

**The Center for Law &  
Public Policy  
on Sexual Violence**

**RIGHTS AND REMEDIES:  
MEETING THE CIVIL LEGAL NEEDS OF  
SEXUAL VIOLENCE SURVIVORS**

**A project of**

**The National Crime Victim  
Law Institute**

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SEXUAL VIOLENCE

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The OVW grant also funded the development of legal resources for coalitions working on difficult systemic advocacy issues in the civil and criminal justice systems. This guide, *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors*, is the result of the collaboration of many individuals and organizations that have lent their time and expertise to this project. This guide is best utilized in conjunction with its companion manual, *A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence*, which addresses victims' rights and remedies in the criminal arena.

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## A Word on Language

For simplicity, the terms “victim” and “survivor” are used interchangeably throughout this guide, and a victim or survivor is generally referred to in the feminine form. We recognize that both women and men are victims of sexual violence. According to the Bureau of Justice Statistics, however, “[m]ost rapes and sexual assaults are committed against females. Female victims accounted for 94% of all completed rapes, 91% of all attempted rapes, and 89% of all completed and attempted sexual assaults.” BJS, 1992-2000, <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf> (last referenced August 30, 2005).

## Disclaimer

This guide is current as of September 2005. The guide is intended as a toolkit to provide the attorneys served under the SACTAP project with a framework and checklist of issues to include when creating their own, state-specific, civil legal remedies guide. Nothing herein constitutes legal advice, and each coalition attorney must look to his or her own state or tribal law to create a comprehensive guide.

While many individuals and organizations generously contributed to this guide, the authors and the National Crime Victim Law Institute alone are responsible for any errors.

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## INTRODUCTION

One out of every six American women<sup>1</sup> has been the victim of a completed or attempted rape in her lifetime. In the United States, nearly 18 million women have been victims of rape or attempted rape.<sup>2</sup> The majority of women assaulted were raped when they were under the age of 18. Overall, about 44% of rape victims in the United States are under age 18. And, fifteen (15%) to twenty percent (20%) of all victims are estimated to be under the age 12.<sup>3</sup> Native American women are most at risk for sexual violence. Indeed, American Indian and Alaska Native women experience a higher rate of violence than any other group, including African-American men and other marginalized groups.<sup>4</sup> While men are also victims of sexual violence, women are far more likely to be victimized.<sup>5</sup>

However, these high rates of sexual violence are not reflected in the data for state and federal sexual assault prosecutions. The reasons for this are many and varied. Many sexual assaults are never reported. Of those, only a small percentage of sexual violence cases are ever charged. Still fewer are ever prosecuted to conviction. Even when a prosecution is successful, the criminal justice system may be limited in its ability to promote recovery, restitution, and restoration for survivors.

Regardless of whether a criminal prosecution is pursued, a sexual violence survivor may have many outstanding legal needs that a criminal court cannot adequately address. Thus, a sexual violence survivor may turn to the civil justice system — in addition to or *in lieu* of the criminal justice system — for the legal relief she seeks. The search for justice in the civil courts may commence immediately following a sexual assault, many decades later, or anytime in between. Some needs may be immediately apparent, while others will emerge only over time.

Sexual violence survivors may seek assistance with a variety of different civil matters. Assistance may be needed in negotiating the state and/or the federal courts. For example, victims may need assistance with safety, employment, housing, educational, family law, and financial matters. They may also need assistance with legal problems within the jurisdiction of the federal courts, such as immigration (including petitions for residency, adjustment of status, work authorization, etc.) and bankruptcy.

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<sup>1</sup> Victims of sexual assault are overwhelmingly female. Sex Offenses and Offenders. Bureau of Justice Statistics, U.S. Department of Justice (1997).

<sup>2</sup> *Prevalence, Incidence and Consequences of Violence Against Women Survey*, National Institute of Justice and Centers for Disease Control and Prevention (1998).

<sup>3</sup> The National Violence Against Women Survey found that of the women who reported being raped at some time in their lives, 21.6% were under the age of 12 years old, 32.4% were 12-17 years old, and 29% were 18-24 years old when they were first raped. This translates to 54% of women victims who were under 18 at the time of the first rape. (Prevalence, Incidence, and Consequences of Violence Against Women. U.S. Department of Justice, Office of Justice Programs. November 1998.)

<sup>4</sup> Sarah Deer, "Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law" (2005), citing generally Lawrence A. Greenfield, Steven K. Smith, U.S. Dept. of Justice, *American Indians and Crime* (1999); Steven W. Perry, U.S. Dept. of Justice, *American Indians and Crime* (2004); Callie Rennison, U.S. Dept. of Justice, *Violent Victimization and Race, 1993-1998* (2001).

<sup>5</sup> For example, in 2002, nine out of every ten rape victims were female. See National Crime Victimization Study (2003).

Rape crisis centers (and other programs serving sexual violence survivors), staff attorneys, *pro bono* lawyers, and other advocates can best serve survivors by ensuring that all the tools of the legal system are available to help survivors negotiate these complicated aspects of the recovery process. Although each individual survivor's circumstances are unique, what all survivors have in common is the need for information that is accurate, that presents the survivor with the full scope of legal options, and that respects individual choices.

This guide will allow coalitions to create a resource to assist survivors in weighing the options and taking those first steps into the civil realm. It is our hope that this information will help speed the process of recovery, and the transition from victim to survivor.

### **A. Purpose**

This guide provides an overview of a sexual violence survivor's rights and remedies within the civil legal context. It identifies legal as well as safety and other practical considerations that should be considered when helping a sexual violence survivor identify legal options in the civil justice system. It is not a substitute for legal advice.

It is also not a detailed overview of state-specific law. Rather, it is a toolkit designed to identify the legal issues that may be implicated for a survivor and the possible sources of law for the remedies chosen.

### **B. Limitations**

This guide is not an end in itself. It is intended to provide coalition staff attorneys with a framework and checklist of issues to include when creating their own state-specific civil legal remedies guide. Each coalition must complete this guide by adding to it state-specific information and laws. The Appendix to this guide contains a compilation of internet links to states' statutes, rules, and regulations to assist the staff attorney in adapting this guide to state-specific information.

### **C. The Civil and Criminal Justice Systems: Intersecting Remedies**

There will be cases in which a survivor's legal needs overlap between the criminal and civil components of the justice system. And, there will be other occasions on which neither the criminal nor the civil process can fully protect the survivor's personal safety, ensure the right to privacy, or compensate for suffering and loss. However, the importance of communication, cooperation, and collaboration between attorneys and advocates assisting a victim in a criminal case and those assisting a victim in a civil case cannot be over-emphasized.

Consider, for example, a survivor who has a court hearing scheduled on a sexual assault or stalking protective order. A prosecutor may wish to attend the hearing in order to

observe the witnesses' demeanors, to hear the victim's (or respondent's) testimony in the civil matter, or to ascertain the evidence proffered in the civil case. Conversely, the victim, her lawyer, and the prosecutor should all be prepared for the assailant's criminal defense attorney partnering with — or perhaps even serving as — the respondent's attorney in any pending civil matter, and for the potential that the victim's testimony in the civil matter may be used against her at a later date. Other examples of intersection include the sexual violence survivor who recognizes the need for both civil and criminal "no contact" orders in order to ensure her safety in the event a criminal prosecution does not proceed or is not successful, or the victim who declines to participate in a prosecution only to be served by the perpetrator with a defamation or "SLAPP" suit (strategic lawsuits against public participation; the term coined for lawsuits that target victims for reporting crime).

Because a survivor may look to both the civil and criminal justice systems for the most comprehensive protection, this toolkit is to be used in conjunction with its companion guide, *A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence*. Together, these resources will provide a comprehensive overview of a survivor's rights and remedies available within both the criminal and civil justice systems.

# CHAPTER ONE: SAFETY AND PROTECTION

## I. PERSONAL SAFETY

A survivor's physical safety following an incidence of sexual violence is of paramount importance. A victim's safety needs will vary depending on a number of factors, including:

- Who the perpetrator is;
- How much he knows about the victim, her work place, residence, friends, family members, etc.;
- The location of the assault;
- Whether the perpetrator acted alone or with others;
- Whether the violence involved the use of weapons;
- The extent of the physical injuries the victim sustained;
- The survivor's age and resources; and
- The degree of contact with the assailant, both pre- and post-assault.

As the majority of sexual assaults are perpetrated by an acquaintance, family member, intimate partner, or non-relative well known to the victim, a victim's relationship, if any, with the perpetrator is likely to be a significant factor in developing an appropriate safety plan.<sup>6</sup>

Safety considerations may arise in a variety of personal and professional contexts and locations; they may be situational, episodic, or enduring; and may vary in severity or lethality. The next section summarizes the types of protective orders available to sexual violence survivors and identifies a variety of safety issues and remedies that may arise pursuant to an assault.

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<sup>6</sup> Statistically, only 14%-23% of sexual assault victims are assaulted by a stranger. Estimates vary because different studies employ different definitions of sexual assault, and populations surveyed include different age groups. The National Women's Study (NWS) found that 22% of rape victims were assaulted by someone they had never seen before or did not know well. (Kilpatrick, Edmunds, & Seymour, 1992). Using a definition of rape that includes forced vaginal, oral, and anal sex, the National Violence Against Women Survey, (Tjaden, P. & Thoennes, N. (1998, November), *A Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey*, and different categories for victim-perpetrator relationships than the NWS, the NVAW study nevertheless reported similar findings. In rape cases occurring after the victim was 18 years old, the NVAW study determined that 14.1% of the rapists were strangers. The National Survey of Adolescents (NSA), a National Institute of Justice funded sample probability study of 4,023 adolescents age 12-17, found that 23.2% of the perpetrators were strangers. (Kilpatrick 1996).

## A. Practical Considerations

This section outlines a number of practical considerations when a survivor is exploring her protective order options.

- If there is any possibility of continuing violence, a victim should receive assistance to develop a realistic safety plan. Appropriate safety planning considerations include a victim's residence (both temporary and extended), place of employment, school site(s), place of worship, court locations, friends' and family members' residences, gym or other workout sites, parking area or bus-stop, and any other locations to which the survivor may travel and/or be vulnerable. Such planning is especially important in situations where there is a potential for continuing violence, such as in the case of spousal, intimate partner, or child sexual assault.
- Consider whether to implement — and what options exist to fund<sup>7</sup> — changes to existing security. This may include installing additional door and window locks, re-keying existing locks, upgrading lighting and security devices, relocating a parking area or designated parking spot, etc.
- Certain locations may trigger an adverse reaction from the victim, either because of memories of where/how the violence occurred, the presence of the perpetrator, or heightened feelings of vulnerability (such as elevators, high-rise parking lots, etc.). A victim and those who serve her should consider this when scheduling appointments, deciding whether to arrange for court security, deciding on the need for an escort, or other situations in which a survivor may be especially vulnerable or fearful.
- In certain cases, relocation and even identity change may be appropriate (including change of name, social security number, and records). Securing a new identity can be a complex process, involving meticulous consideration of which records are changed, when, where, and in what order. A survivor should receive assistance from an attorney or advocate familiar with the process and the necessary safeguards. See the “Identity Change” in Section II below for additional information.
- Centers should also be aware of safety concerns to their clients and staff and develop safety plans and procedures.

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<sup>7</sup> In some communities, funds are available to assist certain residents, *e.g.*, those who are seniors or low-income, with increased security measures. While not specific to sexual assault survivors, such funds may nevertheless be a resource for certain victims. Other possible funding sources for these and other safety measures include homeowner's or renter's insurance, crime victim compensation funds, civil protective order provisions, or state or federal emergency assistance funds. *See also* Chapter Five of this guide, “Tort Liability.”

## **B. Civil Protection Orders**

A civil protection order (“CPO”) is a civil remedy a victim may pursue regardless of whether a criminal investigation is pending or a criminal prosecution is underway. While a protection order may enhance a victim’s safety and help deter future or continued violence, it may also serve as a trigger for continued violence. An attorney or advocate can play a key role in helping a victim identify and understand the choices before her and the possible implications of those choices. Some CPOs require an underlying relationship between the parties; others do not. And, in some cases, a survivor may seek to secure more than one order, as the duration, scope of protection, enforcement mechanisms, and other terms and conditions, may vary.

While every state has a CPO designed to protect victims of sexual violence who are assaulted in the context of an intimate partner relationship, only 12 states have specific Sexual Assault Protection Orders (“SAPO”). By definition, these orders protect a sexual violence survivor regardless of whether the assault was perpetrated by a stranger or a relative or intimate partner.<sup>8</sup> Depending on the relationship between the victim and the perpetrator, and the nature and frequency of the perpetrator’s contacts, a sexual violence victim also may qualify for protection under a state’s domestic violence and/or stalking protective orders. In addition, a victim may be able to utilize a state’s “anti-harassment” or general “no contact” order. These more generic “no-contact” orders typically have no requirement that the parties have a pre-existing intimate or familial relationship prior to the assault.

Civil protection orders are not exclusive; indeed, it may very well be in a survivor’s best interest to petition the court for more than one type of protective order, and even to have two or more orders in effect. For example, while a SAPO may provide for monetary damages and attorney’s fees, a domestic violence restraining order may award a survivor custody of children and possession of the residence, and a stalking order may provide for civil damages, mandatory mental health counseling for the stalker, and other conditions important to the victim. In addition to the different remedies available to a survivor through these various orders, the orders may also remain in effect for varying periods of time. For example, a SAPO or domestic violence order may expire after one, two, or three years, whereas a stalking order may remain in effect for a longer term, or even indefinitely.

A victim may also be eligible for orders in more than one state or Indian Country, and may wish to secure these multiple orders in order to enhance the protections available to her, to increase the remedies available if a violation occurs, or to underscore for the perpetrator the importance of obeying court orders and the victim’s willingness to pursue judicial remedies.<sup>9</sup>

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<sup>8</sup> Currently, only California, Colorado, Florida, Illinois, Maine, Maryland, Minnesota, Montana, Oklahoma, South Dakota, Texas and Wisconsin have protective orders for which a sexual assault survivor is specifically eligible, regardless of the relationship (if any) between the parties.

<sup>9</sup> The Appendix contains a compilation of internet links to all states’ statutes, rules, and regulations to assist a coalition staff attorney in determining neighboring/foreign states’ protective order laws.

If a victim wishes to relocate out of the state, Indian Country or Territory, the protective order will remain in effect consistent with the law of the issuing state, tribe or territory *so long as it meets the requirements set forth in the Violence Against Women Act (VAWA)*, 18 U.S.C. § 2265 *et seq.* Enforcement of a qualifying protective order will be pursuant to the new jurisdiction’s enforcement mechanisms. Military courts also accord full faith and credit to qualifying state and tribal court protective orders. *See below*, Chapter One, Section III, for a more detailed discussion of VAWA’s Full Faith and Credit provisions.

Non-English speaking survivors face unique challenges in accessing the justice system and securing legal protections. Although there are no citizenship or immigration requirements for securing a protection order, many immigrant survivors face significant hurdles due to language, cultural, social, and political obstacles.

Specific considerations for serving non-English speaking survivors include translator and interpreter access, availability of bi-lingual court forms, and confidentiality of services. Some jurisdictions permit the filing of inter-lineated<sup>10</sup> protection order petitions; others accept only translated or English language requests for assistance.

When possible, submit a request for a court interpreter prior to the date and time set for the court hearing(s). If an interpreter is employed, it is important to emphasize at the outset the interpreter’s professional and legal obligation to maintain client confidentiality. Some, but not all, courts have implemented a court interpreter certification program. If your state has such a program, only certified interpreters should be utilized by the courts. For an overview of a model court certification program training, see the National Center for State Courts’ manual “Court Interpretation: Model Guides for Policy and Practice in the State Courts” at: [http://www.ncsconline.org/wc/publications/Res\\_CtInte\\_Pub.pdf](http://www.ncsconline.org/wc/publications/Res_CtInte_Pub.pdf).

The following list identifies the various types of different civil protection orders that may be available through a state or tribal court.<sup>11</sup> It includes a checklist of issues to consider when completing the state-specific information in order to adapt the guide to a specific state or jurisdiction. It is followed by a review of some basic practical safety considerations.

## **1. Sexual Assault Protective Orders**

### **o Eligibility**

- Who is eligible?
- Are there any relationship requirements?

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<sup>10</sup> Inter-lineated petitions are bi-lingual documents that alternate between a line in English followed immediately by a line, just below the English text, in the second language. The second (non-English) language text may be in italics or other font change to help distinguish it from the text above. Inter-lineated forms track the English text, so the translated text is more closely aligned with the English version and thus easier to track.

<sup>11</sup> For an overview of the types of orders that may be available to a sexual assault survivor, *see* Appendix A, “Sexual Assault Protective Orders.”

- May a minor victim apply? Against a minor respondent? Against an adult respondent? Does a guardian or guardian *ad litem* need to be appointed before a minor may obtain the order?
  - What are the residency requirements, if any?
  - What are the venue requirements?
  - May petitioner submit a petition in a language other than English?
- Requisite Elements
  - Completed or attempted sexual contact?
  - By force? Threat of force?
  - Future fear?
- Procedure and Burden of Proof
  - What is the procedure to obtain a SAPO?
  - Standard of proof for issuance?
  - Is it applied for *ex parte* or at a hearing with both parties present?
  - For continuing the order?
- Terms and Conditions
  - Availability (through police, courthouse; daytime only or 24 hours a day/seven days a week)?
  - Length of time order is in effect (temporary; permanent; renewable)?
  - Service of process (who may serve? free or for a charge?)
  - Renewal (procedure; burden of proof for renewal; respondent's right to hearing)?
  - Sanctions for violation (civil or criminal? Maximum sentence)?
- Scope of Protection and Remedies Available
  - Monetary damages?
  - Mental health evaluation or treatment for respondent?
  - Ouster (removal from property)?
  - Custody?
  - Stay-away provisions?
  - Gun dispossession?
  - Financial Support (Child? Spousal? Intimate partner?)

○ Sanctions for Violations

- Is the sanction for a violation civil or criminal?
- Is it contempt or a separate offense?
- Does the law provide for mandatory arrest in the event of an alleged violation?
- What standard of proof is required to effect a warrantless arrest (*e.g.*, probable cause)?<sup>12</sup>

This checklist of questions should be used when researching all types of protective orders available to a survivor. The following numbered sections briefly describe some of the unique aspects of different types of orders that may be available in a state or Tribal court..

## 2. Domestic Violence Protective Orders

Domestic violence protective orders exist in every state and territory.<sup>13</sup> Each state's or territory's laws proscribe who is eligible for a domestic violence protective order (DVPO), the basis for the order, and the burden of proof that must be met before an order may be issued. Only some sexual violence survivors may be eligible for a DVPO. If the sexual violence occurred within the context of an intimate partner relationship, or if the DVPO statute is broadly crafted, a sexual violence survivor may qualify under the state's, tribe's or territory's domestic violence laws. In some jurisdictions, a survivor will be eligible for the DVPO only if she describes the sexual violence as an "intimate sexual relationship."

### Eligibility

For this type of protective order, the law typically requires that a survivor have one of the following types of relationship with the assailant: dating or intimate partner, previous dating or intimate partner; a household member or former household member; a spouse or former spouse; a person with whom the petitioner has a child in common; or a relation by blood, marriage or adoption. In the majority of states, domestic violence protection orders are available to both heterosexual and same sex couples.<sup>14</sup> For an overview of civil protection orders for battered immigrant victims *see* Legal Momentum's March 2005 manual, *Breaking Barriers: A Complete Guide to Legal Rights and Resources*, chapter 5, "Battered Immigrants and Civil Protection Orders, by Leslye Orloff *et al.*

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<sup>12</sup> Every state now permits warrantless mandatory arrest for a misdemeanor crime offense of domestic violence if there is probable cause. Arrest authority for other offenses varies state to state.

<sup>13</sup> "Civil protection orders are available in all fifty states, Puerto Rico, the District of Columbia, and all U.S territories." Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993). *See also* B. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 J. Juv. & Fam. Crt.J. 1 (Special Issue No. 4 1992); J. Stojak, *Domestic Violence* 1 Geo. J. Gender & L. (2000).

<sup>14</sup> *See* "Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2001" by the National Coalition of Anti-Violence Programs (NCAVP) (September 2002), pp. 14-16.

## Requisite Elements

Typically, the requisite showing for obtaining a domestic violence protective order is that the petitioner has been a victim of or been threatened with physical abuse, and that she has a reasonable fear of future harm or threat of harm from a person in an eligible relationship with the victim. The reasonable fear of future harm may be based on past incidents of violence demonstrating a propensity for it to occur again, or credible threats of violence by the assailant upon the victim. The threshold showing for proving eligibility for the order may vary depending on whether the survivor is seeking a temporary or permanent order. *See below*, “Burden of Proof.”

## Procedure

Some states have a two-step protection-order application process, whereby the victim initially obtains a temporary order, valid for an initial time period. This initial period may range from three to seven or ten days, or longer. At the end of the initial period, the petitioner must return to court to provide evidence as to why the order should remain in effect for the longer term.

Other states permit a victim to request an order at an *ex parte* hearing and, if the order is granted, the burden shifts to the respondent to contest the order and request a hearing. If the *ex parte* order is not contested, it will remain in effect for the duration of the statutory period, unless otherwise dismissed or modified.

## Burden of Proof

The burden of proof necessary for maintenance of an order will vary, depending on the jurisdiction. In some states the basis for the order must be proven to be “clear and convincing.” In other jurisdictions, a “preponderance of the evidence” is sufficient. Similar variations exist with respect to the burden of proof required for a renewal of an existing order, or to prove that a violation of an order occurred. (**Note:** If a violation of the order constitutes a criminal offense, the prosecution will likely have to prove “beyond a reasonable doubt” that a violation occurred.) Standards of proof may also vary depending on the type of hearing conducted. For example, a “preponderance of the evidence” standard may apply at the *ex parte* hearing with a “clear and convincing” standard governing the permanent order.

## Terms and Conditions

The length of time that a DVPO remains in effect varies widely, as does the scope of remedies available. In most jurisdictions, an order will remain in effect for one to three years. Orders may be renewable.

## Scope of Protection and Remedies Available

Think creatively as to how best craft an order that maximizes a victim's safety and addresses both her current and anticipated future needs. Elements to consider include whether to:

- prohibit respondent from a survivor's places of residence, employment, education, worship, and the corresponding sites for children or other family members, if applicable;
- prohibit the assailant from contacting a survivor at places she may frequent, such as friends' or relatives' residences;
- obtain a vacate order to oust the assailant (from a shared premises) if the assailant and survivor share a residence. The order should specify exactly what the assailant is allowed to take with him, such as personal belongings, and the manner in which he will be allowed into the house to retrieve his items, such as under the accompaniment of a law enforcement agent. If the assailant and survivor share assets, place restrictions upon removing joint assets, giving use to jointly held automobiles, etc.;
- obtain custody orders, if the assailant and survivor share children, that protect the children, perhaps with limited supervised visitation, and to protect the survivor by ensuring any visitation or exchange occurs in the presence of a third party;
- prohibit any contact and harassment via telephone, mail, electronic mail, or through third parties;
- prohibit assailant from being within a specified distance (*e.g.*, 200 yards, 50 yards, within sight, as prescribed by statutory law) from a survivor and her children;
- require assailant to pay for repairs to a survivor's residence, including costs associated with increased security and/or relocation, for medical expenses incurred as a result of the assault, or for other associated expenses;
- require assailant to relinquish to law enforcement (or a third party) any all weapons and firearms that respondent owns or possesses, including licenses. *See below*, Section IV, for a more detailed discussion of protective orders and gun dispossession.

## Enforceability

Once an order has been obtained, whether temporary or permanent, it is important for a survivor to provide copies to all law enforcement agencies whose jurisdiction includes her residence, place of employment, school, children's school, or any other place specified as a protected place in the order. Some law enforcement agencies have been known to refuse to respond to requests to enforce protective orders if they do not have a copy in their file. Therefore, a survivor may want to carry a copy on her person or in her vehicle, if it is safe for her to do so. She may also want to give copies to family members, school locations, place of employment, and other places covered in the order. Of course, a decision to share the order and its contents with others implicates a survivor's privacy. A survivor will want to weigh the benefits and burdens of this diminished privacy in deciding whether and with whom the order will be shared. Also to be considered is whether there are individuals at the identified sites who may be able to afford the victim greater privacy, such as human resources personnel, security officers, or school administrators.

## Sanctions for Violations

If a respondent violates a protective order, possible sanctions include:

- Civil Contempt of Court
  - Monetary Fine
- Criminal Contempt of Court
  - Monetary Fine
  - Jail Time
- Charge of New and Separate Offense
- Modification of Order – New Terms

For a detailed discussion of battered immigrants and civil protection orders, *see* chapter 5 (“Battered Immigrants and Civil Protection Orders”) in *Breaking Barriers: A Complete Guide to Legal Rights and Resources*, by Leslye Orloff *et al.*

### **3. Orders that Protect Elderly, Disabled, or Other Especially Vulnerable Populations**

Some states have laws designed specifically to protect those who are especially vulnerable, such as the elderly and the physically or developmentally disabled. Such orders may not require a showing of physical violence; emotional or financial abuse may be sufficient.

In contrast to domestic violence and sexual assault protective orders, which typically must be applied for directly by the victim (or her guardian), a petition for an order to protect a disabled or elderly victim may be submitted to the court by a relative, neighbor, care provider, or other third party in some jurisdictions.

#### **4. Stalking Orders**

All fifty (50) states, the District of Columbia, the federal government, and at least ten Indian nations have established the crime of stalking.<sup>15</sup> An additional 12 states allow a stalking victim to pursue a civil law suit against a stalker, pursuant to a state stalking statute or a harassment or other more general provision.<sup>16</sup> In order to be eligible for a stalking protective order, state law typically requires at least two or more unwanted contacts. Violation of a stalking order is a crime in every state; sanctions vary widely and may range from 180-days in jail to a felony prison sentence for a repeat violation.

The range of remedies available to a sexual violence victim who secures a stalking protective order may also be much broader than the remedies available through a DVPO or SAPO. For example, an Oregon stalking victim may request that the court order the respondent into mental health counseling. Wyoming permits a victim to request “exemplary” (punitive) damages.<sup>17</sup> Washington state’s “malicious harassment” law authorizes the court to award a victim up to \$10,000 in punitive damages.<sup>18</sup>

#### **5. General Civil Protection/Anti-Harassment Orders**

A victim of sexual violence may also be eligible for a protection order that is non-sexual assault specific. For example, in Maine, Minnesota, California and Wisconsin, protection orders are available for victims of “harassment.”<sup>19</sup> In each of these four states, “harassment” is defined differently, but all of the interpretations include victims of sexual assault.<sup>20</sup> In California, “harassment” includes “unlawful violence” or a “credible threat of violence.”<sup>21</sup> The statute then defines “unlawful violence” as any assault, battery or stalking.<sup>22</sup>

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<sup>15</sup> See 18 U.S.C. § 2261A (1) for the federal crime of stalking.

<sup>16</sup> California, Kentucky, Michigan, Nebraska, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Wyoming, and West Virginia specifically authorize such suits. The South Dakota, Tennessee, and Washington civil statutes refer to “harassment” or “malicious harassment” rather than stalking, but the conduct proscribed is consistent with stalking. *See, e.g.*, Va. Code Ann. § 8.01-42.3 and Or. Rev. Stat. § 30.866 for civil actions for stalking; and Tenn. Code Ann. § 39-17-308. Links to the state laws may be found on-line at the Stalking Resource Center website: [http://www.ncvc.org/src/main.aspx?dbID=DB\\_CivilStalkingLaws188](http://www.ncvc.org/src/main.aspx?dbID=DB_CivilStalkingLaws188).

<sup>17</sup> Wyo. Stat. Ann. § 1-1-126.

<sup>18</sup> Wash. Rev. Code Ann. § 9A.36.083.

<sup>19</sup> 5 Me. Rev. Stat. Ann. §§ 4651 – 4659; Minn. Stat. Ann. § 609.748; Cal. Civ. P. Code Ann. § 527.6; Wis. Stat. Ann. § 813.125.

<sup>20</sup> *Id.*

<sup>21</sup> Cal. Civ. P. Code Ann. § 527.6.

<sup>22</sup> *Id.*

South Dakota allows orders to be issued against any person against whom stalking or “physical injury is alleged.”<sup>23</sup> In Colorado, Florida, Montana, Oklahoma and South Dakota, victims of sexual violence are eligible for protection under more general statutes that also address victims of domestic violence, stalking and/or harassment.<sup>24</sup> Florida’s statute specifically addresses domestic violence, but if a victim of sexual violence who has no intimate relationship with the assailant reports the sexual violence to a law enforcement agency and cooperates in any criminal proceeding against the assailant, the victim is eligible for a protection order.<sup>25</sup> This is true regardless of whether criminal charges based on the sexual violence have been filed, reduced or dismissed by the state attorney.<sup>26</sup>

## II. FULL FAITH AND CREDIT: ENFORCEMENT OF FOREIGN PROTECTION ORDERS

### A. An Overview of Full Faith and Credit

“Full faith and credit” is the concept that a state, tribe or territory will enforce another state’s, tribe’s or territory’s order as if the order were their own. In the context of protective orders, “full faith and credit” (FFC) most often refers to the provisions of the Violence Against Women Act (VAWA), enacted in 1994 and amended in 2000 and 2005,<sup>27</sup> which requires state, tribal, and territorial governments to enforce one another’s qualifying protective orders.<sup>28</sup> Because of these provisions, if a survivor with a qualifying protective order moves from one state, territory or tribal jurisdiction to another, or works in a different jurisdiction than where the survivor lives, the order remains effective and enforceable in the new jurisdiction. (There may also be state or tribal laws requiring a state, tribe or territory to give full faith and credit to certain foreign<sup>29</sup> orders, but VAWA’s full faith and credit provisions are mandatory upon all states, tribes and territories and thus cannot be modified or rescinded by a tribe, territory or state.)

VAWA’s “Full Faith and Credit” (FFC) provisions also mean that the enforcing jurisdiction must enforce the foreign order *even if* the petitioner would not be eligible for relief in the enforcing state, and even if the issuing state, tribe or territory granted types of

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<sup>23</sup> S.D. Codified Laws §§ 22-19A-8 – 22-19A-17.

<sup>24</sup> Colo. Rev. Stat. Ann. § 13-14-102; Fla. Stat. Ann. § 784.046; Mont. Code Ann. § 40-15; Okla. Stat. Ann. tit. 22, §60; S.D. Codified Laws §§ 22-19A-8 – 22-19A-17.

<sup>25</sup> Fla. Stat. Ann. § 784.046.

<sup>26</sup> *Id.*

<sup>27</sup> VAWA 2005 had not been passed by Congress by the time this manual was sent to press but was subsequently adopted; it was signed into law on January 5, 2006. Where possible, VAWA 2005 is incorporated. s with any legal resource, the reader should confirm current law before relying on the citations and interpretations provided herein.

<sup>28</sup> “Any protection order issued that is consistent with [18 U.S.C. § 2265(b)] . . . shall be accorded full faith and credit by the court of another State, Indian tribe, or territory . . . and enforced by the court and law enforcement personnel of the other State, Indian tribal government, or Territory as if it were the order of the enforcing State or tribe.” 18 U.S.C. § 2265(a).

<sup>29</sup> The term “foreign” refers to an order issued by a court from a different state, tribe or territory than the state, tribe or territory in which the victim is seeking enforcement of the order.

relief that are not available in the enforcing state, tribe or territory. A validly issued protective order travels from jurisdiction to jurisdiction with the petitioner it was issued to protect. Although the terms of the order are determined pursuant to the laws of the issuing state or tribe, a qualifying protection order will be enforced according to the remedies available in the new, rather than the issuing, jurisdiction. Not all protective orders are “qualifying” orders under the federal law, however. For example, an order that was issued without affording the respondent reasonable notice and opportunity to be heard is not entitled to full faith and credit. A mutual order of restraint is not entitled to full faith and credit for enforcement against the petitioner if it does not contain a cross-petition or cross-filing and specific findings that each party is entitled to the order.

## **B. Federal Definition of a Protection Order**

“Protection order” is broadly defined under the federal statute and encompasses an array of civil and criminal protections and restraints. The definition of “protection order” was expanded in VAWA 2005 (which was signed into law on January 5, 2006) and for the first time now includes a specific reference to “sexual violence.” The new law defines “protection order” as:

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence or contact or communication with or physical proximity to, another person, including any temporary or final order issued by civil or criminal courts whether obtained by filing an independent action or as a *pendente lite* order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or stay away injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, dating violence, sexual assault, or stalking.

18 U.S.C. § 2266(5). The statute specifically references both civil and criminal protective orders as entitled to full faith and credit.

For example, a qualifying protection order (“PO”) could be:

- an *ex parte*, temporary, or final order issued by a civil or criminal court;

- an *ex parte*, temporary or final order or disposition issued by a juvenile court;
- an order issued pursuant to an independent legal case (such as a domestic violence, stalking, sexual assault, or elder abuse protective order petition) including a child support, child custody or visitation order;
- temporary relief during another lawsuit (such as a marital dissolution); or
- a condition of release or probation in a criminal case.

***Practice Advice:*** The qualifying foreign order may not be called “protection order,” “restraining order,” “order of restraint,” or even contain any of these terms in the title or text. The protection order may still be a qualifying order, however, as it is the content and conditions of the order that determine whether the order is entitled to full faith and credit under federal law.

### **C. Orders Entitled to Full Faith and Credit**

Certain child custody and support orders may not be covered by the FFC provisions of the Violence Against Women Act, although they may be enforceable under other federal laws. VAWA’s definition of “protection order” specifically excludes a support or custody order “issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law.” However, VAWA 2005 now makes explicit that courts must give full faith and credit to support, child custody or visitation provisions *issued as part of* a protection or restraining order, or other stay away provision or injunction (emphasis added). In other words, if a protection, restraining, or other stay away order or injunction contains provisions for support, custody or visitation, those provisions are not excepted from VAWA’s full faith and credit provisions. A support or custody order that is not issued as part of a protection order or stay away injunction would still be excluded from VAWA’s definition of protection order, unless the order is otherwise “entitled to full faith and credit under other Federal law.” (For example, if the order meets the requirements of the federal Parental Kidnapping Prevention Act (PKPA), it is entitled to full faith and credit.)

#### Are only civil protective orders entitled to FFC?

No. Protection orders issued pursuant to a criminal case are also entitled to full faith and credit. This includes protection orders issued as part of a defendant’s release order (*e.g.*, own recognizance, bond or bail, etc.) or term of probation. *See* 18 U.S.C. § 2266(5).

Does the military give full faith and credit to state or tribal court orders?

Yes. Under federal law passed in January 2000, “[a] civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order.” 10 U.S.C.A. § 1561a(a).

Are all orders entitled to Full Faith and Credit?

No, not all orders are entitled to full faith and credit. Only orders that are consistent with the requirements set forth in 18 U.S.C. § 2265(b) are eligible or “qualifying” orders. This section, which under VAWA 2005 now includes references to Territories and territorial court, provides:

A protection order issued by a State, tribal or territorial court is consistent with this subsection if:

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by State, tribal or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

18 U.S.C. § 2265(b).

If the order complies with the requirements set out in (1) and (2) above, the foreign order must be enforced. This is true even if the petitioner would not be eligible for relief in the enforcing state, tribe or territory or if the issuing state, tribe or territory granted types of relief that are not available in the enforcing jurisdiction.

***Practice Advice:*** In cases where the protective order is issued *ex parte*, the order may not be enforceable unless a subsequent order was issued after the respondent had notice and an opportunity to be heard. The opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, and sufficient to protect the respondent's due process rights. 18 U.S.C. § 2265(b)(2).

Are mutual orders entitled to full faith and credit?

VAWA disfavors mutual orders, and thus certain mutual orders are not entitled to full faith and credit enforcement against the petitioner. Federal law provides that a state or tribal court's protective order is **not** entitled to full faith and credit if the order was issued against someone who was the petitioner in an initial application for protection if:

- (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
- (2) a cross or counter petition was filed, but the court did not make specific findings that each party was entitled to such an order.

18 U.S.C. § 2265(c).

In other words, if a state or tribal protective order contains prohibitions against the petitioner and the respondent, only the provisions in favor of the petitioner are entitled to FFC unless the respondent submitted an independent pleading, and the court made specific findings to justify the order. 18 U.S.C. § 2265(c).

***Practice Advice:*** Advocates have long been concerned that courts will, on occasion, issue mutual orders as a shortcut to resolving accusations of mutual abuse or in lieu of engaging in the analysis necessary to determine whether a party is eligible for an order and whether the order should issue. VAWA's exclusion of mutual orders of restraint underscores this disfavored approach, requiring the court to find an independent basis for restraining a petitioner.

**D. Enforcement of Protection Orders**

Must a foreign order be filed or registered to be enforceable?

No. To further enhance victim safety and ensure enforcement across state and tribal boundaries, federal law provides that a foreign state or tribal order does not need to be registered or filed in the new jurisdiction in order to be enforceable. 18 U.S.C. § 2265(d)(2). Enforcement is required even without registration.

If the petitioner chooses to register the foreign order, is the respondent/person restrained entitled to notice?

No. If a petitioner chooses to register a foreign order, VAWA requires that the respondent cannot be notified unless the petitioner requests such notification. 18 U.S.C. § 2265(d)(1).

Some victims still may choose to register or file a foreign order with the new state or tribal court. A victim should carefully weigh the relative risks and benefits of registration. For example, registering an order in the new state may result in the creation of a court file with the victim's name and contact information, potentially compromising the safety of a victim who has relocated. Conversely, registering a foreign order with the new state or tribal court may enhance safety. For example, registration may ensure that an order is entered into both the state and the federal law enforcement data bases and thus increase the likelihood that gun dispossession laws will be enforced. (*See below*, Section III, for a discussion of "Gun Dispossession.")

On occasion, a victim may be advised to secure a new order in the new jurisdiction, in place of registering or filing a foreign order. Like the registration or filing issue discussed above this practice, too, is potentially problematic. The new state or tribal court may not have personal jurisdiction over the respondent. Or, if the respondent is served with a new order, the new order will be entitled to full faith and credit only if the respondent had notice and a reasonable time to respond.

#### What law applies if a foreign protection order is violated?

The enforcing jurisdiction gives full faith and credit to an order by honoring the terms in the protective order as written by the issuing jurisdiction. However, the state, tribe or territory treats the order as its own order for enforcement purposes. In other words, the law of the issuing state, tribe or territory determines who qualifies for protection, how long the order is effective, and the terms of protection; the enforcing state, tribal, or territorial law controls the terms of enforcement.

#### What is the role of law enforcement?

It is not the job of law enforcement to determine whether an order from another state, tribe or territory is a valid or enforceable order. Challenges to a foreign protective order are made to the court of the enforcing jurisdiction.

#### How will a foreign protective order be enforced if the enforcing state has no comparable order?

One question that arises for survivors living in jurisdictions with a limited range of protection order schemes is how a foreign order will be enforced if the enforcing state, tribe or territory has no comparable protective remedy. For example, currently only 12 states

have statutes that specifically allow victims of sexual violence to secure a civil protection order regardless of the victim’s relationship to the offender. (*See* Appendix A.) In contrast to many of the stalking and domestic abuse orders, sexual violence victims are eligible for such orders even if they have not experienced repeated contact by the offender or are not and never were in an intimate sexual relationship with the perpetrator. While it cannot be stated with certainty as to how the remaining states might enforce another state’s sexual assault protective order, it is likely that the enforcing state will look to its own existing protective order schemes for guidance.

### **E. Tribal Jurisdiction**

VAWA neither expands nor contracts the authority of tribal courts to issue and enforce protective orders. Rather, the statute reiterates that tribal courts have jurisdiction *over matters within the authority of the tribe (emphasis added)*. For tribal courts that only have civil jurisdiction, this means that the sanctions for violating a protection order must be civil, not criminal.

“[A] tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.” 18 U.S.C. § 2265(e).

## **III. GUN DISPOSSESSION**

While the link between domestic violence injury or homicide and the use of firearms is well-documented, less data are available as to the link between sexual violence and the use of firearms. However, some data do exist to suggest a connection. For example, a statewide study in Massachusetts found that of the clients who responded to a survey question asking about the use of a weapon, 13 percent reported that a weapon was used in the commission of the sexual assault.<sup>31</sup> Another recent study shows that more homicides of females were committed with firearms than with any other weapon. Of those killed with a gun, nearly two-thirds died at the hands of an intimate male partner.<sup>32</sup>

In 1994, Congress passed the first laws specifically aimed at removing guns from batterers. Although the federal law focuses mostly on victims of domestic violence, the protections available under the law are in effect for any qualifying protective order. A sexual assault protective order may be a “qualifying” order under federal law if the perpetrator and victim fit within a certain relationship. State firearm laws also have been passed to protect sexual violence and domestic violence survivors from gun violence at the hands of their

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<sup>31</sup> Massachusetts Dept. of Public Health, *Sexual Assault Prevention and Survivor Services Rape and Sexual Assault in Massachusetts*, 2001–2002.

<sup>32</sup> Violence Policy Center, *When Men Murder Women: An Analysis of 2002 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incidents*, (Sept. 2004).

assailants by preventing the perpetrators from securing firearms, either indefinitely or for a limited duration. A survivor and her attorney should also be aware of these state laws as a potential source of protection.

This section provides an overview of the two categories of individuals subject to gun and ammunition dispossession under the Brady Act, 18 U.S.C. § 922(g): (1) those subject to certain types of protective orders; and (2) those convicted of a misdemeanor crime of domestic violence. In addition to the prohibitions imposed on persons subject to a protective order or convicted of domestic violence, the Brady Act also makes it unlawful for an individual to sell or dispose of a firearm or ammunition to a person, knowing or having reasonable cause to know, that the person receiving the firearm is subject to a protective order under § 922(g)(8) or has been convicted of a misdemeanor crime of domestic violence under § 922(g)(9).

### A. Subject to Qualifying Protective Order<sup>33</sup>

The Brady Act makes it illegal for a person to possess a gun or ammunition if the person is subject to certain types of court orders. To be covered under the Brady Act, the order must:

- Be issued after a hearing in which the person had **actual notice of the hearing** and an **opportunity to participate**; AND
- **Prohibit** the individual from **“harassing, stalking, or threatening”** an intimate partner (or either person’s children) or conducting any activity to put the victim in reasonable fear of physical injury to herself or her child; AND
  - Include a finding of **credible threat to the physical safety** of the intimate partner or her child; OR
  - Explicitly **prohibit** the “use, attempted use, or threatened use” of **physical force** that would reasonably be expected to cause bodily injury by its terms.<sup>34</sup>

The statute defines the term “intimate partner” as a spouse or former spouse, an individual who is a parent of a child with the perpetrator, or an individual who cohabitates or has cohabitated with the perpetrator.<sup>35</sup> **Note:** The federal definition of intimate partner may be narrower than in the domestic violence crime provision described below and in states’ definitions. Thus, the class of persons who are eligible for protection under this section may be fewer than those eligible under state or tribal law.

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<sup>33</sup> See 18 U.S.C. § 922(g)(8) for the statute in its entirety. A violation is punishable by up to 10 years in prison and/or a fine. *Id.* § 924(a)(2).

<sup>34</sup> *Id.* § 922(g)(8).

<sup>35</sup> *Id.* § 921(a)(32).

A sexual violence survivor, and her attorney, should be aware that the ban on gun possession under the protective order provision is temporary, lasting only as long as the protective order is in effect. Moreover, there are certain exemptions from the gun ban for perpetrators who possess a firearm for “official use.” The “official-use” exemption applies to individuals who are members of law enforcement, military personnel or local, state, and federal employees who receive, possess, or use firearms pursuant to their official duties.<sup>36</sup>

Although the Brady Act can help protect the physical safety of survivors, its usefulness can be hindered by lack of state enforcement or regulation of firearm possession by perpetrators subject to a qualifying protective order. For example, some states, tribes or territories do not have computer system programs in place that are capable of capturing and reporting the information necessary to establish that a protective order is a Brady qualifying order. In other states, there is no state jurisdiction for dispossessing a perpetrator so a firearm may not be removed. Another impediment is that some states, tribes and territories lack procedures for storing or returning a firearm. As a result, law enforcement officers decline to implement the dispossession federal law authorizes, and federal-state cooperation may be limited.

Judges, too, may play a role in compromising victim safety. Some judges fail to enforce the provision or fail to provide actual notice of a hearing to the perpetrator and as a result the protective order is not Brady-eligible. Other judges decline to include the federal gun law in a court order, perhaps assuming (incorrectly) that if state or tribal law does not ban gun possession when a protective order is issued, the state, tribe or territory is not required to enforce the federal provision.<sup>37</sup>

Once a protective order has lapsed, the perpetrator is eligible to reclaim his firearm under federal law. Before returning the firearm, if a court does not perform a search to determine whether a perpetrator is subject to other state or federal firearms prohibitions, it may issue an order to the police to return a firearm to an individual who is prohibited by law from possessing one.<sup>38</sup> These are issues of which a sexual violence survivor and her attorney should be aware. A survivor should also determine whether her state, tribe or territory has its own gun dispossession law and whether its provisions are more stringent than the federal law regarding enforcement, notice to the victim when the perpetrator may reclaim his gun, and manner and method of return of the weapon.

## **B. Convicted of Misdemeanor Crime of Domestic Violence**

The Brady Act also makes it unlawful for an individual to possess a gun or ammunition if the individual has been convicted of a misdemeanor crime of domestic

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<sup>36</sup> *Id.* § 925.

<sup>37</sup> Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges* 39 COURT REVIEW 32, 38 (2002).

<sup>38</sup> *Id.* at 42.

violence in any court.<sup>39</sup> Unlike the protective order ban, a person subject to the misdemeanor domestic violence crime provision is barred from possessing a gun or ammunition for life. The ban does not apply, however, if the conviction is expunged or set aside, or if the perpetrator has been pardoned or had his or her civil rights restored.<sup>40</sup>

The Brady Act ban is applicable if the following conditions are met:

- The individual is convicted of a misdemeanor crime of domestic violence under state or federal law; AND
- The crime must have as an element physical force, or attempt of physical force, or threatened use of a deadly weapon; AND
- The crime must have been committed by a spouse, former spouse, parent, guardian of victim, other parent of joint child, current or past cohabitant as a spouse, parent, or guardian of the victim, or by a person similarly situated to a spouse, parent, or guardian of the victim.<sup>41</sup>

Implementing this provision may be problematic in states or tribal courts that charge domestic violence under general assault statutes, because they do not have a specific crime of “domestic violence.” Thus, applicability and enforcement of the federal law may turn on how a prosecutor interprets the federal and state statutes, and/or how a crime is pleaded. Another possible solution in those jurisdictions without a misdemeanor crime of domestic violence is for the prosecutor to prove an additional element of a crime: a domestic relationship between the victim and her assailant. Some prosecutors may be unable or unwilling to meet this additional burden.

In contrast to the protective order dispossession scheme described above, there is no “official-use” exemption for abusers convicted of domestic violence. Anyone who is convicted of a misdemeanor crime of domestic violence — including members of law enforcement, military personnel, and other federal or state employees who possess or use firearms as part of their profession — is subject to federal gun dispossession laws.<sup>42</sup>

The Brady Act also makes it illegal for a person to transfer a firearm or ammunition to a convicted felon if that person knows or has reason to know of the individual’s felony status.<sup>43</sup> (Convicted felons are also prohibited from possessing firearms or ammunition.)

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<sup>39</sup> 18 U.S.C. § 922(g)(9). This provision is referred to as the Lautenberg Amendment. 18 U.S.C. § 922(g) also makes possession of a firearm unlawful if someone has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; is a fugitive from justice; is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); has been adjudicated as a mental defective or who has been committed to a mental institution; is an alien illegally or unlawfully in the United States (though an exception to this provision may apply) or has been admitted to the United States under a nonimmigrant visa; or has been discharged from the Armed Forces under dishonorable conditions.

<sup>40</sup> *Id.* § 921(a)(33).

<sup>41</sup> *Id.* § 921(a)(33).

<sup>42</sup> *Id.* § 925.

<sup>43</sup> *Id.* §§ 922(g)(1), (d)(1).

Though the “official-use” exemption allows military personnel and other law enforcement who have been convicted of a felony to possess firearms during official duty, they may not use firearms *at all* during official duty if they have been convicted of a misdemeanor crime of domestic violence. This troubling inconsistency in the law potentially means that an individual who severely batters his spouse and is convicted of a felony may continue to use a firearm while working, while an individual who is only convicted of misdemeanor domestic violence crime may not.<sup>44</sup>

Finally, a gun dispossession order remains valid even when the survivor moves from the state or Indian country where the gun prohibition was ordered to another state or to Indian Country. States, tribes and territories are required to honor gun prohibitions contained in “foreign” protective orders or as a result of a “foreign” conviction if they are entitled to full faith and credit (*see above*, Section II, for a more detailed discussion of “Full Faith and Credit” issues).

#### IV. IDENTITY CHANGE<sup>45</sup>

There may be circumstances in which a sexual violence survivor needs to relocate to a new community or state and assume a new identity, for safety reasons. The reasons why a sexual violence survivor might need to change her identity are far ranging and sometimes complex. For example, a new identity may be necessary in cases where the perpetrator relentlessly stalks a victim even after the assault, where a victim is at risk because she is participating in a criminal prosecution, or when a perpetrator — whether a relative, current or former intimate partner, family member, or stranger — remains determined to pursue the victim at any cost.

This section provides a general overview of the identity change process and identifies factors to be considered before a change is pursued. It details some of the benefits and burdens of an identity change and the procedures for a change of name and/or social security number. The section also identifies methods for protecting one’s new identity after the change has been secured, including consumer law issues that could impact the efficacy of the identity change process.

At the outset, it must be emphasized that this discussion is not a comprehensive “how-to” guide on identity change. Changing one’s identity is a very complex process that, by its very nature, implicates various areas of the law (*e.g.*, consumer law, administrative law, family law, etc.). The assistance and advice of expert legal counsel is critical to the planning and execution of a successful identity change. To proceed otherwise may very well place a

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<sup>44</sup> For further examination of this inconsistency in the law and related issues, *see* Capt. E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, *The Army Lawyer* 3 (Oct. 2000).

<sup>45</sup> Many thanks to Valenda Applegarth, Esq., Greater Boston Legal Services, for permitting us to use her materials and for her substantial assistance with this chapter.

victim directly in harm's way. Therefore, this guide should not be relied upon as the sole resource for pursuing an identity change. Expert legal assistance is a necessary component of a victim's successful identity change.

Changing one's identity is a life-altering decision — one that should be made only as a last resort and only after much careful thought and consideration. Too often, survivors are confronted with the need to pursue an identity change without access to the very resources that would ensure they have a full understanding of the personal, professional, and financial implications of their decision, and of what is involved in the process. They are forced to pursue an identity change without the legal help they need to thoroughly and safely plan the identity change.

As a result, some survivors encounter great difficulty obtaining necessary personal records, securing work with a new name, securing a new social security number, and obtaining the various other protections necessary to fully implement a successful identity change. Indeed, an incomplete or inadequate identity change may place the survivor at even greater risk. Although in recent years legal and administrative tools have made identity change more available to survivors, ultimately, there is no guarantee that a survivor will become or remain secure.

## **A. Before Pursing an Identity Change**

### **1. Practical Considerations**

Before pursuing a name and identity change, it is important that a survivor and her attorney discuss whether it is a practical option for the victim to pursue an identity change. The considerations identified in this discussion may rule out identity change as a viable safety mechanism for a survivor. Alternatively, it may help the survivor confirm that identity change is the appropriate route. Though the following list of considerations is not exhaustive, some questions to consider include:

- Is the survivor prepared to completely sever relationships with people who should not know the new information about her? This may include friends and possibly family members.
- If she has children, will they also be able to assume a new identity and protect the new identity of their mother? Older children may have difficulty consistently using their new names. They may inadvertently disclose the survivor's new name to the assailant or other people who should not have that information. In addition, a survivor may have to forgo the right to child support in order to fully sever unsafe communications.

- Does the perpetrator have visitation rights with the children or joint legal custody? If so, this may preclude a survivor's ability to keep the new identity private.
- Is the survivor prepared to alter her physical appearance if necessary?
- Is the survivor able and willing physically to relocate? Collateral physical relocation is practically imperative to keeping one's new identity from the perpetrator.
- Has the survivor made prior attempts to flee or relocate that have been unsuccessful? If so, why were they unsuccessful? How has her assailant been able to trace her whereabouts in the past? Is it possible to address the previous vulnerabilities to help ensure her safety at this time?

## **2. Documents and Records**

Before pursuing an identity change, a survivor should also identify those documents and records that are important to her (and to her children, if applicable) and which ones can be re-issued to reflect a name change. If a survivor feels that a record which cannot be changed to reflect her new name is too important, then she may not wish to proceed with an identity change. For example, name and identity change may be especially complex if it involves the survivor's immigration status either in the United States or abroad. A survivor considering an identity change should be aware of the following:

- She may obtain a new driver's license reflecting a new name.
- She may obtain a new passport under a new name. A passport is a sufficient alternative form of identification and a new one may be obtained through the U.S. Department of State.<sup>46</sup>
- She may obtain a new social security number.
- She cannot obtain a new birth certificate or educational degree in a new name.
- A survivor who is not a United States citizen or lawful permanent resident may be unable to secure a social security number.
- Agencies that a survivor interacts with usually have access to her old identities and will be able to cross-reference it to a new identity. Steps must be taken to safeguard this cross-referencing.

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<sup>46</sup> See [http://travel.state.gov/passport/passport\\_1738.html](http://travel.state.gov/passport/passport_1738.html) for information on obtaining a new passport.

In addition, the survivor should carefully consider which records and documents to retrieve under her old name and her children's old names before changing identities. She could have considerable difficulty trying to obtain these records later under a different name and could risk linking her new identity to her old one in the process. Such records might include educational, medical, professional, and other records. Identify any other documents and records the survivor will need to retrieve.

### 3. Ways a Perpetrator Can Locate a Survivor

As noted above, a new identity is not a panacea, as it is never entirely secure from disclosure. There are many ways that information about a survivor, including her identity and address, can be made available to the public, especially with the widespread use of the Internet. A survivor and qualified attorney should discuss practical and legal means of preventing dissemination of information to a perpetrator. Consider ways that a perpetrator may be able to find information about a survivor:

- **The Internet.** It can be very easy to locate a person's address or contact information by doing a simple "Google" or "Zaba Search" or other Internet or electronic database search. There are now many online services that provide information on people, including addresses, telephone numbers, and birthdays. Many of these services are free and others charge a fee. Private investigators and computer buffs, among others, are very familiar with these research tools. For this reason, it is important to identify whether a survivor's name yields any results when a search is performed. If so, will the new identity be linked to the previous one in any way? What other information about a survivor might be available on the Internet?
- **Computers.** Perpetrators can locate their victims if both parties have access to the same computers and computer accounts. In planning an identity change or relocation, a survivor should not use the same computer as the perpetrator. It is easy to identify the web pages previously accessed and information downloaded or sent by a victim, as they are saved in the computer's memory system. Also, a survivor should close any email accounts to which the perpetrator may have access.
- **Phone systems.** A survivor should avoid phone calls on an existing cell phone account, as the bill will indicate the origin of the call. It may also be possible for a perpetrator to determine the region where the service tower is located.
- **Global Positioning System (GPS).** This technology allows GPS users to track the location of people or objects. The technology can often be found in cars, watches, or handheld devices. Does a survivor have a GPS system in her car or elsewhere that an assailant might use to locate her? It

may be useful to have the car examined to insure that GPS or other tracking technology has not been installed.

- **Public records.** Many public records are now available on the Internet. Consider whether any of the following apply to the victim: home ownership records, driver's license, professional licenses and memberships, etc.
- **Court records.** These might include those relating to protective orders, marriage, divorce, custody, child support, bankruptcy proceedings, paternity cases, and criminal matters, etc. VAWA 2005 prohibits an issuing or enforcing State, Indian tribe, or territory from publishing publicly on the Internet any information about a protection order or injunction if such publication would be likely to reveal the identity or location of the protected party. 18 U.S.C. § 2265(d)(3).
- **Other records.** Consider other records that the perpetrator may have access to, including voter registration records, registry of motor vehicles, private mailboxes, utilities records, store discount cards, educational and medical records of the children, etc. For example, Vehicle Identification Numbers (VIN) are typically required for registering an automobile, and the original VIN may not be altered. It is possible to determine a car's history through its VIN.
- **Mutual friends and family.** Family and friends are the number one information source when new identities are disclosed.
- **Joint accounts and lines of credit.** These might include bank accounts and other investment accounts, credit accounts.

A survivor should also consider issues or affiliations she has with the perpetrator that may need to be resolved before an identity change. These will vary depending on the survivor's personal situation. They may include, but are not limited to:

- **IRS and state tax filings.** A survivor should consider whether there are any unresolved tax issues with the assailant and whether the victim is in any way affiliated with the perpetrator's tax filings (*e.g.*, joint filing, listed as a dependent, co-owner of a business, etc.).
- **Bankruptcy.** Because a bankruptcy proceeding requires public disclosure of names and social security numbers for the last six years, a survivor should complete the bankruptcy process before undergoing an identity change. If a survivor changes her identity during the bankruptcy proceeding, the security of the new information could easily be compromised.

- **Joint debt and sole debt of the survivor.** It is best to clear up outstanding debt before pursuing an identity change.
- **Joint leases.**
- **Joint real property ownership.**
- **Student loans.**

## **B. Changing an Identity (A Two-Phase Process)**

If a survivor and her attorney determine that identity change is the best way to protect the survivor's safety, the survivor must (1) formally change her name in court; and (2) then apply for a new social security number, *in that order*. Both steps are required for an identity change.

### **1. Name Change**

The first step in a survivor's change of identity is to change her name. She can change her name in two ways: (a) begin using a new name; or (b) formally change her name by court order.

#### **a. Assuming a New Name by Use**

The first way a survivor can change her name is to simply begin using a new name. This means that she begins to identify herself to others and on documents by a name other than her formal legal name. This can only be done in some states.

This method will not necessarily protect a survivor who relocated residences and assumed a new name, since a perpetrator might still be able to locate her under her legal name and social security number. The Social Security Administration will not issue a new social security number if the survivor does not formally change her name through the legal process.

#### **b. Formal Name Change by Court Order**

The second way to change one's name is to file a name change petition and secure a court order declaring the formal name change. Requirements vary by state but generally include a petition to the court requesting a change of name, a statement explaining the reason the new name is requested, and proof of no pending civil or criminal matters against the survivor, including liens, judgments, or debts.

Since the laws governing name change vary from state to state, an attorney must research name change requirements in the state where a survivor will change her name. For example, some states require notice by publication. Other states will waive notice for "good

cause.” It is important for the survivor and her attorney to know the various applicable state laws when determining where and when to begin the process.

Notice Requirement. To complete the name change process, many states require actual notice of name change or notice by publication, often in a newspaper. This requirement can be problematic for a survivor who wishes to conceal her name change, as any publication that could connect her old name with her new one undermines the purpose of name change. Increasingly, however, states are authorizing the waiver of publication and/or sealing of name change records. In Nevada,<sup>47</sup> Pennsylvania,<sup>48</sup> and various other states<sup>49</sup> publication is not required if it would place the petitioner at risk. While some state statutes are specific to domestic violence victims, a court may be willing to extend the protections to non-intimate partner sexual violence survivors, upon request. A survivor should seek expert legal advice to determine if there are legal means to avoid publication requirements. Also, she should explore whether it is possible to file a motion with the court to protect victim privacy.

Name Changes for Minor Children. Similarly, name change for minors varies by state. Securing a new name for a minor child requires careful consideration and planning. Some states may not grant a name change for a child, depending on custody statutes. In addition, state laws may require that written notice be given to both parents of the child before a court will issue a change of name decree. There may also be exceptions to this rule. For example, an Oregon statute (Or. Rev. Stat. § 33.420) provides that notice of a name change of a minor child need not be given to a parent of the child if the other parent of the child files a verified statement in the change of name proceeding that asserts that the minor child has not resided with the other parent and that the other parent has not contributed to or tried to contribute to the support of the child. The attorney and survivor must also consider potentially complicated issues surrounding custody, visitation rights, child support, and educational and medical records of the children. If at all possible, it is important to resolve these family law matters before pursuing a name change for a survivor or child. A survivor should seek legal advice from a local child support expert before pursuing this option.

## **2. Social Security Number Change**

The second phase of an identity change is to change a social security number. The Social Security Administration (SSA) can issue a new social security number to a survivor, though it may require extensive and well-documented evidence of violence and life endangerment.<sup>50</sup> The SSA now requires that a survivor formally change her name by court

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<sup>47</sup> Nev. Rev. Stat. § 41.280.

<sup>48</sup> Act No.2004-214

<sup>49</sup> New York, Virginia, California, New Mexico, Montana, Colorado, and Washington, among others, have similar confidentiality statutes.

<sup>50</sup> Social Security Administration. *New Numbers for Domestic Violence Victims*. SSA Publication No. 05-10093, June 2004, available at <http://www.ssa.gov/pubs/10093.html>. See also, 20 C.F.R. 422.110, titled “Individual’s Request for a Change in Record,” the legal authority allowing issuance of a new social security number (though the regulation does not state this expressly).

order before she can be issued a new social security number. The reason for this requirement is to minimize the likelihood that a perpetrator will be able to locate a survivor; it also minimizes cross-referencing between the old and new names.<sup>51</sup>

A survivor must apply in person at a regional office for a new social security number. Evidence in support of a name change may include affidavits from attorneys, doctors, crisis line or center advocates, medical records, police reports, etc

**Survivors must present the following information when applying in person at the regional Social Security Administration office:**

- Current social security number;
- Original documents that establish age, identity, U.S. citizenship or lawful non-citizenship (*e.g.*, birth certificate and driver's license);
- Original name change certificate;
- Detailed affidavit explaining the reason for requesting a new social security number;
- Evidence demonstrating custody of children for whom new numbers are requested, if applicable; and
- Documentary evidence of violence (*e.g.*, police reports, medical records, protective orders, letters from crisis center or program advocates, and attorneys).

Finally, applying for a new social security number, even under extenuating circumstances faced by survivors, is no guarantee that the Social Security Administration will issue a new number. In addition, it may be extremely difficult to change one's social security number more than once.

**3. Impediments to Name Change: Pending Civil and Criminal Matters**

If certain civil and criminal matters are pending, this may prohibit an identity change. For example, a survivor may be in pending divorce or bankruptcy/debt collection proceedings. She also may be subject to criminal charges. A pending criminal matter is a likely impediment to a court authorizing a name change. If a survivor is subject to any outstanding warrants, on probation or parole, or otherwise subject to court supervision, a name change also may be denied. Consider, too, whether a survivor could be subpoenaed in a pending criminal prosecution of her assailant where she will be subject to testimony under oath. Pending civil and criminal legal matters should be resolved before pursuing a name change.

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<sup>51</sup> For example, if she was only required to change her social security number, the abuser could easily cross-reference her name to her new social security number, undermining the whole purpose of identity change and endangering the well-being of the survivor.

## **C. Living with a New Identity**

A new identity is never one-hundred percent secure. Once an identity is changed, the onus is on a survivor to ensure the security of her new identity. For this reason, it is very important to discuss ways that a survivor may inhibit the perpetrator's access to any information about her. The attorney and survivor should consider all ways that a perpetrator could have access to information about a survivor and discuss practical and legal means to prevent any disclosures to him. (*See above*, Section II.A.3 for “Ways a Perpetrator Can Locate a Survivor.”)

Once her identity is changed, a survivor who deals with agencies through their programs or services will need to work hard to ensure that the agencies do not compromise her new identity. If applicable, she will also need to make sure she continues to receive benefits to which she is entitled.

### **1. Federal and State Agencies Relevant to the Survivor**

Many federal and state agencies now have procedures in place to help survivors maintain the confidentiality of their new identities. Be aware, however, that agency employees might not always be familiar with confidentiality procedures and could require the survivor to reveal both her old and new identities. Survivors should be advised of this possibility. Attorneys should investigate the availability of specialized confidentiality procedures in agencies with which a survivor communicates. For example, many states have specialized procedures for victims of sexual violence, domestic violence, and stalking. *See e.g.*, Wash. Rev. Code § 40.24, Washington State's “Address Confidentiality for Victims of Domestic Violence, Sexual Assault and Stalking.”

Agency programs a survivor might be involved with include, but are not limited to: Child Support Collection and Enforcement, Welfare and Temporary Assistance to Needy Families (TANF), Social Security Income (SSI), Social Security Death Index (SSDI), and Public Housing programs. Many of these agencies have rules and procedures for maintaining victim confidentiality.

#### **a. Child Support Collection and Enforcement**

Since most tracking for child support purposes is done by social security number, a survivor should make every effort to establish child support orders before an identity change and consider the best and safest means of collecting child support. (*See above* “Full Faith and Credit” in Section II of this chapter.) She should also be advised that she may need to forego pursuing child support altogether in order to keep her new identity safe.

**b. Welfare and Temporary Assistance to Needy Families (TANF)**

Survivors who receive welfare and TANF benefits should consider safety issues with regard to maintaining their benefits. Survivors should be aware that TANF time limits for receiving benefits, work requirements, and family caps remain intact after a name change.

**c. Supplemental Security Income and Social Security Death Index (SSI and SSDI)**

Federal law allows notification to an SSI or SSDI claimant of benefit amounts to recipients as well as their names. For women who have changed their identity, this means their assailants could potentially learn their new names and identities. Survivors should confer with the agency staff to address safety issues. Survivors who are the beneficiaries as well as the primary claimants will need to consider safety issues.

**d. Public Housing Programs**

A birth certificate may not be required to secure public housing. A public housing authority might accept alternate means of identification. A survivor should seek advice from her local legal aid office for issues dealing with safety in the public housing system.

**e. Immigration**

If the survivor is adjusting her immigration status, she should seek legal advice from an immigration attorney. (*See* Chapter Seven on “Non Citizen and Immigrant Victims.”)

**2. Resources**

- Greater Boston Legal Services, Relocation Counseling Project, at [www.gbls.org](http://www.gbls.org).
- For information on laws around the country addressing social security number privacy, see the National Conference of State Legislatures website at:  
[http://www.ncsl.org/programs/lis/privacy/SSN2005\\_Pending.htm](http://www.ncsl.org/programs/lis/privacy/SSN2005_Pending.htm).

As outlined in this chapter, changing one’s identity is a complex and potentially lengthy process. Much thought must be put into determining the benefits, the detriments, and the proper timing for pursuing an identity change. Consultation with an attorney is imperative if a survivor is to make an informed and effective decision.

## CHAPTER TWO: SAFE HOUSING

Survivors of sexual assault can face significant barriers to finding and keeping housing because of the violence they have suffered. A sexual violence survivor's right and access to safe housing often are best achieved through a combination of legal protections and practical strategies. For example, while in some instances a survivor may be able to achieve a sense of safety while remaining in her present residence, in others she may feel the need to relocate her residence. Before deciding which option is best for her, there are a variety of practical and legal factors to consider.

**Who is the perpetrator?** A victim's needs — and remedies — are likely to be influenced by whether a victim was assaulted by an acquaintance, friend, family member or partner, or neighbor, or whether the perpetrator was a stranger; and whether the assailant has information about a victim's residence, place of employment, living situation, and other personal locations. Housing concerns or needs may be exacerbated if the violence occurred in a victim's home or if she was assaulted by a neighbor or other person living in close proximity.

The remedies available to a victim may also be determined, at least in part, by the **type of housing in which the victim resides**. A victim may reside in her privately owned residence, a private apartment building, a campus dormitory, a privately owned mobile home located on a rented trailer park site, on tribal land in Indian Country, or in government owned or government subsidized property. Each of these living situations presents a unique set of opportunities and obstacles.

There are also a unique set of issues and needs that may be relevant to immigrant sexual violence survivors. For example, a survivor's options may be constrained by her **immigration status** (*i.e.*, status as citizen, lawful permanent resident, refugee, or undocumented).<sup>52</sup> If a victim's housing is tied to both her employment and her legal status, this may also contribute significantly to her legal needs and level of assistance required. However, there are certain considerations common to all victims, which may be useful for any victim to consider.

### I. Practical Considerations

- Does the assailant have a key or otherwise have access to information about the survivor's residence or to the residence itself?
- What monies might be available to help the victim relocate or to implement additional security measures (*e.g.*, does your state's protective order scheme allow the court to order a respondent to pay the cost of replacement locks and/or the cost of repairing damage? Are monetary

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<sup>52</sup> For a comprehensive guide on the rights of immigrant sexual assault survivors, see the Legal Momentum Immigrant Women Program's Sexual Assault Manual (work in progress; publication expected in June 2006).

damages available as part of a civil stalking order? (*See above*, Section I.B on “Civil Protection Orders.”) Alternatively, will the survivor be eligible for restitution in a criminal proceeding? For crime victim compensation? *See, also A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence*, at Chapter 2.

- Is the landlord required to change the locks? Issue new keys? Who has a right to a key to the residence? May the victim change the locks and still be entitled to reimbursement (from a landlord or insurer)? (*See below*, Chapter Two, Section II on “Victim’s Tenancy Rights.”)<sup>53</sup>
- Is the residence subject to any restrictive covenants or homeowner association restrictions that may impede her ability to implement appropriate housing safety measures?
- Does the survivor have adequate lighting in vulnerable locations such as near entryways and exits and their approaches, in the parking area, in side yards, etc.? (**Note:** In dwellings with multiple tenants, the landlord has a duty to maintain the safety of common areas used by all tenants, such as parking areas and walkways.)
- Does the survivor want to find alternative housing either temporarily or permanently? Are there state or local agencies or programs specifically trained to assist sexual violence survivors in finding emergency or more permanent housing?
- Is the victim disabled, physically or mentally, such that she is entitled to accommodation pursuant to state or federal law? (**Note:** Before providing documentation of a mental disability, the victim must consider the legal and personal implications of such a disclosure. This is especially critical if the victim is participating in a criminal prosecution. If the disability is a result of PTSD following the sexual violence, the victim must consider the effect on her medical or counselor victim-privilege before providing any documentation of the disability. It is critical that the victim provide *informed* consent before privileged information is disclosed.)

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<sup>53</sup> For example, Oregon law specifically permits a sexual assault survivor to request that a landlord change the locks, and may change them herself if the landlord fails to do so. The tenant remains responsible for the cost of the change. A landlord may not require that a tenant provide verification of her victim status. Or. Rev. Stat. § 90.453 (2003). See also Or. Rev. Stat. § 90.459. North Carolina recently passed nearly identical legislation that took effect October 1, 2005. N.C. Gen. Stat. §§ 42-42.1, 42-42.2, and 42-45.1 (2005).

## II. Victim’s Tenancy Rights

As noted above, a survivor’s ability to terminate a lease, avoid eviction, relocate, remove the assailant from a lease, and find safe and affordable housing may depend upon the type of housing in which she lives. A survivor should first look to her lease see what specific provisions are included. In addition, federal, state, and local laws and regulations govern certain types of government-owned or subsidized housing programs, including public housing and Section 8 housing vouchers. Some states have specific provisions protecting tenancy rights of domestic violence, sexual violence, and stalking survivors. In the absence of specific statutes, regulations or policies, generally applicable federal or state housing laws may still provide certain safeguards.

### A. Terminating the Lease

#### 1. Under Specific Statutory Provisions for Victims

Some states have laws that allow victims of sexual assault, domestic violence and/or stalking to terminate a lease early and without penalty if the victim follows certain procedures. Oregon, for example, has a law allowing a victim of domestic violence, sexual assault, or stalking to terminate her lease with a 14-day written notice to her landlord, provided she meets certain other enumerated conditions.<sup>54</sup> Similarly, in Washington state, a tenant who is a victim of domestic violence, sexual assault, or stalking may terminate her lease if she requests the early termination in writing within 90 days of the of the violent act, which needs to have been reported to a “qualified third party.”<sup>55</sup> A summary of the Washington law and FAQs for victims is available online at [www.lawhelp.org/WA](http://www.lawhelp.org/WA) (follow the links from housing and tenants’ rights to the “Issues for Survivors of Domestic Violence, Sexual Assault and Stalking” link. A similar resource is available online at the [www.lawhelp.org/OR](http://www.lawhelp.org/OR) website.) *See, also* Appendix B.

When looking to state law for specific protections that may allow a victim to break a lease, consider:

- Is there a statute that allows a survivor to terminate a lease on the basis of being the victim of domestic violence/sexual assault/stalking or other victim status?
- If so, is there any required documentation, such as:
  - Protective order
  - Police report

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<sup>54</sup> Or. Rev. Stat. § 90.435 (2003).

<sup>55</sup> Wash. Rev. Code § 59.18.575 (2004). See the statute for other criteria the survivor must satisfy to terminate her lease. Oregon and Washington have prepared informational hand-outs and FAQs summarizing victims’ housing rights. *See* Appendix B for the Oregon pamphlet detailing survivors’ housing rights.

- Third party affidavit (*e.g.*, clergy, counselor, police officer, attorney, etc.)
  - If an affidavit is secured from someone with whom the victim has a privileged relationship, is it possible to preserve some confidentiality and maintain the evidentiary privilege?
- How much notice is required (*i.e.*, when does the survivor's liability for payment of rent cease)?
- Are other tenants relieved of their tenancy obligations too? What if the other co-tenant is the assailant?

## 2. Under Traditional Landlord Tenant Law

If a state has no special provisions for terminating leases for victims of sexual violence, there may be other avenues in state landlord/tenant law that allow release of the victim from tenancy obligations. There may be legal as well as non-legal options to pursue. Consider:

- Did the landlord breach any safety requirements under the covenant of quiet enjoyment that allowed the violence to occur (*e.g.*, provide adequate locks, keep common areas reasonably safe, etc.)?
- Are there any breaches of health and safety requirements in the residence that would violate the warranty of habitability under state law?
- Are there other provisions for breaking leases contained in state landlord/tenant law?
- Is it an option to arrange a meeting with the landlord to explain the extenuating circumstances and allow the survivor to break or change the terms of the lease without penalty? (Consider any confidentiality and privacy concerns.)
- If the landlord refuses to release the victim from the lease, what liabilities will the survivor incur if she breaks the lease?
- Is the perpetrator required to vacate the residence pursuant to a criminal or civil protective court order? Does the order provide grounds for removing the assailant from the lease? Conversely, may the victim have the perpetrator ousted from the residence without entirely relieving the perpetrator of financial responsibility for the residence?
- If a protective order provides for the perpetrator to vacate the residence on a temporary basis, is the perpetrator still responsible for a share of the

rent? If the order becomes permanent and the perpetrator remains on the lease, does the perpetrator remain responsible to pay a share of the rent?

## **B. Protections for Victims Who Want to Remain or Apply for Tenancy**

While some survivors may encounter difficulty terminating a lease and moving residences to maintain physical safety, others may experience challenges trying to remain in their homes due to the fact that landlords may attempt to evict them for violence perpetrated against them on the leased premises. A survivor may encounter hurdles trying to secure new housing due to discrimination by landlords who may use her history as a sexual violence survivor to deny her housing.

### **1. Avoiding Eviction and Discrimination**

#### **a. Under Specific Statutory Provisions for Victims**

Pending federal law may provide specific protections for sexual assault and domestic violence survivors.<sup>56</sup> In the meantime, some states have specific statutes that prohibit eviction based on domestic violence or sexual assault perpetrated against the survivor. Louisiana, for example, has a state law prohibiting a public housing authority from terminating a lease based on domestic violence or family violence.<sup>57</sup> Under Washington law, a landlord may not terminate or fail to renew a tenancy based on a resident's status as a sexual assault survivor.<sup>58</sup>

- Does your state have a specific statute prohibiting housing discrimination against victims of sexual violence? If not, does your state have specific statutes addressing housing discrimination against victims of domestic violence that may apply to victims of sexual assault?
- Consider whether the identified statutes apply to all stages of tenancy, application process, tenancy period and renewal of tenancy.
- What are the victim's remedies? May the landlord be held civilly liable under the statute? (Under the Washington law just described, for example, a landlord in violation of the statute may be civilly liable to the survivor for damages, court costs, and attorneys' fees.<sup>59</sup>)

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<sup>56</sup> Title V of the proposed Violence Against Women Act (VAWA) 2005 includes new housing provisions to address the specific housing needs of survivors. Proposals include creating long-term housing opportunities for survivors, reducing evictions and denial of affordable housing to survivors for crimes perpetrated against them, and anti-discrimination measures. *See* S. 1197, H.R. 2876, H.R. 3171. Check the final law passed for safe-housing provisions specific to sexual assault survivors.

<sup>57</sup> La. Rev. Stat. § 40: 506(D). *See also* La. Rev. Stat. § 9:362(3), defining "family violence" to include sexual abuse. The housing authority may, however, terminate the tenancy of the perpetrator of the violence. *Id.* at 40:506(D).

<sup>58</sup> Wash. Rev. Code § 59.18.580.

<sup>59</sup> *Id.*

- May victim status be used as a defense in an unlawful detainer action for eviction?

### **b. Under Traditional State or Federal Law**

The federal Fair Housing Act, 42 U.S.C. §§ 3601–04, (hereinafter “FHA”) prohibits landlords from discriminating on account of sex, among other characteristics.<sup>60</sup> Some recent cases suggest that housing discrimination on the basis of status as a domestic violence victim is commensurate with sex discrimination. In a case filed with the Department of Housing and Urban Development (hereinafter “HUD”), *Alvera v. Creekside Villages Apartments*,<sup>61</sup> a domestic violence survivor claimed that her landlord engaged in sex discrimination, in violation of the Fair Housing Act and Oregon law, when it terminated her lease following a physical assault in her apartment by her husband. HUD ruled that the landlord unlawfully discriminated against Alvera based on her sex.<sup>62</sup>

Likewise, in March 2005, a federal district court in Vermont denied summary judgment to a landlord on a sex discrimination claim.<sup>63</sup> The landlord terminated the victim tenant’s lease shortly after the tenant was attacked by her spouse in their residence. The court suggested that the FHA prohibits discrimination against domestic violence survivors.<sup>64</sup> Given evidence that women are the most frequent victims of sexual violence, a comparable argument to *Alvera*, in the sexual assault context, might be considered.

State fair housing laws may provide similar safeguards proscribing discrimination against women. In addition, local policies in effect at public housing authorities (PHA) may provide certain protections for sexual violence survivors.

Does the eviction or discrimination trigger a FHA (also known as Title VIII) sex discrimination claim?

- If the survivor has trouble paying bills after the assault, are there ways to find her financial assistance or alternative public housing in order to avoid eviction? *See, also A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence*, at Chapter III, Section 9.B, which discusses restitution.
- “Violent criminal activity” is cause for termination in public housing if it occurs in the survivor’s residence, whether perpetrated by the resident, a guest, or any person under her control.<sup>65</sup> It is not settled law as to whether the FHA will protect sexual assault and domestic violence survivors from eviction action by PHAs. If the survivor lives in a federally funded public

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<sup>60</sup> 42 U.S.C. §§ 3601–04.

<sup>61</sup> *Alvera v. Creekside Village Apartments*, No. 10-99-0538-8 (HUD 1999).

<sup>62</sup> *Id.* *See also United States ex rel. Alvera v. C.B.M. Group*, No. CV 01-857-PA (D. Or. 2001).

<sup>63</sup> *Bouley v. Young-Sabourin*, CV 1:03CV320 (D. Vt. 2005).

<sup>64</sup> *Id.*

<sup>65</sup> Federal law allows eviction of a public housing resident if “criminal activity” occurs in her residence, whether perpetrated by the resident, a guest, or any person under her control. 42 U.S.C. § 1437(l)(6) (2004).

housing unit with a “one strike” or “zero tolerance” policy on violence and lives with her assailant, it will be important to take steps to ensure that eviction is enforced only against the assailant and not the victim.

- Does the PHA overseeing the voucher program have a policy against allowing landlords to evict survivors for violent actions perpetrated against them in their rental unit?
- What categorical preferences does the PHA maintain for awarding housing, and is the survivor eligible for any of these preferences? **Note:** An attorney may play a key role in the development of local PHA preference systems and priorities. For the lawyer interested in systemic change, working with local housing authorities represents a key opportunity to educate community partners and promote safe housing for victims of sexual violence.
- If the survivor and abuser cohabitate and sexual assault results in a break-up, does the PHA have a policy favoring the survivor to remain on the lease and not her abuser?

## 2. Victim’s Ability to Change Locks and Landlord’s Duties

- Is there a statute that requires a landlord to change locks, at tenant’s expense and request, after being a victim of sexual assault/domestic violence/stalking? (For example, an Oregon law provides that after receiving actual notice that a tenant is a survivor of domestic violence, sexual assault, or stalking, and a request to change the unit’s locks, the landlord is required to do so promptly.)<sup>66</sup>
- If the landlord does not act within a reasonable time, may the tenant change the locks at her own expense and deliver a copy to the landlord? Does a statute authorize compensation? Conversely, does a rental agreement prohibit it?
- Do Crime Victims’ Compensation funds provide for possible recovery of costs to change locks? **Resource tip:** The website of the National Association of Crime Victim Compensation Boards contains a comprehensive directory of compensation programs in all 50 states and United States territories: <http://www.nacvcb.org/progdir.html>.
- Is there a statute that provides that if locks are changed and there is a vacate order against the alleged perpetrator, the landlord may not, under

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<sup>66</sup> Or. Rev. Stat. § 90.459 (2003).

any circumstances, provide a key to or allow entry of the perpetrator into the residence?

- Does an order to vacate the premises automatically relieve the respondent of tenancy obligations?

### **3. Relocation in Public/Section 8/Federally Subsidized Housing**

- May the survivor request an expedited relocation to another housing complex when she is a victim of a sexual violence? For example, some PHAs have policies allowing for emergency transfers to other units when a tenant's physical safety is in jeopardy. If the PHA has such a policy, what documentation is required to achieve an emergency transfer or "priority status" to effect the transfer? Explore with the victim the most effective yet self-protective means of providing the necessary documentation. Be sure to consider issues of privacy, confidentiality, privilege, and waiver.
- If the survivor has a Section 8 Housing voucher, does the local PHA have a policy permitting a survivor to relocate quickly while maintaining her housing voucher benefits? Or, does the local PHA impose restrictions on moving that would jeopardize the survivor's ability to retain her housing vouchers?
- In federally-assisted housing complexes where both the assailant and survivor are residents, what are the procedures to ensure that the assailant is evicted from the complex? Is an arrest necessary? Sufficient? Is a protective order needed? Does there need to be a formal complaint filed with the housing authority followed by a hearing?
- Is there a policy in place that allows the survivor to retain the voucher if she and her assailant live together as a family and break up following the violence?

## **C. Sexual Harassment**

### **1. Federal Laws**

Women who experience sexual harassment in housing may be able to pursue a Title VIII sex-discrimination claim. Because there is little case law on sexual harassment in housing, courts may look for guidance to Title VII sexual discrimination claims in the employment setting, and may use a similar analysis.

There are two typical sexual harassment scenarios: (1) *quid pro quo*; and (2) creation of a hostile housing environment. The creation of *quid pro quo* sexual harassment may involve landlords or property managers, for example, who consistently demand sexual favors from tenants in exchange for a housing benefit or who evict tenants who do not respond to sexual advances. *Quid pro quo* harassment is prohibited under HUD regulations.<sup>67</sup> In addition, case law recognizes *quid pro quo* sexual harassment as a violation of the FHA. In one case, the Seventh Circuit affirmed an administrative law judge’s decision that a landlord violated the FHA when he made continual inappropriate and unwanted verbal and physical sexual advances toward the tenant.<sup>68</sup> The court found that there was a causal connection between his unwanted sexual advances and her eventual departure from the unit.<sup>69</sup>

In contrast, a hostile housing environment can occur when the landlord, owner, property manager, etc., consistently behaves in an unwelcome and inappropriate sexual manner toward the tenant.<sup>70</sup> If threats or coercion are involved, the survivor may have a separate claim under section 3617 of the FHA, which makes it illegal to “coerce, intimidate, threaten, or interfere” with a person through her housing rights.<sup>71</sup> Further, landlords or property managers who respond inadequately to a tenant’s report of sexual harassment by another tenant, may also be held liable under Title VIII.

Victims of sexual harassment who bring successful suits may be able to collect compensatory and other damages. In *Krueger v. Cuomo*, the Seventh Circuit upheld significant damages to the tenant, including \$2,000 for compensatory damages, \$622 for alternative housing costs, and \$20,000 for emotional distress.<sup>72</sup> In situations where the landlord knew of sexual harassment but took no corrective action, a court may also award punitive damages.

## 2. State and Local Laws

In addition to federal law, a victim may have remedies under state and local tort and anti-discrimination laws. See Chapter Five of this guide for a discussion of Tort Liability. Her PHA may also specifically proscribe sexual harassment.

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<sup>67</sup> 24 C.F.R. 100.65(b)(5).

<sup>68</sup> *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997).

<sup>69</sup> *Id.* at 491. This case was followed by a recent case, *United States v. Koch*, 352 F. Supp. 2d 970 (D. Neb. 2004). *But, see also, Honce v. Vigil*, 1 F. 3d 1085, 1087 (10th Cir. 1993) (court rejected tenant’s *quid pro quo* sexual harassment claim under the FHA because the landlord did not make overt sexual advances or threats and tenant could not prove a causal connection between her refusal to go out with him and her subsequent problems as a tenant).

<sup>70</sup> Certain types of housing are not covered by the FHA. See 42 U.S.C. § 3603(b). Women living in these units may still have remedies available under state and local laws.

<sup>71</sup> 42 U.S.C. § 3617. This provision does not specifically address threats or coercion of a sexual nature.

<sup>72</sup> 115 F.3d 487, 492–93 (7th Cir. 1997).

### III. Affordable Housing and Sexual Assault Survivors

Survivors of sexual violence may face great difficulty securing affordable housing because of the violence they have experienced. Some landlords may unlawfully discriminate in violation of the FHA based on a victim's status as sexual violence survivor. Particularly in the public housing and Section 8 housing program, a survivor of sexual violence may qualify for housing not only because of her financial situation but also because of her status as a sexual violence survivor. The survivor should check state laws and local PHA rules to discern if preferences are available specifically to sexual violence survivors, or for other categorical priorities for which the victim may be eligible (*e.g.*, disability, hate crime victim, veteran, homelessness, safety emergency, etc.)

- What are the financial qualifications for obtaining federally funded housing assistance?
- What are the financial qualifications for obtaining state assistance, both housing and monetary?
- Are there priorities at the state and local level for obtaining both temporary and permanent housing for sexual assault victims? Some PHAs provide for a domestic violence victim preference. Find out if the preference applies to sexual violence survivors, too. Are there other preferences for which the survivor might qualify (*e.g.*, elderly, disabled, homeless, etc.)? What documentation is required?
- If public housing screening procedures include examining criminal history and rental history that threaten to exclude sexual violence survivors, is it possible for the attorney to help the PHA understand and consider in its decision the relationship between a survivor's criminal/rental history and the effects of the sexual violence? An attorney may support a victim's efforts to secure safe housing by helping her identify community members who can demonstrate her reliable and responsible habits in other arenas and in the period prior to the assault.

### IV. Resources

- Legal Momentum: [www.legalmomentum.org](http://www.legalmomentum.org)
- National Law Center on Homelessness and Poverty: [www.nlchp.org/FA%5FHousing/](http://www.nlchp.org/FA%5FHousing/)
- National Sexual Violence Resource Center: [www.nsvrc.org](http://www.nsvrc.org)

- National Center on Domestic Violence and Sexual Assault provides a webpage with a series of publications relating to housing issues for sexual violence and domestic violence survivors:  
**[http://www.ncdsv.org/publications\\_housing.html](http://www.ncdsv.org/publications_housing.html)**
- American Civil Liberties Union, Women's Rights Project:  
**<http://www.aclu.org/WomensRights/WomensRightslist.cfm?c=173>**
- Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 Am.
- **[www.lawhelp.org](http://www.lawhelp.org)**

## CHAPTER THREE: EMPLOYMENT RIGHTS OF SEXUAL ASSAULT SURVIVORS

By Robin Runge, Jessica Mindlin, and Liani Jean Heh Reeves

A woman is sexually assaulted one evening by someone she has been dating for a few weeks. As a result of the assault she is experiencing trauma-related anxiety attacks, and has been talking to a rape counselor about her need to find someone to help her with her anxiety. Although she has cut off all communication with the man who assaulted her, the perpetrator calls her repeatedly at work, threatening to come to her job. He is angry because she has reported the rape to the police and has agreed to participate in a criminal prosecution. Often when he calls her at work, she breaks down in tears, or yells at him to leave her alone. These episodes make it hard for her to concentrate and bring her unwanted attention at work. She has also missed some days of work because of her trauma related to the rape. She anticipates that she will miss more days of work if she is able to locate a health care provider to treat her anxiety and to attend court dates related to the criminal prosecution of the perpetrator of the rape. She is embarrassed and does not want to tell co-workers what happened, but she wants to be safe at work and not lose her job because of absences or work-related disruptions.

This describes the experiences shared by many survivors of sexual violence in the United States each day. Many victims of sexual violence are employed and an assault, regardless of who the perpetrator is or where the assault occurs, has a negative impact on a victim's ability to maintain her employment. Studies confirm what sexual violence victim advocates know is true: Almost 50 percent of sexual violence survivors lose their jobs or are forced to quit their jobs in the aftermath of the crime.<sup>73</sup>

A sexual violence survivor may quit her job for any number of reasons. The trauma she experiences may make it impossible for her to return to work. She may be ashamed and afraid that her co-workers or supervisors may find out about the assault, or she may fear for her safety if the perpetrator knows where she works or has threatened her at the workplace. A survivor may choose to relocate to stay with family or friends while she recovers. She may be fired for missing days of work to cope with the trauma, to meet with lawyers, or attend court hearings, or for performance issues caused by her inability to focus on her job duties after the assault.

At the same time, a survivor's ability to maintain employment is critical to her ability to recover. She needs an income to pay for expenses related to the sexual violence, including medical care, possible relocation, and other health care costs. If she has health insurance provided through her employer, losing her job may also mean losing her health insurance at a time when she needs it most.

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<sup>73</sup> S. REP. NO. 138, 103rd Cong., 2d Sess. 54, n. 69 citing E. Ellis, B. Atkeson and K. Calhoun, *An Assessment of the Long Term Reaction to Rape*, 50 J. Abnormal Psychology No. 3, 264 (1981).

An attorney or advocate can assist a survivor with understanding the range of legal rights and options she may have as an employee. This chapter outlines what protections or benefits a survivor may have under a variety of state or federal laws and how employers may be held liable for failing to protect or accommodate a sexual violence victim. Identification of the relevant issues surrounding employment may enable a survivor and her advocate to negotiate with an employer to provide the kind of support she needs to avoid a temporary or permanent job loss.

## **I. Background and Overview**

Understanding exactly how sexual violence may impact a survivor's job is necessary before discussing the different employment laws and protections that may be available to her. In many instances, the violence may have taken place at the workplace or on the job by a boss, coworker, customer, or member of the public. If the perpetrator harassed and/or assaulted the victim at work, she may not feel safe at work and may quit her job. The perpetrator may know where the victim works and may stalk her at her place of employment. The survivor may need time off from work to heal from injuries caused by the violence, to relocate for safety or healing purposes, or to attend court proceedings.

To assist survivors who may need advocacy around these issues, it is imperative that advocates screen clients to identify whether the violence has affected their jobs. A survivor may seek assistance for an unrelated legal reason, such as housing or protection issues, and therefore the effect of the violence on her employment may not be something she identifies as a specific legal need, or otherwise mentions. Moreover, a survivor may view the violence as something she just has to "deal with;" she may not know that she has protections under the law. Therefore, it is necessary to integrate the provision of support and information about employment rights into a standard intake process. Once employment issues have been identified, a survivor and her attorney should determine a strategy that is most helpful. In doing so, the following should be taken into consideration:

- Her need for safety;
- Her employment status (where she is still employed or has already lost her job);
- Her need to stay employed or return to her job;
- Her access to benefits and coverage by applicable state and federal employment laws;

- Her willingness to disclose the violence in order to access protections in the workplace; and
- Her immigration status.

### **A. At-Will Employment**

Being familiar with the nature of the employment relationship will help in identifying and understanding the scope of a survivor’s possible rights and remedies. Most sexual violence victims who are employed will be “at-will” employees. At-will employment describes the default relationship between an employee and her employer if no other contract exists. An at-will employee can be fired at any time for any reason or for no reason at all. The at-will employee may quit at any time for any reason or for no reason at all. No legal claim will result from any of these actions.

In the United States, the vast majority of employees are at-will employees, meaning they can be fired for any reason — or no reason at all.<sup>74</sup> Although some states prohibit employers from terminating an employee in violation of public policy, most non-union, private sector employees, including accountants, token-takers, waitresses, attorneys, and software engineers, have little if any job protection. As a result, most victims of sexual violence will have limited recourse if they are terminated from employment or are forced to quit. In most jurisdictions in the United States, an at-will employee may legally be fired just for disclosing that she is a victim of sexual assault. Moreover, there is no federal or state law requiring employers to provide paid vacation time to their employees. In fact, approximately 40% of the U.S. workforce has no paid time off from work.<sup>75</sup>

### **B. Survivors of Sexual Assault and Employment**

Despite the fact that most survivors will be at-will employees, sexual violence victims may still have access to employment protections from one or more of three sources: (1) employment contracts; (2) union collective bargaining agreements; or (3) state and federal laws covering anti-discrimination and anti-harassment in employment, family and medical leave, unemployment compensation, workers compensation, and tort remedies. This chapter will focus on the third source of employment protections — legal protections found in federal or state laws.

It is important to note at the outset that all of the federal anti-discrimination laws discussed in this chapter, specifically the Family and Medical Leave Act (“FMLA”) and Title VII, provide protection to all employees regardless

**An immigration attorney must always be consulted when providing employment-related legal assistance to an immigrant victim, even if she is documented, because of the implications any actions taken may have for her immigration status.**

<sup>74</sup> See ACLU Employment Briefing Paper Number 12 at <http://www.skepticfiles.org/aclu/12pap.htm>.

<sup>75</sup> See Vicki Lovell, “No Time to be Sick: Why Everyone Suffers When Workers Don’t Have Adequate Paid Sick Leave,” Institute for Women’s Policy Research, June 2004, at p. 6.

of immigration status, although the remedies may be limited in some instances.<sup>76</sup> Although it is illegal for an employer to hire someone who is undocumented, it is nevertheless a frequent occurrence. Once someone becomes an “employee” as defined under the FMLA and Title VII, she is entitled to the same protections as any other employee regardless of immigration status. However, as a practical matter, immigration status may greatly affect a survivor and the choices and remedies she pursues. Accordingly, particular safeguards must be considered. For example, if a victim with employment-based immigration status loses her job, she may lose her visa status that authorized her to work and reside in the United States. (Although U visas are available to victims of crime, certain requirements must be satisfied, and legal representation typically is needed to assist with the visa application or visa adjustment process.) The retaliation that an undocumented victim may face if she asserts her right to job-guaranteed leave or freedom from sexual harassment at work may include deportation. An undocumented survivor should be aware that this is a possible consequence as she evaluates her options.

Even if none of the laws described in this chapter provides protection in a specific situation, a survivor and her attorney should still explore the possibility of contacting the employer and requesting the kind of support or safety measures the survivor needs. Employers are more frequently open to informal negotiations with their employees to provide voluntarily the help that the employee needs. The key, in these discussions with a survivor, is to follow her lead as to whether or not she feels comfortable disclosing her situation to her employer.

A survivor may not want anyone at work to know about the violence; she may feel that her place of employment is the only place where she is not identified as a survivor and she is ashamed, afraid, or protective of her privacy. It is important to respect these feelings and needs regarding disclosure at the workplace. Each circumstance is unique, and the survivor is in the best position to judge what is best for her.

If she is ready to tell someone at work, strategize with her about whom to tell (her supervisor, someone in the human resources department, or a coworker). Her motivations for disclosing her situation will determine the appropriate person(s) to contact. If she needs time off from work to go to court or is concerned that the perpetrator is a threat to the workplace, then she needs to speak to her supervisor or someone else in a position of authority to request leave or to take other safety actions.

It may be useful for the survivor to practice how she is going to disclose her situation so that she is prepared for the discussion. It is important to ensure that the survivor understand beforehand that she could be fired just for having the discussion with her supervisor, and that if this occurs, she may have no legal recourse. If she discloses that the perpetrator is harassing her at work, her employer may fire her because he perceives her to be a threat. However, the risk of termination may not be as great a deterrent to a victim as it

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<sup>76</sup> See *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002) (federal immigration policy, as articulated by Congress in the 1986 Immigration Reform and Control Act, foreclosed the National Labor Relations Board from awarding back pay to an undocumented alien who was not legally authorized to work in the United States).

appears at first blush. This is because the survivor does not request the time off from work or a job relocation may still be forced to leave her job due to the perpetrator's actions. Thus, the *risk* of termination may be less onerous than the certainty of having to resign.

Nationally, employers are increasingly sympathetic toward victims of sexual violence in their workplace. However, such support is not universal,<sup>77</sup> and a survivor must be advised of the risks of disclosing her assault to her employer.

## II. Safety At Work

### A. Safety Planning

Safety of the survivor is always a priority.<sup>78</sup> The perpetrator of the sexual violence may continue to pose a threat to the survivor after an assault, either because the perpetrator works for the same employer or can otherwise gain access to the building (*e.g.* as a customer, security officer, or a member of the public). If it becomes apparent that safety at work is a concern for the survivor, an attorney or advocate can assist her in developing a safety plan for her at work. A safety plan may include:

- Changing her phone number so that the perpetrator cannot continue to call her at work;
- Changing her office location to one unknown to the perpetrator;
- Modifying her work habits and schedule (including work hours, break hours, meal hours, how she travels to and from work, etc.) in order to minimize opportunities for contact with the perpetrator;
- If a survivor has a protective order, ensuring that it covers the workplace and that she provides a copy of the order of protection and a picture of the perpetrator to the employer;<sup>79</sup> and
- Encouraging her to contact the police and the prosecuting attorney about any threats at the workplace (if she is pressing charges).

Note that some of these steps to safety may require a survivor to disclose to her employer why she is requesting these changes. It is important to explore whether and what

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<sup>77</sup> See, *e.g.*, "Safety Begins at Work: Defusing Potential Violence May Mean Firing the Employee and Risking Litigation," ABA Journal, October 2003, at p. 36. "When Home Comes to Work: Experts Say Employers Should Seek a Balanced Approach in Dealing with Workers Facing Domestic Violence," M. Graham Tebo, ABA Journal, September 2005, at p. 42.

<sup>78</sup> For a more general discussion of safety issues, see Chapter One "Safety and Protection."

<sup>79</sup> For a discussion of the types of protective orders that may be available to a survivor, see Chapter One, Section I.A. of this guide.

she feels comfortable disclosing to her employer. In particular, keep in mind that if she is an at-will employee, she may be fired for any reason or no reason at all — including asking for changes to her workplace routine/environment to increase her safety — absent specific legal protections for victims such as those discussed later in this chapter.

If a survivor decides to talk to someone at work to request leave or some other action, remind her to ask that the person with whom she is speaking keep the contents of their conversation confidential. Many people fail to make this request and then are shocked when they come to work the next day and their personal situation is the topic of discussion. Other survivors decide not to disclose their situation at work because of their fear that coworkers will find out, causing them to be treated differently or blamed for the violence.

Although there is no guarantee that the supervisor or human resource manager will keep such a disclosure confidential, it is important to ask. Increasingly, employers have put procedures and protocols in place to ensure confidentiality, in part due to liability concerns. Clients should be aware, however, that an employer may feel that they must disclose the situation to specific people at the workplace in order to ensure the victim's safety and the security of the workplace. For example, the security guards and the receptionist may need to be informed if the survivor has articulated a specific threat to the workplace from the perpetrator. It is important that the survivor ask to be informed if additional disclosures are made. This avoids a situation where the survivor is surprised and/or embarrassed if one of these people approaches her and speaks to her directly about the threat.

## **B. Workplace Protection Orders**

Beginning in the 1990s, states began passing statutes enabling employers to obtain workplace protection orders on behalf of employees who experienced workplace violence unrelated to domestic violence or sexual assault. Today, ten states<sup>80</sup> have statutes enabling employers to obtain workplace restraining or protection orders. Some of the newer statutes specifically certain victims or survivors. For example, the Arkansas law states that, if “an employer or employer’s employee or invitee” has been a victim of unlawful violence, including rape, received a threat of violence at the work site, or been stalked or harassed by an individual at the work site, the employer may, in addition to or instead of filing criminal charges against the individual, seek a temporary restraining order (TRO), a preliminary injunction, or an injunction prohibiting further unlawful acts by that individual at the work site. Ark. Code § 11-5-115.

Obtaining a workplace protection order may be an effective way for the employer to improve the safety of the workplace and meet its duties under state and federal Occupational Safety and Health Acts. Employees should always be consulted, however, before such an

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<sup>80</sup> These states include Arizona, Arkansas, California, Colorado, Georgia, Indiana, Nevada, North Carolina, Rhode Island, and Tennessee. Arkansas; Ariz. Rev. Stat. § 12-1810; Ark. Code § 11-5-115; Cal. Civ. Proc. Code § 527.8; Colo. Rev. Stat. 13-14-102(4)(B); Ga. Code Ann. § 34-1-7; Ind. Code § 34-26-6; Nev. Rev. Stat. § 33.200 - .360; N.C. Gen. Stat. 95-261; R.I. Gen. Laws § 28-52-2; 20 Tenn. Code §§ 20-14-101 to -109. Legislation has been introduced in Hawaii, Kentucky, New Jersey, New York, North Dakota, Oklahoma, and Washington. Visit the Legal Momentum website (at <http://www.legalmomentum.org/issues/vio/restraining.pdf>) for additional information on pending legislation.

order is obtained, since obtaining that type of protection order may place them at greater risk by angering the perpetrator.

### III. Obtaining Leave from Work

As described in the introduction to this chapter, one critical need that a survivor of sexual violence has is time away from work to address the ways that the violence may have affected her life. Many survivors end up getting fired for excess absenteeism related to the violence or for taking time off from work without following the employer's rules for leaves of absence. Finally, some survivors quit their jobs out of frustration or embarrassment, assuming that they will miss too much time from work for court dates and health care reasons and will be fired anyway, or that they would have to disclose the violence in order to access the leave available.

In many instances, a survivor need not be fired or quit her job for these reasons. In fact, as will be described in this section, many states have laws that require employers to give time off to employees to attend criminal court proceedings. In addition, federal and state laws require some employers to provide family and medical leave to qualified employees to heal from serious health conditions, regardless of the cause of the condition.

#### A. Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA) is the only federal law that provides job-guaranteed leave from work for employees. Although this law does not expressly mention sexual assault or sexual violence, it may offer job-protected leave to victims of sexual assault to heal from mental or physical injuries caused by the violence, if she is eligible and if the injuries rise to the level of a "serious health condition."<sup>81</sup>

The FMLA provides up to 12 weeks of unpaid, job-guaranteed leave every 12 months to employees who: have worked for their employer for at least 12 months and 1250 hours in the last 12 months; work for employers with at least 50 employees; require leave to heal from a "serious health condition" or aid a child, spouse or parent heal from a serious health condition; or require leave for the birth of the employee's child or placement of a child with the employee for adoption or foster care.<sup>82</sup> Federal regulations define a "serious health condition" as an illness, injury, impairment, or physical or mental condition that causes

❑ If your client anticipates the need for leave from work, help her determine if she qualifies for FMLA leave.

❑ If your client has already missed work, help her determine if it qualifies as FMLA leave and what, if anything, she needs to say or to give to her employer to ensure coverage.

❑ If your client has been fired for missing work, and she wants her job back, determine if it is FMLA-eligible and consider helping her write a demand letter or writing one yourself if you think there is a violation of law.

<sup>81</sup> See, e.g., *City of Anchorage v. Gregg*, 101 P. 3d 181 (Alaska 2004) (a domestic violence victim who meets the test for a "serious health condition" may qualify for leave under the FMLA).

<sup>82</sup> 29 U.S.C. § 2601 et seq. (2004); 29 C.F.R. §§ 825.100 et seq. (1995).

incapacity and requires either or both an overnight stay in a hospital or similar facility or continuing treatment by a health care provider.<sup>83</sup>

“Continuing treatment” by a health care provider is defined as meeting one of the following four conditions: (1) a condition causing incapacity and an inability to work for three or more days that requires two or more visits to a health care provider or one visit and a regimen of treatment; or (2) a chronic condition continuing over an extended period of time requiring periodic doctor’s visits and which may cause episodic incapacity; or (3) absences to receive multiple treatments for an illness or injury which would cause a period of incapacity of more than three days if not treated; or (4) pregnancy.<sup>84</sup>

An employee who qualifies for FMLA leave is eligible to receive:

- Unpaid leave, though she may be able (or required) to use vacation, sick or other accrued paid leave;<sup>85</sup>
- Continuation of health care benefits if she received them previously;<sup>86</sup>
- Job protection, meaning that she cannot be fired for exercising her right to take the leave or for taking the leave;<sup>87</sup> and
- Restoration to the same or an equivalent position at the end of the leave.<sup>88</sup>

An employee who requests leave under the FMLA may be required by her employer to provide certification of the need for leave, but this certification need not include reference to the violence.<sup>89</sup> If a survivor has experienced an injury caused by sexual violence and has missed work because she is incapacitated due to the injury, she may qualify for job-guaranteed leave under the FMLA instead of facing termination due to missing days of work.<sup>90</sup> It is important to note, however, that she may not take her leave to relocate, to see her attorney, or if her illness or injury does not rise to the level of a serious health condition.

The FMLA is enforced by the United States Department of Labor. To pursue a claim, an employee who believes her rights under the FMLA have been violated must either

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<sup>83</sup> 29 C.F.R. § 825.114 (1995).

<sup>84</sup> 29 C.F.R. § 825.114.

<sup>85</sup> 29 U.S.C. § 2612 (a-d).

<sup>86</sup> 29 U.S.C. § 2614 (c).

<sup>87</sup> 29 U.S.C. § 2615.

<sup>88</sup> 29 U.S.C. § 2614(a)

<sup>89</sup> 29 U.S.C. § 2613.

<sup>90</sup> See e.g., *City of Anchorage v. Gregg*, 101 P.3d 181, 190 (Alaska 2004) (that plaintiff was a victim of domestic violence was relevant to whether a “serious health condition” exists under FMLA: “A reasonable person could conclude that Gregg was effectively unable to work because she fled the state to leave an abusive husband who followed her, and that she was unable to perform daily activities because she was held in a “hostage situation,” where her behavior was dictated by the combination of fear for her children, a high level of emotional stress, her accident injuries, and her pregnancy.”).

file a complaint with the Department of Labor or file a complaint in federal court within two years of the violation.<sup>91</sup>

## B. State Leave Laws and Sexual Assault

A survivor may not be eligible for FMLA leave for a number of reasons. For example, she may not have an injury or illness that qualifies as a serious health condition, she may not work for a covered employer, or she may not have worked for her employer for the requisite amount of time. Still, she may have state protections available to her. Almost half of the states have family or medical leave laws that provide unpaid job-guaranteed time off for a variety of reasons related to family or illness, including time to heal from the employee's serious health condition or to attend a child's school event. These state laws may assist a sexual violence victim by providing her much needed job-guaranteed leave.<sup>92</sup> California, for example, in 2004, implemented the first paid leave legislation in the country.<sup>93</sup>

Additionally, thirty-one states and territories have "crime victim leave laws" that give victims of crimes, including sexual violence victims, time off to go to criminal court if subpoenaed to appear as a witness or victim of a crime.<sup>94</sup>

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<sup>91</sup> 29 U.S.C. § 2617.

<sup>92</sup> See [www.nationalpartnership.org](http://www.nationalpartnership.org) for additional information about state leave laws (last visited December 15, 2004). Specific state information may be accessed at

<http://www.nationalpartnership.org/portals/p3/library/FamilyMedicalLeave/StateunpaidFMLLaws.pdf>

<sup>93</sup> CAL. UNEMP. INS. CODE § 3300 (West 2004).

<sup>94</sup> See Ala. Code § 15-23-81 (allows victim to respond to subpoena to testify in criminal proceeding or participate in reasonable preparation for a criminal proceeding); Alaska Stat. § 12.61-017 (allows victim to respond to subpoena and to attend court proceedings to give testimony; leave is unpaid); Ariz. Rev. Stat. § 13-4439 (for criminal offenses) and Ariz. Rev. Stat. § 8-420 (2004) (specifically for juvenile offenses) (leave may be unpaid or employer may require victim to use accrued paid leave; exception for undue hardship to employer); Ark. Code Ann. § 16-90-1105; Colo. Rev. Stat. § 24-4.1-303(8) (allows victim to respond to a subpoena or participate in trial preparation); Conn. Gen. Stat. § 54-85b (allows employee to attend court or participate in police investigation for crime against employee or employee's minor child) (§54-85d gives a similar protection to a family member or designee of a homicide victim.); Del. Code Ann. Tit. 11 § 9409 (allows victim to respond to a subpoena, participate in trial preparation, or attend trial proceedings as reasonably necessary to protect the victim's interests); Fla. Stat. § 92.57 (allows victim to respond to a subpoena only); Ga. Code Ann. § 34-1-3 (allows victim to respond to court order such as a subpoena or jury duty; employer may require "reasonable notification" by the employee); Haw. Rev. Stat. § 621.10.5 (allows victim to respond to subpoena, testify, attend court as a prospective witness; allows reasonable attorneys fees if an employee sues for violation of this law and prevails); Ind. Code 35-44-3-11.1 (allows victim to respond to a subpoena only); Iowa Code § 915.23 (allows victim to serve as witness in criminal case; allows reasonable attorneys fees and court costs if an employee sues for violation of this law and prevails); Md. Code Ann. Crim. Proc. § 11-102 or Md. Code Ann. Cts. & Jud. Proc. § 9-205 (allows victim to respond to a subpoena or attend proceedings the employee has a right to attend, as defined by Maryland law); Mass Gen. Laws Ch. 258B, § 3(l) and Mass Gen. Laws § 268-14(b) (allows leave to respond to subpoena); Mich. Comp. Laws § 780.762 and Mich. Comp. Laws § 780.790 (allows victim leave to give testimony in court); Minn. Stat. Ann. § 611A.036 (allows employee to give testimony in court as victim or witness); Miss. Code Ann. § 99-43-45 (allows victim to respond to subpoena or participate in reasonable preparation for court proceedings); Rev. Stat. Mo. § 595.209(1)(14) (allows a witness, victim, or victim's immediate family to respond to a subpoena or to participate in preparation for a criminal proceeding); Mont. Code Ann., § 46-24-205(3) (2003) (allows victim or a member of the victim's family to participate in preparation for or attendance at a criminal justice proceeding; also provides for employer intercession services); Nev. Rev. Stat. § 50.070 (2003) (allows witness or person summoned to appear as a witness to testify; allows reasonable attorneys fees if an employee sues for violation of this law and prevails); N.D. Cent. Code § 27-09.1-17 (allows employee to serve as witness or juror without adverse job outcome); Ohio Rev. Code Ann. § 2930.18 (general crime) and Ohio Rev. Code Ann. § 2151.121.1 (extends protection to juvenile court and delinquency hearings) (allows victim, victim's family members, and/or victim's representative to participate in trial preparation and attend trial proceedings; such protected leave is generally unpaid); 18 Pa. Code § 4957 (allows employee to testify as witness or victim of a crime; such

Another more recent source of job-guaranteed leave for survivors of sexual violence are state laws that provide support specifically designed with the survivor's needs in mind. In the 1990s, victim advocates began working with workers' rights advocates, welfare advocates, and women's rights groups to pass state laws providing targeted leave for victims of domestic violence and sexual assault. Today, six states (California, Colorado, Hawaii, Illinois, Maine, and North Carolina) have statutes and/or ordinances providing unpaid, job-guaranteed leave or leave as a reasonable accommodation specific to victims of sexual assault, stalking and/or domestic violence.<sup>95</sup> The laws vary, but generally provide leave for victims to: (1) go to civil court to obtain protection for themselves and their family; (2) seek medical attention; (3) obtain services from a rape crisis program; and (4) obtain legal assistance. These laws all prohibit an employer from discriminating against an employee in some form, including for exercising her right to the leave. The employer may require the employee to provide certification of her qualifying need for leave. If it is found that an employer failed to provide leave under these laws and thus illegally fired a survivor, she may be entitled to reinstatement and back pay.<sup>96</sup>

Finally, if none of these laws provides protection, a survivor still may have some recourse if her employer voluntarily provides any type of paid or unpaid sick time, vacation time, personal time or disability leave, or if these provisions are included in a collective bargaining agreement that applies her. For these reasons it is critical to determine whether a survivor has a personnel manual or is a member of a union. It is increasingly more common for employment policies and collective bargaining agreements to specifically mention benefits for victims of violence. Moreover, even if sexual violence is not specifically mentioned, these documents will provide valuable information about vacation, sick time, or leave possibilities available to a survivor. They may provide her the opportunity to attend court proceedings, heal from injuries due to the violence, relocate, or take other steps to help recover from the abuse, free from fear of job loss.<sup>97</sup>

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leave is unpaid); R.I. Gen. Laws § 12-28-10 (specific to employment protection for victims who seek protective orders) and R.I. Gen. Laws § 12-28-13 (employment protection for victims of crimes to attend court proceedings); S.C. Code Ann. § 16-3-1550 (allows victim and witness to respond to subpoena); Tenn. Code Ann. § 4-4-122 (only applies to state agencies as employers; employers are not allowed to undertake an adverse employment decision because the employee/victim of a criminal offense takes any lawful action to cause or assist in causing the arrest, prosecution and conviction of the perpetrator of such offense); Utah Code § 78-11-26 (allows employee to respond to a subpoena; if employee prevails in civil suit for violation, reasonable attorneys fees are allowed); 13 Vt. Stat. Ann. § 5313 (allows victim, victim's family member, and victim's representative to respond to a subpoena); 34 V.I.C. § 203(e) (allows victim or witness to respond to subpoena without fear of retaliation or loss of wages from employer); Va. Code Ann. § 18.2-465.1 (allows employee to respond to summons or subpoena and attend future proceedings as required by court in writing; allows employee to serve on a jury); Wyo. Stat. Ann. § 1-40-209(a) (allows victim or witness to respond to a subpoena; allows employee to request employer intercession services); Wis. Stat. § 103.87 (only prevents an employee from being discharged for missing work to respond to a subpoena; employee must notify employer of need to miss work to testify on or before the first business day after receipt of the subpoena). For links to laws cited above, *see* [www.legalmomentum.org/issues/vio/timeoff.pdf](http://www.legalmomentum.org/issues/vio/timeoff.pdf).

<sup>95</sup> Cal. Lab. Code §§ 230 & 230.1 (West 2004); Colo. Rev. Stat. § 24-34-402.7 (2004); Haw. Rev. Stat. 378-72 (2004); 820 Ill. Comp. Stat. 180/1-180/45 (2004); 26 Me. Rev. Stat. § 850 (2004); N.C. Gen. Stat. Chap. 50-B-5.5 (2005); Miami-Dade County, Fla., Code 11A-61 (2003); N.Y.C. Admin. Code § 8-107.1(2004).

<sup>96</sup> See *e.g.* Cal. Lab Code § 230 (West. 2004).

<sup>97</sup> See ABA Commission on Domestic Violence, *A Guide For Employers: Domestic Violence In The Workplace* at 36-38 (1999) (discussing how an employee who is a victim of domestic violence may use her sick time, flextime, and other leave options. Available for purchase from [www.abanet.org/domviol](http://www.abanet.org/domviol)).

## IV. Application of Anti-Discrimination Statutes

When sexual violence or a sexual assault takes place at work, either inside the building or on the premises controlled by the employer, a survivor may be able to avail herself of protections under state and federal anti-discrimination laws if her employer fails to take action regarding the violence or retaliates against her for reporting it. Although sexual violence survivors are not specifically mentioned in most anti-discrimination employment laws, these laws may still provide protection or remedy. Title VII and the Americans with Disabilities Act are two federal laws that may be applicable. In addition, states also have their own anti-discrimination statutes that prohibit discrimination.

Find out the circumstances around her job loss – was it because she reported a sexual assault? Was she fired for performance problems – or simply because she is a survivor of sexual assault?

### A. Title VII

Title VII of the Civil Rights Act of 1964 (Title VII), as amended, prohibits discrimination against an employee in hiring, terms and conditions of employment and firing based on sex (including pregnancy), race, national origin, religion, and color at employers with 15 or more employees.<sup>98</sup> Courts have also recognized that sexual harassment is a prohibited form of sex discrimination.<sup>99</sup> An employer can be held liable if the employer failed to exercise reasonable care to prevent and correct the behavior and the employee did not unreasonably fail to take advantage of corrective opportunities provided by the employer.<sup>100</sup>

If a sexual assault survivor believes that she is being discriminated against at work, advise her to:

- Talk to the person discriminating or harassing her and tell them to stop.
- Talk to a person in authority.
- If she belongs to a union, talk to the shop steward or business agent.
- Keep a journal recording incidents of discrimination.

Sexual violence can constitute sexual harassment when the perpetrator is a supervisor or otherwise an agent of the employer, and he commits an act of rape or sexual assault on the job. Rape may create a sufficiently severe or pervasive hostile environment to hold an employer liable for the resulting damages.<sup>101</sup> It can also constitute sexual harassment when the perpetrator is a coworker or non-employee such as a customer, and the employer knew or should have known of abuse that involved the workplace and failed to take prompt and appropriate remedial action.<sup>102</sup>

<sup>98</sup> 42 U.S.C. § 2000e (2004).

<sup>99</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>100</sup> 42 U.S.C. § 2000e-2(a)(1) (2004).

<sup>101</sup> See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual assault by supervisor with whom employee had prior social relationship); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 911 (9th Cir. 2001) (victim raped repeatedly one evening by client of realty company); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (every rape committed in the employment setting is also discrimination based on the employee's sex); and *Jones v. United States Gypsum*, 81 FEP Cases (BNA) 1695 (N.D. Iowa 2000) (upholding male victim's sexual harassment claim based on assault by female co-worker who grabbed him in the genital area).

<sup>102</sup> See, e.g., *Little v. Windermere Relocation, Inc.*, 265 F.3d 903 (9th Cir. 2001) (rape by client); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (unwanted touching and offensive comments by co-workers); *Menchaca v. Rose Records, Inc.*, 67 Fair Empl. Prac. Cases (BNA) 1334 (N.D. Ill. 1995) (harassment by employer's customer); *Otis v. Wjysc*, 1994 WL 566943 (D. Kan. 1994) (harassment by co-worker); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025-1026 (D. Nev. 1992) (harassment by employer's customer); see also 29 C.F.R. § 1604.11 (d)-(e) (EEOC guidelines confirming

Sexual harassment laws apply to all employees, regardless of the relationship between the perpetrator and the victim.<sup>103</sup>

If an employer does discharge an employee who reports being sexually assaulted, the survivor may be able to pursue a Title VII disparate impact claim. While there is no settled case law on point, the argument may be made that an employer is liable under a Title VII disparate impact theory. To satisfy the elements of a Title VII claim, the victim would need to provide sufficient evidence that the majority of sexual violence victims are female and that the employer has a policy of discriminating against victims of sexual violence.<sup>104</sup>

## **B. Americans with Disabilities Act**

Like Title VII, the Americans with Disabilities Act (ADA) prohibits discrimination against an employee because she has a qualified disability as defined in the statute.<sup>105</sup> The ADA also may require an employer to take affirmative steps through a “reasonable accommodation” for a qualified disabled employee.<sup>106</sup> If an employee has a qualified disability and works for a covered employer and can perform the basic duties of the job, she may not be harassed, fired, demoted, or otherwise discriminated against in the terms and conditions of her employment based upon the disability.<sup>107</sup> A reasonable accommodation is a modification or adjustment to a workplace or job to enable an employee with a qualified disability to perform the basic duties of her job.<sup>108</sup>

There are specific confidentiality provisions related to medical information provided to an employer in the process of self-disclosing a disability or requesting an accommodation.<sup>109</sup> An employee with a disability may seek a reasonable accommodation by making her employer aware of her disability. A sexual violence survivor may have developed severe post-traumatic stress disorder (PTSD) as a result of the violence that qualifies as a disability under the ADA or the state equivalent, and thus she may be entitled to an accommodation at work, related to her PTSD.

However, a survivor should proceed cautiously before pursuing such a claim if she is seeking to maintain as confidential and privileged her medical, counseling, or other protected relationships and records. In some (but not all) states, filing a civil suit may result in a statutory waiver of otherwise confidential and privileged personal documents, such as

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employers’ liability for sexual harassment by co-workers and customers); *See also* “Win For Gantt,” Ann Parks, *Maryland Daily Record*, Feb. 14, 2005.

<sup>103</sup> *See, e.g., Fuller v. City of Oakland*, 47 F.3d 1523 (9th Cir. 1995) (holding city liable for failing to take steps to stop a police officer from harassing another officer after she ended their relationship); *see also Excel v. Bosley*, 165 F.3d 635 (8th Cir. 1999) (finding that sexual harassment at work by employee’s ex-husband violated Title VII).

<sup>104</sup> *See, e.g., Pooley v. Union County*, U.S. District Court for the District of Oregon, Case No. 3-01-0343-JE, Documents 101 (Magistrate’s Findings and Recommendations) and 104 (Order adopting Magistrate’s Recommendations) (denying motion to dismiss whistleblower claim where victim alleged that employer constructively discharged her for testifying against husband in criminal case and for securing and modifying her civil protective order).

<sup>105</sup> 42 U.S.C. § 12102 (2004)

<sup>106</sup> 42 U.S.C. § 12111(9).

<sup>107</sup> 42 U.S.C. § 12112 (b)

<sup>108</sup> 42 U.S.C. § 12111(9)

<sup>109</sup> 42 U.S.C. § 12112(d)

medical, counseling and employment records. Even absent a statute on point, a victim who voluntarily releases her medical, counseling, or employment records to support her claim of PTSD or other disability may have waived her right to keep such records confidential. This issue of inadvertent or intentional release is especially significant for victims who are participating in a criminal prosecution and do not wish to have their personal records disclosed to the criminal defendant(s). Once an evidentiary privilege is waived, it is likely that it may not be reasserted. Similar caution should be exercised by a victim who pursues an unemployment claim for stress- or medical-related reasons following an assault.

### **C. State and Local Laws**

Each state has anti-discrimination statutes that prohibit discrimination on some or all of the bases found in Title VII and the ADA; however, some states may provide more protection than the federal statutes. For example, a state anti-discrimination statute may apply to employers with fewer employees than required under the corresponding federal law. It is important to look to state anti-discrimination statutes to find the most comprehensive protection for a survivor.

In recent years, some states and cities have begun to pass legislation specifically prohibiting discrimination against sexual assault survivors. As of this writing, Illinois and New York City both specifically prohibit employers from discriminating against employees because they are victims of domestic or sexual violence.<sup>110</sup>

These laws are more narrowly tailored than the Title VII discrimination claims, and they do not need to be analyzed under sex discrimination theories. Also, under these laws, discrimination is defined to include firing or penalizing a victim because of the actions of her assailant. Similar laws are pending in several other states and on the federal level.<sup>111</sup>

The Illinois and New York City laws also require employers to make “reasonable accommodations” for victims, which could include safety measures, time off, modified work schedules, etc. Before providing a reasonable accommodation, the employer may ask for “certification” establishing that the employee is a victim. Employers must keep the request for leave and other information they receive confidential.

It is critical that a survivor notify the person the employer has identified to receive complaints regarding harassment or discrimination, or notify a person in a position of authority about the behavior, preferably in writing. Such notice is important to ensure that the employer has an opportunity to rectify the situation and to ensure that the survivor is preserving her rights. The victim should be provided with information about how to file a claim for discrimination with the United States Equal Employment Opportunity Commission or state agency enforcing anti-discrimination statutes in employment.

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<sup>110</sup> 820 Ill. Comp. Stat. 180/1-45 (West 2004); N.Y.C. Admin. Code § 8-107(2004).

<sup>111</sup> See, e.g., SAFE ACT, 2005.

## **V. Remedies**

### **A. Workers' Compensation**

Workers' compensation is a state-run system of workplace insurance that each employer is required to provide. Although the scheme varies from state to state, in all states it provides the exclusive remedy for employees who experience injuries in the course of employment. Intentional torts committed by employees against other employees are generally excluded from the workers' compensation system, but it is important to check your state case law and consult a workers' compensation attorney. The Georgia Court of Appeals has specifically found that where the circumstances of the employment are such that there is an increased risk of sexual assault and the assault was not personal, then such an assault is compensable under the Georgia Workers' Compensation Act.<sup>112</sup> In contrast, the same court held that the Workers' Compensation Act was not the exclusive (or appropriate) remedy, and a tort action was allowed, where the violence "cannot fairly be traced to the employment as a contributing proximate cause and the injury comes from a hazard to which the employee would have been equally exposed apart from the employment."<sup>113</sup>

### **B. Occupational Safety and Health Laws and Tort Actions**

When sexual violence affects workers in the workplace, employers may face liability for failing to take adequate measures to keep the workplace safe. Inadequate safety measures can trigger an employer's obligations under the general duty clause of the Occupational Safety and Health Act.<sup>114</sup> In addition, employers may face liability under tort law negligence theories if employees commit acts of violence in the workplace, or if the employer had reason to know an employee presented the risk of committing an act of violence and the employer failed to take prompt and effective remedial action.<sup>115</sup>

### **C. Wrongful Termination in Violation of Public Policy and Tort Actions**

Almost every state recognizes "wrongful discharge in violation of public policy" as an exception to the general rule of at-will employment. This type of action protects employees who are fired for a reason deemed in violation of a state's public policy. Public policy generally must be based in the state's statutes; every state has statutes that support a strong public policy in support of victims and survivors. Firing an employee after she took one day off from work to get a protective order may violate public policy.<sup>116</sup>

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<sup>112</sup> *Insurance Company of Alabama v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963).

<sup>113</sup> See *Kennedy v. Pine Land State Bank*, 211 Ga. App. 375, 439 S.E.2d 106 (1993).

<sup>114</sup> 29 U.S.C. § 651 (2004).

<sup>115</sup> For a more thorough discussion of tort remedies, see Chapter Five of this guide.

<sup>116</sup> See, e.g., *Aspessos v. Memorial Press Group*, No. 01-1474-A, 2002 Mass. Super LEXIS 404 (Mass. Super. Ct. Sept. 30, 2002) (denying motion to dismiss claim that terminating employee because she was a victim of domestic violence violated public policy).

## **D. Whistleblower Statutes**

Even if a state has no statutory job protections specific to sexual assault or victims in general, there may still be a state remedy available to the survivor. Some states' "whistleblower" protection statutes provide protection for an employee involved with the criminal and/or civil justice system. The law may protect an employee who gives testimony in a criminal proceeding, reports unlawful activity to law enforcement, or initiates or testifies in a civil proceeding. For example, Oregon's whistleblower statute<sup>117</sup> makes it an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation, or other terms, conditions or privileges of employment for the reason that the employee:

- has in good faith reported criminal activity by any person;
- has in good faith caused a complainant's information or complaint to be filed against any person;
- has in good faith cooperated with any law enforcement agency conducting a criminal investigation;
- has in good faith brought a civil proceeding against an employer; or
- has testified in good faith at a civil proceeding or criminal trial.

At least one sex discrimination/employment discrimination case involving a survivor has survived summary judgment on such a claim.<sup>118</sup>

## **VI. Additional Sources of Compensation**

In addition to specific remedies against her employer, a survivor also has several sources of state funds that may be able to compensate her for her injuries or losses associated with an assault.

### **A. Unemployment Insurance**

Unemployment Insurance (UI) is a state-run social insurance program that provides temporary income to workers who lose their jobs through no fault of their own.

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<sup>117</sup> ORS 659A.230.

<sup>118</sup> *Pooley v. Union County*, U.S. District Court for the District of Oregon, Case No. 3-01-0343-JE, Documents 101 and 104. See also *Wholey v. Sears Roebuck*, 370 Md. 38, 803 A.2d 482 (2002) (adopting a tort cause of action for wrongful discharge where an employee reports criminal activity to the proper authorities and is discharged as a result of the report).

Unemployment insurance is primarily funded through employers' payroll tax deductions. Federal law provides some guidance but leaves most decisions under the control of participating states, including monetary earnings requirements, eligibility requirements for benefits, disqualification provisions and penalties, and benefit levels and duration. State UI eligibility requirements generally require that claimants have: (1) worked for a period of time; (2) earned a minimum amount of wages in the last 12 months; (3) be able and available to work; and (4) seek work while collecting unemployment insurance benefits.

**In general, undocumented immigrants are not eligible for benefits because they are not considered able and available to work because of their immigration status.**

A claimant is typically disqualified from UI benefits for: (1) leaving work voluntarily without good cause; (2) having been fired for reasons amounting to misconduct; or (3) refusing to work without good cause. Benefit amounts vary from state to state, but the maximum is approximately \$370 per week and may last up to two years. Benefit amounts are calculated using a "base period," which reflects the applicant's income from employment in the last 12 months preceding the application. In most jurisdictions an applicant must have earned a certain amount in the "base period" to qualify for benefits.

Until recently, it was unclear whether or when victims of sexual assault, domestic violence, or stalking were eligible for unemployment insurance if they were fired or forced to quit their jobs because of the sexual violence. As of this writing, 26 states and the District of Columbia have amended their Unemployment Insurance Codes to clarify that victims of domestic violence are eligible for benefits.<sup>119</sup> For example, Washington State amended its Unemployment Insurance Code such that an individual may be eligible for unemployment insurance benefits if leaving work was necessary to protect themselves from domestic violence or stalking.<sup>120</sup>

Only the Indiana and Oregon statutes specifically identify sexual assault survivors as a protected class. Indiana's Code provides that an individual who voluntarily leaves employment or who is discharged "due to circumstances directly caused by domestic or family violence [including stalking or a sex offense]" will not be disqualified from receiving unemployment insurance. Ind. Code § 22-4-15-1(1)(C)(8). In 2005, Oregon amended its unemployment insurance statute, Or. Rev. Stat. § 657.176 (HB 2662), to provide that an individual who is victim, or parent or guardian of minor child who is victim, of domestic

<sup>119</sup> Ariz. H.B. 2440, 46th Leg., 2nd Reg. Sess. (Ariz. 2004); Ca. U.I. Code §§ 1030, 1032 & §1256; Colo. Rev. Stat. Ann. § 8-73-108(4)(r); Conn. Gen. Stat. § 31-236(a)(2)(A); Del. Code Ann. tit. 19, § 3315(1); D.C. Act 15-418 (June 29, 2004); 820 Ill. Comp. Stat. 405/601; Ind. Code § 22-4-15-1(1)(C)(8); Kan. Stat. Ann. § 44-706(A)(12); Me. Rev. Stat. Ann. Tit. 26, § 1193(A)(4) and Me. Rev. Stat. Ann. tit. 26, § 1043(23)(B)(3); Mass. Gen. L. Ann. ch. 151A, §§ 1, 14, 25, 30; Minn. Stat. § 268.095(1)(8) and Minn. Stat. § 268.095(6)(a)(c); Mont. Code Ann. § 39-51-2111; Neb. Rev. Stat. Ann. § 48-628(1)(a); N.H. Rev. Stat. Ann. tit. 23, § 282-A:32(I)(a)(3); N.J. Rev. Stat. § 43:21-5(j); N.M. Stat. Ann. § 51-1-7 (A); N.Y. Lab. Law § 593(1)(a); N.C. Gen. Stat. § 96-14(1f) and S.B.439, 2003-04 Sess. (N.C. 2003), to be codified at N.C. Gen. Stat. § 96-14(1f); Okla. Stat. Title 40, § 40-2-405(5), §40-3-106(G)(8); Or. Rev. Stat. § 657.176(12); R.I. Gen. Laws § 28-44-17.1; S.D. Codified Laws § 61-6-13.1; Texas Lab. Code Ann. §§ 207.045, 207.046; Wash. Rev. Code §§ 50.20.050, 50.20.100, 50.20.240 and 50.29.020; Wis. Stat. § 108.04(7)(s); and Wyo. Stat. § 27-3-311.

<sup>120</sup> Wash Rev. Code §§ 50.20.050, 50.20.100, 50.20.240, and 50.29.020(2003).

violence, sexual assault or stalking may not be disqualified from receiving unemployment benefits if individual leaves workplace or avoids available workplace to protect individual or minor child from further domestic violence, sexual assault or stalking at workplace or elsewhere.

Although only two states' UI statutes specifically reference sexual assault, in many jurisdictions the definition of domestic violence in the Unemployment Insurance Code includes rape and/or sexual assault, thus providing coverage for victims of intimate partner sexual assault. Even in states without one of these laws, survivors of domestic violence, sexual assault and stalking who lose their jobs for these reasons may still qualify for benefits. Alaska, Hawaii, Nevada, Ohio, Pennsylvania, South Carolina, Utah and Virginia, for example, all permit claimants to qualify for benefits if they were forced to leave their job for "personal" reasons as a qualification for good cause.<sup>121</sup>

In states that have specific statutes addressing a victim's access to UI benefits, it is important to check the statute to see if there are any requirements to prove one's status as a victim. A survivor may have to obtain police or court documents to bring with her to file her claim for benefits. Several statutes do not provide guidance on how to establish that a claimant was fired or quit because of domestic violence, leaving it to the claimant to "prove" her victimization.

In many jurisdictions, UI benefits do not begin until a claim is filed, so it is important that a survivor file as quickly as possible. It is also important that a sexual assault survivor who has lost her job because of violence includes this information in her claim for benefits. It is a good practice to discuss with the survivor the possibility of bringing a copy of a police report, protection order, or other "proof" of the assault or her status as a victim. There is a lot of misunderstanding about eligibility for unemployment insurance, and all too often victims who qualify do not receive benefits. These benefits may be the only or best income source for a survivor, so information and preparation are likely to be key to such a claim.

## **B. Crime Victim Compensation**

All states have Crime Victim Compensation Funds and Programs. All of these programs are eligible for federal Victims of Crime Act funds. These funds may be used to pay for medical expenses, mental health counseling, and lost wages attributable to physical injury. They may also cover other-related out of pocket expenses. Because each state's eligibility requirements vary, it is important to be familiar with each state's eligibility requirements. For example, some states only provide benefits to residents of the state, and/or for a crime committed within the state. Other state compensation programs may provide coverage for any eligible state resident, regardless of where the crime occurred. For example, Oregon, Louisiana, and Michigan, among others, authorize crime victim compensation to a victim if the crime occurred a state that does not have a crime victim compensation program or does not have a program for which the victim would be

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<sup>121</sup> See, e.g., *Rivers v. Stiles*, 697 S.W.2d 938 (Ark. 1985).

eligible,<sup>122</sup> or if the resident was injured outside the United States by an act of international terrorism.<sup>123</sup>

In other states, there may be additional state programs in place to cover some or all sexual assault-related expenses. For example, Oregon's Sexual Assault Victims' Emergency (SAVE) fund covers the cost of a full or partial forensic medical assessment. This coverage is not part of the more traditional crime victim compensation scheme (*e.g.*, the SAVE fund does not have to be the payor of last resort and the class of eligible victims is much broader than for crime victim compensation).

For detailed descriptions of each state's requirements, benefits, and procedures, *see* [www.nacvcb.org/progdir.html](http://www.nacvcb.org/progdir.html).

## VII. Checklists, Sample Materials, Resources

[www.legalmomentum.org/issues/vio/FactsheetPage.shtml](http://www.legalmomentum.org/issues/vio/FactsheetPage.shtml)

[www.caepv.org](http://www.caepv.org)

<http://www.nationalpartnership.org/portals/p3/library/FamilyMedicalLeave/FMLAGuide5thedition02.pdf> (**Questions and answers about the Family Medical Leave Act**).

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<sup>122</sup> *See e.g.*, <http://www.cole.state.la.us/cvr.htm#Basic%20Qualification%20Requirements> for Louisiana eligibility requirements; Oregon requirements may be found on-line at <http://www.doj.state.or.us/CrimeV/form.pdf>

<sup>123</sup> *See* Michigan's informational CVC brochure at [http://www.michigan.gov/documents/Crimevictimcompensation\\_9679\\_7.pdf](http://www.michigan.gov/documents/Crimevictimcompensation_9679_7.pdf)

## CHAPTER FOUR: EDUCATIONAL SETTINGS

Sexual violence in educational settings can present a complex overlay of laws that require both crime reporting and confidentiality of records; both access to education and the guarantee of a safe learning environment. To fully understand a survivor's rights in the educational context, one must look to state and federal law as well as to specific school policies. School obligations may depend on the type of institution (public or private), level of institution (primary, secondary or higher education), age of victim and assailant, status of victim and assailant (student, teacher/school employee, guest, etc.), and a number of other factors that will be discussed in this chapter. When sexual violence occurs in any type of educational setting, a wide range of issues may need to be addressed. These include:

- Personal safety of the victim;
- Confidentiality rights of victims and the accused;
- Right to equal access to education;
- School crime statistics reporting requirements;
- School disciplinary proceedings; and
- Specific considerations for a minor victim or accused.

In addition, any sexual violence that occurs on or in association with a college or other residential campus may encompass a victim's entire life, including social, academic, and housing needs. This chapter outlines the basic laws that are implicated and issues that may arise when sexual violence occurs within an educational context.

### **I. Rights of the Victim in Elementary & Secondary Schools**

Two federal laws provide basic requirements for students' access to and quality of primary and secondary education: (1) the No Child Left Behind Act of 2001; and (2) the Safe Schools Act of 1994. Each is discussed below. Because issues regarding minors may often be implicated in primary and secondary education, some specific issues regarding minors are also discussed.

#### **A. Duties of Schools Under Federal Law**

##### **1. No Child Left Behind Act of 2001**

Crime in schools has been an ongoing concern for students, parents and educators alike. In 2000, students aged 12 to 18 were victims of approximately 1.9 million crimes at school, including about 128,000 serious violent crimes (including rape and sexual assault). Bureau of Justice Statistics (BJS) and the National Center for Education Statistics (NCES), *Indicators of School Crime and Safety: 2002*. The No Child Left Behind (NCLB) Act of 2001 imposes new duties on states to establish a uniform management and reporting system to collect information on school safety and drug use among young people. The states must

include incident reports by school officials and anonymous student and teacher surveys in the data they collect. This information is to be reported publicly so that parents, school officials and others who are interested have information about any violence and drug use at their schools. It also lets parents of children who have been the victims of a violent crime while on school grounds or who attend “persistently dangerous schools,” as defined by the individual states, transfer their child to another public school.

- If a student is a victim of sexual violence, the NCLB Act allows parents to request a transfer to another public school.
- Because crime statistics are now public knowledge, parents may request to transfer if the school has a history and climate of violence that qualifies as “persistently dangerous,” as defined by the state.
- Look to your state law to determine the requirements for a “persistently dangerous” finding. For an example, *see* Virginia Board of Education’s “Persistently Dangerous Schools Identification Process and Criteria,” available online at: [www.pen.k12.va.us/VDOE/nclb/nclbdangerousschools.pdf](http://www.pen.k12.va.us/VDOE/nclb/nclbdangerousschools.pdf).
- In most cases, the school district will pay for transportation of a child who requests a transfer. Subject to a funding cap, districts must provide transportation for all students who exercise their school choice option. Priority is given to the lowest-achieving children from low-income families.

Questions to consider:

- Are victims/students eligible for supplemental services (*e.g.*, tutoring)?
- What is the liability of a school that fails to comply with crime statistics disclosure obligations?

The NCLB Act also provides support programs to prevent violence in and around states. For more information on the No Child Left Behind Act, *see* the U.S. Department of Education’s reference guide at:

<http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf>.

## 2. Title IX

Schools have a duty to provide equal access to education. A school that interferes with that right based on sex, by failing to protect a victim from sexual violence, may be sued for that violation. For further discussion of “Title IX”, *see below*, Section II.E of this chapter.

## **B. Remedies**

The following remedies may be available for a student in a primary or secondary educational setting:

- Removal of teacher or student assailant from class pending full investigation.
- Adjustment to student's schedule or special arrangements for specialized study in order to avoid further contact with assailant, without academic penalty.
- Transfer of victim to different class within same school.
- Transfer to different school as a victim of violence under No Child Left Behind Act.
- Home schooling of the child.

## **C. Specific Considerations for Minor Students**

Many victims — and possibly assailants — at the primary or secondary educational level will be minors. Some specific issues to consider when minors are involved include:

- Does a guardian *ad litem* need to be appointed to protect a minor's rights?
- Are school officials subject to mandatory reporting laws? Look to your state reporting requirements.
- Must school officials either report to parents or obtain parental consent for a minor victim to receive:
  - Medical treatment;
  - Mental health treatment; or
  - HIV/pregnancy testing;

*See State Minor Consent Laws: A Summary*, 2<sup>nd</sup> Ed., published by the Center for Adolescent Health & the Law, as a resource on minor consent issues.

## **II. Rights of the Victim in Institutions of Higher Education**

In 2001, the U.S. Department of Justice National Institute of Justice (NIJ) and the Bureau of Justice Statistics (BJS) released a report, *The Sexual Victimization of College Women*. The report found that three percent of college women experience a completed and/or attempted rape during a typical college year.

The vast majority of rapes occurred in living quarters. For completed rapes, the report found that nearly 60 percent took place in the victim's residence, 31 percent occurred in other campus living quarters, and 10 percent occurred at a fraternity. There are many complications when sexual violence occurs in living quarters of the victim, the assailant or both. In addition, sexual violence on campus is also challenging because of the small contained community of a college campus. The NIJ/BJA report found that the overwhelming number of victims knew their offender; 90 percent were victimized by someone they knew, usually a classmate, friend, ex-boyfriend or acquaintance.

Colleges and universities may have an even greater responsibility to their students than other educational institutions, because the academic setting often encompasses a student's entire life, including housing, meals, academic, social and extracurricular activities. There has been an increasing awareness about the unique implications of college and university sexual violence. Recently, several pieces of federal legislation have been enacted in order to reduce sexual violence on campus and create an environment where victims feel more comfortable and safe to come forward to report their assault.

#### **A. Jeanne Clery Act and the Campus Victim's Bill of Rights**

The Jeanne Clery Act and the Campus Victim's Bill of Rights function together in order to combat the prevalence of sexual violence and provide some uniformity in addressing sexual violence on campuses throughout the nation that receive federal funding.

##### **1. Jeanne Clery Disclosure Security Policy and Campus Crime Statistics Act**

The Jeanne Clery Act, 20 U.S.C. § 1092(f), is a federal law that requires institutions of higher education to disclose campus security information including crime statistics for campus and surrounding areas. Passage of the act was driven by the parents of Jeanne Clery, who was murdered and raped in her dorm room by another student. She was unaware of the history of violence at the university she attended, including the 38 violent crimes on campus in the three years preceding her murder. The Jeanne Clery Act of 1998 amended 1990 legislation requiring colleges and universities — public and private — that participate in federal student aid programs to disclose crime statistics and security procedures, keep a public crime log and make timely warnings, described in more detail below.

Under the Clery Act, colleges are required to provide the following information:

Annual Security Report: A report must be issued by October 1<sup>st</sup> of each year containing crime statistics from the past three years, with type of crime breakdown, including hate crimes, and geographical locales (on campus, non-campus building or property, or public property).

- Sex Offenses Definitions:

Sex Offenses (Forcible): Any sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent.

Sex Offenses (Non-forcible): Unlawful, non-forcible sexual intercourse.

- Currently enrolled students and employees are automatically provided with information about the report and are entitled to request a copy.
- Statistics must be gathered from campus police or security, local law enforcement, and other student officials who have significant responsibility for student activities, including student disciplinary officials.
  - The institution must make a reasonable good faith effort to obtain statistics from outside law enforcement agencies for inclusion in an annual report.
  - Nothing shall be construed to require reporting or disclosure of privileged information. 20 U.S.C. § 1092(f)(10).
    - Professional Counselor Exemption: A person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification.
    - Pastoral Counselor Exemption: A person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor.
    - Exempt counselors may report crimes to a confidential reporting system if the college maintains one.
- Statistics may not identify the victim or perpetrator.

Public Crime Log: Records, in the order received, of the nature, date and time of crime, general location, and disposition. The log must include:

- All crimes (not just those reported in the annual statistics) reported to an institution's police or security department;
- That occurred on campus or within the patrol jurisdiction of campus police or security; and

- Are reported to the police or security department (even if no formal incident report was created).
- The general public, including parents and media, have access to the public crime log.
- The institution may limit information disclosed in order to protect victim confidentiality or the integrity of the investigation.
- The crime log must be open to the public during normal business hours.

Timely Warnings: An institution must, in a manner that is timely and will aid in the prevention of similar crimes, report to the campus community on crimes that are:

- Reportable in the Clery Act statistics, and
- considered by the institution to represent a threat to students and employees.

## **2. Campus Assault Victim's Bill of Rights**

The Campus Assault Victim's Bill of Rights requires institutions that receive federal financial aid to afford sexual violence victims certain basic rights. Some colleges may provide additional rights, procedures and protections. All policies and procedures must be made available to the campus community under the Clery reporting requirements. The following are the minimum that a university must offer in its distributed statement of policy:

- A description of educational programs to promote the awareness of rape, acquaintance rape, and other forcible and non-forcible sex offenses (programming is mandatory).

The Campus Assault Victim's Bill of Rights also requires institutions to have the following policies and procedures relating to sex offenses:

- Immediate Response Measures
  - Inform victim who to contact to after a sexual assault;
  - Identify the importance of preserving evidence;
  - Identify to whom the sex offense is to be reported; and
  - Inform victim of options to notify law enforcement authorities and providing assistance in contacting law enforcement.

- Continuing Assistance
  - Inform victim of option to change academic and living situations, if requested and are reasonably available, and to provide assistance in that transition; and
  - Notification to students of existing on- and off-campus counseling, mental health, or other student services for victims of sex offenses.
- Procedures for an On-campus Disciplinary Proceeding
  - The accuser and the accused have the same opportunity to have others present during the proceeding; and
  - The accuser and the accused shall both be informed of the outcome of the proceeding. This disclosure must be unconditional and not contingent upon any confidentiality agreement. (This does not violate the protection of the privacy of student records under FERPA, see FERPA below for more information.)
  - Sanctions the institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses must be included in the annual security report.

### **3. Remedies for Non-Compliance**

The following remedies may be available for an Institution's non-compliance with the Jeanne Clery Act and the Campus Victim's Bill of Rights:

- Civil penalties imposed by the U.S. Department of Education up to \$27,500 per violation.
- Suspension from participating in federal student aid programs.
- The Clery Act explicitly states that it cannot be used to create a civil cause of action against a college or university; nor can it be used to establish a standard of care. 20 U.S.C. § 1092f(14)(A).
- The required Clery Act statistics and reports can, however, be a powerful tool to aid discovery or to establish foreseeability/prior crimes evidence in another type of action (*i.e.*, negligence-based claim).

## B. Family Education Right to Privacy Act (FERPA)

### 1. Provisions of FERPA

FERPA, 20 U.S.C. § 1232g, generally protects the privacy of student records. It was originally passed in 1974 to prohibit schools from releasing student educational records without consent. There are certain exceptions to FERPA that are particularly relevant to sexual violence on campus:

- The institution must disclose results of on-campus disciplinary proceedings to the victim of any crime of violence or a non-forcible sexual offense. 20 U.S.C. § 1232g(b)(6)(A).
- The institution may publicly disclose results of on-campus disciplinary proceeding if the alleged perpetrator has been found to have committed a violation of the institution's rules or policies. 20 U.S.C. § 1232g(b)(6)(B).
  - The final results shall include on the name of the student, the violation committed, and any sanction imposed on the student. 20 U.S.C. § 1232g(b)(6)(C)(i).
  - The final results may not include the name of the victim without written consent of the victim. 20 U.S.C. § 1232g(b)(6)(C)(ii).
  - An institution may not require the victim to agree to keep confidential the outcome of the disciplinary hearing as a condition to receiving notice of the outcome. *See* U.S. Department of Education Letter Ruling to Dr. John J. DeGioia, President of Georgetown University, OPE ID 00144500, July 16, 2004, available online at: <http://www.securityoncampus.org/reporters/releases/degioia071604.pdf>.
  - A victim may be prohibited from re-disclosing information on the proceeding without the consent of the assailant if the school has not concluded that there was a violation of school policy.
  - If an individual makes an unauthorized re-disclosure, the institution may not allow that individual to access personally identifiable information from education records for at least five years. 34 CFR § 99.33(e).
  - The institution must disclose information on registered sex offenders that are affiliated with the university to the appropriate agencies under the Campus Sex Crimes Prevention Act, discussed in Section II.C *below*.

## **2. Remedies for Non-Compliance**

FERPA does not establish an individual's right to seek damages under 42 U.S.C. § 1983 for disclosure of confidential records; instead, the Department of Education must enforce the law through administrative action. *Gonzaga University v. John Doe*, 536 U.S. 273 (2002).

### **C. Campus Sex Crimes Prevention Act**

The Campus Crimes Protection Act, section 1601 of Public Law 106-386, is a federal law enacted on October 28, 2000, that amended three federal acts with the effect of requiring registration of sex offenders working, volunteering or attending classes on campus. The registration information is made available to appropriate law enforcement agencies, including campus law enforcement. The three acts that comprise the Campus Crimes Prevention Act include the: (1) Wetterling Act; (2) Jeanne Clery Act; and (3) FERPA.

#### **1. Wetterling Act**

The Campus Sex Crimes Prevention Act amends the Wetterling Act, requiring sex offenders to report information regarding any enrollment or employment at an institution of higher education and to provide this information to a law enforcement agency whose jurisdiction includes the institution.

- Applicable sex offenders are required to provide notice of each institution of higher education in that state at which the person is employed, carries on a vocation, or is a student. 42 U.S.C. § 14071(j)(1)(A).
- States are to establish procedures to ensure information is promptly made available to the law enforcement agency having jurisdiction where the institution is located and entered into the State records system. 42 U.S.C. § 14071(j)(2).
- Non-compliance results in 10% loss of Byrne Grant funding if not in compliance by September 30, 2003. 42 U.S.C. § 14071(g).

#### **2. Jeanne Clery Act**

The Annual Campus Security Report must state where law enforcement information provided by a state concerning registered sex offenders ("Megan's Law" information) can be obtained.

### **3. FERPA**

- Effective October 2000.
- Clarifies that FERPA does not prohibit disclosure of sex offender registry information.
- Applies to any educational institution.
- Applies to all registry information.

#### **D. Foley Amendment**

The Foley Amendment provides that disciplinary records concerning violent crimes are not educational records and that universities may release them without student consent.

- Applies only to disciplinary proceedings in which final results were reached on or after October 7, 1998.
- Student disciplinary cases may be released if an accused student is found to have broken school rules with respect to an alleged crime of violence or non-forcible sex offense.
- The institution may not disclose the name of any other student, including a victim or witness, without the prior consent of the other student.

#### **E. Title IX**

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, prohibits discrimination based on sex in any program or activity receiving federal financial assistance from the U.S. Department of Education. Congress enacted Title IX to prohibit sex discrimination in any education program or activity — public or private — receiving federal funds. It states:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 U.S.C. § 1681(a).

The Department of Education’s Office for Civil Rights (OCR) is the primary federal agency responsible for enforcing Title IX, and it has developed regulations that require education programs to take steps to prevent and address sex discrimination.<sup>124</sup>

## 1. Title IX Obligations

Harassment Grievance Procedures: A college must create a sexual discrimination policy that explains how a student can file a complaint and what will happen after he or she makes that complaint.

- Grievance procedures must provide for “prompt and equitable resolution of complaints.”
- Colleges have been found to violate Title IX when their procedures included several processes (through housing, the disciplinary board, and campus police) with no coordination among them. *See, e.g., Sonoma State University*, OCR Case No. 09-93-2131.
- Colleges have been found to violate Title IX when their policies did not contain time frames for resolution of complaints. *See, e.g., Erskine College*, OCR Case No. 04-04-2016.

Responsive Action After Knowledge of Harassment: Once a student reports a sexual harassment, the college must discuss with the student the options for informal and formal action, including an explanation of the grievance procedure.

- Whether or not the harassed student requests action, the college must promptly investigate and take steps to resolve the harassment. An institution may be held liable for an improper response to campus sexual violence.

In *Kelly v. Yale University*, Civ.A. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. 2003), the district court denied Yale University’s motion for summary judgment on Kelly’s charges of Title IX. Kelly claimed that Yale did not respond to her repeated requests for academic assistance following her assault, and that the University was not quick enough to provide her with alternative housing since she lived in the same dormitory as her perpetrator. Such inaction might have exposed her to continued harassment and thus would place the University in violation of Title IX. The court found that “a jury could find that . . . Yale’s failure to provide Kelly with accommodations, either academic or residential, immediately following Nolan’s assault of her, was clearly unreasonable given all the circumstances of which it was aware.” The University ultimately settled out of court with the plaintiff before the case proceeded to trial.

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<sup>124</sup> For more information on Title IX, *see* the United States Department of Justice *Title IX Legal Manual*, available online at <http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf>.

- Investigation must be prompt, thorough and impartial.
- The college should make every effort to keep confidential the names of those involved.

## **2. Protections from Sexual Violence**

Title IX includes provisions that hold schools liable for sex discrimination and harassment, giving women a powerful tool in the battle against sexual violence. Title IX's prohibition against sex discrimination is broad, protecting students, faculty, and staff in federally funded education programs. The law applies to every aspect of the program, such as admissions, recruitment, academics, employment, athletics, and student services. Notably, Title IX's broad prohibition against sex discrimination includes sexual harassment. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court ruled that, in order to constitute sex discrimination in violation of Title IX, the harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." The Sixth Circuit has found that sexual assault qualifies as severe, pervasive, and objectively offensive sexual harassment that could deprive a student of access to the educational opportunities provided by their school. *Soper v. Hoben*, 195 F.3d 845, 855 (6<sup>th</sup> Cir. 1999).

## **3. School Liability Under Title IX**

When students sue their schools under Title IX for monetary damages for pain and suffering resulting from sexual harassment, they must prove that school officials actually knew about the harassment and were deliberately indifferent to it, and that the harassment was so severe, pervasive, and objectively offensive that it limited the student's educational opportunities or benefits. Strict adherence to school policies does not guarantee the school immunity under Title IX. *Kelly v. Yale University*, Civ.A. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. 2003).

### **a. Teacher-Student Sexual Violence**

In cases of a teacher on student assault, the educational institution incurs liability under the United States Supreme Court decision *Gerber v. Lago Vista Independent School District*, 524 U.S. 274 (1998), when a(n):

- Teacher harasses or assaults the student;
- Official who at a minimum has authority to institute corrective measures has actual knowledge of the action;
- Official is deliberately indifferent; and

- The violence or harassment may be *quid pro quo* or create a hostile environment.

### **b. Student-Student Sexual Violence**

The U.S. Supreme Court held in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), that Title IX requires schools to be responsible for addressing and remedying student-to-student harassment. In cases of student/student sexual violence, the educational institution incurs liability when:

- School official has actual knowledge about the action;
- Official is deliberately indifferent;
- School exercises control over individuals and/or places; and
- Harassment is so pervasive so as to deny equal access. Rapes qualifies as being “so pervasive.” *Soper v. Hoben*, 195 F.3d 845, 855 (6<sup>th</sup> Cir. 1999).

### **c. Failure to Adequately Respond**

When a student-plaintiff seeks to hold a school liable for monetary damages for its response to a sexual assault, the student-plaintiff must prove that the school's response, or lack thereof, was unreasonable in light of known circumstances (*see, e.g., Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)).

### **d. Failure to Prevent Sexual Violence**

When a student-plaintiff seeks to hold a school liable for failing to prevent sexual violence or for fostering a sexually hostile environment, he or she must prove that the school had actual notice of the harassment or of a substantial risk of sexual harassment. Some courts have required actual notice of a specific risk (*e.g.*, prior complaints about a specific individual or prior threat directed toward a specific student), while other courts have required only actual notice of a general risk (*e.g.*, complaints about an athletic team or fraternity rather than a specific individual).

### **e. Off-Campus Sexual Violence**

In *Ostrander v. Duggan*, 341 F.3d 745 (8<sup>th</sup> Cir. 2003), the court found that the university was not liable under Title IX for sexual assault in a private off-campus house.

### **f. Privacy Implications**

As with any civil litigation, a claim under Title IX may significantly compromise a victim's privacy. For example, in *Simpson v. University of Colorado*, Civil Action No. 02-RB-

2390, the court ordered discovery of certain evidence, including diary entries and medical records, by defendant-university in a Title IX case.

#### **4. Remedies for Non-Compliance**

In addition to possible civil liability for violations of Title IX, a student may file an administrative complaint with the U.S. Department of Education Office of Civil Rights (OCR). The U.S. Department of Education OCR may find a school in violation of Title IX for sexual violence. OCR has issued a policy guidance that explains a school's responsibilities under Title IX to recognize and effectively respond to sexual harassment of students.

It is important to note that an individual may bring a suit in advance of exhaustion of administrative remedies under Title IX. *Cannon v. University of Chicago*, 441 U.S. 677, 709, fn. 41 (“Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion.”).

#### **F. General Duty of Care**

Although federal law claims often predominate actions where students are assaulted in educational settings, state law claims may also be prominent. Because the university setting may encompass academic, social and residential aspects of a student’s life, the university takes on a heightened responsibility to ensure the safety of its students. A more complete discussion of tort actions follows in Chapter Five of this guide on “Tort Liability.” When considering the general duty of care of university to its students and their ensuing liability, following are some important considerations unique to the university setting with respect to security actions and foreseeability:

- Did a lack of or insufficient campus security contribute to the violence? In *Mullins v. Pine Manor College*, 449 N.E.2d 331 (1983), the Massachusetts court ruled that colleges have a duty to provide students with security.
- Were campus officials aware of a pattern of conduct by the individual(s) responsible for the violence or a pattern of violence and crime in an area of campus and officials failed to take appropriate measures to address?
- If campus officials were aware of a pattern of crimes on campus, did they fail to warn the campus community and did this failure impede victim’s ability to take certain security measures for herself?

In *Stanton v. University of Maine System*, 773 A.2d 1045 (2001), the court found that the university owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.

- Did the violence occur on-campus? In *Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (1999), the Indiana Supreme Court ruled that a fraternity owed a student who was sexually assaulted during a part at the fraternity house the “duty to take reasonable care to protect her.”

### **G. Americans with Disabilities Act (ADA)**

The ADA prohibits discrimination based on disability. If the discrimination was a motivating cause, the student can sue for damages. Section 302(a) provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

### **H. Public Records Laws**

State public records and open records acts may also provide a basis for disclosure of campus records. For example, in *The Miami Student et al. v. Miami University*, 680 N.E.2d 956 (Ohio 1997), the Ohio Supreme Court required the university to disclose student disciplinary records under the Ohio public records act. Similarly, in *Caledonian Record v. Vermont State Colleges*, 833 A.2d 1273 (2003), the Vermont Supreme Court ruled that student disciplinary records not protected by FERPA must be released under the state public records law. This may apply even to private institutions. See *Barrett & Farahany v. Mercer University*, 610 S.E.2d 138 (2005), (Georgia Superior Court ruled that a campus police department operated by a private university is subject to the Georgia public records act).

Internet links to most states’ public records statutes can be found at: <http://www.pbs.org/now/politics/foiamap.html>.

## **III. Responding to Sexual Violence on College Campus**

### **A. Survivor Checklist**

- Seek help from guidance counselor, women's studies program or center, college dean or student affairs office, local rape crisis center.
- Ask about the grievance procedures at your university.
- Always put everything in writing so you have a record and a timeline.
- Avoid talking about the incident with non-professionals. While the desire to talk about your case is understandable, the threat of counter suits for defamation is real.

- Seek medical and/or mental health treatment.
- Get legal advice. If possible, talk to an attorney who has specific experience with sexual violence in the academic environment. Act quickly. There may be time limitations on filing complaints.

**B. Requesting Special Accommodations**

- Change in living situation — move victim or assailant.
- Change in academic schedule.
- Non-contact orders enforced by campus police.

**IV. Resources**

U.S. Department of Education's Office for Civil Rights (OCR) at 800/421-3481.	CALCASA Campus Program 1215 K St., Suite 1100 Esquire Plaza Sacramento, CA 95814
Security on Campus <a href="http://www.securityoncampus.org">www.securityoncampus.org</a>	916-446-2520 (TEL) 916-446-8166 (FAX) 916-446-8802 (TTY/TDD) <a href="mailto:info@calcasa.org">info@calcasa.org</a> <a href="http://www.calcasa.org">www.calcasa.org</a>

## CHAPTER FIVE: TORT LIABILITY

Tort lawsuits are how injured persons seek compensation within the system of civil justice in the United States. They are civil wrongs recognized by law as grounds for a lawsuit. While some torts are also crimes, the primary focus of tort law is to provide relief for damages caused and deter others from committing similar harms. For crime victims, however, the civil justice system is about much more than monetary compensation and deterrence. Victims may pursue civil justice for a variety of other reasons. For example: to provide direct accountability to the victim, to gain control over a case, to achieve justice that was not achieved through the criminal justice system, to recover compensation for damages, to have the victim's day in court, or to create economic incentives for crime prevention.

Tort law is created by each state through the decision of judges (common law) and legislatures (statutory law). This chapter outlines different torts that may stem from a sexual assault or other incidence of sexual violence. Because tort law is state-specific, this chapter will not dedicate a lot of time to the substantive elements of torts. Rather, the purpose of this chapter is to provide a checklist of potential plaintiffs, defendants, and torts, and to identify issues that may arise when a survivor is considering filing a civil lawsuit. This will provide a starting point for the staff attorney or advocate to develop a more substantive guide of tort remedies available to sexual violence survivors in each state.<sup>125</sup>

To find your state's substantive tort law, look to treatises published by bar associations or other legal resource manuals and the *Restatement of Torts*. In addition, your state's Jury Instruction Guide may help identify additional torts and relevant affirmative defenses.

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<sup>125</sup> It should be noted that LAV funds may not be used to bring tort cases on behalf of victims.

## I. Pros and Cons of Litigation

Before filing a civil action, survivors will want to weigh the pros and cons of litigation. Provided below is a checklist of general considerations.

PROS	CONS
<ul style="list-style-type: none"> <li>○ Possible monetary recovery of loss (medical or therapy bills, pain and suffering, lost wages, etc.).</li> <li>○ Accountability of perpetrator; expose wrongdoing.</li> <li>○ Provide sense of closure.</li> <li>○ Give victim voice and forum to tell story.</li> <li>○ Vindication.</li> <li>○ Punishment.</li> <li>○ Force confrontation of perpetrator.</li> <li>○ Force acknowledgment by perpetrator.</li> <li>○ Force acknowledgment by community.</li> <li>○ Public interest; keep perpetrator from re-offending through public exposure.</li> </ul>	<ul style="list-style-type: none"> <li>○ Costs of litigation (hiring attorney, filing, etc.).</li> <li>○ Defendant may be insolvent.</li> <li>○ May take a long time to resolve; no closure.</li> <li>○ Time consuming; time off from work to meet with case, attend depositions, etc.</li> <li>○ Loss of privacy and potential media exposure.</li> <li>○ Subject to deposition and cross-examination.</li> <li>○ May be subject to psychiatric, psychological or medical examination.</li> <li>○ Waiver of confidential privileges.</li> <li>○ Must face perpetrator.</li> <li>○ Results are uncertain.</li> <li>○ Possible countersuit by perpetrator.</li> <li>○ Possible defamation claim by perpetrator.</li> </ul>

## II. Potential Plaintiffs

This section identifies various individuals who may have a claim based on a sexual assault.

### A. Victim

The most obvious plaintiff is the direct victim of the sexual violence. Therefore, this section primarily focuses on the victim in this status. However, for various reasons — such as incapacity of a victim due to age or mental disability — individuals besides the direct victim may be able to bring a claim on behalf of the victim. These types of claims are discussed below. Some issues that may arise involving victims as plaintiffs include:

- Are there multiple victims of the same incident? If so, issues of representation, including potential conflicts of interest and separate legal representation, may arise.
- Are there many victims similarly situated (*e.g.*, many victims of same defendant)? If so, class action issues should be considered. (*See* “Class Action,” Section II.D, *below*.)

### B. Guardian on Behalf of Victim

In some circumstances, the victim’s guardian may have a claim on behalf of the victim. This could arise in cases of a:

- Minor Victim;
- Incapacitated Victim;
- Victim with a Cognitive Disability;
- Victim in Coma/Unconscious; or
- Deceased Victim.

The types of claims that a guardian may be able to bring on a victim’s behalf are discussed below in Section IV.

### C. Victim’s Family

The victim’s family may also be a potential victim. There are two scenarios where this may occur:

- On Behalf of Victim. If the victim is incapacitated or otherwise unable to bring a claim on her own behalf, the victim’s family or representative may be able to file the claim on behalf of the victim. This is the same as a Guardian as the plaintiff, *discussed above*. Similarly, if a victim is deceased, the victim’s family or representative may file a Survival Claim — essentially

stepping into the shoes of the victim and bringing any claims that the victim would have been entitled to claim before his/her death.

- Family's Own Claim. The victim's family members may have their own claims based on the harm they have suffered because of the violence the victim suffered. The types of claims a family may be eligible to bring are discussed below in Section III.

#### **D. Class Action**

A "class action" is a civil suit brought by one or more people on behalf of themselves and others who are similarly situated. This may involve cases such as:

- Numerous offenses by same assailant;
- Numerous offenses within an organization (*e.g.*, prison rape, clergy/church sex abuse cases); or
- Systemic tolerance of sexual violence (*e.g.*, church sex abuse cases, academic institutions, military academies, etc.).

### **III. Potential Torts**

This section outlines the different torts that may be available to a victim of sexual violence. Section V, "Potential Defendants and Theories of Liability," applies these torts to specific defendants and suggests possible theories of liability. The staff attorney must look to state law to: first, determine which torts are available in her state; and second, determine what the exact elements are of each tort.

Torts claims are usually based upon state law that is found either in case law or statute. Many states have state-law specific treatises or continuing legal education materials that will outline tort claims in your state. These are often the best starting place. Torts fall into three general categories:

- Intentional Torts: depend on what defendant knows or should have known by way of his actions or inactions.
- Negligent Torts: depend on whether or not the defendant's actions are unreasonably unsafe.
- Strict Liability Torts: depend on a particular action that causes damage, rather than the degree of care used by the defendant.

## A. Victim Claims

### 1. Intentional Torts

#### Assault and Battery

Civil liability of the actual perpetrators of sexual violence is usually based on assault and battery claims. Assault and battery are intentional torts, meaning that the defendant must have intended the consequences flowing from his act. However, intention is objectively viewed. If the consequences are “substantially certain” to flow from the act, intention exists as a matter of law, even if lacking in a subjective sense. The typical elements of assault and battery are:

#### Assault

- Actor intends to cause harmful or offensive touching or imminent apprehension of such contact; or
- Actor knows with substantial certainty that the action will cause apprehension of a harmful or offensive touching; AND
- Victim is put in apprehension of imminent harm.

#### Battery

- Actor intends to cause unlawful harmful touching, or knows, or should know, with substantial certainty, that his actions will cause such harm.

*Note: Intent to commit the act controls — not an intent to commit a harm*

- Victim does not consent to touching.

#### False Imprisonment/Unlawful Restraint/Kidnapping

A sexual assault usually involves an assailant physically or psychologically restraining the victim in some way. Therefore, a victim may have a claim based on false imprisonment or a similar tort. Typical elements include:

- Defendant must intentionally confine victim.
- Victim has no reasonable means of escape.

#### Intentional Infliction of Emotional Distress (IIED)

A common law tort claim for intentional conduct that results in extreme emotional distress. Elements of this claim include:

- Defendant engaged in extreme & outrageous conduct;
- Defendant intentionally or recklessly caused the injury; and a
- Victim suffered severe emotional distress.
- Physical injury is not required.

Outrage (may be equivalent to an IIED claim in some states)

Behavior that is so extreme it is considered intolerable in a civilized society. For elements of outrage, *see Rice v. Janovich*, 109 Wn.2d 48, 61 (1987).

Exploitation of Professional Relationship

Some states have special statutes that provide tort liability for professionals that abuse their professional relationship. Typically, these statutes will apply to doctors, therapists and clergy.

- Does your state have a tort based on the exploitation of a professional relationship? *See, e.g.*, Tenn. Code Ann. § 29-26-202 *et. seq.* (addressing a therapist’s sexual misconduct with a patient). The mere existence of a sexual relationship between therapist and patient is usually enough to establish liability under these types of statutes.

Other intentional torts to consider include:

- Invasion of Privacy
- Sexual Harassment (Title IX)
- Theft
- Trespass
- Misrepresentation (*e.g.*, “our campus is safe”)
- Libel and Slander
- Violation of Stalking or Aggravated Stalking Statutes (*see* MCL 600.2954)

**2. Negligence-Based Torts**

In contrast to intentional torts, the tort of negligence applies to those situations where injuries are unintentionally, but carelessly, caused. The main objective of negligence law is to compensate those whose injuries result from another's faulty conduct, and to deter careless behavior. Negligence claims in the context of sexual violence will often be brought against third parties for their carelessness which contributed to the sexual violence, such as institutional defendants and individual defendants other than the perpetrators of the violence. Examples of negligent torts include:

- Landlord fails to protect its tenants from a sexually violent or assaultive employee.

- Police force fails to warn and protect women who were at particular risk of being sexually assaulted by a serial rapist.
- Correctional services branch fails to conduct a search and promptly notify police after the escape of a dangerous offender.
- Employer fails to properly screen, train, supervise or take action against its employees.
- Caregiver fails to protect the victim from being sexually violated by the perpetrator.

To establish a claim based on negligence, a plaintiff will have to demonstrate:

- A legal duty was owed by the defendant to the plaintiff;
- Defendant breached that duty;
- Causation between breach of duty and injury to plaintiff; and
- Damages to plaintiff.

Two specific negligence-based torts that may stem from sexual violence incidents include (1) Negligent Infliction of Emotional Distress; and (2) Negligent Transmission of a Sexually Transmitted Disease.

- Negligent Infliction of Emotional Distress
  - Mental disturbance & resulting injury.
  - Negligence which results in fright, shock, mental & physical injury.
- Negligent Transmission of Sexually Transmitted Disease
  - *See, Doe v. Johnson*, 817 F.Supp. 1382, 13939 (W.D. Mich. 1993). Claims for negligent or fraudulent transmission of the HIV virus can be maintained if the defendant:
    - knew he/she was infected with HIV,
    - knew he/she was suffering symptoms of HIV, or
    - knew of a prior sexual partner who was infected with HIV.

If these conditions are met, a defendant has a legal duty to inform the plaintiff of past lifestyle or possibility of being infected with HIV. However, if knowledge is based solely on the defendant's "high risk" activity, a claim for negligent or fraudulent transmission of HIV cannot be maintained because the defendant has no legal duty to inform the plaintiff of such activity.

### 3. Federal Claims

A plaintiff may want to file a lawsuit in federal court. This will most often be in the case where a defendant is a government agency or agent.

- 42 U.S.C. § 1983 (“Section 1983”)

Section 1983 is a federal statutory remedy for the breach of constitutional or other rights created by federal laws. Under this law, a civil action can be brought personally against any person who deprives a person of their civil rights. Section 1983 will most often be used in suits against government agents.

#### B. Third Party Claims

- Loss of Consortium.

At common law, “consortium” was defined as consisting of services, society, and sexual relations. The original common law action was only available to the husband for loss of consortium of the wife. Today:

- Either spouse can sue for recovery for complete loss of services for a definite period of time.
- There is a split of authority regarding whether children can claim a loss of impairment of parental consortium. The majority of jurisdictions do not recognize such a cause of action.

- Loss of Monetary Support.
- Infliction of Emotional Distress.

Bystanders may recover for emotional distress under very limited circumstances. States vary on the standard for recovery, but generally recovery requires:

- The emotional distress must be “serious and verifiable.”
- The distress must be tied as a matter of proximate causation to the observation of the serious injury or death of an immediate family member.
- The plaintiff him/herself must have been in the “zone of danger” (*i.e.*, must have been exposed to a risk of bodily harm by the conduct of the defendant).

- Wrongful Birth
  - When sexual assault results in conception.
  - Parent's claim.
- Wrongful Death

All states have enacted statutes attaching civil liability for wrongful death of another. A wrongful death action is brought by a deceased victim's dependents or relatives. In short:

- Wrongful death actions allow survivors to bring their own cause of action based on death of another.
- Look to statute to see who is entitled to sue.
- Damage Evaluation is based on the death of the deceased.
- Factors allowing for recovery:
  - Value of Lost Wages
  - Value of Lost Household Services
  - Value of Loss of Companionship
  - Funeral Expenses
  - Compensation for Premature Death
- Survival Claim on Behalf of Victim.

States have also enacted statutes providing that personal injury claims "survive" the death of a victim. A survival claim is an action by a deceased victim's estate. It allows the estate's representative to bring an action to recover any damages which the decedent may have recovered had she lived. In short:

- Survival claims allow survivor of deceased victim to bring a claim for torts accrued to the deceased before death.
- Look to state statute to see who is entitled to sue. Compensation may include:
  - Damages to third party plaintiff's own loss (versus that of the deceased victim);
  - Money deceased would have made while alive; and
  - Loss of companionship.

## IV. Potential Defendants and Theories of Recovery

This section provides a checklist of potential defendants and questions that may help identify theories of liability. This is not an exhaustive list of potential defendants or theories. The staff attorney adapting this guide should thoroughly research the theories of liability and recovery in his or her respective state.

### A. Individual Tortfeasors

#### 1. Assailant

The victim of a sexual assault will always have a claim against the assailant himself. These claims will most often be based on intentional torts.

- Assault
- Battery
- False Imprisonment, Kidnapping, etc.
- Transmission of Sexually Transmitted Disease

If the assailant is a professional who has abused his professional relationship, a separate cause of action may lie. For example, the following could establish liability:

- Professional exchanged services for sex.
- Professional coerced victim into sex as part of “treatment.”

**Note:** If a specific statute exists that provides for liability for the type of professional involved, the plaintiff may need not to establish such elements. The mere existence of a sexual relationship may be enough. *See, e.g.,* Tenn. Code Ann. § 29-26-202 *et seq.*

#### 2. Accomplice

The victim may also have a claim against individuals who did not directly commit the sexual violence, but aided the actual assailant in some way. For example, the following are possible scenarios that may establish a claim:

- False Imprisonment/Kidnapping: if accomplice helps get victim into location/situation for assailant to commit sexual violence.
- Misrepresentation: if accomplice coerces victim into situation for assailant to commit sexual violence.
- Assault/Battery: if accomplice puts date rape drugs into victim’s drink.

## **B. Third Party/Vicarious Liability**

In some cases, parties other than the actual perpetrator can be held liable for damages caused by a sexual assault. These are situations where the third party either has (1) a special relationship with or duty to protect the victim; or (2) a special relationship with or duty to control the assailant (vicarious liability).

### **1. Vicarious Liability**

Vicarious liability is a doctrine which allows recovery from an individual, or more often, an institution or corporation, who is obliged to take responsibility for the tortious conduct of another with whom there is an ongoing economic relationship. The relationship must be one which the law considers a legitimate basis for requiring liability to transfer in terms of legal responsibility and the provision of compensation. This form of liability is most often applied in the context of employment relationships to hold employers liable for torts committed by employees in the course of their employment. Vicarious liability may be another doctrine for plaintiff's to invoke in cases of sexual violence. Plaintiffs may rely on the doctrine to hold institutions accountable for sexual abuse. Moreover, while a sexual assault action against an abuser may well succeed, monetary recovery may be limited. If there is an employer or other institution behind the abuser, the plaintiff may have access to their financial resources, whether directly or indirectly through insurance.

### **2. Theories of Liability**

A civil action filed against a third party based on sexual violence is generally a negligence action. The following sections provide a series of questions to help identify possible theories of liability. There may be overlapping theories for any one defendant. For example, a school may be liable both because of a special duty to protect the victim and a duty to control the assailant. A defendant may play more than one role as well. For example, in the scenario above, the school may be liable both as the victim's school and as the assailant's employer. For a more detailed discussion of sexual violence issues in the employment context, see Chapter Three of this guide.

#### **o Employer**

It should be noted that most injured employees cannot sue their employers because workers' compensation is the exclusive remedy. There are, however, exceptions that should be explored with an attorney. Possible considerations include:

- o Did the sexual violence occur at victim's workplace?**
- o Did the victim's employer provide unsafe premises?**
  - Dangerous co-worker?**

- Inadequate lighting or security?
  - Are there heavy shrubs blocking sight?
- Did the victim's employer fail to warn of a known danger?
    - Dangerous co-worker?
    - Dangerous trespasser (*i.e.*, "Peeping Tom")?
- Was the victim assaulted by a co-worker of victim or is assailant's own employer liable?
    - Was assailant's employer negligent in hiring assailant?
    - Did assailant's employer fail to warn of a known danger?
    - *Respondeat Superior*: an employer is strictly liable when the employer's employees are liable (either strictly or negligently) for damages they caused while in the course of their employment.
    - Was assailant acting as agent/on behalf of employer at time of violence? For example, in *Baumeister v Plunkett*, 673 So.2d 994 (La. 1996), the court held that an employer is not vicariously liable merely because the employee committed an intentional tort on the business premises during working hours. There has to be some connection between the conduct and the scope of employment. This court looked to the following factors, with emphasis on the first two factors:
      - Whether tortious act was primarily employment rooted;
      - Whether violence was reasonably incidental to performance of employees duties;
      - Whether act occurred on employer premises; and
      - Whether it occurred during business hours.

In the *Baumeister* case, the supervisor came out of nowhere and without saying anything assaulted the nurse in the break room, so the court held factors one and two did not apply; thus, the hospital was not vicariously liable. The assault was not employment rooted or incidental to the performance of duties. The case essentially rejects blanket vicarious liability for assaults committed by employees on company property during business hours. *See also Kennedy v. Pine Land State Bank*, 439 S.E.2d 106 (Ga. App. 1993) (bank employee assaulted by member of bank's board of directors not eligible for damages under state's Workers' Compensation Act; tort action may proceed where the assault "cannot fairly be traced to the employment as a contributing proximate cause and the injury comes from a hazard to which the employee would have been equally exposed apart from the employment). *Cf. Insurance Company of Alabama v. Wright*, 133 S.E.2d 39 (Ga. App. 1963)

(where the circumstances of the employment are such that there is an increased risk of sexual assault and the assault was not personal, then such an assault is compensable under the Georgia Workers' Compensation Act).

- Can violence be litigated as either “*quid pro quo*” or “hostile environment” sexual harassment?
  - Quid Pro Quo: See, e.g., *Champion v. Nation Wide Security*, 450 Mich. 702, 708, 713-714 (1996) (“[W]e hold an employer strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim.”)
  - Hostile Environment: See, e.g., *Radtke v. Everett*, 442 Mich. 368, 395 (1993) (“Although rare, single incidents *may* create a hostile environment — rape and sexual violence are two possible scenarios. One such extremely traumatic experience may, therefore, fulfill the statutory requirement.”) [Emphasis in original.]

#### Parent/Guardian

- Does the parent have reason to know of specific type of danger, ability to control child, and opportunity to exercise control? See, e.g., *Linder v. Bidner*, 270 N.Y.S. 2d 427 (1966) (dismissing defendant’s motion to dismiss and setting the standard for parental liability).
- Does a statute allow for liability for actions of unemancipated children who cause bodily harm or injury to another? See, e.g., MCL 600.2913 (Under Michigan law, parent may be vicariously liable for child’s acts. Maximum liability is \$2,500).<sup>126</sup>

#### Landlord/Premises Owner

- Where did sexual violence occur?
  - Landowner Duty to Trespasser (uninvited):
    - Duty to refrain from willful, wanton or intentional injury.
  - Landowner Duty to Licensee (social guest):
    - Duty to use reasonable care to warn of hidden dangers known to landowner.

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<sup>126</sup> See, also ORS § 30.765 (parent of unemancipated minor child in Oregon may be liable for damages up to \$7,500 to the same claimant).

- Duty to use reasonable care to avoid affirmative acts of negligence.
- Landowner Duty to Invitee (guests who benefit you or your business):
  - Duty to use reasonable care to keep premises in a reasonable safe condition.
- Did owner of premises where the sexual violence occurred fail to provide adequate security (*i.e.*, owners of parking lots, garages, hotel/motels, private owners of public buildings open to the public and apartment building owners)?
- Did victim's landlord fail to warn of danger (*i.e.*, registered sex offender, failed to help enforce provisions of a protective order)?

#### Common Carrier

- Was victim, a passenger of a carrier, assaulted by an employee of the carrier? For example, in *Jane Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004), the court found that common carriers are vicariously and strictly liable for the intentional torts committed by their employees against passengers, whether or not the act was committed within the scope of the employee's employment. The court relied on the Supreme Court case *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891) when it stated, "A common carrier's strict liability to a passenger for crew member assaults during transit rests upon its special implied duty of protection and safe transport that it owes as a common carrier through its employees to its passengers, and not for the reason that the act is incident to a duty within the scope of the crew member's employment ... In terms of tort liability, this becomes, in effect, a special non-delegable duty owed by the carrier to the passenger." *Doe* at 14.

#### College/School (See also Chapter Four of this guide on "Sexual Violence in Educational Settings.")

A school district has the duty to take reasonable steps to supervise student behavior on school grounds during hours that school is open to students, including prior to beginning of classes, and has a particular duty to protect special education students.

- Did violence occur on school property?
- Did violence occur during hours that school is open to students?

A school may be liable if it should have known of a foreseeable risk involving an employee.

- Was the victim assaulted by school employee?
- Was the school negligent in hiring employee?
- Did the school fail to warn of danger (*e.g.*, registered sex offender, history of violent behavior)?

A school may also be held liable for sexual abuse or assault on a student by another student.

- Was the victim assaulted by another student?
- Did the school have prior knowledge of student assailant's behavior? For example, in *M.W. v. Panama Buena Vista Union School District*, 39 IDELR 127 (Cal. Ct. App. 2003), a 15-year old was sexually assaulted by another student while at school. The victim, who was mentally retarded, had previously been beaten and tricked by the child, who later sexually assaulted him. Nevertheless, the school had not monitored the situation at all times, and the student was attacked when he arrived at the school early one day. The school district argued that it was not foreseeable that the student would be sexually attacked by another student. The court held that it was foreseeable that a student with a propensity for violence could seriously injure another student and that the school district had a duty to provide a safe environment. Further, it was the indifference to the foreseeable danger and inadequate supervision that exposed the special education student to the violence. The court affirmed a jury award of \$2.5 million dollars.
- Did the school fail to provide adequate security?
  - Inadequate lighting?
  - Lack of or insufficient access to emergency telephones?
  - Inadequate safety personnel?
  - Untrained personnel?<sup>127</sup>
- Did the school have reason to know of danger?

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<sup>127</sup> See, *e.g.*, *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983) (precedent setting Massachusetts court ruling that colleges have a duty to provide their students with security which involved a 1977 rape of a student where the school did not provide adequate security); and *Stanton v. University of Maine System*, 773 A.2d 1045 (Maine 2001) (ruling by the Maine Supreme Judicial Court that "University owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.").

- Covered up previous violence?
  - Failed to respond to prior allegations?
  - Systemic tolerance of sexual violence?
- Does the school have a history of tolerating sexual violence?
- Was there a fraternal or other campus organization involved? For example, in *Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (1999), the Indiana Supreme Court ruling that a fraternity owed a student sexually assaulted during a party at fraternity house a “duty to take reasonable care to protect her.”
- If the victim was a minor, did the school fail to provide adequate protection as victim’s guardian?
- Did the school allow the victim to leave school premises with the assailant? For example, *Tate v. Board of Education of Prince George’s County*, 843 A.2d 890 (Md. App. 2004) involved a civil negligence action against school district by minor plaintiff who left school grounds with relative who sexually assaulted her. The question presented was whether the voluntariness component of the “assumption of risk” defense in a civil action is negated as a matter of law because the victim’s consent is not a defense to the criminal offense of statutory rape. The court found that, although victim’s age at the time of the sexual violence prevented her attacker from asserting consent as a defense to criminal charges, the victim could be determined to have assumed the risk of her injuries. In discussing the issue of consent, the court said that “[i]t is not that an underage victim cannot consent to sexual conduct. The crime is not predicated upon the victim’s unwillingness to participate, but rather on the societal notion that a child of tender years has not yet been able to form the necessary sophistication to fully comprehend the potentially adverse effects of sexual activity. We have found no authority for the proposition that the legal impediment to the defense of consent in the criminal court is equally applicable in the civil court.” *Id.* at 897.

### Church

- Did the violence occur at church or at church-sponsored event?
- Was the victim assaulted by a church employee or other agent of church (e.g., church volunteer)?
- Did the church have reason to know of the danger?
  - Covered up previous incidents of violence?

- Failed to respond to prior allegations?
- Did the church have a history of tolerating sexual violence?

### “Dramshop Actions”

Some states allow for “dramshop actions,” suits against retailers of alcoholic beverages who unlawfully serve intoxicated persons or minors, resulting in injury, death or property damage.

- Does your state have a “dramshop action statute”?
- Was alcohol involved in the violence?
- Was the assailant intoxicated?
- Was the victim intoxicated?
- Were date rape drugs involved in the violence?

### Private Organization (e.g., Boy Scouts, fraternity)

*See Delta Tau Delta v. Johnson, above.*

### Government Agencies with Liability

- Did the assault occur on public premises or property (*i.e.*, public park, public transportation)?
- Was the victim assaulted by a public employee?
- Was the victim a public employee? (*See* theories of employer liability above.)
- Was the assailant in public protective custody?
  - Parolee
  - Probationer
  - Escapee
  - Ward of State
  - Child Protective Care
- Was the victim in public protective custody?
  - Public Hospital
  - Child Protective Care
  - Jail, Prison, Other Detention Facility

- Did the government fail to warn or protect from danger (*i.e.*, sex offender registration, failed to enforce or respond to violations of a protective order)?

### Government Agencies Involved in the Sexual Assault Case

Sometimes, a government agency or officer involved in the investigation, prosecution or other aspect of a sexual violence case may be a potential defendant in a civil lawsuit. *But see below*, Section VI.B.3 on “Immunities.”

- Investigative Law Enforcement Officer
- Prosecutor
- Judge
- Supervisory Law Enforcement Officer (*e.g.*, Probation or Parole Officer)

## **V. Remedies**

Tort recovery may include both monetary damages and injunctive relief.

### **A. Compensatory Damages**

#### **1. Generally**

The goal of damages in tort actions is to make the injured party whole through the substitutionary remedy of money to compensate for tangible and intangible losses caused by the tort. For example, the following may be recoverable:

- Past and Future Medical Expenses
- Past and Future Therapy
- Lost Wages: The measure of damages for a wage loss is the gross amount of wages. Social Security, retirement contributions or other withholdings may not be used to reduce a plaintiff’s recovery for lost wages.
- Lost Future Earnings: Must be Proved with reasonable certainty by evidence of:
  - The amount of wages lost for some determinable period; and
  - The future period over which wages will be lost.
- Pain and Suffering
- Emotional Distress<sup>128</sup>

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<sup>128</sup> In *Tarr v. Ciasulli*, 853 A.2d 921 (N.J. 2004), the New Jersey Supreme Court ruled that victims of workplace sexual harassment who seek emotional distress damages under the New Jersey Law Against Discrimination (“LAD”) should be held to a “far less stringent standard of proof” than that required for a tort-based intentional infliction of emotional

- Property Damage
- Loss of Childhood
- Equitable Relief

## **2. Present Value and Inflation**

The present value of a sum is the amount of money that a party must have today in order to be equal to the loss at a date in the future. The propriety of taking into account the factors of present value and inflation in damage awards was recognized by the U.S. Supreme Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). Factoring inflation into an award increases it. Taking into consideration the time value of money decreases it. Therefore, an award of money for expenses to be incurred in the future should be reduced to present value.

### **B. Punitive Damages**

#### **1. Generally**

In extraordinary cases, punitive damages may be allowed. Punitive damage awards further a state's legitimate interest in punishing unlawful conduct and deterring its repetition.

#### **2. Calculating Punitive Damages**

The reasonableness of punitive damages will depend on the degree of reprehensibility of the defendant's conduct. There must be a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Factors that will determine the amount of punitive damages include:

- The profitability of defendant's misconduct.
- The plaintiff's litigation expenses.
- The punishment the defendant will probably receive from other sources.
- The defendant's financial condition and the effect on its condition of a judgment for the plaintiff. Defendant's financial status is a relevant factor in all punitive damage awards that the jury should consider.

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distress claim. In contrast to the tort standard, which requires a plaintiff to demonstrate a severe emotional or physical ailment, a plaintiff's testimony of temporary humiliation is sufficient for a LAD emotional distress claim to reach a jury.

### 3. Procedure

A decision to punish a tortfeasor by means of a punitive damage award is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co., Ltd v. Oberg*, 512 U.S. 415 (1994). Therefore, states will have specific procedures that a litigant must follow in order to recover punitive damages.

- What are your state's procedures for asking for punitive damages?
- What is the standard of proof?

#### C. Attorney Fees

- Does a specific statute provide for fees?

#### D. Creative Remedies

- Crime Victim Compensation

A victim may recover from state compensation funds even where there is no criminal prosecution. However, any compensation must be repaid if there is a later civil recovery.

- Injunctive Relief
- Settlements Out of Court

Settling a case outside of the legal system greatly expands the realm of possible remedies. For example, resolution may include conditions unavailable through a court verdict, such as:

- Defendant must watch an educational videotape about sexual violence (this could include a videotape made by the victim specifically for this event);
- Victim has the opportunity to confront defendant in person (and with the support she needs);
- Defendant must take medication(s);
- Defendant must contribute to anti-sexual violence programs or other organization(s) identified by the victim;
- Employer/campus defendant must implement sexual violence training, education, or services for employees, students, the community, etc.

It should be noted that satisfactory settlements often are reached only after vigorous advocacy throughout the litigation process, often right up to the point of trial.

### **E. Collateral Source Rule**

A payment to an injured person from a source other than tortfeasor is generally not deducted from the damages received from the tortfeasor. For example, payment from a:

- Liability Insurance policy;
- Charity Hospital; or
- Money from Relative.

The existence of a collateral source is generally inadmissible evidence. In other words, no testimony is allowed regarding whether insurance pays the bill.

### **F. Restitution Awards**

- Does state law require that an award of damages in a civil suit must be reduced by the amount of restitution received by the victim in a criminal action?
  - *See, e.g., MCL § 769.1a (9), “Any amount paid to a victim or victim’s estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim’s estate in any federal or state proceeding[.]”*

## **VI. Practical Considerations**

### **A. Statutes of Limitations**

#### **1. Generally**

In civil law, torts are subject to a statute of limitations (SOL). A SOL is a time period in which a claim must be filed. States vary as to how long a victim may have to file a civil action. For example, in many states, torts such as assault or battery are subject to a two-year SOL. *See, e.g., Or. Rev. Stat. § 12.110 (“An action for assault, battery \* \* \* or for any injury to the person \* \* \* shall be commenced within two years[.]”)* This means that a victim of sexual assault must file her claim within two years of when the harm (*i.e.*, the sexual assault) occurred. If she does not, she may lose her opportunity to file an action. (*But see “Tolling,” Section II.A.2., below.*) Different categories of personal injury actions may have different SOLs in a single state. For example, a state may have a two-year SOL for assault and a 3-year SOL for kidnapping or false imprisonment. When working with a sexual violence survivor, it is important to look up applicable SOLs as soon as possible so that she will not

lose her claim(s). Once a timely complaint is filed, a SOL has no effect on how long it takes for a case to conclude. However, most states have “diligent prosecution” statutes which require a plaintiff to move a case to trial within a certain time or face dismissal.

- Advise victims that the only definitive advice regarding SOLs should come from a victim’s attorney.
- In researching SOLs, look to your state law for applicable statutes of limitations as soon as possible. Different claims may have different SOLs.
- Each claim and each defendant are subject to a separate SOL analysis. If there are multiple defendants, each claim against each defendant must meet the applicable SOL.
- If you believe you have missed a SOL, determine whether any tolling provisions apply. (*See* “Tolling,” Section II.A.2, *below*.)
- Consider whether abuse occurred in more than one state. If so, victim may be precluded from filing in one state but not another.
- For assistance determining SOLs, *see*:
  - Civil injury SOLs at:  
[http://www.drugintel.com/public/statute\\_of\\_limitations.htm](http://www.drugintel.com/public/statute_of_limitations.htm).
  - State-by-state survey of SOLs applicable to civil claims for childhood sexual assault at: <http://www.smith-lawfirm.com/statutetable.html>.
  - Any SOLs identified by the above websites are for reference only and should be verified for accuracy.

## 2. Tolling

Once a SOL for a particular claim has been determined, the next step is to determine when the clock begins to run for purposes of meeting the SOL. As mentioned above, in most situations the time starts to run at the time the “harm” occurred, *i.e.*, when the sexual violence occurred. However, most states have tolling exceptions to this general rule. Tolling exceptions protect plaintiffs in situations where they may not be aware for months or even years that they have been harmed. The types of cases where tolling issues may arise include:

- Childhood sex abuse cases (*See* “Child Sexual Abuse,” Section II.A.3, *below*);
- Drug or alcohol-induced sexual violence;

- Victim suffers from mental disability;
- Victim is unconscious/in a coma;
- Victim’s memory is repressed due to post traumatic stress disorder (PTSD) or other condition;
- Victim is otherwise physically or mentally incapacitated;
- Victim of certain crime (*See, e.g.*, Or. Rev. Stat. § 147.065) (“Notwithstanding [the two year SOL in] Or. Rev. Stat. § 12.110 the victim of any compensable crime as defined in Or. Rev. Stat. § 147.005<sup>129</sup> or the victim’s representative may bring an action at any time within the five-year period after the commission of the compensable crime.”);
- Perpetrator conceals violence; or
- Perpetrator’s identity is unknown.

In such situations, SOLs may begin to run on the date of discovery of the harm (“Delayed Discovery”), the date on which the plaintiff “should have discovered” the harm, the date on which the victim reaches the age of majority (“Minority Tolling”), or at some other point as defined by state statute or case law. In summary, a SOL may begin running at one of at least four different times:

- *Earliest*: The date of harm.
- *Later*: The date on which the plaintiff reaches majority (*see* “Childhood Sexual Abuse” section below).
- *Later*: The date on which plaintiff reasonably should have discovered the harm. This refers to the date when a judge considers it fair to say that the plaintiff should have known about the harm, even if the plaintiff did not actually know about it.
- *Latest*: The date on which the plaintiff actually discovered the harm.

### **3. Child Sexual Abuse**

The majority of states now have some type of provision extending the SOLs for adult survivors of child sexual abuse. Some of the extended periods for child sexual abuse are specifically provided for in statute (the most common of which are “Minority Tolling”

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<sup>129</sup> This statute details crimes compensable under Oregon’s Crime Victim Compensation program.

statutes that provide SOLs begin to run when the injured party reaches the age of majority); others are found in case law that interprets a general “tolling” provision.

- Does your state have a “Delayed Discovery” tolling provision that tolls SOL until discovery of harm or until plaintiff reasonably should have discovered harm? Look to case law to see how “reasonably should have discovered” is applied in your state.
- Does your state have a “Minority Tolling” provision that tolls SOL for child sexual abuse until a survivor reaches age of majority?
- Does your state have an “Incapacity Tolling” provision that tolls SOL in the event of mental incapacity or insanity? Some states have found that sexual violence involving repressed memories or PTSD may qualify as “insanity” sufficient to toll SOL.<sup>130</sup>
- Does your state have a “Fraudulent Concealment” provision that tolls SOL if defendant purposely conceals injury?

#### **4. Statutes of Ultimate Repose**

In some states, regardless of statutes of limitations and tolling, a statute of ultimate repose acts as a complete time bar to filing suit. Statutes of ultimate repose provide an overall time limitation for filing suit; once that time has passed, all claims are extinguished. For example, Or. Rev. Stat. § 12.115(1) provides that no action for negligent injury to person or property of another “shall be commenced more than 10 years from the date of the act or omission complained of.” This time bar applies even if a claim would otherwise be tolled. *See also* Ga. Code Ann. § 9-3-73(c) which is “intended to create a statute of repose.” Ga. Code Ann. § 9-3-93(d); *Esener v. Kinsey*, 522 S.E.2d 522, 524 (Ga. App. 1999) (“A statute of ultimate repose sets an ultimate limit on which injuries shall be actionable. Therefore, by definition, a statute of ultimate repose cannot be ‘tolled’ to permit actions to be brought for injuries which did not occur until after the statutory period had expired.”).

- Does your state have a statute of ultimate repose?
- Does it expressly or through case law trump tolling provisions?

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<sup>130</sup> *See, e.g., Jones v. Jones*, 576 A.2d 316 (N.J. App. Div.) *cert. denied*, 585 A.2d 412 (N.J. 1990); *Phillips v. Sugrue*, 800 F. Supp. 789 (E.D. Ark. 1992); *Leonard v. England*, 445 S.E.2d 50 (N.C. App. 1994). A contrary result, however, has been reached in other states. *See, e.g., Travis v. Ziter*, 681 So.2d 1348 (1996); *Lemmerman v. Fealk*, 534 N.W.2d 695 (Mich. 1995); *Lovelace v. Keobane*, 831 P.2d 624 (Okla. 1992); *O’Neal v. Division of Family Services*, 821 P.2d 1139 (Utah 1991); *Burpee v. Burpee*, 152 Misc. 2d 466, (Sup. Ct. 1991); *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990).

## **B. Claims Against Public Agencies**

### **1. Generally**

If a potential defendant is a public entity (such as a state, county, or city agency) or an agent or employee of a public agency, there are usually additional hurdles to filing suit. For example, public entities and their agents are typically protected by certain types of immunities. (*See* Section IV.B.3 on “Immunities.”) Some public entities, like the State, have waived immunity to some degree; however, strict procedural rules, such as notice and timeliness provisions, must be followed in order to sue. For example, often you cannot sue a public entity unless you first file an administrative claim with the city, county, or state of which the agency is a part. A plaintiff may have as little as 60 to 90 days from the occurrence of the injury or harm to submit an administrative claim. This gives the agency an opportunity to remedy the harm outside of litigation and gives the agency notice of a potential claim. Failure to follow a proscribed administrative process may prevent a subsequent civil suit.

- Look up the applicable Tort Claim Notice and other provisions that affect suits against public entities as soon as possible in order to preserve suit against a public entity.
- Consult an attorney to help determine filing, notice, and jurisdictional requirements when suing a public entity.

### **2. Federal Tort Claims Act (FTCA)**

The Federal Tort Claims Act (FTCA), located in Title 28 of the United States Code, allows for suits against the federal government. Prior to Congress’ enactment of the FTCA in 1946, the federal government could not be sued for a personal injury, wrongful death, or property damage caused by its employees unless there was a specific act of Congress explicitly authorizing such an action. Today, the FTCA allows individuals to recover against the federal government for personal injury, wrongful death, and property damage caused by the negligence of a federal employee, acting in the scope of his/her employment.

A person is generally found to be acting within the scope of his/her employment:

- If his/her conduct was authorized by competent authority (for example, a supervisor or a standard procedure); and
- Was serving, at least in part, a governmental purpose.

Even if an act occurs on government property, the federal government cannot be held liable for the intentional acts of assault, battery, false imprisonment or false arrest, abuse of process, or malicious prosecution, with limited exceptions applicable to law enforcement

officers. Also, the federal government cannot be held liable for damages or injuries that stem from the performance of, or failure to perform, a discretionary function.

Procedurally, the FTCA requires a potential plaintiff to:

- First file an administrative action with the agency. Monies may be awarded in whole or in part.
- File in federal court.
- Have the matter tried by a judge, not a jury.
- File a negligence action (not strict liability or intentional tort).
- File a claim for money damages only.
- Procedure governed by the Federal Tort Claims Procedure, Title 28, Chapter 171 of the U.S. Code is the Judiciary and Judicial procedure.
- The substantive law of the state where the negligent act or omission occurred will determine the government's liability.

### **3. Immunities**

Government and public entities are protected by certain immunities. This means that if immunity is found, the agency cannot be held liable and a lawsuit that has been filed will be dismissed. Therefore, it is important to determine before filing whether immunity may preclude certain civil claims against certain public defendants. A survivor considering filing suit should consider the following questions:

- Is a potential defendant a public entity or an agent or employee of a public entity?
- Was the potential defendant acting in his/her official capacity as an agent or employee of a public entity?
- Was the potential defendant acting on behalf of a public entity?
- Was the potential defendant acting under an appearance of acting as an agent/employee of a public entity?

If so, the potential defendant may be protected by some sort of immunity. The most common immunities include:

**a. Sovereign Immunity**

Traditionally, governmental entities enjoyed what is known as “sovereign immunity,” which establishes complete immunity for the government from being sued and found liable in a lawsuit. State and federal governments have reduced this broad sovereign immunity over the years, however, by passing laws that limit, or reduce, the immunity of government entities in certain situations. These laws vary from state to state, but most are modeled on the FTCA, the federal law waiving the sovereign immunity of the federal government under certain circumstances, *discussed above*.

**b. Qualified Immunity**

If a government actor is involved, qualified immunity allows damages for acts that violate an individual’s civil rights if it can be shown that the acts that form the basis of suit:

- Violate clearly established statutory or constitutional rights; and
- Of which a reasonable person would be aware.

**c. Discretionary Immunity**

Public bodies are immune from liability for claims based upon the performance of or failure to exercise or perform a discretionary function or duty. *See, e.g., Or. Rev. Stat. § 30.265(3)(c)* (“[a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”) Discretionary immunity may apply if the tortious act or omission that forms the basis of suit:

- Was as a result of a procedure or policy made by a public officer with policymaking authority. The failure to follow an established policy or procedure deprives the public body of discretionary immunity;
- Was performed as part of the public employee’s duties;
- Was the kind of action that the discretionary immunity doctrine was designed to protect;
- Look to state law to determine standards for discretionary immunity in state courts; and
- The Federal Tort Claims Act includes an additional requirement of acting in good faith for the discretionary immunity granted to the federal government. 28 U.S.C. § 2680.

Some government officials have absolute immunity when acting in their official capacity. The two most relevant types of immunity are those governing: 1) prosecutors and 2) judges.

#### **d. Prosecutorial Immunity**

Prosecutors are absolutely immune from monetary liability for activities “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1986). The intent of a prosecutor plays no role in the immunity inquiry. *McCarthy v. Mayo*, 827 F.2d 1310, 1315 (9<sup>th</sup> Cir. 1987). Immunity is not defeated even by a showing that the prosecutor acted wrongfully, maliciously, or because the criminal defendant ultimately prevailed. *Imbler*, 424 U.S. at 474 & n.27.

In *Broom v. Bogan*, 320 F.3d 1023 (9<sup>th</sup> Cir. 2003), the court reviewed what types of activities are entitled to absolute immunity:

- The initiation of a prosecution and presentation of the State’s case, *citing Imbler*, 424 U.S. 409, 431; and *Milstein v. Cooley*, 257 F.3d 1004, 1008;
- The decision to prosecute and for professional evaluation of a witness “even if that judgment is harsh, unfair or clouded by personal animus,” *citing Roe v. City of San Francisco*, 109 F.3d 578, 583-84 (9<sup>th</sup> Cir. 1997);
- The professional evaluation of the evidence assembled by the police, *citing Roe* at 584;
- The failure to investigate accusations against a defendant before filing charges, *citing O’Connor v. Nevada*, 686 F.2d 749, 750 (9<sup>th</sup> Cir. 1982) (per curium), *aff’g* 507 F. Supp. 546, 548-49 (D. Nev. 1981) (holding prosecutor immune for failure to investigate adequately accusations against defendant before charging him or her);
- The use of false testimony at trial, *citing Imbler*, 424 U.S. at 431; and
- The decision not to preserve or turn over exculpatory material, *citing Imbler*, 424 U.S. at 431-32 n. 34, *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 679 (9<sup>th</sup> Cir. 1984), and sister circuits’ decisions.

In addition to those activities discussed in *Broom*, the following activities are also protected by absolute immunity:

- The decision not to prosecute, *Roe v. San Francisco*, 109 F.3d 578, 583 (9<sup>th</sup> Cir. 1997);
- The functioning as an advocate for the State in grand jury proceedings, *Herb Hallman Chevrolet v. Nash-Holmes*, 169 F.3d 636, 643 (9<sup>th</sup> Cir.), *cert. denied*, 120 S. Ct. 171, 314 (1999);
- The knowing use of false testimony at trial, the suppression of exculpatory evidence, and malicious prosecution, *Imbler*, 424 U.S. 409, 416;
- The participation in a probable cause hearing leading to the issuance of a warrant, *Burns v. Reed*, 500 U.S. 478, 492 (1991); and
- The securing of a grand jury indictment and preparing a criminal complaint, *Milstein v. Cooley*, 257 F.3d 1004, 1012 (9<sup>th</sup> Cir. 2001).

To determine whether prosecutorial immunity exists, consider:

- Whether the potential defendant is a prosecutor or agent associated with the prosecutor's office.
- Whether the potential claim arises from a prosecutor or agent associated with the prosecutor's office acting in his/her official capacity.
- Whether the acts that form the basis of plaintiff's claim were performed by a prosecutor or agent with the prosecutor's office acting in a quasi-judicial junction.
- Whether the potential claim arises from a decision whether or how to prosecute a case.

If the above apply to a potential claim, prosecutorial immunity will likely bar suit.

#### **e. Judicial Immunity**

Anglo-American common law has long recognized judicial immunity, a sweeping form of immunity for acts performed by judges that relate to the judicial process. This absolute immunity insulates judges from charges of erroneous acts or irregular action, even when it is alleged that such action was driven by malicious or corrupt motives or when the exercise of judicial authority is flawed by the commission of grave procedural errors. Absolute judicial immunity is not reserved solely for judges, but extends to non-judicial officers for claims relating to the exercise of judicial functions that are functionally comparable to those of judges — mainly, the exercise of discretionary judgment. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993).

To determine whether judicial immunity exists, consider:

- Whether the potential defendant is a judge or agent associated with the judicial branch of government.
- Whether the potential claim arises from a judge or agent associated with the judicial branch of government acting in his/her official capacity.
- Whether the potential claim arises from a judge or agent associated with the judicial branch of government making a discretionary judgment (versus purely clerical, procedural or administrative action).

If the above apply to a potential claim, judicial immunity will likely prevent a suit.

### **C. Non-governmental Immunities**

Two additional immunities that apply to non-government defendants are spousal immunity and parent-child immunity.

#### **1. Spousal Immunity**

Immunities between husband and wife have been overruled in most jurisdictions. The immunity was intended to preserve the harmony of marriage by forcing spouses to work out grievances and to protect insurance companies against fraud from collusion.

- Does your state have a spousal immunity doctrine in statute or established by case law?
- Has it been overruled or limited?

#### **2. Parent-Child Immunity**

The common law shielded the parent from liability for injury to his/her child. The purposes behind this doctrine were three-fold: (1) to preserve family harmony, (2) to preserve family assets, and (3) to preserve parental authority to control the manner in which children are raised. *See, e.g., Cates v. Cates*, 619 N.E.2d 715, 721, (Ill. 1993). In its original form, the doctrine specifically applied to minors who were under parental control; it did not apply to adult or emancipated children.

The immunity between parent and child has been limited in many jurisdictions to apply only to negligence cases. There is no immunity for willful or wanton conduct by a parent against a child.

- Does your state have a parent-child immunity doctrine in statute or established by case law?
- Has it been overruled or limited?
- Does it apply to foster parents or other inhabitants of child's household (*e.g.*, live-in girlfriend)?

#### **D. Limitations on Recovery**

While damages and other remedies are discussed in further detail above, as a practical matter, a survivor may want or need to consider whether and how any limitations on recovery will affect her decision to file a civil suit. Civil litigation is costly, time intensive, emotionally draining, and can greatly sacrifice a victim's privacy. If damages are subject to a monetary cap or certain types of damage recovery are not allowed or impossible to recover, a survivor may want to consider an alternate remedy or pursue an out of court settlement.

- Are there any caps on damages? For example, public entity tort claims acts or tort reform measures may cap the amount of damages that are recoverable from a particular defendant or recoverable overall.
- Are punitive damages available? The availability of punitive damages depends on type of tort and type of defendant.
- Are damages recoverable from defendant (*e.g.*, is defendant insolvent or immune)?
- Is there another liable party from whom damages could be recovered?
- Is there insurance coverage for intentional acts?

#### **E. Discovery and Waiver of Privacy**

##### **1. Generally**

Control over privacy and release of private information is usually a crucial element to a sexual violence survivor's recovery. Therefore, any survivor considering filing a civil law suit should be advised that she will likely lose much control over their privacy.

##### **2. Discovery**

“Discovery” is a general term used to describe pretrial disclosure of information and documents. It is broadly allowed in most states during civil litigation. The scope of discovery is broader than the standard for admissibility of evidence in courts. Most states and the Federal Rules of Evidence allow discovery requests if the information requested is

merely “relevant” or “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b).

For example, survivors should be warned that in civil cases stemming from sexual violence, the following might be subject to discovery:

- Victim’s medical, sexual, educational, credit, criminal, or employment history or other private information.
- Photos, date books, letters, diaries and other writings of the victim.
- Therapy records. Any person who files a civil case claiming physical or emotional damages often waives the right to confidentiality of some, and perhaps all, medical and other records that might have a bearing on her physical or mental state.
  - This will depend on the claims. A victim may be able to structure a case so that this not at issue (*i.e.*, limiting the type of damages requested).
- PTSD and similar disorders are often claimed by victims. This makes records of other stressors and trauma unrelated to the violence at issue and therefore subject to disclosure. This may include information on:
  - Prior assaults
  - Personal and family relationships
  - Job performance
  - Financial stressors
- If sexuality and intimacy issues form the basis for damages, this will “open the door” to sexual history.

### **3. Protective Measures**

Because of the sensitive nature of sexual violence and the records involved, it is important to try to protect a victim’s privacy to the greatest extent possible. It is important for victims and their attorneys to raise privacy concerns at the earliest time possible. This is especially important if a case is high profile and/or likely to be followed by the media. The media may report any information it has lawfully obtained, even if another party has unlawfully disclosed it. *Florida Star v. B.J.F.*, 491 U.S. 524, 533. Such protective measures may include:

- File Jane Doe Complaints that keep victim’s name from being disclosed. These tend to be disfavored but are sometimes possible. It is more commonly accepted in cases of child sexual abuse.

- File a Protective Order (PO) that covers personal and private records. Make sure PO covers scope of use pretrial and at trial, who has access, and disposal of records.
- File a Motion in Limine (MIL) to keep control of private information at trial. For example, to exclude inadmissible private information, to seal records of court, to keep out media, or to keep certain information from the jury.
  - Argue federal constitutional right to privacy protects information from being disclosed. Then argue additional bases for privacy.
  - Are there any privileges that apply?
  - Look to state privacy laws, including specific victims' rights laws (often state Victim Rights Amendments of statutes provide crime victims right to dignity, fairness, respect, privacy), to argue that information should not be disclosed. (Note that victims' rights are not always easily transportable to a civil proceeding.)
  - Look to public records laws for basis of keeping certain information out of public record.
  - Make analogies to criminal rape shield statutes; consensual sexual relationships do not cause trauma and are not related to damages and should therefore be inadmissible.
    - Fed. R. Evid. 412 provides rape shield protection for alleged sexual violence victims in federal civil suits.
    - Does state statute similarly provide?

## F. Interplay Between Criminal and Civil Actions

### 1. Outcome of Criminal Proceedings: Effect on a Civil Case

- *Effect of Acquittal.* Because the standard of proof is lower in civil cases than in criminal cases, an acquittal on a criminal charge does not bar a subsequent civil suit based on the same conduct. *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938).
- *Effect of Conviction.* A conviction or adjudication does not prevent a crime victim from filing a civil suit based upon the same conduct. The Double Jeopardy Clause is not triggered by litigation between two parties. *United*

*States v. Halper*, 490 U.S. 435, 451 (1989), *overruled on other grounds*, *Hudson v. United States*, 522 U.S. 93 (1997). A conviction in a criminal proceeding can likely be admitted into a civil proceeding.

## 2. Cross-Examination in Criminal Trial Regarding Victim's Civil Suit

Because it is deemed relevant to credibility, a victim may be cross-examined as to whether she has filed, or is contemplating filing, a civil lawsuit that may be affected by the outcome of the criminal case. *See, e.g., People v. Grisham*, 335 NW2d 680 (Mich. App. 1983) (“It is reversible error for a trial court to refuse to allow inquiry and argument regarding a civil action which has been commenced with respect to the criminal action being tried, since the bias or interest of a witness is a proper subject of inquiry.”)

A victim in a criminal case may also be cross-examined on any pleadings she files in a civil case.

## VII. Retaliatory Lawsuits<sup>131</sup>

### A. Introduction

*Imagine:* Jane Doe has just been the victim of sexual violence. She is angry, ashamed, in denial, nervous about entering an unknown criminal justice system, and is terrified that her attacker will come after her again if she reports the crime.

*Now imagine:* Jane musters the courage to report the crime and cooperate with law enforcement throughout the investigation. After the case ends, the criminal defendant files a civil suit, alleging defamation, malicious prosecution, abuse of process, negligent supervision, intentional infliction of emotional distress, negligent infliction of emotional distress, and false arrest, all based on Jane's reporting of the crime and her cooperation with law enforcement.

Unfortunately, this hypothetical is not a hypothetical. These retaliatory lawsuits are frighteningly common and have the aim and effect of chilling victim's First Amendment rights.

### B. What Are These Suits?

Lawsuits which target victims for reporting crime are known as strategic lawsuits against public participation (SLAPP), a term originally coined by Penelope Canan and George W. Pring, professors of sociology and law, respectively. *See* Penelope Canan and George W. Pring, *SLAPPS: Getting Sued for Speaking Out* (1996). While SLAPPs come in

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<sup>131</sup> The Section is adapted from Meg Garvin and Wyatt Rolfe, “Reporting Crime – A Crime Victim's First Amendment Right,” *NCVLI News* (Fall 2004).

many forms, in the context of crime victims' rights SLAPPs are most often civil lawsuits brought by a criminal defendant against a crime victim or witness who reported the crime or cooperated with law enforcement during investigation. Camouflaged as ordinary civil tort suits, SLAPPs, present six common claims: (1) defamation, (2) business torts, (3) process violations, including malicious prosecution and abuse of process, (4) conspiracy, (5) constitutional and civil rights violations, and (6) violations of law. *Id.* at 150-151.

SLAPP suits are not ordinary tort cases. They target a victim's First Amendment rights of free speech and public participation through petitioning of government.

### **C. What Can You Do If Your Client is Slapped?**

Immediately identify the case as a SLAPP and move the case out of the context of simple torts, and into the First Amendment arena.

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I (emphasis added). The final clause of the First Amendment, the right to petition the government for a redress of grievances, is fundamental to "the very idea of a government republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875). *See also United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The United States Supreme Court has held that lawsuits brought as an assault on the First Amendment right to petition should be dismissed unless the petitioning activity at issue was a sham. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991). This doctrine, known as the *Noerr-Pennington* Doctrine, originated in the antitrust arena but has long-since been expanded beyond that arena. *See, e.g., Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) (stating "[w]hether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham"); *Sierra Club v. Buttz*, 349 F.Supp. 934 (N.D. Cal 1972) (naming *Noerr* and its progeny as basis for dismissing an "interference with advantageous relationship" suit); *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (relying on federal case law and establishing a three-prong test for reviewing suits that target petitioning activity in environmental case).

A victim's attorney faced with a retaliatory civil lawsuit must be prepared to argue: (1) the victim's activity was petitioning activity; and (2) the activity was not sham petitioning.

#### **D. What is “Petitioning?”**

The right to petition includes petitioning “all departments of the Government.” *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Courts nationwide have found that reporting criminal conduct, executing a criminal complaint with law enforcement, and assisting with a law enforcement investigation each constitute an exercise of the First Amendment right to petition. *See, e.g., Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) (noting that “[s]ubmission of complaints and criticisms to non-legislative and non-judicial public agencies like a police department constitutes petitioning activity protected by the petition clause”); *Estate of Morris ex. rel. Morris v. Dapolito*, 297 F. Supp. 2d 680, 692 (S.D.N.Y. 2004) (concluding that swearing out a criminal complaint against a high school teacher for assault and seeking his arrest were protected First Amendment petitioning activities); *Lott v. Andrews Ctr.*, 259 F. Supp. 2d 564, 568 (E.D. Tex. 2003) (noting that “[t]here is no doubt that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right”); *Arim v. General Motors Corporation*, 520 N.W. 2d 695 (Mich. Ct. App. 1994) (granting summary judgment to individuals who were sued for their participation in a criminal sting operation run based on the First Amendment); *United States v. Hylton*, 558 F. Supp. 872, 874 (S.D. Tex. 1982) (noting that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right); *Curry v. State*, 811 So.2d 736, 743 (Fla. Dist. Ct. App. 2002) (finding that complaints, even though numerous, made to law enforcement agencies are protected First Amendment activity regardless of “unsavory motivation” of petitioner).

#### **E. What is Sham Petitioning?**

Only legitimate petitioning activity is protected. “Sham” petitioning is not protected by the First Amendment. Therefore, for a crime victim’s reporting and cooperation to be protected that activity must be legitimate, not sham, petitioning.

Sham petitioning was first characterized in *Noerr* as activity that is “nothing more than an attempt to interfere directly with the business relationships of a competitor.” *Noerr*, 365 U.S. at 533, n.23. Generally, sham petitioning can be described as objectively baseless petition, or as one court stated, sham petitioning “encompasses situations in which persons use the governmental *process* — as opposed to the *outcome* of that process — as [a] . . . weapon.” *Omni Outdoor Advertising*, 499 U.S. at 380 (emphasis in original). *See also See, e.g., California Motor Transport Co v. Trucking Unlimited*, 404 U.S. 508 (1972), *Bill Johnson’s Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), *City of Columbia v. Omni Outdoor Products*, 499 U.S. 365 (1991), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, (1993).

#### **F. What Can Be Argued in Addition to Federal Constitutional Arguments?**

Many states have Anti-SLAPP statutes that protect First Amendment petitioning activity. While state statutes vary in scope, many contain a procedural safeguard to ensure

that sham petitioning is not protected. *See, e.g.*, ME. REV. STAT. ANN. 14 § 556 (2003) (providing that a court will grant a motion to dismiss unless the non-movant can show that the petitioning activity “was devoid of any reasonable factual support or any arguable basis in law and that the moving party’s acts caused actual injury to the responding party”); MINN. STAT. ANN. § 554.03 (2000) (protecting activity unless “the conduct or speech constitutes a tort or a violation of a person’s constitutional rights.”); TENN. CODE ANN. § 4-21-1003 (2004) (creating immunity for “[a]ny person who in furtherance of such person’s right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern).

### **G. What Should Be Done?**

Be vigilant — crime victims are targets of reprisal in many forms. Civil lawsuits are one method of reprisal. We must identify these cases as SLAPPs early, reframe the issue as a First Amendment victim’s rights issue, and move to dismiss. This is the only way to ensure these suits do not become judicially condoned reprisal.

## **VIII. Resources**

National Crime Victim Law Institute  
Lewis and Clark Law School  
10015 SW Terwilliger Boulevard  
Portland, OR 97219  
Phone: (503) 768-6819  
Fax: (503) 768-6671  
[ncvliaid@lclark.edu](mailto:ncvliaid@lclark.edu)  
[www.ncvli.org](http://www.ncvli.org)

National Crime Victim Bar Association  
2000 M Street, NW, Suite 480  
Washington, DC 20036  
Phone: 202-467-8753  
Fax: 202-467-8701  
Hotline: 800-FYI-CALL  
[victimbar@ncvc.org](mailto:victimbar@ncvc.org)  
[www.victimbar.org](http://www.victimbar.org)

## CHAPTER SIX: TRIBAL ISSUES

Indian communities have been increasingly concerned with the rising rates of victimization in their communities (NVVA 2002). American Indian and Alaska Native<sup>132</sup> women suffer a higher rate of rape and sexual violence than any other group of people in the United States (Dept. of Justice, BJS 1999). 34.1 percent of Native women will be raped during their lifetime (CDC & DOJ, NVWS 2000). Despite the alarming number of Native rape survivors, advocates often lack understanding of the tribal historical, social and legal issues necessary to know in order to adequately assist this at risk population.

In addition, Native women are most often assaulted by non-Native assailants. *See* Lawrence A. Greenfeld & Steven K. Smith, Dept. of Justice, *American Indians and Crime* (1999) (“About 9 in 10 American Indian victims of rape or sexual violence were estimated to have had assailants who were white or black.”) However, because of the unique legal development of Indian criminal jurisdictional issues, the criminal prosecution of these offenders is difficult and sometimes legally impossible to pursue. Therefore, alternate remedies may be even more important to find justice or recovery for Native survivors.

It would be impossible to provide all the information necessary to assist Native survivors in this chapter. Instead, this chapter will provide a basic overview of the unique historical, social and legal issues that attorneys and advocates must understand to serve Native survivors, or any survivors who have been raped in a Native community. Because of the overwhelming statistics of non-Native assailants and the specific legal challenges implicated, the information primarily addresses the situation where the assailant is non-Native and the victim is Native or the violence occurs in a Native community.

### I. Working with Tribal Sexual Violence Programs

To begin with, coalition advocates and attorneys should take a few preliminary steps to strengthen their relationships with Native communities and to better serve all survivors. These are a few tips to begin:

- Basic Awareness: Be aware that the historical, social and cultural issues that have developed with Indian Nations may create a mistrust of traditional non-Native victim agencies and law enforcement. These issues will be discussed in Part II.
- Needs Assessment: Find out what kind of programs that support tribes and tribal members already exist in your area. For example, do you have a tribal sexual assault, domestic violence, or dual coalition in your area? *See* Appendix A to this chapter for “List of Tribal Coalitions.” Communicate with them about what type of assistance they want. Do not assume they want direct or technical assistance. Some tribal programs just want State

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<sup>132</sup> This chapter will use the terms “Native” and “Indian” interchangeably.

coalitions to become more culturally welcoming and competent for Native women. Others want more comprehensive assistance or ongoing interaction.

- Coalition Fact Sheet on Native Peoples: Work with local tribal agencies to develop a fact sheet for use in trainings, presentations, news articles, etc. Encourage local programs to develop fact sheet for local area they cover. *See below*, Coalition Fact Sheet on Native Peoples Suggestions of Topics to Research and Include.

**COALITION FACT SHEET ON NATIVE PEOPLES**  
Suggestions of Topics to Research and Include<sup>133</sup>

1. State Name: Many states' names are Native-language in origin. For example:
  - Massachusetts means "Great Mountain Place"
  - Kansas means "People of the South Wind"
  - Illinois means "Tribe of Superior Men"
  - Missouri means "Town of the Large Canoes"

To research the origin of state names, *see*:

- Origin of the Names of 28 U.S. States Derived from Native Nations, at:  
<http://www.americanindiansource.com/indianed/statesnames.html>.
- Origin of State Names at:  
<http://www.factmonster.com/ipka/A0854966.html>
- The United States of America, at:  
<http://library.thinkquest.org/4626/states.htm>.

2. Population Numbers:

- What is the total number of Native people living in your state?
- Summarize where population clusters are located.

To research American Indian/Alaska Native populations, *see*:

- The American Indian and Alaska Native Population: 2000 Census 2000 Brief (issued February 2002) at:  
<http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>.
- American Indian and Alaska Native Tribes for the United States, Regions, Divisions, and States at:  
<http://www.census.gov/population/www/cen2000/phc-t18.html>.  
(This set of 130 statistical tables shows the numbers and percent distributions from Census 2000 for the American Indian and Alaska Native Alone and Alone or in Combination Population by Tribe.)
- Characteristics of American Indians and Alaska Natives by Tribe and Language: 2000 at:  
<http://www.census.gov/prod/cen2000/index.html>.

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<sup>133</sup> Adapted from Sacred Circle, From Steps for Change for State Coalitions, Cultural Competency and Native Woman A Guide for Non-Natives Who Advocate for Battered Women and Rape Victims, pp. 45-46.

3. Tribal Nations, Reservations, Corporations, Rancherias, Pueblos, etc.:
  - List the Native Nations within state borders. There are 13 states that don't have federally recognized Nations but Native people live in every state. Some tribes are recognized by the state and some are not recognized by anyone but they exist. Urban areas include Native people from many Nations.
  - For a map of American Indians and Alaska Natives by State, *see* [http://ftp2.census.gov/geo/maps/special/aian\\_wall/aian\\_us.pdf](http://ftp2.census.gov/geo/maps/special/aian_wall/aian_us.pdf).
  - The National Indian Child Welfare Association has developed fact sheets for each state that includes a historical description, a map of the state or US Territory, state-specific demographic information on the American Indian/Alaska Native population from the 2000 U.S. Census data, and state-specific contact information for tribal governments, key tribal organizations, urban Indian organizations, state "Indian Affairs" departments and federal Indian agencies. *See* <http://www.nicwa.org/resources/factsheets/index.asp>.
  - NICWA also has an online tribal directory at <http://www.indians.org/Resource/FedTribes99/fedtribes99.html>.
4. Brief History: Describe the origins of the Native people in your state.
  - Have they always lived there?
  - Were they forced to relocate by the government?
  - What happened to Native people when colonizers arrived?
  - What was life like before white contact?
  - What was resistance like?
  - Try to include at least one creation story from at least one Native Nation.
5. Violence Against Native Women Statistics: Include statistics on the alarmingly high rate of violence against Native women nationally and locally.
  - Research the numbers of Native women served by members of your coalition.
  - Compare numbers with total Native population figures.

- Ask tribal organizations for statistics they may track regarding violence against Native women.
- Consider how the statistics may be skewed by underreporting issues.

## II. Historical/Social Context

Today, there are 2.5 million people who self-identify as Native American and Alaska Native in the United States, accounting for 0.9 percent of the total population. (Census Bureau, 2000). But while Native people make up less than one percent of the total U.S. population, they represent half the languages and cultures in the nation. There are 562 federally recognized tribes, of these, 229 are Alaska Native Villages. (Federal Register, 12-05-03; Vol. 68, No. 234). Native people speak over 250 languages and reflect great diversity in geographic location, culture, customs and history. The highest populations of Native people are concentrated in California, Oklahoma, Arizona, New Mexico and Texas; however, Native people reside in every state (Census Bureau, 2000). *See* Appendix B of this Chapter for “American Indian Population by State.” They live not only on reservations or in Indian communities, but significant populations of Native people also exist in large cities and urban areas such as Los Angeles and Denver.

Yet many advocates, attorneys and others who may have occasion to work with Native survivors of sexual violence are unaware of the unique historical and social issues that may affect survivors’ attitudes, interactions, and decisions. This section will discuss the development of violence in Native communities and the unique issues Native women may face when dealing with the aftermath of a sexual assault or sexual violence.

### A. Violence in Indian Communities

In order to assist Native survivors of sexual violence, it is important to understand the historical context in which violence in Indian communities developed. A population that is today around 2.5 million was estimated to once have been between 20-45 million before European contact in the 1400’s (Sacred Circle, *Cultural Competency*). By 1900, only 250,000 Native people had survived the disease, starvation and murder inflicted upon them by European colonists. Native people still carry with them the scars of this. “[T]he destruction perpetrated by the colonizers lives in the daily lives of Native people. Some call it ‘internalized oppression’ others call it ‘effects of colonization’ and still others define it as ‘casualties of war[.]’ ” (Sacred Circle, *Cultural Competency*).

Despite today’s alarming crime statistics, historically, violence among indigenous peoples was rare. The occasional incident of violence carried with it harsh consequences, often banishment. Furthermore, before colonization, Native women and men were treated as equals and women were relatively free from violence. (Sacred Circle, *Cultural Competency*) A long history of mistreatment by colonists, the government and settlers has inflicted the

population with the aftereffects of disease, war, racism, exploitation of resources, seizure of land, forced migration, introduction of alcohol, and oppressive and coercive policies and laws.

History has transformed once peaceful cultures into cultures plagued by high rates of crime and impoverishment. American Indians experience a *per capita* rate of violence twice that of the U.S. resident population (*American Indians and Crime*, 1992-2002). Rates of violence in every age group are higher among American Indians than that of all races. The poverty rate for Native Americans is approximately 26 percent — 2.6 times higher than that for whites and more than twice the average for all Americans, at approximately 12 percent. (Census Bureau, 2000). A total of 34% of the Native population resides in rural areas, where many reservations are located (Census Bureau, American Indian/Alaska Native Heritage Month, 2003).

Native Americans have the second lowest median household income, \$32,116, while whites have the highest at \$46,305 (Census Bureau press release, 9-24-2002). Compared to 5.8 percent of the general U.S. population, 13.6 percent of the workforce on reservation areas is unemployed (Census Bureau, 2000). A basic understanding of these historical and social developments are necessary to understand Native survivors' fears and needs.

## **B. Unique Issues Faced by Native Women**

The astounding rate of sexual violence against Native women is itself an issue unique to the population. The average rate of rape and sexual violence is 3.5 times higher for Native women than for all other races. But Native women are faced with other cultural and social issues that further complicate their recovery process. For example, Native Americans for generations have internalized both social and personal oppression; this makes reporting the sexual violence extremely difficult. Reporting to non-Native agencies further compounds these problems. Many Native women have a high level of mistrust for white agencies and staff. They also fear being ostracized by their families. As discussed in the remainder of this chapter, Native women will face unique and complex legal challenges to prosecution. Before taking any legal action, a Native woman must first consider the likelihood for justice, reprisals or inaction by the system.

In addition, victims who live in Native communities may face a number of additional barriers, including:

- Intimate community;
- Geographic isolation;
- Lack of transportation;
- Lack of shelters/resources;

- Lack of telephone/ability to communicate;
- Lack of tribal codes to protect women;
- Shortage of legal services;
- Shortage of law enforcement officers.

Advocates should understand that these barriers may exist for the Native survivors they assist in order to better understand the needs of these women and to help them make informed decisions.

### **III. Legal Context**

Finding justice for Native survivors requires navigation through a maze of tribal, federal and state jurisdiction. Legislative and court-imposed limitations on tribal legal authority have created a complex and often inadequate remedy for Native survivors. This section will outline the basic legal issues implicated by sexual violence in Indian communities or sexual assault of Native women.

#### **A. Indian Country Defined**

“Indian Country” is defined by federal statute at 18 U.S.C. § 1151:

- Reservation Fee Lands [§1151(a)]
- Off Reservation Dependent Indian Communities [§1151(b)]
- Tribal Trust Land and Restricted Allotments Outside Reservation [§1151(c)]
- Lands Set Aside for Indian Use [*See Sac & Fox*, 508 U.S. 114 (1993)]

#### **B. Indian Nations as Sovereign Nations**

Indian Nations retain sovereign status with respect to the United States government. The U.S. Constitution recognizes Indian tribes as distinct governments. What this means is that Indian nations have the right to make their own laws and be governed by them. However, the U.S. Congress is recognized by the courts as having the right to limit the sovereign powers of the tribes. Congress must do so in definite terms and not by implication.

Indian Nations continue to possess the following characteristics of their sovereign status:

- A distinctive permanent population.
- A defined territory with identifiable borders.
- A government exercising authority over territory and population.
- The capacity to enter into government-to-government relationships with other nation states.
- Only Congress has plenary power over Indian affairs.
- State governance is generally not permitted within the reservations. (NVAA 2002, *citing* Valencia-Weber and Zuni 1995).

### **C. Tribal Justice Systems**

Historically, Indian Nations did not have justice systems as we know them in the Western context; however, the influence of the federal government led approximately 275 Indian nations and Alaska Native villages to establish contemporary tribal court systems. Today, tribal justice systems vary greatly from nation to nation. A nation may adopt one or more of or varying combinations of the five types of tribal justice forums outlined below. These include: (1) Family Forums; (2) Community Forums; (3) Traditional Courts; (4) Courts of Indian Offenses/CFR Courts; and (5) Tribal Courts.

#### **1. Family Forums**

Family Forums are the least official and most inclusive type of tribal justice system. They actively engage participants in discussing problems and fashioning solutions.

- Who Facilitates: Elders or community leaders usually facilitate family forums such as family gatherings and talking circles.
- Types of Disputes: Problems typically involve interpersonal transactions such as family problems, marital conflicts, juvenile misconduct, violent or abusive behavior, parental misconduct, or property disputes.
- Source of Law: Customary laws, sanctions, and practices.
- Victim Participation: Persons involved in disputes are directly involved in resolving the dispute; therefore victims will be directly involved. However,

because sexual violence is not an “interpersonal transaction,” this type of forum may be inappropriate and/or difficult for a victim.

- Offender Compliance: Mandated and monitored by the families involved.
- Precedence/Review: It is discretionary for decisions and agreements to be recorded in any formal manner by the family. When the family forum cannot resolve a problem or conflict, the matter may be pursued through one of the more formal processes described below.

## **2. Community Forums**

Community Forums reach beyond immediate family to form groups to discuss problems and identify solutions.

- Who Facilitates: Persons outside the immediate family, such as relatives, friends, and other concerned citizens. Some Indian Nations have citizen boards that provide peacemakers or facilitators (Red Lake Tribe 1994; “The Tribal Community Boards Peacemaking Project” 1985; “Akwesasne Community Peacemaking Process” 1993).
- Source of Law: Customary laws, sanctions, and practices.
- Victim Participation: Community-based so victim should be able to participate and ask community for assistance, protection and safety. Creates community accountability, but advocates/victims must be aware of types of pressures that may exist in intimate communities (*i.e.*, pressure for reconciliation, shame to families, etc.).

## **3. Traditional Courts**

Traditional Courts continue to rely on immediate family, other relatives, and friends to explore problems and develop appropriate solutions.

- Who Facilitates: Presided over by the heads of tribal government, such as the governor, lieutenant governors, or other appointed tribal officials.
- Source of Law: Customary laws and sanctions; some Indian Nations have written criminal codes with prescribed sanctions.
- Procedure: Cases are initiated through written criminal or civil complaints or petitions, but the justice process is indigenous. Family and relatives often accompany defendants to court appearances and hearings.

- Victim Participation: Generally, anyone with a legitimate interest in the case is allowed to participate in the process from arraignment through sentencing.
- Offender Compliance: Mandated and monitored by the tribal officials with assistance from the families and relatives. Non-compliance by offenders may result in more punitive sanctions such as arrest and confinement.

#### 4. Courts of Indian Offenses/CFR Courts

Courts of Indian Offenses, also known as “Code of Federal Regulations,” are federal courts with limited jurisdiction pursuant to Title 25, the Code of Federal Regulations. Only a handful of these courts are left, and they exist mostly in Indian communities with few resources.

#### 5. Tribal Courts

Tribal Courts comprise the most formal tribal justice systems and are modeled after Anglo-American legal systems.

- Who Facilitates: Presided over primarily by lay judges who are from the community or another Indian community rather than by law-trained judges who may or may not be Native American.
- Types of Disputes: Tribal courts are most prevalent forums, which handle primarily misdemeanor cases (National American Indian Court Judges Association 1995). The bulk of these cases involve assaults, public intoxication, disorderly conduct, juvenile offenses, and traffic infractions. The remaining are civil actions involving domestic relations, property disputes, personal injury, contracts, and juvenile and family matters such as juvenile delinquency, child welfare, and child custody.
- Source of Law: Tribal courts are judicial forums based on the Anglo-American legal model using written codes, rules, procedures, and guidelines. Some incorporate indigenous justice methods as an alternative resolution process for juvenile delinquency, child custody, victim-offender cases, and other types of civil matters.
- Procedure: Tribal courts are generally in session five days a week with regular days set for arraignments, bench trials, juvenile and family hearings, and other civil hearings. Most defendants or plaintiffs represent themselves. Some courts have prosecutors and public defenders available to represent cases. Since the Indian Civil Rights Act does not require the Indian Nations to provide legal counsel, parties may hire their own legal

counsel or advocates to represent them. The trend of tribal courts has been to use the family and community forums for matters that are highly interpersonal, either as a diversion alternative, as part of sentencing, or for victim-offender mediation.

- Offender Compliance: Noncompliance by offenders may result in more punitive sanctions such as arrest and confinement.
- Precedence/Review: Decisions by tribal judges are briefly written and in some cases oral. Some tribal courts keep trial records, but few keep complete transcripts. The tribal courts are courts of record and appellate systems are in place.

## Tribal Justice Forums

Family/Community Forums	Traditional Courts	Courts of Indian Offenses	Tribal Courts
Established by unwritten customary law and traditions.	Established by the tribal council and tribal religious leaders according to unwritten laws.	Established by the Secretary of Interior under Title 25, Code of Federal Regulations.	Established by the tribal council, usually under the authority of the tribe's Constitution.
Subject only to authority of traditional clan systems and/or family elders, based on consensus of participants.	Subject only to authority of Tribal council and religious leaders.	Subject to authority of Tribal council <i>and</i> Interior Dept. Council may adopt ordinances or resolutions affecting CFR Court but Interior Dept must approve them.	Subject to authority of Tribal council or Law and Order Committees. Tribal Constitutions may require Interior Dept approval of Council ordinances or resolutions affecting the Tribal Court.
Procedures & offenses defined according to unwritten, customary laws, traditions & practices.	Procedures & offenses defined according to unwritten, customary laws, traditions & practices.	Procedures & offenses defined in Title 25, Code of Federal Regulations. Judges may develop Rules of Court for conduct of hearings and trials.	Procedures & offenses defined by Tribal council in codes, ordinances, or resolutions. Tribal judges may develop Rules of Court for conduct of hearings and trials.
Presided by family elders, chosen elders, or adults from the community, or traditional tribal officials	Judges are Governors or chief executive officers of the Pueblo who serve without pay. They are appointed by the Pueblo council, which is composed of ex-Governors and tribal religious leaders.	Judges are appointed by the Commissioner of Indian Affairs, subject to approval by the Tribal council, and are paid w/federal funds.	Judges may be elected by the tribal membership or appointed by the Tribal council if paid by the tribe.
Usually cannot be appealed, but matters may be pursued through formal tribal courts.	Appeals of decisions by the Pueblo Governor are heard usually by the Pueblo Council.	Appeals of CFR Court decisions may be heard by an appellate court composed of judges appointed under the Code of Federal Regulations.	Appeals of Tribal court decisions may be heard by a tribal appellate court, composed of judges or by the tribal council.

Source: (NVAA 2002)

## **D. Sources of Tribal Law**

Tribal courts operate under the tribes' written and unwritten code of laws. Most tribal codes contain civil rules of procedure specific to tribal court, as well as tribal statutes and regulations. While many tribal laws have their origins in state or federal Anglo-American laws, a tribal nation may choose to also adopt a non-traditional legal principle as part of their tribal law. A tribe's code also includes uncodified customary and traditional practices which are based on oral history. Tribal judges often consider testimony regarding tribal custom and tradition from tribal elders and historians. Many tribes have set out procedures dictating the manner in which traditional law should be considered.

Tribes are integrating tribal customs and traditions with the structures and practices adopted from non-tribal legal systems through the development of their tribal common law. Tribal courts generally follow their own precedent and give significant deference to decisions of other Indian Courts. However, no official tribal court reporter exists and not all tribes keep previous decisions on file. The opinions of federal and state courts are persuasive authority in tribal courts.

## **E. Tribal Court Advocates**

Many tribal jurisdictions have established rules that allow specially trained non-attorneys to appear in tribal courts. Some require a tribal bar examination for admission to practice. Advocates who work with Native sexual violence victims or victims assaulted in Indian Country should explore who can appear in tribal court.

## **IV. Jurisdictional Issues**

As political sovereigns, federally recognized tribes can make and enforce their own laws. However, over time, tribal sovereignty has been eroded and significantly reduced in certain areas. Victims, attorneys and advocates will run into the most complex problems when resolving the jurisdictional disputes that arise among the federal government, the tribes and the states. This can make it difficult for victims to find legal recourse that is accessible, timely and just.

### **A. Tribal Criminal Jurisdiction**

Although this is a civil legal remedies guide, advocates must understand the basics of criminal jurisdiction when a crime is committed against a Native woman. This will help a Native survivor understand the extent of her available or unavailable remedies. Jurisdiction will depend on the following factors:

- Race of the Victim (Indian v. non-Indian);
- Race of the Offender (Indian v. non-Indian);

- Where the Offense Occurred; and
- Seriousness of Offense.

Major laws governing jurisdiction over crimes in Indian country include the following:

- General Crimes Act, 18 U.S.C. § 1152.
- Major Crimes Act, 18 U.S.C. § 1153 (Supp. 1986).
- PL 83-280 Indians-Criminal Offenses and Civil Causes-State Jurisdiction, 18 U.S.C. § 1162 (Supp. 1968) (“PL 280”).

**General Crimes Act:** All crimes committed in Indian Country by non-Indians against Indian victims are subject to exclusive federal jurisdiction regardless of the seriousness of the offense.

**Major Crimes Act:** Applies to enumerated felony crimes committed in Indian Country, except for crimes committed in PL 280 states.

**PL 280:** The Federal government granted six states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) criminal jurisdiction over crimes committed in all or part of Indian Country within state boundaries, except those normally included under federal jurisdiction. This created concurrent jurisdiction between the tribes and the states in both investigation and prosecution. This means that both jurisdictions can prosecute a crime. Therefore, two separate proceedings can occur related to the commission of one crime.

The following charts summarize criminal jurisdiction for crimes occurring in Indian Country based on whether the state is a PL 280 state.

### Non-PL 280 States

Type of Crime	Race of Victim	Race of Perpetrator	Jurisdictional Authority
Misdemeanor	Indian Victim	Indian Perpetrator	Tribal
Felony	Indian Victim	Indian Perpetrator	Federal and/or Tribal (concurr.) (but tribes are limited in sentencing)
Misdemeanor	Indian Victim	Non-Indian Perpetrator	Federal (exclus.)
Felony	Indian Victim	Non-Indian Perpetrator	Federal (exclus.)
Misdemeanor	Non-Indian Victim	Non-Indian Perpetrator	State (exclus.)
Felony	Non-Indian Victim	Non-Indian Perpetrator	State (exclus.)

### PL 280 States

Type of Crime	Race of Victim	Race of Perpetrator	Jurisdictional Authority
Misdemeanor	Indian Victim	Indian Perpetrator	Tribal
Felony	Indian Victim	Indian Perpetrator	Tribal and/or State (concurr.) (but tribes are limited in sentencing)
Misdemeanor	Indian Victim	Non-Indian Perpetrator	State (exclus.)
Felony	Indian Victim	Non-Indian Perpetrator	State (exclus.)
Misdemeanor	Non-Indian Victim	Non-Indian Perpetrator	State (exclus.)
Felony	Non-Indian Victim	Non-Indian Perpetrator	State (exclus.)

#### SUMMARY: CRIMINAL JURISDICTION

- In PL 280 states, district or county authorities investigate and prosecute major crimes occurring in Indian Countries within these states.
- The U.S. Attorneys' Offices are responsible for prosecuting major crimes occurring within all other Native nations.
- In all states, Tribal governments may choose to investigate and prosecute crimes, provided the perpetrator is Native American and with the limitations on sentencing, discussed below.

## B. Limits of Tribal Criminal Jurisdiction

In addition to the three federal statutes outlined above, legislative and judicial actions further limited tribal criminal jurisdiction. Understanding these limitations is vitally important when advising a survivor of her options when evaluating civil versus criminal remedies.

**The Indian Civil Rights Act (1968)** limited tribal courts' sentencing powers to jail up to one year and/or \$5000 fine. While the Act imposes no limitations on probation, tribes are severely limited in terms of jail space or resources for probationary supervision. Also of great significance is the U.S. Supreme Court's decision holding that tribal courts have no criminal jurisdiction over non-Indians committing crimes in Indian Country. *Oliphant v. Suquamish*, 435 U.S. 191 (1978).

## C. Tribal Court Civil Jurisdiction

A survivor may want to bring a civil claim against an offender in a tribal court. Tribal courts have broad authority to craft remedies drawing on traditional customs or law. These laws and customs place no limitations on the amount of monetary recovery. Like criminal jurisdiction, however, the contours of tribal civil jurisdiction are complex. Remedies may be limited when the offender is non-Native. Therefore, advocates may also want to help Native victims explore State or Federal civil remedies, discussed below and in other chapters throughout this guide.

Factors for determining a tribal court's civil jurisdiction include:

- Status of parties (tribal member vs. non-tribal member);
- Status of land where action occurred (Tribal Trust, Allotted Trust, Fee, Right of Way);
- Whether non-members have entered into consensual relations with the Tribe or its members; and
- Whether the actions of non-members threaten the political integrity of the tribe or the health and welfare of its members.

Tribal courts have exclusive subject matter jurisdiction over a suit by any person — Indian or non-Indian — against an Indian person, a tribe, or tribal entity for a claim arising in Indian Country. *Williams v. Lee*, 358 U.S. 217 (1959). Therefore, any claim based on a dispute between tribal members arising on the reservation will have exclusive jurisdiction in tribal court. It is unclear whether *Williams v. Lee* extends to suits against Indians from recognized tribes other than the one upon whose reservation the claim arose. Jurisdiction over lawsuits between non-Indians arising on the reservation lies in state court.

The remainder of this section will briefly discuss civil jurisdiction of tribal courts over non-Native offenders. At the end of this section is a chart outlining jurisdiction for general civil litigation based on race of the parties and where the claim arose. The specific civil remedies available within those jurisdictions are discussed in later sections of this chapter and other chapters throughout this guide.

**SUMMARY: LIMITS OF TRIBAL CRIMINAL JURISDICTION**

- Limited to prosecution of members of federally-recognized tribes.
- Limited to 1 year incarceration, \$5000 fine or both.

#### **D. Civil Jurisdiction Over Non-Native Offenders**

The majority of limitations to tribal civil jurisdiction address the powers of tribal governments to exert regulatory powers over the activities of non-members within tribal borders. In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court denied the Crow Tribe regulatory jurisdiction over non-Indians hunting and fishing on a state-owned river running through the tribe's jurisdiction. *Montana* established that tribes continue to have regulatory authority over non-Indians on non-Indian fee lands if one of three tests is met:

- Express congressional delegation;
- Taxation, licensing, or other means regulating activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements; or
- Conduct of non-Indians on fee lands within a reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.

450 U.S. at 564-66. *Montana* only addressed tribal regulation of non-members on lands alienated to non-Indians, so neither its general rule nor its exceptions apply to the adjudicatory powers of a tribe or to activities on tribal land. However, the Supreme Court later limited tribal court jurisdiction in both these regards. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court extended the limitations on tribal regulatory jurisdiction in *Montana* to the tribe's civil adjudicatory jurisdiction as well. In *Nevada v. Hicks, et al.*, - U.S. - (2001), the Court concluded that *Montana's* principles apply to activities on both Indian and non-Indian land.

In *Hicks*, the Court held that a tribal court did not have jurisdiction to adjudicate a tribal member’s tort claim against a Nevada state game warden for conduct that occurred while executing a state court-issued search warrant on tribal trust lands during investigation of an off-reservation crime. *Hicks* involved a Nevada state game warden, which could limit the decision to tribal civil jurisdiction over state officers coming onto tribal lands. “However, if applied more broadly, this decision could result in near complete divestiture of the power of tribes to exert civil jurisdiction over non-Indians within their territory.” (Richland and Deer 168)

**SUMMARY: JURISDICTION - GENERAL CIVIL LITIGATION**

The following chart describes jurisdiction for general civil litigation depending on race of parties and where claim arose and whether that jurisdiction is exclusive to the tribe or concurrent jurisdiction between the tribe and the state (meaning that both have jurisdiction over the matter). It does not apply to Indian country over which the state has assumed jurisdiction pursuant to PL 280. In all instances where state jurisdiction is shown, federal jurisdiction may be acquired if the parties meet the requirements of diversity and citizenship and amount in controversy. Where subject matter of claim particularly affects Indian interests, normal state jurisdiction may be precluded.

<b>Plaintiff</b>	<b>Defendant</b>	<b>Source of Claim</b>	<b>Jurisdiction</b>
Indian	Indian	Indian country	Tribal (exclus.)
Indian	Indian	Non-Indian country	Tribal or state (concurr.)
Non-Indian	Indian	Indian country	Tribal (exclus.)
Non-Indian	Indian	Non-Indian country	State; possibly tribal (conc.)
Indian	Non-Indian	Indian country exc. non-Indian fee lands	Tribal (if code allows); state (concurr.)
Indian	Non-Indian	Indian country non-Indian fee lands	State; possibly tribal (concurr.)
Indian	Non-Indian	Non-Indian country	State (exclus.)
Non-Indian	Non-Indian	Indian country	State; possibly tribal (concurr.)
Non-Indian	Non-Indian	Non-Indian country and Indian country fee lands	State (exclus.)

**E. Review of Tribal Court Decisions by Federal Government**

**1. Exhaustion Rule**

U.S. federal courts let tribes determine their jurisdiction first up through their highest tribal court. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Exceptions to exhaustion are:

- Where the assertion of tribal jurisdiction would be:
  - Motivated by a desire to harass;
  - Conducted in bad faith; or
  - An action that patently violates express jurisdictional prohibitions in federal law.

- OR -

- Where exhaustion would be futile because of lack of adequate opportunity to challenge the court’s jurisdiction (*e.g.*, where there is no tribal court).

## 2. Federal Review at a Glance

The following chart explains what type of review federal courts have over a tribal court’s decision.

Tribal Court Decision	Federal Court Review
Criminal Convictions	No review of convictions of Indians <u>unless</u> Tribe exceeds its jurisdiction ( <i>i.e.</i> conviction of non-Indian). <i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978).
Indian Civil Rights Act (ICRA)-Based “Civil Rights” Cases	May be reviewed only where a person is detained in violation of ICRA rights. <i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).
Other Civil Cases	<p>May be reviewed only to decide whether tribal court has jurisdiction. <i>National Farmers Union Ins. Cos. v. Crow Tribe</i>, 471 U.S. 845 (1985);</p> <p style="text-align: center;">- OR -</p> <p>Where the parties suing each other are from different states and the dispute involves a matter involving money or property that exceeds \$75,000 and the dispute includes a dispute over tribal jurisdiction. <i>Iowa Mut. Ins. Co. v. LaPlante</i>, 480 U.S. 9 (1987).</p>

## F. State Court Civil Jurisdiction Over Indians

State courts have no jurisdiction over a civil claim by a non-Indian against an Indian when the claim arose in Indian Country. *Williams v. Lee*, 358 U.S. 217 (1959). This does not preclude state courts from allowing actions by tribal members against non-Indians based on claims that arose in Indian country. In addition, PL280 granted states civil adjudicatory jurisdiction over claims arising in Indian Country. This means that state courts have concurrent jurisdiction over civil actions involving reservation Indians and can apply the general state laws to those disputes. PL280 did not, however, grant states civil regulatory jurisdiction.

## V. Civil Legal Remedies

When considering the remedies available to Native survivors, advocates and attorneys should keep in mind that Native survivors' sense of justice or punishment may be quite different than the traditional Anglo-American view. For example, in some tribal societies, there is a general belief that punishing offenders is something best left to a spiritual or supernatural authority (Richland and Deer 133). In addition, tribes may not have the same type of division between civil and criminal violations that exist in Anglo-American law.

### A. Remedies in Tribal Courts

Because tribes can not criminally prosecute non-Indian offenders, survivors need to be aware of what civil remedies may be available in tribal courts. In some instances, survivors may have more flexibility seeking civil legal remedies. Unlike the severe restrictions placed on tribes in regards to criminal punishment, there are no such jurisdictional limitations placed on civil remedies or probation. Also, tribal courts may be able to impose more traditional remedies that are more in line with the survivor's wishes. Below are examples of remedies that may be available to survivors through tribal courts.

- Arrest and Detention: Although tribal courts do not have power to criminally prosecute non-Indians, Indian Nations still have inherent sovereign authority to stop and detain all persons suspected of criminal activity. This power includes the authority to hold that person for state and federal agencies that do have the power to criminally prosecute.
- Arrest/Take to Reservation Boundaries: Indian Nations have the authority to take any person suspected of criminal activity to the jurisdiction or reservation boundaries.
- Banishment/Exclusion from Tribal Lands: Tribal courts retain the power to exclude any unwanted person from their reservations. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9<sup>th</sup> Cir. 1985).
- Infractions Systems: Many Indian Nations have changed their tribal codes to make certain minor offenses into civil infractions rather than criminal actions by removing the possibility of imprisonment.
- Forfeiture Laws: Many Indian Nations have expanded the use of civil forfeiture laws to handle offenses involving non-Indians. For example, a non-Indian who is stopped for an alleged driving while intoxicated offense can have his/her vehicle impounded and can be required to appear at a civil forfeiture hearing in order to recover the vehicle.
- Civil Contempt: Tribal courts maintain the power to punish through court's contempt power anyone who violates court orders.

- Monetary Fines: Unlike criminal penalties, the civil jurisdiction of tribal courts is not subject to the statutory limits on the relief courts may grant.
- Sex Offender Registration: Tribes have the authority to require sex offenders living within their borders to register as sex offenders. In *Minnesota v. Jones*, 700 N.W.2d 556 (Minn. Ct. App. 2005), the Minnesota Court of Appeals ruled that the state's predatory-offender registration law is civil and regulatory in nature and is therefore beyond the state's jurisdiction when applied to Indians who live on reservations where they are enrolled tribal members.
- Civil Actions: A victim may use tribal court to pursue civil actions based on causes of action defined by the tribe's code.
- Restorative Justice: Seeks to shift the focus of criminal justice systems away from just dealing with offenders and toward addressing the needs of crime victims and communities (and it incorporates traditional Native American restorative justice concepts).

## **B. Remedies in Federal Courts**

The federal role in the adjudication of civil disputes in Indian country is far more limited than its role in criminal matters. Unlike tribal and state courts, federal courts are not courts of general jurisdiction. Therefore, jurisdiction over civil matters must be based on either (a) federal question or (b) diversity of citizenship.

Indian tribes are authorized by 28 U.S.C. § 1362<sup>134</sup> to bring suits as plaintiffs in federal court but their claims must still arise under federal law. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9<sup>th</sup> Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). The mere fact that a party to a case is an Indian or an Indian tribe does not turn a civil dispute into a federal question, nor does the fact that the controversy arose in Indian country. *Schantz v. White Lightning*, 502 F.2d 67 (8<sup>th</sup> Cir. 1974).

Federal question jurisdiction has assumed increased importance in Indian law since the decision of *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). In that case, a non-Indian brought an action in federal court to enjoin tribal court proceedings in which the non-Indian was a defendant. The Court held that, because the petitioners contended that federal law has divested the Tribe of this aspect of sovereignty, it is federal

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<sup>134</sup> 28 U.S.C. § 1362 provides that “[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

law upon which they relied as a basis for the asserted right of freedom from Tribal Court interference, and therefore the issue arose under federal law. As a consequence, anyone asserting an absence of tribal power under federal statute, treaty or the “common law” of federal Indian law has an entrée into federal court. However, *National Farmers Union* also held that the federal court must permit the tribal court in the first instance to decide the question of its own jurisdiction. *See above*, Section IV.E.1 on “Exhaustion Rule.”

## **VI. Enforcement of Protection Orders**

For information generally on the enforcement of protection orders, *see* Chapter One, Section I.A of this guide.

### **Protection Orders and Indian Country**

VAWA neither expands nor contracts the authority of tribal courts to issue and enforce protection orders. It requires state and tribal governments to enforce one another's protection orders. For Native women, this means that a protection order issued in Indian Country should be honored by local and state law enforcement.

Because protective orders are civil orders, tribes have civil jurisdiction over even non-Indians to issue an order. However, when a victim is trying to enforce a protection order in Indian Country, VAWA reiterates that tribal courts have jurisdiction *over matters within the authority of the tribe (emphasis added)*. 18 U.S.C. § 2265(e) proscribes: “[A] tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.” For tribal courts that only have civil jurisdiction, this means that the sanctions for violating a protection order must be *civil*, not criminal. Therefore, advocates should be aware of whether Indian Nations in their state have enacted civil remedies for protective order violations and partner with Indian Nations to implement statutes that enhance protection efforts.

## **VII. Gun Dispossession in Indian Country**

For information generally on gun dispossession, *see* Chapter One, Section III of this guide. The Brady Act, 18 U.S.C. § 922(g), provides for gun and ammunition dispossession of two categories of individuals: (1) those subject to certain types of protection orders; and (2) those convicted of a misdemeanor crime of domestic violence. Implications specific to Indian Country include:

- The protection order ban should be applicable to orders issued by tribal courts that meet the criteria under the Brady statute.

- Tribes must honor gun prohibitions contained in state or federal protective orders or as a result of qualifying state or federal domestic violence conviction.

## VIII. Indian Child Welfare Act

Native women are more likely than any other group to have children taken away. If the situation arises where a child may be removed from a biological parent, advocates need to be aware that the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (“ICWA”) may be triggered. Advocates should have a basic understanding of ICWA and the philosophy behind it in order to help mothers retrieve children or ensure that Native children are placed with Native families. *See* Appendix C to this Chapter for flowchart: “Will ICWA Apply in State Proceeding?”

In *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005), the Ninth Circuit recently ruled that California tribes do not have exclusive jurisdiction over Indian Child Welfare Act cases. The three-judge panel refused to transfer an Indian child welfare case to the Elem Indian Colony. The mother, a tribal member, had challenged a state court’s termination of her parental rights. Normally, ICWA vests the tribe with exclusive jurisdiction in such cases. But since California is a Public Law 280 state, the court said it had to view the legal landscape in light of the state’s broad civil and criminal jurisdiction over Indian lands. First, the court concluded that it has jurisdiction under ICWA to hear the case. The state had argued that a legal doctrine barred federal courts from reviewing state court decisions. In a more important finding, the court said that ICWA contains an exception for Public Law 280 states like California. The judges noted that the law provides a method for tribes like the Elem Indian Colony to resume exclusive jurisdiction over Indian child welfare matters but that didn’t happen in this case. So rather than “undo this statutory and historical framework and immediately vest exclusive jurisdiction in the tribes,” the court said it must uphold the state’s “concurrent jurisdiction” over Indian child dependency proceedings.

## IX. Housing Issues

Advocates working with Native survivors should be aware of some basic facts on Indian housing. Understanding the severity of housing shortages in Indian Country may help advocates understand the increased vulnerability of Native survivors.

- Housing Needs: An estimated 200,000 housing units are needed immediately in Indian country. (U.S. Commission on Civil Rights, “A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country,” 2003.)

- Homeless: Approximately 90,000 Native families are homeless or underhoused. (U.S. Commission on Civil Rights, “Quiet Crisis,” 2003.)
- Overcrowding: In tribal areas, 14.7 percent of homes are overcrowded, compared to 5.7 percent of homes of the general U.S. population. (Census Bureau, 2000.)
- Plumbing: On Native American lands, 11.7 percent of residents lack complete plumbing facilities, compared to 1.2 percent of the general U.S. population. (Census Bureau, 2000.)
- Telephone Service: Compared to the 2.4 percent of the American population, 16.9 percent of Native Americans in tribal areas lack telephone service. (Census Bureau, 2000.)

From: <http://www.tribal-institute.org/lists/housing.htm>.

## **X. Facts and Issues to Consider**

### **A. Deputizing Indian Lawyers as Special U.S. Attorneys**

Because tribes do not have criminal jurisdiction over non-native offenders, it is up to federal or state authorities to prosecute many sexual violence incidents that occur against Native women. State and/or federal resources combined with the exceedingly high victimization rates of Native women by non-Native offenders may result in inadequate prosecution of these crimes. One option an advocate may wish to explore with a survivor is to seek to deputize an Indian lawyer as a Special U.S. Attorney who can prosecute the crime.

### **B. Use of Spiritual Leaders**

Advocacy may be needed to help a traditional Native woman seek treatment if her choice is to go to a spiritual leader in addition to or rather than mainstream counselors. Most non-Native advocates have little or no knowledge of Native spiritual practices that might include altered states of consciousness on the part of the traditional healer. Advocates should listen without judgment and assist survivors to practice or connect with spiritual leadership/ways of her choosing. (Sacred Circle)

As a practical matter, advocates who assist survivors who seek traditional healing should:

- Consider whether any type of counseling privilege applies? Explain to survivors whether your state's laws will cover these types of communications and the implications of this on her decision-making.
- Consider whether Crime Victim's Compensation in your state will cover expenses. A thirteen-year-old Navajo girl was sexually assaulted by a relative. In addition to the medical services provided by Indian Health Service, the state compensation program reimbursed the family for the traditional healing ceremonies performed by a medicine man.

### **C. Confidentiality**

Confidentiality issues that are present with all victims of sexual violence can be even more difficult to handle in small Native communities where most members know each other, their addresses, cars, etc. Confidentiality may come into play in many of the same situations that would occur with any sexual violence. For example:

- When law enforcement is called to the crime.
- When a report is filed.
- When a Victim Assistance provider becomes involved.

- When a multidisciplinary team (Child Protection Team, SART, etc.) is part of the case.

There are, however, several issues that can be unique to dealing with either Indian women who are victims or sexual violence when it occurs in an Indian community.

### **1. Numerous Agencies Involved**

When dealing with sexual violence of Native women or violence that occurs in Native communities, numerous agencies may participate in one case. For example, Indian Health Services, the Bureau of Indian Affairs, the Federal Bureau of Investigation, the U.S. Attorney's Office, a local District Attorney's Office, tribal or county Child Protective Services, and local law enforcement may all be part of a case at one time or another. Having so many people involved complicates confidentiality issues and puts a victim's privacy at risk.

### **2. Use of Scanners**

In many Native communities, people own "scanners" or CB radios and listen to calls for police dispatch. It is important for advocates and law enforcement agencies in tribal communities to be aware of the problems caused by these types of communication devices. For example, victims of some types, especially sexual violence or domestic violence victims, may not make reports due to fears that other people will hear the call. Police departments or advocacy organizations may want to sponsor community awareness activities to encourage victims to report crimes or may work to develop alternative means of talking to patrol officers which cannot be overheard by the public.

## XI. Resources

### A. Tribal/Non-profit Organizations

<p>The Tribal Law &amp; Policy Institute 8235 Santa Monica Blvd., Ste. 211 West Hollywood, CA 90046 (323) 650-5467 ~ Fax: (323) 650-8149 <b>services@tribal-institute.org</b> <b>www.tribal-institute.org</b></p>	<p>A Native American owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.</p>
<p>Mending the Sacred Hoop S.T.O.P. Violence Against Indian Women Technical Assistance Project 202 East Superior Street Duluth, MN 55802 (218) 722-2781; Toll Free: 888-305-1650 Fax: (218) 722-5775 <b>http://www.msh-ta.org</b></p>	<p>The mission of S.T.O.P. Violence Against Indian Women Technical Assistance Project is to assist Native sovereign nations to improve their response to Indian women who are victimized by domestic violence and sexual violence and restore safety and integrity to them. Focuses on training, technical assistance and resource development.</p>
<p>Sacred Circle: National Resource Center to End Violence Against Native Women 722 St. Joseph Street Rapid City, SD 57701 (877) 733-7623 ~ Fax: (605) 341-2472</p>	<p>Operated by Cangleska, Inc., Sacred Circle aids tribes and tribal organizations to stop violence against Native women. It addresses violence against Native women in the context of the unique historical, jurisdictional, and cultural issues that American Indian/Alaska Native Nations face. Its focus is directed toward professional providers serving these communities, including tribal law enforcement personnel (judges, prosecutors and court workers), probation officers, shelter advocates, and batterer intervention providers.</p>
<p>Native American Rights Fund 1506 Broadway Boulder, CO 80302 (303) 447-8760 ~ Fax: (303) 443-7776 <b>http://www.narf.org</b></p>	<p>A non-profit 501c(3) organization that provides legal representation and technical assistance to Indian tribes, organizations and individuals nationwide.</p>
<p>National American Indian Court Judges Association 4410 Arapahoe Ave., Ste. 135 Boulder, CO 80303 (303) 245-0786 ~ Fax: (303) 245-0785 <b>http://www.naicja.org/</b></p>	<p>A national voluntary association of tribal court judges established in 1969. The Association is primarily devoted to the support of American Indian and Alaska Native justice systems through education, information sharing and advocacy. The mission of the Association, as a national representative membership organization, is to strengthen and enhance tribal justice systems.</p>
<p>National Indian Justice Center 5250 Aero Drive Santa Rosa, CA 95403 (707)579-5507 ~ Fax: (707)579-9019 <b>http://nijc.indian.com/</b></p>	<p>An independent national resource for tribal courts. The Center designs and delivers legal education, research and technical assistance programs to help improve tribal court systems and the administration of justice in Indian Country.</p>

<p>National Indian Law Library 1522 Broadway Boulder, CO 80302 (303) 447-8760 <a href="http://www.narf.org/nill/Nillindex.html">http://www.narf.org/nill/Nillindex.html</a></p>	<p>A public law library devoted to federal Indian and tribal law. NILL serves the public by developing and making accessible a unique and valuable collection of Indian law resources and assisting people with their Indian law-related information needs.</p>
<p>National Congress of American Indians 1301 Connecticut Ave NW, Ste. 200 Washington DC 20036 (202) 466-7767 ~ Fax:(202) 466-7797 <a href="http://www.ncai.org/">http://www.ncai.org/</a></p>	<p>The oldest and largest tribal government organization in the U.S. NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. NCAI's mission is to inform the public and the federal government on tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.</p>
<p>National Native American Law Enforcement Association P.O. Box 171 Washington, DC 20044 (800) 948-3863 <a href="mailto:info@nnalea.org">info@nnalea.org</a> <a href="http://www.nnalea.org/">http://www.nnalea.org/</a></p>	<p>A non-profit organization founded in 1993 in Washington, D.C. and incorporated under the state of Delaware. The mission of the NNALEA is to promote and foster mutual cooperation between American Indian Law Enforcement Officers/Agents/Personnel, their agencies, tribes, private industry and public.</p>
<p>National Indian Child Welfare Association 5100 SW Macadam Avenue, Ste. 300 Portland, OR 97239 (503) 222-4044 ~ Fax: (503) 222-4007 <a href="mailto:info@nicwa.org">info@nicwa.org</a> <a href="http://www.nicwa.org/">http://www.nicwa.org/</a></p>	<p>The most comprehensive source of information on American Indian child welfare and works on behalf of Indian children and families. NICWA provides public policy, research, and advocacy; information and training on Indian child welfare; and community development services to a broad national audience including tribal governments and programs, state child welfare agencies, and other organizations, agencies, and professionals interested in the field of Indian child welfare.</p>
<p>Native American Children's Alliance 210 Pratt Ave. Huntsville, AL (256) 327-3749 ~ Fax: (256) 327-3857 <a href="mailto:kbrown@nationalcac.org">kbrown@nationalcac.org</a> <a href="http://www.nativechildalliance.org/">http://www.nativechildalliance.org/</a></p>	<p>An intertribal, cross-mentoring organization whose mission is to inspire and support the development, growth, and maintenance of multi-disciplinary teams and Children's Advocacy Centers in Native American and Alaska Native communities in their efforts to address child abuse.</p>
<p>Native Elder Health Care Resource Center P.O. Box 6508, Mail Stop F800 Aurora, CO 80045-0508 (303) 724-1483 <a href="mailto:Ursula.RunningBear@UCHSC.edu">Ursula.RunningBear@UCHSC.edu</a> <a href="http://www.uchsc.edu/ai/nehcrc/">http://www.uchsc.edu/ai/nehcrc/</a></p>	<p>A national resource center for older American Indians, Alaska Natives and Native Hawaiians, with special emphasis on culturally competent health care.</p>
<p>National American Indian Housing Council 50 F Street, NW Ste. 3300 Washington, DC 20001 (202) 789-1754; (800) 284-9165 Fax: (202) 789-1758 <a href="http://naihc.net/">http://naihc.net/</a></p>	<p>A national membership organization that promotes, supports, and upholds tribes and tribal housing agencies in their efforts to provide culturally-relevant, decent, safe, sanitary, and affordable housing for Native people in American Indian communities and Alaska Native villages.</p>

## B. Government Agencies

[Local US Attorney's Office]	[Local FBI Office]
[County Prosecutor's Office, including Victim Service Offices]	[City/County/State Law Enforcement Agencies]
Office of Tribal Justice Room 2200 Main Justice Building 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 (202) 514-8812 ~ Fax: (202) 514-9078 <a href="http://www.usdoj.gov/otj/">http://www.usdoj.gov/otj/</a>	Bureau of Indian Affairs General BIA information: (202) 208-3710 <a href="http://www.doi.gov/bureau-indian-affairs.html">http://www.doi.gov/bureau-indian-affairs.html</a>
American Indian and Alaska Native (AI/AN) Affairs Desk <a href="http://www.ojp.usdoj.gov/americannative/whats_new.htm">http://www.ojp.usdoj.gov/americannative/whats_new.htm</a> Established by the U.S. D.O.J., Office of Justice Programs, program office gives federally recognized AI/AN tribes access to funding opportunities, training and technical assistance and other relevant information.	Office on Violence Against Women 810 7th Street, NW Washington, DC 20531 (202) 307-6026 ~ Fax: (202) 307-3911 TTY: (202) 307-2277 <a href="http://www.ojp.usdoj.gov/vawo/">http://www.ojp.usdoj.gov/vawo/</a>
Indian Health Service The Reyes Building 801 Thompson Avenue, Ste. 400 Rockville, MD 20852-1627 <a href="http://www.ihs.gov/">http://www.ihs.gov/</a>	HUD Office of Native American Programs U.S. Department of Housing and Urban Develop. 451 7th Street S.W. Washington, DC 20410 (202) 708-1112 TTY: (202) 708-1455 <a href="http://www.hud.gov/offices/pih/ih/codetalk/">http://www.hud.gov/offices/pih/ih/codetalk/</a>
Office for Victims of Crime U.S. Department of Justice 810 Seventh Street NW, Eighth Floor Washington, DC 20531 (202) 307-5983 ~ Fax: (202) 514-6383 <a href="http://www.ovc.gov">www.ovc.gov</a>	OJJDP Tribal Youth Program 810 Seventh Street NW. Washington, DC 20531 (202) 307-5911 <a href="http://ojjdp.ncjrs.org/typ/">http://ojjdp.ncjrs.org/typ/</a>

### C. Publications

Justin B. Richland and Sarah Deer, *Introduction to Tribal Legal Studies* (AltaMira Press 2004).

U.S. Dept. of Justice, *American Indians and Crime*  
<http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>.

Carol Maicki, *Cultural Competency and Native Women: A Guide for Non-Natives Who Advocate for Battered Women and Rape Victims* (Sacred Circle).

Robert Porter, *The Meaning of Indigenous Nation Sovereignty*,

Nantawan Boonprasat Lewis & Marie M. Fortune, eds., *Remembering Conquest: Feminist/Womanist Perspectives on Religion, Colonization, and Sexual Violence* (Haworth Press 1999).

### D. Internet Resources

<p>National Tribal Justice Resource Center          4410 Arapahoe Ave., Ste. 135          Boulder, CO 80303          (303) 245-0786          Toll Free (877) 97NTJRC  <a href="mailto:mail@tribalresourcecenter.org">mail@tribalresourcecenter.org</a>  <a href="http://www.tribalresourcecenter.org">http://www.tribalresourcecenter.org</a></p>	<p>Website dedicated to tribal justice systems, personnel and tribal law. The Resource Center is the central national clearinghouse of information for Native American and Alaska Native tribal courts, providing both technical assistance and resources for the development and enhancement of tribal justice system personnel. Programs and services developed by the Resource Center are offered to all tribal justice system personnel -- whether working with formalized tribal courts or with tradition-based tribal dispute resolution forums.</p>
<p>Tribal Court Clearinghouse          The Tribal Law &amp; Policy Institute          8235 Santa Monica Blvd., Suite 211          West Hollywood, CA 90046          (323) 650-5467 ~ Fax: (323) 650-8149  <a href="http://www.tribal-institute.org/">http://www.tribal-institute.org/</a></p>	<p>A resource for tribal justice systems and individuals involved in improving justice in Indian Country, this clearinghouse provides information on a variety of areas, including federal legislation, tribal court decisions and tribal court funding.</p>

Link to Tribal Codes and Constitutions at:  
<http://www.narf.org/nill/tribaldocs.html#codes>.

## Appendix A

### List of Tribal Coalitions

Virginia	Washington	Alaska Native Women's Coalition	PO Box 70	St. Michael	AK	99659	907-923-3222
Karen	Thompson	Alaska Native Women's Coalition	Box 788	Metlakatla	AK	99926	907-886-6911
Sally	Mercurief	Alaska Native Women's Coalition	PO Box 940	St. George Island	AK	99591	
Shelly	Beltran	Alaska Native Women's Coalition	PO Box 132	Petersburg	AK	99833	
Eleanor	David	Alaska Native Women's Coalition	PO Box 86	Allekaket	AK	99720	907-968-2467
Louisa	Riley	Alaska Native Women's Coalition	Box 818	Barrow	AK	99723	907-852-5163
Lynn	Hootch	Alaska Native Women's Coalition	PO Box 57	Emmonak	AK	99581	907-949-1443
Joyce	Lopez	Arizona Native American Coalition Against Family Violence	Rt. 2, Box 730 B	Laveen	AZ	85339	520-562-6972
Loretta	Blackwater	Arizona Native American Coalition Against Family Violence	138 Sundust Circle	Laveen	AZ	85339	520-550-1060
Pat	Thorussell	Arizona Native American Coalition Against Family Violence	2300 Hipa Drive	Mohave Valley	AZ	86440	760-326-3047
Rebecca	Cuthill	For Our Future	294 Placer Street	Auburn	CA	95603	530-613-4714
Lynda	Smallenberger	For Our Future	PO Box 4044	Ione	CA	95640	209-763-5670
Lisa	Brunner	Community Resource Alliance	928 8th Street, SE	Detroit Lakes	MN	56501	218-844-5762
Billie	Foster	Minnesota Indian Women's Sexual Assault Coalition	PO Box 134	Grand Marais	MN	55604	218-387-1262
Susan	Archambault	Montana Native American Coalition Against Domestic and Sexual Assault	PO Box 213	Browning	MT	59417	
Corrine	Sanchez	Morning Star House, Inc.	RR 5, Box 442-A	Santa Fe	NM	87506	
Cynthia	Chavez	Morning Star House, Inc. Pueblo of San Felipe DV Program	PO Box 4350	San Felipe Pueblo	NM	87001	505-867-9740
Shea	Goodluck-Barnes	Morning Star House, Inc.	708 West Arrington St.	Farmingington	NM	87401	505-325-7578
Deborah	Blossom	Great Basin Women's Coalition Against Violence	PO Box 245	Owyhee	NV	89832	775-757-2061

Amelia	Scissons	Great Basin Women's Coalition Against Violence	PO Box 524	Owyhee	NV	89832	775-757-2061
Pauline	Musgrove	Oklahoma Native American Domestic Violence Coalition, Inc.	3701 SE 15th St. Suite 100	Del City	OK	73115	405-619-9707
Sheree	Hukill	Oklahoma Native American Domestic Violence Coalition, Inc.	108 West 135th St. N.	Skiatook	OK	74070	918-396-4620
Cindy	Widell- Shores	Tribal Nations & Friends Domestic Violence Coalition	PO Box 729	Anadarko	OK	73005	
Wenona	Grant	Tribal Nations & Friends Domestic Violence Coalition	100 White Eagle Dr.	Ponca City	OK	74601	580-762-1277
Marie	Calica	Indian Country Coalition Against Domestic Violence & Sexual Assault	PO Box 791	Warm Springs	OR	97761	541-553-2293
Desiree	Allen-Cruz	Confederated Tribes of the Umatilla Indian Reservation	PO Box 638	Pendleton	OR	97801	541-966-2895
Lucinda	George	Indian Country Coalition Against Domestic Violence & Sexual Assault	1805 Pine St.	North Bend	OR	97549	541-475-6690
Dee	Hardy	Indian Country Coalition Against Domestic Violence & Sexual Assault	4000 N. Mississippi Ave.	Portland	OR	97227	
Marilyn	Crovatin	Sicangu Coalition Against Sexual Violence	PO Box 227	Mission	SD	57555	605-856-2317
Roseanne	Barber	Sicangu Coalition Against Sexual Violence	PO Box 1374	Mission	SD	57555	605-856-5181
		American Indians Against Abuse	PO Box 1617	Hayward	WI	54843	715-634-9980

## Appendix B

### American Indian Population by State

Chart created by American Indian Policy Center.

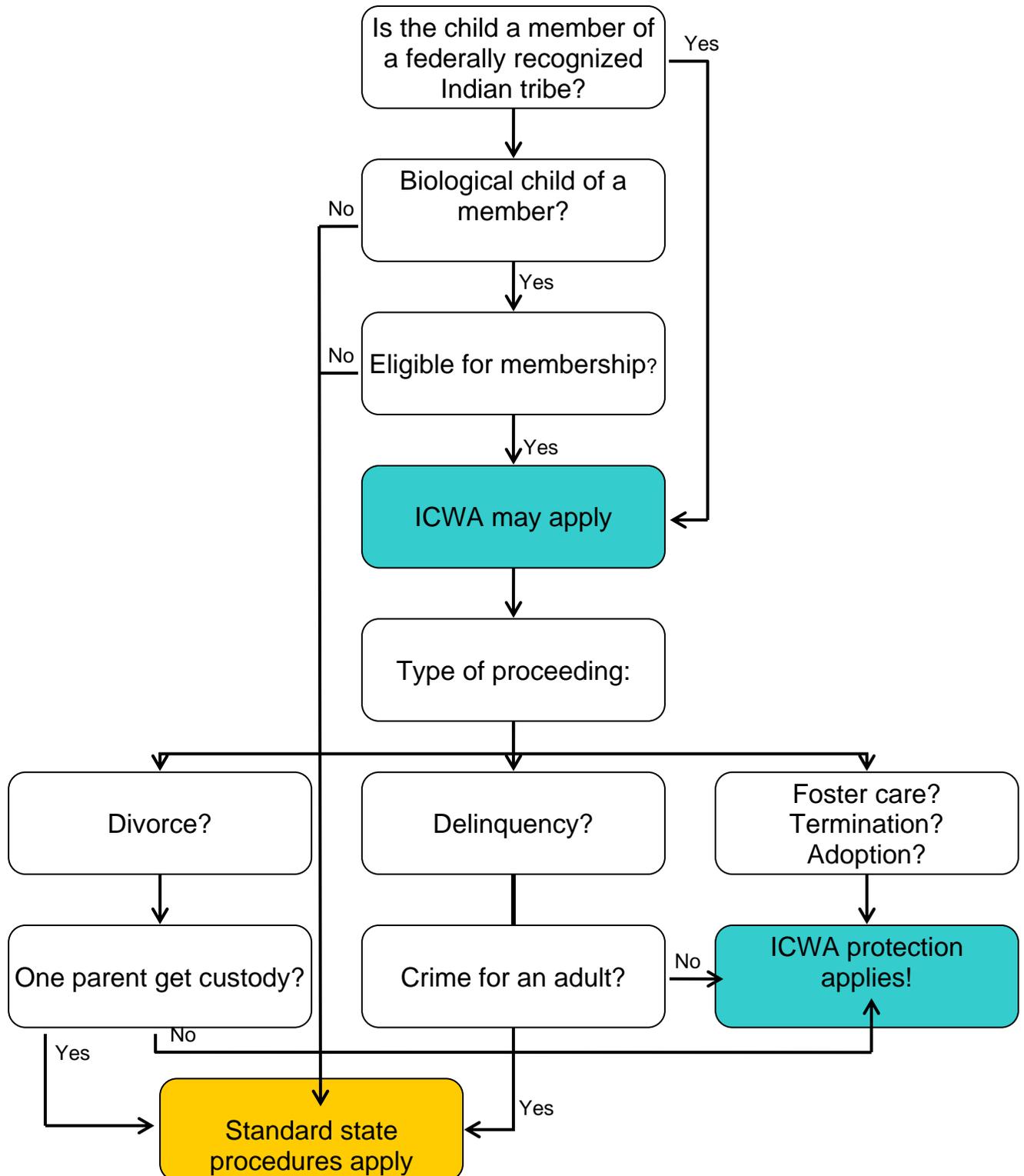
Source: Census 2000/<http://www.census.gov>

**Note:** Population numbers based on American Indian and Alaskan Native Alone category.

State	Population	State	Population	State	Population
Alabama	22,430	Louisiana	25,477	Ohio	24,486
Alaska	98,043	Maine	7,098	Oklahoma	273,230
Arizona	255,879	Maryland	15,423	Oregon	45,211
Arkansas	17,808	Massachusetts	15,015	Pennsylvania	18,348
California	333,346	Michigan	58,479	Rhode Island	5,121
Colorado	44,241	Minnesota	54,967	South Carolina	13,718
Connecticut	9,639	Mississippi	11,652	South Dakota	62,283
Delaware	2,731	Missouri	25,076	Tennessee	15,152
Florida	53,541	Montana	56,068	Texas	118,362
Georgia	21,737	Nebraska	14,896	Utah	29,684
Hawaii	3,535	Nevada	26,420	Vermont	2,420
Idaho	17,645	New Hampshire	2,964	Virginia	21,172
Illinois	31,006	New Jersey	19,492	Washington	93,301
Indiana	15,815	New Mexico	173,483	West Virginia	3,606
Iowa	8,989	New York	82,461	Wisconsin	47,228
Kansas	24,936	North Carolina	99,551	Wyoming	11,133
Kentucky	8,616	North Dakota	31,329	TOTAL U.S.	2,474,243

## Appendix C

### Flowchart – Will ICWA Apply in State Proceeding?



## CHAPTER SEVEN: NON-CITIZEN AND IMMIGRANT VICTIMS

While any victim of sexual violence may be challenged at times by the daunting task of negotiating the civil and criminal justice systems, non-citizen or immigrant victims must confront an additional array of complex challenges and considerations. Access to an interpreter, immigration consequences, fear of deportation and family separation, and mandated participation in a criminal justice proceeding are just a few of the unique issues that may arise for this class of victims.

For this reason, any lawyer or advocate who serves non-citizen or immigrant victims must be keenly aware of and sensitive to the fact that there *may be* immigration consequences for any non-citizen victim based on the choices she makes. While any victim must consider the personal implications of seeking justice in our courts, for immigrant victims, pursuing civil remedies, reporting a crime, and participating in a criminal prosecution may require thoughtful consideration and special courage.

Immigration law is complex and constantly evolving. A victim or advocate may not be able to identify or fully understand the exact immigration consequences implicated; however, it is imperative that the *possibility* of immigration consequences is explored. Therefore, conferring with an immigration expert is highly recommended.

Rather than attempting to cover the broad and complicated range of issues in this guide, CLPPS collaborated with Legal Momentum (formerly the National Organization of Women, Legal Defense and Education Fund) to share materials, resources and expertise. Legal Momentum's Immigrant Women Program (IWP) strives to protect and expand the rights of immigrant women and their children. IWP is currently in the process of creating *Immigrant Victims of Sexual Assault*, a comprehensive guide to rights and remedies of immigrant sexual violence victims.

To obtain a copy of this guide or for information, contact the Legal Momentum Immigrant Women Program at:

1522 K St., NW, Suite 550  
Washington, DC 20005  
Tel: (202) 326-0040  
Fax: (202) 589-0511  
Email: [iwp@legalmomentum.org](mailto:iwp@legalmomentum.org)  
[www.legalmomentum.org](http://www.legalmomentum.org)

# APPENDIX

A. Sexual Assault Protective Orders Chart	<b>168</b>
B. Sample Housing Rights Pamphlet (LASO)	<b>184</b>

## Appendix A

### *Sexual Assault Protective Orders Chart*

TO: Jessica Mindlin  
National Crime Victim Law Institute  
FROM: Jodee LeRoux  
DATE: August 30, 2004  
RE: Protection Order Statutes Available to Victims of Sexual Assault

As of July 2004, these are the states that have protection orders available for victims of sexual assault regardless of their relationship to the assailant. The language used in this chart is paraphrased from the language in the actual statutes. Where there are blank entries in the chart, the information is not addressed in the applicable statute.

<b>COLORADO</b>	
<b>Statute Title</b>	Civil Protection Orders
<b>Citation</b>	Colo. Rev. Stat. Ann. §13-14-102 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Emergency</li> <li>• Temporary</li> <li>• Full</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• An order may be issued to prevent any of the following: <ul style="list-style-type: none"> <li>○ Assaults and threatened bodily harm;</li> <li>○ Domestic Abuse</li> <li>○ Emotional abuse of the elderly or of an at-risk adult; or</li> <li>○ Stalking</li> </ul> </li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Any municipal court of record (if authorized by the governing body), any county court, any district court</li> <li>• Venue is proper in any county where the acts that are the subject of the motion or complaint occur, in any county where one of the parties resides, or in any county where one of the parties is employed.</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• Verbal Emergency Order: <ul style="list-style-type: none"> <li>○ May be issued if Judge finds that an imminent danger in close proximity exists to the life or health of the person in the reasonably foreseeable future.</li> </ul> </li> <li>• Temporary Order: <ul style="list-style-type: none"> <li>○ File a duly verified complaint, alleging that the defendant has committed acts that would constitute grounds for order</li> <li>○ May be issue ex parte</li> </ul> </li> <li>• Full Order: <ul style="list-style-type: none"> <li>○ On the hearing date set when the temporary order was issued, judge can make the decision to make that order permanent or modify the temporary order's terms and make that permanent.</li> </ul> </li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Emergency</li> </ul>

	<ul style="list-style-type: none"> <li>○ Shall expire not later than the close of judicial business on the next day of judicial business following the day of issue unless otherwise continued by the court.</li> <li>● Temporary <ul style="list-style-type: none"> <li>○ Not longer than 14 days after issuance of citation</li> </ul> </li> <li>● Full <ul style="list-style-type: none"> <li>○ Permanent</li> </ul> </li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>● Protected party may apply at any time to the court for modification or dismissal of the order</li> <li>● Restrained party may also apply but if a permanent protection order has been issued or if a motion for modification/dismissal has been filed by the restrained party, not matter how it was decided, no motion may be filed by the restrained party within four years after issuance or disposition of the prior motion.</li> </ul>
<b>Scope of Protection</b>	●
<b>Appeal Process</b>	●
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>● Contempt of Court or</li> <li>● Prosecution for a violation of a civil protection order pursuant to 18-6-803.5</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>● If any law enforcement agency with jurisdiction to enforce an Emergency Protection Order has cause to believe that it has been violated, it SHALL enforce the order.</li> </ul>

<b>FLORIDA</b>	
<b>Statute Title</b>	Action by Victim of...Sexual Violence for Protective Injunction
<b>Citation</b>	Fla. Stat. Ann. §784.046 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>● Temporary Injunction <ul style="list-style-type: none"> <li>○ Ex parte hearing, pending a full hearing</li> </ul> </li> <li>● Permanent Injunction</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>● Victim of sexual violence or the parent or legal guardian of a minor child who is living at home who is the victim of sexual violence if: <ul style="list-style-type: none"> <li>○ (1) the person has reported the sexual violence to a law enforcement agency and is cooperating in any criminal proceeding against the respondent, regardless of whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney; or</li> <li>○ (2) the respondent who committed the sexual violence was sentenced to a term of imprisonment in state prison for the sexual violence and the</li> </ul> </li> </ul>

	respondent's term of imprisonment has expired or is due to expire within 90 days following the date the petition is filed.
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Circuit Court</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• Submit a sworn petition that alleges the incidents of repeat violence, sexual violence, or dating violence that includes the specific facts and circumstances that form the basis upon which relief is sought.</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Temporary <ul style="list-style-type: none"> <li>○ Not more than 15 days</li> </ul> </li> <li>• Permanent <ul style="list-style-type: none"> <li>○ Permanent</li> </ul> </li> </ul>
<b>Modification/Termination</b>	Either party may move for modification or dismissal.
<b>Scope of Protection</b>	Any relief the court deems proper, including an injunction enjoining the respondent from committing any acts of violence or any other relief necessary to protect the petitioner.
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Civil or Criminal Contempt Proceeding</li> <li>• Monetary Assessment</li> </ul>
<b>Misc.</b>	

<b>ILLINOIS</b>	
<b>Statute Title</b>	Civil No Contact Order
<b>Citation</b>	22 Ill. Comp. Stat. Ann. 101 through 302 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Emergency</li> <li>• Temporary</li> <li>• Plenary</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• Any victim of non-consensual sexual conduct or non-consensual sexual penetration, including a single incident of non-consensual sexual conduct or non-consensual sexual penetration; or</li> <li>• By a person on behalf of a minor child or an adult who is a victim of these things but because of age, health or inaccessibility cannot file the petition.</li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Any civil court</li> <li>• File in any county where <ul style="list-style-type: none"> <li>○ 1. the petitioner resides</li> <li>○ 2. the respondent resides OR</li> <li>○ 3. the alleged non-consensual sexual conduct or non-consensual sexual penetration occurred.</li> </ul> </li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a petition for a civil no contact order in any civil court, unless specific courts are designated by local rule or order</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Emergency orders will last for at least 14 days but not</li> </ul>

	<p>more than 21</p> <ul style="list-style-type: none"> <li>• Plenary orders shall be effective for a set period of time not to exceed two years <ul style="list-style-type: none"> <li>○ May be extended one or more times, as required</li> </ul> </li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>• Upon motion by petitioner, court may modify an emergency or plenary civil no contact order by altering the remedy</li> <li>• After 30 days following entry of a plenary no contact order, a court may modify that order only when a change in the applicable law or facts since that order was entered warrants a modification of its terms.</li> <li>• Upon two days notice to the petitioner, a respondent subject to an emergency order may appear and petition the court to rehear the original or amended petition.</li> </ul>
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• Order the respondent to stay away from the petitioner; or</li> <li>• Other injunctive relief necessary or appropriate</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• NO monetary damages</li> <li>• A knowing violation is a Class A misdemeanor</li> <li>• A second or subsequent violation is a Class 4 felony</li> </ul>
<b>Misc.</b>	

<b>MONTANA</b>	
<b>Statute Title</b>	Partner and Family Member Assault, Sexual Assault, and Stalking Safety and Protection of Victims
<b>Citation</b>	Mont. Code Ann. §40-15 (2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Temporary <ul style="list-style-type: none"> <li>○ May be issued ex parte</li> </ul> </li> <li>• Full</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• A victim of stalking, incest, sexual assault, or sexual intercourse without consent.</li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• District courts, justices' courts, municipal courts, and city courts have concurrent jurisdiction to hear and issue orders</li> <li>• Action may be filed in the county where the petitioner currently or temporarily resides, the county where the respondent resides or the county where the abuse occurred</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a sworn petition that states that the petitioner is in reasonable apprehension of bodily injury or is a victim of one of the offenses listed in 40-15-102</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Temporary orders can last for up to 20 days</li> <li>• Hearing for a full order will be held within 20 days of issuance of temporary order</li> </ul>

	<ul style="list-style-type: none"> <li>• A written order of protection may continue for an appropriate time period as directed by the court or be made permanent</li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>• Order may be terminated upon the petitioner's request that the order be dismissed</li> </ul>
<b>Scope of Protection</b>	<p>Order may include any or all of the following:</p> <ul style="list-style-type: none"> <li>• prohibiting the respondent from threatening to commit or committing acts of violence against the petitioner and any designated family member;</li> <li>• prohibiting the respondent from harassing, annoying, disturbing the peace of, telephoning, contacting, or otherwise communicating, directly or indirectly, with the petitioner, any named family member, any other victim of this offense, or a witness to the offense;</li> <li>• directing the respondent to stay 1,500 feet or other appropriate distance away from petitioner, the petitioner's residence, the school or place of employment of the petitioner, or any other specified place frequented by the petitioner and by any other designated family or household member;</li> <li>• prohibiting the respondent from possessing or using the firearm used in the assault</li> <li>• directing the respondent to complete violence counseling</li> <li>• directing other relief considered necessary to provide for the safety and welfare of the petitioner or other designated family member</li> </ul>
<b>Appeal Process</b>	<ul style="list-style-type: none"> <li>• An order issued by a justice's court, municipal court, or city court is immediately reviewable by the district judge upon the filing of a notice of appeal. The district judge may affirm, dissolve, or modify an order of a justice's court, municipal court, or city court.</li> </ul>
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Violation is a criminal offense under 45-5-220 or 45-5-626 and can carry penalties of up to 10,000\$ and up to a 5 year jail sentence.</li> </ul>
<b>Misc.</b>	

<b>MAINE</b>	
<b>Statute Title</b>	Protection from Harassment
<b>Citation</b>	5 Me. Rev. Stat. Ann. §§4651-4659 (2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Emergency</li> <li>• Temporary <ul style="list-style-type: none"> <li>○ May be issued ex parte</li> </ul> </li> <li>• Full</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• Any person who has been a victim of harassment</li> </ul>

<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Proceedings must be filed, heard and determined in the District Court of the division in which either the plaintiff or the defendant resides.</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a sworn petition in an appropriate court alleging harassment</li> <li>• Within 21 days of filing, a hearing shall be held at which the plaintiff will prove the allegation of harassment by a preponderance of the evidence.</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Must be for a fixed period not to exceed one year</li> <li>• At the end of the fixed period, the Court may extend an order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from harassment.</li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>• Temporary Orders – on 2 days notice to the plaintiff, a person who is subject to an order may appear and move the dissolution of or modification of the order. The plaintiff shall have the burden of justifying any finding in the ex parte order which the defendant has challenged by affidavit.</li> <li>• Upon motion of either party, the Court may modify the order from time to time as circumstances require.</li> </ul>
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• After finding that the respondent has committed the alleged harassment, the court may grant any protection order to bring about a cessation of harassment.</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Monetary compensation may be a part of the protection order granted by the court. <ul style="list-style-type: none"> <li>○ Compensatory losses are limited to loss of earnings or support; reasonable expenses incurred for safety protection; reasonable expenses incurred for personal injuries or property damage; and reasonable moving expenses.</li> <li>○ Reasonable costs and attorneys' fees</li> </ul> </li> <li>• Class D Crime</li> <li>• Violation must be treated as contempt and punished in accordance with the law.</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• “Harassment” includes a single act or course of conduct constituting a violation of section 4681; Title 17, section 2931; or Title 17-A, sections 201, 202, 203, 204, 207, 208, 209, 210, 210-A, 211, 253, 301, 302, 303, 506-A, 511, 556, 802, 805 or 806</li> <li>• An arrest for violation of a restraining order may be made without warrant upon probable cause whether or not the violation is committed in the presence of the law enforcement officer.</li> </ul>

<b>MARYLAND</b>	
<b>Statute Title</b>	Peace Orders
<b>Citation</b>	Md. Cts. and Jud. P. Code Ann. §§3-1501 – 3-1509 (2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Interim peace orders</li> <li>• Temporary peace orders <ul style="list-style-type: none"> <li>○ may be issued ex parte</li> </ul> </li> <li>• Final peace order</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• Any person that has been a victim of one of the acts listed in the “how to obtain” section</li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• District Court</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File with the court a petition that alleges the commission of any of the following acts against the petitioner by the respondent, if the act occurred within 30 days before the filing of the petition: <ul style="list-style-type: none"> <li>○ an act that causes serious bodily harm</li> <li>○ an act that places the petitioner in fear of imminent serious bodily harm</li> <li>○ assault in any degree</li> <li>○ rape or sexual offense under §§3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree</li> <li>○ false imprisonment</li> <li>○ harassment under §3-803</li> <li>○ stalking under §3-802</li> <li>○ trespass or</li> <li>○ malicious destruction of property</li> </ul> </li> <li>• Petition shall be under oath</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Interim peace order shall be effective until the earlier of: <ul style="list-style-type: none"> <li>○ the temporary peace order hearing or</li> <li>○ the end of the second business day the Office of the Clerk of the District Court is open following the issuance of the interim peace order</li> </ul> </li> <li>• Temporary Peace Order: <ul style="list-style-type: none"> <li>○ shall be effective for not more than 7 days after service of the order</li> <li>○ Judge may extend as needed, but not more than 30 days, to effectuate service of the order</li> </ul> </li> <li>• Final Peace Order <ul style="list-style-type: none"> <li>○ Not to exceed 6 months</li> </ul> </li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>• May be modified or rescinded during the term of the peace order after: <ul style="list-style-type: none"> <li>○ Giving notice to the petitioner and the respondent, AND</li> <li>○ A hearing</li> </ul> </li> </ul>

<b>Scope of Protection</b>	<p>May include any or all of the following:</p> <ul style="list-style-type: none"> <li>• Order the respondent to refrain from committing or threatening to commit an act specified in §3-1503(a) against the petitioner;</li> <li>• Order the respondent to refrain from contacting, attempting to contact, or harassing the petitioner;</li> <li>• Order the respondent to remain away from the place of employment, school, or temporary residence of the petitioner;</li> <li>• Direct the respondent or petitioner to participate in professionally supervised counseling or, if the parties are amenable, mediation; and</li> <li>• Order either party to pay filing fees and costs of a proceeding under this subtitle</li> </ul>
<b>Appeal Process</b>	<ul style="list-style-type: none"> <li>• If a District Court grants or denies the relief, a respondent or a petitioner may appeal to the circuit court for the county where the district court is located</li> <li>• Appeals shall be heard de novo</li> </ul>
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Misdemeanor</li> <li>• Fine not exceeding 1,000\$ or imprisonment not exceeding 90 days or both</li> <li>• Contempt</li> <li>• A law enforcement officer SHALL arrest with or without a warrant and take into custody an individual who the officer has probable cause to believe is in violation of a peace order.</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• MUST PETITION WITHIN 30 DAYS OF THE INCIDENT</li> </ul>

<b>MINNESOTA</b>	
<b>Statute Title</b>	Harassment; restraining order
<b>Citation</b>	Minn. Stat. Ann. §609.748 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Temporary Restraining Order <ul style="list-style-type: none"> <li>○ May be issued ex parte</li> </ul> </li> <li>• Restraining Order</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• A person who is a victim of harassment may seek a restraining order from the district court <ul style="list-style-type: none"> <li>○ “Harassment” includes: a single incident of physical or sexual assault or repeated incidents of intrusive or unwanted acts, words or gestures that have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target</li> </ul> </li> </ul>

<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• District Court</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a petition for relief accompanied by an affidavit made under oath stating the facts and circumstances from which relief is sought.</li> <li>• If the petitioner doesn't request a hearing, the respondent may request a hearing and that notice of the hearing date and time will be provided to the petitioner at least five days prior to the hearing</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Temporary Restraining Order <ul style="list-style-type: none"> <li>○ Remains in effect until a hearing is held on the issuance of a permanent restraining order</li> </ul> </li> <li>• Restraining Order <ul style="list-style-type: none"> <li>○ Fixed period of time not to exceed two years</li> </ul> </li> </ul>
<b>Modification/Termination</b>	
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• Order the respondent to cease or avoid the harassment of another person or to have no contact with that person</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Violation of the order is a misdemeanor</li> <li>• Contempt of Court</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• Service by publication: <ul style="list-style-type: none"> <li>○ The order for a hearing and a temporary order issued may be served on the respondent by means of a one-week published notice if: <ul style="list-style-type: none"> <li>▪ the petitioner files an affidavit with the court stating that an attempt at personal service made by a sheriff was unsuccessful because the respondent is avoiding service by concealment or otherwise; and</li> <li>▪ a copy of the petition and order for hearing and any temporary restraining order has been mailed to the respondent or the respondent's residence is not known to the petitioner</li> </ul> </li> </ul> </li> </ul>

<b>OKLAHOMA</b>	
<b>Statute Title</b>	Protection from Domestic Abuse Act
<b>Citation</b>	Okla. State. Ann. tit. 22, §60 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Emergency temporary order of protection</li> <li>• Full Protective Order</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• Victim of domestic abuse</li> <li>• Victim of stalking</li> <li>• Victim of harassment</li> <li>• Victim of rape</li> </ul>

<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• District court in the county in which the victim resides, the county in which the defendant resides, or the county in which the domestic violence occurred</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a petition</li> <li>• Within 20 days of the filing, the court shall schedule a full hearing on the petition if the court finds sufficient grounds within the scope of this statute stated in the petition to hold such a hearing.</li> <li>• A petition for a protective order will automatically renew every twenty days until the defendant is served.</li> <li>• A petition for a protective order shall not expire and must be dismissed by court order.</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Emergency Ex Parte Order <ul style="list-style-type: none"> <li>○ shall be in effect until after the full hearing is conducted</li> <li>○ If the defendant, after being served, doesn't appear at the hearing, this order shall be in effect until the defendant is served with the full order</li> </ul> </li> <li>• Full Protective Order <ul style="list-style-type: none"> <li>○ a fixed period not to exceed a period of three years unless extended, modified, vacated or rescinded upon motion by either party or if the court approves any consent agreement entered into by the plaintiff and defendant</li> </ul> </li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>• Upon a filing of a motion by either party to modify, extend, or vacate a protective order, a hearing shall be scheduled and notice given to the parties. At the hearing, the issuing court shall take such action as is necessary under the circumstances</li> </ul>
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• The court may impose any terms and conditions in the protective order that the court reasonably believes are necessary to bring about the cessation of domestic abuse against the victim or stalking or harassment of the victim or the victim's immediate family and may order the defendant to obtain domestic abuse counseling or treatment in a program certified by the Department of Mental Health and Substance Abuse Services at the defendant's expense</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• First Violation - Misdemeanor punishable by a fine of not more than \$1000 or by a term of imprisonment in the county jail of not more than one year or both such fine and imprisonment</li> <li>• Second and subsequent violations – misdemeanor punishable by a term of imprisonment in the county jail of not less than ten days and not more than one year. In addition, the person may be punished by a fine of not less</li> </ul>

	<p>than \$1000 and not more than \$5000</p> <ul style="list-style-type: none"> <li>• Any person who violates an order and without justifiable excuse causes physical injury or physical impairment to the plaintiff or to any other person named in said protection order shall, upon conviction, be guilty of a misdemeanor and shall be punished by a term of imprisonment in the county jail for not less than twenty days nor more than one year. In addition to the term of imprisonment, the person may be punished by a fine not to exceed \$5000. <ul style="list-style-type: none"> <li>○ In determining the term of imprisonment, the jury or sentencing judge shall consider the degree of physical injury or physical impairment to the victim.</li> </ul> </li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• If the court makes specific findings that a petition for a protective order has been filed frivolously and no victim exists, the court may assess attorney fees and court costs against the plaintiff</li> <li>• 22 Okl. St. §40.2 (2004) – A victim protection order for any victim of rape or forcible sodomy shall be substantially similar to a protective order in domestic abuse cases pursuant to Section 60 et seq. of this title. No peace officer shall discourage a victim of rape or forcible sodomy from pressing charges against any assailant of the victim.</li> </ul>

<b>TEXAS</b>	
<b>Statute Title</b>	Protective Order for Victim of Sexual Assault
<b>Citation</b>	Tex. Crim. P. Code Ann. §7A (2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Temporary Order <ul style="list-style-type: none"> <li>○ may be issued ex parte</li> </ul> </li> <li>• Restraining order</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• A person who is the victim sexual assault (22.011) or aggravated sexual assault (22.021) may file an application for a protective order under this chapter without regard to the relationship between the applicant and the alleged offender.</li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• District court, juvenile court having the jurisdiction of a district court, statutory county court, or constitutional county court</li> <li>• The county in which the applicant resides or the county in which the alleged offender resides</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File an application for a protective order</li> </ul>
<b>Length</b>	

<b>Modification/Termination</b>	
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• Court may order the alleged offender to take action as specified by the court that the court determines is necessary or appropriate to prevent or reduce the likelihood of future harm to the applicant or a member of the applicant’s family or household; or</li> <li>• Court may prohibit the alleged offender from: <ul style="list-style-type: none"> <li>○ communicating directly or indirectly with the applicant or any member of the applicant’s family or household in a threatening or harassing manner;</li> <li>○ going to or near the residence, place of employment or business, or child care facility or school of the applicant or any member of the applicant’s family or household;</li> <li>○ engaging in conduct directed specifically toward the applicant or any member of the applicant’s family or household, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person; and</li> <li>○ possessing a firearm, unless the alleged offender is a peace officer</li> </ul> </li> <li>• Court may suspend a license to carry a concealed handgun</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Contempt of court with a fine of as much as \$500 or by confinement in jail for as long as 6 months, or both</li> <li>• Fine up to \$4,000 or by confinement in jail for as long as one year or both</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• To the extent applicable, except as otherwise provided by this chapter, Title 4, Family Code, applies to a protective order issued under this chapter.</li> </ul>

<b>CALIFORNIA</b>	
<b>Statute Title</b>	Injunctions to Prevent Harassment
<b>Citation</b>	Cal. Civ. P. Code Ann. §527.6 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Temporary Restraining Order <ul style="list-style-type: none"> <li>○ May be issued ex parte</li> </ul> </li> <li>• Injunction</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• A person who has suffered harassment <ul style="list-style-type: none"> <li>○ “Harassment” is “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person</li> </ul> </li> </ul>

	that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.” <ul style="list-style-type: none"> <li>▪ “Unlawful violence” is any assault or battery, or stalking</li> </ul>
<b>Venue/Jurisdiction</b>	
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a petition that alleges harassment of the plaintiff by the defendant</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Temporary Restraining Order <ul style="list-style-type: none"> <li>○ Not to exceed 15 days unless the court extends that time for hearing and then not to exceed 22 days</li> </ul> </li> <li>• Injunction <ul style="list-style-type: none"> <li>○ Not more than three years</li> <li>○ At any time within the three months before expiration, the plaintiff may apply for a renewal of the injunction by filing a new petition</li> </ul> </li> </ul>
<b>Modification/Termination</b>	
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• Injunction will prohibit the harassment</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Punishable pursuant to Section 273.6 of the Penal Code</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• The prevailing party may be awarded court costs and attorney’s fees if any</li> </ul>

<b>SOUTH DAKOTA</b>	
<b>Statute Title</b>	Petition for Protection Orders
<b>Citation</b>	S.D. Codified Laws §§22-19A-8 – 22-19A-17
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Temporary Protection Order <ul style="list-style-type: none"> <li>○ May be issued ex parte</li> </ul> </li> <li>• Restraining Order</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• Petition can be filed against any person who violates §22-19A-1 or against any other person against whom stalking or physical injury is alleged</li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• File in circuit court</li> <li>• Venue lies where any party to the proceedings resides</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a petition alleging the existence of stalking or physical injury accompanied by an affidavit made under oath stating the specific facts and circumstances of the stalking or physical injury</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Temporary Orders <ul style="list-style-type: none"> <li>○ 30 days</li> </ul> </li> <li>• Restraining Orders <ul style="list-style-type: none"> <li>○ For a fixed period of time not to exceed three years</li> </ul> </li> </ul>
<b>Modification/Termination</b>	<ul style="list-style-type: none"> <li>• Upon application, notice to all parties, and hearing, the</li> </ul>

	court may modify the terms of an existing order for protection
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• Restrain any party from committing acts of stalking or physical injury as a result of an assault or a crime of violence as defined in subdivision 22-1-2-9</li> <li>• Order other relief as the court deems necessary for the protection of the person seeking the protective order, including orders or directives to law enforcement officials</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Class A misdemeanor</li> <li>• If the violation constitutes an assault pursuant to §22-18-1.1, the violation is a Class 6 felony</li> <li>• If person to be restrained has been convicted of, or entered a plea of guilty to, two or more violations of this section, the factual basis for which occurred after the date of the second conviction, and occurred within five years of committing the current offense, the person to be restrained is guilty of a Class 6 felony for any third or subsequent offense.</li> </ul>
<b>Misc.</b>	

<b>WISCONSIN</b>	
<b>Statute Title</b>	Harassment Restraining Orders and Injunctions
<b>Citation</b>	Wis. Stat. Ann. §813.125 (West 2004)
<b>Type of Orders Available</b>	<ul style="list-style-type: none"> <li>• Temporary Restraining Order</li> <li>• Injunction</li> </ul>
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• A victim of harassment may file a petition <ul style="list-style-type: none"> <li>○ “Harassment” includes striking, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same</li> </ul> </li> </ul>
<b>Venue/Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Circuit Court</li> </ul>
<b>How to Obtain</b>	<ul style="list-style-type: none"> <li>• File a petition alleging that the respondent has violated §947.013 (Harassment)</li> </ul>
<b>Length</b>	<ul style="list-style-type: none"> <li>• Temporary Restraining Order <ul style="list-style-type: none"> <li>○ in effect until a hearing is held on issuance of an injunction – hearing shall be held within 7 days of filing</li> </ul> </li> <li>• Injunction <ul style="list-style-type: none"> <li>○ Not more than 2 years</li> </ul> </li> </ul>
<b>Modification/Termination</b>	
<b>Scope of Protection</b>	<ul style="list-style-type: none"> <li>• Cease or avoid the harassment of another person</li> <li>• Avoid the petitioner’s residence or any premises</li> </ul>

	<p>temporarily occupied by the petitioner OR</p> <ul style="list-style-type: none"> <li>• Both or any combination of the above remedies</li> </ul>
<b>Appeal Process</b>	
<b>Sanctions/Penalties</b>	<ul style="list-style-type: none"> <li>• Fine of not more than \$1,000 or</li> <li>• Imprisonment for not more than 90 days or</li> <li>• Both</li> </ul>
<b>Misc.</b>	<ul style="list-style-type: none"> <li>• If a judge or circuit court commissioner issues an injunction and the judge or commissioner determines, based on clear and convincing evidence presented at the hearing on the issuance of the injunction, that the respondent may use a firearm to cause physical harm to another or to endanger public safety, the judge of circuit court commissioner may prohibit that respondent from possessing a firearm</li> </ul>

## **Appendix B**

### **Sample Housing Rights Pamphlet (LASO)**

## Appendix B

### BREAKING YOUR LEASE EARLY

If you (or a child living with you) have been the victim of domestic violence, sexual assault or stalking within the past 90 days, you have the right to be released from your lease or rental agreement with a 14-day notice, so you can move quickly.

#### How to end your lease with a 14-day notice:

Make a request to your landlord in writing. See [Sample Form 1](#).

Provide verification of the abuse by giving your landlord one of the following:  
a copy of a court protective order (Restraining or Stalking Order or other court order);  
a copy of a police report showing that you or a child living with you has been the victim of domestic violence, sexual assault or stalking;

a statement from a law enforcement officer stating you have reported an act of domestic violence, sexual assault or stalking. See [Sample Form 3](#).

You will not be charged for terminating your lease early (like a lease buy-out fee).

If you are the only person on the lease:

You can end your tenancy and you are responsible for rent only up to the termination date.

If there are other people on the lease:

You will not be responsible for rent or damage occurring past your release date.

Remaining tenants will continue to be responsible for rent.

### HOUSING DISCRIMINATION AGAINST ABUSED WOMEN

Sex discrimination in housing is illegal. When a landlord learns that a tenant is a victim of domestic or sexual violence, the landlord sometimes reacts by discriminating against the victim. In some cases this type of action against domestic or sexual violence victims is illegal sex discrimination.

Some examples of landlord actions that might be sex discrimination:

Your abusive partner lives with you, and your landlord evicts you or takes away your housing voucher because of the abuser's actions.

Your landlord learns that you are in an abusive relationship, makes comments about women who have been abused and then evicts you, or denies your rental application.

Your landlord learns that you are in an abusive relationship or that you have experienced sexual assault, and then treats you differently from male tenants by imposing different rules on you as a condition of renting.

A landlord learns from a prior landlord or review of public records that you were in an abusive relationship or filed for a protective order, and then denies your application because of this history.

**If any of these things have happened to you or you think your landlord has otherwise discriminated against you, you may have rights under state and federal laws. You may wish to contact an attorney to investigate your possible rights.**

### CHANGING YOUR LOCKS FOR YOUR SAFETY

If you (or a child living with you) have been the victim of domestic violence, sexual assault or stalking, you have the right to have your locks changed promptly.

Your landlord must promptly change your locks or give you permission to change your locks if you:

Notify your landlord that you (or a child living with you) are a victim of domestic violence, sexual assault or stalking and that you want your locks changed.

This notice can be verbal, but written notice is always best. See [Sample Form 2](#).

You do not need to provide proof that the violence occurred.

If your landlord refuses or takes too long to change your locks:

You can change the locks without the landlord's permission.

You must provide a copy of the new key to the landlord.

**Who pays?**

You are responsible for the cost of changing your locks.

The landlord should not insist you pay for the lock change before changing the locks.

**Note:** If the abuser is on the rental agreement with you and you want to change the locks to keep the abuser out:

You must have a FAPA restraining order that specifically orders the abuser to move out of the unit.

The landlord should not allow the abuser into the unit without your permission unless court ordered.

The abuser is jointly responsible for the rent until the date the abuser was excluded from the unit.

# HOUSING RIGHTS FOR DOMESTIC VIOLENCE, SEXUAL ASSAULT, and STALKING SURVIVORS

**New changes in Oregon housing law provide protections if you are a domestic violence, sexual assault or stalking survivor.**

You may end your lease early to move quickly; You may have your locks changed for your safety; It may be discrimination if your landlord treats you differently because you have been a victim of domestic violence, sexual assault or stalking (for example: not renting to you or evicting you because you are abused)

**RESOURCES:**

**National Domestic Violence Hotline**  
1-800-799-7233

**National Sexual Assault Hotline**  
1-800-656-HOPE

**Portland Women's Crisis Line**  
for statewide help, and referral  
to a local crisis program  
1-800-235-5333

Prepared by **Legal Aid Services of Oregon** and the **Oregon Law Center**, February, 2004. If you need copies of this flyer or you would like more information about the law, please contact your local legal aid office or go to our website at [www.oregonlawhelp.org](http://www.oregonlawhelp.org). This pamphlet is for general education use only. It is not a substitute for the advice of an attorney. If you have specific legal questions, you should contact an attorney.

## Appendix B

### Sample Form 3. Law Enforcement Officer Verification (This is one form of verification to the landlord.)

LAW ENFORCEMENT OFFICER VERIFICATION FORM

Name of Law Enforcement Officer Name of Tenant

STATEMENT BY TENANT:

I, \_\_\_\_\_, (Name of Tenant) do hereby state as follows:

I (or a minor member of my household or family) have been a victim of domestic violence, sexual assault, or stalking. The most recent incident(s) that I rely on in support of this statement occurred on the following dates:

I make this statement in support of my request to be released from my rental agreement.

Signature of Tenant

Date

STATEMENT BY LAW ENFORCEMENT OFFICER:

I, \_\_\_\_\_ (name of law enforcement officer), do hereby verify as follows:

I am a law enforcement officer.

My name, business address, and business telephone are as follows:

I verify that the person whose signature is listed above has informed me that the person (or minor member of the person's household) is a victim of domestic violence, sexual assault, or stalking based on incident(s) that occurred on the dates listed above.

I reasonably believe the statement of the person above that the person (or minor member of the person's household) is a victim of domestic violence, sexual assault, or stalking. I understand that the person who made this statement may use this document as a basis for gaining release from a rental agreement with the person's landlord.

Signature of Law Enforcement Officer

Date

### Sample Form 1. Notice to Landlord to Terminate Lease With a 14-day Notice.

Dear (landlord's name): (Date)

I am a tenant at (your address). I (or a minor child who lives with me) am a victim of domestic violence, sexual assault or stalking within the past 90 days. Pursuant to new changes to the Oregon Residential and Landlord Tenant Act, this is my 14-day notice that I will end my rental agreement on \_\_\_\_\_ (enter a date 14 days from today and add three days if mailing).

I have enclosed (choose one) a copy of my protection order, a copy of a police report showing that I (or a minor child who lives with me) was the victim of an act of domestic violence, sexual assault or stalking, or, a statement from a law enforcement officer stating that I have reported an act of domestic violence, sexual assault or stalking.

Sincerely,  
(Your name and address)

### Sample Form 2. Request to Change Locks for Safety.

Dear (landlord's name) (Date)

Pursuant to new changes to the Oregon Residential and Landlord Tenant Act, I write to request that you promptly change the locks to my unit. I am a victim of domestic violence, sexual assault or stalking.

(If you are the only tenant on the lease you do not need to provide verification of the violence.)

(If the abuser is on the lease) Enclosed please find a copy of the restraining order that orders the abuser out of the dwelling unit.

Thank you for your assistance.

Sincerely,  
(Your name and address)