



STOP THE BLAMING: RETHINKING RESPONSIBILITY IN DOMESTIC VIOLENCE CASES

BY JUDGE JOSEPH CRAIGEN OSTER

Defense attorney: *"Judge, we'd like to set this case for a bench trial."*

Judge: *"Counselor, do you expect it to go to trial?"*

Defense attorney: *"No, we don't, your honor."*

One of the most common frustrations among police officers, detectives, prosecutors and judges is when an alleged victim (V) in a domestic violence case fails to show up for court. When the defense attorney sees a pattern or is informed by the defendant (D) that V will not appear for court, the matter is set for a bench trial, knowing that the case will likely be dismissed without prejudice. Then, the assumption is the parties will be reunited (if they were ever separated) and the dysfunction will resume. The belief is that if V isn't willing to come to court, then V deserves the consequences, even if that includes further abuse. Because, after all, isn't that what our legal system is all about? Choices and consequences?

We get angry and blame V for wasting all that time and all those resources, all that work - officers responding to the scene and taking witness statements and arresting the defendant, detectives getting a complaint authorized by a prosecutor and signed by a judge/magistrate, court staff opening up a file, the defendant hiring an attorney or requesting a court-appointed counsel, all parties going through the bond hearing, arraignment and pre-trial process - all that work only to have the case dismissed without testimony or findings and the defendant walk. And then the waiting game until, like the movie "Groundhog Day," the police are called again, D is arrested, and we repeat the above scenario only to have another dismissal. All that work. All that work for naught.

Well maybe not. Maybe, even if V doesn't follow through with prosecution, V might be a little safer. But what if, instead of putting all of the responsibility on V for not showing up (or for not changing V's own life like the Bill Murray character did every day in "Groundhog Day"), what if we placed that responsibility on the systems of power that V turned to when the alleged act

of violence occurred? Instead of blaming V or wanting V to change and "follow through for once", maybe we haven't been asking the right questions or looking in the right places for the change. Instead of looking at the powerless, we should be looking at the powerful (i.e., police officers, detectives, prosecutors, judges, even defense attorneys) to change the culture so that, when V does fail to appear, we ask ourselves questions like "what did I miss?" or "how did I fail to create a safe enough environment for V to appear?" or "how can I do my job better the next time?"

Domestic violence homicide is the most preventable of all murders. Often it is foreseeable because the parties have already had contacts with our legal system, either civilly in divorce/custody proceedings in circuit court or criminally in district court. Often, the non-battering party (future or current "V") is making many decisions a day to create the most safety in V's world for V and V's children. Unless we've been in that predicament, how can we judge what is indeed the most rational choice for V to make? So, rather than focus on V, I propose we turn the tables on the power structure and look at ourselves for creating safer communities and families.

First, a brief confession: when I was elected in 1996, I took advice from my father (who had been a municipal/district judge for 27 years) and, in setting terms for probation in domestic violence cases, I usually looked to get the batterer D into marital counseling with the survivor V. "You both have to create security and safety for your child" I might say, or "Your child is half of each of you, don't demean the other." I would equivocate, and as a person in power representing the pinnacle of the system V had turned to, I would ask V to share responsibility for the abuse done by D. The message, even if I didn't say the words, was: "You both are wrong!"

I loved my dad and thought he was a great, compassionate judge, but I've come to realize he and I were dead wrong on this issue. Imagine, not only has V been subject to abuse, but now the court/power structure is ordering that V engage in forced



counseling with the very same person who committed the abuse. This perpetuation of equivocation or shared responsibility for there being a criminal charge in the first place, is dangerous and inappropriate. Domestic violence isn't a marital problem best corrected in couple counseling.ⁱⁱ

The real turning point for me came while sitting on the Macomb Domestic Violence Fatality Review Team in 2005/2006. Along with other stakeholders, I reviewed domestic violence homicides or attempted homicides. We saw that the Vs (all women in those cases) came from all walks of life: some married, some divorced; some strong, some weak; some sober, some addicted; some who did everything "right", some who did everything "wrong." The one common factor we could discern in those cases was that there was no one common factor among Vs, but that the batterers abused and battered the Vs. Pretty simple, pretty clear. It seemed, then, that to address domestic violence and create greater safety, we had to quit asking the tired, boring question "why doesn't she just leave him?" and, in addition to the obvious "why does he batter her?", start asking the question "how can we as judges (prosecutors/police officers/nurses/civil attorneys/counseling providers) take domestic violence more seriously, recognize the signs of manipulation and control, and hold the batterer accountable prior to deadly escalation?"

First Responder

Fortunately, many police and sheriff's departments have established and are establishing protocols for handling domestic violence cases. The officers are on the front line for creating the aura for safety as V enters into the criminal justice system. I am referring more to a culture of empathy and understanding as opposed to actual physical safety. Attentive listening and providing appropriate referrals for safety planning and other services to V at the scene have increased and, I believe, go a long way towards getting V to a safe place, perhaps even a place safe enough from which to follow through with prosecution.

Arraignment/bond conditions

Probably in over 90% of the domestic violence cases I order no contact and no return to the home, among other conditions. I am not sure how V would feel safe in every day life let alone showing up for court if D remains in close proximity. I also inquire, if V is present, whether a pamphlet has been provided from the local support organization/shelter. If not, I hand one to V from the bench. The sooner that V seeks or receives support, the more likely V shows up for court.

With respect to family court orders, when setting bond conditions I frankly find them irrelevant. The district court judge/magistrate is responsible for the safety of the community and for V and V's family. Other than the extremely rare case where D's attorney can show that a family court judge has reviewed the parenting agreement **after** the alleged violence has occurred, I give no weight to the parenting arrangements. Of course, if ordered by a circuit court judge to amend a bond condition or sentence, an order I have not yet received, I would follow that order. Any agreement or precedent is necessarily suspended and superseded by the domestic violence criminal charge and corresponding purpose of bond: to insure personal and public safety

Washtenaw County has a nationally recognized domestic violence court. One of the many great things they do is review in court bond conditions with the defendant within days of arraignment. When my colleague, Judge Mark Fratarcangeli, and I ran an alternative assaultive crime program, we had monthly in-court reviews with defendants and victims (if Vs chose to attend). The main eye-opener for us was the great chasm for communication between us, the judges, and the defendants when it came to understanding bond conditions. A great many of Ds were not following our orders. In some instances D drove with V to court in violation of a no contact order, only days after contact was forbidden. Sometimes the mistakes were actually inadvertent. I think a magistrate/judge needs to engage D at length in dialogue, including asking questions in several different ways and making sure D's answers are clear, to get across not only the terms of bond conditions but the severity for violating them.

With respect to bond violations, especially those alleging unauthorized contact, I prefer immediate hearings. If violators are held accountable without delay, it sets the tone for increased compliance with strict probation in the event of a plea or conviction.

Most prosecutors have crime victim rights units who work with Vs. Increasingly, other support organizations (counseling/shelters/advocacy groups) have made persons available at the pretrial stages and beyond. While this is wonderful and definitely increases the aura of safety, some studies have indicated that more frequent, informal contacts from an assistant prosecutor handling the case would improve V's feelings of safety and reassure V that it is safe to appear for pretrial and trial. Along this same vein, having the same prosecutor handle the case all the way through to trial would increase the likelihood of V's appearance. I recognize that this is very hard to do, especially in larger counties where prosecutors are being asked to do more with fewer attorneys, but what is the cost when the main



witness (V) fails to appear for trial? Again, if we take personal responsibility for V's appearance, how would we change our practices?

Incidentally, I'm sure performance at trial would greatly increase if an assistant prosecutor had these more frequent contacts with V. Sometimes not everything is in the police report, the detective's interview, or the crime victim rights advocate's notes. The more connected, the more understood, the safer V feels, the more V reveals, and the more likely V shows up.

Sentence/probation conditions

Prior to my experience on the fatality review team, especially if the disposition was a plea under advisement pursuant to MCL 769.4a, I would often proceed to immediate sentencing. Now, however, I order a pre-sentence investigation report and a lethality review. This gives me and the probation officer more insight and a better game plan for addressing the needs of both D and V, and holding D accountable.

Typically, alternatives to domestic aggression (ADA), or batterers' intervention, is ordered. Classes can take up to 52 weeks to complete. I may even suggest or order a referral to ADA at the time of plea if I know that it will likely be one of the conditions imposed on D. When ADA classes are ordered along with strict probation, compliance increases and recidivism decreases, some studies suggest. At least one national expert suggests that the lengthier jail sentence, the safer it is for V, because that allows V to get situated without the threat of D. In-court probation reviews also heighten compliance. Every part of the sentence is designed to bring D into reality and hold D accountable. V might leave, V might not leave, that is solely up to V, but we want to make sure that D no longer batters.

Like the bond conditions, generally I won't allow contact until D has shown some signs of compliance and made progress in ADA. If children are endangered, no contact would be ordered as well, regardless of a family court order. Not only does D no longer rule the world, but now D must try to see the world through V's eyes.

Even if V asked for couple counseling, I deny it until D has made substantial progress in ADA classes. Marital counseling may indeed be appropriate for a couple at some point. But only after D has begun the lengthy process of healing and learning to empathize with V. If a couple were training for a marathon and one of them broke a leg or tore an achilles, there is nothing in the world the partner could do to speed up the process. D must get the help and rehabilitation necessary before they can train again. Or V may choose to continue the

race alone.

Defense attorney's obligations as counselor

If the defense attorney gets the case dismissed, either after trial or when V fails to appear, I believe an obligation to D as counselor, and to society in general, still exists. If the attorney had a client with an alcohol or drug problem and the evidence was deemed inadmissible, has the problem or danger suddenly vanished as well? I don't think so. At the very least, the attorney should advise D to get into ADA classes if the attorney has reason to believe that D has a problem. I also think that D should be advised to stay away from V until D attends said classes, again if the case is not decided on the merits.

Imagination

Most of us, hopefully, haven't had to live in the environment of terror that is domestic violence. I think we have an obligation to imagine, however, what it must be like, and how even the slightest perceived wrong move could result in threats or violence. It might help us to overcome our cynicism and egos and the tendency to blame when we don't get the cooperation we think we need or deserve from V. Now imagine that the reason for V not showing up is entirely on us: how might we act differently? We don't need V to have self-enlightenment and create safety if we do our jobs properly. Those of us in power are the ones who must change the environment, making even the earliest signs of terror unacceptable. Remember: this may be our job, but it is V's life.

The next time we feel a wave of frustration or cynicism coming on because someone failed to act in accordance with our expectations or desires, or because V failed to appear for court, let's assume responsibility and take it as a cue to reexamine our individual roles and responsibilities. Perhaps it might help to imagine being V, living in V's world, being on the edge, managing chaos. This empathy for V, walking in V's shoes -- that is what batterer's intervention services demand of the batterer. We should demand no less of ourselves.

Endnotes

- i "Counseling Domestic Violence Victims and Offenders Who Abuse Substances" By Linda Martin LSW, LICDC and Bruce Ripley, MA, CADC Copyright © 2010 by Linda Martin and Bruce Ripley)
- ii Bancroft, Lundy "The Batterer as Parent," Sage 2011