reveal the victim's identity or current location on court documents, and request waivers as needed in pleadings.
- If the decision is made not to go forward with prosecution, inform the victim immediately and explain the reasons for the decision. Use the victim service specialist and advocates in this process to answer the victim's questions and address her needs.
- Refuse to file charges based on cross-complaints by the defendant against the victim, unless the evidence would clearly support such charges.
- Amend any charging decision based on new information or evidence. Encourage law enforcement to communicate any new information immediately, and make yourself available to discuss evidentiary and investigative issues with law enforcement officers.
- Implement office strategy, policy, and protocol in cases involving multiple offenders (e.g., plea agreements in exchange for testimony against co-defendants, joinder of cases, cross-complaints). (See office policy on multiple offenders in the management section.)
- Do not require the victim to sign a criminal complaint or attend pre trial hearings if her presence is not required.

Conduct a Thorough Investigation:

- When possible, use investigators specially trained to investigate sexual assault cases, to work with victims in a sensitive and effective manner, and to facilitate the victim's active participation and empowerment to the maximum extent possible.
- Work closely with investigating officers to ensure the comprehensive collection of all relevant evidence and to protect the admissibility of that evidence at trial. (See

office policy regarding coordination with investigators in the management section.)

- ❑ Investigate high-risk misdemeanor cases thoroughly, and prepare for the trial as though for a felony assault or homicide case.
- ❑ Obtain a medical waiver from the victim for all relevant records. Inform the victim that such records may be subject to discovery, allowing the defense access to such information.
- ❑ Review evidence collected by law enforcement, including complete reports; written statements and documentation of excited utterances; signed medical releases; 911 tapes; Caller ID boxes; photographs of injuries; photographs of the crime scene; photographs of the suspect; weapons used; ballistics reports; broken or damaged property; broken or disabled telephones; torn, stained, or bloody clothing; forensic evidence analysis; forensic medical results; witness statements; and diagrams of the crime scene. Adhere to all guidelines specifying proper collection and storage of evidence, and maintain the chain of custody. Use a checklist to ensure that all such evidence is in the file and admissible at trial.
- ❑ Develop evidence from medical records, letters from the defendant, evidence of the defendant's prior felony convictions, past and current restraining orders, past police reports, and the defendant's criminal record. Consider reviewing court transcripts of earlier proceedings when appropriate. Conduct interviews with the defendant(s) and defense witnesses.

Conduct Pre-trial Procedures and Discovery:

- ☐ Use pre-trial motions in a sexual assault case to identify potential defenses, address anticipated defenses, compel discovery from the defendant, lay the groundwork for expert witnesses, educate the court about key issues, and protect the victim.
- ❑ Use motions *in limine* to establish the admissibility of evidence in order to reduce or eliminate sustained defense objections at trial. When seeking to limit admission of negative victim-related information, balance the interest of protecting the victim from the disclosure of embarrassing facts (e.g., that the victim had been drinking or engaged in prostitution) with maintaining the victim's believability and credibility with the jury.
- ❑ Craft protective pre-trial motions to prevent harassment of the victim in and out of the courtroom, to protect victim privacy, and

to ensure an appropriate courtroom environment for the victim.

- ❑ Submit a written request for reciprocal discovery from the defendant pursuant to local rules.
- ❑ File motions to exclude unreliable and prejudicial expert/scientific evidence under *Daubert* and *Frye* or move to limit the scope of such experts' testimony at trial.
- ❑ Bring a motion to exclude defense expert witnesses offered to testify that the defendant lacks a certain profile. Demand an evidentiary hearing on the issue of whether any such offered profile is accepted within the psychological community, and be prepared to call your own experts to contradict anyone who states that there is a profile.
- ❑ Consider making a motion to request use of closed-circuit television for victim testimony in cases where facing the offender will so traumatize the victim as to inhibit or preclude her ability to testify.
- ❑ Request that the court close all sexual assault hearings and trials to media coverage. Take appropriate measures to protect the victim's identity from the media and the public.
- ❑ Strenuously resist defense requests for continuances. Provide offers of proof (e.g., through expert testimony) of the negative impact such a delay may have on the victim's or other witnesses' ability to testify. When delays are necessary, procedures should be established to ensure that cases are continued to dates agreeable to victims and witnesses and that the reasons for the continuances are clearly stated on the record.
- ❑ If a pre-trial hearing must be rescheduled, consult with the victim to determine and resolve potential scheduling conflicts.

If Appropriate, Negotiate a Plea:

- ❑ Use plea negotiations to further the goals of successful case outcomes. Resist pleas that lower charges and penalties, particularly if any plea substantially alters the nature of the underlying crime (e.g., from a violent crime of sexual assault and battery to a nonviolent crime such as disorderly conduct, destruction of property, or indecent exposure).
- ❑ When considering a plea, balance the safety of the victim and the community against holding the offender accountable and expediting prosecution goals. Consider the seriousness of the offense, past record of the defendant, likelihood of rehabilitation, likelihood of future

violence and intimidation, effective impact of jail time, availability of community supervision, and the victims' bill of rights.

- Consult with the victim regarding plea negotiations and consider her views regarding the crimes pled to and the penalty contemplated. Take the interests of the victim into account in the plea (e.g., restitution, safety, security). Explain to the victim the reasons for the decision to accept a plea (e.g., weaknesses of the evidence).
- Object to requests for diversion in sexual assault cases. If your objection is overruled, request other sanctions and/or conditions to accompany such a diversion in order to enhance offender accountability and victim safety (e.g., no contact with the victim, court monitoring).
- Strenuously object to attempts by the defendant to enter a *nolo contendere* or *Alford* plea to sexual assault charges. Push for a complete disclosure from the defendant in the plea, if possible.
- If the victim objects to a plea but the prosecutor decides to proceed with the plea, the victim should have the opportunity to state to the court her objection and the reasons for her objection, either through an oral or written impact statement at the hearing to accept the plea, or through the prosecutor upon submission of the plea.

Use Trial Strategies:

- Conduct *voir dire* to identify potential jurors' biases and to address and dispel myths that affect violence against women cases. Begin to educate the jury about your theory at the earliest possible stage. Be prepared to argue against any defense motion to eliminate jurors solely on the basis of their personal or professional involvement with crime or violence against women issues. Gauge jurors' perspective regarding traditional areas of sexual assault-related bias (e.g., delayed reporting, non-stranger rape, drug/alcohol use, prior sexual conduct). Request that jurors who clearly display such biases be removed for cause.
- Develop a simple, consistent, and clear theme or strategy for case presentation. Consider themes that focus on reliability of the victim, breach of trust by the defendant, identity of the defendant, or consistency of evidence.
- Become conversant with strategies to deal with complex issues that arise in such cases (e.g.,

drug-facilitated assault (see section below), assaults involving strangulation, past consensual sexual relations with the defendant, victim refusal to testify or recanting previous statements).

- Become conversant with strategies to address issues in typical sexual assault cases, such as delayed reporting, alcohol/drug abuse, and consent defenses.
- Become conversant with the distinct issues and unique strategies related to stranger versus non-stranger cases (e.g., jury bias against those sexually assaulted by a husband, boyfriend, or date).
- Use trial strategies that refute both a consent defense and jurors' potential misconception that a lack of overt physical injuries indicates that the victim consented. Evidence of physical injuries that are inconsistent with consensual activity—even microscopic tears, bruises, or abrasions to the victim's vulva, vagina, or anus—can be a powerful tool to refute a consent defense. Work closely with forensic examiners to understand all aspects of the forensic exam and resulting evidence and reports.
- Consider the order of witnesses to allow for a logical development and flow of case presentation.
- Seek the admission of any 911 tapes to be played during the opening statement.
- Bring the crime scene to the courtroom through physical evidence, photographs or videos, and graphic descriptions from witnesses. Use anatomy diagrams in lieu of photos to illustrate the victim's injuries. Use technology to make your presentation to the jury as vivid and compelling as possible (e.g., animated crime recreation, LCD digital projector presentations). Employ techniques and strategies that bring the harsh reality of the crime alive to the jurors and put a human face on the real consequences of the crime.
- If photographs are ruled admissible, publish them to the jury to provide them with a clear indication of the nature and extent of the crime and its consequences to the victim.
- Become familiar with a range of evidentiary rules, including those pertaining to the use of expert witnesses, lay experts, forensic testimony, non-victim witnesses, exceptions to the hearsay rule, rape shield laws, and to lay the foundation for admissibility of documents and other evidence (e.g., medical records,

drug-facilitated sexual assault, counselor credentials for lay experts).

- Determine whether your state allows the admission of prior sexual conduct/offenses. If so, use such evidence to demonstrate a pattern of behavior, establish the identity of an unknown suspect, or show that the attack was planned.
- Use expert witnesses to educate judges and juries about the unique issues and factual circumstances that often accompany sexual assault cases. Many victim service specialists and advocates may qualify as experts or lay experts in such cases, particularly in establishing patterns of subsequent victim behavior (e.g., post-traumatic stress disorder or rape-related post-traumatic stress disorder).
- Use expert testimony on domestic violence and battered women when the sexual assault victim is married to or dating the defendant and has been battered by the defendant as well. Ask the expert about myths of domestic violence, statistics, case-relevant effects on the victim, and whether the facts of the case at trial are consistent with the impact of domestic violence on battered women.
- Use expert testimony to explain why the victim may not show signs of physical injury as a result of the sexual assault (e.g., fear that resistance might result in more serious injuries, delayed reporting and therefore delayed medical examination).
- Ask medical personnel to describe the demeanor of the victim at the time of the exam/statement in order to help support the victim's story and credibility.
- Advise witnesses to immediately report to law enforcement any attempts by the defendant to contact, threaten, or harass them.
- Develop a trial notebook of arguments and examination questions to support trial and pre-trial motions and strategies.

Victim-Related Testimony and Evidence at Trial

- Prepare the victim for participation in the trial process. Meet with her in the courtroom where the trial will take place. At a location separate from the courtroom, review the questions you expect to ask (without rehearsing the responses) and show the victim/witness any exhibits you plan to introduce. Explain how the trial will likely unfold, arguments that will be made, defenses offered, and witnesses called. Discuss the strategies and questions that the defense is likely to raise on cross examination.

- Identify and plan for the victim's safety needs during the trial (e.g., extra bailiffs, positioning of victim relative to defendant, weapons search). Establish a separate and safe waiting room for the victim.
- Develop strategies on how best to inform the judge and/or jurors if the victim will not be testifying for the prosecution and to determine whether it is appropriate to explain why she is not testifying.
- If the victim will testify, review with her in advance the areas where she will not need to testify (e.g., rape shield prohibited information). Prepare the victim for potential trick questions posed during cross-examination (e.g., "Was your memory better then or now?"). Instruct the victim that if the defense poses such questions, she should pause and remain silent to give you an opportunity to object.
- Conduct the direct examination to allow the victim to recreate the crime for the jury in as much detail as possible. Introduce the victim's testimony with some personal history and background to help the jury to identify with the victim and her perspective. Inquire about her sensory and peripheral memory surrounding the crime that can be corroborated by independent evidence or the testimony of other witnesses (e.g., hearing a siren nearby at the time of the attack).
- Ask the victim to recount her feelings of fear, panic, or other emotions she experienced in addition to her physical and sensory perceptions at the time of the crime. Make sure the victim is completely familiar with the sequence of events before, during, and after the assault, so these can be easily referenced out of order and context during the trial.
- Object to defense attempts to undermine the victim's credibility based on her conduct prior to the crime. Request that such claims be scrutinized under the state's rape shield law and argue that the prior bad acts doctrine should apply to such conduct on the same balancing basis as prior bad acts of the defendant (i.e., balancing the probative versus prejudicial value).
- Strenuously resist defense tactics intended merely to harass, embarrass, or intimidate the victim during the trial process (e.g., harassing motions, requests for production of documents such as the victim's medical or psychological records).
- Request that the court allow a support person—such as a relative, friend, or victim service provider—to accompany the victim

to all court proceedings upon request or as needed.

2. Before the trial, explain the rule of sequestration to the victim, if one exists in your jurisdiction. Where practical, allow the victim to testify as the first witness to preclude the necessity of sequestration.

Defense-Related Testimony and Evidence at Trial

- Anticipate defenses (e.g., consent, alibi, diminished capacity) and adjust trial strategy accordingly.
- Always fully cross-examine the defendant if he takes the stand. Phrase questions simply so that the defendant must testify to the sequence of events in detail.
- When cross-examining the defendant, avoid giving him an opportunity to refute your strongest arguments. Consider what answer might be offered to each question. Prepare contingent follow-up questions based on his anticipated answers. Consider using rebuttal witnesses to counter his claims and defenses. If you do not believe the defendant will give you an answer you seek, consider only raising the issue in your closing argument.

Address Special Issues Related to Drug-Facilitated Sexual Assault Cases:

- Aggressively prosecute and creatively charge in drug-facilitated sexual assault cases. Consider the possibility of charging other crimes committed in conjunction with the sexual assault (e.g., possession and/or distribution of illegal drugs, sexual battery with an incapacitated victim, kidnapping/false imprisonment, criminal negligence).
- 1.1 Be sensitive to the fact that the lack of memory may complicate the trauma for victims of drug-facilitated sexual assault.
- 1.2 In suspected cases of drug-facilitated sexual assault, involve a forensic medical specialist at the earliest point possible to review the case facts and evidence and to assist in the development of prosecution strategies. Make a pre-trial motion to allow your specialist to attend the trial in its entirety.
- 1.3 Before ordering a full drug screen, the investigator or prosecutor should explain to the victim what this test entails and obtain her informed consent. Explain that any test results that reveal that the victim used recreational drugs may prove incriminating.

- If drug screens of the victim reveal the presence of recreational drugs, make it clear to the jury that the victim's voluntary use of such drugs is not evidence of her consent to the sexual act in question.
- Whether or not a positive toxicology result is obtained in a case, use the testimony of expert witnesses, such as a toxicologist or pharmacologist, to explain the test results, why positive test results were not obtained, and the effects of the drug on the victim.
- Use experts to testify that one of the effects of these drugs on the victim is unconsciousness or a relaxed state, which could explain the lack of physical injuries during a sexual assault.
- 1.4 Use friends and bar/restaurant personnel to testify as to the atypical behavior of the victim (e.g., she had only one drink and appeared to be intoxicated). An obvious and inexplicable change in behavior can be offered as proof that a drug was used on the victim, even in cases when objective proof (e.g., a blood toxicology test) is not available.

Develop Sentencing Strategies (also see Court Response Checklists in this series):

- Recommend a sentencing hearing to permit full disclosure of relevant information and to give the victim the opportunity to present an impact statement. Argue that the defendant should be placed in custody pending the outcome of the hearing.
- Ensure that the court conducts an assessment regarding the risk the offender poses to the victim, her family, or the general public as part of the sentencing process.
- Provide the victim with a copy of the court's pre-sentence report to help her prepare her victim impact statement. Offer her assistance in preparing such a statement if she desires. Encourage (but do not require) her to make a written and/or verbal statement reflecting how the crime has affected her life, physically, emotionally, and financially. Encourage the victim to include her sense of continued personal risk the offender poses for her and her opinion regarding possible safety measures (e.g., sentence, conditions of release, no contact, weapons seizure).

- ❑ Consult with the victim regarding the sentencing recommendation. If sentencing guidelines apply, explain to her their impact on the case. Consider the victim's opinion regarding the nature and extent of the sentence to be recommended.
 - ❑ File a sentencing memorandum to provide the court with the basis for all sanctions and provisions requested, including those related to offender disposition and victim safety.
 - ⌋ When recommending dispositions, consider the nature and gravity of the offense, the history of sexual or physical abuse, previous efforts at rehabilitation, the defendant's character and current rehabilitative needs, and the interests of the community in protection and punishment.
 - ❑ Make recommendations for enhanced penalties, pursuant to statutory provisions, for defendants who have been previously convicted of one or more crimes, or for whom there is evidence of a long history of sexual offenses against women.
 - ⌋ Ensure that there are sufficient conditions on the defendant's release (e.g., no contact with the victim, surrender of firearms, surrender of computers), restitution for unreimbursed expenses, abstinence from drugs/alcohol).
 - ❑ Request a no contact order as part of sentencing, or a lifetime protection order, if that is available under state statute.
 - ❑ In consultation with the victim, identify all expenses the victim has incurred as a result of the crime, including any estimates for immediately foreseeable expenses (e.g., counseling). Include a request for a restitution order to cover all such expenses as part of the sentence or plea agreement. Request that the order be paid in full at the time of sentencing or on a payment schedule that will satisfy the order in the shortest timetable possible. Request restitution for victims of uncharged crimes perpetrated as part of the defendant's continuing pattern of sexual assaults.
 - ❑ Request that repeat offenders have their future conduct and whereabouts closely monitored and restricted to maximize victim safety and offender accountability.
 - ❑ Agree to a defendant's participation in a sex offender treatment program only if it is certified by the state and/or the Association for the Treatment of Sexual Abusers (ATSA) and only as a part of sentencing (not prior to sentencing, so that fact will not serve as a mitigating factor for the benefit of the defendant during sentencing). Educate the victim about the issues and potential outcomes of such programs and how her interests and safety may be affected.
 - ⌋ If the court orders completion of a sexual offender treatment program, recommend that it be combined with other sanctions (e.g., incarceration, intensive probation, no contact orders, community work service). Suggest that the court consider longer, more intensive programs and provide specific sanctions for noncompliance.
 - ❑ Encourage the victim to petition for civil protection orders after acquittal.
- Develop Post-sentencing Strategies (also see Court Response Checklists in this series):**
- ❑ Ensure that all convictions are entered into criminal record databases and sexual offender registries as appropriate.
 - ❑ Preserve evidence for use in future proceedings (e.g., appeals, motions to modify/reduce sentence, re-trial, request for clemency, violation of protection orders). However, any of the victim's personal property held as evidence should be returned promptly once it is no longer needed for evidentiary purposes.
 - ❑ Work collaboratively with probation/parole officers and victim service providers and advocates to ensure enforcement of probation, parole, and sentencing conditions. Initiate review hearings or recharge when there are violations.
 - ⌋ Contact high-risk victims at regular intervals to evaluate their safety needs and the risks posed by their offenders, even in cases in which the defendants have been successfully prosecuted and sanctioned. Such offenders may continue to harass, threaten, stalk, or assault their victims. Use the victim contacts as an opportunity to inquire about other victimization needs, such as those related to counseling, finances, or trauma to children.
 - ❑ Encourage the victim to report any violations of the defendant's release conditions.
 - ❑ Respond in a timely manner to any post-sentence victim requests for assistance.
 - ❑ Help ensure that the victim continues to receive notice of any post-sentencing developments (e.g., post-sentencing probation or parole hearings or decisions, release, commutation).
 - ❑ Review with the victim the availability of a court-ordered HIV test of the defendant, if provided for by law. If the victim opts to have the defendant tested, discuss the requirements of such mandatory testing provisions with the

defendant and defense counsel. Provide the victim with counseling regarding her own HIV testing issues and options.

Address Victim Interests and Safety Issues Throughout the Process:

- [-] Address victim safety issues throughout the entire criminal justice process. Evaluate the likelihood of continued violence by the defendant from the time of the initial interview through the conclusion of the trial. Use assessment tools to help make this determination. Immediately pursue strategies that will most significantly enhance the victim's sense of safety. Be aware of the different safety issues facing victims of stranger and non-stranger sexual assaults.



- [-] Work closely with community-based victim advocates and victim/witness specialists to support the victim through interviews and other court procedures and with other needs.
- [-] Work with victim advocates and specialists to develop a process to maintain the confidentiality of the victim's identity and location when necessary. Adhere to policies and practices that discourage disclosure of such confidential information to and by the media. Use anonymous or "blind" case tracking

to meet statistical reporting requirements concerning sexual assault cases.

- [+] Give the victim the name and contact information of the prosecutor and victim/witness specialist assigned to her case, in writing, as soon as they are known. If a new prosecutor is subsequently assigned the case, immediately give the victim that prosecutor's contact information.
- [-] Encourage the victim to keep her contact information current with your office and/or provide the name and number of a family member or other confidant who will always know how to reach her.

Victim/Witness Specialist Response

Work with the Prosecutor Assigned to Each Case to:

- [-] Serve as a liaison between the criminal justice system agencies and the victim.
- [-] Meet with the victim at the earliest point possible. Develop strategies to address the victim's issues, concerns, and fears identified during the course of such discussions. Be aware of discoverability issues related to notes taken in conjunction with victim interviews.
- [-] Work collaboratively with community-based advocates to address the full range of victim needs that go beyond typical justice system response (e.g., emergency housing, economic assistance).
- [-] Provide the victim with information about her statutory rights, legal remedies, and the availability of community assistance and services programs.
- [-] Provide the victim with information about her rights to be present, informed, and heard at critical hearings throughout the criminal justice process and her right to consult with the prosecutor where allowed or mandated by state law.
- [-] Protect the victim's privacy and confidentiality. However, make clear to the victim that communications with you or other prosecution staff may not be confidential and that, by law, exculpatory evidence must be turned over to the defendant. Inform her that communications with community-based advocates may enjoy a higher degree of confidentiality.

Help the victim's family with secondary victimization issues (e.g., counseling for children who may have witnessed the assault).

- ❑ Develop a process to familiarize victims with the criminal court system, general trial procedures, and courtroom protocol (e.g., written materials, videos the victim can review on her own, orientation sessions for groups of victims that include an opportunity to ask questions).
- ❑ Describe to the victim her role in the criminal justice process. Encourage the victim's active involvement in decision-making processes regarding charging, preparation for trial and plea negotiations, sentencing, and pre- and post-trial conditions of release.
- ❑ Provide the victim and witnesses (particularly child witnesses) with courtroom orientation and trial preparation to minimize the trauma of testifying in sexual assault cases.
- ❑ Consider allowing the victim to view the testimony of witnesses in unrelated sexual assault cases. Critique the witnesses' performance with the victim with specific reference to the current case.
- ❑ Suggest that the victim participate in therapy or counseling, or support groups, to diminish the trauma of the trial. Help the victim set up an appointment or obtain referrals from experienced, reliable mental health professionals in the community and community-based programs.
- ❑ Assist the victim with safety planning as necessary. Review the plan with the victim on a periodic basis or as circumstances warrant.
- ❑ Provide the victim with notice of trial and hearing dates, times, and places. Provide her with prompt notice of postponements and rescheduling.
- ❑ Confirm service of subpoenas and protection orders.
- ❑ Provide the victim with a court accompaniment during trial and related hearings, if requested.
- ❑ Offer to intervene with the victim's employer or school to address issues that may arise as a result of her victimization or involvement with the prosecution of the case.
- ❑ Notify the victim of her rights to state and federal victim compensation, restitution, and other financial assistance (e.g., state victim compensation, worker's compensation, public assistance). Help the victim with appropriate applications. Inform the victim that she is not responsible for the costs of any forensic exam performed. Provide assistance to the victim on witness fee applications and reimbursement

forms. Explain what reimbursement victims can receive for testifying.

- ❑ Provide the victim with assistance in preparing victim impact statements and ensure that the completed statement is included in the case record and court file with any necessary confidentiality regarding the victim's current address.
- ❑ Ensure that the victim is notified of the offender's release (e.g., bail, parole, work release, furlough, end of sentence release) in a timely manner. Provide the victim with a copy of any conditions related to the release.

Supervisor Response

- ❑ Oversee prosecution compliance with agency and interagency policy and procedures related to sexual assault.
- ❑ Provide staff with updates and continuing education concerning new statutes and case law related to sexual assault.
- ❑ Create forms and checklists to facilitate compliance with office policies.
- ❑ Problem-solve and engage in critical thinking with assistant prosecutors and other staff on handling complex cases.
- ❑ Assess whether prosecution response meets the goals of victim safety and offender accountability.
- ❑ Determine the need for additional training or supervision of prosecution staff.
- ❑ Establish and develop working relationships with the U.S. Attorney's Office and prosecutors from neighboring jurisdictions.

Data Collection

- ❑ Create databases to expedite docketing, caseload management, and timely victim notification.
- ❑ Include in the office databases information on each case, the nature of the charges, and the continuing status of the case up to and after sentencing.
- ❑ Establish a system that tracks prosecution activities and responses to each case, from intake to post-sentencing.
- ❑ Integrate data systems to include both criminal and civil histories.
- ❑ If victim information is gathered for analysis, establish policies to ensure that data collection methods do not require any identifying information and cannot be traced back to victims.

Management Response

Develop Personnel Policies to Assist Prosecutor:

- Establish sexual assault units in larger offices or create specialists in smaller or satellite offices. Develop policies and practices that minimize the loss of such specialized sexual assault expertise as the result of promotion, reassignment, or turnover (e.g., rotate prosecutors through periods of specialized assignment to sexual assault cases).
- Develop a system to monitor prosecution compliance with protocols, and revise policies and practices as necessary.
- Establish job performance standards for response to sexual assault cases. Reward prosecutors and staff who meet those standards, and provide additional education or corrective measures for those who fail to meet them.
- Create incentives so that assignment to sexual assault will be viewed as a position of elevated authority and autonomy or a promotion.
- Hire staff who reflect the demographics of the community they serve.
- Mentor new or less experienced prosecutors. Have new prosecutors serve as “second chair” to seasoned prosecutors experienced with sexual assault cases.

Set Tone Through the Development of Protocols and Practices, Training, and Other Mechanisms:

- Develop and implement a management plan to allocate sufficient funds, resources, and personnel to respond appropriately and fully to the crime of sexual assault.
- Establish protocols and practices grounded in an understanding of violence against women that promote victim safety and confidentiality and hold offenders accountable. Revise protocols as needed.
- Craft up-to-date policies for sexual assault cases that will strengthen the prosecution’s ability to respond to cases consistently and proactively, regardless of which prosecutor is responsible for the case.
- Use vertical prosecution whenever possible to promote a consistent prosecutorial approach and to afford victims the maximum degree of comfort and trust.
- Where possible, use a multidisciplinary team approach to address the physical, emotional, financial, and legal needs of a sexual assault victim. In addition to the prosecution staff,

such a team might include community-based victim advocates, law enforcement, court personnel, corrections and detention, probation and parole, medical and psychological professionals, private assistance organizations, and public service agencies. Establish agreements or “memoranda of understanding” (MOUs) to guide coordinated efforts of the multidisciplinary team.

- 1. At a minimum, establish policies and programs that enhance coordination between prosecutors and law enforcement. In particular, give investigating officers full access to the legal expertise and case development experience of prosecutors to ensure the comprehensive collection of all necessary evidence and to protect the admissibility of that evidence. Prosecutors can offer guidance concerning issues related to search warrants, arrest, charging, evidence collection and preservation, weapons confiscation, and victim protection.
- Place equal emphasis on misdemeanor and felony offenses. Assign experienced prosecutors to misdemeanor cases.
- Ensure that prosecution protocols specifically prohibit charging victims who recant their testimony with perjury or other penalties. Include a provision in the protocol that details how prosecutors should work with victims and advocates if a victim recants or warns that she may recant.
- Review policies, programs, and facilities to identify and remove barriers to access by victims with special cognitive and physical needs.
- Develop policies and programs to ensure that sign language or non-English translators are available to victims who may need them throughout the criminal justice process services (e.g., translation of materials into relevant languages, 24-hour access to translation and interpreter services, developmental and age-appropriate materials, transportation, babysitting services). Make sure protocol reflects policies against the use of family members, particularly children, for interpretation.
- Develop strategies, policies, and protocols to address cases involving multiple offenders.
- Establish a strategy for obtaining the services of specially trained investigators to work sexual assault cases, either by establishing in-house training programs to create such

expertise on staff or by using investigators from other agencies.

- Support continuing training on violence against women issues for staff throughout the office, including investigators, victim/witness specialists, and prosecutors.
- Provide specialized training for prosecutors on issues related to drug-facilitated sexual assaults, including specialized investigative strategies, trial techniques, and psychological needs of victims.
- Provide staff training and education to establish competency and enhance prosecution response to cultural populations within your jurisdiction.
- Establish a formal procedural process to allow supervisors to affirm or overrule the decisions of prosecutors under their supervision to decline prosecution in sexual assault cases.
- Develop policies and protocols that identify conflicts of interest between the defendant and the prosecution office (particularly in rural jurisdictions). If a conflict exists, develop policies to allow for prosecution by a prosecutor without a conflict.

Provide Leadership in Justice System and Community Initiatives to Stop Violence Against Women:

- Given the prosecutor's role as a bridge between the police, courts, probation, and corrections agencies, support coordination among all branches of the criminal justice system. Also establish working relationships with agencies and organizations outside the criminal justice system, particularly community-based victim advocates (e.g., joint trainings, public education, policy advocacy).
- Facilitate and participate in efforts to educate and solicit support from public and private entities concerning sexual assault issues and programs (e.g., allied government agencies, members of the media, private organizations and clubs).

- Work with members of communities of color and other underserved populations to identify community-specific problems in response to sexual assault and explore solutions. Based on community input, make changes to eliminate the barriers that deny victims from underserved populations access to appropriate services.
- Keep police informed of evolving state laws and regulations in the field of violence against women through roll call trainings, in-service, and educational materials.
- Elicit input from victim advocates and survivors in developing safety planning materials offered by prosecution staff.
- Coordinate with federal, state, and other local prosecutors to ensure that individual cases are brought in the right jurisdiction and that the fullest possible range of charges are filed, including such charges as interstate domestic violence or stalking, weapon possession or transport, and violations under the full faith and credit for protection orders under the provisions of the Violence Against Women Act (VAWA).
- Develop a policy and protocol to allow victims and citizens to lodge complaints concerning prosecution response to sexual assault cases, and to investigate and address such complaints.
- Support legislation and/or court rules that would allow the state attorney general original jurisdiction to provide an alternative where local prosecutors would otherwise retain sole discretion to prosecute sexual assault cases.
- Support legislation that reflects the rights, interests, and needs of sexual assault victims (e.g., enhanced accountability for juvenile sex offenders, revisions that focus on offender rather than victim conduct, increased funding for sexual assault programs).
- Promote community education and zero tolerance of violence against women.

Endnotes

1. Bruce Bachman and Linda Saltzman, "Victims Against Women: Estimates from the Redesignated Survey," *Bureau of Justice Statistics Special Report*, U.S. Department of Justice, Bureau of Justice Statistics, Washington, D.C. (August 1993).
2. Patricia Tjaden and Nancy Thoennes, *National Violence Against Hoopie Survey*, National Institute of Justice, U.S. Department of Justice (2000). *Editor's note:* While victims and offenders of sexual assault are both women and men, the vast majority of victims are female and offenders are male (see Patricia Tjaden and Nancy Thoennes above). For this reason, as well as for consistency of style, this Checklist refers to victims as women and offenders as men.
3. *Ibid.*
4. *Ibid.*
5. Karen Baker, "Overall Crime Victimization Rate Decreases 16%...But Rape Increase 20%," National Sexual Violence Resource Center, Emma, PA (September 5, 2000).
6. People who provide services to victims are based both inside and outside the criminal justice system. While they may perform many of the same functions, the scope of their work and even the law that governs the delivery of their services may vary considerably. Additionally, their titles may vary from jurisdiction to jurisdiction. Service providers based in prosecutors' offices are often referred to as victim/witness coordinators or specialists. Those who operate through community-based nonprofit organizations may be referred to as crisis counselors or victim advocates. For purposes of this publication, the term "victim/witness specialist" is intended to refer only to system-based service providers. The term "victim advocate" refers only to community-based service providers. The phrase "victim service provider" is used generically to refer to both.
7. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (determining admissibility of scientific evidence under Federal Rules of Evidence).
8. *Daubert v. United States*, 293 F. 1015 (D.C. Cir. 1925) (establishing standards for the admissibility of novel scientific techniques).
9. *North Carolina v. Alford*, 400 U.S. 25 (1970) (establishing the defendant's right to accept a guilty plea and still maintain innocence of the crime for which the defendant is charged).