

ETHICAL CONSIDERATIONS
IN DOMESTIC & DATING
VIOLENCE PROSECUTION

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1

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2

All lawyers have a duty to conduct themselves ethically, and prosecutors are (rightly) held to an even higher standard. As Justice Sutherland famously observed in *United States v. Berger*, 295 U.S. 78 (1935), a prosecutor's interest in a criminal case is not that he or she "shall win a case, but that justice shall be done."

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3



We will review the ethical duties of prosecutors from the standpoint of the Rules of Professional Conduct, as well as other professional standards of conduct for State advocates in criminal actions.

 4

We will also explore the many ways in which prosecutors handling domestic violence cases can strive to do justice in the broadest sense of the word, taking into account the interests of victims, defendants, and society as a whole.

 5

DIFFERENCE BETWEEN ETHICS AND PROFESSIONALISM

- Georgia
- Louisiana
- Ohio



 6



“... the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers.”

Former Georgia Chief Justice Harold Clarke

 7

WHO ARE THE MINISTERS OF JUSTICE?





 8

PROSECUTORS AS MINISTERS OF JUSTICE

Prosecutors are often involved in:

- Whether or not to further investigate the allegation
- Whether or not to arrest the suspect
- What evidence to disclose to the defense
- The proposal of terms of a plea bargain
- Making sentencing recommendations to a judge

And most important of all...Prosecutors decide whether or not to charge/indict, bill a suspect with a crime

 9



Domestic and dating violence prosecutors often play a dual role—serving as both advocates for the victim as well as proponents of justice

 10

While some prosecutors may make their decisions about charging based on the likelihood of conviction, we are bound by ethical obligations to file only those charges, which can reasonably be substantiated by admissible evidence at trial





PROSECUTION STRATEGIES AND ETHICAL CHALLENGES



- Evidentiary constraints in domestic violence cases
- specifically the types of character evidence and prior acts of the defendant allowed during trial
- Key prosecution themes and strategies

 12

GENERAL LACK OF CIVILITY

Professional Misconduct

- Obstructive tactics
- Vulgar speech
- Abusive conduct
- General incivility



A batterer may abuse a partner for years, but is often charged for only one abuse event. Thus, the legal process takes the assault out of the context of the larger abusive relationship.



In presenting evidence of the context of a violent relationship, prosecutors must comply with the rules of evidence.

HISTORICAL EVIDENCE

Social science research suggests that the ongoing violent relationship is essential to understanding an individual event of violence. Thus, the history of violence in the abusive relationship may be necessary to prove that a given assault occurred and to support the seriousness of that assault. This context or history may be highly “probative” evidence.

ETHICAL OBLIGATIONS OF THE PROSECUTOR

Prosecutors need to be able to address domestic violence issues. It may be important, for example, for a prosecutor to help a jury understand why a woman who has been repeatedly assaulted remains in an abusive relationship and why her doing so is not a defense to additional criminal assault(s).



STRATEGIES

Emphasize the need to understand the dynamics of an abusive relationship when providing training for police, judges and prosecutors.



Address misconceptions held by individuals who are selected as jurors in domestic violence cases.



TRADITIONAL ATTITUDES

The public often misconstrues the ongoing nature of domestic violence. They fail to understand that a single incident of abuse is one part of a longstanding pattern of psychological control and physical violence. Individuals without personal experience with domestic violence have a very difficult time conceiving of violence by intimate others. It is from this uninformed group of individuals that a prosecutor will seat a jury. In fact, any potential juror who has personal knowledge of or experience with domestic violence, and therefore has some understanding of the dynamics of domestic violence, is often struck for cause.



TYPES OF ETHICAL VIOLATIONS

1. Charging without probable cause
2. Engaging in selective prosecution
3. Concealing evidence
4. Failing to enforce perjury statutes



 19

LACK OF PROBABLE CAUSE

The first ethical rule of prosecutors is to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

In domestic and dating violence crimes, charging decisions often rely heavily on the victim's "character, behavior, and credibility."

"No-drop" policies *may* complicate prosecutors' ethical sensibilities.

 20

FACTORS TO CONSIDER



- The nature of the offense
- Whether the crime involves violence or serious bodily injury
 - Probability of conviction
- Criminal history of the accused
 - Potential deterrent value of prosecution to the offender, victim, and society at large
- Willingness of the victim to cooperate

 21

“NO-DROP” POLICIES



22

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NO-DROP POLICY

- Who has a “no drop” policy?
- Who takes the victim wishes into consideration?
- Who seeks “no contact” orders automatically?



23

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SELECTIVE PROSECUTION

Because it violates the Equal Protection Clause of the 14th Amendment, the U.S. Supreme Court has held that selective prosecution exists when the prosecution of a law is “directed exclusively against a particular class of persons.”

Prosecutors may not charge a person with a criminal offense based on “an unjustifiable standard such as race, religion, or other arbitrary standard.”

United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)

24

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ABSOLUTE IMMUNITY DOES NOT INCLUDE

- Acting as your own investigator
- Giving advice to police during investigation
- Attesting to the truth of facts in support of an arrest warrant
- Signing a search warrant affidavit



Kalina v. Fletcher, 522 U.S. 118 (1997)

QUALIFIED IMMUNITY

- Offering legal advice to police about an un-arrested suspect
 - Administrative activities
- “When the functions of prosecutors and detectives are the same...the immunity that protects them is also the same.



Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606 (1993)

CONCEALMENT OF EVIDENCE

Prosecutors must make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense.





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FAILING TO PROSECUTE PERJURY

Accurate and truthful testimony is essential to upholding the integrity of the criminal justice system. But domestic and dating violence cases often see recantation and/or minimizing.

However, teasing out perjury from witness intimidation is hugely important for domestic and dating violence prosecutors.

Witness intimidation may deter domestic and dating violence victims from calling for help, accessing the justice system, and participating in the court process.

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ABA MODEL RULE 3.3(A)(3)

(a) A lawyer shall not knowingly

(3) Offer evidence that the lawyer knows to be false. If a lawyer...has material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.



MATERIAL WITNESS WARRANTS



A prosecutor may ask for a material witness warrant if the person has refused to obey a court ordered a lawfully issued subpoena, and/or if it is impractical to attempt to secure a person's presence by subpoena.



VICTIM RIGHTS

- Victims Bill of Rights
 - OVW Grants
 - VAWA Grants
- State Grants through Law Enforcement



REASONS TO REJECT A CASE

- the victim's wishes
- victim provocation issues
- whether the offender was being held on another case
- whether the evidence was sufficient to result in a conviction



 34

DOMESTIC VIOLENCE



 35

IT'S NOT MY PROBLEM

**Parallel civil and criminal investigations
and/or legal proceedings**



 36

FUTURE HARM

Upon termination of case, retention of evidence and post-investigation analysis



 37

GUIDANCE AND TRAINING

- Line prosecutors
- Law enforcement
- Judiciary
- Probation and parole



 38

SPECIAL PROSECUTORS/UNITS



 39

PROSECUTOR'S ROLE IN ADDRESSING MISCONDUCT

- Police
- Defense
- Witnesses
- Jurors



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40

PRESSURES AND POLITICAL CONSIDERATIONS



41

Questions



42
