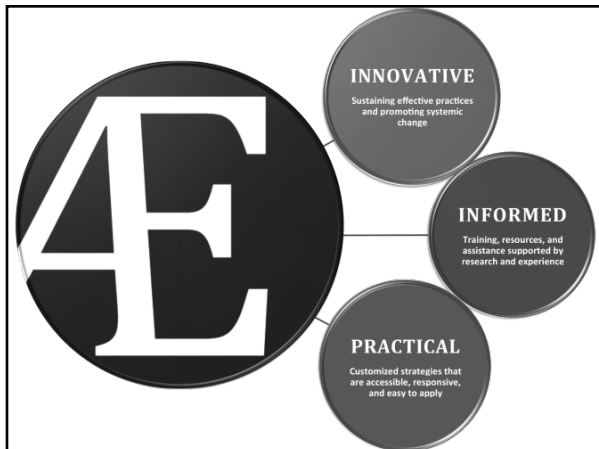


GOING FORWARD WITHOUT THE VICTIM

Evidence-Based Prosecution of Domestic Violence

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN



AEQUITAS

AVAILABLE 24/7 VIA TELEPHONE AND/OR EMAIL

TECHNICAL ASSISTANCE	TRAINING	RESOURCES
<ul style="list-style-type: none"> • Case consultation • Policy review • Legal research • Motions prep • Identification of experts • Peer review 	<ul style="list-style-type: none"> • Live • Web-based 	<ul style="list-style-type: none"> • Recorded webinars • Model briefs, motions, expert reports, etc. • Sample Voir Dire questions, expert examinations, etc.

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

SUPPORT

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AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

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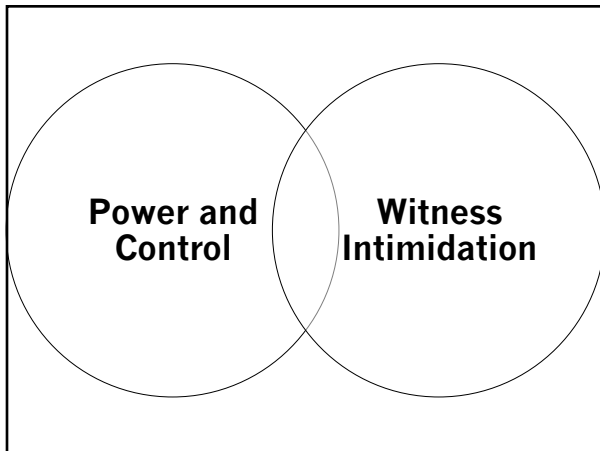
LEARNING OBJECTIVES

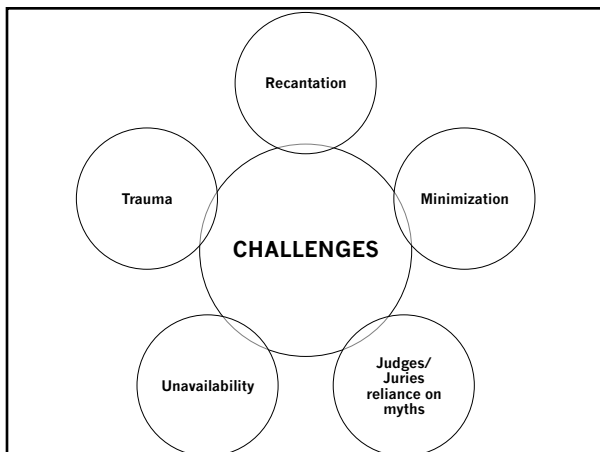
- Identify and preserve evidence that will strengthen the case regardless of victim participation.
- Build a case that does not depend solely upon victim testimony at trial.
- Develop and present expert testimony to explain victim behavior.
- Conduct direct or cross-examination of victims who recant, minimize, or testify for the defense, using a "soft cross" technique.

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WHAT ARE THE GREATEST CHALLENGES IN DOMESTIC VIOLENCE CASES?

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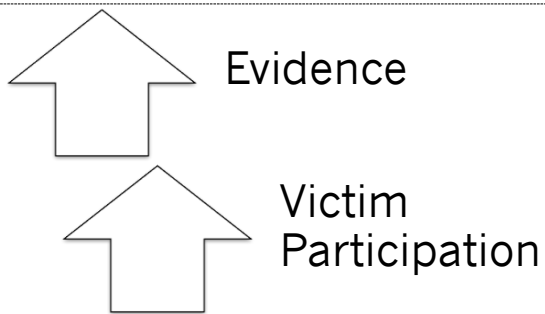


REMEMBER

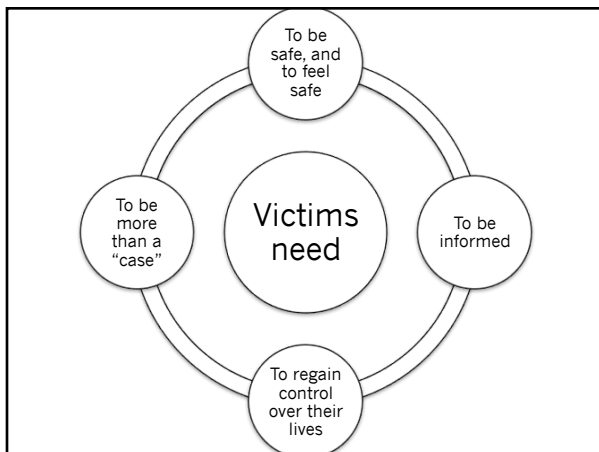
- Offender's actions cause the victim's inability to participate in the investigation and prosecution
- The offender is responsible for the victim's trauma and fear

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BUILDING THE CASE



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BUILDING THE EVIDENCE-BASED CASE

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EVIDENCE-BASED

Building and presenting a case in which prosecutors can hold offenders accountable for their behavior with or without the victim's testimony

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DULUTH POLICE DOMESTIC ABUSE POLICY

"The department is committed to engaging in a comprehensive approach to intervening in domestic abuse incidents. The investigation of these cases sets the foundation for almost every subsequent action by the courts and community-based agencies. It is the cornerstone of an effective, coordinated inter-agency response. The intent of the law and this order is to protect victims from ongoing domestic abuse."

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EVIDENCE-BASED NECESSARILY REQUIRES...

...Evidence

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911 CALL



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WHAT EVIDENCE WOULD YOU COLLECT?

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EVIDENCE COLLECTION

- | | |
|--|--|
| <ul style="list-style-type: none"> • 911 call • Statements <ul style="list-style-type: none"> • Victim • Neighbor • Offender • Crime scene <ul style="list-style-type: none"> • Damaged property • Location of incident and neighbor's house | <ul style="list-style-type: none"> • Photos of victim <ul style="list-style-type: none"> • Injury • Clothing • Demeanor • Photos of defendant <ul style="list-style-type: none"> • Lack of injury • Demeanor • Medical records |
|--|--|

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EVIDENCE TO ESTABLISH THE HISTORY OF RELATIONSHIP?

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HISTORICAL EVIDENCE

- | | |
|---|---|
| <ul style="list-style-type: none"> • Police reports <ul style="list-style-type: none"> • Offender • Victim • Location • Civil Protection Orders • Case files • Criminal histories | <ul style="list-style-type: none"> • Medical records • Statements <ul style="list-style-type: none"> • Family • Friends • Co-workers • Prior relationships |
|---|---|

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ONGOING INVESTIGATION?

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ONGOING INVESTIGATION

- Social media
- Consistent contact with victim and/ or advocate
- Follow-up with family, friends, and neighbors
- Jail phone calls
- Weapons

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DOMESTIC VIOLENCE SUPPLEMENT

(1/3)

FD-103a (Rev. 10/10)
COMMONWEALTH'S ATTORNEY'S DOMESTIC VIOLENCE SUPPLEMENT

Offense: _____ Offense Name: _____ Report Date: _____

Defendant's Name: _____

Defendant is a JUVENILE? ☐ Yes ☐ No

Defendant at Scene? ☐ Yes ☐ No

Arrested? ☐ MIA or Fug? ☐ Yes ☐ No

Given Miranda Warning? ☐ Yes ☐ No

Alcohol Used? ☐ Yes ☐ No

Intoxication Observation (check below if not sure):

Speech: ☐ Slurred, incoherent, shouting, other _____

Order of Alcohol: ☐ Strong, last, other _____

Eyes: ☐ Bloodshot, watery, glassy, other _____

Faces: ☐ Flushed, pale, other _____

Choking: ☐ Drip, sialid, dribbled, normal, other _____

Ability to Walk: ☐ Stumbling, swaying, falling, other _____

Ability to Stand: ☐ Stepping, falling, leaning for support _____

Arms: ☐ Cooperative, fighting, aggressive, cowering _____

Intervenor? ☐ Yes ☐ No

EPO Requested? ☐ Yes ☐ No

EPO Obtained? ☐ Yes ☐ No

EPO Issued? ☐ Yes ☐ No

Weapon Observed? ☐ Yes ☐ No

Visible Injuries to Defendant? ☐ Yes ☐ No

Comprehension of Injuries? ☐ Yes ☐ No

Injury Observation Chart: Indicate Location & Type

Description of Injuries: _____

Weapons Used? If yes, what type:
Gun _____ Knife _____ Club _____ Other (spec) _____

TO BE COMPLETED BY OFFICER (NOT THE DEFENDANT)
Defendant's Statement: _____

Victim's Name: _____		(B) (6)	
Yes	No		
Interviewed? <input type="checkbox"/>		"Domestic Violence Complaints Given?"	
Taken to the hospital? <input type="checkbox"/>		Yes	
Alcohol/Drugs? <input type="checkbox"/>		No	
If yes, kind of substance? _____		Victim wearing of injuries? Visible injuries to victim? <input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		[Empty Observation Chart. Indicate location and type below.]	
Victim released due to incident?			
If yes, new address & phone: _____			
Relationship to Victim? _____			
Number of Children in Household _____			
Children present during incident? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Child Name (s) _____ DOB _____			
1. _____			
2. _____			
3. _____			
Victim's Description of Injuries:			

Signature: _____			
Victim's Statement: (COMPLETED BY VICTIM)			

[illegible]

Witness Information		IRM #
1. Name	Relationship to Victim	
Address	Phone #	
	Work #	
2. Name	Relationship to Victim	
Address	Phone #	
	Work #	
3. Name	Relationship to Victim	
Address	Phone #	
	Work #	

THIS SECTION MUST BE COMPLETED.

Investment Agreement and Why?

Why needed (otherwise)?

Was there any protective orders in place at the time of the incident?

Investment History Check Completed and Result?

What was the emotional state of the parties present?

Any previous assaults, reported or not reported? Describe:

If the incident involved a child, a disabled person, or older abuse, describe _____

Was Child or Adult Protective Services notified? Why? _____

Any abuse of children or elderly?

What was the condition of the home? (premises)?

Witness: TPO Denied, Why?

Possibly Molester:

Additional Notes

Estimating Circumstance / Justification for No Arrest?

Reviewing Supervisor: _____ **Code:** _____

[illegible]

- Prosecutor's first impression of case
- Review evidence prior to writing report
 - Review body-worn camera/ other video, audio recordings
 - Written statements of victim/ accused/ witnesses
- Write detailed report that highlights compelling evidence

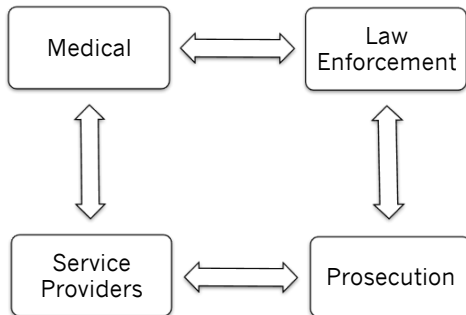
REPORT WRITING

CONT'D

- Do not include judgment or opinions
- Explicitly explain observations
 - NOT Defendant acted nervous
 - BUT Defendant wringing hands, not making eye contact, constantly looking around
- Use language of force where indicated
 - NOT victim performed oral sex on defendant
 - Defendant forced his penis into victim's mouth

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COOPERATION



INTRODUCTION OF STATEMENTS

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EXCEPTIONS TO HEARSAY

VA RULE 2:803

Common law and statutory exceptions are based on theory of trustworthiness

- Excited utterance
- Then existing mental, emotional, or physical condition
- Medical treatment or diagnosis
- Present sense impression

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CRAWFORD v. WASHINGTON

541 U.S. 36 (2004)

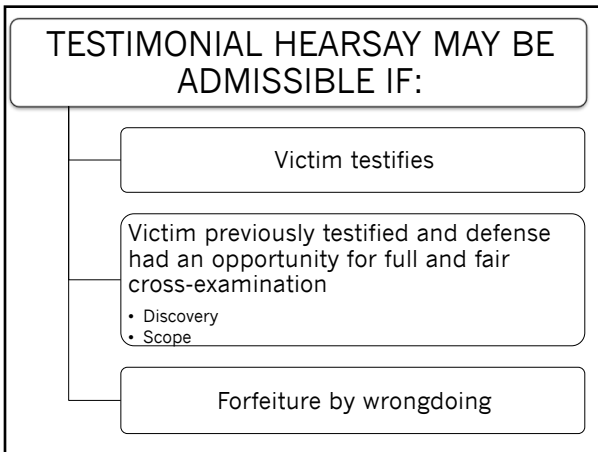
- ◉ Requires secondary analysis of hearsay statements when the declarant does not testify
- ◉ Are the statements "testimonial"?
 - Primary purpose is for use in later prosecution
 - Typically more formal statements

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EXAMPLES

TESTIMONIAL	NONTESTIMONIAL
<ul style="list-style-type: none">◉ Statement made to detective◉ Testimony at pre-trial hearing◉ Deposition testimony	<ul style="list-style-type: none">◉ Ongoing emergency<ul style="list-style-type: none">• 911 Call• On scene officer◉ Casual remarks to non-LEOs◉ Statements to medical professionals

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FORFEITURE BY WRONGDOING

What to do when offender has successfully intimidated the victim

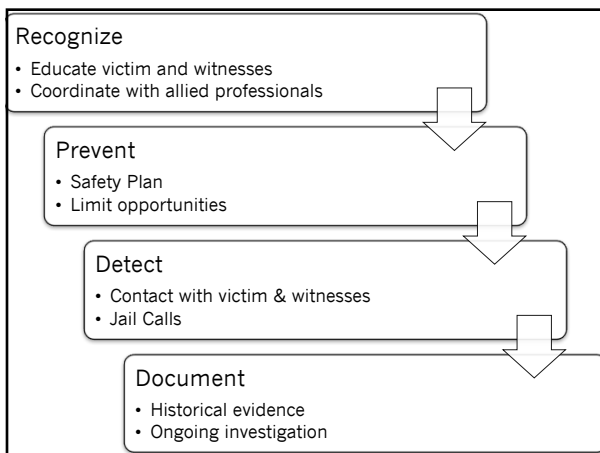
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Urban criminal justice system professionals said more victims were intimidated in domestic violence cases each year than in gang or drug crime.

KERRY HEALEY, NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN ACTION, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES (Oct. 1995)

Domestic violence victims appear at elevated risk for retaliation, especially when living with or economically dependent on the offender, or in contact with the offender because of shared parenting.

DO ARRESTS AND RESTRAINING ORDERS WORK? (Buzawa & Buzawa eds., 1996)



“Only unsuccessful intimidation ever came to the attention of police or prosecutors.”

Kerry Healey, National Institute of Justice, Research in Action, Victim and Witness Intimidation: New Developments and Emerging Responses (Oct. 1995) <https://www.ncjrs.gov/pdffiles/witintim.pdf>

CONCEPT

- ◉ Defendant has the right to confront witnesses against him/her
- ◉ Right can be forfeited if the witness cannot be confronted due to the defendant’s wrongdoing

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BACKGROUND

- ◉ U.S. since 1878
 - Reynolds v. United States
- ◉ Rule of Equity
- ◉ No jurisdiction has rejected
- ◉ Many have codified it

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VIRGINIA LAW

CRAWFORD v. COM., 281 VA. 84 (2011)

“The Court of Appeals discussed what it referred to as the “possibility,” left open by the United States Supreme Court in *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, (2008), “that a defendant's intention to prevent testimony might be inferred from the surrounding circumstances, such as in a case of ongoing domestic violence.”

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FED R EVID 804(b)(6)

A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

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FORFEITURE HEARING

PRELIMINARY DETERMINATIONS, VA RULE 2:104

(a) Determinations Made by the Court. The qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be decided by the court, subject to the provisions of subdivision (b).

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PROVING FBW

U.S. v. HOULIHAN, 92 F.3D 1271 (1ST CIR. 1996)

- ◉ Burden of proof
 - Preponderance of the evidence in most jurisdictions—approved in Giles
- ◉ Applies to potential witnesses
 - Formal proceeding need not be under way

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EVIDENCE

- ◉ History of abuse
- ◉ Prior charges filed and withdrawn
- ◉ Testimony from bond hearing or prior cases
- ◉ Evidence of victim's fear of defendant and prior cases
- ◉ Anything to show what defendant did to prevent or discourage victim from testifying

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PREPARING FOR TRIAL

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PREPARE WITH ALL WITNESSES

- ◉ Meet with Officer/Detective prior to trial
 - Officer and Commonwealth's Attorney should familiarize themselves with report and evidence prior to meeting
 - Review report / audio / video recordings/physical evidence
- ◉ Discuss anticipated direct testimony and cross examination
- ◉ Discuss use of physical and demonstrative evidence

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PREPARE WITH ALL WITNESSES CONT'D

- ◉ Meet with Victim prior to trial
- ◉ Discuss anticipated direct testimony and cross examination and Redirect
 - Consider mock cross examination
- ◉ Discuss use of physical and demonstrative evidence

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PRETRIAL LITIGATION

- Evidence of other crimes, VA Rule 2:404
- Admissible expert testimony
- Motions to exclude inadmissible character evidence
- Determine admissibility of statements
 - Non hearsay
 - Exceptions to hearsay
 - Forfeiture by wrongdoing

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DISCOVERING DEFENSES

- Pay attention to defense counsel's arguments at all preliminary hearings
- Interview defense witnesses
- Talk to investigators about what is not in the police report

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TRIAL STRATEGIES

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GENERAL STRATEGIES

- Develop an offender-focused theme and theory
- Control the narrative
- Turn perceived weaknesses into strengths
- Deliver powerful opening and closing arguments that present a clear, complete picture of the case

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ESTABLISHING DEFENDANT'S GUILT

Introduce circumstantial evidence of defendant's wrongdoing in case-in-chief

- Prior crimes/ other acts – VA Rule 2:404
- Consciousness of guilt
 - Fled the scene
 - Lied to police
 - Intimidated victim

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JURY SELECTION

EDUCATE THE JURY

- Elements of crime can be satisfied without victim testimony
- Victim behavior can seem counterintuitive
- Effects of trauma

UNCOVER BIASES

- Will the juror "get" counterintuitive behaviors of victim?
- Can they convict without a victim testifying?

ESTABLISH EMPATHY

- They should care even if victim does not testify
- DV is not a private, family issue

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VICTIM BEHAVIOR

- Identify behavior with which the jury may have an issue
- Use expert witness and/or elicit testimony from witnesses to help explain reactions to trauma
- Counter defense arguments about lack of credibility

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TRIAL TESTIMONY

- Be familiar with evidence relevant to testimony
- Answer only the question asked
- Answer honestly, completely, and concisely
- Ask to explain answer when necessary

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TRIAL TESTIMONY

CONT'D

- It's OK to say "I don't know."
- It's OK to say "I don't understand the question."
- Ask question to be repeated if necessary.
- It's OK to be emotional during testimony
 - Do not become argumentative with questioner

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CROSSING THE VICTIM

- Avoid using traditionally aggressive tactics to maintain empathy
- Demonstrate relationship between DV dynamics and recantation
- Elicit favorable testimony, develop conflicting testimony, and attack the defendant's credibility

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POSSIBLE DEFENSES

It didn't happen

☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐

Self defense

☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐

Accident

☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐

Reasonable doubt

☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐

Other defenses

☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐

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IT DIDN'T HAPPEN

- Examine physical evidence
- Identify the most trustworthy statements
- Look at the medical evidence
- Show lack of motive to lie or motive to lie for the defendant's benefit

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SELF-DEFENSE

- Must understand the law
- Use the language of the law
- Go through the evidence
- Show the jury why, under these facts, self defense is not legally valid

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SELF-DEFENSE

DEFENDANT WITHOUT FAULT

- Reasonably fears
- Imminent bodily harm
- Used no more force than was reasonably necessary to protect himself

VA Model Jury Instruction 33.5

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SELF-DEFENSE

DEFENDANT WITH FAULT

- Retreated as far as safely could
- Good faith attempt to abandon fight
- Desire for peace made known
- Reasonably feared harm
- Used no more force than was reasonably necessary to protect himself

VA Model Jury Instruction 33.6

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DISPROVING SELF DEFENSE

- ◉ Note victim and defendant's
 - Appearance
 - Emotional condition
 - Injuries
 - Use of alcohol or drugs
- ◉ Note and document condition of crime scene
- ◉ Record all statements at the scene

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ACCIDENT

- ◉ Defendant must admit injury
- ◉ Defendant must admit that “something happened”
- ◉ Evidence that establishes aggression and trauma

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REASONABLE DOUBT

- ◉ Prove your elements
- ◉ Explain the definition of reasonable doubt to the jury
- ◉ Educate jury about realities of DV through expert testimony

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OTHER DEFENSES

- Blame the victim
- Arguing *de minimus* injury
- Ask jury to improperly consider that the victim did not testify
- Jury nullification

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GOING FORWARD

- Thoroughly investigate and document evidence in domestic violence cases
- Be proactive to try to encourage victim participation
- Anticipate defenses and effectively counter defenses with evidence and trial strategies

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