Washington Coalition of Sexual Assault Programs

Beyond the Criminal Justice System:
Transforming Our Nation’s Response to Rape

A Practical Guide to Representing Sexual Assault Victims

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WCSAP is committed to fostering a culture of respect, dignity and autonomy for all individuals. We recognize that disrespect, ignorance and the abuse of disparities in power are the roots of sexual violence. To that end, WCSAP endeavors to engage with agencies and individuals who share our commitment.

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KEEPING CURRENT WITH THE LAW

This 2004 Washington State Edition of the Victim Rights Law Center Manual, Beyond the Criminal Justice System: Transforming Our Nation’s Response to Rape was published in October 2004. While every effort has been made to include the most up to date information, practitioners are encouraged to keep current with legislative and case law developments made after publication.

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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 generally chosen to use the term “victim” over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide remedies for rape and sexual assault victims. Because this Manual is a guide for attorneys and advocates who are negotiating these systems with their clients, using the term “victim” allows easier interfacing with these systems.

She/He: Although both males and females are victims of rape and sexual assault and females can be assailants, in the overwhelming majority of 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.

Assailant: Depending upon the context within the Manual, a rapist may be described in several ways, including as the perpetrator or the defendant. For the most part, in this Manual we have chosen to use the term “assailant” as it accurately describes those cases where the rapist has been formally charged with a crime and those cases where no criminal charges are pending. We recognize, of course, that until there is a conviction, there is only an allegation of a crime. Because this Manual is written for attorneys and advocates for the victim, we have chosen not to include the term “alleged” when describing either the assault or the assailant.

Sexual Orientation: This Manual addresses heterosexual rape and sexual assault. Some of the issues and questions which arise within the context of same-sex sexual assaults are similar to those arising in different-sex sexual assaults, although there are also many differences. A full discussion of these differences is beyond the scope of this Manual.
FOREWORD

Like a rock thrown into calm water, sexual assault causes a powerful ripple effect throughout a victim's life. A victim's physical safety, her housing, education, employment, immigration status and economic stability can all be disrupted as a direct result of the assault.

Beyond the Criminal Justice System: Transforming Our Nation's Response to Rape, provides attorneys with a practical and detailed road map for representing sexual assault survivors. We hope it will be used widely as a starting point to help transform our nation's response to rape. By refocusing our legal resources on providing zealous, independent legal advocacy to sexual assault victims we believe our nation will become a more just place. We encourage creative and vigilant advocacy and ask that you keep us informed of your work.

Susan H. Vickers, Executive Director
Victim Rights Law Center
Boston, MA June 2003

We thank the Victim Rights Law Center in Boston for providing their expertise in the preparation of this Manual. Without their generous support in adapting the original manual this 2004 Washington Edition would not have been possible. We also thank the U.S. Dept. of Justice, Office on Violence Against Women for funding this collaborative project.

The Legal Program of the Washington Coalition of Sexual Assault Programs provides technical assistance and support, training and resource materials to attorneys and legal advocates working with victims of sexual assault throughout Washington. We are here to assist you in responding to the myriad of legal issues that may be encountered by a victim and look forward to working with you.

Catherine A. Carroll, Staff Attorney
WA Coalition of Sexual Assault Programs
Olympia, WA October 2004
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CORE PRACTICE DYNAMICS

WHAT YOU SHOULD KNOW BEFORE YOU TAKE YOUR FIRST CASE
CHAPTER ONE
CORE PRACTICE DYNAMICS:
What you need to know before you take your first case.

I. RESTORING RAPE VICTIM'S LIVES - MOVING BEYOND THE CRIMINAL JUSTICE SYSTEM

When most Americans think of rape and the law, they think of criminal justice. They think of the accused being put on trial. They think of establishing criminal guilt "beyond a reasonable doubt." Most Americans also appreciate the emotional harm suffered by the victim. In fact, over the past three decades numerous statutory reforms have tried to offer rape victims better protection within the criminal justice system.¹

Yet very few people understand the powerful domino effect sexual assault can have on a victim's entire social and economic life. One incident of sexual assault can destabilize a victim's housing, her employment, schooling, privacy, immigration status and basic long-term financial welfare.² This is especially true when the assailant is someone in the victim's social community. If the assailant is a neighbor, friend, co-worker, or classmate, the threats often become more serious.

To address the civil legal needs of victims and to prevent long-term socio-economic harm, our nation must change the way it responds legally to allegations of rape. Instead of focusing our legal resources exclusively on the issue of criminal sanctions against the assailant, we also need to concentrate legal resources on stabilizing the physical, emotional and financial welfare of the victim. We need to keep victims in school, keep them employed, and protect their privacy. We should be focused on restorative remedies that return a victim to her original life trajectory before the assault.

² Please see Note on Terminology regarding the use of she as the generic pronoun throughout the manual.
Yet, on a practical level, to accomplish this paradigm shift we must establish that sexual assault victims are entitled to restorative civil remedies regardless of the status of criminal sanctions against the assailant. Today, many of the civil remedies that sexual assault victims need depend, either technically or discretionarily, upon criminal justice outcomes. On a technical level, in many states victims cannot access state victim compensation programs unless they cooperate with law enforcement. On a discretionary level, most third party institutions and decision makers, such as housing authorities, schools and employers, are extraordinarily wary of imposing significant restrictions on an assailant unless criminal charges exist. Landlords, employers and educators literally say: “I do not want to decide a rape case. That should be handled by the criminal courts.”

The current paradigm - making basic civil remedies for sexual assault survivors dependent upon the outcome of the criminal justice system - is problematic for two reasons:

- First, rape remains the least reported, least indicted and least convicted felony in America. Only 16-32% of rape victims report the crime to law enforcement authorities, and only 5% of college victims report. Of those reports, approximately 25% result in formal charges and 12.5% result in a conviction. This means approximately 75% of the rapes reported to law enforcement are never prosecuted. Given this reality, if civil remedies are contingent on criminal justice outcomes, the vast majority of victims will be left without any assistance.

- Second, to have any meaning and to prevent serious harm, most civil remedies (housing, safety orders, privacy, education, employment, etc.) need to be secured quickly in the weeks and months following an assault. However, the time between report to the police and a plea or trial in a criminal case may sometimes be years. Appeals will take even longer. Many victims will have left their jobs, their housing, or their educational institution by the time a criminal sanction is imposed.

II. CONFRONTING “HE SAID, SHE SAID”: HOW TO DEAL EFFECTIVELY WITH ACQUAINTANCE RAPE CASES

By representing sexual assault victims in non-tort, non-criminal matters, you will be engaged in cutting-edge legal practice. The primary hurdle you will confront, however, is a

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social problem not a legal problem: American society remains deeply ambivalent about “acquaintance rape.” The majority of decision-makers would prefer to decide cases in which the assailant is a “behind the bushes attacker with a weapon”. They do not want to decide rape cases in which the weapons involved are alcohol, trust, privacy and social vulnerability.5

Yet rapes committed by known assailants represent approximately 80% of all sexual assault cases.6 Friends, relatives, classmates, boyfriends, and colleagues represent the majority of rapists. They are men we know. They are men we trust. And if we do not hold them accountable, they will probably rape again.7

As an attorney for the victim in an acquaintance rape situation, you will confront powerful social resistance. Absent your zealous advocacy, decision-makers in most cases will choose either:

▪ to view the accused as not culpable enough to be labeled a rapist,
▪ to view the victim as not innocent enough to deserve legal protection, or
▪ to find insufficient corroboration in the case, although they may view the victim as sympathetic and believe she was probably raped.

To assist you in overcoming these odds, we have identified five practice dynamics:

A. Paint a Portrait of the Assailant as a “Typical Rapist”

Most defense arguments in acquaintance rape cases focus on a victim’s credibility as well as her culpability. Your job as the victim’s attorney is to shift the focus onto the defendant’s

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6 Also note that the majority of rapists target youthful victims; 84% of sexual assault victims are age 24 or younger. U.S. Department of Justice, National Institute of Justice, Sexual Victimization of College Women (2000); D.G. Kilpatrick, C.N. Edmunds, & A.K. Seymour, Rape in America: A Report to the Nation.
credibility and culpability. You must paint a portrait of a “typical rapist” and show why the assailant in your case fits that profile.

David Lisak, Ph.D., University of Massachusetts Boston is a leading researcher in the area of acquaintance rapists. He has found acquaintance rapists fit the following patterns. After reviewing this list, ask yourself: *How many of the following acts did the defendant in your case commit? Does he fit the profile of an acquaintance rapist?*

1) **Rapists who attack acquaintances premeditate the crimes and chose a victim.**

   - They manipulate their victims into positions of vulnerability – alone in a room, or in a car, or in a secluded area.
   - They often ply their victims with alcohol and, increasingly, use so-called “knock-out” drugs to disable them entirely.
   - Like other kinds of criminal predators, these rapists are also adept at identifying vulnerable women; women who are least likely to fight off an assault, least likely to scream, and least likely to report the crime once it has been committed.

2) **Rapists who attack acquaintances only use instrumental violence:**

   - Undetected rapists 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).
   - They may well tell their victims such things as, “you’re drunk, no one will believe you,” or “if you tell anyone it’s your reputation that will suffer.”
   - They will escalate their 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.

B. **Confront the Issue of a Victim’s “Contributory Negligence”**

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8 Dr. David Lisak is an Associate Professor of Psychology at the University of Massachusetts Boston and Director of the Men's Sexual Trauma Research Project. His research has been published in leading journals in psychology, trauma and violence and he serves as a consultant to law enforcement nationwide. We thank him for the generous use of his materials here.
In most cases, there is a certain level of consensual contact between the assailant and the victim prior to the assault. Such consensual contact can range from a conversation in a crowded area, to drinking alcohol together, to kissing and other foreplay. If any of this consensual contact appears reckless in the eyes of the decision-maker, it will be detrimental to your case. What case law across the country suggests is that a woman subjects herself to an “unreasonable risk” of rape under a huge array of circumstances. As succinctly stated by Ellen Bublick in a recent law review article,

“[A] reasonable woman does not go outside alone at night to hail a cab or walk to her car in a hotel parking lot, especially if a man is outside. She does not take four or five steps inside the door before closing it. She double checks her door lock and is certain that every window is closed. She does not open the door when someone knocks, or invite a salesman into her home, or a man into her hotel room. She never drinks alcohol with a man, particularly if he is older or streetwise or someone she has recently met.”

In tort cases, this desire to assign blame to the victim is manifested in the “comparative fault” statutes that many jurisdictions allow the third parties to use in rape cases. It is not uncommon given the prevalence of rape myths in our culture to see the same social calculus in non-tort cases. In your case, if the victim drank to excess or engaged in promiscuous sex, or any other socially “unacceptable” behavior, you need to address the issue directly. You must work to distinguish this issue of so-called “negligence” from the issue of the victim’s consent.

C. Prove Lack of Consent by Providing Corroborating Evidence

In most sexual assault cases, the assailant’s defense is “consent.” While proving the victim did not consent is not the legal burden in most civil settings, the reality is that the social burden will remain on you to affirmatively prove the victim did not consent.

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10 Bublick, at 1414-1415. These statutes allow damages to be reduced depending upon the amount of fault placed at the victim’s door. Id. at 1431-1434. The nightmarish reality of this paradigm is demonstrated by a Louisiana case wherein a 13-year old girl who was gang-raped by three 17-year old boys in a park campground. Id at 1428-1429, (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 rape. Id; Morris v. Yogi Bear’s Jellystone Camp Resort, 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 v. Yogi Bear’s Jellystone Camp Resort, 539 So.2d at 77-78.
To meet this burden you will have to establish corroborating evidence for the victim’s story. While corroboration may no longer be a technical black letter law requirement, the majority of decision-makers still want corroboration before they will hold the assailant accountable.  

So, “What constitutes corroborating evidence in ‘he said/she said’ cases?” To help you answer this question, we have included a summary here of the key types of corroborative evidence. (Each chapter of the Manual also includes an evidentiary checklist to assist you with building a case.)

1. Victim’s Behavior, Mindset

In order to understand how the victim demonstrated her lack of consent, the decision-maker must come to know the victim’s reality; before, during and subsequent to the sexual assault. They need to know the exact actions of the defendant and the exact thoughts and emotions of the victim. They need to know if the victim acquiesced out of fear - even if on the surface the reason for the fear may not be apparent.

2. Witnesses and Medical Personnel

If the victim does not report the crime immediately to police, her actions after the crime are vitally important. It is very helpful if the victim told someone what occurred, whether the victim confides in a doctor, a family member or a friend. Witnesses who observed or spoke with the victim and/or assailant in the hours leading up to and following the assault can be integral in

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11 Despite thirty years of efforts to eliminate corroboration requirements in criminal statutes (see Vitauts M. Gulbis, Modern Status of Rule Regarding Necessity for Corroboration of Victim’s Testimony in Prosecution for Sexual Offense, 31 A.L.R. 4th 120, most decision-makers still want to see corroboration of a rape victim’s testimony; see also Cassia Spohn and Julie Horney, Rape Law Reform: A Grassroots Revolution and Its Impact, at 73, 112-117, 160. 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 made 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 story, 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.


13 Linda A. Fairstein, Sexual Violence: Our War Against Rape, at 635.
many acquaintance rape cases. Medical personnel in particular are often powerful corroborating witnesses.

3. Physical Evidence

Decision-makers have an ingrained expectation that rape evidence will include physical evidence - bruising, scratching, blood, torn clothing, etc - therefore it is important to provide such evidence, even if it is only to provide a physical context (and not a critical link in establishing the identity of the assailant). It helps establish the credibility of the victim and may be used to negate an offender’s version of the facts. Finally, it helps decision-makers feel they are not just relying on the victim’s testimony.

- **Vaginal/Anal Injury.** Although two thirds of rapes leave no physical injury, there is a significant chance that the vaginal wall does contain signs 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 she was not a willing partner of the accused.”\(^\text{14}\) In Washington, the oral testimony of a Sexual Assault Nurse Examiner (SANE) on this issue is often a pivotal element in a case.

- **Rape kits** are evidence collection kits that contain various slides, swabs, scrapings, combings, and articles of clothing taken from the victim.\(^\text{15}\)

\(^{14}\) Linda A. Fairstein, *Sexual Violence: Our War Against Rape*, at 153.

\(^{15}\) The Washington Sexual Assault Evidence Collection Kit collects evidence from every part of the victim's body as well as clothing and items with which the assailant may have had contact. The steps of the examination may include: 1) Comprehensive Toxicology Testing if warranted; 2) Blood Samples, which are used for pregnancy, Hepatitis B screening, and toxicology testing if applicable; 3) Oral Swabs; 4) Fingernail Scrapings if the victim scratched at the assailant’s skin or clothing; 5) Clothing: Any clothing that might contain evidence is collected. This can include the clothing worn at the time of the assault, or any clothing currently being worn that might have evidence (i.e. underwear, jacket, etc.); 6) Bite Marks: If the victim has bathed, the wound would be measured and photographed. If the survivor has not bathed since the assault, the bite mark would also be swabbed to pick up any saliva; 7) Head Hair Combing: The survivor’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) Pubic Hair Standard: Samples of the victim’s pubic hair are cut and plucked from different places in the pubic area; 11) External Genital Swabbing: If the victim’s external genitalia were involved in the assault, the pubic area and inner thighs are examined and swabbed; 12) Vaginal Swabs and Smears; 13) Perianal Swabs; 14) Anorectal Swabs and Smears; 15) Drop Sheet to catch debris from the body.
Bruising, Bite Marks, Scratches, Other Marks. This type of physical injury should be fully documented. Investigator’s notes, photos, and medical personnel notes all contribute to the corroboration of the victim’s account. Photos in particular have a significant impact.

4. Thorough Investigation of Defendant

Since sexual assault cases are often decided based upon who is more credible, any statements which show that the defendant lied, or knew about the harm he committed, are critical to undermining his credibility. Victories for the victim are often won on the basis of statements made by the defendant and/or his prior bad acts. To this end, 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, this sort of information is often known in the community and can be discovered by investigation. Investigative resources are a key element in most cases.

D. Clarify the Burden of Proof for the Decision-Maker

Because most civil decision-makers view rape as a serious criminal issue, they often implicitly assume that the burden of proof is “beyond a reasonable doubt”. This burden generally does not apply in any of the civil settings outlined in this manual. As an attorney arguing in favor of civil restorative remedies for sexual assault victims, you must clarify this for decision-makers. Despite the fact that the issue involved is rape, the burden of proof in civil matters is not “beyond a reasonable doubt” but some significantly lower burden.

E. Tackle the Issue of Intoxication and Consent

When is a person too intoxicated to be able to consent to sex? This is a question on which the courts have yet to reach a consensus; however, it is a critical question that needs a definitive answer. Research indicates that acquaintance rapists specifically target intoxicated victims and that a very high percentage of victims are intoxicated when they are assaulted.16

For references on rates of intoxication among sexual assault victims and assailants see: D. Lisak & P.M. Miller, Repeat rape and multiple offending among undetected rapists, at 73-84; National Center on Addiction and Substance Abuse at Columbia University, Dangerous Liaisons: Substance Abuse and Sex (December 1999) (Estimate that alcohol use by victim, assailant, or both is implicated in 46-75% of ‘date rapes’ of college students);
Despite enormous efforts to correct this problem through statutory reform, no decision has yielded a bright-line rule. Most courts are still struggling with defendants’ primary argument: “The victim’s intoxication did not rise to the level which made her incapable of consent.”

Most courts focus on a range of objective and subjective factors, using an analysis similar to a “totality of the circumstances” test. They look at the victim’s ability to walk and speak, her awareness of what happened; and they consider the volume of alcohol consumed by the victim. The problem with this approach is different outcomes to very similar fact patterns. For example, why should two beers be enough to show incapacity to consent in Kansas and five ounces of bourbon be room for doubt in California? In a recent case, the Kansas court held that where a 14-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.” In contrast, the California court recently reversed a defendant’s conviction where the 16-year old victim was repeatedly sexually assaulted by the defendant and his friend after drinking at least five ounces of bourbon and having nothing to eat, and exhibiting essentially the same intoxication symptoms as the Kansas victim.

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17 See Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 Ariz. L. Rev. 131, 156-173 (2002). Ms. Falk offers a comprehensive assessment of how all fifty states, three territories, the federal system and the Uniform Code of Military Justice deal with the issue of consent and intoxication in sexual assault cases. The author notes that all the jurisdictions, with three exceptions, fall into four general categories: some which include intoxicant language within their definitions of mental incapacity which is then used within the sexual offense laws; some which use intoxicant language within their definitions of “without consent”; some which define force as including intoxicants; and some which incorporate intoxicant language directly into specific sexual assault laws. Id at 156-157. 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
18 Kansas and California are both states with rape by intoxication laws that do not require the defendant to have administered the intoxicant. See Falk, at 170 and footnotes 400-402; Cal. Penal Code 261(a)(3) (“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)(2000)(“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”).
20 People v. Giardino, 82 Cal.App. 4th 454, 467-468, 98 Cal.Rptr.2d 315, 325-326 (2000) (There was testimony that the victim was “obviously intoxicated”, felt “woozy, very light-headed”, fell repeatedly while she was walking, slurred her words, and generally “wasn’t altogether there”).
The bottom line is that you will likely need to counter the following arguments if you believe your client was too intoxicated to consent:

- “The victim was not that intoxicated. She was sober enough to consent.”
- “If the victim was intoxicated, the defendant is still not guilty of rape because he had a reasonable and good faith belief that the victim consented.”
- “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.

- How many drinks did she have?
- How large were the drinks?
- What type of alcohol was involved?
- At what time did she have the drinks?
- What is her height and weight?
- What is her history of reaction to alcohol?

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, vomiting? Were they concerned for her welfare? How so? 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.

It may also help to look to drunk-driving cases for precedent. In drunk driving cases, it is routinely assumed that one’s judgment to drive is impaired if your blood alcohol level is .08, which roughly amounts to more than one drink an hour.21

Other useful areas for analogy include:

- Contract cases or cases involving trusts or wills where individuals have been held incapable of knowingly signing a document due to intoxication.22

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21While you will generally 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 also: University of Pittsburgh Student Health Service Health Education Website at http://www.studhlth.pitt.edu/studenthealthed_wbpage/Alcohol/links/page51.html for Table of Approximate Blood Alcohol Levels which may be helpful in making a rough calculation of your client’s blood alcohol content.
22 See Dahlstrom v. Roulette Pontiac-Cadillac GMC, Inc., 1983 Ohio App. LEXIS 15118 (Verdict for plaintiff affirmed where plaintiff executed two written sales contracts, a promissory note and security agreement with the defendants while intoxicated, since in Ohio “intoxication may show want of capacity to contract” and “securing
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.

Criminal cases (such as murder) which require specific intent by the defendant and the issue of intoxication is raised as a defense.

The above are all examples of cases where courts have seriously considered issues of capacity and intoxication when the decisions made while intoxicated carry grave consequences, such as the financial and economic consequences of entering into a contract, the significant consequences of waiving constitutional rights, and the moral and criminal consequences of murder. As a victim’s attorney, your role is to convince decision-makers that due to the physical and emotional consequences of consenting to sexual activity and the extreme harm experienced when one has sex against her will, it is essential that consent be given by a clear and lucid person, capable of understanding her surroundings and her decisions.

III. BUILDING A COMPASSIONATE ATTORNEY-CLIENT RELATIONSHIP

Rape robs a victim of both control and dignity. Therefore perhaps more than with any other type of client, it is vitally important for you to allow the victim to be in control. Your job is to provide information, options and support. Your job is not to decide what she should do. While she may be in acute distress over the difficulty of the legal choices with which she is faced (and they will be some of the hardest of her life), it is important for you to resist the urge to make those choices for her.

Your attorney-client relationship should help restore her sense of control and dignity.

A. Help Prioritize Victim's Concerns

possession of property when a defendant knew of plaintiff’s state of intoxication constitutes fraud”); see also Babcock v. Engel, 58 Mont. 597, 194 P. 137 (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”.)

The first step in being an effective advocate is to understand your client's unique perspective. What are your client's priorities? What are her goals? Part of your job as the victim's attorney will be to maintain sensitivity to her priorities, which will fluctuate over the course of your representation. As you will find out, every rape survivor follows a unique path to healing. Some survivors are very private and will resist any legal action that requires them to make public disclosures. Some survivors need "justice" in order to move on. Most simply want to restore the safety of their homes, their jobs and their schools.

1. **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 continue to live as they did prior to the assault. If the perpetrator is a member of their social community, such as a peer at school, a fellow immigrant, a colleague at work, or a neighbor, victims are often willing to take legal actions that will allow them to remain within these communities. However, most sexual assault victims make a clear distinction between legal actions that help (defensively) to stabilize their personal lives (for example at school, work or church), and those that take (offensive) legal action against the assailant. Often, in the initial crisis stage post-assault, victims will take the necessary steps to do the former but not the latter.

2. **Maximize Privacy**

   For most sexual assault victims, privacy is like oxygen. It is a pervasive, consistent need at every step of the representation. Most sexual assault victims will try to limit the number of people who know about the assault. They will carefully weigh the pros and cons of whether and what to tell family, friends, third parties and law enforcement.

   Creative and consistent efforts by attorneys to protect the victim's privacy are essential. At each stage of your representation, you should review with the victim three points: who will know about the assault, what they will know, and when they will know it. Please see the Privacy Chapter for an extensive discussion of these matters and how to prepare the client and her family as to how to best protect her privacy interests.

3. **Seek Justice**
In general, most victims are not prepared emotionally to deal with the requirements of the legal system until months have passed after the assault. After the initial crisis stage has passed (usually three to six months after the assault), victims are more prepared to think about seeking legal remedies and confronting the assailant. The problem with this timing is that many legal decision-makers view "late" complaints as less credible. Unless a victim makes a formal complaint within days of the assault, it can be very difficult to seek serious sanctions against the assailant. Therefore, even if a victim does not want any immediate legal action, it is imperative for her to file some type of formal report about the assault as soon as possible. Most police departments, school administrators, and employers recognize this and will prepare a formal incident report, but take no further action without the victim's consent.\textsuperscript{24}

B. Preparing Victims for Difficult Compromises

The underlying tension for a zealous advocate is that most victims must make difficult compromises between maintaining personal control and privacy, and seeking remedies. At many junctures along the road to recovery there are clear trade-offs: \textit{When will the victim give up the privacy she very much wants, in order to secure a remedy she very much needs?} Rarely does a victim secure a valued remedy without some loss of privacy.

Given the magnitude of the personal and economic harm caused by sexual assault, one would expect victims to pursue all available legal remedies. Yet this is rarely the case. As anyone who works with domestic violence and abuse victims knows, the personal benefits of "not rocking the boat" are enormous, as are the risks of taking action. The same is true for rape and sexual assault victims. \textit{The challenge for attorneys is to maximize the remedies while minimizing the discomfort for the victim.}

C. Preparing Victims for the Social Backlash

Since so many sexual assaults involve acquaintances or family, it is crucial to prepare your client for the potential backlash she faces if she reports the assault and pursues any remedies against the assailant.

\textsuperscript{24} Currently one of the major differences between domestic violence cases and sexual assault cases is victim control. See: Douglas E. Beloof, \textit{Victims in Criminal Procedure}, at 240, Note 1. The trend is to give victims in domestic violence cases no control of the decision to charge a defendant or the sentence to give the defendant. \textit{Id.} In contrast sexual assault victims are given much of the control over the decision to charge a defendant. \textit{Id.}
1. **Gossip**

The victim and assailant's social group (e.g., families, peer groups, and co-workers) may gossip and respond in a non-supportive manner when they hear of charges being brought against someone they know. They may even provide damaging statements against the victim.

While controlling gossip is not traditionally thought of as an attorney's role, it is a primary concern for anyone working with a sexual assault victim. For example, a university student reported a rape to her dean. The dean's secretary told a work-study student about the assault, and that work-study student in turn told other students. As a result, the victim did not trust the school's adjudication system to protect her privacy and did not pursue a formal complaint against the assailant.

2. **Credibility Challenges**

In a “he said/she said” scenario, the credibility of the victim becomes the focal point of an investigation; therefore investigators and legal decision-makers put significant emphasis on whether the victim appears credible and consistent, or confused with a constantly changing story. Investigators' interest is not usually due to skepticism, but rather because they want the case to withstand the anticipated defense arguments. While it is normal to want to deny or omit particularly embarrassing or degrading aspects of the assault, the victim must be encouraged to report all critical details including any underage drinking or drug use. Any omissions in the victim's initial accounts may be used by defense counsel to attack the victim's credibility.

D. **Counter-Intuitive Aspects of Working with Sexual Assault Survivors**

The following is a brief list of the counter-intuitive aspects of how rape survivors cope in the aftermath of an assault.25

Many times a survivor experiences memory problems. This can be due to disruptions in memory caused by the trauma itself. Amnesia (lack of conscious memory) and hypernesia (distinct memory of one or more aspects of the traumatic event) can both occur after any traumatic event. Ingestion of alcohol or drugs before or during the assault also frequently impairs memory.

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25 Lisa Hartwick, LICSW, Clinical Director, Boston Area Rape Crisis Center, 2003.
Due to the shame and isolation that are common responses among sexual assault survivors, disclosure of the assault is often delayed. It is common for survivors not to tell anyone about the assault right away. This does not mean that the assault was "not that bad," or that it did not happen at all. Some people never disclose their victimization.

Survivors may preface their description of the incident with a minimizing statement. For example: "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 rape, but…" Minimization is a defense. It assists the survivor in psychologically processing the event. It should not be interpreted as an objective statement of fact.

Guilt surrounding aspects of the survivor's involvement in the assault is common. For example, the survivor can feel guilty for not listening to advice that was given to her. "I can't believe that I went to that party, my parents have always told me to avoid that group of kids."

E. Preparing Victims to be Utterly Candid

As indicated above, it is important to recognize that sexual assault victims frequently leave out parts of the story of the assault. Sometimes they forget; sometimes they are too embarrassed or ashamed to speak about the details. A victim may even fabricate elements of a story to protect her privacy. For example, a victim who was attacked at the end of a quiet dinner date might lie in the initial interview about having smoked marijuana before dinner. Similarly, a teenager who was breaking curfew when she was attacked may lie about the events preceding the attack; or a woman with a prostitution background may lie about prior arrests. Victims often fear that if they tell the truth the case will not be taken seriously.

Naming this phenomenon for the victim at the start of your relationship can help. By letting the victim know it is a natural urge to want to protect her privacy she may be better able to understand why it is so important to tell you the whole truth. She needs to understand that the veracity of the victim is the focal point of every case. While a small falsehood may have no direct bearing on the rape, it can give the decision-maker just enough reason to distrust her. Remind her that everything she says to you is strictly confidential unless she wants you to share it with others.

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26 Linda A. Fairstein, Sexual Violence: Our War Against Rape, at 140.
IV. ISSUE SPOTTING & HARM ASSESSMENT

When a sexual assault survivor walks into your office, she may have already sustained serious emotional, medical or socio-economic harms as a direct result of the assault. Your job will be to complete a thorough assessment of her legal needs and options.

On a practical level, as you perform this assessment you must constantly remember that a victim's legal choices in one area will likely impact another. For instance, securing a housing remedy may depend upon making a criminal complaint and an affidavit submitted for a protective order hearing may hinder a criminal prosecution. Therefore, in order to provide competent representation you should be familiar with all the legal areas covered in the Manual. Summaries are provided below.

A. Your Client’s Mental Health

As an attorney, you need to be familiar with the basic mental health sequelae that commonly result from sexual assault. These include post traumatic stress disorder, depression, increased substance use, and suicidality. Please note: while the victim in an acquaintance rape situation may not have the visible bruises, torn clothes and bloody cuts of a violent stranger assault, she will have comparable emotional trauma.

- Post Traumatic Stress Disorder (PTSD)

Almost one-third (31%) of all rape survivors develop post-traumatic stress disorder (PTSD) sometime during their lifetimes. PTSD is the development of characteristic symptoms, which last for more than one month, following a traumatic event.

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27 See Mary P. Koss and Mary R. Harvey The Rape Victim: Clinical and Community Interventions; see also Judith Lewis Herman Trauma and Recovery New York, Basic Books (1992).
28 We thank Lisa Hartwick, LICSW, Clinical Director of the Boston Area Rape Crisis Center who helped prepare this synopsis. See also Samuel Pillsbury, Crimes Against the Heart: Recognizing the Wrongs of Forced Sex, 35 Loy. L.A. L. Rev. 845, 895.
30 Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, Washington, DC (2000). The symptoms are: 1) Recurrent and intrusive recollections of the event; 2) Recurrent distressing dreams, during which the event is replayed; 3) Acting or feeling as if the traumatic event were recurring (includes sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes; 4) Intense psychological distress at exposure to internal or external cues that symbolize or resemble as aspect of the traumatic event; 5) Physiological reactivity that often occurs when a person is exposed to internal or external cues that resemble or symbolize aspects of the traumatic event (such as the anniversary date of the assault, seeing the assailant, being in proximity to where the event occurred; 6) Persistently avoiding stimuli associated with the trauma. The person may deliberately avoid thoughts, feelings, or conversations about the traumatic event and avoid activities, situations or people who remind the survivor of the traumatic event. This avoidance of reminders may
- **Depression**

  Depression is a common response to sexual assault. Although some survivors do not develop what is called clinical depression or a major depression, they can have less severe symptoms and/or a combination of symptoms.\(^{31}\)

- **Use of Drugs to Cope**

  It is common for survivors of sexual assault to use substances as a way of coping with their trauma. This activity can move from an effective short-term coping strategy to an abuse of substances, as defined by impairment of functioning. The U.S. Public Health Service Office on Women's Health reports that 50-75% of women in substance abuse treatment programs are survivors of sexual violence. Rape survivors are 6.4 times more likely to have used cocaine or other hard drugs.\(^{32}\)

- **Suicidality**

  Sexual assault survivors often feel overwhelmed by a range of emotions. One response to having a strong emotional reaction is to become suicidal. In the Rape in America study conducted by the National Victim Center (1992), it was found that 33% of the rape victims and 8% of the non-victims of crime said they had seriously considered suicide.\(^{33}\) Thus, rape victims were 4.1 times more likely than non-crime victims to have contemplated suicide.

- **B. Medical Effects**

  include amnesia for an important aspect of the traumatic event; 7) Diminished responsiveness to the external world, “psychic numbing,” or “emotional anesthesia,” which usually begins soon after the traumatic event. The person may complain that previously enjoyed activities are no longer enjoyable; 8) Feelings of detachment or estrangement from other people and/or inability to feel emotions—especially feelings associated with tenderness, intimacy or sexuality; 9) Sense of foreshortened future (e.g. does not expect to have a career, marriage or children); 10) Persistent symptoms of increased arousal. These can include: Difficulty falling or staying asleep, Irritability or outbursts of anger, Difficulty concentrating, Hypervigilance, Exaggerated startle response.

  \(^{31}\) *Id.* Depression has the following symptoms: 1) Depressed mood for most of the day and nearly every day, by self report (feels empty, feels sad), or by observation of others (appears tearful); 2) Markedly diminished interest or pleasure in all, or almost all, activities for most of the day and nearly everyday; 3) Significant weight loss (not dieting) or weight gain—disturbance in appetite; 4) Insomnia (cannot get to sleep), hypersomnia (sleeping too much), or a general disturbance in sleep.; 5) Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down; 6) Fatigue or loss of energy, 7) Feelings of worthlessness or excessive or inappropriate guilt, 8) Diminished ability to think or concentrate or indecisiveness nearly every day; 9) Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or suicide attempt or a specific plan for committing suicide.


  \(^{33}\) *Id.*; see also: www.nova.org. NOVA, 1757 Park Road, NW, Washington, DC 20010.
In the hours and weeks following a sexual assault, victims confront a wide range of possible medical complications from the assault. Depending on the nature of the assault and the number of assailants, a victim must make a complex range of medical decisions regarding the following:

- Sexually transmitted diseases including herpes, HIV, syphilis, gonorrhea, chlamydia.
- Fertility complications including but not limited to pelvic inflammatory disease and ectopic pregnancy.
- Unwanted pregnancy versus postcoital contraception (the "morning after pill").
- Medical complications from "date rape drugs."

Possible preventive treatment for these complications include:

- Antibiotics for sexually transmitted disease.
- The morning after pill for possible unwanted pregnancy.
- HIV prophylaxis.

As a result, a typical visit to a hospital emergency room for a sexual assault and rape kit can take hours. Many survivors are faced with difficult issues concerning payment of resulting bills and the privacy of their medical records that result from such treatment. They also face long-term medical complications from the assault including unwanted pregnancy, untreatable diseases, and side effects from the medications prescribed.

If the victim has symptoms consistent with a "date rape drugging," such as intoxication, reduced inhibitions and severe memory loss, a second set of medical issues arise. The symptoms for the two most common "date rape drugs" [Rohypnol (Flunitrazepam) and GHB (Gamma-Hydroxybuterate)], take effect approximately 30 minutes after taking the drug and peak within

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34 See T.E. McConkey, M.L. Sole and L. Holcomb, Assessing the Female Sexual Assault Survivor, 26 Nurse Practitioner 28-39 (July 2001); see also S. Rovi and N. Shimoni Prophylaxis Provided To Sexual Assault Victims Seen at US Emergency Departments, 57(4) Journal of the American Medical Women’s Association 204-7 (Fall 2002); see also J.D. Bamberger, C.R. Waldo, J.L. Gerberding, and M.H. Katz, Postexposure Prophylaxis for Human Immunodeficiency Virus (HIV) Infection Following Sexual Assault,106(3) American Journal of Medicine 323-6 (March 1999).


36 For example, victims who have been prescribed HIV prophylaxis may experience major problems with side effects from the drugs. Problems include being sick every day for a month, not being able to get out of bed, extreme fatigue, affecting their ability to return to work or school.

37 See: How to Prevent Drug Induced Rape, Pamphlet by Palm Beach County Sheriff's Office, Florida; "Rohypnol Fact Sheet," Smith, D., & Calhoun "Gamma-Hydroxybuterate" Worthington, E., Palm Beach. 'A common abuse of GHB is by rapists slipping the drug into a victim's drink, usually alcohol, before the rape or assault. Within a few moments, the victim appears drunk and helpless. Often, the assailant acts as a "Good Samaritan" and offers to escort the victim home. When the victim regains consciousness, she has no memory of the assault'.

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two hours. The effects can last up to eight hours depending upon the dose. After that time, victims often do not recall whether sexual penetration took place and therefore toxicology testing can be a vital to determining what happened.

Unfortunately, there is a very slim window of opportunity to seek forensic toxicology testing and there are limited places to get such testing. Most drugs are metabolized very rapidly and unless the victim recognizes the symptoms of a drug-facilitated rape within the first six to 12 hours post assault, toxicology testing is very unlikely to detect the drug. In fact, the popularity of certain "date rape drugs," such as Rohypnol and GHB, is based upon how rapidly they are flushed out of the body - in some cases within six hours or less.

Please also note that comprehensive toxicology testing will detect the presence of all substances, medications and drugs both illegal and legal. If a victim is regularly taking an antidepressant, using marijuana, cocaine or other prescription drugs, these substances will appear in the analysis.

C. Issue Spotting - A Complex Range of Legal Matters

1. Privacy

As mentioned above, sexual assault victims generally seek to protect their privacy to the greatest extent possible. This includes limiting the number of people in their immediate social circle who know about the assault, keeping their names out of public documents - including newspapers - and keeping medical and counseling records out of the hands of defense counsel. These concerns are serious when the assailant is a member of the same social circle, attends the same university, works for the same employer, lives in the same apartment building, is a family member, or goes to the same church as the victim.

2. Protective Orders

A victim's sense of physical safety may be shattered and she may remain hyper-vigilant, anxious, and frightened for months and even years after the assault. Therefore, safety planning is

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38 Please note, GHB is particularly dangerous because it is easily manufactured by individuals in their own kitchen therefore it is difficult to measure the strength and dosage and different people respond differently to the same dose. As a result, there have been deaths associated with the use of GHB in combination with alcohol. See http://www.projectghb.org/what_is_ghb.htm for comprehensive information on GHB.
a critical element of any legal representation. For guidance on comprehensive safety planning in your community, we suggest seeking the help of an experienced sexual assault or domestic violence advocate. The Manual's Protective Order chapter addresses the role that protective orders can play in a victim's safety planning.

3. **Financial Compensation**

   Sexual assault can have devastating economic consequences. Hospital and medical bills, lost wages, lost school tuition, psychotherapy bills and housing relocation costs mount quickly, but very few victims ever recoup these losses. This Manual reviews three avenues of recovery: the Washington State Victim Compensation Program; restitution through civil protective orders or criminal conviction; and third party civil tort liability.

4. **Employment**

   Sexual assault often has a substantial impact on a victim's employment. The emotional and physical consequences of sexual assault can make it difficult to continue working. A victim may need to take time off. She may need to transfer to a different location to feel safe. She may need to reduce responsibilities or change jobs for a period of time. In some workplaces, these types of accommodations are not a major problem. For more marginal workers, however, such changes can result in the loss of employment.

   When the assault occurred at work, was perpetrated by a co-worker, or is otherwise work-related, sexual assault triggers a much more serious employment crisis. In these situations, safety concerns, privacy concerns, and job security issues blend together to create a truly life-challenging event. In these instances, immediate legal intervention is essential to maintaining the employment status of the victim.

5. **Education**

   Sexual assault is rampant on America's campuses. The U.S. Department of Justice estimates that for every 10,000 undergraduate females, 350 are sexually assaulted every year.39 When a student is sexually assaulted, a range of legal issues surface and her educational progress may be put in jeopardy. The victim must contend with disciplinary proceedings, housing issues, and

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tuition issues, stay away orders, and privacy concerns. As her attorney, you play a vital role in ensuring that this complex range of interests is protected in dealings with school authorities and before the civil and criminal courts. Maintaining school attendance, or securing a transfer to another educational institution, is a baseline goal of any representation.

6. Housing

Many sexual assaults take place in the victim's home. For example, among university students who are assaulted on campus, almost 60% of sexual assaults take place in the victim's dormitory. When a victim is raped in her own home she often will wish to move. If the assailant lives in the same housing complex or the same dormitory the victim may want to seek to have the assailant removed.

7. Immigration

Many sexual assault victims are noncitizen immigrants. If this is the case, you need to pay particular attention to your client’s unique immigration concerns. Many immigrant sexual assault victims will not report the crime or seek help out of fear of the impact it may have on their own status, the status of family members (who are possible witnesses), or the status of the assailant. Some victims will be pressured by members of their immigrant community not to go to the police because they do not want the assailant to be deported.

8. Criminal Justice

Society generally expects the criminal justice system to be the primary venue for "trying rape cases." For example, in a recent child custody hearing in which the mother alleged that the child was a product of a "date rape," the judge stated "I am not going to try a rape case in my courtroom." Universities, high schools, housing authorities, and employers expect the criminal justice system to respond to rape. For this reason alone, it is vital for attorneys to understand what the criminal process does, and does not, offer sexual assault victims. You cannot effectively represent a sexual assault victim in the civil realm if you do not understand the basics of the criminal justice system.

40 Id.
ISSUE SPOTTING CHECKLIST

This checklist is intended to assist with a preliminary client interview. You should use the specific subject matter checklists following each Chapter for a more in-depth analysis of each issue. Note: These issues 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 protection 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?
✓ Civil liability: Is there possible civil claim against the assailant or a third party?
PRELIMINARY EVIDENCE CHECKLIST

This checklist will help with a preliminary evidence assessment. *It is not exhaustive.*

**Victim Impact**

- 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 (prosecuting attorney, police, campus security)
- Report to civil authority (e.g. housing, education, employer)
- Protection order application/affidavit
- Are there multiple statements? Are they consistent?

**Assailant Statement(s)**

- Law enforcement reports (prosecuting attorney, police, campus security)
- Statement for civil authority (e.g. housing, education, employer)

**Potential Witnesses**

- Witnesses the victim first told about the assault
- Witnesses who saw/spoke to the victim before/after the assault
- Witnesses who saw/spoke to the assailant before/after the assault
- Medical or forensic nurse 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 (e.g. torn clothing)
CHAPTER TWO:
PRIVACY RIGHTS FOR SEXUAL ASSAULT VICTIMS
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PRIVACY RIGHTS FOR SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

Privacy is a pervasive concern of sexual assault victims. A victim’s privacy concerns can range from a generalized fear of social gossip within her circle of peers, family, and co-workers, to a specific concern about disclosures of confidential records. It is a "gate-keeping" issue, which if left unaddressed, will discourage many victims from pursuing legal remedies. An attorney should conduct a comprehensive privacy assessment at the beginning of any representation, asking a victim about her specific privacy concerns including:

- Who is she most afraid of finding out about the sexual assault?
- What information is she most concerned about protecting?
- Is she willing to release some private information in order to secure a legal remedy?

The answer to this last question will change as the representation progresses. It is common for a victim’s fear about community exposure to interfere with other interests she may have. For example, she may not want her peers at school interviewed as part of your investigation for a school disciplinary complaint. This may limit your ability to collect supporting affidavits. You will need to facilitate an open and honest discussion about these trade-offs as the representation progresses.

II. PRACTICE CONSIDERATIONS

A. Preventive Practice

Unfortunately, sexual assault victims often do not have the benefit of private counsel until after there has already been a major breach of a client’s privacy rights, resulting in disclosure of otherwise protected information. At that point, your goal as an attorney is to minimize the scope of the harm, rather than preventing it altogether. Once private information is disclosed, it is virtually impossible to "put the genie back in the bottle." The harm is done.

The best way to prevent privacy harms is to commence representation as soon as possible after the assault. By advising clients of their privacy rights and notifying third parties of these rights many problems can be avoided. The following steps can aid in preventive practice:
1. **Advise Your Client and Your Client’s Family of Their Privacy Rights**

Review the rights outlined in this Chapter and the Criminal Justice Chapter and advise your client and her family that they should consult you prior to discussing assault-related matters with the following parties: employment authorities, education authorities, housing authorities, criminal justice authorities, including police, prosecutors, defense counsel and defense investigators.

2. **Notify Appropriate Third Parties of Your Client’s Privacy Interests, Preferably In Writing**

For example:

- If the victim is involved in an education case, the Family Education Rights and Privacy Act\(^1\) and individual school regulations may require parties involved in disciplinary matters to keep the matter confidential. School authorities and other student witnesses should be put on notice about your client’s interest in enforcing these privacy rules.

- If the victim has received medical, mental health, or substance abuse care that may be the target of defense subpoena, notify these providers of a victim’s intent to protect all possible privacy interests. It is particularly important that mental health providers be put on notice that the victim wishes to assert any and all privacy protections that may apply to the victim’s records. *See the Testimonial Privileges section below for a fuller discussion of this issue.*

**B. Preparing Clients for the Criminal Justice System**

If the victim is involved in the criminal system, it may be appropriate for victim’s counsel to enter a notice of appearance on her behalf. To date, the case law in Washington regarding a victim’s ability to assert standing in a criminal case is limited to representation at sentencing.

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hearings. However, this is a new area of law developing across the country, e.g. asserting victim standing, and counsel should consider how representation of a sexual assault victim in the criminal system can help ensure that her privacy rights are protected throughout the process. Please consult the Criminal Justice Chapter for a detailed discussion about how to prepare clients for interviews with criminal justice authorities. This short summary is not a replacement for that Chapter.

- Victims should know that if inquiries are made into private or sensitive matters unrelated to the assault, the victim has the right to interrupt the interview, ask for a break, and consult privately with her attorney or advocate.

- Victims should know that personal information of the nature outlined in this Chapter should not be discussed with law enforcement. These subjects can include:

  - Current or past rape crisis counseling
  - Past sexual activities, including past sexual abuse
  - Past or current psychotherapy
  - Past or current drug and alcohol treatment
  - HIV testing and records

- Victims should know that any information that could potentially discredit them may be “turned over” to the defense by the prosecution.

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2 There is limited case law in Washington regarding the victim’s ability to assert standing in a criminal case. See *State v. Lindahl*, 114 Wash. App.1, 56 P.3d 589, 595-596 (2002) (holding that the attorney for murder victim's family was entitled to address the court at sentencing hearing and was entitled to file a sentencing memorandum). See also *State v. Hixson*, 94 Wash.App. 862, 973 P.2d 496 (1999) (holding where the trial court did not abuse its discretion by allowing both mother of victim, and mother's attorney, to testify during sentencing hearing following defendant's conviction for second degree manslaughter).

3 For more information about victim standing see the National Crime Victims Law Institute at www.ncvil.org

4 If the victim has a relationship with the assailant, and if she has recently had sexual intercourse with him or another person, this information may be relevant and the victim would likely have to answer questions that related to sexual activities within a certain time frame.

5 See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment).
This preventive work is the attorney’s chance to lay the groundwork for privacy protections. It is important to remember that the state is primarily concerned with gathering evidence for a prosecution (a focus that may be at odds with the victim’s desire to keep information confidential), while you, the victim’s attorney, are concerned with protecting her privacy.

C. Extending Privacy Protections from the Criminal to the Civil Arena

Many of the statutory protections designed to protect sexual assault victims’ privacy developed within the criminal justice system. Yet, the same protections are often useful in civil arenas. For example, the exclusion of evidence regarding the victim’s past sexual history can be useful in education and employment settings.

An attorney should first assess what civil privacy protections exist in the specific civil arena (for example, the Health Insurance Portability and Accountability Act (HIPAA) for medical records and the Federal Education Rights and Privacy Act (FERPA) for educational records). Then, if appropriate, counsel should argue for augmenting those civil protections with those available in the criminal justice system. Third party institutions may be willing to extend such protections on a case-by-case basis.

D. Sealing of Court Records

If your client is concerned about her privacy and she has gone to court or filed papers with a court (such as a request for a protective order with an attached affidavit by your client) you should consider asking the court to seal the documents. While 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 available. In some situations, the privacy interests to be protected outweigh the public’s interest in disclosure. Court files that are ordinarily public may be sealed

6 See the end of this Chapter for a list of Washington statutes.
7 Wash. Rules of Evidence, §412
8 See Public Law 104-191 and the applicable Health and Human Services regulations for the Privacy Rule at 45 C.F.R. Parts 160 and 164.
9 20 USC § 1232.
10 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.”).
under order of the court. To request that a court file be sealed, the victim must make a motion to the court and show that “compelling circumstances” exist which support the motion to seal. Any request to seal a civil or domestic court file because of the “sexual misconduct” of a party is left to the discretion of the court. However, keep in mind, the order which seals the file is not generally sealed.


In general all court proceedings and records are open to the public. Most court records are also available for public inspection, unless the court orders closure or sealing, or other restrictions. Once a motion and supporting affidavit is submitted, the court will determine whether a proceeding should be closed or records sealed.

Below are the grounds for closure or sealing before charges are filed:

- There is a likelihood of jeopardy to an accused's right to a fair trial; or
- There exists a substantial threat to effective law enforcement; or
- There exists a substantial threat to the privacy or safety of an individual;
- For other good cause shown; and that there are no less restrictive means available to protect the interest threatened.

Grounds for closure or sealing after charges are filed:

- There is a substantial probability of jeopardy to an accused's right to a fair trial; There exists a serious and imminent threat to effective law enforcement; or
- There exists a serious and imminent threat to the privacy or safety of an individual; or

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13 Id. at (c)(2)(B)
14 Id. at (e)(2)(B)

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For other good cause shown; and that there are no less restrictive means available to protect the interest threatened.

E. Evolving Law – HIPAA

Beginning in April 2003, regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA)\textsuperscript{15} will affect the disclosure of personal health information (the “Privacy Rule”). The Privacy Rule preempts all state laws that are less protective of patient’s privacy while leaving more protective laws in place.\textsuperscript{16} In some instances, the Privacy Rule and state laws may address a certain type of disclosure with legal requirements that are different but not necessarily contrary. A covered entity must then comply with both sets of requirements, if possible. For example, the Privacy Rule permits disclosure of protected health information in response to a subpoena if the covered entity believes the requester has made a reasonable effort to notify the individual whose information is being sought. On the state level, under Wash. Rev. Code §70.02.060(2), a hospital’s release of patient records pursuant to a subpoena requires that the subpoena be in compliance with notice requirements outlined in Wash. Rev. Code §70.02.060(1). Because these statutes set different - but compatible - requirements for privacy and disclosure, both laws must be complied with by the covered entities.

The Privacy Rule governs how patient information may be used and disclosed by hospitals, physicians and other covered entities.\textsuperscript{17} For certain types of information and disclosures, patients may need to provide written authorization before a health care provider is allowed to disclose information.\textsuperscript{18} For example, an individual must specifically authorize the use or disclosure of his or her information for marketing purposes. Therefore, attorneys should consider the Privacy Rule’s impact in all privacy matters related to medical records and other sources of protected health information, keeping in mind that state law confidentiality standards will continue to apply in areas that the Privacy Rule does not specifically regulate.

\textsuperscript{15} Public Law 104-191 and the applicable Health and Human Services regulations for the Privacy Rule at 45 C.F.R. Parts 160 and 164.
\textsuperscript{16} 45 C.F.R. §§ 160.202 and 203. WCSAP has a comprehensive memorandum analyzing the impact of the Privacy Rule on the confidentiality obligations and practices of Community Sexual Assault Programs. Although the analysis in this memorandum is not necessarily generally applicable, please let us know if you would like a copy.
\textsuperscript{17} 45 C.F.R. Parts 160 and 164.
\textsuperscript{18} 45 C.F.R. § 164.508.
III. **Evidentiary Privileges**

The Washington Legislature has enacted a number of statutory privileges that may be invoked to protect a victim’s privacy. Evidentiary privileges entitle a victim to prevent the disclosure of confidential communications in court proceedings. When a criminal defendant seeks access to confidential communications and/or records, an evidentiary privilege may apply. Victims who seek counseling and other support services after an assault should be told that these privileges exist and should also be informed of their limits.

**A. Fourteen Washington Privileges**

1. **Sexual Assault Advocate Privilege, Wash. Rev. Code §5.60.060(7)**

   A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made by the victim to the sexual assault advocate. A "sexual assault advocate" means the employee or volunteer from a rape crisis center, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

   A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and/or communications has immunity from any liability, civil, criminal, or otherwise. A disclosure is presumed to be made in good faith.


   A counselor shall not disclose any information acquired from a victim of sexual assault when that information was necessary to enable the counselor to render professional services to the victim. A counselor may disclose information with the written consent of victim and in the
case of death or disability. However, a counselor shall not treat as confidential communications that reveal the contemplation or commission of a crime or harmful act.\textsuperscript{19}

A counselor is an individual, practitioner, therapist, or analyst who engages in the practice of counseling to the public for a fee, including hypnotherapists.\textsuperscript{20} A client is an individual who receives or participates in counseling or group counseling.\textsuperscript{21} Counseling means employing any therapeutic techniques, including but not limited to social work, mental health counseling, marriage and family therapy, and hypnotherapy, for a fee that offers, assists or attempts to assist a victim in the amelioration or adjustment of mental, emotional, or behavioral problems. Counseling includes therapeutic techniques to achieve sensitivity and awareness of self and others and the development of human potential.


A person licensed as a mental health counselor, marriage and family therapist or social worker shall not disclose any information provided by a victim to a therapist in their professional capacity when the information was necessary to enable the therapist to render professional services to the victim. However, if the therapist reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the victim any other individual her or she may disclose relevant information. However, there is no obligation on the part of the provider to so disclose.


Confidential communications between a client and a psychologist are privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between an attorney and client, subject to some limitations.

5. **Doctor Patient, Wash. Rev. Code §5.60.060(4)**

A physician or surgeon, shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending a patient, which was necessary to

\textsuperscript{19} Wash. Rev. Code §18.19.180(2)
\textsuperscript{20} Wash. Rev. Code §18.19.020(3)
\textsuperscript{21} Wash. Rev. Code §18.19.020(1)
enable him or her to prescribe or act for the patient. This does not apply in any judicial
proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and 90
days after filing an action for personal injuries or wrongful death, the claimant shall be deemed
to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one
physician or condition constitutes a waiver of the privilege as to all physicians or conditions,
subject to such limitations as a court may impose pursuant to court rules.

This privilege is waived with respect to involuntary commitment proceedings and relating to the administration of antipsychotic medication.


A registered nurse providing primary care or practicing under protocols, whether or not
the physical presence or direct supervision of a physician is required, may not be examined in a
civil or criminal action as to any information acquired in attending a patient in the registered
nurse's professional capacity. Exceptions include patient consent or if the information relates to
the contemplation or execution of a crime.

7. **Communications with Clergy, Wash. Rev. Code §5.60.060(3)**

"A member of the clergy or a priest shall not, without the consent of a person making the
confession, be examined as to any confession made to him or her in his or her professional
character, in the course of discipline enjoined by the church to which he or she belongs."


**Wash. Rules of Prof'l Conduct 1.6: Confidentiality**

"A lawyer shall not reveal confidences or secrets relating to representation of a client
unless the client consents after consultation, except for disclosures that are impliedly authorized
in order to carry out the representation. A lawyer may reveal such confidences or secrets to the
extent the lawyer reasonably believes necessary: (1) To prevent the client from committing a
crime; or (2) To establish a claim or defense on behalf of the lawyer in a controversy between the
lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer"
based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order."

"An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." (Wash. Rules of Professional Conduct 6.1)

9. Communications between Husband and Wife, Wash. Rev. Code §5.60.060(1)

A husband shall not be examined for or against his wife, without the consent of the wife; nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. This exception does not apply in the following situations: 1) a civil action or proceeding by one against the other; 2) a criminal action or proceeding for a crime committed by one against the other; 3) a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant; 4) a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian.


A qualified and/or intermediary interpreter shall not, without the written consent of the parties to the communication, be examined as to any communication the interpreter interprets under circumstances where the communication is privileged by law. A qualified and/or intermediary interpreter shall not, without the written consent of the parties to the communication, be examined as to any information the interpreter obtains while interpreting pertaining to any proceeding then pending.


All memoranda, work notes or products, or case files of centers are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant
to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. The foregoing privilege and limitation on evidentiary use does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter.

12. **Mediation, Wash. Rev. Code §5.60.070**

If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding except when all parties to the mediation agree, in writing, to disclosure.

13. **Public Officer, Wash. Rev. Code §5.60.060(5)**

"A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure." A public officer is a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government.25

14. **Journalist Privilege**

The Supreme Court, held that: (1) there is a common-law qualified reporters' privilege in civil cases, and (2) the privilege extends to both working reporters and the organizations by whom they are employed. *Senear v. Daily Journal-American*, 97 Wash. App. 148, 641 P.2d 1180 (1982); This was affirmed in *State v. Rinaldo*, 102 Wash. App. 749, 689 P.2d 392 (1984.).

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25 Wash. Rev. Code §9A.04.110(13)
where the Supreme Court again held that journalists have qualified common-law privilege to withhold confidential information from criminal defendant.

IV. PROTECTING PRIVILEGED RECORDS IN WASHINGTON

In Washington, the defense may seek access to victim’s privileged medical, counseling or mental health records. The first step in any procedure for disclosure of privileged or confidential material is to inform the victim of such a request.

A. Case Law Overview

The seminal case that Washington law has developed upon is a 1987 U.S. Supreme Court case called, Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In Ritchie, the court recognized that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. Further, the court stated that evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Relying on Ritchie, in State v. Gonzalez, 110 Wash.2d 738, 757 P.2d 925 (1988) the Washington Supreme Court held that a defendant seeking names of the alleged rape victim's previous sexual partners, when questioned in pretrial deposition, must make a showing that the requested information was material. They further stated that “the mere possibility that an item of undisclosed evidence might help with the defense or might affect the outcome of the trial does not establish materiality in the constitutional sense.” Further, the court, relying on Wash. Crim. Ct. Rule 4.6(a), stated that the trial court determines whether the harm to the complainant [sexual assault victim] outweighs the usefulness of the requested information to the defendant.

Additionally, in State v. Ahlfinger, 50 Wash.App. 466, 749 P.2d 190 (1988), the Washington Supreme Court held that where the privileged report of a rape crisis center contained

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26 Ritchie at 1001
27 Id.
28 Id.
29 State v. Gonzalez at 747
30 State v. Gonzalez at 750
31 State v. Gonzalez at 747
nothing inconsistent with any evidence to which the defendant has been given access or with the
victim's trial testimony, disclosure of the rape crisis center record was not required. The
defendant was not entitled to disclosure of the rape crisis center report used by the witness to
refresh his memory where the report contained little information, none of which was inconsistent
with the testimony of the witness or the victim under Wash. Evidence Rule 612.

V. WASHINGTON RAPE SHIELD STATUTE

A. Criminal Cases, Wash. Rev. Code §9A.44.020

“In order to convict a person of a sex offense it shall not be necessary that the
testimony of the alleged victim be corroborated. 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, nonchastity, or sexual mores contrary to community standards is inadmissible on
the issue of credibility and is inadmissible to prove the victim's consent.”32 But when the
perpetrator and the victim have engaged in sexual intercourse with each other in the past, and
when the past behavior is material to the issue of consent, evidence concerning the past behavior
between the perpetrator and the victim may be admissible on the issue of consent to the
offense.33

Similarly, in any prosecution for the crime of rape or for an attempt to commit rape, or
an assault with an intent to commit any such crime, evidence of the victim's past sexual behavior
including but not limited to the victim's marital behavior, divorce history, or general reputation

32 Wash. Rev. Code §9A.44.020(2), see also State v. Hudlow 99 Wn.2d 1, 659 P.2d 514 (1983) (Supreme Court
held: (1) evidence of victims' promiscuity was properly excluded under the rape victim shield statute, and (2) trial
court's ruling excluding evidence of victims' promiscuity did not deny defendants the ability to effectively cross-
examine and impeach prosecuting witnesses in regard to their testimony about the actual rape incident); State v.
Kalamarski, 27 Wash.App. 787, 620 P.2d 1017 (1980) (Defendant appealed pretrial orders of the Superior Court,
Spokane County, allowing defendant to testify concerning prior date and consensual intercourse with alleged rape
victim, but allowing only limited cross-examination of alleged victim concerning her marriage and divorce and
prohibiting cross-examination of her concerning prior date or consensual sexual intercourse. The Court of Appeals,
held that: (1) limitation of cross-examination found in statute declaring evidence of alleged rape victim's past sexual
history inadmissible to impeach her credibility but allowing evidence of prior sexual intercourse between victim and
defendant to show consent was not denial of defendant's due process rights; (2) trial court did not abuse its
discretion in determining that evidence of prior act of sexual intercourse between alleged rape victim and defendant
occurring approximately 18 months before act for which defendant was tried was inadmissible for purpose of cross-
examination of victim; (3) trial court did not abuse its discretion in ruling that evidence of psychiatric counseling
which alleged rape victim had undergone four years previous would not bear on question of her consent; and (4)
statute did not shift burden of proof to defendant to show that alleged rape victim consented to alleged rape).
33 Wash. Rev. Code §9A.44.020(2)
for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim. Evidence is admissible on the issue of consent only pursuant to the following procedure:

- A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
- The written motion shall be accompanied by an affidavit(s) in which the offer of proof shall be stated.

If the court finds that the offer of proof is sufficient, the court will order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court. At the conclusion of the hearing, if the court finds that the evidence is admissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice and that its exclusion would result in denial of substantial justice to the defendant, the court shall make an order stating what evidence may be introduced by the defendant, including the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

**Note:** Wash. Rev. Code §9A.44.020 does not prohibit the cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior. However, the court may require a hearing concerning such evidence.

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34 *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980) (evidence of prior rape complaints by rape victim not admissible where defendant was unable to prove the prior complaints were unfounded). *State v. Knutson* 121 Wash.2d 766, 854 P.2d 617 (1993). (Supreme Court held that trial court's failure to disclose nurse's note in 14-year-old female complaining witness' medical records stating that witness had been "prostituting in the past" did not violate defendant's due process rights.)
35 Wash. Rev. Code §9A.44.020(3)(a)
36 Wash. Rev. Code §9A.44.020(3)(b)
37 Wash. Rev. Code §9A.44.020(3)(c)
38 Wash. Rev. Code §9A.44.020(3)(d)
39 Wash. Rev. Code §9A.44.020(4); See also *State v. Camara* 113 Wash.2d 631, 781 P.2d 483, (1989) (Supreme Court held that: (1) burden of proof on consent lies with defendant in rape prosecution, and (2) defendant was not
B. Civil Cases, Evidence Generally Inadmissible - 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 admissible in any civil proceeding involving alleged sexual misconduct. Evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.⁴⁰

A party intending to offer evidence under Wash. General Rules of Application, Evidence Rule 412, must file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.⁴¹ Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.⁴²

VI. WASHINGTON STATUTORY PRIVACY PROTECTIONS

Separate and distinct from evidentiary privileges are numerous statutory provisions that afford protection of the victim’s privacy. It is important to familiarize yourself with these rights and always keep an open mind about other rights that may not be listed.

A. Sexual Assault Specific Statutes

In 1979 the Washington Legislature enacted the Victims of Sexual Assault Act. The act acknowledges the prevalence of sexual assault as one of the most rapidly increasing violent crimes in the State of Washington.\textsuperscript{43} It further states that there is a lack of adequate training, public information and community awareness about sexual assault that adversely impacts victims' ability to receive proper assistance to recover from the psychological and physical trauma of sexual assault.\textsuperscript{44} The act further sets aside state funding to facilitate services and contacts between the criminal justice system and the health care system and rape crisis centers.\textsuperscript{45}

\begin{itemize}
  \item \textbf{a. Records of rape crisis centers not available as part of discovery}
  \textit{Wash. Rev. Code §70.125.065}\textsuperscript{46}

  Records maintained by rape crisis centers shall not be made available to any defense attorney as part of discovery in a sexual assault case unless:

  \begin{itemize}
    \item A written pretrial motion is made by the defendant to the court stating that the defendant is requesting discovery of the rape crisis center's records;
    \item The written motion is accompanied by an affidavit or affidavits setting forth specifically the reasons why the defendant is requesting discovery of the rape crisis center's records;
    \item The court reviews the rape crisis center's records in camera to determine whether the rape crisis center's records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records to the defendant; and
  \end{itemize}

\end{itemize}

\textsuperscript{43} Wash. Rev. Code §70.125(1)(a)
\textsuperscript{44} Wash. Rev. Code §70.125(1)(b)-(f)
\textsuperscript{45} Wash. Rev. Code §70.125(1)(g)-(h), (2)

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The court enters an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings.

b. Definitions

- "Rape crisis center" means a community-based social service agency which provides services to victims of sexual assault.47
- "Community sexual assault program" means a community-based social service agency that is qualified to provide and provides core services to victims of sexual assault."
- "Sexual assault" means one or more of the following:48
  (a) Rape or rape of a child;
  (b) Assault with intent to commit rape or rape of a child;
  (c) Incest or indecent liberties;
  (d) Child molestation;
  (e) Sexual misconduct with a minor;
  (f) Custodial sexual misconduct;
  (g) Crimes with a sexual motivation; or
  (h) An attempt to commit any of the aforementioned offenses.
- "Specialized services" means treatment services for victims of sexual assault including support groups, therapy, and specialized sexual assault medical examinations.49
- "Victim" means any person who suffers physical and/or mental anguish as a proximate result of a sexual assault.50

2. Client Records of Domestic Violence Programs, Wash. Rev. Code §70.123.075

Client records maintained by domestic violence programs are not subject to discovery in any judicial proceeding unless a written pretrial motion is made stating that discovery is

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47 Wash. Rev. Code §70.125.030(5)
48 Wash. Rev. Code §70.125.030(7)(a) – (h)
49 Wash. Rev. Code §70.125.030(8)
50 Wash. Rev. Code §70.125.030(9)

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requested of the client's domestic violence records. The written motion must be accompanied by an affidavit(s) specifying the reasons why discovery is requested of the program's records. The court reviews the records in camera to determine whether the records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records. The court then enters an order stating whether the records or any part of the records are discoverable setting forth the basis for it’s findings.

"Domestic violence program" means a program that provides shelter, advocacy, or counseling services for domestic violence victims.\textsuperscript{51}

**B. Non Sexual Assault Specific Statutes**


   It is the policy of the State of Washington to provide for the completeness, accuracy, confidentiality, and security of criminal history record information and victim, witness, and complainant record information as defined in this chapter. This Act assists victims of sexual assault to obtain civil redress. Specifically, it gives victims in a civil case access to all the police investigative records – regardless of whether criminal charges are filed.\textsuperscript{52}

2. **Medical Records, Health Care Information Access and Disclosure, Wash. Rev. Code §70.02 et Seq.**

   The Washington Legislature has recognized that health care information is personal and sensitive information which, if improperly used or released, may cause significant harm to a patient's privacy, health care or other interests. Further, it is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers. The movement of patients and their health care information across state lines, access to and exchange of health care information from automated data banks, and the emergence of multistate health care providers

\textsuperscript{51} Wash. Rev. Code §70.123.020(7)  
\textsuperscript{52} Wash. Rev. Code §10.97.110
creates a compelling need for uniform law, rules, and procedures governing the use and
disclosure of health care information.

As such, when a defense attorney in any criminal proceeding subpoenas the medical
records of a sexual assault victim, the statute requires that the victim be notified and given an
opportunity to object.\footnote{Wash. Rev. Code §70.02.060} This often serves as a sound basis for a motion to quash such a subpoena.

**PRACTICE TIP: Need for Private Counsel in Criminal Proceedings**

In order to protect her privacy interests and health care information, practitioners should
consider making an appearance on behalf of a victim of sexual assault if her medical records are
subpoenaed. Deputy prosecutors are not in the best position to raise this objection on behalf of
the victim because they do not represent the victim or the victim’s interests.


The Public Disclosure Act (PDA) is designed to make public officials and all levels of
government transparent and accountable to the public. The Act provides for the inspection
and copying of many different types of government maintained records and documents. For
sexual assault victims, the relevant provisions of the PDA are the exemptions under the Act.
The following are exempt from public inspection and copying:\footnote{Wash. Rev. Code §42.17.310(a)(b)(d)(e)(cc)(kk)(mm)(pp)(rr)}

- Personal information in any files maintained for students in public schools, patients or
  clients of public institutions or public health agencies, or welfare recipients.(a)
- Personal information in files maintained for employees, appointees, or elected
  officials of any public agency to the extent that disclosure would violate their right to
  privacy.(b)
- Specific intelligence information and specific investigative records compiled by
  investigative, law enforcement, and penology agencies, and state the nondisclosure of
  which is essential to effective law enforcement or for the protection of any person's
  right to privacy. (d)
- Information revealing the identity of persons who are witnesses to or victims of crime
  or who file complaints with investigative, law enforcement, or penology agencies. (e)
Client records maintained by a rape crisis center or domestic violence program. (cc)

Names of individuals residing in emergency or transitional housing that are furnished to the department of revenue or a county assessor in order to substantiate a claim for property tax exemption. (kk)

The personally identifying information of current or former participants or applicants in a paratransit or other transit service operated for the benefit of persons with disabilities or elderly persons. (mm)

Records maintained by the Board of Industrial Insurance Appeals that are related to appeals of Crime Victims Compensation claims. (pp)

Any records of investigative reports prepared by any state, county, municipal, or other law enforcement agency pertaining to sex offenses or sexually violent offenses. (rr)

4. **HIPAA (Health Insurance Portability and Accountability Act of 1996)**
   
   (Public Law 104-191 and HHS Regulation 45 C.F.R. § 160 and 164).

As noted above, beginning in April 2003, regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA)\(^55\) will affect the disclosure of personal health information (the “Privacy Rule”). The Privacy Rule preempts all state laws that are less protective of patient’s privacy while leaving more protective laws in place.\(^56\) In some instances, the Privacy Rule and state laws may address a certain type of disclosure with legal requirements that are different but not necessarily contrary. A covered entity must then comply with both sets of requirements, if possible. The Privacy Rule governs how patient information may be used and disclosed by hospitals, physicians and other covered entities.\(^57\) For certain types of information and disclosures, patients may need to provide written authorization before a health care provider is allowed to disclose information.\(^58\) The Office for Civil Rights of the U.S.

\(^{55}\) Public Law 104-191 and the applicable Health and Human Services regulations for the Privacy Rule at 45 C.F.R. Parts 160 and 164.

\(^{56}\) 45 C.F.R. §§ 160.202 and 203. WCSAP also has a comprehensive memorandum analyzing the impact of the Privacy Rule on the confidentiality obligations and practices of Community Sexual Assault Programs in Washington. Although the analysis in this memorandum is not necessarily universally applicable, please let us know if you would like a copy.

\(^{57}\) 45 C.F.R. Parts 160 and 164.

\(^{58}\) 45 C.F.R. § 164.508.
Department of Health and Human Services will enforce this statute and violations can result in fines of up to $250,000 and up to 10 years in prison.\textsuperscript{59}

\textsuperscript{59} Public Law 104-191 § 1177(a) and (b).

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PRIVACY CHECKLIST

What general or specific privacy concerns does the client have?

✓ General community knowledge: Family, school, work, housing
✓ Mental health care and 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, when, where?
✓ 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 the 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.
CHAPTER THREE:
PROTECTIVE ORDERS FOR SEXUAL ASSAULT VICTIMS
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PROTECTIVE ORDERS FOR SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

Sexual assault shatters a victim’s sense of safety. A victim may not feel safe for months or years after the sexual assault. If she has ongoing contact with the assailant, her post-assault fear and hypervigilance may be especially acute. The assailant may pose an ongoing threat or may use the fear instilled by the first assault to intimidate the victim and prevent her from seeking civil or criminal justice remedies.

*Careful safety planning is needed if the assailant knows:*
- Where the victim lives,
- Where the victim works,
- Where the victim attends church,
- Where the victim attends school, or
- If the assailant made a specific threat to harm the victim if the victim reports the assault.

Every victim should be offered comprehensive safety planning early and at each step of representation. Legal practitioners are encouraged to obtain and use additional resources for this safety assessment. An experienced sexual assault or domestic violence advocate is often the best referral for comprehensive safety planning.¹ Safety planning measures can include:
- Notifying neighbors and friends of the safety threat
- Carrying a cellular phone to call 911 in the event of an emergency
- Identifying safe places to stay or reside away from home, and
- Seeking a protection order from the civil or criminal courts.

Unlike the other safety measures listed, the purpose of a protection order is to place a legal burden on the assailant to have no further contact with the victim. Protection orders do not preclude other civil or criminal remedies and may create the security to pursue those remedies. Such orders are not without risk, however, and ongoing consultation with an experienced sexual assault advocate is advised.

II. PRACTICE CONSIDERATIONS

There are several types of protective orders that may be available to victims of sexual assault in Washington:

- Domestic Violence Orders of Protection
- Anti-Harassment Orders
- No Contact Orders
- Vulnerable Adult Protection Orders

An attorney should assess whether an order, and which type of order, may be appropriate for the particular needs of a client and the facts of the case. Depending on the type of relationship a victim has with the assailant, and the other civil or criminal remedies she is seeking, the victim may qualify for one, if not more, of the above types of orders.

While this chapter discusses all of the orders, the primary focus is on the two most common protection orders, the domestic violence order of protection under Wash. Rev. Code § 26.50, et. Seq., and the anti-harassment order under Wash. Rev. Code § 10.14, et. Seq.

A. Potential for Retaliation and Timing of the Application for a Protection Order

When a victim files a police complaint or seeks some other legal intervention directed toward the assailant, it may trigger a heightened risk of retaliation by the assailant. If a victim fears retaliation, you should consider filing for protection orders before filing requests for those other remedies. Careful timing of filing, service, and hearings may play an important role in
protecting safety. This is especially true in the context of the victim’s decision about whether to report the assault to criminal authorities. If the police plan to make an immediate arrest, the victim may want to talk with an advocate in the criminal justice system about whether a criminal no contact order is available to her. Otherwise, you may want to coordinate the filing of the police complaint with a civil order of protection. If that is the case, an attorney can request that police not release the assailant until the application for the order has been filed, and an *ex parte* order granted, and/or other safety measures put in place.

A similarly crucial time to be concerned about retaliation is when an assailant is notified of the outcome of a disciplinary proceeding at work or school. If the assailant is going to be dismissed from his employment or suspended or expelled from school as a result of the victim’s complaint, protection orders may play a vital role in shielding the victim from harm.

**B. Interrelationship of Protective Order with Other Civil and Criminal Remedies**

1. **Substantive Implications**

   Protection orders may have a substantial impact on other civil remedies the victim seeks. On a positive note, if a victim is seeking to have the assailant removed from a school, work or housing setting, a protection order may expedite that process. Housing agents, educational institutions and employers may prefer to take decisive action against the assailant in reliance on a court order, rather than relying on their own internal investigation. These institutions may feel this will limit their liability exposure to the assailant.

   On a less positive note, protection orders potentially impede other remedies the victim seeks. For example, if a victim wishes to pursue a domestic violence protection order on the basis of the existence of a dating relationship, her attorney must weigh the consequences of alleging such a relationship. A dating relationship may be used to support an assailant’s defense that sex was consensual. When there is a tenuous relationship, an anti-harassment order or a criminal no contact order may be a better option, if those remedies are available.

2. **Evidentiary Implications**
It is important to consider the implications of creating an evidentiary record in a protection order hearing. For example, affidavits can be published or used in subsequent criminal or civil proceedings. If the affidavit describes an event with a specificity that varies from a police report or other statement, it may be used to impeach the victim during cross-examination in future proceedings. Similarly, if an affidavit discloses rape of a minor, or a statutory rape that has not been reported, it may be reported to police or the Department of Social and Health Services for follow-up if the affidavit is read by a mandated reporter.\(^2\) Also, if there is a criminal prosecution pending, you should consult with the deputy prosecuting attorney on the case.

3. **Privacy Issues**

Pleadings, including petitions, affidavits and other statements from protection or anti-harassment order proceedings are public record. This means that any person may go to the courthouse clerk’s office and request to view the court file for these civil cases. In some instances, these public files may even be “checked out” of the courthouse, like a lending library, with the court’s permission. A victim’s address, as well as the address of her workplace and school, may be included in the public court file if it is included as part of the order—for instance, if these addresses are ordered as places the assailant is prohibited from going near, the victim has the choice to list those specific addresses or to note that they are “confidential.”

If a specific address is listed, it will appear in the final order and therefore be contained in the public file. An attorney working with a victim must ascertain whether any address relevant to the victim is already known to the assailant or not, and therefore whether confidentiality of any address is preferred.

Additionally, there are proposed court rules pending which would govern the accessibility of public court documents over the Internet.\(^3\) It is unclear, at this time, whether

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\(^2\) Wash. Rev. Code § 26.44.030(1)(a) – (c). The following are mandatory reporters: any medical practitioner; county coroner or medical examiner; law enforcement officer; professional school personnel; registered or licensed nurse; social services counselor; psychologist; pharmacist; licensed or certified child care providers or their employees; employees of the Department of Social and Health Services; juvenile probation officers; Department of Corrections personnel; and any adult who has reasonable cause to believe that a child who resides with them has suffered severe abuse, and is able or capable of making a report.

there will be any specific exceptions prohibiting the dissemination or access of certain court files, and whether any specific exceptions would protect victims of sexual assault.

Court files that are ordinarily public may be sealed under order of the court.\(^4\) To request that a court file be sealed, the victim must make a motion to the court and show that “compelling circumstances” exist which support the motion to seal.\(^5\) Any request to seal a civil or domestic court file because of the “sexual misconduct” of a party is left to the discretion of the court. The order which seals the file is not generally sealed.\(^6\)

### C. Speed and Efficiency of Protective Orders

Hearings on protective orders, particularly under Wash. Rev. Code § 26.50, may be speedier and more victim-friendly than other avenues for holding the assailant accountable. Immediate, \textit{ex parte} relief is available, and whether or not a final order will be entered is decided at a hearing 14-24 days after the \textit{ex parte} order is obtained.\(^7\) While criminal prosecution of an assailant may take from one to two years and a school or employment disciplinary process may take two to four months, a protection order may be obtained within a matter of weeks.

The filing procedures, court personnel, and hearings procedures for Wash. Rev. Code § 26.50 Orders of Protection are intended to be “user-friendly” and easier than other civil legal areas for persons representing themselves (those proceeding \textit{pro se}) to navigate.\(^8\) Many jurisdictions offer “protection order advocates,” nonlawyer advocates usually employed by the court or the local prosecutor’s office, to help victims who do not have the benefit of legal counsel fill out paperwork, figure out where to go in the courthouse to ask a judge for an emergency order and to file the paperwork, as well as to sometimes stand with the victim (although not

\(^5\) Id. at (c)(2)(B)
\(^6\) Id. at (e)(2)(B)
\(^7\) Wash. Rev. Code § 26.50.070
\(^8\) Wash. Rev. Code § 26.50.035 requires the administrator for the courts to develop: (1) instructions and informational brochures for the public’s use when filling out protection order forms, and (2) a court staff handbook on domestic violence and the protection order process. It further requires all court clerks to retain a community resource list of domestic violence assistance programs, sexual assault agencies, legal assistance programs, interpreters, multicultural programs, and batterers’ treatment programs serving the county in which the court is located.

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speak on her behalf) at the hearings. Wash. Rev. Code §26.50 was written with a legislative intent to acknowledge the widespread harm caused by domestic violence, to assist victims of domestic violence, and to prevent additional acts of domestic violence from taking place. While it was not designed to meet the specific needs of sexual assault victims, and further legislation may be needed to address those needs, that it was intended to assist some class of “victims” does account for whatever “user-friendliness” one encounters in that process.

Additionally, under the definition of the practice of law, General Rule 24(b)(6), providing assistance to another to complete a form provided by a court for protection under Wash. Rev. Code § 10.14 (harassment) or Wash. Rev. Code § 26.50 (domestic violence prevention), when no fee is charged to do so, is permitted as an exception to the practice of law, whether or not the assistance constitutes the practice of law. If a victim of sexual assault is seeking one of these orders, it is likely the sexual assault advocates in your community can provide assistance throughout the pro se process.

The rules of evidence do not apply in proceedings involving a domestic violence order or protection or an anti-harassment order. This is, in part, to allow victims, as well as the assailants in these actions, to speak more freely than otherwise allowed in court proceedings and to allow those who are not represented by an attorney to get as much information or evidence in before the court as possible even if they are not familiar with the rules of evidence. Protection order hearings are, in some counties, heard on the basis of affidavits only. This means that some judges will decide protection order issues on the basis of the written petition and supporting written declarations and any oral information offered by the parties themselves during the

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9 Wash. Rev. Code § 26.50.030, Findings – 1992 c 111. “Refinements [in the existing protection order process] are needed so that victims have the easy, quick, and effective access to the court system envisioned at the time the protection order process was first created.”

10 State v. Dejarlais, 136 Wash.2d 939, 940, 969 P.2d 90 at 92 (1997) (noting that the Legislature has clearly recognized a public interest in domestic violence protection orders by stating that domestic violence is a problem of immense proportions affecting individuals as well as communities); see also Muma v. Muma, 115 Wash. App. 1, 60 P.3d 592 (2002); (review denied 149 Wash.2d. 1029, 78 P.3d 656 (2003)) (rejecting Appellants argument that there had been no recent acts of physical domestic abuse to support the Petitioner’s request for an Order for Protection, and stating “We refuse to construe the law so as to require that Ms. Muma wait until Mr. Muma commits further acts of violence against her or their children in order to seek an Order for Protection”).

11 Under the service standards issued by the Office of Crime Victim Advocacy for Community Sexual Assault Programs in Washington State, providing assistance with orders of protection, anti-harassment orders and no contact orders is a core service offered to sexual assault victims by sexual assault advocates.

hearing. Additional witnesses, and more typical examination of witnesses, are not allowed in every county. Check your county’s local rules for additional information about this procedure.

D. Exposing Client to Sanctions As a Result of a Protective Order

There is no clear public policy about whether, or when, courts report information heard during hearings that might rise to the level of criminal activity to another agency, such as law enforcement. Judges or other court personnel may be more prone to make reports to other agencies if there are issues of child abuse. For example, if a woman was raped and her children were present (even if asleep) someone might report that to Child Protective Services for an investigation. Certain individuals are deemed by law to be “mandatory reporters” of child abuse issues, and any attorney working with a victim of any kind of violence should be familiar with that law and inform clients about mandatory reporting and the potential consequences of such reporting.13

III. Four Types of Protective Orders

Several types of protection orders may be available to victims of sexual assault, depending on the protection sought, and the circumstances of the victim and the assailant. These orders may depend upon what “relationship,” if any, exists between the victim and the assailant and whether there are criminal or other proceedings pending.

A. Orders for Protection (Wash. Rev. Code § 26.50 et seq)

Orders for Protection are designed to protect victims of domestic violence. Domestic violence, as defined by Wash. Rev. Code §26.50.010, means:

- Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members;
- Sexual assault of one family or household member by another;

1. Who may petition for an order:

The law renders certain persons eligible to seek a protection order, and then only against other certain persons. A victim of sexual assault may seek an Order for Protection against the assailant if the assailant was a family or household member, which is defined as follows:  

- Spouses
- Former Spouses
- Persons who have a child in common
- Adult persons related by blood or marriage
- Adult persons who are living together currently or who have lived together in the past
- Persons 16 years of age or older who are living together currently or who have lived together in the past and who have or have had a “dating relationship”
- Persons 16 years of age or older with whom a respondent sixteen years of age or older has or has had a “dating relationship”
- Persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

Washington courts have considered the question of how to interpret further the definition of “household or family member” in this day of blended families and extended families sometimes living together. A new spouse is a “household member” on behalf of whom an order

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14 Wash. Rev. Code § 26.50.010(2)
15 Wash. Rev. Code § 26.50.010(3) (“dating relationship” means a social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) the length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties).
may be sought, when an ex threatens his or her former spouse and that person’s new partner.\textsuperscript{16} However, a rape committed against a defendant’s minor sister-in-law was not an act of domestic violence because the crime was not committed by one household or family member against another.\textsuperscript{17} An “in-law” does not apparently fit into the definition of family member even though they are related by marriage in a sense. The marriage relationship must be the spouses themselves. Because the sister-in-law did not live with the defendant, she was not a qualified “household member,” either.\textsuperscript{18}

2. **Available Relief**

In an Order for Protection, specific relief is available which includes\textsuperscript{19}:

- Restraining acts of domestic violence;
- Excluding respondent from shared dwelling and/or from the residence, workplace or school of the petitioner, or from the daycare or school of a child;
- Restraining respondent from any contact with victim or victim’s children or household members (restraints relating to the respondent’s children can be no more than one year);
- Making temporary residential provisions for children;
- Ordering batterer's treatment, sexual deviancy evaluation or treatment, alcohol or drug treatment, parenting classes;
- Ordering electronic monitoring;
- Other relief as necessary for protection of petitioner and family members (including directives to peace officers) (probably includes the surrender of weapons);

\textsuperscript{16} See *Hecker v. Cortinas*, 110 Wash.App. 865, 866, 43 P.3d 50 at 52-53 (2002) (rejecting Respondant’s argument that an order for protection was incorrectly extended to her ex-husband’s second wife because she did not qualify as a family of household member under § 26.50.010 and holding that the second wife does qualify as a family or household member as she lives with the Respondant’s ex-husband).

\textsuperscript{17} See *State v. Garnica*, 105 Wash. App. 762, 20 P.3d 1069, 1075 (2001). In this case, the court seemed to have focused on the sister-in-law’s status as a minor; it is unknown whether the result would have been the same if the sister-in-law had been an adult.

\textsuperscript{18} *Id.*
• Use of essential personal property, including cars; and
• Costs and attorney’s fees.

A protection order may restrict all contact between the victim and the assailant, or it may allow for some contact, such as telephone calls or letters. The relief asked for is almost entirely dependent upon what the victim believes will help keep her safe, and what relief the evidence will support.

An Order for Protection cannot deal with child support or other financial support for the family. The order cannot last longer than one year in regard to children, unless it is issued as part of a dissolution or other family law action. An Order for Protection cannot guarantee the safety of anyone. Safety planning is essential.

3. What the victim has to show:

The petition shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought. This uses the legal definition of domestic violence and stalking as above.

An act of domestic violence need not be recent to serve as an acceptable basis for an Order for Protection. A sexual assault victim may allege past acts of domestic violence, even those that also were a basis for a prior expired Order for Protection, as an appropriate basis of a new order. “As the title of the Act indicates—Domestic Violence Prevention—the Legislature made it clear that the intent of Wash. Rev. Code § 26.50 is to prevent acts of domestic violence.”

19 Wash. Rev. Code § 26.50.060
20 State v. Dejarlais, 136 Wash. 2d. 939, 969 P.2d at 93.
22 Spence v. Kaminski, 103 Wash. App. 325, 12 P.3d 1030 at 1033-1034 (2000) (Woman sought a protection order for herself and her children based on allegations of domestic violence that took place five years earlier, during her marriage, and on recent threats by her ex-husband; the Court of Appeals ruled that a history of abuse, and a court’s belief that the petitioner fears future abuse are sufficient to persuade a rational person that the petitioner has been put in fear of imminent physical harm).
23 Muma v. Muma, 115 Wash. App. 1, 60 P.3d 595 (holding that the concept of res judicata does not apply in protection order proceedings). Res judicata is intended to prohibit the relitigation of issues once they have been litigated to their finality. In this case, the court found that domestic violence issues may not be able to be litigated to finality; the fear of her ex-husband that Ms. Muma continued to feel, in conjunction with Mr. Muma’s past acts of violence against her, served as an eligible basis for a new Order for Protection.
24 Id.
Therefore, a victim who had been sexually assaulted by a family or household member, or someone with whom she had a dating relationship, may arguably seek an Order for Protection well after the sexual assault itself. If she continued to fear the assailant, or if the assailant issued new threats, she could petition for an order based upon the past assault as well as her continuing fear, or the new threats.

4. Process involved in seeking an Order for Protection

a. Where to go

Victims may generally go to any Superior Court, District, or Municipal Court to petition for an Order for Protection.25 In less populated counties, a petitioner may want to call the local courthouse first to determine if there are certain hours petitions for Orders of Protection are heard. If the victim files the initial paperwork, and requests an *ex parte* or emergency order at a District or Municipal court, the case must be transferred to Superior Court for the 14-day hearing if the case involves children in common and there is a request for the court to deal with custody/contact issues; if the petition contains a request to remove the assailant from the parties’ shared home; and if there is a pending dependency or family law action between the parties. No fees for filing or service of process may be charged by a public agency to petitioners seeking relief under this chapter. Petitioners shall be provided the necessary number of certified copies at no cost.26

b. The process

Obtain and complete the mandatory forms. Attorneys can download the forms online at [http://www.courts.wa.gov/dv/?fa=dv.online](http://www.courts.wa.gov/dv/?fa=dv.online). The online program is “interactive,” meaning you may fill out the forms online by answering the questions asked in the electronic drop-down menus.

- Petition for Order for Protection
- Law enforcement information sheet
- Child custody information sheet
- Declaration (blank form that witnesses may fill out)

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26 Wash. Rev. Code § 26.50.040

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Attach supplementary documents and declarations at the time of filing (it is helpful to submit as much supporting evidence as possible; but documents in addition to the petition and the declaration within the petition are not required). Then, go to ex parte commissioner or district or municipal court judge to obtain the temporary order. This may be done at Superior Court, District or Municipal Court. Return to clerk’s office, which issues free certified copies of temporary order and send it to the sheriff for service. Submit supplementary documents and declarations by filing, serving and delivering a copy of the working papers to the judge or department at least five days in advance of hearing (a good idea, but rarely done).

If you have a supporting declaration or other exhibits or documentary evidence with you when you go to file, you can attach it to your petition and it will get served with the other papers. Otherwise, you must arrange to have these materials served separately at least five days in advance of the hearing, and file a Return of Service form before the hearing itself. The assailant must be served at least five days before hearing. The hearing takes place fourteen days after issuance of temporary order. The hearings are sometimes recorded on tape. Most commissioners will hear only argument from attorneys and testimony from the parties themselves. Any information from other witnesses must generally be submitted in writing and in proper form to the court and the opposing party at least five days before the hearing. The parties may attempt to submit additional documentary evidence at time of hearing. However, courts do not always allow this. At the hearing the order is either granted or denied. Make sure you get multiple certified copies before leaving the courthouse.

5. Motion for Reconsideration or Revision

If you believe the court made the wrong decision, you have 10 days to file a motion for reconsideration or revision.

- **Reconsideration**: motion to the same decision-maker, either submitting information that was unavailable at the time of the first hearing, or arguing that the decision-maker should have applied the law differently. If your motion for reconsideration is denied, you have 10 days to file for revision.
• **Revision:** motion to a judge (higher ranking than commissioner); no additional information may be submitted; the general argument is misapplication of law.

### B. Anti-Harassment Orders (Wash. Rev. Code § 10.14 et Seq.)

Anti-harassment orders focus on the assailant’s conduct and does not rely upon any particular familiarity or relationship between the victim and the assailant. This is one way in which anti-harassment orders differ from other civil protection orders. For victims of sexual assault who do not meet the relationship requirement under a domestic violence protection order, anti-harassments orders are often their only civil remedy for obtaining protection from the assailant. However, it is important for attorneys to keep in mind that anti-harassment orders where not intended to provide protections to victims of sexual assault. Anti-harassment orders are intended for a wide range of harassing behavior and are not necessarily designed to address the serious nature of rape or sexual assault.

Wash. Rev. Code §10.14.020 governs these orders, and defines “harassment” as follows:

- A knowing and willful course of conduct directed at a person;
- Which seriously alarms, annoys, harasses, or is detrimental and
- Which serves no legitimate or lawful purpose

1. **Who can petition for an order**

Any person who alleges the harassing behavior, as defined in the statute, has been directed at them and shows how the behavior has had the required impact on them is eligible for an anti-harassment order. No specific relationship between the victim and the assailant is required.

2. **What the order may contain**

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An anti-harassment order may restrain the assailant from making any attempts at keeping the victim under surveillance. It may also require the assailant to stay a stated distance away from the victim, her workplace, school or residence.

3. What the victim must show

To obtain an anti-harassment order, the victim must allege that the assailant engaged in the “unlawful harassment” of the victim; and that a “course of conduct” was initiated by the assailant. A course of conduct generally means a pattern, or a series of occasions of conduct. It can be difficult for victims of sexual assault to allege this unless there were multiple instances of assault or if the assailant has engaged in continuing threats or harassment against the victim since the time of the initial assault.

When petitioning for an anti-harassment order, a victim of sexual assault also will have to show that the assailant was given clear notice that any continuing contact was unwanted; and that the conduct was designed to annoy, harass, alarm; and that the conduct has the purpose or effect of unreasonably interfering with the petitioner’s privacy or that it has the effect of creating an intimidating, hostile, or offensive environment for the petitioner.

The victim also must allege that the behavior would cause a reasonable person to suffer substantial emotional distress and that the behavior actually causes substantial and emotional distress to the petitioner. These burdens of proof can be met through narrative or anecdotal evidence, such as the petitioner’s affidavit and affidavits from supporting witnesses.

4. Process involved in seeking an Anti-Harassment Order

The process in seeking an anti-harassment order is quite similar to the process described above regarding orders for protection. The similarities include:

28 Wash. Rev. Code § 10.14.020(1) (unlawful harassment means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child).

29 Wash. Rev. Code § 10.14.020(2) (“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. “Course of conduct” includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication).

• The use of mandatory forms, found at superior, district, or municipal courts or online
• Alleging in the petition and any supporting declaration that the legal definitions and factual requirements are met in this particular circumstance
• An *ex parte* emergency order may be sought, at which point the opposing party has not yet received notice but at which time a hearing will be set to take place in two weeks
• The opposing party must then be served with the paperwork and given notice of the hearing and the allegations
• A hearing will take place, at which oral testimony from the parties may be taken, and at which a one year order may or may not be entered

5. **Enforcement of Anti-Harassment Orders**

Any willful disobedience by an assailant of any temporary anti-harassment protection order or civil anti-harassment protection order issued under Wash. Rev. Code § 10.14, subjects the assailant to criminal penalties. Any assailant who willfully disobeys the terms of any order issued under this chapter may also, in the court's discretion, be found in contempt of court and subject to penalties. "Any respondent age 18 years or over who willfully disobeys any civil anti-harassment protection order shall be guilty of a gross misdemeanor."

a. **Notice to Law Enforcement**

"A copy of an anti-harassment protection order granted under this chapter shall be forwarded by the clerk of the court on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the order, the law enforcement agency shall forthwith enter the order into any computer-based criminal intelligence.

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35 Wash. Rev. Code § 10.14.120

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information system available in this state used by law enforcement agencies to list outstanding warrants. The law enforcement agency shall expunge expired orders from the computer system. Entry into the law enforcement information system constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any county in the state.\footnote{Wash. Rev. Code §10.14.110}

6. Differences between an Anti-Harassment Order and Domestic Violence Protection Order

There is a filing fee required to petition for an anti-harassment order, as well as fees for service and certified copies. The exact fees may vary from county to county. Victims may ask permission from the court to proceed \textit{in forma pauperis}, meaning to proceed without having to pay the fees.\footnote{Wash. Rev. Code §10.14.060.} Anti-harassment orders are under the jurisdiction of the district courts, and therefore sexual assault victims should go to their local district court to initially file their case.\footnote{Wash. Rev. Code §10.14.150(1).} However, the district court may, in cases where a district court judge makes findings that meritorious reasons exist to do so, transfer the case for the final hearing to superior court, which has concurrent jurisdiction.\footnote{Wash. Rev. Code §10.14.150(2).}

C. Criminal No Contact Orders \footnote{The information in this section is based on a training outline authored by Kristin Pugh, MSW, a Domestic Violence Advocate with the Seattle City Attorney’s Office.} (Wash. Rev. Code § 10.99 et Seq.)

In criminal proceeding involving domestic violence, the court is empowered to put a “no contact order” (NCO) in place which prohibits the assailant from having any contact with the victim.\footnote{Wash. Rev. Code §10.99.040(2)(a) (“When any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim”).} No-contact orders are criminal orders issued by judges in criminal courts at the municipal, district, and superior court levels as a result of a criminal action. They are not initiated by victims.

NCOs may be put into place at any time during the court proceedings—when the assailant is charged with a crime, or at a bail hearing.\footnote{Wash. Rev. Code §10.99.040(2)(a). \textit{State v. Rodman}, 94 Wash. App. 930, 973 P.2d 1095, 1098 (1999).} At the time of arraignment, the court is
supposed to determine whether a NCO shall be either issued or, if previously issued, extended.\textsuperscript{44} NCOs end when the criminal case ends (e.g., when charges are dropped, after a “not guilty verdict,” or when jurisdiction ends).\textsuperscript{45}

Not all crimes result in NCOs being ordered; crimes require a “domestic violence” designation, meaning there was a family or other intimate relationship between the victim and the assailant, in order for a NCO to be statutorily authorized.\textsuperscript{46} It is important to note that this type of no contact order is not available to a victim of sexual assault if she does not have the requisite relationship with the assailant under Wash. Rev. Code § 10.99.020(3). Therefore, even if the assailant is charged with a sex offense against the victim, the judge may or may not have the authority to issue a NCO.

<table>
<thead>
<tr>
<th>PRACTICE TIP: Extending NCO to Include Child Witnesses</th>
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<tbody>
<tr>
<td>To encourage a court to enter a NCO for child witnesses of the act of violence, attorneys working with sexual assault survivors may want to advocate with the prosecutor to encourage the judge to make specific findings, on the record, about the basis for including the children in the order and why no contact between the defendant and the children is necessary.</td>
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If a NCO is statutorily authorized, only the victim of the crime is protected, although some judges have imposed NCOs for child witnesses of domestic violence.\textsuperscript{47} NCOs are not flexible and do not offer creative solutions to each individual’s issues. NCOs use standardized language as mandated by law and the names of the parties involved are simply filled into the blanks on a preprinted form.

1. How an NCO is obtained

\textsuperscript{44} Wash. Rev. Code §10.99.040(3).
\textsuperscript{45} Id. See also \textit{State v. Schultz}, 146 Wash.2d 540, 48 P.3d 301 (2002) (holding that NCO does not terminate upon a finding of guilt in a domestic violence prosecution, rather it remains in effect until the defendant’s sentencing).
\textsuperscript{46} Wash. Rev. Code §10.99.040.
\textsuperscript{47} \textit{State v. Ancira}, 107 Wash. App. 650, 27 P.3d 1246 at 1248-1249 (2001). (After defendant violated a no-contact order requiring him to stay away from his wife, the trial court entered a new no-contact order as a condition of sentencing, which included defendant's two children as well as his wife. Defendant objected to the children’s’ inclusion in part on the basis that they were not victims of his crime. The court concluded that the order violated the defendant's fundamental right to parent because the inclusion of the children in the order was not reasonably necessary to meet the State’s legitimate objective of protecting the victim of his crime).
There is no petition required for an NCO. A judge will issue the order, often regardless of a victim’s wishes. Unless the victim is in court when the order is issued, she may not know it exists until she either receives a copy in the mail or calls the court - although the law requires that a certified copy of the order be provided to her. It can be difficult to know if there is an order and where it is from. Attorneys working with a victim of sexual assault who may be involved in a criminal proceeding as a crime victim, who do not have a police report number or court case number may be able to determine if an NCO has been entered by having the following information available when calling the court or the prosecutor to inquire:

- In what city and at what time did the crime happen?
- Were the police called? If so, which department responded?
- Was the suspect arrested at that time; if not, when?
- Name and date of birth of suspect; if this is not known, the victim’s information may suffice

The victim may request the NCO be lifted at any stage of a case, but the final say for lifting or canceling a NCO rests with the judge, not the victim. If the victim’s situation is such that some civil protection or restraining order is available to her, she may want to consider seeking one even if an NCO is ordered as part of a criminal case. Because NCOs are only good for as long as the court has jurisdiction over the assailant, the NCO may suddenly be voided if a jury issues a “not guilty” verdict after trial or if the charges are dismissed. NCOs also do not offer the same level of restriction as protection orders as they do not specifically address safety at the workplace, daycare, or school, and they do not include provisions for the custody of children.

2. Other Criminal No Contact Orders

Courts may also issue an NCO pursuant to Wash. Rev. Code §9A.46.040 in harassment cases. Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any assailant charged with a crime involving harassment is

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released from custody before trial, on bail or personal recognizance, the court authorizing the release may require that the defendant to:

- Stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other location, as shall be specifically named by the court in the order;\(^{51}\)
- Refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by the court in the order.\(^{52}\)

"An intentional violation of a court order issued under Wash. Rev. Code §9A.46.040 is a misdemeanor."\(^{53}\)

Courts also may order no contact with witness/victims during the pretrial period pursuant to Superior Ct. Crim. Ct. R. 3.2(d)(1) and District Ct. Crim. Ct. R. 3.2(d)(1). A violation of these orders may support a contempt prosecution and/or the revocation of release pending trial.

### D. Vulnerable Adult Protection Orders\(^{54}\)

A vulnerable adult in cases of sexual abuse\(^{55}\) may seek an order of protection in superior court. A vulnerable adult is generally someone over the age of 60 who has the functional, mental, or physical inability to care for himself or herself; or is found incapacitated or who has a developmental disability or is admitted to any facility; or is receiving services from home health, hospice, or home care agencies or is receiving services from an individual provider.\(^{56}\) The petition shall allege that the petitioner is a vulnerable adult and that the petitioner has been sexually abused. A petition shall be accompanied by affidavit made under oath stating the specific facts and circumstances which demonstrate the need for the relief sought. A petition for

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\(^{51}\) Wash. Rev. Code §94A.46.040(1)(a)

\(^{52}\) Wash. Rev. Code §94A.46.040(1)(b)

\(^{53}\) Wash. Rev. Code §94A.46.040(2)

\(^{54}\) Wash. Rev. Code §74.34.110

\(^{55}\) Wash. Rev. Code §74.34.020(2)(a)
an order may be made whether or not there is a pending lawsuit, complaint, petition, or other action between the parties. A petitioner is not required to post bond to obtain relief in any proceeding under this section. An action under this section shall be filed in the county where the petitioner resides; except that if the petitioner has left the residence as a result of the sexual abuse or in order to avoid sexual abuse, the petitioner may bring an action in the county of either the previous or new residence. The filing fee for the petition may be waived at the discretion of the court.

The court shall order a hearing on a petition not later than 14 days from the date of filing the petition. Personal service shall be made upon the respondent not less than five court days before the hearing. If timely service cannot be made, the court may set a new hearing date. Pursuant to Wash. Rev. Code § 74.34.130, the court may order relief as it deems necessary for the protection of the petitioner, including, but not limited to the following:

- Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation;
- Excluding the respondent from petitioner's residence for a specified period or until further order of the court;
- Prohibiting contact by respondent for a specified period or until further order of the court;
- Prohibiting the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
- Requiring an accounting by respondent of the disposition of petitioner's income or other resources;
- Restraining the transfer of property for a specified period not exceeding 90 days; and
- Requiring the respondent to pay the filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee.

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56 Wash. Rev. Code § 74.34.020(13)
57 Wash. Rev. Code § 74.34.120

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"Any relief granted by an order for protection, other than a judgment for costs, shall be for a fixed period not to exceed one year. The clerk of the court shall enter any order for protection issued under this section into the judicial information system. When an order for protection is issued, upon request of the victim, the court may order a peace officer to assist in the execution of the order of protection."58 Additionally, the Department of Social and Health Services, in its discretion, may seek relief on behalf of and with the consent of any vulnerable adult. Neither the Department of Social and Health Services nor the State of Washington shall be liable for failure to seek relief on behalf of any persons under this section.59

**IV. RECORPDING OF PROTECTION, ANTI-HARASSMENT AND NO CONTACT ORDERS TYPES**

**A. Judicial Information System**

Orders of Protection, Anti-harassment orders are recorded in the judicial information system (JIS) to prevent the issuance of competing protection orders in different courts, and to give courts information for issuance of orders.60 JIS is available in each district, municipal, and superior court and should be consulted by judges before they issue any order for protection or anti-harassment orders. The mandatory forms for requesting these civil orders require the petitioner to disclose any other existing, and potentially competing, order as well.

**B. Full Faith and Credit**

Valid orders for protection entered in other jurisdictions are entitled to full faith and credit in Washington state61, and the Legislature has enacted law to help remove the barriers faced by people entitled to protection under so-called foreign orders. If the issuing court had jurisdiction over the parties and matter under the law of the issuing state,62 there is a presumption in favor of validity where the order appears valid on its face.63

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58 Wash. Rev. Code § 74.34.130
59 Wash. Rev. Code § 74.34.150
61 Wash. Rev. Code §26.52.020
62 Wash. Rev. Code §26.50.020 (defining “state” to include any territory, possession, tribe, or United States military tribunal.)
63 Wash. Rev. Code §26.52.020

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A sexual assault survivor with a valid order for protection from another state may file that order by presenting a certified or other authenticated copy of the foreign protection order to a clerk of the court of a Washington court where that person presides or where the person believes enforcement may be necessary. Copies shall be accepted by the clerk without cost, and the clerk shall assist the person in filling out an information form needed for processing the protection order.

C. Computer-Based Law Enforcement Information System (LEIS).

Orders for Protection, after issuance, are transmitted by the court to an appropriate law enforcement agency (usually defined as the county where the respondent lives), for entry into the computer-based criminal intelligence information system used throughout the state. No contact orders are also entered into this system for tracking purposes. Washington’s system is referred to as “LEIS,” and an order, once entered, stays in that system until law enforcement receives notice that the order has been expired, vacated, or superseded by another order. Entry into LEIS constitutes notice to all other law enforcement agencies throughout the state, and so the order is enforceable in any other county. When a sexual assault survivor reports the violation of an order of protection, or anti-harassment order, or NCO after it has been entered, there should be a record of that order available to any law enforcement officer anywhere in Washington state.

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64 Wash. Rev. Code §26.52.030(1)
68 Id.
69 Id. Was. Rev. Code §10.99.040(6);
70 Id.
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/Girlfriend
✓ Date
✓ Roommate
✓ Friend
✓ Acquaintance
✓ Other

What type of protection order may the victim qualify for?
✓ Domestic Violence Protection Order
✓ Anti-Harassment Order
✓ Vulnerable Adult Protection Order
✓ Criminal No Contact Order

Will the Protection 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 14-day hearing
✓ Privacy rights
✓ Scope of hearing
CHAPTER FOUR:
CRIME VICTIMS COMPENSATION FOR SEXUAL ASSAULT VICTIMS
CHAPTER FOUR
CRIME VICTIMS COMPENSATION FOR SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

The economic consequences of a sexual assault can be staggering. Victims may face significant medical bills, as well as costly counseling and mental health services. After an assault, victims also may miss work or school, or lose wages and benefits. This chapter is a guide to using the Washington Crime Victims Compensation Program (CVC). CVC is designed to help compensate victims of violent crime for the crime-related economic losses they suffer.

II. WASHINGTON PROGRAM ELEMENTS

A. Scope of the Program

CVC is a state compensation program administered by the Department of Labor and Industries.\(^1\) The program provides financial assistance to victims of violent crime, including rape and sexual assault. The program currently provides reimbursement of the following expenses:

- Medical
- Dental
- Counseling
- Partial payment of lost wages
- Partial payment of funeral costs
- Modifications to homes and vehicles to accommodate permanent injuries
- Limited pension payments if the crime permanently prevents the victim from returning to work
- Limited pension payments to the spouse or child of a deceased victim
- Counseling for family members of sexual assault and homicide victims
- All benefits have maximum dollar limits set by law

Please note that housing, moving, and relocation expenses are not covered. Also not covered are property losses, and lost wages for the parent of a child victim.

Costs are reimbursed at the rates established in the industrial insurance Medical Aid Rules and Fee Schedules and/or the Crime Victims Compensation Program Mental Health Treatment Rules and Fees booklet. A provider must accept these fees as payment in full and is prohibited from billing the victim or their insurance for the balance.

B. Benefits Covered

Medical and mental health benefits are capped at $150,000. The combination of non-medical benefits cannot exceed $30,000. Time-loss compensation (partial replacement of wages) can be up to $15,000. A victim of sexual assault may be eligible for time-loss compensation if she was gainfully employed at the time of the sexual assault or gainfully employed at least three consecutive months of the 12 months preceding the criminal act.

Vocational benefits are capped at $5,000. Most vocational services are provided by Department of Vocational Rehabilitation (DVR). Permanent partial disability awards for permanent loss of function may be granted at the time a claim is closed. The combination of disability award, time-loss and vocational benefits cannot exceed $30,000. Pension benefits are paid to victims for a permanent total disability when injuries are so severe they are unable to engage in any employment. Pension benefits, including any time-loss paid, cannot exceed $40,000.

In addition to providing coverage for treatment of eligible sexual assault victims, CVC can also provide coverage for counseling of the immediate family members of sexual assault victims. Counseling is provided for family members who:

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2 Wash. Adm. Code §296-30-090
3 Wash. Rev. Code §7.68.085
4 Wash. Rev. Code §7.68.070(13)
5 Wash. Rev. Code §7.68.070(14)
6 Wash. Rev. Code §7.68.070(7)
7 Wash. Rev. Code §7.68.070(8)
8 Wash. Rev. Code §7.68.070(13)
9 Id.
10 Wash. Adm. Code §296-30-080(1)

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psychological trauma as a result of the sexual assault, witnessed the assault, or need help in aiding the victim's recovery.\textsuperscript{11} Family members must first exhaust all other available resources before CVC will authorize payment for their treatment.\textsuperscript{12} Immediate family members include: parents, spouse, children, sibling, grandparents and any member of the household who assumes duties and is associated as a family member.\textsuperscript{13}

1. **Forensic Rape Examination**

Washington law mandates the cost of forensic rape exams to be paid by Crime Victims Compensation.\textsuperscript{14} The examination must be conducted for the purpose of possible prosecution. A victim of sexual assault does not need to file a claim with the Crime Victims Compensation program to be eligible for this benefit and may not be billed for these costs. However, if the examination includes any treatment costs or the victim requires follow-up treatment, an application for benefits must be filed for any of those treatment costs related to the assault to be considered for payment through the CVC.\textsuperscript{15}

C. **CVC Departmental Liens**

Funds recovered directly from the perpetrator, or the perpetrator’s insurance company, are subject to the CVC Department’s lien.\textsuperscript{16} This lien is created by benefits paid to the victim. Reimbursement is governed by the Department’s lien statute.\textsuperscript{17}

D. **Informing Victims About the Program**

The vast majority of sexual assault victims never learn about CVC. Consequently, often the best advice an advocate can provide to a victim facing economic loss is to tell her about the CVC Program. Victims should be advised that even if not experiencing immediate economic losses, they should still submit an application to the program. Once deemed eligible, victims can access compensation funds to cover future damages.

\textsuperscript{12} Wash. Rev Code §7.68.130(3)
\textsuperscript{13} Wash. Adm. Code §296-30-080(2)
\textsuperscript{14} Wash. Rev Code §7.68.170
\textsuperscript{15} Wash. Adm. Code §296-30-170
\textsuperscript{16} Wash. Rev Code §7.68.120 et Seq.
\textsuperscript{17} Wash. Rev. Code §51.24.060

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resulting from the current crime. Delay may cause ineligibility due to timing and statute of limitations problems.\textsuperscript{18}

E. Eligibility

In order for a victim of sexual assault to be eligible for Crime Victims Compensation benefits she must report the sexual assault to law enforcement within one year of the assault or when she would have reasonably discovered the assault occurred.\textsuperscript{19} Generally, she then must file her application to the CVC within two years of reporting the crime to law enforcement, absent a showing of good cause. “Good cause” is determined on a case-by-case basis and may extend the period of time in which an application can be received for up to five years after the date the criminal act was reported to law enforcement authorities.\textsuperscript{20}

The victim should complete and sign the application and mail it to: Crime Victims Compensation Program, PO Box 44520, Olympia, WA 98504-4520. Once the application is received, the victim will be notified in writing.

F. The Law Enforcement Reporting Requirement

Crime Victims Compensation funds are not available if the criminal act is not reported by the victim or someone on her behalf to one of the following authorities:\textsuperscript{21}

- Local law enforcement (city, county or state police agencies)
- Federal police
- Indian tribal police
- Military police
- Child Protective Services (when CPS has reported to local police).

If the sexual assault could not reasonably have been reported within the period required by the above authorities, it must have been reported within 12 months of when a

\textsuperscript{18} Wash. Rev. Code §51.28.050
\textsuperscript{19} Wash. Rev. Code §7.68.060(1)(a)
\textsuperscript{20} Id.
\textsuperscript{21} Wash. Adm. Code §296-30-060
report could reasonably have been made. In making determinations as to reasonable time limits, the department shall give greatest weight to the needs of the victim.\textsuperscript{22}

1. Cooperation

In order to be eligible for benefits, the victim must provide reasonable cooperation to law enforcement officials to apprehend and convict the assailant.\textsuperscript{23} Victims are not held ineligible if their failure to cooperate is based upon fear of retribution, or other considerations, such as threats, or financial dependence on the offender.\textsuperscript{24} Reasonable cooperation is interpreted liberally in favor of the victim. This includes consideration of other factors such as whether the victim is a minor, and whether there might be some other physical or mental disability that would inhibit the victim’s cooperation.\textsuperscript{25}

G. Comprehensive Review of Victim’s Expenses Related to the Assault

A practice step that can significantly enhance a victim’s ability to receive compensation is simple record keeping. It can be helpful for an advocate to work closely with a victim to draw up a comprehensive list of all the financial costs stemming from the assault, starting from immediately following the assault and continuing to the present. The advocate can assist the victim with documenting these expenses by collecting receipts, bills, affidavits, and other relevant documents.

H. Time Considerations for Compensation

Once a victim of sexual assault applies for CVC benefits she generally will be informed as to whether her claim is accepted or denied within six to eight weeks.

III. Assessing Eligibility

Undocumented victims of sexual assault are covered by CVC. If the person is a victim of a violent crime, benefits can be provided.\textsuperscript{26} The focus is on where the victim

\textsuperscript{22} Wash. Rev. Code §7.68.060(1)(b)
\textsuperscript{23} Wash. Rev. Code §7.68.070(11)
\textsuperscript{24} Wash Adm. Code §296-30-010(6)
\textsuperscript{25} Id.
\textsuperscript{26} Wash. Rev. Code §7.68.020(3)
resides and where the criminal act occurred, not the legal status of the victim. However, given the current political climate and the fact that Washington is a border state, it may be wise to consult with an immigration attorney prior to submitting an application for benefits if your client is undocumented. For additional information, or specific questions, contact the Crime Victims Compensation Program at 1-800-762-3716. TDD 1-360-902-4974. 27

A. Satisfying Key Requirements

Eligibility is determined by the statutes in effect on the date the criminal act occurred. To be eligible for CVC benefits, a person must be a victim of a criminal act. A “criminal act” 28 is an act committed or attempted in Washington state, which is punishable as a felony or gross misdemeanor under the laws of Washington state. This includes acts of domestic violence and alcohol/drug related crimes. A “victim” is defined as a person who suffers bodily injury or death as a proximate result of a criminal act of another person. 29

With respect to the criminal act requirement, the occurrence must be verified by the CVC or evidence which is reasonably credible. 30 The practical application of this policy is that CVC claims involving sexual assault victims tend to require verification. Claims are often verified on the basis of a police report alone. However, it is also departmental policy when evaluating evidence to determine verification, that the CVC gives greater weight to the quality, than to the quantity, of evidence. Evidence that can be considered for verification of claimed criminal acts includes, but is not limited to, one or more of the following: 31

1) Police or other investigation reports.

2) Child protective services or other government agency reports.

3) Diaries or journals kept by victims and others.

4) Third party reports from school counselors, therapists and others.

5) Current medical examinations.

27 www.lni.wa.gov/insurance/cvc/htm
28 Wash. Rev. Code §7.68.020(2)
29 Wash. Rev. Code §7.68.020(3)
30 Wash. Adm. Code §296-30-010
31 Id.
6) Medical or psychological forensic evaluations.
   (In the absence of other adequate forensic evaluation reports, independent assessments per Wash. Adm. Code §296-31-069 may be conducted when indicated).

7) Legal and historical reports.

8) Current and past medical and mental health records.

9) Reports of interviews with the victim's family members, friends, acquaintances and others who may have knowledge of pertinent facts. When such interviews are necessary to determine eligibility, the victim will be given the choice of whether to allow the interviews to be conducted. The victim also will be given the understanding that eligibility may be denied if the interviews are not conducted. The department will act according to the victim's choice.

A victim of sexual assault may be considered ineligible if it is determined that she “consented,” “incited,” or “provoked” the crime.\(^{32}\) According to the CVC Policy Manual, 3.00.9, “consent” means to give assent or to agree to by a course of action; to voluntarily allow what is planned or done by another. “Provocation” means to cause anger, resentment, deep feeling: to cause another to take action, to instigate. “Incitement” means to urge forward, to provoke to action: to goad.

A victim cannot apply for benefits when the injury occurs while the victim was engaged in an attempt to commit, or during the commission of a felony.\(^{33}\) A victim also is ineligible for CVC benefits if the injury occurred while incarcerated in any county, city or federal jail, or institution operated by the Department of Corrections or the Department of Social and Health Services.\(^{34}\) The victim also must provide reasonable cooperation to state or local law enforcement agencies in their efforts to apprehend and convict the assailant.\(^{35}\)

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\(^{32}\) Wash. Rev. Code §7.68.070(3)(a)
\(^{33}\) Wash. Rev. Code §7.68.070(3)(b)
\(^{34}\) Wash. Rev. Code §7.68.070(3)
\(^{35}\) Wash. Rev. Code §7.68.070(11)
**PRACTICE TIP: Advocacy**

If a victim’s claim is initially denied by CVC, prior to engaging in the formal appeal process, contact the claims adjustor directly and ask them about the basis for the denial. Sometimes claims are denied because the claims adjustor does not have enough information to make a proper decision. Advocacy cannot be underestimated in responding to CVC denials. *For a list of the regional claims adjustors, contact the legal program at WCSAP.*

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**B. Statute of Limitations**

An application for benefits must be received within two years of the police report, or within two years of the 18th birthday if the victim was a minor.\(^{36}\) Exceptions to timely filing include the following:

- For minors the time does not begin to run until their 18th Birthday.
- In repressed memory, the time in which to report the crime and file an application for benefits begins when the victim discovers, or reasonably could have discovered, the elements of the crime.\(^{37}\)
- For a victim involved in a civil commitment process of a sexual predator the time begins when they are notified of the proceeding or interviewed or deposed or testify in connection with the proceedings.\(^{38}\)

**C. "Fund of Last Resort"**

Crime Victims Compensation is considered a "fund of last resort." As a secondary payer, benefits for crime victims are given only after other available public and private resources have been exhausted.\(^{39}\) CVC has the statutory authority to assert liens against various insurance recoveries including life insurance and the victim's auto insurance. It also may seek restitution directly from the assailant.\(^{40}\) The victim is entitled to pursue

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\(^{36}\) Wash. Rev. Code §7.68.075  
\(^{37}\) Wash. Rev. Code §7.68.060(3)  
\(^{38}\) *Id.*  
\(^{39}\) Wash. Rev. Code §7.68.130  
\(^{40}\) Wash. Rev. Code §7.68.120
criminal restitution, civil actions\textsuperscript{41} and to appeal any decision made by the Crime Victims Compensation program.\textsuperscript{42}

IV. **Appeal Process**

Any decision made by CVC is subject to disagreement by a crime victim. Decisions are generally communicated by Order and Notices, which include protest and appeal rights and the addresses where they must be sent. Protest and appeal rights are governed by the Board of Industrial Appeals.\textsuperscript{43} The Board of Industrial Appeals is governed by Wash. Rev Code §51.52 et. Seq.

A. **Asserting Protection of Rights**

All the information below can be found at Wash. Rev. Code §51.52 et. Seq. If a victim of sexual assault disagrees with the decision made by CVC, she must send a written protest within 90 days of receiving the Order and Notice. Once the Board receives her appeal a copy will be sent to the Department to give it a final chance to reconsider its decision. If CVC decides to reconsider its decision, it will normally enter an order reassuming jurisdiction over the claim. This is known as an Abeyance Order. This order stops the appeal at the Board. The Board will then send an Order Returning Case to Department for Further Action. This will not affect the right to appeal from any further decision of the CVC.

If CVC does not reassume control of the appeal, it remains at the Board. The appeal is then reviewed to make sure the Board has the right to hear the appeal and make a decision. If the Board finds that an appeal is not from a final decision of the Department, the Board will not have the right to hear the appeal. In that case it will issue an Order Denying Appeal. This will not affect a victim’s right to appeal from any further decision of the Department.

If the appeal is filed within the time allowed by law and appears to be under the Board's jurisdiction, an Order Granting Appeal will be received. An order granting the

\textsuperscript{41} Wash. Rev. Code §7.68.050, Wash. Rev. Code §7.68.120, Wash. Rev. Code §7.68.130
\textsuperscript{42} Wash. Rev. Code §7.68.110
\textsuperscript{43} Id.
appeal does not mean the victim has won her appeal or that any relief will be granted. It simply means the Board agrees to hear the appeal and that further proceedings will be held.

**B. Representation Before the Board**

When appearing before the Board, a victim may represent herself. She may bring someone with her to give advice and support. At her request, this person will receive notice of all proceedings. She may also choose to be represented by a lay person (non-lawyer) or by a lawyer. The Department of Labor and Industries will be represented by a member of the state attorney general's office at all proceedings in which it is a party. Self-insured employers are generally represented by private attorneys. If her case cannot be settled in mediation, it would be wise for a victim to consider hiring a lawyer who understands the laws concerning her case. Usually a lawyer will accept a case on a "contingent fee" basis. That is, the lawyer will charge a fee only if he or she is successful in getting additional benefits on appeal.

**C. The Mediation Conference**

After an appeal is granted, the first proceeding scheduled by the Board will probably be a mediation conference. A mediation conference is an informal gathering of the parties with a mediation judge. The conference may be held as a telephone conference call or a face-to-face meeting of the parties. The Board will send out notices to all concerned parties letting them know the type, location and time of the conference.

The main purpose of the mediation conference is to try to settle the appeal without a formal hearing. The role of the mediation judge is to assist the parties in reaching a mutually acceptable resolution. That assistance may be in the form of: making informal contacts with one or all parties; providing information on relevant Board or appellate decisions; or reviewing with parties the likelihood of success of the appeal. The judge will review the Department's claim file and any information which the parties may have.

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44 Wash. Rev. Code §51.52.100
45 Wash. Rev. Code §51.52.095

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The mediation judge will look at the evidence supporting the requested relief and suggest what additional kinds of support may be necessary.

When notified to participate in a mediation or settlement conference, the victim will not need to bring witnesses. Testimony will not be taken. However, a record will be made to state the results of the conference. It needs to be clear on the record whether or not the Board has authority to hear the appeal. The victim should therefore bring a copy of the historical and jurisdictional facts. These will be sent with the notice advising her of the conference. This is a summary of the history of her case. She should be ready to discuss whether this history is correct and should bring any medical reports or other documents supporting the appeal. The victim should also be prepared to discuss the issues involved. Most importantly, she should be prepared to explain what it is she wants.

Several different settlement options may be explored in mediation. All settlement discussions will be kept confidential. One possible method of settlement is to arrange for an examination of the worker by one or more doctors. This will be done at the Board's expense, but everyone must agree beforehand that the results of this examination will be binding on all parties.

An appeal can be settled by an agreement of all parties who participate in the process. The agreement must be supported by the law and facts which have been agreed to by the parties. Often a medical report will be enough for an agreement. Once a settlement is reached, the Board will issue what is called an Order on Agreement of Parties. This order explains the terms of the settlement and directs the Department of Labor and Industries to take whatever action has been agreed to.

When a settlement cannot be reached, the mediation judge will gather information necessary to define and narrow the issues to be considered. The mediation judge may also make preliminary rulings which will control future proceedings in the appeal. However, the mediation judge will not make any decision resolving factual disputes without the parties' consent.

D. Hearing

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46 Wash. Rev. Code §51.52.102

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When an appeal does not settle in mediation, it is assigned to a hearings judge. This judge will schedule and conduct hearings. Board hearings are like trials in Superior Court. The original hearing in a worker’s compensation case is held either in the county where the injury occurred or the county where the worker resides. When necessary, the location can be changed. Everyone involved will receive a notice listing the location, date, and time of the first hearing. The judge may continue the hearing to another time. This allows all parties to have an equal chance to present their evidence.

The hearings judge will preside over the proceedings. Witnesses are sworn in and all testimony is recorded by a court reporter. Evidence will be admitted under the Rules of Evidence used in Superior Court. Under these rules, "hearsay" evidence such as a medical report is usually not acceptable. Instead, the doctor who prepared the report will need to testify.

There are two main differences between a Board hearing and a court trial. There is no jury at a Board hearing. Also, Board hearings are often held in public buildings, such as libraries. Despite these differences, all participants are expected to conduct themselves in an orderly and courteous manner. The person appealing the decision has the initial burden of presenting evidence. In cases where the Department is claiming that a worker has obtained benefits through fraud, the Department or self-insured employer must present evidence first.

The formal record established at the hearing will be the basis for any further decisions in the appeal process. Any evidence in support of the appeal should be presented at this time.

E. Proposed Decision and Order

When all hearings in an appeal are completed, the typed record of these hearings will be reviewed and a Proposed Decision and Order will be issued. The Proposed Decision and Order is made up of the judge's discussion and analysis of the evidence presented, followed by findings of fact and conclusions of law. The Proposed Decision and Order will direct the Department of Labor and Industries to take the action indicated by the decision. The Proposed Decision and Order becomes final 20 days from receipt.

47 Wash. Rev. Code §51.52.104

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unless a Petition for Review is filed with the three-member Board. If no Petition for Review is filed then the Board will enter a final Order Adopting Proposed Decision and Order.

F. Petition for Review

If there is disagreement with any portion of the Proposed Decision and Order, a request to the Board to review the Proposed Decision and Order must be submitted. A Petition for Review must be filed in writing, within 20 days from the date the Proposed Decision and Order was received. If this is not done, the decision will become final and the right to appeal to Superior Court will be lost. One may be able to receive additional time to file a Petition for Review by filing a written request for an extension of time within the 20-day time limit. A transcript of the proceedings also will be provided, free of charge, upon request. To file a Petition it must be delivered or mailed within the time allowed, to:

Board of Industrial Insurance Appeals
Petition for Review
2430 Chandler Court SW
PO Box 42401
Olympia WA 98504-2401

If mailed, a Petition is considered filed on the day it is sent. It should be titled "Petition for Review" and should include:

(a) The claim or firm number and the Board's docket number as shown on the Proposed Decision and Order;
(b) A statement of what is incorrect about the Proposed Decision and Order;
(c) Arguments supporting any objections, including references to legal authorities relied upon; and,
(d) The desired Board action.

A general objection to unfavorable evidence rulings is sufficient. However, any disagreement with any findings of fact or conclusions of law must be made as specific objections. The Board may refuse to review the case. In that event, it will issue an Order

48 Wash. Rev. Code §51.52.106

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Denying Petition for Review. This makes the Proposed Decision and Order the final order of the Board.

If the Board agrees to review the case, it will issue an Order Granting Petition for Review. The Board may decide to allow additional evidence, in which case the appeal will be returned to the Industrial Appeals Judge. However, the Board rarely allows the presentation of additional evidence. Any evidence the victim wishes the Board to consider should always be submitted at the initial hearings.

If the Board does not allow presentation of additional evidence, it will issue a final Decision and Order which will contain the Board's decision in the appeal, findings of fact, and conclusions of law. The Board must issue the final Decision and Order within 180 days of the date the Petition for Review was filed.
CRIME VICTIMS 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

Has the victim made a report to law enforcement?

✓ To Whom?
  □ Local police
  □ Tribal police
  □ State police
  □ Federal police
  □ Child Protective Services
✓ Is it within a year of the assault?
  □ If not, is good cause exception applicable?

Check statute of limitations issues and timing of application:

✓ Is it within two years of reporting to law enforcement?
✓ Is the victim a minor?
✓ Are there other reasons for delay such as mental or physical impairment?

Victim's Application:

✓ Date of assault
✓ Date of reporting to law enforcement
✓ Evidence and verification that a criminal act occurred
✓ Description of injuries
✓ Documentation of expenses

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CHAPTER FIVE:
EMPLOYMENT RIGHTS FOR SEXUAL ASSAULT VICTIMS
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EMPLOYMENT RIGHTS OF SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

A victim’s employment is subject to major disruptions after a sexual assault. When the assailant is a co-worker or knows where the victim is employed, a victim may miss days of work because she fears for her safety or she may need extra protection in her work environment. Regardless of where the assault occurred or who the assailant is, victims may need assistance in maintaining employment. Independent legal representation can help ensure that victims receive the help they need. This chapter provides an overview of the protections and remedies available to victims in the employment context.

II. PRACTICE CONSIDERATIONS

A. Privacy

Out of concern for personal privacy, fear of employer reprisal, or wishing to avoid gossip among co-workers, most sexual assault victims choose never to disclose the assault to their employers. Thus, victims often forego the employment benefits outlined in this Chapter, as all the remedies require a certain level of disclosure to employers and some degree of involvement by co-workers, such as the human resources department. Assessing and honoring a victim’s workplace privacy concerns is the first step in any legal representation.

If a victim chooses to pursue one or more of the strategies discussed below, a careful balance must be maintained between protecting her employment interests and protecting her privacy interests. At each juncture, confer with your client and make sure that she is aware of who will know, when they will know, and what they will know.

B. How to Work with Employers
Employers are often shocked to learn that an employee has been sexually assaulted, particularly when the assault has been committed by a co-worker or occurred on work premises. More often than not, the employer will not have prior experience with a sexual assault case and may look to you for guidance and advice. This is particularly true with a co-worker assault, if there is no criminal indictment, or if a small company with no in-house legal counsel is involved. In these situations, employers may be confused about how to respond in a way that protects the rights of both employees. In particular, small employers may hesitate to transfer, suspend or discharge the assailant. It is vital to explain to employers their legal duties to safeguard the well-being of the victim, to avoid a hostile work environment and to prevent retaliation against the victim for reporting the assault. An immediate plan should be put in place that accommodates the victim’s needs and rights, while also protecting the assailant’s own employment rights.

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 adjustments (e.g. periods of paid sick time followed by part-time employment, or changes in work schedule or location) needed to help the victim return to work. Providing the employer with a concise list of what the victim requires can help all of the parties contain their anxiety over how to transition effectively while also protecting the victim’s privacy.

III. SEXUAL ASSAULT PERPETRATED AT WORK OR BY A CO-WORKER

When the assailant is a co-worker or has some connection to the victim’s workplace, issues of physical and emotional safety are paramount. Even if the assailant is not a co-worker, he may know where the victim works and might attempt to contact her there.

A. Safety in the Workplace
There are a number of ways that you can help victims maintain their physical safety at work. *Please note if a victim has serious concerns for her physical safety, refer her to an experienced counselor immediately for comprehensive safety planning.*

1. **Enforcing Protective Orders**

Protective orders can be effective tools in protecting a victim’s safety at work. A court-issued order may also be useful in helping the employer transfer, discipline or discharge the assailant if he is also an employee. If the victim qualifies for an anti-harassment order or domestic violence protection order, or if there is a criminal case pending against the assailant, the court has the authority to order the assailant to stay away from the victim’s workplace.

**PRACTICE TIP: Enforcing Protective Orders in the Workplace**

If the victim has a protective order, or if you assist the victim in getting one, make sure it specifies the victim’s workplace. The victim should carry a copy of the order with her at all times. If appropriate, you should provide a copy of the order to the victim’s supervisor at work, the employer’s legal department and security personnel. Any of these people can call the police if the assailant shows up at the victim’s workplace. Such violations can result in further criminal sanctions against the assailant.

A victim may not be able to obtain a protective order against a co-worker. This does not prevent the employer from ordering the employee to have no further contact with the victim.

*Please see the Protective Orders Chapter of this Manual for specific details on obtaining and enforcing protective orders.*

B. **Sexual Harassment**

Sexual assault at work, and an employer’s failure to remedy or protect against that assault, may constitute what is referred to as “hostile environment” sexual harassment. This type of sexual harassment violates both federal and state law prohibiting sex discrimination in the workplace.¹

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1. Title VII of the Civil Rights Act of 1964\textsuperscript{2}

Title VII holds employers liable when unwelcome conduct of a sexual nature by co-workers or supervisors is so severe or pervasive that it creates an abusive work situation or “hostile environment.” The standard for employer liability for sexual harassment varies depending on whether the harasser is a supervisor or a co-worker. When the harasser is a supervisor, the employer is liable if the supervisor takes a tangible job action against the employee, such as demoting, firing, or giving the employee an undesirable work assignment. If there is no tangible job action, the employer is liable for the harassment unless it can establish a two-part defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the [victimized] employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”\textsuperscript{2} When the harasser is a co-worker, the employer is liable for sexual harassment that causes a hostile or abusive work environment if the employer knew or should have known about the harassment and failed to take prompt action.\textsuperscript{3}

The United States Equal Employment Opportunity Commission (EEOC) has defined sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.\textsuperscript{4} The first and second definitions are commonly referred to as “quid pro quo” sexual harassment; the third definition is known as “hostile work environment” sexual harassment.

An employee who has been sexually assaulted by another employee (corporate


\textsuperscript{3} Id. at 558, (quoting \textit{Faragher v. City of Boca Raton}, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662) (1998).

\textsuperscript{4} 29 CFR §1604.11(a).
officer, manager, supervisor or co-worker) or by the owner of the company may have a
civil claim of “sexual harassment” against her employer when the assault (1) constitutes
an actionable form of harassment, (2) occurs because of her gender and (3) is connected
in some manner to her employment.

In 1998 the United States Supreme Court issued two landmark decisions
involving sexual harassment claims – *Burlington Industries*, 524 U.S. 742, 118 S.Ct.
2257, 141 L.Ed.2d 633 (1998); and *Faragher*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d
662 (1998). The Court held that an employer will be held vicariously liable for an
actionable hostile work environment created by a supervisor with immediate or
successively higher authority over an employee. In those instances when no tangible
employment action has been taken against the victim (e.g., discharge, demotion or
undesirable reassignment), the employer may defend against liability by proving (1) it
exercised reasonable care to prevent and promptly correct any sexually harassing
behavior; and (2) the employee-victim unreasonably failed to take advantage of any
preventive or corrective opportunities provided by the employer or to otherwise avoid
harm. When the supervisor’s harassment encompasses tangible employment actions
against the employee, the employer cannot avail itself of an affirmative defense and will
be held liable. As to an employer’s liability for sexual harassment by an employee
towards a co-worker, the Court in dicta accepted the “unanimity of views” among the
lower federal courts that have implicitly treated such harassment as outside the scope of
common employees’ duties and have judged employer liability for co-worker harassment
under a negligence standard.

2. Washington State Law

The Washington Law Against Discrimination (WLAD), Wash. Rev. Code chapter

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5 “[I]n order to be actionable under the statue, a sexually objectionable environment must be both
objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one
that the victim in fact did perceive to be so. *Harris v. Forklift Systems, Inc.*, 510 U.S.17, 21-22, 114 S.Ct.
367, 370-371,126 L.Ed.2d 295 (1993). We directed courts to determine whether an environment is
sufficiently hostile or abusive by ‘looking at all the circumstances,’ including the ‘frequency of the
discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive
utterance; and whether it unreasonably interferes with an employee’s work performance.’ *Id.*, 510 U.S. at
23; *Faragher*, 524 U.S. at 787-788.

6 *Burlington Industries*, 524 U.S. at 764-765.

7 *Faragher*, 524 U.S. at 799.

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49.60, prohibits employers with eight or more employees from discriminating on the basis of sex in addition to other statutorily identified classifications.\(^8\)

In Washington, the leading case is *Glasgow v. Georgia-Pacific Corp.*, in which the Washington Supreme Court identified the legal elements of proof for a hostile work environment sexual harassment claim under RCW 49.60 as follows:\(^9\)

- **The Harassment Was Unwelcome.**
  
  The *Glasgow* court explained that “unwelcome” meant that the plaintiff did not solicit or incite it and further regarded the conduct as undesirable or offensive.\(^10\)

- **The Harassment Was Because Of Sex.**

  *Glasgow* expressly states that the question to be asked is “would the employee have been singled out and caused to suffer the harassment if the employee had been of a different sex? This statutory criterion requires that the gender of the plaintiff-employee be the motivating factor for the unlawful discrimination.”\(^11\)

- **The Harassment Affected the Terms Or Conditions Of Employment.**

  The *Glasgow* court distinguished between “casual, isolated or trivial manifestations of a discriminatory environment” that do not rise to a level affecting the terms and conditions of employment from harassment that is “sufficiently pervasive so as to alter the conditions of employment.”\(^12\) Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well-being of an employee is a question to be determined with regard to the totality of the circumstances.

- **The Harassment Is Imputed To The Employer.**

  *Glasgow* holds strict liability is imputed to the employer when there is proof that “an owner, manager, partner or corporate officer personally participates in the harassment.” When a plaintiff’s supervisor or co-worker has created the discriminatory work environment,

  the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt

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\(^8\) Wash. Rev. Code § 49.60.030, 49.60.180.


\(^10\) Id. at 406.

\(^11\) Id.

\(^12\) Id., at 406-407.

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and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer’s knowledge or constructive knowledge of it and (b) that the employer’s remedial action was not of such nature as to have been reasonably calculated to end the harassment.\footnote{Id. at 407. In \textit{Thompson v. Berta Enterprises}, 72 Wash. App. 531, 536, 864 P.2d 983 (Div. I 1994), the Court of Appeals held that an employer is strictly liable for quid pro quo harassment committed by its supervisory personnel. See generally e.g., \textit{Schonauer v. DCR Entertainment}, 79 Wash. App. 808, 905 P.2d 392 (1995); Wash. Rev. Code §49.60.180. The court adopted the 11th Circuit’s formula in \textit{Henson v. Dundee}, 682 F.2d 897 (11th Cir. 1982), regarding the elements that a plaintiff must prove to establish a claim of quid pro quo harassment under Wash. Rev. Code § 49.60, to wit: “(1) she belongs to a protected group, (2) she was subject to unwelcome sexual harassment, (3) the harassment was based on gender and (4) her reaction to the harassment complained of affected tangible aspects of the employee’s compensation, terms or conditions of employment.” \textit{See Henson}, 682 F.2d at 909. \textit{Id.} at 987.}

Decided in 1985, \textit{Glasgow v. Georgia-Pacific} remains the law today. While there have been relatively few Washington Supreme Court decisions regarding sexual harassment since \textit{Glasgow}, there have been a series of Court of Appeals decisions in all three divisions.\footnote{See generally e.g., \textit{Barker v. Botting}, 121 Wash. App. 1030, 2004 WL 938533 (Wash. App. Div. 3 May 3, 2004).}

For purposes of advising victims of sexual assault about whether they may have a claim of sexual harassment when the assailant is an owner, manager, corporate officer, supervisor, employee or client/customer of the employer, it is important to keep in mind that the courts will consider, in viewing the totality of the circumstances, whether the severity of a single incident is sufficient to alter the terms and conditions of the victim’s employment. A rape or violent sexual assault will likely meet that standard - an isolated squeeze of the breasts or pinch on the buttocks may not. In addition, victims must be sure that their employer knows about the sexual harassment or assault.\footnote{See \textit{Glasgow}, 103 Wash.2d at 407.} The courts will hold an employer strictly liable when it is an owner, corporate officer or manager who engages in the prohibited conduct.\footnote{See \textit{Glasgow}, 103 Wash.2d at 406.}

When the assailant is a co-worker or non-managerial supervisor who has engaged in the sexually harassing conduct, the courts may permit an employer to avoid liability if it takes prompt, remedial action reasonably calculated to end the harassment. Absent other mitigating facts, for example, a court may find that an employer has discharged its

\cite{5-7}
legal responsibility if it immediately places the assailant-employee on leave status while it conducts an investigation into the incident and subsequently terminates the employee when it determines that the employee did assault the victim. Thus, this sexual harassment victim may find herself without legal recourse against her employer because the employer, having taken prompt and corrective action, satisfied its legal obligations under *Glasgow*.

There are rarely witnesses to sexual harassment or assault in the workplace. Thus, the victim’s testimony, and therefore her credibility, may be the sole foundation of the case. A prompt complaint is considered more credible than one that is filed some time after the harassment occurred. Harassing or inappropriate letters and e-mails or other kinds of evidence (including semen stains on clothing) also may support the victim’s complaint, especially when the assailant denies the assault. Additionally, other sexual harassment complaints against the assailant will help to corroborate a complaint.

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**PRACTICE TIP: Protecting the Victim’s Rights During Company Investigations**

When a company receives an employee’s complaint of sexual harassment, the company may limit its liability for damages if it promptly investigates and responds to the complaint. Because a company is liable for any sexual harassment by its supervisors, regardless of whether the employer knew of or condoned the behavior, the employer may use the investigation to begin to prepare its defenses to potential litigation. Given the risk that any statements made may be used by corporate counsel concerned about company liability, the complainant/employee should consult with private counsel before answering any questions.

Internal investigations by an employer also may pose serious problems for a victim’s privacy interests. *For more information on how to protect your client’s privacy rights, consult the Privacy Chapter of this Manual.*

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**C. Retaliation**

Retaliating against a victim for complaining of sexual harassment is prohibited by law. It is not unusual, however, for a victim of workplace assault (or harassment) to find herself subjected to retaliation, a common manifestation of “blame the victim.” Work colleagues and allies of the assailant may turn against her. Supervisors may treat

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her unfavorably. The company may decide to transfer her (the victim) but not him (the assailant) or to change the victim’s work assignment, work hours or job site. Such actions may constitute prohibited retaliation subsequent to the employee’s having protested what she believed was unlawful sexual harassment.

Sometimes retaliation takes the form of violence or threats of violence. Once a sexual harassment complaint has been made, the harasser may retaliate by creating a more offensive or hostile work environment. Sometimes the employer retaliates by demoting or transferring the victim, rather than the harasser. Retaliation may result in a separate damages award and punitive damages against the employer.

1. **Wrongful Termination in Violation of Public Policy**
   **(Retaliatory Discharge)**

   There are a number of scenarios that can arise that would bring the sexual assault event into the workplace. For instance, an employee rapes or sexually assaults a co-worker or subordinate employee on company property or while on company business. The victim reports the assault to the company by way of a human resources representative or a management official. Perhaps she files a report with the local police department. The employer places both employees on administrative leave pending an investigation. Shortly thereafter, the company notifies the victim that she is (or they both are) being discharged.

   In a domestic violence situation, for example, the assailant might appear at, or repeatedly telephone, the victim’s workplace. In response, the employer tells the employee that if the assailant shows up again, she’ll be fired. A few days later, when the assailant reappears, the employee is discharged.

   One other example occasionally occurs. The employee being harassed obtains an anti-harassment order that includes a provision prohibiting the harasser from coming near her at her work site. The employer, however, informs the employee that it does not want to get involved in the employee’s personal, domestic matters and refuses to take a copy of the restraining order or recognize it. It tells her that if she persists, she’ll be fired. Or, the employer may say, upon receiving the restraining order and when both parties are employees, that it cannot guarantee the order will be followed – his job requires him to
come inside the prohibited distance – so it has no choice but to terminate her employment.\footnote{18}

These examples reflect exceptions to how most employers treat their employees who have been subjected to sexual assault. Regrettably, however, exceptions happen. When the employee-victim has been \textit{terminated}, she or he may have legal recourse against the employer.

In the landmark case of \textit{Thompson v. St. Regis Paper Co.}, the Washington Supreme Court held that an employer can be liable in tort for wrongful discharge if it terminates an employee for a reason that contravenes a clear mandate of public policy.\footnote{19} This exception to the at-will doctrine requires that “the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened.”\footnote{20}

The public policy exception has been recognized in the following contexts – when an employee is fired (a) for refusing to commit an illegal act; (b) for performing a public duty or obligation; (c) for exercising a legal right or privilege; and (d) in retaliation for reporting employer misconduct.\footnote{21}

In \textit{Gardner v. Loomis Armored, Inc.}, the Washington Supreme Court identified the specific elements that a plaintiff must prove to establish a claim of wrongful discharge in violation of public policy:\footnote{22}

\begin{itemize}
\item[(1)] the existence of a clear public policy (called the “clarity element”);
\item[(2)] that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (called the “jeopardy element”); and
\end{itemize}

\footnote{18} If it appears that the employer has a practice of refusing to recognize anti-harassment orders, the lawyer should consider whether there may be a sex discrimination claim in addition to a retaliatory discharge claim. \footnote{19} \textit{Thompson v. St. Regis Paper Co.}, 102 Wash.2d 219, 685 P.2d 1081 (1984). \footnote{20} \textit{Id.} at 232. \footnote{21} \textit{Hubbard v. Spokane County}, 146 Wash.2d 699, 707-708 (2002), citing \textit{Dicomes v. State}, 113 Wash.2d 612, 618, 782 P.2d 1002 (1989). \textit{This tort is only available when there has been a termination; it does not cover wrongful transfers, discipline, demotions, or other adverse actions short of dismissal. See White v. State}, 131 Wash.2d 1, 19-20, 929 P.2d 396 (1997). Sometimes, an employee who has been subjected to a sexual assault or other egregious conduct finds she simply cannot continue working at the same work site and therefore resigns or quits. In order to avoid application of the at-will doctrine and establish that the employer’s action constituted a “constructive discharge,” the employee must prove that the employer deliberately created the intolerable working conditions, forcing her to leave. \textit{Martini v. Boeing Co.}, 137 Wash.2d 357, 366 n.3, 971 P.2d 45 (1999); \textit{Bulaich v. AT&T Info. Sys.}, 113 Wash.2d 254, 261, 778 P.2d 1031 (1989). \footnote{22} \textit{Gardner v. Loomis Armored, Inc.}, 128 Wash.2d 931, 913 P.2d 377 (1996). © 2004 Victim Rights Law Center, Inc. 5-10
that the public-policy-linked conduct caused the dismissal (called
the “causation element”).
In addition, the defendant must not be able to offer an overriding justification for the
dismissal (referred to as the “absence of justification element”).

Wash. Rev. Code §26.50, the Domestic Violence Prevention Act (DVPA), was
passed in 1985 to provide victims of domestic violence expedient and effective access to
the courts. Legislative findings clearly set out the public policy behind the DVPA:

Domestic violence is a problem of immense proportions affecting
individuals as well as communities. Domestic violence has long been
recognized as being at the core of other major social problems: child
abuse, other crimes of violence against person or property, juvenile
delinquency, and alcohol and drug abuse. Domestic violence costs
millions of dollars each year in the state of Washington for health care,
absence from work, services to children, and more. The crisis is growing.

Wash. Rev. Code §26.50.060(1)(b) and (c) specifically provide that a petitioner
may seek a protection order excluding the respondent from the workplace of the
petitioner and prohibiting the respondent from knowingly coming within, or remaining
within, a specified distance from a specified location of the petitioner.

Attorneys should argue that an employee who is discharged because she has
accessed her statutory right to seek an order of protection to escape what the Legislature
has found to be a crisis of “immense proportions,” has a claim for wrongful discharge in
violation of public policy. Applying Wash. Rev. Code §26.50.030 for example, the
legislative findings regarding the DVPA establishes the existence of a clear public policy;
that public policy is jeopardized when an employer terminates an employee who seeks
the protection of the DVPA (and thereby discourages use of the law); and the employee’s
invoking her right to obtain (or enforce) a protection order prompted the employer to
dismiss her.

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23 Id. at 941.
database).
25 This same analysis applies to antiharassment orders obtained under Wash. Rev. Code § chapter 9A.46.
See Wash. Rev. Code § 9A.46.010 (“The Legislature finds that the prevention of serious, personal
harassment is an important government objective.”). A defendant charged with harassment may be ordered
to stay away from the victim’s home, school, business, or place of employment. See Wash. Rev. Code §
9A.46.040, 9A.46.050.
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2. Washington Law Against Discrimination

Sexual assault victims who become disabled on a temporary or long-term basis should consider requesting accommodation from their employer if an accommodation is needed to help the employee perform the essential functions of her or his job. Although an employer is not obligated to implement the specific accommodation that an employee requests, both the employer and employee are required to engage in an interactive process in good faith to devise an accommodation. It does not matter whether the disability arises from an injury or illness that occurred on the job or off work. It also does not matter if the disability is permanent, long-term or temporary.

Prior to the Americans with Disabilities Act of 1990 (ADA), persons with disabilities in Washington State were afforded protection under the WLAD, Wash. Rev. Code §49.60. Although Washington courts in interpreting the WLAD have turned to federal law for guidance, the WLAD’s protection of persons with disabilities differs significantly from the ADA. To begin with, unlike the ADA, the WLAD expressly provides that it is to be interpreted liberally.

Under Washington law, “disability” is defined as “the presence of any sensory, mental, or physical disability” when such a sensory, mental or physical condition is (1) medically cognizable or diagnosable; (2) exists as a record or history; or (3) is perceived to exist whether or not it does exist in fact. Recent court decisions have refined the definition and have held that “a disability is a sensory, mental, or physical abnormality that substantially limits the ability to perform the job.”

An employer has a duty to make reasonable accommodation for an “able worker

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26 The courts have held that an employer in fulfilling its duty to make reasonable accommodation is not required create a position for the employee, *Pulcino v. Federal Express*, 141 Wash.2d 629, 644, 9 P.3d 787 (2000), change the employee’s supervisor, *Snyder v. Medical Service Corp.*, 145 Wash.2d 233, 240-241, 35 P.3d 1158 (2001), or eliminate or modify an essential job function, *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 534, 70 P.3d 126 (2003).
29 *Pulcino*, 141 Wash.2d at 643.
31 Wash. Rev. Code § 49.60.020.
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with a disability” unless to do so would impose an undue hardship.\textsuperscript{34} Reasonable accommodations include such measures as making adjustments in job duties, work schedules or scope of work, making changes in the job setting or conditions of work, and informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified.\textsuperscript{35}

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\textbf{PRACTICE TIP: Evolving & Changing Case Law}
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Since passage of the ADA, Washington courts are increasingly looking to the more narrow federal law for “guidance,” notwithstanding the WLAD’s predating the ADA by 17 years. There are now an abundance of reported disability discrimination cases which should be reviewed if the sexual assault victim encounters difficulty with her or his employer regarding either unfavorable treatment on the job or a denial of a request for reasonable accommodation. \textit{See case law regarding Wash. Rev. Code §49.60 et. seq.}

\section{D. Washington's Unemployment Compensation}

Despite legal protections, many victims unfortunately lose their jobs as a result of sexual assault. Some victims may qualify for unemployment compensation. Recently, Washington amended its Unemployment Insurance code.\textsuperscript{36} Under Washington State law, a victim may be eligible for unemployment insurance benefits if leaving work was necessary to protect themselves from domestic violence or stalking. The enforcing agency must consider the individuals need to address the physical, psychological, legal and other effects of the abuse. Individuals qualifying for unemployment under this provision need not keep a job-search log.

Although the statute is intended to benefit battered women, the definition of “domestic abuse” is broad enough to include many victims of sexual assault. The statute provides benefits to victims who experience physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.\textsuperscript{37}

\textsuperscript{34} Wash. Admin. Code §162-22-025.
\textsuperscript{36} Wash. Rev. Code § § 50.20.050, 50.20.100, 50.20.240, 50.29.020.
\textsuperscript{37} Wash. Rev. Code § 26.50.010

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**PRACTICE TIP: Unemployment Compensation for Sexual Assault Victims**

Victims of sexual assault should apply for unemployment benefits under the Wash. Rev. Code §50.20. Although it is intended to benefit victims of domestic violence and stalking, many sexual assault victims also may take advantage of it. When the assailant is a boyfriend or ex-boyfriend or a date, the assault could fall under the statutory “dating relationship” definition of “domestic violence.” *For more detailed arguments relating to “dating relationships” and sexual assault, please see the Chapter on Protection Orders of this Manual.*

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E. The Unionized Workplace

If the employee is a member of a union, her contract may provide specific procedures for filing a sexual harassment complaint or a grievance charging retaliation. Many union contracts require that a complaint or grievance be filed within a specific time period, so it is crucial to review the contract as soon as possible following an assault.

IV. EMPLOYMENT ISSUES COMMON TO ALL VICTIMS

In situations where the assault is unrelated to work, most victims still face challenges in the workplace. A victim may need to take time off from work to participate in criminal or civil proceedings or to recover physically and emotionally, as a result she may lose job security and wages. Some victims may be temporarily disabled following the assault, and may experience post-traumatic stress disorder (PTSD) or other psychological injuries that necessitate accommodations at work. In a worst-case scenario, the victim may lose her job and require compensation on that basis as well.

A. Crime Victims

Victims are often torn between participating in the criminal process and meeting their responsibilities at work. Because the criminal process often requires the victim to miss time for work in order to assist in the investigation and to appear in court, her job may be in jeopardy. Pursuant to Wash. Rev. Code §7.69.030(8) deputy prosecuting
attorneys and the court may be able to assist victims who face employment problems by talking to the employers about the victim’s need to miss work and the right to do so without losing her job.

B. Sex Discrimination

If an employer allows male employees time off from work to attend to family court or child support proceedings, but refuses to allow female employees time off to seek protective orders, the employer may be discriminating against the female employees because of their sex.\textsuperscript{38} Such conduct may constitute sex discrimination in violation of Title VII and Wash. Rev. Code §49.60.030.

C. Family and Medical Leave Act\textsuperscript{39}

A victim who needs time off from work to seek medical attention and heal from serious injury resulting from sexual assault may be entitled to job-protected leave under the federal Family and Medical Leave Act (FMLA). The FMLA applies to private employers with 50 or more employees. A victim must have worked a minimum of 1,250 hours in the previous 12 months in order to be eligible for unpaid leave under the Act, and she must be suffering from a “serious health condition.” Post-traumatic stress disorder, depression, broken bones or strains caused by sexual assault may qualify as serious health conditions under the Act. The FMLA prohibits employers from discharging, retaliating against, or discriminating against a victim who has taken leave pursuant to the Act. The employer must continue to pay the victim’s health insurance premiums during the leave, and the employer must return the victim to the same or similar position at the end of the leave.

As of last year, Washington requires private and public sector employers with 100 or more employees to provide up to 12 weeks in a 24-month period, of unpaid, job-protected leave to their employees who have worked for the employer for one year, at


\textsuperscript{39} Runge, \textit{Domestic Violence as a Barrier to Employment}, at 554-55.

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least 35 hours per week during the year to care for a newborn, or to attend the terminal
health condition of a child under the age of 18.\textsuperscript{40}

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\textbf{PRACTICE TIP: Documenting Family and Medical Leave}\\
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Victims must seek some sort of medical attention in order to qualify for Family and Medical Leave. Employers retain the right to ask for certification from a medical provider in order to excuse an employee from work. Therefore, letters from doctors and therapists may be necessary to adequately document a victim’s eligibility for leave.\\
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\end{tabular}
\end{center}

\textbf{D. Americans with Disabilities Act\textsuperscript{41}}

Disabilities caused by rape or sexual assault may qualify victims for protection from discrimination, as well as reasonable accommodation in the workplace under the Americans with Disabilities Act (ADA). A disability is defined as any impairment that “substantially limits a major life activity,” such as walking, standing, thinking, lifting, or taking care of one’s self. Victims are also protected under the ADA even if they are only perceived as being disabled, regardless of whether they have some actual disability.

The ADA requires that the employer provide reasonable accommodations to the victim, so long as she is able to perform the essential function of her job. A modified work schedule, transfer to a different location, and changes in the workspace or equipment all qualify as reasonable accommodation. Employers cannot discriminate against employees who request such accommodations.

\textbf{E. Nonlegal Remedies Available Through Employers}

Victims should review their employment benefits in order to access non-legal resources as needed. Paid sick days, unused vacation time and holidays, and short and long-term disability leave all may be available as part of the victim’s employment benefits package. Using these benefits, a victim may be able to protect her job status and

\textsuperscript{40} Wash. Rev. Code §§ 49.78.020, 49.78.030 (2004).

\textsuperscript{41} 42 U.S.C. § 12102; 42 C.F.R. §825.114; Runge, \textit{Domestic Violence as a Barrier to Employment}, at 556-57.
receive some wages while taking time off work to address the physical, emotional, and legal repercussions of an assault.

Employers may also be able to protect the victim’s safety in the workplace. The employer should ask the victim what she needs to ensure her safety. Calls from the assailant may be screened or transferred to security personnel, and the victim’s name and telephone number can be removed from automated phone directories. The victim may want to relocate her workspace to a more secure area, or change her work schedule, work site, or work assignment. If the company is large enough to have a corporate security department, security officers can assist with the development of a workplace safety plan.42

**PRACTICE TIP: Privacy and Safety**

Accessing employment benefits requires a certain amount of involvement by employers and other co-workers. The victim may be required to disclose the sexual assault to her employer. A careful balance must be maintained between protecting a victim’s employment interests and maintaining her privacy interests.

**F. Crime Victims Compensation for Lost Wages**

As victims of violent crime, victims of sexual assault have the right to Crime Victims Compensation (CVC). Victims who have lost wages or employment as a direct result of an assault may apply for CVC benefits.43 Note, however, that CVC is a fund of last resort; if compensation for lost wages is available through some other source, such as workers compensation or unemployment insurance, the victim will be deemed ineligible for CVC benefits. CVC provides a maximum of $40,000 for non-medical benefits and $150,000 for medical treatment. *For a more detailed description of the program and how to apply, please see the Crime Victims Compensation Chapter of this Manual.*

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42 Runge, *Domestic Violence as a Barrier to Employment*, at 560
43 See the Crime Victims Compensation Chapter in this Manual.
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, court appearances, other
  ✓ Schedule changes
  ✓ Job security
  ✓ Other

What benefits is the victim entitled to under State and Federal Law?
  ✓ Unemployment Insurance benefits
  ✓ American with Disabilities Act
  ✓ Workers' Compensation
  ✓ Family & Medical Leave Act
  ✓ Crime Victim's Compensation benefits
  ✓ 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 criminal justice system or a protection order?
  ✓ Is there an active criminal investigation?
  ✓ Is there a protection order in place?
CHAPTER SIX
EDUCATION RIGHTS FOR SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

This chapter addresses the experiences and needs of victims of sexual assault in universities and colleges. It outlines the basic administrative, state and federal law protecting students. It is important to note that while there are many potential avenues of redress open to the victim, there are no easy choices. Proceeding against the assailant through a college or university’s internal administrative process may interact in complex ways with a criminal or civil tort case. The rules and remedies discussed in this chapter should be reviewed and understood as overlapping and intersecting those discussed in the criminal, protection order, and privacy chapters of this manual.

II. INSTITUTIONAL FRAMEWORK

A. Schools’ Authority to Address Sexual Assault

Generally, three sources of authority allow educational institutions to protect and assist student victims of sexual assault. First, colleges and universities have codes of conduct which establish behavioral norms for the community and a complaint or grievance process for violations of these norms. Second, colleges and universities are responsible for, and have authority over, their own property and campuses, including classrooms and dormitories. Finally, many educational institutions have a police authority. While some colleges and universities still maintain private campus safety forces, in Washington most use law enforcement with near complete criminal jurisdiction comparable to local police.

B. Identifying Schools’ Duties to Protect Students

Schools have specific duties to prevent and respond to on-campus sexual assault. These duties are derived from state and federal law. First, under various third-party-liability theories, colleges and universities may be held civilly liable for intentional torts committed on their campuses, by their students, or against their students. Second, federal laws, such as Title IX of the Civil Rights Act, the Jeanne Clery Campus Safety Act, and the Family Education Rights and
Privacy Act, prescribe particular duties. Yet, the specific standards that apply to a particular school will depend on whether it is a public or private, secondary or post-secondary school.

III. ASSESSING STUDENTS’ NEEDS

When a student has been raped or assaulted by another student – or group of students – on campus, every aspect of her life may be impacted. The first step in representing a student victim, therefore, is to assess what action may need to be taken to:

• secure her physical safety
• protect her privacy
• move her housing, or the assailant’s housing
• reschedule classes and examinations, or have the assailant removed from her classes
• preserve her extra-curricular programs
• address her employment/work-study concerns
• assess her financial concerns: scholarships and financial aid

It is vital to continually re-assess a victim’s physical safety, especially before taking any legal steps or requesting disciplinary action against the assailant or assailants.

A. Campus-Based Remedies

The campus-based remedies available to victims of sexual assault vary greatly from institution to institution. Student handbooks and campus policy and procedure manuals often list potential remedies for victims. Changes in a victim’s housing, class schedule, and exam schedule can be requested of the Dean of Students or the Dean of Residential Life. These remedies – which impact just the victim – are typically available even if the victim does not wish to use the college’s disciplinary process. It is much more difficult to remove assailants from campus housing or classes, or to compel assailants to stay away from the victim on campus. Some schools may issue a campus-wide "stay-away" order while the disciplinary process is pending. Some just require the assailant to stay away from the victim. Other universities issue mutual orders, where both the victim and the assailant are ordered to stay away from each other.
A school may be cautious about infringing on what it perceives to be the due process rights of a student accused of rape or sexual assault. Therefore, the college often will not take action against an assailant until the disciplinary process is completed and a violation of the student code of conduct is found.

If the victim is successful in demonstrating a violation of the student code of conduct, a disciplinary board may impose sanctions ranging from probation to expulsion. With probation, the assailant is typically allowed to stay on campus but may be monitored. Generally, subsequent misconduct will result in a harsher penalty. Some schools require the assailant to take a leave of absence until the victim graduates. The most serious sanction available 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.

B. Off-Campus Remedies

The legal remedies available to victims through both the criminal justice and civil process systems can help school officials make difficult choices and better protect victims within the school. Student victims may qualify for civil orders of protection orders under the Washington Domestic Violence Prevention Act, Wash. Rev. Code §26.50 or Harassment, Wash. Rev. Code §10.14. Please refer to the Protective Orders Chapter of this manual for more detailed information on obtaining and enforcing these orders.

**PRACTICE TIP: Helping Victims Make Difficult Choices**

One of the tough choices facing students participating in campus disciplinary proceedings is whether or not to pursue a protection or anti-harassment order at the same time. In these cases, special care must be taken at the 14-day hearing. Often, the assailant’s counsel uses that hearing as an opportunity to cross-examine and even intimidate the victim. Additionally, if the court denies the victim’s application, that finding may undermine the victim’s disciplinary case. When victims choose to pursue protection orders, every step should be taken to limit the scope of inquiry at the 14-day hearing. For more details, please refer to the Protective Order Chapter of this Manual.

IV. Practice Considerations

A. Protecting Students’ Privacy Rights
Privacy is a particularly acute need for students. If details about the sexual assault get out into the community, particularly if the assailant(s) is a fellow classmate, the resulting gossip and harassment can lead to isolation, withdrawal and even failure at school. More often than not, if the assailant is a fellow classmate, the school will “divide” - 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. Counsel must anticipate this sort of “toxic” community gossip and division following an allegation of sexual assault, and work with school authorities to minimize the backlash and protect the victim.

In addition, university student codes typically prohibit disclosing information during the disciplinary process. The Family Education Rights and Privacy Act prohibits disclosing the content of educational records to persons other than the student, or the student’s parent if she is a minor. Title IX of the Civil Rights Act prohibits sex discrimination at educational institutions, including hostile learning environments. For a more detailed review of these protections as well as those available under state law, see the Privacy Chapter of this Manual.

B. Assessing the Benefits of On vs. Off-Campus Remedies

Victims need thorough advising when making decisions about whether and when to use the student disciplinary process, the external criminal justice system, or to pursue potential civil damages and remedies. Each forum provides its own “justice” remedies for victims, but it may not be possible to pursue actions in each forum simultaneously, and one action may have significant impact on another. Victims are therefore confronted with difficult choices.

Universities should be able to swiftly offer the victim housing changes, changes in class schedule and exams, no contact orders and no trespass orders. Seeking to remove the assailant from a dorm, a classroom, or the campus, however, is more difficult. Even so, victims can access these remedies with relative ease and without the complications of the criminal and civil justice systems.

C. Relationship with Criminal Justice System

Records of school disciplinary proceedings are discoverable in Washington State criminal actions. (Wash. Rev. Code §10.52.040; Wash. R. Crim. P. 4.8; Wash. R. Civ. P. 34)
Consequently, student victims may be forced to choose between seeking a remedy within the college or university and seeking justice outside.

If a victim chooses to pursue criminal charges before accessing campus-based remedies, or if a school postpones its own disciplinary procedure until a criminal case is resolved, the victim often must co-exist with her assailant on campus, and her educational needs may not be addressed. Additionally, either student may graduate before the completion of the criminal case, rendering school disciplinary action moot. Given these considerations, many victims choose to forego either the disciplinary proceeding or filing a criminal complaint. It is crucial, therefore, for the victim to receive thorough counseling on the pros and cons of seeking off-campus remedies.

V. THE DISCIPLINARY COMPLAINT PROCESS

A. Each School has a Unique Disciplinary Process

1. Public Schools

Some university policies provide procedural guarantees beyond those required by law. Every institution handles sexual assault disciplinary issues differently, so the first step in every case is to review the university’s policies and its student handbook. Many handbooks are available on-line.

Most colleges and universities have adopted general procedures for resolving student complaints against other students. Typically, a student can file a complaint with the Dean of Students. An administrative board then determines 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 may invite students to meet and try to reach a mutual resolution of the complaint. Negotiating with her assailant can 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. For more information on the specific procedures at a particular university, consult that school’s policy manual.

2. Private Schools
To date, in Washington we have not identified any cases in which students have complained of due process violations under private school rules or disciplinary proceedings.

B. Does The Student Code Comply with Legal Duties?

A complicated web of state and federal law governs the college and university response to rape and sexual assault. Federal law includes the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (requiring universities and colleges to disclose the occurrence of violent crimes and to develop reporting procedures), the Family Educational Rights and Privacy Act (FERPA) (prohibiting schools from disclosing student records), and Title IX of the Civil Rights Act (prohibiting sex discrimination within education institutions). Please note that the discussions below are brief overviews of the law. The interpretation of these laws is complex, especially in the context of sexual assault, and the procedures for enforcing them are cumbersome. Please refer to the in-depth discussions of these laws at the end of this Chapter for more detailed explanations.

1. Complying with the Clery Act

Perhaps the most important sections of the Clery Act are the requirements that colleges and universities annually report violent crimes on campus, including rape and non-forcible sexual assault, publish alerts to any on-campus group that is in particular danger of being victimized, and establish and publish clear and reasonable reporting procedures and resources available for victims. While there is no private right of action available under the Act, colleges and universities that do not comply face sanctions. If a college or university has violated the Act, a complaint may be registered with the U.S. Department of Education.

2. Complying with FERPA

The Family Education Rights and Privacy Act (FERPA) ensures that students and their parents are not denied or prevented from accessing the students’ educational records. FERPA also prohibits schools from releasing information contained in educational records to persons

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2 20 USC § 1232g (2001).
4 20 USC § 1092(f).
5 20 USC § 1232g(a).
other than the student or parent without express written consent.\(^6\) FERPA makes various exceptions to allow disclosures, including exempting campus law enforcement reports from the category of private “educational records” and allowing for necessary disclosures when students pose safety risks to the school community. Additionally FERPA allows for disclosure when the request is pursuant to a subpoena. However, FERPA still requires notification to the student or the student’s parents if she is a minor. Students may seek injunctive relief based on FERPA.\(^7\) Additionally, the U.S. Department of Education issues significant sanctions against schools that violate the Act.\(^8\)

3. **Complying with Title IX**

Students at private colleges and universities might find additional protection under Title IX of the Civil Rights Act, 20 U.S.C. § 1681, which prohibits sex discrimination within educational institutions. The Department of Education’s Office for Civil Rights (OCR) has set out schools’ responsibilities in its Revised Sexual Harassment Guidance (2001).\(^9\) Educational institutions must:

- Respond promptly and effectively to sexual harassment.
- Adopt and publish grievance procedures.
- Designate an employee to coordinate compliance with Title IX.

If a school has not met these requirements, after exhaustion of campus-based remedies, complaints can be filed with the OCR. The OCR may force the school to take corrective measures or face loss of federal funding, but victims do not receive monetary damages.

Students who have suffered injuries as a result of a school’s violation of Title IX may also be able to pursue damages in civil actions. The U.S. Supreme Court has recognized a private right of action under Title IX by a victim against a school.\(^10\) Successful private claims have three main aspects:

- School official had *actual knowledge* of the assault.
- School has *control* over the assailant.

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\(^6\) 20 USC § 1232g(b).
\(^8\) 20 USC § 1232g(f).
\(^9\) Available at www.ed.gov/offices/OCR/shguide/index.html.
School failed to respond reasonably and acted with *deliberate indifference*.11

C. Investigation on Campus: Building a Case

Schools may look to outside legal precedent for guidance in what kinds of evidence to use. In Washington State, courts regularly admit statements from individuals to whom the victim has told about the rape under the “excited utterance” exception to the hearsay rule.12 Schools may find these statements useful as well. *Please refer to the Criminal Justice Chapter of this manual for more information on “excited utterance.”*

1. The Victim’s Statement

Most colleges and universities require the victim to submit a written statement to initiate a disciplinary process. The statement should contain as many specific details of the assault, and the circumstances leading up to it, that the victim can remember. The statement should also list potential witnesses who may have seen or spoken to the victim or assailant before or after the assault. If a police report was made or medical care received, including forensic rape kit examinations, that information should also be included. Finally, the statement should describe the victim’s experiences following the assault, such as depression, anxiety, fear, drop in grades, encounters with the assailant or his friends on campus, and harassment. Some schools allow a campus police officer or faculty member to bring the complaint on behalf of the victim. Consult the school’s policies and procedures for additional information concerning initiating the disciplinary process.

2. Witness Statements and Physical Evidence

Affidavits or statements also should be taken from the witnesses identified in the victim's statement. Any person who may know or have heard about the assault, particularly anyone who heard admissions from the assailant/s, or to whom the victim spoke immediately following the assault, should be interviewed. Witnesses such as friends, family members or roommates to whom the victim disclosed the assault after it occurred, could provide corroborating testimony for disciplinary proceedings. Healthcare providers, campus security officers, advocates who

11 Id.
12 Wash. Rules of General Application, Rules of Evidence 803(a)(2)
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.

PRACTICE TIP: Rape Kits and SANE Nurse Testimony

Victims should obtain their medical records from any hospital visit associated with the sexual assault. If a rape kit examination was performed by a SANE nurse (Sexual Assault Nurse Examiner), it is important to identify the attending nurse.

3. Obstacles to On-Campus Investigations

Conducting a thorough on-campus investigation may be difficult for several reasons. A victim’s concerns about privacy will be a primary barrier to investigation. Most victims want as few people as possible to know the details of the assault, especially when the assailant is a classmate. Additionally, many students lack the financial resources to hire a private investigator or to finance an extensive investigation. Accordingly, a victim may require that if an independent investigation takes place, it must be quiet and limited.

On-campus investigations face other potential road blocks. In the intense social environment on college campuses, students’ loyalties are often split between the assailant and the victim. This split is especially common where both parties are students and where one, or both, is a member of an extra-curricular campus group, such as a fraternity, sorority or athletic team. Because of these conflicting loyalties, fellow students may choose not to assist with the investigation, even if they have valuable information about the assault.

PRACTICE TIP: On-Campus Investigation

Not all college and university policies permit private investigation as part of the disciplinary process. Make sure to consult the individual institution’s policies and procedures before initiating an on-campus investigation.

D. Problematic Aspects of School Codes and Policies
1. Nonspecific Policies

The Clery Act assumes that colleges and universities have reliable procedures for reporting and redressing violent crime. The Act specifically states that procedures must be established which facilitate the reporting of crimes.\textsuperscript{13} Despite the Act, not every college or university makes it easy to report a crime, particularly a rape or sexual assault. More importantly, this failure may serve to discourage the victim from ever reporting the crime, violating the Clery Act’s requirement that established procedures \textit{facilitate} the reporting of crimes.

Policies that fail to specifically address sexual harassment, including sexual assault also may be in violation of the Department of Education’s Title IX Guidance on Sexual Harassment, which requires schools to adopt effective procedures for reporting and responding to sexual harassment. Furthermore, attorneys may argue that policies that do not provide minimum sanctions for rape and sexual assault may violate the Guidance, as they put the victim, as well as other students, at risk. If no serious sanction such as suspension or expulsion is available, there is no guarantee that the assailant will not assault another student. Policies that fail to establish minimum sanctions specific to rape and sexual assault may be unreasonable and may contribute to further sexual harassment and violence. Schools and universities could therefore be held liable for any further, specific harm suffered by a student attributable to inadequate policies and procedures under Title IX.

A school’s disciplinary policies may also fail to specify how rape and sexual assault investigations are to be conducted and what evidence will be considered. Such silent or unclear policies may be incompatible with a school’s responsibilities under Title IX,\textsuperscript{14} which requires schools to adopt and publish effective and reasonable grievance procedures.

2. Sanctioning Victims

A major barrier that prevents many victims from coming forward is fear that they may face sanctions in the disciplinary process. It is not unusual that the victim was assaulted while engaged in underage drinking or illegal drug use. School officials often, but not in every case,

\textsuperscript{13} 20 USC § 1092(f)(1)(c)(ii).
\textsuperscript{14} As designated by the DOE-OCR.
decline to pursue sanctions against the victim for these disciplinary violations. One could argue that sanctioning assault victims violates the Clery Act, which requires that reporting procedures facilitate reporting and encourage that it be done candidly.\textsuperscript{15} Sanctioning the victim also may constitute sex discrimination under Title IX.

### 3. Student Cross Examinations

In some university disciplinary proceedings, the assailant is allowed to question the victim. And, in most disciplinary proceedings, the victim is not allowed to be represented by counsel. Even if the victim’s attorney is permitted to be present, usually the attorney is not allowed to participate. It is difficult, therefore, to protect the victim from harassment, intimidation, and improper questioning. Accordingly, counsel for the victim should argue that permitting a student accused of rape to freely question his victim exceeds the scope of the assailant’s due process rights.

Allowing the assailant to question the victim also raises questions under Title IX’s requirement that school officials act promptly and reasonably to prevent further harassment. Student-on-student examination not only puts the victim at risk for further harassment, it 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 is unreasonable.

<table>
<thead>
<tr>
<th><strong>Practice Tip:</strong> Presence of Counsel</th>
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<tr>
<td>As a rule, colleges and universities do not allow legal representatives of either party to be present during internal disciplinary proceedings. Many times, attorneys will wait in the hall outside a hearing and the victim can exit and have a conversation if needed. Some permit legal counsel to be present, but do not allow counsel to speak or participate in the proceedings. Though precluded from participating in a hearing, an attorney may help a victim navigate the disciplinary process and participate indirectly, including helping to draft a statement or complaint and preparing affidavits, monitoring the type of evidence used or conduct allowed during the hearing. Additionally, attorneys may advocate for the victim in direct negotiations with the defendant student or his counsel. In place of 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.</td>
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\textsuperscript{15} 20 USC § 1092(f)(1)(c)(ii).
4. Forcing Victims to Chose Between Criminal vs. School Forums

College and university policies that postpone disciplinary proceedings until the criminal proceedings are completed are inappropriate as such policies effectively force victims to choose either the criminal process or the disciplinary process, but not both. Requiring students to make this choice is problematic in light of the Department of Education Office for Civil Right’s Sexual Harassment Guidance, which requires schools to take prompt and effective corrective action for harassment. A policy that postpones disciplinary proceedings until a criminal case is concluded prohibits prompt and effective responses to the assault, failing to meet the needs of victims and to remedy their educational environment for extended periods of time. Such a policy could be in violation of the Guidance.

VI. IN-DEPTH DISCUSSIONS OF LAWS

A. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

The Clery Act requires that colleges and universities be up-front about the occurrence of violent crime on their campuses and how they prevent and respond to it. Among the Act’s requirements, schools must:

- Report and publish incidents of violent crimes on campus including rape and non-forcible sexual assault;
- Post campus alerts to notify any group on campus that is in particular danger of being victimized;
- Establish and publish reasonable reporting procedures; and
- Establish and publish the availability of resources available to victims.\(^{16}\)
- The Act does not require that offending students be publicly identified.\(^{17}\)

Additionally, under the Clery Act schools must establish clear procedures that facilitate reporting of violent crimes on campus. Information required by the Clery Act must be available to current and prospective students and their parents. There is no private right of action available under the Act. Colleges and universities that fail to comply do, however, face significant

\(^{16}\) 20 USC § 1092(f).
\(^{17}\) Id.
sanctions. The U.S. Department on Education may impose fines of up to $25,000, and violations also jeopardize the institution’s receipt of federal aid and funding.  

B. The Family Education Rights and Privacy Act

The Family Education Rights and Privacy Act (FERPA) both limits and enables disclosures of information. FERPA ensures that students and their parents are not denied or prevented from accessing the information contained in the students’ educational records. FERPA also prohibits schools from releasing information contained in educational records to persons other than the student or parent without express written consent.

FERPA may seem to contradict the disclosures mandated by the Clery Act and disclosures necessary for effective disciplinary proceedings, but certain exceptions have been carved out for disciplinary and law enforcement proceedings.

- FERPA provides that the term “education records” specifically excludes records produced and maintained by law enforcement units of the school for the purposes of law enforcement.
- Additionally, the Act permits the disclosure of the results and nature of disciplinary proceedings to the victim of the offense and to other school faculty and officials who have legitimate interests as well as to other members of the community whose safety is at risk.

Sanctions for violating FERPA include the loss of federal funding and aid. Victims may file complaints with the Department of Education. Though FERPA does not provide a private right of action, injunctive relief may be sought via an action brought under the federal civil rights statute, 42 U.S.C. §1983.

C. Title IX Sex Discrimination

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Title IX of the Civil Rights Act prohibits sex discrimination, including sexual harassment, in public and private educational institutions. There are two means of assessing a school’s responsibilities under Title IX, each having its own requirements and remedies. First, student-victims may file complaints with the U.S Department of Education’s Office for Civil Rights (OCR). The complaint procedure is delineated in the OCR’s Revised Sexual Harassment Guidance. If the OCR finds that the school violated Title IX, it can compel the school to take corrective measures or face loss of federal funding. Second, the U.S. Supreme Court has recognized a private right of action under Title IX. Students can pursue civil complaints against universities that have engaged in sex discrimination or have subjected students to the hostile education environment brand of sexual harassment. In these cases, monetary damages are available.

1. Filing Complaints with OCR

The OCR has published a Revised Sexual Harassment Guidance which establishes the responsibilities of colleges and universities under Title IX concerning sexual harassment on their campuses. According to the Guidance schools must:

- **Take prompt and effective corrective action against sexual harassment.**
  - Sexual harassment can be a hostile environment that is the result of unwanted sexual contact and is pervasive enough to deny or limit a student’s ability to access or benefit from education.
  - Schools must take action upon notice of the harassment. This notice requirement can be satisfied two ways. First, schools that have actual knowledge, i.e. the victim has made a report, complaint, or has told a school official of the assault, have notice of the assault. Schools are also on notice if they should have known about the harassment. This can be established by showing that a school official witnessed the harassment,

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was aware of possible harassment, or with reasonable inquiry, would have found out about the harassment.

- Prompt and effective action is that which stops the harassment, prevents future harassment, and remedies the effects of the harassment.

- **Ensure that employees are trained to respond to and report harassment.**
  - This requirement is closely related to the notice requirement discussed above. School officials should be able to identify harassment and promptly respond to reporting it.

- **Adopt and publish grievance procedures.**
  - Grievance procedures should provide students with accessible information about how to file harassment complaints. The procedure should not be burdensome.

- **Appoint a staff member to coordinate compliance with Title IX.**

  Students must first attempt to resolve the harassment within the school before turning to the OCR. If the college or university has not responded promptly to the victim’s complaint and is not in compliance with the above regulations, the student can file a complaint with the OCR. Once a complaint is filed, the OCR will conduct an investigation and determine whether the school violated its Guidance. If the student’s complaint is substantiated, the OCR will require the school to take corrective measures. The OCR may monitor this process. In the event that the school fails to take the required corrective measures, the OCR may sanction the school by canceling federal funding.

2. **Private Actions Under Title IX**

   The U.S. Supreme Court has recognized a private right of action under Title IX. Before a Title IX complaint can be initiated, on-campus remedies must be exhausted. Then, the plaintiff

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must establish three factors. First, it must be shown that a school official had knowledge of the sexual assault. In cases where the assailant was a staff or faculty member, constructive knowledge can be imputed to university officials. In these cases, if an official knew - or should have known - about the assault or harassment, the school may be liable. In cases of student-on-student rape, a school official must have actual knowledge of the assault. 28 In most cases, this knowledge can only be shown if the victim reported the rape or sexual assault.

The second factor is control. Colleges and universities must have some degree of control over the assailant’s actions. As employers, educational institutions exercise significant control over faculty and staff. Therefore, if the assailant is a school employee – a professor, a residential advisor, a teaching assistant, or a janitor – the control requirement is easily met. Students, on the other hand, have a more attenuated relationship with school officials. Although educational institutions have a more or less custodial relationship with students who reside on campus, actual control over individual students and knowledge of their actions can be difficult to show.

Educational institutions are presumed to have control over properties and organizations within their immediate reach. 29 A rape or sexual assault that occurs in a residence hall or school-affiliated organization, such as a fraternity, is more likely to lead to liability under Title IX. Where an educational institution exercises some degree of control over students off-campus, liability may also be found.

Finally, after the sexual assault is reported, a college or university official must respond immediately and reasonably. A finding of “deliberate indifference” makes the school liable for future harm under Title IX. The notion of “deliberate indifference” is broad and encompasses each of the elements discussed above. A school that does not immediately respond in a way that is not clearly reasonable may be found liable for injuries suffered as a result of continued harassment. 30

28 Id.
29 Id.
EDUCATION CHECKLIST

Assessing Client Needs:

✓ Safety
✓ Employment
✓ Privacy
✓ Tuition
✓ Disciplinary process
✓ Financial aid
✓ Classes
✓ Housing
✓ Sports
✓ What are the 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 the victim have?
✓ What specific privacy concerns does the 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
CHAPTER SEVEN:
HOUSING RIGHTS FOR SEXUAL ASSAULT VICTIMS
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HOUSING RIGHTS FOR SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

This Chapter provides general information about public and private housing in Washington as it relates to sexual assault victims. While the chapter lists resources that may be available to a victim immediately following an assault, the focus is on long-term solutions. For short-term solutions and non-legal solutions, victims often look to emergency shelter placements and financial assistance from charitable and religious organizations.

A. Assess Current Housing Status

The first step in representing your client is to determine what kind of housing she is currently living in. Does she live in private unsubsidized housing or some form of publicly subsidized housing? This usually can be determined by reviewing the lease or rental application.

- **Private housing** is where the property owner receives no government subsidies for the property. People living in a mobile home in a mobile home park and where they only rent the land have different legal protections then those renting a house or an apartment.¹

There are various kinds of publicly subsidized housing in Washington, including:

- **Public housing** (sometimes referred to as “projects”) is housing which is owned and operated by a local public housing authority (PHA), e.g. Seattle Housing Authority (HA), Yakima HA and Bellingham HA.²

¹ For example, a mobile home park owner must issue a five-day notice to pay or vacate rather then the three-day notice issued to tenants in an apartment complex. See Wash. Rev. Code §59.20.080(1)(b), §59.12.030(3).
² For a list of housing authorities in Washington state: [www.hud.gov/offices/pihpha/contacts/states/wa.cfm](http://www.hud.gov/offices/pih/pha/contacts/states/wa.cfm). The listing indicates whether the PHA operates a public housing and/or Section 8 voucher program.
- *Section 8 Housing Choice Voucher* Program (aka “tenant-based assistance”) is where a family receives a housing voucher from the PHA to help pay the rent and the family is responsible for finding a landlord to accept the voucher and rent to the family. If the family decides to relocate, the voucher is transferred to the new residence.

**PRACTICE TIP: Client Choices**

Public housing provides the greatest legal protections to applications and tenants. However, families often prefer the Section 8 voucher program because they have more flexibility over where they can live. However, because of the program’s popularity, the waiting list for a voucher is often many years longer than the wait to get into public housing and other affordable housing programs.

- *HUD Multi-family Housing* Programs (also referred to as “project-based assistance”) is housing in which a property owner receives assistance from the U.S. Department of Housing and Urban Development (HUD), often a low-interest loan, to make the apartment rents affordable to low-income families. Families must make an application to the apartment complex where they wish to reside and if the family decides to move or is evicted from the complex, they lose the housing assistance which is tied to the unit they occupied. The unit is then rented to another eligible low-income family.  

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- *Low Income Housing Tax Credits* (LIHTC) is housing that is funded by tax credits that a for-profit or non-profit developer receives from the Internal Revenue Service (IRS). The rent in a LIHTC property is based on the number of bedrooms – not based on the number of people in the household or individual household income – and can be set as high as 30% of “area median gross income.”  

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4 A list of Washington LIHTC properties can be obtained at: [http://www.wshfc.org/property/property.asp](http://www.wshfc.org/property/property.asp).
PRACTICE TIP: LIHTC Income Adjustments Not Available

The rents for a LIHTC unit are more affordable than a unit receiving no government housing subsidies. However, the rents are not as low as the rents in HUD-funded properties, which generally are set at 30% of the family’s adjusted monthly income and the family’s rent is reduced or increased with decreases or increases in family income, respectively. Therefore, families who live in LIHTC housing also should apply for housing in a HUD-funded property which provides deeper rental subsidies.

The housing options available to a victim of sexual assault will depend on the type of housing she lives in, whether she needs to move to a location unknown to her assailant and the financial and other resources available to her.

B. Determine Victim’s Needs

The next step in effectively representing a victim is to carefully determine what housing remedies best suit her needs. A victim's relocation options differ with the type of housing in which she lives and the type of housing to which she seeks to move.

The remedies available to a victim include:

- Request a transfer to another unit or complex;
- Obtain priority status or qualify for some type of preference;
- Obtain a protection order to remove assailant from the home;
- Ask the landlord to change the locks;
- Terminate the lease with the landlord;
- Negotiate with the landlord to modify the terms of the lease agreement; and
- Ask the landlord to evict or move the assailant.

Which option(s) the victim exercises may depend on the financial resources available to her, the victim’s need to move to an undisclosed location, the need to be close to persons providing emotional and other support, and/or the victim’s need to be in close proximity to a medical/mental health provider.

Victims with minor children who do not have any source of income or work prospects may qualify for a monthly cash grant from TANF (Temporary Assistance for Needy Families), medical assistance and food stamps. To apply for these programs, send the client to their local DSHS (Department of Social and Health Services) office, aka “welfare” office.
C. Securing Housing Remedies

One of the key elements in effectively representing a victim’s housing needs will be to gather documentation of the harm sustained by the victim and offer that documentation in a manner that least compromises a victim’s privacy interests. Examples of effective documentation can include: police reports, letters from law enforcement, medical reports and letters from medical personnel, and protective orders. If the victim has not reported the sexual assault to law enforcement or sought medical or other support services prior to meeting with the attorney, an important first step will be for the attorney to assist the victim in establishing some record of the sexual assault such as undergoing a medical exam, filing a police report and/or filing a protection order.

Recently the Washington Legislature amended the state landlord-tenant laws to establish stronger protections for victims of sexual assault, domestic violence, and stalking. The new law is intended “to increase safety for victims of domestic violence, sexual assault, and stalking by removing barriers to safety and offering protection against discrimination.” These protections are available to tenants in both government subsidized and private housing. However, a victim of sexual assault may only avail herself of these legal protections if there is some third-party record of the sexual assault.

II. PUBLICLY SUBSIDIZED HOUSING

Rape victims who live in public or subsidized housing may be willing to relocate, or may want to have the assailant removed from the housing unit. Victims who live in private housing, but who are indigent or face financial difficulties after the assault, may face particularly acute
short and long-term housing problems. Subsidized housing is available for indigent and low- to moderate-income persons and may be well suited to a victim’s needs.

Victims will need help in either keeping or applying for government housing assistance. There are many types of local, state and federally funded housing programs and the rules for each program may differ. A common feature of most government funded housing programs is that the participant/tenant usually pays only 30% of their monthly income towards rent and the rent is adjusted if the family’s income increases or decreases. Also, most publicly funded housing programs require “good cause” for eviction/termination of the family’s housing assistance. In contrast, in private housing a landlord may evict a tenant without giving the tenant any reason for the eviction.\textsuperscript{12}

\textbf{A. Victims Already in Subsidized Housing}

Victims who live in subsidized housing may need to move after an assault, especially when the assault occurred in their home or was perpetrated by a neighbor. A victim may no longer feel safe in her home or may need to move for reasons related to a psychiatric or physical disability caused or compromised by a sexual assault. Under these circumstances, victims may want to transfer to another unit/complex, terminate the lease, or force the assailant to stay away from or vacate the residence.

\textbf{1. Transfers}

Some landlords, especially housing authorities, own and operate many different apartment complexes. Some housing authorities will have written policies allowing transfers for victims of a crime or sexual assault.\textsuperscript{13} In addition to, or instead of, obtaining a protection order or anti-harassment order, the victim may need to move in order to prevent the assailant from finding her. If the victim wishes to move and the landlord has other properties with vacancies, the victim should put the request and reasons for the transfer in writing.

\textsuperscript{12} Absent a lease, a landlord my evict a tenant after properly serving the tenant with a 20-day termination notice. Wash. Rev. Code §59.12.030(2). The landlord is not required to provide the tenant with a reason in the termination notice. \textit{Id.} However, the City of Seattle has a “just cause” eviction ordinance. SMC 22.206.160.C. So unlike in other areas of the state, Seattle landlords can only evict a tenant upon a showing of “just cause” for the eviction. \textit{Id.}

\textsuperscript{13} See 24 C.F.R. § 903.7(m)(PHA annual plan must include statement of PHA’s safety and crime prevention measures). If the PHA plan does not include a policy allowing victims of a crime, including a sexual assault, to transfer to an alternative, safer location, advocates may want to get involved in the PHA planning process to get the PHA to adopt such a policy.
In some cases, the victim may experience depression, anxiety, post-traumatic stress disorder (PTSD) or other physical or mental health problems. In such cases, the attorney, with the victim's permission, should have the victim evaluated by a medical and/or mental health professional and have the provider draft a letter briefly explaining the nature of the disability and the connection of the disability to their patient’s need to move from the current housing. The letter from the provider should also include the following phrase: “We are requesting the transfer as a reasonable accommodation.”14 If the landlord rejects the transfer request, the victim should file a fair housing complaint with one of the fair housing agencies described below.

**PRACTICE TIP:**  **Requesting a Reasonable Accommodation**

Victims or household members, including children, who experience mental health problems, e.g. depression, anxiety, post-traumatic stress disorder, etc., as a result of a sexual assault may request that the landlord transfer them to another unit or complex as a “reasonable accommodation” for their disabilities.15

2. **Terminating the Lease**

Victims of sexual assault and their household members may end a lease with the landlord by meeting the following three conditions:16

1) The victim must have either: A valid order for protection, including an anti-harassment order or criminal no-contact order issued under Wash. Rev. Code §10.99, or a record of reporting the incident of sexual assault to a “qualified third party.” A “qualified third party” means any of the following people: law enforcement officers, state court employees, doctors, nurses and other health care professionals, licensed mental health professionals or counselors, members of the clergy, or crime victim/witness program advocates.17 Although reporting to a qualified third party may help you end your lease, you should know that it does not provide you with the legally enforceable safety provisions that come with an order for protection.

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15 See, supra fn. 9.
2) The landlord must be notified in writing that the individual is a victim of sexual assault and a copy of the valid order for protection or the record of the report to a qualified third party must be included in the written notification.

3) The victim must inform the landlord that she will be moving out within 90 days of the incident of sexual assault, not 90 days from when the victim reported the incident.\(^\text{18}\)

If these three conditions are met, a victim of sexual assault may end her lease and move out without having to pay for the rest of the time on the lease. The victim is still responsible for rent due for the month in which she leaves even if she leaves in the middle of the month. Also, she is still entitled to a refund of the deposit.

If the victim has a Section 8 voucher, she must also send the PHA written notice that she is exercising her rights under Wash. Rev. Code §59.18.575 to terminate the lease. The PHA should then issue the victim a new voucher to search for a new residence. The voucher usually expires after 60 days, but often can be extended.\(^\text{19}\) The housing authority’s policies regarding extensions and maximum search times vary with each PHA, and can be found in the Section 8 Administrative Plan for the particular PHA. In addition, if the victim needs additional time to search for a residence because of a disability (physical or emotional), the PHA has a duty to extend the search period as a “reasonable accommodation.”\(^\text{20}\)

3. Ordering Assailant to Stay Away from the Property

A protection order or anti-harassment order can be helpful in removing the assailant from the victim’s home and/or keeping him a short distance from the victim’s home. However, other remedies exist to bar the assailant from the property entirely. A landlord may issue a “No Trespass” notice to the assailant and then have the assailant arrested for criminal trespass if he comes back to the property after receiving the notice.\(^\text{21}\) An individual can only be trespassing if he is not a resident of the property or after being lawfully evicted.

\(^{19}\) 24 C.F.R. § 982.303(b).
\(^{20}\) 24 C.F.R. § 982.303(b)(2).
\(^{21}\) See City of Bremerton v. Widell, 146 Wash.2d 561, 51 P.3d 733 (2002). Housing authority may “trespass” a nonresident from its property. However, even after receiving a trespass notice, a nonresident cannot be convicted of criminal trespass if he/she is invited onto the property by a resident. Although the trespassed individual is guilty of...
While a landlord must comply with a protection order removing the assailant from the victim’s home, such orders may not permanently remove the assailant from the unit or allow the landlord to remove the assailant’s name from the lease. To properly evict the assailant, the landlord must initiate an Unlawful Detainer action. Once the landlord obtains an eviction judgment and Writ of Restitution, the sheriff may forcibly remove the assailant, and the landlord may issue the trespass notice to the assailant and remove the assailant’s name from the lease.

B. Victims in Need of Affordable Housing

**PRACTICE TIP:** Submission of Multiple Applications

Usually, there is a wait to get into any affordable housing program, so attorneys should have their client complete as many rental applications as possible. There is no penalty for applying to multiple housing programs.

1. Types of Affordable Housing Programs

There is no single application or waiting list for the variety of affordable housing programs that exist. There also is no penalty for submitting an application to multiple housing programs or landlords. However, once an applicant moves into an affordable housing unit, it is unlikely the applicant will continue to qualify for a “preference/priority,” as described below. In other words, once a victim receives housing assistance from one affordable housing program, it becomes more difficult for the victim to qualify for other affordable housing programs because applications are ranked based on need for affordable housing.

C. Qualifying for a preference or priority

Many housing authorities try to house families based on need for affordable housing. “Preferences” or “priorities” are the housing authorities’ way of ranking the hundreds of thousands of applications they receive each year. In the past, HUD determined the type of preferences, e.g. homelessness, living in substandard housing, etc., that the PHA adopted.

criminal trespass if he/she exceeds the scope of the resident’s invitation; for example, “proceed[ing] at will to a part of the premises wholly disconnected to the purpose of the invitation . . .” *Id.* at 573, 739.

However, Congress repealed the federal preferences in 1998 and gave the PHAs the discretion to adopt local preferences.\textsuperscript{23} While HUD encouraged PHAs to adopt preferences for victims, the PHAs were not required to do so.\textsuperscript{24}

Attorneys need to ask the local PHA if it has a preference for victims of sexual assault. If one of these preferences exists, write a letter explaining why the victim should qualify for the preference. Additionally, attorneys need to determine if there are other preference categories that the victim may qualify for. For example, if a victim is assaulted in her home, by someone who knows where she lives and the assailant threatened to harm her in the future or if it is likely he may retaliate after she reports to the police, she may be forced to flee her home. Accordingly, many sexual assault victims will qualify for a “homeless” preference.

Qualifying for a preference does not mean that the individual will immediately receive housing assistance. Again, hundreds, if not thousands, of applicants qualify for these preferences each year, so each new applicant is placed on a waiting list with everyone else who qualified for the preference. Applicants are then awarded housing based on their place on the waiting list – usually determined by their application date, though some PHAs use a random lottery system – and those with the earliest application date (or lottery number) are awarded housing first and so on.

To strengthen the client’s application, attorneys should submit a letter in support of their client’s application. The letter should focus on attributes, such as timely payment of bills and being a good neighbor, which landlords look for when considering a rental application. Some housing providers, usually the housing authorities, also require an applicant to provide positive references from prior landlords. In such a case, the attorney should assist the victim identify professionals, e.g. medical providers, employers, school officials, volunteer coordinators, shelter providers, etc., who could write a supportive letter for the victim. While all these individuals may not be able to directly comment on whether the victim would be a good tenant, they can speak to such things as whether the victim paid their bills, showed up in a timely manner for appointments, interacted well with the provider and staff, etc. These qualities help the PHA evaluate whether the applicant would be a good tenant.

\textsuperscript{24} 42 U.S.C. § 1437f(o)(6)(A)(i).
D. Liability and Duty of the Housing Authority

Under state law, a landlord, including a government landlord, may not terminate a tenancy, fail to renew a tenancy, or refuse to enter into a rental agreement based on the individual's status as a victim of sexual assault, or because the individual terminated a rental agreement as permitted under Wash. Rev. Code §59.18.575. However, a landlord may reject the application from a victim for other lawful reasons, such as a history of nonpayment of rent or a history of criminal activity, unrelated to the sexual assault.

1. Denial of Applications

A landlord who refuses to enter into a rental agreement in violation of the aforementioned state law may be liable to the applicant in a civil action for damages sustained by the applicant. The prevailing party may also recover court costs and reasonable attorneys' fees.

In addition, public housing and Section 8 voucher applicants who wish to contest a denial of their housing application have the right to an informal (administrative) hearing to contest the decision. Attorneys working with victims can help increase the victim’s chances of prevailing at the hearing by helping the victim identify professionals such as social services providers, counselors, doctors, employers, clergy and others who could write a letter supporting the victim’s housing application. Attorneys also should ask for a copy of the PHA’s admissions criteria – public housing admissions policies are found in the “Admissions and Continued Occupancy Policy” Manual, while Section 8 voucher policies are found in the “Section 8 Voucher Administrative Plan.”

The rights applicants have to contest an adverse decision vary with each program and usually can be determined by requesting a copy of the admissions policy. Even in the absence of any clear written admissions policy, a victim has the right to request that the landlord provide her with a written reason for denying the application. If the landlord mentions that the denial was based on information from a tenant screening company, ask for the name of the screening company, then contact the company and ask for copies of the information they received about the applicant and dispute any inaccurate or incomplete information.

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27 See 24 C.F.R. § 960.208.
2. **Unlawful Discrimination**

If the victim believes that the landlord rejected his/her application for discriminatory reasons, he/she may file a complaint with the HUD Office of Fair Housing and Equal Opportunity (FHEO) at 1-800-669-9777, TTY 1-800-927-9275 or with a local fair housing agency such as the Seattle Office of Civil Rights (SOCR). These agencies, however, would not be able to investigate or charge the landlord with violations under Wash. Rev. Code §59.18.580 because the rights are unique to that Washington state law, but would investigate and charge a landlord with violations of the federal and local fair housing laws, respectively. If your client has experienced discrimination because she is a victim of sexual assault, file a discrimination complaint with the Washington State Human Rights Commission (HRC) by contacting 1-800-233-3247, TTY 1-800-300-7525.

3. **Eviction**

State law prohibits a landlord, including a government landlord, from evicting a tenant because he/she was a victim of a sexual assault. Therefore, if a landlord attempts to evict a tenant because he/she was a victim of a sexual assault, the tenant may raise as a defense in the eviction action that the eviction violates the provisions of Wash. Rev. Code §59.18.580(3).

E. **Subsidized Housing and Non-U.S. Citizens**

*Please note that accessing certain cash based public benefits, may complicate subsequent naturalization, adjustment of status, and re-entry into the United States, triggering the Immigration and Naturalization Act’s Ground for Inadmissibility based on an immigrant’s “Danger of Becoming a Public Charge.” An immigration attorney should be consulted if there are any concerns that accepting housing assistance will jeopardize a client’s immigration status.

**PRACTICE TIP: Eligibility**

A victim may be eligible for government subsidized housing even if no one in their household is a U.S. citizen or has a green card. Living in subsidized housing will not hurt an individual’s chances of getting a green card or re-entering the U.S. after being abroad.

1. **Housing programs available to all immigrant families:**
   - Short-term housing assistance, such as homeless and battered women’s shelters;\(^{30}\)
   - Local and state funded housing programs;\(^{31}\)
   - Low Income Housing Tax Credit housing;
   - Section 231 (insurance mortgages for housing for elderly);\(^{32}\)
   - Section 221(d)(3) (unless receiving Rent Supplement or Section 8 funds);\(^{33}\)
   - Section 515 (rural housing);\(^{34}\)
   - Section 811 (supportive housing for disabled);\(^{35}\) and
   - Housing Opportunities for People with AIDS (HOPWA).\(^{36}\)

2. **Housing programs only available to citizens or “eligible” immigrants**

   While a victim does not have to be a citizen or permanent resident in order to receive state-assisted housing, he/she must verify that at least one household member, even a child, is a

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\(^{31}\) See Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61344, 61361 (November 17, 1997) (governmental entity or private entity not receiving federal funds can provide benefits, such as housing benefits, without verification of citizenship or immigration status unless other source requires verification).
\(^{34}\) 42 U.S.C. § 1485.
\(^{35}\) 42 U.S.C. § 8013(b)(1).
\(^{36}\) 42 U.S.C. § 12901.
citizen or “eligible” immigrant to qualify for HUD funded housing assistance. “Eligible” immigrants are:

- Aliens admitted for lawful permanent residence (LPR) – persons with a “green card”;
- Refugees and persons granted asylum;
- 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;
- Aliens lawfully present as a result of the Attorney General’s withholding deportation; and
- Aliens lawfully admitted for temporary or permanent residence.

If every household member is a citizen or an eligible immigrant, the family will receive a full housing subsidy. A “mixed” family – a family with some members who have U.S. citizenship or eligible immigrant status and some without U.S. citizenship or eligible immigrant status – will not receive a fully housing subsidy; rather their housing assistance will be “prorated.” Proration essentially means that the subsidy is reduced so that only the household members with citizenship or eligible immigration status receive a rent subsidy.

3. Housing programs that verify immigration status are:

- Public housing;
- Section 8 Voucher and programs receiving Section 8 funds: Section 202 projects (only units with Rent Supplement or Section 8 assistance);

37 24 C.F.R. § 5.506(b).
38 24 C.F.R. § 5.506(a)(2)(citing 42 U.S.C. § 1436a(a)(defines who is an eligible immigrant)).
39 24 C.F.R. § 5.504(b)(3).
40 24 C.F.R. §§ 5.516, 5.518 and 5.520.
41 The different HUD programs have different formulas for prorating the housing subsidy. See 24 C.F.R. § 5.520(b).
42 24 C.F.R. § 5.500(a); see also 4350.3 HUD Occupancy Handbook, Chapter 3: Eligibility for Assistance and Occupancy, p. 3-21(lists the HUD multifamily housing programs that restrict assistance to noncitizens).
Section 236 program (for tenants paying below market rent only);
Properties receiving Rental Assistance Payments (RAP);
Properties receiving Rent Supplements; and
Section 514/516 programs (only farm laborer required to verify eligible status).\(^{43}\)

**PRACTICE TIP: Full Disclosure in Applications**

Applicants should not conceal the identity of anyone who will be living in the unit or use false documents to qualify for a housing subsidy. Doing so will result in termination from the program for fraud and expose the individual to criminal charges, which could result in deportation.

4. **Verifying Social Security Numbers**

Housing programs that require proof of U.S. citizenship or eligible immigration status also require any household members who claim eligible immigration status to provide proof of a valid Social Security number (SSN).\(^ {44}\) Household members who do not claim to be eligible for a housing subsidy should *not* be required to provide a SSN.

Landlords who receive Low Income Housing Tax credits (LIHTC) often will demand that applicants provide proof of a valid SSN in order to qualify for a LIHTC unit; however, there is no statutory authority for LIHTC properties to impose such a requirement.

**III. PRIVATE HOUSING**

**A. Liability and Duty of Private Landlords**

Like government landlords, private landlords also are prohibited from terminating a tenancy, failing to renew a lease, or refusing to rent to an individual because the individual was a victim of a sexual assault, domestic violence or stalking or because the individual terminated a rental agreement as permitted under Wash. Rev. Code §59.18.575.

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\(^{43}\) 7 C.F.R. § 1944.153.
\(^{44}\) 24 C.F.R. §§ 5.216 and 5.218.
For any housing program, carefully review the denial letter for any deadlines for appealing the decision. Where applicable, immediately submit a letter disputing the decision denying the rental application. Even if the denial letter does not mention any appeal rights, ask for a meeting with the owner/manager (with authority to reject or approve the application).

B. Unlawful discrimination

If your client has experienced discrimination because he/she is a victim of sexual assault, file a discrimination complaint with the Washington State Human Rights Commission (HRC) by contacting 1-800-233-3247, TTY 1-800-300-7525. In addition, if a landlord has denied housing to your client because of her status as a victim of sexual assault, the landlord’s actions may violate local, state and federal fair housing laws, warranting a complaint with one of the fair housing enforcement agencies listed above.

C. Terminating a Tenancy or Lease

Pursuant to Wash. Rev. Code §59.18.575, a victim of sexual assault, including household members, may end a lease with the landlord by meeting the following three conditions:

1) The victim must have either:

   a. A valid order for protection, anti-harassment order or no-contact order OR

   b. A record of reporting the sexual assault to a "qualified third party”.

        i. A “qualified third party” means any of the following people: law enforcement officers, state court employees, doctors, nurses and other health care professionals, licensed mental health professionals or counselors, members of the clergy, or crime victim/witness program

45 See, Alvera v. C.B.M. Group et al., No. CV 01-857-PA, Consent Decree (D. Or. 2001) (denying housing to victims of domestic violence has disparate impact on women and as such constitutes unlawful sex discrimination).
advocates.\textsuperscript{46} Although reporting to a qualified third party may help a victim end her lease, it does not provide any legally enforceable safety provisions that come with an order for protection.

2) The landlord must be notified in writing that your client is victim of sexual assault and attach a copy of the valid order for protection or the record of the report to a qualified third party to your letter.

3) Inform the landlord that the victim will be moving out within 90 days of the incident of sexual assault. It is 90 days from the date the incident occurred, not 90 days from when you reported the incident.\textsuperscript{47} A third party report must include the following elements:\textsuperscript{48}

- It must be signed and dated by the qualified third party.
- It must state that the tenant or the household member notified him or her that he or she was a victim of an act or acts that constitute a crime of sexual assault
- It must state the time and date the sexual assault occurred.
- It must indicate the location where the sexual assault occurred.
- It must provide a brief description of the sexual assault.
- The tenant or household member must inform the landlord of the name of the assailant

If these three conditions are met, a victim of sexual assault may end her lease and move out without having to pay for the rest of the time on the lease. The victim is still responsible for rent due for the month in which she leaves, even if she leaves in the middle of the month, but will be entitled to a refund of her deposit.

**D. Eviction in Private Housing**

Additionally, under Wash. Rev. Code §59.18.580, a landlord cannot legally terminate a victim's lease, refuse to renew her lease, evict her, or refuse to rent to her because she is a victim of sexual assault. The landlord can end your tenancy or evict you for other lawful reasons, such as failure to pay rent. If you believe the victim is being discriminated against by a landlord

\textsuperscript{46} Wash. Rev. Code §59.18.570(4).
\textsuperscript{47} Wash. Rev. Code §59.18.575(1)(b).
\textsuperscript{48} Wash. Rev. Code §59.18.575(1)(b)(i)-(v)
because she is a victim of sexual assault, she may be entitled to financial compensation from the landlord.

- A victim should not move out in response to a landlord’s threat of eviction or even after the landlord gives the victim a notice of eviction.
- The victim should continue to pay the rent.
- If the landlord refuses to accept the victim’s rent payment, the victim should not spend the rent but instead, set it aside as rent so she is not tempted to spend the rent.
- The victim should immediately file a discrimination complaint with the fair housing agencies described above.
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
✓ Eviction in private housing

What are the possible non-legal remedies?

✓ Emergency housing shelters
✓ Family or friends
CHAPTER EIGHT:
NONCITIZEN VICTIMS OF SEXUAL ASSAULT
CHAPTER EIGHT
NONCITIZEN VICTIMS OF SEXUAL ASSAULT

I. INTRODUCTION

A. Reassure Immigrant Sexual Assault Victims about Confidentiality

Immigrant victims of sexual assault may be extraordinarily wary about seeking help or reporting the crime following a sexual assault. Generally, noncitizens are concerned about their immigration status and are cautious about protecting their interests. This is especially true for persons who are not legally present in this country. Therefore, at the start of any consultation, it is necessary to reassure a victim that anything she says to you will remain confidential unless she chooses otherwise. In fact, it may be necessary to regularly reassure the victim of attorney/client privilege and confidentiality.

B. Secure Supervision by an Experienced Immigration Attorney

Immigration laws and regulations are complex. No manual, such as this, can adequately prepare an inexperienced attorney to represent a noncitizen with an immigration issue. Therefore, the first imperative in working with immigrant sexual assault victims is to secure supervision by an experienced immigration attorney.

If you cannot secure such supervision, you should refer sexual assault victims with questions concerning their immigration status to an immigration advocate with expertise in domestic violence or sexual assault. This chapter provides basic information about immigration issues that arise in the context of sexual assault, but this information is intended only to assist you in exploring noncitizens' options. Do not advise noncitizen victims on what their immigration status is or how they can change that status. The risks of providing incorrect advice – which include arrest and deportation – are too great.

This cautionary rule also applies to immigration advocates who are not aware of how sexual assault may impact a victim’s immigration status. Some advocates have never worked with noncitizens who are victims of sexual violence. Share this manual with immigration
advocates with whom you consult¹ and use your knowledge to push them to examine all possibilities.

C. Secure Competent and Sensitive Translation Services

If you have any doubt about your ability to communicate effectively with a client because of language differences, seek support from a competent and trained translator. In Washington State, referrals are available for sexual assault victims. Please contact your local rape crisis center.

II. Practice Considerations

- Never tell a noncitizen to go to the Department of Homeland Security (DHS) (formerly the INS).

  No one should speak to DHS before consulting with an immigration law expert. DHS may arrest and deport noncitizens before they have the chance to talk to a lawyer.

- Encourage noncitizens to talk to an immigration expert before they leave the United States

  A noncitizen may be barred from returning to the United States. Lawful permanent residents (those who have a "green card") and applicants for lawful permanent residence who go abroad for extended periods of time or to pick up their immigrant visas may fall into certain categories of persons barred from entering the United States. Some noncitizens who have been in the United States without DHS permission may be permanently barred from entering or gaining legal status in the United States. In addition, even noncitizens who leave the United States and return with DHS permission ("advance parole") may be immediately deported if they end up in immigration proceedings.

¹ For referral to immigration advocates with expertise in domestic violence, contact Gail Pendleton at the National Immigration Project of the National Lawyers Guild, Inc., at gail@nationalimmigrationproject.org, or Grace Huang at the Washington State Coalition Against Domestic Violence, at grace@wscadv.org

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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.

III. DETERMINING A NONCITIZEN'S IMMIGRATION STATUS

Noncitizens may think they have status when they do not, they may not know what their status is, or they may think they cannot get status when they can. The following questions will assist you and your client in determining how to respond to the sexual assault without jeopardizing your client’s immigration status.

- **Is your client in immigration proceedings with DHS now?**
  
  If yes, she should immediately see an immigration legal advocate. Noncitizens who are facing deportation hearings or have missed deportation hearings, and who are not in immediate crisis or danger, should get legal counsel before taking any steps to respond to the assault.

- **What immigration documents does your client have?**
  
  Immigration documents may provide answers concerning your client’s immigration status. Review even outdated documents with your client.

- **Did your client ever have documents?**
  
  Noncitizens without documents are not necessarily “undocumented aliens.” Your client may be hesitant to talk to you about her status because she fears being reported to DHS. If you can guarantee confidentiality, reassure her that anything she tells you is confidential and you will not share it with anyone else. If you cannot promise confidentiality, do not inquire further about her status; rather, refer her to an immigration attorney or advocate.

- **Is your client undocumented?**
  
  A noncitizen probably is undocumented if:
She came into the United States without a visa; and
She did not speak to an DHS official at the border; and
No one has applied for status for her in the United States.

She also may be undocumented if she has a visa that is no longer valid. Her visa might no longer be valid because:

- The visa expired and she did not get an extension; or
- She did something she was not permitted to do, such as work without DHS permission.
- She has a student visa and failed to attend classes.

Even if she is undocumented now, your client may be able to obtain legal status. Again, refer your client to an experienced immigration attorney for assistance in resolving any questions she may have about her status.

IV. INTERSECTION WITH THE CRIMINAL JUSTICE SYSTEM

Regardless of immigration status, all victims of violent crimes have the right to police protection and access to the criminal justice system. Noncitizen victims of sexual assault should be able to report the assault to local law enforcement authorities without fear of deportation. It is the general policy among many police departments not to inquire into a victim’s immigration status or require documentation as part of the criminal investigation. Before sending your client to the police or to any other agency, however, check that immigration status is not an issue with that agency. If the agency does inquire, confirm that they will not report a victim to DHS.

It is the policy of the Seattle Police Department not to ask about immigration status when assisting victims. If a victim voluntarily discloses her status, the Department will not contact Immigration and Customs Enforcement (ICE). Before sending your client to any other department or agency, however, check that immigration status is not an issue with that department or agency and confirm that they will not report a victim to ICE.
PRACTICE TIP: Protecting Noncitizens During the Criminal Process

Noncitizens may need extra protection when pursuing criminal charges in cases where the victim has a previous relationship with the perpetrator, especially if the assailant is aware of the victim’s lack of legal status. It is not unusual for assailants to threaten to report the victim to DHS as a means of retaliation or to discourage legal action. Working with the deputy prosecuting attorney and victim witness advocate can help. A deputy prosecutor may be able to:

1) File charges for obstruction of justice, and
2) Order the assailant to desist from reporting.

V. THE U-VISA

The federal government has created a new visa specifically for victims of sexual abuse, trafficking and many other crimes. Under the Victims of Trafficking and Violence Prevention Act of 2000, the U-Visa will be available to victims who report the crime to law enforcement officials and cooperate in criminal investigations. Victims who have “suffered 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 visa and will be given work authorization.

Currently, the regulations for the U-Visa are still being developed and immigration attorneys report large backlogs of clients seeking the visa. After three years, some victims with U-Visas may be eligible to apply for lawful permanent residence, which may eventually lead to citizenship. Because regulations have not yet been developed and U-Visas have not been issued, a victim’s options after three years are still unclear. If a client is interested in pursuing the U-Visa, refer the client to an experienced immigration attorney or advocate who has experience with this visa. Again, the immigration system is exceptionally complex and even a well-intentioned attorney, if not familiar with the system, may jeopardize a client’s status.

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3 Id. at § 7102.
PRACTICE TIP: Preparing for U-Visas

Though U-Visa regulations have not yet been issued, victims who qualify for a U-Visa may receive interim relief. Therefore, at the outset of representation, it is important to lay the appropriate groundwork for your client’s possible application for the U-Visa. If a victim has reported to law enforcement, an attorney should document the client’s assistance with the investigation by obtaining a certificate of cooperation from law enforcement officers. For more detailed information and sample forms, please refer to National Immigration Project Training Materials available at www.nationalimmigrationproject.org.

VI. EMPLOYMENT PROBLEMS FOR NONCITIZENS

A victim’s immigration status may be linked to her employment status. Immigrants with employment-based visas are typically sponsored by their employer. If a victim is in danger of losing her employment as a result of a sexual assault, she may also be in jeopardy of losing her status. For ways to protect a victim’s job status please refer to the Employment Chapter of this Manual. If your client’s legal status is compromised, or if she needs to adjust her legal status, please refer her to an immigration attorney/advocate.

VII. ACCESS TO PUBLIC BENEFITS

Many noncitizen victims do not apply for or receive the public benefits they are qualified to receive. Often, this is due to confusion and fear about dealing with government agencies. A victim may believe that she cannot receive public benefits if she does not have legal status. Noncitizens may fear that receiving benefits will prevent them from obtaining or adjusting immigration status in the future. The public benefits listed below are available to victims of sexual assault regardless of immigration status. Applying for and receiving these benefits will not jeopardize your client’s status.
A. Public Benefits

According to the U.S. Attorney General, the following public services are available without any status qualification, which means that providers should not inquire into your client’s status or require a Social Security number:\(^4\)

- Free Care/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
- Other Services Provided by Non-Profit Charitable Organizations

For more information on public benefits in Washington State, please visit the Northwest Justice Project’s website at [www.nwjustice.org](http://www.nwjustice.org).

B. Danger of Becoming a “Public Charge”

Many noncitizens forego public benefits because of their fear of the “public charge” grounds for inadmissibility. Noncitizens currently applying for green cards (permanent resident status), or green-card holders who have traveled abroad for six months or longer and wish to return to the United States, may be prohibited from entering the United States if they fail to meet the admissibility criteria set out in the Immigration and Nationality Act which include the likelihood of becoming a “public charge.”\(^5\)

Victims should not refuse to apply for much-needed benefits on this basis. The DHS uses a “prospective test” when determining whether a noncitizen will become a public charge, taking into consideration all circumstances, including age, health, family status, assets, education, and


skills. 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.

More importantly, immigrants who receive U-Visas (discussed above) may qualify for a waiver of the “public charge” rule. For more detailed information on public benefits, refer to the National Immigration Law Center’s website at www.nilc.org.

VIII. CONCLUSION

The typical myriad socioeconomic harms from sexual assault are exacerbated when victims are not U.S. citizens. Accessing benefits may be difficult and may sometimes raise serious implications for a victim’s immigration status. However, it is possible for noncitizen victims to access much-needed help, regardless of their immigration status. In many cases, it will be of paramount importance to consult with an experienced immigration attorney/advocate.

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 noncitizen to go the Department of Homeland Security (DHS).
✓ Encourage noncitizens to talk to an immigration expert before leaving the United States.
✓ If your client have received notice of a hearing with an 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 police departments reporting policy is regarding undocumented victims reporting crime, before disclosing
✓ Discuss immigration protections with law enforcement

Does your client have any interest in applying for a U-Visa or other immigration status?
Does your client have employment issues related to the sexual assault?
CHAPTER NINE:
CRIMINAL JUSTICE AND SEXUAL ASSAULT VICTIMS
CHAPTER NINE
CRIMINAL JUSTICE AND SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

Sexual assault victims have numerous rights within the criminal justice system. For attorneys who do not regularly practice criminal law, advising sexual assault victims in exercising and protecting these rights can be a daunting task. This Chapter will give you a basic framework for such representation. If you have little prior experience in the criminal court system, however, we advise you to consult additional resources.¹

- The first section of this Chapter provides a chronological introduction to basic practice matters, including how to best protect victims’ privacy interests throughout the investigative process. This part contains the majority of practice issues.
- The second section addresses specific post-conviction remedies including the Washington Sex Offender Registry and Post-Incarceration Civil Commitment of Sexually Violent Predators.
- The third section contains three reference lists: (1) Typical Types of Evidence in Sexual Assault Cases, (2) The Washington Victim Bill of Rights, and (3) Questions Commonly Asked by Sexual Assault Victims and Their Answers.

II. PRACTICE CONSIDERATIONS: THE CRIMINAL PROCESS CHRONOLOGICALLY

Your primary role in representing a victim who is pursuing a criminal complaint against her assailant is to advise her of her rights in the criminal process and to protect her privacy interests throughout that process. In doing this, it generally is worth taking time to discuss your role and the exact scope of your representation with both the prosecutor and victim witness advocate assigned to the case.² Clarifying your role as a private attorney can help all parties be

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2 In Washington, victim witness advocates work for the Prosecuting Attorney’s Office with victims and civilian witnesses of violent crime. A victim witness advocate assists a victim from the time a case is referred to the
clearer about the distinction between the role of the state’s prosecutor and the role of the victim’s personal attorney.

You can be of great assistance to the victim, and arguably the prosecutor, throughout this process if you have a good grasp of the facts and evidence of the case and can help present the facts and evidence in the light most favorable to the victim. This can be useful where there may be differing versions of events as the victim is interviewed by police and then the District Attorney’s Office. It may be helpful to keep in regular contact with the prosecutor throughout the process, in order to keep the prosecutor informed of any changes in witnesses, or other evidence that you become aware of as the case progresses.

**PRACTICE TIP: Documenting the Assault**

The importance of creating a record of the assault as soon as possible after it occurred cannot be overemphasized. While the victim may not want to talk to police right away or make an incident report, you should encourage her to file some kind of official report or prepare an affidavit or statement describing the assault. Creating this kind of report early in the case can help protect the victim’s credibility and her ability to pursue the criminal case and other remedies.

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**A. Investigative Stage**

Prosecuting Attorney’s Office until the conclusion of the investigation or court proceedings. The goal of successful victim witness assistance is three-fold: 1) Assist victims in their recovery from victimization; 2) Reduce the level of secondary injury associated with the aftermath of crime and participation in the criminal justice system; and 3) Aid in the prosecution of criminal cases by ensuring that crime victims, witnesses, and family members are provided with the rights and services mandated by the Washington Constitution and various statutes. The level of service varies from office to office, but offered services frequently include the following: crisis intervention and referrals, victim of violent crime compensation, notification services, bail notification services, trial preparation/in court advocacy and support, right to allocution, and post sentencing advocacy.

Please note: The crisis intervention services and support provided to victims by Washington Victim Witness Advocates are not protected by any privilege and are discoverable by the defense. Victim witness advocates are agents of the prosecuting attorney prosecuting the charges and therefore are subject to Superior Ct. Crim. R. 4.7(a)(3), Wash. Rules of Prof’l Conduct 3.8(d), and *Brady v. Maryland*, 373 U.S. 83 at 87 (1963) (holding that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment).

The crisis intervention services and support provided to victims by a sexual assault advocate who is not employed by the prosecuting attorney's office is generally protected by a privilege and is generally not discoverable by defense. See Wash. Rev. Code §5.60.060(7). For this reason, many victims may be better served by a community-based advocate.
Sexual assault cases are generally subject to an intense screening process by law enforcement. This process can take anywhere from a few days to several months. The most common types of sexual assault evidence are described in the third section of this Chapter and they can include the forensic rape exam, other physical evidence, victim statements, and assailant statements.

Generally, when a victim reports the assault, she will be interviewed by a police investigator several times. The case will then be referred to a prosecutor and, depending on the practice in the local Prosecuting Attorney’s Office, the prosecutor may interview the victim again. The prosecutor will then decide whether to file charges in the case.

1. Preparing Victims for Interviews with Law Enforcement

Law enforcement investigators often ask far-ranging questions about a victim’s personal life in order to identify and assess all the variables that might influence a case. Sexual assault victims often feel the need to tell police a great deal about their personal history. While this interest in learning everything about a victim is a natural function of the law enforcement investigation and it is essential that investigators obtain detailed accounts of an assault in order to prepare a successful criminal case, some information is not relevant and need not be disclosed by victims.

Washington practice does not differ significantly from national practice in this area. Washington’s pertinent statutory authority and/or case law is cited below. The following authority pertains to the state prosecutor’s obligation to turn over victim statements.

- Washington Superior Court Criminal Rule (CrR) 4.7(a)(3);
- Rules of Professional Responsibility (RPC) 3.8(d); and
- *Brady v. Maryland*, 373 U.S. 83, 83. S.Ct. 1194, (1963) (prosecution must turn over to the defense all exculpatory material in its custody or control.)

- **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 the information is directly relevant to the assault.
Similarly, interviewers should not inquire into the victim’s immigration status. Before the interview, advise your client that she need not answer these questions and that she can take a break from an interview to consult with you. *For more detailed information on victims’ privacy rights and immigration concerns, please refer to the respective chapters of this Manual.*

- **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. Superior Ct. Crim. R. 4.7(a)(3), Rules of Prof’l Conduct 3.8(d), and *Brady v. Maryland*, 373 U.S. 83 at 87 (1963), require that the prosecution turn over to the defense all exculpatory material in its custody or control. Because a good defense attorney can use small inconsistencies to attempt to impeach a victim’s credibility with the jury, all victim statements are “potentially exculpatory.” You can protect your client’s privacy rights by insisting on being present at the interview with the victim witness advocate, as well as any other interviews which occur as the case is prepared for trial.

- **Victims should be advised:** to describe all relevant *details of the assault as truthfully as possible*. Equivocations or omissions of particular details or collateral issues, such as underage drinking, drug use or extramarital affairs can endanger successful prosecution. Such inaccuracies may have “no direct bearing on the rape but can give the jury just enough reason to distrust [the victim].”³ Once “they distrust her on a minor issue, their faith in her entire story is undermined.”⁴ Yet, it is normal for victims who have experienced sexual trauma to omit details of the assault.⁵ Unless there are serious Fifth Amendment concerns

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⁴*Id.*
⁵*Id.* at 14.
regarding illegal activity, victims should be advised to be utterly candid about the
details of the assault.  

B. Law Enforcement Charging Decision

1. The Police/Prosecutor Decide to Arrest the Assailant

If there is an arrest, the defendant will be arraigned in the District or Superior court. Depending on the seriousness of the underlying allegations, such as whether the victim was physically injured or threatened, a hearing may be held regarding conditions of release. Bail must be set in all Washington cases, but many defendants are unable to post the necessary amount and will remain in custody pending disposition of the case. If the defendant is unable to post the bail amount necessary, the defendant will remain in custody pending disposition of the case. Once a defendant is found guilty of a sex offense by a judge or jury, or enters a guilty plea to a sex offense, he is no longer eligible for bail. See State v. Blilie, 132 Wn.2d 484, 939 P.2d 691 (1997). Those defendants who have been released on bail will be taken back into custody at this point.

If the victim is afraid of the assailant, her attorney should ask the prosecutor to request the court to impose limitations upon the defendant's conduct, including preventing him from contacting the victim and ordering him to stay away from the victim's home, workplace and/or school. See the Protective Order Chapter of this Manual for more information.

2. Possible Charges

There are numerous sexual assault related criminal charges in Washington. As the victim’s attorney, the most important issues to be aware of are: 1) whether there was penetration of a bodily orifice, 2) the age of the victim, 3) the degree of physical force used to commit the

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6 Please note that if you discover that your client is vulnerable to potential criminal charges, you should exercise extreme caution before allowing her to meet with police and prosecutors. Unless the state grants her immunity from prosecution for any crimes which could be disclosed or discovered through her testimony, advising your client not to talk to law enforcement may be the safest course for the client.

7 Once a defendant is found guilty of a sex offense by a judge or jury, or enters a guilty plea to a sex offense, he is no longer eligible for bail. State v. Blilie, 132 Wash.2d 484 at 492, 939 P.2d 691 (1997).

8 Release of an accused is governed by Superior Ct. Crim. R. 3.2 and Wash. Cr RLJ 3.2.

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offense, and 4) whether the assailant occupied a position of authority over the victim. These four elements largely determine what charges will be brought against the assailant.\(^9\)

The most commonly charged crimes are:

- **Child Molestation**, Wash. Rev. Code §9A.44.083 (first degree), Wash. Rev. Code §9A.44.086 (second degree), and Wash. Rev. Code §9A.44.089 (third degree);
- **Communication With a Minor For Immoral Purposes**, Wash. Rev. Code §9.68A.090;
- **Custodial Sexual Misconduct**, Wash. Rev. Code §9A.44.160 (first degree), and Wash. Rev. Code §9A.44.170 (second degree);
- **Indecent Exposure**, Wash. Rev. Code §9A.88.010;
- **Indecent Liberties**, Wash. Rev. Code §9A.44.100;
- **Rape of a Child**, Wash. Rev. Code §9A.44.073 (first degree), Wash. Rev. Code §9A.44.076 (second degree), and Wash. Rev. Code §9A.44.079 (third degree);
- **Rape**, Wash. Rev. Code §9A.44.040 (first degree), Wash. Rev. Code §9A.44.050 (second degree), and Wash. Rev. Code §9A.44.060 (third degree);
- **Sexual Misconduct with a Minor**, Wash. Rev. Code §9A.44.093 (first degree), and Wash. Rev. Code §9A.44.096 (second degree); and

3. **Preliminary Hearing**

In practice, preliminary hearings are rarely held because they expose the victim to a potentially difficult cross-examination. In Washington, both felony and misdemeanor offenses may be filed by a prosecutor without the necessity of a grand jury. Felony charges will ultimately be tried in the Superior Court.\(^{10}\) If the assailant is arrested and is initially brought to the District Court, the case will generally be given a preliminary hearing date at first appearance.

4. **Filing**


\(^{10}\)While a defendant convicted in superior court can be sentenced to the state prison, in the district courts, a defendant may only be sentenced to the county house of correction for a maximum of one year. If there are multiple counts however, the prosecutor has the option of asking for consecutive time on each count of the complaint, thus increasing the defendant’s potential jail time.
In Washington, both felony and misdemeanor offenses may be filed by a prosecutor. Felony charges will ultimately be tried in the Superior Court as the District Court does not have jurisdiction. Under Wash. Rev. Code § 3.02 et seq., a defendant sentenced in the District Court may only be sentenced to a maximum of one year in the county house of correction.

C. Conflicts Between Victims and Prosecutors

1. Prosecutor Does Not File An Information

It is nearly impossible to force the state to conduct a criminal investigation if it chooses not to. There is “no effective formal criminal procedure available to compel an investigative or prosecutorial agency to investigate a crime” and such agencies generally have “discretion to use their resources as they see fit.”11 A prosecutor’s discretion is limited by four things: 1) an ethical obligation which requires that there be sufficient evidence or probable cause of the crime before instituting criminal proceedings against someone; (2) a constitutional requirement that charging not be done selectively using an unjustifiable standard such as race, religion, or other arbitrary classification; (3) a constitutional requirement that the prosecution not be vindictive or retaliatory in violation of due-process rights; and (4) a requirement that the prosecutor act ethically and in good faith.12

<table>
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<tr>
<th>PRACTICE TIP: Informal Appeal of Prosecutor's Charging Decision</th>
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<tr>
<td>If a victim is notified by a prosecuting attorney's office that charges will not be filed, the victim may have an informal right to appeal that determination to the elected prosecuting attorney. Clearly, prosecutors exercise discretion in making charging determinations. If you feel that the prosecutor has declined to file charges in error of the evidence, consider meeting with the prosecuting attorney and appealing to the elected prosecuting attorney if necessary for review of that decision.</td>
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11 Beloof, Victims in Criminal Procedure, at 201. (Beloof notes one of the major differences (and one which likely accounts for the large number of domestic violence prosecutions) between domestic violence cases and sexual assault cases is victim control. Id at 240, Note 1. The trend is to give victims in domestic violence cases no control of the decision to charge a defendant or what sentence to give the defendant. Id. In contrast, sexual victims are given much of the control over the decision to charge a defendant. Id.)

12 Id at 249.
2. Prosecutor Proceeding Without Victim Consent: Subpoena Power of Prosecutors

Prosecutors generally do not seek indictments in sexual assault cases without a victim’s consent. However, this is a matter of public policy, not law. It may be helpful to check in with the appropriate prosecutor’s office regarding its policy before a victim makes a final decision to report. If a prosecutor decides to proceed without the victim’s consent, the victim’s attorney should be aware of the scope of prosecutorial subpoena power.

There is a general duty on all persons to testify when they have knowledge about a criminal case. Unless a privilege exists, when victims are subpoenaed, like other witnesses, they must testify. Washington law recognizes numerous privileges, some of which a defendant may assert and some of which a victim or witness in a case may assert. Please refer to the Privacy Chapter of this Manual for a summary of statutory privileges. The Fifth Amendment against self-incrimination also would be a reason to move to quash a subpoena, if necessary.

If a witness knowingly fails to appear, without sufficient excuse, she may be held in contempt of court and may also be punished by a fine, or imprisonment, or both. If the person was properly served with the subpoena and failed to appear at the specified date and time, a bench warrant may be issued to bring the person into court. The State's case may then be continued or dismissed with or without prejudice.

If the victim is served with a subpoena to appear at a criminal proceeding in another state, the subpoena may be quashed in a Washington court if the victim is not a “material and necessary witness” or if complying with the order would cause her “undue hardship.” Out-of-state subpoenas have been successfully quashed based upon the emotional trauma caused to the victim and the interference with her recovery.

3. Pretrial Defense Interviews

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14 See Wash. Rev. Code §5.60.060.
15 Wash. Rev. Code §7.21.010(1)(c). (The maximum punishment is one year in jail and/or a $5,000 fine.)
16 Wash. Rev. Code §10.52.040; Superior Ct. Crim. R. 4.10(a); Wash. CrRLJ 4.10(a).
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In Washington, defendants have the right to interview witnesses and victims prior to trial. While witnesses and victims have a right to request that the prosecutor attend any such interview, the prosecuting attorney may not instruct them to refuse an interview unless the prosecutor is present. Even if present, the prosecutor cannot interfere with the defense interview.

Your presence as independent counsel for the victim at any defense interview will enable you to protect your client's privacy rights. You can assert appropriate privileges on behalf of your client, and you can instruct your client not to answer irrelevant questions.

If a witness or victim refuses to participate in a pretrial interview, the court may order a deposition, suppress the witnesses' testimony or dismiss the charges.

D. Public Access to Reports and Records

The Washington Public Records Act, Wash. Rev. Code §42.17, permits individuals to access all records kept in the state, with specific exceptions. Key documents concerning sexual assault cases fit within those exceptions. For example:

1. Police Reports

While the investigation is pending, access to police reports is limited by Wash. Rev. Code §42.17.310(1)(d). Once an investigation is completed and the case is referred to the prosecuting attorney, the police reports are discoverable by the general public except as limited by other exceptions to the Public Disclosure Act.

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21 Anecdotally, many prosecutors report that trial court judges have found the following to constitute "interference" with a defense interview: 1) ending the interview because the victim or witness appears tired; 2) informing a victim or witness that they do not have to answer a particular question because the question seeks privileged material; and 3) informing a victim or witness that they do not have to consent to the interview being taped.
22 See State v. Gonzalez, 110 Wash.2d 738 at 749, 757 P.2d 925 (1988). (holding that while the rape shield law does not directly apply to pretrial interviews, a rape victim may refuse to speak about her prior sexual relationships during pretrial interviews.)
23 See State v. Wilson, 149 Wash.2d 1, 65 P.3d 657 (2003); Superior Ct. Crim. R. 4.6(a); Wash. Cr. RLJ 4.6(a).
25 See Cowles Publ'g Co. v. Spokane Police Dep't, 139 Wash.2d 472, 987 P.2d 620 (1999).
Information revealing the identity of a child sex abuse victim must be redacted from any police report that is released to the public. An adult sex abuse victim who requests confidentiality at the time of reporting the crime may also have her name redacted from any police report that is released to the public. The explicit and graphic facts about the sexual assault will also be redacted from police reports prior to release to the public.

Once charges are filed, the defendant's attorney will be entitled to receive copies of all police reports. The defendant's attorney may show the reports to the defendant, but may not provide the defendant with copies of the report. A defendant who chooses to represent himself at trial will generally receive redacted copies of the police reports.

A law enforcement agency may provide copies of reports to the victim in order to assist the victim in obtaining civil redress. As a general rule, release of reports for this purpose will be delayed until any pending criminal prosecution of the assailant is completed or until after the prosecution determines that no charges will be filed.

2. Court Documents

Many prosecutor's offices substitute initials for the names of child and adult sexual assault victims in most documents filed with the courts. Many defense attorneys, as required by a particular court's standard of practice, will follow the same procedure. However, a victim's name must be spelled out in its entirety in jury instructions and will appear in full in the trial transcripts.

III. POST-CONVICTION SAFETY

A. Civil Commitment of Sexually Violent Predators

26 Wash. Rev. Code § 42.17.31901.
27 Wash. Rev. Code § 42.17.310(1)(e)
30 Superior Ct. Crim. R. 4.7(3).
32 See Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 848 P.2d 1258 (1993) (holding that a statute requiring that the identities of child sexual assault victims not be disclosed to the press or the public at any court proceeding involved in the prosecution of the sexual assault was unconstitutional).
Washington State law provides for the indefinite civil commitment of sexually violent predators (SVPs). The State may petition for commitment of a person designated as an SVP. If granted, the SVP is not released from prison, but is instead transferred to a secure mental health facility. An individual designated as an SVP will remain at the treatment facility until deemed safe to be released.

Under Wash. Rev. Code §71.09.020(16), *In re Thorell*, 149 Wash.2d 724, 744 fn. 8; 72 P.3d 708(2003), a "sexually violent predator" is a person who:

- Has been charged with or convicted of at least one crime of sexual violence;
- Suffers from a mental abnormality or personality disorder that causes him serious difficulty controlling his sexually violent behavior; and
- The person’s mental abnormality or personality disorder make him more likely than not to engage in predatory acts of sexual violence unless confined in a secure facility.

All offenders detained in Washington prisons, state mental hospitals, and juvenile facilities are screened prior to release to determine if they meet any of the criteria of an SVP. If so, they are referred to the appropriate prosecuting authority in the county where the offender was most recently convicted of a sexually violent offense. The Washington State Attorney General’s Office handles SVP cases for 38 of Washington’s 39 county prosecutors. The King County Prosecutor handles cases referred to that county.

As part of the referral process, a psychological evaluation of the offender is conducted to determine whether he meets the definition of an SVP. Once an SVP petition is filed, the offender undergoes another psychological evaluation prior to the commitment trial. If an offender is committed as an SVP, he is entitled to annual reviews of his commitment status.

From the enactment of the SVP statute in 1990 through July 1, 2004, over 500 offenders have been formally referred as potential SVPs. As of July 1, 2004, there are 204 offenders

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33 Wash. Rev. Code § 71.09 et seq.
34 Wash. Rev. Code § 71.09.020(15). (In general, crimes of sexual violence include physical sex offenses.)
35 Wash. Rev. Code § 71.09.020(8). (The term “mental abnormality” is defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.”). Mental abnormalities seen in SVP cases typically include pedophilia, paraphilia not otherwise specified (nonconsenting persons), and sexual sadism; all disorders found in the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (DSM-IV-TR).
detained under the SVP statute. More than half of these have been committed; the others are awaiting their commitment hearing.

B. Victim Participation in the Commitment Process

In Washington, the victim is entitled to notification when the sexual offender is released from incarceration. If the Attorney General’s Office or the King County Prosecutor has taken no action to declare the offender a sexually violent predator, the victim may intervene. Notification will occur only if the victim is registered with the Victim/Witness Program and has requested notification whenever an offender’s status changes. Notification may be by both telephone and letter. The Department of Correction’s Victim Service Unit should also notify the victim if an offender is transferred to the Washington Treatment Center while awaiting a hearing.

The SVP prosecutor will contact an offender’s prior victims to notify them that an SVP action has been filed against the offender. A victim may be asked to assist in the SVP prosecution by testifying at the commitment trial. Victim advocates are available to assist the victims who choose to participate in the SVP trial process.

C. Sex Offender Registration & Community Notification

The Sex Offender Registration Law, Wash. Rev. Code § 9A.44.130, is designed to assist law enforcement officials in tracking sex offenders in Washington. The statute requires registration for adult and juvenile persons convicted of a sex offense who live and/or work in Washington. Also under Wash. Rev. Code §9A.44.140, those persons convicted or adjudicated

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36 Information on how to enroll in the Victim/Witness Program may be found at http://www.doc.wa.gov/communityprotection/vwregistration.htm or may be obtained by calling 1-800-322-2201 (toll free in Washington State) or 360-753-6211.

of a sex offense who were released from incarceration, probation, parole or the state department of social and health services or a local juvenile youth services or detention facility on or after July 28, 1991, must register.

Before the Department of Corrections or a local police department may release registration information to the public, the statute requires the Department to classify the offender according to his level of risk of reoffense and his degree of dangerousness. In classifying an offender, the Department considers a variety of factors relating to recidivism and dangerousness.

IV. CORROBORATING EVIDENCE IN SEXUAL ASSAULT CASES

Please see Chapter One, Section Two for a full discussion of corroborating evidence in acquaintance sexual assault cases.

A. Physical Evidence

Physical evidence is crucial in prosecuting sexual assault cases. It can establish the credibility of the victim and may be used to negate or support a victim or assailant’s version of the facts. The general wisdom is that jurors in rape cases “want to see everything.” They want to know the full context of each element of the assault recantation. This would include things like the defendant’s pants or other clothing; the victim’s clothing, whether torn or not; the doctor’s testimony about how the victim appeared following the assault; photographs, floor plans, and other details. Thus, while there may be no objective need for such physical evidence, a good prosecutor should provide as much physical evidence as possible. Such physical evidence gives the jurors a more visceral understanding of the assault. Outlined below are some of the primary types of physical evidence investigators collect:

• Vaginal/Anal/Oral Injury. Although two-thirds of rapes leave no physical injury, there is a significant chance that the vaginal wall will show signs of


38 Information regarding registered sex offenders may be obtained at http://www.waspc.org/wa_sex/index.shtml

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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 she was not a willing partner of the accused.”39 A medical exam is therefore important even if identification of the assailant is not an element of the case.

- **Bruising, Bite Marks, Scratches, Other Marks.** Each physical injury should be fully documented. Photographs or video can have great impact. Bite marks, pinches, abrasions and lacerations should be photographed as soon as possible because they can heal quickly.40 Bruises may not appear on the skin until several days after the assault and should be documented as they appear.

- **Rape Kits.** Rape kits are evidence collection kits used by hospitals that contain various slides, swabs, scrapings, combings, and articles of clothing taken from the victim. Please refer to Chapter One for a full description of the contents and procedures of a rape kit in Washington.

- **Victim/Defendant Clothing.** Both the victim’s clothing and the defendant’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.41 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.42

- **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 relations took place; 3) establish that force was used; 4) establish the offender’s activity.”43

- **Blood Alcohol Tests.** A preserved blood sample will document the victim’s alcohol level.44 Similar tests should be done for the defendant.

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39 Fairstein, at 153.
41 Deluca, at 30.
V. VICTIMS' COMMON QUESTIONS ABOUT CRIMINAL PROCESS

Victims need accurate information so that they can make fully informed choices about reporting the assault to law enforcement officials. Many victims ask the following questions when they are deciding whether to report an assault:

• **If I report, do I lose control of whether the case is prosecuted?**
  
  Once a victim reports the assault to police, she becomes a witness in the state’s case against the assailant. While the victim does not control whether that case is prosecuted, most prosecutors will not go forward without the victim’s consent. Prosecutors typically consider various factors in determining whether to prosecute without the victim’s consent, including whether there is sufficient evidence to support a conviction without the victim’s testimony, whether she has been threatened into not cooperating, and whether she has other reasons for not participating. Rarely will a sexual assault victim be forced to participate as a witness in criminal proceedings against her will.\(^{45}\)

• **Can I file a police report and then not go any further with prosecution?**
  
  If the victim wants to report to police but not prosecute, many police departments will accommodate this choice; most allow victims to file incident reports without pressuring them to go further. There are many reasons to file such reports, even when the victim is not ready to proceed with an immediate criminal investigation, such as qualifying for victim compensation, or establishing an evidentiary record.

• **Will my name be published in court documents or the newspaper?**


\(^{45}\)See Beloof, *Victims in Criminal Procedure*, 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.*
While many jurisdictions attempt to protect the name of a victim of rape or sexual assault, once a case is filed in court, newspapers may publish the victim's name and other identifying information.\footnote{See Allied Daily Newspapers v. Eikenberry, 121 Wash.2d 205, 848 P.2d 1258 (1993). Adult victims of sexual assault have few legal protections when it comes to preventing the disclosure of their names to the media. Only in cases involving child victims of sexual assault have the courts been willing to limit identifying information presented by the media.}

**How long will the criminal process take?**

On average, a criminal case takes anywhere from two months to two years to come to trial. Victim participation is most active in the first months, during the investigation stage. During pretrial motions and conferences, victim participation may be sporadic or not required at all. It is not until trial that a victim may again be brought back into regular contact with the criminal justice system. During this “down time” some victims find it relatively easy to put the court proceedings out of mind; others find it difficult to do so while the case is pending. Every victim must be given sufficient information to weigh for herself whether she is able to manage a lengthy, arduous and sometimes confusing criminal process.

**How likely is a criminal conviction?**

Rape cases are difficult to prosecute and difficult to win. Approximately one-quarter of sexual assault reports to police result in the filing of criminal charges, and roughly half of those charges result in a conviction. Victims need to understand these odds, and still understand that every case is different. \textit{Statistics do not predict what will happen in an individual case.}\footnote{Cassia Spohn & Julie Horney, \textit{Rape Law Reform: A Grassroots Revolution and Its Impact}, New York, Plenum, (1992).}

\section*{VI. Rights of Victims in Washington}

Victims who choose to participate in the criminal justice system are protected by the Washington State Constitution and by various statutes.\footnote{See Wash. Const. art.I, § 35 (amended 1989); Wash. Rev. Code §7.69.030; Wash.Rev. Code § 7.69A.030.} Prosecutorial personnel, and in particular victim witness advocates, are charged by the Washington Victims’ Bill of Rights with providing victims with the following rights and services:

\subsection*{A. Right to Confer with the Prosecutor}
The victim has the right to confer with the prosecutor at all important stages of prosecution. This means that victims should be informed in advance of the defendant’s arraignment, hearings on motions by defense to obtain psychiatric or other confidential records of the victim, the filing of a dismissal or other acts terminating the prosecution. Additionally, under Wash. Rev. Code § 7.69.030(13)(14) the victim has a right to make a statement to the court about the State’s proposed sentence recommendations. Various statutes also create a legal duty on the part of the prosecuting attorney to inform the court of the victim’s position before the court rules upon whether to accept the plea agreement.49

Neither the Washington Constitution, nor the various crime victim statutes give a victim standing in a criminal case.

B. Violations Do Not Give the Victim a Cause of Action

There exists no private right of action for victims who have been denied the rights established in the Victim Bill of Rights.50 “The failure of a person to make a reasonable effort to ensure that victims, survivors, and witnesses under this chapter have the rights enumerated in Wash. Rev. Code § 7.69.030 shall not result in civil liability against that person.”51

According to Wash. Rev. Code § 7.69.030(1)-(16), reasonable efforts shall be made to ensure that all victims of sex crimes have the following rights:

- To receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims;
- To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim is involved;
- To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;
- To receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;

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• To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;
• To be provided, whenever practical, a secure waiting area during court proceedings that does not require her to be in close proximity to the defendant and his family and/or friends;
• To have any personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence;
• To be provided with appropriate employer intercession services to ensure that employers of victims will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;
• To access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;
• To have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the victim and at any judicial proceedings related to criminal acts committed against the victim;
• To be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying;
• To, upon request, be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions;
• To submit a victim impact statement or report to the court which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;
• To present a statement personally or by representation, at the sentencing hearing for felony convictions;
• To restitution ordered by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment; and
• To present a statement in person, via audio or videotape, in writing or by representation at any hearing conducted regarding an application for pardon or commutation of sentence.
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?
- Past sexual abuse, past or present mental health status
- 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 privilege
- Prepare victims for interviews with law enforcement
- 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
CHAPTER TEN:
THIRD PARTY LIABILITY FOR SEXUAL ASSAULT VICTIMS
CHAPTER TEN
THIRD-PARTY LIABILITY FOR SEXUAL ASSAULT VICTIMS

I. INTRODUCTION

This chapter delineates some of the civil legal remedies available to sexual assault victims. It is not a practice guide, as are other chapters. Third-party liability covers a lot of ground and cannot be taught in a single chapter. Instead this chapter is intended to give an overview of the primary theories of third-party liability for the practitioner to consider. The rights of victims to recover damages from third parties have accrued through statute, legislative policy and common law.

II. PRACTICE CONSIDERATIONS

A. Civil and Criminal Processes

In criminal cases, legal authorities – the police and county prosecuting attorneys – investigate and decide whether to prosecute an assailant. In cases of hate crimes or civil rights violations, the Washington State Attorney General’s Office or the United States Attorney may prosecute the assailant. The criminal process is controlled by the state, subject to the constitutional protections afforded criminal defendants. In criminal prosecutions, the victim is simply a witness for the prosecution.

In civil actions, victims initiate complaints against their assailants or third parties who may be liable to them. Civil cases are tried before judges or juries. Most resolve prior to trial, often by settlement agreement between the parties. In theory, the civil and criminal processes are entirely separate and should not affect or impede each other. In sexual assault cases, the civil and criminal actions may overlap in complex ways. Advocating for a victim requires an understanding of the potential impact each process has on the other.

Why consider an action against a third party? Often it is the only way to recover monetary damages for the victim and to force changes that will prevent future harm. It is
also a way for the victim to stand up and state clearly that what happened to her is unacceptable, hurtful, and wrong.

B. Legal Bases for Civil Actions Against Assailants and Third Parties

Civil actions against assailants are based on theories of assault and battery, rape, sexual harassment, infliction of emotional distress, and other torts as defined by law. Remedies in such actions can include compensatory damages (including medical expenses and lost wages and earning capacity), pain and suffering, and/or equitable relief. In some cases punitive damages and/or recovery of reasonable attorney fees are allowed.\(^1\) In addition to an action against the assailant, a victim may also have a right of action against third parties who owe the victim a duty of care and who failed to prevent the assault because of their negligence. Owners or operators of convenience stores, universities and colleges, commercial landlords, government entities, nursing homes, hospitals, schools, restaurants, bars, parking lots, and hotels, as well as other third parties, may be liable if the victim can establish that a legal duty exists to protect individuals from foreseeable violent acts.

C. Useful Tools in Assessing Liability

Third-party liability cases are highly fact-specific and require a detailed analysis of the facts in order to determine whether liability exists. If the assailant is prosecuted, the information available through the criminal investigation can be valuable in determining whether facts exist to support an independent civil action against a third party.\(^2\)

Additionally, state agencies required by Washington law to investigate violent crime may have information that can assist in analyzing the viability of a civil suit. For example, the Washington State Department of Social and Health Services (DSHS) investigates cases of suspected child abuse or neglect,\(^3\) reports of abuse of nursing home

\(^1\) See e.g. Wash. Rev. Code §9A.36.083 and Wash. Rev. Code §49.60.030(2).

\(^2\) Given the relatively short time line in criminal prosecutions in Washington due to speedy trial rights of defendants, it is often preferable to wait until the criminal process is completed before initiating a civil action, being mindful, of course, of the civil statutes of limitation involved.

patients,\textsuperscript{4} and reports of abuse of vulnerable adults.\textsuperscript{5} If the assailant is a licensed professional, there may be an investigation pursuant to action to revoke or suspend his or her license.

In many instances, investigative reports are available to the victim or upon request pursuant to the Washington Public Records Act (PDA).\textsuperscript{6} Although the PDA exempts many personal documents from public disclosure, information gathered by police and other agencies may still be disclosed that reveal facts that can be used to establish liability of third persons, corporations or other entities. For example, under Wash. Rev. Code §42.17.310(d) specific intelligence information and specific investigative records compiled by law enforcement that is essential to effective law enforcement is exempt from disclosure. However, it is not uncommon for police reports, particularly after an investigation is complete, to be disclosed pursuant to a PDA request.\textsuperscript{7}

Finally, attorneys must remain aware of statute-of-limitation issues. In Washington, most civil claims based on a sexual assault, unlike many actions for personal injury, are governed by a two year filing requirement. A court case must be commenced within two years of the date of the occurrence of the assault.\textsuperscript{8} For cases involving emotional distress the statute of limitations is three years.\textsuperscript{9}

\textbf{D. Solvency of Defendant and Attachment of Assets}

In civil actions seeking damages directly from the assailant (as distinguished from a negligent employer, government entity, etc.) some preliminary assessment of the nature and magnitude of financial resources of the assailant will allow you and your client to reach a realistic decision about whether and/or how to proceed. There will often be no insurance coverage available. A judgment can remain in force for up to 20 years,\textsuperscript{10} and wages, bank accounts, etc., can be garnished, but this is an arduous, slow process.

\textsuperscript{4} Wash. Rev. Code §70.124.050.
\textsuperscript{5} Wash. Rev. Code §74.34.063.
\textsuperscript{6} Wash. Rev. Code §42.17.310.
\textsuperscript{7} See \textit{Cowles Publ'g Co. v. Spokane Police Dep't}, 139 Wash.2d 472, 987 P.2d 620 (1999)
\textsuperscript{8} Wash. Rev. Code §4.16.100.
\textsuperscript{9} Wash. Rev. Code §4.16.080(2)
\textsuperscript{10} Wash. Rev. Code §4.56.210 provides for a 10-year effective period for any judgment, which can be extended an additional 10 years pursuant to Wash. Rev. Code § 6.17.020.
Generally speaking, judgments based on intentional and/or reckless acts are not fully dischargeable in bankruptcy.\(^\text{11}\)

If the assailant owns real estate in the state of Washington, it is possible to obtain a writ of attachment at the outset of litigation based on the fact that the claim filed is for injuries arising from the commission of a crime.\(^\text{12}\) A successful attachment can be a powerful incentive for settlement and gives your client some assurance of collection of some, or all, of any judgment. If a settlement is reached that includes future payments, these can then be secured against the real property.

III. **THIRD-PARTY LIABILITY IN SEXUAL ASSAULT CASES**

**A. Alcohol and Liability for Violent Acts**

Wash. Rev. Code §66.44.270 provides for criminal penalties when any person knowingly or intentionally supplies, gives, or otherwise supplies alcoholic beverages to a minor or provides or allows a minor to possess alcoholic beverages on property he or she owns or controls. The law covers private parties at which alcohol is made available and where minors are present. It also covers commercial establishments that employ a bartender or other adult who furnishes alcohol to a minor who then commits a violent act. Violation of the statute can be used as evidence of negligence against a social or commercial host where the victim can establish a connection between the alcohol service and the assault.\(^\text{13}\)

Commercial establishments may also be liable for criminal acts when the assailant (regardless of age) was served alcoholic beverages while in a state of visible intoxication.\(^\text{14}\)

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\(^{11}\) Wash. Rev. Code §6.15.050(3). If the possibility of bankruptcy arises or is anticipated, a bankruptcy specialist should be consulted. The statutes and regulations pertaining to what is or is not dischargeable under the differing forms of bankruptcy are complicated and subject to frequent revisions.


B. Violence in the Workplace: Sexual Harassment

When co-workers, employers or supervisors engage in acts of sexual violence or unwelcome sexual conduct, these behaviors may give rise to claims of sexual harassment under the Washington Law Against Discrimination, Wash. Rev. Code §49.60. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature.\(^\text{15}\) The law permits the award of compensatory damages as well as attorney fees.\(^\text{16}\) For a more detailed discussion of sexual harassment claims, see the Employment Chapter of this Manual.

C. Sexual Harassment in Educational Institutions

Wash. Rev. Code §49.60.215 prohibits sexual harassment in places of public accommodation. “Public accommodation” include a wide array of facilities, including educational institutions.\(^\text{17}\) Washington case law has addressed sexual harassment in the employment context. By analogy, a claim for sexual harassment in a school, college, or university would require a showing that the offensive sexual conduct (1) was unwelcome; (2) occurred because of gender; (3) affected the terms or conditions of the student’s educational experience; and (4) can be imputed to the educational institution.\(^\text{18}\)

Federal civil rights law provides further possible remedies for sexual abuse occurring in a school setting. Title IX of the Education Amendments of 1972, 20 U.S.C. sections 1681 et seq. offers one of the principal remedies for students abused by teachers and other school officials. Claims may also be available under 42 U.S.C. 1983. Both of these statutes provide for injunctive relief as well as compensatory damages, attorney fees, and possibly punitive damages.\(^\text{19}\)


\(^{16}\) Wash. Rev. Code §49.60.030.


\(^{19}\) For a more in-depth introduction to litigation of school violence and abuse claims under federal law, see Frazee, David, Ann M. Noel, and Andrea Brenneke, Violence Against Women, Chapter 19 (1998). Please note that since publication of this treatise the civil rights remedies in the Violence Against Women Act of 1994 have been found to be unconstitutional. See United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000). All other provisions of the VAWA remain in effect.
D. Negligent Security

Ownership or control of the property where a sexual assault occurred may serve as the basis for imposing liability for injuries resulting from the foreseeable criminal conduct of third persons lawfully on the premises. The factual basis of a negligent security case differs greatly depending on where the incident occurred and how the assailant entered the premises. As part of any negligent security case a plaintiff must establish that the defendant should have foreseen, prevented or deterred the violent crime which caused injury to persons lawfully on the premises.\(^{20}\)

Courts have found liability in a variety of locations and circumstances, including:

- A college may be liable because of inadequate security leading to the rape of a student on campus by an unidentified assailant, when campus rape is foreseeable based on prior events.\(^{21}\)
- A convenience store may be liable for the assault of a store patron in its parking lot.\(^{22}\)

E. Employer Negligence (Negligent Infliction of Emotional Distress; Negligence in Hiring, Retention or Supervision).

An employee who has been sexually assaulted on the job may have a civil action against the employer for its negligence in hiring, retaining and/or supervising the assailant. Common law claims of negligence against an employer are typically secondary to claims of intentional tort, such as discrimination or wrongful discharge. However, in the absence of discrimination, including sexual harassment, or wrongful discharge, a victim of a sexual assault at the workplace who has suffered emotional distress damages may wish to consider filing suit against the employer for its negligence.\(^{23}\)

Generally, the victim will need to establish the four elements of any negligence claim: (1) the existence of a duty of care; (2) the breach of that duty; (3) causation; and (4) damages.\(^{24}\) In determining whether the employer is liable to a victim of sexual assault

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\(^{22}\) See, Nivens v. 7-11 Hoagy's Corner, 133 Wash.2d 192, 943 P.2d 286 (1997).
for the actions of its employee, the court will consider whether the employee was acting within the scope or course of employment.\textsuperscript{25} If so, the employer may be found vicariously liable.\textsuperscript{26} If the employee’s actions are determined to be outside the scope of employment, the inquiry will focus on whether the employer knew or should have known the employee posed a risk of harm to others.\textsuperscript{27} These lawsuits are difficult to win, and the courts, in keeping with the at-will doctrine, are reluctant to expand employer liability.

\textbf{F. Landlord/Tenant Liability}

Residential landlords owe their tenants a duty of reasonable care to provide adequate security measures, including working locks.\textsuperscript{28} Local landlord/tenant laws may provide additional security obligations for landlords.\textsuperscript{29}

A 1999 Washington Court of Appeals case held for the first time that a residential landlord has a duty to protect tenants from foreseeable criminal acts of third parties.

\begin{quote}
[A]residential landlord owes its tenant a duty to protect the tenant from foreseeable criminal conduct of third persons on the premises. The landlord has the affirmative duty to take reasonable steps to protect the tenant from such conduct to satisfy its duty.\textsuperscript{30}
\end{quote}

\textbf{G. Liability of Church for Abuse of Parishioner}

Where a member of the clergy engages in pastoral counseling, Washington courts have indicated that the cleric will be held to an appropriate standard of care, similar to that applicable to any other counselor.\textsuperscript{31} If a pastoral counselor has sexual contact with a counselee there will be a cause of action against the counselor and perhaps against the religious institution as well.\textsuperscript{32}

\begin{footnotes}
\item[29]See, for example, Seattle Municipal Code § 22.206.140.
\item[32]See sections herein pertaining to liability of therapist to patient and of employer for intentional acts of employee.
\end{footnotes}
H. Liability of Therapists and Other Health Care Providers for Sexual Contact With Client.

Mental health counselors in Washington fall under the provisions of laws pertaining to malpractice claims against all health care providers.\textsuperscript{33} A person bringing a malpractice claim must show one or more of the following:

- The injury resulted from the failure of a health care provider to follow the accepted standard of care;
- The health care provider promised the patient or his representative that the injury suffered would not occur; or
- The injury resulted from health care to which the patient or his representatives did not consent.\textsuperscript{34}

Sexual contact, either forcible or “consensual,” between a therapist and client violates the standard of care for any health care provider in the state, including each of the various disciplines providing mental health counseling. It is a crime in Washington for a health care provider to have sexual contact with a client or patient during a treatment session, consultation, interview, or examination.\textsuperscript{35} Regulations explicitly prohibit sexual contact between psychologists and present or former clients\textsuperscript{36} or licensed counselors and clients.\textsuperscript{37} Sexual contact between any health care provider and a client or patient will subject the health care provider to possible restriction or loss of a license to practice in Washington.\textsuperscript{38}

In the context of sexual assault, the law prohibiting sexual contact between providers and clients may impact the availability of insurance coverage, as most malpractice policies do not cover intentional acts of the insured. However, if the provider works for a clinic, hospital or government agency, potential liability for the sexual assault

\begin{itemize}
\item \textsuperscript{33} Wash. Rev. Code §RCW 7.70.010 et seq.
\item \textsuperscript{34} Law & Mental Health Professionals, Benjamin, G. Andrew H., Rosenwald, Laura, Overcast, Thomas E., and Feldman, Stephen R. American Psychological Association, 1995, p. 453.
\item \textsuperscript{35} Wash. Rev. Code §9.44.100(d). Note that there is an affirmative defense if the defendant can “can prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment.”
\item \textsuperscript{36} Wash. Adm. Code §246-924-358.
\item \textsuperscript{37} Wash. Adm. Code §246-810-049.
\item \textsuperscript{38} Wash. Rev. Code §18.130.180(24).
\end{itemize}
may extend beyond the individual assailant. Unfortunately, many therapist malpractice policies now contain exclusions for any action involving sexual contacts with clients. Therefore it is important to obtain and review the policy in force at the time of the wrongful acts.

Courts have taken note of the particular nature of the misconduct involved when a therapist has sexual contact with a client, even when it appears to be “consensual” at the time. Because a counseling relationship involves a phenomenon known as “transference,” any sexual contact between counselor and counselee constitutes professional negligence.39

I. Liability of Therapist or Other Health Care Provider for Foreseeable Harm Caused by Patient.

If a health care provider knows or should know that a particular patient presents a serious danger to a third party the therapist is obligated to use reasonable care to protect the intended victim against such danger.40 If the patient presents a danger to a known third party, the health care provider may be obliged to warn the potential victim or notify appropriate authorities. If the patient presents a foreseeable danger to the general public or some subset thereof, the health care provider may be obliged to take other steps to take reasonable precautions to protect anyone foreseeably endangered.41 If such steps are not taken, the health care provider may be liable to the injured third party.

This duty to protect from known dangerous propensities of a patient has been extended to mental health clinics as well as individual practitioners.42 In one case, however, the Washington Court of Appeals found that an outpatient alcohol treatment facility does not have a level of control over its clients sufficient to impose a duty of care to the public at large, and thus the treatment facility had no duty to protect the general public from dangerous propensities of its clients.43

41 Id. at 427-428.
J. Duty of Hospitals and Residential Care Facilities to Protect Vulnerable Residents

A hospital has a duty to protect vulnerable or impaired residents from foreseeable harm inflicted by third parties.\textsuperscript{44} Similarly, residential care facilities for disabled adults have a duty to protect their residents. This duty has been found to give rise to liability on the part of a private group home for sexual assault of a disabled resident by a staff member, stranger, resident or visitor.\textsuperscript{45} Although nursing homes have been found by courts to have some duty to protect their patients from sexual assault, courts are reticent to place liability on such institutions based on cause and foreseeability.\textsuperscript{46}

K. Employer Liability for Employee’s Violent Act.

1. Negligent Hiring and Retention

When employees have contact with the public in the course of business, employers have a duty of care in the selection and the retention of employees. An employer must not retain an employee if the employer knows or should know that the employee is unworthy, by habits, temperament or nature, to deal with the persons invited to the premises by the employer. The employer’s knowledge of an employee’s past acts of impropriety or violence puts an employer on notice that the employee may eventually commit an assault.\textsuperscript{47} For example, an apartment owner was found liable where a janitor who assaulted a resident had a history of similar conduct.\textsuperscript{48}

An employer has a duty to conduct a background investigation of a potential employee appropriate to the position for which the employee is being considered.

To prove negligent hiring in Washington, the plaintiff must demonstrate that (1) the employer knew or, in the exercise of ordinary care, should have known of its

\textsuperscript{44} Hunt v. King County, 4 Wash. App. 14, 481 P.2d 593, rev. denied, 79 Wash.2d 1001 (1971).
employee's unfitness at the time of hiring and (2) the negligently hired employee proximately caused the resulting injuries.\footnote{Carlsen v. Wackenhut Corporation, 73 Wash. App. 247, 252, 868 P.2d 882, rev. denied, 124 Wash. 2d 1022 (1994).}

2. Vicarious Liability

An employer may be vicariously liable for the intentional torts of employees committed within the scope of their employment. An act is within the scope of employment if it is done during the course of employment and for the purpose of employment. An intentional act of assault may, under certain circumstances, be found to fall within the scope of employment.\footnote{Robel v. Roundup Corp., 148 Wash.2d 35, 53, 59 P.3d 611 (2002).} An employer who gives authority to an employee to act with force, such as a nightclub bouncer, is liable if the employee uses excessive force.\footnote{Bratton v. Calkins, 73 Wash. App. 492, 498, 870 P.2d 981 (Wash. App., Div. 3, 1994).} An employer is not responsible for the violent acts of an employee if an employee steps aside from the scope of his employment to carry out an independent purpose of his own.\footnote{Burlington Industries v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).} For example, a Washington Court of Appeals has found that sexual assaults of patients by a doctor during the course of medical examinations were not performed in the furtherance of the employer medical clinic’s business, even though the employment situation provided the opportunity for the assaults and the means for carrying them out, and thus the clinic was not vicariously liable.\footnote{Thompson v. Everett Clinic, 71 Wash. App. 548, 860 P.2d 1054 (1993).}

L. Government Liability

1. Public Duty Doctrine

If a government entity and/or its employee breaches a duty owed to the public in general, individuals injured as a result have no cause of action against the government entity.\footnote{Honcoop v. State, 111 Wash.2d 182, 759 P.2d 1188 (1988).} Moreover, duties owed to the public-at-large are not usually enforceable as to individual members of the public. This is known as the “public duty doctrine,” and has
been summed up with the phrase “a duty to all is a duty to no one.” If a victim of sexual assault seeks to establish liability on behalf of a government employer, she may be barred from doing so under the Public Duty Doctrine, unless an exception applies. There are five exceptions to the Public Duty Doctrine:

- “Legislative intent.” This exception occurs when the terms of a legislative enactment show specific intent to identify and protect a particular and circumscribed class of persons.
- “Failure to enforce.” This exception arises when government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and someone within the class the statute intended to protect is injured.
- “Rescue doctrine.” This arises when government agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff.
- “Special relationship.” There are two variants of this exception.
  1) A special relationship arises when a relationship exists between a government agency and any reasonably foreseeable member of the public setting an individual off from the general public and the individual relies on explicit assurances given by the agent or assurances inherent in a duty vested in the government agency.
  2) Another type of special relationship arises when a government agency has “taken charge” of an individual and knows or should know that the individual poses a risk to others or where the agency has a direct relationship with a third party which gives rise to a duty of care.

57 Id.
58 Id.
59 Id.
60 See Taggart v. State, 118 Wash.2d 195, 234, 822 P.2d 243 (1992), (quoting Restatement (Second) of Torts § 319 (1965) “One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.”) Caulfield v. Kitsap County, 108 Wash. App. 242, 29 P.3d 738 (2001).
2. Public Duty Doctrine Exceptions


When a government entity takes charge of an individual and is or should be aware that the individual poses a risk to others, the government entity must exercise reasonable care to control the dangerous individual to prevent him from causing harm to others.61 

“Taking charge” is not restricted to placing a person in custody. A state parole officer “takes charge” of parolees under the officer's supervision regardless of there not being a custodial relationship or continuing hourly or daily contact.

When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm.62

Thus if the assailant is a sexually violent predator or a registered sex offender under parole, or community supervision or community custody, the attorney should consider whether the recent assault falls within an exception to the public duty doctrine in asserting a negligence claim against the government. These same principles apply to probation officers (as to both adult and juvenile probationers63) and pretrial release supervisors, even in situations where they personally have no power to take the supervisee into custody.64 The parole or probation officer may be personally entitled to qualified immunity from suit by persons injured by a person under supervision, if the officer can show that he or she performed a statutory duty in substantial compliance with the directives of superiors and relevant guidelines.65 The State of Washington or other governmental entity does not share in this qualified immunity.66

It makes no difference what underlying offense the supervisee is charged with or convicted of. The important questions are whether the supervisee is complying with supervision conditions, whether the supervisor is monitoring appropriately, and whether

61 Bishop v. Miche, 137 Wash.2d 518 (1999); Id. at 219.
62 Taggart, 118 Wash. 2d at 220.
64 Bishop, 137 Wash. 2d at 528.
65 Taggart, 118 Wash. 2d at 216.
the supervisee’s known behaviors and misbehaviors create a foreseeable risk of dangerous behavior of the type which injures the victim.67

Please note: Washington has strictly enforced prerequisites to filing suit against local or state government entities. Tort claim filing requirements, including waiting periods, must be followed precisely.68

- Liability for Failure to Protect after Assuring the Victim Protection Would Be Afforded.

When an individual has contact with a police agency and is given express assurances of assistance upon which she reasonably relies to her detriment, the first type of “special relationship” exception to the public duty doctrine comes into play.69 In Noakes v. Seattle, a disabled woman called 911 reporting that a prowler was breaking into her house. She was repeatedly assured that help was on its way - and relied on these assurances – while waiting for police assistance as the violent intruder broke in and assaulted and raped the woman and her mother. The police were not, in fact, dispatched as promised. The court found that the assurances of the 911 operator arguably created a special relationship with the women, and denied summary judgment for the city of Seattle based on their public-duty-doctrine argument.70

As the court found in Chambers-Castanes v. King County, 100 Wash. App, 275, 286, 669 P.2d 451, 458 (1983),

[A]n actionable duty to provide police services will arise if, (1) there is some form of privity between the police department and the victim that sets the victim apart from the general public, and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim.

70 Noakes, at 700; Beal v. City of Seattle, 134 Wash.2d 769, 954 P.2d 237 (1998); Bratton v. Welp, 145 Wash.2d 572, 40 P.3d 656 (2002); Chambers-Castanes, 100 Wash. 2d 769.
While simply assisting a victim in obtaining a protective order against the assailant does not create a special relationship sufficient to overcome the public-duty doctrine, assurances by a police officer to a victim that a case will be referred for prosecution, and the fact that a victim reasonably relies on those assurances, does create a special relationship between law enforcement and a victim. In short, there must be direct contact setting the citizen apart from the general public, and express assurances of assistance that give rise to a justifiable reliance on the part of the citizen.\textsuperscript{71}

3. **Failure to Protect Persons under the Supervision of a Government Entity.**

When a government agency undertakes the supervision of a vulnerable adult,\textsuperscript{72} the agency and its employees owe a duty of care in providing services to the vulnerable adult. For example, a county case manager for a disabled adult has a duty to use reasonable care to protect the disabled adult from foreseeable harm, including harm caused by the actions of third parties.\textsuperscript{73} The individual caseworker may be entitled to qualified immunity if he or she can show they carried out a statutory duty according to procedures dictated by statute and superiors and acted reasonably. The State does not share in this qualified immunity, however.\textsuperscript{74}

IV. **Conclusion**

The above is an outline of possible grounds for civil damage actions in sexual assault cases. It is by no means exhaustive. When you are consulted by a sexual assault victim for advice as to possible civil claims, it is important to listen carefully, explore all avenues as to possible defendants, and investigate as fully as possible, so that you can discuss the pros and cons of a possible lawsuit most realistically with your client. You should also be familiar with resources available to your client, such as Crime Victims

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\textsuperscript{71} Id.
\textsuperscript{72} Wash. Rev. Code §74.34.020(13)
Compensation (discussed in another chapter of this manual), so that you can help her access them as needed.

The decision to proceed with a civil claim is a particularly difficult one for sexual assault victims. On the one hand, a lawsuit may afford an avenue for recognition of the harm done to the victim and a means of acknowledgment of her pain, suffering, and need for funds for treatment. On the other, a civil case can take years from the time the victim consults you until it is resolved by settlement or trial. Your client must surrender many rights of privacy and even at times her feelings of dignity in the context of a lawsuit. It can be a long, hard road, but for most who embark on it, it can be a rewarding one. For others, it is not the most productive path to follow, and you need to be prepared to honor a decision not to proceed. Your client needs to know that she has the final word throughout the process, and can even dismiss a lawsuit in progress if she wishes.

Try to assure that your client has adequate support during the course of litigation. Interrogatories and depositions can be brutally difficult for a sexual assault victim. Ideally, she should maintain a relationship with a counselor, even if only for periodic support during the litigation process. She should at least identify people she trusts to turn to during difficult periods. Your law firm cannot function as her support system. This would not be healthy for her or for you and your employees. It is important to empower your client as much as possible as it pertains to her legal claims, but to draw appropriate boundaries as to your role in her life.

Finally, if you embark on a civil claim on behalf of a sexual assault victim, be creative and assertive. This can be a challenging and very satisfying area of practice!
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## TABLE OF STATUTES AND RULES

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