



BEYOND THE CRIMINAL JUSTICE SYSTEM

Using the Law to Help Restore the
Lives of Sexual Assault Victims

A Practical Guide for Attorneys and Advocates

VICTIM RIGHTS LAW CENTER, INC.

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This manual is dedicated to the thousands of rape and sexual assault victims served by the Victim Rights Law Center – you taught us so much of what we need to know.

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A NOTE ON TERMINOLOGY

This manual is intended to be a resource that is accessible, concise, and useful to the practitioner. To meet this goal, we have made various choices about terminology and usage that we hope will illuminate rather than obscure the difficult issues and questions we discuss.

Victim/Survivor: We have chosen to use the term “victim” and “survivor” interchangeably throughout this manual. Although “victim” is the term used in the criminal justice system and in most civil settings that provide remedies for rape and sexual assault victims, many advocates prefer the term “survivor.” Because this manual is a guide for both attorneys and advocates who help victims navigate the civil and criminal justice systems, we use both terms to ensure that our manual is inclusive.

She/He: The Victim Rights Law Center is keenly aware that males, females and the transgendered are victims of rape and sexual assault, and that females as well as males may be perpetrators. At the same time, the evidence is overwhelming that, in the majority of sexual assault cases, the assailant is male and the victim is female. We have chosen, therefore, to use the female pronoun when describing the victim and the male pronoun when describing the assailant. Our choice of language is not intended to minimize the harms experienced by any individual sexual violence survivor, whether the victim be an adult or minor, male, female or transgender.

Assailant/Perpetrator: Depending upon the context within this manual, a sexual assailant may be described as a “perpetrator,” “assailant” or “defendant.” Most often, in this manual we have chosen to use the terms “assailant” or “perpetrator.” We recognize, of course, that until there is a conviction, there is only an allegation of a crime. Because this manual is written for victims’ attorneys and advocates, we have chosen not to include the term “alleged” when describing either the assault or the assailant.

Sexual Orientation: This manual focuses primarily on non-intimate partner heterosexual rape and sexual assault. Sexual assault is not limited to assaults by one sex against the other, however, and our focus on sexual assault committed by men against women is by no means intended to diminish or ignore the impact of same-sex sexual assault or sexual assault perpetrated against transgender victims. While some of the issues and questions that arise within the context of same-sex or transgender sexual assaults are similar to those arising in opposite-sex sexual assaults, there are also many differences. A thorough and thoughtful discussion of these differences is beyond the scope of this manual.

Attorney and/or Advocate: This manual is designed as a resource tool for both attorneys and advocates. By the term “advocate” we refer to an individual (paid or volunteer) who provides services to sexual assault victims under the auspices of a non-profit, non-governmental organization serving victims of sexual assault. Both advocates and attorneys provide expert assistance and perform critical functions. Their roles

intersect but are not identical, however. Because the focus of this manual is the transformation of our nation's *legal* response to sexual assault, where practice or focus diverges this manual more often emphasizes the attorney-client relationship and legal representation.

Scope of this manual: There are many vital subject areas that were beyond the scope of this manual. We would be remiss if we did not mention them here, and convey our hope that we, and other sexual violence experts, will address these important topics in future publications. Specifically, we recognize that this manual does not substantively address critical and emerging practice areas such as: sexual assault within intimate partner relationships; the intersection of sexual assault with parental rights, child custody and other family law matters; electronic privacy; sexual assault in gay, lesbian, bisexual, and transgender relationships; and sexual assault in the military.

Beyond the Criminal Justice System:
Using the Law to Help Restore the Lives of Sexual Assault Victims
A Practical Guide for Attorneys and Advocates

Foreword

After seven years of providing thousands of sexual assault victims with free legal services, the Victim Rights Law Center has found one truth to be clear: It is the norm, not the exception, that a sexual assault will have a long-term impact on a victim's life including her privacy, physical safety, housing, education, employment, immigration status and/or economic stability. For some victims, even a single sexual assault can lead to a life plagued with substance abuse, homelessness, depression, and suicide.¹

The mission of the Victim Rights Law Center is to use the power of the law to mitigate, if not prevent, this myriad of harms. The Victim Rights Law Center believes that we can help create a healthier, safer and more productive nation by providing zealous, independent legal advocacy to sexual assault victims. Our nation needs a cadre of attorneys and advocates committed to using the law to aid sexual assault victims in their recovery process and to prevent long-term harm. This manual, **Beyond the Criminal Justice System Using the Law to Help Restore the Lives of Sexual Assault Victims** *A Practical Guide for Attorneys and Advocates* is designed to provide lawyers and community based victim advocates with a practical and detailed road map for meeting sexual assault victims' legal needs. While this manual is addressed to both attorneys and advocates, because this is a legal manual there are junctures at which we place a greater emphasis on or focus the discussion more toward the role of the attorney and the attorney-client relationship. The Victim Rights Law Center believes, however, that attorneys and advocates, as well as other community service providers, are key to identifying and meeting the full range of sexual assault survivors' legal needs. We hope you will join us in this effort.

We thank the Office for Victims of Crime at the U.S. Department of Justice for funding our original 2005 Massachusetts manual, and we thank the Office on Violence Against Women at the U.S. Department of Justice for funding this 2007 National Edition. Many thanks, too, to the countless writers, editors, researchers, and volunteers who made these publications possible. We look forward to continuing our existing – and developing new – partnerships across the country as we continue to develop resources that examine

¹ Nearly one-third of all sexual assault victims develop sexual assault-related Posttraumatic Stress Disorder (PTSD). D.G. Kilpatrick, C.N. Edmunds, & A.K. Seymour, *Rape in America: A Report to the Nation*. Arlington, VA, National Center for Victims of Crime (1992) at 7 (hereinafter *Rape in America*). “Rape-related Posttraumatic Stress Disorder dramatically increases women’s risk for major alcohol and drug abuse problems. Compared to women who have never been sexually assaulted, sexual assault victims with [sexual assault-related] PTSD were 13 times more likely to have two or more major alcohol problems (20.1% vs. 1.5%) and 26 times more likely to have two or more major drug abuse problems (7.8% vs. 0.3%).” *Id.* at 7-8. Sexual assault victims were more than four times more likely than non-victims of crime to report that they had seriously contemplated suicide and 13 times more likely than their non-victim counterparts to have made a suicide attempt. *Id.*

the nuanced legal needs of victim subpopulations, including youth, students, people with disabilities, and other traditionally underserved communities (many of whom are targeted for sexual assault at disproportionately higher rates). We encourage you to be vigilant and creative in your advocacy, and hope that you will keep us informed of your important work in this arena.

Susan H. Vickers, Esq.

Founder and Executive Director,
Victim Rights Law Center, October 2007

Chapter One

INTRODUCTION²

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The need to transform our nation's response to sexual assault is urgent. The time has come to change the paradigm that the criminal justice system is the exclusive and most effective arena for protecting and promoting sexual assault victims' rights. Civil courts, too, must become a vehicle for promoting victim healing and recovery.

The Victim Rights Law Center was founded in 2000 to pursue this single mission: To help create and train a national cadre of non-profit attorneys able, willing, and committed to zealously advocating for sexual assault victims on an individual basis. The Victim Rights Law Center believes that the law can – and should – be a potent force

² The Victim Rights Law Center thanks Jessica E. Mindlin, Esq., and Susan H. Vickers, Esq., the authors of this chapter.

for change. We believe that victims will better heal, recover, and thrive if they are represented by ardent advocates and also by legal counsel dedicated to safeguarding victims' rights. We believe that victim advocacy and legal representation should be rooted in the empowerment model, which respects that every victim has the right to decide how best to heal, whom to tell, when to disclose, and what legal actions to pursue. We are committed to the premise that we need more than just new or better laws to protect sexual assault victims' rights; we also need the lawyers to defend and advance them. Finally, we are dedicated to the proposition that, as a nation, we must respond to victims' urgent, unmet need for legal counsel. Even the strongest laws and most protective provisions are meaningless if victims are unaware of their rights or do not have access to the lawyers necessary to enforce them.

This manual is dedicated to answering a simple question: *What do you do when a sexual assault victim walks through your door and asks for legal help?* This manual provides simple, direct guidance for attorneys and advocates trying to answer that question. It is a practical guide that includes concrete lessons about how to conduct an effective intake, how to spot important legal issues, and how best to respond to sexual assault victims' legal needs. Chapters One through Seven summarize issues that intersect with, and often transcend, victims' legal needs (*e.g.*, privacy, safety, mental health, and medical matters). Chapters Eight through Fourteen provide an overview of specific legal practice areas, and victims' rights and remedies in those areas. Both components are written with advocates' and attorneys' daily practices in mind.

At the outset, we want to underscore the importance of understanding both the specific community in which an individual client resides as well as the broader legal, social, and cultural context in which sexual assault occurs. This introductory chapter provides a brief synopsis of the latter – *i.e.*, the historic, legislative, and cultural milieu in which you will practice. We would be remiss, however, if we did not also emphasize the significance of the individual victim's community as it relates to sexual assault and your representation of that client.

Sexual assault is a private, personal event but every victim's experience is influenced by the social and cultural context in which the assault occurs. To be an effective advocate, you need to understand the distinct legal and cultural norms of the victim's community. For instance, if your client is Native American,³ a high school student,⁴ gay, lesbian, or transgender, a person with a disability,⁵ or a recent immigrant, it will be vital for you to be cognizant of the social, cultural, and community values that may influence and inform your client's needs and the remedies available to her. Although we cannot possibly list here all the sub-populations that merit mention, we hope that future editions of this manual, or future resources by other authors, will be published to provide more community-specific context for these and other distinct population groups. For now, we alert you to the need to remain attuned to these issues in your daily

³ American Indian and Alaska Native women experience a higher rate of sexual violence than any U.S. other racial or ethnic population group. According to an April 2007 report from Amnesty International, at least one in three indigenous women will be raped or otherwise subjected to sexual violence in their lifetime; at least 86% of reported rapes or other sexual assaults against indigenous women are committed by non-Native American men. *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007) at web.amnesty.org/library/index/ENGAMR510352007 citing Patricia Tjaden & Nancy Thoennes, U.S. Department of Justice, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women* (2000). American Indian and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the United States in general. Steven W. Perry, *American Indians and Crime – A BJS Statistical Profile 1992-2002*, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, December 2004, available at www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf, last visited May 5, 2007. See also Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law* (2005), citing generally Lawrence A. Greenfield, Steven K. Smith, U.S. Department of Justice, *American Indians and Crime* (1999); Callie Rennison, U.S. Department of Justice, *Violent Victimization and Race, 1993-1998* (2001).

⁴ Between 44% and 60% of all sexual assault victims in the United States were first sexually assaulted when they were under the age of 18. (Estimates vary depending upon how the survey was conducted, whether minors and adults or only the latter were interviewed, the definition of sexual assault employed by the study, and other variables.) See Kilpatrick *et al.*, *supra* note 1, at 3. According to the National Violence Against Women Survey, approximately 22% of sexual assault victims surveyed were under the age of 12 years old, 32% were between the ages of 12-17, and nearly 30% were age 18-24 when they were first sexually assaulted. *Prevalence, Incidence, and Consequences of Violence Against Women*. U.S. Department of Justice, Office of Justice Programs. November 1998. According to the Violence Against Women Act of 2005 Reauthorization, 1.8 million of the 22.3 million adolescents ages 12-17 in the U.S. have been victims of a serious sexual assault and minors under the age of 18 account for 67% of all sexual assault victimizations reported to law enforcement officials. Violence Against Women Act Reauthorization 2005 (Pub. L. No. 109-162), citing Dean Kilpatrick, and Benjamin Saunders. *The Prevalence and Consequences of Child Victimization*, April 1997, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.

⁵ Studies consistently demonstrate that people with cognitive disabilities are sexually victimized more often than those without a disability. Furey, E. M. (1994). *Sexual Abuse of Adults with Mental Retardation: Who and where?* MENTAL RETARDATION, 32, 3, pp. 173-180. Other studies suggest that 49 percent of people with cognitive disabilities will experience 10 or more sexually abusive incidents in their lifetime. D. Sobsey & T. Doe, *Patterns of sexual abuse and assault*, SEXUALITY AND DISABILITY, 9 (3), 243-59.

practice, and urge you to enhance your understanding of the culturally specific populations in your community. Any victim who is a member of a community that is separated by class, gender identity, race, national origin, age, disability, sexual preference, or language proficiency will face distinct cultural and legal challenges to recovery. A truly effective legal response to sexual assault must include such population-specific perspectives.

I. UNDERSTANDING THE MYRIAD OF SOCIO-ECONOMIC AND PERSONAL HARMS

Sexual assault results in a myriad of long-term social, economic, physical, and psychological harms. Social science research reveals that the effects of sexual assault reverberate throughout a victim's life. The Victim Rights Law Center's experience serving more than 2000 survivors is consistent with this research: A single incident of sexual assault can destabilize every aspect of a victim's life, including her housing, employment, education, privacy, immigration, medical and mental health, financial stability and physical safety and well-being.⁶ Violent and "non-violent"⁷ sexual assaults alike can cause victims to suffer PTSD, depression, insomnia, panic attacks, memory impairment, increased drug and alcohol use, avoidance of sexual assault-related places and objects, rejection by peers, colleagues, and family, and suicidal ideation and self-

⁶ "During the weeks or months following the [sexual assault] women frequently make costly changes in their lifestyles; this may involve moving to a 'better' neighborhood, buying expensive security systems, or avoiding work situations which they suddenly perceive as dangerous." Martha R. Burt & Bonnie L. Katz, *Rape, Robbery, and Burglary: Responses to Actual and Feared Victimization, with Special Focus on Women and the Elderly*, VICTIMOLOGY: AN INTERNATIONAL JOURNAL 10:325, 330 (1995). Another study (cited by Burt and Katz) found that the "long-term implications of victimization may also be hidden and underestimated. . . . educational attainment and lifetime earnings are lower for victims of childhood physical or sexual assault. These impacts have yet to be incorporated into cost-of-crime estimates." Ross Macmillan, *Adolescent Victimization and Income Deficits in Adulthood: Rethinking the Costs of Criminal Violence from a Life Course Perspective*, CRIMINOLOGY (May 2000). See also T.R. Miller, *Victim Costs and Consequences: A New Look*, NCJ-155282, Washington, D.C., National Institute of Justice.

⁷ In this context, the term "non-violent" refers to sexual assaults that are committed by the emotional manipulation of the victim and/or the perpetrator's abuse of authority, rather than the use of overt force or violence. Our use of the term "non-violent" is not meant to diminish, in any way, the reality of sexual assault as a violent act of aggression towards its victim.

harm.⁸ Fear of pregnancy and sexually transmitted infections may cause a victim further psychological harm.⁹

Although how any individual victim responds to the trauma of sexual assault will vary, for most victims there is a hierarchy of fundamental needs. The most urgent needs include physical safety, emotional well-being, economic security, and educational stability.¹⁰ These needs are most acute in the first six months following an assault,¹¹ but may persist and shift over time. Consider the following three scenarios:

(1) *A high school junior is sexually assaulted by a classmate at a party off school grounds with underage drinking. Classmates learn about the assault and tease her. The victim is humiliated, afraid of the perpetrator, and does not report the assault to the police or her mother because she had been drinking. She receives no medical care or counseling; she stops attending school and her grades plummet from Bs to Fs. She is placed on academic probation and then held back a grade. Eventually, she discloses the assault to her mother.*

(2) *A woman is sexually assaulted at knifepoint in her bedroom following a date with a co-worker. Despite his threats of harm, she calls and reports the sexual assault to the police, who launch a criminal*

⁸ Ironically, it is these very effects of sexual assault that often lead the triers of fact to perceive victims as less credible, rather than as victims whose responses are consistent with the trauma they suffered. This lack of credibility further impairs victims' ability to succeed in the civil, criminal, or administrative law arena. See also JUDITH HERMAN, *TRAUMA AND RECOVERY* (1997), at 57-58.

⁹ *Id.*

¹⁰ For a general discussion of the hierarchy of human needs and humans' desire and need to meet those needs, see ABRAHAM MASLOW, *MOTIVATION AND PERSONALITY* 15 (1954).

¹¹ In the current dominant legal paradigm, such needs are placed at the periphery of our legal response to sexual assault, or, at worst, are conceptualized as a personal rather than legal problem. This acute disjuncture between what victims seek and what the criminal justice system offers likely accounts for some of the failures of sexual assault law reform over the last thirty years. Because the criminal justice system offers remedies such as vindication, meaning, and a sense of justice that are consistent with higher-level needs, and fails to offer solutions for more basic needs, it makes sense that many victims do not make a criminal complaint immediately after an assault. See generally Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventative Law Into Law School Curriculum*, 5 *PSYCHOL. PUB. POL'Y & L.* 1123 (1999) (describing victims' use of the criminal justice system).

investigation. She has bruises on her arms where he held her down as well as vaginal lacerations and bruising. No black eyes; no stab wounds; no torn clothes. The perpetrator tells the police it was consensual and the criminal prosecution does not proceed. The victim must see the perpetrator at work each day. Soon, she is afraid to go to work, to sleep in her bed, or to remain in her home. She is fired from her job for excessive absences. Her landlord will not pay to change the locks on her door and she cannot afford to change them herself. She is not eligible for a protection order because she was not sexually assaulted by a spouse or partner. She can no longer afford to pay her rent, her car payments, or the tuition for her vocational training program. She will soon be evicted for unpaid rent.

(3) A young, immigrant, live-in childcare provider is sexually assaulted by an acquaintance of the family for whom she works. She does not report the assault to anyone for fear of losing her job and her immigration status. She regularly sends money home to support her family overseas. She is afraid that she will be deported if she complains to the police. In the months that follow she falls ill and eventually seeks medical care. She learns both that she is pregnant and that she has HIV as a result of the assault. When she discloses her status to the family, she is fired.

The scenarios described above are not theoretical situations or imagined harms. They are real cases¹² – the experiences of three of the more than twelve million estimated victims of forcible sexual assault in America.¹³ Each of these victims' lives was transformed in an instant by the sexual assault, resulting in the abrupt loss of her education, residence, or employment, as well as her physical and mental health. Sexual

¹² The facts presented here are drawn from three of the thousands of victims represented by the Victim Rights Law Center to date. The details were modified to protect clients' privacy.

¹³ *Rape in America*, *supra* note 1, at 2.

assault can lead to depression, social isolation, physical and psychological harms, and declining social and economic productivity. The life-long consequences of sexual assault can be enduring and profound.¹⁴

II. 1970-2000: UNITED STATES RAPE LAW REFORM¹⁵

The first wave of major sexual assault law reform in this country (1970-2000) focused almost exclusively on the criminal justice system's response to sexual assault.¹⁶ From 1970-2000, state and federal legislatures enacted sexual assault shield laws, provided for privileged protection of sexual assault counseling records, repealed marital sexual assault exceptions, eliminated evidentiary corroboration requirements and cautionary instructions regarding the absence of corroboration, and abolished the statutory "reasonable mistake of fact" defense.¹⁷

While all these reforms represented significant symbolic steps towards an appropriate criminal justice response to sexual assault, the concrete outcomes for victims and society have been disappointing.¹⁸ In short, sexual assault reform laws do not appear

¹⁴ These consequences include, but are not limited to: the failure to graduate from high school, college, or higher education, and the resulting reduction in lifetime earnings; being fired from a job which, in turn, undermines future employment prospects; becoming homeless following an eviction for unpaid rent as a direct result of the inability to secure or retain a job following a sexual assault due to inadequate leave, safety concerns, or PTSD and other mental health disorders.

¹⁵ This discussion of the sexual assault law reform movement and the civil rights needs of sexual assault survivors is adapted from I. Seidman & S. Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467 (2005).

¹⁶ Stacy Futter & Walter R. Mebane Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 79 (2001) (hereinafter Futter & Mebane) (discussing various empirical studies of sexual assault law reform impact). These criminal justice reforms fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (eliminating corroboration requirements, enacting sexual assault shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries). *Id.* at 3.

¹⁷ See generally Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127 (1996).

¹⁸ See David P. Bryden, *Forum on the Law of Rape*, 3 BUFF. CRIM. L. REV. 317, 320-21 (2000); Hunter, *supra* note 17, at 134, 140, 155-56; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 128-30 (1999).

to have deterred the commission of sexual assault, enhanced its prosecution, or increased conviction rates.¹⁹

Research indicates that, although the laws changed on paper, societal attitudes – including those reflected by our judges, juries, and other fact-finders – have not kept pace with statutory reform.²⁰ Rape laws have changed, but core social beliefs about sexual autonomy and gender roles have not. The vast majority of law enforcement personnel, judges and potential jurors remain confused about what constitutes consensual sex.²¹ They are ambivalent about criminal sanctions for “non-violent” sexual assault, for assaults committed by a perpetrator with whom the victim was previously sexually intimate, or for any assault that did not result in visible physical injury.²² Similarly, jurors, prosecutors and police remain unclear about the boundary between sex and sexual assault.²³

As a result, sexual assault victims – especially victims of non-stranger sexual assault – face the same hurdles today that they did thirty years ago, before the advent of sexual assault law reform.²⁴ Even though “resistance” has been eliminated as a statutory element of the crime, jurors still expect immediate complaints by victims, with accompanying hysteria, torn clothes and other indicia of a struggle.²⁵ Perhaps most disheartening is that trial, appellate, and state supreme courts are still arguing over the

¹⁹ See CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT, 77-104 (1992) (finding no change in number of reports, indictments, and convictions in majority of jurisdictions studied). See also Futter & Mebane, *supra* note 16, at 83-85; David P. Bryden & Sonja Lengnick, *Rape In the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997).

²⁰ *Id.* at 173.

²¹ STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 2 (1998).

²² *Id.*

²³ *Id.* at 95-98.

²⁴ Rape victims will encounter additional difficulties when the defense’s theory is based on one of consent, which constitutes the vast majority of cases. Seventy-eight percent of sexual assault victims are assaulted by someone they know, and the most common defense in these cases is consent. Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey*. Washington, DC: National Institute of Justice, U.S. Department of Justice (1998) at 2, 5, available online at www.ncjrs.org/pdffiles1/nij/183781.pdf.

²⁵ See Bryden & Lengnick, *supra* note 19, at 1196 (declaring juries often conform to system norms by blaming victims and acquitting defendant rapists).

same issues: the meaning of consent, degrees of force, the victim's role as an active or passive participant, and the victim's right to privacy.²⁶

Nationally, one out of every six adult women in America has experienced a forcible sexual assault.²⁷ The majority of victims (78%) were sexually assaulted by a known perpetrator.²⁸ The remaining 22% were sexually assaulted by strangers.²⁹ More recently, social science researchers have come to recognize that the majority of non-stranger sexual assaults are not one-time incidents; rather, these perpetrators commit multiple sexual assaults.³⁰ Many perpetrators deliberately select and groom victims who are least likely to be effective witnesses against them.³¹ This profile of the typical non-stranger perpetrator undercuts many of the more commonly held beliefs about non-stranger sexual assault, *i.e.*, that the perpetrator “drank too much,” “got carried away,” “misunderstood the victim,” “thought she consented,” and “won’t let it happen again.”

Unfortunately, judges, juries, and other triers of fact continue to rely on outdated and erroneous notions of sexual assault victims and perpetrators. They view vulnerable or marginalized victims (*e.g.*, victims with a history of substance abuse or child sexual assault, with diminished mental capacity, those who are homeless, those with undocumented immigration status) as less credible. They fail to fully grasp the implications of perpetrators' victim selection – *i.e.*, that these victims are targeted specifically *because* of their credibility and vulnerability issues.

²⁶ *Id.* (arguing men who control the justice system are irrationally obsessed with the dangers of false sexual assault accusations); *see also* SUSAN ESTRICH, *REAL RAPE* (1987) at 42-43 (suggesting the underlying theme in the criminal justice system surrounding sexual assault is distrust of women).

²⁷ Kilpatrick *et al.*, *supra* note 1. The report, *Rape In America: A Report to the Nation*, obtained its data by combining two studies, the National Women's Study (“NWS”), and the National Violence Against Women Survey (“NVAWS”). The estimates reported were derived from research data made available by the National Victim Center and the Crime Victim Research and Treatment Center at the Medical University of South Carolina. Data from the various national studies vary because the studies employed different ways of defining and measuring sexual assault, different time frames (*e.g.*, over the entire lifespan vs. past year only), different units of analysis in reporting statistics (*e.g.*, within a given time frame, how many total people have been sexually assaulted vs. how many total incidents of sexual assault), and surveyed different population groups (*e.g.*, adults vs. all age groups; women vs. both genders).

²⁸ *Id.*

²⁹ *Id.*

³⁰ David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) *VIOLENCE AND VICTIMS* 73 (2002).

³¹ *Id.*

It is our hope that, by relying on scientific research, we can expand our collective understanding of how perpetrators identify, isolate, and assault their victims, and our civil and criminal justice system will become more hospitable ground for those seeking justice in our courts. Until then, judges, juries, law enforcement, and other decision makers will continue to lack empathy for victims of sexual assault, question their credibility, and blame them for their own victimization. So long as this remains true, victims will continue to encounter hostile and adverse outcomes in both the civil and criminal realm.

If we are to be successful in advancing sexual assault victims' civil rights in both the criminal and civil arena, we cannot ignore the outcomes from the past thirty years of sexual assault law reform in the criminal system. We must learn from our failures as well as our successes. Although statutory reforms have failed to produce significant changes in outcomes within the criminal justice process to date, we remain convinced that the law can serve as a tool for victim healing and recovery.

III. PLACING VICTIMS' CIVIL LEGAL NEEDS AT THE CENTER OF OUR NATION'S LEGAL RESPONSE TO SEXUAL ASSAULT

Criminal justice remedies alone cannot prevent the myriad of harms that flow from a sexual assault. The government's interests – public safety considerations – may conflict with a victim's individual needs. Even if a criminal prosecution can enhance a victim's safety, or promote her healing and recovery, the case may take years to be resolved. Even if a prosecution is pursued, a criminal conviction is difficult to achieve.³²

In each of the sexual assault cases outlined above, civil justice remedies helped to secure the victims the rights and protections they needed to remain employed, relocate or secure their housing, access private, confidential and affordable medical services (including counseling, prophylaxis for HIV and other STIs, and emergency

³² According to data gleaned from the 2003 National Crime Victimization Survey, less than 10% of all perpetrators of rape and sexual assault will be convicted of a felony offense. *See also* the National Center for Policy Analysis study at www.ncpa.org/studies/s229/s229.html. More than one-half of all sexual assault prosecutions are either dismissed before trial or result in an acquittal. Majority Staff of the Senate Judiciary Committee, *Violence Against Women: The Response to Rape: Detours on the Road to Equal Justice* (May 1993) available at www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text.

contraception). The civil justice system provides a forum in which sexual assault victims can pursue the remedies they need to meet their most basic human needs.

To prevent the myriad of personal and social harms detailed above, we must change the current model to one that ensures victims' access to the civil courts. Following is a summary of the nine core civil legal issues that may offer critical remedies and relief to survivors of sexual assault.³³ Each of these practice areas is discussed in greater detail in the chapters that follow. As a nation, it is our obligation to ensure that sexual assault does not become a life sentence for its victims. Attorneys and advocates are two of the critical partners to help fulfill that obligation.

A. Privacy

For most sexual assault victims, privacy is a pervasive, consistent need at every step of recovery. Privacy needs arise in the immediate aftermath of an assault. In small, more insular communities, the privacy imperative is even more acute. For example, on high school and college campuses or within a tightly-knit immigrant, Native American, sexual minority, or rural community, it is exceedingly difficult to contain the gossip that is usually generated by an allegation of sexual assault. Victims in smaller communities are all too keenly aware of how whispers and murmurs may follow a victim for years to come. Both the fear and the actual invasion of privacy further exacerbate a victim's sense of violation and isolation.

Once sexual assault is disclosed publicly or reported to criminal or civil authorities, the victim's privacy is vulnerable in sadly familiar ways. Protection of medical, mental health, and sexual assault crisis center records is crucial from the minute the victim seeks care and counseling.

Outside of the criminal justice process, privacy violations may easily occur in relation to employment, education, housing, and financial compensation.³⁴ For example,

³³ See Appendix A, Issue Spotting Checklist, for an overview of issues to consider in civil cases.

³⁴ See Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (2001). For example, if the victim is involved in an education-related case, the Family Education Rights and Privacy Act and school regulations may require parties involved in disciplinary matters to keep material confidential. *Id.*

in a suspected drug facilitated sexual assault, toxicology testing can be vital.³⁵ At the same time, comprehensive testing, may disclose a victim's use of illegal substances.³⁶ This may expose the victim to unintended consequences, such as making her vulnerable to criminal prosecution, compromising her employment, housing status, etc.

Thus, it is critical that victims' attorneys and advocates recognize survivors' varied and complex privacy needs, and how they arise in the context of civil and criminal remedies. Victim empowerment, and a collaborative, holistic and coordinated approach to protecting survivors' privacy interests, should be at the heart of the services provided. *See* Chapter 3, on Privacy, for a more comprehensive discussion of this issue.

[KNOW YOUR STATE'S LAW: State laws vary regarding with whom, and to what extent, a victim's communications with service providers are privileged. Every state and territory provides for privileged attorney-client communications. Privilege laws also protect communications with social workers, psychologists, and other mental health providers. The majority, but not all, of the states also have an advocate privilege that affords some confidentiality for communications between a victim and a sexual assault or rape crisis center counselor, although these privileges are rarely absolute. Know the law in your jurisdiction so that both you and the victim know what level of privacy and protections are afforded to communications among and between providers.]

B. Non-Citizen Survivors

Sexual assault survivors who are not United States citizens encounter greater actual and perceived barriers to obtaining the civil remedies that can assist in their recovery. Victims without legal status are especially vulnerable and isolated from the

³⁵ *See* Kristin Littel, *A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents* 99-104 (Sept. 2004), available at www.ncjrs.org/pdffiles1/ovw/206554.pdf.

³⁶ *Id.*

remedies that can help protect them.³⁷ Fear and misinformation prevent many non-citizen victims from applying for and receiving the safety protections, medical assistance, counseling, housing, and employment benefits victims are qualified to receive.³⁸ Undocumented, out of status, and other non-citizen victims may also be reluctant to access government benefits to which they are entitled because they fear being declared a “public charge,” a determination that can be the basis for denials of future applications to remain in the United States.³⁹

A sexual assault may also disrupt or alter a victim’s immigration status. For example, if a victim is in the U.S. on a student visa and drops out of school as a result of the assault, she may lose her legal status. Non-immigrants with employment-based visas are similarly at risk of being deported or losing legal status if they are dismissed from or quit work as a result of an assault.⁴⁰ See Chapter 8 for further discussion of serving non-citizen survivors.

³⁷ Leslye E. Orloff *et al.*, *With No Place To Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. L.Q. 313, 315 (1995). See also Orloff *et al.*, *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (anticipated publication June 2007, Legal Momentum).

³⁸ *Id.* Despite perception and information to the contrary, some public services are available to individuals without any status qualification, meaning that providers should not inquire into a client’s immigration status or require a social security number to provide services. *Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 C.F.R. §§ 3613-3616 (2001). According to the Attorney General, available services include: free emergency Medicaid and mental health, disability, or substance abuse treatment necessary to protect life or safety; free crisis and counseling services; free violence and abuse prevention/protection services; free emergency shelter and transitional housing assistance; victim compensation; and other services provided by non-profit charitable organizations. *Id.*

³⁹ See Immigration and Nationality Act, 8 U.S.C. § 1182 (2003). The United States may prohibit non-citizens currently applying for green cards (permanent resident status), or green card holders who have traveled abroad for six months or longer, from entering the United States if they fail to meet the admissibility criteria set out in the Immigration and Nationality Act, which includes the likelihood of becoming a Public Charge. *Id.* The Department of Homeland Security uses a prospective test when determining whether a non-citizen will become a public charge, taking into consideration all circumstances, including age, health, family status, assets, education, and skills. 8 U.S.C. § 212(a)(4)(B)(i) (2001). If a victim uses benefits on a temporary basis only, it is unlikely that she will be denied admission based on the public charge criteria. 8 U.S.C. §§ 1641-1642 (2004). More detailed information on public benefits can be found at the National Immigration Law Centers website at www.nilc.org (last visited Feb. 14, 2005).

⁴⁰ There are new adjunctive immigration status possibilities for victims of sexual assault related to their involvement with the criminal justice system. See Victims of Trafficking and Violence Prevention Act of 2000, PUB. L. No. 106-386, 114 STAT. 1464 (2000). The federal government has created a new visa specifically for victims of sexual abuse, trafficking, and many other crimes. *Id.* Under the Victims of Trafficking and Violence Prevention Act of 2000, the U-Visa is available to victims who report the crime to law enforcement officials and cooperate in criminal investigations. *Id.* Victims who have suffered

C. Access to Medical and Counseling Benefits that Help Protect a Victim's Financial Welfare

The profound medical and emotional harm caused by a sexual assault may also result in significant financial burdens for the victim.⁴¹ Costs of basic necessary medical care may include counseling, pregnancy or pregnancy termination, prescription drugs (including anti-depressants and prophylactic HIV treatments), and the prevention or treatment of sexually transmitted infections. Sexual assault survivors should have guaranteed access to the medical and counseling care they need. Sadly, for most survivors, this isn't so.

Although states may cover the cost of a forensic medical exam, until recently payment was often conditioned on a victim's prompt reporting to law enforcement and cooperation with an investigation and prosecution.⁴² Even if a forensic exam is paid for by the government, a survivor may still incur significant financial liabilities as a result of a sexual assault. For example, lack of medical insurance may pose a barrier to ongoing medical and mental health services. Even if a survivor has medical insurance, for privacy reasons she may opt not to bill the insurer for the cost of care. If reimbursement is requested, treatment for depression, PTSD or other mental health diagnoses may lead to escalating insurance rates, coverage exclusions in future plans, and premiums associated with an elevated risk group. Crime victim compensation ("CVC") funds may not cover the victim's costs because CVC is the payor of last resort.

For a discussion of the financial implications of sexual assault and how to help advance a survivor's financial stability, *see* Chapter 13 (Financial Compensation

substantial physical or mental abuse as a result of having been a victim of criminal activity, including sexual assault, abusive sexual contact, and felonious assault, are eligible for the three-year visa and can receive work authorization. *Id.*; *see also* National Lawyers Guild, *National Immigration Project Training Materials*, at www.nationalimmigrationproject.org (providing additional information on visas and sample forms). *See also* Chapter 8, *infra*, for a more detailed discussion of sexual assault and non-citizen victims.

⁴¹ *See generally, supra* note 8.

⁴² The 2005 reauthorization of the Violence Against Women Act of 1994 (commonly referred to as VAWA) mitigated this problem. VAWA now provides that a "State, Indian tribal government, unit of local government, or another governmental entity" is not eligible to receive VAWA STOP grant funds "unless the entity incurs the full out-of-pocket cost of forensic medical exams" by providing the examinations to victims free of charge, arranging for victims to obtain them free of charge, or reimbursing victims for the cost of the examination 28 C.F.R. § 90.14; 42 U.S.C. § 3796gg-4 (2006).

Concerns). *See also* Chapters 7 (Safety and Protection Orders) and 10 (Employment Rights).

D. Safety and Protection Remedies

Sexual assault often shatters a victim's sense of physical safety for decades. Mental health research demonstrates that sexual assault victims routinely suffer as high or higher rates of Posttraumatic stress and other anxiety disorders than victims of other violent crimes.⁴³ Addressing the issue of victim safety may help to alleviate some anxiety, but it must be victim-centered and directed.

Victims' physical safety should be a paramount concern for advocates and attorneys. Appropriate safety planning should be pursued with every survivor client. Victims must have access to information about civil protection orders, criminal no-contact provisions, and other legal tools that can proscribe harmful contact between the victim and the perpetrator. Unfortunately, most of the safety planning guides currently in use are designed to meet the needs of domestic violence victims. Safety planning guides for victims of non-intimate sexual assault are still nascent.

Civil protection orders may help enhance victim safety. In some jurisdictions, these orders can award relocation costs, payment for medical expenses, and other financial assistance. Although most civil protection order statutes require a familial or intimate partner relationship, in a minority of jurisdictions civil protection orders are available to victims of stranger, acquaintance, dating, and other non-intimate partner sexual assault. Because of their expedited application process and speed of entry, these civil orders are easier for victims to secure, and thus are often more likely to be pursued.⁴⁴

⁴³ For data regarding the mental health impact of sexual assault, *see* Chapter 6, *infra*.

⁴⁴ *See, e.g., Frizado v. Frizado*, 651 N.E.2d 1206, 1211 (Mass. 1995) (describing legislative purpose in creating lay-friendly procedures). Protection order hearings in particular may be speedier and more comfortable for victims than other avenues for holding the accused accountable. They tend to be resolved within two weeks, instead of the one to two years a criminal prosecution takes or the two to four months required for a school or employment disciplinary process. Filing procedures, court personnel, and hearings for protection orders are often more victim-friendly than criminal procedures and other types of protection orders because the legislation has often been drafted with victims (albeit domestic violence victims) in mind, and also because the rules of evidence are applied with flexibility to allow plaintiffs and defendants to speak freely. In Massachusetts, for example, there is no right to a jury trial in such proceedings, and while there is a general right to cross-examination, the judge may limit cross-examination for good cause.

For victims who do not know the identity of their assailant, however, protection orders are typically not an option because the protection order is issued against an individual respondent, and must be served upon him before it is enforceable.

Safety remedies may also be sought at educational, residential, and other institutions where a perpetrator and victim may intersect (*e.g.*, school, office, factory, apartment building, reservation and place of worship). Finally, criminal courts may issue stay-away or no-contact orders at the time of a defendant's arrest or arraignment. Chapter 7, on Safety and Protection Orders, discusses the various orders in greater depth.

E. Access to Safe Housing

The majority of sexual assaults take place in or near where the victim, or the victim's friend, relative or neighbor, resides.⁴⁵ Not surprisingly then, some victims want to relocate following an assault whether for safety, mental health, financial or other reasons. An attorney or advocate may be able to help a victim terminate her lease or rental agreement⁴⁶ and/or secure new housing. For example, an advocate or attorney can assist a victim to gain entry to public or subsidized housing, secure a housing transfer, or evict a perpetrator. For victims who want to remain in their current housing, security enhancements (*e.g.*, motion detectors, alarm system, bars on windows or doors, enhanced locks and lighting, cardkey entry), reasonable accommodations (for victims with a disability), or other modifications may be requested. An advocate or attorney may also be able to help a survivor remain in her assisted living facility, group home, or other residential care program, and achieve the safety she needs to maintain her residential stability. *See* Chapter 11 for a more detailed discussion of survivors' housing rights and remedies.

⁴⁵ According to the U.S. Department of Justice Bureau of Justice Statistics, 60% of sexual assaults and rapes in 2005 occurred at the victim's home (36.4%) or at or near the victim's friend's, relative's or neighbor's home (23.7%). Data accessible online at www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv0561.pdf (last accessed May 23, 2007). *See* www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv0563.pdf for the distribution of rape and sexual assault incidence by occurrence and victim-offender relationship.

⁴⁶ A limited, but increasing number of jurisdictions have enacted laws to limit victims' liability if they break a lease or contract as a result of a sexual assault. *See State Law Guide: Housing Laws Protecting Victims of Domestic and Sexual Violence*, published by Legal Momentum. Available at www.legalmomentum.org/issues/vio/housing.pdf. *See also* Terri Keeley, *Preventing Homelessness and Ensuring Housing Rights for Victims of Landlord Sexual Assault* (August 2006).

F. Education

The incidence of sexual assault is disturbingly high in middle and high schools and colleges across our nation.⁴⁷ Sexual assault can create a nearly insurmountable barrier to equal access to education. The U.S. Department of Justice estimates that thirty-five out of every 1,000 undergraduate females are sexually assaulted every year.⁴⁸ In Boston, MA, alone, that translates into an estimated 3,500 college victims yearly, based on the current student population of approximately 100,000 female students.⁴⁹ The figures are no less staggering for high school students. One in ten high school students in Boston report being victims of sexual assault every year.⁵⁰ Forty-seven percent of the sexual assault reports received by the Boston Police Sexual Assault Unit involve victims aged seventeen and younger.⁵¹

Pursuant to Title IX of the Education Amendments of 1972 of the Civil Rights Act (Title IX),⁵² the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act),⁵³ and the Family Educational Rights and Privacy Act (FERPA),⁵⁴ educational institutions have specific duties regarding the prevention of and response to on-campus sexual assault.⁵⁵ Colleges and universities may also be held civilly liable for intentional torts committed on their campuses by or against their

⁴⁷ According to *Rape in America*, *supra* note 1, 32% of all rapes occurred when the victim was between the ages of 11 and 17. *Id.* at 3. More than another 20% of all rapes occurred when the victim was between the ages of 18-24. *Id.* See also Bonnie S. Fisher *et al.*, U.S. Department of Justice, *The Sexual Victimization of College Women* 23 (2000) at 11, available at www.ncjrs.gov/pdffiles1/nij/182369.pdf (hereinafter Fisher, *et al.*).

⁴⁸ Fisher *et al.*, at 11.

⁴⁹ U.S. CENSUS BUREAU, 2002 *American Community Survey Profile: Population and Housing Profile: Boston, MA* (2002), available at www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Narrative/385/NP38500US11221120.htm (estimating 213,000 enrolled in college in Boston, approximately half of whom are female).

⁵⁰ MASS. DEPT. OF PUBLIC EDUC., *Youth Risk Behavior Survey* (2001), available at www.doe.mass.edu/lss/yrebs99/toc.html.

⁵¹ SEXUAL ASSAULT UNIT, BOSTON POLICE DEPT., *Age of Sexual Assault Victims in Boston in 2001*, available at www.ci.boston.ma.us/police/pdfs/VAge2001.pdf.

⁵² 20 U.S.C. §§ 1681-1688 (2004).

⁵³ 20 U.S.C. § 1092 (1998).

⁵⁴ 20 U.S.C. § 1232g (2001).

⁵⁵ See, e.g., 20 U.S.C. § 1092(f) (2002) (codifying Clery Act campus security policy and campus crime statistics disclosure requirement).

students.⁵⁶ Federal and state laws provide effective tools for lawyers and advocates to help ensure that educational institutions protect victims' educational stability, privacy, and access to special education services.⁵⁷ See Chapter 9 for further discussion of adult survivors' rights and remedies in the education context.⁵⁸

G. Obtaining and Maintaining Employment and Employment Benefits

A sexual assault victim's employment is likely to suffer major disruptions after a sexual assault. Absenteeism may sky rocket, and productivity often plummets.⁵⁹ An assault by a co-worker or at a work location will usually trigger an even more acute employment crisis that, without legal intervention, will likely result in the victim's resignation or termination.⁶⁰ Thus, legal interventions are critical to help a victim remain employed and/or receive employment leave benefits and to protect a victim's privacy rights in the workplace. The federal Family and Medical Leave Act and its state counterparts, Title VII, and state anti-discrimination and employment laws all provide potential sources for employment protection rights.⁶¹ Unions, too, may have negotiated worker protection policies. If a victim becomes physically or emotionally disabled as a result of a sexual assault, she may be entitled to reasonable accommodations and protection from discrimination under the Americans with Disabilities Act.⁶² Victims who

⁵⁶ See *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983) (colleges must act to use reasonable care to prevent injury to their students by third persons, regardless of whether the third person acts were accidental, negligent, or intentional). *Id.* at 337 (quoting *Carey v. New Yorker of Worcester, Inc.*, 245 N.E.2d 420, 422 (1969)).

⁵⁷ See 20 U.S.C. § 1232g.

⁵⁸ The Education chapter focuses on remedies for adult victims. A detailed discussion of the education rights of minors is beyond the scope of this manual.

⁵⁹ See generally Robin Runge, *Employment Rights of Sexual Assault Victims*, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (September-October 2006), 299-312. See also Rebecca Smith *et al.*, *Unemployment Insurance and Domestic Violence: Learning From Our Experiences*, 1 SEATTLE J. FOR SOC. JUST. 503 (Fall/Winter 2002).

⁶⁰ See generally *id.*

⁶¹ See 29 C.F.R. § 825.114 (2004); Robin R. Runge *et al.*, *Domestic Violence as a Barrier to Employment*, 34 CLEARINGHOUSE REV. 552, 554 (2001).

⁶² 42 U.S.C. § 12112 (2004). A disability is defined as any impairment that substantially limits a major life activity, such as walking, standing, thinking, lifting, or taking care of ones self. *Id.* at § 12102. Victims are also protected under the Americans with Disabilities Act even if they are only *perceived* as being disabled, regardless of whether they have some actual disability. *Id.* The Americans with Disabilities Act requires that the employer provide reasonable accommodations to the victim, so long as she is able to perform the essential functions of her job. *Id.* § 12112. A modified work schedule, transfer to a different location, and changes in

are terminated or leave their job due to a sexual assault may also qualify for unemployment compensation.⁶³

In addition, a CPO may order an assailant to stay away from the victim's workplace or to compensate a victim for wages lost as a result of the assault. In many states, victims who have lost wages or employment as a direct result of an assault may apply for victim compensation.⁶⁴ However, crime victim compensation usually requires cooperation with law enforcement. It is also a fund of last resort. For example, if compensation for lost wages is available through some other source, such as worker's compensation or unemployment insurance, the victim may be deemed ineligible for victim's compensation.⁶⁵ If the assault is directly related to employment (*i.e.*, when the perpetrator is a co-worker or the assault takes places at work), a victim may need and be entitled to additional protection in her work environment. A sexual assault at work, and an employer's failure to appropriately address or protect against that assault, may constitute sexual harassment in violation of federal and state law prohibiting sex

the workspace or equipment all qualify as reasonable accommodation. *Id.* Employers cannot discriminate against qualified employees who request such accommodations. *Id.*

⁶³ *See, e.g.*, IND. CODE § 22-4-15-1(C)(8) (an individual who voluntarily leaves employment or who is discharged "due to circumstances directly caused by domestic or family violence [including stalking or a sex offense]" will not be disqualified from receiving unemployment insurance.); OR. REV. STAT. § 657.176 (an individual who is a victim, or parent or guardian of minor child who is a victim, of domestic violence, sexual assault or stalking may not be disqualified from receiving unemployment benefits if the individual leaves the workplace or avoids an available workplace to protect individual or minor child from further domestic violence, sexual assault or stalking at the workplace or elsewhere). *See also* MASS. GEN. LAWS ch. 151A, § 25(e) (2004). In Massachusetts, for example, an employee who leaves work or is discharged from her job because of domestic violence or on-the-job sexual harassment (including sexual assault) is eligible for unemployment compensation. *Id.* Although the domestic violence statute is intended to benefit battered women, the state's definition of domestic violence is broad enough to include many victims of sexual assault. *See* M.G.L.A. 209A. The statute specifically provides benefits to victims who have been in a "substantive dating or engagement relationship" relationship with the perpetrator. *Id.* at 1. The statutory definition of abuse includes "(1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; [and] (3) causing another to engage involuntarily in sexual relations by force, threat or duress." *Id.*

⁶⁴ *See* CAL. GOV'T CODE § 13950-67 (West 2004). *See generally* the Legal Momentum website at www.legalmomentum.org/legalmomentum/programs/ehrsa/ for a listing of and links to states' employment protections for victims of violence against women. Because the links provided focus on protections for domestic violence victims, review the statutes and regulations and the facts of your case to ascertain whether your client is eligible for the protections and remedies provided.

⁶⁵ *Id.*

discrimination in the workplace. *See* Chapter 10 for a more detailed discussion of employment-related considerations for victims.

H. Financial Stability

The loss of wages, cost of medical care and counseling, interruption of education, loss of tuition, moving expenses, and increased housing and transportation costs are just some of the staggering economic consequences of sexual assault. Advocacy to prevent these losses may include: insurance claims against third parties; an application for disability; unemployment and other public benefits or insurance programs; actions for child support; applications under victim compensation statutes; and tort claims against perpetrators, employers, hosts, landlords, universities and others.⁶⁶ The most accessible financial remedy may be a claim under a state, tribal or territorial CPO scheme, or to a state victim compensation fund (if the crime victim compensation statutory requirements have been met).⁶⁷ State victim compensation schemes typically cover medical, dental and counseling expenses, lost wages and lost financial support for dependents of victims of homicide.⁶⁸ Most compensation statutes do not cover lost tuition, relocation and housing expenses, or lost employment due to non-physical injuries such as mental health problems.⁶⁹ As noted above, the crime victim compensation fund is the payor of last resort. Although crime victim compensation statutes can offer much needed temporary financial relief immediately after an assault, because they routinely require a victim to report the crime to and cooperate with law enforcement, and often exclude coverage for

⁶⁶ *See* Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1428 (1999) (describing comparative apportionment approach to assigning fault in civil sexual assault actions). Civil tort actions against perpetrators are based on theories of assault and battery, sexual assault, sexual harassment, infliction of emotional distress, and other torts as defined by law. Remedies in such actions can include compensatory damages, including medical expenses, lost wages and earning capacity, pain and suffering, and equitable relief. In some cases punitive damages, are allowed. *See* MASS. GEN. LAWS ch. 151B, § 9. Victims also have a right of action against third parties who owe them a duty of care and who failed, by their negligence, to prevent the assault. Such cases are generally referred to as negligent security or premises liability cases. *Id.* at 1428. A court may impose liability on owners or operators of convenience stores, universities and colleges, commercial landlords, bus stations, hospitals, high schools, restaurants, bars, parking lots, hotels, and other third parties if the victim can establish that a legal duty existed to protect individuals from foreseeable violent acts.

⁶⁷ For links to each state's crime victim compensation statute and application process, visit www.nacvcb.org.

⁶⁸ *See* CAL. GOV'T CODE § 13950-67.

⁶⁹ *Id.*

victims who were engaged in certain illegal acts (such as substance abuse, underage drinking, prostitution, etc.) only a minority of all sexual assault victims may be eligible for this remedy. See Chapter 13 for additional discussion of financial issues for survivors.

I. Independent Legal Counsel for Victims in the Criminal Justice System

The role of crime victims in the criminal justice process is the subject of increasing legislation and debate. Thousands of relatively recent legislative enactments provide victims of crime, generally, with various rights pertaining to restitution, privacy, the right to be informed in matters of trial and sentencing, and the right to make statements of victim impact at sentencing.⁷⁰ (These crime victim rights are not sexual assault specific but nevertheless may provide legal bases for rights and remedies for sexual assault victims.) Thirty-three states have adopted crime victims' rights amendments to their state constitutions. The remaining seventeen states and the federal government have passed statutes doing the same.⁷¹ If victims are going to succeed in enforcing their current rights under these new and existing laws, however, they need informed and aggressive legal representation.⁷² Attorneys are critical to the effort to help victims enforce their statutory and constitutional crime victims' rights.⁷³

Navigating the criminal justice system is a difficult and complex task for any crime victim. Victims' and prosecutors' interests intersect but they are not always aligned.⁷⁴ This conflict is most apparent in the realm of sexual assault victims' privacy

⁷⁰ John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victims Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002) (summarizing trends supporting crime victims' rights).

⁷¹ For links to the state and federal crime victim rights laws, visit www.ncvli.org.

⁷² See generally Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

⁷³ The Violence Against Women Act of 2005 amended the definition of civil legal assistance to include "criminal justice investigations, prosecutions and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy." PUB. L. No. 109-162, section 40002(a)(16)(B).

⁷⁴ See John W. Gillis & Douglas E. Beloof, *supra* note 70, at 695 (2002) (discussing adequacy of prosecutorial enforcement). Because conflicts between victims and prosecutors are commonplace, prosecutorial enforcement alone is inadequate. See also *Commonwealth v. Oliviera*, 780 N.E.2d 453, 457 (Mass. 2002); *Commonwealth v. Neumyer*, 731 N.E.2d 1053, 1058 (Mass. 2000).

rights. For example, the prosecution may want evidence from the victim's personal life to strengthen its case, while the victim wishes to keep her personal life private despite the impact on prosecution. Or, a prosecutor may gather extensive medical, counseling and other private information about the victim which must then be disclosed to the defense pursuant to the state's obligation under *Brady v. Maryland*.⁷⁵ Until recently, sexual assault crisis center advocates routinely struggled alone to protect sexual assault victims once the criminal process had begun.⁷⁶ While non-lawyer sexual assault crisis center and other advocates have played the largest and most vital role in protecting victim's privacy rights, the time has come for victims' private attorneys, too, to be present in the courtroom defending victims' civil legal and crime victims' rights. Chapter 14 provides an overview of the criminal justice process, survivor's rights and remedies, and how advocates and attorneys can help to implement and enforce them.

IV. CONCLUSION

For more than one hundred and fifty years, sexual assault victims have sought healing and justice in the criminal courts.⁷⁷ Too often, their efforts have proven unsuccessful. The criminal justice system is not designed to – or capable of – meeting the full range of victims' legal needs. For a panoply of reasons, including the failure of sexual assault reform law, the persistence of anti-sexual assault-victim bias, and antiquated notions of consent, only a small minority of victims achieve the criminal justice outcomes they initially seek.

The time has come to create a new paradigm, where our civil and our criminal courts are hospitable and effective legal forums for sexual assault victims. There is an array of civil rights and remedies to ensure that victims secure the financial, emotional, medical and psychological stability and support that they need. But, victims cannot

⁷⁵ 373 U.S. 83 (1963).

⁷⁶ See generally Lois Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253 (2005).

⁷⁷ See, e.g., *People v. Benson*, 18 Wis. 502 (1856) (“no case has ever gone to the jury, upon the sole testimony of the prosecutrix unsustained by facts and circumstances corroborating it, with[out] the Court warning them of the danger of a conviction on such testimony”); *State v. Dowell*, 11 S.E. 525 (N.C. 1890) (husband may “enforce sexual connection; and in the exercise of this marital right, it is held that he cannot be guilty of sexual assault,” but he may be liable “as if a stranger” if he helps another “ravish his wife”).

navigate the treacherous paths of the justice system on their own. It is our hope that this manual will guide attorneys and advocates in this effort. Sexual assault victims' rights and remedies are symbolic, but not substantive, unless we have advocates and attorneys to help achieve them. We have learned from past reform efforts that passing laws is not enough; we also need lawyers to enforce them. We hope you will join us in this effort. Without you, we cannot succeed.

Chapter Two

INTAKE AND BEYOND: FORGING AN EFFECTIVE CLIENT RELATIONSHIP⁷⁸

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This chapter shifts the focus from sexual assault law reform and victim harm to the relationship between victims and their attorneys and/or advocates. It summarizes some of the general concerns that many victims experience, and provides a framework for establishing a healthy, effective and productive advocate- or attorney-client

⁷⁸ Thanks to Victim Rights Law Center attorneys Michelle Harper, Kate Lawson, and Jessica E. Mindlin, and VRLC Executive Director Susan H. Vickers for serving as the authors of this chapter. Thanks, too, to Angela Lehman, Esq., for her contributions.

relationship. The chapter concludes with some practical tips for advocates and attorneys who provide direct services to victims of sexual assault.

I. GENERAL CONCERNS OF VICTIMS

Although every sexual assault, every victim, and every legal case is unique, there are common concerns that many victims share. For example, in the aftermath of an most sexual assault victims experience the need to reclaim their sense of autonomy and control. They want the right to decide whether, how, when and to whom the assault will be disclosed. They want and need safe housing, employment, access to medical care and financial stability. And, they want and deserve a legal system that validates their harms and provides a venue for criminal and civil justice. At the core, victims want and need healing and recovery. Advocates and attorneys can help them to achieve this.

Identifying and understanding a victim's identified needs and goals is not a static process. They will likely shift throughout the course of your representation or assistance, and you will need to adapt your services accordingly. At the center of your relationship, however, should be the victim's expression of her needs; the services provided to her should be informed and directed by the tools and remedies that the victim identifies as those she needs for her recovery and healing.

A. Stabilize Daily Life

In the first days and weeks following an assault, many victims' first priority is to ensure that they can live in safety, protect their privacy, and reclaim their former lives to the extent possible and practical. If the perpetrator is a family friend, relative, religious leader, or other trusted person in the victim's community, it may be especially difficult for a victim to pursue legal action that will allow her to remain safely within her community. Moreover, many sexual assault victims clearly distinguish between defensive legal steps that help stabilize their personal lives (*e.g.*, a civil academic protection order) and offensive ones that require affirmative legal action against the perpetrator (such as a civil tort or criminal suit). Often, in the initial stage immediately

following a sexual assault, victims are more inclined to pursue the former rather than the latter.⁷⁹

B. Maximize Privacy

Given the magnitude of the personal and economic harm caused by sexual assault, one might expect victims to pursue all available legal remedies. Yet, this is rarely the case. At the heart of this reluctance is often the fact that privacy is a constant and pervasive concern.⁸⁰ Rarely does a victim of rape or sexual assault secure a valued remedy without some attendant loss of privacy. For example, if she wants the perpetrator sanctioned at work, she typically has to disclose to her employer and supervisor(s); if she wants the perpetrator removed from her classroom for safety, academic, or mental health reasons, she risks disclosure to school friends, classmates, teachers and administrators. In rural communities, especially, calling 911 or filing a police report can compromise victim privacy as police records, scanners, and public records requests each present opportunities for privacy breaches. Similarly, victims living in small or insular immigrant communities are often forced to choose between their privacy rights and their remedies.

Most victims will try to limit the number of people who know about the assault and the level of detail which must be revealed. They will carefully weigh the benefits and burdens of whether and what to tell family, friends, employers, educators, law enforcement, judges, court staff, hearings officers, and other third parties. As noted above, they may choose to forego the legal remedies otherwise needed to protect their privacy.

⁷⁹ For a *discussion* of the hierarchy of human needs and humans' desire and need to meet those needs, see ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 15 (1954).

⁸⁰ "When victims of sexual assault, attempted sexual assault, and sexual assault did not report the crime to the police, the most often cited reason was that the victimization was a personal matter." *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* at 3, BUREAU OF JUSTICE STATISTICS, August 2002, NCJ 194530. Sixty-six percent of sexual assault victims surveyed reported they would be "much" (50%) or "somewhat" (16%) more likely to report a sexual assault to the police if there were a law prohibiting the media from getting and disclosing their names and addresses. *Rape in America*, *supra* note 1.

As a victim's advocate or attorney, you cannot overestimate a victim's interest in protecting her privacy. You can help her to negotiate this perilous path, and craft remedies and approaches that best meet her evolving needs. For example, a victim may opt to pursue a legal remedy but not to discuss the sexual assault in open court or a legal pleading. You may help her file a school disciplinary complaint but respect her request that you not call all possible witnesses on her behalf; you may help her pursue a workplace transfer or unemployment compensation in lieu of filing a civil protection order petition against the perpetrator. At each stage of your assistance or legal representation, avail yourself of the opportunity to review with the victim what will be disclosed, who will know about the assault, and how and when the information may be used. Caution the victim that she should consult with you prior to discussing assault-related matters with anyone, including friends, family members, employers, school personnel, housing authorities and landlords, law enforcement, prosecutors, or defense attorneys and investigators. Reassure her that it is important for you to know this information and that you will make every effort to protect her privacy throughout the case.

As anyone who works with victims of trauma can attest, the human psyche is both extraordinarily resilient and extremely fragile. Because both the act of disclosure and the attendant loss of privacy can be traumatic for victims, you will need to be creative and persistent in your efforts to maintain a victim's privacy. Provide her with the information she needs to understand and assess the relative benefits of disclosure versus privacy. (*See Chapter 3 for a more detailed discussion of victim privacy and informed consent.*)

C. Seek Justice

Although every victim is unique, the majority of sexual assault victims need time to recover before they are emotionally prepared to confront the perpetrator and actively pursue legal remedies. For some victims three to six months may be adequate, but others

may need much longer.⁸¹ Unfortunately, our justice system is not well-suited to such realities and delayed reporting is often perceived as less credible or unreliable. In the criminal context, it is often difficult for an adult victim to pursue a prosecution if the incident is not reported promptly, *i.e.*, within days of the assault. (There are exceptions to the expectation of prompt reporting, but most involve a child or especially vulnerable victims, such as those incapable of consent.)

In the civil context, too, false perceptions about delayed reporting can undermine a victim's credibility and thus inhibit potential remedies and outcomes. If you can help your client identify her needs and concerns, you will be better positioned to craft appropriate solutions that address these prompt reporting challenges. For example, some police departments, school administrators, and employers are willing to prepare a formal incident report but take no further action pending victim consent.⁸² You may be able to secure certain remedies by disclosing that your client is the victim of a crime or violent crime without revealing the nature of the assault. Present the criminal and civil options and remedies to your client even if she is confident that she does not want to pursue immediate legal action. Together, you and your client can assess her options and she can decide how best to proceed.⁸³

⁸¹ For example, relative to non-victims, sexual assault victims reported more somatic complaints, had poorer perceptions of their physical health, greater psychological distress, and sought more medical – but not mental health – services in the one year following the assault. Victims continued to seek medical attention at the end of the year after the assault, even when perceptions of their own poor health and somatic symptoms were no longer significantly elevated. Rachel Kimerling and Karen S. Calhoun, *Somatic Symptoms, Social Support, and Treatment Seeking among Sexual Assault Victims*, *Journal of Consulting and Clinical Psychology*, v62 n2 p333-40 Apr 1994.

⁸² Currently one of the major differences between domestic violence cases and sexual assault cases in the criminal context is the issue of victim control. See DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE, at 240, Note 1. The current trend is to give victims in domestic violence cases no control of the decision to charge a defendant or the sentence to be imposed. *Id.* In contrast, sexual assault victims are given much of the control over the decision to charge a defendant, and criminal cases will rarely proceed without their cooperation and consent. See Section IV, *infra*, for a discussion of some of the differences between intimate and nonintimate partner sexual assault.

⁸³ For a more detailed discussion of protecting victim privacy, see Chapter 3, *infra*. See also JESSICA E. MINDLIN, ESQ. & LIANI JEAN HEH REEVES, ESQ., CONFIDENTIALITY AND SEXUAL VIOLENCE SURVIVORS: A TOOLKIT FOR STATE COALITIONS, available online at www.lclark.edu/org/ncvli/objects/L&C77576/confidentialitybook.pdf. An overview of states' privilege laws may be accessed online at www.ilearning.ci.fsu.edu/familyvio/privilege.php.

[PRACTICE TIP: Contact the agency or entity with whom the victim is considering filing an incident report to confirm that the filing will not trigger further investigation absent victim consent. If this is not the case, work with the victim to help her identify and understand the benefits and burdens of reporting. *See also* Chapter 14, Criminal Justice and Sexual Assault Victims, Section V.A., for a discussion of anonymous or “blind” reporting.]

[PRACTICE TIP: Help your client to document the sexual assault. Even if your client does not want to talk to the police right away or file an incident report, help her to make notes or prepare a written statement describing the assault. Creating this kind of documentation early in the case can help protect her credibility and strengthen her claim should she decide to pursue other remedies at a later date. It is critical, however, that any documents she create be appropriately safeguarded so as not to compromise her privacy in the future. If you are an attorney, your client should prepare her written notes or statements for your client file to help ensure that it is protected by work-product and/or attorney-client privilege. If you are an advocate covered by a victim-advocate privilege, the victim should be advised of the scope of the privilege (and how it has fared in the courts).]

II. BUILDING AN EFFECTIVE CLIENT RELATIONSHIP

A. Meeting Your Client

When you first meet your client, if it is close in time to when the assault occurred be aware that she may be experiencing medical and/or mental health issues due to the assault. She may be in physical pain, or she may be experiencing some of the responses commonly associated with trauma. For example:

- She may be experiencing sudden immobilizing panic attacks related to unidentified reminders of the assault;
- She may have difficulty setting out a concise chronology of events;

- Her concentration may be impaired and as a result she may need you to simplify and repeat the information you are providing;
- She may have spotty or limited memory (due to the impact of the trauma and/or as a result of drugs used during the assault); and
- She may be experiencing feelings of self-blame, anger and frustration, or she may be (or appear to be) significantly minimizing the impact of the assault. (A survivor's cultural identity and background may also inform the extent and manner to which her emotions are expressed.)

(See Chapter 6 on mental health issues, for additional discussion of how mental health conditions may impact your representation in a sexual assault case.)

As a general rule, during the initial interview do not ask about or pursue disclosure of the most embarrassing details of the assault and the facts surrounding it. Allow the victim time to get to know you a little bit better before asking her to share such details.

When you do inquire, it can be helpful to the victim to explain why you are asking these detailed questions and how they are important to her case. Assure her that the information she shares with you is confidential and privileged (if your relationship with her is, indeed, privileged) and that you will not disclose the facts to anyone outside your office without her express permission.

If at all possible, provide a private place where the victim can tell you the details of the assault. Allow enough time for the interview so that she can proceed at her own pace. Let her recount her experience in a way and in the sequence that makes sense to her. Make sure that you understand the terminology the victim is using. If appropriate, it may make a victim feel more at ease if you use the same or similar words that she used for sex organs, sex acts, body parts, etc. Be aware that language barriers as well as disabilities and generational, and/or cultural issues and values may impede communication, and make it difficult for a victim to fully describe her experience.

B. Empowering the Victim

Sexual assault robs a victim of her dignity and control; you can help a victim to reclaim them. The challenge is to provide the victim with information, options, and

support so that she can make an informed decision as to what is best for her at any given juncture. To accomplish this, it is critical that you, as her advocate or lawyer, not decide for her what remedies to pursue. Defer to the victim's needs and choices, instead.⁸⁴

The key to accomplishing this is for you and the victim, together, to operate within a relationship that is based on an "empowerment model," *i.e.*, a relationship in which the victim directs the course of her advocacy and her right to self-determination is respected.⁸⁵ Promoting victim autonomy allows the attorney-client or victim-advocate relationship to serve as a stepping stone in the victim's recovery, regardless of the substantive outcomes in the case.

Maintaining a neutral stance toward a victim's legal decisions sometimes can be difficult. The remedies a victim decides or declines to pursue may not be the options you hope she will exercise. If the victim is in acute distress over the legal or other choices that confront her (and they will be some of the most difficult of her life), it may be tempting to make decisions for her. Resist this urge, encourage her to identify and select the course(s) of action she wishes to pursue, and defer to the choices she elects.

Applying your expertise to help a victim pursue the outcomes she has identified is consistent with ethical and zealous advocacy. "Client empowerment," however, should not be equated with abdicating your ethical obligation. While it is important to empower the victim and respect her choices, an attorney's legal and ethical responsibilities are not subordinate to a victim's wishes. A victim needs to have a lawyer whose expertise she can rely on, and to whom she can turn for professional judgment as she considers her options regarding legal strategies, negotiations, and communications with others on her behalf. The challenge is to combine client-centered services with ethical, effective and zealous victim advocacy.

⁸⁴ See, e.g., MARY P. KOSS & MARY R. HARVEY, *THE RAPE VICTIM: CLINICAL AND COMMUNITY APPROACHES TO TREATMENT*, LEXINGTON, MASS, S. GREENE PRESS (1991) ; Cheryl Regehr, Susan Cadell, & Karen Jensen, *Perceptions of Control and Long Term Recovery from Rape* 69 (1) AM. J. ORTHOPSYCHIATRY 110-115 (Jan. 1999); Jacquelyn L. Resnick, *From Hate to Healing: Sexual Assault Recovery*, 16 (1-2) J. COLLEGE STUDENT PSYCH. 43-63 (2001).

⁸⁵ See generally, V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students To Client-Centered, Client-Empowering, And Multidisciplinary Problem-Solving In A Clinical Setting*, 9 CLINICAL L. REV. 83 (Fall 2002).

[CHECK YOUR STATE’S LAW: Each state has its own set of rules that govern attorneys’ ethical obligations and professional responsibility. Advocates, too, are governed by agency and professional ethics. Professional responsibility rules and codes of conduct can guide you as you navigate this course of victim/client empowerment and ethical and effective legal representation.]

C. Establishing Trust

There is a conundrum at the heart of every attorney-client or victim-advocate relationship when it comes to sexual assault, client disclosure, and victim privacy. On the one hand, as the victim’s attorney or advocate you must respect and advocate for your client’s right to privacy. You will want to support her efforts to reclaim her identity and control of her life. This includes respecting her desire and right to keep private the intimate details of her sexual assault, her sexual and social history, and any other information that she does not wish to disclose. Indeed, compelling a victim to disclose the details of her sexual assault can be damaging and traumatic.⁸⁶

At the same time, it is difficult to represent a client effectively if you do not know all of the facts and have all of the information you need. You may have to ask a victim questions that feel invasive and she does not want to reveal to help her protect her privacy. It may help to explain to the victim that if you cannot anticipate from where the privacy attacks will come, it will be difficult to prevent or respond to them.

[PRACTICE TIP: When possible, inform your client ahead of time what issues you will be discussing at your client meetings. This allows her to prepare herself emotionally for the discussion. It also spares her unnecessary anxiety caused by worrying about a topic or issue that will not be discussed. For this same reason, try to determine ahead of time

⁸⁶ Nicole P. Yuan, Mary P. Koss & Mirto Stone, *Current Trends in Psychological Assessment and Treatment Approaches for Survivors of Sexual Trauma*, VAWNET, April 2006, (noting recent studies evaluating “the effects of structured disclosure activities, such as written and oral elaboration of the traumatic experiences, on survivors’ mental health”; recalling the details of sexual trauma may trigger “high levels of emotional distress”). Accessible online at www.vawnet.org/SexualViolence/Research/VAWnetDocuments/AR_SVTreatment.php (last accessed January 19, 2007).

whether the defendant will be present at any meeting you and your client attend, such as a court hearing, deposition, pre-trial conference, disciplinary hearing, law enforcement interview, etc.].

When it is time to discuss difficult facts, it may help to give the victim examples of the types of information victims often want to keep private but that you will need to know. As noted above, explain why this information is important. This can reassure her that you have an understanding of sexual assault, that you can handle hearing the information she is about to share, and that you can be trusted with it. Assure her that prior sexual history, mental health issues, alcohol or drug use (both in general and at the time of the assault), and current HIV and STD status can be difficult to disclose but can be key to her case so should be revealed.

To the extent possible provide culturally and linguistically appropriate services. If the victim is a member of a marginalized and/or population-specific community, such as a racial or ethnic minority, immigrant, lesbian, gay, bisexual or transgender, Deaf or hard of hearing, or non-English speaking victim, cultural sensitivity may be key to your success. Partner with other service providers as necessary to provide these competent services.

[PRACTICE TIP: Cultural competence includes more than linguistic communication. It includes an awareness of and sensitivity to the fact that the victim's experience of a sexual assault is influenced by the survivor's cultural, religious, social, socio-economic, and historical customs, beliefs, values and community. The attorney or advocate should take care to listen to and learn from the client, and ensure that the client's experiences and perceptions are treated with respect. You may need to allocate additional client time to garner an understanding her experience and perspective.]

If appropriate, you may want to reassure the victim that it is not uncommon for victims to have had consensual sexual contact with the assailant prior to the assault or to have been voluntarily or involuntarily intoxicated at the time of the assault. Explain that

it is okay to tell you if, at the time of the assault, she was engaged in unlawful activity such as underage drinking or illegal drug use. Be aware of the fact that a victim of intimate-partner sexual assault may be afraid or embarrassed to admit that the perpetrator was her partner or spouse. A victim may be similarly fearful or embarrassed if the assailant was someone in a position of authority (such as a teacher, caregiver, therapist, or member of the clergy).

These are just a few of the trust issues that you may encounter in providing legal advocacy and services to victims of sexual assault. The examples provided here are not exclusive. An overview of privacy considerations to discuss with your client, both at the outset and throughout the course of your representation or assistance, may include the following:

- Affirm to the victim that she will be consulted prior to your taking any legal action.
- Ask the victim to let you manage sensitive information by entrusting it to you early and updating the information often. Be receptive to the disclosure of new or different information from your client at all stages of your representation.
- If you have a privileged relationship with the victim, reassure her throughout the course of the representation that what she tells you is protected by privilege. Honor that privilege consistently. Make sure your client is aware of any mandatory reporting obligations that you may be subject to, if relevant in the case. (This may be especially important if the victim is a minor, older adult, or person with a disability.)
- Inform the victim of her right to confidentiality and privacy in other professional relationships (*e.g.*, sexual assault crisis counselor-client, psychotherapist-patient, etc.), as well as how waiver operates.
- Explain your jurisdiction's mandatory reporting requirements.
- Identify any providers from whom the victim may or is likely to receive services but whose communications are not privileged (*e.g.*, victim assistance, school teacher).
- Explain that embarrassing, inconsistent, or undisclosed information – if revealed later on – can be used as evidence against your client. Remind her that she can entrust this information to you so that you can manage it and/or prepare for its disclosure.

In sum, remember that it is not uncommon for victims to omit details of the sexual assault that are a source of shame or discomfort. You will want to be certain that you have gathered all the facts about the case and your client that you need to represent her effectively. To accomplish this, you must first establish a relationship based on trust.

D. Encouraging Candor

Sexual assault victims often omit important details when recounting the assault. Sometimes they forget; sometimes they are too embarrassed, ashamed or fearful to disclose all of the details. On occasion, a victim may even fabricate certain elements of the assault to protect her privacy. This does not mean that she wasn't sexually assaulted or that her other disclosures are not credible. It may reflect her lack of trust or vulnerability. Such omissions or commissions may prove fatal to a criminal, civil or administrative case, however, so it is best to address them early and directly in your representation.

It is imperative that the victim understand that the veracity of her disclosure is the likely focal point of any sexual assault case. While a minor falsehood may have no direct bearing on whether the underlying sexual assault occurred, it can undermine a victim's credibility and eviscerate her legal case. A minor deception – whether by omission or commission – may leave a decision-maker free to distrust and discredit the victim's testimony.⁸⁷ You can encourage your client to be candid by letting her know that you understand her need to protect her privacy fiercely. Explain that you want to help her do this, but that to be an effective advocate you need to know all of the relevant facts. Review with her the scope and protections afforded by the relevant privileges (*e.g.*, attorney-client, advocate-victim) and reassure her that you are committed to protecting her privacy to the extent the law allows. (If you are a new advocate or attorney, prepared talking points may help you to address this issue with your client. *See* Appendix B for a sample script.)

⁸⁷ LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE*, at 140, New York, William Morrow & Company, Inc. (1993).

While it is important to stress the need for candor, it is equally important to honor a victim's need for privacy and secrecy at the outset of the case. In the first interview, victims will usually provide only a very general account of what happened to them. Additional memories and disclosures will likely be forthcoming. It is wise to lay the foundation for the victim's need to be candid in the initial interview, but you do not need to pursue full disclosure at this time unless there is an urgent time constraint. Afford the victim an opportunity to learn to trust you. If you know you need to elicit facts that may reflect poorly on your client, it may be best to pursue disclosure only after a mutual relationship has developed. You may also want to let the victim know that you understand that her memory may be sporadic, and that it is both appropriate and important for her to inform you of any new recollections as they emerge.

E. Assessing the Case

For attorneys and advocates, especially, it is important to ascertain and help your client understand both the possible legal remedies and the probability of success. Although some victims opt to pursue a civil or criminal case regardless of the likely outcome, every victim should make as informed a decision as possible.

The three most common issues that arise in any civil, criminal, or administrative sexual assault case are: (1) intoxication; (2) credibility; and (3) consent. Defendants routinely proffer one of three defenses: (1) "It didn't happen"; (2) "It wasn't me"; or (3) "It was consensual." Given that the majority of sexual assaults are committed by someone the victim knows, the second and third defenses (*i.e.*, credibility or consent) are most common. (In cases of drug- or alcohol-facilitated sexual assault perpetrated by a known assailant, the victim may be unsure whether an assault occurred or who committed it.) To effectively assess your client's case and advise her as to which remedies will most likely help her achieve the outcomes she seeks, be prepared to discuss each of these issues and likely defense responses. It may help you, and your client, to develop an extremely detailed timeline of the case, with as much detail as your client can recall and is able to share. Do not expect, however, a victim to disclose all of the details at your initial interview. One of the symptoms of trauma is loss of memory and limited recall,

which may inhibit your client's ability to recount every detail of the assault in a single, initial interview. In addition, because there is a great deal of shame associated with sexual assault, even if a survivor remembers many details from the assault she may be reluctant to disclose them until she knows that she can trust you and that her privacy will be protected.

III. SOME PRACTICAL INFORMATION AND TIPS FOR WORKING WITH VICTIMS OF SEXUAL ASSAULT

A. Foster a Positive Relationship

As an attorney or advocate, you can foster a positive relationship with your client and ultimately help aid in her healing by minimizing opportunities for re-traumatization and providing emotional support when needed. For example, it is important to:

- Address privacy concerns at the outset and throughout representation.
- Demonstrate to the client that you understand the difficulty of discussing and reviewing details of the assault.
- Plan for emotional support for your client immediately after difficult hearings, depositions, or meetings.
- Limit repetition of questions that require the victim to detail the assault to prevent exacerbation of symptoms of trauma.
- Explain your agenda for each meeting in advance and talk to the victim about any stressors she is experiencing that may not seem related to the representation.
- If you are communicating with your client through an interpreter, it is important to look at and speak directly to your client (and not to the interpreter).

B. Be Aware of Potential Obstacles to Effective Advocacy and Representation

Due to the nature of sexual assault, some or all of the following dynamics may present obstacles to legal representation or advocacy. Although they can not always be avoided, it may be helpful for both you and the victim to be prepared for them if they do arise:

- An advocate or attorney can become a trigger that reminds the victim of the assault, and this in turn can lead to the victim avoiding meetings, canceling appointments, etc.
- Depression (and its accompanying inactivity), along with other mental health consequences of sexual assault, can hamper the chronology and progression of legal advocacy or representation.
- Victims have a wide spectrum of needs, but legal solutions are often very limited in scope and are sometimes difficult to pursue. This may cause a victim to feel hopeless or discouraged about the utility or effectiveness of legal remedies.

C. Elicit Challenging Facts

As discussed earlier in this chapter, you must be aware of any challenging facts pertaining to your client that could affect your representation. The following are tips for eliciting such facts:

- Ask your client to let you manage challenging facts by entrusting them to you early and often. Be receptive to disclosure at all stages of representation.
- Refrain from facial or verbal expressions that could be interpreted as judging the victim harshly or negatively.
- Review with the victim how privilege operates and, as appropriate, reassure the victim that what she tells you is protected by confidentiality and/or privilege.
- Explain the need to anticipate defenses so that you can be prepared to respond to them appropriately.
- Remind the victim that you need to have as much information as possible about the case if you are to represent her effectively.
- Ask clarifying questions about facts that do not seem complete or that are unusual.

IV. SEXUAL ASSAULT VERSUS DOMESTIC VIOLENCE: UNDERSTANDING THE DIFFERENCES IN REPRESENTATION

Sexual assault occurs in both intimate-partner and non-intimate-partner relationships. Many of the readers of this manual may have some, or even significant, experience representing victims of domestic violence. While there are many similarities between victims of sexual and domestic violence (*e.g.*, client-centered representation, the

need for personalized safety planning, the importance of protecting victims' privacy) there are also significant differences that should not be overlooked.

One key difference between intimate- and non-intimate-partner sexual assault is that victims of intimate-partner sexual assault typically have an ongoing relationship with the perpetrator. In contrast, most sexual assault victims know – but are not intimate partners with – their assailant. This absence of an intimate-partner relationship has significant implications for both a victim's needs and the remedies available to her. For example, civil protection orders for victims of intimate-partner violence are available in every U.S. state and territory. In contrast, only a minority of jurisdictions extend such protections to victims of non-intimate-partner sexual assault.⁸⁸ If the sexual assault victim does not know who her assailant is, it is difficult if not impossible to secure a protection order. Even if the victim can get a protection order, it may not if it is impossible to serve it.

Domestic violence victims and their advocates routinely turn to the civil courts for relief, most commonly in the family law forum. In contrast, victims of non-intimate-partner sexual assault are rarely referred to or able to access experienced legal counsel to help them pursue remedies outside of the criminal justice arena. Victims of non-intimate-partner sexual assault are less likely than their domestic violence counterparts to report the sexual assault to law enforcement. This underreporting persists even if the victim viewed the sexual assault as more serious than a physical assault.⁸⁹

How law enforcement agencies respond to intimate-partner versus non-intimate-partner sexual assault also varies greatly. For example, over the past twenty years most law enforcement agencies across the country have adopted mandatory arrest and “no-drop” policies in domestic violence cases. These policies have relieved victims of the responsibility – and the right – to decide whether the perpetrator should face arrest and prosecution. The motivation for these policies are multi-fold: that the victim should not

⁸⁸ See *infra*, Chapter 7, Safety and Protection Orders.

⁸⁹ “Finding showed that [victims] of sexual assault were far less likely to report their victimization to police (22%) compared to victims of physical assault including both intimate and nonintimate physical violence (78%).” FAIRSTEIN, *supra* note 87, at 210.

bear the burden of determining whether a law was violated when she was assaulted by her partner; that domestic violence causes societal as well as individual harm for which the abuser should be held accountable; that victim-driven complaints increase the risk of coercion and witness tampering; and that “no-drop” policies enhance victim safety because only the government, and not the victim, can decide whether a criminal case will proceed. This same approach has not been extended to cases of sexual assault. For better and for worse, sexual assault victims must actively pursue a prosecution if they want a criminal case to proceed.

Similarly, over the past ten to twenty years, legislation has been passed to ease the burdens placed on domestic violence victims (*e.g.*, unemployment compensation for domestic violence victims, workplace leave policies to attend court, medical and other assault-related appointments, priority in public housing placements for domestic violence victims). Comparable protections are just beginning to be enacted for sexual assault victims. Because the criminal justice system continues to be the dominant forum for addressing sexual assault victims’ legal needs, these victims have not achieved similar gains in the civil arena.

Privacy concerns, while existent for victims of domestic violence, are especially acute for victims of sexual assault.⁹⁰ They often predominate when sexual assault victims assess their legal options.⁹¹ In contrast to domestic violence victims, who know and are the intimate partners of their abusers, the victim of a non-intimate-partner sexual assault may have an abundance of private information about herself, her family, her workplace, and her extended community to protect.

⁹⁰ Rape victims are reportedly more fearful that others will find out [about the assault] than they are about catching a sexually transmitted infection or dying. Ronald E. Acierno, Ph.D., Co-Director, Older Adult Crime Victim’s Center, National Crime Victim’s Research and Treatment Center, Department of Psychiatry and Behavioral Sciences. E-mail to Patrick B. Mooney, 29 Apr. 1997. *See also Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* at 3, BUREAU OF JUSTICE STATISTICS, August 2002, NCJ 194530 (for victims of sexual assault (including both completed and attempted sexual assault), who did not report the crime to the police the most often-cited reason was that the victimization was a personal matter).

⁹¹ *Id.*

Finally, the issues of credibility, consent and intoxication are paramount in many non-intimate partner civil and criminal sexual assault cases. In contrast, victim consent is virtually never a defense in a domestic violence case. An attack on victim credibility is typically the focal point of the perpetrator's defense in a sexual assault case. All too often perpetrators successfully shift the focus of a case from their own criminal behavior to the victim's conduct, including the victim's clothing, prior sexual history, whether she was drinking or intoxicated at the time of the assault, location at the time of the assault, etc.

To ensure appropriate services and effective representation, advocates and attorneys need to be aware of (and understand) the differences between representing victims of non-intimate partner sexual assault and victims of domestic violence. To conflate the two risks overlooking the realities of victims' needs and the role you can play in how to meet them.

V. INTIMATE PARTNER SEXUAL ASSAULT: A HIDDEN DIMENSION OF DOMESTIC VIOLENCE⁹²

Although the focus of this manual is on non-intimate-partner sexual assault, practitioners should also have an understanding of sexual assault within the context of domestic violence. Intimate-partner sexual assault encompasses a wide range of behaviors including control and possessiveness around the issue of sex and reproductive choice; coercing a victim to perform sexual acts against her will; hurting the victim physically in relation to sex; and blackmailing or extorting sex.

In a 2005 study of a diverse group of 148 abused women seeking orders of protection, 68% reported sexual assault in addition to physical violence.⁹³ In a more recent study of a batterer intervention program, 53% of the 229 men in the program

⁹² This material on sexual assault within the context of intimate-partner relationships was provided by Lynn Hecht Schafran, Director, National Judicial Education Program, at Legal Momentum, and is based on a forthcoming web-based curriculum entitled *Intimate Partner Sexual Assault: The Hidden Dimension of Domestic Violence*. See www.legalmomentum.org/programs/njep/. We thank her for generously providing us with this material.

⁹³ Judith McFarlane *et al.*, *Intimate Partner Sexual Assault Against Women: Frequency, Health Consequences and Treatment Outcomes*, 105 OBSTETRICS & GYNECOLOGY 99 (2005).

answered “yes” to behaviorally based questions about whether they engaged in behaviors against their partners that met their state’s definition of rape or sexual assault.⁹⁴ Despite the prevalence of sexual assault within intimate-partner relationships, many service providers are just beginning to recognize and develop expertise in addressing the issue.

Numerous factors contribute to the hidden nature of sexual assault within domestic violence: victims are reluctant to disclose this personal and humiliating form of abuse and do not want to tarnish their credibility in doing so; many victims do not realize that it is a crime; until recently there was a lack of a legal framework to address the crime because of the marital rape exemption; and until recently there has been a dearth of training for domestic violence attorneys and advocates on how to address issues relating to sex and sexual assault.

Attorneys and advocates need training on sexual assault generally, and on the co-occurrence of sexual assault in the domestic violence context specifically, to serve domestic violence victims more effectively. Because sexual assault in the context of an intimate-partner relationship is a leading indicator of lethality,⁹⁵ education for service providers is critical to help victims stay alive and safe.

VI. COLLABORATING WITH OTHER SERVICE PROVIDERS

No single professional can meet all of a victim’s needs. Indeed, it is usually unwise for any single individual or organization to attempt to do so given the complexity and full array of victims’ needs.⁹⁶ To provide the most effective and appropriate services

⁹⁴ Raquel Kennedy Bergen & Paul Bukovec, *Men and Intimate Partner Rape: Characteristics of Men Who Sexually Abuse Their Partner*, 21 JOURNAL OF INTERPERSONAL VIOLENCE 1375 (2007).

⁹⁵ Jacqueline Campbell *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, 93 AMERICAN J. OF PUBLIC HEALTH 1089 (July 2003).

⁹⁶ As Dr. Mary Koss notes in her recent article, *Restoring Rape Survivors – Justice, Advocacy, and a Call to Action*, “no single entity offering services to [victims] can assert ownership of the response to sexual assault, nor is it feasible for one institution to offer an all-encompassing approach to healing across the spectrum of needs. . . . [A] wide variety of community agencies and service providers are already involved in the business of ‘restoring’” victims and interdependencies exist.” ANN. N.Y. ACAD. SCI. 1087: 206, 209 (2006).

to sexual assault victims, the attorney or advocate must work closely with other community providers to provide effective, holistic, client-centered services.⁹⁷

In many communities, these community providers have come together to form a Sexual Assault Response Team. A Sexual Assault Response Team (SART) is a multidisciplinary inter-agency team that works collaboratively to provide specialized and improved sexual assault intervention and services to sexual assault survivors. The goals of a SART are to improve and coordinate the interventions and services offered to sexual assault survivors, including victim support, advocacy, medical care, evidence collection, and legal assistance. Composition of the SART will vary based on the community's needs. A SART typically consists of representatives from law enforcement (including police, prosecutor, and victim assistance/victim witness personnel), mental health, community based sexual assault victim service providers, and forensic and other medical personnel. (Local legal aid providers should also be encouraged to participate to ensure that victims' civil needs are being identified and addressed.) Team members meet regularly to develop and improve protocols and procedures that address how each agency will respond to a sexual assault and how the agencies will work together to provide a coordinated community response. Nationally, the creation of SARTs has led to higher reporting rates, enhanced evidence collection, more plea bargains, increased victim cooperation, and improved victim services.⁹⁸ These improved victim services, in turn, may result in more effective inter-agency communication and offender accountability

[PRACTICE TIP: Be careful not to compromise victim privacy when pursuing community collaborations. A victim's sense of autonomy and privacy has already been shattered by the assault and you must make every effort not to undermine it further. (*See* Chapter 3 on Privacy.)]

⁹⁷ Collaboration between sexual assault and domestic violence providers is particularly important in communities where the programs are not dual providers. Without such partnerships, victims of sexual assault in intimate-partner relationships may not get the assistance and support they need from victim service providers.

⁹⁸ Linda E. Ledray, *SANE Role in Evidence Collection and Utilization*, Presentation for VRLC National Sexual Assault Law Institute (June 2005) (hereinafter "SANE Institute").

VII. CONCLUSION

Establishing and maintaining a positive and productive relationship with a client healing from sexual assault is both necessary and rewarding. For a victim whose sense of trust and safety in the world has recently been ruptured, your patience and trust may be a stepping stone to recovery. It may also be the key to her ability to achieve justice in the legal system. Proceed cautiously as you ask your client to revisit, and perhaps relive, her violation and betrayal. If your client engages in behavior that undermines her legal case or makes your task more difficult, remember that it is unlikely she seeks to undermine you or your efforts. Her actions are not about you. Rather, it is that the road to restoration is complex, and ever changing.

Chapter Three

PRIVACY: A PRE-EMINENT CONCERN FOR SEXUAL ASSAULT VICTIMS⁹⁹

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⁹⁹ The Victim Rights Law Center thanks the chapter authors, Michelle Harper, Esq., Paula Finley Mangum, Esq., Jessica E. Mindlin, Esq., Kathryn Reardon, Esq., and Susan Vickers, Esq. Thanks, too, to Sarah Boonin, Esq., Julie Field, Esq., Cassandra Hearn, Sybil Hebb, Esq., and Lydia Watts, Esq. for their contributions.

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I. INTRODUCTION

Privacy is a pre-eminent concern for sexual assault survivors. In one major national study, more rape victims expressed concerns about other people finding out or blaming them for the rape than about rape-related pregnancy or HIV-AIDS infection.¹⁰⁰ At the same time, privacy is the domain of a victim's life most likely to be intruded upon and violated following a sexual assault.

Privacy considerations can influence almost every decision a sexual assault victim needs to make. A victim concerned about her privacy may decline to report the assault to law enforcement,¹⁰¹ seek medical assistance, receive mental health counseling,¹⁰² or disclose to friends, family, colleagues, workplace supervisors, or a

¹⁰⁰ *Rape in America*, *supra* note 1, at 2.

¹⁰¹ According to the 1992 study *Rape in America*, only 16% of sexual assaults are reported, making sexual assault the "most underreported violent crime in America." *Supra* note 1, at 5. The majority of sexual assault victims seek medical care related to the assault, a smaller minority seek mental health care, and an even smaller percent will report to law enforcement.

¹⁰² As the U.S. Supreme Court noted in its landmark decision establishing a federal psychotherapist-patient privilege, "Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment." *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 1925 (1996).

partner that she was assaulted.¹⁰³ In an effort to protect her privacy, she may opt not to pursue a criminal prosecution; refuse to participate in an academic disciplinary proceeding; and otherwise forego services and remedies that can hold a perpetrator accountable for, and help a victim recover from, the violence committed. Because a victim's choices regarding her privacy are very likely to direct your legal representation or advocacy, privacy should be the first issue you and your client discuss. It should remain a consideration throughout the course of your representation.

A. Victim Credibility

Sexual assault victims who pursue civil or criminal legal remedies are often the subject of intense attacks on their credibility. In our adversarial court system, defendants and their legal counsel will search for any shred of evidence that may undermine a victim's credibility. A sexual assault victim's medical history, past alcohol or drug use, prior consensual sexual contact, or history of previous sexual assaults, for example, are often used to distract the public and the court from the facts at issue, and to discredit the victim in a civil or criminal case. The invasion of the victim's privacy often provides the fodder for such credibility attacks.

Civil or criminal defendants are not the only ones who invade a victim's privacy or attack her credibility. The victim's friends, family, colleagues, and community members may also engage in such behaviors; these "friendly fire" attacks on victim privacy, which might otherwise be viewed as "gossip" in more benign circumstances, may be as or more harmful to the victim than the actions of adverse parties. While criminal and civil privacy statutes are designed to protect victims against credibility attacks and privacy invasions by the defendant, the media, adversarial third parties, and the public at large, no such statutes routinely address attacks on credibility or privacy invasions that originate with those closest to the victim – her friends, family, classmates, and coworkers. Even well-intentioned professionals may inadvertently compromise a

¹⁰³ *Id.* More than 70% of victims surveyed reported that they were "somewhat" or "extremely" concerned that their family would learn they had been sexually assaulted; 68% were worried about people outside their families knowing; and 50% worried about their names being made public by the news media. *Rape in America*, *supra* note 1.

victim's privacy. Service providers, such as advocates, attorneys, law enforcement officers, court or medical personnel, and other professionals are too often be the source of privacy breaches.¹⁰⁴

Unfortunately, preventing the release of a victim's private information is not always an achievable goal. Sexual assault victims often do not have the benefit of legal advice until after there has been a breach of privacy, and personal or protected information has been released. Once your client's privacy has been compromised, your goal as an attorney is to try to minimize the harm.

B. Core Practice Dynamics

As a starting place for your work representing survivors on privacy matters, it is helpful to remember that many, if not most, victims of sexual assault will have privacy concerns. A sexual assault victim's fear of others finding out about the assault is a natural part of the trauma reaction; sexual violation is humiliating, degrading, and undermines a victim's sense of autonomy and dignity. Also, like any victim, a sexual assault survivor does not want her personal life exposed to the defendant or to the public at large. Many sexual assault victims fear that they will be subject to attacks on their credibility if they pursue civil or criminal legal remedies. Although you need your client to trust you and to disclose all of the relevant facts of the case, she may not be ready to do so at the outset of your representation. Therefore, she may withhold certain information and reveal it only later, once your relationship is strengthened.

¹⁰⁴ The Kobe Bryant case offers a glaring example of such breaches. The Colorado court ordered that the victim's identity be withheld from the media at her request. However, several blunders by the judge and court personnel led the media to her identity, which effectively made non-evidentiary background information about the victim available to the public. Some of the blunders included the: (a) failure to seal preliminary hearing information about the victim's sexual history; (b) publication of the victim's name; (c) posting of an order with DNA information on the court's website; and (d) court clerk's mistaken emailing – to seven news entities – sealed transcripts from an *in camera* hearing containing expert testimony about the victim's recent sexual activity. In the Bryant case, the court's repeated mishandling of sensitive information caused the victim great embarrassment and significant safety concerns. Once her identity was revealed, she received death threats, her reputation was smeared, and every aspect of her physical, sexual, and mental health was analyzed. In the end, it proved to be too much. The victim decided not to pursue the case and asked that the criminal prosecution be dismissed. *People v. Bryant*, 94 P.3d 624 (Colo. 2004).

1. Victims' Unintentional Disclosures: Protecting Victim Privacy

For a victim, discussing her sexual assault presents a difficult dilemma: On the one hand, talking about the assault is necessary to healing, and to accessing the support of family, friends, mental health professionals, and others who can provide critical assistance. Disclosing personal information related to the assault may also be necessary for her to access the remedies or accommodations she seeks, such as leave from school or work, housing changes, a revised schedule, etc.

At the same time, the more information a victim shares the more likely it is that private information will be disclosed to people who do not need to know her personal details. Even when a victim's communications are protected by state or federal, privacy laws, such as the laws governing educational and medical institutions and government agencies, breaches do occur. If a victim's communications are not protected by a privilege, or if she waives the privilege (*e.g.*, by disclosing the privileged communications to a non-privileged third party such as a friend, partner, colleague or neighbor) her once-private disclosures to a mental health counselor, school official, or medical provider may be bared for the public (and the perpetrator) to see or hear. (If the victim is a minor, her privacy rights may be even more abridged, as parents and guardians may sometimes release information intentionally or accidentally without a minor victim's consent.) Well-meaning or inadvertent releases of the details of a victim's sexual assault may be emotionally devastating and even dangerous for a victim. Therefore, it is critical that all victims be able to make informed decisions about whether and to whom to disclose the assault or other personal details, and that they understand the potential implications of those disclosures. If a victim wants to ensure that her information remains as private as possible, she will need to limit what she says, and to whom she says it.

Together, you and the victim may want to identify who knows about the assault, what they know, and to whom they may re-disclose. For example, if the victim reported the incident to school officials, an employer, or any third party, make sure those individuals and institutions are aware of their privacy obligations. (For a discussion of

educational institutions' obligations to maintain victim privacy, *see* Chapter 9, Education Rights for Adult Sexual Assault Victims. Employment-related privacy is discussed in Chapter 10.)

You can help the victim identify with whom she feels safe discussing the assault. It is helpful to be specific – identify the individual friends, counselors, family members, or other community members. Because talking about the assault and recounting the experience is sometimes a necessary and important component of a victim's healing, it may be useful for a victim to identify in advance who she believes will respect her privacy and what it is safe to disclose.

[PRACTICE TIP: If a victim is requesting a work, housing or educational accommodation, the victim is likely to have to provide at least some information about the assault to the employer, landlord or educational institution. Such communications are not necessarily protected by privilege or other confidentiality obligations. It is a best practice to submit a request in writing that the individual or institution keep the information private and that the victim be informed prior to any re-disclosure. Carefully consider how much information needs to be disclosed in order to achieve the remedy sought. For example, it may be possible for the victim to release more general information, such as “I was the victim of a crime” or “I was the victim of an inter-personal violent crime.” *See* Chapters 9 (Education), 10 (Employment) and 11 (Housing) for a review of privacy in the education, employment, and housing contexts, respectively.]

As noted above, a victim's privacy may be breached by individuals and/or agencies. For example, a victim's personal information may be inadvertently released under the belief that it is subject to disclosure.¹⁰⁵ Sometimes, disclosure is compelled

¹⁰⁵ *See, e.g., State v. Gonzales*, 125 P.3d 878, 538 Utah Adv. Rep. 25 (2005) (trial court did not err in denying defendant access to victim's mental health records secured through defendant's release to hospital, rules of civil procedure that require prior notice of any commanded production or inspection of documents before trial be served on each party will apply to criminal matters where privileged information is at stake).

because victims, their service providers, and/or family members do not fully understand the difference between confidential and privileged information, or how waiver operates.¹⁰⁶ (A victim should be advised of how privilege operates, to whom your jurisdiction's privilege laws apply, and how privilege may be waived. The victim should also understand how releases of information operate, and what happens once otherwise confidential or privileged information is released.)

[KNOW YOUR STATE'S LAW: It is important to know whether, in your jurisdiction, a waiver of privilege has to be intentional or if it can be inadvertent. If the victim is receiving services from a provider in another state, you will need to know the privilege laws of the other jurisdiction so you can advise your client accordingly. Depending on where and how the communications occur, you may need to consider conflict of law and interstate communication issues, too.]

[PRACTICE TIP: Caution the victim that if she recounts her experience to someone with whom she does not have a privileged relationship, that person may be forced to testify about what the victim said. In addition, if the victim discloses the details of any privileged communications to a non-privileged third party, she may waive any privilege she may have had. For example, if a victim discloses what her therapist, doctor, or lawyer said to her (or vice versa) she may have waived her privilege and the provider could be required to release records or to testify to specific communications.]

Once personal and private information is in the public domain, it is very hard to contain. Therefore, to the greatest extent possible, your efforts to ensure the victim's privacy should be preventative, not just responsive.

¹⁰⁶ See, e.g., *State v. Denis L.R.*, 270 Wis. 2d 663, 672, 678 N.W.2d 326, 331 (Wis. App., 2004), (trial court not required to consider mother's lack of intention to waive daughter's counselor-patient privilege; waiver occurred and was material).

2. Preventing Third Parties' Unintentional Disclosures

Violations of victim privacy often occur inadvertently (*i.e.*, when someone unintentionally discloses personal or private information about the victim's life without permission). For example, a medical records department may include the victim's entire mental health history record when it responds to a subpoena requesting medical records only for the morning of the assault.¹⁰⁷ Or, a police detective may not be aware of the implications for the victim if he tells a friend about the assault of a woman in his town. Even seemingly vague or one-sided conversations in public places, such as elevator exchanges or cell phone conversations may be the source of unwarranted or unauthorized disclosure. Friends, too, often share information about a victim without understanding the damage that "benign" gossip can cause.

In many instances, there is no legal recourse available to sexual assault victims when third parties do not safeguard their privacy rights. However, in some jurisdictions and under certain circumstances penalties do exist. For example, New York law provides damages and attorney's fees as sanctions for "wrongful disclosure" of a sexual assault victim's identity.¹⁰⁸ Similarly, in Massachusetts, police are under an affirmative duty to keep reports and conversations about sexual assault out of the public sphere, and police are subject to imprisonment and fines for failure to honor this duty.¹⁰⁹ Although a penalty cannot undo all of the harm, financial remuneration may help a victim relocate, to continue in counseling, or receive other remedial assistance after the privacy breach.

¹⁰⁷ See, e.g., *People v. Bryant*, 94 P.3d 624 (Colo. 2004).

¹⁰⁸ N.Y. CIV. RIGHTS LAW § 50-c ("If the identity of the victim of an offense defined in subdivision one of section fifty-b of this article is disclosed in violation of such section, any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff.")

¹⁰⁹ MASS. GEN. LAWS ANN. ch. 41, § 97D (All reports of rape and sexual assault or attempts to commit such offenses and all conversations between police officers and victims of said offenses shall not be public reports and shall be maintained by the police departments in a manner which will assure their confidentiality. Whoever violates any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both.)

3. Authorized Release: Unexpected Consequences

One of the most complex considerations in representing a sexual assault victim is assessing how information is released to support one claim or remedy may later be used to undermine the victim's interests in another context. For example, a detailed affidavit in a CPO case could be used to impeach a victim in a criminal trial. An affidavit from a medical or mental health professional documenting the victim's Posttraumatic Stress Disorder (PTSD), submitted in support of a victim's disability claim, may waive the physician-patient or therapist-client relationship. If the defendant in the criminal trial later subpoenas the victim's records, a privilege likely was waived and the victim's records will have to be released. Similarly, a sexual assault crisis counselor's affidavit describing the victim's fear of the assailant may be useful evidence in support of a request for school accommodation such as class change or room re-assignment, but when the victim consented to the release she also waived her victim-advocate privilege.

The victim's own disclosures or submissions may be used against her, too. The impact of a sexual assault, and how trauma affects memory is such that it is not unusual for the details of an assault to vary over time (*see* Chapter 6 on mental health issues). While such variations are to be expected, they will nevertheless be used to undermine a victim's credibility. For example, a victim's affidavit in support of a request for a protection order may be used to impeach her in a subsequent criminal proceeding if the affidavit is inconsistent with her testimony and/or statements to police, hospital staff, etc. If the victim needs to submit an affidavit, give testimony in a protection order hearing, or provide any other statement to which a defendant may have access, assess how much detail needs to be provided to secure the remedy requested. If any factual inconsistencies do arise during the course of your representation, be prepared to explain them to the trier(s). If necessary, secure expert testimony to explain the impact of trauma on memory and recall and to educate the decision maker that it is common for specific details to vary over time as the victim recalls and relates the account of her sexual assault.

[PRACTICE TIP: You may want to hire an expert witness to explain these variations and to help the trier of fact understand that such

inconsistencies are likely evidence of a truthful and credible recall, rather than fabricated or unreliable testimony.]

Because victims are often asked to sign blank or very broad releases of information, you and your client should discuss how a release may operate to compromise her privacy. A victim should be advised to execute – and providers cautioned to accept – only written, specific, narrowly crafted, and time limited releases of information.

OVW grantees and sub-grantees are required to “protect the privacy and confidentiality of persons receiving services.”¹¹⁰ Specifically, individuals, organizations, and government entities (and their sub-grantees) funded by VAWA may not “disclose any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs” or “reveal individual client information without the informed, written, reasonably time-limited consent of the person receiving services.”¹¹¹ If the release of information is compelled by statute or court mandate, the grantee or sub-grantee must make reasonable attempts to notify the victim that disclosure was ordered, and take steps necessary to protect the privacy and safety of the persons affected by the release of information.¹¹²

Although these VAWA confidentiality provisions do not establish a statutory or common law privilege, they may be cited as evidence of Congress’ intent to enhance and protect victim privacy. (Other federal victim services grants that include privacy protections include, among others, the Family Violence Prevention and Services Act (42 U.S.C. § 10402(a)(2)(E)) and Emergency Shelter Grants (42 U.S.C. § 11375(c)(5)).

If a victim consented to the release of information that will now be used against her, gather as much evidence as possible to ascertain the scope of the executed release. It

¹¹⁰ 42 U.S.C.A. § 13925(b)(2)(A).

¹¹¹ 42 U.S.C.A. § 13925(b)(2)(B). The current regulations require the consent of the guardian if a victim is disabled. 42 U.S.C.A. § 13925(b)(2)(B)(ii).

¹¹² 42 U.S.C.A. § 13925(b)(2)(C).

may be possible to argue that the information disclosed was outside the scope authorized, that the victim did not give informed consent, or that the waiver applied to some, but not all, of the victim's information.

4. The Difference Between Confidentiality and Privilege

To safeguard privacy, it is critical that the victim, the advocate, and any other service providers understand the difference between *confidential* and *privileged* communications. The terms "confidentiality" and "privilege" are sometimes used interchangeably but the legal protections they afford are very different and victims need to understand the difference. A confidential communication is one made with the expectation that it will not be widely repeated or shared, or otherwise accessible to the general public. The information may be private in nature or embarrassing if released, but disclosure of confidential information is not necessarily legally prohibited. For example, details about an assault told in confidence to a co-worker, friend, or classmate are not legally protected even if the person promises to keep them confidential. If non-privileged information is subpoenaed or otherwise ordered disclosed by the court, it generally must be released.

In contrast, a privileged communication is specifically protected from disclosure by established legal safeguards. The information is required to be kept private as a matter of law. State and federal laws establish these legal privileges. The scope of, and exceptions to, privilege laws vary from jurisdiction to jurisdiction.¹¹³ In every jurisdiction, however, privileged information is afforded enhanced privacy and is not generally accessible unless it falls within an exception or the privilege has been waived.

Whether a victim has a privileged relationship with a provider depends on both the jurisdiction's privilege laws and the context in which the information is shared. For example, communications between a victim and a lawyer, medical provider, member of

¹¹³ Every state and territory, for example, requires certain professionals to report child abuse, even if the abuse was disclosed in what otherwise would have been a privileged communication. Which professionals are covered by the mandatory reporting laws, however, is left to the determination of the individual jurisdiction. For links to individual jurisdictions' abuse reporting laws, see www.childwelfare.gov/systemwide/laws_policies/state/reporting.cfm (last accessed January 19, 2007).

the clergy, or psychotherapist typically are protected by privilege laws.¹¹⁴ Significantly, prosecutor-based victim or witness assistance advocates are not usually governed by any privilege. To the contrary, because witness assistance advocates are an agency of the state, any exculpatory information they possess must be provided to the defendant.¹¹⁵

In addition, as noted above, there are exceptions and limitations to privilege laws. If a privilege is qualified, rather than absolute, then the privilege may be pierced if certain conditions are met. (For example, a qualified privilege may protect the information from public disclosure but nevertheless require that, upon a certain showing by the requesting party, the information be provided to the court for *in camera* review. The most common privilege exceptions are those that require the reporting of abuse of a child,¹¹⁶ an older adult, or a person with disabilities. In addition, professionals whose communications are generally protected by a privilege may be required or permitted to reveal client information if the client is a danger to self or others,¹¹⁷ or if it is imminent that the client will commit a crime.¹¹⁸

Not all privileges are created equal. A victim should be cautioned that, just as some communications with providers are privileged and some are not, the exceptions to

¹¹⁴ In addition to any privilege laws, many professional organizations' Codes of Conduct also require client confidentiality, such as those that govern mental health counselors, psychologists, and social workers, as well as medical providers and attorneys. A breach of the confidentiality duty gives rise to a tort cause of action. *See, e.g., Alberts v. Devine*, 395 Mass. at 68-70 (physician owes patient a duty not to disclose medical information without patient's consent).

¹¹⁵ *See, e.g., Crime Counselor Confidentiality Act* ALA. CODE 1975 §§ 15-23-40 to 46 (2005); *Who May not Testify Without Consent*, COLO. REV. STAT. § 13-90-107 (2005); *Victim-Counselor Privilege*, HAWAII REV. STAT., RULES OF EVID., RULE 505.5 (2005); *Confidentiality of Statements Made to Rape Crisis Personnel*, 735 ILL. COMP. STAT. 5/8-802.1 (2005).

¹¹⁶ Not all sexual contact with a minor is subject to a jurisdiction's mandatory reporting statute. A professional's mandatory reporting obligation may turn on whether the assailant is also a minor and also the age difference between the parties.

¹¹⁷ *See Camille Glasscock Dubose & Cathy O. Morris, The Attorney as Mandatory Reporter*, 68 TEX. B.J. 208, 210 n.23 (2005) *citing* MD. FAMILY LAW CODE ANN. § 5-705 (2001); MISS. CODE ANN. § 43-21-353 (2001); NRS § 432B.220 (2001); ORC ANN. 2151.421 (2002); O.R.S. §§ 419B.005, 010 (2001); TEX. FAM. CODE ANN. § 261.101 (2001). *See also Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425 (Cal. 1976) (psychotherapist may be held liable for failure to breach client privilege to warn victim that client was an imminent risk to her safety).

¹¹⁸ *See generally*, Brian Sheppard, Annotation, *Views of United States Supreme Court as to Attorney-Client Privilege*, 159 A.L.R. FED. 243 (2000) *see also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5501 (2006) .

evidentiary privilege laws apply to some providers but not to others. For example, a social worker may be required to report any “abuse” of a child, older adult, or person with disability but a lawyer may be exempt from mandatory reporting if the abuse is disclosed by the abuser in the context of an attorney-client relationship.¹¹⁹

Finally, the presence of a third party may abrogate the privilege.¹²⁰ (For example, if an attorney and the client discuss the case in the presence of the victim’s friend or if a victim discusses the assault in a therapy session with her boyfriend.) Similarly, the partial waiver of a privilege may also be held to abrogate the entire privilege, resulting in a complete waiver and the unintended release of the victim’s private information.

You will want to be aware of the limitations on the attorney-client privilege in your jurisdiction and discuss them with your client before she discloses private information. In particular, your client must understand how it affects a privilege if she chooses to have a third party, such as a friend, partner, or support person, present for what would otherwise be a privileged communication. Only after she understands the implications of waiver can a victim truly give informed consent.

II. IMPORTANT QUESTIONS REGARDING VICTIMS AND PRIVACY

Certain questions are critical for a victim and her advocate and/or lawyer to discuss so that the advocate or lawyer can address any privacy concerns. The lawyer should outline the victim’s legal rights, and identify the victim’s most pressing privacy concerns, prior disclosures, and special vulnerabilities. Each of these questions should be addressed both at the outset of the victim’s legal representation and as the case proceeds.

A. What are the Victim’s Most Pressing Privacy Concerns?

Most sexual assault victims have fears about certain people finding out about the assault, certain details being disclosed, or certain aspects of their personal history being

¹¹⁹ *Id.*

¹²⁰ Not all third parties’ presence abrogates the privilege. The presence of an individual who is necessary to effect the representation (*e.g.*, an interpreter needed for the client and provider to communicate effectively) does not result in abrogation or waiver of the privilege.

scrutinized. Conduct a comprehensive privacy assessment by asking the victim about her specific concerns, including:

- Who knows about the attack?
- Who is she afraid may find out and why (*e.g.*, what is she afraid will happen if those individuals find out)?
- What aspect of the assault or her own personal history is she most concerned about anyone knowing?
- Is there a risk that her privacy will be invaded by the media (is this a higher profile case or did the assault occur in a smaller, close-knit community)?
- What kind of harm does she fear may result from disclosure? (This might include but is not limited to: fear of gossip among her friends, peers, colleagues, campus, etc.; that she (and/or the perpetrator) will be ostracized or evicted from her community (including immigrant, Tribal or faith community); loss of or irrevocable damage to personal (intimate partner or non-intimate partner) and professional relationships; and loss of professional advancement opportunities.)

B. With Whom Has the Victim Discussed the Assault and What Information Was Disclosed?

Depending on when the victim was assaulted, the circumstances of the assault, her support network, how she responds to crises or to significant life events, and a myriad of other individual factors, the victim may have never disclosed the assault to anyone or she may have spoken about it to numerous people. It is important to gauge the extent of her disclosures so that you have a clear understanding of what information (or misinformation) is in the public realm.

If the victim had a forensic medical exam and/or law enforcement interview, request a copy of the medical and police reports. Review these with the victim so that she knows what information is in the reports and has an opportunity to correct any errors or omissions. (*See* Chapter 5 for an overview of the forensic medical exam.) Similarly, if the victim made verbal or written statements to an employer, landlord, school official or other third party, try to ascertain the content of those statements. Request a copy of any statement that was written (*e.g.*, in a letter or note, e-mail, text message, Instant Message (IM), IP Relay, TTY/TTD, etc.) or notes that were recorded.

C. Special Vulnerabilities: Mental Health; Mandatory Reporting

To protect a victim's privacy you will need to know any outrageous or spurious claims the defense is likely to assert. Typically the victim is the best source for this information. Ask her specifically about her medical and mental history including any mental health, alcohol, drug, or criminal issues. Although none of these personal issues may be relevant to whether she was sexually assaulted, each one of these personal issues may be used to attack her credibility and undermine a legal case.

[PRACTICE TIP: If a victim insists on meeting with you with a family member or support person present, request that the third party give you some time with the victim alone. Use this time together to explore any potentially awkward or embarrassing issues for the victim, and to explain to the victim how privilege and confidentiality operate. Even if a victim says that she is comfortable discussing her case in the presence of the third party, it may nevertheless inhibit her disclosures and your discussion of the case. Explaining how confidentiality and privilege laws operate may also help you justify the time in private.¹²¹]

[PRACTICE TIP: When inquiring about the victim's past history, it may help to ask the victim, "What are the worst things that the other side is likely to say about you?" or "Defendants often dredge up any nasty evidence about a victim that they can find. What do you think the defendant may accuse you of having done? After we know that, we can talk about how to respond to those accusations."]

Independent of any mental health, drug, or criminal history, a victim may be vulnerable to an invasion of her privacy if she falls within a jurisdiction's mandatory reporting requirements. As discussed above (*see* Section I.B.4), communications that would otherwise be privileged may not be protected from disclosure if the information

¹²¹ The presence of a third party who is necessary to providing services to a victim, such as an interpreter or translator, typically does not constitute a waiver a privilege.

received must be reported to a state or law enforcement authority. Minor victims,¹²² older adults, or persons with a disability¹²³ are most often the subject of mandatory reporting laws. In many jurisdictions, medical professionals are required to report certain injuries that are likely the result of a crime.¹²⁴ In a minority of jurisdictions, attorneys are also mandated reporters under certain circumstances.¹²⁵

The victim's attorney or advocate should be cognizant of the likely consequences once a mandatory report is made, and advise the victim accordingly. If a report is made to a government agency such as Adult or Child Protective Services, the victim may become eligible for services that may be beneficial to her, but there is no guarantee of safety or continued confidentiality once the report has been made. In fact, protective services agencies generally have a long list of agencies and individuals to whom client information must be disclosed.¹²⁶

¹²² For instance, under N.M. STAT. ANN. § 32A-4-3 (2006), every person, including a medical professional, a law enforcement officer, a judge presiding during a proceeding, school official, a social worker acting in an official capacity, or a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to child protective services or law enforcement. But not all sexual contact with a minor, or between two minors, constitutes child abuse. *See, e.g., Conn. AG Blumenthal Opinion Interpreting Mandated Reporter Statute, Sept. 30, 2002* (sexual relations between a teenaged minor under 16 with an individual who is more than two years older but is under the age of 21, is not *per se* child abuse).

¹²³ For example, under ARIZONA REVISED STATUTE, A.R.S. § 46-454 (2006), medical professionals, social workers, a peace officer or other person who has responsibility for the care of an incapacitated or vulnerable adult and who has a reasonable basis to believe that abuse or neglect of the adult has occurred or that exploitation of the adult's property has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer or to a protective services worker. Abuse includes sexual abuse. *Cf. COLORADO REVISED STATUTE, 26-3.1-102(b)* (2006).

¹²⁴ *See, e.g., MO. ANN. STAT. § 578.350* (2006) (requiring physicians, nurses, and therapists to report any person treated for a gunshot wound to local law enforcement officials); VA. CODE ANN. § 54.1-2967 (2006) (requiring physicians and any other person giving medical aid to report wounds inflicted by a weapon); D.C. CODE ANN. § 2-1361 (2006) (mandating physicians to report injuries caused by firearms or other dangerous weapons).

¹²⁵ *See* Camille Glasscock Dubose & Cathy O. Morris, *The Attorney as Mandatory Reporter*, 68 TEX. B.J. 208, 210 n.23 (2005) citing MD. FAMILY LAW CODE ANN. § 5-705 (2001); MISS. CODE ANN. § 43-21-353 (2001); NRS § 432B.220 (2001); ORC ANN. 2151.421 (2002); O.R.S. §§ 419B.005,010 (2001); TEX. FAM. CODE ANN. § 261.101 (2001).

¹²⁶ For example, Colorado's Child Protective Services are obligated to report information about an instance of suspected child abuse or neglect to as many as eighteen individuals or agencies. C.R.S. 19-1-307 (2006). New Mexico law requires disclosure to sixteen individuals or agencies. N.M. STAT. ANN. § 32A-4-33 (2006).

III. PRIVACY VERSUS PROTECTION: A RECURRING CHOICE

Every sexual assault victim has to choose between keeping her information private and disclosing details to access the remedies she seeks. This can be a difficult decision, especially for a victim who is still in crisis or coming to terms with the fact that she was sexually assaulted. Moreover, this decision will likely have to be made repeatedly, as information will be requested each time she seeks assistance or an accommodation from a court, landlord, counselor, educational institution, medical provider, etc. At each juncture, the victim will have to decide whether the benefit of disclosure outweighs the burden. A victim's answer to this question will likely depend upon the information sought, to whom it is being released, the extent to which the recipient will keep it private, and the remedy to be gained.

[PRACTICE TIP: As your legal representation progresses and the information requested – as well as your client's physical and emotional state – changes or evolves, the victim's answers to questions involving disclosure also may evolve. A victim may become more reluctant than before to release information if prior disclosures were poorly handled. Or, she may have had positive experiences with service providers, the media, etc. – or simply become less private about the assault or other personal details and thus be more willing to have information released. For this reason, you and your client should revisit the issue as the need arises, and your client will know that she is free to reconsider the question or change her mind as the case progresses.]

As always, your obligation is to give the victim the information she needs so that she can make informed decisions. She should understand that her desire to keep personal information out of the public domain may limit the scope of remedies you can pursue. For example, if a victim does not want to disclose the details of her assault to her employer, her options for workplace accommodations may be limited. (*See* Chapter 10, *Employment Rights for Sexual Assault Survivors*, for possible workplace remedies.) Or, a victim may opt to withdraw a school disciplinary complaint once she learns that her

friends will be interviewed or called as witnesses in the case. Whenever possible, develop legal strategies and remedies that meet both the victim’s legal and privacy needs.

[PRACTICE TIP: A victim may be able to access certain remedies by disclosing the information in more general terms (for example that she was a victim of a violent crime, a felony, or an assault) rather than describing the incident in detail or identifying it as a sexual assault.]

While some remedies, such as a protection order or civil suit may be pursued at a later date, others may be time- or evidence-barred (*e.g.*, physical evidence may be lost or destroyed if a victim declines a forensic exam, the statute of limitations for a civil or criminal suit may expire).

IV. TOOLS FOR PROTECTING PRIVILEGED COMMUNICATIONS

A. Identifying the Evidentiary Privileges

Evidentiary privileges inhibit the fact-finding process. Nevertheless, as a society, we accept that these privileges are necessary to preserve the integrity of certain significant, socially valuable relationships.¹²⁷

A privilege is typically established by a judge¹²⁸ or statute or by the common law. With the exception of parent-child or spousal privileges, the most common evidentiary privileges in the United States are those that protect communications between certain professionals and their clients.¹²⁹ These protected relationships include communications between a(n):

- Attorney-client;

¹²⁷ “Effective psychotherapy depends upon an atmosphere of confidence and trust [T]he mental health of the Nation’s citizenry, no less than its physical health, is a public good of transcendent importance.” *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 1925 (1996).

¹²⁸ *See, e.g., id.* at 8 (establishing a new federal privilege, the psychotherapist-patient privilege on the basis that Federal Rule of Evidence 501 authorizes federal courts “to define new privileges . . . by interpreting common law principles in the light of reason and experience”).

¹²⁹ *See* Jessica E. Mindlin, Esq. & Liani Jean Heh Reeves, Esq., *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions*, at 13 (National Crime Victim Law Institute, 2005). Available at www.lclark.edu/org/ncvli/objects/L&C77576confidentialitybook.pdf (last accessed January 19, 2007).

- Psychotherapist-patient (including psychologist, social worker, or other licensed mental health worker);
- Clergy-parishioner;
- Advocate-victim;
- Physician/Medical provider-patient; and
- Sexual or domestic violence counselor-victim.

[CHECK YOUR STATE’S LAW: Identify the privilege laws in your jurisdiction and determine how the courts have addressed these privileges in sexual assault and other cases. See www.ndaa-apri.org/apri/programs/vawa/statutes.html for links to state-specific privilege and privacy laws.]

Where a privilege exists, the privilege is held by the person whose information is protected under the law. The protected person is the only person who can agree to waive the protection of the privilege.

Although only the privilege holder has the authority to legally withhold or prevent disclosure of relevant evidence in court, as a practical matter when privileged information is subpoenaed to court, it sometimes is the provider (*i.e.*, the information holder) who first asserts the privilege on behalf of the victim (or the privilege holder). In a criminal case, because the victim is a witness, and not a party to the case, she may not necessarily receive notice that her privileged information has been requested.¹³⁰

While all evidentiary privileges are potentially relevant to protecting your client’s privacy, the records most often sought in a sexual assault case are mental health and counseling records. Pre-assault mental health records are often used to claim that the client is mentally imbalanced. Post-assault mental health records may be used as a basis

¹³⁰ See, e.g., *Commonwealth v. Dwyer*, 448 Mass. 122 (2006) (establishing a new protocol that allows defense counsel to inspect pretrial, subject to a protective order, presumptively privileged records produced by a third party, if the requirements of relevance, admissibility, necessity, and specificity have been met; requires notice to the third party who is the subject of the records and an opportunity to be heard; legal counsel requesting the records is prohibited from copying, disclosing or disseminating the contents of the record to any person, including the defendant). See Appendix C, Sample Motion to Quash, for a basis motion to quash a subpoena. In addition to the argument articulated in the sample motion, additional arguments may be available to the victim depending on the jurisdiction, the provider’s funding source, state and federal laws, etc.

for arguing that the victim is fabricating certain elements of her account. The disclosure of information a victim believed to be confidential may be devastating. It is important for you, the victim – and the provider – to know the scope of the mental health provider’s privilege including whether it protects both written and verbal communications that currently or will soon exist, and how they may best be protected.

[PRACTICE TIP: A victim should consider whether she wants to receive services, if possible, only from providers with whom she has a privileged relationship. For example, a victim may choose to receive counseling from a social worker or psychologist rather than a crisis counselor or advocate, if the latter is not covered by an evidentiary privilege.]

[PRACTICE TIP: If you have reason to believe that your client has records or communications that are privileged under the law of your jurisdiction, send a letter to the provider and/or record holder (*e.g.*, counselor, therapist, psychologist, etc.) stating that your client is asserting her privilege and does not consent to the release of her records. Ask the provider to notify you immediately if he or she receives a subpoena or other request for your client’s privileged information.]

B. Assessing Your State’s Privilege Law: A Procedural Checklist

Because privilege laws vary widely from jurisdiction to jurisdiction, it is imperative that advocates and attorneys be familiar with the laws of the governing jurisdiction(s). (*See* Section I.B.1, above, regarding interstate communications and privilege laws). Following is a list of questions you will want to consider when assessing the privilege laws in your jurisdiction:

- Is there a single standard of review for different privileges or do the standards differ?¹³¹

¹³¹ A majority of the states that have a tiered system *de facto* employ a single standard and process for disclosure to both *semi-absolute* and *qualified* privileges. For instance, in some states, all the counseling-related privileges are treated similarly in terms of the judicial protocol for determining whether the defendant has a right to pierce the privilege for the sake of ensuring a fair trial. For example, Michigan’s various

- Is there a time limit for filing a request for disclosure (subpoena) and the response (*e.g.*, Motion to Quash the Subpoena or Motion to Dismiss)?¹³²
- May defense counsel issue a subpoena directly, or does it require judicial oversight or approval?
- Is the victim entitled to formal notice when a subpoena for her private information is issued? (If yes, does the victim have to be personally served? If the victim may be personally served, be sure to prepare her for this possibility so that she is not taken completely by surprise should service occur.)
- Who bears the burden of proof? (Is it the victim's burden to invoke her privilege or is the privilege self-executing?)¹³³
- Who may assert the privilege? If the victim is a minor, can she assert the privilege or is a parent or guardian required?
- Have the statutory standards for upholding the privilege been modified by case law? If so, what is the legal basis for the modification?¹³⁴
- What standard of proof applies to the judge's threshold and subsequent inquiries?¹³⁵
- Is there a rule that governs where the records are to be held during a preliminary inquiry? May the victim and/or her provider retain the records

privileges are treated the same way. The Michigan Supreme Court does not apply different tests to account for the subtle distinctions between the various privileges. *See*: Sexual assault counselor-victim privilege [MICH. COMP. LAWS § 600.2157a(2); MICH. STAT. ANN. § 27A.2157(1)(2)]; Psychologist-patient privilege [MICH. COMP. LAWS § 330.1750; MICH. STAT. ANN. § 14.800(750)]; Social worker-client privilege [MICH. COMP. LAWS § 339.1610; MICH. STAT. ANN. § 18.425(1610)].

¹³² Most states do not have a strict rule as to the timing of the motion for production of records. However, some states have opted for delayed motions to maintain privilege and preserve judicial resources. For example, in California, materials protected under the psychotherapy-patient privilege are not disclosed for any reason pre-trial, to avoid any unnecessary invasion of privilege. *See* CAL. EVID. CODE § 1014.

¹³³ For example, Michigan privileges are all self-executing and require an affirmative waiver before they can be used in a judicial proceeding. MICH. COMP. LAWS ANN. § 330.1750; MICH. COMP. LAWS ANN. § 600.2157.

¹³⁴ For example, in *People v. Stanaway*, the Michigan Supreme Court cited to both the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution and the corresponding provision in the Michigan constitution, Art. 1, § 17. 521 N.W.2d 557 (Mich. 1994). The Court stated that in *certain* circumstances an *in camera* review of the [privileged] records is “necessary so as not to undermine confidence in the outcome of a trial. In camera inspection of privileged information by the court is a ‘useful intermediate step between full disclosure and total nondisclosure.’” *Stanaway*, 521 N.W. 2d at 575 (quoting *United States v. Gambino*, 741 F. Supp. 412, 414 (S.D.N.Y. 1990)).

¹³⁵ In Michigan for example, the defense proffer must “*establish a reasonable probability that the privileged records are likely to contain material information necessary*” to the defense. *Stanaway*, 521 N.W.2d at 562 (emphasis added). A generalized assertion of a need to attack the credibility of the victim will not meet “the threshold showing of a reasonable probability that the records sought contain information material to the defense sufficient to overcome the various statutory privileges.” *Id.* Rather, the defendant must demonstrate “*a good-faith belief, grounded in articulable fact,*” that there is a reasonable probability that the records contain material information necessary to the defense. *Id.* (emphasis added).

or does the court require that they be provided to the court? If the records must be held in the court's possession, can they be kept under seal?

- If the defense motion is allowed, is there direct access by the defense or *in camera* judicial review?¹³⁶
- Does the introduction of one portion of a victim's medical or counseling record waive the privilege for her entire medical or counseling history?
- What standard does the trial judge apply in reviewing documents *in camera*?¹³⁷
- Is appellate review permitted? If so, in which court must the appeal be filed? What is the standard of review? Is it abuse of discretion or are the legal issues reviewed *de novo* (anew)?¹³⁸ How often are judges' decisions appealed?
- What is the process for issuing a stay or interlocutory appeal of the court's order requiring disclosure?

[PRACTICE TIP: Court records, even under seal, may be subject to inadvertent disclosures.¹³⁹ If your client's confidential or privileged records are subpoenaed for *in camera* review, to the extent permissible try not to deliver them to the court until your appeals are exhausted.]

¹³⁶ See, e.g., **Arizona**: *State ex rel. Romley v. Superior Court in and for the County of Maricopa*, 172 Ariz. 232, 238-240, 836 P.2d 445 (Ariz. App. 1992), *review denied*; **Kansas**: *State v. Shoptaw*, 56 P.3d 303, 306-308 (Kan. App. 2002), *review denied*, 2002 Kan. LEXIS 841 (2002); **Missouri**: *State v. Koenig*, 115 S.W.2d 408, 414-415 (Mo. App. 2003); **Oklahoma**: *State ex rel. Suttle v. District Court of Jackson County*, 795 P.2d 523, 524-525 (Okla. Crim. App. 1990). The Victim Rights Law Center thanks Marguerite Grant, Assistant District Attorney, Middlesex County, MA, for the generous use of her research materials in this chapter.

¹³⁷ For example, in Michigan, when a judge conducts an *in camera* review of the records, he/she seeks to "ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence should it be provided to the defendant." *Stanaway*, 521 N.W.2d at 562. The Michigan Supreme Court also noted that "material" has been interpreted to mean "exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.* at 569 & 575 n.40.

¹³⁸ For example, in Michigan appellate review is permitted. Although the articulated standard of review is "abuse of discretion," in *Stanaway*, the Michigan Supreme Court declined to rely only on the record and ordered the trial judge to conduct at least one fact-finding hearing. 521 N.W.2d at 563.

¹³⁹ See, e.g., *People v. Bryant*, 94 P.3d 624 (Colo. 2004) (records containing sexual assault victims' private information inadvertently released, repeatedly, by court personnel despite court protective orders prohibiting disclosure).

C. Rape Shield, HIPAA, Crime Victims Rights Laws and Other Avenues to Protecting A Victim's Records

State and federal privilege laws are usually the centerpiece of any effort to defeat a request for a victim's confidential information. But, a victim may not always be able to avail herself of this defense (*e.g.*, because there is no applicable privilege or because the privilege was waived). If no state or federal privileges apply, look for other grounds on which to object to disclosure of the victim's records. These may include a common law privilege, constitutional right to privacy, crime victims' rights, public policy argument, agency regulations, funding requirements, etc. In addition, you may be able to protect your client's privacy if the request for information was not properly executed.

This section outlines a variety of approaches to protecting victim privacy. It also highlights some areas where victims' records are especially at risk for disclosure. (As noted in the introduction, this section does not address electronic privacy issues. Documents addressing electronic privacy issues for victims may be accessed on VAWnet at new.vawnet.org/category/index_pages?category_id=93 and through the National Network to End Domestic Violence's Safety Net Project (www.nnedv.org).

1. Rape Shield Statutes

A victim's sexual conduct prior to the assault, and her sexual activity subsequent to it, is often the subject of intense scrutiny. Only the former, prior sexual conduct, including prior sexual assaults, is generally protected by state laws known as "rape shield" laws."

Rape shield laws prohibit a victim's previous sexual history or conduct from being admitted as evidence in a criminal and/or criminal case. The majority of states and the federal government have enacted rape shield laws.¹⁴⁰ The legislative purpose of these

¹⁴⁰ See, *e.g.*, **Alabama:** ALA. CODE § 12-21-203(b) (evidence relating to the past sexual behavior of the victim shall not be admissible as direct evidence or on cross examination of the victim or other witnesses); **California:** CAL. EVID. CODE § 1103(c)(1) & (2) (opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct or any such evidence is not admissible to prove consent, nor is evidence of the manner in which the victim was dressed at the time of the assault); **Florida:** FLA. STAT. § 794.022(2) & (3) (evidence of prior consensual sexual activity between victim and any person other than offender is not admissible, and reputation evidence relating to a victim's prior sexual conduct or evidence presented for purpose of showing the manner of dress of victim at the time of assault is not

statutes is to ensure that the focus of the trial remains on the sexual assault and the defendant's behavior, rather than the victim's past sexual activity.¹⁴¹ While a victim's pre-assault sexual history may be protected by sexual assault shield laws, her post-assault sexual activity will generally be deemed admissible as impeachment evidence.¹⁴²

Although most states have enacted sexual assault shield statutes, there are significant exceptions to these laws. The most common exceptions include the admissibility of: (1) specific sexual acts that occurred with the assailant within a reasonable time period before and after the alleged assault;¹⁴³ (2) specific sexual acts that

admissible); **Illinois**: 725 ILL. COMP. STAT. 5/115-7(a) (the prior sexual activity or reputation of the victim is not admissible); **Massachusetts**: MASS. GEN. LAWS ch. 233, § 21B (evidence of the reputation of the victim's sexual conduct and specific instances of the victim's sexual conduct are not admissible); **New York**: N.Y. CRIM. PROC. LAW § 60.422 (evidence of a victim's sexual conduct shall not be admissible); **Ohio**: OHIO REV. CODE ANN. § 2907.02(D) (evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admissible); **Pennsylvania**: 18 PA. CONS. STAT. ANN. § 3104 (specific instances of a victim's past sexual conduct, opinion evidence of a victim's past sexual conduct, and reputation evidence of a victim's past sexual conduct are not admissible); **South Dakota**: S.D. CODIFIED LAWS § 23A-22-15 (evidence of specific instances of a victim's prior sexual conduct shall not be admitted nor reference made thereto before jury or jury panel without a preliminary hearing to determine the relevancy and materiality of the evidence); **Texas**: TEX. R. EVID., Rule 412 (reputation or opinion evidence of the past sexual behavior of a victim is not admissible; evidence of specific instances of the victim's sexual behavior is not admissible); **Washington**: WASH. REV. CODE § 9A.44.020 (evidence of the victim's past sexual behavior including, but not limited to, the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and inadmissible to prove consent). *See also* FEDERAL RULE OF EVIDENCE 412.

¹⁴¹ *See generally*, Shacara Boone, *New Jersey Rape Shield Legislation: From Past to Present – the Pros and Cons*, 17 WOMEN'S RTS. L. REP. 223, 223 n.6, 225 (1996). *See also* Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK L. REV. 291 (2005).

¹⁴² *See* Richard I. Haddad, *Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases*, 39 COLUM. J.L. & SOC. PROBS. 185, 191 (2005); Josh Maggard, *Courting Disaster: Re-Evaluating Rape Shields in Light of People v. Bryant*, 66 OHIO ST. L.J. 1341, n.92, n.129 (2005).

¹⁴³ *See, e.g.*, **Alabama**: ALA. CODE § 12-21-203(c) (evidence relating to victim's past sexual activity that directly involves the participation of the defendant may be admitted after *in camera* review of evidence); **California**: CAL. EVID. CODE § 1103(c)(3) (prohibition of opinion evidence, reputation evidence, and evidence of specific instances of victim's sexual conduct does *not* apply to victim's sexual conduct with defendant); **Florida**: FLA. STAT. § 794.022(2) (statute only excludes evidence of prior consensual sexual activity between victim and *any person other than offender*) (emphasis added); **Illinois**: 725 ILL. COMP. STAT. 5/115-7(a) (evidence of victim's past sexual activity with the accused may be admitted if offered by defendant on issue of whether victim consented); **Massachusetts**: MASS. GEN. LAWS ch. 233, § 21B (evidence of a victim's past sexual conduct with the accused may be admissible); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence of victim's prior sexual conduct admissible if it proves or tends to prove specific instances of victim's prior sexual conduct with the accused); **Ohio**: OHIO REV. CODE ANN. § 2907.02(D) (evidence of prior sexual activity with the accused may be admissible); **Pennsylvania**: 18 PA. CONS. STAT. ANN. § 3104 (allows use of evidence of victim's past sexual conduct with the defendant where consent of the victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence); **Texas**: TEX. R. EVID., RULE 412 (allows use of evidence of specific instances of past sexual behavior with

may otherwise explain injuries and physical characteristics alleged to be the result of the assault;¹⁴⁴ and (3) specific facts that allegedly demonstrate a victim's motivation to lie.¹⁴⁵ Most statutes also allow for a general exception to inadmissibility when, in the court's discretion, the probative value of the evidence outweighs any prejudicial effect.¹⁴⁶

It is important to note that sexual assault shield statutes are rules of *admissibility*, not outright privacy protections. As such, they do not prohibit the defense in a civil or criminal case from investigating a victim's sexual history or, in a criminal case, the compulsory discovery of such evidence if it is in the state's possession. The information may still be acquired, even if it is inadmissible as evidence or for consideration during the civil or criminal trial.¹⁴⁷

the accused offered on the issue of consent); **Washington**: WASH. REV. CODE § 9A.44.020 (evidence of past sexual behavior may be admissible when the perpetrator and victim have engaged in sexual intercourse with each other in the past and when past behavior is material to the issue of consent).

¹⁴⁴ See, e.g., **Florida**: FLA. STAT. § 794.022(2) (evidence of prior consensual sexual activity by the victim may be admitted after *in camera* review if used to prove that the defendant was not the source of semen, pregnancy, injury, or disease); **Massachusetts**: MASS. GEN. LAWS ch. 233, § 21B (evidence of victim's prior sexual conduct may be admitted after *in camera* review to show the cause of any physical feature, characteristic or condition of the victim); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence of prior sexual conduct may be admissible if it rebuts the prosecution's evidence which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim); **Ohio**: OHIO REV. CODE ANN. § 2907.02(D) (evidence of prior sexual activity may be admissible if it involves evidence of the origin of semen, pregnancy or disease); **Texas**: TEX. R. EVID., RULE 412 (evidence of prior sexual activity may be used to rebut or explain scientific or medical evidence introduced by the State).

¹⁴⁵ See, e.g., **California**: CAL. EVID. CODE § 1103(c)(5) (nothing in sexual assault shield statute makes inadmissible evidence offered to attack the credibility of victim as provided in CAL. EVID. CODE § 782; CAL. EVID. CODE § 782 (provides review and admissibility procedure for evidence of prior sexual activity used to attack the victim's credibility); **Massachusetts**: *Commonwealth v. Sa*, 790 N.E.2d 733, 737 (Mass. App. Ct. 2003) (interpreting MASS. GEN. LAWS ch. 233, § 21B to allow evidence of prior sexual activity to show victim's bias or motivation after *in camera* review); **Texas**: (evidence may be admitted that relates to the motive or bias of the alleged victim).

¹⁴⁶ See, e.g., **California**: CAL. EVID. CODE § 1103(c)(2) (evidence of the manner in which the victim was dressed at the time of the commission of the offense may be allowed if the court determines it to be relevant and admissible in the interest of justice); **Illinois**: 725 ILL. COMP. STAT. 5/115-7(b) (evidence used for impeachment may be used if the court determines that the evidence is relevant and the probative value outweighs the danger of unfair prejudice); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence may be admissible if after an *in camera* hearing the court finds it relevant and admissible in the interests of justice); **Texas**: (evidence of specific instances of a victim's past sexual behavior is admissible if its probative value outweighs the danger of unfair prejudice); **Washington**: WASH. REV. CODE § 9A.44.020 (evidence regarding the past sexual behavior of the victim may be admissible if relevant to the issue of the victim's consent, as long as the probative value of the evidence is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice).

¹⁴⁷ See, e.g., REVISED CODE OF 9A.44.020 (in a sexual assault case, "evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for

Moreover, because sexual assault shield statutes govern the admission of evidence in court, their protections do not extend outside the courtroom. Therefore, if the assailant spreads salacious information about the victim’s past sexual behavior, there is no recourse under rape shield laws.

[CHECK YOUR STATE’S LAW: It is important to assess, at the pre-trial stage, whether and to what extent your jurisdiction’s sexual assault shield law applies. Research your sexual assault shield law, paying particular attention to the exceptions within the statute, so you can best advise your client about the level of protection she is likely to be afforded.]

[PRACTICE TIP: If the defense is making statements about the victim that are likely to damage her reputation and bias the jury, consider whether to request that the court issue a “gag order” prohibiting the parties (and anyone under their control) from discussing the case in public. See Section 7, below, on Common Torts Remedies (and Defenses thereto): Slander, Defamation, and Invasion of Privacy.]

2. HIPAA, Crime Victims’ Rights Laws and Other Constitutional and Statutory Privacy Protections

Depending on your jurisdiction, additional general crime victim rights laws and sexual assault – specific privacy protections may be available to protect the victim. For example, some states’ laws prohibit disclosure of a sexual assault victim’s and/or a minor’s identifying information in legal pleadings, court testimony, court records, police reports,¹⁴⁸ and other public records. The type of information encompassed by these

promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim”); WASHINGTON EVIDENCE RULE 412 (evidence “offered to prove that any alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim’s sexual predisposition is not is not admissible in any civil proceeding” unless it falls within a statutory exception).

¹⁴⁸ See, e.g., **Alaska**: ALASKA STAT. § 12.61.140 (exempts from public inspection and disclosure the portion of court records and police records containing the name of the victim, except with the consent of the prosecuting court); **California**: WEST’S ANN. CAL. PENAL CODE § 293 (prevents members of law enforcement agencies, not the prosecution, from making public the name and address of a reported sex offense victim who requests anonymity, except to other authorized agencies, including the public defender); **Florida**: FLA. STAT. § 92.56 (under certain circumstances, exempts from public disclosure court records and

statutes may include the name of the victim as well as her address, phone number, place of employment and other identifying information.¹⁴⁹ To protect victims' names in legal records and proceedings, some states' laws allow the use of pseudonyms or redaction of identifying information pertaining to the victim.¹⁵⁰ State statutes may also protect the privacy of some sexual assault victims, such as minors, by allowing court proceedings and trials in sexual assault cases to be closed to the public.¹⁵¹

In addition to sexual assault-specific privacy protections, a victim may also be able to avail herself of privacy protections that extend to crime victims generally or to the public at large. For example, there are heightened privacy protections for alcohol or drug

testimony that reveal a victim's photograph, name, or address); **Michigan**: M.C.L.A. 780.558 (prohibits the victim's home and work addresses, and home and work telephone numbers from being a part of the court file or ordinary court documents unless contained in a transcript of the trial or used to identify the place of the crime). For a state-by-state review of the privacy rights of victims of violence against women, see the National Center for the Prosecution of Violence Against Women, APRI website, *available at* www.ndaa.org/apri/programs/vawa/statutes.html.

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., **Alaska**: ALASKA STAT. § 12.61.140 (victim's initials, rather than full name, must be used on court records); **California**: CAL. PENAL CODE § 293.5 (upon a victim's request, the victim's name may be changed to the pseudonym of Jane or John Doe in all records and proceedings); see also *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 14 (Ct. App. 1997); **Florida**: FLA. STAT. § 92.56 (state may use pseudonym instead of victim's name); **Massachusetts**: M.G.L. c. 265 § 24C (sections of police and court records identifying the name of a sexual assault victim are not considered public records and disclosure of a sexual assault victim's identity is an unlawful act).

¹⁵¹ See, e.g., **California**: WEST'S ANN. CAL. PENAL CODE § 868.7 (magistrate may close the examination of a minor who is a complaining witness to sex offense, "where testimony before the general public would be likely to cause serious psychological harm to the witness and where no alternative procedures . . . are available to avoid the perceived harm."); **Illinois**: 725 ILCS 5/115-11 (in cases involving sex offenses against victims under the age of 18 years, the court may exclude from the proceedings while the victim is testifying, all persons who do not have a direct interest in the case *except the media*); **New York**: MCKINNEY'S JUDICIARY LAW § 4 (in proceedings and trials for sexual assault and assault with intent to commit sexual assault, criminal sexual acts (and some other crimes), the court may, in its discretion, exclude the public from the courtroom); **Michigan**: M.C.L.A. 600.2163a (upon a finding that special arrangements are "necessary to protect the welfare" of a minor or disabled victim/witness in certain criminal proceedings, the court shall exclude from the courtroom during the victim's testimony all persons not necessary to the proceedings).

treatment¹⁵² or other health-related records.¹⁵³

The Health Insurance Portability and Accountability Act¹⁵⁴ (HIPAA) provides privacy protection for certain medical records. HIPAA does not guarantee the privacy of all medical records, however, because many medical records are in the possession of non-HIPAA regulated institutions. For example, most rape crisis centers do not fall within the definition of a HIPAA provider. Financial, school, and employment institutions often possess medical records, too. Credit card companies, insurance institutions and other agencies may have access to medical information about a victim, too. If a victim submits medical information in support of a request for employment leave, the employer's files are not governed by the HIPAA regulations. (See Chapter 12 for additional discussion of HIPAA. Additional information on HIPAA and privacy is *available online* at the Privacy Rights Clearinghouse, *available at* www.privacyrights.org/fs/fs8-med.htm.)

Thirty-three jurisdictions have passed constitutional amendments specifically affording rights to victims of crime.¹⁵⁵ The remaining jurisdictions have passed legislation establishing statutory rights for victims. Although these crime victims' rights laws vary with respect to victims' standing, enforcement rights, and remedies, it is

¹⁵² See, e.g., **Connecticut**: CONN. GEN. STAT. § 17a-688 (addiction service providers may not disclose treatment records unless the court allows their disclosure "for cause shown."); **Ohio**: OHIO REV. CODE ANN. § 3793.13 (records or information from an alcohol/drug treatment program shall be kept confidential, and disclosed only under express circumstances); **Massachusetts**: M.G.L. c. 111B, § 11 (record of treatment for alcoholism afforded each patient shall be confidential and shall be made available only upon proper judicial order); M.G.L. c. 111E, § 18 (record of drug rehabilitation treatment shall be confidential and shall be made available only upon proper judicial order); **Nevada**: NEV. REV. STAT. § 458.280 (treatment facility records are confidential and must not be disclosed without patient's consent, except as otherwise provided in statutes); **Pennsylvania**: 71 PA. CONS. STAT. ANN. § 1690.108 ("All patient records and all information contained therein relating to drug or alcohol abuse or drug or alcohol dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation, or drug treatment center shall remain confidential and may be disclosed only" as statutorily provided).

¹⁵³ See, e.g., **Indiana**: IND. CODE § 34-43-1-12 (medical records "concerning a dangerous communicable disease" are confidential and "will only be provided under a court order after in camera review"); **Massachusetts**: M.G.L. c. 111, § 119 (records pertaining to venereal diseases shall not be public records, and the contents thereof shall not be divulged except upon proper judicial order or to a person whose official duties, in the opinion of the commissioner, entitle him to receive information contained therein); **Wisconsin**: WIS. STAT. § 252.11 ("Reports, examinations and inspections and all records concerning sexually transmitted diseases are confidential . . . and may not be divulged except as may be necessary for the preservation of the public health," etc.).

¹⁵⁴ 45 C.F.R. Parts 160, 162 and 164 (2007).

¹⁵⁵ See www.ncvc.org/ncvc/main.aspx?dbID=DB_Amendments128 or www.ncvli.org/ncvliblibrary.html for links to each jurisdiction's crime victim rights laws.

possible that they may provide an additional avenue for protecting a victim’s privacy right. (See Chapter 14 for additional discussion of crime victims’ rights.) Finally, in some states, the state constitution includes a specific right to privacy. Depending upon how this right has been interpreted in case law, it too may afford some privacy protection to a sexual assault victim.¹⁵⁶

[CHECK YOUR STATE’S LAW: Review your jurisdiction’s statutes and constitution to determine whether your client is entitled to statutory privacy protections as a general matter or, specifically, as a victim of a sexual assault or violent crime.]

3. Sealing Records (or Impoundment)¹⁵⁷ and Closed Courtrooms to Enhance Victim Privacy

If your client has submitted documents to the court (such as a request for a protection order or an affidavit from the victim or a support person) or otherwise appeared in court on matters pertaining to the sexual assault, and is now concerned about her privacy, consider whether to ask the court immediately to impound or seal the documents. Although documents filed in a court action are generally available to the public, not every document – or every item in a document – needs to be publicly

¹⁵⁶ See, e.g., **Alaska**: ALASKA CONST. ART. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed.”); **Florida**: FLA. CONST. ART. I, § 23 (“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein.”); **Louisiana**: LA. CONST. ART. I, § 5 (“Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.”); **Massachusetts**: M.G.L. c. 214 § 1B (“A person shall have a right against unreasonable, substantial or serious interference with his privacy.”); **Montana**: MONT. CONST. ART. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”); **Rhode Island**: R.I. GEN. LAWS § 9-1-28.1 (“every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually”); **Wisconsin**: WIS. STAT. § 995.50 (right of privacy recognized and interpreted). See also, *Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980) (“there is and should be such a right which protects against any wrongful or unseemly intrusion into what should properly be regarded as one’s personal affairs”).

¹⁵⁷ The Victim Rights Law Center is grateful to the law firms of Goodwin Procter LLP and Foley Hoag LLP for their commitment to protecting the privacy rights of sexual assault victims in the Boston area, with special appreciation to Colin Zick, Esq., and Brenda Sharton, Esq., for their efforts. This section is adapted from portions of briefs the firms prepared in *pro bono* cases on behalf of sexual assault victims.

available.¹⁵⁸ Depending on the circumstances, protecting a victim’s privacy interests may outweigh the public’s interest in disclosure.¹⁵⁹ The decision to seal all or part of a court record “lies within the sound discretion of the district court, after balancing the need for public access to the record and the parties’ desire for confidentiality.”¹⁶⁰

A motion to exclude the public from the court is another possible remedy for a victim seeking to maintain her privacy. If you are considering filing a motion to close the courtroom, however, be prepared to meet a high standard of proof; a court lacks the authority to close a courtroom unless and until it has found that the public’s right to access the courts is outweighed by “overriding” government interests and the closure is narrowly tailored to serve that interest.¹⁶¹

Finally, attorneys and victim advocates must remain attentive to what information is available in the court file, including documents submitted by the defendant. As necessary, be prepared to file requests to keep personal information private including a Motion to Seal the Record, or a portion thereof, in a civil or criminal case. In especially sensitive cases (*e.g.*, cases involving a minor victim, a high profile victim or defendant, or especially gruesome or disturbing facts) a Motion to Close the Hearing should also be considered. An attorney may also want to file a motion requesting that all sensitive or private documents be returned to the victim or the court for safekeeping to guard against their inadvertent (or deliberate) release.

The advent of courts’ increasing use of technology presents opportunities to both compromise and enhance victim privacy. For example, courts’ use of closed circuit camera or videoconferencing for pre-trial hearings of defendants in custody may spare a victim from having to see her assailant in person. At the same time, courts’ decisions to

¹⁵⁸ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (“If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.”); *The Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 604, 608 (2000).

¹⁵⁹ *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509-10 (1984); *Cox*, 420 U.S. at 496; *Globe Newspaper Co., Inc. v. Clerk of Suffolk County Superior Court*, 2002 WL 202464, at *4 (Mass. Super. Feb. 4, 2002).

¹⁶⁰ *See Doe v. Nat’l Railroad Passenger Corp.*, 1997 WL 116979 (E.D. Pa. Mar. 11, 1997).

¹⁶¹ *Press-Enterprise Co. v. Superior Court*, *supra* note 159, 478 U.S. 1, 9, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

make their electronic court records available to the public present profound risks for victims' safety and privacy violations. Increasingly, courts across the country are implementing web access to public records. While many courts are limiting access to private or sensitive information,¹⁶² errors occur.¹⁶³ Because the risk of error is great and the consequences grave, attorneys and advocates should be especially cautious if the court's records are accessible online.¹⁶⁴

Practitioners should be aware of the level of access generally available for court records in a given jurisdiction (*i.e.*, what records are available online, who can access those records electronically), and monitor how access is being limited. Counsel for a victim should understand the process for seeking to seal records, and check, and check again, to ensure that they remain sealed, and that the sealing of records is being consistently followed by the court when subsequent documents are filed which may contain sensitive information.

4. Identify and Enforce Service, Notice, and Standard of Proof Requirements

Procedural irregularities and errors account for many unnecessary privacy violations. Pay close attention to how and to whom a subpoena was delivered. Review any applicable state, local or supplementary court rules to ensure that service was properly accomplished. For example, was a subpoena *duces tecum* served on the custodian of records? Was the certificate of service signed and returned to the court? Did the person who effected the service have capacity to serve the subpoena? Does the law require notice to the victim and if so was such notice provided?¹⁶⁵ Ensuring that each

¹⁶² See Carlson & Steketee, *Public Access to Court Records: Implementing the CCJ/COSCA Guidelines Final Project Report*, October 15, 2005, available at [www.courtaccess.org/modelpolicy/PublicAccessFinal Report %20.pdf](http://www.courtaccess.org/modelpolicy/PublicAccessFinal%20Report%20.pdf).

¹⁶³ See, *e.g.*, *People v. Bryant*, 94 P.3d 624 (Colo. 2004) (court records containing personal and private information about the victim accidentally released by court personnel on multiple occasions).

¹⁶⁴ VAWA 2005 addressed the issue of online records. See 28 C.F.R. 20 (2006).

¹⁶⁵ For a more in-depth discussion regarding how to respond to and challenge subpoenas, see Jessica E. Mindlin, Esq. & Liani Jean Heh Reeves, Esq., *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions*, at 28 (National Crime Victim Law Institute, 2005). Available at www.lclark.edu/org/ncvli/objects/L&C77576confidentialitybook.pdf.

of these procedural requirements was satisfied is another tool for protecting your client's privacy.

Determine what standard of proof the court will employ to determine whether or how a privilege may be pierced.¹⁶⁶ (See www.ndaa-apri.org/apri/programs/vawa/statutes.html for links to states' privilege and privacy statutes.) Make sure that your client's due process and procedural rights are not abridged.

[PRACTICE TIP: If you anticipate that a rape crisis program or other provider will be served with a subpoena, alert the program to this possibility. Hopefully, the program already has in place a subpoena response policy and staff is familiar with that policy. This is a good time to confirm the agency's subpoena response procedures and to reiterate that the victim's records are confidential and/or privileged, and not to be released.]

5. Federal Education Laws and Victim Privacy

Younger women and teens are at particularly at risk for sexual assault.¹⁶⁷ Victims who are in school confront additional, and some unique, challenges if the assault occurred at school, was perpetrated by a classmate, or is otherwise interfering with school work and school-related activities. A victim may choose to pursue school-based disciplinary action against an assailant and/or may seek student housing, employment, or academic accommodation. Pursuing any of these remedies usually leads to the disclosure

¹⁶⁶ For example, in Massachusetts, Rule of Civil Procedure Rule 45 requires that, if a third party is served with a subpoena for sensitive and/or privileged records (*i.e.*, any record which would subject the patient to criticism, embarrassment, or serious loss), the provider third party may contest it by sending a letter to the requesting party objecting to the subpoena. Sending the letter shifts the burden onto the requesting party to secure a court order for the production of the documents. The requesting party will then be required to: explain the need for any sensitive or privileged records; be aware of statutory protections and exceptions for certain records; and explain how these records fit into an exception. Be sure to research the rules of procedure in your jurisdiction to determine the proper procedure for issuing and serving a subpoena.

¹⁶⁷ Adolescent females age 16-19 are four times more likely than the general population to report rape or sexual assault and attempted sexual assault. See *Sexual Violence and Adolescents*, VAWNET, www.vawnet.org, citing American Academy of Pediatrics, *Care of the Adolescent Sexual Assault Victim*, PEDIATRICS, 107(6), 1476 (2001).

of significant personal information about the victim. (See Chapter 9, Education Rights for Sexual Assault Victims, for a comprehensive discussion of students' rights.)

The Family Educational Rights and Privacy Act (FERPA) prohibits educational institutions from sharing information in a student's record with any person or institution without the student's written permission (her parent or legal guardian's permission, if she is under the age of 18).¹⁶⁸ This includes disclosure to other students, faculty and staff members not involved in a student matter, and third parties outside the institution.¹⁶⁹ If a student's records are requested, the school must notify the student who may then deny or grant the access requested. There are exceptions in FERPA, however, for legal subpoenas. FERPA allows records to be disclosed pursuant to a subpoena issued by a court in a civil action, upon notification to the student.¹⁷⁰ (These are different from subpoenas that are issued directly by defense counsel.) If a school receives a court-issued subpoena in connection with a criminal prosecution, FERPA requires disclosure, even without student notification.¹⁷¹

FERPA also permits a postsecondary institution to disclose to any alleged victim of a crime of violence (as defined in 18 U.S.C.), or a victim of a nonforcible sexual assault, the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator regarding the alleged offense.¹⁷² It also allows the hearing results to be released if the accused student is found to have violated the school's rules or policies.¹⁷³ If the results of the hearing are released, however, the name of any other student, such as a victim or witness, may be released only with that student's written consent.¹⁷⁴

¹⁶⁸ 20 U.S.C. § 1232g(b); 20 U.S.C. § 1232g(d).

¹⁶⁹ 20 U.S.C. § 1232g(b).

¹⁷⁰ 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31 (2005).

¹⁷¹ *Id.*

¹⁷² 20 U.S.C. § 1232g(b)(6)(A).

¹⁷³ 20 U.S.C. § 1232g(b)(6)(B).

¹⁷⁴ 20 U.S.C. § 1232g(b)(6)(C)(ii).

FERPA does not allow any civil action for damages by the student whose privacy has been violated. However, if the violation has not yet occurred but is imminent, a victim may move for a civil injunction enjoining the school from sharing information.

[PRACTICE TIP: Although FERPA protects the privacy of student records, it does not relieve an educational institution of its Title IX obligation to investigate a report of sexual assault. (*See* Chapter 9).]

6. Health Laws, HIPAA and Victim Privacy

A victim's health and medical records generally contain private, personal information, independent of any information she disclosed about the sexual assault. With exceptions, HIPAA prohibits health providers from sharing patient information with third parties without written authorization from the patient.¹⁷⁵ For example, if a victim applies for accessible public housing due to a disability resulting from the sexual assault, or if she seeks accommodations or leave from her employment based on medical or disability concerns, her potential landlord or her employer may not gain access to her private medical records without her permission. Similarly, private investigators or defense attorneys seeking access to her records should also be denied permission (absent the victim's written consent).

A victim/patient is not always notified if the prosecutor or defendant has requested her medical records without a release. If the victim has any reason to believe that her confidential or privileged records may be requested, you may want to alert the provider to this possibility and ask that the provider notify you immediately if the records are requested. This is especially important if the records may be subpoenaed, as HIPAA has an exception for court-issued subpoenas.¹⁷⁶ If a health provider or records holder receives a court-issued subpoena, it may disclose those records, even without notice to the patient.¹⁷⁷

¹⁷⁵ 45 C.F.R. § 164.508.

¹⁷⁶ 45 C.F.R. § 164.512(e).

¹⁷⁷ *Id.*

HIPAA also contains an exception for subpoenas not accompanied by court order. This exception allows a medical provider to disclose confidential records without notice to the patient once the provider receives satisfactory assurance that the patient received prior notice of the request and the opportunity to object to the request.¹⁷⁸ In light of this exception, if your client wishes to preserve the privileged and confidential nature of her medical records, it is important that you notify her healthcare providers immediately of this intent and clearly state her objection to any requests for her health records. (See Appendix D for sample letter.)

[KNOW YOUR STATE’S LAW: It is important to know what the law in your jurisdiction requires regarding release of patient or victim records and to respond accordingly.]

7. Common Torts Remedies (and Defenses thereto): Slander, Defamation, and Invasion of Privacy

Tort claims related to privacy invasions are an essential consideration in sexual assault cases. A victim may consider filing a slander, defamation, or invasion of privacy suit to protect her privacy,¹⁷⁹ or she may be threatened or served with a lawsuit alleging that she committed such acts. Either way, the same legal standards will apply.¹⁸⁰

A defendant may implicitly or explicitly threaten legal action (or actually file a suit) against a victim for defamation or slander. Most often, these suits are filed in the hope of intimidating a victim into withdrawing her allegations. Also known as SLAPP¹⁸¹ suits (Strategic Lawsuits Against Public Participation), victims are more likely to be vulnerable to threats of defamation or slander if no criminal charges have been or will be filed.

¹⁷⁸ *Id.*

¹⁷⁹ As previously noted, attorneys funded through the Office on Violence Against Women’s Legal Assistance to Victims grant program are prohibited from representing victims in tort suits.

¹⁸⁰ For an overview of defamation law and the related tort of invasion of privacy (or, public disclosure of private facts), see RESTATEMENT OF THE LAW (SECOND) TORT (1977), and SACK ON DEFAMATION, 3rd Edition (2006).

¹⁸¹ For a summary of SLAPP suits against victims of sexual assault, see JESSICA E. MINDLIN, ESQ. & LIANI JEAN HEH REEVES, ESQ., RIGHTS AND REMEDIES: MEETING THE CIVIL LEGAL NEEDS OF SEXUAL VIOLENCE SURVIVORS (2005) at 128, available online at www.lclark.edu/org/nevli/objects/L&C77576civilbook.pdf.

A victim may have a variety of defenses that can be raised in response to a SLAPP or civil tort suit, including the defenses of truth and privilege. A victim may also be able to file her own tort suit, with counterclaims, against the defendant. A victim's response to a tort or SLAPP suit may include the affirmative defense that truth is a complete defense to an action for defamation (although not to invasion of privacy).¹⁸²

To the extent the claim relies on a victim's statements to law enforcement, the victim's statements may be governed by a qualified privilege, and thus not defamatory unless made recklessly or with malice.¹⁸³

[PRACTICE TIP: If there is any potential for an affirmative or defensive tort claim and you are not an expert in tort law, seek co-counsel who specializes in defamation actions to assist with the case. Limited *pro bono* assistance may be more readily available in this practice area.]

D. Some Practical Suggestions

This section outlines some practical suggestions for protecting your client's privacy, such as attending client interviews (so that you can help her know when to object or decline to answer), securing independent victim representation, and recruiting *pro bono* assistance. It also addresses privacy and communication issues that may arise in the context of community collaborations.

1. Attend Interviews with Your Client

Privilege violations routinely occur during school interviews, law enforcement investigations, depositions, and other victim interviews. Police, prosecutors, or school personnel may ask the victim questions that often lead to inadvertent disclosures by the victim. For example, a detective may notice the victim seems depressed and ask, "Are

¹⁸² SACK ON DEFAMATION, *supra* note 180, § 12.4.

¹⁸³ See, e.g., *Correllas v. Viveiros*, 410 Mass. 314, 322-323 (1991) (affirming the dismissal of both a defamation claim and a claim for intentional infliction for emotional distress because the alleged defamatory statements were privileged reports made to police); *Dijkstra v. Westerink*, 168 N.J. Super. 128, 136 (1979) (affirming dismissal of claims against assault victim for libel, slander, malicious use and abuse of process, and invasion of privacy because victim's statements identifying plaintiff to police were qualifiedly privileged and there was no evidence that defendant made statements with actual malice).

you seeking counseling?” Or, a school official may enquire whether the victim saw her physician and what the doctor had to say about an injury. While well-intentioned, perhaps, such inquiries may be problematic, especially if the victim’s answer involves disclosure of a private conversation or communication. An innocent exchange may result in a victim’s counseling or medical records being released to a criminal defendant.¹⁸⁴ Your presence may deter such questions or, at the very least, allow you to caution your client before she responds. (See Chapter 14, Criminal Justice, and Chapter 9, Education Rights, for a more comprehensive discussion of protecting victim privacy in police and school-based interviews and hearings, respectively.¹⁸⁵)

2. Independent Legal Counsel for Victims in Criminal Proceedings

It is axiomatic that prosecutors represent the interests of the state and not the victim. Although, historically, prosecutors have taken some responsibility for protecting a sexual assault victim’s privacy interests, prosecutors’ and victims’ interests in a criminal trial often diverge. For example, a prosecutor may be anxious for a victim to comply with a court’s order rather than risk dismissal of a criminal case¹⁸⁶ or to secure a victim’s counseling records because they provide persuasive evidence that she was sexually assaulted, even if the victim wants to keep such records private (this may be especially important to a victim if the records will reveal personal information that she has never disclosed to family or friends). Moreover, discovery¹⁸⁷ rules require that law

¹⁸⁴ See, e.g., *State v. Denis L.R.*, 270 Wis. 2d 663, 672, 678 N.W.2d 326, 331. (Wis. App., 2004) (trial court not required to consider mother’s lack of intention to waive daughter’s counselor-patient privilege; knowledge or lack of the knowledge of the privilege is irrelevant, and communication need only be volitional).

¹⁸⁵ See also Douglas E. Beloof, Esq., Jessica E. Mindlin, Esq., & Liani Jean Heh Reeves, Esq., *A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence* (2005), available at www.lclark.edu/org/ncvli/objects/L&C77576criminalbook.pdf (last accessed January 19, 2007).

¹⁸⁶ See, e.g., *People v. Misbrenner*, Case No. 04-CR 25847-01 (5th Mun. Dist. Ct., Cook Cty., 2006) (judge reconsidered his threat to hold victim in contempt for refusing to watch a videotape in which the defendants recorded their sexual acts and other activity with the victim, where she had no memory of the incidents).

¹⁸⁷ For a discussion of the difference between Discovery and Production in a criminal case, see K. Montagriff, *Discovery versus Production: There Is A Difference*, available at www.ncvli.org/objects/NewsletterSpring06.pdf (last accessed January 20, 2007).

enforcement agencies and prosecutors (and their victim assistance advocates¹⁸⁸) turn over to the defense any exculpatory or impeachment evidence, including a victim's personal records. Because the prosecutor cannot and does not represent the victim, a victim cannot have a privileged, attorney-client relationship with the prosecutor or anyone in his or her employ.

[PRACTICE TIP: It can be confusing to a victim when her communications with a sexual assault, rape crisis, or other community-based victim assistance advocate are privileged but her communications with a prosecutor's or a law enforcement agency's victim assistance advocate are not. It is critical that the victim understand this distinction so that she can make informed decisions about what information is safe to disclose and to whom. Although advocates or victim witness assistance personnel employed by a law enforcement or prosecution agency also provide assistance and support, their legal capacity to be a safe repository of confidential and sensitive information is limited.]

3. Recruit *Pro Bono* Assistance

Protecting victims' privacy can require specialized knowledge, including an understanding of privilege laws, privacy statutes, victims' and defendants' constitutional rights, crime victims' rights, public policy guidelines, professional and ethical obligations, and sexual assault programs funding regulations, and more. It can also be time consuming, and thus a significant burden on a non-profit advocate or solo practitioner. For this reason, it can be very helpful to identify free or *pro bono* resources in your community, or nationally, who can help you advocate for your client.¹⁸⁹

¹⁸⁸ See, e.g., KY. R. Evid. 506 N.M. R. ANN. 5-501; ARIZ. REV. STAT. ANN. § 8-409 (2006); ALASKA STAT. § 24.65.120 (2006); *But see* ALASKA STAT. § 24.65.200 (2006). Advocates employed with non-profit agencies such as sexual assault crisis centers, domestic violence programs, or other non-governmental organizations are not subject to these same discovery rules, as they are not an arm of the state or a party to the case, and thus are not governed by the government's discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁸⁹ The Victim Rights Law Center provides free legal representation to sexual assault victims in Massachusetts. The VRLC also provides sexual assault legal technical assistance to U.S. Department of Justice's Office on Violence Against Women grantees. Although not sexual assault-specific, the Office for

Sexual assault programs, coalitions, and national advocacy organizations can sometimes offer direct assistance or help to identify additional resources. *Amicus* briefs at the appellate level have proven to be persuasive to courts on these issues, and a state coalition or national advocacy organizations may be able to assist you by locating attorneys and firms to help conduct legal research or write briefs, as well as individuals or organizations willing to sign on as *amici curiae*.¹⁹⁰

4. Community Collaborations Can Create Privacy Challenges

Provider participation in community collaborations (including coordinated community response teams or multidisciplinary teams, for example) can present a unique set of privacy challenges. Multidisciplinary teams may be in place to review agency actions in sexual assault cases. A coordinated community response team may want to review an individual client file to determine whether any systems in the community could have done more to prevent the sexual assault. As the victim's attorney or advocate, you may believe that a community agency might have useful information that would help the client's case. Although well-intentioned, informal communications among allied professionals, as well as close personal and professional relationships and common goals, sometimes result in confidentiality challenges and lead to inadvertent breaches of confidentiality and privilege.

Even among allies, client confidentiality must be maintained. If your client's case is subject to review by a coordinated community response or multidisciplinary team, or if you want to collaborate with a sexual assault agency on client representation, special care must be exercised to ensure that victim privacy is respected. Each provider who serves the victim is governed by a unique set of confidentiality rules and obligations. Narrowly crafted, time-limited, content-specific releases of information should always be

Victims of Crime currently provides funding for nine state and federal clinics to provide free legal assistance to crime victims in criminal cases. The clinics are located in Arizona (two clinics), California, Idaho, Maryland, New Jersey, New Mexico, South Carolina, and Utah, and focus on enforcing victims' rights in the criminal process. They are funded through the National Crime Victim Law Institute. See www.ncvli.org/demoproject.html for additional information.

¹⁹⁰ See *id.* Other organizations to consult include Legal Momentum (www.legalmomentum.org), the National Center for Victims of Crime, available at (www.ncvc.org), the National Sexual Violence Resource Center, available at (www.nsvrc.org), and the Victim Rights Law Center, available at (www.victimrights.org).

executed by the victim before information is released, even among community partners and allies. This is a best practice even if the providers may, as a matter of law, share information without a waiver. Even when each provider's communications are protected by a statutory privilege that allows the release of information without waiver, a client's informed consent should still be secured. If a release is not signed, and if there is no statutory protection, confidential information cannot and should not be released.

[PRACTICE TIP: A time-limited, written release of information should be executed only with a victim's informed consent. One helpful way of evaluating whether the consent is informed is to consider: "What would I want to know before deciding whether to release my personal information?" The issues to address may include:

- What information will be shared?
- Who will have access to the information that will be released?
- For how long will the release be valid?
- How will the information be safeguarded from inadvertent disclosure?
- May the release be revoked (and if so, how)?

A victim has the right to know the potential consequences, risks, options, and advantages and disadvantages associated with granting or withholding the release and the sharing of information.]

V. CONCLUSION

For a survivor, the violation of her privacy following a sexual assault – whether in the form of well-intentioned support, “gossip,” or inadvertent (or deliberate) privilege or other breaches – may be one of the most devastating and enduring harms. You can help to prevent this. Protecting victims' privacy requires both vigilance and action. As her advocate, you must honor the victim's privacy needs and decisions, even if you do not share her concerns or if you disagree with her decision to forego legal remedies for privacy reasons. Because each sexual assault and each victim is unique, there is no one method for protecting a victim's rights, but common needs include: alerting providers to

possible threats or likely privacy breaches; reviewing court files and filing appropriate motions to safeguard the information contained therein; attending client interviews; ensuring the use of narrow and time-limited releases; and educating allies, partners, and the victim about privilege, waiver, and informed consent.

The vast majority of sexual assault victims will never report a sexual assault to criminal or civil authorities, seek legal remedies, or receive justice from the legal system designed to serve and protect them, in part, because of privacy concerns. When a victim does take the risk to seek redress, it is both your burden and your privilege to defend her privacy interests. Your vigilance and advocacy may help ensure that she can safely access the services essential to her healing.

Chapter Four

MAKING YOUR CASE: ADDRESSING THE OVERARCHING ISSUES OF INTOXICATION, CREDIBILITY AND CONSENT¹⁹¹

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¹⁹¹ The Victim Rights Law Center thanks the authors of this chapter, Claire Harwell, Esq. and Angela Lehman, Esq. Thanks, too, to Dr. David Lisak, Ph.D., Susan H. Vickers, Esq. and Lydia Watts, Esq. for their contributions.

Despite thirty years of reform efforts, the thorny issue of whether a victim consented to sex remains at the heart of the matter in most sexual assault cases. The first question jurors, administrators, and the public generally ask is: “Did she consent?” What they’re really asking is: “Is the victim lying?”

As an attorney or advocate, you must be prepared to confront and address challenges related to the issue of victim consent and its ugly corollary, *i.e.*, that the victim isn’t being truthful. Physical, emotional, and expert evidence is critical in this regard, because the success of a civil, criminal, or administrative case often turns on the effectiveness of the evidentiary presentation on consent. Legal and other requirements notwithstanding, decision-makers of all kinds (*e.g.*, judges, jurors, landlords and public housing officials, employers, etc.) still look for corroboration to help bolster a victim’s credibility and to support her account of non-consensual sex.

Although consent is the most common defense in non-stranger sexual assault, neither criminal nor civil law provides a coherent definition of consent in the sexual assault context.¹⁹² A few colleges and universities have tried to produce more nuanced and rigorous definitions of consent, but these remain the exception rather than the rule.¹⁹³

¹⁹² Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 128–29 (1994) (“Consent is the defense most likely to result in an acquittal, and it is the defense most commonly used in acquaintance sexual assault cases,” despite the fact that most state legislatures have failed to actually define consent.).

¹⁹³ In 1996, Antioch College issued a sexual offense prevention policy which, with minor changes, remains in effect to this day. The policy attempted to define nonconsensual sexual conduct. It defines consent to sex as “the act of willingly and verbally agreeing to engage in specific sexual conduct.” ANTIOCH COLLEGE SEXUAL OFFENSE PREVENTION POLICY (2005) at 1, available at www.antioch-college.edu/Campus/sopp/SOPP2006%20.pdf (last visited 2/26/07). See also ANTIOCH COLLEGE CMTY GOV’T, SEXUAL OFFENSE PREVENTION & SURVIVOR’S ADVOCACY PROGRAM, ANTIOCH COLLEGE SURVIVAL GUIDE 2005-2006 (2005), available at www.antioch-college.edu/Campus/cg/ (last visited 2/26/07) (expounding on Antioch College’s Sexual Offense Prevention Policy). The Antioch Sexual Offense Prevention Policy provides:

- All sexual contact and conduct between any two (or more!) people must be consensual;
- Consent must be obtained verbally before there is any sexual contact or conduct;
- Silence is never interpreted as consent;
- If the level of sexual intimacy increases during an interaction (*i.e.*, if two people move from kissing while fully clothed, which is one level, to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before moving to that new level;
- If one person wants to initiate moving to a different level of sexual intimacy in an interaction, that person is responsible for getting the consent of the other person(s) involved before moving to that level;

Moreover, a single campus policy does not rise to the level of enforceable law, of course. For purposes of a civil or criminal prosecution any such standard for consent is wholly aspirational. In virtually every context in which you will be advocating for a victim, no such concept of consent will be in effect. In the courts, the *de facto* (although not *de jure*) burden will remain on the victim to explain how the sexual assault occurred and to demonstrate that she did not consent.

Within this very murky water, attorneys (and advocates, as appropriate) must be extraordinarily careful about how they present the facts regarding the issue of consent. This chapter will explain how attorneys and advocates can respond to challenges to a victim's credibility. It presents ideas for how to articulate a theory of the case that both bolsters victim credibility and demonstrates that the victim did not consent.

One of the overarching challenges in many cases involving consent is that the victim may have been voluntarily or involuntarily intoxicated at the time of the assault. (The assailant may have been intoxicated, too.) If this is the case, it is important to demonstrate: (1) how the victim's intoxication impaired her ability to consent; (2) that the assailant was aware of the victim's inability to consent; and/or (3) if applicable, that the assailant intentionally used alcohol or drugs to incapacitate the victim or render the victim vulnerable to the assault.

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- If you have a particular level of sexual intimacy before with someone, you must still be sure there is consent each and every time;
 - If you have a sexually transmitted disease, you must disclose this fact to a potential partner before engaging sexually;
 - If anyone asks you to stop a particular kind of sexual attention or behavior, you must stop it immediately no matter what your intentions are with the attention;
 - Don't ever make assumptions about consent; assumptions can hurt someone and get you in trouble. Consent must be clear and verbal (*i.e.*, saying, "Yes, I want to kiss you, too.").

ANTIOCH COLLEGE SURVIVAL GUIDE 2005-2006 AT 123-24.

The policy: (1) emphasizes the use of explicit verbal communication in request for and acceptance of an offer of sex; (2) *expressly* prohibits silence as a form of consent; and (3) requires that requests for (and assent to) intimacy must be renewed at every stage as sexual intimacy increases. The policy has been maligned as unworkable in the contemporary sexual environment. Nevertheless, the Victim Rights Law Center agrees with the fundamental principle of the policy and offers it as a conceptual model: to be consensual, intimacy must be accompanied by an affirmative and verbal assent.

I. THE ISSUE OF CONSENT

A. The Lack of a Common Definition of “Consent”

Stephen Schulhofer, in his book *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, first articulated the concept that interference with sexual autonomy should be illegal and codified and incorporated into the statutory framework, regardless of whether the interference was accomplished by force, threats, abuse of trust, exploitation of psychological or physical incapacity, intoxication, or exploitation of psychological or economic power or authority.¹⁹⁴ Yet, historically, neither criminal nor civil law has provided a clear definition of what constitutes sufficient consent to sexual contact. In both the civil and criminal arena, almost uniformly sexual assault laws fail to outline clearly when coercion crosses the line into lack of consent.

It is the attorney’s (or, as appropriate, the advocate’s) task to educate the decision-maker, and to address the issue of consent in the context of the specific case before the court, hearings officer or committee. It may be inescapable that the victim’s behavior (drinking alcohol), dress (wearing tight or revealing clothing), and conduct (voluntarily entering the defendant’s home or bedroom, permitting the door to be closed, engaging in what she believed would be limited sexual contact, etc.) will remain at the center of most cases. You will have to persuade the trier of fact not to be distracted by irrelevant facts that are manipulated to undermine a victim’s credibility, and not to succumb to the defendant’s effort to shift blame by focusing on the victim’s actions, rather than the perpetrator’s intention or misconduct.

B. Consent is Clearly Defined in Other Areas of the Law

In the absence of a clear legal definition of consent in a criminal sexual assault case, it may be useful and effective to analogize to other areas of law in which “consent” has been defined, and where the law regarding consent is both highly developed and refined. For example, under the Fourth Amendment, neither silence nor ambivalence

¹⁹⁴ STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW*, 99–113 (1998).

constitute consent.¹⁹⁵ Even when consent is affirmatively given, some Fourth Amendment cases courts have nevertheless concluded that the consent granted was not valid. The consent may be vitiated if, for example, it was obtained by the police through coercion based on the age and education of the subject, the subject's lack of understanding of his or her rights, or by wearing down the subject in a repetitive or psychologically coercive manner.¹⁹⁶

Similarly, silence and ambivalence do not constitute consent under the law of robbery, trespass, battery, or contract law. Consent in the form of passive submission fails as a defense to robbery, unless the owner of the property actively participates in the theft.¹⁹⁷ Thus, a "submissive" victim may still be a victim of trespass or battery under criminal law.¹⁹⁸

In contract law, passive submission or silence ordinarily does not constitute acceptance of an offer.¹⁹⁹ Typically, acceptance may be inferred from silence or submission only where the parties had a prior contractual relationship and extrinsic evidence may be required to support the claim of mutual assent.²⁰⁰ Absent this, written or oral communication is usually required as support for the existence of the contract.²⁰¹

In the medical context, silence or ambivalence do not constitute consent to medical treatment. Medical providers must secure patient consent before proceeding with a proposed treatment, procedure or care plan. Indeed, medical ethics, statutes, and case law all require that a patient give *informed* consent before agreeing to a proposed

¹⁹⁵ Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 70–72 (1996) (discussing consent to searches under the Fourth Amendment).

¹⁹⁶ *Id.* at 71; see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (discussing voluntariness as a component of consent to search and seizure under the Fourth and Fourteenth Amendments).

¹⁹⁷ Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126 (1986) (noting unique burden on sexual assault victim to prove non-consent).

¹⁹⁸ See *id.*

¹⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. A (1981).

²⁰⁰ See *id.* § 69.

²⁰¹ See Katharine K. Baker, *Sex, Rape, and Shame*, B.U.L., REV. 688–89 (1999) (noting words necessary to manifest consent in contract context); see also *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.").

medical treatment, non-treatment, or invasive procedure. In the medical arena, the conditions of patient consent have been well defined and may be a source of support for your efforts too proactively protective the rights (and dignity) of victims.²⁰²

In the medical context, the law has developed based on the premise that medical treatment without consent constitutes a form of battery, *i.e.*, an unwanted physical invasion of personal physical autonomy.²⁰³ The doctrine provides a bright line test for consent, requiring affirmation by more than mere silence or deduction from circumstances or behavior.²⁰⁴ Further, prior consent to treatment does not imply current consent; rather, the patient must provide an affirmative statement of consent for every incident of treatment.²⁰⁵

An attorney may draw from these contract, criminal, medical, and other cases to argue, by analogy, that the same rule should apply to consent in the context of sexual relations: The fact that a victim had prior consensual relations with the perpetrator does not mean that she consented to the sexual contact on the occasion at issue.²⁰⁶ The mere fact that the parties were sexual in the past cannot be allowed to mean that one party has permanently waived the right to refuse sexual contact in the future.

II. KEY TYPES OF CORROBORATIVE EVIDENCE: HOW TO DEMONSTRATE THAT THE VICTIM DID NOT CONSENT

Despite the passage of sexual assault shield, privacy, and crime victims' rights laws, and the elimination of corroboration or violence requirements, society still expects sexual assault victims to resist and for the assault to leave visible injuries of physical trauma and harm. Victims are expected to prove resistance or provide witnesses to

²⁰² See Kasubhai, *supra* note 195, at 68–70.

²⁰³ See *id.* at 68; *Bang v. Charles T. Miller Hosp.*, 88 N.W.2d 186 (Minn. 1958) (sterilization without proper informed consent deemed a battery).

²⁰⁴ *Id.* at 68–69.

²⁰⁵ See *id.* at 69 (describing process of patient consent).

²⁰⁶ See also A. Berkowitz, *Guidelines for Consent in Intimate Partner Relationships, Campus Safety and Student Development*, CAMPUS SAFETY AND DEVELOPMENT, Volume 4(3): 49-50, March/April 2002 (outlining guidelines for clearly establishing that consent is present in sexually intimate relationships).

corroborate their claims.²⁰⁷ For example, in May 2002, Harvard University’s Faculty of Arts and Sciences adopted a rule requiring “sufficient independent corroboration” before the university’s administrative board would initiate a full investigation of a sexual assault complaint.²⁰⁸ Following a great deal of controversy and campus debate, the “sufficient independent corroboration” requirement was eliminated.²⁰⁹

What constitutes corroborating evidence in “he said/she said” cases? Following is a summary of the key types of corroborative evidence.

A. Eliciting the Victim’s Behavior, Mindset, and Actions

To understand the issue of consent and why the sexual assault was not a consensual act, decision-makers must understand the victim’s mindset at the time of the assault and immediately thereafter.²¹⁰ They need to know the actions of the defendant and the thoughts and emotions of the victim. They need to know if the victim acquiesced out of fear – even if the reason for the fear may not be apparent.²¹¹ To identify these issues and help you and your client prepare to convey them to the trier of fact, it may be helpful to have a general investigative checklist that you can rely on as you prepare your case.²¹²

²⁰⁷ See generally Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim’s Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4th 120 (1984); see also CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT*, 73, 112–17, 160 (1992). In their study of six representative jurisdictions across the nation, Spohn and Horney asked officials to rank thirteen evidentiary factors in order of importance for conviction. Their empirical research shows that corroboration and resistance still play a major role in the decision making of most police and prosecutors. The rankings, in order of importance were: 1) victim can identify suspect; 2) victim reported promptly; 3) physical evidence (hair, clothing, DNA, etc.); 4) no inconsistencies in victim’s account; 5) documented physical injury; 6) corroborating witnesses; 7) suspect used dangerous weapon; 8) suspect and victim had no previous relationship; 9) victim did not use drugs or alcohol at time of assault; 10) evidence that victim resisted; 11) victim has no prior felony convictions; 12) suspect and victim are strangers; 13) victim does not have reputation for promiscuity.

²⁰⁸ COMMITTEE TO ADDRESS SEXUAL ASSAULT AT HARVARD, PUBLIC REPORT 13 (Harvard University, Apr. 2003), available at www.fas.harvard.edu/~casah/files/CASAH_FinalReport.pdf (last visited Feb. 26, 2007).

²⁰⁹ *Id.*; Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 992–94 (2004).

²¹⁰ LISA MCGOVERN, *THE MASSACHUSETTS PROSECUTORS’ MANUAL: DOMESTIC VIOLENCE AND SEXUAL ASSAULT*, Chapter 7- Trial Strategies (Mass. District Attorneys Ass’n ed., 2001).

²¹¹ LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 635 (1993).

²¹² This section was adapted from an Investigative Checklist written by Claire Harwell, Esq., a former prosecutor and consultant to VRLC. We thank her for the generous use of her materials here.

Following is a brief summary of some issues of which to be aware when you meet your client for the first time and as you continue your advocacy and assistance.²¹³

First, allow the victim to relay the events as she remembers them and in the level of detail with which she is comfortable. Allow your client to set the pace of the first interview. After she has recounted the incident, review your information to make sure that you have learned the basic overview of the case, including the “who, what, when, where and why.” Depending on whether you are assisting the victim with a civil, criminal, administrative, or other matter, the information you need to elicit will vary. The information you are likely to need to know may include:

- What happened.
- Who the assailant was.
- When, where, and how the assault was committed: whether a weapon, force, or direct or indirect threat of force was used as part of the assault.
- Whether the victim blacked out or otherwise lost consciousness. If yes, try to determine why the victim lost consciousness.
- Whether the victim consumed any alcohol or drugs, voluntarily or involuntarily. Be sure to convey to your client that you are not judgmental about the use of legal or illegal substances, but rather are asking so that you have a full understanding of the facts and issues regarding her case. This is also a good time to remind your client of the laws in your jurisdiction regarding privileged communications (and how privileges may be waived).
- Whether there are injuries that have not yet been documented (it may be appropriate to arrange for someone other than yourself to photograph the injuries to reduce the possibility that you will be called as a witness in the case).
- Whether the victim received medical care. Even if a victim is certain that she does not want to prosecute the assault and/or believes that it is too late to gather forensic evidence, a medical exam may be important for a number of

²¹³ The discussion that follows is applicable to providing services to a survivor who has the cognitive abilities to discuss the assault in detail. A survivor may not have this capacity due to age, disability, cognitive disability, or for other reasons, in which case an alternate methods will have to be employed to ensure adequate assistance and advocacy are provided.

reasons, including the opportunity to discuss the risk and treatment options for sexually transmitted infections, pregnancy, internal injuries, etc.

Depending on how traumatic it is for the victim, you may want to discuss the more detailed aspects of the assault over several meetings. It may be very helpful for the victim to know before each appointment with you what issue(s) will be addressed. This may help her be mentally and emotionally prepared for the discussion, and also spare her any unnecessary anxiety caused by anticipating a discussion that does not occur.

The additional information you want to elicit may include:

- As many details as she can remember about the scene of the assault, what happened, what was said, what was inferred, her mental state, where, how and with what the victim was penetrated, whether any foreign objects were inserted or utilized, etc.;
- Whether there are any possible witnesses to anything that happened (including those she saw immediately after the assault);
- Any other details she noticed or focused on during the assault that would not have been noticed otherwise;
- What physical sensations, if any, she remembers experiencing during the assault and after;
- Whether she has any new, now visible, injuries such as bruising or soreness;
- Any possibility of drugs and/or alcohol having been used to compromise the victim;²¹⁴
- Gather as much information as possible about the assailant. This includes the assailant's possible reasons for targeting the victim, his methods of restraint, his attitude changes, any statements made or reactions to the victim's resistance, his circle of friends, and any prior existing relationship between the victim and the assailant. Anticipate that the defense's response is likely to include that the sexual contact was consensual. Prepare for this by

²¹⁴ This discussion may include the following: did she eat or drink anything voluntarily; if so, in what quantity; what was the timeline of effects; was there a discrepancy between what she drank and her reaction as compared to her past experiences drinking or using drugs; what was the victim's weight and physical condition when she took drugs or alcohol; are there other people who would know about her condition when she drank and what the assailant must have observed; are there toxicology reports to which to compare her reactions; any chance she took something without knowing it; did the assailant have an opportunity to tamper with her drink; are her reactions consistent with common sexual assault drugs?

collecting any and all information that could demonstrate lack of consent. Also document any contact by the perpetrator with the victim post-assault. (A perpetrator's communications following the assault may help to refute the "it didn't happen" defense.)

B. Fresh Complaint Witnesses and Medical Personnel

If the victim does not report the crime immediately to police but decides to do so later on, her actions after the crime are vitally important. It is very helpful if the victim told someone what occurred. A victim may have confided in a doctor, family member, friend, roommate, or colleague. Witnesses who observed or spoke with the victim and/or assailant in the hours leading up to and following the assault can be integral to the prosecution of a non-stranger sexual assault case.²¹⁵ Medical personnel, in particular, are often powerful and effective corroborating witnesses as jurors tend to view them as both neutral and credible reporters.

C. Physical Evidence

Judges, jurors, and other triers of fact have a deeply ingrained expectation that sexual assault evidence will include physical evidence such as bruising, scratching, blood, torn clothing, etc. The problem with this expectation is that it does not match reality because most sexual assaults do not yield such physical evidence.²¹⁶ Where there is such evidence, however, it is very useful because it provides a physical context, helps to establish the credibility of the victim, and may be used to negate an offender's version

²¹⁵ For example, many states recognize a "first-" or "prompt-" complaint witness (*i.e.*, the first person the complainant told of the assault) and permits that person to testify in criminal cases about the conversation which otherwise would be considered hearsay. *See, e.g., Commonwealth v. King*, 834 N.E.2d 1175, 1197-98 (Mass. 2005). The Court reasoned that the testimony of a single "first complaint" witness is permissible to refute an inference that silence is evidence of lack of credibility on the part of a sexual assault victim. *Id.* at 1197.

²¹⁶ *See* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 611 (1997) ("Seventy percent of sexual assault victims report no physical injury and another twenty-four percent report only minor physical injury."); Sarah E. Ullman, *Does Offender Violence Escalate When Rape Victims Fight Back?*, 13 J. INTERPERSONAL VIOLENCE 179, 190 (1998) (noting that studies do not support the view that most sexual assaults "result in serious physical injury or death"). *See also* Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 157 (1992) ("If the victim has no bruises, broken bones, or physical injuries, it is hard for men to 'see' the violence.").

of the facts. Finally, it helps decision-makers give credence to other circumstantial evidence.

Physical evidence may be collected from a variety of different sources, including the site where the assault occurred, the location of the lure or first contact, the location(s) the victim and the assailant went to following the assault, the victim's and the assailant's clothing and person, and any objects used to commit the assault. Evidence gathered may also include statements from witnesses and any relevant communications from the assailant. If the assault is reported to law enforcement, the most common sources from which evidence may be gathered include:

- **Vaginal/Anal Injury.** Although two-thirds of sexual assaults leave no physical injury, there is still a significant chance that the vaginal wall contains some sign of trauma. "Forced intercourse, even in a sexually active adult, may result in lacerations or abrasions because the sensitive area may not have been lubricated as it would be in a consensual act. . . . Even minor abrasions are enough to make the point to a jury that [the victim] was not a willing partner of the accused."²¹⁷ The oral testimony of a Sexual Assault Nurse Examiner (SANE) on this issue is often a pivotal element in a civil or criminal case.
- **SAFE Kits.** Sexual Assault Forensic Evidence collection kits containing various slides, swabs, scrapings, combings, and articles of clothing taken from the victim.²¹⁸ In some states (*e.g.*, California) evidence is also collected from the accused assailant. Such evidence collection may be especially important depending on how the assault was perpetrated. For example, if the assailant engaged in digital penetration or fellatio, he may be an as good, if

²¹⁷ FAIRSTEIN, *supra* note 87, at 153.

²¹⁸ "SAFE kits" are used to collect evidence from every part of the victims' body, as well as clothing and items with which the perpetrator may have had contact. The steps of the examination can include: 1) comprehensive toxicology testing (if warranted); 2) blood samples (may be used to measure HCG levels for pregnancy and Hepatitis B screening as well as toxicology testing, if applicable); 3) oral swabs; 4) fingernail scrapings (if the victim scratched at the assailant's skin or clothing); 5) clothing collection (any clothing that might contain evidence, for example, clothing worn at the time of the assault, or any clothing currently being worn that might contain evidence (*i.e.* underwear, jacket, etc.)); 6) bite marks (if the victim has bathed since the assault, the wound is measured and photographed; if not, the bite mark is also swabbed to collect any saliva); 7) head hair combing (the victim's hair is combed and any debris and/or loose hairs are collected); 8) head hair standard (samples of the victim's hair are cut and plucked from different regions of the head to be used for comparison); 9) pubic hair combing (the victim's pubic hair is combed for any debris and/or loose hairs); 10) external genital swabbing (if the victim's external genitalia were involved in the assault, the pubic area and inner thighs are examined and swabbed); 11) vaginal swabs and smears; 12) perianal swabs; and 13) anorectal swabs and smears. Although the practice is now disfavored in some jurisdictions, some states (*e.g.*, Massachusetts) also collect a "pubic hair standard" (samples of the victim's pubic hair are cut and plucked from different places in the pubic area).

not better, source of medical evidence than the victim. (*See* Chapter 5 for an overview of the forensic exam, and a discussion of forensic medical issues for sexual assault survivors.) Although the results will not be conclusive in proving lack of consent, the fact that the victim submitted to such a rigorous exam and provided an oral account of the sexual assault to the examiner can provide circumstantial support and bolster her credibility.

- **Bruising, Bite Marks, Scratches, and Other Marks.** This type of physical injury should be fully documented. Investigator’s notes, photos, and medical records all help corroborate the victim’s account. Photos, in particular, may have a significant impact as they provide a visual record of both the victim’s and the assailant’s physical and/or emotional state.
- **Victim and Assailant Clothing.** Both the victim’s and the assailant’s clothing should be collected, particularly in cases where the assailant ejaculated onto clothing or wiped himself with clothing items. Clothing, furniture, bedding, or tissues can be tested for the presence of semen, and the assailant’s body and clothing can be tested for the presence of the victim’s blood, epithelial cells, etc. You may want to confirm that this evidence was collected, as the FBI lists failure to obtain all the victim’s and suspect’s clothing worn at the time of the assault as one of the primary mistakes in sexual assault investigations.²¹⁹
- **Crime Scene Search.** “The goal of a crime scene search is to locate evidence that will: 1) link the offender to the crime scene; 2) establish that sexual [contact] took place; 3) establish that force was used; [and] 4) establish the offender’s activity.”²²⁰ If the victim reports the assault to the police, they should ensure that the crime scene is preserved, evidence is collected, and proper testing is conducted.
- **Blood Alcohol Tests.** A preserved blood sample (drawn with victim consent) will document the victim’s alcohol level.²²¹ Similar tests should be done for the assailant, if possible.

The police report is a critical component of a sexual assault prosecution. A poorly crafted police report may undermine or even bar effective prosecution and a thorough and well documented investigation may help secure a conviction. Individual law enforcement officers’ experience, comfort and expertise discussing and documenting a sexual assault may vary widely.

²¹⁹ SEX-RELATED OFFENSES: CRIMINAL INVESTIGATION, Chapter 10 (Charles R. Swanson ed., 1984).

²²⁰ CRIMINAL AND CIVIL INVESTIGATION HANDBOOK 639 (J. Joseph Grau ed., 1993).

²²¹ F.R. Lewington, *New Initiatives in the Investigation of Rape*, 56 MEDICO-LEGAL J. 111, 122 (1998).

As soon as possible, review the police report with the victim to ensure that it contains her verbatim statements and that the language in the report has not been “sanitized.” The specific words uttered by the victim and/or the defendant should be recorded, along with the victim’s emotional state, her description of the feelings, terror, humiliation, shame, fear, etc. that she experienced. If necessary, it may be appropriate to request that the police conduct a follow-up interview and file a supplemental report.

D. Keep the Focus on the Victim’s Right to Decide Whether to Consent

There may have been some consensual sexual contact between the assailant and the victim sometime prior to or immediately preceding the assault. For example, a victim may have been kissing the perpetrator prior to the assault and then been forced into other sexual activity against her will. Or, a victim may have engaged in consensual oral sex and then been forced to have vaginal and/or anal intercourse against her will. You may need specifically to confront the issue of a woman’s right to engage in some – and not other – sexual contact, and underscore the fact that forced sexual contact can constitute a sexual assault.²²² Failure to address this issue could be irrevocably detrimental to your case.

The court or trier of fact may also blame the victim for the sexual assault based upon the consensual contact that preceded the offense. Case law across the country suggests that a woman subjects herself to an “unreasonable risk” of sexual assault under a wide array of circumstances.²²³ In tort cases, the assignment of blame to the victim is articulated as the concept of “comparative fault.” Many jurisdictions allow third parties to raise the comparative fault argument in sexual assault cases.²²⁴

²²² See, e.g., *In re John Z.*, 60 P.3d 183 (Cal. 2003) (holding withdrawal of consent effectively nullifies any earlier consent; continuing to engage in sexual intercourse once consent has been withdrawn constitutes forcible sexual assault). *But see Maouloud Baby v. State of Maryland*, No. 225, 2007 WL 431376, at *15 (Md. Ct. Spec. App. Feb. 9, 2007) (under Maryland law, once a woman consents to sexual intercourse with a man he may continue until he climaxes, even if the woman asks him to stop; withdrawal of consent cannot be the basis for a charge of sexual assault).

²²³ *But see* 720 ILCS 5/12-17 (Illinois statute expressly precluding a consent defense based on the victim’s attire at the time of the offense).

²²⁴ Ellen Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1414–15 (1999). These states allow damages to be reduced depending upon the amount of fault placed at the

If the victim in your case drank to excess or engaged in casual sex or any other behavior looked down upon in her community, you will need to address this issue directly, too. Be prepared to counter any victim blaming and to explain that the issue of consent is distinct from victim behavior. The challenge will be to persuade the trier of fact that the victim may have consented to a multitude of activities, but never consented to the contact that constitutes the sexual assault. Underscoring this absence of consent may be especially important if the victim voluntarily consumed alcohol or drugs. As one commentator states, “[i]f you pour liquor on it, it’s not a crime.”²²⁵ “[J]urors already place blame on the sober victim for an alleged acquaintance sexual assault, which means that they are more suspicious and judgmental of the intoxicated victim of an alleged acquaintance sexual assault.”²²⁶ You will need to recognize and respond to such “blame-shifting” which is merely a thinly-veiled attack on a victim’s credibility regarding the issue of consent. Your goal is to establish that the victim did not consent and to persuade the decision-maker to focus on the *assailant’s* actions and conduct.

III. DELIBERATE AND PREMEDITATED: DEMONSTRATING THE PERPETRATOR’S INTENT

As an attorney, your job is to help ensure the trier of fact understand that the defendant intentionally engaged in sexual contact without the victim’s consent. Most defense arguments in non-stranger sexual assault cases focus on a victim’s credibility as well as her culpability. You must shift the focus to the *defendant’s* credibility and

victim’s door. *Id.* at 1427–31. The nightmarish reality of this paradigm is demonstrated by a Louisiana case in which a thirteen-year old girl who was gang-sexually assaulted by three seventeen-year old boys in a park campground. *Id.* at 1428–29 (referring to *Morris v. Yogi Bear’s Jellystone Park Camp Resort*, 539 So. 2d 70 (La. Ct. App. 1989)). The jury found the victim 12% responsible for her gang sexual assault. *Id.* at 1429; *Morris*, 539 So. 2d at 72. This finding was upheld by the appellate court on the basis that the victim “willingly participat[ed] in the original beer drinking, and apparently and voluntarily [left] her friend to go to a secluded place with a strange boy,” and thus her actions “undoubtedly set the stage for the terrible events which followed.” *Id.* at 1429; *Morris*, 539 So. 2d at 77-78. In the experience of civil practitioners at the Victim Rights Law Center, this same social calculus is at issue in non-tort cases as well.

²²⁵ See Kramer, *supra* note 192, at 124.

²²⁶ Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 420 (2004).

culpability, and help to paint a vivid portrait of the perpetrator's intention to engage in sexual contact without the victim's legal consent.²²⁷

Since criminal, civil, administrative, and other sexual assault cases often turn on who the fact-finder determines to be more credible, any statements which show that the defendant knew he was inflicting harm, pre-meditated the assault, lied about it, or knew that the victim was incapable of consent will be critical to undermining his credibility. In civil, criminal, administrative, and other proceedings, victories for the victim are often won on the basis of the defendant's statements and/or his prior bad acts.²²⁸

[PRACTICE TIP: Collect any and all statements the assailant made to police, employer, school, friends and other witnesses, if possible. Find out who is in his social circle and what his dating habits are, as that information may be critical to portraying him as a "typical" acquaintance rapist, especially if this information leads to new witnesses or reveals prior victims.]

It is imperative to conduct a thorough investigation of all possible witnesses in the case as well as any prior incidents of sexual misconduct by the defendant. On college campuses and high schools, in particular, the community often knows this sort of information, and it can be discovered by investigation. Investigative resources are a key element in most cases. Talk to anyone your client or the police have identified as witnesses to the assault or witnesses who may be useful in corroborating your client's account. With the victim's consent, identify and interview witnesses who can provide you with details about any relationship between the assailant and the victim, who saw them together, who saw injuries on either person, who witnessed any psychological

²²⁷ See Teresa Scalzo, *Overcoming the Consent Defense*, AMERICAN PROSECUTORS RESEARCH INSTITUTE, Vol. 1, No. 7, available online at www.ndaa.org/publications/newsletters/the_voice_vol_1_no_7_2006.pdf for a discussion of offender-focused prosecution and the issue of consent.

²²⁸ See FEDERAL RULE OF EVIDENCE 403(b) regarding use of defendant's prior bad acts. See also *Commonwealth v. Ascolillo*, 541 N.E.2d 570, 575 (Mass. 1989) (court noted that the defendant's own testimony suggested that the victim may have been so intoxicated that she was incapable of consent where defendant testified that he refused to give the victim more drugs because "she had had too much" and "she looked pretty high").

effects of the assault on the victim, who heard post-assault statements by the victim or the assailant, and/or who knew of a plan by the assailant to target this or any other victim.

Further, consider whether and how to utilize empirical research on rapists and other sex offenders. This research can help to accurately portray the assailant as a sexual predator – not simply a confused young man who “read the signals wrong” or “had a misunderstanding” with the victim. The intentionality of the assailant’s acts may be especially enlightening. Leading research in the field by Dr. David Lisak²²⁹ reveals that non-stranger rapists engage in a predictable pattern of behavior that includes pre-meditation, victim selection, victim cultivation, and measured instrumental violence.²³⁰ Reviewing the following information may help you understand patterns of typical non-stranger rapists, and help you to explain the perpetrator’s behavior in context, and to the trier of fact.

A. Non-Stranger Perpetrators Premeditate the Crime and Select the Victim

Non-stranger perpetrators are not “carried away” or acting “in the heat of the moment.” Rather, they premeditate their crime and carefully select a victim. Other characteristics are as follows:

- They manipulate their victims into positions of vulnerability. For example, they isolate the victim so that she is alone in a room, a car, or a secluded area.

²²⁹ Dr. David Lisak of the University of Massachusetts, Boston, is a leading researcher in the area of non-stranger rapists. Dr. Lisak’s work has been published in *VIOLENCE AND VICTIMS* 2002; 17(1):73-84; *MEN AND THE PROBLEMS OF NON-RELATIONAL SEX*. R.L. Levant & G.R. Brooks (eds.) New York: Wiley (1997); *JOURNAL OF TRAUMATIC STRESS*, 9, 721-743 (1996); and *PSYCHOTHERAPY*, 32, 258-269 (1995). For further research on acquaintance rapists see D. Lisak & S. Roth, *Motives and Psychodynamics of Self-Reported, Unincarcerated Rapists*, 60(2) *AM. J. ORTHOPSYCHIATRY* 268-280 (1990) and N.M. Malamuth, R.J. Sockloskie, Mary P. Koss & J.S. Tanaka, *Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students*, 59 *J. CONSULTING AND CLINICAL PSYCHOL.* 670-681 (1997). The Victim Rights Law Center thanks Dr. Lisak for the generous use of his materials.

²³⁰ See D. Lisak & P.M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*. *VIOLENCE AND VICTIMS* 2002; 17(1): 73-84 (study of more than 100 undetected rapists revealed that nearly two thirds were serial rapists and that these serial rapists committed an average of nearly six rapes each). See also Veronique N. Valliere, *Understanding the Non-Stranger Rapist*, *THE VOICE*, Vol. 1, No, 11 (The National Center for the Prosecution of Violence Against Women, American Prosecutors Research Institute).

- They often ply their victims with alcohol and, increasingly, use so-called “knock-out” or other drugs to disable them entirely.
- Like other kinds of criminal predators, these perpetrators are also adept at identifying vulnerable women. They deliberately target women who are the least likely to fight off an assault, to scream, or to report the crime.

B. Non-Stranger Perpetrators Generally Use Only Instrumental Violence

Undetected perpetrators tend to use only as much violence as is necessary to intimidate their victims and ensure their submission.

- They use verbal threats, often in a more sophisticated manner than simply threatening physical harm (although such threats are common). For example, they may tell their (vulnerable) victims: “You’re drunk, no one will ever believe you,” or “If you tell anyone, it’s your reputation that will suffer.”
- Non-stranger perpetrators commonly escalate the level of threat as needed, typically using their body weight and arms to pin down their victims to instill a sense of helplessness and to terrify them into submission.
- Weapons are rarely involved, unless as a vague threat to the victim’s general well being.

Judges, jurors, and other triers of fact often misunderstand these patterns of perpetrator behavior. Because of the lack of overt threats, they do not readily understand why a victim was afraid of the perpetrator or how this fear affected the victim’s behavior. Advocates and attorneys need to help these triers of fact understand the fear the victim experienced, and how the apparent lack of force is part of the perpetrator’s methodology.

IV. INTOXICATION AND CONSENT

Research indicates that non-stranger rapists and sexual predators specifically target intoxicated victims and that a very high percentage of victims are intoxicated when they are assaulted.²³¹ In one study of college gang sexual assaults, researchers found that

²³¹ For references on rates of intoxication among sexual assault victims and assailants, *see id.* See also NAT’L CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, *Dangerous Liaisons: Substance Abuse and Sex* 42 (December 1999) (estimating that alcohol use by victim, assailant, or both is implicated in anywhere from 46 to 75% of “date sexual assaults” of college students); BUREAU OF JUSTICE STATISTICS, U.S. DOJ, *Alcohol and Crime* (Apr. 1998); and U.S. DOJ, *An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime* (Apr. 1998)).

every case involved the use of alcohol.²³² While tackling the problem of intoxication and consent in sexual assault cases is a challenge even to the best of advocates and attorneys, it is a challenge we must overcome.

A. State Statutes Vary Regarding the Interrelation of Sexual Assault, Intoxication, and Consent

When is a person too intoxicated to be able to consent to sex? Every jurisdiction in the country except Massachusetts,²³³ Georgia, and the Uniform Code of Military Justice has attempted some statutory reform on the issue of consent and intoxication.²³⁴ Yet, there is still no clear definition of precisely how much alcohol or drugs result in a person's inability to consent to sex. Further, there is no consensus as to whether or to what extent it matters whether a victim became intoxicated voluntarily or without consent. The issue of consent and intoxication remains a complex one for attorneys, judges, juries and others who adjudicate such matters.

The Model Penal Code (MPC) states that actual consent is not legal consent if "it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct" ²³⁵ Although most jurisdictions explicitly include sexual assault of intoxicated or drugged victims in their sexual

²³² Kramer, *supra* note 192, at 116.

²³³ In Massachusetts, the issue of consent and intoxication is determined by case law evolving from an 1870 precedent. *Commonwealth v. Burke*, 105 Mass. 376, 380–81 (1870)), is still good law as evidenced by the recent case of *Commonwealth v. Molle*, 779 N.E.2d 658, 664 (Mass. App. Ct. 2002), *cert. denied*, 785 N.E.2d 382 (Mass. 2003). The following language in *Burke* has been modified into the standard jury instruction given in consent intoxication cases: "We are therefore unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was sexual assault. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor." *Burke*, 105 Mass. at 380–81. See *Ascolillo*, 541 N.E.2d at 463; *Commonwealth v. Simcock*, 575 N.E.2d 1137, 1143–44 (Mass. App. Ct. 1991), *cert. denied*, 579 N.E.2d 1360 (Mass. 1991); *Commonwealth v. Helfant*, 496 N.E.2d 433, 438–39 (Mass. 1986); *Commonwealth v. Fionda*, 599 N.E.2d 635, 639 (Mass. App. Ct. 1992). See also Patricia J. Falk, *A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 172 n.249 (2002) (noting *Burke* is "'one of the leading American cases on the law of sexual assault'" (internal citation omitted)).

²³⁴ Falk, *supra* note 233, at 156–57 (evaluating statutes by jurisdiction).

²³⁵ MODEL PENAL CODE § 2.11(3)(b) (1962) (defining ineffective consent).

offenses, the MPC²³⁶ and the majority of jurisdictions still require that the alleged assailant administer the intoxicant for non-consent to be presumed.²³⁷ This majority approach effectively assigns responsibility to the victim when there is an allegation involving the use of alcohol or drugs by only punishing instances in which the defendant administers the intoxicant.²³⁸ This is typically accomplished by defining “mentally incapacitated” to mean, for example, “temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a[n] . . . intoxicating substance administered without his or her consent”²³⁹ Therefore, a victim who voluntarily consumed alcohol and was subsequently sexually assaulted is left unprotected in jurisdictions that follow this model, because she does not fit the statutory definition of sexual assault without consent due to mental incapacitation (unless, of course, she is otherwise covered by an alternate category such as “unconscious” or “mentally disabled.”²⁴⁰)

A minority of states do not differentiate between voluntary and involuntary intoxication, so that a victim who cannot consent due to her own voluntary intoxication may still be protected.²⁴¹ Some states accomplish this through a broader definition of “mental incapacitation” that may include, for example, incapacity “produced by illness,

²³⁶ *Id.* at 168; *see also* DEL. CODE. ANN. tit. 11 § 761 (2007) (defining “without consent” as, *inter alia*, the “defendant had substantially impaired the victim’s power to appraise or control the victim’s own conduct by administering or employing without the other person’s knowledge or against the other person’s will, drugs, intoxicants or other means for the purpose of preventing resistance.”).

²³⁷ *See* Falk, *supra* note 233, at 158–73 (analyzing fifty-six American jurisdictions and delineating which jurisdictions do not require that the assailant administer the intoxicant; states that do not require administration by the assailant include: Alaska, California, Iowa, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Carolina, South Dakota, Virginia, Virgin Islands, Washington, and Wisconsin).

²³⁸ *See id.* at 173, 187–89 (noting that approximately two-thirds of jurisdictions that explicitly include sexual assault of intoxicated or drugged victim in sexual assault offenses “require that the defendant administer the intoxicant before criminal liability attaches”).

²³⁹ *See, e.g.*, FLA. STAT. ANN. § 794.011(1)(c) (West 2005); CONN. GEN. STAT. ANN. § 53a-65 (West Supp. 2007) (“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling such person’s conduct owing to the influence of a drug or intoxicating substance administered to such person without such person’s consent, or owing to any other act committed upon such person without such person’s consent.”).

²⁴⁰ *See* Falk, *supra* note 233, at 138.

²⁴¹ *Id.* at 173 (noting that approximately two-thirds of jurisdictions that explicitly include sexual assault of intoxicated or drugged victims in their sexual offense statutes “require that the defendant administer the intoxicant” and “the remaining states focus instead on the inability of the victim to appraise the sexual nature of the conduct or to consent”).

defect, the influence of a substance or some other cause” without specifying who administered the intoxicating substance, and regardless of whether it was involuntarily or voluntarily consumed.²⁴² Alternatively, other states have determined an act of sexual penetration constitutes sexual assault if “the victim was unable to understand the nature of the act or was unable to give knowing consent,” without enumerating specifically by what means or by whom the victim was left unable to give knowing consent.²⁴³

Louisiana and the District of Columbia, for example, criminalize a sexual assault regardless of whether the victim was voluntarily or involuntarily intoxicated (although the severity of the crime will differ). Cases in which the assailant administered the intoxicant are more serious (*i.e.*, “forcible sexual assault”²⁴⁴ and “first degree sexual abuse”)²⁴⁵ than those in which the victim was independently intoxicated (*i.e.*, “simple sexual assault”²⁴⁶ or “second degree sexual abuse”).²⁴⁷

A number of jurisdictions also require that the defendant knew or reasonably should have known of the victim’s condition and her inability to consent.²⁴⁸ Other jurisdictions that are silent as to this requirement offer an affirmative defense where the defendant did not know that the victim was unable to give consent.²⁴⁹ Details such as how many drinks the defendant saw the victim consume, how coherent her speech was, and whether she drifted in and out of consciousness will factor into a determination of whether the defendant knew or reasonably should have known of the victim’s inability to consent.

²⁴² WASH. REV. CODE § 9A.440.10(4) (2005).

²⁴³ 720 ILL. COMP. STAT. 5/12-13(2) (2005).

²⁴⁴ LA. REV. STAT. ANN. § 14:42.1 (West Supp. 2007).

²⁴⁵ D.C. CODE ANN. § 22-3002 (West Supp. 2007).

²⁴⁶ LA. REV. STAT. ANN. § 14:43 (West Supp. 2007).

²⁴⁷ D.C. CODE ANN. § 22-3003 (West Supp. 2007).

²⁴⁸ See Falk, *supra* note 233, at 158-73 (analyzing all American jurisdictions and noting which require that the defendant knew or should have known of the victim’s inability to consent; these states include, but are not limited to: Alaska, California, District of Columbia, Guam, Hawaii, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, Rhode Island, South Carolina, Tennessee, Virginia, Virgin Islands, Washington, and Wisconsin).

²⁴⁹ See Falk, *supra* note 233, at 162-63 & n.192 (listing Arkansas, Connecticut, Kentucky, New York, Oregon, and West Virginia as states providing an affirmative defense when defendant did not know of victim’s inability to consent).

In some states, how an intoxicated victim was sexually violated may determine whether a crime was committed and the seriousness of the offense. In other states, an intoxicated victim's gender or marital status may determine whether or how serious a crime was committed. In North Carolina, second degree sexual assault consists of "vaginal intercourse with another person . . . who is mentally incapacitated."²⁵⁰ The Alabama sexual assault and intoxication statutes apply only if sexual intercourse occurred, the assailant was a person of the opposite sex, and the victim was intoxicated without his or her consent.²⁵¹ Idaho's drug facilitated sexual assault law requires that the assault be perpetrated by a male against a female.²⁵² In Ohio and Rhode Island, drug facilitated sexual assault is a crime only if the defendant and the victim are not married to one another.²⁵³

Despite enormous efforts to address the issue of intoxication and consent through statutory reform, no decision has yielded a bright-line test.²⁵⁴ Like the state legislatures, the courts, too, have yet to reach a consensus on this question.²⁵⁵ To determine whether a

²⁵⁰ N.C. GEN. STAT. § 14-27.3 (West 2007).

²⁵¹ ALA. CODE § 13A-6-60, -61 (West 2007) ("A person commits the crime of sexual assault in the first degree if: [the person] engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being mentally incapacitated." Mental incapacitation is caused by the influence of a narcotic or intoxicating substance administered to the person without consent.).

²⁵² IDAHO CODE ANN. § 18-6101(4) (West 2007) ("Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis where . . . the female . . . is unable to resist due to any intoxicating, narcotic, or anaesthetic substance").

²⁵³ OHIO REV. CODE ANN. § 2907.02 (West 2007) (defining sexual assault as, *inter alia*, "sexual conduct with another who is not the spouse of the offender . . . when for the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception"); R.I. GEN. LAWS § 11-37-1, -2 (2007) (providing first degree sexual assault requires "sexual penetration . . . [where] [t]he accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated").

²⁵⁴ See Falk, *supra* note 233, at 156–73. Ms. Falk offers a comprehensive assessment of how all fifty states, the District of Columbia, three territories, the federal system, and the Uniform Code of Military Justice address the issue of consent and intoxication in sexual assault cases. She notes that all the jurisdictions, with three exceptions, fall into four general categories. Jurisdictions do one of the following: (1) include intoxicant language within their definitions of mental incapacity which is then used within the sexual offense laws; (2) employ intoxicant language within their definitions of "without consent;" (3) define force as including intoxicants; or (4) incorporate intoxicant language directly into specific sexual assault laws. *Id.* at 156–57. The three exceptions (Massachusetts, Georgia, and the Uniform Code of Military Justice) fall into a fifth category, which relies solely upon case precedent rather than statute. *Id.* at 157.

²⁵⁵ NORTHEASTERN UNIVERSITY'S STUDENT CODE OF CONDUCT, available at www.neu.edu/osccr/code.html, provides a good example of a clearer line that could be drawn by courts in these cases. It puts an affirmative duty on the parties to gain manifest consent and clearly indicates that intoxication will be considered to

victim was unable to consent due to intoxication, courts consider a range of objective and subjective factors, such as the victim's ability to walk and speak, her awareness of what happened, and the volume of alcohol consumed by the victim.²⁵⁶ The problem with this approach is that very similar fact patterns result in different outcomes. For example, a victim's consumption of two beers may establish incapacity to consent in Kansas whereas drinking five ounces of bourbon is not sufficient in California.²⁵⁷ A Kansas court held that where a fourteen-year old victim drank two beers which resulted in her appearing "very well intoxicated" with difficulty walking, tripping all over the place, bloodshot eyes and slurred speech, there was "sufficient evidence that she was psychologically and physiologically impaired due to the effects of alcohol" with little memory of the assault and "little indicia of rational decision-making during or after the assault."²⁵⁸ In contrast, a California court reversed a defendant's conviction where a sixteen-year old victim was repeatedly sexually assaulted by the defendant and his friend after she drank at least five ounces of bourbon on an empty stomach. The California victim exhibited essentially the same intoxication symptoms as the Kansas victim.²⁵⁹

vitate consent. As amended in July 2002, the NORTHEASTERN UNIVERSITY CODE OF STUDENT CONDUCT, *Level I Grievous Violations #5* states "[r]ape, which is defined as the oral, anal or vaginal penetration by an inanimate object, penis, or other bodily part, without consent. 'Consent' means a voluntary agreement to engage in sexual activity proposed by another. . . . 'Consent' requires mutually understandable and communicated words and/or actions demonstrating agreement to participate in proposed sexual activity. 'Without consent' may be communicated by words and/or actions demonstrating unwillingness to engage in proposed sexual activity. For instance, the act of penetration will be considered without consent if the victim was unable to give consent because of a condition of which the offending student was or should have been aware, such as drug and/or alcohol intoxication, coercion, and/or verbal or physical threats, including being threatened with future harm."

²⁵⁶ See *infra* notes 258-259 and accompanying text.

²⁵⁷ This dichotomy is notable because Kansas and California have similar sexual assault by intoxication laws that do not require the defendant to have administered the intoxicant. See Falk, *supra* note 233, at 170 & nn. 400, 402; CAL. PENAL CODE § 261(a)(3) (West 2007) ("Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused"); KAN. STAT. ANN. § 21-3502(C) (West 2007) ("when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender").

²⁵⁸ *State v. Chaney*, 5 P.3d 492, 498 (Kan. 2000).

²⁵⁹ For the trier of fact, extreme intoxication does not necessarily constitute incapacity to consent. See, e.g., *People v. Giardino*, 98 Cal. Rptr. 2d 315, 325-27 (Cal. Ct. App. 2000) (holding the jury could have reasonably concluded that the victim did consent and had the capacity to do so even though there was testimony that the victim was "obviously intoxicated," felt "woozy, very light-headed," fell repeatedly while

B. Practical & Creative Approaches to Meeting the Intoxication Challenge

If you believe your client was too intoxicated to consent, you will likely need to counter the following three arguments:

- (1) “The victim was not that intoxicated. She was sober enough to consent.”
- (2) “If the victim was intoxicated, the defendant is still not guilty of sexual assault because he had a reasonable and good faith belief that the victim consented.”
- (3) “If the victim was intoxicated, she is not a reliable witness.”

The response to all three arguments should be the same. You must carefully assess your client’s level of intoxication prior to the assault. If your client was intoxicated by alcohol, you will want to determine:

- How many drinks she had and over what period of time;
- What type of alcohol was involved;
- How large were the drinks and how much alcohol each drink contained;
- What time she had the drinks;
- What her height and weight is;
- How much and when the victim ate prior to and while consuming the alcohol;
- Whether she has ever consumed alcohol before and, if so, how she has reacted to it in the past.

Draw a careful timeline of when the victim had each drink. Secure statements from witnesses who can testify to her level of intoxication. Did they see the victim slurring her speech, staggering, or vomiting? Were they concerned for her welfare? Why? How concerned were they? For example, if you have multiple witnesses stating that they felt the victim was too intoxicated to walk home alone, she was probably too intoxicated to consent to sex. (Intoxication, however, does not necessarily equal

she was walking, slurred her words, and generally “wasn’t altogether there,” because the evidence also demonstrated that the victim was able to walk on her own and undress herself).

incapacity to consent.)²⁶⁰ The legal standard for driving under the influence may, when viewed creatively, provide an analogy for demonstrating a victim's intoxication and lack of consent argument. Scientific and statistical studies provide the underpinning for drunk driving cases, in which it is routinely assumed that one's judgment to drive is impaired when the blood alcohol level is .08.²⁶¹ Evidence of a victim's alcohol consumption and the likely state of intoxication may be similarly reconstructed. Other useful analogies may include:

- Contract cases or cases involving trusts or wills where individuals have been held incapable of knowingly signing a document due to intoxication,²⁶² and
- Criminal cases involving either the defendant's confession or his consent to the search of his person, car, home, or other belongings while he is intoxicated.²⁶³

In the contract and criminal cases referenced above, courts have given great weight to allegations regarding capacity and intoxication where the consequences of decisions are deemed to be grave. You may analogize to these cases, and argue that courts should give no less weight to matters of autonomy and bodily integrity than they accord to the financial and economic consequences of entering into a contract. Consent

²⁶⁰ *Id.*

²⁶¹ While you generally will not have access to data on the victim's blood alcohol level within an hour of the assault, conducting a rough estimate of blood alcohol levels based on height, weight, and volume, can be helpful to some decision-makers. See the University of Pittsburgh Student Health Service Health Education Website, available at www.studhlth.pitt.edu/healthed/alcohol/links/page51.html for a Table of Approximate Blood Alcohol Levels which may be helpful in making a rough calculation of your client's blood alcohol content.

²⁶² See *Dahlstrom v. Roulette Pontiac-Cadillac GMC, Inc.*, No. 9-182, 1983 Ohio App. LEXIS 15118, at *4 (Ohio Ct. App. June 24, 1983) (affirming verdict for plaintiff where plaintiff executed two written sales contracts, a promissory note, and a security agreement while intoxicated, since in Ohio "intoxication may show want of capacity to contract" and "securing possession of property when a defendant knew of plaintiff's state of intoxication constitutes fraud"); see also *Babcock v. Engel*, 194 P. 137, 139 (Mont. 1920) ("The courts have held quite uniformly that, whenever the element of inadequacy of consideration is coupled with the defense of intoxication, a less stringent rule with respect to the burden of proof will be applied, upon the theory that one party will not be permitted to invoke the aid of a court of equity to assist him in compelling the performance of a contract whose terms are, as to his adversary, unjust, when such terms were exacted while the adversary was laboring under the influence of intoxicants, by reason whereof he was more easily influenced into a bad bargain, and less able than he would be when sober, to protect his own interests.").

²⁶³ For a helpful reference in such cases, see JULIANE BALLINO *ET AL.*, TRYING DRUG CASES IN MASSACHUSETTS, Chapters 5-7 (Stephanie Page, ed., MCLE 1999). If alcohol or drugs are involved, defendants often argue that the consent to search the car was ineffective because their drug intoxication rendered them incapable of making a rational decision which was the product of a rational intellect and a free will.

to sex, with all its physical, emotional, and medical risks, should similarly require the consent of a lucid and a coherent person who is capable of understanding where, how, and with whom she is engaging in intimate sexual relations.

V. DRUG-FACILITATED SEXUAL ASSAULT

A. An Overview

The last twenty years have seen a significant increase in the incidence of drug-facilitated sexual assault (DFSA). Anecdotal accounts indicate there is epidemic use of “rape drugs.”²⁶⁴ No one knows how common DFSA is, however, because today’s research tools cannot measure the frequency or incidence of the use of these drugs.²⁶⁵ Investigations are often inconclusive for a myriad of reasons. Two primary reasons are (1) delayed reporting and (2) limited testing.

First, many victims are not immediately aware that they have been drugged. Even if they are aware, the immediate and residual effects of the drug impede timely reporting and examination. (A victim may be unconscious for hours after the assault and then feel woozy and hung-over after regaining consciousness.) In addition, some victims do not promptly report or present for medical care due to feelings of guilt or self-blame (if they ingested alcohol and/or drugs voluntarily), confusion and uncertainty about the events that transpired, and a reluctance to make an accusation without knowledge or clear memory of the assault.²⁶⁶ As a result, by the time the victim presents for medical care – if she seeks it at all – any remaining traces of the drug may be too insignificant to be measured.²⁶⁷

Second, even if a victim seeks testing, there are scores of drugs that may be used for DFSA. Most victims don’t know what drug they consumed, and it is considered too costly, inefficient, and an ineffective use of resources to test for a random sampling. As a

²⁶⁴ See, e.g., Koesters SC, Rogers PD, Rajasingham CR. *MDMA (‘ecstasy’) and other ‘club drugs’: The new epidemic*. PEDIATRIC CLIN. NORTH AM. Apr. 2002; 49(2):415-33.

²⁶⁵ Nora Fitzgerald & K. Jack Riley, *Drug Facilitated Rape: Looking for the Missing Pieces*, NAT’L INST. JUSTICE J. at 10 (Apr. 2000), available at www.ncjrs.gov/pdffiles1/jr000243c.pdf (last visited Feb. 26, 2007).

²⁶⁶ *Id.* at 12.

²⁶⁷ *Id.*

result, by the time a victim reports a suspected DFSA, conclusive forensic evidence often has been lost. (See Chapter 5 for additional discussion of DFSA and the forensic exam.)

DFSA victims often report experiencing some or all of the following symptoms:

- sensations of drunkenness that do not correspond with the amount of alcohol consumed;
- altered levels of consciousness; unexplainable signs of physical trauma;²⁶⁸
- slowing psychomotor performance;
- muscle relaxation;
- decreased blood pressure;
- sleepiness;
- headaches;
- dizziness;
- nightmares;
- confusion;
- tremors; and
- unexplained gaps in memory.²⁶⁹ (To the extent victims can remember events, however, their memory is typically accurate and consistent with the events that transpired.)

When victims cannot provide a complete narrative of events, they often encounter suspicion, disbelief, and/or frustration. This inability to supply the information requested compounds the victim's sense of helplessness, vulnerability and frustration.²⁷⁰

Over the counter, prescription, and illegal drugs, alone or in combination with alcohol, may be used to facilitate a sexual assault. While certain drugs are more widely known, there are at least 40 different drugs that may be used to commit a DFSA. Currently, the drugs most commonly given to victims include Ketamine, and Gamma

²⁶⁸ Fitzgerald & Riley, *supra* note 265, at 9.

²⁶⁹ EXECUTIVE OFFICE OF THE PRESIDENT: OFFICE OF NATIONAL DRUG CONTROL POLICY, *Drug Policy Information Clearinghouse Fact Sheet: Rohypnol* (2003) (hereinafter "Rohypnol Fact Sheet").

²⁷⁰ *Id.* at 12.

Hydroxybutyrate (“GHB”).²⁷¹ The use of Rohypnol, a benzodiazepine, has been widely publicized but is now much more difficult to obtain. (Rohypnol functions like the central nervous system depressant Valium, but is ten times more powerful.²⁷² Because it is tasteless and odorless it is an especially potent sexual assault weapon.²⁷³)

As with alcohol intoxication, states vary as to whether and to what extent a victim is incapable of consenting to sexual contact when she is voluntarily (versus involuntarily) intoxicated by a legal or illegal drug. Approximately one-half of the jurisdictions in the United States have some type of drugging statute; some jurisdictions take drugging into account in grading the severity of the offense or in determining the length of sentence.²⁷⁴ Another category of related statutes consists of controlled substances provisions outlawing the possession and distribution of “rape drugs.”²⁷⁵ In addition, the administration of any intoxicant may be considered battery.²⁷⁶

B. Protecting Your Client’s Interests: The Privacy Implications of Toxicology Tests

Toxicology tests have serious privacy implications for victims. Comprehensive toxicology testing may detect the presence of all substances, prescribed medications and drugs – both illegal and legal – depending on what panels are conducted. For example, if a victim is regularly taking an anti-depressant, using marijuana or cocaine, or using prescription drugs, these substances may all be detected in the analysis. In fact, they will interact and have an exponential impact on the victim’s incapacitation. As an advocate, you should be educated about these privacy implications. Before a victim submits a

²⁷¹ Fitzgerald & Riley, *supra* note 265, at 9. See also NATIONAL JUDICIAL EDUCATION PROGRAM, *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases. A Model Four-Day Curriculum: Drug Facilitated Sexual Assault* (2001). Other drug classes that are reportedly used according to this source are: Ethanol, Benzodiazepines, Barbiturates, Opiates, Antihistamines, Hallucinogens, and Sedatives.

²⁷² Rohypnol Fact Sheet, *supra* note 269, at 1.

²⁷³ *Id.*

²⁷⁴ See Falk, *supra* note 233, at 158 (describing criminal drugging statutes as falling into five categories including: 1) drugging to accomplish a sexual offense; 2) drugging to commit any crime; 3) non-therapeutic drugging; 4) drugging to poison; and 5) grading and sentencing provisions based on drugging).

²⁷⁵ See *id.* at 158.

²⁷⁶ See *id.* at 136.

blood or urine sample for analysis, she must be advised that toxicology testing may reveal her use of legal or illegal substances. (*See* Chapter 5 for additional discussion of this issue.) Also, because the defense will likely be provided a copy of the lab report, they will have information about any prescription medications identified in the tests. These may include prescriptions for treating a mental health or medical condition, including depression, cancer, multiple sclerosis, etc. The defense may use this information to cross-examine the victim and embarrass her or undermine her credibility. It is vital to prepare the victim if this has occurred, and to adapt the legal strategy accordingly.

VI. CONCLUSION

Despite decades of advocacy, the many advances of the anti-sexual violence movement have resulted in too little change. Victims continue to be attacked on grounds of intoxication, credibility and consent. Judges, juries, hearings officers – even family and friends – blame the victim as they wonder: “What did she do to invite or encourage the assault?”; “Did she want it?”; and “Did she consent?” Through medical, mental health, forensic, and other evidence, you can confront this anti-victim bias. The concept of a right to bodily autonomy is so simple. The reality is still difficult to achieve.

Chapter Five

UNDERSTANDING VICTIMS' MEDICAL NEEDS: THE MEDICAL AND FORENSIC EXAMINATIONS²⁷⁷

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I. INTRODUCTION

Not all sexual assault related medical exams are for forensic purposes. There are many compelling health reasons for a victim to seek medical care following an assault unrelated to evidence collection. Sexual assault victims' emergent medical needs may include: evaluating injuries; providing any necessary treatment for injuries; being

²⁷⁷ The information in this section is excerpted and summarized primarily from the U.S. Department of Justice Office on Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents* (September 2004), available at www.ncjrs.gov/pdffiles1/ovw/206554.pdf. (hereinafter "National Protocol"). The Victim Rights Law Center thanks Susan Vickers, Esq., for her contributions to this chapter. Thanks, too, to Kate Lawson, Esq., Angela Lehman, Esq., Dr. Linda Ledray, Ph.D., R.N., SANE-A, FAAN, and Cassandra Hearn for their contributions.

assessed for prophylaxis against HIV and other sexually transmitted infections (STIs), assessing pregnancy risk and discussing possible use of emergency contraception;²⁷⁸ assessing other reproductive health issues; and seeking appropriate referrals (including counseling, STI treatment, pregnancy prevention) and follow-up contact or care. Moreover, a victim may want a medical examination, but may not want or agree to a forensic exam or evidence collection.

[PRACTICE TIP: It is imperative to understand a victim's medical circumstances as well as how those circumstances may affect her legal case. For example, it is important to know whether a victim is receiving HIV prophylaxis because the side effects may inhibit a victim's ability to be productive in an employment or educational context. (In some instances, the side effects may be so severe that a victim requires substantial accommodations before she can resume her work or school.)]

The two components of the post-assault exam (the medical and the forensic) may be provided by the same or a separate medical provider. This chapter focuses primarily on the former, *i.e.*, the combined post-assault medical and forensic examination, and the evidence collection process. Such exams are most likely to be conducted prior to or at the outset of your providing services to a sexual assault survivor. The exams may be conducted by a specially trained Sexual Assault Nurse Examiner (SANE), a Sexual Assault Examiner (SAE), an emergency medicine doctor, a nurse, or other medical provider. (*See* Section I.B., below for a discussion of the SANE.)

²⁷⁸ Timing of emergency contraception (EC) is critical for victims. EC should be administered as soon as possible following exposure to the risk of pregnancy and ideally within twelve hours (although reduced efficacy has been proven up to 72 or more hours). Because some hospitals, doctors, pharmacists and drug store chains refuse to dispense EC for religious, moral, or other reasons, it is important to be familiar with local practices regarding its availability. It is also important to be familiar with the law in the state where the victim is seeking the EC. For example, Washington, Illinois, New York, Massachusetts, and New Mexico now mandate access to EC. *See* WASH. REV. CODE ANN. § 70.41.350 (2007), 410 ILL. COMP. STAT. ANN. 70/2.2 (2007), N.Y. PUB. HEALTH LAW § 2805-p (2007), MASS. GEN. LAWS ch. 111 § 70E (2007), and N.M. STAT. § 24-10D-3 (2007). California, Hawaii, and Massachusetts allow EC to be sold over-the-counter. CAL. BUS. & PROF. CODE § 4052.3 (2007), HAW. REV. STAT. § 461-1 (2007), MASS. GEN. LAWS ch. 94C § 19A (2007).

A forensic medical exam is referred to as a Sexual Assault Forensic Exam (SAFE). When a medical provider conducts the SAFE, the provider will both meet the victim's immediate health needs and collect forensic medical evidence and information.²⁷⁹ Addressing a victim's medical needs may include: evaluating injuries; conducting a medical exam promptly; providing any necessary treatment; prescribing and/or administering prophylaxis against HIV and other sexually transmitted infections (STIs), assessing pregnancy risk and discussing, providing, and/or prescribing emergency contraception; assessing reproductive health issues; and providing appropriate referrals (including counseling, STI treatment, pregnancy prevention) and follow-up contact or care.

The medical examiner will also gather information and evidence that may be used for forensic purposes. This may include obtaining a history of the assault, documenting exam findings, and properly collecting, handling, and preserving evidence. A medical provider may later be asked to analyze and present the findings and provide factual and expert opinions.²⁸⁰

[PRACTICE TIP: In your initial intake with the victim, determine if she had a medical and/or forensic examination following the sexual assault. In every sexual assault case, whether or not a medical forensic examination was conducted may affect the availability and success of her legal remedies in a civil or criminal prosecution. This is especially true if the examination revealed physical indications or evidence of the assault.]

II. INFORMED CONSENT

Prior to starting a sexual assault forensic exam and before each medical or forensic procedure, the medical examiner should tell the victim what will be done, and

²⁷⁹ *Id.* at 15.

²⁸⁰ Legal Momentum's National Judicial Education Project has produced sexual assault training materials for prosecutors and other professionals, including a video entitled *Presenting Medical Evidence in an Adult Rape Trial*, available at www.legalmomentum.org/legalmomentum/publications/national_judicial_education_program_njep/.

why. The victim must consent both to the medical evaluation and treatment and to the forensic exam and evidence collection. Consistent with the National Protocols for Sexual Assault Medical Forensic Examinations,²⁸¹ a victim should be asked to provide both verbal and written consent for the medical and the forensic procedures.²⁸² The examiner may not proceed without the victim's permission, and the victim has the right to decline any (or every) aspect of the exam.²⁸³

The medical examiner should explain the implications of declining a particular procedure, including that declining a procedure may negatively affect the quality and effectiveness of medical care, the usefulness of evidence collection, and, ultimately, any criminal investigation and/or prosecution. Further, the medical examiner should explain to the victim that the assailant may use the declination of a particular procedure to discredit the victim. It is also helpful to let the victim know that the medical examiner is not providing this information to pressure her into consenting, but rather to insure that she makes an informed decision. If a procedure is declined, the victim's reason(s), if disclosed, should be documented by the medical examiner.²⁸⁴

[PRACTICE TIP: The victim always has the right to decide whether and when to proceed; the medical examiner should provide her with the medical information she needs to make these decisions.]

The medical examiner must assess whether the patient has the cognitive capacity to consent to the examination. If the victim lacks capacity to give informed consent, the examiner should follow applicable internal policies and jurisdictional statutes for securing consent. For a victim with a cognitive disability, for example, appropriate policies would include a procedure for determining guardianship, obtaining consent from the guardian if needed, and alternative steps if the guardian is not available or is suspected of abuse or neglect. Exam facilities should also have policies in place regarding consent for treatment in cases in which patients are unconscious, intoxicated, or

²⁸¹ National Protocol, *supra* note 277.

²⁸² *Id.* at 39.

²⁸³ *Id.*

²⁸⁴ *Id.*

under the influence of drugs, and are therefore temporarily incompetent to give consent.²⁸⁵

If the victim is a minor, the medical examiner (as well as the attorney and/or advocate) should be familiar with the jurisdictional statutes governing a minor's right to consent to emergency medical care, counseling, contraception, STI testing and treatment, and evidence collection. No one statute is likely to govern all of these issues. For example, a minor may have the right to authorize her own forensic examination or testing for STIs, but she may need parental consent for the birth control or other contraception. (There are exceptions to parental consent requirements if the parent or guardian is the suspected offender or cannot be found and the evidence must be collected quickly. In such cases, the law generally specifies who may give consent in lieu of the parent or guardian, such as a police officer, representative from the jurisdiction's children's services department, or judge.²⁸⁶) An emancipated minor may have the legal right to make some or all of these decisions for herself. In some jurisdictions, a pregnant minor is emancipated by virtue of her pregnancy. Even if a minor has the express right to consent to certain medical procedures, however, the care provided or communications between the victim and the examiner may not necessarily be kept confidential from the minor's parent or guardian.

[PRACTICE TIP: The laws that govern a minor's right to consent and right to privacy to are varied and complex. The Center for Adolescent Health Law (CAHL) publishes a monograph that has a state by state overview of minors' rights in the health care context.²⁸⁷ The monograph may help practitioners determine the full range of a minor's consent and privacy rights in the context of a sexual assault. A sexual assault coalition attorney or juvenile rights attorney may also be able to provide expert guidance on providing services to minors. *See also* VAWA, 42

²⁸⁵ *Id.* at 40.

²⁸⁶ *Id.*

²⁸⁷ Information about the CAHL monograph available online at www.cahl.org/MC%20Monograph.htm.

U.S.C.A. § 13925 (a) (37)(2)(b) (addressing confidentiality and services to minors).]

Some victims will have a friend and/or a family member with them when they arrive at the hospital or medical provider. Ideally, only the medical examiner and possibly the (community based) sexual assault victim advocate should be in the room during the initial interview, unless the victim states that she needs an additional support person present. If the victim wishes to have a third person such as a friend or family member present, the victim should be informed of what effect this may have on her rights regarding privilege, privacy and confidentiality. This is especially important if the third party's presence waives a victim's medical or other privilege. (The presence of a third party, such as a parent or intimate partner, may also inhibit a victim's ability or willingness to disclose all of the facts surrounding the assault. Withholding information may compromise the care provided, and/or may later be used to discredit a victim's testimony.) Law enforcement (including a law enforcement- or prosecutor-based victim assistance advocate) should also remain out of the room during the medical exam. Similarly, no prosecutor or law enforcement personnel should be in the room during evidence collection. It may be appropriate for a third person to come in to support the victim during this time.²⁸⁸ However, the victim and the support person must understand that, depending on the jurisdiction, the support person may be required to testify in court about a victim's statements, appearance, etc.

III. THE FORENSIC EXAMINATION

A. The Sexual Assault Nurse Examiner (SANE)

A growing trend across the United States (and a best practice) is the use of sexual assault nurse examiners (SANEs) to conduct a forensic medical exam. SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform forensic exams. The terms "sexual assault forensic examiner" and "sexual assault examiner" are often used more broadly to denote a health care provider (*e.g.*, a

²⁸⁸See generally, SANE Institute, *supra* note 98.

physician, physician assistant, nurse, or nurse practitioner) who has been specially educated and completed clinical requirements to perform this exam.²⁸⁹ Approximately 80% of SANE programs are based in hospitals, with the remaining 20% based in community entities such as police departments, medical clinics, YWCAs, sexual assault crisis centers, and prosecutor's offices.²⁹⁰ A SANE may obtain state or national certification, or both.²⁹¹

The role of a SANE includes providing medical care, appropriate evidence collection and documentation, being knowledgeable about the forensic examination data and results, providing victims with referrals for follow-up services, testifying in court or other legal proceedings (the SANE may be called as a witness by the defendant and/or the prosecution), communicating with law enforcement, and meeting regularly with the area's SART, if one exists. Evidence collected during a medical forensic exam may be used to corroborate force, corroborate recent sexual contact, identify the assailant,²⁹² and, if the SANE testifies, the victim's assault history. A SANE can help a victim negotiate the medical and legal systems by reducing both the waiting time for an evidentiary examination and the examination period, improving evidence collection, and anticipating and responding to victims' needs.

They should seek informed consent as discussed in the section above. SANES should also inform victims they have a right to receive medical care regardless of whether the assault is reported to law enforcement, and what effect, if any, the decision to report

²⁸⁹ *Id.* at 53.

²⁹⁰ SANE Institute, *supra* note 98.

²⁹¹ *Id.* (National certification is through the International Association of Forensic Nurses (IAFN) and includes the following features: (1) the national training is a more sophisticated testing process; (2) the national standard is set through a nursing organization [which one?]; and (3) if a SANE is nationally certified in one state, she may practice in another. Features of state certification include: (1) the certifying body varies state to state (*e.g.*, Department of Health, Attorney General's Office); (2) certification requirements vary, no consistent standards; (3) state certification only restricts the SANE's practice; and (4) state certification program is expensive to develop and monitor.)

²⁹² Evidence that may identify the assailant includes DNA from any body tissues (fluid containing cells), which includes semen (sperm/seminal fluid), blood, saliva, perspiration, hair, nail, skin, urine/fecal material, and vomit.

may have regarding payment for medical care and the forensic exam.²⁹³ (See Chapter 13 on Financial Considerations for additional information.)

Attorneys and advocates should be familiar with the SANE program in their area (and try to establish one if none exists). It is important for both the victim and the trier of fact to understand that a lack of medical evidence does not mean that there was no sexual assault.²⁹⁴

B. The Sexual Assault Forensic Exam

The SANE will establish a medical forensic history by asking the patient detailed questions related to the assault. This information will guide the exam, evidence collection, and crime lab analysis of findings. There is no one set of questions that examiners ask when taking a victim's forensic medical history. Possible questions include:

- date and time of the sexual assault(s);
- pertinent patient medical history;
- recent consensual sexual activity;
- post-assault activities of patients;
- assault-related patient history;
- suspect information (if known);
- nature of the physical assault(s); and
- description of the sexual assault(s).²⁹⁵

Injuries that can be seen and any areas of soreness are typically documented. (Hopefully, the examiner will document the exam using lay terms, such as “bruise” instead of “ecchymosis” and “redness” instead of “erythema.”) As noted above, the victim should be cautioned that “no sign of genital trauma” does not mean that no sexual

²⁹³ National Protocol, *supra* note 277, at 49-50.

²⁹⁴ See the National Judicial Education Program/Legal Momentum video *Presenting Medical Evidence in an Adult Rape Trial*, available at www.legalmomentum.org/legalmomentum/publications/national_judicial_education_program_njep/.

²⁹⁵ See *id.* See also National Protocol, *supra* note 277, at 49-50.

assault occurred. The vagina and uterus are extremely flexible and may accommodate objects or organs inserted against the victim's will without leaving a visible injury. A victim should also be reassured that the body may have its normal human sexual response, even where the victim does not consent. That normal response may include lubrication, relaxation of the pelvis, swelling of the labia, tilting of the pelvis to prepare for penetration, or even assistance with insertion. For a male victim, the normal response may include an erection or ejaculation.

1. The SAFE Kit

A SAFE should be conducted by a SANE or other medical examiner specifically trained in medical evidence collection. The SANE or other examiner will use a SAFE kit (formerly referred to as a "rape kit" or "sexual assault kit") to gather the medical evidence.

A SAFE kit contains evidence collection tools including slides, swabs, combs, and evidence packaging bags or bindles.²⁹⁶ Standard documentation forms are included in the contents of the SAFE kit. These forms include a consent form for evidence collection and medical treatment, and a consent form for toxicology testing, if applicable.²⁹⁷ The specific procedures to be followed and sources of evidence are determined by the type of assault, where and how the victim was assaulted, and the victim's post-assault activity. Although the victim may consent to all steps of the examination at the beginning of the process, she or he has the right to refuse any individual step, or to stop the exam at any time.

The evidence collected is not limited to the SAFE kit. Additional items or samples may be gathered including the speculum used in the forensic exam, buccal swabs instead of blood (for a reference sample), toilet tissue, emesis, lice (if found on the victim

²⁹⁶ *Id.*

²⁹⁷ See Section C(2), below, for a discussion of informed consent to toxicology testing.

and/or assailant), condoms, tampons, and anything found in the vaginal vault, if applicable to the case.²⁹⁸

2. The Timing of the SAFE

Many jurisdictions use 72 hours after the assault as the standard cutoff time for collecting evidence, but collection beyond that point is possible. In response to advancing DNA technologies, some jurisdictions have extended the standard cutoff time (*e.g.*, to five or seven days).²⁹⁹ These technologies enable forensic scientists to analyze evidence previously unusable. Thus, it is critical that in every case where a patient is willing, the medical examiners should obtain the medical forensic history, examine patients, and document findings. For medical reasons, it may also be important for a victim to receive medical care outside the standard evidence collection period. Also, the information gained from the history and exam may help a health care provider determine whether there is evidence to collect and, if so, what should be collected.³⁰⁰ Situations where evidence may be found even after considerable periods of time include patients who complain of pain or bleeding, have visible injuries, are immobile or bed-bound, have not washed themselves since the assault, are uncertain about time, have a history of significant trauma from the assault, or where there was ejaculate that was not removed.³⁰¹ If a victim is unsure whether she wants to prosecute the assailant, she should be given the option of having the exam conducted to preserve any possible evidence. The medical examiner and/or the victim advocate should be sure to let the victim know how long law enforcement will keep the evidence if no report is filed.

3. Documentation Collected

SANEs are responsible for documenting forensic details of the exam in the medical forensic report. This report usually includes patient consent forms related to evidence, the medical forensic history, and documentation of exam findings. (The

²⁹⁸ Some jurisdictions also use dental floss (in the case of an oral assault), although its use is controversial because of fears of increased HIV exposure if the floss cuts the victim's gum during the collection process.

²⁹⁹ National Protocol, *supra* note 277, at 7.

³⁰⁰ *Id.* at 277.

³⁰¹ *Id.*

medical forensic history and documentation of exam findings are discussed below.) The only medical issues documented in this report are findings that potentially relate to the assault or pre-existing medical factors that could influence interpretation of findings. If a SANE is required to testify in court, the SANE will likely use the report to refresh her memory.³⁰²

Separate medical documentation by SANEs and other clinicians follows a standard approach of addressing acute complaints, gathering pertinent historical data, describing findings, and documenting treatment and follow-up care. The medical record is stored at the exam site. The exam site has clear policies about who is allowed access to these records.³⁰³

As a best practice, forensic examination records should be maintained separately from other records to avoid inadvertent disclosure of unrelated information and to preserve victim confidentiality. The medical record is not part of the evidence collection kit; it should not be submitted to the crime lab. Much of the information in a medical record is not relevant to case prosecution, and releasing it infringes patients' privacy rights. In addition, the records may be protected by physician-patient privilege. Although all or part of the medical record may be subpoenaed, if a patient does not consent to its release the court will have to decide whether some or all of the information in records will be released.³⁰⁴ A victim's attorney may brief this issue for the court to try and protect the victim's privacy by limiting which records will be released, and securing confidentiality provisions and conditions on the redisclosure of any information that will be released. (*See* Chapter 3 for a more detailed discussion of protecting victims' privacy rights.)

[PRACTICE TIP: When you request a victim's forensic medical record, if the records are not computerized request a color (rather than black and white) photocopy, or inspect the original report. Differences such as

³⁰² *Id.* at 79.

³⁰³ *Id.*

³⁰⁴ *Id.*

different colored pens or changes in handwriting and/or writing instruments are more easily detected in originals and in color copies. This can help you to identify how different providers who entered notes into the medical record and explain any irregularities or inconsistencies in a medical report.]

4. Chain of Custody for the SAFE Kit

Once the SAFE kit has been opened by the examiner, it cannot be left unattended. The chain of custody must be preserved so that the evidence is both admissible and credible. Once completed, the kit is sealed, placed in an evidence or other sealed transport bag, and a Chain of Possession label is affixed. (This label documents the chain of possession of the kit from the hospital to the crime lab.)³⁰⁵

C. Drug-Facilitated Sexual Assault and Collecting Toxicology Samples

If the victim's account and/or physical symptoms suggest that drugs facilitated the assault, the victim should be given the option to have Comprehensive Toxicology Testing. SANEs should be trained in how to screen for suspected drug-facilitated sexual assault, obtain patients' informed consent for testing, and collect toxicology.³⁰⁶ For a more detailed discussion of drug facilitated sexual assault, *see* Chapter 4, on Consent.

[PRACTICE TIP: Routine toxicology testing is not recommended because of the risk of breaching victims' privacy. Under no circumstances should the medical forensic exam and treatment be conditioned upon a patient's consent to toxicology testing.]

1. Situations that May Warrant Toxicology Testing

Urine and/or blood samples might be collected in any of the following situations:

- if a patient's medical condition appears to warrant toxicology screening for optimal care (*e.g.*, the patient presents with drowsiness, fatigue, light-

³⁰⁵ *Id.* at 104.

³⁰⁶ *Id.* at 101.

headedness, dizziness, nausea, decreased blood pressure, memory loss, impaired motor skills, or severe intoxication);

- if a patient or accompanying persons (*e.g.*, family member, friend, or law enforcement representative) states the patient was or may have been drugged; or
- if a patient suspects drug involvement because of a lack of recollection of the specific event(s).³⁰⁷

Two of the more commonly known rape drugs include Gamma Hydroxybutyrate (GHB) and Rohypnol. Rohypnol is not approved for sale in the U.S. It has many street names, including Roofies, Ruffies, Roche, R-Z, Rib, Rope, Stupefy, Shays, Roachies, La Rocha, Circle, Roach-2, Roopies, Lunch Money, Whiteys, the “forget pill” and others. Rohypnol was widely publicized and more commonly used until the mid- to late 1970’s but its availability and usage have since declined.

GHB is a rapidly acting central nervous system depressant commonly used in drug-facilitated sexual assault.³⁰⁸ Currently, GHB is not sold in the United States for medical purposes. It has been explored as a pre-anesthetic, as a treatment for alcoholism and narcolepsy, for muscle-building and fat reduction, and as a sleep aid. Prior to 1990, it was available over-the-counter in health food stores and in gyms. GHB is still used in Europe, but other drugs are given along with the GHB to manage the side effects, which can include seizures. GHB can be manufactured easily by individuals in their own kitchen; it is an odorless and colorless liquid or powder. Some perpetrators add flavorings to make the smell more common like cinnamon, to give it color, and to mask its slightly salty taste. The recipe has been found on the internet and in gyms. It may be ordered through magazines, where it is touted as a way to enhance a sexual experience.

GHB is very dangerous. Different people respond differently to the same dose and when the drug is manufactured at home it is difficult to measure the strength and dosage without sophisticated laboratory equipment. There have been deaths associated with the use of GHB in combination with alcohol. The street names for GHB are varied,

³⁰⁷ *Id.* at 102-103.

³⁰⁸ See generally EXECUTIVE OFFICE OF THE PRESIDENT: OFFICE OF NATIONAL DRUG CONTROL POLICY, *Drug Policy Information Clearinghouse Fact Sheet: Gamma Hydroxybutate (GHB)* (2002).

and include (but are not limited to): Liquid E., Liquid X., Grievous Bodily Harm, G, Georgia Home Boys, Cherry Meth, Salt Water, Vita-G, G-Juice, Bedtime Scoop, Easy Lay, Energy Drink, and Goop.

A common abuse of GHB by perpetrators involves slipping the drug into a victim's drink, usually alcohol, before the sexual assault. Within a few moments, the victim appears drunk and helpless. Often, the perpetrator acts as a "Good Samaritan" and offers to escort the victim home. The victim has no memory of the assault when she regains consciousness. Although Rohypnol and GHB have received much publicity regarding their use as rape drugs, many different drugs may be used to incapacitate a victim or to commit a drug-facilitated sexual assault.

2. Separate Informed Consent for Toxicology Testing

Because of the sensitive issues surrounding toxicology testing, there is a separate and very detailed consent form that the victim must sign before proceeding. Toxicology testing potentially exposes the victim to all sorts of privacy invasions, so it is crucial the victim understand that the testing will detect the presence of ALL substances, medications and drugs, regardless of whether they are legal. Use of anti-depressants, marijuana, cocaine, or other prescription and illegal drugs will be made available to the defense, prosecution, and other law-enforcement professionals, if it is revealed during the toxicology analysis.

Medical providers should explain toxicology testing procedures to patients. Before agreeing to toxicology testing, a provider should ensure that the patient understands:³⁰⁹

- The purposes of toxicology testing and the scope of confidentiality of results;
- The ability to detect and identify drugs and alcohol depends on collection of urine and/or blood within a limited time period following ingestion;

³⁰⁹ National Protocol, *supra* note 277, at 102.

- There are thousands of drugs that may be used to effect an assault, and the lab is likely able or willing to test for only a few of the many drugs that might have been used;
- There is no guarantee that testing will reveal that drugs were used to facilitate the assault;
- Testing may or may not be limited to drugs commonly used to facilitate sexual assault and may reveal other drugs or alcohol that patients may have ingested voluntarily;
- Whether any follow-up treatment is necessary if testing reveals the presence of drugs used to facilitate sexual assault;
- Test results showing voluntary use of drugs and/or alcohol may be discoverable by the defense and used to attempt to discredit the victim or to question the victim's ability to accurately perceive the events in question. (Test results could also help substantiate that the victim's voluntary ingestion of drugs and/or alcohol sufficiently impaired the victim's capacity to legally consent);
- Whether there is a local prosecution practice of charging sexual assault victims for illegal voluntary drug and/or alcohol use revealed through toxicology screening;
- Failure or refusal to undergo testing when indicated by circumstances as described above may negatively impact the investigation and/or prosecution;
- When and how the victim can obtain information on the results from toxicology testing;
- Who will pay for toxicology testing; and
- Whether patients have the opportunity to revoke their consent to toxicology testing.

The information set out above is complex, and a traumatized victim may not be able to fully or immediately appreciate the implications of consenting to or refusing a toxicology test. Care should be taken in delivering the information to patients. The information must be explained using simple, commonly used words, in the primary language of the victim, slowly, and without judgment. Even when not in trauma or in physical and emotional pain, many people will just sign documents, or will be uncertain

about asking questions or demanding more information. In order for consent to be truly informed, the victim must fully understand these complicated concepts and the potential ramifications of the decisions.

3. The Timing of Toxicology Testing

Toxicology samples should be collected as soon as possible after a suspected drug-facilitated case is identified and informed consent is obtained. The samples should be collected even if the patient has not decided whether to report the assault to law enforcement.³¹⁰ The popularity of certain these “sexual assault drugs” such as Rohypnol and GHB is based partly on how rapidly they are flushed out of the body – in some cases they leave the bloodstream within 6 hours or less.³¹¹ This means that it is very likely that, despite a drugging having taken place, the toxicology test may find no traces of the drug. The length of time that the drugs used in most drug-facilitated assault cases remains in the urine or blood depends on a number of variables including: the type and amount ingested; patients’ gender, body size and metabolism rate; whether the victim had a full stomach at time of ingestion; and when victim last urinated.

Because these drugs disappear so rapidly, it is important to collect the sample to preserve a victim’s options. Without a sample, you are left to build a circumstantial case around the issue of consent. (*See* Chapter 4, The Overarching Issues of Intoxication, Credibility and Consent.)

a. Urine

If the patient may have been drugged within 96 hours prior to the exam (and the patient consents), the medical examiner should collect a urine specimen. Urine allows for a longer detection period than blood for drugs commonly used in DFSA. The sooner a urine specimen is obtained after the assault, the greater the chances of detecting drugs that are quickly eliminated from the body. Ideally, patients should not urinate until after

³¹⁰ *Id.* at 103.

³¹¹ GHB typically leaves the bloodstream in four to seven hours, although it still detectible in urine within 12 hours. Rohypnol is detectible in urine up to 72 hours.

evidence is collected. The number of times the patient urinated prior to collection of the sample should be documented by the medical examiner.³¹²

b. Blood

If the patient may have been drugged within 24 hours prior to the exam (and the patient consents), the medical examiner should collect a blood sample. A blood sample taken within this time period may be able to pinpoint the time when drugs were ingested. If a blood sample is collected for toxicology screening, it should be accompanied by a urine sample. When a blood alcohol determination is needed, the medical examiner should collect blood within 24 hours of alcohol ingestion, and consistent with the jurisdiction's policy.³¹³

IV. CONCLUSION

You will be able to serve your client better if you understand the medical and forensic examination process. Your assistance may be key to helping her decide whether to consent to specific procedures, to her understanding of how the information and evidence gathered may be used, and to her ability to negotiate the medical and criminal justice systems.

³¹² *Id.*

³¹³ *Id.*

Chapter Six

VICTIMS' MENTAL HEALTH ISSUES: WHAT THEY ARE AND WHY THEY MATTER TO PROVIDING EFFECTIVE VICTIM ADVOCACY AND LEGAL REPRESENTATION³¹⁴

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I. INTRODUCTION

Advocates and attorneys (and other professionals) should be aware of two distinct mental health issues that often arise in the context of sexual assault: (1) Sexual assault often causes an array of cognitive and mental health impacts ranging from memory impairment to drug and alcohol abuse. These may be of varying duration and

³¹⁴ The Victim Rights Law Center thanks the chapter authors, Dr. Nicola Brown, Lisa Hartwick, LICSW, and Susan Vickers, Esq., for their work.

intensity. (2) Perpetrators frequently target individuals who are already suffering from mental health challenges (*e.g.*, bipolar disorder, depression, alcoholism) because these individuals are often perceived as more vulnerable, socially or physically weaker, and less likely to be effective witnesses against the assailant.³¹⁵ Understanding both of these issues is integral to providing effective advocacy and representation. It can impact your relationship with your client and be key to meeting the victims' needs.

This chapter provides an overview of the most common mental health issues associated with the trauma of sexual assault. The information provided is intended to assist attorneys and advocates by providing a general understanding of some basic mental health issues for sexual assault victims. This chapter identifies only some of the more common major mental health illness. It is only a brief summary. It is not a substitute for mental health expertise. It certainly cannot replace the counseling or services provided by trained experts in the field.

Mental health issues may arise at any time in the course of providing services to a survivor. Regardless of whether a victim's mental health issues are a post- or pre-assault condition, it is vital for the attorney or advocate working with the victim to understand how the mental health condition relates to the sexual assault. The victim's mental health may impact your representation or advocacy in a variety of ways, including:

- Understanding what civil legal remedies the victim needs. (For example, if a high school student is suffering from panic attacks as a result of the sexual assault, school accommodations, access to appropriate care/benefits, and/or a protection order against the assailant while the victim is at school may need to be sought)
- The victim's ability to be the most credible witness possible. Memory impairment may make it challenging for the victim to provide a linear account of all aspects of the assault. Depression may prevent a victim from attending vitally important legal meetings. Mental health illness prior to the assault, such as bi-polar disorder with delusions or schizophrenia may lead a judge, jury, or other adjudicator to question the victim's competency to

³¹⁵See generally D. Fowler, *The Case for Treating Trauma in Severe Mental Illness: A Commentary*, AM. J. OF PSYCHIATRIC REHABILITATION 7, 205-12 (2004).

provide credible testimony. Symptoms of existing medical conditions (*e.g.*, Alzheimer's) may also escalate due to trauma.

- Privacy concerns that the attorney and advocate must work vigilantly to protect. For instance, if the victim suffered from bipolar disorder prior to the assault or was sexually abused as a child she may have extensive treatment records. Those records may be the target of defense subpoenas in the event of adversarial legal action.

These are just a few examples of how a victim's mental health issues may impact an advocate or attorney's assistance. Your advocacy strategy must reflect an accurate understanding of your client's mental health status, both pre- and post-assault.

[PRACTICE TIP: Only a professional with the proper training and credentials can render a mental health diagnosis; it is never the role of an advocate or attorney to suggest or attempt to determine that a victim suffers from a mental health condition.]

If you believe your client is exhibiting symptoms of a serious mental health disorder, you should refer her to an appropriate service provider for proper diagnosis and treatment.

[PRACTICE TIP: Although advocates and attorneys are encouraged to work collaboratively with one another and other service providers, including medical and mental health personnel, it is important to be mindful of how such collaborations might impact your client's privacy interests. An attorney's communications with a client are privileged; an advocate's communications may be privileged, too, depending on the jurisdiction. Be careful not to inadvertently breach or compromise a victim's confidentiality by discussing her case with other service providers. Sharing information about a victim can waive the attorney-client, advocate-client, or other privilege and may also trigger mandatory reporting requirements, depending on the nature of the information exchanged, with and by whom it is shared, and your jurisdiction's privilege and mandatory reporting laws. Although you and the other providers are working together to benefit the client, you should always

have a signed, written, time limited release from the victim before discussing her case. (See Chapter 3 on Privacy for additional information.)]

II. “COUNTER-INTUITIVE” ASPECTS OF WORKING WITH SEXUAL ASSAULT SURVIVORS

Because the mental health impact of a sexual assault may not be obvious or make intuitive sense, we begin this chapter with the “counter-intuitive” aspects of working with sexual assault survivors. Four of the most common counter-intuitive aspects of serving survivors of sexual assault involve: (1) victim memory; (2) delayed disclosure; (3) self-blame; and (4) minimization.³¹⁶ Each of these is discussed below.³¹⁷

A. Memory

Sexual assault disrupts normal memory functioning.³¹⁸ Memories of a sexual assault are often different than other traumatic or unpleasant memories. As one study describes them, “[t]he most powerful discriminator of sexual assault from other unpleasant memories was the degree to which they were less clear and vivid, contained a less meaningful order, were less well-remembered, and were less thought and talked about.”³¹⁹ Amnesia (impairment of memory) and hypernesia (distinct memory of one or more aspects of the traumatic event) can both occur after any traumatic event.³²⁰

There are other factors besides the trauma itself that may cause or exacerbate disruptions in memory. Memories of the key elements of an assault frequently are

³¹⁶ The Victim Rights Law Center thanks Lisa Hartwick at the Center for Violence Prevention and Recovery at Beth Israel Deaconess Medical Center in Boston for her contributions to the conceptualization of this chapter. Thanks, too, to Dr. Nicola Brown for her outstanding research and valuable assistance.

³¹⁷ For a general discussion of victims’ mental health disorders and the criminal prosecution, see David R. Englert, Ashleigh Diserio & Kate M. Ryan, *The Prosecutor’s Guide to Mental Health Disorders*, THE VOICE, Vol. 1, No. 10 (The National Center for the Prosecution of Violence Against Women, American Prosecutors Research Institute).

³¹⁸ W. E. Hovdestad & C. M. Kristiansen, *Mind meets body: On the nature of recovered memories*, 19 WOMEN & THERAPY 31-45 (1996).

³¹⁹ S. Tromp *et al.*, *Are Rape Memories Different? A Comparison of Rape, Other Unpleasant, and Pleasant Memories Among Employed Women*, J. OF TRAUMATIC STRESS 605-627 (1995).

³²⁰ J. A. Chu, *REBUILDING SHATTERED LIVES: THE RESPONSIBLE TREATMENT OF COMPLEX POSTTRAUMATIC AND DISSOCIATIVE DISORDERS* (1998).

impaired when a victim ingested alcohol or drugs prior to the assault.³²¹ A victim may lack a coherent memory due to a drug she knowingly consumed and/or a drug that was used by the perpetrator to induce anterograde amnesia. A sexual assault perpetrated following the victim's ingestion of a drug designed to compromise her memory and/or render her powerless to protest is often described as a drug-facilitated sexual assault ("DFSA").³²² The drugs used in a DFSA (formerly referred to as "date rape" drugs), may include any drug that induces amnesia and are used to facilitate a sexual assault. The resulting amnesia may be partial or total. Although some people assume that such drug-induced gaps in memory lessen the severity of a post-assault reaction, this is not always the case. A victim's experience of an assault that cannot be remembered fully may be as frightening and traumatic as the experience of intact, or even intrusive, memory.³²³ Survivors may suffer an intense effect without a full recollection of the assault, "replay" memory fragments in a ruminative way, become stuck on catastrophic scenarios they imagine may have happened in the "lost" time, and may have an elevated sense of vulnerability given the premeditation DFSA requires.³²⁴

It is very likely that the victim you are working with will suffer one or all of these memory phenomena. This can be problematic in the context of a civil or criminal legal case, as it may seem that the victim is unsure of what happened, or is even fabricating events, because her memory is so impaired by the trauma or the drug-induced amnesia. It is important to understand that these behaviors are actually indicia that a truly traumatic event occurred. Professionals with whom the victim interacts must understand the impact of sexual assault trauma and DFSA and not penalize or doubt the victim because she is having difficulty remembering events in detail or with total accuracy. As the victim's attorney or advocate, it may be frustrating to represent a client when new, potentially significant, details of the case emerge over time. It may also be challenging to

³²¹ S. A. Seifert, *Substance Use and Sexual Assault*, 34 *SUBSTANCE USE & MISUSE* 935-945 (1999).

³²² J. Gauntlett-Gilbert *et al.*, *Drug Facilitated Sexual Assault: Cognitive Approaches to Treating the Trauma*, 32 *BEHAVIORAL & COGNITIVE PSYCHOTHERAPY* 215-223 (2004) (hereinafter "Gauntlett-Gilbert *et al.*").

³²³ Fitzgerald & Riley, *supra* note 265, at 8-15.

³²⁴ Gauntlett-Gilbert *et al.*, *supra* note 322.

piece together the victim's experience when key events are missing or relayed on a timeline that is not linear. Be patient and understanding with your client, especially when difficult memories come to the fore, or when your client finds it difficult or even impossible to recount accurately what happened.

[PRACTICE TIP: Advocates must be prepared to respond to the inferences likely to be raised when a victim seeks remedies and her memory is impaired. While such impairments are common, and there are well-established scientific explanations why a victim's memory of the sexual assault may be "fuzzy," the absence as well as the recovery of memory may be used against her in court. Judges, lawyers, juries, and others may find a victim with memory problems less credible. Therefore, part of your task is to educate decision makers that such memory problems are both common and reliable indicia of an assault. Indeed, they should be seen as support for the veracity of a victim's experience, rather than cause for doubt.]

B. Delayed Disclosure

Guilt and shame are common responses to sexual assault.³²⁵ Due to this shame and the isolation that it causes, victims often delay disclosure.³²⁶ This delay, which may be hours, days, or years, should not be seen as an indication that the assault was not traumatic or that it did not happen. While false reports of sexual assaults are made to law enforcement agencies or other professionals, the incidence of false reporting is both marginal and at a rate similar to other felonies.³²⁷ What is *more* common is that victims never report the crime to the police. The *Rape in America* study, conducted in 1992 by the National Victim Center,³²⁸ is still the most methodologically sound study of this issue.

³²⁵ J. H. HERMAN, *TRAUMA AND RECOVERY*, 69 (1992) (hereinafter "Herman").

³²⁶ S. E. Ullman, *Social Support and Recovery from Sexual Assault: A Review*, 4 *AGGRESSION & VIOLENT BEHAVIOR* 343-413 (1999); *see also* L. M. Monroe *et al.* *The Experience of Sexual Assault: Findings From a Statewide Victim Needs Assessment*, 20 *J. OF INTERPERSONAL VIOLENCE* 767-776 (2005).

³²⁷ K. A. Lonsway & L. F. Fitzgerald, *Rape Myths: In Review*, 18 *PSYCHOL. OF WOMEN Q.* 133-164 (1994).

³²⁸ *See Rape in America*, *supra* note 1.

That study found that only 16% of all sexual assaults are ever reported, making sexual assault the “most underreported violent crime in America.”³²⁹

[PRACTICE TIP: Educating fact-finders about the realities of delayed reporting is vital to effective sexual assault advocacy. If they do not understand that this is a well-established and common phenomenon, many decision-makers will assume a delayed response signals a less serious or non-existent assault.]

C. Self-Blame

It is common for victims to blame themselves for some or many aspects of the assault.³³⁰ For example, a victim may feel guilty for failing to heed cautionary advice or for engaging in certain behaviors prior to the assault. While this logic is flawed, it is extremely common because it offers the victim (and society at large) some sense of protection and control. It allows the victim to believe that if she discontinues those behaviors, she can be safe.³³¹ This psychological phenomenon is known as the “Just World Theory,” in which bad things happen to bad people, and people get what they deserve.³³² By believing that she might have done something differently and prevented the assault, a victim can try to ward off feelings of terror and powerlessness. Initially, this may help a survivor cope.³³³ Self-blame is likely to set in eventually, however.³³⁴ Longitudinal data demonstrate that self-blame is associated with poor psychological well-

³²⁹ *Id.*

³³⁰ R. JANOFF-BULMAN, SHATTERED ASSUMPTIONS: TOWARDS A NEW PSYCHOLOGY OF TRAUMA (1992).

³³¹ H. C. Sinclair & L. E. Bourne, Jr., *Cycle of Blame or Just World: Effects of Legal Verdicts on Gender Patterns in Rape-Myth Acceptance and Victim Empathy*, 22 PSYCHOL. OF WOMEN Q. 575-588 (1998).

³³² M. J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980).

³³³ S. A. Crome, *Adult Rape Scripting within a Victimological Perspective*, 6 AGGRESSION & VIOLENT BEHAVIOR 395-413 (2001).

³³⁴ Kimberly Hanson Breitenbecher, *The Relationships Among Self-Blame, Psychological Distress, and Sexual Victimization*, JOURNAL OF INTERPERSONAL VIOLENCE, Vol. 21, No. 5, 597-611 (2006); P.A. Frazier, *Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model*, J. PERS. SOC. PSYCHOL. June 84 (6):1257-69 (2003); (past, present, and future control were differentially related to post-trauma distress; both self-blame and rapist blame were associated with higher distress levels); R. Janoff-Bulman, *Characterological Versus Behavioral Self-blame: Inquiries Into Depression and Rape*, J. PERS. SOC. PSYCHOL. 1979 Oct. 37(10):1798-809 (1979) (analysis of two key types of self-blame among rape victims and victim depression).

being, such as increased depression and fear, and lower self-esteem.³³⁵ It is imperative that you not validate or reinforce the victim's self-blame. It may be helpful to remind the victim that the perpetrator – and not she – is responsible for the assault.

[PRACTICE TIP: When preparing victims for interviews with law enforcement, prosecutors, or other decision-makers (such as an employer or school or immigration official), help your client identify this tendency toward self-blame and help her re-direct the blame toward the perpetrator. She should understand that those who do not have a solid grounding in sexual assault or trauma may misunderstand or misconstrue a victim's self-blame as an indicator that the victim is at least partly responsible for her own sexual assault.]

D. Minimization

Victims of sexual assault also may minimize the traumatic nature of the sexual assault. For example a victim may preface her description of the incident with a minimizing statement such as, "It wasn't that bad, but I do think that what he did to me was wrong," or "I don't know if what happened to me was sexual assault, but" Minimization is a frequently used psychological defense mechanism that helps the victim cope with a highly threatening and stressful event that would otherwise be overwhelming.³³⁶ It should not be interpreted as an objective statement of fact.

[PRACTICE TIP: It is important to prepare your client as to how the impact of minimizing statements during interviews and testimony with law enforcement and other decision-makers. While these comments are a normal response to sexual assault, such statements will not advance the client's substantive legal interests. If they are made a part of the case record, it is vital to address them in the case, and to explain how that

³³⁵ N. R. Branscombe *et al.*, *Counterfactual Thinking, Blame Assignment and Well-Being in Rape Victims*, 25 BASIC AND APPLIED SOCIAL PSYCHOL. 265-273 (2003).

³³⁶ A. W. Burgess & L. L. Holmstrom, *Adaptive Strategies and Recovery from Rape*, 136 AM. J. OF PSYCHIATRY 1278-1282 (1979).

such minimization is a common psychological response to sexual assault and not a statement of objective fact.]

III. POST-ASSAULT MENTAL HEALTH CONDITIONS: THE CONSEQUENCES OF SEXUAL ASSAULT

To work with a sexual assault victim effectively you need to be familiar with the mental health harms that commonly result from sexual assault.³³⁷ Four common mental health issues, discussed below, include increased risk for PTSD, depression, anxiety, increased substance use, and suicide.³³⁸ Each victim's response to the trauma is unique and depends on a multitude of interacting factors including:

- Individual attributes (*e.g.*, age and developmental stage, prior victimization, pre-trauma coping skills);
- Event (*e.g.*, frequency, severity and duration of the trauma, extent of the terror and humiliation endured); and
- Environmental factors (*e.g.*, quantity, quality, and accessibility of support system and community resources).

No one factor is determinative. Together, they will operate to affect the course of a victim's recovery.³³⁹

Contrary to popular belief, most sexual assault victims do not sustain visible bruising, torn clothes or bloody cuts.³⁴⁰ Perpetrators use a variety of means to accomplish the sexual assault and overcome a victim's resistance, including drugs, threats, intimidation, weapons, and manipulation. Violent physical force is used in only a minority of sexual assaults. Most victims (70%) do not sustain the physical injuries that

³³⁷ J. M. Golding, *Sexual Assault History and Long Term Physical Health Problems: Evidence from Clinical and Population Epidemiology*, 8 CURRENT DIRECTIONS IN PSYCHOL. SCI. 191-194 (1999); M. P. KOSS, & M. R. HARVEY, *THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS* (2d ed. 1991).

³³⁸ Kilpatrick, D. G. *et al.*, *Violence and Risk of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results from the National Survey of Adolescents*, 71 J. OF CONSULTING & CLINICAL PSYCHOL. 692-700 (2003); G. Steketee & E. B. Foa, *Rape Victims: Posttraumatic Stress Responses And Their Treatment: A Review Of The Literature*, 1 J. OF ANXIETY DISORDERS 69-86 (1987).

³³⁹ M. R. Harvey, *An Ecological View of Psychological Trauma and Trauma Recovery*, 9 J. OF TRAUMATIC STRESS 3-23 (1996).

³⁴⁰ *Id.*

might be expected from a violent assault.³⁴¹ Even in the absence of a physical injury, a victim of non-stranger or acquaintance sexual assault may suffer emotional trauma comparable to the trauma experienced by victims in stranger sexual assaults, or in sexual assaults in which the person has sustained physical injuries.³⁴² (Almost half of women in the Rape in America study who were not physically injured “nonetheless feared being seriously injured or killed during the sexual assault.”³⁴³)

[PRACTICE TIP: It is important to educate decision-makers about the fact that most sexual assaults do not result in any visible physical injury, and that this absence of visible injury does not mean that the victim was not physically or emotionally harmed by the assault. The fear and trauma may be especially important to explain when seeking a protection order for your client. (See Chapter 7, on Safety, for additional information.)]

For the mental health diagnoses discussed in this section, provide appropriate referrals, document victims’ symptoms and mental health concerns, and protect a victim’s privacy rights. Referrals provided should be to a mental health care provider experienced in providing services to sexual assault or trauma survivors. It is especially important to document symptoms of mental health concerns if they provide the basis or support for a survivor’s legal remedies. For example, to secure a housing transfer it may be helpful (or necessary) to demonstrate that the victim is suffering from Posttraumatic Stress Disorder (PTSD) as a result of the sexual assault that occurred in her home. Or, a victim may have to provide evidence of PTSD to secure certain unemployment or disability benefits. Mental health professionals are an important source of such documentation.

At the same time, you will need to carefully assess how best to protect the privacy of the victim’s records. For example, if you submit medical documentation it

³⁴¹ *Rape in America*, *supra* note 1, at 4.

³⁴² M. D. Schwartz & M. S. Leggett, *Bad Dates or Emotional Trauma? The Aftermath of Campus Sexual Assault*, 5 VIOLENCE AGAINST WOMEN 251-271 (1999).

³⁴³ *Rape in America*, *supra* note 1, at 4.

may constitute a waiver of the victim's mental health or medical privilege. You can help the victim balance the benefits of pursuing a legal remedy against the disadvantages of compromising some amount of privacy. It is critical that the victim make an informed decision whether to release records or allow a provider with whom she has a privileged relationship to testify on her behalf. It is especially important to consider how any decision may affect a pending or future civil and/or criminal case. With the victim's permission, an attorney may want to consult with law enforcement or the prosecutor to ensure that the victim's decisions in the civil case are informed by a possible or pending criminal investigation or prosecution. (See Chapter 3 on Privacy for additional information.)

The use of the term "assault" in the singular (rather than "assaults") is not intended to ignore or diminish the harms caused by the fact that many sexual assault survivors have been victims more than once. Indeed, nearly one-half of all minor and adult rape victims have been raped more than once.³⁴⁴ Approximately two-thirds of individuals reporting sexual victimization also reported sexual revictimization.³⁴⁵ Individuals who have suffered multiple prior traumas are at increased risk of revictimization. In particular, child sexual abuse was found to be a reliable predictor of adult sexual assault victimization. Survivors of childhood sexual abuse are more than three times more likely than non-childhood survivors to be victimized.³⁴⁶ There is less research exploring the underlying mechanisms of this elevated vulnerability, but some hypothesize that early abuse diminishes opportunities to develop healthy boundaries and relationships, and perverts the expectation of having loving relationships.³⁴⁷ Evidence also suggests that revictimization is associated with difficulty in interpersonal

³⁴⁴ *Id.*

³⁴⁵ C. C. Classen *et al.*, *Sexual Revictimization: A Review of the Empirical Literature*, 6 TRAUMA, VIOLENCE, & ABUSE 103, at 111 (2005) (hereinafter "Classen *et al.*").

³⁴⁶ A. H. Maker *et al.*, *Child Sexual Abuse, Peer Sexual Abuse, and Sexual Assault in Adulthood: A Multi-Risk Model of Revictimization*, 14 J. OF TRAUMATIC STRESS 351-368 (2001).

³⁴⁷ I. Arias, *The Legacy of Child Maltreatment: Long-Term Health Consequences for Women*, 13 J. OF WOMEN'S HEALTH 468-473 (2004).

relationships, coping, self-representations, affect regulation, and greater self-blame and shame.³⁴⁸

A. Posttraumatic Stress Disorder

The Diagnostic and Statistical manual of Mental Disorders is often referred to as the mental health professional's "bible." It is the touchstone for all psychiatric diagnoses. According to the most recent edition, the Diagnostic and Statistical manual of Mental Disorders IV-Text Revision (DSM-IV-TR), Posttraumatic Stress Disorder (PTSD) "is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves . . . threatened death or serious injury, or other threat to one's physical integrity [For adults, the] person's response to the event must involve intense fear, horror, helplessness or horror."³⁴⁹ A sexual assault is specifically delineated as a direct, violent, personal assault.³⁵⁰ The DSM-IV-TR notes that "[t]he disorder may be especially severe or long lasting when the stressor is of human design (*e.g.*, torture, rape).³⁵¹ To meet the diagnosis, one must have symptoms from each of the three following symptom clusters: (1) Re-experiencing the trauma (*e.g.*, intrusive memories or dreams); (2) Persistent avoidance (*e.g.*, avoiding activities, places, or people that are reminders of the trauma); and (3) Increased arousal (*e.g.*, hypervigilance, exaggerated startle response). These symptoms must persist for more than a month, and cause significant distress or impairment in someone's ability to function in important areas of daily life, such as work or family responsibilities.³⁵²

³⁴⁸ See generally Classen *et al.*, *supra* note 345.

³⁴⁹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., Text Revision 2005) (hereinafter "DSM-IV-TR") at 463. This document provides the more specific criteria and requirements for diagnosis. Only particular, licensed mental health professionals such as psychiatrists and psychologists have the authority to render a formal diagnosis.

³⁵⁰ *Id.* "For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury." *Id.* at 464.

³⁵¹ *Id.* at 464.

³⁵² AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) (hereinafter "DSM-IV"). This document provides the more specific criteria and requirements for diagnosis. Only particular, licensed mental health professionals such as psychiatrists and psychologists have the authority to render a formal diagnosis.

Studies suggest that, compared to other types of traumatic events, sexual assault victims are the largest single group of PTSD sufferers.³⁵³ Across numerous studies, reported rates of PTSD among sexual assault survivors range from 30% to 65%. (The variation is accounted for by the timing of symptom assessment.)³⁵⁴ Rape victims are more than six times more likely than non-crime victims to develop PTSD.³⁵⁵ PTSD is highly prevalent among victims of intimate partner sexual assault, too.³⁵⁶ Flashbacks, difficulty eating and sleeping, nightmares, loss of trust, intense fear and suicidal ideation and attempts are common reactions among victims of sexual assault by a spouse or long-term intimate partner. Because intimate partner sexual assault often occurs repeatedly and over an extended period of time,³⁵⁷ and because of the proximity of the perpetrator to the victim, such sexual violence can cause profound psychological damage to the victim.³⁵⁸

More recently, trauma specialists have been calling attention to a phenomenon known as “complex PTSD”³⁵⁹ or “disorders of extreme stress, not otherwise specified” (“DESNOS”). Complex PTSD or DESNOS is thought to be an adaptation to early and/or chronic trauma not captured in the PTSD diagnosis.³⁶⁰ For example, “Dissociation” is not

³⁵³ E. B. Foa *et al.*, *The Treatment of Rape Victims* (1987) (Paper presented at the conference State-of-the-Art in Sexual Assault, Charleston, S.C.).

³⁵⁴ N. P. Yuan *et al.*, *The Psychological Consequences Of Sexual Trauma*, in NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 5 (2006), available at new.vawnet.org/Assoc_Files_VAWnet/AR_Psych_Consequences.pdf.

³⁵⁵ *Rape in America*, *supra* note 1, at 7.

³⁵⁶ McFarlane *et al.*, *supra* note 93, at 99-108.

³⁵⁷ In the most recent *National Institute of Justice Violence Against Women Survey*, 24.7% of women raped by a former spouse or cohabiting partner said they were raped both before and after the relationship ended. Another 6.3% said they were raped only after the relationship ended. (Tjaden and Thoennes, *Extent, Nature and Consequences of Rape Victimization*, at 25.)

³⁵⁸ As David Finkelhor and Kersti Yllo, two pre-eminent researchers in the field have noted, “. . . When you're raped by your husband, you have to live with your rapist.” LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985).

³⁵⁹ J. L. Herman, *Complex PTSD: A Syndrome In Survivors of Prolonged And Repeated Trauma*, 5 J. OF TRAUMATIC STRESS 377-391 (1992).

³⁶⁰ B. A. Van der Kolk *et al.*, *Disorders of Extreme Stress: The Empirical Foundation of a Complex Adaptation to Trauma*, 18 J. OF TRAUMATIC STRESS 389-99 (2005). Although not a free-standing diagnosis, the DSM-IV Field Trial for PTSD supported the existence of a complex but consistent pattern of symptomology in addition to PTSD that is consistent with these observations. The effects of complex PTSD or DESNOS with an example of their possible manifestation include *persistent alterations in*: (a) the ability to regulate affect and impulses (*e.g.*, modulation of anger); (b) attention or consciousness (*e.g.*,

included in the PTSD diagnosis, but is a potential trauma-related symptom. Dissociation is most often associated with early and/or chronic sexual abuse. Some argue it is the central feature of all trauma-related disorders.³⁶¹ Dissociation can involve a range of phenomena from altered awareness or attention, to out of body experiences and lost time, to its most extreme form, Dissociative Identity Disorder (“DID”). In DID, the individual’s “integrative capacity is insufficient to (fully) integrate these [traumatic] experiences within the confines of a relatively coherent personality” which over time, can “develop into more or less separate and habituated ways of perceiving and functioning.”³⁶² Dissociation is usually triggered by a strong emotional reaction such as feelings of terror, surprise, shame, helplessness, entrapment or exposure. Women who are vulnerable to dissociation may dissociate during an assault. While dissociation may be an effective coping mechanism for some victims, it may also place a victim at greater risk for revictimization. At least some empirical data has suggested that dissociation can interfere with an individual’s ability to assess risk and danger adequately.³⁶³

In addition to the harmful affects of PTSD itself, victims may suffer further because PTSD frequently co-occurs with other disorders. Extensive epidemiological data routinely show PTSD to have psychiatric comorbidity rates upwards of 80%.³⁶⁴ Some of the disorders typically co-occurring with PTSD include depression and substance abuse.

B. Depression

Depression is a common response to sexual assault. A recent study drawing from a national sample of women with a history of sexual assault found that 58.4% of

depersonalization); (c) somatization (*e.g.*, chronic pain); (d) self-perception (*e.g.*, a sense of permanent damage); (e) perception of the perpetrator (*e.g.*, idealization); (f) interpersonal relationships (*e.g.*, inability to trust); and (g) systems of meaning (*e.g.*, loss of beliefs).

³⁶¹ O. Van der Hart *et al.*, *Dissociation: An Insufficiently Recognized Major Feature of Complex Posttraumatic Stress Disorder*, 18 J. OF TRAUMATIC STRESS 413-423 (2005).

³⁶² *Id.* at 415.

³⁶³ Classen *et al.*, *supra* note 345, at 103-29.

³⁶⁴ R. C. Kessler *et al.*, *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES OF GEN. PSYCHIATRY 1048-1060 (1995).

respondents met the criteria for a major depressive syndrome.³⁶⁵ Another longitudinal survey, with a large national sample, found that “sexual assault victims were three times more likely than non-victims of crime to have ever had a major depressive episode.”³⁶⁶ Although some victims do not develop clinical depression, they can have more mild symptoms of depression and/or a combination of mild depression and other psychological symptoms.

Depression is a serious medical illness. It is more than just feeling “down in the dumps” or “blue” for a few days. According to DSM-IV, a Major Depressive Episode has numerous symptoms, at least one of which must be a “depressed mood for most of the day, nearly every day” or a “markedly diminished interest or pleasure in all, or almost all, activities for most of the day, nearly every day” for a two week period.³⁶⁷ Other common symptoms include unintended and significant changes in appetite or weight, disturbed sleep (sometimes having great difficulty sleeping, or sleeping too much), noticeable changes in psychomotor agitation (accelerated movement or activity such as incoherent conversation, expansive gesturing or pacing and hair twirling) or psychomotor retardation (slowed coordination and speech, impaired articulation; a person may appear sluggish and hesitant), persistent fatigue or loss of energy, and feelings of worthlessness or excessive guilt. A continued, diminished ability to think or concentrate as well as recurrent thoughts about death and/or suicide are also often part of the clinical picture of depression. Together, these symptoms cause significant distress, disruption, or impairment in important areas of daily life, such as work and family.³⁶⁸ Only a licensed mental health professional should render assessments and diagnoses of depression or any other psychological disorder. If you believe your client may be clinically depressed, provide referrals and encourage her to seek assistance from a mental health counselor trained in sexual assault trauma.

³⁶⁵ S. E. Ullman & L. R. Brecklin, *Sexual Assault History and Suicidal Behavior in a National Sample of Women*, 32 SUICIDE & LIFE-THREATENING BEHAVIOR 117-130 (2002) (hereinafter “Ullman 2002”).

³⁶⁶ *Rape in America*, *supra* note 1, at 7.

³⁶⁷ DSM-IV, *supra* note 352, at 356.

³⁶⁸ *Id.*

[PRACTICE TIP: If your client is suffering from depression, it is important to: (1) refer the client for mental health services; (2) evaluate how the depression impacts your services and the case; and (3) assess how best to help the victim protect her privacy interests.]

C. Substance Use and Abuse

Some sexual assault victims use prescription and/or illegal drugs or alcohol to cope with their trauma.³⁶⁹ They self-medicate to blot the memory or numb the emotional pain of the assault. Over the long term, however, this approach is self-defeating. Research shows that using substances to blunt the trauma leads to both substance abuse and to increased symptoms of PTSD.³⁷⁰ What begins as a seemingly effective short-term coping strategy may escalate into substance abuse and impaired functioning. The line between substance “use” and “abuse” is not always apparent and may be crossed without recognition. What distinguishes substance “use” from “abuse” is a recurrent use that results in “a failure to fulfill major role obligations at work, school or home,” places the individual or others in physical danger, leads to related legal troubles, and/or continues despite persistent problems caused by its use.³⁷¹ The U.S. Department of Health and Human Services reports that as many as 90% of women with substance abuse disorders and mental health issues have a history of sexual and/or physical abuse.³⁷²

Compared to non-victims of crime, sexual assault victims are 6.4 times more likely to have used cocaine or other hard drugs. Sexual assault victims with PTSD are 13 times more likely to have alcohol-related problems, and 26 times more likely to have two

³⁶⁹ D. G. Kilpatrick *et al.*, *A 2-Year Longitudinal Analysis of the Relationship Between Violent Assault and Substance Use in Women*, 65 *J. OF CONSULTING & CLINICAL PSYCHOL.* 834-847 (1997); A. M. Young, *Self-Perceived Effects of Sexual Trauma Among Women Who Smoke Crack*, 40 *J. OF NURSING & MENTAL HEALTH SERVICES* 46-53 (2002). *See also* D. Kaysen, T. Simpson *et al.*, *Alcohol Problems and Posttraumatic Stress Disorder in Female Crime Victims*, *J. OF TRAUMA AND STRESS*, Jun 19(3):399-403 (2006) (victims with alcohol problems remained more symptomatic post-assault).

³⁷⁰ S. E. Ullman *et al.*, *Trauma Exposure, Posttraumatic Stress Disorder And Problem Drinking In Sexual Assault Survivors*, 66 *J. OF STUDIES ON ALCOHOL* 610-619 (2005).

³⁷¹ DSM-IV, *supra* note 352, at 199.

³⁷² THE CENTER ON WOMEN, VIOLENCE AND TRAUMA, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., *available at* www.mentalhealth.samhsa.gov/cmhs/womenandtrauma/wcdvs.asp (last retrieved April 21, 2006).

or more serious drug abuse problems than non-victims.³⁷³ There is also evidence that multiple assaults compound the risk of drug use. One study found that, when compared to women who reported a single assault, women who reported multiple sexual assaults were 3.5 times more likely to begin or increase substance use.³⁷⁴ Victims of childhood sexual assault are at particular risk. One study estimates this group to have ten times the likelihood of drug addiction and twice the likelihood of alcoholism than those who have not experienced childhood sexual assault.³⁷⁵

These data may help you better understand the issues and challenges confronting your client. They may also be used to help you convey to the courts, opposing counsel, the trier of fact, and others, the myriad of ways in which the assault has placed your client at greater risk. While no one can undo the fact that she was assaulted, the justice system can – and should – help provide remedies for the wrong that occurred.

[PRACTICE TIP: If your client is engaged in substance abuse, you will want to evaluate whether and how best to: (1) refer the client for treatment; (2) assess how the substance abuse impacts your representation and legal case; and (3) how you can help the victim protect her privacy interests.]

D. Suicide and Sexual Assault

The National Victim Center's 1992 *Rape in America* study found that 33% of sexual assault victims said they had seriously considered suicide. This number is more than four times greater than for non-victims of crime (8%).³⁷⁶ Thirteen percent of sexual assault victims moved beyond consideration and attempted suicide.³⁷⁷ More recent

³⁷³ *Rape in America*, *supra* note 1; SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH STATISTICS SOURCE BOOK (B. Rouse ed., 2d ed. 1998).

³⁷⁴ Judith McFarlane *et al.*, *Intimate Partner Sexual Assault Against Women and Associated Victim Substance Use, Suicidality, and Risk Factors for Femicide*, 26 ISSUES IN MENTAL HEALTH NURSING 953-967 (2005).

³⁷⁵ J. N. Briere & M. Runtz, *Post Abuse Trauma: Data and Implications for Clinical Practice*, 2 J. OF INTERPERSONAL VIOLENCE 367-379 (1987).

³⁷⁶ *Rape in America*, *supra* note 1.

³⁷⁷ *Id.*

studies demonstrate similar findings, but with increased risk: in a national sample of women with sexual assault histories, 35% reported suicidal thoughts and 17% reported suicide attempts.³⁷⁸

Interaction with other factors can elevate suicide risk, although there is no established relationship between suicidal ideation and suicide attempts. Women who had suicidal ideation as well as those who made suicide attempts reported more traumatic life events, increased alcohol dependence, and less social support currently available to them than sexual assault victims who were not suicidal. Women with suicidal feelings and attempts were also significantly more likely to meet the diagnosis of PTSD and/or Major Depression.³⁷⁹ Suicidal ideation also appears to be higher among women who experienced a group sexual assault.³⁸⁰ Suicide attempts also have been linked with higher levels of social conflict,³⁸¹ and multiple incidence of sexual assaults.³⁸² One study found that suicide attempts were 3 times more likely in “survivors of both child and adult sexual assault than for survivors of child or adult sexual assault only.”³⁸³ In one study of battered women, 22% of those who were also sexually assaulted reported suicide threats or attempts within 90 days of applying for a protection order, compared to 4% of women who were only physically abused.³⁸⁴

[PRACTICE TIP: As with depression and substance abuse, if your client is suicidal or is having suicidal ideation, you should (1) refer her to mental health services; (2) assess how her mental health impacts your representation and her legal case; and (3) analyze and be proactive about ways to help the victim protect her privacy interests.]

³⁷⁸ Ullman 2002, *supra* note 365, at 117-130.

³⁷⁹ *Id.*

³⁸⁰ Christine A. Gidycz & Mary. P. Koss, *A Comparison of Group and Individual Sexual Assault Victims*, 14 *PSYCHOL. OF WOMEN Q.* 325-342 (1990).

³⁸¹ Ullman 2002, *supra* note 365, at 117-130.

³⁸² E. M. Ellis *et al.*, *An Examination of Differences Between Multiple- and Single-Incident Victims of Sexual Assault*, 91 *J. OF ABNORMAL PSYCHOL.* 221-224 (1982).

³⁸³ Ullman 2002, *supra* note 365, at 125.

³⁸⁴ McFarlane *et al.*, *supra* note 374.

IV. VICTIMS WITH A PRE-SEXUAL ASSAULT MENTAL ILLNESS

Perpetrators deliberately target vulnerable victims, including victims with mental health issues. Not surprisingly, then, the incidence of victimization for women with a major mental illness, such as bipolar disorder, schizophrenia, or other psychotic disorders appears to be escalated. The preceding section provides an overview of the severe mental health challenges and/or consequences that some sexual assault victims may experience. The information is intended to provide some insight to help you better serve your clients. It is not a substitute for expert medical or mental health advice. If you believe that your client has or may be suffering from a severe mental illness, the information here may help you assess or identify certain mental health issues so that you can make an appropriate and timely referral. This understanding may also help an attorney assess the possible impact on the victim of a civil or criminal trial and whether and how testifying as a witness may cause a victim further harm. This, in turn, can help a survivor to make more informed decisions about how she wants to proceed. Thus, understanding your client's mental health status is critical to your ability to provide ethical and effective legal advocacy and representation.

A review of studies examining severe mental illness (SMI) and risk for victimization reported that, across studies, 51-97% of women diagnosed as having a SMI reported being sexually or physically abused during their lifetime.³⁸⁵ A recent large-scale epidemiological study found that the prevalence of sexual assault or sexual assault was 17.2 times greater among persons with SMI than among the general population.³⁸⁶

In a study of *recent* victimization in a large sample study of inpatients and outpatients where the primary diagnoses were schizophrenia, schizoaffective disorder, bipolar disorder and major depressive disorder, approximately one in five women (20%)

³⁸⁵ L. A. Goodman *et al.*, *Physical and Sexual Assault History in Women with Serious Mental Illness: Prevalence, Correlates, Treatment and Future Research*, 23 SCHIZOPHRENIA BULLETIN 685-696 (1997).

³⁸⁶ L. A. Teplin *et al.*, *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62 ARCHIVES OF GEN. PSYCHIATRY 911-921 (2005) (hereinafter "Teplin *et al.*").

reported having been sexually assaulted in the past twelve months.³⁸⁷ The authors of the study concluded that this group of women – *i.e.*, women with severe mental illness – was 16 times more likely than women from a community sample to report violent victimization in the past year.

These high victimization rates are thought to be associated with an increased vulnerability due to “symptoms associated with SMI, such as impaired reality-testing, disorganized thought process, impulsivity, and poor planning and problem solving, [which] can compromise one’s ability to perceive risks and protect oneself.”³⁸⁸ SMI can sometimes go hand in hand with other risk factors for victimization like substance abuse and homelessness.³⁸⁹ One study found these factors were positively correlated with recent assault, along with childhood abuse and number of recent hospitalizations.³⁹⁰

It is important to underscore here that it is often not known whether the identified risk factors contribute to and/or flow from the reported victimization.³⁹¹ In other words, do the vulnerabilities associated with SMI lead to increased sexual victimization, or does sexual victimization disproportionately result in SMI. Homelessness, for example, could reflect a “higher degree of dysfunction,” and increased exposure to dangerous situations (such as having to spend nights on the streets), or it could be one of the outcomes of the interpersonal victimization sustained in the assault.³⁹²

[PRACTICE TIP: If you have any reason to believe that your client is or has been in treatment for a major mental illness, it may be necessary to inquire into her mental health history and treatment. Addressing these topics in the most sensitive manner possible is important, and, as a general rule, it is not appropriate to discuss these issues in a general

³⁸⁷ L. A. Goodman *et al.*, *Recent Victimization in Women and Men with Severe Mental Illness: Prevalence and Correlates*, 14 J. OF TRAUMATIC STRESS 615-632 (2001) (hereinafter “Goodman 2001”).

³⁸⁸ Teplin *et al.*, *supra* note 386, at 911.

³⁸⁹ T. K. Logan *et al.*, *Victimization and Substance Abuse Among Women: Contributing Factors, Interventions, and Implications*, 6 REV. OF GEN. PSYCHOL. 325-397 (2002).

³⁹⁰ Goodman 2001, *supra* note 387, at 615-632.

³⁹¹ *Id.* at 627.

³⁹² *Id.*

intake interview. Instead, to the extent possible address the client's mental health history in the context of a developed relationship in which trust and rapport have already been established. Explain that you are asking these questions in an effort to help protect her privacy. You should also assure her that the information she discloses to you will only be released with her permission. The questions that follow are provided as a sample to help you elicit this information.]

Questions that may help you identify and open the door to discussing mental health issues with the victim include:

- Are you currently or have you ever been in counseling or therapy?
- Are you taking any medications for a mental health condition? What are you taking and who prescribes them to you? *Or* Do you take any psychotropic medication? If yes, what medication?
- Do you currently have or have you ever had a psychiatric disorder?
- Has a doctor or other medical provider ever prescribed you medication for depression or other mental health condition?
- Have you ever had a psychiatric admission to a hospital or psychiatric facility?

If the victim answers “yes” to any of these questions regarding her mental health history, you should:

- Discuss with her the privacy of her treatment records, including whether they have ever been released to the state in support of a housing, disability, or other public benefits claim or in any other legal action;
- Explain how privileges and waiver (and mandatory reporting, if applicable) operate in your jurisdiction, including physician-patient, attorney-client, advocate-victim, social worker-client and any other privileges that may be pertinent;
- Address issues of credibility with the victim, including how her mental health or psychiatric history may be used to undermine her credibility;

- Find out how the mental illness is affecting the victim and encourage her to seek mental health support;
- Determine what symptoms the victim had both prior to and following the assault; and
- Determine what, if any, diagnoses pre-date and/or post-date the assault.

The following section provides a brief summary of schizophrenia, bipolar disorder, and borderline, three of the more common mental illnesses that might present in your work with sexual assault victims. It is intended only as a cursory introduction. Victims may experience other significant mental health challenges (such as acute anxiety, phobias, etc.) which are not discussed in this manual.

A. Schizophrenia

Schizophrenia is a devastating brain disorder – the most chronic and disabling of the severe mental illnesses. People with schizophrenia often suffer terrifying symptoms such as hearing internal voices not heard by others or believing that other people are reading their minds, controlling their thoughts, or plotting to harm them. The first signs of schizophrenia typically emerge in young people in their teens or twenties. Symptoms can include: hallucinations (in any modality – visual, auditory, etc.), delusions; disordered thinking including paranoia, or unusual or tangential speech; or seriously disorganized behavior including inability to maintain basic daily life activities. A schizophrenic may present with bizarre or markedly disheveled appearance, strange posturing, or unpredictable shouting or swearing; and social withdrawal that impairs interactions with others. It is these “cognitive impairments, poor social skills, and poor social-problem-solving abilities” that may make this population more vulnerable to sexual abuse.³⁹³

In a study of trauma exposure among psychiatric outpatients with schizophrenia or schizoaffective disorder specifically, 26% of the men and 64% of the women reported

³⁹³ J. S. Gearon *et al.*, *Traumatic Life Events and PTSD Among Women with Substance Use Disorders and Schizophrenia*, 54 *PSYCHIATRIC SERVICES* 523 (2003) (hereinafter “Gearon *et al.*”).

being sexually assaulted in their lifetime.³⁹⁴ In a study of women with schizophrenia or schizoaffective disorder and co-occurring substance abuse or dependence, “the average number of traumatic life events reported was 8, and almost 75% of the sample reported revictimization.”³⁹⁵

B. Bipolar Disorder

Bipolar disorder, which used to be referred to as “manic-depression” is a serious mental illness that causes shifts in a person’s mood, energy, and ability to function. In contrast to the more moderated emotional ups and downs that everyone experiences, the symptoms of bipolar disorder are extreme. They cause severe mood swings from periods of mania, characterized by abnormal euphoria and expansive or irritable mood persistent for a week or more, to a hopeless depression, and then back again. Often, there are periods of normal mood range in between. Dramatic changes in energy and behavior accompany prominent changes in mood and cause significant impairment in daily functioning. They may include prolonged periods of little or no sleep, pressured speech, racing thoughts, agitation or notably increased goal-directed activity, and impulsive, increased sexual activity, and risky behavior such as unaffordable spending sprees and sexual indiscretions. These episodes can also share symptoms similar to those in the psychotic disorders, such as persecutory or grandiose delusions or catatonia.³⁹⁶

C. Borderline Personality Disorder

Borderline personality disorder (BPD) is a contested DSM category, characterized by pervasive instability in moods, interpersonal relationships, self-image, and behavior, all of which often seriously disrupt family and work life. The clinical picture can vary, but must include a majority of the following symptoms:

- Frantic efforts to avoid real or imagined abandonment;

³⁹⁴ K. T. Mueser *et al.*, *Trauma and Posttraumatic Stress Disorder in Severe Mental Illness*, 66 J. OF CONSULTING & CLINICAL PSYCHOL. 493-499 (1998).

³⁹⁵ Gearon *et al.*, *supra* note 393, at 523.

³⁹⁶ DSM-IV, *supra* note 352. This document provides the more specific criteria and requirements for diagnosis. Only particular, licensed mental health professionals such as psychiatrists and psychologists, have the authority to render a formal diagnosis.

- A pattern of unstable and intense interpersonal relationships characterized by alternating idealization and devaluation;
- Markedly unstable sense of self;
- Potentially self-damaging impulsivity (e.g., reckless driving, substance use);
- Recurrent suicidal threats or gestures, or self-injury;
- Marked reactivity in mood;
- Chronic feelings of emptiness;
- Inappropriate, intense anger or difficulty controlling anger; and
- Transient, stress-related paranoid ideation or severe dissociative symptoms.³⁹⁷

A watershed study revealed that 81% of a group of patients diagnosed with BPD have histories of major childhood trauma and that the more symptomatic the patient, the more extensive the history of trauma.³⁹⁸ Since then, numerous other studies have identified similar findings,³⁹⁹ raising the question as to whether BPD should really be considered a “personality disorder” at all, or if the changes in character are better conceptualized as a trauma-related attachment disorder,⁴⁰⁰ or part of complex PTSD.⁴⁰¹ Under this alternate view, BPD is viewed as the primary component of PTSD rather than a separate mental illness.

V. CONCLUSION

A victim’s pre- or post-assault mental health can have a profound impact on a victim’s ability to pursue legal remedies and your advice and advocacy on her behalf.

³⁹⁷ DSM-IV, *supra* note 352, at 710.

³⁹⁸ Judith L. Herman *et al.*, *Childhood Trauma in Borderline Personality Disorder*, 146 AM. J. OF PSYCHIATRY 490 (1989).

³⁹⁹ J. M. Goodwin, *Redefining Borderline Syndromes as Posttraumatic and Rediscovering Emotional Containment as a First Stage in Treatment*, 20 J. OF INTERPERSONAL VIOLENCE 20-25 (2005).

⁴⁰⁰ G. Liotti, *Trauma, Dissociation, and Disorganized Attachment: Three Strands of a Single Braid*, 41 PSYCHOTHERAPY: THEORY, RESEARCH, PRACTICE, TRAINING 472-486 (2004).

⁴⁰¹ Herman, *supra* note 325; B. A. Van der Kolk & C. Courtois, *Editorial Comments: Complex Developmental Trauma*, J. OF TRAUMATIC STRESS 385-388 (2005).

Because there are a myriad of mental health harms that a victim may experience, and these may influence or even guide your legal assistance, it is important to be aware of and responsive to any mental health issues that may be extant emerge or in the course of your representation. If you have concerns regarding a victim's safety or mental health condition, it is important to provide the victim with appropriate referrals. Finally, you will need to be familiar with a victim's mental health status to help articulate her needs and experiences as she proceeds through the civil, criminal, and/or administrative justice system(s).

Chapter Seven

SAFETY AND PROTECTION ORDERS⁴⁰²

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⁴⁰² The Victim Rights Law Center thanks the authors of this chapter, Michelle Harper, Esq., Paula Finley Mangum, Esq., Jessica E. Mindlin, Esq., and Kathryn Reardon, Esq.

I. INTRODUCTION

Sexual assault shatters a victim's sense of safety. A victim may not feel physically safe for months or years after the assault. If she has ongoing contact with the assailant, her post-assault fear and hyper-vigilance may be especially acute. The assailant may pose an ongoing threat or the fear instilled by the first assault may intimidate the victim and prevent her from seeking remedies through the civil or criminal justice system. This chapter identifies steps you can take to help your client regain her sense of safety, including safety planning, securing protection orders, and other specific safety measures.

II. SAFETY PLANNING

Every victim should be offered comprehensive safety planning both at the outset of and throughout her legal representation or advocacy. Because a victim's situation is not static, safety planning should be an ongoing process and not a single, one-time event. It is imperative to have the victim participate in the safety planning, as she is in the best position to assess what is most likely to help keep her safe. Victims should be encouraged to confer with an advocate trained in safety planning for sexual assault survivors. (An experienced sexual assault counselor is likely the best referral for comprehensive safety planning. A domestic violence victim advocate may be able to assist with safety planning, although safety plans for sexual assault survivors differ from plans for domestic violence victims in some critical respects.)

Attorneys who have been trained in safety planning are essential, too, as legal representation must be consistent with the survivor's broader safety strategy. Attorney-client safety planning may be conducted in collaboration with a sexual assault crisis center or other appropriate service provider. A survivor's safety plan should be updated and revised as necessary throughout the course of legal representation or advocacy.

Lawyers and advocates should ensure that a survivor receives ongoing, individualized, and case-specific safety planning services.⁴⁰³

The following information is intended only as an initial overview of some common safety planning considerations. It is not a substitute for comprehensive training in this important area. Safety planning considerations may include:

- Seeking a civil and/or criminal protection order (if appropriate and available);
- Changing previous travel and transportation routines, including traveling to and from work or school at different times and by a different route, if possible (*see* Chapter 9, on Education, and Chapter 10, on Employment, for more information regarding seeking and obtaining accommodations for such schedule changes);
- Carrying a cellular phone to call 911 in the event of an emergency (cell phones that are programmed to call just 911 and have no other service can be obtained free of charge from many domestic violence and sexual assault service providers, shelters, and from The Wireless Foundation, www.wirelessfoundation.org);
- Identifying safe places to stay or reside away from home (including seeking emergency shelter or transitional housing, if necessary);
- Notifying neighbors and friends of the safety threat; and
- Additional residential and workplace security measures.

Careful safety planning is particularly important if the assailant knows the victim's daily routines or where the victim lives, works, or attends religious, cultural or educational events; has made a specific threat to harm the victim if she reports the assault; or has access to a weapon.

For survivors who do not know the identity of their assailant, safety planning may be especially challenging. In cases of extreme danger, a victim may want to

⁴⁰³ For additional resources, *see* WomensLaw.org, www.womenslaw.org/safety.htm (last visited Jan. 10, 2007).

consider seeking relocation services and legal advice on the viability of identity change.⁴⁰⁴

For some, but not all, survivors a civil protection order may be an appropriate remedy to enhance victim safety. For others, especially victims of stranger sexual assault, they may be no remedy at all (*e.g.*, if the victim does not know who the perpetrator is, she may not know who to name as the respondent, personal service of the order may be impossible, etc.) Moreover, sexual assault-specific civil protection orders are not available in most jurisdictions for victims of non-intimate partner sexual assault.⁴⁰⁵ Other protection order remedies that may be appropriate for (and available to) a sexual assault victim include a criminal “no contact” provision (which typically remains in effect so long as criminal charges against the defendant are pending or the defendant has been convicted), stalking order, military protective order on behalf of an older victim or a victim with disabilities, or a school-based or other institutional order. General anti-harassment orders may also provide a victim with protection. *See* Section III. A., below, for a more detailed discussion of the various orders.

III. FACTORS TO CONSIDER BEFORE FILING FOR A PROTECTION ORDER

The purpose of a protection order is to get an enforceable court order that enhances a victim’s safety. The remedies available pursuant to a civil protection order

⁴⁰⁴ For additional information about the appropriate and effective use of relocation services including the legal and practical implications of identity change, contact the National Relocation Counseling Project, Valenda Applegarth, Esq. (sited at Greater Boston Legal Services; (800) 323-3205 or for voice mail (617) 603-1557)).

⁴⁰⁵ Currently, sixteen states have civil protection orders for which victims of non-intimate partner sexual assault may be eligible. (Victims may also be eligible for other, more general civil anti-harassment or peace orders in the relevant jurisdiction but the remedies and enforcement mechanisms available to the victim through such orders may be very limited in scope.) The sixteen states include: **Alaska**: AS § 18.65.850, *et seq.*; **California**: CAL. CIV. P. CODE ANN. § 527.6; **Colorado**: COLO. REV. STAT. § 13-14-102; **Florida**: FLA. STAT. § 784.046; **Illinois**: 740 Ch. 22 ILL. COMP. STAT. 101-302; **Maine**: 5 ME. REV. STAT. §§ 4651-4659; **Maryland**: MD. CTS. AND JUD. P. CODE ANN. §§ 3-1501-1509; **Minnesota**: MINN. STAT. § 609.748; **Montana**: MONT. CODE. §§ 40-15-102 – 15.303; **North Carolina**: N.C. GEN. STAT. § 50C-1; **Oklahoma**: OKLA. STAT. tit. 22, § 60.2; **South Dakota**: S.D. CODIFIED LAW §§ 22-19A-8-2219A-17; **Tennessee**: TENN. CODE § 36-3-601 *et seq.*; **Texas**: TEX. CRIM. P. CODE §§ 7A.01-7A.06; **Vermont**: 12 VSA § 5131 *et seq.*; **Washington**: RCW 7.90 RCW; **Wisconsin**: WIS. STAT. § 813.125. For a summary of states’ civil protection order statutes including sexual assault, domestic violence and stalking orders, contact the American Bar Association Commission on Domestic Violence *available at* www.abanet.org/domviol.

vary by jurisdiction and type of order, but may include a “stay-away” provision that requires the assailant to stay a certain distance away from a survivor and/or her children or other family members, temporary custody, housing rights, economic assistance, and cooperation with immigration or other legal or administrative proceedings.

While every state and territory has a domestic violence protection order, only a minority of states have sexual assault specific orders.⁴⁰⁶ (Court injunctions, general anti-harassment orders, no-contact orders in criminal cases, and stay-away orders issued by educational institutions or on behalf of employers may provide additional sources of protection.) If a civil protection order (CPO) is obtained, an assailant may be sanctioned for contacting a victim, even if no assault or other criminal activity is committed during the contact. Further, protection orders do not necessarily preclude other civil or criminal remedies; indeed, they may provide a victim with the interim resources necessary to pursue those other courses of action.

A. Types of Protection Orders

There are a variety of different types of protection orders available to victims, depending on: (1) the circumstances of the assault; (2) where the victim (or the perpetrator) lives; (3) the state or territory in which the assault took place; and (4) the relationship, if any, between the victim and the perpetrator.⁴⁰⁷ The eight most common types of orders are:

- (1) **Sexual Assault Specific Safety Orders:** These are civil protection orders that provide remedies specifically for victims of sexual assault and do not require an underlying relationship between the victim and the assailant. Consequences for violating a sexual assault CPO may include civil or criminal contempt or criminal liability.
- (2) **Domestic Violence Safety Orders:** Often referred to as “restraining orders,” these CPOs may be available to victims of sexual assault who have a qualifying relationship with the

⁴⁰⁶ *Id.*

⁴⁰⁷ Depending on the jurisdiction, these orders may be referred to as “restraining orders,” “stay-away orders” or civil “protection orders.” The term “protection order” in this Chapter includes all such orders of protection.

perpetrator, such as a dating or sexually intimate relationship, currently live together or did so in the past, or are related by blood, marriage, or adoption.

- (3) **Anti-Stalking Orders:** These orders are available to any victims of stalking victims, including victims of sexual assault, and there are no relationship requirements. Eligibility is likely to be determined by how many contacts or incidents have occurred between the parties and whether the victim experienced objectively reasonable fear. Typically, stalking protection orders require at least two or more unwanted contacts between the victim and the perpetrator.
- (4) **“Peace” Orders:** Many states offer safety or “peace” orders that are general enough to be an option for all victims of harassment and assault, including sexual assault victims.
- (5) **Criminal Justice System Based Orders:** Such orders are sought by the prosecutor on behalf of the victim in a criminal case, if a criminal case against the defendant is pending. They are also a standard condition of a defendant’s release agreement in any criminal case.
- (6) **Institution-Based Orders:** These orders, typically issued by employers, educational institutions, or housing authorities, may be available to provide protection to victims when they are on the institution’s property or participating in activities sponsored or hosted by the institution.
- (7) **Civil Injunctions:** Civil judicial orders require that the assailant refrain from committing certain acts and may be obtained if the victim has filed an underlying civil claim against the assailant. Although civil injunctions lack the criminal consequences that may be imposed for violations of one of the first five CPOs described above, they are still court-issued orders and may be an avenue to additional legal remedies if violated.
- (8) **Military Protective Orders:** Military protection orders may be issued against a service member in any branch of the United States military (*e.g.*, Army, Navy, Marine Corps, Air Force, etc.). The order may be written or verbal. Service and enforcement of a military protection order may present unique challenges if the perpetrator and the victim do not reside on the same military base or installation, or other military site.

An attorney should assess whether an order is necessary and, if so, which type of order(s) may be appropriate for each individual client based on the client's needs and the specific facts of the case. Depending on the relationship between the victim and the assailant, the nature and frequency of the sexual assault(s), the jurisdiction's requirements, and the other civil or criminal remedies she is seeking, a victim may be eligible for one, all, or none of the orders described above.

[PRACTICE TIP: A victim who seeks a protection order must be informed of how the protection order process may affect a criminal prosecution. For example, the victim's statements in the petition for the order and at any subsequent court hearings may, in essence, provide the defendant with access to victim testimony that he would never otherwise be able to access. *See* Section D., below, for further discussion of this issue.]

B. Full Faith & Credit

The Full Faith and Credit provision of the Violence Against Women Act⁴⁰⁸ (VAWA) requires that states, territories, and tribes enforce protection orders issued by another state, territory, or tribe as long as the issuing entity had proper jurisdiction and the defendant was afforded notice adequate to protect his due process rights.⁴⁰⁹ This provision also requires that law enforcement personnel enforce protection orders issued by another jurisdiction *as if the order were issued by the enforcing state, territory, or tribe*.⁴¹⁰ (Military courts are also required to give full faith and credit to qualifying state and tribal protection orders.)⁴¹¹ The victim does not need – and state law may not require her – to register or file the protection order in the enforcing state for this VAWA

⁴⁰⁸ 18 U.S.C.A. §§ 2261–2266 (2000 & Supp. 2006).

⁴⁰⁹ 18 U.S.C.A. § 2265 (2000 & Supp. 2006).

⁴¹⁰ *Id.*

⁴¹¹ 10 U.S.C.A. § 1561a (Supp. 2006) (“A civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order. . . . [T]he term ‘civilian order of protection’ has the meaning given the term ‘protection order’ in section 2266 (5) of title 18.”)

provision to apply.⁴¹² Federal law requires that Full Faith and Credit be extended to any “injunction, restraining order or any other order issued by a civil or criminal court for the purpose of preventing . . . sexual violence.”⁴¹³

[PRACTICE TIP: VAWA’s Full Faith and Credit provision may be especially important if you are working with a client from another state, territory, or tribe who already has a protection order, or if your client is considering relocating to another state. The provision may also be pertinent if a client works in or travels to a state, territory, or Indian Country other than the one that issued the protection order.⁴¹⁴]

C. Retaliation, Timing, and Application

When a victim files a police complaint or seeks civil legal intervention directed toward the assailant, it may increase the risk of retaliation by the assailant. If your client fears retaliation, discuss how she thinks the perpetrator is likely to respond and whether it will enhance or diminish her safety if you file for protection orders. The careful timing, filing, service, and court hearings may play an important role in protecting the safety of the victim. This is especially true in the context of the victim’s decision regarding whether to report the assault to criminal authorities. If the police plan to make an immediate arrest, the prosecutor may seek a criminal stay-away order on the victim’s behalf. If the prosecutor will not seek such an order, you may want to coordinate the filing of the police complaint with the protection order application. (Even if a stay-away order is issued in a criminal case, the victim may want to secure a civil protection order, too. The civil protection order may be dismissed, modified, or renewed at the victim’s discretion. It will remain in effect even if criminal charges against the assailant are dismissed.)

⁴¹² 18 U.S.C.A. § 2265(d) (Supp. 2006).

⁴¹³ 18 U.S.C.A. § 2265a, 2266(5) (Supp. 2006) .

⁴¹⁴ For additional information regarding Full Faith and Credit and inter-state enforcement of protection orders, *see* JESSICA E. MINDLIN, ESQ. & LIANI JEAN HEH REEVES, ESQ., *RIGHTS AND REMEDIES: MEETING THE CIVIL LEGAL NEEDS OF SEXUAL VIOLENCE SURVIVORS*, at 30–36 (2005) (*available online at www.lclark.edu/org/ncvli/objects/L&C77576civilbook.pdf*).

[PRACTICE TIP: Filing for a protection order may trigger retaliation – especially if the assailant views it as a precursor to, or a negative inference in, a criminal trial. Help the victim assess whether filing for a protection order will result in added danger or further harm and, if so, what she may be able to do to minimize the harm. Be sure to engage in at least some basic, ongoing safety planning with your client. If you are an attorney, you may want to refer her to a sexual assault crisis counselor or other advocate with safety planning expertise for further assistance.]

Risk of retaliation is also heightened when an assailant is notified of the outcome of an employment or educational disciplinary proceeding. If the assailant is going to be dismissed from or otherwise sanctioned at work or suspended or expelled from school as a result of the victim's complaint, protection orders may play a vital role in protecting a victim. Protection orders may also provide the victim with additional legal recourse if the perpetrator contacts her in violation of a court order.

[CHECK YOUR STATE'S LAW: Some but not all states require mandatory arrest of a respondent who violates a protection order. In many states, violation of a protection order is a criminal offense and an assailant may face additional criminal charges if he violates an order.]

A victim who obtains a protection order may find that the assailant uses the court system to subject her to further harassment. For example, the assailant may file a motion to vacate, modify, or compel the victim to appear in court and recount her victimization. Documenting these and similar efforts may help you persuade the court that these filings are thinly veiled efforts to intimidate, harass, or injure your client. In some states, an assailant's over-use of the court system may be deemed evidence of harassment if it is sufficiently extreme.⁴¹⁵ (The standard for vacating or modifying a civil protection order may not be articulated in a statute. If the standard is not defined, look to the common law for guidance regarding the applicable standard.)

⁴¹⁵ See, e.g., *In re Marriage of Phasavath*, No. 56152-9-I, 2006 WL 1005003, at *4 (Wash. Ct. App. Apr. 17, 2006) (The court looked to husband's repeated threats to pursue legal action as evidence of harassment).

D. The Significant Interrelationship Between Protection Orders and Other Civil and Criminal Remedies

1. Substantive Implications

Protection orders may have a substantial impact on other remedies the victim seeks. The impact may be beneficial, or it may prove burdensome or even dangerous. For example, securing a protection order may help a victim expedite the assailant's ouster from a residence, school, or work site. Landlords, housing authorities, employers, schools, and other agencies and institutions are sometimes reluctant to devote sufficient time and resources to conducting their own internal investigation. Additionally, they often fear litigation and liability if they take action against a perpetrator without adequate evidence or support. For them, a court order such as a CPO may alleviate both the fear and the burden: a court order containing judicial findings may be relied on in lieu – or in support – of an institution's own internal investigation. It may embolden an otherwise reluctant landlord, employer, or administrator.

At the same time, a CPO application has significant potential to undermine other outcomes that the victim seeks, such as criminal conviction of the assailant. For example, a victim who wants to secure a CPO may feel obliged to describe her relationship with the assailant as a “dating” or “intimate partner” relationship to be eligible for the protection order, even if such a relationship is not firmly established. The victim's attorney must help the victim to understand the risk of characterizing the relationship in this manner as it may be used against her in a criminal prosecution. (Such evidence of a dating or intimate relationship may be used to support an assailant's defense that sex was consensual in a related criminal or civil proceeding. If the victim denies the relationship, she may be accused of lying – either on the civil application or in the criminal case. In such cases, a civil injunctive, housing, school-based, or criminal-based stay-away order may be a better option (*see below*)). Another significant risk of a CPO is that a victim may provide statements in her CPO petition or at a CPO hearing (where victims often appear *pro se*) that are at variance with subsequent testimony. This is especially true for victims who provide testimony while still in a state of shock or

trauma. Any discrepancies between the victim's testimony in a CPO case and in the subsequent criminal case can be used as grounds for impeachment.

Finally, some victims are unable to resolve their CPO cases if there is a concurrent criminal prosecution. This typically occurs when a judge delays the civil case if it would require a defendant facing criminal charges to compromise his Fifth Amendment rights by testifying in the civil matter. Some jurisdictions have resolved this dilemma by continuing the terms of the temporary CPO until the criminal case is resolved, by prohibiting the use of a respondent's CPO testimony in a related criminal case, or by not issuing any findings and having the parties stipulate to the order instead.

2. Evidentiary Implications

As noted above, an affidavit submitted in support of a request for a CPO may be used as part of an effort to undermine the victim in a subsequent criminal proceeding. If the affidavit contains many specific facts and the victim's subsequent testimony (in a civil or criminal case) differs from the affidavit, the defense may try to use it to impeach the victim during a criminal proceeding. This is especially common when a victim's testimony and/or prior statements to police, hospital staff, witnesses, etc. differ from the statements set forth in the CPO petition. Although such inconsistencies are both human nature and a normal reaction to trauma, they may nevertheless be used against a victim in a criminal case. At the same time, a CPO petition that is significantly devoid of specific facts may be used to impeach the victim in a criminal trial precisely for that reason.

Attorneys in CPO proceedings must think strategically about how much detail to include in an affidavit. The victim's certainty about the details, her ability to recall the information consistently, and privacy considerations will inform that choice. If you are in a state or territory in which the nature of the relationship between the perpetrator and the victim determines eligibility for the order, eligibility considerations also may influence how you and your client choose to describe the relationship between the parties. As noted above, if the victim describes herself as being in a "dating" relationship with the assailant to be eligible for the CPO, this description will likely enhance the criminal

defense argument that the sexual contact was consensual. (*See* Chapter 3, on Privacy, for additional information.)

E. Seeking a Civil Protection Order: Benefits and Burdens

Never make promises to a client about what a protection order can and cannot provide: assailants' behavior cannot be predicted with total accuracy. Some perpetrators will abide by CPOs because they fear punishment if they do not obey a court order. Others will violate a court order with impunity, even if they have been punished for prior violations. In the end, the order is simply a piece of paper and cannot fully ensure that a victim will be protected from contact, harassment, or even assault by the assailant.

The reasons to pursue – or not pursue – a CPO will vary from client to client. Some victims may feel confident that an order will stop further contact and harassment and provide them with a sense of safety and security. Other victims may fear retribution if they seek an order. Respect this fear and do not encourage her to ignore it. Your role is to help your client make informed decisions.

The scope of protection and remedies available through a CPO is different in every jurisdiction. In addition to the specific remedies outlined under the law, many CPO statutes contain a “catch-all” provision that allows a court to order additional remedies the court deems necessary. There are many remedies a victim may want to request the court to order, but some of the more common or important provisions include:

- A stay-away provision prohibiting the respondent from direct or indirect contact with the victim;
- Compensation for lost or damaged property;
- Ordering the perpetrator to vacate a residence;
- Restitution for medical or counseling costs, lost wages, damaged personal property, moving expenses, and any other out-of-pocket costs incurred as a result of the assault;⁴¹⁶

⁴¹⁶ *See, e.g., Maine*: ME. REV. STAT. ANN. tit. 5, § 4655 (Supp. 2006) (allowing judge to order “payment of monetary compensation to the plaintiff for losses suffered as a direct result of the harassment”); *Massachusetts*: MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 2006) (allowing judge to order the defendant to pay monetary compensation to the abused person for “losses suffered as a direct result of such abuse,” including “loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries

- Assistance with the victim’s housing costs (such as rent or mortgage, residential parking fees, etc.);
- Surrender of firearms and/or suspension of the respondent’s right to carry a weapon;⁴¹⁷ and
- An award of child or spousal support.⁴¹⁸

All states allow a court to award temporary custody pursuant to a CPO either by statute or through the use of “catch-all” provisions. Some states’ laws specifically address the issue of rape that results in pregnancy. If the victim is suing the perpetrator for custody, issuance of a CPO and the findings and terms therein may be helpful in any subsequent custody or divorce (or immigration) proceedings. (See Chapter 8 for additional information regarding non-citizen survivors.)

[PRACTICE TIP: A CPO proceeding is a much more timely vehicle than a criminal case for a victim seeking emergency financial compensation. Although a convicted defendant in a criminal case may be ordered to pay restitution, in most jurisdictions it is the prosecutor and not the victim who decides whether and how much restitution to request. Even if the defendant is ordered to pay restitution, it is typically ordered only at sentencing, if at all. (A victim may also have more success

sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney’s fees”); **Missouri**: MO. ANN. STAT. § 455.050(3) (West 2003) (allowing court to order respondent to pay compensation to victim including money for housing costs, court costs, and medical expenses resulting from abuse); **New York**: N.Y. FAM. CT. ACT § 841(e) (McKinney 1999) (allowing court to order respondent to pay restitution in amount not to exceed \$10,000).

⁴¹⁷ See, e.g., **Colorado**: COLO. REV. STAT. § 18-1-1001(3)(c) (2006) (court may issue order prohibiting defendant from possessing or controlling firearm or other weapons); **Massachusetts**: MASS. GEN. LAWS ANN. ch. 209A, §§ 3B–3C (West Supp. 2006) (providing for suspension of firearms license and surrender of firearms and ammunition upon issuance of protection order if plaintiff demonstrates “a substantial likelihood of immediate danger of abuse”); **New York**: N.Y. FAM. CT. ACT § 842-a (McKinney Supp. 2005) (providing for surrender of firearms and license suspension upon issuance of protection order). While VAWA prohibits possession of a firearm by a respondent subject to a qualifying protective order, not all CPOs are “qualifying orders” under federal law. Therefore, a victim may want to request dispossession as a condition of the state CPO.

⁴¹⁸ See, e.g., **California**: CAL. FAM. CODE § 6341 (Deering 2006) (allowing court to order child support if parties are married or respondent is presumptive father and there is no pre-existing support order in place); CAL. FAM. CODE § 6346 (Deering 2006) (allowing court to issue custody and visitation orders as part of protection order hearing); **Illinois**: 750 ILL. COMP. STAT. 60/214(b) (2004) (allowing court to address issues of custody, visitation, and support payments in protection order proceeding); **New York**: N.Y. FAM. CT. ACT § 842 (McKinney Supp. 2007) (allowing order of protection to include custody award, order of visitation, and temporary order of support).

seeking reimbursement in a CPO than in a criminal case because of the lower standard of proof.) States' Crime Victim Compensation funds may be an additional source for funds to cover a victim's expenses. *See* Chapter 13 for additional information on victims' financial remedies.]

[CHECK YOUR STATE'S LAW: Some states' sexual assault, domestic violence, or stalking CPO statutes have a "catch-all" provision that allows the court to grant any remedy that a victim needs to be safe from future violence.⁴¹⁹]

A CPO must be served on the respondent before it is enforceable. If the assailant was a stranger, or if the victim does not know how or where he may be reached, this may be difficult to achieve.

She will also need to be prepared to testify about the assault in front of the judge (and, after the *ex parte* stage, in front of the perpetrator as well). The victim's testimony may have to be given in open court. (*See* Section IV of this Chapter for additional information regarding obtaining protection orders. *See also* Section III.C.3, of Chapter 3, above, regarding sealed records and closed courtrooms to enhance victim privacy.)

[CHECK YOUR STATE'S PROCESS: In many states, CPO hearings are more informal than other court proceedings. It may even be possible for a victim to get an order granted without a full hearing.⁴²⁰ If the

⁴¹⁹ *See, e.g., Montana:* MONT. CODE ANN. § 40-15-201(2)(j) (2005) (order of protection may include order "directing other relief considered necessary to provide for the safety and welfare of the petitioner or other designated family member"); **North Carolina:** N.C. GEN. STAT. § 50C-5 (2005) (court may order "other relief deemed necessary and appropriate by the court" as part of civil no-contact order); **South Dakota:** S.D. CODIFIED LAWS § 22-19A-11 (2006) (protection order may include order for "other relief as the court deems necessary for the protection of the person seeking the protection order, including orders or directives to law enforcement officials"); **Texas:** TEX. CODE CRIM. PROC. ANN. art. 7A.05 (Vernon 2005) (as part of a protection order, a court may "order the alleged offender to take action as specified by the court that the court determines is necessary or appropriate to prevent or reduce the likelihood of future harm to the applicant or a member of the applicant's family or household").

⁴²⁰ *See, e.g., Frizado v. Frizado*, 420 Mass. 592, 597-98 (1995) (procedure for obtaining a protection order is "intended to be expeditious," "must be practical," and "the rules of evidence need not be followed, provided that there is fairness in what evidence is admitted and relied on."); *Maksuta v. Higson*, 577 A.2d 185, 186 (N.J. Super. Ct. App. Div. 1990) ("The Domestic Violence Act provides for proceedings which may be relatively informal."); IND. CODE ANN. § 34-26-5-10 (LexisNexis Supp. 2006) (no automatic hearing required for the order to become permanent but a hearing is required if requested by either party or if the petitioner

assailant is willing to “consent” to the order being granted, there may be no hearing at all. Other states, however, do not have summary proceedings and may conduct full evidentiary hearings.⁴²¹ In addition, in many states CPO hearings are conducted in open court, in which case the victim will have to testify about her experience before an open courtroom.⁴²² This may be difficult and could re-traumatize the victim. Be sure you are familiar with the practices of the court in which you are appearing, and with all relevant privacy protections it may be possible to pursue.]

Inform the victim that, in a contested hearing, the assailant will be present in court, and the victim will have to see him. This could be very difficult. If there is a hearing, the assailant will have an opportunity to present his version of the facts. This may also be traumatic, insulting, and distressing for the victim to hear. The respondent (if he is *pro se*) or his attorney will probably cross-examine the victim following her testimony. If the respondent is *pro se*, some judges will require him to direct his questions to the judge, who will then pose them to the victim, if the judge deems the questions appropriate. However, not all judges will provide such a “screen.” Even if she is not questioned directly by the respondent, the victim will still hear the respondent’s questions even if she is not required to answer them.

Sometimes, judges – most often those who are not familiar with sexual assault issues – may require a sexual assault victim to answer questions that are relevant only to a higher standard of proof than the standard required for issuance of a CPO. Although

requests monetary relief, possession of joint property, prohibition of the possession of a firearm, or eviction of the offender from the residence).

⁴²¹ See, e.g., *Utey v. Baez-Camacho*, 743 So. 2d 613, 614 (Fla. Dist. Ct. App. 1999) (“The purpose of a due process hearing following the grant of an ex parte temporary injunction is to give the defendant an opportunity to show that the allegations previously relied on are not true. The witnesses should be sworn, each party should be permitted to call witnesses with relevant information, and cross-examination should be permitted.”). See also Christina DeJong & Amanda Burgess-Proctor, *A Summary of Personal Protection Order Statutes in the United States*, 12 VIOLENCE AGAINST WOMEN 68 (2006), available online at vaw.sagepub.com/content/vol12/issue1.

⁴²² See generally WomensLaw.org, www.womenslaw.org (last visited Jan. 10, 2006), for a description of the procedures for obtaining a protection order in every state and the District of Columbia.

the standard of proof in the CPO case does not require a finding that there was criminal non-consensual sex, a judge may nevertheless question the victim or allow the defense to ask questions that seek to establish the respondent's criminal conduct. This may be damaging to the victim emotionally, and may also undercut the criminal case against the assailant. Attorneys should be familiar with the standard of proof in the governing jurisdiction and carefully consider which of the perpetrator's acts meet the statutory requirements. Careful attention to the standard and the evidence given may be a way to spare the victim from testifying about the assault itself. Familiarity with state and local court rules, the rules of evidence, limitations on cross-examination, and any rules regarding the protection of private or privileged information may also help an attorney object to the admission of certain information.⁴²³

[PRACTICE TIP: Emphasize to the victim and prepare her for the fact that it is critically important to give consistent testimony so that any evidence she gives in the CPO hearings is not later used against her in the criminal case. Another option is to wait until the criminal case is concluded, if it is practical for her to do so.]

While the CPO process is difficult and frightening for some victims, for others it is very healing and empowering. For some victims, recounting their experience in court helps them come to the realization that they were wronged through no fault of their own. Being believed by the court and respected by a supportive judge who grants the order may help a victim feel vindicated and in control. This may be especially true if the CPO

⁴²³ For a practical guide to evidentiary issues encountered in civil protection order cases, the American Bar Association's Commission on Domestic Violence offers outlines on evidence issues in domestic violence cases entitled *Litigation Tips In Domestic Violence Cases: A Techniques and Strategies Teleconference Series*, available at www.abanet.org/domviol/attorneys.html#training. See also Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43 (2000). Your state's continuing legal education program or domestic violence program may also provide manuals on evidence issues and litigating protection order cases. See, e.g., OBTAINING, ENFORCING AND DEFENDING C.209A RESTRAINING ORDERS IN MASSACHUSETTS (Andrea J. Cabral ed., 1997 & Supp. 2004) available from Massachusetts Continuing Legal Education, Ten Winter Street, Boston, MA 02108 (800) 966-6253. National sexual assault-focused resources may be more difficult to locate, but helpful state sexual assault resources do exist. See e.g., SEXUAL VIOLENCE LAW IN KENTUCKY: A HANDBOOK OF CRIMINAL, CIVIL, AND ADMINISTRATIVE LAWS (Marylee Perry ed., 2003), available for purchase from KASAP at (502) 226-2704 or email execadmin@kasap.org. See also CIVIL REMEDIES FOR WOMEN VICTIMIZED BY VIOLENCE: A PRACTICE MANUAL FOR ATTORNEYS (Carol E. Jordan et al. eds., 2003), available for purchase from UK/CLE at (859) 257-2921 or www.uky.edu/Law/CLE.

is continued after a contested hearing in which the judge believed the victim and not the assailant. At the same time, for many victims the legal system is not a vehicle (or even a catalyst) for healing and should not necessarily be viewed as such by the victim.

[PRACTICE TIP: Spend the time to get to know your client well enough to have a conversation with her about the relative benefits and burdens of seeking a CPO. If you can earn her trust and understand one another, both you and your client will enter these proceedings confident that the process is worth pursuing, regardless of the outcome. If you avoid a difficult conversation or have not worked through the decision together, your client may blame you for putting her through a harrowing ordeal that was not worth the pain; this may be true even if she prevails and the order is issued. A victim should be cautioned that CPO petitions are public documents. Therefore, any facts that she includes in the CPO petition are likely to become accessible to the general public. Although a court may be willing to seal the documents, even a sealed document is not an assurance that the victim's personal information will remain private. Talk to your client about what she hopes to gain through the order and whether there are other ways to access those remedies. If there are no better options and she knows what to expect from the process, then you can both move forward confident that she has selected the remedy that is right for her.]

F. Speed and Efficiency of Protection Orders

Protection order hearings may be a more expeditious and victim-friendly venue for holding the assailant accountable relative to other civil or criminal prosecutions. CPO cases are typically resolved within two weeks to one month. In contrast, it can take two to four months to complete a school or employment disciplinary process and one to two years for a criminal prosecution. Filing and hearing procedures as well as court personnel are often more victim-friendly in CPO cases than in criminal cases or other types of civil proceedings. In many jurisdictions, civil protection order statutes were

created mostly with input from domestic violence victims and with the expectation that in most cases the parties would represent themselves. Although CPO proceedings are accessible to *pro se* litigants, research has found that assistance of counsel improves victims' access to and outcomes in CPO cases.⁴²⁴ Legal representation may be critical in non-intimate partner sexual assault cases, too, to prevent the proceeding from turning into a sexual assault trial.

IV. OBTAINING PROTECTION ORDERS

A. Sexual Assault Specific Protection Orders

Some state legislatures have established safety orders specifically for victims of sexual assault.⁴²⁵ In contrast to domestic violence CPOs, these sexual assault protection orders do not require a qualifying relationship – such as dating, marriage, intimate sexual partner, etc. – between the parties.⁴²⁶ Further, most states do not require the victim to report the incident to law enforcement or to participate in a criminal prosecution.⁴²⁷ However, there are exceptions: For example, Florida requires a victim to cooperate with

⁴²⁴ In their 2003 article, *Explaining the Recent Decline in Domestic Violence*, economists Amy Farmer and Jill Tiefenthaler³ conclude that the availability of legal services in a victim's county of residence "has a significant, negative effect on the likelihood that an individual woman is battered. . . . [and that] legal services provision is one likely significant factor in explaining the decline [in domestic violence]." CONTEMPORARY ECONOMIC POLICY, Vol. 21, No. 2, April 2003, 158-172.

⁴²⁵ As of May 2007, fifteen states offer civil protection orders or no-contact orders for victims of sexual assault. For a state survey of sexual assault protection order statutes, see NAT'L CTR FOR VICTIMS OF CRIME, PROTECTIVE ORDERS FOR VICTIMS OF SEXUAL ASSAULT (2005). See, e.g., **Florida**: FLA. STAT. § 784.046 (2005) (victim may file a sworn petition for an injunction for protection against sexual violence in circuit court; if violated, respondent shall be held in custody in accordance with the rules of criminal procedure, pending a hearing); **Illinois**: 740 ILL. COMP. STAT. 22/201 (2004) (victim of non-consensual sexual conduct or penetration may petition a court for a civil no-contact order); 740 ILL. COMP. STAT. 22/219 (2004) ("A knowing violation of a civil no contact order is a Class A misdemeanor; A second or subsequent violation is a Class 4 felony.").

⁴²⁶ See, e.g., **Montana**: MONT. CODE ANN. § 40-15-102(2) (2005) (victim of sexual assault is eligible regardless of the relationship to the offender); **Texas**: TEX. CODE CRIM. PROC. ANN. art. 7A.01(a) (Vernon 2005) (victim of sexual assault may file an application for a protection order without regard to the relationship between the applicant and the alleged offender).

⁴²⁷ See, e.g., **Illinois**: 740 ILL. COMP. STAT. 22/202(a) (2004) (action may be commenced independently or in conjunction with a criminal prosecution); **Montana**: MONT. CODE ANN. § 40-15-102(5) (2005) ("A petitioner is eligible for an order of protection whether or not: (a) the petitioner reports the abuse to law enforcement; (b) charges are filed; or (c) the petitioner participates in a criminal prosecution.").

law enforcement;⁴²⁸ in Iowa, an order may issue upon the defendant's arrest, a magistrate's finding of sexual assault, and a continued threat to the victim.⁴²⁹ While most protection orders are civil in nature, Arkansas law authorizes a permanent criminal protection order in sexual assault cases where a defendant has been convicted and exhausted his right to appeal.⁴³⁰

1. Petitioning for an Order

In most jurisdictions, petitioning for a sexual assault protection order is a two-step process.⁴³¹ The first step is to file for a temporary order; this typically involves the victim filing an "application," "complaint," "petition," or "affidavit" in civil court. Issuance of the order typically requires a showing of immediate or imminent harm. If granted, the preliminary order will be issued based on the victim's application and will be issued *ex parte* (*i.e.*, the respondent does not need to be notified or present at this initial hearing). If issued, the order is temporary and will be effective only for a fixed, and relatively short, period of time.⁴³² The order will be valid but unenforceable until it is served on the respondent.

⁴²⁸ FLA. STAT. § 784.046 (2005) (victim must have reported sexual violence to a law enforcement agency and be cooperating in any criminal proceeding against respondent).

⁴²⁹ IOWA CODE § 664A.3 (2006).

⁴³⁰ ARK. CODE ANN. § 5-14-103 (2006) (providing sexual assault victims with a criminal permanent no-contact order when defendant pleads guilty or *nolo contendere* or has exhausted all appeals after conviction).

⁴³¹ There are some exceptions to this general rule, however. For example, although there are no sexual assault specific CPOs in Oregon, the initial *ex parte* order granted under the state's Family Abuse Prevention Act remains in effect for one year unless the respondent requests a hearing. OR. REV. STAT. § 107.716(6) (2005).

⁴³² *See, e.g.*, **Florida**: FLA. STAT. § 784.046 (2005) (court may grant a temporary injunction not to exceed 15 days upon an *ex parte* hearing pending a full hearing); **Illinois**: 740 ILL. COMP. STAT. 22/214, 22/216 (2004) (court may order an emergency order lasting 14–21 days without notice to respondent based on victim's petition); **Montana**: MONT. CODE ANN. § 40-15-201(4) (2005) (court may issue an immediate temporary order of protection based upon victim's sworn petition and other evidence for up to 20 days without prior notice to the respondent); **Texas**: TEX. CODE CRIM. PROC. ANN. art. 7A.02 (Vernon 2005) (based on victim's application, court may enter a temporary *ex parte* order without a hearing or notice to respondent); TEX. CODE CRIM. PROC. ANN. art. 7A.04 (Vernon 2005) (Title 4, Family Code applies to sexual assault protection orders); TEX. FAM. CODE ANN. § 83.002 (Vernon 2002) (temporary *ex parte* orders not to exceed twenty days but may be extended upon petition by plaintiff or by judge for additional twenty day periods).

[CHECK YOUR STATE’S LAW: Federal, state and Tribal laws vary with respect to where is the proper venue for obtaining this type of safety order.]

To obtain a protection order, most states require that the victim make a minimum showing in the initial application, complaint, or affidavit. Although the exact language varies from jurisdiction to jurisdiction, most courts look for two criteria. First, in her application or affidavit, a victim must state that she is the victim of a sexual assault or attempted sexual assault committed by the perpetrator. She needs to provide the court with enough information that it can reasonably believe her assertion.⁴³³ As noted above, in some jurisdictions, a victim’s report to law enforcement or cooperation with an investigation and/or prosecution, or a conviction in a criminal case is necessary before an order may issue.⁴³⁴

Second, most statutes require that the victim assert that she is afraid of her assailant and fears for her safety. Again, she should be sure to provide enough information for a trier of fact to determine that she is in fear or danger of future harm by the assailant.⁴³⁵

The second step of the protection order process requires that the victim return to court for a hearing at which the respondent is present. The assailant will have an

⁴³³ See, e.g., **Illinois**: 740 ILL. COMP. STAT. 22/213(a) (2004) (petitioner must show she is a victim of non-consensual sexual conduct or penetration); **Iowa**: IOWA CODE § 664A.3 (2006) (magistrate must find probable cause to believe a sexual assault occurred); **Texas**: TEX. CODE CRIM. PROC. ANN. art. 7A.03 (Vernon 2005) (the court must find there are “reasonable grounds to believe that the applicant is the victim of a sexual assault”).

⁴³⁴ See, e.g., **Arkansas**: ARK. CODE ANN. § 5-14-103 (2006) (providing sexual assault victims with a permanent criminal no-contact order when defendant pleads guilty or *nolo contendere* or has exhausted all appeals after conviction); **Florida**: FLA. STAT. § 784.046 (2005) (requiring that victim has reported sexual violence to a law enforcement agency and is cooperating in any criminal proceeding against respondent); **Iowa**: IOWA CODE § 664A.3 (2006) (protection order available upon arrest and a finding by a magistrate that a sexual assault occurred and the defendant poses a threat to the victim).

⁴³⁵ See, e.g., **Florida**: FLA. STAT. § 784.046 (2005) (petitioner must show that an immediate and present danger of violence exists); **Iowa**: IOWA CODE § 664A.3 (2006) (magistrate must find that the presence of or contact with the defendant poses a threat to her safety); **Montana**: MONT. CODE ANN. § 40-15-201(1) (2005) (sworn petition must state that she is in “reasonable apprehension of bodily injury” and is in “danger of harm if the court does not issue a temporary order”); **Texas**: TEX. CODE CRIM. PROC. ANN. art. 7A.03 (Vernon 2005) (required finding that applicant is the “subject of a threat that reasonably places the applicant in fear of further harm from the alleged offender”).

opportunity to respond to the victim's initial complaint.⁴³⁶ Both parties will be given an opportunity to present evidence. The court may decide to continue, make permanent, modify, or vacate the preliminary protection order.

2. Drafting the Affidavit

It is important to remember that the information contained in a victim's affidavit may significantly impact the other legal remedies available to her. Any statements contained in the CPO affidavit must be consistent both with statements she has made in the past and any testimony she may give in the future. When drafting the affidavit, the victim and her attorney will want to find the right balance between providing enough detail to support the victim's request while at the same time committing to as little detail as possible so as not to undermine any testimony she may give in the future. To the extent possible, limit the information in the affidavit so it cannot later be used to impeach the victim. It is important to review medical records and police reports prior to filing the protection order affidavit to avoid inconsistencies, if possible. Be extremely wary of including any details that may be inconsistent with a victim's prior statements to law enforcement, medical providers, and other first responders. Although there may be very good reasons for any inconsistencies, they may be used to undermine the victim's credibility.⁴³⁷ At the same time, an affidavit that is vague or contains too few specifics may expose a victim to additional or more invasive questioning by the judge and also by the defendant (at the subsequent hearing for a permanent order). In addition, as discussed previously, a victim's attorney or advocate should know whether there is a pending criminal prosecution or investigation. A lawyer should be sure to assess the impact an affidavit may have on those proceedings.

⁴³⁶ See, e.g., **Florida**: FLA. STAT. § 784.046 (2005) (requiring a full hearing); **Montana**: MONT. CODE ANN. §§ 40-15-201 to 202 (2005) (allowing a 20-day period for respondent's response); **Texas**: TEX. CODE CRIM. PROC. ANN. art. 7A.03 (Vernon 2005) (requiring a full hearing and statement of the required findings).

⁴³⁷ Where inconsistencies are found between the victim's current description of what occurred and these records, interview your client closely to obtain more information. This may include an explanation of why there is a difference (e.g., a non-professional interpreter was used for the initial police interview) or additional detail so that the information is consistent with the records or report.

In some cases, a victim may have the opportunity to submit a supplemental affidavit to the initial pleadings. This may be an opportunity to bolster previous, or add additional allegations about the assault. Be aware, however, that filing a supplemental affidavit may result in inconsistencies between the first and second affidavits, or between statements in the affidavit and those made to the police or prosecutor. Such inconsistencies may also jeopardize a victim's credibility unless they are adequately explained in the supplemental affidavit.

[PRACTICE TIP: In some attorneys' experience, judges scrutinize perceived inconsistencies more closely in sexual assault cases than in other protection order cases. If you have access to other attorneys or advocates who have handled these cases, it can be critical to get their insight into local practice. Individual judges may approach these matters very differently, so find out as much as you can about the specific judge assigned to the matter, if you know the judge ahead of time. This information can also help you determine your case strategy.]

B. Peace Orders and Anti-Harassment Orders

A few jurisdictions allow courts to issue general anti-harassment protection orders.⁴³⁸ An anti-harassment order may be an effective civil remedy for victims not eligible for a sexual assault or other CPO that has a broader scope and better enforcement mechanism. Anti-stalking orders typically are designed so that victims will be able to prove that the requisite harassment occurred. These laws do not require the complainant to have a qualifying relationship with her harasser.⁴³⁹

⁴³⁸ See, e.g., **California**: CAL. CIV. PROC. CODE § 527.6(a) (Deering 1995) ("person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment"); **Maine**: ME. REV. STAT. ANN. tit. 5, § 4653 (Supp. 2006) (victim of harassment may apply for a temporary protection order or consent agreement); **North Dakota**: N.D. CENT. CODE § 12.1-31.2-01(2) (Supp. 2005) (victim of disorderly conduct may seek a protection order). In Maryland, the Peace Order statute specifically allows an order based on sexual assault. MD. CTS. AND JUD. P. CODE ANN. §§ 3-1501-1509.

⁴³⁹ See *supra* note 53.

“Harassment” may include a wide spectrum of behavior ranging from assault to unwanted contact and annoyance.⁴⁴⁰ Through these orders, a court will enjoin a victim’s assailant from further harassment. Anti-harassment orders do not usually offer a victim the range of remedies available in a sexual assault or domestic violence CPO. The consequences of violating an order do not usually include arrest.⁴⁴¹ Remedies such as emergency financial assistance and ouster are also not available. For some assailants, however, the very existence of a court order may be an effective deterrent and afford the victim some additional relief.

A victim may petition for an anti-harassment order in civil court. Most jurisdictions provide for an *ex parte* application process. As with the other types of orders discussed above, temporary anti-harassment orders may be converted into longer term or permanent injunctions following a full hearing of which the parties were given notice and an opportunity to be heard.⁴⁴² Standard application procedures require a victim to petition. A sworn affidavit describing the harassment and the need for relief may also be required.⁴⁴³

⁴⁴⁰ See, e.g., **California**: CAL. CIV. PROC. CODE § 527.6(b) (Deering Supp. 2006) (harassment defined as “unlawful violence, a credible threat of violence, or a knowing and willing course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose”); **Maine**: ME. REV. STAT. ANN. tit. 5, § 4651(2)(c) (Supp. 2006) (harassment includes a single act or course of conduct constituting gross sexual assault); **North Dakota**: N.D. CENT. CODE § 12.1-31.2-01 (Supp. 2005) (disorderly conduct means intrusive or unwarranted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person).

⁴⁴¹ See, e.g., **California**: CAL. PENAL CODE § 273.6(a)-(b) (Deering Supp. 2006) (violation of an order is a misdemeanor punishable by fine of not more than \$1000 or by imprisonment for not more than one year, or both; if physical injury results, the violation is punishable by fine of not more than \$2000 or imprisonment for no less than thirty days nor more than one year, or both); **Maine**: ME. REV. STAT. ANN. tit. 5, § 4659 (2002) (violation of a protection order is a Class D crime that may result in warrantless arrest upon probable cause that violation occurred); **North Dakota**: N.D. CENT. CODE § 12.1-31.2-01(7) (Supp. 2005) (violation punishable by imprisonment of up to one year or fine of up to \$2000, or both).

⁴⁴² See, e.g., **Maine**: ME. REV. STAT. ANN. tit. 5, § 4654 (Supp. 2006) (court may issue temporary order based upon verified complaint or affidavit and complaint without written or oral notice to defendant or his attorney); **North Dakota**: N.D. CENT. CODE § 12.1-31.2-01(4) (Supp. 2005) (based on the petition for relief, court may grant a temporary protection order pending a full hearing).

⁴⁴³ See, e.g., **Maine**: ME. REV. STAT. ANN. tit. 5, § 4654(2)(A) (Supp. 2006) (to obtain a temporary order, victim must file verified complaint, or an affidavit accompanying the complaint, stating that she “may be in immediate and present danger of suffering extreme emotional distress as a result of defendant’s conduct,” whether she has or has not contacted law enforcement, and “sufficient information to substantiate the alleged harassment”); **North Dakota**: N.D. CENT. CODE § 12.1-31.2-01(3) (Supp. 2005) (“petition for relief must allege facts sufficient to show the name of the alleged victim, the name of the individual engaging in the

C. Anti-Stalking Orders

At least seventeen states have enacted laws that authorize protection orders for victims of stalking.⁴⁴⁴ Anti-stalking orders may be an effective remedy for some sexual assault victims. Typically, to qualify for a protection order based on stalking, the victim must have had at least two unwanted contacts with the assailant where she experienced fear or apprehension.⁴⁴⁵ In some states, acts such as following the victim or coming into her presence is a sufficient basis for issuing an order. However, other states require more substantial action, such as a direct threat or physical assault.⁴⁴⁶ Eligibility for an anti-stalking order varies widely. A victim whose assailant has contacted her even once after the assault may qualify for an anti-stalking order. In every state that has an anti-stalking statute, violating the order may constitute a criminal offense.⁴⁴⁷

disorderly conduct,” and that the individual engaged in disorderly conduct and must be accompanied by an affidavit made under oath “stating the specific facts and circumstances supporting the relief sought”).

⁴⁴⁴ See Catherine A. Carroll, *Stalking Protection Orders By State* (Apr. 28, 2006), available at www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=41544 (last visited Jan. 30, 2007) (chart on stalking remedies published by the Stalking Resource Center).

⁴⁴⁵ See, e.g., **Michigan**: MICH. COMP. LAWS §§ 750.411h, 750.411i, 600.2950a (Supp. 2006) (requiring repeated or continuing harassment that would “cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested”); **Ohio**: OHIO REV. CODE ANN. § 2903.211(A)(1) (West 2006) (defining stalking as when a person knowingly engages in two or more actions or incidents closely related in time that cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person); **Oregon**: OR. REV. STAT. § 30.866(1) (2005) (requiring repeated and unwanted contact that causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim’s immediate family or household, among other requirements).

⁴⁴⁶ See, e.g., **Michigan**: MICH. COMP. LAWS § 750.411h (West 2004) (prohibited contact includes but is not limited to: “(i) following or appearing within sight of the individual; (ii) approaching or confronting that individual in a public place or on private property; (iii) appearing at the individual’s workplace or residence; (iv) entering onto or remaining on property owned, leased, or occupied by that individual; (v) contacting that individual by telephone; (vi) sending mail or electronic communications to that individual; or (vii) placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.”). Cf. OHIO REV. CODE ANN. § 2903.211(B)(2) (West 2006) (menacing by stalking is a felony if: (a) the offender made a threat of physical harm to or against the victim; (b) the offender trespassed on the land or premises where the victim lives, is employed, or attends school; (c) the victim is a minor; (d) the offender has a history of violence towards the victim or any other person; (e) the offender had a deadly weapon; or (f) the offender caused serious physical harm to the premises where the victim lives, to the real property where the premises is located, or to any personal property located on the premises).

⁴⁴⁷ See, e.g., **Ohio**: OHIO REV. CODE ANN. § 2919.27(B)(1) (West 2006) (violation of a protection order is a misdemeanor of the first degree); **Oregon**: OR. REV. STAT. § 163.750(2) (2005) (violation of court’s stalking protection order is a Class A misdemeanor unless the person has a prior conviction for stalking or for

Victims may be able to apply for an anti-stalking order without filing criminal charges or otherwise pursuing criminal remedies.⁴⁴⁸ Similar to the orders discussed above, protection orders for victims of stalking are usually available through the civil court process.⁴⁴⁹ Temporary *ex parte* orders are usually available and, like their domestic violence and sexual assault counterparts, may be extended or made permanent upon a full hearing.

D. Domestic Violence Protection Orders

Every state has enacted legislation authorizing CPOs to protect victims of domestic violence.⁴⁵⁰ In jurisdictions that do not offer sexual assault specific safety orders, domestic violence protection orders may be appropriate. They may also be appropriate for certain victims depending on the remedies the victim seeks, the terms of the order, and the conditions which must be satisfied to secure the order. For a domestic violence order to be appropriate in a sexual assault case, however, there must be some type of dating, intimate partner, or other qualifying relationship between the parties.⁴⁵¹ A

violation of a stalking protection order, then violation is a Class C felony). For a summary of all seventeen states' anti-stalking laws, see Carroll, *supra* note 443.

⁴⁴⁸ See, e.g., **Michigan**: MICH. COMP. LAWS ANN. § 600.2950a(1) (West Supp. 2006) (relief may be sought or granted whether or not the individual to be restrained or enjoined has been charged or convicted); ORS §§ 30.866 (2007) (a person may bring a civil action in a circuit court for a court's stalking protection order or for damages, or both). Cf. ORS § 163.730 (2007) (stalking citation requested through law enforcement).

⁴⁴⁹ See, e.g., **Michigan**: MICH. COMP. LAWS ANN. § 600.2950a(1) (West Supp. 2006) (individuals may petition to the family division of circuit court); **Oregon**: OR. REV. STAT. § 30.866 (2006) ("a person may bring a civil action in circuit court").

⁴⁵⁰ See, e.g., **Alabama**: ALA. CODE § 30-5-2 (1998) (order of protection available to prevent abuse by spouse, former spouse, relative, person with whom the plaintiff has a child in common, or present or former household member); **Kentucky**: KY. REV. STAT. ANN. § 403.720 (LexisNexis 1999) (protection order available to prevent abuse by current or former spouse, specified relatives, person with whom the plaintiff has a child in common, and individual who lives with plaintiff or has lived with plaintiff); **Virginia**: VA. CODE ANN. §§ 16.1-228, -253.1 (Supp. 2006) (protection orders available to prevent abuse by current or former spouse, specified relatives, person with whom the plaintiff has a child in common, and individual who lives with plaintiff or has lived with plaintiff within the past 12 months). For a synopsis and link to every state's domestic violence protection order statute, see WomensLaw.org, www.womenslaw.org (last visited Jan. 10, 2007). See also DeJong & Burgess-Proctor, *supra* note 421, at 68–88.

⁴⁵¹ See generally FREDRICA LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE (Clark Boardman: 2004). For an overview of domestic violence CPOs, including the requisite relationship, scope of protection offered, duration, renewal procedures, terms of enforcement, etc., see *Domestic Violence Civil Protection Orders by State*, chart compiled by C. Carroll, R. Runge, and the ABA Commission on Domestic Violence (2006). See also Catherine Klein & Leslye Orloff, *Providing Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 954 (1993).

sexual assault victim who cannot satisfy the relationship element (*e.g.*, related to the assailant by blood, marriage, or adoption, share a residence, have a prior sexually intimate relationship), may not qualify for a jurisdiction’s domestic violence protection order. In some states, however, dating relationships do fall within the scope of the required underlying relationship,⁴⁵² so if a victim was assaulted during a date or by an assailant with whom she shared a romantic relationship, perhaps she is eligible for a domestic or family violence protection order.

[CHECK YOUR STATE’S LAW: The definitions and scope of who is eligible for a domestic violence protection order vary from state to state. Research your state’s statute to determine if your client’s relationship with the assailant meets your state’s definition.]

Because the remedies for sexual assault victims are much more limited than those for domestic violence victims, you may need to think creatively about how to secure the protections your client seeks. Think expansively when assessing how to fit the facts of your client’s relationship into the statutory definition. For example, a victim may have been sexually assaulted by someone to whom she is related by blood, marriage, or adoption (*e.g.*, brother-in-law, father-in-law, adult son, cousin) and thus be eligible for a family violence order. Even if the assault occurred on their first date, some jurisdictions’ definitions of a “dating relationship” might encompass a one-time date.⁴⁵³ In other jurisdictions, sharing a dormitory or living in the same communal housing may be the

⁴⁵² See, *e.g.*, **Arkansas**: ARK. CODE ANN. § 9-15-103 (2005) (“family or household members” defined to include a dating relationship, but a dating relationship does not include “a casual relationship or ordinary fraternization between two individuals in a business or social context”); **Illinois**: 750 ILL. COMP. STAT. 60/103(6) (2004) (“family or household members” includes persons who “have or have had a dating or engagement relationship”); **Washington**: WASH. REV. CODE § 26.50.010(2) (West 2005) (“family or household members” includes “persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship”).

⁴⁵³ See, *e.g.*, ALASKA STAT. § 18.66.990(5)(C) (2006) (“are dating or who have dated”); IND. CODE § 35-41-1-10.6(a)(2) (LexisNexis Supp. 2006) (person who “is dating or has dated”); ME. REV. STAT. ANN. tit. 19A, § 4002 (2005) (“are or were ‘sexual partners’”); W. VA. CODE § 48-27-204(4) (West 2004) (“persons who are or were dating: Provided, that a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship.”). *But see Oriola v. Thaler*, 84 Cal. App. 4th 397, 412 (Cal. Ct. App. 2000) (defining “dating relationship” as a “serious courtship” and offering extensive rationale for why a dating relationship requires exclusion of casual relationships stating that four outings, and only one alone, was not a dating relationship).

basis for eligibility.⁴⁵⁴ Do not be reluctant to be innovative in your approach. The legislative histories of state domestic violence protection order schemes provide opportunities to find support for expansive and inclusive statutory interpretation by a court applying the law to protect victims in individual cases.⁴⁵⁵]

Many states have specialized courts for domestic violence protection order hearings. These courts are typically staffed by judges who have received specialized training on the dynamics of domestic violence.⁴⁵⁶ State laws and court procedures govern whether your jurisdiction's specialized domestic violence court (if there is one) is the exclusive court in which requests for protection orders may be filed or whether protection orders may also be issued by family courts in divorce or criminal proceedings. Research the procedures that apply in your jurisdiction.

[CHECK YOUR STATE'S LAW: If your state has a family violence court, you may need to file for the protection order at this specialized court, and in accordance with their specific procedures.]

If the victim is eligible for relief, in many jurisdictions an emergency order is granted at the time of filing. In other jurisdictions, the protection order petitioner may elect to seek a temporary order followed by a hearing on the CPO or she may choose to forego the emergency order and request that a hearing be held on the full order. In most jurisdictions, the *ex parte* order remains in effect for a limited amount of time (typically ten to fourteen days). The victim will have to return to court prior to the expiration of the temporary order to seek a "permanent" order or an extension of the order.

⁴⁵⁴ See, e.g., *Hamilton v. Ali*, 795 A.2d 929, 934 (N.J. Super. Ct. Ch. Div. 2001) (students sharing a dorm suite were "household members" for purposes of New Jersey's Prevention of Domestic Violence Act).

⁴⁵⁵ See generally Klein & Orloff, *supra* note 451. See also *A Guide for Effective Issuance & Enforcement of Protection Orders*, National Council of Juvenile and Family Court Judges (2005); *Model Code on Domestic and Family Violence*, National Council of Juvenile and Family Court Judges (1994), available online at www.ncjfcj.org/images/stories/dept/fvd/pdf/modocode_fin_printable.pdf.

⁴⁵⁶ See Susan Keilitz, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001), available at www.ncjrs.gov/pdffiles1/nij/grants/186192.pdf; see also Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285 (2000) (discussing both the traditional court system and several model domestic violence programs); Juliette Terzieff, *New York Courts Untangle Domestic Violence*, *WOMEN'S ENEWS*, June 6, 2005, available at www.womensenews.org/article.cfm/dyn/aid/2324/context/archive.

[CHECK YOUR STATE’S LAW: The duration of the domestic violence protection order varies from jurisdiction to jurisdiction. Check your statute for the duration of the order in your state, tribe or territory.⁴⁵⁷ Some states’ orders remain in effect for one year (unless renewed), while others are valid for as long as three years.⁴⁵⁸ A few states allow for life-time orders but this can be limited to the most serious cases.⁴⁵⁹]

E. Stay-Away Orders and Criminal Prosecutions

1. Securing an Order Via the Criminal Process

In many jurisdictions it is standard practice for a prosecutor to seek a stay-away order as a part of the criminal prosecution. Once a defendant has been charged, a general no-contact order is typically entered, prohibiting the accused from direct or indirect contact with the victim. A no-contact order may also be a condition of the defendant’s pre-trial release even where no statutory language requires it.⁴⁶⁰ The no-contact provision

⁴⁵⁷ See *supra* note 42.

⁴⁵⁸ See, e.g., **Kansas:** KAN. STAT. ANN. § 60-3107(e) (2005) (one year, renewable for an additional year); **Kentucky:** KY. REV. STAT. ANN. § 403.750(2) (LexisNexis Supp. 2005) (three years, renewable for an additional three years); **Ohio:** OHIO REV. CODE ANN. § 3113.31(E)(3)(a) (West 2005) (up to five years); **Iowa:** IOWA CODE § 708.12(2) (2005) (some no-contact orders available for five years).

⁴⁵⁹ **Massachusetts:** *Champagne v. Champagne*, 429 Mass. 324, 327–28 (1999) (allowing permanent restraining orders in divorce cases under Mass. Gen. Laws ch. 208, § 18 and noting that permanent orders are available under chapter 209 for married parties, separated parties, and unmarried parties with children); **New Jersey:** N.J. STAT. ANN. §§ 2C:12-10.1 (West 2005) (requiring a permanent protection order be issued upon conviction in stalking cases; victim may seek dissolution).

⁴⁶⁰ See, e.g., **California:** CAL. PENAL CODE § 646.93(c) (Deering Supp. 2006) (judge shall impose as additional conditions of release on bail that the “defendant shall not initiate contact in person, by telephone, or any other means with the alleged victims”, or “knowingly go within 100 yards of the alleged victims, their residence, or place of employment”); **Connecticut:** CONN. GEN. STAT. ANN. § 54-64a(c)(6) (West Supp. 2006) (as additional condition on release, court may order that the arrested person “avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense”); **Delaware:** DEL. CODE ANN. tit. 11, § 2108(a)(5) (2001) (as condition of secured or unsecured release, court may “require the person to have no contact or restricted contact with the victim, the victim’s family, victim’s residence, place of employment, school or location of the offense”); **Florida:** FLA. STAT. § 903.047 (2005) (as a condition of pre-trial release the court shall require that “the defendant refrain from any contact of any type with the victim, except through pretrial discovery” pursuant to the rules of criminal procedure); **Indiana:** IND. CODE ANN. § 35-33-8-3.2 (LexisNexis Supp. 2006) (“upon a showing of clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community,” a court may require that the defendant refrain from any direct or indirect contact with an individual); **Maine:** ME. REV. STAT. ANN. tit. 15, § 1026(3)(A)(5) (Supp. 2006) (conditions may include that the defendant avoid all contact with a victim of the alleged crime); **Massachusetts:** MASS. GEN. LAWS ANN. ch. 276, § 58A(2)(B)(v) (West 2005)

may be entered by a pre-trial release officer, or by a judge at the bail or dangerousness proceeding or other pre-trial hearing. The criminal court has broad discretion as to what can be ordered in the criminal case as part of any pre-trial release order.

[PRACTICE TIP: Attorneys and advocates for sexual assault victims should work with prosecutors and Victim Witness Advocates to assure that any pre-trial release or bond order contains as many specific protections the victim wants, and that the dangerousness hearing accurately describes the victim’s level of fear.]

[CHECK YOUR STATE’S LAW: Some states offer more specific, and more stringent, no-contact orders specifically for cases of sexual assault.⁴⁶¹]

[PRACTICE TIP: It is important to communicate to the prosecutor the victim’s fear of her assailant. Have the prosecutor or Victim Witness Advocate contact the victim when a stay-away order is issued as part of the criminal case to ensure that the victim understands all of the terms of the order. This will enable her to make an informed decision as to whether the criminal stay-away order meets her needs or whether she

(court may order pretrial release subject to restrictive condition that defendant avoid all contact with an alleged victim of the crime).

⁴⁶¹ See, e.g., **Alaska**: ALASKA STAT. § 12.30.029 (2006) (in sexual assault cases, before ordering release of a person charged with a crime, the court “shall consider the safety of the alleged victim” and may order that the person “have no contact with the alleged victim except as specifically allowed by the court” and order that the person “reside in a place where the person is not likely to come in contact with the alleged victim of the offense”); **Arizona**: ARIZ. REV. STAT. ANN. § 13-3967(E)(2) (West Supp. 2006) (when a person who is charged with sexual offense is released on his own recognizance or on bail, court shall impose “a condition prohibiting the person from having any contact with the victim”); **Iowa**: IOWA CODE § 664A.3 (2006) (when a person is arrested for sexual abuse and the magistrate finds probable cause that a crime has occurred and that “the presence of or contact with the defendant poses a threat to the safety of the alleged victim, persons residing with the alleged victim, or members of the alleged victim’s immediate family,” the magistrate “shall enter a no-contact order” which shall require the defendant to have no contact with “the victim, persons residing with the victim, or the victim’s immediate family”); **Kentucky**: KY. REV. STAT. ANN. § 431.064(2) (LexisNexis Supp. 2005) (before releasing someone charged with a sexual offense, the court may issue an order: “enjoining the person from threatening to commit or committing acts of domestic violence or abuse against the alleged victim,” “prohibiting the person from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly,” or “directing the person to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be”).

wants additional protection through a civil protection order. Ideally, a victim could be confident that if the perpetrator contacts her his bail will be revoked.]

There are a variety of ways that a criminal defendant may be released from custody pending trial. The court may require posting of a cash bond as security that the assailant will return to court. Depending on the nature and severity of the offense, the defendant's criminal history and flight risk, jail capacity, and other factors, a defendant may be released on his "personal recognizance" – his promise to return to court subject to punishment if he does not return – or to the custody of a third party. If the assailant is a flight risk or poses a danger to the public (this includes the victim and any witnesses), the prosecutor may ask that the defendant be ordered to remain in custody pending trial or sentencing.

Also, make sure that your client is aware of her rights pursuant to any state constitutional or statutory crime victims' rights laws.⁴⁶² These crime victims' rights may include the right to be notified of any court hearings at which the defendant may be present, to be consulted regarding any plea offer or sentencing recommendation, and to be notified of the defendant's release status. (A victim may want to register with VINE, the computerized "Victim Information and Notification Everyday" service that contacts registered victims to apprise them if the convicted defendant in their case is released from custody, escapes, is transferred, etc.⁴⁶³) Some victim rights may be automatic while others extend only if a victim specifically requests them.

[PRACTICE TIP: Enactment and enforcement of crime victims' rights laws is increasing nationally. Judges, prosecutors, and court personnel may not be familiar with a victim's specific rights or how to implement

⁴⁶² For more information about crime victims' rights by state, *see* the National Victim's Constitutional Amendment Passage website at www.nvcap.org/states/ (last visited Jan. 10, 2007).

⁴⁶³ More information about VINE is *available online* at www.appriss.com/VINE.html.

them. A victim may need your help to exercise and enforce her crime victims' rights.⁴⁶⁴]

2. Revoking Bail for Violating the Release Order By Having Contact With the Victim

If the assailant violates the terms of his release, with the victim's permission you may be able to provide the prosecutor with a clear and concise summary of that violation. If the defendant attempts to intimidate the victim or other witness, after safety planning the victim may want your help to notify the prosecutor to ask the court to revoke the assailant's release status. The prosecutor could ask the court to hold the assailant in jail pending trial. If the assailant is intimidating the victim or witnesses, or getting others to do so on his behalf (from either outside or inside jail), that is a separate criminal offense for which he can be charged. The defendant could also be taken into custody pending trial for intimidating a witness.

3. Limitations of Criminal Stay-Away Orders

A stay-away order issued in a criminal case may not be sufficient to help a victim feel safe. The terms of the stay-away order and the scope of remedies it authorizes may be too narrow. Or, if criminal charges are dismissed or the defendant is acquitted, the order will likely be dismissed in its entirety. Because it is within the prosecutor's discretion whether to pursue criminal charges, the criminal stay-away order may or may not offer protection. On occasion, a criminal case is dismissed and the victim is not notified of the dismissal, leaving her with little or no protection. For these and other reasons, a victim may choose to pursue one or more of the civil protection order remedies described above as a companion remedy to a stay-away order. A civil remedy may be the most effective and practical method for securing the protections she needs and deserves.

⁴⁶⁴ The National Crime Victim Law Institute provides technical assistance to lawyers on crime victim rights issues. See www.ncvli.org.

F. Private Property Orders: Housing, Employment, and School-Based Orders

Women and girls who are school-age are among the most frequent victims of sexual assault.⁴⁶⁵ It is especially important for these victims, who are among those most likely to be attending an educational institution, to know whether they can be protected from the assailant without having to go through a civil or criminal court procedure.

Some, but not all, academic institutions will issue a stay-away order when a student is charged with assaulting another student. (Some schools issue mutual orders that are binding on both parties. Such orders are especially problematic as they punish the victim for her own victimization. Moreover, mutual orders are not “qualifying protective orders” under federal law and thus are not entitled to full faith and credit under federal law.) Although school-based orders are issued most often when a disciplinary proceeding is pending, they may also be available as a remedy even without a formal disciplinary proceeding.⁴⁶⁶ Consult the individual institution’s policy manual for more detailed information on obtaining and enforcing protection orders within academic institutions. (*See also* Chapter 9, addressing victims’ rights in the context of Education.)

For a victim who was assaulted at work or by a co-worker or supervisor, and who does not want to seek her own order, an employer’s protection order may be an adequate remedy. These orders are not available in all jurisdictions, but they are in effect in some cities and states to allow employers to seek protection orders when violent crimes occur at work.⁴⁶⁷ Employer-based orders typically require the assailant to stay away from the

⁴⁶⁵ According to the Office of Justice Programs Bureau of Justice Statistics, women and girls between the ages of 12 and 24 comprise the majority of sexual assault victims. U.S. DOJ, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES, Table 4 (Victimization rates for persons age 12 and over, by gender and age of victims and type of crime) (2005) (females between the ages of 16 and 19 are more than twice as likely as those in any other age group to be the victim of rape or sexual assault or domestic violence; women ages 20–24 also have an elevated risk of suffering being victimized by a rape or sexual assault or domestic violence). *See also* Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 397 (2005).

⁴⁶⁶ *See* 42 U.S.C.A. § 14043c-3 (Supp. 2006) (funding development of appropriate responses within schools for students experiencing domestic or dating violence). *See also* Reardon, *supra* note 465, at 399-409 (advocating for protective policies concerning sexual violence on college campuses).

⁴⁶⁷ *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1810 (West 2003); ARK. CODE ANN. § 11-5-115 (2002); CAL. CIV. PROC. CODE. § 527.8(a) (Deering Supp. 2006); COLO. REV. STAT. § 13-14-102(4)(b) (2006); GA. CODE ANN. § 34-1-7(b) (2004); IND. CODE ANN. § 34-26-6-6 (LexisNexis Supp. 2006); ME. REV. STAT. ANN. tit. 5,

workplace. (See Chapter 10 on Employment for more information on workplace protection orders.)

Finally, landlords and public housing authorities may be able to issue or obtain no-trespass orders requiring assailants to stay away from residential buildings. (See Chapter 11 on Housing for additional information on housing based orders.)

G. Civil Injunctions

If the victim is not eligible for any of the protection orders described above, you may be able to seek a civil injunction on her behalf. Unlike sexual assault, family violence, and stalking protection orders, which typically result in arrest and/or criminal consequences if violated, violation of a civil injunction will result only in civil contempt of court.⁴⁶⁸ Civil contempt proceedings may lead to a lengthy trial or protracted hearing. Rarely will they result in the assailant's incarceration. Because of the time and legal resources required for this lengthy process, a civil injunction can be an expensive remedy. Therefore, if the victim qualifies for one of the victim-specific protection orders described in this chapter, it will almost always be more advantageous to seek one or more of those orders first. Civil injunctions are often viewed as a remedy of last resort because they are cumbersome and time intensive to secure, and the protection and enforcement remedies are typically limited in scope.

[CHECK YOUR STATE'S LAW: Review your state's rules of civil procedure to determine the standard and procedures for seeking a civil injunction.]

§ 4653 (Supp. 2006); NEV. REV. STAT. § 33.250(1) (2005); N.C. GEN. STAT. § 95-261 (2005); R.I. GEN. LAWS § 28-52-2 (2003); TENN. CODE § 20-14-102 (Supp. 2005). Employers may also have policies in place to assist victims of domestic violence and/or sexual assault. See, e.g., Jane A. Randel & Kimberly K. Wells, *Corporate Approaches to Reducing Intimate Partner Violence Through Workplace Initiatives*, 3 CLINICS OCCUP. ENVTL. MED. 821, 830 (2003) (describing CIGNA Corporation's policy of seeking protection orders to discourage perpetrators from entering the premises). For a summary of employer-based remedies for victims of sexual and domestic violence, see the Employment and Housing Rights for Victims of Domestic Violence drop-down charts available at the Legal Momentum website, www.legalmomentum.org/legalmomentum/programs/ehrs/ (last visited Jan. 10, 2006).

⁴⁶⁸ 43A C.J.S. *Injunctions* § 398 (2005).

H. Military Protection Orders

The United States Military Justice System has its own, unique version of protection orders. In the military, any commissioned officer can issue an order restricting the liberty of any enlisted member. Only an individual's commanding officer, however, may restrict the liberty of a commissioned or warrant officer. (A commanding officer may delegate this authority to a warrant, petty, or noncommissioned officer.)

The armed services version of a CPO is referred to as a Military Protective Order (MPO). An MPO may be verbal or in writing (although written orders are preferred). A Commander or commissioned officer may issue an MPO regardless of whether a CPO is already in place.⁴⁶⁹ A victim may want to get both a CPO and MPO, because the scope of protections will differ. For example, an MPO may include provisions that are more restrictive than those in the CPO. It may also include locations that are beyond the jurisdiction of the civil court that issued the CPO, such as locations outside the U.S. Conversely, the CPO can afford protection where the MPO may not, such as at sites off the military base, installation, camp, etc.

Before an MPO may issue, there must be a "reasonable belief" that:

- An offense for which the accused may be court-martialed has been committed;
- The person to be restrained committed it; and
- The restraint ordered is required by the circumstances.

Because a military protection order is issued by a commanding officer, it is not enforceable if the service member is reassigned to another command. Moreover, civilian law enforcement agencies and civilian courts cannot enforce an MPO because it does not meet the due process requirements under the full faith and credit provisions of VAWA. A civilian victim may notify military law enforcement, however, if the MPO is violated. Also, some military installations have entered into cooperative agreements with local

⁴⁶⁹ As of Fiscal Year 2007, U.S. Military Contractors operating in combat zones are subject to the Uniform Code of Military Justice (UCMJ), too. Previously, the UCMJ applied only to civilians in combat areas during periods of war declared by Congress.

law-enforcement agencies that allow civilian authorities to detain a military offender until military police arrive.

V. CONCLUSION

Safety planning and protection orders are important tools in helping a victim access a variety of resources and protections she needs to live in peace and to recover from the assault. Your role as a victim advocate or attorney is to help her determine which type of order is most appropriate for her unique circumstances. To help your client successfully navigate the protection order process, you must be familiar with the laws of the relevant jurisdiction. In addition, in many cases, you will be called upon to think and argue creatively while you pursue justice on the victim's behalf. Finally, community partnerships and collaborations will often be the key to ensuring that victims have access to all of the services they need to keep them safe.

Chapter Eight

SERVING NON-CITIZEN VICTIMS OF SEXUAL ASSAULT⁴⁷⁰

Note to the Reader:

THIS CHAPTER HAS BEEN TEMPORARILY DELETED DUE TO PENDING REVISIONS OF FEDERAL IMMIGRATION LAW, INCLUDING PUBLICATION OF THE FINAL “U-VISA” REGULATIONS.

PLEASE VISIT THE VICTIM RIGHTS LAW CENTER WEBSITE AT WWW.VICTIMRIGHTS.ORG FOR INFORMATION REGARDING THE UPDATED STATUS OF THIS CHAPTER.

A REVISED CHAPTER ON “SERVING NON-CITIZEN VICTIMS OF SEXUAL ASSAULT” WILL BE PUBLISHED ON OUR WEBSITE FOR DOWNLOADING AS SOON AS PRACTICABLE.

⁴⁷⁰ The Victim Rights Law Center thanks the author of this chapter, VRLC attorney Kathleen Devlin.

Chapter Nine

THE EDUCATION RIGHTS OF ADULT SEXUAL ASSAULT SURVIVORS⁴⁷¹

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⁴⁷¹ The Victim Rights Law Center thanks Kathryn Reardon, Esq., the author of this chapter. Thanks, too, to Jessica E. Mindlin, Esq., and to S. Daniel Carter and Security on Campus for their contributions. This Chapter focuses on survivors' educational rights in the context of student-to-student sexual assault, with an emphasis on sexual assault of college women, including victims in two- and four-year educational institutions, community, private and state colleges, vocational programs, and other post-GED or post-high school institutions of higher education. While students of all ages (and genders) are victims of sexual assault, the target audience for this manual is advocates and attorneys who represent adult, female, sexual assault survivors.

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I. INTRODUCTION

Education is a key component of economic success. All along the educational continuum, completing a course of study results in increased life options and expanded earning capacity. For poor and low income women especially, education is a path out of poverty.⁴⁷² When a sexual assault interrupts that education, whether in middle school, high school or post-high school,⁴⁷³ the ripple effects can have life-long, devastating results.

Adults and children of any age may be victims of sexual assault. It is school-age girls and women, however, who are the most common victims. Immediate, effective

⁴⁷² A 2006 report for the Institute for Women and Policy Research confirms the link between poverty and education. See Avis Jones-DeWeever, Ph.D & Barbara Gault, Ph.D, *Resilient & Reaching for More: Challenges and Benefits of Higher Education for Welfare Participants and Their Children*, Institute for Women's Policy Research April 2006, available at www.iwpr.org/pdf/D466.pdf. "High school dropouts experience the lowest level of earnings over the course of a lifetime; however, earnings increase significantly at each level of additional educational achievement. Just some exposure to higher education, even without completing a degree, increases lifetime earnings by 50 percent. Completing an associates degree increases earnings even more, by 60 percent; and completing at least a bachelor's degree more than doubles one's earnings over the course of a lifetime, as these earnings shoot up by 110 percent. . . . While the lasting economic benefits associated with postsecondary education are applicable to all, its benefits are especially key to the economic well-being of women and particularly crucial for women of color. Women with at least some college exposure increase their earnings by 57 percent over the average earnings of women who have not completed high school. The education premium then jumps to a 182 percent earnings increase over non-high school graduates for those who complete a bachelor's degree (U.S. Department of Commerce, Bureau of the Census 2003). When comparing earnings between high school graduates and those with just some exposure to post-secondary education, the importance of a four-year degree comes clearly into focus. Women who had only some exposure to college increased their earnings by only 5 percent over those with a high school diploma, but those who completed a bachelor's degree enjoyed at least a 59 percent increase in earnings (U.S. Department of Commerce, Bureau of the Census 2003). . . . Higher education also substantially reduces the risk of poverty, especially among women of color." *Id.* at 14-16.

⁴⁷³ "Post high-school" education is defined as training/education taking place after the completion of a high school degree or high school graduate equivalency degree (GED) including but not limited to those offered by: agricultural training institutions, colleges, cosmetology schools, culinary institutes, home health aid training institutions, nursing schools, technical schools, universities, vocational schools, etc.

legal advocacy and representation can help victims to access the remedies they need to continue their educational pursuits and avoid the poverty trap that is all too common for those whose education is derailed.

Because this manual is focused on legal advocacy and representation of adult victims of sexual assault, this education chapter will have a similar focus on adult students pursuing post-high school education. According to the National Institute of Justice's report on *The Sexual Victimization of College Women*,⁴⁷⁴ almost five percent (4.9 %) of college women are sexually victimized each calendar year. As many as one-fifth to one quarter of all women in higher educational institutions may be the victim of a sexual assault or attempted sexual assault.⁴⁷⁵ Nationally, nearly one-fourth of all sexual assault victims were between the ages of 18-24 when they were first assaulted.⁴⁷⁶

When a student is sexually assaulted her educational experience may be profoundly altered. In an instant, the safety of her academic environment is ruptured. For many students at two- or, four-year, professional, academic or vocational institutions, a wide array of services (*e.g.*, employment, medical, financial aid, mental health, residential facilities, etc.) and activities (*e.g.*, academic, social, athletic and other extracurricular) are concentrated at one site. When the victim does not feel safe at that site, her educational opportunities are compromised.

The insular nature of many academic communities can exacerbate the impact of an assault. The perpetrator; the victim and the assailant may be in school together and share common classes, friends, and colleagues. Peer and other pressure may make it

⁴⁷⁴ Bonnie S. Fisher *et al.*, *The Sexual Victimization of College Women*, 10 (National Institute of Justice's Bureau of Justice Statistics ed., 2000), available at www.ncjrs.gov/pdffiles1/nij/182369.pdf.

⁴⁷⁵ *Id.*

⁴⁷⁶ High school and college aged women are the most vulnerable for date or acquaintance sexual assault. The National Violence Against Women Survey found that of the women who reported being sexually assaulted at some time in their lives, 29.4% were 18-24 years old when they were first sexually assaulted. Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women*, 6 (U.S. Department of Justice, Office of Justice Programs, ed. 1998), available at www.ncjrs.gov/pdffiles/172837.pdf.

difficult for the victim to report the assault, or to label it a “sexual assault.”⁴⁷⁷ Even if the perpetrator is a peer and withdraws from school, the perpetrator’s friends and peers may rally around him and attempt to humiliate or harass a victim. If the perpetrator is not a classmate, he may know where the victim lives, works, studies or attends classes. The medical and mental harms associated with a sexual assault may also disrupt a victim’s educational progress. For these and other reasons, a student victim may need your help to identify the various arenas in which she needs assistance and protection.

To best help your client evaluate her options, at the outset of your representation you will want to determine:

- The victim’s relationship to the offender (*e.g.*, whether the assailant is a fellow student, faculty or staff member, non-employee third party, intimate partner, client, stranger, etc.);
- Where the assault occurred (on or off the school site or campus; in school owned, private, or public housing);
- The type of academic institution (private or public; secular or religious);
- Whether and when the school was notified of the assault and what action if any it took in response;
- Student, faculty and staff guidelines for responding to sexual harassment and sexual assault (including any student handbook, published campus policies, or student code of conduct);
- The school’s disciplinary process; and
- What your client hopes to achieve.

Because some residential campuses are such a unique environment, where students live, work, study, eat and socialize in close proximity, they tend to be hyper-socialized communities. As an advocate for your client, you should be prepared to talk to your client about and help your client address the following issues that may arise after a sexual assault:

⁴⁷⁷ The reasons for this are varied, but include victims’ “embarrassment, not clearly understanding the legal definition of the term ‘sexual assault,’ not wanting to define someone they know who victimized them as a rapist or because others blame them for their sexual assault.” *Id.* at 10.

- Student/faculty gossip; disclosure and discussion of the victims' personal information;
- Polarization of the community (with some faculty, staff and students supporting the victim and others supporting the assailant);
- Loss of friends;
- Drop in grades;
- Scholarship status (especially important if the student's scholarship requires a level of academic or athletic performance which may be compromised as a result of the assault); and
- Attendance at class, participation in exams, and any pending time-sensitive school-related projects that she may be unable to complete.

Understanding the facts surrounding the assault, the academic environment, and your client's goals can help ensure that you and your client can work together to accomplish the outcomes she seeks.

[PRACTICE TIP: Sometimes victims are reluctant to disclose all of the facts surrounding an assault. This is especially true if a victim engaged in a minor offense, such as underage drinking or contraband on campus. Before pursuing legal remedies, you will want to know how the student's institution (and the state) will respond if the victim discloses that she engaged in a prohibited activity prior to the assault, to ensure that the victim is making informed decisions. *See also* Chapter 14, the Criminal Justice System.]

II. SEXUAL ASSAULT, EDUCATIONAL INSTITUTIONS AND THE LAW

There are a multitude of federal (and some state) laws that afford education-related rights to victims of campus sexual assault. The federal laws include Title IX of the Education Amendments of 1972⁴⁷⁸ (Title IX), the Jeanne Clery Disclosure of Campus

⁴⁷⁸ 20 U.S.C. § 1681 *et seq.*

Security Policy and Campus Crime Statistics Act⁴⁷⁹ (the Clery Act), and the Family Educational Rights and Privacy Act⁴⁸⁰ (FERPA). Pertinent state laws may include anti-discrimination, slander, libel, and negligence laws, and state statutory or constitutional crime victims' rights provisions.⁴⁸¹ Although the focus of this chapter is on student-on-student assault, the rights discussed under Title IX, below, extend to a victim regardless of whether the perpetrator is a student, faculty, or member of the staff. If a victim is both a student and a school employee, additional rights and remedies may be available under state or federal employment law. For a discussion of victim rights in the employment context, *see* Chapter 10 on Employment.

A. Title IX

Title IX is best known as the law that requires colleges and universities to provide women and men equal access to sports and athletic opportunities. Less well known, however, are two other important facets of the law: (1) Title IX is not limited to institutions of higher learning; and (2) Title IX is not limited to sports; it prohibits educational institutions from engaging in any discrimination on the basis of sex.

Specifically, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance”⁴⁸² The prohibition extends, but “is not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities.”⁴⁸³ It protects

⁴⁷⁹ 20 U.S.C. § 1092f (1998).

⁴⁸⁰ 20 U.S.C. § 1232g (2001).

⁴⁸¹ For a summary of civil remedies for victims sexually assaulted at an academic institution, *see* Chapter 4 of Jessica E. Mindlin & Liani Jean Heh Reeves, *Rights and Remedies: Meeting The Civil Legal Needs of Sexual Violence Survivors* (2005), available online at www.lclark.edu/org/ncvli/objects/L&C77576_civilbook.pdf. While this chapter discusses the most significant federal laws that protect the rights of student victims, there may be other civil remedies available to victims, such as those based on tort or contract liability. *See, e.g., Stanton v. Univ. of Maine Sys.*, 773 A.2d 1045 (Me. 2001) (university had a duty to reasonably warn students and to advise them of possible safety measures); *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 971 (Ind. 1999) (fraternity had a “duty to take reasonable care to protect” student who was sexually assaulted during a fraternity party).

⁴⁸² 20 U.S.C. § 1681(a).

⁴⁸³ OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 2 (2001), available at

students engaged in both academic and non-academic activities, including extra-curricular, athletic and other school programs.⁴⁸⁴ Under Title IX, sexual harassment is a prohibited form of sex discrimination.⁴⁸⁵ A little understood aspect of Title IX is that a sexual assault may also constitute a violation of Title IX, under the theory that sexual assault is a severe form of sexual harassment.⁴⁸⁶ Title IX proscribes sexual harassment (including sexual assault) committed by faculty or staff,⁴⁸⁷ or by a fellow student.⁴⁸⁸ To constitute a hostile environment, the harassment must be severe and pervasive, and objectively offensive.⁴⁸⁹

A sexual assault victim may come to you seeking information about a school's obligations under Title IX, assistance with a disciplinary proceeding that is about to commence or is already underway, or for general information about her education rights following an assault. You and your client may need to educate the academic institution about her rights under this federal law, and ensure that the school fully complies with its duties and obligations.

[PRACTICE TIP: In 2001, the U.S. Department of Education's Office for Civil Rights issued its *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. The publication is an excellent resource for practitioners new to

www.ed.gov/offices/OCR/archives/pdf/shguide.pdf (hereinafter "Revised Sexual Harassment Guidance"). Certain institutions – such as religious, military, merchant marine – may be exempt from Title IX, as are the membership practices of certain organizations, such as social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts, and the Campfire Girls. 20 U.S.C. §1681, 1682(3)(a).

⁴⁸⁴ *Id.* at 2.

⁴⁸⁵ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL, 96 (2001) available at www.usdoj.gov/crt/cor/coord/ixlegal.pdf (hereinafter "Legal manual").

⁴⁸⁶ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992). *Accord Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 282 (1998).

⁴⁸⁷ *See generally Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998).

For the institution to be liable for an employee's actions, a school official who has authority to institute corrective measures must have actual knowledge of the acts and act with deliberate indifference. *Id.* at 286, 291.

⁴⁸⁸ *See generally Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

⁴⁸⁹ *Id.* at 650 (harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

the Title IX arena. It is accessible and concise, and provides citations to relevant cases, resources, and regulations. It may be accessed *online at* www.ed.gov/offices/OCR/archives/shguide/index.html. The Title IX Legal manual, published by the U.S. Department of Justice, Civil Rights Division, is also a helpful resource. It sets out “the legal standards that should be used in investigating and resolving allegations of sexual harassment of students by school employees, other students, and third parties.”^{490]}

Most likely, a complaint of sexual assault at an academic institution will be analyzed as an allegation of sexual harassment. The first step in determining whether a sexual harassment claim falls within the purview of Title IX is to establish whether the conduct complained of denies or limits a student’s ability to participate in or benefit from the program based on sex.⁴⁹¹ If it does, step two of the analysis requires an assessment of the school’s responsibility to address the conduct.

Title IX recognizes two types of sexual harassment that may deny or limit a student’s ability to participate in or benefit from a school program: (1) *quid pro quo* harassment, which occurs when an educational decision or benefit is based on a student’s submission to unwelcome sexual conduct; and (2) “hostile environment” harassment. A single act of sexual harassment or sexual assault may, if sufficiently severe, create a hostile environment.⁴⁹² To determine whether a hostile environment was created, the Department of Education’s Office for Civil Rights (OCR) examines a variety of related factors as well as the totality of the circumstances.⁴⁹³ The OCR assessment includes the following eight factors:

⁴⁹⁰ Legal manual, *supra* note 485, at 98.

⁴⁹¹ Revised Sexual Harassment Guidance, *supra* note 483, at 19, citing *Fenton Community High School Dist. #100*, OCR Case 05-92-1104.

⁴⁹² *Id.* at 6. See also *id.* at 31 n.45, citing 34 C.F.R. 106.31(b); *Vance v. Spencer County Public School District*, 231 F.3d 253, 259 (6th Cir. 2000) (“one incident can satisfy a claim” of sexual harassment under Title IX); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999) (“under Title IX a sexual harassment claim may be based on a hostile educational environment”).

⁴⁹³ Revised Sexual Harassment Guidance, *supra* note 483, at 5.

1. Degree to which the conduct affected one or more students' education and whether the harassment denied or limited a student's ability to participate in or benefit from the school's program;
2. Type, frequency, and duration of the conduct;
3. Identity of and relationship between the alleged harasser and the subject or subjects of the harassment;
4. Number of individuals involved;
5. Age and sex of the alleged harasser and the subject or subjects of the harassment;
6. Size of the school, location of the incidents, and context in which they occurred;
7. Other incidents at school; and
8. Incidents of gender-based but nonsexual harassment.⁴⁹⁴

No one single factor is determinative. Other factors, such as the age difference, power differential, or age of the victim may also inform the OCR decision.

1. Preventing and Responding to Sex Discrimination under Title IX

Title IX requires schools to take specific measures to prevent incidents of sex discrimination and to respond appropriately if incidents nevertheless occur. Through regulations promulgated by the OCR, Title IX requires schools to adopt and publish an anti-discrimination policy, establish grievance procedures providing for the “prompt and equitable resolution of complaints” of sex discrimination, including sexual harassment,⁴⁹⁵ and identify at least one (but ideally more than one) employee responsible for receiving complaints, coordinating investigations into alleged violations, and ensuring Title IX compliance.⁴⁹⁶ The school must notify all its students and employees of the name, office

⁴⁹⁴ *Id.* at 6-7.

⁴⁹⁵ *Id.* at 21.

⁴⁹⁶ *Id.* at 29 n.32, citing 34 C.F.R. § 106.8(a).

address, and telephone number of the employee or employees designated.⁴⁹⁷ The school must also make sure that all of the designated employees receive adequate training on what constitutes sexual harassment, and that they can explain how the school’s grievance procedures operate.⁴⁹⁸ OCR requires schools to apply a “preponderance of the evidence” standard (rather than “clear and convincing” or “beyond a reasonable doubt”) when determining whether sexual harassment or a sexual assault occurred.⁴⁹⁹

a. Adopt and Publish a Policy Against Discrimination

As noted above, a school must both adopt and publish a policy prohibiting sex discrimination, and the grievance procedures to be followed to resolve a complaint of sex discrimination. Even if no sexual harassment or discrimination occurs, a school that fails to adopt and publish such a policy is in violation of Title IX.⁵⁰⁰

b. Prompt and Equitable Grievance Procedures

The school’s anti-sex discrimination policy must provide for the prompt and equitable resolution of a discrimination complaint.⁵⁰¹ A university must address complaints of discrimination on the basis of sex in a timely manner and provide an appropriate or adequate remedy or resolution, and take steps to eliminate any hostile environment that may have been created.⁵⁰² The complaint procedure must contain a

⁴⁹⁷ Revised Sexual Harassment Guidance, *supra* note 483, at 21, citing 34 C.F.R. § 106.8(a).

⁴⁹⁸ Revised Sexual Harassment Guidance, *supra* note 483, at 21, citing Cape Cod Community College, OCR Case No. 01-93-2047 (college violated Title IX in part because the designated Title IX coordinator had no training, was unfamiliar with the law, and was unaware that he was the designated coordinator).

⁴⁹⁹ *See, e.g.*, U.S. Department of Education Letter Ruling to Dr. John J. DeGioia, President of Georgetown University, OPE ID 00144500, July 16, 2004 (hereinafter “Georgetown Letter”) at 3. *See also* U.S. Department of Education Letter Ruling to Dr. Jane Jervis, President of The Evergreen State College, OPE ID 10922064 at 8.

⁵⁰⁰ Revised Sexual Harassment Guidance, *supra* note 483, at 19, Section IX.

⁵⁰¹ 34 C.F.R. § 106.8(b). *See also* Revised Sexual Harassment Guidance, *supra* note 483, at 19, Section IX.

⁵⁰² *See* Revised Sexual Harassment Guidance, *supra* note 483, at 16.

specific time frame for resolving the complaint,⁵⁰³ and it may not be unduly burdensome or protracted.⁵⁰⁴

OCR has identified specific factors it will consider in weighing whether a school's grievance procedure is prompt and equitable. These include whether the procedures provide for:

1. Notice of the procedure to students, parents of elementary and secondary students, and employees, including where complaints may be filed;
2. Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
3. Adequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
4. Designated and reasonably prompt timeframes for the major stages of the complaint process;
5. Notice to the parties of the outcome of the complaint; and
6. An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.⁵⁰⁵

Mediation is not an acceptable grievance procedure in certain cases, such as an alleged sexual assault, even if entered into voluntarily by both the complainant and the accused.⁵⁰⁶ Title IX does permit use of a student disciplinary procedure not designed specifically for Title IX grievances so long as the procedure meets the requirement of affording a complainant a "prompt and equitable" resolution.⁵⁰⁷

[PRACTICE TIP: Although a school may follow student grievance procedures not specifically crafted to comply with Title IX, a victim in a

⁵⁰³ See, e.g., Erskine College, OCR Case No. 04-04-2016.

⁵⁰⁴ See, e.g., Sonoma State University, OCR Case No. 09-93-2131 (college's procedure that required victim to pursue separate housing, disciplinary board, and campus law enforcement remedies with no coordination among the various departments violated Title IX).

⁵⁰⁵ Revised Sexual Harassment Guidance, *supra* note 483, at 20.

⁵⁰⁶ *Id.* at 21.

⁵⁰⁷ *Id.* at 21.

Title IX grievance hearing is entitled to certain rights and protections not typically afforded other students in non-Title IX hearings. For example, a sexual assault victim has the right to know the outcome of the hearing.⁵⁰⁸ Whether the victim has a right to appeal the grievance committee's decision when the defendant has the right to appeal is one factor the OCR will consider when evaluating a policy's fairness.⁵⁰⁹ Although the OCR rules do not articulate a specific standard of proof, the OCR has required educational institutions to apply a "preponderance of the evidence" standard when determining whether a violation occurred.^{510]}

c. Protect Due Process and First Amendment Rights

Public school employees and students in public and state-supported schools have federally protected due process and first amendment (free speech) rights.⁵¹¹ These rights extend both to the complainant and the accused. (Additional student or employee rights may be established by state law, contract, faculty or student handbooks, collective bargaining agreements, or other institutional policies and practices.) A school's grievance policy must respect these rights. At the same time, a school may not abrogate its responsibility under Title IX and must respond to complaints of harassment or discrimination that are unprotected speech, and to speech or activities that threaten or intimidate a targeted student or group of students.

⁵⁰⁸ Although FERPA generally forbids a school from disclosing a student's educational record without the student's (or the parent's or guardian's) consent, a school is obliged, under Title IX, to notify the complaining student of the outcome of its investigation. To the extent that there is a conflict between Title IX and FERPA, Title IX will prevail. Revised Sexual Harassment Guidance, *supra* note 483, at vii.

⁵⁰⁹ Although OCR says the right to appeal is one factor they will consider in determining fairness, OCR has also held that granting a victim the right to appeal is not, in and of itself, a Title IX violation. *See* www.securityoncampus.org/lawyers/ocr15052041.pdf.

⁵¹⁰ *See* OCR Letter to The Evergreen State College (April 4, 1995) at 8 ("The evidentiary standard of proof applied to Title IX actions is that of a 'preponderance of the evidence.'")

⁵¹¹ Revised Sexual Harassment Guidance, *supra* note 483, at 22.

2. Remedies for Violations of Title IX

Title IX allows for both private and public rights of action.⁵¹² The U.S. Department of Education's OCR is the agency responsible for investigating and resolving allegations of sex discrimination under Title IX. A victim will need to secure her own attorney to pursue a Title IX private civil suit.

a. The OCR Complaint Process

To initiate a complaint against an educational institution with the U.S. Department of Education, a victim must file a complaint with the OCR within 180 calendar days of the date of the alleged discrimination, unless the time for filing is extended by OCR for good cause.⁵¹³ The complaint must allege an act of sex discrimination in violation of Title IX. The OCR will then investigate the complaint. OCR will consider whether:

- (1) the school has a disseminated policy prohibiting sex discrimination under Title IX⁵¹⁴ and effective grievance procedures;⁵¹⁵
- (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment;⁵¹⁶ and
- (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.⁵¹⁷

The OCR will seek the offending institution's voluntary compliance with an appropriate remedy.⁵¹⁸ If the school will not or cannot voluntarily comply, OCR may refer the case for prosecution to the U.S. Department of Justice. A finding of an

⁵¹² *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) (an individual has a private right of action under Title IX); *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 284 (1998) (“private right of action under Title IX is judicially implied”).

⁵¹³ *How to File a Discrimination Complaint with the Office for Civil Rights*, Office for Civil Rights, U.S. Department of Education, www.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt (last visited Feb. 6, 2007).

⁵¹⁴ Revised Sexual Harassment Guidance, *supra* note 483, at 14 citing 34 C.F.R. § 106.9.

⁵¹⁵ *Id.* at 14 citing 34 C.F.R. § 106.8(b).

⁵¹⁶ *Id.* at 14 citing 34 C.F.R. § 106.31.

⁵¹⁷ *Id.* at 14 citing 34 C.F.R. §§ 106.31 and 106.3. *See also* Legal manual, *supra* note 485, at 97.

⁵¹⁸ 20 U.S.C. § 1682.

unremedied Title IX violation may also jeopardize an institution's receipt of future federal aid and funding.⁵¹⁹

[PRACTICE TIP: A school has an obligation to investigate and respond to any allegation of sex discrimination, even if no complaint is filed by the victim. The inquiry must be prompt, thorough and impartial. The Revised Sexual Harassment Guidance specifically cautions schools that they may need to take interim steps during the investigation process. These might include placing the complainant and the accused in separate classes, providing alternative housing, allowing the complainant to transfer to another class, or providing alternative services.⁵²⁰]

[PRACTICE TIP: A school must take a complainant's request for confidentiality into consideration when conducting its investigation. The school is advised to respect the student's request for confidentiality "as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students."⁵²¹ This is another juncture at which a victim's attorney or advocate must help the client anticipate what information she is and is not willing to have disclosed. For example, depending on the circumstances surrounding the assault, it may be possible for the school to raise the matter with the student without disclosing who filed the complaint. Or, it may be impossible to maintain victim privacy while proceeding with an investigation of the alleged offense. A victim should be sure to advise the school of her position regarding disclosure. It may also be important to review a victim's safety plan at this time and modify it as necessary in anticipation of the accused's response.]

⁵¹⁹ 42 U.S.C. § 2000d-1.

⁵²⁰ Revised Sexual Harassment Guidance, *supra* note 483, at 16-17.

⁵²¹ *Id.* at 17.

b. Private Civil Suit for Damages Under Title IX

A victim assaulted in a school-related activity or program may also pursue a private civil case against an educational institution. To establish a Title IX claim for damages based on sexual harassment, a victim plaintiff must show that the: (1) defendant had actual knowledge of that sexual harassment; (2) defendant was deliberately indifferent to sexual harassment; and (3) harassment was so severe, pervasive, and objectively offensive that it deprived plaintiff of access to educational opportunities or benefits provided by the educational institution. Title IX does not require a victim to exhaust her administrative remedies before pursuing a civil claim.⁵²² Same sex harassment is also actionable under Title IX.⁵²³ The “deliberate indifference” standard can be a difficult standard to meet in some cases.⁵²⁴ A school that takes some action merely must show that its response was not “clearly unreasonable” in light of known circumstances.⁵²⁵

A school may be liable for sexual harassment that occurs off the premises if it occurs during a school-related activity or program.⁵²⁶ The victim will have to prove that

⁵²² See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 708 n.41 (1979) (“Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion.”).

⁵²³ See, e.g., *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607 (8th Cir. 1996) (female student brought claim for alleged harassment by female teacher; denied on other grounds).

⁵²⁴ The “deliberate indifference” must cause the “abuse to occur or make students vulnerable to such abuse, and that abuse ‘must take place in a context subject to the [university’s] control’.” *Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003) (internal citations omitted).

⁵²⁵ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 649 (1999) (noting that the standard was *not* one of a “mere ‘reasonableness’” standard but rather a defendant had only to prove that an action was “not clearly unreasonable”).

⁵²⁶ *Crandell, D.O. v. New York College of Osteopathic Medicine*, 87 F. Supp. 2d. 304, 316 (S.D.N.Y. 2000) (harassment occurred in an off-campus medical clinic during student’s paid internship). See also Legal manual, *supra* note 485, at 103.

the school had notice of the acts⁵²⁷ and control over the actor(s), in addition to acting with deliberate indifference.⁵²⁸

If the victim is pursuing a civil suit against the perpetrator or the school, discuss the effect the suit and the specific relief requested may have on her privacy rights. Depending on the claims, the harm alleged, and the remedies sought, a victim may be required to produce to the defense personal and private information such as medical records, correspondence, diary notes, or other written documents.⁵²⁹ It may be possible, however, to protect her privacy by excluding claims or not requesting certain kinds of damages (such as emotional distress).

[PRACTICE TIP: Title IX was modeled after Title VII of the Civil Rights Act of 1964⁵³⁰ and they share a common purpose.”⁵³¹ In many areas, Title VII case law is looked to for guidance in how a Title IX claim may be established.⁵³² Notably different, however, are the Title VII and Title IX standards for assessing a defendant’s liability in a private suit for damages. Under Title IX, a school must have actual knowledge and be “deliberately indifferent” to the harassment. In contrast, an employer may be liable under Title VII for an employee’s conduct even if it has no notice.⁵³³]

⁵²⁷ *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 285, 288 (1998) (it would frustrate the purposes of Title IX to permit a damages recovery without actual notice to a school district official; “Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice”).

⁵²⁸ *See Ostrander v. Duggan*, 341 F.3d 745, 749-51 (8th Cir. 2003) (University of Missouri not liable under Title IX for sexual assault that occurred in a private off-campus house rented by fraternity members where there were no prior complaints of assaults by the accused; public university liable under Title IX only if it “exercises substantial control over both the harasser and the context in which the known harassment occurs.” (quoting *Shrum ex Rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001))).

⁵²⁹ *See, e.g., Simpson v. University of Colorado*, Civil Action No. 02-RB-2390 (plaintiff-victim in Title IX suit alleging emotional distress damages ordered to disclose to defendant-university her diary entries and names of and records from treating therapists for 3-year period prior to assault).

⁵³⁰ 42 U.S.C. § 2000d *et seq.*

⁵³¹ Legal manual, *supra* note 485, at 56.

⁵³² *Id.* at 58, note 34.

⁵³³ *Id.* at 100.

B. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act⁵³⁴

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act (the Clery Act) is a federal law that requires colleges and universities to disclose campus crime information and to adopt a sexual assault policy. The Clery Act was enacted in 1990 and subsequently amended in 1992, 1998, and 2000. All public and private postsecondary educational institutions that are eligible to participate in federal student aid programs are subject to the Clery Act. The Clery Act requires the institution's sexual assault policy to guarantee sexual assault victims certain basic rights.⁵³⁵

Under these provisions of the Clery Act, known as the Campus Sexual Assault Victims' Bill of Rights, institutions must issue an annual campus security report which is made available to all students, staff, prospective students, and the public by October 1st of each year.⁵³⁶ The report must contain the following:

- A description of educational programs intended to promote the awareness of various forms of sexual assault;
- Procedures students should follow if a sexual assault occurs, including the importance of preserving evidence for possible criminal proceedings and to whom offenses should be reported;
- Information about a student's option to notify law enforcement, including a statement that institutional personnel will assist students in reporting if they request it;
- A notice to students of existing on- and off-campus counseling, mental health, or other student services, such as victim advocates, for sexual assault victims;
- A notice to students that the institution will change a victim's living and academic placement if the victim reports the offense to any official, requests the reassignment, and one is reasonably available;

⁵³⁴ 20 U.S.C. § 1092(f) (2002).

⁵³⁵ *Id.*

⁵³⁶ 34 C.F.R. § 668.41(e).

- Possible sanctions that an institution may impose following a final determination in an institutional disciplinary proceeding involving an alleged sex offense.⁵³⁷

Institutions are also required to provide notice that they will afford both the accused and the accuser with the following rights in any institutional disciplinary proceeding regarding an alleged sex offense (irrespective of whether both parties are students or where the assault occurred):

- The same opportunity to have someone present with them at the hearing, such as an advocate, attorney or other support person; and
- The right to be notified of the outcome of the proceeding.⁵³⁸

It is important to note that it is not a violation of the accused student's federal privacy right to disclose, to the accuser, the outcome of a disciplinary proceeding in which it was alleged that the student sexually assaulted the accuser. Moreover, such disclosure to the victim must be unconditional, and cannot be conditioned upon the victim's signing an agreement to keep the outcome confidential.⁵³⁹

There is no private right of action available under the Clery Act (which means a student cannot sue the school if the school does not comply with the Act).⁵⁴⁰ Instead, colleges and universities that fail to comply with its requirements face civil penalties (of up to \$27,500 per violation).⁵⁴¹ These penalties may be imposed by the U.S. Department of Education ("ED"), the agency charged with enforcing the law. The institution also risks losing its eligibility to participate in federal student aid programs.

Even though the Clery Act does not authorize a victim to recover damages for a Clery violation, in addition to the threat of possible federal action the Clery Act may be useful as an information gathering tool.

⁵³⁷ 34 C.F.R. § 668.46(b)(11)(i)-(iv), (vii).

⁵³⁸ 34 C.F.R. § 668.46(b)(11)(vi)(B).

⁵³⁹ See, e.g., Georgetown Letter, *supra* note 499, at 3.

⁵⁴⁰ 20 U.S.C. § 1092(f)(14)(A).

⁵⁴¹ 20 U.S.C. § 1094(c)(3)(B).

The Clery Act requires the institution to disclose the following:

- Report and publish an annual Security Report containing three years' worth of crime statistics for violent crimes, including sexual assault and other serious crimes;⁵⁴²
- Post campus alerts to notify any group on campus that is in particular danger of being victimized;⁵⁴³
- Establish and publish reasonable reporting procedures to facilitate the reporting of crimes;⁵⁴⁴ and
- Establish and publish the availability of resources for victims of sexual assault.⁵⁴⁵

These disclosures may be helpful to a victim to prove a claim or secure an accommodation or civil remedy. For example, the school's records may demonstrate that a school had notice of an individual's propensity to be violent or the dangerousness of a building or locale, or information contained in a public crime log may help establish a perpetrator's modus operandi or prior bad acts.

The public crime log must include all crimes, not just those (such as murder, manslaughter, arson, burglary, sexual assault, and hate crimes) that must be reported in the campus security report. (The full list of crimes that must be included in the security report is set forth in 20 U.S.C. 1092(f)(1)(F).) The log must be open to the public (including the media) during regular business hours.

The Clery Act affords victims of crime certain privacy protections. The statistics in the public crime log may not identify victims of crimes or persons accused of crimes.⁵⁴⁶ Also, any "privileged" communications are exempt from the Clery Act's reporting

⁵⁴² 20 U.S.C. § 1092(f)(1)(F)(i)(II).

⁵⁴³ 20 U.S.C. § 1092(f)(3).

⁵⁴⁴ 20 U.S.C. § 1092(f)(1)(A); 20 U.S.C. § 1092(f)(1)(G); 20 U.S.C. § 1092(f)(4).

⁵⁴⁵ 20 U.S.C. § 1092(f)(1)(D); 20 U.S.C. § 1092(f)(1)(E); 20 U.S.C. § 1092(f)(8)(B).

⁵⁴⁶ 20 U.S.C. § 1092(f)(7).

requirements. Indeed, the Act expressly prohibits schools from identifying victims of crimes or persons accused of crimes in their mandatory statistics reports.⁵⁴⁷

Anyone may file a claim with the ED alleging violations of the Clery Act. Complaints are to be filed with the ED Regional Office having jurisdiction over the state or territory where the post-secondary institution's campus is located.⁵⁴⁸

[PRACTICE TIP: If a victim was assaulted while engaged in underage drinking or illegal drug use, she may fear that she will be sanctioned by the school if she reports an assault and the underlying facts. Because the Clery Act requires that reporting procedures facilitate reporting and encourage candid disclosure,⁵⁴⁹ an attorney or advocate may argue that sanctioning an assault victim for such a minor infraction would violate the spirit and the law under Clery.]

C. The Family Educational Rights and Privacy Act (FERPA)⁵⁵⁰

FERPA is a Federal law that gives students at educational institutions receiving federal funds a general right to privacy in their educational records.⁵⁵¹ The right is not absolute, however, and disclosure of certain information may be mandated. FERPA also affords students the right to seek to have their records amended.

Under FERPA, a school generally may not disclose personally identifiable information from a postsecondary student's education records to a third party unless the student provides written consent.⁵⁵² There are several exceptions to FERPA's prohibition on nonconsensual disclosure of education records, however, two of which are pertinent to

⁵⁴⁷ 20 U.S.C. § 1092(f)(10).

⁵⁴⁸ U.S. Department of Education "Dear Colleague Letter," GEN-96-11, May 1996.

⁵⁴⁹ 20 U.S.C. § 1092(f)(1)(c)(ii).

⁵⁵⁰ 20 U.S.C. § 1232g (2002).

⁵⁵¹ The term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. *See* 34 C.F.R. § 99.3 "Education records."

⁵⁵² 34 C.F.R. § 99.30(a).

victims of sexual assault whose assailants are involved in campus disciplinary proceedings.

First, FERPA does not prohibit disclosure to an alleged victim of any crime of violence or non-forcible sex offense of the final results of any disciplinary proceeding conducted by the educational institution against the alleged perpetrator for the crime of which he is accused.⁵⁵³ The accused does not have to have been found guilty of the offense in order for the outcome to be disclosed to the victim; the institution may report the final results of the disciplinary proceeding to the complainant, regardless of whether the institution concluded a violation was committed.⁵⁵⁴

Second, FERPA does not prohibit a postsecondary educational institution from disclosing the final results of a disciplinary proceeding if the institution determines that the student committed a violation of the institution's rules or policies with respect to the crime or offense. Interpreting regulations provide that the institution must not disclose the final results of a disciplinary proceeding unless it determines that the student is accused of committing a crime of violence or non-forcible sex offense and, with respect to the accusation, the student has committed a violation of the institution's rules or policies.⁵⁵⁵

Once an institution determines that an accused student is an alleged perpetrator and has violated the institution's rules or policies, certain information may be disclosed. The final result of the hearing must include the name of the student, the violation committed, and any sanction imposed.⁵⁵⁶ The final results of the disciplinary hearing may include the name of any other student such as the victim or witnesses only if that student consents in writing.⁵⁵⁷ As noted above, an institution may not require a sexual assault victim to agree to keep the outcome of the disciplinary hearing confidential as a condition to her receiving notice of the outcome.⁵⁵⁸ If a violation is found to have occurred, then

⁵⁵³ 20 U.S.C. § 1232g(b)(6)(A).

⁵⁵⁴ *Id.* 34 C.F.R. § 99.31(a)(13).

⁵⁵⁵ 20 U.S.C. § 1232g(b)(6)(B); 34 C.F.R. § 99.31(a)(14).

⁵⁵⁶ 20 U.S.C. § 1232g(b)(6)(C)(i).

⁵⁵⁷ 20 U.S.C. § 1232g(b)(6)(C)(ii).

⁵⁵⁸ Georgetown letter, *supra* note 499.

there are no restrictions on disclosure or redisclosure of the final results of the disciplinary proceeding.

In contrast, a victim may be prohibited from re-disclosing information regarding the outcome of a disciplinary proceeding without the consent of the accused if the post-secondary institution did not find that a school policy was violated. (If an individual makes an unauthorized re-disclosure, the U.S. Department of Education's Family Policy Compliance Office may bar that individual from accessing personally identifiable information from education records for at least five years.)⁵⁵⁹

Private student records may also be released pursuant to valid legal subpoenas. If there is a court issued subpoena in a *civil* action, FERPA allows the records to be disclosed, upon notification to the student and an opportunity for the student to move to quash the subpoena. The student must be given an opportunity to quash the subpoena. However, if a school receives a court issued subpoena in connection with a *criminal* prosecution, FERPA requires disclosure without notification to the student if so ordered by the issuing authority. A school's ability to disclose information to a victim regarding her assailants, and that victim's ability to re-disclose such information, is a grey area of FERPA.⁵⁶⁰ However, the Department of Education has issued recent opinions lending clarity to the issue. According to the Department of Education, schools must inform complaining victims of the outcomes of their complaints, regardless of whether a school opts to take action against the assailant.⁵⁶¹ FERPA may not be used to prevent a victim from speaking about her experience.⁵⁶² Although FERPA does not permit a civil action for damages by a student whose privacy has been violated, if a FERPA violation has not

⁵⁵⁹ 34 C.F.R. § 99.33(e); The issue of who has authority to impose the 5-year bar is addressed in an email from LeRoy Rooker, U.S. Education Department Family Policy Compliance Office to S. Daniel Carter, Senior Vice President, Security on Campus, Inc., April 10, 2002 (“[T]he Department, and not an educational institution, may impose the ban.”).

⁵⁶⁰ 20 U.S.C. § 1232g(b)(6)(A); 20 U.S.C. § 1232g(b)(6)(B).

⁵⁶¹ Disclosure to Victims of Alleged Crimes of Violence, Family Policy Compliance Office, U.S. Dept. of Educ. (March 10, 2003), citing 20 U.S.C. § 1232g(b)(6) and 34 C.F.R. § 99.31(a)(13), *available at* www.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html.

⁵⁶² 34 C.F.R. § 99.33; 34 C.F.R. § 99.31(a)(14) (regulations only deal with disclosure by the institution, not the student).

yet occurred but is imminent, a victim may move for a civil injunction enjoining the school from releasing the information at issue.

D. School Handbooks

Schools' Student Handbooks are another source of rights and remedies for student victims, and they may supplement the rights, remedies and information available to victims pursuant to Title IX, FERPA and the Clery Act. School handbooks serve as a guide to an institution's unique policies and procedures. Typically, these handbooks set out, in writing, a student's rights regarding safety, discipline, housing, coursework, and other areas of interest to campus victims. Similar to employee handbooks in the employment context, school handbooks may provide support as to whether certain promises were made or contract rights established, and whether a school followed (or failed to follow) its own established procedures.

[PRACTICE TIP: Because there is no uniformity among school handbooks, even if you are familiar with one school's policies and procedures it may not be a guide to another school's procedures. Each school's handbook must be reviewed anew. Also, remember that Title IX requires every school to publish grievance procedures and make them available to their students. The handbook is the first place to look to determine whether a school has complied with this requirement, and whether the policies set out are consistent with Title IX. Some public schools, including secondary schools, publish their handbooks online.]

Most schools have specific policies relative to sexual harassment and sexual assault. The policies will generally include a time frame for an investigation, a complaint procedure, and the range of potential consequences if the perpetrator is found responsible. At many institutions, the disciplinary procedure may prohibit an attorney's presence at the disciplinary hearing. Although an attorney may be the student's representative throughout the process, schools often prefer to keep the processes internal and private. They may regard attorneys as hindering the investigation and hearing processes. Even if an attorney is not allowed into the hearing room, however, an advocate or attorney may

remain outside the room but still on site and be available to the victim to provide advice and support during breaks, recesses, etc.

Student handbooks and campus policy and procedure manuals often list potential remedies for victims. As an advocate for the victim, you should advocate for whatever accommodation your client needs even if it is not specifically listed within the handbook. Do not be afraid to be creative in meeting your client's needs or fashioning an appropriate remedy.

E. On-Campus Accommodations

For some victims, accommodations to their on-campus environment may be sufficient to allow them to remain in school.⁵⁶³ Accommodations may cover one or more critical aspects of a student's life, including her academic, residential, financial, medical and mental health needs. For example, a victim may need to: add, drop or change courses or instructors, move from a day to evening program (or vice versa), or attend classes at an alternate institution; relocate her housing (or have the alleged perpetrator relocated to a different housing site); add, drop or modify campus employment; and receive on- or off-campus counseling or health care that is covered by her school insurance. Additional campus-related accommodations may include:

- Campus stay away orders;
- Excused class absences;
- Extensions on class work and projects;
- Special scheduling or rescheduling of exams and projects;
- Accommodations for the taking of exams (more time, in a separate room, etc.);
- Incomplete grades for coursework;
- Withdrawal from classes or school (without financial penalty); and
- Tuition assistance.

⁵⁶³ See, e.g., Revised Sexual Harassment Guidance, *supra* note 483, at 16.

[PRACTICE TIP: Many of these and similar needs may easily be met by an institution. Negotiating with campus faculty and administration may be the quickest and easiest route to achieving these accommodations. Or, it may be necessary to resolve the matter through the institution's legal counsel. Regardless of whether you are negotiating with faculty, administrators, or legal counsel, you may need to explain to the school official the dynamics of sexual assault and why the accommodation requested is critical to your client's safety and recovery. Be prepared to tell the school official, in general terms, how victims may need time to heal from the trauma, seek counseling, and recover from depression or other common side effects of being a victim. Be extremely careful not to reveal any information that compromises your client's privacy rights unless you have express permission to do so.]

F. Stay-Away Orders

Because most sexual assault victims are assaulted by a friend, classmate or acquaintance, safety may become the primary concern. Many victims want the assailant to be removed from any location where he may intersect or have access to his victim. The victim may be seeking his removal from the institution entirely. Because removal infringes significantly the rights of the accused, it may be the most difficult pre-hearing remedy to obtain. Intermediate remedies that are short of temporary or permanent expulsion, such as interim suspension, may be easier to achieve. Some schools will issue a campus-wide "stay-away" order to ensure against any further interaction between the victim and the assailant. If you seek this remedy, you may want to argue that it is the surest method for the school to ensure that the victim does not remain in a hostile environment, and eliminating any hostile environment is required by Title IX. To this end, some institutions may issue mutual orders, which require both the victim and the perpetrator to stay away from each other. Seemingly neutral on their face, such orders unfairly punish victims insofar as they restrict or penalize the complaining victim and proscribe the behavior of one who has been accused of no wrong.

III. THE DISCIPLINARY PROCESS

A. Introduction

Every post-secondary institution has a mechanism for addressing allegations of student violations of inappropriate or unlawful conduct. At larger academic institutions, the mechanism typically involves a campus disciplinary proceeding, including an investigation, hearings committee and a review board. Smaller institutions may have a sole hearing officer rather than a committee or board.

Disciplinary proceedings are very different from criminal investigations and prosecutions. Schools' internal disciplinary processes do not usually adhere to the traditional rules of evidence. Because the information that may be gathered and submitted is not constrained by traditional rules of evidence, it may be helpful (or harmful) to a victim. An attorney or advocate will want to carefully consider all of the information submitted to the disciplinary board or hearing officer, as it will be discoverable for purposes of a criminal trial. Therefore, if a student victim decides to pursue both academic and criminal complaints, she should be well-counseled about her written and oral statements; most likely the defense will try to use them to impeach her in a criminal trial. (Of course, the disciplinary proceedings may also assist the student victim with her criminal trial because the assailant may prepare a statement on his own; such statements sometimes contain incriminating statements and evidence.) Depending on the status of a criminal investigation, a school may try to delay the disciplinary hearing until the criminal case is completed. Such a delay is inappropriate, and arguably unlawful, as a complainant has the right to a timely and effective resolution to her complaint (*see* discussion of Title IX, above). The victim should not be forced, as a practical matter, to choose between the school's internal procedures and the criminal process.

B. The Disciplinary Process: An Overview

Most secondary institutions have adopted general procedures for resolving student to student complaints. Typically, the aggrieved student can file a complaint with

a Director of Student Judicial Affairs, Dean of Students or other designated personnel. If the school has an administrative board, the board will be the body to determine whether the case has merit. While some schools only collect and review written evidence before reaching a decision, others require students to participate in formal hearings. Additionally, some schools invite students to meet to try to reach a mutual resolution of the complaint. A victim should carefully consider whether this is a forum that is safe, appropriate and suitable to her needs. (Other schools specifically preclude sexual assault allegations from this mediation or conciliation process.)

[PRACTICE TIP: Negotiating directly with the assailant may be especially traumatic for a victim. To the extent possible, such meetings should be avoided or waived unless the victim is prepared to confront the assailant on her own. Consider the use of screens, closed circuit televisions, and other devices to screen the victim from contact with the perpetrator.]

[PRACTICE TIP: For more information on the specific procedures at a particular university, consult that school's policy manual, School Handbook, and any other written or online publication that may outline students' rights, school procedures, and faculty and staff obligations.]

Public institutions must provide minimal due process rights. Private institutions, on the other hand, are not required to provide such constitutionally required minimal due process, although to protect itself from liability, the school will effectively offer due process rights by ensuring fair and reasonable procedures. Accordingly, most institutions, whether required to or not, will proceed under the "basic fairness" rule.⁵⁶⁴

⁵⁶⁴ *Schaer v. Brandeis University*, 432 Mass. 474, 481 (2000). See generally *Anderson v. Mass. Inst. of Tech.*, 3 Mass. L. Rptr. 293 (Mass. Super. Ct. 1995); *Tedeschi v. Wagner College*, 49 N.Y.2d 652 (N.Y. 1980); *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721 (1st Cir. 1983); *Merrow v. Goldberg*, 672 F. Supp. 766 (D. Vt. 1987); *Rendell-Baker v. Kohn*, 457 U.S. 846 (1982); *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W. 2d 108 (Minn. 1977); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238 (D. Vt. 1994); *NCAA v. Tarkanian*, 488 U.S. 179 (1988); *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205 (Md. Ct. Spec. App. 2000); *Mangla v. Brown Univ.*, 135 F.3d 80 (1st Cir. 1998); *Doherty v. S. Coll. of Optometry*, 862 F.2d 570 (6th Cir. 1988), *Dinu v. President & Fellows of Harvard Coll.*, 56 F. Supp. 2d 129 (D. Mass. 1999); *Giles v. Howard Univ.*, 428 F. Supp. 603 (D.D.C. 1977); *Holert v. Univ. of Chicago*, 751 F. Supp. 1294 (N.D. Ill. 1990); *Slaughter v.*

1. The Victim's Statement

Most colleges and universities require the victim to submit a written statement to initiate a disciplinary process. Some schools allow a campus police officer or faculty member to bring the complaint on behalf of the victim. The victim's statement should describe the victim's experiences during and following the assault. It should be as specific and detailed as possible, taking into consideration the victim's need for privacy and dignity. The statement may include effects of the assault such as depression, anxiety, fear, drop in grades, and any post-assault encounters with the assailant or his friends on campus, including harassment or threats of retaliation. The written statement should identify any witnesses to the assault, and to whom the assault was first reported.

[PRACTICE TIP: A victim may submit her written statement before an attorney or advocate is involved in the case. As soon as possible after joining the case, the attorney or advocate should review any information previously submitted, and help the victim amend or supplement it as necessary. It may be important to explain that victims' memory and recall typically is not linear, and may be sporadic or episodic, and that such additional disclosures are common for victims of sexual assault. (See Chapter 5 on victims' mental health for additional information on victim trauma and memory.)]

Although the victim statement initiates the disciplinary process, it is also the document that follows her throughout a criminal prosecution, if one is imminent or ongoing. If you are involved in helping the victim prepare her initial statement, be cautious about including too much detail about her activity or relationship before or after the assault. Because an attorney probably will not be allowed to attend the disciplinary hearing with the victim, there may be no one present to help the victim limit the scope of

Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975); *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976); *Jansen v. Emory University*, 440 F. Supp. 1060 (N.D. Ga. 1977); *Lyons v. Salve Regina Coll.*, 565 F.2d 200 (1st Cir. 1977); *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984); *Univ. of Miss. Medical Ctr. v. Hughes*, 765 So. 2d 528 (Miss. 2000); *Rumyon v. McCrary*, 427 U.S. 160 (1976); *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 445 N.E.2d 136 (Mass. 1983); *Ahlum v. Adm'rs. of Tulane Educ. Fund*, 617 So. 2d 98 (La. Ct. App. 1993); *Goss v. Lopez*, 419 U.S. 565 (1975); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69 (4th Cir. 1983); *Life Chiropractic Coll., Inc. v. Fuchs*, 337 S.E.2d 45 (Ga. App. 1985).

the questions that she will be asked to answer. The more information that the victim includes that is not directly relevant to the assault, the greater the likelihood that someone on the panel may pursue questions that are inappropriate and/or irrelevant. Prepare the victim for this possibility and for how she should respond to avoid establishing a potentially damaging record. (A victim should also be prepared for the possibility that the assailant may try to contact her prior or subsequent to the hearing.)

2. The Investigation

Like the disciplinary hearing process, each school's investigation process will also vary widely from school to school. At some institutions, a victim may have some input into the investigation and will be consulted and kept informed. At other institutions, the investigation is conducted with little or no input or consultation on the part of the victim, and she may have no idea whether or when an investigation is complete. Also, while many schools have their own campus security departments or sworn law enforcement officers, other institutions rely on or contract with local, state, or tribal law enforcement agencies to provide security and enforcement services. The scope of duties performed by campus officers often varies depending on the institution's size and financial capacity. (While some post-high school institutions are small and financially limited, others are larger than the average town or city and employ scores of sworn law enforcement officers.)

Depending on the type of school, size, location, etc., an institution may conduct its own investigations. If the investigation is handled by the institution, the school's own law enforcement or a student affairs official such as the Dean of Students will perform all the fact finding, including contacting and interviewing all the witnesses or potential witnesses, gathering written witness statements, and submitting the statements to the person in charge of the disciplinary process. A few institutions will allow the student to be involved in the investigation. Depending on the circumstances and financial resources, a victim may want to hire a private investigator or an independent person to collect evidence and interview witnesses. If the victim is allowed to coordinate or conduct her own investigation, an attorney may be instrumental in the process. The

attorney may contact potential witnesses, interview students, draft written witness statements and prepare any pleadings to be filed.

[PRACTICE TIP: On rare occasions, a victim's attorney may persuade the investigating agency that the attorney is in a better position than the agency to conduct interviews, gather witness statements, and prepare a summary of the investigation for the agency's review. If this is an option, it may be the surest method of protecting the victim's privacy and ensuring that all of the appropriate witness statements are secured.]

With the victim's permission, healthcare providers, school or campus security officers, other advocates who assisted the victim, roommates, friends and family all should be contacted and interviewed. Any other evidence, such as e-mails, voicemails, notes, instant messaging records, computer files, clothing, and photographs should also be collected and made available during the disciplinary process.

Victims should obtain their medical records from any hospital visit associated with the sexual assault. If a SAFE Kit was performed by a SANE nurse, it is important to identify the attending nurse so that the nurse can testify to authenticate the kit and explain the medical report.

[PRACTICE TIP: Be sure to discuss confidentiality and privilege with your client so that she does not inadvertently waive her right to privacy during the hearing. This is especially important if the victim seeks to assert her privilege rights in any criminal proceeding that may be concurrent with or subsequent to the institution's disciplinary hearing.]

3. Preparing for the Hearing

As a rule, educational institutions do not allow legal representatives for either party to be present during internal disciplinary proceedings. (They may, however, allow a victim advocate to attend.) If the hearing is before a board, attorneys often wait in the hall outside the hearing room so that the victim can exit and consult with the attorney, if

needed. Some institutions will permit legal counsel to attend the hearing but not speak or otherwise participate in the proceeding.

Even if an attorney is precluded from participating directly in the hearing, an attorney may help a victim navigate the disciplinary process. The lawyer may help draft a statement or complaint, prepare affidavits, and monitor the type of evidence submitted or conduct permitted during the hearing. An attorney may also help the victim prepare an opening or closing statement, and prepare her for the experience of testifying to the hearing officer or board. It may be helpful to the victim if the lawyer conducts mock hearing sessions that include questions the defendant or hearing officer or panel are likely ask the victim. The simulated hearing should include where the victim and the defendant are likely to be seated.

[PRACTICE TIP: It can be very helpful to the victim to visit the hearing site with her lawyer or advocate before the hearing date. This can help a victim to orient herself in the room and identify any privacy, safety, or other accommodations she may want to request, such as a privacy screen between the victim and the accused, re-positioning of the tables or chairs, etc.]

A victim's lawyer may also advocate for her directly with the accused student or his legal counsel. Indeed, a victim's attorney may be able to negotiate an agreement that provides the victim with remedies and protections that would be difficult if not impossible for her to secure through the school disciplinary process. Such negotiations may occur prior to, during or following a school disciplinary hearing.

In place of legal counsel, many colleges and universities allow or appoint a staff or faculty member to advocate for the student. It is important to establish a good, working relationship with that advocate. Also, it is absolutely critical that, before entering the hearing, the victim understand with whom her communications are privileged and how the privilege(s) may be waived. Be sure to inform your client that disclosure of personal information, therapist information, and medical records may be probative in an internal disciplinary process but may compromise her privacy in both the

academic and any criminal proceedings. Once waived, a privilege may not be able to be restored. She should proceed cautiously and carefully before disclosing any information that may compromise her privacy rights inadvertently. She should not be afraid to tell the board that she needs to consult with counsel before answering any question she fears may compromise her privilege.

4. At the Hearing

In some educational institutions' disciplinary proceedings, the assailant is allowed to question the victim directly. Allowing the assailant to question the victim directly may violate a school's obligation under Title IX to act "promptly and reasonably" to prevent further harassment. Student-on-student examination puts the victim at risk for further harassment, and effectively creates an ongoing hostile environment in which the assailant may interrogate and harass the victim. Under these conditions and in light of the already traumatic circumstance of sexual assault, the practice of allowing students accused of sexual misconduct to question complaining victims may be deemed unreasonable. Accordingly, counsel for the victim should argue that permitting a student accused of sexual assault to freely question his victim is beyond any notion of "basic fairness."⁵⁶⁵

5. After the Hearing

If the hearing officer or disciplinary board is persuaded that the accused violated the institution's code of conduct, the officer or board may impose sanctions on the assailant. The range of sanctions may include probation to expulsion, and for a varying period of time. With probation, the assailant is typically allowed to stay on campus but his conduct may be monitored and his right to engage in athletics, fraternity activities, or other "high risk" activities may be curtailed. Typically, any subsequent misconduct will result in a harsher penalty. Some schools require the assailant to take a leave of absence; although the duration of the leave may vary, the defendant is commonly allowed to return the semester or year following the victim's anticipated graduation date. The most

⁵⁶⁵ See *supra* note 84.

serious sanction is dismissal or forced withdrawal from school. Once expelled, the assailant has little or no chance of readmission and his record may be a barrier to admission at other institutions. (For information regarding the institution's right to disclose the proceeding results, see the discussion of FERPA, above.)

IV. SCHOOL DYNAMICS

A. Protecting Students' Privacy Rights

Privacy is a particularly acute need for victims who are students. A sexual assault victim needs both privacy and support. She needs to re-assert control over her life to recover from the assault. If certain details of the sexual assault are released into the community, the loss of privacy, as well as the resulting gossip and harassment can lead to victim isolation, withdrawal and academic failure.

At the same time, support from her community may be a victim's critical lifeline, and the controlled sharing of information may be the only way to get the support she needs. The challenge, often, is how the victim can get the support she needs, the school can conduct its full and effective investigation, and victim privacy can be maximized while gossip and polarization within the school community are contained.

Because the disclosure of some information about the assault is almost inevitable, the educational institution and the victim's advocate should be proactive in managing or responding to disclosures so as to minimize the harm. All too often, when the assailant is a fellow classmate the student body and faculty will fracture, with some students choosing loyalty to the victim and others to the assailant. This social division can be devastating to the victim and can cause irreparable educational harm. Attorneys and advocates should anticipate such a toxic community response and work with school authorities to minimize the backlash and protect the victim. It may be appropriate to remind all students of the right to privacy, and of their own obligations under the student conduct code to treat their fellow students with dignity and respect. If specific students can be identified as the source for the vitriol or backlash, it may be appropriate for a school official to meet with the student(s) regarding the institution's obligation under

Title IX to avoid the creation of a hostile environment. Students and staff involved in the disciplinary process should also be cautioned to avoid the inadvertent release of private information, to keep files secure, and offices locked. It may also be appropriate to review the educational institution's crime log that is maintained pursuant to the Clery Act, to ensure that any information recorded in the log respects victim privacy. Finally, it may be possible to subpoena student witnesses to a hearing, and ask that, in advance of the hearing, they be instructed not to discuss the case outside the proceedings. (For a more detailed discussion of privacy concerns, *see* Chapter 3 on Privacy.)

V. THIRD-PARTY LIABILITY

Depending on the circumstances surrounding the crime, the victim may have a cause of action against a third party for the sexual assault that was committed. For example, third-party liability may result if a security mechanism was negligently installed or maintained, thereby allowing the perpetrator access to an area that should have been secured, or if a recruitment agency failed to conduct a proper criminal background check and the college or university hiring a faculty or staff member effected an inappropriate and dangerous hire.⁵⁶⁶

[PRACTICE TIP: Attorneys funded by the U.S. Department of Justice's OVW- Legal Assistance to Victims program are prohibited from representing victims in tort cases, including third-party liability civil suits. An LAV-funded attorney should identify any such liability that may exist, and provide the victim with a timely referral to appropriate legal counsel who may assist the victim with a potential tort claim.]

VI. CONCLUSION

Adult women between the ages of 18 to 24 comprise one of the groups most at risk for sexual assault. The student victim who can complete her education or preserve her educational opportunities after a sexual assault may avoid some of the long-term consequences of the assault, including compromised medical or mental health care,

⁵⁶⁶ Tort liability on such grounds would be based on a negligent hiring theory.

diminished earning potential from limited education, and the abrupt loss of community and social support. You can help prevent this. By assisting the victim at this crucial stage of her life, your advocacy and/or representation can have a significant and positive impact on her long-term well-being. The information and assistance you provide may help to propel her academic and emotional journey to success.

Chapter Ten

SEXUAL ASSAULT VICTIMS' EMPLOYMENT RIGHTS⁵⁶⁷

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⁵⁶⁷ The Victim Rights Law Center thanks Robin R. Runge, Esq., Director of the American Bar Association's Commission on Domestic Violence, for the generous use of her material for this chapter. The Victim Rights Law Center thanks all of the chapter authors, Michelle Harper, Esq., Paula Finley Mangum, Esq., and Robin Runge, Esq., for their contributions.

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I. INTRODUCTION

A sexual assault victim may experience major disruption in her work life following a sexual assault. While estimates vary, according to one study, almost fifty percent of sexual assault victims lose their jobs or are forced to quit their jobs in the aftermath of the crime.⁵⁶⁸ Victims become unemployed after a sexual assault for a multitude of reasons. A victim may quit or be forced to leave her job because the physical and emotional injury she sustained makes it impossible for her to return to work. The perpetrator may be a co-worker or supervisor or may know where she works and threaten her at the workplace, causing the victim to fear for her safety at the work site. Or, she may be ashamed and afraid that her boss will find out about the sexual assault; she may quit her job rather than risk having her assault become common knowledge. Finally, she may be fired for missing work (to meet with lawyers, counselors, attend court appearances, or just to take care of her emotional needs) or for poor performance issues caused by her inability to focus on her job duties after the assault. (*See also*

⁵⁶⁸ S. REP. NO. 103-138, at 54 & n. 69 (1993) (citing Elizabeth M. Ellis, Beverly M. Atkeson & Karen S. Calhoun, *An Assessment of Long Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOL. 263, 264 (1981)).

Chapter 5 (medical and forensic examinations), Chapter 6 (mental health) and Chapter 12 (serving victims with disabilities) for further discussion of these issues.)

A victim's ability to establish financial stability may be critical to ability to meet her basic needs and recover from the assault. She will likely need an income to pay for expenses related to the sexual assault including doctor visits, mental health care, other health care costs, transportation, safety measures, and possible relocation. These expenses will be in addition to her pre-existing financial obligations. Furthermore, if she has health insurance provided through her employer, losing her job may mean losing her health insurance – and her work-site social network, support system, etc. – at a time when she needs it most.

A sexual assault victim will not necessarily identify employment-related issues as a legal problem when she meets with you. There may be more urgent legal matters pending (such as privacy concerns or a victim's rights in a criminal prosecution) or a victim may not realize that she could be eligible for workplace protections or accommodations. Therefore, it is important that advocates integrate employment-related questions into their standard intake process. If the client does have employment issues, explain her options and help her determine the best strategy for meeting her employment needs, taking into consideration:

- (1) privacy needs, including whether she is prepared to tell anyone at work about the assault to access protections in the workplace;
- (2) personal safety, including travel to and from work, as well as at the work site;
- (3) work status (*e.g.*, whether she is still employed, is about to lose, or has already lost her job);
- (4) who the perpetrator of the assault is (*e.g.*, whether the perpetrator is a co-worker, supervisor, visitor to the work-site);
- (5) whether the assault occurred at the workplace;
- (6) access to benefits, including medical and mental health insurance, retirement, disability, sick or personal time, and public assistance;

- (7) employment status (*e.g.*, at-will employee, union member, contract employee, temporary worker, independent contractor, municipal, state or federal employee, membership in a protected class, such as age, sex, race, or ethnicity) and the applicable employment laws;
- (8) victims' need and/or desire to remain employed or to return to her job;
- (9) whether her current income is sufficient to meet her basic needs and sustain her recovery efforts; and
- (10) immigration status.

As discussed below, sexual violence victims may be entitled to protections or benefits under a variety of employment laws. Even where there are no legal remedies available to a client, an advocate may be able to negotiate with the victim's employer to get the accommodations she needs to avoid job loss or to be reinstated if her employment was previously terminated.

II. PRACTICE CONSIDERATIONS

A. Identifying and Understanding Your Client's Employment Needs

To represent a survivor client effectively, you will need to understand her individual goals and employment needs. For example, it is necessary to discuss a victim's individual privacy concerns and to determine what information she is comfortable disclosing, to whom, and when. The remedies available to a survivor often depend on how much information she is willing to disclose to the employer. If a victim is not currently employed, you will want to ascertain whether she wants to return to the workplace (especially if the assault happened at work), and what accommodations she might need to return to work for the same employer at the same or a different location, or at a new job altogether. In crafting an appropriate plan, it may help to discuss why, when, and under what circumstances the victim wants to return to work. (A victim may need the income, structure, and support; she may be concerned that leaving her job will negatively affect her career goals; and/or she may not have considered whether taking a leave from work is an appropriate or viable option in her circumstances.)

In addition to understanding your client's goals and needs, you will also want to know her employment history. Determine how long the client has worked for the employer, whether she is a full, part-time, permanent or temporary employee, and whether she is a member of a union. Ask about any significant employment information, including demotions or promotions, raises, prior leaves of absence, disciplinary history and prior workplace complaints. Be sure to ask whether and when your client became the employer's employee, because the remedies available to an independent contractor may be much more limited than those available to an employee.

The client's personnel record is an invaluable tool in evaluating a case. Often, a victim's employment history will inform her employer's reaction to a report of sexual assault. It may also affect the accommodations and remedies available to her. Understanding the entirety of your client's employment situation, including her fears, goals, concerns, and employment record is essential to successful representation.

[PRACTICE TIP: Obtain and review your client's personnel file to assess her employment history rather than relying exclusively on the client's description of her past work performance. It is critical that you understand the *employer's* perspective of the victim's employment history. You will need to know whether any documentation exists that could negatively impact your client's case.]

[CHECK YOUR STATE'S LAW: In some states, employers are required by law to grant access to personnel records upon an employee's request.⁵⁶⁹ Unless the statute defines what a "personnel" record must include, however, the employer is free to keep all the information that might be useful in this situation in a "non-personnel" file and not deliver

⁵⁶⁹ See, e.g., **California:** CAL. LAB. CODE § 1198.5 (2006) ("Every employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee."); **Illinois:** 820 ILL. COMP. STAT. 40/2 (2005) ("Every employer shall, upon an employee's request which the employer may require be in writing on a form supplied by the employer, permit the employee to inspect any personnel documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action . . ."); **Minnesota:** MINN. STAT. § 181.961 (2005) ("Upon written request by an employee, the employer shall provide the employee with an opportunity to review the employee's personnel record.").

it to the client or her attorney until the client sues and requests the information in discovery. In states where there is no such legal requirement, an employer may still make the records available as a matter of policy. Review your state's law and your client's employee handbook to determine if her employer has an obligation to allow the victim to access her personnel records.]

When providing employment advice, it is critical to know your client's citizenship and immigration status. Although it is illegal for an employer to hire someone who is undocumented, it happens frequently. Once someone becomes an "employee" as defined under the federal anti-discrimination laws discussed later in this chapter (*see* Section III below), she is entitled to the same protections as any other employee regardless of her immigration status. However, in practice, these benefits are limited. An employer may retaliate by terminating a victim and/or reporting her to immigration authorities if she asserts her right to job-guaranteed leave or to be free from sexual harassment at work.⁵⁷⁰ Undocumented workers discharged for engaging in union activity may have no effective legal remedies.⁵⁷¹ Because the consequences for non-citizen employees can be so severe, it is vital to consult an immigration attorney before providing employment-related legal assistance to an immigrant client, even if she is documented and authorized to work in the United States.⁵⁷²

⁵⁷⁰ As a technical matter an employer's retaliatory reporting of an undocumented worker to a government agency may violate the anti-retaliation features of an employment statute. *See, e.g., Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883 (1984). As a practical matter, the technical violation will seldom prevent an unscrupulous employer from contacting the immigration authorities. A victim may be able to access work authorization pursuant to the U (or T) visa process. If you are not an experienced immigration practitioner, it is important to consult with one before advising a survivor on how her immigration status may be affected by the remedies she pursues.

⁵⁷¹ *See Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002) (despite the employer's unlawful termination of an undocumented worker in retaliation for union activity, the worker was not entitled to back pay or reinstatement remedies because such an award would conflict with Federal immigration law).

⁵⁷² It is important, however, not to reflexively accept legal positions attempting to expand beyond its actual holding the court's decision in *Hoffman*, *supra*, note 570. The precise holding of the case is that back pay remedies are not available under the National Labor Relations Act (private sector Federal labor law) because the award of these remedies would conflict with the presently effective Federal immigration statute, the Immigration Reform and Control Act of 1996 ("IRCA"). At the present time the decision has absolutely no applicability to state law or to other Federal employment statutes. For a full discussion of the employment

For an undocumented victim, it can be frightening and intimidating to be asked about her immigration status. Before you ask a victim about her immigration status, explain why you need to know this information. If she does not understand why the information is relevant and that you will not disclose her immigration status to anyone without her express permission, she may not provide accurate information and/or she may never return for services again. Reassure the victim that the information she provides to you is confidential and (if applicable) covered by the attorney-client or advocate-victim relationship.

For a comprehensive discussion of how best to serve non-citizen sexual assault survivors, see Chapter 8, *Serving Non-Citizen Victims of Sexual Assault*. See also Legal Momentum's forthcoming manual, *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, Legal Momentum (anticipated publication date June 2008; to be available online at www.legalmomentum.org/legalmomentum/programs/iwp).

B. At-Will Employment: The Vulnerable Worker

Like the vast majority of employees in the U.S., most victims of sexual assault are "at-will" employees. At-will employment describes the default relationship between an employee and her employer if no other contract exists.⁵⁷³ An at-will employee is one who may be fired at any time, for any reason, or for no reason at all. Conversely, the at-will employee may quit at any time, for any reason, or for no reason at all.⁵⁷⁴ In an at-will employment relationship, no legal claim can result from either party's termination of the employment, except where the termination violates local, state or federal law, such as a

rights of immigrant and non-citizen victims of sexual assault and sexual harassment, see *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, Legal Momentum at www.legalmomentum.org/legalmomentum/programs/iwp (anticipated publication date June 2008).

⁵⁷³ See William M. Howard, Annotation, *Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees*, 105 A.L.R.5th 351 (2003).

⁵⁷⁴ See Howard, *supra* note 573, § 2(a).

termination based on discrimination.⁵⁷⁵ At-will employees have limited recourse if they are terminated from employment.⁵⁷⁶

In most jurisdictions in the United States, an at-will employee may be fired legally just for disclosing that she is a victim of sexual assault.⁵⁷⁷ For example, if she discloses that a perpetrator who is not an employee is harassing her at work, her employer may fear he will be held liable if the assailant comes to the workplace and harms the victim or her co-workers. While the victim may have a claim of retaliation against her employer for terminating her after she disclosed that the perpetrator was a co-worker or supervisor, in other circumstances the victim may have no legal recourse. (For some victims, the possibility of being fired does not deter disclosure because they feel that if they do not obtain the requested accommodation (*e.g.*, time off or a change in schedule or job), they will be forced to quit or be fired from their job anyway. Nevertheless, it is important to discuss the possible consequences of disclosure, especially if the victim is an at-will employee. *See* Section C., below, for additional disclosure considerations.)

[CHECK YOUR STATE'S LAW: In some states, even at-will employees who are victims of sexual assault may be afforded additional protections. For example, employers in Illinois and New York are prohibited from firing, sanctioning, or refusing to hire victims of sexual assault, and are required to provide reasonable accommodations, including leave, relating to the assault.⁵⁷⁸ Employers in these jurisdictions must keep confidential any information and documentation they receive from the victim in support of the victim's request for leave.⁵⁷⁹ Research the law in your jurisdiction to determine whether there

⁵⁷⁵ *See* Michael A. Disabatino, Annotation, *Modern Status of Rule that Employer May Discharge At-will Employee for Any Reason*, 12 A.L.R. 4th 544 (1982).

⁵⁷⁶ *Id.* at 574.

⁵⁷⁷ *Id.*

⁵⁷⁸ 820 ILL. COMP. STAT. §§ 180/1-999; N.Y.C. CODE § 8-107.1.

⁵⁷⁹ 820 ILL. COMP. STAT. § 180/20(d); N.Y.C. CODE § 8-107.1(3)(b).

are any additional protections for at-will employees.⁵⁸⁰ See Section IV.C, below for a discussion of wrongful termination claims, which may be a remedy even for the at-will employee victim.]

C. Disclosing the Assault to an Employer

Even if none of the laws described in this chapter can provide protection to your client, you and your client may still consider disclosing the assault to the employer. Depending on the type of business, the number of employees, and the employer's policies, work ethics and understanding of sexual assault, a manager or employer may be an important ally in the victim's recovery. If the victim wishes to disclose the assault to and request accommodation from the employer, it is best to have a summary of the kind of support and safety considerations the victim needs to feel safe and to aid in her recovery.

Some employers may be willing to discuss informally how to accommodate a victim's needs. The key in these discussions is to follow your client's lead as to what information she wants to disclose. It is important to respect your client's feelings and needs regarding disclosure in the workplace. Each circumstance is unique and only she is able to decide what is best for her.

An employer's response to a disclosure of sexual assault and/or a request for accommodation may be difficult to anticipate. The employer may have direct or indirect experience with sexual assault. Or, the employer may have no prior experience with a sexual assault case and may not know how to respond appropriately. In some cases, an employer may be unsympathetic or suspicious of a victim's report of a sexual assault. If the perpetrator is a co-worker, the employer may be hesitant to suspend, transfer or terminate the assailant for fear of being sued by the accused. If the assailant is charged criminally, the employer may be more amenable to sanctions, but most perpetrators are

⁵⁸⁰ See the Legal Momentum website at www.legalmomentum.org/legalmomentum/programs/ehrsa/ for a listing of and links to states' employment protections for victims of violence against women. Because the resource focuses on protections for domestic violence victims, review the statutes and regulations and the facts of your case to ascertain whether your client is eligible for the protections and remedies described.

never criminally charged and prosecuted.⁵⁸¹ Smaller employers, who rarely have in-house counsel or on-call legal advice, may be especially reluctant to sanction the assailant, for fear of liability. Companies with fewer employees may be hesitant to transfer the assailant if there is no comparable position to which he may be transferred. Finally, an employer may perceive a victim's presence at work as a safety risk to other employees, which could in turn jeopardize the victim's employment security. However, employers may have a legal duty to safeguard the victim's well-being to avoid creating a hostile work environment, and to protect against a retaliation claim.

D. Privacy

Many sexual assault victims choose not to disclose the assault to their employers in an effort to preserve personal privacy, avoid employer reprisal or prevent gossip among co-workers.⁵⁸² Identifying and honoring a victim's workplace privacy concerns is the first step in any legal representation, even if it means forgoing an employment benefit.

To access many of the benefits and legal causes of action described below, your client will have to disclose at least some information regarding the assault. Typically, the closer the link between the assault and the workplace, the more likely accommodations will be granted. It is your job to help the victim achieve the balance between maintaining her privacy and requesting accommodations from her employer that is right for her. While many employers now have procedures and protocols in place to

⁵⁸¹ More than half of all sexual assault prosecutions are either dismissed before trial or result in an acquittal. Majority Staff of the Senate Judiciary Committee, *Violence Against Women: The Response to Rape: Detours on the Road to Equal* (May 1993) available at [www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+ Women/ResponsetoRape/full-text](http://www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text). According to data gleaned from the 2003 National Crime Victimization Survey, less than 10% of all perpetrators of sexual assault and rape will be convicted of a felony offense. See also the National Center for Policy Analysis study at www.ncpa.org/studies/s229/s229.html.

⁵⁸² For example, when surveyed, victims of sexual assault and attempted rape reported that the most significant reason for their decision not to report their assault to law enforcement was that the victimization was a "personal matter." *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* at 3, BUREAU OF JUSTICE STATISTICS, August 2002, NCJ 194530. Sixty-six percent of sexual assault victims surveyed reported they would be "much" (50%) or "somewhat" (16%) more likely to report a sexual assault to the police if there were a law prohibiting the media from getting and disclosing their names and addresses. D. Kilpatrick, C. Edmunds, and A. Seymour, *Rape In America: A Report to the Nation* (1992).

ensure workplace confidentiality, it is still important to carefully assess what information to offer to the employer. For example, it may be just as effective to inform an employer that a client was the victim of an assault or a violent crime, without disclosing that it was sexual in nature. Provide as much information as possible so that your client can weigh the relative benefits and burdens of disclosing or withholding specific facts.

If the victim is ready to tell someone at work about the assault, strategize with her about whom it may be best to tell. This decision will be informed by her reasons for disclosing. For example, if she needs time off from work to go to court, or if she is concerned that the perpetrator is a threat to the workplace, she needs to speak to her supervisor or someone else in a position of authority. A supervisor or management personnel will need to be informed to authorize a leave or to implement safety accommodations. If the assailant is a co-worker or supervisor and the victim wishes to preserve her right to file a sexual harassment claim under Title VII (discussed in Section II, below), she will usually need to follow the employer's protocol for reporting an incident of workplace harassment. Help the victim practice how she is going to disclose her situation, so that she is prepared for the discussion. The more clearly she can describe her circumstances, her emotional state and her proposal for assistance, the more likely it is that the employer will appreciate the situation and respond in a constructive manner.

[PRACTICE TIP: Review the victim's employee handbook and any other workplace policies for applicable grievance and complaint procedures. If the assailant will be prosecuted in a criminal or school disciplinary case, or if the victim may sue the perpetrator civilly, it is important to remember that any statements the victim makes (verbally or in writing) may later be testified to at the perpetrator's hearing. Also, the victim should be advised of what communications are privileged and how the privilege is waived, so that her privacy rights are not inadvertently compromised or her privileges waived.]

If a victim decides to disclose the sexual assault to her employer, address her privacy concerns directly with the employer. Request that the employer keep the victim's disclosure confidential. Although in most cases there is no guarantee that the employer will respect a victim's confidentiality, it is important to ask. It is also best to put this request in writing to establish proof that the request was made. However, be aware that if the assailant is a co-worker, supervisor or vendor, the employer may not be able to promise absolute confidentiality, but will likely promise to tell only those who have a reason or need to know about the situation. Victims should also be aware that an employer may decide to disclose the situation to specific people to ensure the victim's safety and the security of the workplace. For example, the employer may need to inform security guards or receptionists if the victim has articulated a specific threat to the workplace from the perpetrator. It is important that the victim ask the employer to inform her if additional people are notified about her situation. This avoids surprise and/or embarrassment if one of these people approaches the victim and speaks to her about the threat.

E. Safety at Work

1. Safety Planning

If the perpetrator works for the same employer as the victim, can gain access to the building (*e.g.*, as a customer or a member of the public), or knows where the victim works, he may continue to pose a threat to her at her workplace. If it becomes apparent that safety at work is a concern for the victim, help her develop a safety plan that includes travel to, from and at the work site. (*See* Chapter 7 on Safety and Protection Orders for additional safety information.) As part of this safety plan, a victim may want to request a change to her phone number at work, a relocation of her workspace to a more secure area, or a change in her work schedule, work site or work assignment. She may also request that that her name and telephone number be removed from automated phone directories, that her work status not be disclosed to outside callers, and that calls from the assailant (if his identity is known) be screened or transferred to security personnel. If the company is large enough to have a corporate security department, security officers can assist with the

development of a workplace safety plan.⁵⁸³ Note that some of these steps require the victim to disclose the assault to her employer to explain why she is requesting these changes. As noted above, it is important to explore whether she feels comfortable disclosing to her employer, and to discuss the possible risks of termination if she is an at-will employee.

[PRACTICE TIP: Attorneys should have at least a basic understanding of safety planning for sexual assault survivors, especially because a victim may never seek services from more than one advocate or provider. At the same time, lawyers and advocates should partner to ensure that victims develop appropriate safety plans that can be modified to meet their evolving safety needs. If your client has safety concerns, do not ignore or minimize her fears even if you do not agree with her risk assessment. Safety is a paramount consideration, and appropriate safety planning is victim centered and directed. Do not conclude an appointment with your client without engaging in at least some basic safety planning. At a minimum, ensure that the victim knows how to access a local sexual assault crisis center safely.]

If your client has a protection order, help her determine whether it should include her workplace. Discuss with her whether to provide a copy of the order and, if available, the perpetrator's photo to her employer. If she is pursuing criminal charges, encourage her to consider whether it is safe to contact the police and the prosecuting attorney about any threats at the workplace.

⁵⁸³ For a discussion of employment issues for victims of domestic violence, see Robin R. Runge, Marcellene E. Hearn, & Spenta R. Cama, *Domestic Violence as a Barrier to Employment*, 34 CLEARINGHOUSE REV. 552, 560 (Jan.-Feb. 2001).

2. Workplace Protection Orders

Some states have passed statutes enabling employers to obtain workplace protection orders to prevent violence, stalking or harassment of their employees.⁵⁸⁴ In some states, an employer may apply for a protection order on behalf of itself.⁵⁸⁵ In other jurisdictions, an employer may seek an order only on behalf of the threatened employee.⁵⁸⁶ These statutes also vary in terms of what the employer must demonstrate to obtain a workplace protection order. Some jurisdictions require only that the employer demonstrate the employee received a credible threat of violence;⁵⁸⁷ others require evidence that the employee is in imminent danger and will suffer irreparable harm unless a protection order is issued.⁵⁸⁸ For the employer to seek such an order, the victim will

⁵⁸⁴ See *State Law Guide: Workplace Restraining Orders*, www.legalmomentum.org/issues/vio/restraining.pdf (last visited Jul. 21, 2006) (listing states that have proposed or enacted statutes that allow employers to obtain workplace protection orders).

⁵⁸⁵ See, e.g., **Arizona**: ARIZ. REV. STAT. § 12-1810 (2006) (“An employer or an authorized agent of an employer may file a written verified petition with a magistrate, justice of the peace or superior court judge for an injunction prohibiting workplace harassment.”); **Georgia**: GA. CODE ANN. § 34-1-7 (2005) (“Any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to have been carried out at the employee’s workplace, may seek a temporary restraining order and an injunction on behalf of the employer prohibiting further unlawful violence or threats of violence by that individual at the employee’s workplace or while the employee is acting within the course and scope of employment with the employer.”); **Tennessee**: TENN. CODE ANN. § 20-14-102 (2006) (“Any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to have been carried out at the employee’s workplace, may seek a temporary restraining order and an injunction on behalf of the employer prohibiting further unlawful violence or threats of violence by that individual at the employee’s workplace or while the employee is acting within the course and scope of employment with the employer.”).

⁵⁸⁶ See, e.g., **California**: CAL. CIV. PROC. CODE § 527.8 (2006) (“Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.”); **Indiana**: IND. CODE § 34-26-6-6 (2006) (“An employer may seek a temporary restraining order or injunction on behalf of an employee to prohibit further violence or threats of violence by a person if: (1) the employee has suffered unlawful violence or a credible threat of violence from the person; and (2) the unlawful violence has been carried out at the employee’s place of work or the credible threat of violence can reasonably be construed to be carried out at the employee’s place of work by the person.”); **North Carolina**: N.C. GEN. STAT. § 95-261 (2006) (“An action for a civil no-contact order may be filed as a civil action in district court by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee’s workplace.”).

⁵⁸⁷ See, e.g., **Indiana**: IND. CODE § 34-26-6-6 (2006) (“An employer may seek a temporary restraining order or injunction on behalf of an employee to prohibit further violence or threats of violence by a person if: . . . the employee has suffered unlawful violence or a credible threat of violence from the person . . .”).

⁵⁸⁸ See, e.g., **California**: CAL. CIV. PROC. CODE § 527.8 (2006) (“Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order in accordance with subdivision (a)

need to disclose some information about the assault or threat of violence against her. As discussed above, disclosing the assault compromises some victim privacy and may also expose her to possible termination if she is an at-will employee. In addition, while some laws require that the employer consult with the victim before seeking an order, other states permit the employer to obtain an order without notice to or consent from the victim.⁵⁸⁹ If the victim works in a jurisdiction where her consent is not required, submit a request in writing to the employer asking that he consult with your client before pursuing such an order. At a minimum, ask the employer to notify your client if an order is requested. If appropriate, include in the request that the victim may be at increased risk for retribution by the perpetrator if the employer obtains a protection order, and thus prior notice is important for safety and planning purposes. (As a practical matter, it may be impossible for the employer to apply for or secure an order without the victim's cooperation, regardless of what the law requires.⁵⁹⁰)

of Section 527, if the plaintiff also files an affidavit that, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the defendant, and that great or irreparable harm would result to an employee.”); **Colorado:** COLO. REV. STAT. § 13-14-102 (2006) (“If the judge or magistrate finds that an imminent danger exists to the employees of a business entity, he or she may issue a civil protection order in the name of the business for the protection of the employees. An employer shall not be liable for failing to obtain a civil protection order in the name of the business for the protection of the employees and patrons.”); **Georgia:** GA. CODE ANN. § 34-1-7 (2006) (“Upon filing a petition with the court for an injunction pursuant to this Code section, the petitioner may obtain a temporary restraining order if the petitioner also files an affidavit which, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the respondent and that great or irreparable harm shall result to an employee if such an injunction is not granted.”).

⁵⁸⁹ See, e.g., **Arizona:** ARIZ. REV. STAT. § 12-1810 (2006) (“When the employer has knowledge that a specific person or persons is [sic] the target of harassment . . . , the employer shall make a good faith effort to provide notice to the person or persons that the employer intends to petition the court for an injunction against workplace harassment.”); **Nevada:** NEV. REV. STAT. § 33.260 (2006) (“If an employer has knowledge that a specific person is the target of harassment in the workplace and the employer intends to seek a temporary or extended order for protection against such harassment, the employer shall make a good faith effort to notify the person who is the target of the harassment that the employer intends to seek such an order.”); **North Carolina:** N.C. GEN. STAT. § 95-261 (2006) (“The employee that is the subject of unlawful conduct shall be consulted prior to seeking an injunction under this Article in order to determine whether any safety concerns exist in relation to the employee’s participation in the process. Employees who are targets of unlawful conduct who are unwilling to participate in the process under this Article shall not face disciplinary action based on their level of participation or cooperation.”).

⁵⁹⁰ See, e.g., **Georgia:** GA. CODE ANN. § 34-1-7 (2006) (“Upon filing a petition with the court for an injunction pursuant to this Code section, the petitioner may obtain a temporary restraining order if the petitioner also files an affidavit which, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the respondent and that great or irreparable harm shall result to an employee if such an injunction is not granted.”); **Nevada:** NEV. REV.

Enforcement of workplace protection order enforcement varies from state to state. Generally, sanctions for a violation include a fine and/or contempt of court. Violations sometimes result in criminal charges, too.⁵⁹¹

[CHECK YOUR STATE’S LAW: Look at your state or local statute if you are practicing in a jurisdiction that provides for a workplace protection order to determine the process for obtaining and enforcing a protection order. In some jurisdictions, the forms are available online.⁵⁹²]

[PRACTICE TIP: It is very important to explain to your client that a workplace protection order only applies to the workplace and will not keep the perpetrator away from her at any other place, such as home, general public places and school.]

3. Sexual Assault and Workplace Policies

A growing number of employers have implemented domestic violence policies to address the needs of victims of violence in the workplace. A few employers have specifically expanded these protections to include victims of sexual violence and/or stalking. You should determine whether the victim’s employer has such a policy and, if so, what recourse and procedures exist.

STAT. § 33.270 (2006) (“A verified application is accompanied by an affidavit that contains specific facts which clearly show that immediate and irreparable injury, loss or damage will result to the employer, an employee of the employer while the employee performs the duties of his employment or a person who is present at the workplace of the employer before the person who allegedly committed the harassment or his attorney can be heard in opposition”); **Rhode Island**: R.I. GEN. LAWS § 28-52-2 (2005) (“Proof (by affidavit in an *ex parte* hearing, or by a preponderance of the evidence in any other hearing) . . .”).

⁵⁹¹ See, e.g., **Colorado**: COLO. REV. STAT. § 13-14-102 (2006) (“A person failing to comply with *any* order of the court issued pursuant to this section shall be found in contempt of court or may be prosecuted for violation of a civil protection order”); **Nevada**: NEV. REV. STAT. § 33.280 (2006) (“A temporary or extended order for protection against harassment in the workplace may: . . . Include the following statement: ‘WARNING [¶] This is an official court order. If you disobey this order, you may be arrested and prosecuted for the crime of violating an order for protection against harassment in the workplace and any other crime that you may have committed in disobeying this order.’”); **North Carolina**: N.C. GEN. STAT. § 95-269 (2006) (“A violation of an order entered pursuant to this Article is punishable as contempt of court.”).

⁵⁹² For example, sexual assault protection order forms are available online in Alaska and Washington State. See Alaska Court System Family Law Help Center, www.state.ak.us/courts/shcdv.htm#0c (last visited Feb. 21, 2007); Court Forms: Sexual Assault, www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=65 (last visited Feb. 21, 2007).

[PRACTICE TIP: Workplace policies may be found in employee handbooks, on an employer’s website, postings at the job site, in a union contract, etc. If the employer’s policy only addresses domestic violence, try to request that the employer extend the policy to victims of sexual assault. The employer may need to be educated about why the reasons for a domestic violence policy (*e.g.*, how violence impacts a victim’s ability to work, societal costs and harms, benefits to the employer, a victim’s need to retain her employment income and benefits) also apply to victims of sexual assault. Collaboration with a rape crisis program may be critical to this process.]

4. Other Workplace Policies or Programs

If the assault occurred at the workplace, review with your client any materials the employer has provided to its employees regarding discrimination and harassment, including statements or publications regarding workplace safety, codes of conduct and workplace ethics. These policies may be in an employee handbook, in written policies provided to employees, in postings in the workplace, or on the employer’s intranet. Federal and state laws require employers to provide employees with certain information about their rights to work in a safe environment that is free of discrimination, including sexual harassment (*see* discussion below).⁵⁹³ It is important to determine whether the employer failed to adhere to a particular procedure it promised to follow in response to the employee’s complaint(s) of inappropriate conduct, or whether the employer failed to distribute a policy against sexual harassment in the workplace, as required by federal (and

⁵⁹³ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; 29 C.F.R. § 1604.11; EEOC.gov, *Policy Guidance on Current Issues of Sexual Harassment*, available at www.eeoc.gov/policy/docs/currentissues.html (last visited Jul. 21, 2006) (“An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and nonsupervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to ‘encourage victims of harassment to come forward’ and should not require a victim to complain first to the offending supervisor. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.” (Citation omitted.)).

many state) laws. Such policy violations may increase your leverage when negotiating with the employer for accommodations or assistance for your client.

The victim's employer may also offer its employees benefits in addition to the leave options discussed below. For example, the employer may have an Employee Assistance Program that allows the employee to obtain free and confidential counseling, or it may offer other resources through its insurance policies or other programs that could assist your client.

[PRACTICE TIP: Review your client's personnel manual to determine what, if any, benefits are offered and what protocols the employee must follow to access those benefits. Also assess the privacy implications of accessing Employee Assistance Programs as communications to determine whether communications to their staff or counselors are protected by privilege.]

F. Leave as a Benefit

There is no federal or state law that requires an employer to provide employees with paid vacation or leave time. Indeed, approximately 40% of the U.S. workforce currently receive no paid time off from work.⁵⁹⁴ For sexual assault victims, this lack of paid leave can be especially burdensome, as they often need time away from work to address the medical, mental health, and legal effects of the sexual assault.

A victim and her lawyer or advocate should review the victim's employment benefits (including any pertinent collective bargaining agreement provisions, if the victim is a union member) to determine whether the victim is entitled to any paid or unpaid time off work. Such benefits may include paid or unpaid sick leave, vacation days, holiday time, "personal" days, a leave bank, and short- and long-term disability leave. A victim will need to follow the appropriate procedure to avail herself of the relevant leave time. By using these benefits, a victim may be able to protect her job status and even receive her wages while taking time off of work to address the physical, emotional and legal

⁵⁹⁴ Vicki Lovell, Inst. for Women's Pol'y Res., *No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave* (May 2004), www.iwpr.org/pdf/B242.pdf.

repercussions of an assault. Be aware, however, that employers are not required to provide these benefits, and even if they do a victim may not be entitled to use them if she has not met the employer's requirements such as length of employment, position, probationary period, hours worked, or staffing capacity.

[PRACTICE TIP: If your client has a personnel manual, employee contract or collective bargaining agreement, review it to determine whether her employer offers any benefits specifically for victims of violence. Even if sexual assault is not specifically mentioned, these documents will provide you with valuable information about the vacation, sick time or leave possibilities that may allow your client to attend court proceedings, heal from injuries due to the violence, relocate or take other steps to help recover from the assault.⁵⁹⁵]

Many victims are ultimately fired for excessive absenteeism related to the assault, or for taking time off but not following the employer's rules for requesting and using such leave. (Some victims simply stop communicating with their employer after an assault, which leads to workplace sanctions.) Other victims quit their jobs out of frustration or embarrassment, assuming that they will miss too much time from work and will be fired anyway, or out of a concern that they would have to disclose the assault to access the leave available.

When an employee has been sexually assaulted by someone not affiliated with her employment and the assault did not occur at her place of work, your first step is to assist the victim in identifying the accommodations she may need to help her return to or retain her work, if she chooses to remain employed. If the victim was sexually assaulted at work or by a co-worker or supervisor, your first step is to advise her that she may be able to pursue remedies available to her under anti-discrimination law. (*See* Section III, below, for a discussion of federal and state anti-discrimination laws.)

⁵⁹⁵ *See, e.g.*, A.B.A. COMM'N ON DOMESTIC VIOLENCE, A GUIDE FOR EMPLOYERS: DOMESTIC VIOLENCE IN THE WORKPLACE 36-38 (1999) (discussing how an employee who is a victim of domestic violence may use her sick time, flextime, and other leave options).

G. The Unionized Workplace⁵⁹⁶

There are three primary sources for the rules governing unions and employers in a unionized workplace: (1) Collective Bargaining Agreements; (2) federal labor acts; and (3) state labor acts. (Where federal and state law overlap, state laws are generally preempted.⁵⁹⁷)

1. Collective Bargaining Agreements

Collective Bargaining Agreements (CBAs) establish the rules most frequently used and understood in unionized workplaces. CBAs are legally binding private agreements negotiated by a union and employer. The terms of a CBA may provide greater protection for sexual assault victims than what the state and federal law require. The terms of the CBA may not diminish employees' rights and remedies unless there is a "clear and unmistakable" waiver of the right by the party⁵⁹⁸ and the waiver does not affront public policy.⁵⁹⁹

CBAs will differ from union to union and employer to employer. An employer is not specifically required to bargain over issues related to sexual assault, domestic violence or general criminal conduct arising in the workplace. An attorney could argue,

⁵⁹⁶ The Victim Rights Law Center thanks Prof. Michael C. Duff, J.D., Assistant Professor of Law at University of Wyoming College of Law (and former NLRB attorney), for the generous use of his materials for this section.

⁵⁹⁷ See generally U.S. CONST. art. VI; Cornell University Law School's Legal Information Institution, Collective Bargaining and Labor Arbitration: An Overview, www.thecre.com/fedlaw/legal89/collective_bargaining.htm (last visited Feb. 21, 2007). Preemption is unusually broad in labor relations law because the courts have found that states are also preempted from legislating in areas that Congress deliberately left unregulated, creating a broad zone of "field" preemption. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). What this means to the practitioner in a unionized environment is that you will seldom encounter state labor relations law unless you are dealing with a public employee.

⁵⁹⁸ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (finding that union's waiver of its members' ADA claims must be clear and unmistakable); *General Elec. Co. v. Nat'l Labor Relations Bd.*, 414 F.2d 918, 923 (4th Cir. 1969) ("[W]e recognize the established canon that while a union may waive its statutory right to information relevant to the processing of grievances, only clear and unmistakable language will warrant a conclusion that waiver was intended."). For a summary of case law and trends in this area, see 20 WILLISTON ON CONTRACTS § 55:30 (4th ed. July 2004).

⁵⁹⁹ *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 842 P.2d 938 (Wash. 1992); see also 20 WILLISTON ON CONTRACTS § 55:30 ("[A] collective bargaining agreement that would allow discrimination against persons with disabilities in contravention of the Americans with Disabilities Act or state antidiscrimination statutes is unenforceable.")

however, that if requested by the union an employer must bargain regarding sexual assault policies because such policies impact worker safety, and safety on the job is a term and condition of employment.⁶⁰⁰ Unfortunately, not all unions have bargained over these issues vigorously or successfully, and/or not all employers have agreed to have them incorporate into a CBA.⁶⁰¹

Some CBAs have extremely broad grievance provisions permitting the filing of grievances in connection with almost any workplace dispute. A grievance related to sexual assault, domestic violence or general criminal conduct would easily be covered by such a broad grievance policy. Other grievance provisions are more narrowly drafted and permit the filing of a grievance only in connection with a dispute that is cognizable under the CBA. If a victim who is a union member seeks to file a grievance, the first person she needs to speak with is the union steward.⁶⁰²

2. Federal Labor Acts: The NLRA and the LMRDA

The second major source of rules governing the unionized workplace is the National Labor Relations Act (NLRA).⁶⁰³ The NLRA applies to most private, non-agricultural employees and employers engaged in some aspect of interstate commerce.⁶⁰⁴

⁶⁰⁰ See, e.g., *A.K. Steel Corp.*, 324 N.L.R.B. 173, (1997); *Northside Ctr. for Child Dev.*, 310 N.L.R.B. 105 (1993).

⁶⁰¹ There may be legitimate reasons for the absence of protections in a CBA, but a practitioner should be alert to the possibility that such provisions were deliberately omitted from the CBA because of a history of unlawful sexual conduct in the particular workplace. The absence of such protections may alert a bargaining unit member of the possibility of an avenue for redress. Of course, if the employer and union have bargained over these issues and, as a result, incorporated certain rights into a collective bargaining agreement, a victim may be able to file a grievance under those collective bargaining agreement provisions over any sexual assault occurring in the workplace. Further, unionized individuals who think they have been sexually harassed may file employment discrimination charges with the Equal Employment Opportunity Commission within 180 days from the alleged discriminatory act, or with a state human relations commission within the time limits established by the relevant state.

⁶⁰² AFL-CIO, available at www.aflcio.org/yourjobeconomy/rights/rightsatwork/sexharass.cfm.

⁶⁰³ 29 U.S.C. §§ 160 *et seq.* (2005); see also 29 U.S.C.A. § 185 (2005) (regulating suits by and against labor organizations).

⁶⁰⁴ NLRB's jurisdiction does not include certain individuals or employers. Under the NLRA, the term "employer" does not include the United States or any State government, or any political subdivision of either, or any Government corporation or Federal Reserve Bank, or any employer subject to the Railway Labor Act. The NLRA also provides that, under the Act, the term "employee" includes any employee *except* the following: (1) agricultural laborers; (2) domestic servants; (3) any individual employed by his or her parent or spouse; (4) independent contractors; (5) supervisors; (6) individuals employed by an employer subject to

The NLRA protects, from retaliation by their employers, employees who choose to engage in “protected concerted activity.” The NLRA also protects bargaining unit members from arbitrary discrimination by their union in matters of workplace representation. Decisions and regulations of the National Labor Relations Board (NLRB) interpret the Act, and are binding upon the union and the employer subject to judicial review by federal Courts of Appeal and the United States Supreme Court.⁶⁰⁵

The filing of a grievance must be distinguished from the filing of a charge with the NLRB. A “charge” alleges a violation of the NLRA.⁶⁰⁶ An employee may file a charge with the NLRB at any point within 180 days from the occurrence of alleged an unfair labor practice (and is thereafter referred to as a “charging party”). However, if a statutory charge *could* also be filed as a contractual grievance under the terms of an existing CBA, then the NLRB will “defer” the charge to the grievance-arbitration procedure set out in the CBA, even if the charging party would prefer NLRB to grievance arbitration procedures.⁶⁰⁷ Examples of a grievance might include an employer’s refusal to allow a victim to: change her shift so she can carpool with colleagues; transfer to a work site that the perpetrator is not aware of; bring a pet to work for safety and emotional security; take a “personal” or “flex” day without advance notice; or use sick time to change her residence, meet with a lawyer, or pursue safety precautions such as changing her locks or installing window barriers. Even if a charge is deferred, the NLRB will

the Railway Labor Act; and (7) government employees (including employees of the Federal Reserve Bank, city, town, school district, etc.).

⁶⁰⁵ NLRB decisions can be found in any major legal database (*e.g.*, Lexis or Westlaw). More information is available at www.nlr.gov/nlr/home/default.asp.

⁶⁰⁶ 29 U.S.C. § 160. In most instances the charge must allege that the actions of an employer or a union have been motivated by an employee’s union or protected concerted activity. This probably will not be the typical situation you will encounter. Following the filing of a charge at an NLRB regional office, the regional director will, at the conclusion of a 6-8 week investigation, either issue a complaint or dismiss the charge. If a complaint issues, a trial-like hearing is held at the regional office which is overseen by a Federal Administrative Law Judge. There are ongoing and potentially lengthy appeal rights from the ALJ’s decision. From a practitioner’s perspective, this is not a good procedural route for prompt action.

⁶⁰⁷ *United Techs. Corp.*, 268 N.L.R.B. 557 (1984) (“It is fundamental to the concept of collective bargaining that the parties . . . are bound by the terms of their contract. . . . [I]t is contrary to the basic principles of the Act [NLRA] for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.”)

review an arbitration award, or an agreement made by the Union and the Employer prior to arbitration, if requested to do so by the charging party.⁶⁰⁸

If your client has an employment contract, or if she is a member of a union and thus governed by a CBA, review the contract and the CBA to identify possible remedies and courses of action. Her recourse and remedies will vary depending on the specific terms of the CBA. Advocating for a unionized employee who is the victim of sexual assault may be more complex if the assailant is also a unionized employee. The NLRB will seldom involve itself in a union's internal deliberations (*e.g.*, whether a union should conduct a serious internal investigation or pursue a grievance when both the victim and the assailant are union members). But the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), administered by the Department of Labor, broadly affords union members due process rights in connection with internal union matters.⁶⁰⁹ Importantly, the LMRDA may, in limited instances, provide attorneys' fees to prevailing parties who establish non-compliance with statutory, intra-union due process rights.⁶¹⁰ In contrast, under the NLRA a union has almost no financial liability for any unlawful conduct in which it engages.⁶¹¹

[PRACTICE TIP: Even the mention of a LMRDA suit may quickly get the attention of a union that has been reluctant to act on a victim's complaint. Review the CBA to determine the grievance procedures. Pay close attention to any time limits for filing the grievance and any sections in the CBA that might preclude attorney representation at a grievance hearing. Even if you are prohibited from representing the client in the grievance proceeding, you may still be able to offer

⁶⁰⁸ *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

⁶⁰⁹ One example is that union members in good standing have the right to attend union meetings, presumably including a meeting in which the internal union discipline of a member-assailant is under discussion. Labor Management Reporting and Disclosure Act of 1959 (LMRDA) (Griffin-Landrum Act), 29 U.S.C. §§ 411 *et seq.* (2006).

⁶¹⁰ 29 U.S.C. § 412 (2006).

⁶¹¹ However, in some instances the Union may incur liability under Title VII for its inactivity in the presence of racially and sexually discriminatory conduct directed at its member by the involved employer or the employer's employees. *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650 (7th Cir. 2006).

guidance and advice behind the scenes; you should be prepared to assist the client if, after the grievance procedure is complete, the client wishes to file a charge with the NLRB or pursue a claim under state or federal anti-discrimination law.]

III. MAINTAINING THE VICTIM'S EMPLOYMENT

The employment rights and remedies available to a sexual assault victim will often vary depending on where the assault occurred and who perpetrated the assault. Specifically, the job-related recourse available to a victim may depend on whether the assault occurred on or off the work site, was committed by a colleague, supervisor, workplace manager, company guest or invitee, or stranger, and what state and federal laws govern the employer.

A. Remedies Specific to Assaults Committed on Work Premises or in the Course of Employment

When an assault has occurred at work or during the course of employment, specific state and/or federal remedies may be available to the victim because of where or why the assault occurred. These remedies may include benefits authorized pursuant to state and federal anti-discrimination laws, occupational health and safety programs, and workers' compensation schemes.

1. Sexual Harassment Claims Pursuant to Anti-Discrimination Laws

Although sexual assault is not specifically mentioned in most federal and state employment anti-discrimination laws, these laws may nevertheless provide valuable protections to victims of sexual assault. Sexual harassment is a form of sex discrimination.⁶¹² A sexual assault committed on the job by a supervisor or co-worker may create a sufficiently severe or pervasive hostile environment to constitute sexual

⁶¹² See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

harassment for which an employer may be held liable.⁶¹³ A victim sexually assaulted by another employee may be entitled to protection by anti-discrimination laws if her employer fails to take action following an assault at work or retaliates against her for reporting it. The “work site” may include a location within the workplace, at a company building, or on any other premises controlled by the employer (such as a parking structure, exercise facility, training camp, etc.). It can also constitute sexual harassment when the perpetrator is a non-employee, such as a customer or vendor, and the employer knew or should have known that the harassment (or assault) involved the workplace but nevertheless failed to take prompt and appropriate remedial action.⁶¹⁴

[PRACTICE TIP: Sometimes a survivor experiences harassment or discrimination at the worksite by other employees who learn that she is a sexual assault survivor. If this is the case, a survivor may wish to: (a) inform the person(s) harassing or discriminating against her that their behavior is inappropriate and unwelcome; (b) talk to a supervisor, manager, or other person in authority and advise them of the problem; (c) inform the shop steward or business agent, if she is a union member; and (d) maintain a log in which she records any incidents of harassment or discrimination. (For privacy reasons, the victim should not use the log as a personal diary or journal. The log may be subpoenaed or submitted as evidence in a civil or criminal case. Entries should be brief and

⁶¹³ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (involving a sexual assault by supervisor with whom employee had a prior social relationship); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 911 (9th Cir. 2001), *amended and superseded*, 301 F.3d 958 (9th Cir. 2002) (involving a serial sexual assault on one occasion during business trip); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995), *abrogated by Burlington Indus.*, *supra* note 612, and by *Faragher*, *supra* note 612; *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (“[E]very sexual assault committed in the employment setting is also discrimination based on the employee’s sex.”); *Jones v. United States Gypsum*, 81 Fair Empl. Prac. Cas. (BNA) 1695 (N.D. Iowa Jan. 21, 2000) (upholding sexual harassment claim based on assault in genital area, including discussion citing cases).

⁶¹⁴ See, e.g., *Little*, *supra* note 613; *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (involving unwanted touching and offensive comments by co-workers); *Menchaca v. Rose Records, Inc.*, 67 Fair Empl. Prac. Cas. (BNA) 1334 (N.D. Ill. Apr. 3, 1995) (involving harassment by employer’s customer); *Otis v. Wyse*, No. 93-2349-KHV, 1994 WL 566943 (D. Kan. Aug. 24, 1994) (involving harassment by co-worker); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025-26 (D. Nev. 1992) (involving harassment by employer’s customer). See also 29 C.F.R. § 1604.11 (EEOC guidelines confirming employers’ liability for sexual harassment by co-workers and customers).

straightforward, documenting the date, time, and location of the incident, specific statements made or actions taken, witnesses, if any, and the victim’s response.)]

Title VII of the Civil Rights Act of 1964 (Title VII)⁶¹⁵ provides the statutory framework for pursuing anti-discrimination remedies (including Title VII employment, Title IX education, and Title VIII housing sex discrimination contexts).⁶¹⁶ Title VII prohibits discrimination against an employee in hiring, setting terms and conditions of employment and firing based on sex (including pregnancy), race, national origin, religion and color by an employer with 15 or more employees.⁶¹⁷ As noted above, sexual harassment is a prohibited form of sex discrimination.⁶¹⁸

Under Title VII, there are two kinds of sexual harassment: (1) “tangible employment action” (what used to referred to as “*quid pro quo*”) sexual harassment, where submission to, or rejection of, the sexual advance, request or conduct is used as a basis for employment decisions affecting the individual; and (2) “non-tangible employment action” (previously referred to as a “hostile work environment”) sexual harassment, where the unwelcome conduct of a sexual nature by co-workers or supervisors is so severe or pervasive that it creates an abusive work situation. Under either scheme, an employer may be liable under Title VII if the employer failed to exercise reasonable care to prevent and correct the behavior, so long as the employee did not unreasonably fail to take advantage of corrective opportunities provided by the employer.⁶¹⁹

State or local anti-discrimination laws may provide employees with broader protections than those afforded by Title VII.

⁶¹⁵ 42 U.S.C. § 2000e *et seq.* (2004).

⁶¹⁶ For example, Title IX, which prohibits sex discrimination in education draws heavily from Title VII laws and jurisprudence. *See* Chapter 9 for a more detailed overview of the reliance on Title VII precedents in the education context.

⁶¹⁷ 42 U.S.C. § 2000e (2004). Certain employers, including members of Congress and religious institutions, are exempt from Title VII.

⁶¹⁸ *Burlington Indus.*, *supra* note 612); *Faragher*, *supra* note 612.

⁶¹⁹ 42 U.S.C. § 2000e-2(a)(1) (2004).

[CHECK YOUR STATE’S LAW: In some jurisdictions, an employee may pursue a claim of sexual harassment against the employer for harassment by a co-worker even if the employer neither knew nor should have known of the harassment, if the person who perpetrated it had supervisory authority.⁶²⁰]

In recent years, some states and cities have begun to pass legislation specifically prohibiting discrimination against victims of sexual assault. For example, Illinois and New York City laws specifically prohibit employers from discriminating against employees because they are victims of domestic or sexual violence.⁶²¹ These state and local laws allow for more straightforward claims than claims under Title VII because they do not have to rely on sex discrimination theories. Their respective laws prohibit employers from refusing to hire, discharging, or penalizing a victim based on her actual or perceived status as a victim of sexual assault, or because of the perpetrator’s conduct.⁶²² They also require employers to grant a victim’s request for “reasonable accommodations.” Such accommodations might include transfer to an alternate work site, staggered work shifts, desk relocation, or authorized leave time. An employer may ask the victim to provide evidence that she is a victim and thus entitled to the law’s protections.

[CHECK YOUR STATE’S LAW: Review legislation in your jurisdiction to determine whether there are additional employment protections for victims of sexual assault. Also, remain current with any changes to federal law that would provide similar protections. For example, the Security and Financial Empowerment Act has been proposed in two previous sessions of Congress but not yet passed.⁶²³ If it passes, the SAFE Act will provide victims of sexual assault leave without penalty to make court appearances, seek legal assistance and

⁶²⁰ See *College-Town v. Mass. Comm’n Against Discrimination*, 508 N.E.2d 587 (Mass. 1987).

⁶²¹ 820 ILL. COMP. STAT. § 180/1-999; N.Y.C. CODE § 8-107.1.

⁶²² 820 ILL. COMP. STAT. § 180/30; N.Y.C. CODE § 8-107.1.

⁶²³ In the 2005-2006 session, the bill was submitted as the Security and Financial Empowerment Act, H.R. 3185, 109th Cong. (2005) and as the SAFE Act, S.1796, 109th Cong. (2005).

conduct safety planning. The SAFE Act will also allow victims in every state to access unemployment benefits if they are fired or forced to leave their job as a result of the violence.⁶²⁴]

If your client is being sexually harassed or assaulted at work and wants the employer to address the problem, it is critical that she provide notice to the employer of the behavior. Preferably, the notice will be submitted in writing to ensure that the employer has an opportunity to rectify the situation, and that your client preserves her legal rights. Help your client craft this document, as it may later be used in a civil or criminal trial or administrative hearing.

Typically, the employee handbook will specify the person to whom a report should be submitted. Be sure to discuss with your client the privacy implications of filing such a report. Discuss the benefits and burdens of reporting the incident to the employer so that the victim is making an informed decision about how to proceed. (*See* Chapter 3 on victim privacy.) If the victim decides to notify her employer, provide her with information about how to file a discrimination claim with the U.S. Equal Employment Opportunity Commission (EEOC) or the analogous state agency. A victim may want to file an EEOC or state discrimination complaint if the employer does not respond to her complaint or terminates her in retaliation for filing it.

[PRACTICE TIP: A charge of discrimination must be filed with the EEOC within 180 days of the alleged violation, or within 300 days if the charge is also covered by a state or local anti-discrimination law. EEOC timelines are distinct from the statutes of limitation for state or federal claims. If the survivor is suing a government entity, additional notice or filing deadlines may apply. Review your state, county and local regulations concerning the time limit for filing a discrimination complaint because the time limit requirement may be tolled under certain circumstances (*e.g.*, where the complainant filed a grievance pursuant to a collective bargaining agreement).]

⁶²⁴ *See* www.govtrack.us for bill tracking information and for a summary of the proposed legislation.

2. Workers' Compensation

The workers' compensation program is a state-run system of workplace insurance in which every employer is required to participate. In all states, it provides the exclusive remedy for employees who experience injuries in the course of employment. To be compensable, however, the injury must not be "personal" (*i.e.*, directed at a particular employee for reasons unrelated to the victim's employment).⁶²⁵ An injured worker is barred from pursuing a private tort suit for injuries sustained at work if workers' compensation benefits are awarded.⁶²⁶ (A victim may be able to pursue a private suit even if a workers' compensation claim is denied, depending on what grounds the claim was denied.) If awarded, workers' compensation benefits may include temporary wages, wages for work missed, reimbursement for medical expenses, and protection from retaliation by the employer for filing the compensation claim.

[PRACTICE TIP: Workers' compensation laws do not bar tort claims against third parties such as independent contractors, vendors and customers.⁶²⁷]

There are several key considerations that are applicable to workers' compensation claims in every jurisdiction. These include: (a) timely notice; (b) continued employment; (c) documentation of the injury; and (d) injury in the course of employment.

a. Timely Notice

First, attorneys must be cognizant of timing and statute of limitation issues. Most jurisdictions require that the victim give proper notice of the assault and injury to her

⁶²⁵ See Eliot J. Katz, Annotation, *Workers' Compensation: Sexual Assaults as Compensable*, 52 A.L.R. 4th 731 (1987) (noting that compensation requires that the injury arise out of and in the course of employment; some courts have interpreted this to mean "that where the sexual assault is directed at the employee for a motive that is personal to the assailant, and not because she happens to be an employee, the assault is unrelated to and does not arise out of the employment").

⁶²⁶ See 6 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 100.01 (15th ed. 2006).

⁶²⁷ LARSON, *supra* note 626, § 110 ("When compensable injury is the result of a third person's tortious conduct, all statutes preserve a right of action against the tortfeasor, since the compensation system was not designed to extend immunity to strangers.").

employer within a specified period of time.⁶²⁸ Constructive notice is sufficient. Notice then triggers the employer's duty to provide information on workers' compensation insurance. A workers' compensation claim must then be filed within the statutory time limits.⁶²⁹

b. Continued Employment

Second, a victim must maintain her job to be eligible for workers' compensation.⁶³⁰ If she voluntarily leaves her employment, she will be deemed ineligible for workers' compensation benefits based on the prior assault. This requirement applies even if she leaves employment as a direct result of the assault or as a result of her employer's response to her complaint,

c. Adequate Documentation

Third, to continue to receive compensation on a long-term basis, a victim will be required to provide documentation of the assault and her injuries. Typically, employers require updated reports from a physician or therapist evaluating the victim stating that treatment is still needed or the injury persists.⁶³¹ If an employer chooses to, it may discontinue compensation after a period of time. To continue receiving compensation, the victim may have to pursue an administrative appeal process. This process is usually governed by a state Workers' Compensation Board or Department of Labor Relations.⁶³² The appeal process may result in long-term compensation payments. The documentation

⁶²⁸ See 6 LARSON, *supra* note 626, § 126.01 ("Notice of injury, the first step in compensation procedure is normally given to the employer. The period is comparatively short; it may be 'forthwith' or 'as soon as practicable' or a specified period of weeks or months.").

⁶²⁹ See 6 LARSON, *supra* note 626, § 126.01 ("The compensation claim itself is normally filed with the administrative agency. The period is usually one or two years, and the purpose is the same as that of any limitations statute: to protect the employer against claims too old to be successfully investigated and defended.").

⁶³⁰ See C.J.S. *Workers Compensation* § 141 ("When the employment relationship ceases to exist, whether temporarily or permanently, the liability of the employer under the compensation act ceases to exist.").

⁶³¹ See C.J.S. *Workers Compensation* § 918 ("A workers' compensation claimant may be required to submit to a medical examination when requested by the employer, the commission, the board or the court.").

⁶³² See 6 LARSON, *supra* note 626, § 131.01 ("In all states, some kind of provision is made for reopening and modifying awards.").

and evaluation necessary for the appeal will be the same as the documentation submitted in the initial claim.

d. Injured in the Course of Employment

Fourth, and finally, a victim may have a workers' compensation claim even if the sexual assault occurred outside of the course of employment, if the victim is unable to work due to injury from the assault that combines with or exacerbates a separate injury that occurred "in the course of" and "arising from" her employment. For example, if an injury from the sexual assault exacerbated a pre-existing work-related injury that was demonstrable in her medical records (but perhaps was not severe enough to prevent her from working), and as a result of this new injury the victim now cannot work, she may be covered by the workers' compensation program.

In most states, as long as the work-related injury contributes to the total work incapacity in a "significant" or "substantial" manner, the victim may be covered by workers' compensation during the period of her work incapacity (so long as the work-related injury continues to contribute to the victim's incapacity).⁶³³ However, where the jurisdiction's eligibility standard requires that the work-related injury contributes more than a "significant" or "substantial" amount to the victim's inability to work, recovery on this basis may be denied.⁶³⁴

[PRACTICE TIP: Do not concede the extent to which the victim's incapacity arises from or is due to a work-related injury or incapacity until you know all of the victim's work injury history. Workers' compensation benefits may be the victim's only or best source of financial support, and a claim should not be jeopardized without expert advice. The perpetrator may be without resources and judgment proof but that is seldom true of the employer.]

⁶³³ See generally Robin Cheryl Miller, *Cause of Action to Recover Workers' Compensation Benefits for Injury Resulting From Aggravation or Acceleration Of, or Combination With, Pre-Existing Condition*, 2 CAUSES OF ACTION 2D 251 (2005).

⁶³⁴ *Id.*

Finally, before agreeing to accept workers' compensation benefits, a victim must understand all of her options for recovering lost wages and medical costs, including crime victim compensation funds and civil claims against the employer (*see* Chapter 13, Financial Remedies). As discussed above, workers' compensation is a complete remedy, and in most states recovery will bar the victim from obtaining additional damages from the employer or funding from another source.

[CHECK YOUR STATE'S LAW: Attorneys should carefully check the statutes and case law in their jurisdiction to ascertain the limitations of workers' compensation benefits. Depending on the law in your jurisdiction, it may be possible for the victim to file a workers' compensation claim in addition to seeking tort remedies, as long as ultimately she elects only a single remedy.⁶³⁵]

3. Occupational Safety and Health Laws and Tort Actions

When sexual assault occurs at the workplace, employers may face liability for failing to take adequate measures to keep the workplace safe. Inadequate safety measures can trigger an employer's obligations under the general duty clause of the Occupational Safety and Health Act (OSHA).⁶³⁶ Obtaining a workplace protection order may be an effective way for the employer to improve the safety of the workplace and meet its duties under state and federal Occupational Safety and Health Acts.⁶³⁷ In addition, employers

⁶³⁵ *See* 6 LARSON, *supra* note 625, § 103.02 ("Aside from the judge-made law allowing the employee choice of remedy, some compensation statutes give employees who have suffered injury as a result of the employer's intentional tort the explicit right to choose between tort and compensation remedies. In other states, the employee does not need to make such an election, but can pursue both remedies simultaneously. Among those jurisdictions, at least one allows the employee to keep both the compensation and any damages awarded, but others require that an offset be taken to avoid double recovery."). *See also Jones v. VIP Dev. Co.*, 472 N.E.2d 1046 (Ohio 1984) (holding that application for and receipt of workers' compensation benefits does not preclude common-law action for damages for intentional tort).

⁶³⁶ 29 U.S.C. § 651 (2004).

⁶³⁷ *See* 29 U.S.C. § 654 (2006); OSHA.gov, *see also Standard Interpretations: 12/18/2003 Elements Necessary for a Violation of the General Duty Clause*, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24784 (last visited Jul. 21, 2006) (OSHA guidelines state that the "General Duty Clause is used only where there is no standard that applies to the particular hazard." Four elements are needed to prove a violation of the General Duty Clause: the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; the hazard was recognized; the hazard was causing or was likely to cause death or serious physical harm; and there was a feasible and useful method to correct the hazard.).

may face liability under tort law negligence theories if employees commit acts of violence in the workplace, or if the employer had reason to know an employee presented the risk of committing an act of violence and the employer failed to take prompt and effective preventive action.⁶³⁸

[PRACTICE TIP: Attorneys receiving Legal Assistance to Victim (LAV) funding through the U.S. Department of Justice's Office on Violence Against Women may not pursue tort-based remedies because of restrictions imposed by the funding source. However, all attorneys and advocates should be able to identify when to make a referral to a tort attorney and should work to preserve potential tort claims for their clients.]

B. Protection and Benefits That May Be Available to Any Victim

There are a variety of employment-related remedies that may be available to a victim of sexual assault regardless of where, or by whom, the assault was committed. These include protection orders that enhance workplace safety, authorized leave under federal or state family and medical leave acts, the Americans with Disabilities Act, and various state crime victims' rights and violence against women leave laws.

1. Protection Orders

Protection orders can be effective tools to help secure a victim's safety at work. If the victim qualifies for a civil protection order, or if there is a criminal case pending against the assailant and a criminal stay-away order is issued as a condition of his release, the court may be able to order the perpetrator to stay away from the victim's place of work, and even to stay a certain number of feet from the victim no matter where she is. If the assailant is also an employee, a protection order may make an employer more likely to transfer, discipline or discharge the assailant rather than risk the assailant violating the order. However, the order cannot force the employer to take action against a perpetrator-

⁶³⁸ For a comprehensive discussion of potential tort claims in the context of sexual assault, please see Jessica E. Mindlin & Liani J.H. Reeves, *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Assault Survivors* (2005), www.lclark.edu/org/ncvli/objects/L&C77576_civilbook.pdf.

employee unless the employer is a party to the case. *See* Chapter 7, on Safety, for additional information regarding Protection Orders.

[CHECK YOUR STATE’S LAW: Review your state’s civil protection order statutes to determine whether your client qualifies for an order and what remedies are available to protect her while at work.]

2. Federal, State and Local Leave Laws

Federal, state, and local laws require some employers to provide leave to eligible employees, such as victims of sexual assault, victims of crime, and other qualifying employees (*e.g.*, those eligible for leave under a state or federal family medical leave act). An overview of some of these laws is provided below.

a. The Federal Family Medical Leave Act⁶³⁹

The federal Family and Medical Leave Act (FMLA) is the only federal law that provides employees job-guaranteed leave from work.⁶⁴⁰ Although the FMLA does not expressly mention sexual assault or sexual violence, it may offer an eligible employee job-protected leave to heal from mental or physical injuries caused by the sexual violence if the injuries rise to the level of a “serious health condition.”⁶⁴¹

The FMLA provides up to 12 weeks of unpaid, job-guaranteed leave every 12 months to employees who: work for an employer with 50 or more employees; have worked for the employer for at least 12 months and worked at least 1,250 hours in the previous 12-month period; and require leave to heal from a “serious health condition.”⁶⁴² Federal regulations define a “serious health condition” as an illness, injury, impairment or physical or mental condition that involves:

⁶³⁹ 29 U.S.C. §§ 2601, 2612 (2004); 29 C.F.R. §§ 825.100 *et seq.* (1995).

⁶⁴⁰ *Id.*

⁶⁴¹ *See Municipality of Anchorage v. Gregg*, 101 P.3d 181 (Alaska 2004) (finding that domestic violence victim that has established that she has a “serious health condition” may be eligible for FMLA leave).

⁶⁴² 29 U.S.C. §§ 2601 *et seq.* (2004); 29 C.F.R. § 825.100. The FMLA also allows for leave for a parent or guardian to care for his or her child, spouse, or parent who is healing from injuries. (The Act provides for other family-related leaves which are not relevant to this discussion.)

(1) inpatient care in a hospital, hospice or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care; or

(2) continuing treatment by a health care provider.⁶⁴³

An employee who qualifies for FMLA leave is entitled to:

1. unpaid leave (though she may be able to use vacation, sick or other accrued paid leave);
2. continuation of health care benefits, if she received them previously;⁶⁴⁴
3. job protection (in that she cannot be fired for taking the leave);⁶⁴⁵
and

⁶⁴³ 29 C.F.R. § 825.114 (1995). More specifically, 29 C.F.R. 825.114 (a) states that: “A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (A) Treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition.

A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment [examples omitted].”

⁶⁴⁴ 29 U.S.C. § 2614.

⁶⁴⁵ 29 U.S.C. § 2615.

4. restoration to the same or an equivalent position at the end of the leave.⁶⁴⁶

An employee who requests leave under the FMLA may be required by her employer to provide a completed Certification of Health Care Provider.⁶⁴⁷ This certification need not include a specific reference to the sexual assault. It is sufficient if the health care provider attests that the leave is required because the employee has a “serious health condition.”⁶⁴⁸

[PRACTICE TIP: Providing a health care provider’s certification is likely to implicate a survivor’s privacy. For this reason, it may be in a survivor’s best interest to ask a physician other than her regular treating physician for the necessary certification letter so as to avoid waiver of provider-patient confidentiality.]

If your client has a sexual assault-related injury, and she has missed work because she is incapacitated due to the injury, she may qualify for job-guaranteed leave under the FMLA. This may help her avoid a termination due to missing days of work.⁶⁴⁹ However, it is important to note that she may not take her leave to relocate, to see her attorney, or if her illness or injury does not rise to the level of a serious health condition.⁶⁵⁰ This statute is enforced by the U.S. Department of Labor, and an employee who believes her rights under the FMLA have been violated must either file a complaint with the U.S. Department of Labor or file a complaint in federal court within two years of the violation.⁶⁵¹

⁶⁴⁶ 29 U.S.C. § 2614.

⁶⁴⁷ The form is available to download from the US Department of Labor web site at www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf.

⁶⁴⁸ 29 U.S.C. § 2613.

⁶⁴⁹ See *Municipality of Anchorage*, *supra* note 641.

⁶⁵⁰ 29 C.F.R. § 825.200 (2006) (“An employee’s FMLA leave entitlement is limited to . . . the following reasons: (1) The birth of the employee’s son or daughter, and to care for the newborn child; (2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (3) To care for the employee’s spouse, son, daughter, or parent with a serious health condition; and, (4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.”)

⁶⁵¹ 29 U.S.C. § 2617.

[PRACTICE TIP: If a victim anticipates the need for leave from work, help her determine if she qualifies for FMLA leave. There is a strong preference under the FMLA for advance notice to employer, so she should provide as much notice to the employer as possible. If she has already missed work, help her determine whether her absence qualifies as FMLA leave and what, if anything, she needs to say or give to her employer to ensure coverage. If a victim has been fired for missing work, and she wants her job back, determine if her absence was FMLA-eligible or protected. It may be best to offer to help the victim draft her demand letter or to write it yourself, if you believe the law was violated and your client consents.]

b. State Leave Laws

i. Medical Leave

If your client does not qualify for FMLA leave either because she does not have an injury or illness that qualifies as a serious health condition, she does not work for a covered employer or she has not worked for her employer for the requisite amount of time, she may still be eligible for leave under state law. Almost half of the states have family or medical leave laws that provide unpaid, job-guaranteed time off for a variety of reasons related to illness including to heal from the employee's serious health condition.⁶⁵² Many of the state laws have less onerous eligibility requirements than the FMLA.

[CHECK YOUR STATE'S LAW: If your client is not eligible for FMLA leave, determine the requirements for medical leave in your state. Even if your client is eligible for FMLA, assess your state's leave laws to determine whether she is entitled to more leave than that allowed under

⁶⁵² See www.nationalpartnership.org for additional information about state leave laws.

the federal law. Keep in mind that most medical leave will be unpaid.

However, some states may offer paid leave in some circumstances.^{653]}

ii. Leave for Victims of Crime

Approximately one-half the states have “crime victim leave laws” that give victims of crimes, including sexual assault, time off to go to criminal court if subpoenaed to appear as a witness or victim of a crime.⁶⁵⁴ An employer may be subject to a fine or commit a criminal offense by denying a victim her statutorily required leave.⁶⁵⁵ A few states allow courts to impose restitution or job reinstatement as a criminal penalty for a leave violation.⁶⁵⁶ Other statutes authorize victims to pursue a civil cause of action

⁶⁵³ For instance, under California’s State Disability Insurance program, eligible workers who suffer lost wages due to non work-related illness or injury are entitled to partial wage-replacement and short-term benefits. CAL. UNEMP. INS. CODE. §§ 2625-2626 (2006). *See also* **Hawaii**: Hawaii Temporary Disability Insurance Law, HAW. REV. STAT. §§ 392 *et seq.* (2006); **New Jersey**: Temporary Disability Benefits Law, N.J. STAT. ANN. §§ 43:21-25 *et seq.* (2006) ; **New York**: Disability Benefits Law, N.Y. WORKERS’ COMP. LAW §§ 2001 *et seq.* (2006); **Rhode Island**: Rhode Island Temporary Disability Insurance Act, R.I. GEN. LAWS §§ 28-39 *et seq.* (2005).

⁶⁵⁴ *See, e.g.*, **Alabama**: ALA. CODE § 15-23-81 (prohibiting the discharge or discipline of an employee who is a victim for responding to a subpoena to testify in a criminal proceeding or participating in necessary preparation for a criminal proceeding); **Arkansas**: ARK. CODE ANN. § 16-90-1105 (prohibiting discharge or retaliation against an employee participating at the prosecutor’s request in preparation for a criminal justice proceeding or for attendance at the proceeding); **California**: CAL. LAB. CODE §§ 230-230.1 (2004) (mandating leave for sexual assault victims to obtain protection orders or any judicial relief related to her health, safety, or welfare and prohibiting the discharge of, discrimination of, or retaliation against any employee who takes time off for medical treatment, counseling, sexual assault crisis services, safety planning, or relocation); **Colorado**: COLO. REV. STAT. § 24-34-402.7 (2004) (requiring certain employers to allow for up to three days off for sexual assault victims to obtain protection orders, obtain medical care and counseling, relocate, or seek legal assistance); **Delaware**: DEL. CODE ANN. tit. 11, § 9409 (prohibiting discharge or discipline of an employee responding to a subpoena, participating in trial preparation, or attending trial proceedings as reasonably necessary to protect victim’s interests); **Illinois**: 820 ILL. COMP. STAT. § 180/20 (requiring that certain employers allow up to twelve weeks leave for sexual assault victims to seek medical assistance or counseling, obtain services from a victim services organization, participate in safety planning and relocation, or seek legal assistance, including civil legal proceedings); **Wisconsin**: WIS. STAT. § 103.87 (requiring paid leave be granted for victim to respond to a subpoena).

⁶⁵⁵ *See, e.g.*, **Massachusetts**: MASS. GEN. LAWS ch. 258B, § 3; MASS. GEN. LAWS ch. 268, § 14B (punishing violation as a misdemeanor with a fine and/or imprisonment); **Michigan**: MICH. COMP. LAWS §§ 780.762, .790 (punishing violation as a misdemeanor punishable by imprisonment for not more than 90 days or a fine); **South Carolina**: S.C. CODE § 16-3-1550 (punishing violation as contempt of court); **Utah**: UTAH CODE § 78-11-26 (punishing violation as criminal contempt with a fine or imprisonment); **Virginia**: VA. CODE ANN. § 18.2-465.1 (punishing violation as a misdemeanor).

⁶⁵⁶ *See, e.g.*, **Minnesota**: MINN. STAT. § 611A.036 (punishing violation as a misdemeanor and providing for job reinstatement and payment of back wages, as appropriate); **Wisconsin**: WIS. STAT. § 103.87 (punishing violation as a misdemeanor with a fine or full restitution, including reinstatement or back pay).

against an employer, including actual and punitive damage claims.⁶⁵⁷ Finally, some states may offer victims a more streamlined administrative process for pursuing complaints against an employer.⁶⁵⁸

[CHECK YOUR STATE’S LAW: Visit www.legalmomentum.org/issues/vio/timeoff.pdf for a list of and links to the jurisdictions that have passed such laws.]

iii. Leave for Victims of Sexual Assault

Recently enacted state laws may be another source of job guaranteed leave for victims of sexual assault. Some states have adopted laws that provide support specifically designed with the victim’s needs in mind.

In the 1990s, victim advocates began working with workers’ rights advocates, welfare advocates, and women’s right groups to pass state laws providing targeted leave for victims of domestic violence and sexual assault. As a result, some states now have statutes and/or ordinances providing unpaid, job-guaranteed leave or leave as a reasonable accommodation specifically to victims of domestic violence and sexual assault/violence.⁶⁵⁹ The laws vary, but generally they provide leave for victims to: (1) go

⁶⁵⁷ See, e.g., **Alaska**: ALASKA STAT. § 12.61.017 (creating a civil action for a victim to obtain compensatory or punitive damages against her employer); **Colorado**: COLO. REV. STAT. § 24-34-402.7 (2004) (damages or equitable relief); **Connecticut**: CONN. GEN. STAT. § 54-85b (reinstatement, damages, and reasonable attorneys fees); **Florida**: FLA. STAT. § 92.57 (lost wages and benefits, punitive damages, and reasonable attorneys fees); **Hawaii**: HAW. REV. STAT. § 621-10.5 (lost wages and benefits, reinstatement without loss of position, seniority or benefits, damages, and attorneys fees); **Iowa**: IOWA CODE § 915.23 (actual damages, court costs, reasonable attorneys’ fees, reinstatement, and cease and desist orders against employer).

⁶⁵⁸ See, e.g., **California**: CAL. LAB. CODE § 230 (2004) (allowing victim to file a complaint with Division of Labor Standards Enforcement of the Department of Industrial Relations for damages, reinstatement, and reimbursement for lost wages and benefits); **Illinois**: 820 ILL COMP. STAT. § 180/35 (damages, reinstatement, and attorneys’ fees).

⁶⁵⁹ See, e.g., **California**: CAL. LAB. CODE § 230 (2004) (“An employer may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child.”); **Colorado**: COLO. REV. STAT. § 24-34-402.7 (2004) (“Employers shall permit an employee to request or take up to three working days of leave from work in any twelve-month period, with or without pay, if the employee is the victim of domestic abuse . . . , the victim of stalking . . . , [or] the victim of sexual assault”); **Hawaii**: HAW. REV. STAT. §§ 378-72 (2004) (allowing leave for victims to, *inter alia*, “[s]eek medical attention for the employee or employee’s minor child to recover from physical or psychological injury or disability caused by domestic or sexual violence”); **Illinois**: § 820

to civil court to obtain protection for themselves and their family; (2) seek medical attention; (3) obtain services from a sexual assault crisis program; and (4) obtain legal assistance.⁶⁶⁰ These laws prohibit employers from discriminating against employees who are victims of sexual assault and prohibit employers from penalizing victims for exercising their rights to the leave. If an employer is found to have failed to provide leave under these laws, and thus illegally fired a victim, she may be entitled to reinstatement and back pay.⁶⁶¹

[PRACTICE TIP: These laws allow the employer to require that a victim requesting leave provide certification of her qualifying need for leave. As discussed above, providing such certification by the victim's treating physician may constitute a waiver of confidentiality. To avoid possible waiver, consider obtaining certification from a different doctor.]

[CHECK YOUR STATE'S LAW: Visit www.legalmomentum.org/issues/vio/timeoff.pdf for a listing of states that have enacted employment leaves that include victims of sexual assault.]

c. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits most employers from discriminating against an employee because she has a qualified disability as defined in the statute.⁶⁶² The disability must amount to "a physical or mental impairment" that "substantially limits" her ability to perform "one or more major life activities," such as caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing,

ILL. COMP. STAT. § 180/1-180/45 (2004) ("An employee who is a victim of domestic or sexual violence or has a family or household member who is a victim of domestic or sexual violence whose interests are not adverse to the employee as it relates to the domestic or sexual violence may take unpaid leave from work to address domestic or sexual violence . . ."); **Maine:** ME. REV. STAT. tit. 26, § 850 (2004) ("An employer must grant reasonable and necessary leave from work, with or without pay, for an employee to: A. Prepare for and attend court proceedings; B. Receive medical treatment or attend to medical treatment for a victim who is the employee's daughter, son, parent or spouse; or C. Obtain necessary services to remedy a crisis caused by domestic violence, sexual assault or stalking.").

⁶⁶⁰ See, generally, *supra* note 96.

⁶⁶¹ *Id.*

⁶⁶² 42 U.S.C. § 12102. The ADA prohibits employers with 15 or more employees from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

walking, working or learning.⁶⁶³ Yet, she still must be able to perform the essential functions of her job with or without some form of reasonable accommodation. “Reasonable accommodation” is defined as a modification or adjustment to a workplace or job to enable an employee with a qualifying impairment to perform the basic duties of her job.⁶⁶⁴

The ADA may require an employer to take affirmative steps to provide a reasonable accommodation to an employee with a disability as long as the accommodation does not impose an “undue hardship” on the employer.⁶⁶⁵ If an employee with a qualifying impairment works for a covered employer and performs the basic duties of her job, she may not be harassed, fired, demoted, or otherwise discriminated against in the terms and conditions of her employment based upon her disability or impairment.⁶⁶⁶

[CHECK YOUR STATE’S LAW: Each state also has anti-discrimination statutes that prohibit discrimination based on disability, some of which provide more protection than the ADA to employees, such as covering smaller employers.]

Sometimes, as a result of a sexual assault, a victim will have an impairment that qualifies her as disabled under the ADA or the state equivalent, and entitles her to a reasonable accommodation from her employer. For example, a sexual assault victim may have developed severe Posttraumatic stress disorder (PTSD) that substantially impairs her ability to focus and work after it gets dark, because the assault occurred in a parking garage at night, but she is able to function without problem during the day. In such a case, a reasonable accommodation might be to seek a work schedule modification that allows her to arrive at and leave from work before dark. Another type of accommodation that a sexual assault victim might need is a reasonable period of leave for a designated period of time for the specific purpose of allowing the employee to obtain psychological counseling and rest. If the leave is for a reasonable duration that will not pose an undue

⁶⁶³ 29 C.F.R. § 1630.2.

⁶⁶⁴ 42 U.S.C. § 12111(8)(i); 29 C.F.R. § 1630.2(o).

⁶⁶⁵ 42 U.S.C. § 12111(b)(5)(A).

⁶⁶⁶ 42 U.S.C. § 12112 (2006); 29 C.F.R. § 1630.

hardship on the employer, the employer may be obligated to provide it.⁶⁶⁷ The determination of whether an accommodation constitutes an “undue hardship” is a fact-based determination, and will depend on the size of the business, number of employees, nature of the workers’ job, the flexibility of employer, etc.

An employee with a disability may seek a reasonable accommodation by making her employer aware of her disability, but there is no standard language for making this request.⁶⁶⁸ Once an employee expresses a desire to be accommodated, her employer has a duty to initiate and engage in an interactive process to uncover potential accommodations even in situations where the employee did not request a specific accommodation.⁶⁶⁹ There are specific confidentiality provisions related to medical information provided to an employer in the process of self-disclosing a disability or requesting an accommodation.⁶⁷⁰ (See Chapter 12 on Representing Sexual Assault Victims With Disabilities and Chapter 5 on Privacy for additional information regarding disability claims and privacy concerns.)

[PRACTICE TIP: You should be aware of any pre-assault disabilities the victim may have had, as well as any accommodations she may have previously requested from her employer, especially any that the employer granted. Reviewing her personnel file can help with this analysis.]

⁶⁶⁷ 42 U.S.C. § 12112(5)(a).

⁶⁶⁸ See EEOC.gov, *The ADA: Your Employment Rights as an Individual With a Disability: More Questions and Answers About the ADA*, available at www.eeoc.gov/facts/ada18.html (last visited Jul. 23, 2006) (“If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.”).

⁶⁶⁹ See EEOC.gov, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, available at www.eeoc.gov/policy/docs/accommodation.html#5.

⁶⁷⁰ See 42 U.S.C. § 12112(d); EEOC.gov, *The ADA: Your Employment Rights as an Individual With a Disability: Can an Employer Require Medical Examinations or Ask Questions About a Disability?*, www.eeoc.gov/facts/ada18.html (last visited Jul. 23, 2006 (“The results of all medical examinations must be kept confidential, and maintained in separate medical files.”)).

IV. FINANCIAL ASSISTANCE FOR VICTIMS WHOSE EMPLOYMENT HAS TERMINATED

As discussed above, an employee whose employment was wrongfully terminated may be able to achieve reinstatement by using FMLA or anti-discrimination statutes and case law. If the employee is not reinstated, and she is no longer employed, the following programs may be important sources of financial support. (*See* Chapter 13, Financial Compensation Concerns for Sexual Assault Victims, for additional information about public benefits programs.)

A. Unemployment Insurance Benefits

Unemployment insurance (UI) is a state-run social insurance program that provides temporary income to workers who lose their jobs through no fault of their own.⁶⁷¹ Unemployment insurance is funded primarily through employers' payroll tax deductions.⁶⁷² Federal law provides guidance but leaves most decisions under the control of participating states, including monetary earnings requirements, eligibility requirements for benefits, disqualification provisions and penalties, and benefit levels and duration.

State UI eligibility requirements generally require that claimants: (1) have worked for a certain period of time; (2) have earned a minimum amount of wages in the last 12 months; (3) be able and available to work; and (4) seek work while collecting unemployment insurance benefits.⁶⁷³ A claimant is typically disqualified from UI benefits for: (1) leaving work voluntarily without good cause; (2) having been fired for

⁶⁷¹ *See* C.J.S. *Social Security and Public Welfare* § 282 (2006).

⁶⁷² *See* Federal Unemployment Tax Act, 26 U.S.C.A. §§ 3301-3311 (2006).

⁶⁷³ *See, e.g., Arizona:* ARIZ. REV. STAT. § 23-771 (2005) ("An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual: 1. Has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the department prescribes. 2. Has made a claim for benefits in accordance with § 23-772.3. Is able to work. 4. Is available for work. 5. Has been unemployed for a waiting period of one week. . . . Has been paid wages for insured work during the individual's base period equal to at least one and one-half times the wages paid to the individual in the calendar quarter of the individual's base period in which such wages were highest, and the individual has been paid wages for insured work in one calendar quarter of the individual's base period equal to at least one thousand five hundred dollars."); **California:** CAL. UNEMP. INS. CODE § 1253 (2006) (setting eligibility requirements as including a properly filed claim for benefits, registered and reported for work at a public employment office, able and available for work); **Indiana:** IND. CODE § 22-4-14-1 (2005) (setting eligibility requirements as including completing a claim for benefits, registering for work at an employment office, and being physically and mentally able to work.).

reasons amounting to misconduct; or (3) refusing to work without good cause.⁶⁷⁴ Benefit amounts vary from state to state, generally are capped at a certain dollar amount, and may be paid for up to two years. Benefit amounts are calculated using a “base period” which reflects the applicant’s income from employment in the last 12 months preceding the application.⁶⁷⁵

[PRACTICE TIP: In general, undocumented workers are not eligible for benefits because they are not considered able and available to work due to their undocumented status.⁶⁷⁶]

Until recently, it was unclear whether victims of domestic violence, sexual assault or stalking were eligible for unemployment insurance if they were fired or forced to quit their jobs because of the violence. As of this writing, 26 states and the District of Columbia have amended their Unemployment Insurance Codes to clarify that victims of domestic violence are eligible for benefits.⁶⁷⁷ Only a minority of states, however,

⁶⁷⁴ See, e.g., **Delaware**: DEL. CODE ANN. tit. 19, § 3314 (2006) (making grounds for disqualification include leaving work without a good cause, refusal to accept a suitable employment opportunity, or seeking or receiving benefits under the laws of another state); **Massachusetts**: MASS. GEN. LAWS ch. 151A, § 25 (2005) (making grounds for disqualification include failing to comply with the registration and filing requirements of the commissioner, failing to apply for suitable employment when notified to do so, or participating in an unauthorized labor dispute);

New Hampshire: N.H. REV. STAT. § 282-A:32 (2005) (making grounds for disqualification include voluntarily leaving work without good cause, being discharged for work-related misconduct, or failing to apply for “acceptable and suitable work when directed to do so”).

⁶⁷⁵ See, e.g., **Nebraska**: NEB. REV. STAT. § 48-626 (2005) (“Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) twenty-six times his or her benefit amount or (2) one-third of his or her wages in the employment of each employer per calendar quarter of his or her base period”); **Wyoming**: WYO. STAT. § 27-3-303 (2006) (“[T]he weekly benefit amount for an eligible individual is four percent (4%) of his total wages payable for insured work in that quarter of his base period in which his wages were highest computed to the next lower multiple of one dollar (\$1.00).”).

⁶⁷⁶ All state statutes require that a person be *able* and *available* to work to qualify for benefits. Undocumented status acts as an automatic bar under the statutory provisions. See, e.g., **Oregon**: OR. REV. STAT. § 657.184 (2006) (“Benefits shall not be paid on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted to the United States for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of section 212(d)(5) of the Immigration and Nationality Act.”); See also **Connecticut**: CONN. GEN. STAT. § 31-227 (2005).

⁶⁷⁷ **Arizona**: ARIZ. REV. STAT. § 23-771 (2005); **California**: CAL. UNEMP. INS. CODE § 1256 (2006); **Colorado**: COLO. REV. STAT. § 8-73-107 (2005); **Connecticut**: CONN. GEN. STAT. § 31-236 (2005); **Delaware**: DEL. CODE ANN. tit. 19, § 3314 (2006); **District of Columbia**: D.C. CODE § 51-131 (2006);

specifically include protections for victims of *sexual* (or stalking) violence.⁶⁷⁸ Even if sexual assault is not covered by a separate provision in the UI code, the definition of “domestic violence” in the jurisdiction’s UI code may encompass acts of sexual violence outside the intimate partner context.

[PRACTICE TIP: Even if the domestic violence law does not appear to extend to victims of sexual assault, you may be able to argue successfully that benefits should be authorized for all such victims because the same policy interests apply.]

In states where the UI provisions specifically reference a victim’s eligibility, it is important to be familiar with what evidence, if any, the statute requires a claimant submit to prove her victim status.⁶⁷⁹ Several domestic violence based unemployment insurance statutes do not provide guidance on how to establish that a claimant was fired or quit because of domestic violence. UI provisions specific to sexual assault are even more uncommon; a claimant may be left to navigate the UI process with little guidance.⁶⁸⁰ At the same time, a victim may be disqualified for benefits if she is unable to “prove” that she is a victim of such violence.

Kansas: KAN. STAT. § 44-706 (2005); **Illinois:** 820 ILL. COMP. STAT. § 405/601 (2005); **Indiana:** IND. CODE § 22-4-15-1 (2005); **Maine:** ME. REV. STAT. tit. 26, § 1193 (2005); **Massachusetts:** MASS. GEN. LAWS ch. 151A, § 25 (2005); **Minnesota:** MINN. STAT. § 268.095 (2005); **Montana:** MONT. CODE ANN. § 39-51-2111 (2005); **Nebraska:** NEB. REV. STAT. § 48-628.01 (2005); **New Hampshire:** N.H. REV. STAT. § 282-A:32 (2005); **New Jersey:** N.J. STAT. § 43:21-5 (2006); **New Mexico:** N.M. STAT. § 51-1-7 (2006); **New York:** N.Y. LAB. LAW § 593 (2006); **North Carolina:** N.C. GEN. STAT. § 96-14 (2005); **Oklahoma:** OKLA. STAT. tit. 40, § 3-106 (2005); **Oregon:** OR. REV. STAT. § 657.176 (2006); **Rhode Island:** R.I. GEN. LAWS § 28-44-17.1 (2006); **South Dakota:** S.D. CODIFIED LAWS § 61-6-13.1 (2006); **Texas:** TEX. LAB. CODE § 207.046 (2005); **Washington:** WASH. REV. CODE § 50.20.050 (2005); **Wisconsin:** WIS. STAT. § 108.04 (2005); **Wyoming:** WYO. STAT. § 27-3-311 (2006).

⁶⁷⁸ See, e.g., WASH. REV. CODE §§ 50.20.050, 50.20.100, 50.20.240, & 50.29.020 (2003). See also OR. REV. STAT. § 657.176 (2006).

⁶⁷⁹ See, e.g., **Montana:** MONT. CODE § 39-51-2111 (2005) (requiring an order of protection, the police record, medical documentation, or other documentation or certification of sexual assault); **New Jersey:** N.J. STAT. § 43:21-5 (2006) (requiring a restraining order, the police record, medical documentation or other certification of domestic violence); **Texas:** TEX. LAB. CODE § 207.046 (2005) (requiring a protection order documenting family violence, the police record, and a physician’s statement or other medical documentation).

⁶⁸⁰ See, e.g., **Arizona:** ARIZ. REV. STAT. § 23-771 (2005) (requiring that domestic violence be documented without specifying the nature or source of the documentation required); **Colorado:** COLO. REV. STAT. § 8-73-107 (2005) (containing no guidelines on how to establish status as a victim); **New York:** N.Y. LAB. LAW § 593 (2006) (same).

[PRACTICE TIP: If your client quit her job or was fired for sexual assault related reasons, you and your client will want to decide together what information can and should be provided in support of the UI claim. Documentation submitted may include a court protection order, police report, statements from colleagues, and any other “proof” of her victim status. Because the information submitted may become part of a public record, discuss privacy issues with the victim.]

If the victim resides in a jurisdiction that does not specifically reference benefits to victims of sexual, domestic or stalking violence, UI benefits may still be available based on other, more general, UI provisions. For example, an unemployed victim may be eligible for benefits if she can demonstrate that she quit her job for good cause, “just cause,” or another justifiable reason.⁶⁸¹

In many jurisdictions, a claimant is not eligible for UI benefit payments until a claim is filed.⁶⁸² In addition, there may be a one- or two-week waiting period once

⁶⁸¹ See **Alaska**: ALASKA ADMIN. CODE tit. 8, § 85.095 (2006) (“Good cause for voluntarily leaving work under AS 23.20.379(a)(1) includes . . . leaving work for reasons that would compel a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave work; the reasons must be of such gravity that the individual has no reasonable alternative but to leave work . . .”); **Hawaii**: HAW. CODE R. § 12-5-47 (2006) (“Generally, a leaving or quitting for good cause where it is for a real, substantial, or compelling reason, or a reason which would cause a reasonable and prudent worker, genuinely and sincerely desirous of maintaining employment, to take similar action. Such a worker is expected to try reasonable alternatives before terminating the employment relationship.”); **Ohio**: OHIO. REV. CODE § 4141.29 (2006); JUR. 3d *Unemployment Compensation* § 59 (Cum. Supp. 2006) (“The determination of whether just cause exists for unemployment compensation claimant to quit her job necessarily depends upon the unique factual considerations of the particular case.”); **Pennsylvania**: 43 PA. CONS. STAT. § 802(b) (2005) (requiring “necessitous and compelling nature” to show good cause); **South Carolina**: S.C. CODE § 41-35-125 (allowing benefits if claimant voluntary leaves or is discharged because of domestic violence); **Utah**: UTAH CODE § 35A-4-405 (“A claimant may not be denied eligibility for benefits if the claimant leaves work under circumstances where it would be contrary to equity and good conscience to impose a disqualification. . . . Using available information from employers and the claimant, the division shall consider for the purposes of this chapter the reasonableness of the claimant’s actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.”); **Virginia**: *Va. Employment Comm’n v. Fitzgerald*, 452 S.E.2d 692 (Va. 1995) (interpreting the good cause requirement of VA. CODE § 60.2-618 (2006) as requiring an employee to take those steps that could be reasonably expected of a person desirous of retaining his employment before hazarding the risks of unemployment.” (internal quotation marks omitted)).

⁶⁸² See, e.g., **California**: CAL. UNEMP. INS. CODE § 1253 (2006) (requiring a claim for benefits in the week benefits are desired to be eligible for benefits that week); **Nebraska**: NEB. REV. STAT. § 48-628.01 (2005) (requiring the commissioner of the department of labor to find that a claimant made a claim for benefits in accordance with the statutory and regulatory requirements before that claimant is eligible for benefits); **Oklahoma**: OKLA. STAT. tit. 40, § 2-203 (2005) (“An unemployed individual must file an initial claim for

eligibility is established but before payments begin. Therefore, it is important that the victim file her claim as quickly as possible to ensure maximum UI benefit coverage.

B. Social Security Disability Insurance & Supplemental Security Income

If your client suffers from a total disability as a result of the sexual assault, she may be eligible for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). While eligibility for these programs does not require a victim to have left or lost her employment due to the assault, only victims (and other individuals) who cannot work due to a disability are eligible for SSI and SSDI benefits.

Both SSI and SSDI are federally administered programs that provide assistance to people with disabilities. To be eligible for either program, the victim must demonstrate that she is totally disabled, meaning that she cannot perform the work she did before, cannot adjust to other work because of her medical condition, and her disability is expected to last for at least one year or to result in death.

[PRACTICE TIP: To be eligible for SSI or SSDI, a victim must meet the very strict definition of disability. No benefits are payable for a partial or for short-term disability.]

While SSI benefits are based on the victim's financial need, SSDI benefits are based solely on the Social Security payroll taxes the victims has paid over her working career. To determine whether your client may be eligible for either assistance program and to apply online, access the Social Security Administration's website at www.socialsecurity.gov/. (See Chapter 12 on Representing Sexual Assault Victims With Disabilities for additional information about these programs.) Receipt of SSDI benefits may disqualify a victim from unemployment, welfare, or other need-based public benefits.

unemployment benefits by calling an Oklahoma Employment Security Commission claims representative in a Commission Call Center, by completing the required forms through the Internet Claims service provided by the Commission, or by completing all forms necessary to process an initial claim in a local office of the Commission or any alternate site designated by the Commission to take unemployment benefit claims.”).

C. Wrongful Termination in Violation of Public Policy

Most states recognize an exception to at-will employment for “wrongful termination (or discharge) in violation of public policy.”⁶⁸³ The public policy exception to at-will employment is both narrow in scope and extraordinarily variable from state to state. Generally, to state a claim for wrongful termination in violation of public policy, a plaintiff must establish the following five key elements: (1) existence of an important public policy; (2) employee was engaged in conduct favored by that public policy; (3) employer knew or believed the employee was engaged in a protected activity; (4) retaliation was a motivating factor in the dismissal; and (5) employee’s discharge would undermine that public policy.⁶⁸⁴

The critical inquiry in considering the doctrine’s potential applicability is identifying the precise “public policy” violated by the discharge.⁶⁸⁵ States vary widely in terms of what may constitute a valid source of “public policy.”⁶⁸⁶ However, most states require the articulated public policy to be clear, fundamental, and firmly established in statutory, constitutional, or perhaps regulatory or federal law.⁶⁸⁷ Furthermore, even where

⁶⁸³ The first reported case recognizing wrongful termination in violation of public policy was *Petermann v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (involving an employee asked to perjure himself before a legislative investigative committee). Since then, most states have recognized the doctrine as a common law exception to the at-will doctrine. However, courts in a few states have declined to recognize the exception, instead leaving the issue to the legislature. See, e.g., *Howard v. Wolff Broad. Corp.*, 611 So. 2d 307, 313 (Ala. 1992) (declining to recognize public policy exception at-will employment); *Blair v. Physicians Mut. Ins. Co.*, 496 N.W.2d 483 (Neb. 1993) (same); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, (1983) (leaving to the legislature the job of creating public policy exception; the legislature subsequently enacted a Whistleblower Statute (N.Y. LAB. LAW § 740) in response to the opinion).

⁶⁸⁴ 82 AM. JUR. 2d. *Wrongful Discharge* § 55. The precise elements required to state a claim for wrongful termination in violation of public policy will vary from state to state, and advocates should conduct state-specific research.

⁶⁸⁵ *Id.* § 58.

⁶⁸⁶ Texas, for example has one of the most narrowly tailored exceptions to the at-will doctrine, recognizing a cause of action for wrongful termination in violation of public policy only where an employee has been fired for failure to perform an illegal act. See, e.g., *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). In contrast, the Supreme Court of Illinois articulated a broad and flexible definition of public policy: “Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a matter must strike at the heart of a citizen’s social rights, duties and responsibilities before the tort will be allowed.” *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981). For a good discussion of the variability among states in what constitutes “public policy,” see *id.* at 130-32.

⁶⁸⁷ Many states require the “public policy” violated by the termination be embodied in the state’s statutory or constitutional law. See, e.g., *Imes v. City of Asheville*, 594 S.E.2d 397 (N.C. Ct. App. 2004) (requiring

a plaintiff can identify a statutory basis for the public policy, her wrongful termination claim may be preempted if the statute upon which it is based provides for its own remedies, and those remedies are deemed to be exclusive by the court.⁶⁸⁸

Because the public policy exception to the at-will doctrine is so narrowly tailored in many jurisdictions, employees who are unfairly discharged in the aftermath of a sexual assault may have limited success with their wrongful discharge claims. Nonetheless, courts have recognized wrongful termination claims in a variety of contexts that may be applicable to terminations in the aftermath of sexual assault. For example, several jurisdictions recognize wrongful termination in violation of public policy where employees are fired for cooperating with ongoing criminal investigations or reporting crimes to the proper authorities.⁶⁸⁹ In cases where victims are terminated for their involvement in *civil* cases arising from their assaults, general “open court” laws or public policies guaranteeing the rights of citizens to go to court may serve as established “public

statutory basis for public policy); *Hennessey v. Santiago*, 708 A.2d 1269, 1273 (Pa. Super. Ct. 1998) (noting an exception to public policy only where employer requires employee to commit crime, prevents employee from complying with statutorily imposed duty, and discharges employee when specifically prohibited from doing so by statute). Other states additionally recognize public policy based on federal law. *See, e.g., Peterson v. Browning*, 832 P.2d 1280, 1283 (Utah 1992).

⁶⁸⁸ *See, e.g., Watson v. Peoples Security Life Insurance Co.*, 588 A.2d 760 (Md. 1991) (finding that there was no discharge in violation of public policy for hostile work environment because that claim is actionable under Title VII, which provides the exclusive remedy); ARIZ. REV. STAT. §§ 23-1501, *et seq.* (stating that if an employee is discharged in violation of state statute that provides its own civil remedy, that remedy is exclusive and employee can’t bring common law claim for discharge in violation of public policy). *See also Ross v. Stouffer Hotel Co. (Haw.) Ltd.*, 879 P.2d 1037 (Haw. 1994); *Walsh v. Consol. Freightways, Inc.*, 563 P.2d 1205 (Or. 1977).

⁶⁸⁹ *See Hummer v. Evans*, 923 P.2d 981 (Idaho 1996) (involving termination for compliance with court-issued subpoena); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 216 (S.C. 1985) (same). *See also Cox v. County of San Diego*, 233 Cal. App. 3d 300, 311 (Ct. App. 1991), *abrogated by Zavala v. Arce*, 58 Cal. App. 4th 915 (Ct. App. 1997) (recognizing “strong public policy that all citizens should make themselves available as witnesses in criminal actions” but rejected claim that plaintiff was terminated in violation of public policy for participating in sexual assault trial, where the evidence showed she was terminated for different, legitimate reasons) (abrogated on other grounds). *See also Pooley v. Union County*, No. 3:01-0343-HE (D. Or. --) (denying defendant’s motion to dismiss whistleblower claim where victim alleged that employer constructively discharged her for testifying against husband in criminal case and for securing and modifying her civil protection order). *But see Jersey v. John Muir Medical Center*, 97 Cal. App. 4th 814, 815 (Ct. App. 2002) (at-will employee of medical center, who was terminated by employer for bringing a personal injury action against patient who assaulted her, was not terminated in violation of public policy because “[n]one of the broad constitutional and statutory provisions plaintiff relies upon reflect a legislative determination that it is against public policy for an employer to insist that its employees not sue its customers”).

policy.”⁶⁹⁰ Victims may also draw on victim or witness protection statutes, as well as laws guaranteeing or protecting the right to physical safety.⁶⁹¹

Victims of sexual assault may also be successful in stating claims for wrongful termination in violation of public policy where they can ground their claims in state laws that expressly protect victims’ employment rights.⁶⁹² However, to the extent these employment statutes contain their own remedial provisions, common-law wrongful termination claims may be preempted.

Another basis for bringing a wrongful termination claim is that a victim was terminated after exercising her right to seek and obtain a protection order, victim compensation, or some other statutory benefit or protection afforded her.⁶⁹³ Finally, federal and state anti-discrimination statutes may provide the requisite public policy basis for wrongful termination claims involving sexual harassment that resulted in assault or

⁶⁹⁰ For example, the Oklahoma Supreme Court ruled that an open courts clause (rule providing right to access courts) could support a common law wrongful discharge claim. *Groce v. Foster*, 880 P.2d 902 (Okla. 1994) (worker fired after refusing to withdraw negligence suit against a customer for injury suffered while working with customer). *But see Jersey*, *supra* note 689 (plaintiff employee of medical center not terminated in violation of public policy for bringing personal injury suit against patient who assaulted her).

⁶⁹¹ For example, in *Watson v. Peoples Security Life Insurance Co.*, 588 A.2d 760 (Md. 1991), the Maryland Court of Appeals recognized a cause of action for wrongful discharge in violation of public policy based on an employee’s termination in response to seeking legal redress against a co-worker for sexual harassment that amounted to assault and battery. The *Watson* Court stated, “The clear mandate of public policy which *Watson*’s discharge could be found to have violated was the individual’s interest in preserving bodily integrity and personality, reinforced by the state’s interest in preventing breaches of the peace, and reinforced by statutory policies intended to assure protection from workplace sexual harassment.” *Id.* at 767.

⁶⁹² *See, e.g.*, CAL. LAB. CODE § 230 (2000) (prohibiting employers from discharging, discriminating, or retaliating against employee victims who take time off to obtain judicial relief or to ensure her health and/or safety); CONN. GEN. STAT. § 54-85b (2004) (prohibiting discrimination against employee victims who must participate in court proceedings or in investigations or prosecutions); 820 ILL. COMP. STAT. 180/30 (prohibiting employers from discriminating against or terminating employees because they are victims of domestic or sexual violence); ME. REV. STAT. tit. 26, § 850 (2001) (imposing a \$200 penalty on employers who refuse to grant victims of domestic violence “reasonable and necessary” leave to attend court proceedings, receive medical treatment, or obtain other necessary services); MICH. COMP. LAW § 780.762 (employer who discharges victim or victim representative who must appear in court is guilty of misdemeanor); N.Y. PENAL LAW § 215.14 (2000) (prohibiting employers from discharging victims of violent crimes for taking time off to appear in court or filing protection orders); R.I. GEN. LAWS § 12-28-10 (2000) (prohibiting discrimination against employees who obtain restraining orders).

⁶⁹³ *See, e.g., Pooley v. Union County*, *supra* note 689. *See also Apessos v. Mem’l Press Group*, No. 01-1474-A, 15 Mass. L. Rptr. 322, 2002 WL 31324115 (Mass. Super. Ct. Sept. 30, 2002) (finding sufficiently clear public policy in the constitutional right to seek recourse in the law for all injuries and noting that “A victim should not have to seek physical safety at the cost of her employment.”).

sexual assault.⁶⁹⁴ However, preemption may be a bar to bringing a wrongful termination claim based on sexual harassment or discrimination in the workplace.

V. CONCLUSION

Safe and secure employment can be a cornerstone in the life of a sexual assault survivor. Gainful employment has the capacity to provide the financial, social, personal, and practical support a survivor needs to navigate the path to recovery. For other survivors, time away from work is key. Your task is to help a survivor identify and secure the benefits she needs.

There are many legal and practical resources that may be available to help a survivor achieve the employment remedies she seeks. Because many of the statutes and employee policies that may provide a basis for a victim's claims do not specifically reference sexual assault survivors, however, you will need to be resourceful and creative, and argue that justice and due process require that these same protections be extended to victims of sexual assault. Existing case law will be an important resource as you and your client pursue employment remedies within the civil legal system. Even in the absence of laws providing for leave and other employment remedies, attorneys and advocates should pursue benefits and advocate with employers to find arrangements that will meet a victim's needs.

⁶⁹⁴ See, e.g., *Rojo v. Kliger*, 801 P.2d 303 (Cal. 1990) (finding plaintiffs had cause of action for wrongful discharge in violation of public policy where they alleged they were “continually subjected to sexual harassment and demands for sexual favors by defendant, and that their refusal to tolerate that harassment or acquiesce in those demands resulted in the wrongful discharge”); *Insignia Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. 2000) (recognizing abusive discharge based on claim that employee was wrongfully fired because she refused to acquiesce in a form of quid pro quo sexual harassment that would have amounted to prostitution); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530 (4th Cir. 1991) (finding plaintiff stated a claim under North Carolina law for wrongful termination in violation of public policy claim where plaintiff was fired for refusing to succumb to employer's demands for sexual favors – essentially refusing to commit the crime of prostitution).

Chapter Eleven

HOUSING RIGHTS OF SEXUAL ASSAULT VICTIMS⁶⁹⁵

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⁶⁹⁵ The Victim Rights Law Center thanks Michelle Harper, Esq., Kathryn Reardon, Esq., and Barbara Zimbel, Esq., the authors of this chapter.

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I. INTRODUCTION

Approximately forty percent of all sexual assaults occur in a victim's home (with an additional nearly 20% occurring at the home of the victim's friend, relative, or neighbor).⁶⁹⁶ A victim may need to find new housing following a sexual assault because it is unsafe to remain in her current residence or because doing so causes her significant emotional trauma. Other reasons for moving include because: her landlord or a tenant committed the assault; she sustained an injury during the assault which left her physically disabled and thus unable to remain in her current residence; she was previously homeless; she and the assailant share a residence; or the perpetrator is employed at the facility where she resides. A victim might also need to move following an assault because she lost the right to occupy her residence (*e.g.*, an employee who resides in company-owned housing that must be vacated when employment terminates or a military spouse who has to vacate military housing if the assailant spouse is discharged) or to be closer to her family or other support system.

While some victims may opt to relocate following an assault, others may elect or be forced to remain in their existing housing. A victim may remain in her current housing – even if it is dangerous – if the physical, social, emotional or financial burden of moving outweighs her psychological, physical safety, or privacy concerns.

⁶⁹⁶ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 3 (1997), available at www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf (hereinafter ("Sex Offense Statistics") (nearly 40% of all sexual assaults occur in a victim's home).

A victim may also be forced to remain in her current location due to the critical shortage of safe, affordable, and accessible housing options (if the victim is low income, has a physical disability or mobility challenges, or resides in an assisted living facility, mental health facility, residential treatment program, safe and affordable housing may be especially difficult to secure).⁶⁹⁷ Even if a victim's ultimate goal is to relocate, she may need to remain where she is living pending relocation. Therefore, this chapter discusses legal remedies to assist victims both in securing new housing and remaining in their current one with necessary safety and other accommodations. (For a discussion of housing issues for sexual assault survivors with disabilities, please *see* Chapter 12, on representing victims with disabilities). Regardless of whether a victim chooses to move or to remain in her current housing, safe and secure housing is a critical component of a victim's recovery.

[PRACTICE TIP: Regardless of whether your client plans to relocate or to remain in her current housing, it is important to discuss issues of housing safety and home security. This discussion can be important even if your client plans to move in the near future. Safety considerations may include the addition of safety bars and locks, extra lighting, a new parking spot, a monitored alarm system (including the alarms worn by older adults and others who may be unable to summon their own emergency assistance), new curtains and privacy shields, a change in schedule and routine, and other safety-related modifications. If a survivor needs immediate short-term housing assistance, a local sexual assault or domestic violence program or adult services department may be able to help provide an emergency placement. If a victim needs financial assistance, charitable and religious organizations may also be able to help defray her housing costs.]

⁶⁹⁷ See, e.g., Daniel Pelletiere, *The Rental Housing Affordability Gap: Comparison of 2001 and 2003 American Housing Surveys*, Nat'l Low Income Housing Coalition, available at www.nlihc.org/doc/rentalgap.pdf. (March 2006) (hereinafter ("Pelletiere")) (reporting a nationwide shortage of at least 4.5 million affordable rental units).

II. ADDRESSING HOUSING ISSUES: INITIAL CONSIDERATIONS

Short-term housing remedies for sexual assault victims are scarce across the country. There are virtually no emergency housing shelters specifically for victims of sexual assault. At the same time, the cost of housing is rapidly increasing nationally. Low income victims are especially hard-hit by these increases, as they are forced to spend increasing percentages of their income on housing costs. In rural communities, housing availability may be extremely limited, and confidential or anonymous housing options are virtually non-existent. In urban areas, the increased demand for private housing and long waiting lists for public or subsidized housing severely limit survivors' housing options, regardless of income.

Victims who live in public housing may be especially vulnerable to sexual assault because of poor security issues, limited housing options, and inability to relocate (even if their safety is at risk). Some victims are at increased risk because they reside in close quarters with perpetrators who cannot be avoided due to shared facilities and common spaces (such as bathroom, kitchen, and laundry facilities). In a recent, non-random study of sexual assault of tenants by landlords, 45% of survey respondents who reported that they had been sexually assaulted or sexually assaulted by a landlord lived in some form of subsidized housing, including public housing, Section 8 voucher-subsidized or Project-based Section 8 housing.⁶⁹⁸ More than 70% of the survivor respondents reported that they wanted to – but could not – move after the assault either because they had nowhere to go or because they could not afford the financial penalties associated with relocation.⁶⁹⁹

Often, victims who do leave their homes are forced to live in temporary housing situations, which may include residing with friends or family, in homeless shelters, or in

⁶⁹⁸ Keely, *Landlord Rape and Sexual Assault of Tenants: Survey Findings and Advocacy Approaches*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y, Nov.-Dec. 2006, at 441, 444-45 (hereinafter referred to as ("Keely Survey").

⁶⁹⁹ More than 70% of the respondents to the Keely Survey who were sexually assaulted or sexually assaulted by a landlord reported that they wanted to – but could not – move after the assault either because they had nowhere to go or because they could not afford the financial penalties associated with relocation. *Id.* at 444.

single room occupancy (SRO) hotels.⁷⁰⁰ While the focus of this chapter is on longer-term housing solutions for victims, short-term solutions are also addressed because you may need to help a survivor obtain short-term housing immediately following an assault.

A. Assess Current Housing Status

The first step in assisting a survivor on a housing related issue is to identify her housing needs.⁷⁰¹ As a preliminary matter, determine if she has a place to live or was homeless, lives in a private or government facility, military base, residential care facilities, specialized treatment programs, private unsubsidized housing, or in one of the various forms of publicly subsidized housing. If the victim lives in subsidized housing, you will need to identify in what type of housing she resides.

The five most common forms of subsidized housing include:

- (1) **Public Housing:** Developments owned and operated by local housing authorities that are funded with state and/or federal funds;
- (2) **Project-Based Subsidized Housing:** Public Housing Authorities (PHAs) administered by Local Housing Agencies, Rural Housing Authorities administered by the U.S. Department of Agriculture, or other state agencies, enter into assistance contracts with private owners for specified units and for a specified term. The public housing authority then refers families from its waiting list to the project owner to fill vacancies;
- (3) **Tenant-Based Subsidized Housing Vouchers:** The tenant receives a subsidy and may use it towards rent to a private landlord. (*e.g.*, Voucher Programs, Section 8);

⁷⁰⁰ This dire lack of short-term housing alternatives for sexual assault survivors should be a priority for every sexual assault advocacy organization in the country. See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 478 (2005).

⁷⁰¹ Published Housing manuals may also provide more comprehensive information regarding housing issues. See, *e.g.*, HUD Housing Programs: Tenants' Rights (The National Housing Project ed., 3d ed. 2004); see also AMY E. COPPERMAN ET AL., LEGAL TACTICS: FINDING PUBLIC AND SUBSIDIZED HOUSING (Amy E. Copperman & Annette R. Duke eds., Massachusetts Law Reform Institute 2d ed. 2006). *Tenants' Rights in New Jersey* is available free of charge from Legal Services of New Jersey, P.O. Box 1357, Edison, NJ 08818-1357 (888) 576-5529.

- (4) Privately-Owned Subsidized Developments: Privately-owned developments that are subsidized by either state or federal funds; and
- (5) Low Income Housing Tax Credit Program: The Low Income Housing Tax Credit Program, administered by the Internal Revenue Service, is now the single largest housing subsidy program.

A survivor's options regarding relocation, security, and other housing related needs can vary widely, depending upon the type of housing she occupies and the type(s) for which she is eligible, in whose name the residence is rented or leased, housing availability, any special needs, and the jurisdiction in which the victim resides.

[CHECK YOUR STATE'S LAW: The applicable laws, rules and regulations will vary depending on the funding source of the subsidy.⁷⁰² Each housing authority or agency has its own priorities and procedures; some give priority to victims of sexual assault, but others do not. Even if victims of non-intimate partner sexual assault are not accorded priority status *per se*, explore whether there is another priority category for which a victim may be eligible.]

B. Help the Survivor Determine Her Needs

The next step is to help the survivor determine what housing remedies best suit her needs. A victim's options will depend on her current housing as well as the type of housing to which she seeks to move. While specific remedies are discussed in more detail in subsequent sections of this chapter, generally the remedies a victim who resides in public or subsidized housing may seek include requests to:

- Transfer to a safer housing facility;

⁷⁰² For an overview of public and subsidized housing, see the U.S. Department of Housing & Urban Development website information on Public Housing and Housing Choice Vouchers, available at www.hud.gov/offices/pih/about/index.cfm. See also MASSACHUSETTS CONTINUING LEGAL EDUCATION, ACCESSING AFFORDABLE HOUSING FOR LOW INCOME PEOPLE (2006) (Part A: The Different Types of Public and Subsidized Housing), available from Massachusetts Continuing Legal Education, 10 Winter Street, Boston, MA 02108, (800) 966-6253.

- Terminate the lease with the PHA or Section 8 landlord;
- Obtain priority status for new affordable housing or a housing voucher based on her status as a sexual assault victim;
- Have the assailant evicted;
- Have the assailant's name removed from the lease or rental agreement;
- Modify existing housing to increase safety;
- Contest an eviction proceeding initiated by a landlord seeking to evict the tenant for events related to the sexual assault; and / or
- Obtain a temporary protection order through the local courts requiring the assailant to stay away from the victim and the premises (the order may contain an ouster provision, requiring the tenant to vacate the premises even if he is a legal tenant).

[CHECK YOUR STATE'S LAW: In addition, in some jurisdictions, the PHA may be able to obtain its own order to keep the assailant off the premises. This may be in addition to or in lieu of any protection order the victim obtains.]

If a victim lives in private housing, she may be able to:

- Terminate the lease with the landlord's agreement;
- File a claim against the landlord in court asking that she be relieved from the lease provisions;
- Seek a court order directing the assailant to vacate the residence;
- Request that the assailant be ordered to compensate her for housing-related monetary losses;
- Request modifications to her existing housing to increase her physical safety;
or
- Obtain a protection order on her own or through her landlord, ordering the assailant to stay away from the victim's residence.

If the perpetrator is the landlord or another resident against whom the landlord takes no action, or if the landlord retaliates against the victim for pursuing her rights, she may have additional remedies available to her, including tort, federal or state sex discrimination, and whistleblower claims.

[CHECK YOUR STATE’S LAW: Some states have specialized housing courts in which to address housing disputes; other states put the jurisdiction of housing disputes within a general or other court.]

III. PUBLIC AND SUBSIDIZED HOUSING

As noted above, many states – and urban areas, especially – are experiencing rapidly rising housing costs and a severe shortage of public and subsidized housing.⁷⁰³ The waiting lists at housing authorities for public housing and voucher programs are long and openings are too infrequent. Often, the only realistic hope for an applicant is to obtain what federally subsidized programs refer to as “priority” status. In some PHAs, priority status is awarded to victims of crime, individuals at risk to become homeless, and local residents. Statements from police reports, court hearings, or mental health workers may help to establish a victim’s need for priority housing. Also, because there is no limit on the number of PHAs to which a victim can apply, if a survivor is willing to relocate, a victim may want to apply to a number of PHAs to help decrease her wait time.

[PRACTICE TIP: One of the key elements in effectively representing a survivor on a housing matter is to document the harm sustained and explain how it relates to her housing needs. At the same time, you must take care to offer documentation in such a way as to minimize the invasion to the victim’s privacy interests. Examples of effective

⁷⁰³ Housing shortages have been the subject of a series of newspaper and other articles across the country. See, e.g., Yolanda Putman, *CHA Seeks Landlords to Fill Housing Gaps*, CHATTANOOGA TIMES FREE PRESS, June 26, 2006, at B1; Gwen Filosa, *HUD Raises Rental Voucher Values; But Housing Shortage Remains, Activists Say*, TIMES-PICAYUNE, June 22, 2006, at 1; Paul R. Jefferson, *Solutions Sought for Housing Shortage*, MORNING STAR, June 7, 2006, at Business and Financial News; Melanie Lefkowitz, *THE HOUSING SQUEEZE; Close Quarters, A World of Grief; In A Metropolis With Low Vacancies and High Rents, New Yorkers Find Themselves Forced to Share Living Spaces*, NEWSDAY, June 18, 2006, at A04; Olivia Gonzales Howe, *Public Housing for Sale*, DES MOINES REGISTER, September 28, 2004, at 1U. See also Pelletiere, *supra* note 697.

documentation may include police reports, letters from law enforcement, medical reports, letters from medical personnel and protection orders issued in a civil or criminal case. The documentation does not necessarily have to reference that a sexual assault was committed. Determine whether the documentation can be crafted in such a manner as to both provide the necessary documentation (*e.g.*, that she was the victim of a violent crime, a felony, an assault, etc.) and protect her privacy interests. (*See* Chapter 3, Privacy: A Pre-eminent Concern For Sexual Assault Victims, for guidance on drafting an affidavit that maximizes victim privacy.)]

A. Victims Currently Residing in Public Housing

The housing remedies a victim in public housing may seek may include: (1) transfer to another unit; (2) termination of her lease; (3) the addition of safety features to her existing housing; or (4) a stay away order or order of ouster. An overview of each one of these four remedies is provided below.

1. Transfer

The federal government has encouraged PHAs to adopt transfer policies for victims of violent crime and their families.⁷⁰⁴ Some PHAs have created an “emergency case” designation that allows for emergency housing transfers, while others have not established any eligibility criteria.⁷⁰⁵ For example, housing authorities may permit transfers for reasons such as harassment by other residents, domestic violence or being a

⁷⁰⁴ *See generally*, 42 U.S.C.A. § 14043e-4(f)(4) (allocating funding to facilitate public housing transfers); U.S. DEP’T OF HOUSING AND URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 216 (2003), *available at* www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf (“HUD continues to strongly encourage PHAs to exercise discretion in determining if domestic violence-related evictions are warranted as well as utilizing various tools, such as policies designed to transfer victims and address absences from public housing units.”).

⁷⁰⁵ Since each PHA has its own administrative plan, it is necessary to look at the administrative plan of the PHA that covers the locality in which the victim resides or that issued the Section 8 voucher. An PHA’s approved Public Housing Authority Plan can be found online on HUD’s website *at*: www.hud.gov/offices/pih/pha/approved/. The PHA’s policies on transfers are listed in Section 3 “Policies on Eligibility, Selection and Admissions” of part A of the “Annual Streamlined PHA Plan Components” of each PHA Annual Plan. The transfer requirements are listed separately for public housing and Section 8, so be sure to check in the appropriate subsection.

victim or witness to a violent crime at a particular development.⁷⁰⁶ The terms and requirements of a transfer policy will differ with each local authority. Consult a local housing expert or the PHA to determine which policy is controlling in your jurisdiction.

2. Terminating the Lease

To remain in good standing with the PHA, a victim may need to tell her landlord the reason she is terminating the lease.⁷⁰⁷ If a victim temporarily leaves her public housing unit for safety reasons without proper notification to the PHA, the PHA may consider the unit abandoned and may attempt to evict a victim's entire household.⁷⁰⁸ As an advocate or attorney, you can help a survivor prepare her notice to the PHA that she intends to return to the unit. You may also be able to help a victim secure funds to make sure that her rent is fully paid during the time she is absent, thereby helping to preserve her housing rights.

If a victim has a Section 8 voucher – that is, she lives in private housing and part of the rent is subsidized by the government – you can help her to negotiate directly with her landlord regarding terminating her lease, and then notify the PHA of this negotiation.⁷⁰⁹ (The Section 8 regulations provide that the initial term of the lease must be for at least one year.⁷¹⁰ Therefore, if a victim has been in her unit for less than one year she will likely need her landlord's permission to terminate the lease prior to its scheduled expiration. In all cases, the victim should make sure that the rent is current with the landlord for any time that she is in possession of the unit. Otherwise, the landlord may bring eviction proceedings for non-payment of rent. You may be able to help her secure the financial assistance needed to pay her rent through emergency

⁷⁰⁶ *Id.*

⁷⁰⁷ See Susan A. Reif & Lisa J. Krishner, *Subsidized Housing and the Unique Needs of Domestic Violence Victims*, 34 CLEARINGHOUSE REV. 31 (May-June 2000), available through the National Center on Poverty Law, Chicago, IL.

⁷⁰⁸ See 33A E. GEORGE DAHER & HARVEY CHOPP, MASSACHUSETTS PRACTICE SERIES § 15:26, 225 (3d ed. 2000).

⁷⁰⁹ 24 C.F.R. § 982.314.

⁷¹⁰ 24 C.F.R. § 982.309(a)(1).

assistance funds, a protection order scheme, crime victim compensation, and other public and private sources.)

[PRACTICE TIP: Given the recent demand for affordable housing in many parts of the country, terminating a lease has not been a problem. However, if the landlord cannot quickly re-rent the residence, the landlord may seek to hold the victim liable for damages in the amount of unpaid rent.]

If the victim leaves the unit but intends to return, she must notify the PHA.⁷¹¹ A tenant may not be absent from Section 8 housing for a period of more than 180 consecutive calendar days in any circumstance, or for any reason without forfeiting her occupancy rights. At its discretion, the PHA may allow absence for a lesser period in accordance with PHA policy.⁷¹² Terminating the lease during the first year of the tenancy without the landlord's agreement, failing to pay the rent, or an unauthorized extended absence from the unit are each grounds for termination of the Section 8 voucher.⁷¹³

Once a tenant permissibly terminates her Section 8 lease she will be given a new voucher that she may use to locate alternative housing.⁷¹⁴ The voucher usually expires in 120 days, but can be extended upon a showing of an intensive (but unsuccessful) housing search.⁷¹⁵ This time requirement varies with each PHA, and can be found in the Section 8 Administrative Plan for the particular PHA. In addition, if there is a period of time during which the victim cannot conduct a housing search (for a medical reason, for example) she may request that the search time on her voucher be suspended for that time period. Section 8 Vouchers are portable, meaning that if a victim chooses to relocate to another state or to Indian Country, her Section 8 voucher will follow her and remain valid, so long as she did not violate her previous lease.⁷¹⁶ In addition, under the Violence

⁷¹¹ 24 C.F.R. § 982.551(i).

⁷¹² 24 C.F.R. § 982.312.

⁷¹³ 24 C.F.R. § 982.552(c).

⁷¹⁴ 24 C.F.R. § 982.314.

⁷¹⁵ 24 C.F.R. § 982.303 (voucher must be valid for at least 60 days and extensions may be granted at the discretion of the PHA).

⁷¹⁶ See 24 C.F.R. § 982.353(b); 24 C.F.R. § 982.355(d).

Against Women Act of 2005 (VAWA 2005), a victim of domestic violence, dating violence or stalking who moves to protect her health or safety may retain her Section 8 voucher even if moving would otherwise be a lease violation, as long as she has complied with all other obligations of the Section 8 program.⁷¹⁷

[PRACTICE TIP: If the victim’s income has been reduced as a result of the assault, make sure that the rent amount is modified to reflect her actual income. Also, if the voucher is in both the victim and assailant’s names, request that the assailant be removed from the voucher. If the voucher is in the assailant’s name, you may ask that the PHA transfer the voucher to the client under the PHA’s “family break-up policy,” which all PHAs are required to have as part of their Section 8 Administrative Plans.]

3. Evicting the Assailant

If the assailant is a resident of federally subsidized public housing or federally subsidized project-based public housing, the PHA may evict the accused for having committed a violent crime. If the assailant receives a Section 8 voucher, the PHA may similarly terminate his voucher. Federal regulations governing federally subsidized public housing or project-based public housing provide that a tenant’s activity that threatens the health and safety of other tenants or the landlord is grounds for eviction.⁷¹⁸ In addition, the regulations regarding drug or violent criminal activity, the so-called “one-strike” regulations, are particularly stringent and require PHAs to utilize leases that allow eviction where a household member or a guest engages in such activity.⁷¹⁹ Under these required leases, the PHA may evict a tenant if it determines that the tenant has engaged in criminal activity, regardless of whether he has been arrested or convicted for such

⁷¹⁷ 42 U.S.C. § 1437f(r)(5). The Victim Rights Law Center would like to thank the National Law Center on Homelessness and Poverty for the generous use of their materials here.

⁷¹⁸ 24 C.F.R. § 966.4(f)(12)(i).

⁷¹⁹ *Id.*

activity, and without satisfying the standard of proof used for a criminal conviction.⁷²⁰ The PHA may, but is not required to, permit other family members to remain so long as the guilty party vacates. These regulations, along with language mandatory in leases in federally subsidized housing, have been interpreted to allow eviction of the whole family even where family members could not have anticipated or controlled the activity of the guilty party.⁷²¹ However, as discussed in more detail below, VAWA 2005 establishes an exception to the federal “one-strike” eviction rule for tenants who are victims of domestic violence, dating violence or stalking.⁷²²

VAWA 2005 also allows PHAs or Section 8 landlords to modify a lease to evict or remove a tenant who engages in criminal acts of physical violence against family members or others, while allowing the victim tenant or lawful occupant to remain.⁷²³ In addition, VAWA 2005 clarifies that nothing in the new provisions limits the authority of a public housing agency, when notified, to honor court orders addressing rights of access to or control of the property, including civil protection orders that protect the victim or address the distribution or possession of property among the household members upon family separation.⁷²⁴

Finally, under both fair housing and negligence theories, a landlord may be found to have a duty to take reasonable steps to create safe housing. This duty arises once the landlord knows, or should have known of certain risks, such as unlighted stairways, broken windows or door locks, isolated laundry rooms, predatory tenants, etc.

⁷²⁰ 24 C.F.R. § 966.4(l)(5)(iii). Although neither Congress nor HUD has provided PHAs with any standards of proof (Bryan Cho, *Getting Evicted for the Actions of Others: A Proposed Amendment to the Anti-drug Abuse Act*, 44 B.C. L. REV. 1229, 1246 (2003)), the civil nature of evictions and this silence on the part of Congress and HUD implies that the standard to be applied is a preponderance of the evidence. (Dean P. Cazanave, *Congress Steps Up War on Drugs in Public Housing—Has It Gone One Step Too Far?*, 36 LOY. L. REV. 137, 150 (1990)); see also The National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS (3d ed. 2004) § 14.2.7.3 at 14/61.

⁷²¹ *HUD v. Rucker*, 535 U.S. 125, 128 (2002).

⁷²² See 42 U.S.C. § 1437d(l)(5); 42 U.S.C. § 1437f(c)(9)(B); 42 U.S.C. § 1437f(d)(1)(B)(ii); 42 U.S.C. § 1437f(o)(7)(C); 42 U.S.C. § 1437f(o)(20)(A). See also NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, THE IMPACT OF THE VIOLENCE AGAINST WOMEN ACT 2005 (VAWA) ON THE HOUSING RIGHTS AND OPTIONS OF SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE: FREQUENTLY ASKED QUESTIONS, available at www.nlchp.org/FA_DV/VAWAHousingFAQ3-06.pdf.

⁷²³ 42 U.S.C. § 1437f(c)(9)(C)(ii).

⁷²⁴ 42 U.S.C. § 1437f(o)(20)(D)(ii). HUD .

4. Avoiding Victim's Eviction

There are various potential bases for avoiding or contesting a victim's eviction, including housing provisions contained in the Violence Against Women Act 2005 Reauthorization, as well as disparate impact arguments under the Fair Housing Act⁷²⁵ and discrimination claims under the Section 504 of the Rehabilitation Act of 1973, among others.

As noted above, VAWA 2005 carves out an exception to the "one-strike" rule for tenants who are victims, providing that "criminal activity directly relating to domestic violence, dating violence, or stalking" does not constitute grounds for termination of a tenancy.⁷²⁶ Although sexual assault is not specifically referenced in this exception to the one-strike rule, sexual assault is included in the "Purpose" section of VAWA 2005.⁷²⁷ Advocates may be able to argue successfully that the intent of the statute is to provide additional legal protections for victims of sexual assault and therefore the exception to the one-strike rule should also apply to sexual assault.

[PRACTICE TIP: Depending on the relationship between the victim and the perpetrator and the context in which the assault occurred (*e.g.*, a stalking or dating relationship) a sexual assault survivor may or may not be afforded protection by the VAWA 2005 housing amendments. If the assault did not occur in the context of domestic violence, dating violence or stalking, an attorney or advocate may argue that consistent interpretation of the statute requires that sexual assault be included in the exception to the one-strike provision. If the victim was stalked prior to or following the assault, it may be helpful to secure a stalking protection order or otherwise document the perpetrator's stalking conduct to access this remedy. Also, when notifying the PHA of the assault, it is advisable to classify the assault as a "criminal act of physical violence" rather than

⁷²⁵ 42 U.S.C. § 3604 (prohibiting discrimination based on race, color, national origin, sex, religion or familial status).

⁷²⁶ *See supra* note 27.

⁷²⁷ 42 U.S.C. § 14043e-1.

a rape or sexual assault. This is because, as discussed above, VAWA 2005 allows for the eviction of tenants who have committed criminal acts of violence, without delineating specific crimes. In addition, under VAWA 2005, where some other state or federal law provides greater protection to victims than VAWA, the more favorable law governs.⁷²⁸ Therefore, if your state's laws or legislation offer protections with broader coverage to include victims of sexual assault, look to those laws rather than VAWA.⁷²⁹]

VAWA 2005 also provides that the PHA or Section 8 landlord may request documentation from the tenant that she has been a victim of violence.⁷³⁰ However, a landlord is not required to obtain such documentation and may provide benefits to a victim based solely on the victim's statement.⁷³¹ If the landlord does request documentation, a victim may satisfy this request by producing a police report or court record that documents the incident(s) of violence or by producing a signed statement from a victim service provider, attorney or medical professional from whom the victim has sought services. The signed statement must attest under penalty of perjury that the professional believes that the incidents are bona fide incidents of abuse.⁷³² VAWA 2005

⁷²⁸ See 42 U.S.C. §§ 1437d(c)(3); 1437d(l)(6)(F); 1437d(u)(1)(E); 1437f(c)(9)(C)(vi); 1437f(d)(1)(B)(iii)(IV); 1437f(o)(6)(B), (7)(D)(vi), (20)(D)(v); 1437f(ee)(1)(F) (2006).

⁷²⁹ For a state-by-state survey of housing protection laws for domestic and sexual abuse survivors, see NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, STATE LAWS AND LEGISLATION TO ENSURE HOUSING RIGHTS FOR SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE, available at www.nlchp.org/FA_DV/DVHousingstatelaws3-06.pdf (hereinafter "State Laws").

⁷³⁰ 42 U.S.C. § 1437d(u)(1)(A); 42 U.S.C. § 1437f(ee)(1)(A). The U.S. Department of Housing and Urban Affairs release ifs approved "victim certification" form (Form 50066) that victims may use to access the protections against eviction under VAWA. The form is available online at www.hudclips.org/cgi/index.cgi. An explanatory notice to accompany the form was also issued and is available online too (Notice PIH 2006-42, December 27, 2006).

⁷³¹ 42 U.S.C. § 1437d(u)(1)(D); 42 U.S.C. § 1437f(ee)(1)(D).

⁷³² See 42 U.S.C. § 1437d(u)(1)(A), (C); 42 U.S.C. § 1437f(ee)(1)(A), (C) (information regarding the content and form of certification). See also U.S.C. § 1437d(u)(1)(A), (B); 42 U.S.C. § 1437f(ee)(1)(A), (B) (information regarding timing requirements for requesting and producing documentation); 42 U.S.C. § 1437d(u)(2)(A); 42 U.S.C. § 1437f(ee)(2)(A) (confidentiality requirements pertaining to documentation).

requires that the landlord keep confidential any information provided by the victim, including her status as a victim.⁷³³

[PRACTICE TIP: If a victim is concerned about her privacy, consult Chapter 3 on Privacy to help her make an informed decision regarding her privacy rights and whether and to what extent she feels comfortable sharing the information necessary to retain her housing. Craft documents in such a manner as to maximize her privacy but still provide the information necessary to protect her rights and secure her remedies (*e.g.*, is it sufficient to say that your client was a victim of “a felony,” “an assault,” or “a violent crime,” rather than a rape or sexual assault, and have her still qualify for the remedy she seeks?).]

As noted above, under the one-strike rule, a victim of sexual assault may be at risk of being evicted from public housing or being terminated from the Section 8 program if a member of her household or a guest engages in criminal violence or drug activity.⁷³⁴ While VAWA 2005 exempts victims of criminal stalking, domestic violence, or dating violence, as noted above sexual assault is not explicitly included within this exemption. Keep in mind, however, that the one-strike rule allows – but does not mandate – eviction or termination of the housing assistance. PHAs may be less likely to exercise their discretion to evict a victim of sexual assault, even if the assault did not occur in the context of domestic violence, dating violence or stalking, in light of the VAWA 2005 provisions, but this cannot be assured. Therefore, as appropriate, an attorney or advocate may be able to argue on a victim’s behalf that the exception to VAWA’s exceptions to the one-strike rule should be extended to sexual assault victims too.

⁷³³ See 42 U.S.C. § 1437d(u)(2)(A); 42 U.S.C. § 1437f(ee)(2)(A).

⁷³⁴ See generally, 42 U.S.C. § 1437 *et seq.*; 24 C.F.R. Parts 5 (General HUD Program Requirements), 960 (Admission to, and Occupancy of, Public Housing), 964 (Tenant Participation and Tenant Opportunities in Public Housing), 965 (PHA-Owned or Leased Projects – General Provisions), 966 (Public Housing Lease and Grievance Procedure), 982 (Section 8 Tenant Based Assistance: Housing Choice Voucher Program), 983 (Project-Based Voucher Program), 880 (Section 8 Assistance for New Construction), 881 (Section 8 Assistance for Substantial Rehabilitation), 882 (Section 8 Assistance for Moderate Rehabilitation), 883 (Section 8 Assistance for State Housing Agencies), 886 (Section 8 Assistance – Special Allocations). For other special federally subsidized housing programs, see HUD MULTIFAMILY OCCUPANCY HANDBOOK 4350.3 REV-1. Also, in some jurisdictions a parent may be liable for the act of a child. See, *e.g.*, MASS. GEN. LAWS ch. 131 § 85G.

[CHECK YOUR STATE’S LAWS: In addition to the VAWA protections, in some jurisdictions a tenant may have a defense in an eviction or voucher termination proceeding on the basis that she could not have controlled the person guilty of the offending conduct or could not have reasonably foreseen such conduct.⁷³⁵ Whether this is a possible defense will depend on the PHA.]

Even if a victim does not have a strong claim under VAWA, the FHA, or other federal or state statute, you may be able to persuade the judge or trier of fact to allow a victim to remain in her residence on grounds of equity. Such a claim may be more likely to succeed if the assault was perpetrated by the landlord, a building manager, or tenant.

A tenant who is threatened with eviction usually has the right to a hearing under the PHA’s tenant grievance procedure prior to the landlord filing an eviction in court.⁷³⁶ This hearing presents an opportunity for a tenant to explain the situation and present mitigating factors, and it may deter the PHA from proceeding to court.

If a victim of sexual assault is threatened with eviction or voucher termination because of her status as an assault victim, consider the defense or counter claim that such eviction or termination constitutes discrimination on the basis of sex. Discrimination in federally subsidized housing is prohibited by numerous federal laws including Title VIII: Fair Housing Act, 42 U.S.C. § 3604 (prohibiting discrimination based on race, color, national origin, sex, religion or familial status); 42 U.S.C. § 1981 (prohibiting discrimination based on race); and Section 504 of the Rehabilitation Act of 1973 and 29 U.S.C. § 794 (prohibiting discrimination based on disability). (See Chapter 12 on representing victims with disabilities for additional information.) The Urban Development (HUD) has previously concluded that evicting a female tenant based on her

⁷³⁵ See, e.g., *Spence v. Gormley*, 378 Mass. 258, 263 (Mass. 1982) (Mass. housing statutes “permit the BHA to terminate a tenant’s lease on the basis of violent conduct by a household member, unless the tenant can point to special circumstances indicating that she could not foresee or prevent the violence.”).

⁷³⁶ See 42 U.S.C. § 1437d(k); 24 C.F.R. § 966.51.

status as a domestic violence victim constitutes sex discrimination in violation of the Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act).⁷³⁷

[CHECK YOUR STATE’S LAW: In addition to a claim under federal law, a victim may also may be able to bring an action under your jurisdiction’s local anti-discrimination laws, if they also proscribe housing discrimination based on sex.⁷³⁸]

5. Modifications to Existing Housing to Increase Safety

If a victim chooses to remain in her existing housing or is forced to remain there temporarily while she seeks alternate housing, she may need modifications to her current residence. Examples of the kinds of modifications a survivor may seek include: installing additional lights, locks, security bars, or a security system; changing the locks; modifying her lease to allow a service or companion animal; on-site or alternative parking; and controlled building access (such as an electronic buzzer or card key system). In most instances, requests for such accommodations will be submitted directly to the property manager. When providing notice to the management company of the need for an accommodation, it is advisable to document the request in writing. (See Chapter 2 on Privacy and Chapter 12 on Disability for an overview of privacy issues, accommodation requests, and written victim statements.) Know that if the survivor suffers from a disability as a result of the sexual assault, she may be entitled to additional housing accommodations.

⁷³⁷ See *United States v. The C.B.M. Group, Inc. et al.*, United States District Court for the District of Oregon, Civil No. 01-857-PA (Consent Decree). See also *Bouley v. Young-Sabourin*, Case No. 03-CV-320, Rulings on Cross Motions for Summary Judgment (D. Vt.) (March 10, 2005) (Fair Housing Act protections extend to victims of domestic violence), available at www.aclu.org/FilesPDFs/sj%20decision.pdf; *Pooley v. Union County*, Case No. 3-01-0343-JE (Dist. Oregon 2003), Documents 101 (Magistrate’s Findings and Recommendations) and 104 (Order adopting Magistrate’s Recommendations) (denying in part defendant’s Motion for Summary Judgment because discrimination on the basis of domestic violence may constitute discrimination on the basis of sex, in violation of Title VII).

⁷³⁸ For a state-by-state survey of housing protection laws for domestic and sexual abuse survivors, see *State Laws*, *supra* note 729. See also *State Law Guide: Housing Laws Protecting Victims of Domestic and Sexual Violence*, LEGAL MOMENTUM, 2006, www.legalmomentum.org/issues/vio/housing.pdf (hereinafter “Legal Momentum”).

[PRACTICE TIP: Review the victim’s lease for any provisions regarding criminal activity on the property, costs associated with replacing or changing locks, pet exclusions, etc. Whether she will be held responsible for the expense of the requested modifications will likely depend on the willingness of the management company to pay for the expense. If the victim is responsible for payment, research your state’s victim compensation scheme to determine whether such costs may be covered. If the assailant is convicted, a victim may also ask the court to order that the defendant pay restitution. If a victim wants a pet for personal safety or security reasons, this may constitute a reasonable housing accommodation.]

6. Ordering the Assailant to Stay Away

If the victim was assaulted at the public or subsidized housing development where she resides, and the assailant is not a resident of that development, she may be able to enjoin the assailant from entering the housing development by requesting that the PHA issue a no-trespass order against the assailant. While each PHA’s specific policy will differ, generally, the PHA will ask the local police department to issue a warning to the assailant and then place the assailant’s name on a no-trespass list, maintained by the development manager.⁷³⁹ If the assailant returns to the development, he is in violation of the order and can be arrested.⁷⁴⁰

[CHECK YOUR STATE’S LAW: Review your PHA’s no-trespass policy to determine the procedure in your jurisdiction. Also, research your state’s legislation to determine whether a public housing authority can obtain a protection order excluding the assailant from the housing development.⁷⁴¹]

⁷³⁹ Elena Goldstein, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L. L. REV. 215, 216 (2003) (discussing general application of no-trespass orders by public housing authorities).

⁷⁴⁰ *Id.*

⁷⁴¹ See MASS. GEN. LAWS ch. 121B, § 32C (allowing landlord of public or subsidized housing to “bring a civil action for injunctive or other appropriate equitable relief in order to prohibit the person from entering or

B. Victims Who Need But Do Not Yet Reside in Affordable Housing

The previous section addressed the rights and remedies for survivors who currently reside in public or subsidized housing. The following section is an introduction to affordable housing options. For additional information regarding public housing assistance, consult HUD's website on affordable housing *at*: www.hud.gov/offices/cpd/affordablehousing/index.cfm or contact your PHA.

A range of state and federally funded public housing programs, as well as privately subsidized developments and voucher programs, are available to victims of sexual assault who qualify for assisted housing. Assisted housing may include public housing and voucher assistance; these are limited to low-income families and individuals. To qualify for public housing, a victim's household income cannot exceed 80% of the median income for the county or jurisdiction.⁷⁴² To qualify for voucher assistance, the household income generally cannot exceed 80% percent of the median income for the area, although households whose income does not exceed 30% of the average median income for the area receive preference in placement in these programs.⁷⁴³ Be aware that, because income limits vary from jurisdiction to jurisdiction, a victim may be eligible at one PHA but not at another.

As discussed below, in some jurisdictions and/or circumstances, a victim of sexual assault may also fit into a priority group for purposes of housing admission, which could shorten the waiting time.

[CHECK YOUR STATE'S LAW: Housing authorities and agencies have "priorities" or "preferences" for their federal programs. These differ from state to state.] Note that a victim must still meet the income eligibility requirements to obtain priority status. These requirements may not be waived.]

remaining in or upon the public or subsidized housing development" when that person has "caused serious physical harm to a member of a tenant household or employee of the landlord or any other person lawfully on the premises of the housing authority"). Note that as of the date of this publication, research revealed no other state with an analogous statute.

⁷⁴² 42 U.S.C. § 1437a; 24 C.F.R. § 960.201.

⁷⁴³ 24 C.F.R. § 982.4; § 982.201; § 5.603.

[PRACTICE TIP: What and how household income is computed may determine a victim's eligibility for public or subsidized housing. If a victim was denied such housing on the basis of excess earnings, make sure that the household income was calculated correctly. For example, if the victim was sexually assaulted by an intimate partner whose income she cannot access, that income should not be attributed to the victim. Also, sometimes the overall income may be reduced due to extraordinary medical or other expenses.]

1. Public Housing

Sexual assault victims looking to move from private to public housing must go through the same (lengthy) application and screening process as other applicants. A victim may apply to any housing authority; she does not have to live in the city or town currently to be eligible to submit an application.⁷⁴⁴ However, if she wishes to live in a particular community, she must apply with the PHA for that specific community. She may apply to as many PHAs as she chooses.

[PRACTICE TIP: Given the long waiting lists, even for priority applicants, it is advisable to apply to many different PHAs.]

2. Voucher Programs

The federal Housing Choice Voucher Program allows eligible families to choose and lease affordable, privately-owned, rental housing.⁷⁴⁵ If a victim wishes to obtain a Section 8 voucher, she must apply separately at each particular PHA or, in some jurisdictions, at the regional non-profits (RNP) that administer Section 8 programs.⁷⁴⁶ As

⁷⁴⁴ 24 C.F.R. § 960.206 (local public housing authorities are prohibited from adopting a residency requirement, but can utilize a residency preference).

⁷⁴⁵ See generally 24 C.F.R. § 982.1, *et seq.*

⁷⁴⁶ See generally, Ann O'Hara & Emily Cooper, *Eligibility, Applications and the Waiting List Process, SECTION 8 MADE SIMPLE: USING THE HOUSING CHOICE VOUCHER PROGRAM TO ASSIST PEOPLE WITH DISABILITIES* 21, 21-28 (2d ed. 2003), available at www.tacinc.org/index/admin/index/uploads/docs/Sect8.2ndEd.pdf. See also *Introduction to the Housing Voucher Program*, CENTER ON BUDGET AND POLICY PRIORITIES, May 15, 2003, www.centeronbudget.org/5-15-03hous.htm (families can apply for vouchers at any agency that administers the voucher program).

discussed above, there are income guidelines for a rental voucher. Financial eligibility will vary depending on the PHA.⁷⁴⁷ Those who qualify for Section 8 vouchers pay approximately 30% of their income toward rent. The housing authority pays the remainder directly to the landlord.⁷⁴⁸

Long waiting lists make these vouchers difficult to obtain. However, each voucher program, as discussed below, allows for priority status in certain cases.⁷⁴⁹ Federally funded developments may use their own priority schemes, which may or may not include priorities for victims of violent crime generally, or victims of domestic violence, sexual assault, dating violence or stalking, in particular.⁷⁵⁰

a. Tenant-Based Vouchers

With a tenant-based voucher from a PHA, a tenant may live anywhere in the state and, after the first year, may live anywhere in the country.⁷⁵¹

[PRACTICE TIP: Be familiar with the practices in your region. Not every city or town administers Section 8 vouchers. Also, be aware that some PHAs and RNPs have closed their Section 8 waiting list while others only accept applications from those who fall within their established priorities. Each city or town establishes its own priority list.]

[PRACTICE TIP: To best assist your client, check waiting lists for open housing developments, determine which priority categories are available, and familiarize yourself with the steps involved in the application process. A housing search is a difficult, complicated, and time consuming task, and often is best accomplished by those familiar with the options and existing resources. Housing advocates, legal services

⁷⁴⁷ 24 C.F.R. § 982.201.

⁷⁴⁸ See U. S. DEP'T OF HOUSING AND URBAN DEV., HOUSING CHOICE VOUCHERS FACT SHEET (2006), available at www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm.

⁷⁴⁹ 24 C.F.R. §§ 982.54; 982.202; 982.203.

⁷⁵⁰ *Id.*

⁷⁵¹ 24 C.F.R. § 982.353.

programs, shelter networks, and other social service agencies may be able to help a victim navigate this process.]

Once an applicant's name comes to the top of the lists for the units to which she applied, she will be called into the PHA office. If she was granted a priority, the PHA will determine whether she still qualifies for the priority and will check her income, past tenancy history and criminal history. If she meets all of the eligibility criteria, she will be given a voucher that is valid for a set period of time. She must secure housing before the voucher expires. As described above, the specific time allocated varies by PHA, but it is often 120 days (with the possibility of extensions). Many PHAs grant extensions or toll the time period if a victim cannot search for housing because of a disability or for some other allowable reason.⁷⁵²

b. Project-Based Vouchers

Project-based vouchers are a component of a PHA's housing choice voucher program. Under this portion of the program, PHAs enter into assistance contracts with private owners for specified units and for a specified term.⁷⁵³ To obtain a project-based voucher, a victim must apply at each particular PHA, just as she would for a tenant-based voucher. The PHA will then refer eligible applicants on the waiting list to properties that have project-based voucher assistance when units become vacant.⁷⁵⁴ Unlike tenant-based vouchers, which are linked to the tenant and therefore allow for continued assistance to a victim who permissibly terminates her lease to move to new housing, project-based voucher assistance is tied to the unit.⁷⁵⁵ Therefore, when a victim moves from a project-based unit she may not have a right to continued housing assistance. While a victim who terminates her lease under the project-based voucher program may be eligible for a

⁷⁵² 24 C.F.R. § 982.303 (voucher must be valid for at least 60 days and extensions may be granted at the discretion of the PHA). Federal law leaves the determination of search time, extensions, tolling, priorities and other details of the Section 8 program to the discretion of each PHA which must put these details in what is called its Section 8 Administrative Plan. This is a public record and available at each PHA.

⁷⁵³ See U. S. DEP'T OF HOUSING AND URBAN DEV., PROJECT BASED VOUCHERS (2006), available at www.hud.gov/offices/pih/programs/hcv/project.cfm.

⁷⁵⁴ *Id.*

⁷⁵⁵ See 24 C.F.R. §§ 982.1(b) & 983.5.

tenant-based voucher when one becomes available, if the victim terminates her lease before the end of one year, she relinquishes her opportunity for continued tenant-based assistance.

[PRACTICE TIP: Determine which type of assistance a victim is receiving and research the federal regulations and PHA administrative plan to best advise her of her options and the potential consequences of lease termination or relocation.]

3. Privately Owned Subsidized Developments

There are also a number of privately owned subsidized developments to which the victim may want to apply. These are privately owned and operated, and funded by either the federal government, a state government, or a combination of both. The victim must apply at each particular development or management company serving that development. For a list of privately owned subsidized housing developments, contact your PHA. This information is also available on HUD's website, which provides a link to search for subsidized housing in each state.⁷⁵⁶

C. Getting Priority Status

Due to the overwhelming demand for public and subsidized housing, there may be a long wait list for a new unit. Public housing and subsidy programs are subject to various local, state, and federal screening processes and preferences.⁷⁵⁷ Victims of sexual assault may qualify for high priority or emergency status when applying for some public housing. Because of the importance of such status in reducing the wait for public housing, you will want to determine what priority categories are available in the PHA or housing unit desired, and whether and how a victim may fit into one or more of the priority status categories. The best way to learn about which preferences are available is to call the PHA. To determine whether a victim is eligible for priority status, you will

⁷⁵⁶ See www.hud.gov/local/index.cfm for a link to each state's local housing authority's page.

⁷⁵⁷ For important laws and regulations governing eligibility, see 42 U.S.C. § 1437a and 24 C.F.R. § 960 (federally subsidized housing); 42 U.S.C. § 1437f and 24 C.F.R. § 982 (Section 8); 42 U.S.C. § 1436a; 24 C.F.R. § 5 (general HUD applicability requirements).

want to consider carefully the facts of the specific assault and make sure that you have all the information necessary to make an informed assessment. It may be helpful to secure the assistance of a housing advocate or legal aid attorney to assist you in this process.

1. Proving Qualification for Priority

Federal law permits each PHA to set its own priorities for its public housing and Section 8 programs, and to order these priorities as they wish.⁷⁵⁸ The PHA's priorities for the public housing programs are set forth in its Public Housing Occupancy Plan. The PHA's Section 8 priorities are in its Section 8 Administrative Plan.

[PRACTICE TIP: Section 8 Public Housing Occupancy and Administrative Plans are public records. It is important to obtain and review them to determine whether your client is eligible for priority status.]

A PHA may opt (or decline) to give priority to: local residents; victims of natural disasters or residential condemnations; homeless people; victims of domestic violence; or those who must relocate to avoid retaliation.⁷⁵⁹ Most PHAs, if they have priorities, will give them to those who are homeless or imminently homeless (*i.e.*, those seeking housing within six months of one of the underlying incidents listed above). As discussed below, each priority requires different forms of proof. Establishing this proof is often difficult for victims of crime who may have vacated a unit quickly for safety reasons, fear reprisal (*e.g.*, government witness), or are otherwise unable to provide safely the evidence required. In all cases, a victim will have to show a connection between the assault and her current or imminent homelessness. Ideally, the PHA to which your client is applying will have already established sexual assault as a priority. If not, your client may be able to qualify for one of the following established priorities, depending on the PHA.

⁷⁵⁸ See 42 U.S.C.S. § 1437f(d)(1)(A); 24 C.F.R. § 960.206(a) ("Establishment of PHA local preferences. The PHA may adopt a system of local preferences for selection of families admitted to the PHA's public housing program. The PHA system of selection preferences must be based on local housing needs and priorities as determined by the PHA.").

⁷⁵⁹ *Id.* The establishment of priorities is within the discretion of each PHA.

a. Domestic Violence Priority

If the victim's assailant is a household member, she may qualify for a domestic violence priority. To be eligible for this priority, the victim must usually be one who became or who will imminently become homeless due to domestic violence committed by a household member. PHAs usually want some proof of the domestic violence, such as a court order, police report, hospital report, statement of a neutral third party, etc. Although the victim does not have to be in a shelter to be eligible for this priority, she likely will not be considered "imminently" homeless if more than six months have passed since the assault.

b. Reprisal Priority

A victim may be eligible for a reprisal priority (sometimes known as a "relocation to avoid reprisal" priority) if the assailant is not a household member and the victim is not eligible for a domestic violence priority. A reprisal priority typically applies when a victim has been involved in the civil or criminal court system, or has contacted the police, and, in the opinion of a law enforcement official, needs to relocate for her safety. The victim will need a law enforcement official to document this need for relocation.

c. Homeless Priority

To be eligible for a homeless priority, some PHAs require that the applicant be in a shelter. This requirement may be especially onerous for victims who are not survivors of intimate partner sexual violence, because they may not meet the requirements for a domestic violence shelter. Some PHAs will not consider homeless someone who is temporarily staying with friends or relatives. The applicant will usually have to obtain certification of homelessness from the shelter provider. Given the lack of short-term housing for sexual assault victims, obtaining such documentation may be difficult. In addition, because of the traumatic effects of sexual assault, many victims will feel unsafe staying in a homeless shelter after an assault, and this can make it difficult to provide the necessary documentation. A written statement from a social worker, sexual assault crisis

counselor or physician, which explains why the victim is not in emergency shelter (*e.g.*, that she is too traumatized to reside in a shelter but has no safe and reliable place to live) may be acceptable to the PHA in lieu of shelter certification. In the event that the PHA determines that the victim voluntarily made herself homeless by leaving her last home, it is important to detail the safety or psychological reasons why she fled her previous residence.

[PRACTICE TIP: Be sure to secure your client’s informed consent before releasing any information that may make her eligible for housing. Also, consult with your client and determine how you can provide the information requested while minimizing the amount and type of private information that is released. (For example, you can document that your client was the victim of a violent criminal assault, that she was hospitalized, and that enhanced security are especially important to her recovery without disclosing that the assault was sexual in nature. *See* Chapter 3, Privacy: A Pre-eminent Concern For Sexual Assault Victims, for additional information).]

D. Housing for Non-U.S. Citizens

Applying for and/or receiving government subsidized housing assistance may have unique – and grave – consequences for a non-citizen or undocumented sexual assault survivor. Special care must be taken in any housing case where the client is not a U.S. citizen, and if you are not an expert in immigration matters you should consult with an immigration expert before pursuing a government funded housing remedy. For an overview of immigration issues for sexual assault survivors, *see* Chapter 8, Serving Non-Citizen Victims of Sexual Assault Victims.

[PRACTICE TIP: Accessing public benefits, such as welfare assistance, may complicate subsequent efforts to naturalize, adjust status, or gain re-entry into the United States. Receiving public assistance may also be the basis for a “Danger of Becoming a Public Charge” determination under the Immigration and Naturalization Act’s Grounds for Inadmissibility.

Although to date accepting housing assistance has not been used as the basis for a “public charge” claim, an immigration attorney should be consulted if there are any concerns that accepting housing assistance may jeopardize a client’s immigration status.]

A victim does not have to be a citizen or permanent resident to receive government-assisted housing. However, she and each member of her household must be an “eligible non-citizen” to receive a full housing subsidy from a federally funded housing program. “Eligible non-citizens” include:

- “Green card” holders (*i.e.*, “Aliens” lawfully admitted for permanent residence);
- Persons who have been granted asylum by DHS or an immigration judge;
- Special agricultural workers;
- “Registry” cases: Aliens deemed lawfully admitted as permanent residents as a result of the Attorney General’s grant of discretion;
- Aliens with “parole” status who are lawfully present in the United States due to a grant of discretion by the Attorney General for emergent or public interest reasons;
- “Legalized” residents: Aliens lawfully admitted for temporary or permanent residence under 8 U.S.C. § 1255a.

If some but not all of the household members are citizens or “eligible non-citizens” (*i.e.*, some of the household members are “out of status” with the Department of Homeland Security,⁷⁶⁰ and thus are present in the U.S. illegally), the household is eligible only for partial federal housing assistance. The assistance will be pro-rated, depending on the percentage of the household members who are citizens or “eligible non-citizens.”

When a victim applies for federal housing under “eligible non-citizen status,” the information provided to the housing agency will be confirmed with the Department of Homeland Security (DHS) database. The verification of “eligible non-citizen” status is the only automatic DHS check the housing authority will conduct. Housing authorities and owners of subsidized housing are not required to verify information with DHS or

⁷⁶⁰ Formerly known as the Immigration and Naturalization Service, or INS.

report the client's status to DHS. State privacy laws also prohibit housing programs from sharing a client's information without authorization, unless they are required to do so by law.

IV. PRIVATE HOUSING

Private landlords often fear they may be sued and held liable for discrimination. As a result, they may sometimes be more flexible than PHAs and Section 8 landlords when negotiating accommodations for victims of sexual assault. The following section discusses possible bases for landlord liability and the remedies victims may seek when residing in private housing.

A. Liability of Private Landlords

If the perpetrator of the sexual assault was a landlord, building manager or management company employee, the victim may be able to establish a claim of a hostile housing environment. The Fair Housing Act prohibits discrimination on the basis of sex in the sale or rental of housing.⁷⁶¹ Because sexual harassment (including sexual assault) constitutes a form of sex discrimination, a victim may have remedies against her landlord, building manager or owner of her housing for violating her right to be free from discrimination. If successful, a victim could be entitled to actual and punitive damages, and an order allowing her to return to her housing if she was evicted.⁷⁶² Note that victims residing in either public or private housing may bring claims under the Fair Housing Act, if applicable.

[CHECK YOUR STATE'S LAW: In addition to a claim under federal law, your client may also be able to bring an action under your state's

⁷⁶¹ 42 U.S.C. §§ 3600, *et seq.*

⁷⁶² See NOW LEGAL DEFENSE AND EDUCATION FUND, SEXUAL HARASSMENT IN HOUSING: A PRIMER (2003), available at www.legalmomentum.org/issues/vio/LRK_SexHarassment.pdf; see also David J. Stephenson, Jr., *Actions Under Fair Housing Act* (42 U.S.C.A. §§ 3601 *et seq.*), *Based on Sexual Harassment or Creation of Hostile Environment*, 144 A.L.R. FED. 595 (1998).

local anti-discrimination laws, which may also prohibit sex discrimination in housing.^{763]}

[PRACTICE TIP: In general, private landlords have the same duty as employers; once they know or should have known about sexual harassment on their property, they must take prompt remedial action reasonably calculated to end the harassment. (See Chapter 10 for a discussion of sexual assault employment remedies.)]

If the assailant was a tenant or a stranger, the landlord may be liable for damages for a sexual assault on his property if he did not reasonably ensure the tenant's safety. A landlord also may be liable to the victim for a breach of the warranty of habitability or a breach of the covenant of quiet enjoyment. Under both bases of liability, a victim may seek monetary damages and terminate the lease.

[CHECK YOUR STATE'S LAW: Research your state's statutory and common law to determine which remedies are available in your jurisdiction. Note that some states have adopted the Uniform Residential Landlord and Tenant Act, which codifies the warranty of habitability and covenant of quiet enjoyment, expressly requiring that landlords provide clean and safe conditions.^{764]}

1. Warranty of Habitability

A majority of jurisdictions recognize a warranty of habitability that is implied by common or statutory law in all residential leases, and cannot be waived by a lease agreement.⁷⁶⁵ This warranty typically covers the security and safety of the leased premises, requiring that the landlord provide safe conditions, and may serve as the basis

⁷⁶³ For a state-by-state survey of housing protection laws for domestic and sexual abuse survivors, see State Laws, *supra* note 729. See also Legal Momentum, *supra* note 738.

⁷⁶⁴ Twenty-one states have adopted some version of URLTA. UNIFORM LAW COMMISSIONERS, A FEW FACTS ABOUT THE UNIFORM RESIDENTIAL LANDLORD TENANT ACT, available at www.nccusl.org/Update/uniformactfactsheets/uniformacts-fs-urlta.asp. The twenty-one states are: Alabama, Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington.

⁷⁶⁵ See generally, 49 AM. JUR. 2D *Landlord and Tenant* § 449 (2005).

for a landlord's liability for a sexual assault. The warranty typically covers the maintenance, provision and repair of the *physical* facilities; it extends to common areas of the leased premises. A landlord generally need not have intended to breach the warranty, but simply must have had knowledge of the conditions, to be liable for a material breach of the implied warranty of habitability.⁷⁶⁶

[CHECK YOUR STATE'S LAW: Case law has interpreted the breach of this warranty and the liability attached to landlords throughout the country. Check your state's case law to determine the established precedent in your state.]

2. Covenant of Quiet Enjoyment

Those states that recognize the covenant of quiet enjoyment will hold a landlord liable if he interferes with a tenant's use and enjoyment of the apartment. Even if a tenant owes rent, it may not be a bar to bringing a claim for breach of quiet enjoyment.⁷⁶⁷ In the context of sexual assault, be aware that, if the assailant was the landlord, the victim-tenant very likely may have a strong claim against the landlord for monetary damages for breach of the covenant of quiet enjoyment.

[CHECK YOUR STATE'S LAW: Check the common or statutory law in your state for more information. In some jurisdictions, there may be a cap on the amount of money that can be awarded.⁷⁶⁸ Also, in some states, if a landlord has interfered with a tenant's use of the apartment such that

⁷⁶⁶ See, e.g., **California:** *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324 (Cal. App. 1981) (landlord's failure to improve security while landlord had knowledge of risk constituted breach of the warranty of habitability); **Florida:** *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. Dist. Ct. App. 1985) (landlord's failure to provide locks constituted breach of warranty of habitability); see also Tracy A. Bateman & Susan Thomas, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R. 5TH 207 (1996).

⁷⁶⁷ RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) §§ 6.1, 11.1 (2006); *Northern Terminals, Inc. v. Smith Grocery, etc.*, 138 Vt. 389, 394-396 (Vt. 1980); *Bedell v. Los Zapatistas, Inc.* 805 P.2d 1198, 1199-1200 (Colo. Ct. App. 1991).

⁷⁶⁸ See, e.g., AMY E. COPPERMAN ET AL., LEGAL TACTICS: FINDING PUBLIC AND SUBSIDIZED HOUSING 243 (Amy E. Copperman & Annette R. Duke, eds. 2006) ("The money damages the court awards you will be the equivalent of either three months' rent or your actual loss, whichever is greater.").

the tenant must move immediately, the tenant may be able to do so without penalty.⁷⁶⁹]

B. Terminating a Tenancy or Lease

Because nearly 40% of all sexual assaults occur in the victim's home,⁷⁷⁰ a victim may opt to vacate her residence following the sexual assault. A victim who wants to break her lease with a private landlord may encounter obstacles in terminating the contract.

A few states have enacted laws to facilitate lease termination when a sexual assault occurs.⁷⁷¹ Outside of these jurisdictions, a victim must negotiate with her landlord for permission to terminate her lease or find some other legally justifiable reason to terminate, such as the landlord's breach of his warranty of habitability or covenant for quiet enjoyment (discussed above), or constructive eviction or breach of contract (discussed below). Otherwise, a victim may incur a negative rental history, be held financially liable for the breach of contract, and suffer other financial and housing burdens. A victim may be more successful in negotiating an early lease termination if she can persuade the landlord that there are immediate safety concerns resulting from the sexual assault. In addition, if the victim is able to secure new tenants to cover the

⁷⁶⁹ See, e.g., *Blackett v. Olanoff*, 371 Mass. 714 (Mass. 1977); *Charles E. Burt v. Seven Grand Corp.*, 340 Mass. 124 (Mass. 1959); *Cramer v. Knight Real Estate, Hampden Housing Court*, 91-SC-1875 (1992); *Bocchini v. Gorn Management Co.*, 69 Md. App. 1 (Md. 1986) (suggesting tenant's right to move without penalty).

⁷⁷⁰ Sex Offense Statistics, *supra* note 696, at 3. In addition, nearly 20% of all sexual assaults occur at the home of a friend relative or neighbor. *Id.*

⁷⁷¹ See, e.g., **Oregon**: OR. REV. STAT. § 90.453 (2006) (landlord must release tenant from lease upon 14 days notice and verification that tenant is a victim of a sexual assault within the 90 days of the notice); **North Carolina**: N.C. GEN. STAT. § 42-45.1 (2006) (tenant who is victim of sexual assault can terminate lease by providing landlord 30 days written notice, accompanied by a copy of protection order or police report to regarding incident of sexual assault); **Washington**: WASH. REV. CODE. §§ 59.18.575; 59.18.570 (if tenant notifies landlord in writing that she is a victim of sexual assault and has a restraining order or has reported the assault to law enforcement, a counselor, court employee, clergy member, attorney, social worker, mental health professional, licensed counselor, or advocate at an agency that assists victims of domestic violence, stalking, or sexual assault, tenant may quit the premises without further obligation under the rental agreement). For an overview of current and pending laws to protecting the housing rights of sexual assault victims, see Legal Momentum, *supra* note 740.

remaining portion of her lease, the landlord may be more amenable to the victim's request to early termination of her lease.⁷⁷²

1. Constructive Eviction

A victim may also be able to terminate her lease early under the theory of constructive eviction. A constructive eviction occurs when an intentional act or omission of the landlord, or someone acting under the landlord's authority or with the landlord's permission, permanently deprives the tenant of the beneficial enjoyment of the premises, causing the tenant to abandon the premises.⁷⁷³ Where a landlord is put on notice of the sexual assault and fails to take immediate action to prevent future violence by evicting the assailant or allowing the victim to terminate her lease early, a victim may be able to assert this claim. In addition, where the landlord is the assailant, a victim may also have a viable claim of constructive eviction.

[CHECK YOUR STATE'S LAW: Determine what the victim must show to make this claim in your state, including whether she must demonstrate that the landlord intended the effect of the constructive eviction.]

2. Breach of Contract

A creative option for victims seeking to terminate their lease is to assert a contractual claim for "Discharge by Supervening Impracticability."⁷⁷⁴ Discharge by supervening impracticability occurs: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made . . . [and, as a result, the party's] remaining duties to render performance are discharged,

⁷⁷² For more information for such strategies, see Naomi Stern, *Early Lease Termination by Battered Tenants*, 10 DOMESTIC VIOLENCE REP., Feb.-Mar. 2005, at 33-48, available at www.nlchp.org/FA_DV/DVR%20reprint%2010-3_Stern.pdf.

⁷⁷³ See Francis Amendola et al., *What Constitutes Constructive Eviction*, 52A C.J.S. LANDLORD & TENANT § 966 (2005); see also Francis Amendola et al., *What Constitutes Constructive Eviction – Particular Acts of Landlord Constituting Eviction*, 52A C.J.S. LANDLORD & TENANT § 969 (2005).

⁷⁷⁴ RESTATEMENT (SECOND) OF CONTRACTS c. 11, § 261 (1981).

unless the language or the circumstances indicate to the contrary.”⁷⁷⁵ Advocates may be able to argue successfully that a “basic assumption” upon which a rental agreement was entered into was that the tenant would not be physically or sexually assaulted; when the assault occurred, this “basic assumption” was destroyed thereby discharging the victim’s remaining contractual duties.⁷⁷⁶ While novel, depending on the circumstances of the assault the victim may have some, even if limited, success asserting this contractual claim.

A second creative option that may allow a victim of sexual assault to avoid financial responsibility and/or penalty for early termination is to assert a claim for interference with contractual relations. The tort of interference with contractual relations is an action that assigns liability to a third party whose intentional tortious behavior induces a breach on the part of the party to a contract not involving the third party.⁷⁷⁷ If the victim can prove, in a civil action, that the physical assault perpetrated by the assailant caused her to break her lease or contract with her landlord, and therefore the financial responsibility for the breach should be shifted to the assailant, she may be relieved of any financial responsibility for the termination.

[CHECK YOUR STATE’S LAW: Research the law in your jurisdiction to determine the requirements and standards to assert these contractual claims.] Even if these civil claims may have limited success in your jurisdiction, they may be more persuasive if criminal action against the perpetrator is pending or has concluded with a conviction. If a conviction was secured, the victim may also be able to request restitution for any breach of contract or other damages she sustained. Also,

⁷⁷⁵ *Id.* at § 265.

⁷⁷⁶ Although the case was not reported, in the Virginia case *Aldridge v. Lexington Tower Association*, 1982 WL 215308 (Va. Cir. Ct. 1982), a woman was sexually assaulted on the property and terminated her lease early for that reason. The property management withheld her security deposit because of the early termination. The court terminated the residential lease agreement on the grounds of impossibility of performance of a contract because of the assault on the leased property, and stated that the landlord had no right to withhold the security deposit because there had been no damage to the leased property and the lease had been terminated by the tenant without fault.

⁷⁷⁷ See Richard D. English, J.D., *Liability for tortious interference with prospective contractual relations involving sale of business, stock, or real estate*, 71 A.L.R. 5th 491 (1999).

reimbursement through a state or tribal crime victim compensation program scheme does not require a conviction (although it does typically require a report to and cooperation with law enforcement). (See Chapter 13 on Financial Remedies and Chapter 14 on Criminal Justice for additional information about financial remedies for victims.)

3. Tenants-at-Will

A tenant-at-will in private housing may terminate the tenancy at any time but must give proper notice.⁷⁷⁸ Proper notice is often determined by the term of the tenancy or the frequency with which the rent is due. For example, if rent is paid on a daily or weekly basis, the term of occupancy may be one day or one week. However, depending on the jurisdiction, notice may be required at least one month prior to the termination date. This one month notice requirement may pose a problem for a victim who wants to terminate a lease immediately.⁷⁷⁹ A tenant who terminates a lease without adequate notice may forfeit her security deposit. If a victim must leave for safety reasons, she should, if possible, give the required notice to the landlord and pay rent for a final month of tenancy, even if she is staying elsewhere. If the victim was forced out due to affirmative acts by the landlord (*e.g.*, if her landlord was the assailant), she can rescind the tenancy and, if sued by landlord, may be able to argue successfully that the landlord – and not she – should be held responsible for any breach.

C. Eviction in Private Housing

1. Evicting the Assailant

Many leases have provisions proscribing criminal conduct or conduct that interferes with the safety of other tenants. In general, if a tenant violates a material term of a lease, the landlord has the right to terminate the lease by giving a thirty day quit notice. Even when successful, the eviction process may take substantially longer than

⁷⁷⁸ RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant), § 1.6 (1977) (“A landlord-tenant relationship may be created to endure only so long as both the landlord and the tenant desire. Statutes commonly require some period of notice to terminate the tenancy.”).

⁷⁷⁹ See, *e.g.*, MASS. GEN. LAWS ch. 186, § 12 (requiring at least 30 days notice).

this thirty-day period, however. As a result, the period waiting for the tenant-perpetrator's eviction (thirty-day notice, plus the time for an eviction process) may be too lengthy and thus intolerable for a victim who cohabits with or lives in close proximity to the assailant. One option is for a victim to stay elsewhere until the eviction process is complete, and then reclaim her former housing. This temporary absence should not compromise her tenancy rights. A protection order may be a useful remedy in such a case, as the protection order could include a condition that the assailant vacate a shared premises or otherwise stay a minimum distance from the victim at all times. If the sexual assault is the sole reason for the eviction, it is likely that the victim will be asked to submit a written statement and/or testify at an eviction hearing in order for the landlord to prevail.

2. Avoiding Victim's Eviction

Victims of sexual assault sometimes face eviction from private housing following an assault, especially if the victim requests special accommodation that the landlord does not want to provide or if the assailant is a member of the victim's household or guest (due to a fear that the victim's presence poses a safety risk to other tenants and thereby increases the landlord's potential liability). A landlord also may seek to evict the tenant if he objects to the presence of law enforcement at the victim's residence.

A number of defenses may be available to victims in private housing against whom eviction proceedings have been filed. If the assault occurred at the victim's residence, the most persuasive defense may be that the landlord violated his obligation to provide adequate security. (This same theory may be the basis for a counterclaim against the landlord.) Another possible defense is that the eviction is a form of retaliation against a victim, or an act of sex discrimination (because victims of sexual assault are overwhelmingly female). Sex discrimination is prohibited under the Fair Housing Act.⁷⁸⁰ Both sex discrimination and retaliation may also constitute violations of public policy. Depending on the circumstances surrounding the assault, the remedies sought, and/or any subsequent publicity (including victim statements), other possible claims may include a

⁷⁸⁰ 42 U.S.C. §§ 3600, *et seq.*

free speech or whistleblower claims (alleging that the victim is being penalized for having reported a crime to law enforcement). (*See, e.g., Pooley v. Union County*, U.S. District Court for the District of Oregon, Case No. 3-01-0343-JE, (denying motion to dismiss whistleblower claim where victim alleged that employer constructively discharged her for testifying against husband in criminal case and for securing and modifying her civil protection order).)

D. Modifications to Existing Housing to Enhance Victim Safety

If the victim was assaulted in her home but must remain in her existing housing, she may want to make modifications to her current housing to increase her safety. In most instances, you will need to negotiate with the landlord regarding both the right to make modifications and who will bear the cost. A few states have statutes requiring landlords to change the locks if a victim requests such a change (and submits documentation of the assault), but most states do not have such provisions.⁷⁸¹

[CHECK YOUR STATE'S LAW: If your state does not have any laws or regulations governing lock changes for sexual assault victims in private housing, review your client's lease to determine whether any provision addresses your client's request. If your client is ultimately responsible for the expense of such modifications, review your state's crime victim compensation laws to determine whether your state's program covers such costs. If the assailant was convicted, the victim may want to submit a restitution request to the court. You should also review the jurisdiction's crime victims' rights laws to determine whether the victim has a right to restitution or other financial compensation. A victim may need the assistance of an attorney to help her enforce her crime victims' rights. If your client has a disability as a result of the sexual assault, she may be entitled to additional accommodations. (*See*

⁷⁸¹ *See, e.g., Oregon*: OR. REV. STAT. § 90.459 (2006); *Utah*: UTAH CODE ANN. § 57-22-5.1 (2006). *See also* State Laws, *supra* note 729.

Chapter 12 on Representing Sexual Assault Victims with Disabilities for additional information regarding disability issues.))]

E. Ordering the Assailant to Stay Away

If the victim was assaulted in her apartment and the assailant is not also a tenant of that apartment or complex, she may want to ask her landlord to seek a no-trespass order against the assailant. Keep in mind that the landlord may request a copy of a police report or protection order before seeking such order, so it will be important to discuss privacy issues with your client before making such a request (or submitting documentation) to the landlord. (The landlord may have access to the information even without the client's consent, to the extent the information is a matter of the public record and/or is not protected by the victim's privacy rights.)

[CHECK YOUR STATE'S LAW: Review the law in your jurisdiction to determine the procedure a landlord must follow to request and obtain a no-trespass order against a non-tenant assailant.]

V. CONCLUSION

Without access to safe and stable housing, it may be extremely difficult for a sexual assault survivor to recover physically and emotionally from the assault, maintain her employment, continue her education, and otherwise continue to participate in the daily activities that may be central to her recovery and survival. The loss of safe and secure housing may be especially acute for low income or disabled survivors, whose housing options are often limited and insecure. Many victims may not be aware of the housing remedies available to them following their assault. You should familiarize yourself with the housing policies in your jurisdiction and the resources available to survivors. Discuss housing needs and concerns with your sexual assault clients, including safety issues and safety planning. Even if a sexual assault survivor is not eligible for any of the housing remedies discussed in this chapter, a comprehensive safety plan can help her feel safer wherever she resides.

Chapter Twelve

REPRESENTING SEXUAL ASSAULT VICTIMS WITH DISABILITIES⁷⁸²

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⁷⁸² The Victim Rights Law Center thanks Amy E. Judy, J.D., for her significant contribution to this chapter and for the generous use of her materials. Ms. Judy is the Violence Against Women with Disabilities Project Coordinator with *Disability Rights Wisconsin*. This chapter contains information excerpted from the following sources: *Rights and Reality II: An Action Guide to the Rights of People with Disabilities in Wisconsin*, Disability Rights Wisconsin (2001); *Accessibility Guide for Domestic Violence and Sexual Assault Services Providers*, Violence Against Women with Disabilities Project: A Collaborative Project of Disability Rights Wisconsin, Wisconsin Coalition Against Domestic Violence, Wisconsin Coalition Against Sexual Assault and Independence First (2004); and *Confidentiality of Information and Records: A Guide for Programs Working with Women with Disabilities who are Survivors of Sexual Assault or Domestic Violence*, Disability Rights Wisconsin for the Violence Against Women with Disabilities Project (2004). Thanks, too, to Michelle Harper, Esq., Robert Laurino, Esq., Chief Assistant Prosecutor, Essex County, N.J., Jessica E. Mindlin, Esq., and Lydia Watts, Esq., for their contributions.

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I. WORKING WITH CLIENTS WITH DISABILITIES – SOME INITIAL CONSIDERATIONS

There are many different kinds of physical and cognitive disabilities, and whether, how, and the extent to which a disability impacts a victim’s life – and thus your representation – may vary widely. When and how a victim developed a disability also may influence her needs. For example, if the survivor has a mental or physical disability as a result of the sexual assault, you may play an especially critical role in helping her to access the agencies, providers, and legal remedies that can meet both her sexual assault and disability-related needs.

Because there is such a tremendous variation in how any one individual experiences her disability, the considerations detailed in this section are guidelines for representation; they are not a model to be followed with exact precision. One important issue to note is that a client's disability may not be obvious or apparent to you, other service providers, or a trier of fact. You may need to help these allied professionals understand the nature of your client's disability and/or her corresponding needs. This is often the case when a client's mental or physical disability is not physically apparent or is mild in nature, where symptoms appear and disappear, or when they vary intermittently in severity. For example, someone with multiple sclerosis, Parkinson's, or a bi-polar disorder may appear with no signs of a physical or mental impairment on some occasions (especially if a disease is in its early stages and/or medications are effective). But, if the client with a disability stops taking the necessary medication, the client may rapidly decompensate and the resulting mental instability may be obvious and profound. Because not all disabilities are apparent, it is important to ask all of your clients whether they have a disability; it is best not to rely on outward appearances for this determination.⁷⁸³ In some cases, serving clients with disabilities may require a specialized skill set, depending on the victim, the disability, and the victim's needs. For clients with physical disabilities, you may need to consider whether and how the client can gain entry to your office, the courthouse, counseling centers, sexual assault crisis providers, etc. Meeting with you in your office or appearing at a court hearing may require additional time planning, including transportation, parking, and building access. A victim may prefer to confer with you or appear in court by telephone, and telephonic court appearances may require permission from the court, access to specialized phone services such as a TTY or TTD line, etc. The victim who is reluctant to disclose a disability may be more willing to request an accommodation (such as large print materials, in-person meetings, etc.).

Serving a sexual violence survivor with a disability also may require you to utilize legal resources, safety tools, and community service providers with which you

⁷⁸³ Even when asked, not every client with a disability will choose to disclose it. Sometimes, persons with disabilities will choose not to tell you (or other providers) that they have a disability. This issue is referenced section III A, below.

have limited or no experience. While some areas of the law may be familiar, applying that law to serving victims with disabilities may be unique. For example, many advocates and attorneys are accustomed to complying with mandatory reporting laws for child victims but have limited if any experience with the reporting requirements for vulnerable or at-risk adults. Safety planning for victims with disabilities may prove challenging when the legal remedies differ, housing or counseling options are limited, and community collaborations are not in place. Depending on the disability, statutes of limitation for relevant legal remedies may vary, too. Service providers (including the advocate and attorney) and triers of fact⁷⁸⁴ may have limited, if any, experience working with substitute decision-makers such as guardians, conservators, and powers of attorney. For the survivor with a substitute decision maker, the lawyer or advocate must navigate both sets of relationships to ensure that the survivor is part of the decision making process to the extent practicable.

A. Client Safety

As with all sexual assault clients, safety considerations should be paramount for the lawyer or advocate serving a sexual violence survivor with a disability. An initial safety assessment for a client with disabilities should involve a discussion about safety strategies that are pertinent to the victim's disability, as well as other considerations.

Talk with your client about any specific concerns she may have about her safety. Some concerns might be unique to the victim's disability experiences. For example, if a client was victimized by a caregiver who provides personal care services (such as bathing, toileting, transferring from bed to wheelchair, transportation, etc.), learn what support the victim needs to establish meaningful personal safety. This might include the presence of a third person to help her feel confident that she won't be re-victimized, or hiring an aide who is well know to the victim and with whom she feels secure. If the safety plan involves access to emergency services, the victim may need accommodations

⁷⁸⁴ For an overview of sexual assault prosecutions involving a victim or witness with a developmental disability, *see generally* William Paul Deal and Viktoria Kristiansson, "Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault," THE VOICE, Vol. 1, No. 12 (The National Center for the Prosecution of Violence Against Women, American Prosecutors Research Institute).

to ensure such access, including a phone with programmed speed-dial, specialized transportation services, back-up medical equipment at an off-site location, etc. Organizations that serve people with disabilities may be able to help you and your client develop an appropriate and realistic safety plan. (Additional materials and publications may also be accessed online. *See, e.g.,* www.accessingsafety.org.) Depending on the circumstances, an attorney or advocate may also consider working with Adult Protective Services to ensure the victim's well-being. A local disability rights organization may help you assess whether this is an appropriate referral for your client.

B. Serving a Client With a Substitute Decision-Maker

While many individuals with disabilities do not have substitute decision-makers (*e.g.*, guardian, power of attorney for health care or finances, conservator), some people with disabilities have a designated person who legally “stands in the shoes” of the person with a disability for purposes of certain decisions. It is critical to establish at the outset whether your client has a substitute decision-maker and, if so who that person is, their duties, the scope of the decision-making authority, and whether the individual is assaulting the victim. You will need this information to ensure that you have obtained informed consent, that you are authorized to pursue legal remedies on behalf of your client with disabilities, and that you providing effective and ethical representation. Note that some victims with cognitive impairments may be self-advocates, in that they have the capacity to make their own decision in some or all matters, or their family members never obtained legal guardianship after the individual reached adulthood. Therefore, the self-advocate possessed full legal rights. The problem arises when the self-advocate does not possess the cognitive capacity to understand the legal proceedings. Thus a guardian *ad litem* may have to be appointed.

[PRACTICE TIP: When representing a client with a disability, ask her about any substitute decision-maker she might have and, if so, what type of decision maker she has. It will help if you are familiar with the applicable state laws for guardianships, powers of attorney, or any other substitute decision-makers allowed under the law of your jurisdiction.

Request a copy of any court-orders (such as the appointment of a guardian or conservator) or other relevant legal documents to determine the scope, duration, and any limitations of the decision-making authority. For example, if a guardian has authority to make decisions regarding a ward's health care, but not financial or legal matters, the decision-making authority is limited to health-related circumstances only. Finally, be sure to secure the informed consent of the substitute decision-maker and the client to pursue legal remedies. While informed consent might be legally required only for the decision maker, for attorneys and advocates it remains an important practice to consult with a survivor regarding her case and to respect her choices as appropriate.]

C. Mandatory Reporting Requirements

Check your state's statutes and administrative regulations to determine whether there is mandatory reporting for abuse or neglect of adults with disabilities, to ascertain who is mandated to report, and to confirm how "abuse" is defined. You will need to establish whether the individual client with whom you are working meets, for reporting purposes, the statutory definition of "disabled," "vulnerable adult" or "at-risk adult."

[PRACTICE TIP: Do not presume that every individual with a disability falls under the mandatory reporting requirement. If you are unsure of your obligation to report, consult with your local bar or advocacy organization to help you assess what you may, and what you must, report.]

The scope of what must be reported, to whom, relevant definitions, etc., will vary depending on the jurisdiction, the basis for the reporting requirement (*e.g.* a survivor's age, disability, etc.), and the provider's professional obligations. For example, advocates' obligations will likely differ from attorneys' (the latter's reporting obligations are more likely to be proscribed by attorney-client privilege and legal ethics regulations). In addition, some providers may have reporting obligations pursuant to their contractual commitments.

D. Statutes of Limitation

The state, tribal, federal, or military laws and regulations that apply to survivors with disabilities may differ from the laws and regulations that pertain to survivors without a disability. For example, filing periods or durational requirements (as well as eligibility criteria) for protection orders issued on behalf of a person with a disability or a “vulnerable adult” often differ from the filing period requirements for sexual assault or domestic violence specific protection orders. State statutes of limitation for complaints of housing or employment related disability discrimination may differ from the state or federal limitation periods for other discrimination complaints.

II. LEGAL TOOLS TO CONSIDER

A. An Overview of Federal Laws

This section provides a summary of some of the federal laws most commonly utilized to protect and advance the rights of people with disabilities. These laws include the: (1) Americans with Disabilities Act;⁷⁸⁵ (2) Rehabilitation Act of 1973: Section 504;⁷⁸⁶ (3) Fair Housing Act;⁷⁸⁷ and (4) Family and Medical Leave Act of 1993.⁷⁸⁸ A 2005 guide published by the U.S. Department of Justice’s Civil Rights Division summarizing all of the federal disability rights laws is *available online at www.usdoj.gov/crt/ada/cguide.htm* Although none of these laws is sexual assault specific, each may be utilized to help protect a sexual assault survivor’s civil rights. The rights and remedies the laws provide for are discussed in greater detail in Sections III-VII, below.

1. Americans with Disabilities Act⁷⁸⁹

In 1990, the Americans with Disabilities Act (ADA) was passed to address longstanding discrimination against people with disabilities. The ADA consists of five Titles, four of which address a specific area of the law: Title I – Employment

⁷⁸⁵ 42 U.S.C. § 12101, *et seq.*

⁷⁸⁶ 29 U.S.C. § 794.

⁷⁸⁷ 42 U.S.C. § 3601, *et seq.*

⁷⁸⁸ 29 U.S.C. § 2601, *et seq.*

⁷⁸⁹ 42 U.S.C. § 12101, *et seq.*

discrimination; Title II – Government services, including transportation; Title III - Public accommodations and services provided by private entities; and Title IV – Telecommunications. (Title V of the ADA contains a variety of miscellaneous technical provisions, and confirms that nothing in the ADA amends or supersedes the protections in Section 504 of the Rehabilitation Act; *see* Sections V.2 and VI.3, below, for how Section 504 may advance survivors’ housing and employment rights.)

Under the ADA, whether a particular condition is considered a disability is determined on a case-by-case basis. As a matter of law, some conditions are excluded from the protections of the ADA (*e.g.*, current substance abuse, compulsive gambling, and pedophilia) and will not be deemed a disability.⁷⁹⁰ In the employment context, the ADA prohibits employment discrimination against a qualified applicant or employee in hiring, promotion, compensation, termination, and other terms of employment. Employers with 15 or more workers are subject to the ADA. An employer must be willing to provide a “disabled” employee with a reasonable accommodation. An employer may not require the employee to take a medical exam as a condition of employment unless all employees must submit to such an exam.

Title II of the ADA prohibits discrimination in government services. Public agencies, such as courts, county health care clinics, Health and Human Services agencies, public housing agencies, etc., as well as public transport providers (*e.g.*, trains, buses, subway, light rail or streetcar systems) may not deny or exclude persons with disabilities from the benefits of their services, programs, or activities. For example, if your client is Deaf or hard of hearing and needs an interpreter to communicate with the prosecutor, police investigator, court clerk or judge, a free interpreter must be provided. Similarly, government agencies must include ramps and/or elevators in new construction, purchase or lease wheelchair accessible buses or trains if possible, provide Braille panels in public buildings, and ensure that new crosswalk signs have audio as well as visual indicators.

[PRACTICE TIP: The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA. The EEOC Web site

⁷⁹⁰ 42 U.S.C. § 12211(b).

has a section dedicated to disability discrimination. It may be accessed at: www.eeoc.gov/types/ada.html. For resources and a checklist on business compliance with the ADA, see www.usdoj.gov/crt/ada/adahom1.htm.]

As noted above, Title III of the ADA governs both public accommodations and services provided by private entities. It guarantees that individuals with disabilities are offered full and equal enjoyment of the “goods, services, facilities, privileges, advantages, or accommodations”⁷⁹¹ offered by a place of public accommodation.⁷⁹²

The public accommodations provision applies to any nonprofit group or private place of business that is open to the public for the sale or lease of goods or services.⁷⁹³ For example, sexual assault and domestic violence programs, hospitals, doctor’s offices, day care centers and hotels are all considered public accommodations. (Private clubs and religious organizations are the only private entities explicitly exempted from the requirements of Title III.⁷⁹⁴)

Places of public accommodation are required to make reasonable modifications to their policies, practices, and procedures to make their goods and services available to people with disabilities.⁷⁹⁵ Public accommodations also must provide access to goods and services to people with disabilities through the use of auxiliary aids and services to promote effective communication (*e.g.*, closed captioning, telecommunications devices, interpreters, and alternate formats for written materials).⁷⁹⁶ It is the responsibility of the public accommodation to assume any financial obligations resulting from compliance with the ADA; the burden may not be shifted to the person requesting modifications or services.⁷⁹⁷

⁷⁹¹ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

⁷⁹² Places of public accommodation are defined at 28 C.F.R. § 36.104; *see also* 42 U.S.C. § 12181.

⁷⁹³ *Supra*, note 9.

⁷⁹⁴ 42 U.S.C. § 12187.

⁷⁹⁵ 28 C.F.R. §§ 36.202 and 36.203. Certain buildings, such as facilities preserved as historical sites, may be exempt from this requirement.

⁷⁹⁶ 28 C.F.R. § 36.303.

⁷⁹⁷ 42 U.S.C. § 12182.

Finally, Title III requires the removal of physical and structural communication barriers in facilities.⁷⁹⁸ If a public accommodation is unable to provide access by removing barriers, it is required to provide alternatives. The Americans with Disabilities Act Accessibility Guidelines (ADAAG) serve as a guide for removing these types of barriers.⁷⁹⁹

Both an individual complainant and the U.S. Department of Justice (DOJ) may file complaints of discrimination on the basis of disability. Individuals may file a private civil action for injunctive relief. Remedies available in a private suit may include a permanent or temporary injunction, a restraining order, or other type of order (*e.g.*, to remove barriers or provide an auxiliary aid or service).⁸⁰⁰ Compensatory or punitive monetary damages may not be granted in a private suit.⁸⁰¹

Lawsuits filed by the DOJ typically focus on complaints that show a pattern or practice of discrimination, or discrimination that raises an issue of public importance. The remedies available in civil actions brought by the DOJ include both those available through individual suits, as well as monetary damages.⁸⁰² (Monetary damages do not include punitive damages, but do include all forms of compensatory damages, such as out-of-pocket expenses and damages for pain and suffering). The court also may assess a civil penalty against the defendant in an amount up to \$50,000 for the first violation and up to \$100,000 for any subsequent violation.⁸⁰³ In addition to litigation, the ADA encourages the use of alternative means of dispute resolution (*e.g.*, settlement negotiations, conciliation, facilitation, mediation, mini-trials, and arbitration).⁸⁰⁴

⁷⁹⁸ 28 C.F.R. § 36.304.

⁷⁹⁹ 28 C.F.R. Part 36, Appendix A. *See also* 49 C.F.R. Part 37.

⁸⁰⁰ 28 U.S.C. § 12188.

⁸⁰¹ *See Powell v. Nat'l Bd. Of Med. Examiners*, 364 F.3d 79, 86 (2d Cir. 2004).

⁸⁰² 42 U.S.C. § 12188.

⁸⁰³ *Id.*

⁸⁰⁴ Available online at www.usdoj.gov/crt/ada/publicat.htm#Anchor-ADA-46919.

2. Rehabilitation Act of 1973: Section 504⁸⁰⁵

The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs receiving federal financial assistance. Section 504 states that “no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under” any program or activity that receives federal funding. Each federal agency has its own set of Section 504 regulations that apply to that particular agency’s programs. Agencies that provide federal financial assistance to programs or individuals are also subject to the Section 504 regulations. Requirements common to these regulations include: reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and physically accessible new construction and alterations. Each agency is responsible for enforcing its own regulations. (For additional information on Section 504 and access to housing for people with disabilities, *see* Section V.B.2, below.)

3. Fair Housing Act⁸⁰⁶

The Fair Housing Act (FHA) makes it unlawful (with respect to the sale or rental of a dwelling) to: make, print, or publish any notice, statement or advertisement that indicates any preference, limitation, or discrimination based on handicap; represent to any person on the basis of their handicap that any dwelling is not available for inspection, sale, or rental when it is available to other persons; induce any person to sell or rent any dwelling by representations regarding the entry into the neighborhood of a person of a particular handicap; or discriminate or otherwise make available or deny a dwelling to a buyer or renter because of handicap. *See* Section V.B.1, below, for a discussion of the FHA and disabled victims’ housing rights. *See also* Chapter 11, Housing Rights of Sexual Assault Victims.

⁸⁰⁵ 45 C.F.R. Part 84.

⁸⁰⁶ 42 U.S.C. § 3601, *et seq.*

4. Family & Medical Leave Act of 1993⁸⁰⁷

The federal Family and Medical Leave Act (FMLA) requires covered employers to grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period. A “covered employer” is one who has at least 50 employees. An “eligible employee” is someone who has worked for her employer for at least 12 months and worked at least 1250 hours in the preceding 12 month period.⁸⁰⁸ A covered employer must grant an eligible employee up to 12 weeks of leave for any one or more of the following four reasons:

- (1) The birth and care of the newborn child of the employee;
- (2) Placement with the employee of a son or daughter for adoption or foster care;
- (3) To care for an immediate family member (spouse, child, or parent of the employee) with a serious health condition; or
- (4) For medical leave when the employee is unable to perform the essential functions of his or her position because of a serious health condition.⁸⁰⁹

Under certain conditions, an employee may use the 12 weeks of FMLA leave on an intermittent basis. An employer may allow or require the employee to substitute annual vacation, personal and/or sick leave for some or all of the 12-week leave.⁸¹⁰ An employee on FMLA leave is entitled to certain job protections.⁸¹¹ An employee who returns to work following FMLA leave must be allowed to return to the same position or to a position that offers “equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment.”⁸¹²

⁸⁰⁷ 29 U.S.C. § 2601; 29 C.F.R. Part 825.

⁸⁰⁸ 29 U.S.C. § 2601 *et seq.* (2004); 29 C.F.R. §§ 825.100 *et seq.* (1995).

⁸⁰⁹ *Id.* See also U.S. Department of Labor, Family and Medical Leave Act synopsis, www.dol.gov. A “serious health condition” is an illness, injury, impairment, or physical or mental condition that causes incapacity and requires either or both an overnight stay in a hospital or similar facility or continuing treatment by a health care provider. 29 C.F.R. § 825.114 (1995).

⁸¹⁰ 29 U.S.C. § 2612 (a-d).

⁸¹¹ 29 U.S.C. § 2615.

⁸¹² 29 U.S.C. § 2614(a).

One right that may be very important for a sexual assault survivor with medical or counseling needs is that an employee who is on FMLA leave is entitled to maintain her current health insurance and health benefits coverage (such as pre-tax contributions to a medical expense account).⁸¹³ (For additional discussion of a victim's employment rights, please *see* Chapter 10, Employment Rights of Sexual Assault Victims.)

B. State Laws

In addition to the federal laws that guarantee the rights of persons with disabilities, there are a variety of state laws that provide protections comparable to the federal laws discussed above. In addition, many states also have court and/or evidence rules that offer additional protection to individuals with disabilities. These state laws may supplement the federal protections, and afford greater protection to victims in certain arenas.

[KNOW YOUR STATE'S LAW: Research your state's laws to determine whether they provide greater protections, protect a broader group of persons with disabilities, offer additional legal remedies, or are otherwise more advantageous to your client (*e.g.*, longer statutes of limitation, lower standards of proof, less rigorous standards for determining who is disabled, etc.).]

[PRACTICE TIP: If a victim's rights were violated under both federal and state law, four factors to consider when deciding which avenue(s) to pursue include: (1) the amount of time the governing agency has in which to act on a complaint or grievance; (2) complainants' experience with the agency and how often individuals with disabilities are successful in their claims; (3) the difficulty preparing and pursuing a complaint or grievance;⁸¹⁴ and (4) the types and scope of remedies available.]

⁸¹³ 29 U.S.C. § 2614(c).

⁸¹⁴ *Rights and Reality II: An Action Guide to the Rights of People with Disabilities in Wisconsin*, (2001), p. 237.

III. PRIVACY ISSUES AND VICTIMS WITH DISABILITIES

A. Information Sharing and Privacy Concerns

For any sexual assault survivor, confidentiality is a vital right that often is compromised when specific services or legal remedies are pursued. The privacy rights of survivors with disabilities may be especially at risk, because these survivors often are required to disclose the details of their disabilities to secure access to employment, housing, public benefits, and other legal remedies. (*See* Chapter 3 for a detailed discussion of survivors' privacy rights.)

In addition, when disability-related information is disclosed, a person with a disability is often stigmatized due to the public's lack of understanding, fear, and misconceptions about physical and cognitive disabilities. Because of this, a victim may be reluctant to disclose his or her disability or she may refuse to pursue certain legal remedies or avenues (that you believe should be pursued) because of the discrimination previously suffered. Such choices might frustrate legal advocates who believe certain legal strategies might be successful if the client discloses a disability or pursues a specific remedy. But, as with all victims, the client should be presented with all of her legal rights and options, and her choices must be respected.

B. Ensuring Privacy and Informed Consent When There Are Multiple Service Providers

1. The Challenge in Maintaining Confidentiality

Informed consent and privacy are important to ensure victim safety and freedom from stigma and discrimination, and meaningful access to services from health and human services providers. Informed consent and privacy also are important to preserving a survivor's dignity, autonomy, and right to self-determination. Survivors who access human services want to have control over the information about their lives as well as the services they receive.

The laws governing confidentiality and privilege are complex.⁸¹⁵ Agency, state and federal laws, administrative codes, and regulations govern client privacy rights, as do certain funder requirements (*e.g.*, the Violence Against Women Act of 2005 added new client confidentiality requirements for programs receiving VAWA funding.⁸¹⁶). Ethical and licensing obligations also may determine a victim's rights and a provider's duties (*e.g.*, attorney ethics, clinical social work licensing requirements).

Survivors with disabilities are more likely to have on-going relationships with a multitude of different service providers. For example, a survivor with a mental illness may be receiving therapy from a counselor, medications from a psychiatrist, and also have a case manager (if she receives publicly funded benefits or services). A survivor with a developmental disability may be receiving vocational or day services, live in an adult family home, receive assistance from a home health care aid, and have a case manager. In addition to disability-related services and providers, a victim may also be receiving sexual assault-related services, such as counseling from a sexual assault crisis program and medical care from a hospital or clinic. To provide legal advocacy services that are effective and appropriate, it may be necessary to communicate with these other service providers. Such communications must occur only with the informed consent of your client (and her designated decision maker, if applicable).

2. Health Care Provider Records and Privacy: The Health Insurance Portability and Accountability Act of 1996⁸¹⁷

A survivor's providers may be subject to the confidentiality requirements established by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA is the premier federal law governing the privacy of health care provider records. Although HIPAA was enacted primarily to reform health care financing, a secondary

⁸¹⁵ Confidentiality and privilege are intersecting but distinct sources of privacy rights. Confidential communications are made with the expectation of privacy, and that the information shared will not be accessible to the general public. Generally, if confidential information is subpoenaed it must generally be released (unless it is also privileged). Privileged communications are accorded a greater level of protection than information that is only confidential. Privileged information may remain private even if subpoenaed, unless certain exceptions are satisfied or the privilege is waived by the privilege holder.

⁸¹⁶ 42 U.S.C. § 13925(b)(2).

⁸¹⁷ 45 C.F.R. Parts 160 and 164.

goal was to reform health care privacy and security practices. In essence, HIPAA sets a minimum threshold for the privacy of patient's health care records. State or local laws may afford additional privacy protections.

HIPAA applies to "health care" providers and health care information. HIPAA defines "health care" as the "care, services, or supplies related to the health of an individual, including preventative, diagnostic, therapeutic, maintenance, or palliative care, and counseling, service, assessment, or procedure with regard to physical or mental condition, or functional status, of an individual or that affects the structure or function of the body."⁸¹⁸ The sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription is also included in the definition of health care. "Health information"

means any information, whether oral or recorded in any form or medium that is created or received by a health care provider and relate to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.⁸¹⁹

HIPAA is enforced by the U.S. Department of Health and Human Services' Office of Civil Rights. Penalties for non-compliance range from fines of up to \$25,000 for multiple violations in one calendar year to fines up to \$250,000 and/or imprisonment for knowingly misusing individually identifiable information.⁸²⁰ (For a more detailed discussion of how HIPAA may help you protect a survivor's privacy, please *see* Chapter 3, Privacy: A Pre-eminent Concern For Sexual Assault Victims.)

Because a survivor with a disability may be especially fearful of disclosing personal and medical information, a fuller understanding of HIPAA and the protections it affords may help to allay some fears. It is also important to remember that HIPAA establishes only the minimum of privacy that must be afforded to patient health records. Check your state's confidentiality and privacy laws, too. When the state and federal law are in conflict, the federal law generally controls. However, if state law provides for greater privacy protection or other rights, then the state law will control. This is important because of the greater privacy guarantees, and because any releases of

⁸¹⁸ 45 C.F.R. § 160.103.

⁸¹⁹ 45 C.F.R. § 164.502-519.

⁸²⁰ 42 U.S.C. § 1320d-6(a)(3) & (b).

information or consent forms executed by your client (or her decision maker) must be HIPAA (and other federal and state law) compliant. (See Chapter 3, Privacy: A Pre-eminent Concern For Sexual Assault Victims, for additional information about HIPAA and victim confidentiality).

IV. VICTIM ACCESS TO MENTAL HEALTH SERVICES

Survivors with disabilities, like many survivors of sexual violence, experience mental health and other medical consequences as a result of the violence they have sustained. The medical consequences of a sexual assault may compound or exacerbate an existing disability. The assault may also result in a new or additional mental health disability (*e.g.*, Posttraumatic stress or anxiety disorder).

If your client requests but is denied an accommodation she needs to access health care (*e.g.*, an ASL or other interpreter for the hard of hearing so that she can receive mental health services, materials in alternate formats, etc.), she may be able to avail herself of certain federal, state, or local legal remedies including, but not limited to, the ADA, Section 504, or state or local anti-discrimination or health care laws. Such laws may not be designed specifically to address the needs of sexual assault victims or victims with disability, but may still be a source of additional rights and protections. For example, insurers in Oregon are now required to provide mental health insurance coverage that is equal to the benefits provided for other medical care, including parity for prescription drug coverage, psychiatric hospitalizations, mental health counseling, etc.)⁸²¹ Similarly, federal patients' rights laws may provide benefits and protections, such as the laws that protect individuals in a federally funded hospital or community-based residential youth facility.⁸²² Medicare- and Medicaid-funded hospital patients are also afforded certain federal guarantees, including entitlements and due process rights.⁸²³

⁸²¹ ORS § 743.556.

⁸²² 38 U.S.C. 7334, *et seq.*

⁸²³ 42 U.S.C. § 290 and 42 C.F.R. § 482.13.

V. HOUSING ISSUES AND REMEDIES FOR CLIENTS WITH DISABILITIES

A. Issue Spotting

Safe, secure and accessible housing is critically important to all survivors, but it may be especially difficult to secure for victims with physical and/or cognitive disabilities. This is because appropriate, affordable housing stock is often limited and admission may be difficult to gain. Victims with physical disabilities may be barred or impeded from residing in housing that is not designed to accommodate their needs. For example, a victim with a physical disability or mobility challenges may need housing that is wheelchair accessible. A Deaf or hard of hearing victim may need a residence where the telephones, smoke alarms, security alarms, and other safety devices are visual instead of auditory. These services and devices may be especially important to a victim who was assaulted in her home, or in situations where the victim believes the perpetrator knows where she resides. Victims with mental or cognitive disabilities are sometimes evicted from or denied entry to certain housing because their mental illness is perceived to or does in fact result in anti-social, physically aggressive, or self-destructive behavior. (For example, some residential facilities will not accept or retain a resident who engages in serious acts of self-harm.) Addressing housing needs may be the first step to providing effective advocacy for victims with disabilities. The following examples illustrate how a disabled victim's circumstances may result in an acute housing need:

- Client was sexually assaulted in her apartment and the landlord denies her request to have a service animal to alert her to visitors;
- Client is not permitted to bring her service animal into emergency or transitional housing;
- Landlord refuses to allow client to make reasonable modifications to apartment to establish or enhance accessibility (*e.g.*, a designated disabled parking space or a parking space closest to an accessible entrance);
- Client faces eviction for failure to pay rent on time due to a traumatic brain injury she sustained during an sexual assault;
- The survivor resides in a group home, family home, or other residential care facility where the perpetrator is employed; or
- Client's safety is at risk and she wishes to relocate but is told there are no accessible units available that can accommodate her disability.

B. Potential Housing Remedies for Clients with Disabilities

Both the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act of 1973 prohibit discrimination against people with disabilities in housing. For a more detailed discussion of survivors' housing rights, *see* Chapter 11, Housing Rights of Sexual Assault Victims.

1. Fair Housing Act Protections for Individuals with Disabilities

The FHA has included protections for people with disabilities only since its amendment in 1988. The FHA generally applies to multi-family housing; it applies to single family homes only under certain circumstances.⁸²⁴ The FHA states that people with disabilities cannot be denied access to housing and requires that reasonable exceptions to policies, practices and procedures must be made for people with disabilities. It also requires that people with disabilities be allowed to make reasonable modifications to the occupied premises.⁸²⁵ Under the FHA and Section 504 of the Rehabilitation Act (discussed below), “discrimination” includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”⁸²⁶

Federal policy regarding service animals is found primarily in Title III of the ADA, and is based on previous interpretations of section 504 of the 1973 Rehabilitation Act.⁸²⁷ Under Title III, places of public accommodation are not allowed to invoke a “no pets” policy and a service animal is not a pet. The FHA’s reasonable accommodation provisions also have applicability to service animals, providing that an individual with a disability may request to occupy a dwelling unit with a service animal as a reasonable accommodation to a “no pets” policy and a landlord may not charge an additional security deposit for the service animal.⁸²⁸

⁸²⁴ 42 U.S.C. § 3603(b)(1) and (2).

⁸²⁵ 42 U.S.C. § 3601 *et seq.*

⁸²⁶ 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

⁸²⁷ 29 U.S.C. § 794.

⁸²⁸ 42 U.S.C. § 3604(f)(2).

2. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 was the first law to prohibit discrimination against people with disabilities in housing. It applies to housing programs, services and activities administered and/or funded by the federal government.⁸²⁹ Federal housing assistance is provided by the Department of Housing and Urban Development (HUD) and the Rural Development agency through public housing authorities and other organizations.

HUD has developed one set of 504 regulations which apply to all applicants for, and recipients of, HUD assistance. In addition to the general prohibition of discrimination and physical accessibility requirements, these regulations make it clear that public aid recipients (*i.e.*, agencies that receive federal funds) must provide effective program accessibility, such as communication for blind, Deaf and residents with a disability, when the disability prevents him/her from accessing the recipient's regular communications.⁸³⁰ The regulations require assurances of compliance by recipients and provide enforcement mechanisms.⁸³¹ Perhaps the most important concept the FHA adopted from Section 504 is that of "reasonable accommodation." As noted earlier, both the FHA and Section 504 define discrimination to include refusing to make reasonable accommodations in rules, policies, practices, or services when these accommodations are necessary for equal opportunity to use and enjoy the housing.⁸³²

[PRACTICE TIP: The disabled person must show that the individual from whom the disabled person requested a reasonable accommodation knew (or should have known) about the need for accommodation. Therefore, it is best practice to submit any accommodation request in writing, and to retain a copy for the record. If possible, the records should also evidence that the person received the accommodation request (*e.g.*, a return receipt, certificate of personal service, etc.)]

⁸²⁹ 29 U.S.C. § 794.

⁸³⁰ 24 C.F.R. § 9.103.

⁸³¹ 24 C.F.R. Parts 8 and 9.

⁸³² 42 U.S.C. § 3604.

C. Enforcement

Enforcement of federal housing anti-discrimination law is initiated by an individual or agency complaint. If a disabled victim believes that she was denied an equal housing opportunity, she may file a complaint with the appropriate administrative agency or file a civil court action. A complaint alleging a FHA or Section 504 violation may be submitted to HUD's Fair Housing and Equal Opportunity Office in Washington, DC, or any local HUD office. Complaints under Section 504 about other federal agencies (*e.g.*, the Office of Rural Development, Office of Public and Indian Housing, or Government National Mortgage Association), or their recipients, must be filed directly with the agency accused.

Complaints must be in writing, signed and affirmed under penalty of perjury by the person with a grievance. FHA complaints must be filed within one year from the alleged violation. Section 504 complaints must be filed within 180 days of the violation. If a complaint has been filed and the agency is not able to successfully resolve the matter, the investigating agency will make an initial determination as to whether it believes discrimination occurred.⁸³³ If the agency finds cause to believe that a prohibited housing practice has occurred, it will make a charge and serve all parties. The complainant or respondent may elect, within 20 days of issuance of the charge, to have the claims decided in a civil action.⁸³⁴

Instead of using the administrative complaint process, it also is possible for a complainant to pursue a civil lawsuit to enforce the protections of this law. In contrast to other discrimination complaints (such as employment-based complaints of sex discrimination, which require a victim to first file an administrative complaint with the EEOC and obtain a "right to sue" letter), the complainant is not obliged to first pursue the administrative process.⁸³⁵ A civil action must be filed within two years of the alleged discriminatory act under the FHA; the two-year limitation period is tolled for the time a complainant is pending with the agency pursuant to the administrative process.⁸³⁶

⁸³³ 24 C.F.R. § 103.30; 42 U.S.C. § 3610(a); 24 C.F.R. § 8.56(c)(3).

⁸³⁴ 24 C.F.R. § 103.30, 42 U.S.C. § 3610(a), and 24 C.F.R. § 8.56(c)(3).

⁸³⁵ 42 U.S.C. § 3604.

⁸³⁶ 42 U.S.C. §§ 3613 and 106.04(6m).

Additional information about HUD and the complaint process may be requested directly from the HUD Office.⁸³⁷ Other national resources include Disability Rights and Resources page at www.hud.gov/offices/fheo/disabilities/ and the National Fair Housing Advocate Online at www.fairhousing.com. Numerous state and local government and non-governmental agencies also provide information, resources and assistance with fair housing matters.

[PRACTICE TIP: If the accommodation request involves a service animal, the client is not required to provide documentation of what tasks the service animal performs or whether the animal is “certified.”]

VI. EMPLOYMENT ISSUES AND REMEDIES FOR CLIENTS WITH DISABILITIES

Sexual assault survivors with disabilities often encounter a variety of employment-related challenges, including hiring, retention, terms of employment, accommodations, etc. Secure employment is important for many reasons, including a disabled victim’s financial stability, social network, access to health and other benefits, and a victim’s sense of empowerment and self-worth. (For a detailed discussion of sexual assault survivors’ employment rights generally, please *see* Chapter 10, Employment Rights of Sexual Assault Survivors.)

A. Potential Employment Remedies for Clients with Disabilities

A variety of federal laws authorize financial assistance to, or remedies for, survivors with disabilities who cannot work, or who currently are, or wish to be, employed. These laws include: (1) Government benefit programs, Social Security Disability Insurance and Supplemental Security Income; (2) Titles I and II of the ADA; (3) the FMLA; (4) Title VII of the Civil Rights Act of 1964; and (5) The Rehabilitation Act.

1. Social Security Disability Insurance & Supplemental Security Income⁸³⁸

Some survivors of sexual violence have limited capacity to work, are unable to work, or lose employment due to their disability. Social Security Disability Insurance

⁸³⁷ Additional information about the FHA, HUD and Section 504 Regulations is available from the HUD Fair Housing Hotline at (800) 669-9777 and (800) 927-9275 (TTY).

⁸³⁸ Rules for SSDI and SSI are found in Title 20 of the Code of Federal Regulations, parts 404 and 416.

(SSDI) and Supplemental Security Income (SSI) are federal public benefits programs administered by the Social Security Administration (SSA). Both SSDI and SSI provide cash income payments to people with disabilities. To receive SSDI or SSI benefits on the basis of a disability, a person must have an impairment that meets a strict disability test.⁸³⁹

a. SSDI

SSDI pays benefits to people with disabilities who have worked and paid Social Security taxes on their earnings, and to certain dependents of a worker who has retired, become disabled, or died.⁸⁴⁰ There are no income or resource limits for SSDI eligibility. After a two-year waiting period, anyone eligible for SSDI due to a disability will also be deemed eligible for Medicare.⁸⁴¹ Medicare is a health insurance program for Social Security beneficiaries who are over the age of 65 or permanently disabled. Medicare is not a “welfare” program, and eligibility is not based on financial need.

b. SSI

In contrast to SSDI, which has no financial income or asset requirements, SSI is a need-based federal program. SSI pays benefits to people with disabilities whose income and resources are below established limits. Sometimes, resources and income of parents and spouses are counted. The person or family does not have to have a work history. Eligibility for SSI will make a person eligible for Medicaid, which can be retroactive for up to 90 days. The Medicaid program is a need-based program funded jointly by the state and federal governments.⁸⁴² There are two major categories of individuals who qualify for Medicaid: low-income persons who are over age 65 or permanently blind or disabled and parents, pregnant women and children who meet income and asset limits. An application for SSDI and/or SSI should be made to the local SSA District or Branch Office. Office location and application information is available at SSA offices and on the SSA web site.⁸⁴³

[PRACTICE TIP: SSDI and SSI are complicated programs for those who do not practice administrative or public benefits law, yet they can be

⁸³⁹ 20 C.F.R. § 404.1505 and 416.905.

⁸⁴⁰ 42 U.S.C. § 401, *et seq.*

⁸⁴¹ 42 U.S.C. § 1383.

⁸⁴² 42 U.S.C. § 1396, *et seq.* and 42 C.F.R. Part 430, *et seq.*

⁸⁴³ The SSA office number is (800) 772-1213, and their website is www.ssa.gov.

vital resources for survivors with disabilities. If this is not your area of expertise, seek the assistance of an expert. Many legal aid and legal services offices prioritize representing low income clients on public benefit matters.]

Medical evidence from doctors, psychologists, or other treatment providers who know the claimant well is the most important evidence in proving disability and eligibility for SSI or SSDI. It is not unusual for someone's claim to be denied when they first apply, on the basis of a lack of proof of disability. Because this is a very specialized area of law, it is important to secure the assistance of an experienced public benefits lawyer if you are not familiar with this practice area. The filing deadlines, appeals processes, and proof needed to access these programs successfully may be complex and difficult to navigate, and the financial consequences of a failed claim may be severe.

[PRACTICE TIP: Look in the U.S.C. and C.F.R. for the applicable federal law or rule that governs your client's legal issue. Note that, while the rules in the C.F.R. are generally current, they do not always reflect the most recent policy changes. The most current policy is contained in the Program Operations manual System (POMS), available through the SSA.]

2. Americans with Disabilities Act (ADA)

a. Title I

The employment provisions of the ADA apply to employers who have fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year.⁸⁴⁴ The ADA makes it unlawful for an employer to discriminate on the basis of disability against a qualified individual with a disability in regard to the employment relationship from application to termination.⁸⁴⁵ Determinations of whether an individual has a disability are made on a case by case basis, not simply by a diagnosis or label.

⁸⁴⁴ 29 C.F.R. §§ 1630.2(b) and (e). The ADA does not cover the United States as an employer or corporations wholly owned by the United States government, nor does it apply to Indian tribes as employers. Employees of the federal government and its subcontractors are protected from discrimination based on disability under the Rehabilitation Act of 1973.

⁸⁴⁵ 29 C.F.R. §§ 1630.2 and 1630.4.

[PRACTICE TIP: This area of discrimination law is complex, and ever-changing. If you are not an employment lawyer, or are unfamiliar with Title I law, consult with an employment discrimination attorney with expertise in these cases.]

To be protected under the ADA an individual must be able to perform the essential functions of the job, which are the fundamental job duties of the employment position the individual with a disability holds or desires. Reasonable accommodation means modifications or adjustments to a job application process, to the work environment, or to the manner or circumstances under which the position is performed that allow the individual with a disability to perform the essential functions.⁸⁴⁶ Determining the appropriate reasonable accommodation should be an interactive process between the employer and the individual with the disability.

[PRACTICE TIP: Although a request for an accommodation does not have to be made in writing, it is a best practice to submit the request in writing so that it is dated and a copy can be kept in the client's records.]

Employers are not required to provide the specific accommodation, modification, or device the individual with a disability requests; they are obliged to provide an accommodation that effectively meets the needs of the person with the disability. An employer may request reasonable documentation that supports the need for the accommodation. "Reasonable documentation" includes information that is needed to establish that the individual has an ADA disability and that the disability necessitates a reasonable accommodation. An employer is not allowed to request documentation that is unrelated to the disability and the need for the accommodation.

ADA Title I can serve as an important advocacy tool, especially for survivors with disabilities who need time off work because of their disability. Employers are prohibited from penalizing employees for work missed during a leave that was granted as a reasonable accommodation.⁸⁴⁷ If an employee acquires a disability, from a sexual assault for example, the employee may have to demonstrate her/his continued ability to

⁸⁴⁶ 29 C.F.R. § 1630.2(o).

⁸⁴⁷ The point at which a leave becomes unreasonable will vary from job to job and with the needs of the employer.

perform the essential functions of the job, or may develop the need for reasonable accommodations.⁸⁴⁸

[PRACTICE TIP: It is when an employee requests an accommodation and the employer responds with a request for documentation that a victim's privacy is especially vulnerable. Sometimes, employers seek information beyond the scope of what relates to the job. Survivors with disabilities and advocates should be careful to protect client privacy by not signing releases of medical information that are overbroad, non-specific, or for an indefinite period.]

If the employer refuses to grant a reasonable accommodation, the client may choose to file a complaint with the Equal Employment Opportunity Commission (EEOC). To file a charge, contact the EEOC and ask to file a charge of discrimination. The EEOC will prepare a charge form and send it out for the client's signature. It is important to ensure that: (1) the information on the charge form is accurate and reflects what the client believes the employer did wrong; and (2) the signed charge form is returned to the EEOC before the 300 days has passed.

The completed charge form will then be sent to the employer for a response; at this time, the EEOC investigation is underway. Once the EEOC receives the employer's response, it will review the information and render its initial determination as to whether there is probable cause that the employer discriminated against the employee. In most cases, the EEOC does not find probable cause. An individual who believes she was discriminated against may still sue the employer even if the EEOC does not find probable cause. The EEOC issues what is called a Right-to-Sue letter. This letter establishes that the administrative requirements have been exhausted and the client may proceed to court within 90 days of the letter being issued.

If the EEOC does find probable cause, it will typically try to negotiate a remedy on a victim's behalf. If the EEOC cannot reach agreement with the employer, the agency may file a lawsuit in federal court on the client's behalf.⁸⁴⁹

⁸⁴⁸ ADA: A Technical Assistance manual on the Employment Provisions Title I.

⁸⁴⁹ An EEOC Attorney will be assigned to represent the client, but the client also has the right to intervene with a private attorney.

[PRACTICE TIP: The following are important advocacy tips for representing a client in the context of Title I employment cases:

- Encourage the client not to delay in requesting an accommodation. Make sure that the employer is aware of the request for an accommodation (once employment is terminated, it may be too late for a viable claim regarding denial of an accommodation).
- If the client has already been terminated, determine whether the individual was able to perform the essential functions of the job.
- Gather documentation, such as job descriptions, performance reviews, witness statements, etc.
- Assess whether and when to file an ADA Title I complaint or lawsuit or a complaint to Equal Employment Opportunities Commission (EEOC).
- In considering remedies, possible requests include money for back pay, out of pocket expenses, reimbursement for attorney's fees, expert witness fees, court and other costs, medical costs that were not covered because insurance was terminated, emotional distress damages, etc. The employee could also seek punitive damages.]

b. Title II

Title II of the ADA prohibits public entities from discriminating against qualified people with disabilities in any aspect of employment. Public entities also must make “reasonable accommodations” for employees with disabilities, unless the accommodation would place an “undue hardship” on the public entity.⁸⁵⁰ (*See* Section VI, below, for additional discussion of Title II.)

[PRACTICE TIP: Check your state's laws regarding employment discrimination. Typically, ADA Title II employment complaints may be filed either with the Equal Employment Opportunities Commission (EEOC) or the state equivalent. Remember that claims must be filed within 300 days of the alleged incident of discrimination.]

3. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) can help ensure leave for a survivor with a disability who needs leave time from work. The FMLA covers employers with 50

⁸⁵⁰ 28 C.F.R. § 35.140.

or more employees and provides that an individual may receive up to 12 weeks of leave (unpaid unless available paid leave exists).⁸⁵¹ A sexual assault survivor might qualify for leave under FMLA due to having a “serious health condition,” if the survivor is receiving ongoing treatment by a health care provider. It is important to submit a request for leave under FMLA as soon as possible and to gather any documentation that supports the client’s “serious health condition.”

You will need your client’s informed consent before requesting the documentation, in addition to that of her substitute decision-maker, if she has one. A signed, time limited, record-specific release of information should be used to secure the informed consent. You may need to contact the ongoing treatment provider to clarify what documentation should be provided in support of the claim that your client has a “serious medical condition” that requires ongoing treatment.

[PRACTICE TIP: While the FMLA strategy might be the easiest, most efficient, or least invasive method for securing time off work for your client, another possible option is for the survivor with a disability to request time off from work due to her disability as a “reasonable accommodation” under Title I of the ADA.]

4. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964 may also provide employment remedies for a survivor with a disability. Title VII prohibits, *inter alia*, discrimination based on sex. If a survivor with a disability believes that she is being discriminated against because she is a *female* sexual assault survivor, and can demonstrate that the employer’s policies have a disproportionate impact on female employees, she may be able to pursue a Title VII claim.⁸⁵²

As for any survivor, if a survivor with a disability was sexually assaulted at the workplace there may be a basis for a Title VII sexual harassment claim.⁸⁵³ (For more information about Title VII, please *see* Chapter 10, Employment Rights of Sexual Assault

⁸⁵¹ 29 U.S.C. § 2601.

⁸⁵² *See, e.g., Pooley v. Union County*, U.S. District Court for the District of Oregon, Case No. 3-01-0343-JE, Documents 101 and 104.

⁸⁵³ 42 U.S.C. § 2000(e).

Victims.)⁸⁵⁴ Title VII recognizes two forms of sexual harassment: (1) “hostile work environment” or “non-tangible employment action” in which a coworker’s or supervisor’s unwelcome sexual conduct is so severe or pervasive as to create an intolerable, hostile work environment; and (2) “*quid pro quo*” harassment, in which an employee’s or potential employee’s acceptance or rejection of a sexual advance affects an employment related decision.⁸⁵⁵

5. Rehabilitation Act of 1973

Also known as the “Rehab Act,” this law prohibits discrimination on the basis of disability in programs receiving Federal financial assistance. It requires affirmative action on the part of an employer, and prohibits employment discrimination by federal government contractors and agencies or subcontractors with contracts of more than \$10,000. If an employer is covered under the Rehab Act, a discrimination complaint may be filed with the appropriate federal agency (*see* Section II.A.2, above, for an overview of Section 504 of the Rehab Act).

B. Privacy Issues and Employment

In the employment context, all information obtained in post-job offer medical examinations and inquiries must be kept in separate files and treated as confidential medical records. These records are to be kept separately, apart from personnel files. Although all medical-related information must be kept confidential, supervisors and managers may be informed about necessary work restrictions or accommodations.

There is often a stigma associated with having any disability, but this is especially true for women with mental illness. For any victim with a disability, the decision to inform her employer that she has a mental illness (or any other disability) to avail herself of the protections under the law, is a deeply personal one that should be made with much caution and care. Once the information is disclosed to an employer, it cannot be withdrawn. As an advocate for your client, you can help her identify the advantages and disadvantages of such a disclosure, including the remedies and protections that may be available to her, how difficult it is likely to be to secure and enforce those remedies, what disability- and treatment-related information will have to be

⁸⁵⁴ For a discussion of employment remedies for sexual assault survivors, *see, also* J. Mindlin and L. Reeves, *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Assault Survivors*, Chapter 5.

⁸⁵⁵ 42 U.S.C. § 2000e-2(a)(1) (2004).

disclosed, and what effect, if any, the disclosure may have on the victim's other legal needs or issues (*e.g.*, a criminal trial, a child custody case, etc.).

VII. HELPING CLIENTS WITH DISABILITIES NAVIGATE THE COURTHOUSE

Survivors with disabilities often encounter numerous, and unique, barriers in accessing the courts and other public entities. These barriers may include: courthouses that are not physically accessible or that lack the capacity to accommodate assistive technology; judges and other court personnel who are not attentive or responsive to the needs of victims with disabilities; few or no auxiliary aids and services (*e.g.*, American Sign Language interpreters, materials in alternate formats such as large print or Braille, readers for the blind or visually impaired); a lack of interpreters for the Deaf and hard of hearing; no TTY and TTD lines, etc.⁸⁵⁶ Because Title II of the ADA prohibits discrimination against people with disabilities by public entities, and states are not immune from private suit,⁸⁵⁷ there may be an ADA remedy if access to the courthouse or public entity is limited or denied.

[PRACTICE TIP: Your local or state court administrator's office may have an ADA compliance officer that can assist you and your client in accessing court services.]

A. Title II and the Public Entity: An Overview

Title II guarantees that people with disabilities have equal access to services, programs, and activities offered by public entities, including employment. "Public entities" include any state or local government and any of its departments, agencies, or other instrumentalities. All activities, services, and programs of public entities are covered, including activities of state legislatures and courts, town meetings, police and

⁸⁵⁶ See www.courts.michigan.gov/scao/resources/standards/aj_checklist.pdf for a checklist of courthouse access issues.

⁸⁵⁷ *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004) (holding that Title II constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment in lawsuit filed by court reporter who alleged she lost work because she could not access courtrooms and a criminal defendant who crawled up two flights of stairs to his first hearing but was arrested for failure to appear after refusing to be carried or to crawl to his second, in a courthouse with no elevator).

fire departments, motor vehicle licensing, and employment.⁸⁵⁸ Title II also imposes architectural accessibility requirements on facilities used by public entities.

The Federal government is not considered a public entity under the ADA, but is covered by sections 501 and 504 of the Rehabilitation Act of 1973.

The definition of a “disabled” person for Title II is the same as that for the other titles of the ADA. Three categories of individuals are protected by Title II of the ADA:

- (1) Individuals who have a physical or mental impairment that substantially limits one or more major life activities;⁸⁵⁹
- (2) Individuals who have a record of a physical or mental impairment that substantially limits one or more of the individual’s major life activities; and
- (3) Individuals who are regarded as having such an impairment, whether they have the impairment or not.

The “qualified individual with a disability” means “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”⁸⁶⁰

Public entities must provide “program accessibility,” meaning that the services, programs, and activities of a public entity must be “readily accessible to and usable by” people with disabilities. Program accessibility can be accomplished in a variety of ways, including:

- (1) modifying policies, practices or procedures;
- (2) acquiring adaptive equipment or a communication device; or
- (3) providing services at alternate, accessible sites.⁸⁶¹

⁸⁵⁸ 29 U.S.C. §§ 790-794.

⁸⁵⁹ “Major life activity” means functions such as caring for oneself, performing manual tasks, walking, hearing, seeing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i).

⁸⁶⁰ 28 C.F.R. § 35.104. *See also* 42 U.S.C. § 1231(2).

⁸⁶¹ 28 C.F.R. §§ 35.149-35.150.

B. Title II Remedies When Access to a Public Entity Is Denied

There are two options for victims to consider if they believe their rights were violated under the ADA Title II: (1) An administrative complaint with the appropriate federal agency; or (2) A lawsuit in federal district court.

An individual may file a complaint at one of three different types of federal agencies: (1) an agency that provides funding to the public entity that is the subject of the complaint; (2) the U.S. Department of Justice; or (3) a federal agency designated in Title II regulation to investigate Title II complaints. Eight federal agencies are designated to receive Title II complaints.⁸⁶² The eight federal agencies are:

- (1) Department of Agriculture: Farming and the raising of livestock, including extension services;
- (2) Department of Education: Education systems and institutions (other than health-related schools) and libraries;
- (3) Department of Health and Human Services: Schools of medicine, dentistry, nursing, and other health-related schools; health care and social service providers and institutions, including “grass roots” and community services organizations and programs; and preschool and daycare programs;
- (4) Department of Housing and Urban Development: State and local public housing, and housing assistance and referral;
- (5) Department of Interior: Lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums;
- (6) Department of Justice: Public safety, law enforcement, and the administration of justice, including courts and correctional institutions; commerce and industry, including banking and finance, consumer protection, and insurance; planning, development, and regulation (unless otherwise assigned); State and local government support services; and all other government functions not assigned to other designated agencies;
- (7) Department of Labor: Labor and the work force; and

⁸⁶² An individual may contact the U.S. Department of Justice to determine with which federal agency to file a complaint.

- (8) Department of Transportation: Transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.⁸⁶³

These complaints must be filed within 180 days of the alleged acts of discrimination, unless the time for filing is extended by a federal agency for good cause. Private lawsuits alleging Title II discrimination also may be filed in federal court, and reasonable attorney's fees may be awarded to the prevailing party.

[PRACTICE TIP: To assist a client with disabilities in requesting an accommodation or modification under Title II, determine what accommodation the client wants and needs and request the accommodation from the court in writing. In the request, it may be helpful to cite the specific Title II language of the ADA.]

VIII. CONCLUSION

Serving a sexual assault survivor who also has a disability presents an additional set of challenges for the survivor that must be addressed. These challenges may include heightened privacy concerns, the accessibility of services, and discrimination on the basis of disability (in addition to any discrimination the survivor may experience based on her status as a sexual assault survivor; indeed, it may be difficult if not impossible to discern whether the discrimination the victim encounters is based on her status as a sexual assault survivor, a person with a disability, or both). In addition to the federal, state, and local laws that are specifically designed to protect the rights of and provide remedies for victims of sexual assault and women, disability-specific remedies may also provide a right or remedy for a survivor with disabilities.

⁸⁶³ See www.ada.gov for more information.

Chapter Thirteen

FINANCIAL COMPENSATION CONCERNS FOR VICTIMS OF SEXUAL ASSAULT⁸⁶⁴

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I. INTRODUCTION

A sexual assault may negatively impact a victim's financial status in a myriad of ways, including her ability to be gainfully employed, pay for housing, meet her assault and non-assault related financial obligations, and otherwise support herself financially. Trauma and mental health issues may make it difficult for a victim to remain working or to secure employment. Medical or counseling bills also may exacerbate her financial burden.

This chapter addresses the need for financial assistance or compensation that may result from a sexual assault. The first section discusses common financial costs and

⁸⁶⁴ The Victim Rights Law Center thanks Kathryn Reardon, Esq., the author of this chapter. Thanks, too, to Michelle Harper, Esq., and Mariella de Jesus, Esq., for their contributions.

concerns of sexual assault victims. The second section addresses victim compensation programs administered by the state that provide financial assistance to crime victims, through a combination of state and federal funding sources. The third, and final, section will discuss additional avenues of possible legal recourse, including civil and criminal restitution, and civil liabilities of the assailant or third parties, such as the victim's employer or school.⁸⁶⁵

II. COMMON FINANCIAL COSTS AND CONCERNS

Victims' assault related costs commonly include medical, mental health, education, housing, employment, transportation, and child care related expenses. Often, survivors are not aware of the financial remedies and benefits that may be available specifically to assist a victim of sexual assault or a victim of a violent or compensable crime.

A victim client may (mistakenly) believe that she has to bear the full cost of any expenses associated with the assault, and that nothing that can be done to relieve her of this burden. As a result, she may never discuss her financial concerns with you and will instead struggle to meet them alone. Or, she may decline treatment or services because she cannot afford them. This can exacerbate the harm, leading to further financial losses including eviction, car and other property repossession, high interest loans, debt collection service fees, and even civil or criminal repercussions (*e.g.*, unpaid support obligations, traffic fines, etc.).

Although it may feel awkward or invasive for an advocate to ask about a client's financial situation, it is possible to query a client in a respectful, non-judgmental manner. Because a survivor may not be aware of the options available to her, or may not feel comfortable raising money issues without an express invitation to do so, you should discuss financial issues as part of your comprehensive screening process. It may be helpful to pose the questions in general terms, noting that many sexual assault victims incur financial costs and have financial concerns following an assault, and this is an area in which you may be able to provide assistance.

⁸⁶⁵ For victims of marital sexual assault, financial compensation may also be accessed through property settlements, spousal support, and other dispositions.

A. Medical and Counseling Expenses

According to the National Institute of Justice's 1996 report, *Victim Costs and Consequences: A New Look*, the tangible, out-of-pocket cost for the average rape or attempted rape victim exceeds \$5,000 per victim. The bulk of these expenses are for medical care and mental health counseling. The expenses may include unreimbursed medical bills for assault-related emergency and follow-up medical care, prescription drugs and mental health counseling.

Prescription drug costs may be especially significant if the sexual assault victim is prescribed anti-depressant, emergency contraception, antiretroviral, and other potentially expensive medications. If a victim does not have or does not wish to bill medical insurance (*e.g.*, for privacy reasons), she will have to find alternate coverage or absorb the cost herself. Even if her expenses are covered by Crime Victim Compensation funds or restitution, a victim typically has to apply for reimbursement of such expenses (unless they are covered by the state as part of the forensic examination process).

A victim also may incur costs for both short- or long-term mental health care. Even if the victim has private or government funded medical insurance, she may incur significant out-of-pocket costs if there is a significant insurance deductible, co-pay, or if the services are not delivered by an in-plan or preferred provider. A victim may be able to get free counseling services from her local sexual assault crisis center, but some centers are only able to provide short-term or crisis counseling. Short-term interventions are not a substitute for ongoing mental health counseling. Similarly, support groups may supplement – but are not a substitute for – individual counseling or psychotherapy. Whether and to what extent the rape crisis center counselor is covered by the jurisdiction's privilege laws should also be considered if a civil or criminal prosecution is proceeding.

B. Employment Related Costs

A victim may be absent from work for days, weeks or even months after a sexual assault. The absences may be due to medical or mental health issues, safety concerns, relocation efforts, or for court appearances and meetings with legal counsel (this is often the case where a victim is involved with both a civil and a criminal prosecution, and is thus required to appear in court for a variety of different hearings – which are often set

over or continued with little notice to the victim). These frequent and continued absences may cause a victim to lose wages, benefits and sometimes even her job.

[KNOW YOUR STATE'S LAW: An increasing number of cities, counties, and states are requiring employers to grant victims of domestic violence, sexual assault and/or stalking leave from work. Be familiar with the details of the victim's case and the laws and policies in the relevant jurisdiction(s) to determine what protections are available to your client. A list of laws and regulations, and a summary of employment related cases, is *available online at www.legalmomentum.org/legalmomentum/programs/ehrsa*. See also Chapter 10, Employment Rights of Sexual Assault Victims.]

C. Education Related Expenses

If a victim is in school, her grades may drop after the assault, which can result in the withdrawal from classes or school, loss of tuition, scholarships and financial aid, and/or suspension from athletic or other extra curricular activities. If any one of these is an issue for your client, it is critical to address the matter as soon as possible to prevent or mitigate such losses.

The administrators at the victim's school (specifically, the Dean of Students or Director of Financial Aid) may be able to provide financial assistance or relief. The school may be willing to defer the victim's tuition payment, reimburse or provide a tuition credit if she has stopped attending class, provide an emergency student loan, substitute a grant or scholarship for work-study funds, or temporarily suspend a minimum grade requirement. Depending on your jurisdiction's guidelines, Crime Victim Compensation funds may also be a resource to reimburse a victim for tuition costs and related educational expenses if she withdraws from school as a result of the assault.

[PRACTICE TIP: If the victim will be discussing the assault with a school official or any other third party, be sure that she understands what issues should and should not be discussed, what conversations should not be revealed, and how privilege and waiver operate. A victim must understand that anyone with whom she discusses the case may become a potential witness in a criminal or civil case. It is advisable to have an

attorney review the content of any request the victim plans to submit to the school in writing, including a request for assistance or accommodation. *See* Chapter 9, Education Rights, for a more detailed discussion of adult sexual assault victims' rights in the educational context.]

[PRACTICE TIP: The local sexual assault crisis center may have experience (and collaborative relationships) with campus administrators that may help your client achieve the outcome she seeks. If you are an attorney, consult with the center or a local advocate so that you know who on campus may be the most (or least) likely to assist your client.]

D. Relocation Costs

As discussed in Chapter 7, a victim may need to relocate or make improvements to her existing housing as a result of an assault. These expenses may be covered by the landlord or building owner, a prosecutor's witness protection fund, or a crime victim compensation program (*see* section III below). If the victim receives public assistance benefits, emergency benefits may be available to assist a victim. Non-profit organizations also may be able to assist with relocation costs, or the costs of modifying an existing residence. The assailant may be ordered to pay or to reimburse the victim for such costs pursuant to a civil protection order, a civil case, or a restitution hearing in a criminal proceeding.

E. Child or Other Dependent Care Costs

Following a sexual assault, a victim may be unable to care for her children or other dependent family members to the extent she did prior to the assault. She may have to hire others to provide the services she once performed. Reimbursement for these assault-related expenses may be covered by insurance, crime victim compensation, emergency or other financial assistance ordered pursuant to a civil protection order, or restitution in a criminal proceeding.

III. CRIME VICTIM COMPENSATION PROGRAMS

The Crime Victim Compensation (CVC) program may be an important financial resource for any sexual assault victim, but especially for a victim with limited income or

resources. Unfortunately, some sexual victims never learn about the CVC program, or that there are funds available to reimburse them for certain crime related expenses. Some victims are aware of the benefits but, rightly or wrongly believe they are ineligible for them. It is important to advise your client about the program and how to apply for funds, even if she is receiving services from a victim witness program or is participating in a criminal prosecution.

This section provides an overview of the CVC program. It summarizes which expenses typically are covered by the CVC scheme, eligibility requirements, application procedures, privacy considerations, and the process for filing an appeal if a victim's claim is denied.

A. An Overview

Every state (and U.S. Territory) has a CVC program. CVCs are administered by a state government agency, such as a crime victims' compensation board, an attorney general's office or a department of social services.

[CHECK YOUR STATE'S LAW: The National Association of Crime Victim Compensation Programs website *at* www.nacvcb.org has links to each state's Victim Compensation Program.]

Eligibility for CVC funds varies from jurisdiction to jurisdiction, as does the type of expenses covered and the maximum coverage allowed. Typically, the type of expenses covered by a CVC program include:

- (1) Medical care (including forensic exams and hospital, physician, and nursing services);
- (2) Mental health counseling (for the victim and her family);
- (3) Rehabilitation services;
- (4) Lost wages;
- (5) Property loss or damage (including clothing taken as evidence);
- (6) Crime scene clean-up; and
- (7) Temporary lodging.

A victim must report the crime to and cooperate with law enforcement to be eligible for CVC benefits. A victim has a specified period of time in which she must report the crime, although exceptions are permitted. (Even if the assault was not reported to the police initially, it may not be too late to report and thus become eligible for CVC benefits. A victim should not delay, however, as the time allowable for an application will eventually expire.)

Not all crimes are compensable. Each state has the authority to decide which crimes and what victims shall be covered. In many states, a victim is not eligible if she was a participant in or “contributed” to the crime. (Such provisions may be used to deny benefits to a victim who was sexually assaulted while engaging in prostitution, for example.) Even if a victim is deemed eligible for benefits, the money may not be released immediately and payment may not be forthcoming for several months. Some expenses may be billed directly to the CVC program (*e.g.*, counseling costs) while others will have to be paid first and a request for reimbursement submitted thereafter.

This time lag may be especially difficult for victims with limited resources. A few states provide for “emergency” awards to be given at the outset of the process without the necessity of an investigation or administrative hearing. These awards tend to be of a smaller value.

If a victim has limited funds, it may be possible to ask a provider to bill the program directly, or to wait for payment until the CVC funds are released. You may be able to help a victim request other creditors to defer payment, too. While it is generally not necessary to inform a debt collector that the victim was sexually assaulted, your client may receive an extension or a suspension of interest accrual if the creditor is informed that a victim has a reimbursement claim pending with the CVC program. As with any other disclosure, this information should be shared only with a victim’s informed consent.

[KNOW YOUR STATE’S LAW: Because each jurisdiction’s eligibility requirements vary, it is important to be familiar with the requirements in the jurisdiction where the victim resides and where the crime occurred. For example, some states will pay benefits only to residents of their state while others will provide compensation if the crime was committed in the state. Also, certain expenses may be excluded from coverage (*e.g.*, some states will not cover housing, moving and relocation expenses), so

it is especially important for you to be familiar with the benefits scheme in the jurisdiction(s) that may provide compensation to the victim.]

[PRACTICE TIP: Thorough record keeping can strengthen a victim's CVC request. To maximize benefits, work closely with the victim to create a comprehensive list of all her assault-related expenses from the time of the assault and continuing to the present. Remind the victim that to receive reimbursement she will need to submit receipts, bills, provider statements, and other relevant documents.]

B. Applying for Compensation

The first step is to file an application for victim compensation with the appropriate government agency. The application must include ample documentation that the victim meets the requirements for compensation and must clearly state her need for compensation. As noted above, there is usually a specified period of time in which a victim may request compensation. The time limit typically begins to run as of the time of the assault. It is usually shorter than the statute of limitations for the underlying criminal offense. Most states allow for a relatively short time period for filing, requiring that the claim be filed within six months to three years from the date of the assault.

[CHECK YOUR STATE'S LAW: Many statutes set a time period for filing the claim for compensation. Attorneys and advocates must be clear on that time period so that victims do not delay in filing claims if that will preclude them from reimbursement. The time period may be tolled or extended for victims of child sexual abuse.]

C. Specific Terms of Coverage

Each state's victim compensation statute will specifically identify the types of expenses that are covered by the program. Often, the CVC scheme establishes caps, reductions, and exceptions to coverage. For example, most states limit the overall amount of compensation that an individual victim may receive. Limits range from \$15,000 to \$50,000. Some states further reduce this coverage by limiting payment for specific expenses (such as counseling, loss of property, lodging, etc.).

In most states, crime victims' compensation is a payer of last resort and will cover only out-of-pocket expenses. If a victim has an alternative source of payment for her expenses (*e.g.*, private health insurance, workers compensation, disability insurance, unemployment compensation, Medicaid, Social Security benefits, Medicare, restitution or civil suits), she must first seek payment from that source. In some cases, if these other sources cover the full cost of her expenses, a victim will be deemed ineligible for victim compensation. If, however, these sources cover only a portion of these expenses, a victim may request CVC payment for the balance.

[PRACTICE TIP: If payment could be provided by an alternate alternative funding source but the victim opts not to access that source, she may need to submit a persuasive explanation as to why the CVC program should still cover her expenses. For example, if a victim does not want to bill her insurance for sexual assault related medical expenses for safety or privacy reasons, or because her medical coverage is provided by the assailant, she may be able to persuade the CVC program to cover her costs.]

Finally, as referenced previously, CVC may be denied or diminished based on a victim's conduct. A number of states withhold or offer reduced compensation if the victim has some degree of responsibility for her injury or loss. If, for example, the victim is determined to have instigated or unreasonably contributed to the risk or occurrence of an injury or loss, compensation may be denied. Of course, any rule that suggests that a sexual assault victim is in some way responsible for her own sexual assault (*e.g.*, "putting herself in a dangerous situation") or any rule that punishes a victim for fighting back against her assailant is extremely problematic. Nevertheless, coverage may be denied. Many states, however, have an exception to this "contributory negligence" rule if the victim is injured when trying to prevent a crime or if she cooperates with law enforcement. Some states waive this rule specifically for victims of sexual assault.

[KNOW YOUR STATE'S LAW: Links to every jurisdiction's crime victims' compensation program are *available online at* www.aardvarc.org/victim/restitution.html (*see* the listings under "Victim Compensation Information by State.")]

D. Timely Report to Law Enforcement

Most states require that the victim report the crime to and cooperate with law enforcement to be eligible for victim compensation. Sufficient cooperation may be as minimal as obtaining a civil protection order with criminal consequences or filing an incident report. In other states, the victim must consent to and assist with the prosecution of the assailant. In most states, reports to law enforcement must also be timely, so a long delay between the assault and reporting the assault may preclude a victim from being eligible for victim compensation. Depending on the state, the required reporting period can be as short as 48 hours and as long as five days. Note, however, that many states offer an exception to this timely reporting rule. Some states waive the timely reporting rule specifically in cases of sexual assault. Other states will waive the rule if a victim can show “good cause” for having waited to file a report. (See www.nacvcb.org/statelinks.html for links to each state’s crime victim compensation provisions.) Fear, physical injury and emotional trauma associated with a sexual assault are often adequate to show “good cause.” A prosecution or conviction are not required to be eligible for compensation (such determinations are not within the victim’s control).

[PRACTICE TIP: A victim may be able to file a police report without deciding immediately whether to press charges and/or follow through with prosecution. Filing a police report solely to preserve the possibility of requesting CVC may afford a victim the time to decide whether to assist with a prosecution. However, be aware that whether a victim will be allowed to file a report without initiating an investigation is a matter of local department practice. Therefore, while some police may be willing to postpone investigating and pressing charges, others may be obliged to investigate the case to some extent. Before a victim reports an assault, you may want to contact the police department or the local sexual assault crisis center to ascertain what local practice (or even a particular officer) will allow.]

E. Privacy and the Request for CVC Funds

Every jurisdiction has its own scheme for processing claims for crime victims’ compensation. Some jurisdictions require only that the victim file an application and that the CVC fund representative conduct a short investigation. In the course of conducting

these investigations, the CVC representative asks a victim to execute a release of information so that the CVC can access police reports, witness statements, and the victim's medical records. A few jurisdictions provide for an administrative hearing that could become a mini-trial for the victim, including in-person testimony by the victim and witnesses. While the records of the proceedings are generally considered public records, confidential records received in preparation for the hearing are confidential and exempt from disclosure. Some states specifically protect information pertaining to claims or hearings involving victims of sexual assault. As an advocate for your client, you should determine how much privacy your client may be afforded in these proceedings. Help her to understand her choices, and to assess whether her privacy concerns outweigh her need for financial assistance.

[PRACTICE TIP: If your client is seeking victim compensation to cover mental health counseling costs, her therapist or counselor will likely have to submit a statement regarding the victim's mental health. In some jurisdictions, however, records provided to the CVC for documentation purposes are exempt from the public record and do not have to be disclosed to the prosecution or the defendant if a criminal case is pending. Even if the records are supposed to remain private, because a victim's privacy is often compromised, identify these potential privacy concerns for your client. The victim may also want to discuss the content of a report with the mental health provider before it is submitted.]

Please *see* Chapter 3, Privacy: A Pre-eminent Concern For Sexual Assault Victims, for a more detailed discussion of victims' privacy rights.

F. Appealing a Denial

The most common reasons for denying a victim's request for CVC include victim credibility, exclusion based on the victim's participation in a criminal act, or an alternate source of funds. If you believe that your client's claim was denied erroneously, determine whether your client wishes to file an appeal.

In most jurisdictions, the appeal is a two-step process that involves: (1) Request for administrative reconsideration; and (2) Judicial review. [CHECK YOUR STATE'S

LAW: Carefully review your jurisdiction's CVC statute to determine how, where, and by when to file an appeal.]

IV. RESTITUTION FROM THE PERPETRATOR

Restitution typically is available in a criminal case only if the perpetrator has been convicted of a criminal offense. Restitution is usually requested as part of the criminal sentence. A victim may have a statutory and/or constitutional right to restitution in a criminal case. Such rights are not a guarantee, however, that restitution will be ordered sufficient to fully compensate a victim for her losses.

A victim usually must submit her request for restitution to the court prior to sentencing. State constitutions and statutes vary greatly as to what expenses may be reimbursed through restitution. If an expense is allowable, the prosecutor may (or may not) advocate for the full amount of restitution on the victim's behalf.

If the perpetrator was a juvenile and the case was resolved in juvenile court, restitution will not necessarily be ordered. Some, but not all, states expressly authorize restitution in juvenile cases. A state may also limit the amount of restitution that may be ordered in a criminal or juvenile matter.

A victim may be able to request restitution as part of her civil protection order application, too. Any such financial award could be a – but not the sole – provision of a protection order. Courts are often reluctant to order restitution in a civil protection order hearing. A victim may have more success persuading a court to include in the protection order an emergency award for housing, medical, or legal expenses. Further, because victims of non-intimate partner sexual assault are eligible for protection orders in only a minority of states, this remedy may be further limited in scope. (*See* Chapter 7, Safety and Protection Orders, for a more detailed discussion of the protection order remedies available to victims of intimate and non-intimate partner sexual assault.) One advantage of restitution over some other forms of compensation is that the debt may not be discharged through bankruptcy.

V. TORT REMEDIES: CIVIL LIABILITY OF ASSAILANT OR THIRD PARTIES

Attorneys who are funded by the Office on Violence Against Women's Legal Assistance to Victims (LAV) grant program are statutorily prohibited from asserting tort

claims on behalf of their clients. In some cases, where clients have potential tort claims against the perpetrator or third parties, this mandate limits the array of remedies the LAV-funded attorney may pursue on behalf of a client. Nevertheless, an attorney still has an obligation to identify a victim's legal remedies and to provide an appropriate referral if you believe your client has potential tort claims against the perpetrator or another tortfeasor. For this reason, it is important that all practitioners be familiar with basic tort practice, even if only for issue spotting and referral purposes (and for avoiding claims of malpractice).

There are a variety of tort claims that a victim may be able to pursue against the perpetrator, such as intentional or negligent infliction of emotional distress, assault, battery, or false imprisonment. Claims against a third party such as a business, employer, nursing home, foster parent, or licensing agency may include negligent hiring or supervision, dereliction of duty, fraud, breach of contract, etc.⁸⁶⁶

“Tort actions present a number of advantages [over criminal prosecution] for victims proceeding against alleged assailants,”⁸⁶⁷ such as a lower standard of proof, broader discovery rights against the defendant, recovery for both economic and non-economic damages, “a more even distribution of procedural benefits enjoyed by the parties and a more fluid definition of the prohibited harmful conduct.”⁸⁶⁸ Claims against third-party defendants present another avenue for victims, as the third parties would typically not be subject to criminal prosecution for their acts or failure to act.

“[T]ort doctrine, though different from criminal law in a number of ways that can benefit victims, still presents a significant set of concerns and challenges for victims.”⁸⁶⁹ Civil litigation is often a lengthy process, with some cases taking years to resolve. For victims in need of financial assistance or emotional closure, the duration of the civil case may be especially difficult and of limited benefit. The civil discovery process may be harrowing for a victim because evidence that is precluded in a criminal prosecution or

⁸⁶⁶ For an excellent discussion of sexual assault and tort remedies for victims, see Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55 (2006). See also Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 105 (1981); Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, GOLDEN GATE U. L. REV. 479 (1979)

⁸⁶⁷ *Id.* at 57.

⁸⁶⁸ *Id.*

⁸⁶⁹ *Id.* at 61.

limited under the jurisdiction's rape shield law may be discoverable and/or admissible in a civil case. Moreover, all of the anti-victim biases evident in criminal cases may extend to the victim's civil prosecution, resulting in an abundance of victim-blaming by the defense.

If a victim is currently involved in a criminal case against the assailant, it is important to ensure that the victim understands how a civil tort action might affect the prosecution's case. For example, if a victim files a civil suit at the same time a criminal prosecution is proceeding the defendant may try and argue in the criminal proceeding that the victim is mainly motivated by financial gain, and that the criminal case is part of a thinly veiled attempt to get money damages. If a victim opts to wait until the criminal prosecution is complete, however, the victim should be aware of any relevant civil statutes of limitation to ensure that the civil suit is not time-barred.

If the victim is considering filing a tort case against the perpetrator or a third party, the victim and anyone assisting her should proceed cautiously before discussing the assault with an outside third party. Refraining from such discussion may be difficult if the victim is requesting assistance from the third party, such as employment or residential accommodations, medical or mental health services, etc. The third party may also be a potential defendant, however, such as an employer, landlord, or school, and may seek to interview the victim to lay the groundwork for a possible defense. A victim may need to balance the information disclosed, and provide as general information as possible, both to protect her privacy and preserve the strength and merit of her potential tort claims.

VI. CONCLUSION

Many clients will suffer financial consequences as a direct result of a sexual assault. Helping victims minimize their financial losses is an essential component of your civil representation. Crime Victim Compensation programs, restitution orders, and protection orders may be the best sources for financial compensation, short of more extensive civil litigation (such as tort claims). Because these remedies vary from one jurisdiction to another, you and your client will want to collaborate to ensure that she has considered every financial remedy available to her. While money can never fully compensate a victim for the violation she sustained, the funding sources outlined here may spare her the additional insult of bearing the financial burden of her assault.

Chapter Fourteen

CRIMINAL JUSTICE AND SEXUAL ASSAULT VICTIMS⁸⁷⁰

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I. INTRODUCTION

The criminal justice system can be a frightening and intimidating maze of laws and procedures that leaves a sexual assault victim feeling revictimized. While advocates based in prosecutors' offices, law enforcement agencies, and community-based non-profit agencies have assisted victims in criminal court for decades, rarely have victims

⁸⁷⁰ The Victim Rights Law Center thanks Michelle Harper, Esq., Angela Lehman, Esq., and Paula Finley Mangum, Esq., the authors of this chapter. Thanks, too, to Sarah Boonin, Esq., and Lydia Watts, Esq. for their contributions.

had the benefit of their own attorney to protect their interests and enforce their rights. Until recently, victims were left to navigate this difficult system without an advocate of their own.⁸⁷¹

For lawyers who do not regularly practice in the criminal law arena, advising a sexual assault victim on when and how to enforce her rights can be a daunting task. This Chapter provides an overview of how a criminal case proceeds through the courts, and highlights what you can do as an attorney both to protect and to empower sexual assault victims in the criminal justice system.⁸⁷²

II. YOUR ROLE: ADVISING YOUR CLIENT

Criminal charges against a perpetrator are prosecuted by the state, territory, Tribal court, or federal government. The victim's role traditionally has been limited to that of a government witness without rights of her own, and the outcomes of criminal prosecutions have been disappointing for victims. According to data gleaned from the Majority Staff Report of the Senate Committee on the Judiciary, *The Response to Rape: Detours on the Road to Equal Justice*,⁸⁷³ "54% of rape prosecutions result in either a dismissal or an acquittal, approximately 1 in 10 rapes reported to the police result in time served in prison and 1 in 100 rapes (including those that are unreported) result in a sentence of more than one year in prison. A rape prosecution is more than twice as likely as a murder prosecution to be dismissed. In one study, more than 40% of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims." S. Rep. No. 102–197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, *Gender Justice in the Colorado Courts* 91 (1990)).

While having legal counsel for victims will not necessarily change the outcome of criminal prosecutions, lawyers for victims can help ensure that a victim understands the criminal process and makes informed decisions about how to proceed. Change is

⁸⁷¹ While victim assistance advocates in prosecutors' offices provide many excellent services to victims of crime, because they are part of the prosecution they are limited in the services they can offer a victim and, importantly, in their ability to provide confidential services or protect her privacy. The services may also be limited in scope where they are grounded in the victim's prosecution-related rather than civil legal needs.

⁸⁷² For further reference see: Douglas E. Beloof, *Victims in Criminal Procedure*, Carolina Academic Press (1999); see also, Douglas E. Beloof, Jessica E. Mindlin, and Liani Jean Heh Reeves, *A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence*, available at www.lclark.edu/org/ncvli/objects/L&C77576criminalbook.pdf.

⁸⁷³ 103d Cong., 1st Sess., 2 (Comm. Print 1993)

now on the horizon, with all 50 states and the federal government having enacted a variety of crime victims' rights legislation.⁸⁷⁴ These crime victim rights are in addition to a victim's state or federal constitutional rights (such as the right to privacy or the right against self-incrimination).

Your primary role in representing a victim who is a witness in a criminal prosecution against her assailant is to ensure that she is aware of, understands, and has someone to help her protect her privacy and enforce her rights. Because attorneys representing victims' interests in a criminal prosecution is still an emerging practice area, it is especially important to discuss your role and the scope of your representation with your client, the prosecutor and any victim witness advocate assigned to the case.⁸⁷⁵ You may also need to educate the judge and judicial staff about your role and the victim's right to have her own attorney to represent her interests in a criminal prosecution. Clarifying your role as a private attorney can help all participants be clearer about the distinction between the role of the state's prosecutor and the role of the victim's private attorney.

The most significant distinction is that you represent the victim and are ethically obligated to advocate zealously for her interests. In contrast, the prosecutor, who represents the government's interests, is governed by a different set of legal and ethical obligations with respect to the victim and the assailant. The prosecutor represents the government's interests and does not personally represent the victim.

Your client's interests may not always be aligned with the prosecutor's. For example, prosecutors may be interested in accessing medical, counseling or other records

⁸⁷⁴ Additional information on state and federal crime victim rights legislation is available online in the NCVLI Library which may be accessed at www.ncvli.org. See also, www.nvcn.org.

⁸⁷⁵ Victim witness advocates are typically employed by a prosecutor's office or law enforcement agency to assist victims and other witnesses of violent crime. A victim witness advocate may assist a victim from the time a case is first referred to the prosecutor's office until the conclusion of the investigation or court proceedings. Generally, the goal of victim witness assistance programs is to: 1) Assist victims in their recovery from the crime; 2) Reduce the level of secondary injury associated with the aftermath of the crime and participation in the criminal justice system; and 3) Aid in the prosecution of criminal cases by ensuring that crime victims, other witnesses, and family members are supported. Although individual programs vary, assistance may include one or more of the following: crisis intervention and referrals; assistance with financial compensation, including restitution and the crime victim compensation program; notification of scheduled hearings, including pre-trial, bail, release status, and sentencing matters; trial preparation; in-court advocacy and support; assistance with right to allocution; and post-sentencing advocacy.

a victim may want to keep private. The prosecution may also seek to compel a reluctant witness to testify against her will.⁸⁷⁶

Despite these fundamental differences, there are ways in which you and the prosecutor can work together. You can help your client articulate her goals in the criminal justice process, and determine how best to accomplish them. You can help prepare her for the experience of testifying in a criminal case. You can assist the prosecutor by sharing (with the victim's permission) your in-depth understanding of the facts and evidence of the case and offer assistance regarding the most effective method of presenting the evidence. Helping your client pursue the civil remedies also may enable her to remain engaged in the criminal justice process. It is critical to keep in regular contact with the prosecutor to ensure that a victim's rights are respected. (Even though you are the victim's civil attorney, you and your client have a stake in the outcome of the criminal case.)

[CHECK YOUR STATE'S LAW: Most victim witness assistance personnel are under the jurisdiction of the prosecutor's office or a law enforcement agency. Even if there is a victim-advocate privilege in your jurisdiction, in most (but not all) jurisdictions it will probably apply only to community-based victim advocates. It will not protect the confidentiality of information disclosed to prosecutor or law enforcement agency's victim assistance personnel. Furthermore, information disclosed to such a government-based victim assistance advocate may have to be provided to the defense. Like prosecutors, these victim assistance personnel are obligated to turn over to the defendant any potentially exculpatory material in their control or custody.⁸⁷⁷ (Community-based advocates typically are not governed by this requirement, as they are not agents of the state.)]

⁸⁷⁶ See, e.g., *S.A. v. Sup. Ct. In and For Cnty. Of Maricopa*, 171 Ariz. 529 (Ariz. App. Div. 1992) (crime victim who failed to appear in court pursuant to a subpoena arrested after refusing to testify); See also, Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No-Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZA WOMEN'S L.J. 281, 287 (2003); John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J. at 4 (Aug. 22, 1983) (discussing case in Anchorage, Alaska in which a victim was jailed for failing to testify).

⁸⁷⁷ See, e.g., *Commonwealth v. Liang*, 434 Mass. 131, 135-136 (2001) (noting that prosecutors' duty to disclose exculpatory evidence includes evidence obtained by victim advocates who serve as prosecutors' agents). Cf. A.R.S. §§ 8-409, 13-4401, 13-4430 (A crime victim advocate shall not disclose as a witness any communication between the advocate and victim without victim's written consent.)

[PRACTICE TIP: A victim's lawyer should document everything the client can remember about the assault. The importance of documenting the assault as soon as possible cannot be overemphasized. Even if the victim does not want to talk to police or make an incident report right away, encourage her to make detailed notes for your file or to prepare a written statement for your records that describes the assault. (*See* Chapter 3 on Privacy for additional discussion of victim confidentiality.) It can also be important to encourage the victim to obtain medical care, even if she does not want to immediately report to the police. Prompt and timely medical care may be critical to protecting the victim's medical well-being as well as providing critical documentation of the incident for subsequent criminal prosecution. A SAFE (sexual assault forensic exam) or other forensic exam can secure forensic evidence which would otherwise be lost.⁸⁷⁸]

Delayed reporting, although common, often undercuts a victim's credibility with a jury or other civil or administrative trier of fact. Thus, the more timely an assault is reported to medical or law enforcement authorities the more credible a victim's testimony may be regarded. At the same time, you must take care to protect your client's privacy and to ensure that her decisions are made thoughtfully and with informed consent. Consider having your client prepare her written notes or statements for your client file, as this can protect it as attorney work-product or a communication protected by the attorney-client privilege. (*See* Chapter 3 on Privacy for additional information.)]

A. Preparing Victims for Interviews with Law Enforcement

Victims should be prepared for law enforcement officers to carefully scrutinize allegations of sexual assault. A victim may be subjected to an intensive interview process. This process can take anywhere from a few days to several months. When a victim reports an assault, she will usually be interviewed by a police investigator several times. The case may then be referred to a prosecutor who, depending on the local

⁸⁷⁸ Depending on the jurisdiction, the age of the victim, and other factors, a medical provider may be mandated to report the sexual assault. Be sure to advise the victim if this is the case so that she can make an informed decision about whether, how, and from whom to seek medical care.

practice, may interview the victim again. Other evidence will also be collected and evaluated during this process.

The most common types of sexual assault evidence gathered include fresh complaint witnesses, evidence reports from the sexual assault forensic exam, other physical evidence, and statements by the victim and the assailant. Depending on the jurisdiction, a prosecutor may be involved with the case during the investigation phase.

1. The Importance of Candor in Reporting Details of the Assault

Advise your client to describe all relevant details of the assault as accurately, consistently and truthfully as possible. Victims of trauma often forget or suppress certain facts, and it is not uncommon for victims of sexual assault to omit details of their assault.⁸⁷⁹ In particular, victims are more likely to withhold information that they fear will get them into trouble, such as underage drinking, illegal drug use, or an extra-marital affair. Although these omissions may be common, equivocating or withholding certain details or collateral issues may endanger an otherwise successful prosecution. The omissions may lead the trier of fact to conclude that the victim deliberately withheld or lied about more significant facts.

Once the victim's credibility is undermined, it is difficult if not impossible to restore it.⁸⁸⁰ If necessary, you may be able to educate the prosecutor (verbally, through a motion, etc.) about why victims often omit details of an assault, so that the prosecutor can educate the judge or jury as well. An expert witness may be able to testify about victims' behavior and the myths surrounding sexual assault. Still, the more the victim can remember and share from the outset, the more likely it is that the criminal case against her assailant will proceed accordingly. A victim should be advised to be completely candid about the details of the assault.

[PRACTICE TIP: If the details of the assault involve any illegal activity on the part of your client and could compromise your client's Fifth Amendment rights, you may need to work with the prosecution to secure

⁸⁷⁹ See FAIRSTEIN, *supra*, at 14.

⁸⁸⁰ *Id.* at 140. Linda Fairstein explains, inaccuracies may have “no direct bearing on the sexual assault but can give the jury just enough reason to distrust [a victim. Once] they distrust her on a minor issue, their faith in her entire story is undermined.” *Id.*

immunity for your client regarding any illegal activity in which she may have been engaged. *See* Section 4 below and Chapter 2 for additional information. If the defendant is aware of the victim’s activity, it is important to notify the prosecutor so that the appropriate motions can be filed to exclude evidence, the prosecution can prepare to address the issue at trial, etc.]

2. Facts She Does Not Have to Disclose

Law enforcement investigators will often question a victim extensively about her personal life to identify and assess all the variables that might influence the decision to charge or prosecute a criminal case. This interest in learning everything about a victim is a natural function of the law enforcement investigation process, and it is essential that investigators obtain detailed accounts of an assault to prepare a successful criminal case. Sexual assault victims often feel compelled to answer all of these questions, and to tell the police a great deal about their personal and/or sexual history. However, if the information sought is not relevant, a victim should know that she does not need to disclose it. One of your most important tasks is to help protect a victim’s privacy rights. You play a key role in ensuring that she understands her rights and makes informed decisions about what information to release and what information to keep private.

[PRACTICE TIP: Preventing disclosure of privileged and/or confidential information is critically important during the investigation stage. Once released, personal information can be very difficult to protect. Consider scripting a sentence that the victim can remember and repeat when she feels that she is being asked invasive questions: “I’m sorry, but I am not comfortable answering the question.” Or, “I’m uncomfortable answering that question. I’d like to talk to my lawyer [advocate] first.”⁸⁸¹ *See* Chapter 3, Privacy, for more detailed information on victims’ privacy rights.

⁸⁸¹ Some states specifically authorize the presence of a support person to accompany a crime victim. *See, e.g.,* ORS § 147.425, *et seq.* (a victim of a person crime who is 15 years of age or older may select an adult as their personal representative (PR) so long as the representative is not a suspect in, party, or witness to, the crime; the PR may accompany the victim through the investigation and prosecution process (except grand jury proceedings and certain child abuse assessments); the health care provider, law enforcement agency, protective service worker or court may not prohibit the PR from accompanying the victim unless they believe the PR would compromise the process). Of course, an attorney may be present to assist a victim, too.

Every victim needs to know that she does not have to disclose information about her past or present physical or mental health, substance abuse, sexual experiences, or immigration status unless it is directly relevant to the assault (*e.g.*, if she needs documentation from law enforcement to pursue immigration relief such as a T or U visa, or if it explains why the victim delayed seeking medical care or reporting the assault to law enforcement). It is also important for a victim to understand that the information she provides to law enforcement may be included in the police report which, in turn, will be provided to the defense.

[PRACTICE TIP: Questions about a victim’s immigration status are inappropriate unless they relate directly to the assault (*e.g.*, where the perpetrator threatened to report the victim to law enforcement if she did not consent to the sexual contact or if she reported it to the police) or they are necessary to secure a remedy for the victim. (For example, a prosecutor may ask as a means to assist the victim in obtaining a special visa to assure her continued presence in the country.) If your client is at risk of being asked questions about her immigration status, before any interviews are conducted advise her that she is not obliged to answer any questions relating to her immigration status. Remind her that she is free to take a break from an interview to consult with you or an advocate. *See* Section 7 below and Chapter 8, on Serving Non-Citizen Victims, for more detailed information on victims’ most common immigration concerns.]

3. Exculpatory Evidence

Every victim should understand that any information she provides to police, victim witness advocates, or prosecutors must be disclosed to the defense if it is potentially exculpatory or is potential impeachment evidence.⁸⁸² Exculpatory evidence is any evidence which absolves, or is likely to absolve, the defendant of guilt. For example, exculpatory evidence in a sexual assault case might include a comment by the victim that she was drinking and her memory is hazy, or that she believes the injuries she sustained were from the assault but can’t be absolutely sure. Information must also be disclosed to the defense if it can be used to impeach the victim or to try and demonstrate that she is

⁸⁸² *Brady v. Maryland*, 373 U.S. 83 (1963) .

not truthful. Because defense attorneys can use small inconsistencies to attempt to impeach a victim's credibility, virtually any victim statement may turn out to be "potentially exculpatory."

[CHECK YOUR STATE'S RULES: Consistent with federal law, the rules of criminal procedure in your state will include a rule about law enforcement's obligation to turn over any exculpatory evidence in its custody and control to the defense.]

[PRACTICE TIP: You may be able to protect your client's privacy rights by being present at the interview with law enforcement, the prosecutor or a victim witness advocate, and as the case is developed for trial. However, the victim should be advised that this may hinder the government's prosecution of the case.]

4. The Victim's Potential Criminal Liability

If the sexual assault occurred while your client was engaged in a criminal act (such as underage drinking⁸⁸³ or possessing, using or selling drugs), these facts will likely be revealed during the investigation. If you have reason to believe that your client could face criminal charges, she should be extremely cautious about meeting with police and prosecutors without an attorney present. If necessary, the victim or her lawyer should consult with an experienced criminal defense attorney before deciding how to proceed. Remind the victim that she can request a break from a law enforcement interview to consult with her lawyer before she speaks about any criminal act in which she may have participated.

[PRACTICE TIP: If you do not have criminal defense experience, you will need to consult with an experienced criminal lawyer before your client talks to law enforcement. You and the victim need to make informed decisions about whether and what to disclose. She needs to understand what it means to waive her Fifth Amendment rights against self-incrimination and admit to criminal acts. If she has a criminal case pending against her, admitting to another criminal act could be especially

⁸⁸³ Academic institutions approach the issue of underage drinking in a variety of ways when it is disclosed during a sexual assault investigation. Some schools will pursue disciplinary charges against both the victim and the perpetrator while others decline to proceed against either party.

detrimental. If she is represented by a defense attorney in a pending criminal matter, consult with that attorney before allowing her to speak to law enforcement about further criminal acts. You may need to pursue a grant of immunity and/or other protections from the prosecution on her behalf, in exchange for the victim's cooperation or testimony in the sexual assault case.]

5. Rape Shield Laws

Every state and the District of Columbia has enacted a "sexual assault shield law" that prohibits the admission into evidence of a victim's past sexual conduct or her reputation for sexual behavior.⁸⁸⁴ These laws, however, have numerous exceptions. Tell your client about the protections that are available to her through sexual assault shield laws, but warn her that these "protections" are not absolute. They may be pierced by the defendant in a criminal case. Typically, evidence about a victim's past sexual history is allowed if it purports to explain: (1) source of semen; (2) source of injury; (3) consent; or (4) bias, ulterior motive, prior false report, or other such evidence. Explain to your client that, although the sexual assault shield law governs the admissibility of evidence at trial, she as well as her friends, family members, and colleagues, may still be interviewed, pre-trial, about her sexual history by the prosecution and/or the defense.

In some jurisdictions, a victim has the right to refuse to submit to a defense interview but the defense is not required to advise the victim of this right. Be sure to advise your client whether she is required to consent to a defense interview, and help her prepare how she wants to respond if she is approached for a defense interview that is not mandatory. The victim may also want to prepare her friends and family for this possibility.

[CHECK YOUR STATE'S LAW: Research your state's rape shield laws so that you can best advise your client on what protections are available in your jurisdiction, the scope of those protections, and how she can best

⁸⁸⁴ A chart summarizing states' rape shield laws, is available online at the American Prosecutors Research Institute website at www.ndaa.org/pdf/vaw_rape_shield_laws_may_05.pdf. The text of each state's rape shield laws is available at www.ndaa.org/pdf/vaw_rape_shield_laws_nov_18_%AD03.pdf.

protect her privacy.⁸⁸⁵ As a victim’s attorney, you may also file and argue your own rape shield motion on behalf of your client. You are not obliged to rely on the prosecutor to file this motion for the victim.] (*See* Chapter 3 on Privacy for more information.)

6. Immigration Status

As a general rule, local police do not enforce immigration laws and do not ask about crime victims’ immigration status. Some local police departments, however, have chosen to enforce immigration laws.⁸⁸⁶ If your client is an undocumented immigrant or “out of status” (*i.e.*, does not have a current valid visa or green card) and she chooses to report the sexual assault to the police, there is a possibility that the police will report the victim’s status to immigration authorities. If this is an issue for your client, you may want to call your local police department before she reports to ascertain what their policy is regarding immigration law enforcement. Even a policy of non-enforcement is not a guarantee that a victim’s immigration status will not be disclosed and reported to the Department of Homeland Security. Please *see* Chapter 8 on Serving Non-Citizen Victims for a more comprehensive discussion of immigration issues.

III. THE CRIMINAL JUSTICE PROCESS

A. An Overview of a Criminal Prosecution

Criminal law and procedure varies from jurisdiction to jurisdiction. The types of offenses, the elements of each crime, and even the process followed once a defendant is charged, is unique to each jurisdiction. There are some commonalities, however. For example, sexual offenses are commonly titled “sexual assault,” “rape,” “sexual offenses,” “sodomy,” “sexual contact,” or “indecent liberties.” In every jurisdiction, the prosecutor is responsible for deciding whether and how to proceed with criminal charges. With the increasing gravity of the offense, there is a corresponding increase in the severity of the possible punishment. Some sex crimes are misdemeanors (*e.g.*, indecent exposure or statutory sexual assault where the parties are close in age), but most sex crimes are

⁸⁸⁵ For a more detailed discussion of rape shield laws and victim privacy, *see* Jessica E. Mindlin and Liani Jean Heh Reeves, “*Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions*, available online at www.lclark.edu/org/ncvli/objects/L&C77576confidentialitybook.pdf.

⁸⁸⁶ For additional information, *see* the National Immigration Law Center’s website at: www.nilc.org and the National Immigration Project’s website at: www.nationalimmigrationproject.org.

felonies. Felony cases are typically more complicated and complex, and the consequences for the defendant are more significant. For example, a convicted felon may be denied the right to carry a firearm, to vote, or to hold certain jobs.

Post-incarceration supervision is often referred to as “parole.” “Probation” may be the equivalent of parole, or it may refer to supervision of a misdemeanor or to post-conviction supervision of a convict who was incarcerated or otherwise sentenced to any time in custody.

[CHECK YOUR STATE’S LAW: To represent a victim effectively, you should be familiar with your jurisdiction’s penal code, and the proper name and elements of each sexual offense with which the defendant may be charged. Many jurisdictions have standard jury instructions. These instructions may be useful because they set out every element of the crime (*e.g.*, whether intent is required, the definition of force, the requisite age difference between the parties, whether penetration is required, etc.).]

Following is an overview of how criminal cases typically proceed in state courts. Although specific procedures may vary, the overall process is somewhat standard.

B. Probable Cause Hearings and Grand Jury Proceedings

Each state has its own procedures for commencing the felony process (called variously preliminary hearings, probable cause hearings, grand jury proceedings, etc.). Felony charges may be filed after a defendant is “bound over” (also referred to as “held over”) following a probable cause or preliminary hearing, or after a “true bill” is returned by a grand jury.⁸⁸⁷ While some states have a designated procedure for remanding certain criminal cases to a higher court, in other states the prosecutor may elect which process to pursue.

⁸⁸⁷ For example, in Colorado, a preliminary hearing is held within 30 days of the date charges are filed on every felonious sexual assault, and grand jury indictments are rare and usually reserved for major homicide cases or racketeering cases. (*Colo. Crim. P. 5.*) In New Hampshire, a probable cause hearing will normally be held, although a defendant may waive in writing his right to a probable cause hearing if he is represented by counsel. (*N.H. Dist. & Mun. Cts. R. 2.19.*) Occasionally, a case will go straight to the grand jury in what is called a “secret indictment.” Finally, while there is a grand jury proceeding in Wisconsin, it is almost never used. For serious sexual assault cases the DA simply issues a written complaint detailing the facts of the crime to initiate the criminal process.

Several states take all felony cases directly to the grand jury for indictment.⁸⁸⁸ In all states, grand juries meet in secret. The grand jury hearing is an opportunity for the victim to testify about what happened to her without being subjected to cross-examination. Typically, the defendant does not appear before the grand jury. (Some defense attorneys are having their clients testify at a grand jury proceeding in an effort to prevent criminal charges from being filed in the first place. Even if the defendant testifies to the grand jury, it will not be in the victim's presence.)

As a practical matter, a prosecutor may seek to have the case indicted by the grand jury before the defense attorney has a chance to get a probable cause hearing scheduled. The frequency of probable cause hearings varies widely from state to state. If a probable cause hearing is scheduled, the victim may be called to testify.⁸⁸⁹ (A defendant's spouse may not be compelled to testify. A minor may or may not be required to testify, depending on her age and whether she is deemed competent.) Although cross-examination is limited at a probable cause hearing, a victim may be cross-examined by the defense and this can be quite traumatic. For some victims, it is their first post-assault encounter with the perpetrator. Some prosecutors prefer to proceed with a probable cause or preliminary hearing because it is an opportunity to preserve the victim's testimony, should she be unavailable for future proceedings.

[PRACTICE TIP: If your client may be subject to cross-examination, prepare her for this experience by conducting mock examinations in a victim-friendly environment, such as your office. Prior to the session, advise her that you will be "attacking" her in ways that you expect the assailant's attorney to conduct the examination. Be sure to let her know that your arguments and accusations are for simulation purposes only, and do not represent your personal beliefs. Schedule enough time for the practice session so that you can support your client afterward, as even the practice session may be traumatic.]

⁸⁸⁸ In Massachusetts, probable cause hearings are rarely held; if the defendant is arrested, the case will generally be given a probable cause hearing date at the arraignment and the prosecutor has until then to go to the grand jury for an indictment. The same is true for New York; however the defendant does have a right to a prompt preliminary hearing (called a felony hearing) on whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury. (NY CLS CPL § 180.10.).

⁸⁸⁹ A victim may also have the right to attend the hearing pursuant to the jurisdiction's crime victims' rights laws, should she wish to be present.

Depending on the jurisdiction's criminal procedures, the preliminary hearing and grand jury proceedings may result in a victim's privacy being compromised. A victim's attorney should file a notice of appearance at this juncture to help protect a victim's privacy. A probable cause hearing provides defense counsel with an opportunity to collect as much information as possible about the victim. Too often, no one advises a victim ahead of time that she has certain privacy rights and that she may refuse to answer certain questions. If a probable cause hearing is held, an advocate or attorney should make sure the victim knows what questions she can refuse to answer based on privilege, and should plan to attend the hearing with the victim.

Regardless of whether a case proceeds following a grand jury or a probable cause hearing, an attorney should be present if there are significant privacy concerns or Fifth Amendment concerns. Then, if a question is asked that requires the victim to waive a privilege, she can consult with her attorney outside of the fact finder's presence.

C. Arraignment

If there is an indictment returned or an arrest warrant issued, the police typically will arrest the assailant or allow him to turn himself in to the police department for processing (also referred to as the "booking" process). The defendant will later be arraigned in court. Depending on the seriousness of the underlying allegations, such as whether the victim was injured or threatened, the assailant's past criminal record, and whether the defendant is likely to appear or is considered a flight risk or dangerous, the defendant will either be released (on bond or bail, on his own recognizance, or to the custody of a third party) or he may be held in custody pending disposition of the case. If the victim is afraid of the assailant, the bail or release hearing is the time to ask the court directly – or to ask the prosecutor to request – that the defendant be held in custody. At a minimum, the victim may want a stay away order to be issued as a condition of release. (*See* Chapter 7 on Safety for additional information.)

D. Pretrial Motions and Hearing

Various pretrial motions and hearings may be scheduled before the trial date. The victim will be notified if her presence is required. (State crime victim rights laws may also grant a victim the right to attend certain pre-trial hearings, even if her presence is not required.) Be on the alert for hearings scheduled by the defendant as part of an

effort to gain access to the victim's privileged communications, such as her mental health, medical, or counseling records or her communications with a sexual assault crisis counselor. A prosecutor may also try to access these records without notice to the victim or without the victim's permission. If an attorney has filed a notice of appearance on behalf of the victim in the criminal case, the attorney should receive notice of any scheduled court hearings. An attorney may also file a motion objecting to any request for the victim's confidential records. (See Chapter 3, Section IV, above, for a detailed discussion of protecting victims' records and the protocol established by the Massachusetts Supreme Judicial Court in *Commonwealth v. Dwyer*.)

[PRACTICE TIP: Check your state's privilege law and be prepared to ensure that the victim asserts her privilege to prevent disclosure of these records.]

IV. VICTIM RIGHTS LAWS

Every state and the District of Columbia afford victims of crime certain statutory or constitutional rights. Victims have standing to enforce their rights in some jurisdictions, whereas in others the prosecutor must enforce those rights. In addition, some victims' rights are automatic while others are only upon the victim's request. States' victim rights laws typically include the right to:

- Confer or consult with the prosecutor.⁸⁹⁰ This particular right may include a specific right to confer with the prosecution concerning a plea bargain.⁸⁹¹ In other states, the right to confer includes the right to consult with the prosecution regarding contemplated dismissal of the case.⁸⁹²

⁸⁹⁰ See, e.g., **Illinois**: ILL. CONST. ART. I, § 8.1 (3) (victims have the right to communicate with the prosecution); **Texas**: TEX. CONST. ART. I, § 30 (2)(b)(3) (victims have the right to confer with a representative of the prosecutor's office). See also Beloof, *supra* note 872, at 235-36.

⁸⁹¹ See, e.g., **Minnesota**: MINN. STAT. ANN. §§ 609.115, 611A.031 (prosecutor must make reasonable effort to consult with victim about plea bargain); **New Jersey**: N.J. STAT. ANN. § 2C: 14-2.1 (victim shall have opportunity to consult with prosecutor prior to conclusion of any plea negotiations); **New York**: N.Y. CRIM. PROC. LAW § 390.90 (prosecutor should consult with victims of violent crimes before plea bargaining with defendant); **South Carolina**: S.C. CODE REGS. § 16-3-1530(B)(12) (victim has right to discuss views with prosecutor before plea bargain is offered); **South Dakota**: S.D. CODIFIED LAWS ANN. § 23A-7-8 (victim must have opportunity to comment on plea bargain).

⁸⁹² See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (6) ("To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition"); **Louisiana**: LA. CONST. ART. I, § 25 ("the right to confer with the prosecution prior to final disposition of the case") See also Beloof, *supra* note 872, at 444.

- Be heard.⁸⁹³
- Deliver a victim impact statement at sentencing and parole proceedings.⁸⁹⁴
- Be notified of the defendant's release.⁸⁹⁵

Some states also provide for victim notification when sex offenders are released from custody following incarceration. At least one state, Alabama, mandates that a victim be notified automatically when a sex offender is released from custody.⁸⁹⁶ In other states, the victim may have the burden of specifically requesting that she receive such notification.⁸⁹⁷ Depending on the state, a victim may also be entitled to automatic notification if a sex offender has been designated a sexually violent predator.⁸⁹⁸

⁸⁹³ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (3) (“To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.”); **Texas**: TEX. CONST. ART. I, § 30 (2)(B)(2) (“the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim’s testimony would be materially affected if the victim hears other testimony at the trial...”); **Illinois**: ILL. CONST. ART. I, § 8.1 (8) (“The right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim’s testimony would be materially affected if the victim hears other testimony at the trial.”). See also Beloof, *supra* note 872, at 526.

⁸⁹⁴ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (4) (“To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.”); **California**: CAL. PENAL CODE § 679.02 (2, 5) (2006) (“For the victim, the victim’s parents or guardian if the victim is a minor, or the next of kin of the victim if the victim has died, to be notified of all sentencing proceedings, and of the right to appear, to reasonably express his or her views, have those views preserved by audio or video means...and to have the court consider his or her statements...” “Upon request by the victim or the next of kin of the victim if the victim has died, to be notified of any parole eligibility hearing and of the right to appear, either personally...or by other means...and...to reasonably express his or her views, and to have his or her statements considered...”); **Illinois**: ILL. CONST. ART. I, § 8.1 (4) (“The right to make a statement to the court at sentencing”). Every state and Washington, D.C. affords a victim the right to make a victim impact at sentencing. A complete list is available through www.ncvli.org.

⁸⁹⁵ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (2) (“To be informed, upon request, when the accused or convicted person is released from custody or has escaped.”); **California**: CAL. PENAL CODE § 679.02 (2006) (“Upon request by the victim or the next of kin of the victim if the crime was a homicide, to be notified of an inmate’s placement in a reentry or work furlough program, or notified of the inmate’s escape”); **Texas**: TEX. CONST. ART. I, § 30 (2)(b)(5) (“the right to information about the conviction, sentence, imprisonment, and release of the accused.”).

⁸⁹⁶ **Alabama**: CODE OF ALA. § 15-20-26. In Alabama, the Attorney General’s Office is charged with notifying the victim of the sex offender’s release and where the offender plans to reside. In addition, the offender is restricted from establishing residence within 1000 feet of the victim or the victim’s immediate family. Furthermore, the offender is prohibited from having contact with the victim – the sex offender must not come within 100 feet of his former victim.

⁸⁹⁷ **Washington**: WASH. REV. CODE § 4.24.550(3). **Ohio**: OHIO REV. CODE ANN. § 2950.10(A)(1) (provides for victim notification if the victim requests notification through the state Attorney General’s Office. If the victim has requested notification, she receives information regarding the offender’s name, address, school attended, and/or the offender’s place of employment.)

⁸⁹⁸ See, e.g., **Pennsylvania**: 42 PA. CONSOL. STAT. § 9797 (A)(1). Although every state provides for some sort of public access to sex offender registry information, the general rule is that the public’s access to information does not include identifying information about the victim. A majority of the states surveyed contained a provision in their sex offender laws mandating that information identifying the victim should not be subject to disclosure and should remain confidential. Of the states surveyed, Alabama (CODE OF ALA. §

While these victims' rights laws represent states' emerging and continuing efforts to protect the rights of crime victims, victims are often unable to assert their rights and/or the remedies are unenforceable. For example, victims whose rights are denied may not have standing to enforce their rights.⁸⁹⁹ Even if a victim has standing, the remedy may be limited or the victory may be pyrrhic. (Even where standing is specifically granted to victims, case law or statutory limitations often curtail their ability to pursue a remedy in criminal court against the defendant or to bring a civil action against the government actors who denied them their rights.⁹⁰⁰)

Victims seeking to assert and enforce their crime victims' rights at the federal level have specifically articulated and enforceable rights. In 2004, Congress passed the Federal Crime Victim Rights Act (CVRA),⁹⁰¹ which provides that the victim of a Federal offense or an offense in the District of Columbia has:

- The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

15-20-34(A)); California (CAL. PENAL CODE § 290.4 (2004)(A)(2)-(3)), Massachusetts (MASS. GEN LAWS CH. 6, § 178I), New York (N.Y. CORRECT. § 168-Q), Pennsylvania (42 Pa. Consol. Stat. § 9798(a)(2)), South Dakota (S.D. CODIFIED LAWS § 22-22-40), and Texas (TEX. CRIM PROC. CODE ANN. ART. 62.08(b)(3)) all mandate that sexual assault victims' information shall not be released to the public.

⁸⁹⁹ See generally, John W. Gillis and Douglas E. Beloof, *The Next Step for A Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002); see also, Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 864 (1997) ("With unwavering uniformity, the courts have consistently converted each such legislative effort into a hollow statutory promise of a right without a remedy.")

⁹⁰⁰ For example, Arizona (ARIZ. REV. STAT. § 13-4437(A)), Florida (FLA. STAT. CH. 960.001(7)), Indiana (IND. CODE § 35-40-2-1), and Texas (TX CONST. ART. I, § 30) explicitly grant victims standing to enforce their rights. However, the Arizona Supreme Court has held that, although a victim has standing to seek an order or to bring a special action, a victim does not have standing to argue before an appellate court that the trial court's ruling in a criminal proceeding was in error or to bring the types of action against the defendant that the State can bring. *State v. Lamberton*, 899 P.2d 939 (Ariz. 1995). Similarly, in both Indiana and Texas, the legislative provisions granting standing expressly limit and qualify a victim's standing to enforce her rights.

⁹⁰¹ 18 U.S.C. § 3771.

- The reasonable right to confer with the attorney for the Government in the case.
- The right to full and timely restitution as provided in law.
- The right to proceedings free from unreasonable delay.
- The right to be treated with fairness and with respect for the victim’s dignity and privacy.⁹⁰²

In contrast to most state crime victims’ rights laws, the federal CVRA includes specific enforceability provisions.⁹⁰³

[PRACTICE TIP: Review your jurisdiction’s crime victims’ rights legislation to ascertain what rights your client has and what, if any, statutory mechanisms are available to enforce them.⁹⁰⁴ It may be useful to speak with organizations in your area who work with victims, such as your state’s crime victim assistance program or crime victims’ rights organizations.]

V. VICTIMS’ COMMON QUESTIONS ABOUT THE CRIMINAL PROCESS

Victims need accurate information to make fully informed choices about whether to report an assault to a law enforcement official. When deciding whether to report an assault to law enforcement, many victims ask questions about reporting to law enforcement, victim autonomy if the case proceeds, privacy concerns, how long it takes for the case to go to trial, and the likelihood of conviction.

A. Reporting to Law Enforcement

Once a victim reports the assault to police, she is a witness in the state’s case against the assailant. While the victim does not control whether a case is prosecuted, most prosecutors will not proceed with a non-intimate partner sexual assault prosecution without the victim’s cooperation. (Prosecutors routinely proceed without a victim’s cooperation in domestic violence cases.) Prosecutors typically consider a variety of

⁹⁰² *Id.*

⁹⁰³ See 18 U.S.C. § 3771(f)(1) and 18 U.S.C. § 3664 (Crime Victim Mandatory Restitution Act).

⁹⁰⁴ Links to the state and federal crime victims’ rights laws are *available online at* www.ncvli.org/ncvlilibrary.html. The National Crime Victim Law Institute (www.ncvli.org) and the National Center for Victims of Crime (www.ncvc.org) offer technical assistance to crime victim advocates and attorneys.

factors in determining whether to prosecute without a victim's consent, including the sufficiency of the evidence, the age of the victim, the potential impact of the proceedings on the victim, the danger posed by the perpetrator, whether the victim has been threatened into not cooperating, and the severity of the offense. Some states will allow a sexual assault victim to file a "blind" or anonymous sexual assault report. Although it is rare for a sexual assault victim to be forced to participate as a witness in criminal proceedings against her will, it can happen. In recent years, sexual assault victims have been threatened with contempt charges – and a few have even been prosecuted – for refusing to testify against the perpetrator in a criminal case.⁹⁰⁵

B. The Decision to Pursue Criminal Charges: Victim Autonomy

If a victim wants to report to police but not prosecute, some police departments may accommodate this choice by allowing her to file an incident report without pressuring her to go further. There are many reasons to file such a report even when the victim is not ready to proceed with an immediate criminal investigation. These include qualifying for victim compensation benefits, establishing an evidentiary record, or documenting an assault as required for certain civil remedies (such as early termination of a lease or employment leave). Because police protocol will vary by department, it is important to contact your local police department to discuss this option before advising your client to report the assault if she knows she does not wish to proceed with a criminal prosecution.

C. Privacy Concerns

Depending on the law in your state, the name of a victim of sexual assault may be protected from publication in court records.⁹⁰⁶ In addition, some states protect the

⁹⁰⁵ See, e.g., *People v. Misbrenner*, *supra* note 186. Cf. Beloof, *supra* note 872, at 201 discussing the trend of giving victims in domestic violence cases no control of the decision to charge a defendant or what sentence to give the defendant, while sexual victims are given much of the control over the decision to charge a defendant. *Id.*

⁹⁰⁶ See, e.g., **Alaska**: ALASKA STAT. § 12.61.140 ("The portion of the records of a court or law enforcement agency that contains the name of the victim of an offense . . . shall be withheld from public inspection...except with the consent of the court in which the case is or would be prosecuted."); **Louisiana**: See LA. REV. STAT. ANN. § 44.3(A)(4)(D) ("Nothing herein shall be construed to require the disclosure of information which would reveal the identity of the victim of a sexual offense . . . held by the offices of the attorney general, district attorneys, sheriffs, police departments, Department of Public Safety and Corrections, marshals, investigators, public health investigators, correctional agencies, communications districts, intelligence agencies, or publicly owned water districts of the state"); **New York**: N.Y. CIV. RIGHTS LAW § 50-B ("The identity of any victim of a sex offense shall be confidential. No report, paper, picture,

confidentiality of sexual assault victims in police reports by deeming police reports to be non-public records or by exempting the name and other identifying information of the victim from disclosure as part of the report.⁹⁰⁷ A victim may also request that additional personal information be kept out of the public record, such as her residential address, telephone number, place of employment or school. However, this privacy cannot be guaranteed. Disclosures are sometimes made pursuant to a Freedom of Information Act (FOIA) request. Even previously sealed court records are sometimes opened to the media.⁹⁰⁸

In addition, while many newspapers as well as television and radio stations have a policy of not publishing the names or pictures of sexual assault victims without their consent, this policy is often unwritten, and it is not legally required. To the contrary, the media have well established First Amendment rights in this regard.⁹⁰⁹ However, an attorney may be able to file motions to help protect a victim's privacy, including motions to keep a victim's name or image out of the public record, to restrict access to the victim or her identity, to keep private the names and images of a victim's children or other family members, etc.⁹¹⁰ See Chapters 3 (Privacy) and 7 (Safety) for additional discussion of this issue.

photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim.”); **Florida:** FLA. STAT. § 794.03 (“No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense. . . . Such identifying information is confidential . . . An offense under this section shall constitute a misdemeanor of the second degree. . .”).

⁹⁰⁷ See, e.g., **Florida:** FLA. STAT. ANN. § 119.071(2)(H) (name, address and other identifying information of victim in police report is deemed confidential and exempt from public inspection and copying); **Illinois:** 5 ILCS 140/8 (law enforcement agency must redact the private identifying information of a victim before making the remainder of the document available for public inspection); **New York:** MCKINNEY’S CIVIL RIGHTS LAW § 50-B(1) (any report (including a police report) in the custody or possession of any public officer or employee that reveals the identity of a sexual assault victim, shall not be made available for public inspection).

⁹⁰⁸ See, e.g., *People v. Bryant*, 94 P.3d 624 (Colo. 2004) (previously sealed court records in a criminal sexual assault case unsealed and released for inspection by the media).

⁹⁰⁹ The *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (state may not sanction newspaper for publishing name of sexual assault victim when the name was lawfully obtained from publicly released police report); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (broadcasting company may not be held liable for publishing truthful information obtained from court records that were open to the public).

⁹¹⁰ See Jessica E. Mindlin and Liani Jean Heh Reeves, Eds., *Confidentiality and Sexual Assault Survivors: A Toolkit for State Coalitions* available online at www.lclark.edu/org/ncvli/objects/L&C77576confidentialitybook.pdf.

D. Duration of a Criminal Prosecution

Although states vary, on average a criminal prosecution may take between six months and two years to come to trial (although backlogs at state and federal forensic labs may further delay a criminal prosecution).⁹¹¹ Victim participation is most active in the first three to six months, during the investigation and grand jury stages. During pre-trial motions and conferences, victim participation may be sporadic or not required at all. It is not until trial that a victim may again be in frequent and regular contact with the prosecutor, the victim assistance advocate, and other court personnel. During this period of relative inactivity, some victims find it relatively easy to put the court proceedings out of their minds; others find it difficult to move beyond the criminal case so long as criminal charges against the defendant are pending. It is critical to provide a victim with sufficient information for her to weigh for herself whether she is willing and able to endure a lengthy, arduous, and sometimes confounding criminal justice process.

E. Likelihood of Conviction

Sexual assault cases can be difficult to prosecute and even more difficult to win. Approximately a quarter of sexual assault reports to police result in a criminal indictment, and only half of those indictments result in a conviction.⁹¹² Victims need to understand these odds, and still understand that every case is different. Statistics do not predict what will happen in an individual case.

VI. CONCLUSION

For sexual assault victims, participating in a criminal prosecution can be healing, empowering, and a venue for reclaiming their autonomy and sense of self. It can also be a profoundly humiliating, frustrating, and painful process that violates victim privacy and results in further trauma. Your representation and advocacy may help determine the outcome for the victim. You can help a victim navigate these difficult waters and ensure

⁹¹¹ See, e.g., New York City Independent Budget Office Fiscal Brief (“the average stay in city jails for inmates eventually convicted . . . increased by more than one-third, from 5.5 months in 1994 to 7.7 months in 1999, and has remained at roughly this level through 2004”) *available online at* www.ibo.nyc.ny.us/iboreports/jailtimecredit_fbsept2005.pdf; Twenty-first Judicial District of Louisiana Victim Assistance (more serious cases take an average of one to three years to get to trial) *online at* www.21jdda.org/victim.html; and *State Court Cuts Time to Process Criminal Cases* (in fiscal year 2005 criminal cases in Hawaii take an average of 217 days), *accessible online at* www.bizjournals.com/pacific/stories/2005/11/14/story6.html (last accessed online on May 1, 2007).

⁹¹² Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact*, New York, Plenum, (1992).

that her decisions are informed, her privacy is protected, and her crime victim rights are respected.

ISSUE SPOTTING CHECKLIST

This checklist is intended to assist with a preliminary client interview. You should use this list in conjunction with the Victim Rights Law Center's national manual, Beyond the Criminal Justice System: Using the Law to Help Restore the Lives of Sexual Assault Victims (A Practical Guide for Attorneys and Advocates), Jessica E. Mindlin and Susan H. Vickers, Eds.

Note: The issues highlighted below must be re-assessed regularly during the course of representation as the client's circumstances change.

- **Physical Safety**
 - Is your client afraid for her physical safety? Has the assailant made any threats of retaliation if she reports the crime?
 - If yes, refer client to an experienced sexual assault or domestic violence advocate for comprehensive safety planning.
 - If yes, assess viability of a protective order(s) to enhance safety.

- **Privacy Concerns**
 - Inform client of her basic privacy rights. *See Privacy Chapter.*
 - Assess whether your client has privacy concerns regarding general community exposure or disclosure to specific persons.

- **Other Needs**
 - Financial Compensation: *Are there costs associated with the assault?*
 - Employment Security: *Is her job performance being impacted by the assault?*
 - Education Stability: *Is her schooling being impacted by the assault?*
 - Housing Security: *Is her housing safe following the assault?*
 - Immigration Status: *Does she have immigration concerns?*
 - Criminal Justice: *Does she have questions about the CJS?*
 - Third Party Civil Liability: *Is there possible third party liability?*

PRELIMINARY EVIDENCE CHECKLIST

This checklist will help with a preliminary evidence assessment. It is not exhaustive.

- **Victim Statement**
 - Specific details about the assault
 - Specific threats by the assailant
 - Account of victim's ongoing fear for physical safety
 - Description of injuries; names of possible witnesses, including medical providers
 - Description of effect on life and well-being
 - Elements of assault that the victim is concerned about revealing

- **Authorities in receipt of a Victim Statement(s)**
 - Law Enforcement Reports (District Attorney, Police, Campus Security)
 - Report to Civil Authority (*e.g.*, Housing, Education, Employer)
 - Protective Order Complaint/Affidavit
 - Are there multiple statements? Are they consistent?

- **Assailant Statement(s)**
 - Law Enforcement Reports (District Attorney, Police, Campus Security)
 - Statement for Civil Authority (*e.g.*, Housing, Education, Employer)

- **Potential Witnesses**
 - Fresh complaints (Witnesses the victim first told about the assault)
 - Witnesses who saw/spoke to the victim before/after assault
 - Witnesses who saw/spoke to assailant before/after assault
 - Medical or Forensic Rape Kit Examiner
 - Other important potential witnesses (*e.g.*, those at "the party.")

- **Physical Evidence**
 - Medical Records
 - Rape Kit
 - Toxicology analysis

- Pictures
- Scratches
- Bruises
- Lacerations
- Other Physical Evidence

PRIVACY CHECKLIST

- **What specific privacy concerns does the client have?**
 - General Community Knowledge: Family, School, Work, Housing
 - Mental Health Care & Counseling
 - Rape Crisis Counseling
 - Medical Records
 - Past Sexual Abuse
 - Past or Present Substance Abuse
 - HIV Testing
 - Privacy of Name, Phone Number, Address, Employment, School

- **What disclosures have already been made? To whom?**
 - Who, What and When?
 - In writing or verbal?

- **Inform victim and her family about the victim's privacy rights.**
 - General Privacy Rights (School, Employment, Housing)
 - Privacy Rights with regard to Criminal Justice System
 - Testimonial Privileges
 - Other Statutory Protections

- **Inform third parties/providers of victim's privacy rights as appropriate.**

- **Assess victim's privacy concerns with respect to the criminal justice system.**

PROTECTIVE ORDER CHECKLIST

- **What are the victim's specific safety concerns?**
 - Has the victim been referred to an experienced sexual assault advocate for comprehensive safety planning?

- **What type of relationship did the victim have with the assailant?**
 - Boyfriend
 - Date
 - Roommate
 - Friend
 - Acquaintance
 - Other

- **What type of protective order may the victim qualify for?**
 - C. 209A (Household, Domestic or Significant Dating Relationship)
 - Civil Injunctive Protective Order (Arm's Length Types of Relationships)
 - Criminal-Based Stay Away Order
 - Housing-Based Order
 - Campus-Based Order

- **Will the Protective Order aid, interfere or conflict with any other remedies?**
 - Criminal Justice Prosecution
 - Employment Remedies
 - University Disciplinary Process
 - Housing Remedies
 - Civil Tort Liability

- **Limitations of Cross Examination at ten-day hearing.**
 - Privacy rights
 - Motion in limine
 - Scope of hearing

VICTIM COMPENSATION CHECKLIST

Remember, victims can qualify now for compensation for losses they may suffer in the future.

- **Assessing Victim's Needs:**
 - Lost Wages
 - Medical Bills
 - Counseling Bills
 - Lost homemaker services
 - Dental Care

- **Has the victim made a report to law enforcement?**
 - Has the victim made a report to an alternative qualifying agency or Court?
 - o Local or Campus Police
 - o Chapter 209A Order
 - o Report to Housing Authority

- **Check statute of limitations issues and timing of application:**
 - Is it within three years of the assault?
 - Does the victim qualify for "Good Cause" exception to reporting requirement?

- **Victim's Application:**
 - Date of the assault
 - Names of health care providers seen
 - Description of injuries
 - Documentation of Expenses

EMPLOYMENT CHECKLIST

- **Is the assault related to work?**
 - Is the assailant a supervisor, co-worker or an employee?
 - Did the assault occur at work or a work-sponsored function?
 - Is the workplace unionized?

- **What are the Victim's work-related needs?**
 - Safety
 - Privacy
 - Employer Based Benefits
 - Time Off for Medical Help, for Court Appearances, for Other
 - Schedule Changes
 - Job Security
 - Other

- **What benefits is the victim entitled to under State and Federal Law?**
 - Unemployment Insurance Benefits
 - Americans with Disabilities Act
 - Workers' Compensation
 - Family and Medical Leave Act
 - Victims' Compensation
 - Title VII Protection from Discrimination

- **What benefits may be provided by the employer?**
 - Unpaid/Paid Medical Leave
 - Vacation Time
 - Sick Time
 - Short-term Disability
 - Long-term Disability

- **Does the case intersect with the criminal justice system or a protective order?**
 - Is there an active criminal investigation?
 - Is there a protective order in place?

EDUCATION CHECKLIST

- **Assessing Client Needs:**
 - Safety
 - Employment
 - Privacy
 - Tuition
 - Disciplinary Process
 - Financial Aid
 - Classes
 - Housing
 - Sports
 - What are victim's "justice goals"?
 - Do on or off-campus remedies best meet those goals?

- **Is the perpetrator a fellow classmate?**
 - What specific safety concerns does victim have?
 - What specific privacy concerns does victim have?
 - What specific academic accommodations does the victim need?

- **Does the case intersect with the criminal justice system?**
 - Has a police report been made to campus or local police?
 - Is the victim interested in pursuing criminal charges?
 - Do school policies allow simultaneous police and school complaints?

- **On-Campus Disciplinary Process: (*Get a copy of the student handbook*)**
 - Are the procedures for student complaints clear?
 - What confidentiality rules and policies apply?
 - What investigation rules apply? Are there any?
 - Is there a faculty or staff advisor working with the victim?
 - Who is the supervisor or contact person for the disciplinary process?
 - What are the limitations on attorney involvement?

- **Are there any legal issues with regard to:**

- Jeanne Clery Disclosure of Campus Security Act
- The Family Education Rights and Privacy Act
- Title IX
- Third Party Civil Liability

HOUSING CHECKLIST

- **Assessing Housing Needs:**
 - Is the victim a non-U.S. citizen?
 - Did the assault take place in or near the victim's residence?
 - Does the assailant live in or near the victim's residence?
 - Does the assailant know where the victim lives?
 - Does the victim live in public or private housing?
 - What specific safety and privacy concerns does the victim have?
 - If possible, does she seek to move?
 - If possible, does she seek increased security at her existing residence?
 - If possible, does she seek to have the perpetrator removed?

- **Does she now require access to or a transfer within public housing?**
 - Does she qualify for priority status?
 - What is the liability and duty of the Housing Authority?

- **Does she need assistance with a private housing agent?**
 - Liability of Private Landlords
 - Terminating a Tenancy or Lease
 - Changing Provisions in a Lease
 - Eviction in Private Housing

- **What are the possible non-legal remedies?**
 - Emergency Housing Shelters
 - Family or Friends

IMMIGRATION CHECKLIST

Basic Do's and Don'ts

- Reassure client about attorney-client confidentiality
- Get supervision by an experienced immigration attorney
- Get competent and culturally sensitive translation services
- Never tell a non-citizen to go to the Department of Homeland Security (DHS).
- Encourage non-citizen victims to talk to an immigration expert before leaving the United States.
- If your client has received notice of a hearing with the immigration Court or interview with DHS, refer her to an immigration attorney or advocate immediately. Failure to attend a hearing or interview may result in immediate arrest and deportation.

- **What is your client's present immigration status?**
 - Is your client in immigration proceedings with DHS now?
 - What immigration documents does your client have?
 - Did your client ever have documents?
 - Is your client undocumented?

- **What is the assailant's immigration status?**
 - Is the perpetrator part of the victim's community?

- **Has your client reported to the police?**
 - Try to find out what the department's reporting policy is before disclosing
 - Discuss immigration protections with law enforcement

- **Does your client have any interest in applying for a U-Visa, T-visa, or other immigration remedy?**

- **Does your client have employment issues related to the assault?**

- **Will accessing public benefits in any way harm your client's immigration status?**

CRIMINAL JUSTICE CHECKLIST

- **Address Victims' Questions About the Criminal Process**
 - If I report, do I lose control of whether the case is prosecuted?
 - Can I file a police report and then not go any further with prosecution?
 - Will my name be published in court documents or the newspaper?
 - How long will the criminal process take?
 - How likely is a criminal conviction?

- **Address Physical Safety**
 - Does your client have concerns for her physical safety?
 - Refer her to a counselor for comprehensive safety planning

- **Assess Privacy Concerns**
 - Does your client have specific privacy concerns?
 - o Past sexual abuse, past or present mental health status
 - o Past substance abuse
 - Inform client of privacy rights before reporting to law enforcement
 - Inform all parties in writing of victim's desire to raise any privileges

- **Prepare Victims for Interviews with Law Enforcement (*See in depth discussion in the Criminal Chapter.*)**
 - Victims should be advised:** that issues regarding their past or present physical or mental health, substance abuse, or past sexual abuse need not be disclosed in these interviews unless directly relevant to the assault.
 - Victims should be advised:** that any information they divulge to police, victim witness advocates, or prosecutors will be disclosed to the defense if it is potentially exculpatory.
 - Victims should be advised:** to describe all relevant *details of the assault* as truthfully as possible.

- **Assess Options if Prosecutor Does Not Seek an Indictment**

- **Assess Options if Prosecutor Proceeds Without Victim's Consent**

Appendix B

Sample Script for Discussing the Issue of Client Candor

“It is common for someone who has been sexually assaulted to want keep some or many of the details of the assault as private as possible. In order to help you to the best of my ability, I need you to trust me, to be honest with me and to share even difficult and personal facts. I am not afraid of hearing them. I will do my best to represent you and to protect your privacy fiercely.

The law recognizes that trust and private communications between a lawyer and her client [or an advocate and a victim] is critically important. I am allowed – in fact, I am required – to keep confidential almost anything you say to me (unless you ask me to release it). Except in very rare circumstances, even the judge cannot make me reveal your confidences.

But, to be your most effective advocate, I need you to tell me all of the facts. In my experience, some victims don’t want to talk about the specific details of their assault such as obscene or threatening things said by the assailant, the specific sexual acts in which they were forced to engage, or illegal activities that they may have been involved in before the assault. Some victims feel guilty about having used drugs or alcohol before the assault. Sometimes victims are embarrassed or reluctant to say that they had been sexual with the perpetrator before the assault took place. Some victim will blame themselves for being in the situation in which the assault occurred.

You were a victim, and you are not to blame for what happened to you. You did not ask to be assaulted.

The other side will certainly use anything they know or discover to their advantage, and we want to be prepared. You don’t have to tell me everything today; we can, and will, talk often over the next few weeks and you should feel free to tell me things at a time and pace with which you are comfortable.” But, I want you to know that I need you to tell me everything I need to know so that I can do the best possible job representing you.

UNITED STATES DISTRICT COURT

PLAINTIFF) DOCKET NO.
)
)
v.)
)
DEFENDANT)
)
)
_____)

MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 45(c)(3)(a)(iii), PLAINTIFF [or non-party to the action], hereby moves to quash the subpoena served on _____ and PLAINTIFF [or non-party] further moves pursuant to Fed. R. Civ. P. 26(c) for a protective order prohibiting further discovery regarding privileged communications. In support of these motions, PLAINTIFF [or non-party] submits and incorporates the accompanying memorandum of law.

REQUEST FOR HEARING AND ORAL ARGUMENT

PLAINTIFF [or non-party] requests that the Court schedule a hearing and oral argument on her Motion to Quash Subpoena and for Protective Order and Sanctions.

Respectfully submitted,

PLAINTIFF [or non-party]
By her attorney,

UNITED STATES DISTRICT COURT

)	DOCKET NO.
PLAINTIFF)	
)	
v.)	
)	
DEFENDANT)	
)	
_____)	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH AND FOR PROTECTIVE ORDER

BACKGROUND

Insert here the facts of your case.

ARGUMENT

**Defendant Has Not Established an Exception to the Psychotherapist-Patient
Privilege**

According to Fed R. Civ. P. 45(c)(3)(A), the Court “shall quash or modify a subpoena if it requires disclosure of privileged or other protected matter and no exception or waiver applies.” The Defendant does not dispute that Ms. P’s counseling records are privileged and he agrees that the federal law of privilege applies in this case. *See Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 226-227 (D. Mass. 1997). In a discovery dispute, once a privilege is established and the question becomes whether there is an exception to that privilege, the party asserting the exception has the burden of establishing its existence. *See F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 460 (1st Cir. 2000). In this case, the Defendant has not established an exception to the psychotherapist-patient privilege.

In *Jaffee v. Redmond*, the Supreme Court held that confidential communications made in the course of therapy between a patient and her psychotherapist, psychologist, or licensed social worker are protected from compelled disclosure under Rule 501 of the

Federal Rules of Evidence. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). The Supreme Court explicitly held that decisions regarding the psychotherapist-patient privilege should not be made by balancing the patient's interests and the value of the evidence. *Id.* at 17. *See also Vanderbilt v. Town of Chilmark*, 174 F.R.D. at 227. The *Jaffee* decision was very clear: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee* at 17. In *Vanderbilt*, the Court reiterated: "After *Jaffee*, a court cannot force disclosure of [privileged information] solely because it may be extremely useful to the finder of fact. Giving weight to the usefulness of the evidence as a factor in a decision regarding the scope of the privilege would be a balancing exercise that was barred by *Jaffee*." *Vanderbilt* at 229.

The importance of the Courts' reasoning in *Jaffee* and *Vanderbilt* is underscored by the facts of the present case, where the Defendant now seeks access to the privileged records of a rape victim who is not a party to the litigation. There can be no doubt as to the importance of allowing a rape victim to receive confidential counseling and treatment. *See Jaffee*, 518 U.S. at 11. Moreover, a broader public good is significantly endangered if victims of crime are unable to rely on the protections of the psychotherapist-patient privilege because of the possibility of future disclosure. *See id.* at 10-11 (mere possibility of disclosure may impede successful treatment of individuals suffering the effects of emotional problems). Public interests would suffer if crime victims were not able to receive effective treatment for the trauma they suffered and, as a result, become unwilling or unable to participate in criminal or civil proceedings that ensue. *See id.* at 11-12 & n.10.

Although *Jaffee* proscribes the use of a balancing test for evaluating the scope of the psychotherapist-patient privilege, the Supreme Court recognized that there are situations where an exception or waiver applies. *See Jaffee* at 18, n.19 (an exception to the privilege might arise, for example, "if a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist."). Since *Jaffee*, the First Circuit has held that when examining the scope of a privilege, the Court must first decide

whether a potentially relevant exception to the privilege exists. *In re Grand Jury Proceedings, Violette*, 183 F.3d 71, 75 (1st Cir. 1999). If no such exception exists, the Court's inquiry ends. *Id.* Here, the Defendant has not established, as is his burden, that a relevant exception to the privilege exists.

In sum, the Defendant cannot show that an exception applies to the psychotherapist-patient privilege in this case. Accordingly, Ms. P respectfully requests that the Court deny the Defendant's motion to compel production of her counseling records present and allow her motion to quash the subpoenas served on COUNSELOR and HOSPITAL. Ms. P further requests that the Court allow her motion for a protective order that she not be required to respond to further discovery related to these matters.

Respectfully submitted,

PLAINTIFF [or non-party]

By her attorney,

Appendix D

[INSERT YOUR LETTERHEAD HERE]

[Insert recipient's name & contact information here.]

Dear Doctor X (or To the Keeper of the Records):

I represent [insert Victim's name here]. Please be advised that Ms. _____ does not consent to the release of any protected health information and/or privileged records in your possession.

Ms. _____ further declines to waive her privilege regarding any communications she may have had with you whether verbal or in writing. Accordingly, at this time, Ms. _____ does not authorize the release of any of her personal or private information.

Thank you for your attention to this matter. Please contact me if you have any questions or if you receive a request for Ms. _____'s records or for any information regarding her communications with you or anyone within your agency or office.

Thank you for your immediate and continuing attention to this matter.

Sincerely,

[Insert your name & contact information here.]

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Other Authorities

20 WILLISTON ON CONTRACTS § 55:30 (4th ed. July 2004)..... 246

24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5501 (2006)..... 56, 57

33A E. GEORGE DAHER & HARVEY CHOPP, MASSACHUSETTS PRACTICE SERIES § 15:26, 225 (3d ed. 2000) 287

6 ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 100.01 (15th ed. 2006)..... 255, 256, 258

A Guide for Effective Issuance & Enforcement of Protection Orders, National Council of Juvenile and Family Court Judges (2005) 182

A. Berkowitz, *Guidelines for Consent in Intimate Partner Relationships, Campus Safety and Student Development*, CAMPUS SAFETY AND DEVELOPMENT, Volume 4(3): 49-50, March/April 2002..... 91

A. H. Maker *et al.*, *Child Sexual Abuse, Peer Sexual Abuse, and Sexual Assault in Adulthood: A Multi-Risk Model of Revictimization*, 14 J. OF TRAUMATIC STRESS 351-368 (2001) 141

A. M. Young, *Self-Perceived Effects of Sexual Trauma Among Women Who Smoke Crack*, 40 J. OF NURSING & MENTAL HEALTH SERVICES 46-53 (2002) 146

A. W. Burgess & L. L. Holmstrom, *Adaptive Strategies and Recovery from Rape*, 136 AM. J. OF PSYCHIATRY 1278-1282 (1979)..... 138

A.B.A. COMM’N ON DOMESTIC VIOLENCE, A GUIDE FOR EMPLOYERS: DOMESTIC VIOLENCE IN THE WORKPLACE 36-38 (1999) 245

ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 15 (1954)..... 5, 26

Accessibility Guide for Domestic Violence and Sexual Assault Services Providers, Violence Against Women with Disabilities Project: A Collaborative Project of Disability Rights Wisconsin, Wisconsin Coalition Against Domestic Violence, Wisconsin Coalition Against Sexual Assault and Independence First (2004) 316

ADA: A Technical Assistance manual on the Employment Provisions Title I 341

AFL-CIO, *available at* www.aflcio.org/yourjobeconomy/rights/rightsatwork/sexharass.cfm 247

Alaska Court System Family Law Help Center, *available at* www.state.ak.us/courts/shcdv.htm#0c..... 242

American Bar Association Commission on Domestic Violence, *available at* www.abanet.org/domviol 159

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., Text Revision 2005) passim

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., Text Revision 2005).....	142
AMY E. COPPERMAN <i>ET AL.</i> , LEGAL TACTICS: FINDING PUBLIC AND SUBSIDIZED HOUSING (Amy E. Copperman & Annette R. Duke eds., Massachusetts Law Reform Institute 2d ed. 2006).....	282, 308
Ann O’Hara & Emily Cooper, <i>Eligibility, Applications and the Waiting List Process</i> , SECTION 8 MADE SIMPLE: USING THE HOUSING CHOICE VOUCHER PROGRAM TO ASSIST PEOPLE WITH DISABILITIES 21, 21-28 (2d ed. 2003), <i>available at</i> www.tacinc.org/index/admin/index/ uploads/docs/Sect8.2ndEd.pdf	298
ANTIOCH COLLEGE CMTY GOV’T, SEXUAL OFFENSE PREVENTION & SURVIVOR’S ADVOCACY PROGRAM, ANTIOCH COLLEGE SURVIVAL GUIDE 2005-2006 (2005), <i>available at</i> www.antioch- college.edu/Campus/cg/ (last visited 2/26/07).....	87
ANTIOCH COLLEGE SEXUAL OFFENSE PREVENTION POLICY (2005) at 1, <i>available at</i> www.antioch- college.edu/Campus/sopp/SOPP2006%20.pdf (last visited 2/26/07).....	87
Avis Jones-DeWeever, Ph.D & Barbara Gault, Ph.D, <i>Resilient & Reaching for More: Challenges and Benefits of Higher Education for Welfare Participants and Their Children</i> , Institute for Women’s Policy Research April 2006, <i>available at</i> www.iwpr.org/pdf/D466.pdf	193
B. A. Van der Kolk & C. Courtois, <i>Editorial Comments: Complex Developmental Trauma</i> , J. OF TRAUMATIC STRESS 385-388 (2005)	154
B. A. Van der Kolk <i>et al.</i> , <i>Disorders of Extreme Stress: The Empirical Foundation of a Complex Adaptation to Trauma</i> , 18 J. OF TRAUMATIC STRESS 389-99 (2005)	143
Betsy Tsai, Note, <i>The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation</i> , 68 FORDHAM L. REV. 1285 (2000)	182
Bonnie S. Fisher <i>et al.</i> , <i>The Sexual Victimization of College Women</i> , 10 (National Institute of Justice’s Bureau of Justice Statistics ed., 2000), <i>available at</i> www.ncjrs.gov/pdffiles1/nij/182369.pdf	17, 194
Brian Sheppard, Annotation, <i>Views of United States Supreme Court as to Attorney-Client Privilege</i> , 159 A.L.R. FED. 243 (2000)	56
Brian Sheppard, Annotation, <i>Views of United States Supreme Court as to Attorney-Client Privilege</i> , 159 A.L.R. FED. 243 (2000);	57
Bryan Cho, <i>Getting Evicted for the Actions of Others: A Proposed Amendment to the Anti-drug Abuse Act</i> , 44 B.C. L. REV. 1229, 1246 (2003)	290
BUREAU OF JUSTICE STATISTICS, U.S DOJ, <i>Alcohol and Crime</i> (Apr. 1998).....	102

BUREAU OF JUSTICE STATISTICS, U.S DOJ, <i>An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime</i> (Apr. 1998)	102
BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 3, (1997), available at www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf	279, 309
C. C. Classen <i>et al.</i> , <i>Sexual Revictimization: A Review of the Empirical Literature</i> , 6 TRAUMA, VIOLENCE, & ABUSE 103, at 111 (2005).....	141, 142, 144
CAHL monograph available online at www.cahl.org/MC%20Monograph.htm	118
Callie Rennison, U.S. Department of Justice, <i>Violent Victimization and Race, 1993-1998</i> (2001)	3
Camille Glasscock Dubose & Cathy O. Morris, <i>The Attorney as Mandatory Reporter</i> , 68 TEX. B.J. 208, 210 n.23 (2005).....	56
Camille LeGrand & Frances Leonard, <i>Civil Suits for Sexual Assault: Compensating Rape Victims</i> , GOLDEN GATE U. L. REV. 479 (1979)	361
Cape Cod Community College, OCR Case No. 01-93-2047.....	201
Carlson & Steketee, <i>Public Access to Court Records: Implementing the CCJ/COSCA Guidelines Final Project Report</i> , October 15, 2005, available at www.courtaccess.org/modelpolicy/PublicAccessFinalReport %20.pdf	75
Cassia C. Spohn, <i>The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms</i> , 39 JURIMETRICS J. 119, 128-30 (1999)	7
CASSIA SPOHN & JULIE HORNEY, <i>RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT</i> , New York, Plenum, (1992).....	8, 92, 383
CATHERINE A. CARROLL, <i>STALKING PROTECTION ORDERS BY STATE</i> (Apr. 28, 2006), available at www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=41544	179
Catherine Klein & Leslye Orloff, <i>Providing Protection for Battered Women: An Analysis of State Statutes and Case Law</i> , 21 HOFSTRA L. REV. 801, 954 (1993)	180, 182
Cheryl Regehr, Susan Cadell, & Karen Jensen, <i>Perceptions of Control and Long Term Recovery from Rape</i> 69 (1) AM. J. ORTHOPSYCHIATRY 110-115 (Jan. 1999).....	31
Christina DeJong & Amanda Burgess-Proctor, <i>A Summary of Personal Protection Order Statutes in the United States</i> , 12 VIOLENCE AGAINST WOMEN 68 (2006), available online at vaw.sagepub.com/content/vol12/issue1	170, 180
Christine A. Gidycz & Mary. P. Koss, <i>A Comparison of Group and Individual Sexual Assault Victims</i> , 14 PSYCHOL. OF WOMEN Q. 325-342 (1990)	148

CIVIL REMEDIES FOR WOMEN VICTIMIZED BY VIOLENCE: A PRACTICE MANUAL FOR ATTORNEYS (Carol E. Jordan <i>et al.</i> eds., 2003), available for purchase from UK/CLE at (859) 257-2921 or www.uky.edu/Law/CLE	171
COMMITTEE TO ADDRESS SEXUAL ASSAULT AT HARVARD, PUBLIC REPORT 13 (Harvard University, Apr. 2003), available at www.fas.harvard.edu/~casah/files/CASAH_FinalReport.pdf (last visited Feb. 26, 2007)	92
<i>Confidentiality of Information and Records: A Guide for Programs Working with Women with Disabilities who are Survivors of Sexual Assault or Domestic Violence</i> , Disability Rights Wisconsin for the Violence Against Women with Disabilities Project (2004)	316
<i>Conn. AG Blumenthal Opinion Interpreting Mandated Reporter Statute, Sept. 30, 2002</i>	60
Court Forms: Sexual Assault, available at www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=65 (last visited Feb. 21, 2007)	242
CRIMINAL AND CIVIL INVESTIGATION HANDBOOK 639 (J. Joseph Grau ed., 1993).....	97
D. Beloof, J. Mindlin, and L. Reeves, <i>A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence</i> , available at www.lclark.edu/org/ncvli/objects/L&C77576criminalbook.pdf	364
D. Fowler, <i>The Case for Treating Trauma in Severe Mental Illness: A Commentary</i> , AM. J. OF PSYCHIATRIC REHABILITATION 7, 205-12 (2004)	132
D. Kaysen, T. Simpson <i>et al.</i> , <i>Alcohol Problems and Posttraumatic Stress Disorder in Female Crime Victims</i> , J. OF TRAUMA AND STRESS, Jun 19(3):399-403 (2006).....	146
D. Lisak & S. Roth, <i>Motives and Psychodynamics of Self-Reported, Unincarcerated Rapists</i> , 60(2) AM. J. ORTHOPSYCHIATRY 268-280 (1990)	101
D. Sobsey & T. Doe, <i>Patterns of sexual abuse and assault</i> , SEXUALITY AND DISABILITY, 9 (3), 243-59	3
D.G. Kilpatrick, C.N. Edmunds, & A.K. Seymour, <i>Rape in America: A Report to the Nation</i> . Arlington, VA, National Center for Victims of Crime (1992)	passim
Daniel Pelletiere, <i>The Rental Housing Affordability Gap: Comparison of 2001 and 2003 American Housing Surveys</i> , Nat'l Low Income Housing Coalition, available at www.nlihc.org/doc/rentalgap.pdf . (March 2006).....	280
David Finkelhor and Kersti Yllo, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985)	143

David J. Stephenson, Jr., <i>Actions Under Fair Housing Act (42 U.S.C.A. §§ 3601 et seq.), Based on Sexual Harassment or Creation of Hostile Environment</i> , 144 A.L.R. FED. 595 (1998).....	306
David Lisak & Paul M. Miller, <i>Repeat Rape and Multiple Offending Among Undetected Rapists</i> , 17(1) VIOLENCE AND VICTIMS 73 (2002)	9, 101
David P. Bryden & Sonja Lengnick, <i>Rape In the Criminal Justice System</i> , 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997).....	8
David R. Englert, Ashleigh Diserio & Kate M. Ryan, <i>The Prosecutor's Guide to Mental Health Disorders</i> , THE VOICE, Vol. 1, No. 10 (The National Center for the Prosecution of Violence Against Women, American Prosecutors Research Institute).....	134
Dean P. Cazanave, <i>Congress Steps Up War on Drugs in Public Housing—Has It Gone One Step Too Far?</i> , 36 LOY. L. REV. 137, 150 (1990)	290
Disclosure to Victims of Alleged Crimes of Violence, Family Policy Compliance Office, U.S. Dept. of Educ. (March 10, 2003), available at www.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html	213
<i>Domestic Violence Civil Protection Orders by State</i> , chart compiled by C. Carroll, R. Runge, and the ABA Commission on Domestic Violence (2006)	180
Douglas E. Beloof, <i>Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights</i> , 38 SUFFOLK L. REV. 291 (2005)	68
Douglas E. Beloof, Esq., Jessica E. Mindlin, Esq., & Liani Jean Heh Reeves, Esq., <i>A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence</i> (2005), available at www.lclark.edu/org/ncvli/objects/L&C77576criminalbook.pdf (last accessed January 19, 2007)	81
Douglas E. Beloof, <i>The Third Model of Criminal Process: The Victim Participation Model</i> , 1999 UTAH L. REV. 289 (1999)	21
DOUGLAS E. BELOOF, <i>VICTIMS IN CRIMINAL PROCEDURE</i> , Carolina Academic Press (1999).....	28, 364
E. B. Foa et al., <i>The Treatment of Rape Victims</i> (1987) (Paper presented at the conference State-of-the-Art in Sexual Assault, Charleston, S.C.).....	143
E. M. Ellis et al., <i>An Examination of Differences Between Multiple- and Single-Incident Victims of Sexual Assault</i> , 91 J. OF ABNORMAL PSYCHOL. 221-224 (1982).....	148
EEOC.gov, <i>Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act</i> , available at www.eeoc.gov/policy/docs/accommodation.html#5	268
EEOC.gov, <i>Policy Guidance on Current Issues of Sexual Harassment</i> , available at www.eeoc.gov/policy/docs/currentissues.html	243

EEOC.gov, <i>The ADA: Your Employment Rights as an Individual With a Disability: More Questions and Answers About the ADA</i> , available at www.eeoc.gov/facts/ada18.html (last visited Jul. 23, 2006)	268
Elena Goldstein, <i>Kept Out: Responding to Public Housing No-Trespass Policies</i> , 38 HARV. C.R.-C.L. L. REV. 215, 216 (2003)	296
Eliot J. Katz, Annotation, <i>Workers' Compensation: Sexual Assaults as Compensable</i> , 52 A.L.R. 4th 731 (1987).....	255
Elizabeth M. Ellis, Beverly M. Atkeson & Karen S. Calhoun, <i>An Assessment of Long Term Reaction to Rape</i> , 90 J. ABNORMAL PSYCHOL. 263 (1981)	228
Ellen M. Bublick, <i>Citizen No-Duty Rules: Rape Victims and Comparative Fault</i> , 99 COLUM. L. REV. 1413 (1999).....	20, 98
Ellen M. Bublick, <i>Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies</i> , 59 SMU L. REV. 55 (2006).	361
E-mail to Patrick B. Mooney, 29 Apr. 1997	40
Employment and Housing Rights for Victims of Domestic Violence drop-down charts available at the Legal Momentum website, www.legalmomentum.org/legalmomentum/programs/ehrs/ (last visited Jan. 10, 2006).....	188
<i>Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault</i> , Legal Momentum (anticipated publication date June 2008; to be available online at www.legalmomentum.org/legalmomentum/programs/iwp	233
Ersine College, OCR Case No. 04-04-2016	202
EXECUTIVE OFFICE OF THE PRESIDENT OFFICE OF NATIONAL DRUG CONTROL POLICY, <i>Drug Policy Information Clearinghouse Fact Sheet: Rohypnol</i> (2003).....	112
EXECUTIVE OFFICE OF THE PRESIDENT: OFFICE OF NATIONAL DRUG CONTROL POLICY, <i>Drug Policy Information Clearinghouse Fact Sheet: Gamma Hydroxybutate (GHB)</i> (2002)	126
<i>Explaining the Recent Decline in Domestic Violence</i> , Amy Farmer and Jill Tiefenthaler, CONTEMPORARY ECONOMIC POLICY, Vol. 21, No. 2, April 2003.....	173
F.R. Lewington, <i>New Initiatives in the Investigation of Rape</i> , 56 MEDICO-LEGAL J. 111, 122 (1998).....	97
<i>Fenton Community High School Dist. #100</i> , OCR Case 05-92-1104.....	199
Francis Amendola et al., <i>What Constitutes Constructive Eviction – Particular Acts of Landlord Constituting Eviction</i> , 52A C.J.S. LANDLORD & TENANT § 969 (2005).....	310

FREDRICA LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE (Clark Boardman: 2004).....	180
Furey, E. M. (1994). <i>Sexual Abuse of Adults with Mental Retardation: Who and where?</i> MENTAL RETARDATION, 32, 3, pp. 173-180	3
G. Liotti, <i>Trauma, Dissociation, and Disorganized Attachment: Three Strands of a Single Braid</i> , 41 PSYCHOTHERAPY: THEORY, RESEARCH, PRACTICE, TRAINING 472-486 (2004).....	154
G. Steketee & E. B. Foa, <i>Rape Victims: Post-Traumatic Stress Responses And Their Treatment: A Review Of The Literature</i> , 1 J. OF ANXIETY DISORDERS 69-86 (1987).....	139
Gail M. Ballou, <i>Recourse for Rape Victims: Third Party Liability</i> , 4 HARV. WOMEN'S L.J. 105 (1981).....	361
Gwen Filosa, HUD Raises Rental Voucher Values; But Housing Shortage Remains, Activists Say, TIMES-PICAYUNE, June 22, 2006, at 1	285
H. C. Sinclair & L. E. Bourne, Jr., <i>Cycle of Blame or Just World: Effects of Legal Verdicts on Gender Patterns in Rape-Myth Acceptance and Victim Empathy</i> , 22 PSYCHOL. OF WOMEN Q. 575-588 (1998).....	137
<i>How to File a Discrimination Complaint with the Office for Civil Rights</i> , Office for Civil Rights, U.S. Department of Education, www.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt	204
HUD Housing Programs: Tenants' Rights (The National Housing Project ed., 3d ed. 2004)	282
HUD MULTIFAMILY OCCUPANCY HANDBOOK 4350.3 REV-1	293
I. Arias, <i>The Legacy of Child Maltreatment: Long-Term Health Consequences for Women</i> , 13 J. OF WOMEN'S HEALTH 468 (2004).....	141
Ilene Seidman & Susan Vickers, <i>The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform</i> , 38 SUFFOLK U. L. REV. 467, 478 (2005)	7, 282
<i>Introduction to the Housing Voucher Program</i> , CENTER ON BUDGET AND POLICY PRIORITIES, May 15, 2003, available at www.centeronbudget.org/5-15-03hou.htm	298
J. A. CHU, REBUILDING SHATTERED LIVES: THE RESPONSIBLE TREATMENT OF COMPLEX POSTTRAUMATIC AND DISSOCIATIVE DISORDERS (1998).....	134
J. Gauntlett-Gilbert <i>et al.</i> , <i>Drug Facilitated Sexual Assault: Cognitive Approaches to Treating the Trauma</i> , 32 BEHAVIORAL & COGNITIVE PSYCHOTHERAPY 215-223 (2004).....	135
J. H. HERMAN, TRAUMA AND RECOVERY, 69 (1992)	5, 154
J. H. HERMAN, TRAUMA AND RECOVERY, 69 (1992).....	136

J. L. Herman, <i>Complex PTSD: A Syndrome In Survivors of Prolonged And Repeated Trauma</i> , 5 J. OF TRAUMATIC STRESS 377-391 (1992)	143
J. M. Golding, <i>Sexual Assault History and Long Term Physical Health Problems: Evidence from Clinical and Population Epidemiology</i> , 8 CURRENT DIRECTIONS IN PSYCHOL. SCI. 191-194 (1999)	139
J. M. Goodwin, <i>Redefining Borderline Syndromes as Posttraumatic and Rediscovering Emotional Containment as a First Stage in Treatment</i> , 20 J. OF INTERPERSONAL VIOLENCE 20-25 (2005).....	154
J. N. Briere & M. Runtz, <i>Post Abuse Trauma: Data and Implications for Clinical Practice</i> , 2 J. OF INTERPERSONAL VIOLENCE 367-379 (1987)	147
J. S. Gearon <i>et al.</i> , <i>Traumatic Life Events and PTSD Among Women with Substance Use Disorders and Schizophrenia</i> , 54 PSYCHIATRIC SERVICES 523 (2003).....	152, 153
Jacqueline Campbell, <i>et al.</i> , <i>Assessing Risk Factors for Intimate Partner Homicide</i> , 93 AMERICAN J. OF PUBLIC HEALTH 1089 (July 2003).....	42
Jacquelyn L. Resnick, <i>From Hate to Healing: Sexual Assault Recovery</i> , 16 (1-2) J. COLLEGE STUDENT PSYCH. 43-63 (2001).....	31
Jane A. Randel & Kimberly K. Wells, <i>Corporate Approaches to Reducing Intimate Partner Violence Through Workplace Initiatives</i> , 3 CLINICS OCCUP. ENVTL. MED. 821 (2003)	188
Jane H. Aiken & Jane C. Murphy, <i>Evidence Issues in Domestic Violence Civil Cases</i> , 34 FAM. L.Q. 43 (2000).....	171
Jessica Dayton, <i>The Silencing of a Woman's Choice: Mandatory Arrest and No-Drop Prosecution Policies in Domestic Violence Cases</i> , 9 CARDOZA WOMEN'S L.J. 281, 287 (2003).....	366
Jessica E. Mindlin, Esq. & Liani Jean Heh Reeves, Esq., <i>Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions</i> , available at www.lclark.edu/org/ncvli/objects/L&C77576confidentialitybook.pdf	passim
Jessica E. Mindlin, Esq. & Liani Jean Heh Reeves, Esq., <i>Rights and Remedies: Meeting the Civil Legal Needs of Sexual Assault Survivors</i> (2005), available at www.lclark.edu/org/ncvli/objects/L&C77576civilbook.pdf	passim
John Riley, <i>Spouse-Abuse Victim Jailed After No-Drop Policy Invoked</i> , NAT'L L.J. (Aug. 22, 1983)	366
John W. Gillis & Douglas E. Beloof, <i>The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victims Rights in the Courts</i> , 33 MCGEORGE L. REV. 689 (2002).....	21, 379
Josh Maggard, <i>Courting Disaster: Re-Evaluating Rape Shields in Light of People v. Bryant</i> , 66 OHIO ST. L.J. 1341, n.92, n.129 (2005)	68

Judith L. Herman <i>et al.</i> , <i>Childhood Trauma in Borderline Personality Disorder</i> , 146 AM. J. OF PSYCHIATRY 490 (1989)	154
Judith McFarlane <i>et al.</i> , <i>Intimate Partner Sexual Assault Against Women and Associated Victim Substance Use, Suicidality, and Risk Factors for Femicide</i> , 26 ISSUES IN MENTAL HEALTH NURSING 953-967 (2005)	147
Judith McFarlane, <i>et al.</i> , <i>Intimate Partner Sexual Assault Against Women: Frequency, Health Consequences and Treatment Outcomes</i> , 105 OBSTETRICS & GYNECOLOGY 99 (2005).....	41
JULIANE BALLINO <i>et al.</i> , TRYING DRUG CASES IN MASSACHUSETTS, Chapters 5-7 (Stephanie Page, ed., MCLE 1999).....	109
Juliette Terzieff, <i>New York Courts Untangle Domestic Violence</i> , WOMEN'S ENEWS, June 6, 2005, available at www.womensenews.org/article.cfm/dyn/aid/2324/context/archive	182
K. A. Lonsway & L. F. Fitzgerald, <i>Rape Myths: In Review</i> , 18 PSYCHOL. OF WOMEN Q. 133-164 (1994).....	136
K. Montagriff, <i>Discovery versus Production: There Is A Difference</i> , available at www.ncvli.org/objects/NewsletterSpring06.pdf (last accessed January 20, 2007)	81
K. T. Mueser <i>et al.</i> , <i>Trauma and Posttraumatic Stress Disorder in Severe Mental Illness</i> , 66 J. OF CONSULTING & CLINICAL PSYCHOL. 493-499 (1998)	153
Karen M. Kramer, <i>Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes</i> , 47 STAN. L. REV. 115, 128-29 (1994)	87, 99, 103
Katharine K. Baker, <i>Once a Rapist? Motivational Evidence and Relevancy in Rape Law</i> , 110 HARV. L. REV. 563, 611 (1997).....	95
Katharine K. Baker, <i>Sex, Rape, and Shame</i> , B.U.L., REV. 688-89 (1999)	90
Kathryn M. Reardon, <i>Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights</i> , 38 SUFFOLK U. L. REV. 395, 397 (2005).....	187
Keely, <i>Landlord Rape and Sexual Assault of Tenants: Survey Findings and Advocacy Approaches</i> , CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y, Nov.-Dec. 2006, at 441, 444-45	281
Kilpatrick, D. G. <i>et al.</i> , <i>Violence and Risk of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results from the National Survey of Adolescents</i> , 71 J. OF CONSULTING & CLINICAL PSYCHOL. 692-700 (2003).....	139
Kilpatrick, D.G., <i>et al.</i> , <i>A 2-Year Longitudinal Analysis of the Relationship Between Violent Assault and Substance Use in Women</i> , 65 J. OF CONSULTING & CLINICAL PSYCHOL. 834-847 (1997).....	146

Kimberly Hanson Breitenbecher, <i>The Relationships Among Self-Blame, Psychological Distress, and Sexual Victimization</i> , JOURNAL OF INTERPERSONAL VIOLENCE, Vol. 21, No. 5, 597-611 (2006).....	137
Koesters SC, Rogers PD, Rajasingham CR. <i>MDMA ('ecstasy') and other 'club drugs': The new epidemic</i> . PEDIATRIC CLIN. NORTH AM. Apr. 2002; 49(2):415-33.....	110
Kristin Littel, <i>A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents</i> 99-104 (Sept. 2004), available at www.ncjrs.org/pdffiles1/ovw/206554.pdf	12
Kristin Littel, U.S. Department of Justice, <i>A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents</i> 99-104 (Sept. 2004), available at www.ncjrs.org/pdffiles1/ovw/206554.pdf	passim
L. A. Goodman <i>et al.</i> , <i>Physical and Sexual Assault History in Women with Serious Mental Illness: Prevalence, Correlates, Treatment and Future Research</i> , 23 SCHIZOPHRENIA BULLETIN 685-696 (1997).....	149
L. A. Goodman <i>et al.</i> , <i>Recent Victimization in Women and Men with Severe Mental Illness: Prevalence and Correlates</i> , 14 J. OF TRAUMATIC STRESS 615-632 (2001)	150
L. A. Teplin <i>et al.</i> , <i>Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey</i> , 62 ARCHIVES OF GEN. PSYCHIATRY 911-921 (2005).....	149, 150
L. M. Monroe <i>et al.</i> <i>The Experience of Sexual Assault: Findings From a Statewide Victim Needs Assessment</i> , 20 J. OF INTERPERSONAL VIOLENCE 767-776 (2005)	136
Lawrence A. Greenfield, Steven K. Smith, U.S. Department of Justice, <i>American Indians and Crime</i> (1999).....	3
LeRoy Rooker, U.S. Education Department Family Policy Compliance Office email to S. Daniel Carter, Senior Vice President, Security on Campus, Inc., April 10, 2002	213
Leslye E. Orloff <i>et al.</i> , <i>With No Place To Turn: Improving Legal Advocacy For Battered Immigrant Women</i> , 29 FAM. L.Q. 313, 315 (1995)	13
LINDA A. FAIRSTEIN, <i>SEXUAL VIOLENCE: OUR WAR AGAINST RAPE</i> , New York, William Morrow & Company, Inc. (1993).....	35, 92, 96, 368
Linda E. Ledray, <i>SANE Role in Evidence Collection and Utilization</i> , Presentation for VRLC National Sexual Assault Law Institute (June 2005).....	43, 119, 120
LISA MCGOVERN, <i>THE MASSACHUSETTS PROSECUTORS' MANUAL: DOMESTIC VIOLENCE AND SEXUAL ASSAULT</i> , Chapter 7- Trial Strategies (Mass. District Attorneys Ass'n ed., 2001)	92

Litigation Tips In Domestic Violence Cases: A Techniques and Strategies Teleconference Series, <i>available at</i> www.abanet.org/domviol/attorneys.html#training	171
Lois Kanter, <i>Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims</i> , 38 SUFFOLK U. L. REV. 253 (2005)	22
Lynn Hecht Schafran, Director, National Judicial Education Program, at Legal Momentum, based on forthcoming web-based curriculum, <i>Intimate Partner Sexual Assault: The Hidden Dimension of Domestic Violence</i> , <i>available at</i> www.legalmomentum.org/programs/njep/	41
Lynne Henderson, <i>Rape and Responsibility</i> , 11 L. & PHIL. 127, 157 (1992)	95
M. D. Schwartz & M. S. Leggett, <i>Bad Dates or Emotional Trauma? The Aftermath of Campus Sexual Assault</i> , 5 VIOLENCE AGAINST WOMEN 251-271 (1999).....	140
M. J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980)	137
M. R. Harvey, <i>An Ecological View of Psychological Trauma and Trauma Recovery</i> , 9 J. OF TRAUMATIC STRESS 3-23 (1996)	139
Majority Staff of the Senate Judiciary Committee, <i>Violence Against Women: The Response to Rape: Detours on the Road to Equal Justice</i> (May 1993) <i>available at</i> www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text	10, 236
Martha R. Burt & Bonnie L. Katz, <i>Rape, Robbery, and Burglary: Responses to Actual and Feared Victimization, with Special Focus on Women and the Elderly</i> , VICTIMOLOGY: AN INTERNATIONAL JOURNAL 10:325, 330 (1995)	4
Mary Koss, <i>Restoring Rape Survivors – Justice, Advocacy, and a Call to Action</i> , ANN. N.Y. ACAD. SCI. 1087: 206, 209 (2006).....	42
MARY P. KOSS AND MARY R. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY APPROACHES TO TREATMENT, Lexington, Mass, S. Greene Press (1991)	31, 139
MASS. DEPT. OF PUBLIC EDUC., <i>Youth Risk Behavior Survey</i> (2001), <i>available at</i> www.doe.mass.edu/lss/yrbs99/toc.html	17
MASSACHUSETTS CONTINUING LEGAL EDUCATION, ACCESSING AFFORDABLE HOUSING FOR LOW INCOME PEOPLE (2006) (Part A: The Different Types of Public and Subsidized Housing).....	283
<i>Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA</i> (2007) <i>available at</i> web.amnesty.org/library/index/ENGAMR510352007	3
Melanie Lefkowitz, THE HOUSING SQUEEZE; Close Quarters, A World of Grief; In A Metropolis With Low Vacancies and High Rents,	

New Yorkers Find Themselves Forced to Share Living Spaces, <i>NEWSDAY</i> , June 18, 2006, at A04.....	285
Michael A. Disabatino, Annotation, <i>Modern Status of Rule that Employer May Discharge At-will Employee for Any Reason</i> , 12 A.L.R. 4th 544 (1982)	234
Michelle J. Anderson, <i>The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault</i> , 84 B.U. L. REV. 945, 992–94 (2004)	92
<i>Model Code on Domestic and Family Violence</i> , National Council of Juvenile and Family Court Judges (1994), available online at www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode_fin_printable.p df	182
Mustafa K. Kasubhai, <i>Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head</i> , 11 WIS. WOMEN’S L.J. 37, 70–72 (1996)	90, 91
N. P. Yuan <i>et al.</i> , <i>The Psychological Consequences Of Sexual Trauma</i> , in NAT’L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 5 (2006), available at new.vawnet.org/Assoc_Files_VAWnet/AR_Psych Consequences.pdf	143
N. R. Branscombe <i>et al.</i> , <i>Counterfactual Thinking, Blame Assignment and Well-Being in Rape Victims</i> , 25 BASIC AND APPLIED SOCIAL PSYCHOL. 265-273 (2003).....	138
N.M. Malamuth, R.J. Sockloskie, Mary P. Koss & J.S. Tanaka, <i>Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students</i> , 59 J. CONSULTING AND CLINICAL PSYCHOL. 670-681 (1997)	101
Naomi Stern, <i>Early Lease Termination by Battered Tenants</i> , 10 DOMESTIC VIOLENCE REP., Feb.-Mar. 2005, at 33-48, available at www.nlchp.org/FA_DV/DVR_%20reprint%2010-3_Stern.pdf	310
NAT’L CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, <i>Dangerous Liaisons: Substance Abuse and Sex</i> 42 (December 1999).....	102
NAT’L CTR FOR VICTIMS OF CRIME, PROTECTIVE ORDERS FOR VICTIMS OF SEXUAL ASSAULT (2005)	173
NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, STATE LAWS AND LEGISLATION TO ENSURE HOUSING RIGHTS FOR SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE, available at www.nlchp.org/FA_DV/DVHousingstatelaws3-06.pdf	292
NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, THE IMPACT OF THE VIOLENCE AGAINST WOMEN ACT 2005 (VAWA) ON THE HOUSING RIGHTS AND OPTIONS OF SURVIVORS OF DOMESTIC AND SEXUAL	

VIOLENCE: FREQUENTLY ASKED QUESTIONS, <i>available at</i> www.nlchp.org/FA_DV/VAWAHousingFAQ3-06.pdf	290
National Center for Policy Analysis study, <i>available at</i> www.ncpa.org/studies/s229/s229.html	10, 236
National Center for the Prosecution of Violence Against Women, APRI website, <i>available at</i> www.ndaa.org/apri/programs/vawa/statutes.html	71
National Center for Victims of Crime, <i>available at</i> (www.ncvc.org)	83
National Immigration Law Centers website at www.nilc.org (last visited Feb. 14, 2005).....	13
NATIONAL JUDICIAL EDUCATION PROGRAM, <i>Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases. A Model Four-Day Curriculum: Drug Facilitated Sexual Assault</i> (2001)	112, 135
National Judicial Education Program/Legal Momentum video <i>Presenting Medical Evidence in an Adult Rape Trial</i> , <i>available at</i> www.legalmomentum.org/legalmomentum/publications/national_judicial_education_program_njep/	121
National Lawyers Guild, <i>National Immigration Project Training Materials</i> , <i>available at</i> www.nationalimmigrationproject.org	14
National Network to End Domestic Violence's Safety Net Project, <i>available at</i> (www.nnedv.org).....	67
National Sexual Violence Resource Center, <i>available at</i> (www.nsvrc.org).....	83
National Victim's Constitutional Amendment Passage website at www.nvcap.org/states/ (last visited Jan. 10, 2007)	185
New York City Independent Budget Office Fiscal Brief, <i>available at</i> www.ibo.nyc.ny.us/iboreports/jailtimecredit_fbsept2005.pdf	383
Nicole P. Yuan, Mary P. Koss, & Mirto Stone, <i>Current Trends in Psychological Assessment and Treatment Approaches for Survivors of Sexual Trauma</i> , VAWNET, April 2006, <i>available at</i> www.VAWnet.org/SexualViolence/Research/VAWnetDocuments/AR_SVTreatment.php	32
Nora Fitzgerald & K. Jack Riley, <i>Drug Facilitated Rape: Looking for the Missing Pieces</i> , NAT'L INST. JUSTICE J. at 10 (Apr. 2000), <i>available at</i> www.ncjrs.gov/pdffiles1/jr000243c.pdf (last visited Feb. 26, 2007). 110, 111, 112, 135	
NORTHEASTERN UNIVERSITY'S STUDENT CODE OF CONDUCT, <i>available at</i> www.neu.edu/osccr/code.html	106
NOW LEGAL DEFENSE AND EDUCATION FUND, SEXUAL HARASSMENT IN HOUSING: A PRIMER (2003), <i>available at</i> www.legalmomentum.org/issues/vio/LRK_SexHarassment.pdf	306
O. Van der Hart <i>et al.</i> , <i>Dissociation: An Insufficiently Recognized Major Feature of Complex Posttraumatic Stress Disorder</i> , 18 J. OF TRAUMATIC STRESS 413-423 (2005)	144

OBTAINING, ENFORCING AND DEFENDING C.209A RESTRAINING ORDERS IN MASSACHUSETTS (Andrea J. Cabral ed., 1997 & Supp. 2004)	171
OCR Letter to The Evergreen State College (April 4, 1995).....	203
OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 2 (2001), <i>available at www.ed.gov/offices/OCR/archives/pdf/shguide.pdf</i>	passim
OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS	187
Olivia Gonzales Howe, Public Housing for Sale, DES MOINES REGISTER, September 28, 2004, at 1U	285
Orloff <i>et al.</i> , <i>Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault</i> (anticipated publication June 2007, Legal Momentum)	13
OSHA.gov, see also <i>Standard Interpretations: 12/18/2003 Elements Necessary for a Violation of the General Duty Clause</i> , <i>available at www.osha.gov/pls/oshaweb/owadisp.show_document? p_table=INTERPRETATIONS&p_id=24784</i>	258
P.A. Frazier, <i>Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model</i> , J. PERS. SOC. PSYCHOL. June 84 (6):1257-69 (2003)	137
Patricia J. Falk, <i>A Statutory Overview and Proposals for Reform</i> , 44 ARIZ. L. REV. 131, 172 n.249 (2002)	103
Patricia Tjaden & Nancy Thoennes, <i>Prevalence, Incidence, and Consequences of Violence Against Women</i> , 6 (U.S. Department of Justice, Office of Justice Programs, ed. 1998), <i>available at www.ncjrs.gov/pdffiles/172837.pdf</i>	3, 8, 194
Paul R. Jefferson, Solutions Sought for Housing Shortage, MORNING STAR, June 7, 2006, at Business and Financial News	285
Pearl Goldman & Leslie Larkin Cooney, <i>Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventative Law Into Law School Curriculum</i> , 5 PSYCHOL. PUB. POL'Y & L. 1123 (1999)	5
<i>Presenting Medical Evidence in an Adult Rape Trial</i> , <i>available at www.legalmomentum.org/legalmomentum/publications/national_judi cial_education_program_njep/</i>	116
Privacy Rights Clearinghouse, <i>available at www.privacyrights.org/fs/fs8-med.htm</i>	72
R. C. Kessler <i>et al.</i> , <i>Posttraumatic Stress Disorder in the National Comorbidity Survey</i> , 52 ARCHIVES OF GEN. PSYCHIATRY 1048-1060 (1995)	144

R. Janoff-Bulman, <i>Characterological Versus Behavioral Self-blame: Inquiries Into Depression and Rape</i> , J. PERS. SOC. PSYCHOL. 1979 Oct. 37(10):1798-809 (1979).....	137
R. JANOFF-BULMAN, SHATTERED ASSUMPTIONS: TOWARDS A NEW PSYCHOLOGY OF TRAUMA (1992).....	137
Rachel Kimerling and Karen S. Calhoun, <i>Somatic Symptoms, Social Support, and Treatment Seeking among Sexual Assault Victims</i> , <i>Journal of Consulting and Clinical Psychology</i> , v62 n2 p333-40 Apr 1994.....	28
<i>Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000</i> at 3, BUREAU OF JUSTICE STATISTICS, August 2002, NCJ 194530.....	26, 40, 236
Raquel Kennedy Bergen & Paul Bukovec, <i>Men and Intimate Partner Rape: Characteristics of Men Who Sexually Abuse Their Partner</i> , 21 JOURNAL OF INTERPERSONAL VIOLENCE 1375 (2007)	42
Rebecca Smith <i>et al.</i> , <i>Unemployment Insurance and Domestic Violence: Learning From Our Experiences</i> , 1 SEATTLE J. FOR SOC. JUST. 503 (Fall/Winter 2002).....	18
RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. A (1981)	90
RESTATEMENT (SECOND) OF CONTRACTS c. 11, § 261 (1981)	310
RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) §§ 6.1, 11.1 (2006).....	308
RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant), § 1.6 (1977)	312
RESTATEMENT OF THE LAW (SECOND) TORT (1977)	79
Richard D. English, J.D., <i>Liability for tortious interference with prospective contractual relations involving sale of business, stock, or real estate</i> , 71 A.L.R. 5th 491 (1999).....	311
Richard I. Haddad, <i>Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases</i> , 39 COLUM. J.L. & SOC. PROBS. 185, 191 (2005)	68
<i>Rights and Reality II: An Action Guide to the Rights of People with Disabilities in Wisconsin</i> , Disability Rights Wisconsin (2001).....	316, 328
Robin Cheryl Miller, <i>Cause of Action to Recover Workers' Compensation Benefits for Injury Resulting From Aggravation or Acceleration Of, or Combination With, Pre-Existing Condition</i> , 2 CAUSES OF ACTION 2D 251 (2005).....	257
Robin R. Runge, Marcellene E. Hearn, & Spenta R. Cama, <i>Domestic Violence as a Barrier to Employment</i> , 34 CLEARINGHOUSE REV. 552, 560 (Jan.-Feb. 2001).....	18, 239

Ronald E. Acierno, Ph.D., Co-Director, Older Adult Crime Victim's Center, National Crime Victim's Research and Treatment Center, Department of Psychiatry and Behavioral Sciences. E-mail to Patrick b. Mooney, 29 Apr. 1997.....	40
Rosemary C. Hunter, <i>Gender in Evidence: Masculine Norms vs. Feminist Reforms</i> , 19 HARV. WOMEN'S L.J. 127 (1996).....	7
Ross Macmillan, <i>Adolescent Victimization and Income Deficits in Adulthood: Rethinking the Costs of Criminal Violence from a Life Course Perspective</i> CRIMINOLOGY (May 2000).....	4
S. A. Crome, <i>Adult Rape Scripting within a Victimological Perspective</i> , 6 AGGRESSION & VIOLENT BEHAVIOR 395-413 (2001).....	137
S. A. Seifert, <i>Substance Use and Sexual Assault</i> , 34 SUBSTANCE USE & MISUSE 935-945 (1999).....	135
S. E. Ullman & L. R. Brecklin, <i>Sexual Assault History and Suicidal Behavior in a National Sample of Women</i> , 32 SUICIDE & LIFE-THREATENING BEHAVIOR 117-130 (2002).....	145, 148
S. E. Ullman et al., <i>Trauma Exposure, Posttraumatic Stress Disorder And Problem Drinking In Sexual Assault Survivors</i> , 66 J. OF STUDIES ON ALCOHOL 610-619 (2005).....	146
S. E. Ullman, <i>Social Support and Recovery from Sexual Assault: A Review</i> , 4 AGGRESSION & VIOLENT BEHAVIOR 343-413 (1999).....	136
S. Tromp et al., <i>Are Rape Memories Different? A Comparison of Rape, Other Unpleasant, and Pleasant Memories Among Employed Women</i> , J. OF TRAUMATIC STRESS 605-627 (1995).....	134
SACK ON DEFAMATION, 3rd Edition (2006).....	79, 80
Sarah Deer, <i>Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law</i> (2005).....	3
Sarah E. Ullman, <i>Does Offender Violence Escalate When Rape Victims Fight Back?</i> , 13 J. INTERPERSONAL VIOLENCE 179, 190 (1998).....	95
SEX-RELATED OFFENSES: CRIMINAL INVESTIGATION, Chapter 10 (Charles R. Swanson ed., 1984).....	97
SEXUAL ASSAULT UNIT, BOSTON POLICE DEPT., <i>Age of Sexual Assault Victims in Boston in 2001</i> , available at www.ci.boston.ma.us/police/pdfs/VAge2001.pdf	17
<i>Sexual Violence and Adolescents</i> , VAWnet, www.vawnet.org , citing American Academy of Pediatrics, <i>Care of the Adolescent Sexual Assault Victim</i> , PEDIATRICS, 107(6), 1476 (2001).....	76
SEXUAL VIOLENCE LAW IN KENTUCKY: A HANDBOOK OF CRIMINAL, CIVIL, AND ADMINISTRATIVE LAWS (Marylee Perry ed., 2003).....	171

Shacara Boone, <i>New Jersey Rape Shield Legislation: From Past to Present – the Pros and Cons</i> , 17 WOMEN’S RTS. L. REP. 223, 223 n.6, 225 (1996)	68
Sonoma State University, OCR Case No. 09-93-2131	202
Stacy Futter & Walter R. Mebane Jr., <i>The Effects of Rape Law Reform on Rape Case Processing</i> , 16 Berkeley Women’s L.J. 72, 79 (2001).....	7
<i>State Court Cuts Time to Process Criminal Cases</i> , available at www.bizjournals.com/pacific/stories/2005/11/14/story6.html	383
<i>State Law Guide: Housing Laws Protecting Victims of Domestic and Sexual Violence</i> , Legal Momentum, 2006, available at www.legalmomentum.org/issues/vio/housing.pdf	16, 295, 307, 314
<i>State Law Guide: Workplace Restraining Orders</i> , www.legalmomentum.org/issues/vio/restraining.pdf	240
STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW, 99–113 (1998)	8, 89
Steven W. Perry, <i>American Indians and Crime – A BJS Statistical Profile 1992-2002</i> , Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, December 2004, available at www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf , last visited May 5, 2007.....	3
SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH STATISTICS SOURCE BOOK (B. Rouse ed., 2d ed. 1998).....	147
Sue Anna Moss Cellini, <i>The Proposed Victims’ Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim</i> , 14 ARIZ. J. INT’L & COMP. L. 839, 864 (1997)	379
Susan A. Reif & Lisa J. Krishner, <i>Subsidized Housing and the Unique Needs of Domestic Violence Victims</i> , 34 CLEARINGHOUSE REV. 31 (May-June 2000)	287
Susan Estrich, <i>Rape</i> , 95 YALE L.J. 1087, 1126 (1986).....	90
Susan Estrich, <i>Real Rape</i> (1987) at 42-43	9
SUSAN KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY (2001), available at www.ncjrs.gov/pdffiles1/nij/grants/186192.pdf	182
T. K. Logan et al., <i>Victimization and Substance Abuse Among Women: Contributing Factors, Interventions, and Implications</i> , 6 REV. OF GEN. PSYCHOL. 325-397 (2002).....	150
T.R. Miller, <i>Victim Costs and Consequences: A New Look</i> , NCJ-155282, Washington, D.C., National Institute of Justice	4
Teresa Scalzo, <i>Overcoming the Consent Defense</i> , AMERICAN PROSECUTORS RESEARCH INSTITUTE, Vol. 1, No.7, available at	

www.ndaa.org/publications/newsletters/the_voice_vol_1_no_7_2006.pdf	100
Terri Keeley, <i>Preventing Homelessness and Ensuring Housing Rights for Victims of Landlord Sexual Assault</i> (August 2006).....	16
THE CENTER ON WOMEN, VIOLENCE AND TRAUMA, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., available at www.mentalhealth.samhsa.gov/cmhs/womenandtrauma/wcdvs.asp (last retrieved April 21, 2006)	146
The National Crime Victim Law Institute, available at www.ncvli.org/demoproject.html	83, 186
The National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004) § 14.2.7.3 at 14/61	290
The Wireless Foundation, available at www.wirelessfoundation.org	158
Tjaden and Thoennes, <i>Extent, Nature and Consequences of Rape Victimization</i> , at 25	143
Tracy A. Bateman & Susan Thomas, <i>Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person</i> , 43 A.L.R. 5th 207 (1996)	308
U. S. DEP'T OF HOUSING AND URBAN DEV., PROJECT BASED VOUCHERS (2006), available at www.hud.gov/offices/pih/programs/hcv/project.cfm	300
U.S. CENSUS BUREAU, 2002 <i>American Community Survey Profile: Population and Housing Profile: Boston, MA</i> (2002), available at www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Narrative/385/NP38500US11221120.htm	17
U.S. CONST. art. VI; Cornell University Law School's Legal Information Institution, <i>Collective Bargaining and Labor Arbitration: An Overview</i> , available at www.thecre.com/fedlaw/legal89/collective_bargaining.htm	246
U.S. DEP'T OF HOUSING AND URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 216 (2003), available at www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf	286
U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL, 96 (2001) available at www.usdoj.gov/crt/cor/coord/ixlegal.pdf	passim
U.S. Department of Commerce, Bureau of the Census 2003.....	193
U.S. Department of Education "Dear Colleague Letter," GEN-96-11, May 1996.....	211
U.S. Department of Education Letter Ruling to Dr. Jane Jervis, President of The Evergreen State College, OPE ID 10922064 at 8	201
U.S. Department of Education Letter Ruling to Dr. John J. DeGioia, President of Georgetown University, OPE ID 00144500, July 16, 2004	201, 209

U.S. Department of Housing & Urban Development website information on Public Housing and Housing Choice Vouchers, <i>available at</i> www.hud.gov/offices/pih/about/index.cfm	283, 299
U.S. Department of Labor, Family and Medical Leave Act synopsis, <i>available at</i> www.dol.gov	327
U.S. DOJ, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES, Table 4	187
UNIFORM LAW COMMISSIONERS, A FEW FACTS ABOUT THE UNIFORM RESIDENTIAL LANDLORD TENANT ACT, <i>available at</i> www.nccusl.org/Update/uniformactfactsheets/uniformacts-fs-urlta.asp	307
University of Pittsburgh Student Health Service Health Education Website, <i>available at</i> www.studhlth.pitt.edu/healthed/alcohol/links/page51.html	109
V. Pualani Enos & Lois H. Kanter, <i>Who's Listening? Introducing Students To Client-Centered, Client-Empowering, And Multidisciplinary Problem-Solving In A Clinical Setting</i> , 9 CLINICAL L. REV. 83 (Fall 2002).....	31
Valerie M. Ryan, <i>Intoxicating Encounters: Allocating Responsibility in the Law of Rape</i> , 40 CAL. W. L. REV. 407, 420 (2004).....	99
VAWNET at new.vawnet.org/category/index_pages?category_id=93	67
Veronique N. Valliere, <i>Understanding the Non-Stranger Rapist</i> , THE VOICE, Vol. 1, No. 11 (The National Center for the Prosecution of Violence Against Women, American Prosecutors Research Institute)	101
Vicki Lovell, Inst. for Women's Pol'y Res., <i>No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave</i> (May 2004), <i>available at</i> www.iwpr.org/pdf/B242.pdf	244
Victim Rights Law Center, <i>available at</i> (www.victimrights.org)	83
Violence Against Women Act Reauthorization 2005 (Pub. L. No. 109-162), <i>citing</i> Kilpatrick, Dean, and Saunders, Benjamin. <i>The Prevalence and Consequences of Child Victimization</i> , April 1997, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.....	3, 21, 289, 330
VIOLENCE AND VICTIMS 2002; 17(1):73-84; MEN AND THE PROBLEMS OF NON-RELATIONAL SEX. R.L. Levant and G.R. Brooks (eds.) New York: Wiley (1997)	101
Vitauts M. Gulbis, Annotation, <i>Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense</i> , 31 A.L.R. 4th 120 (1984).....	92
W. E Hovdestad & C.M. Kristiansen, <i>Mind meets body: On the nature of recovered memories</i> , 19 WOMEN & THERAPY 31-45 (1996)	134

William M. Howard, Annotation, <i>Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees</i> , 105 A.L.R.5th 351 (2003).....	233
William Paul Deal and Viktoria Kristiansson, “ <i>Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault</i> ,” THE VOICE, Vol. 1, No, 12	319
WomensLaw.org, available at www.womenslaw.org	158, 170, 180
www.21jdda.org/victim.html	383
www.aardvarc.org/victim/restitution.html	357
www.accessingsafety.org	320
www.aclu.org/FilesPDFs/sj%20decision.pdf	295
www.ada.gov	348
www.appriss.com/VINE.html	185
www.childwelfare.gov/systemwide/laws_policies/state/reporting.cfm (last accessed January 19, 2007)	55
www.courts.michigan.gov/scao/resources/standards/aj_checklist.pdf	345
www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf	262
www.eeoc.gov/types/ada.html	324
www.fairhousing.com	337
www.govtrack.us	254
www.hud.gov/local/index.cfm	301
www.hud.gov/offices/cpd/affordablehousing/index.cfm	297
www.hud.gov/offices/fheo/disabilities/	337
www.hud.gov/offices/pih/pha/approved/	286
www.hudclips.org/cgi/index.cgi	292
www.ilearning.ci.fsu.edu/familyvio/privilege.php	28
www.legalmomentum.org/issues/vio/timeoff.pdf	265, 266
www.legalmomentum.org/legalmomentum/programs/ehrsa	352
www.nacvcb.org	20, 354
www.nationalimmigrationproject.org	373
www.nationalpartnership.org	263
www.ncvc.org	380
www.ncvc.org/ncvc/main.aspx?dbID=DB_Amendments128	72
www.ncvli.org	21, 365, 378
www.ncvli.org/ncvlilibrary.html	72, 380
www.ndaa.org/pdf/vaw_rape_shield_laws_nov_18_%AD03.pdf	372
www.ndaa.org/pdf/vaw_rape_shield_laws_may_05.pdf	372

www.nilc.org	373
www.nlr.gov/nlr/home/default.asp	248
www.nvcn.org	365
www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv0561.pdf (last accessed May 23, 2007)	16
www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv0563.pdf	16
www.securityoncampus.org/lawyers/ocr15052041.pdf	203
www.socialsecurity.gov/	273
www.usdoj.gov/crt/ada/adahom1.htm	324
www.usdoj.gov/crt/ada/cguide.htm	322
www.usdoj.gov/crt/ada/publicat.htm#Anchor-ADA-46919	325
Yolanda Putman, <i>CHA Seeks Landlords to Fill Housing Gaps</i> , CHATTANOOGA TIMES FREE PRESS, June 26, 2006	285