

SEXUAL ASSAULT

LEGAL ADVOCACY MANUAL

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PREFACE

A statewide workgroup collaborated to produce the first edition of this manual, including representatives from the following organizations: the Texas Association Against Sexual Assault, the Institute on Domestic Violence & Sexual Assault at UT Austin, Texas Advocacy Project, Texas Municipal Police Association, Texas Office of the Attorney General, and Texas RioGrande Legal Aid. This edition, updated to reflect legislation enacted by the 82nd and 83rd Legislatures, is a product of the same collaboration.

The purpose of the manual is to assist sexual assault legal advocates in rape crisis centers, as well as other service providers who could benefit from an overview of the legal systems and remedies that affect survivors of sexual assault. Rape crisis centers have varying capacities for providing legal advocacy to survivors. Very few centers employ practicing attorneys. Some centers have trained, designated legal advocates, while other advocates fill that role among others. It is our hope that this manual will be a useful tool in any rape crisis center, regardless of its staffing pattern. Additionally, this manual should be valuable to other professionals who work with sexual assault survivors outside the rape crisis center setting.

The manual includes thorough discussions of both civil and criminal legal mechanisms. It provides advocates with thorough explanations of important laws and general guidance for assisting survivors through the system. Along the way, it highlights practical and useful advocacy strategies.

Importantly, the manual is not to be construed as a substitute for legal counsel. Legal advocacy is not legal advice, and all advocates are urged to use the utmost caution against using this manual as anything other than a tool to help assist survivors through a difficult and frequently confusing time. In addition, the manual does not address non-legal issues, such as the cultural dynamics of sexual violence, crisis intervention skills, or medical care for survivors. Therefore, it represents only one aspect of effective support and advocacy. For in-depth coverage of these other topics, look to TAASA's Sexual Assault Training Program Manual.

Sexual assault is a pervasive crime that affects women, men, and children across Texas. Survivors deserve informed, confident advocates that can help guide them through the legal system and protect their interests. Every effort has been made to produce a reference that is applicable to diverse communities and traditionally underserved populations.

A word on usage: Throughout the manual, you will notice many [aa] icons, which signal brief Advocacy  Action asides. After reading information on some specific laws or procedures, these sections will offer guidance on how to apply the information as a practical matter in your advocacy.

Finally, we are especially thankful for the thoughtful contributions from Dr. Jennie Barr; Bronwyn Blake, Esq.; Polly Bone, Esq.; Dorie Budde; Jim Currier; Shannon Edmonds, Esq.; Maricarmen Garza, Esq.; Jennifer Gonzalez; Erin Hendricks, Esq.; Karen Kalergis; Ramey Ko, Esq.; JJ Lara; Suzanne McDaniel; Scott Merchant; Buddy Meyer, Esq.; Julia Raney Rodriguez, Esq.; Angelica Rodriguez; Vicki Spriggs; Allison Taylor; Nydia Thomas, Esq.; Frances Wilson; and Edna Yang, Esq. This resource could not have been realized without your guidance and support.

Chris Kaiser
Staff Attorney, TAASA

PART ONE: THE CRIMINAL JUSTICE PROCESS

Foundations of the Criminal Justice System: Substance and Procedure

Introduction

Most of this manual examines the details of the criminal justice system that advocates encounter on a day-to-day basis. It addresses the issues and concerns that commonly arise and offers suggestions for how to help. But before diving in, it will be helpful to gain an understanding of how the criminal justice system is organized and how it operates.

Criminal law has two aspects: procedure and substance. Procedure is what this manual focuses on. It refers to the whole path through the system—from the police report and investigation, through the prosecution, punishment, appeal, and release. It also includes the rights of victims and defendants in the justice system. The substance of criminal law, on the other hand, refers to our definitions of what is illegal. Substantive criminal law answers, “What constitutes a crime?” First, we will look at how different offenses are categorized depending on their seriousness and which courts hear which types of crimes. Then, we will look to the Texas Penal Code to define the sexual and violent crimes that advocates encounter most often. With that introductory material covered, the manual will proceed through the rest of the criminal justice process.

i. Basic Procedure: Jurisdiction and Offense Levels

Criminal cases can only go to a court that has jurisdiction, and Texas has several types of criminal courts. “Jurisdiction” means the court’s authority to apply the law to a case and bind the parties to its decisions. Practically speaking, that simply means which court is allowed to hear a case. Jurisdiction also determines which court police must communicate with about the investigation, including requests for search warrants and arrest warrants.

Which court has jurisdiction in a particular case depends on how severe the offense is. The following two pages describe the different categories of crimes in Texas and their corresponding jurisdictional rules. Fortunately, you won’t need an extensive understanding of jurisdiction, because the same types of courts have jurisdiction over most offenses related to sexual assault. Just understand that an offense is either a **misdemeanor** (punishable by up to 1 year in jail and a \$4,000 fine) or a **felony** (more severe punishments) and that most cases related to sexual assault will go before either a **District Court** or a **County Court** (see p.14).

- **District Courts and Criminal District Courts** have jurisdiction to hear **any felony case**, cases transferred from county courts because the county judge is not a licensed attorney, and cases involving official misconduct. Because most offenses related to sexual assault are felonies, District Courts and Criminal District Courts can usually hear them.
- **County Courts, County Courts at Law, and County Criminal Courts** have jurisdiction to hear **misdemeanor cases involving fines in excess of \$500**. Most misdemeanor cases involving sexual assault will exceed that amount and will be within County Court jurisdiction.

Many factors can affect the level and type of offense with which the prosecutor decides to charge the defendant. (see “Prosecutorial Discretion,” *infra* at 46) The chart on the following page will help you see how that decision affects the punishments available to the court.

Sometimes cases go to courts not listed here, such as municipal courts, because the prosecutor has charged the defendant with a lesser offense in exchange for a guilty plea, also known as a plea agreement. (see p.46 & p.55) As an advocate, be particularly vigilant about the survivor’s interests in municipal courts, where magistrates are frequently not attorneys and often lack your expertise on sexual violence issues.

MISDEMEANORS

CATEGORY	PUNISHMENT	EXAMPLES
Class A	up to 1 year in a county jail and/or a fine up to \$4,000	Assault (causes bodily injury); Stalking (first offense); Violating Protective/Magistrate's Order (first offense)
Class B	up to 180 days in a county jail and/or a fine up to \$2,000	Terroristic Threat; Indecent Exposure; Harassment; Disorderly Conduct (discharge/ display firearm)
Class C	fine not to exceed \$500	Assault (threatens bodily injury or causes offensive or provocative contact)

FELONIES

CATEGORY	PUNISHMENT	EXAMPLES
Capital	death by lethal injection or life imprisonment	Capital Murder (murder of peace officer or fireman; murder in course of kidnapping, burglary, robbery, aggravated sexual assault, or arson; murder for remuneration or hire; murder while incarcerated in or escaping from a penal institution; murder of more than one person; or murder of a child younger than 6 years of age)
First Degree	5-99 year or life in prison; may also be fined up to \$10,000	Murder; Aggravated Sexual Assault; Aggravated Kidnapping; Aggravated Robbery; Arson (place of worship or causes bodily injury or death)
Second Degree	2-20 years in prison; may also be fined up to \$10,000	Murder (sudden passion); Man-slaughter; Indecency With a Child (by sexual contact); Sexual Assault; Robbery; Aggravated Assault; Arson
Third Degree	2-10 years in prison; may also be fined up to \$10,000	Intoxication Assault; Kidnapping; Stalking (subsequent conviction); Violating Protective/Magistrate's Order (third conviction or commits assault or stalking)
State Jail (Fourth Degree)	180 days to 2 years in state jail, may also be fined up to \$10,000; or court may impose Class A misdemeanor punishment	Criminally Negligent Homicide; Burglary of a Building; Theft/Criminal Mischief of \$1,500 or more or Criminal Mischief of less than \$1,500 to a habitation with a firearm or explosive weapon; Forgery

ii. Substantive Law: The Texas Penal Code

CRIMINAL STATUTES

As noted in the Introduction, substantive criminal law refers to our definitions of crime. Generally, definitions of crimes under Texas law are found in the Texas Penal Code. The Penal Code is the definitive source to find out what acts or omissions are illegal under Texas law. However, the method and language the law uses to define crimes can be very confusing to those unaccustomed to it. Therefore, this section presents a brief walkthrough for reading criminal statutes.

Any crime has two basic components: the intent to perform an act, and the act itself. The Latin term “mens rea” (pronounced “mens ray-uh”) refers to the intent requirement. “Actus reus” (pronounced “act-us ree-us”) refers to the criminal act. No crime has been committed unless a person has both a guilty mind and a guilty act. For example, punching someone while sleepwalking is not an assault because the sleepwalker has no conscious intent. Likewise, selling lemonade does not become a crime simply because the person selling it mistakenly believes selling lemonade is illegal. Both an illegal act and the intent to commit the act are necessary.

For any particular crime, the statute must define both the mens rea and actus reus components in great detail. That is why statutes are so wordy. The definitions are separated into specific parts, called “elements.” In Texas law, each of the elements of a crime is usually given its own letter or number, like “(a)” or “(2).” In order to commit a crime, a person’s conduct must include each and every element of the crime listed in the statute.

Consider the offense, “Injury to a child, elderly individual, or disabled person,” as defined in TEX. PENAL CODE § 22.04(a):

“Sec. 22.04. INJURY TO A CHILD, ELDERLY INDIVIDUAL, OR DISABLED INDIVIDUAL.

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

(1) serious bodily injury;

(2) serious mental deficiency, impairment, or injury; or

(3) bodily injury.”

The first component you see in the statute is the mens rea, or the intent requirement. A person can commit this offense in two ways: by an act or by an omission. To commit it by an act, the statute says the act must be intentional, knowing, reckless, or with criminal negligence. To commit the offense by an omission, the omission must be intentional, knowing, or reckless. Most intent requirements in Texas law involve the states of mind used here: “intentional,” “knowing,” or “reckless.”

The next thing we notice for this offense are the elements of the actus reus, or the criminal act. The first element listed is the identity of the victim. To commit this offense, the act must be performed either against (1) a child, (2) an elderly individual, or (3) a disabled individual. The second element describes the effect of the act on the victim. The perpetrator’s act must result in either (1) a serious bodily injury, (2) a serious mental injury or impairment, or (3) a bodily injury to the victim.

	MENS REA	IDENTITY OF VICTIM	HARM TO VICTIM
By Act	(1) Intentional, (2) Knowing, (3) Reckless, OR (4) Criminally negligent	(1) Child, (2) Elderly person, OR (3) Person with a disability	(1) Serious bodily injury, (2) Serious mental injury/impairment, OR (3) Bodily injury
By Omission	(1) Intentional, (2) Knowing, OR (3) Reckless	(1) Child, (2) Elderly person, OR (3) Person with a disability	(1) Serious bodily injury, (2) Serious mental injury/impairment, OR (3) Bodily injury
	✓	✓	✓

Thus, if a person's conduct causes one of those results to a type of victim listed in the statute, and the person acted with the state of mind required by the statute, then the person has committed this crime.

Analyzing crimes in this way might seem overly complicated, but that is what prosecutors and police officers do with every criminal complaint they receive. When we talk about proving a crime beyond a reasonable doubt, what we really mean is proving each and every element of both the mens rea and actus reus components beyond a reasonable doubt. That is what is required to convict any criminal defendant.

Therefore, it is important for legal advocates to have a basic understanding of how substantive criminal law works. When you can break down a criminal statute to its basic parts, you can better communicate with the players in the justice system. That means you can also be more helpful to survivors. For example, understanding how the criminal statutes work enables you to discuss and understand why a prosecutor feels a lesser offense is easier to prove than sexual assault, or why the prosecutor wants to offer a plea agreement instead of going to trial (**see p.55**). You will also be more helpful to the survivor during the investigation, because you will better understand what evidence police need and why.

DEFENSES

Defenses to Prosecution

Some laws list “defenses to prosecution.” A defense to prosecution does not mean the prosecutor cannot charge a person, or that she cannot take a case to trial. It simply means that if a defendant claims a certain fact is true, the prosecutor must prove that it is not true in order to convict the person. For example, a defense to the crime “Online solicitation of a minor” is that the perpetrator is married to the minor. Therefore, if the defendant claims he is married to the minor, the prosecutor must prove in court that he is not married to the minor.

When a defendant “raises a defense,” as describe above, it basically adds another element to the offense that the prosecutor must prove.

Affirmative Defenses

Some criminal statutes also list “affirmative defenses.” Ordinarily, it is the state’s responsibility to prove each element of the crime. However, where there is an affirmative defense available, the defendant can also try to prove the defense independently, rather than relying entirely on the state to fail in proving some element of the crime. The burden is on the defendant to prove each element of the affirmative defense, but if he does so, he has proven his innocence.

For example, if a defendant is charged with the crime “Indecency with a child,” he has an affirmative defense if he was married to the minor at the time of the offense. Therefore, if the defendant can prove he was married to the minor at that time, he has proved his innocence of the offense.

ENHANCEMENTS

In addition to defenses, some criminal laws also describe situations that make the punishment more severe. For example, if a defendant is convicted of “Aggravated sexual assault,” the range of punishment is the same as any first degree felony: 5-99 years in prison and up to a \$10,000 fine. However, if the prosecutor also proves an additional fact—e.g., that the victim was younger than 6—then the defendant must receive a mandatory minimum of 25 years in prison. Enhancements are included as part of the Penal Code provision that defines the offense, usually as a separate subsection (e.g., TEX. PENAL CODE § 22.021(f) for aggravated sexual assault).

Hate Crimes – TEX. PENAL CODE § 12.47

In addition to specific enhancements found within criminal statutes, there is also a punishment enhancement available whenever a crime is committed against a person based on group-based hate.

Section 12.47, Texas Penal Code, provides that the punishment for a crime can be increased one offense level if the court finds that it was motivated by bias or prejudice against the victim’s “race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference” (citing TEX. CODE CRIM. PROC. § 42.014). For example, if a court finds that a defendant sexual assaulted a Lesbian woman because of the defendant’s homophobia, the court would enhance the offense from a second degree felony to a first degree felony. The exception to that rule is a first degree felony, which is not enhanced to a capital offense, and a class A misdemeanor, which is not enhanced to a felony. Instead, if a court finds that a class A misdemeanor was a hate crime, the offense will carry a minimum term of confinement of 180 days.

UTexas’s hate crime statutes apply in cases involving offenses against the person, which are listed in Title 5 of the Penal Code (Chapters 19-22), as well as arson, criminal mischief, and graffiti, which are listed in Chapter 28. Where sexual offenses are motivated by hate, the prosecutor can try to obtain a tougher punishment for the perpetrator.

Unfortunately, advocates and survivors should be aware that prosecutors in Texas rarely utilize the hate crime statute. (see p.46) Section 411.046, Government Code, requires the state to collect and maintain data on hate crimes throughout the state. From that information, we know that only a very small fraction of all reported hate crimes are prosecuted as such. Between 2001 and 2012, there were only 10 hate crime convictions in Texas out of the thousands reported, most coming as the result of plea agreements.¹

¹“Texas Hate Crime Law has Little Effect,” Eric Dexheimer, Austin American-Statesman (January 24, 2012).

iii. Sexual Assault and Related Offenses

Sexual assault legal advocates encounter various criminal offenses, and the differences among them can be subtle. Especially during plea negotiations (**see p.55**), the names of many different offenses can be thrown around very quickly, so it is helpful to be familiar with what they all mean. This section and the next serve an introduction and reference to the offenses advocates are most likely to encounter. Refer to the chart on page 9 to see punishment ranges for each offense level.

The following are not necessarily complete descriptions of each offense. They have been adapted thoroughly and carefully for better clarity, but over time the Legislature makes changes to criminal statutes.

SEXUAL ASSAULT, TEX. PENAL CODE § 22.011

1. Intentionally or knowingly causing penetration of another's sexual organ or anus by any means, or of another's mouth by the actor's sexual organ, without consent; OR
2. Intentionally or knowingly causing another's sexual organ to contact or penetrate the sexual organ, anus, or mouth of another, including the actor, without consent; OR
3. Any such penetration of a child younger than 17, regardless of consent.

Definition of Consent: An act is without consent if:

- a. the actor compels the other person to submit or participate by the use of **physical force or violence**;
- b. the actor compels the other person to submit or participate by **threatening to use force or violence** against the other person or any other person, and the other person believes that the actor has the present ability to execute the threat;
- c. the other person has not consented and the actor knows the other person is **unconscious or physically unable to resist**;
- d. the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault **incapable either of appraising the nature of the act or of resisting it**;
- e. the other person has not consented and the actor knows the other **person is unaware that the sexual assault is occurring**;
- f. the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by **administering any substance without the other person's knowledge**;
- g. the actor is a **public servant who coerces the other person** to submit or participate;

Sexual contact or intercourse with a person with a mental disability or illness can automatically be sexual assault or aggravated sexual assault, if the person cannot understand or appreciate the nature of the act (**see p. 15**)

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- h. the actor is a mental health services provider or a health care services provider who causes the other person, who is a **patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor;**
 - i. the actor is a **clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman** in the clergyman's professional character as spiritual adviser; or
 - j. the **actor is an employee of a facility where the other person is a resident**, unless the employee and resident are formally or informally married to each other under Chapter 2, Family Code.

Affirmative Defenses:

- a. The other person was a child younger than 17, married to the actor, and the child consented, OR
- b. The other person was 14 or older and consented, the actor was not more than 3 years older and had no reportable convictions for sex offenses (**p. 70, Sex Offenders**), and the Bigamy law (TEX. PENAL CODE § 25.01) did not prohibit the actor from marrying the other person.

Offense Levels:

- a. Second degree felony, except:
- b. First degree felony if the victim is a person the actor is prohibited from marrying under the Bigamy law, TEX. PENAL CODE § 25.01.

AGGRAVATED SEXUAL ASSAULT, TEX. PENAL CODE § 22.021 – A “sexual assault,” as defined above, in which:

- 1. The perpetrator causes or threatens death, serious bodily injury, or kidnapping to the victim or another person;
- 2. The perpetrator displays or uses a deadly weapon;
- 3. The perpetrator administers drugs to incapacitate the victim, or provides drugs to the victim with the intent of facilitating the sexual assault;
- 4. The perpetrator acts in concert with another during a sexual assault against the same victim;
- 5. The victim is a child younger than 14; OR
- 6. The victim is a disabled person, or a person 65 years of age or older.

Mandatory Minimum 25-Year Imprisonment:

- a. If the victim was younger than 6, OR
- b. If the victim was younger than 14, and the offense involved any of the factors described in 1-4 above

Offense Level:

- a. First degree felony

INDECENCY WITH A CHILD, TEX. PENAL CODE § 21.11

1. Sexual contact with the genitals, anus, or breast (including through clothing), for the purpose of sexual gratification or arousal, between a child younger than 17 and the perpetrator, OR
2. Exposure of a child's or the perpetrator's anus or genitals for the purpose of sexual gratification.

Affirmative Defenses:

- a. The actor was not more than 3 years older than the child and of the opposite sex; had no reportable convictions for sex offenses (**see p.68**); and did not use force, duress, or threats against the victim at the time of the act; OR
- b. The actor was the spouse of the child at the time of the act.

Offense Levels:

- a. Second degree felony if involving sexual contact, OR
- b. Third degree felony if involving exposure, and no sexual contact.

CONTINUOUS SEXUAL ABUSE OF YOUNG CHILD OR CHILDREN, TEX. PENAL CODE § 21.02 Two or more of the following offenses (or one offense repeated) against a child or children younger than 17 during a period 30 days or longer:

1. Sexual assault,
2. Aggravated sexual assault,
3. Indecency with a child,
4. Burglary with intent to commit one of the above offenses,
5. Sexual performance by a child, OR
6. Kidnapping with intent to abuse the victim sexually.

Affirmative Defense:

- a. The perpetrator had no reportable convictions for sex offenses (**see p.68**); is no more than 5 years older than the victim (or youngest victim); and did not use force, threat, or duress against any victim during any act.

Mandatory Minimum 25-Year Imprisonment

Offense Level:

- a. First degree felony

iv. Related Offenses

VIOLATION OF CERTAIN COURT ORDERS OR CONDITIONS OF BOND IN A FAMILY VIOLENCE, SEXUAL ASSAULT OR ABUSE, OR STALKING CASE, TEX. PENAL

CODE § 25.07 – Violating a family violence, sexual assault, or stalking protective order (including an ex parte protective order that has been served on the perpetrator), or a condition of bond set in a family violence, sexual assault or abuse, or stalking case related to the safety of the victim or the community by:

1. Committing family violence or an act in furtherance of sexual assault, aggravated sexual assault, or stalking;
2. Communicating directly in a threatening or harassing manner with a protected individual or a member of the family or household;
3. Threatening a protected individual or a member of the family or household through any third party;
4. Or communicating in any manner with the protected individual or a member of the family or household, except through the person's attorney;
5. Going to or near a residence, place of employment, child care facility, or other place specified in the order;
6. Possessing a firearm; or
7. Harming, threatening, or interfering with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a protected person.

Offense Levels:

- a. Class A misdemeanor, except:
- b. Third degree felony if the actor has been previously convicted under this section 2 or more times, or has violated the order or bond condition by committing an act of assault or stalking.

VIOLATION OF PROTECTIVE ORDER ISSUED ON BASIS OF SEXUAL ASSAULT OR ABUSE, STALKING, OR TRAFFICKING, TEX. PENAL CODE § 38.112 – Violating a sexual assault,

stalking, or human trafficking protective order issued under Ch. 7A, Code of Criminal Procedure, by:

1. Communicating directly or indirectly in a threatening or harassing manner with the applicant or any member of the family or household;
2. Communicating in any manner with the applicant or a member of the family or household, except through the applicant's attorney;
3. Going to or near a residence, place of employment or business, child care facility, school, or other place specified in the order; or
4. Possessing a firearm.

Offense Levels:

- a. Class A misdemeanor

STALKING, TEX. PENAL CODE § 42.072 – Repeated conduct directed toward a specific victim that the perpetrator:

1. Knows will, or
2. Reasonably should know will:
 - a. constitute Harassment under Penal Code § 42.07, or
 - b. cause the victim to reasonably fear:
 - i. bodily injury or death to the victim,
 - ii. bodily injury or death to a member of the victim’s family or household, or
 - iii. a crime against the victim’s property; and
3. The conduct actually causes the victim such fear.
 - a. Offense Level:
 - i. Third degree felony

HARASSMENT, TEX. PENAL CODE § 42.07 – Communicating by telephone, in writing, or by electronic method with intent to harass, abuse, torment or embarrass the victim, including:

1. Making obscene comments or suggestions
2. Threatening bodily injury or other felony against the victim or a family or household member
3. Falsely reporting the death or serious bodily injury of another to the victim, if reasonably likely to alarm the victim
4. Making repeated anonymous phone calls to the victim
5. Intentionally failing to hang up or disengage a telephone connection with the victim
6. Knowingly permitting another to use one’s telephone for a purpose listed above
7. Sending repeated electronic messages likely to harass, abuse, torment, or embarrass the victim

Offense Level:

- a. Class B misdemeanor

DISORDERLY CONDUCT, TEX. PENAL CODE § 42.01 – Intentionally or knowingly breaching the peace in public, including (but not limited to):

1. Abusing or threatening another in public
2. Using abusive or indecent language in public likely to breach the peace
3. Exposing one’s genitals or anus
4. Acts of voyeurism that violate others’ privacy
5. Discharging or displaying a firearm or other deadly weapon in public in a manner calculated to alarm another person

Offense Levels:

- a. Class C misdemeanor, except:
- b. For number 5 above, class B misdemeanor

INDECENT EXPOSURE, TEX. PENAL CODE § 21.08 – Exposing one’s anus or genitals for the purpose of sexual gratification, without regard for offending others present.

Offense Level:

- a. Class B misdemeanor

PUBLIC LEWDNESS, TEX. PENAL CODE § 21.07 – Engaging in sexual contact or intercourse in public, with another person or animal, without regard for offending others present.

Offense Level:

- a. Class A misdemeanor

OBSCENITY, TEX. PENAL CODE § 43.23

1. Wholesale promoting obscene material or devices² with knowledge of the nature of the material,
2. Promoting obscene material or devices with knowledge of the nature of the material or devices, OR
3. Producing, presenting, or directing an obscene performance, or participating in a performance in a way that makes it obscene

Affirmative Defense:

- a. The person who promotes obscene material or an obscene device does so for a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose.

Offense Levels:

- a. For number 1 above, state jail felony
- b. For numbers 2 and 3 above, class A misdemeanor
- c. Any offense is elevated to a second degree felony if the obscene material or performance depicts a child younger than 18, an image indistinguishable from a child younger than 18, or an image modified to depict an identifiable child.

OBSCENE DISPLAY OR DISTRIBUTION, TEX. PENAL CODE § 43.22 – Displaying or distributing obscene material (such as a photograph, drawing, or other visual representation) with knowledge that the material is obscene, and without regard for offending others.

Offense Level:

- a. Class C misdemeanor

PROHIBITED SEXUAL CONDUCT, TEX. PENAL CODE § 25.02 – Sexual intercourse, including penetration of the mouth or anus, with one’s relative (extending to first cousins, aunts, uncles, ancestors, and descendants, by either blood or adoption, and by either whole or half blood).

Offense Levels:

- a. Third degree felony, except:
- b. Second degree felony if involving the actor’s ancestor or descendant

People married to their first cousins in Texas before the law was changed in 2005 are not guilty of prohibited sexual conduct.

²The prohibition on promoting or possessing “obscene devices,” as defined by Tex. Penal Code § 43.21(a)(7), is invalid because it unconstitutionally burdens privacy rights stemming from the Due Process Clause of the Fourteenth Amendment. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. Tex. 2008).

ONLINE SOLICITATION OF A MINOR, TEX. PENAL CODE § 33.021

1. Knowingly soliciting a minor over the Internet, by email or text message, or other electronic message to meet another person to engage in sexual contact or intercourse (even if the meeting did not occur, and even if the actor did not intend for the meeting to occur), OR
2. A person 17 or older communicating in a sexually explicit manner with a minor, or distributing sexually explicit material to a minor, over the Internet, by email or text message, or other electronic message, with intent to sexually arouse or gratify any person.

In October 2013 the Texas Court of Criminal Appeals ruled the Online Solicitation of a Minor statute unconstitutional. As of this writing the law remains on the books, but it will not be used to prosecute crimes unless the Legislature amends the law.

Definition of "Minor":

- a. For this statute, a minor is any person who the actor believes to be younger than 17, or who represents himself or herself as being younger than 17.

Defenses to Prosecution:

- a. The actor was married to the minor, OR
- b. The actor was not more than 3 years older than the minor, and the minor consented.

Offense Levels:

- a. For number 1 above, second degree felony.
- b. For number 2 above, third degree felony, but second degree if the victim was younger than 14.

SEXUAL PERFORMANCE BY A CHILD, TEX. PENAL CODE § 43.25

1. Employing, authorizing, or inducing a child younger than 18 to engage in actual or simulated sexual conduct, or a performance that includes such conduct (a "performance" is any live or recorded visual representation that can be shown before an audience of one or more people), OR
2. Promoting such conduct or performance with knowledge of its nature.

Affirmative Defenses:

- a. The defendant was the child's spouse at the time of the offense; OR
- b. The conduct was for a legitimate educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose; OR
- c. The defendant is not more than two years older than the child.

Offense Levels:

- a. For number 1 above, second degree felony, or first degree if the child is younger than 14
- b. For number 2 above, third degree felony, or second degree if the child is younger than 14

POSSESSION OR PROMOTION OF CHILD PORNOGRAPHY, TEX. PENAL CODE § 43.26

1. Knowingly or intentionally possessing, or accessing with intent to view, any film, photo, or other visual reproduction (or disks or files containing such reproductions) that depicts a child younger than 18 engaging in actual or simulated sexual conduct, OR
2. Knowingly or intentionally promoting or possessing with intent to promote the material described above.

Affirmative Defenses (only for number 1 above):

- a. The defendant was the child’s spouse at the time of the offense; OR
- b. The conduct was for a legitimate educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose; OR
- c. The defendant is not more than two years older than the child.

Offense Levels:

- a. For number 1 above, third degree felony
- b. For number 2 above, second degree felony

The offense under number 2, and the defense under b., can apply to the transmission of nude or sexually suggestive photos between or among youths by text or SMS message, popularly abbreviated as “sexting.” This offense will only apply, however, if the perpetrator is older than 17. In any case, the defense is not a bar to prosecution, so the prosecutor can still choose to bring charges (see p. 46)

ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL DEPICTING A MINOR, TEX. PENAL CODE § 43.261 – A minor commits the offense if:

1. he or she sends to another minor visual material depicting any minor (including the actor) engaged in sexual conduct (including nudity), if the actor created the visual material or knows it was created by another minor; OR
2. he or she possesses visual material described above in an electronic format, if the actor created the visual material or knows it was created by another minor.

Offense Levels:

- a. In general, Class C misdemeanor
- b. Class B misdemeanor if:
 1. the actor sends the material with intent to harass another, or
 2. the actor has previously been convicted under this section
- c. Class A misdemeanor if:
 1. The actor has previously been convicted of sending material with intent to harass another, or
 2. The actor has previously been convicted two or more times under this section.

Affirmative Defense:

- a. The visual material depicted only the actor and another minor who are within 2 years of age

-
- and were in a dating relationship or married at the time of the offense, and
- b. The material was transmitted only to or from the actor and the other minor.

Defense to Prosecution:

- a. The actor:
1. Did not solicit the visual material,
 2. Possessed the material only after receiving it from another minor, and
 3. Destroyed the material within a reasonable amount of time after receiving it.

aa **ADVOCACY ACTION:** The 82nd Legislature enacted Penal Code § 43.261 to give law enforcement a more lenient option to address sexting. Prior to the creation of this offense, the only criminal offenses available to describe sexting between minors were Possession or Promotion of Child Pornography and Online Solicitation of a Minor, both felonies with serious long-term consequences. However, even this more lenient offense treats abusive or harassing sexting more seriously. When minors are victims of online or electronic harassment, bullying, or dating violence, the conduct often constitutes a more severe offense.

IMPROPER PHOTOGRAPHY OR VISUAL RECORDING, TEX. PENAL CODE § 21.15

Photographing, recording, broadcasting, or transmitting images of another:

1. Without consent and with intent to sexually arouse or gratify any person, OR
2. At a bathroom or private dressing room, without consent and with intent to sexual arouse or gratify any person or to invade the subject's privacy.

Offense Level:

- a. State jail felony

EMPLOYMENT HARMFUL TO CHILDREN, TEX. PENAL CODE § 43.251

Employing a child younger than 18 at:

1. A place intended to provide sexual stimulation or gratification to customers, such as a massage establishment, nude studio, or modeling studio, OR
2. Any establishment permitting a child to work nude or topless.

Offense Level:

- a. Second degree felony, except:
- b. First degree felony if the child was younger than 14 at the time the offense was committed.

SALE, DISTRIBUTION, OR DISPLAY OF MATERIAL HARMFUL TO MINOR, TEX.

PENAL CODE § 43.24

1. Selling, distributing, or exhibiting harmful material to a minor, OR

Definition of “Harmful Material”:

- a. Material that: appeals to a minor’s prurient interest in sex, nudity, or excretion; is patently offensive according to prevailing adult standards; and is utterly without redeeming social value for minors.

Defenses to Prosecution:

- a. The sale, distribution, or exhibition was by a person having a scientific, educational, governmental, or other similar justification; OR
- b. The sale, distribution, or exhibition was to a minor accompanied by a consenting parent, guardian, or spouse.

Offense Levels:

- a. Class A misdemeanor, except:
- b. Third degree felony if involving the hiring, employing, or using a minor to accomplish the sale, distribution, or exhibition.

IMPROPER RELATIONSHIP BETWEEN EDUCATOR AND STUDENT, TEX. PENAL CODE

§ 21.12

1. Sexual contact or intercourse with a primary or secondary school student, regardless of the student’s age, by an employee of the school in which the student is enrolled, OR
2. An offense of Online Solicitation of a Minor (TEX. PENAL CODE § 33.021), by an employee of the school in which the student is enrolled

Affirmative Defense:

- a. The actor was the spouse of the student at the time of the offense.

Offense Level:

- a. Second degree felony

TRAFFICKING OF PERSONS, TEX. PENAL CODE § 20A.02

1. Trafficking a person, knowing the person will engage in forced or coerced labor or services, OR
2. Benefitting from participating in any venture that involves trafficking, including by knowingly receiving forced labor or services

Definition of “Trafficking”:

- a. Transporting, enticing, recruiting, harboring, providing, or otherwise obtaining another person by any means.

Offense Levels:

- a. Second degree felony, except:
- b. First degree felony if the conduct involves the offense of Compelling Prostitution or Sexual Performance by a Child, and the victim was a child younger than 18, regardless of whether the perpetrator knew the child’s age.

PROSTITUTION, TEX. PENAL CODE § 43.02

1. Offering to engage, agreeing to engage, or engaging in sexual conduct for a fee, OR
2. Soliciting another in a public place to engage in sexual conduct for a fee.

Defense to Prosecution:

- a. The actor engaged in the conduct because she or he was a victim of human trafficking under TEX. PENAL CODE § 20A.02.

Offense Levels:

- a. Class B misdemeanor, except:
- b. Class A misdemeanor if the actor has previously been convicted of prostitution 1 or 2 times,
- c. State jail felony if the actor has previously been convicted of prostitution 3 or more times, and
- d. Second degree felony if the person solicited is younger than 18, regardless of whether the actor knew the age of the person solicited at the time the offense was committed.

PROMOTION OF PROSTITUTION, TEX. PENAL CODE § 43.03

1. Soliciting another to engage in prostitution, OR
2. Receiving money earned from another's prostitution services

Offense Level:

- a. Class A misdemeanor, except
- b. State jail felony if the actor has been previously convicted under this section, and
- c. Second degree felony if the actor commits the offense in relation to a person younger than 18, regardless of whether the actor knew the person's age at the time the offense was committed.

AGGRAVATED PROMOTION OF PROSTITUTION, TEX. PENAL CODE § 43.04

Knowingly owning, investing in, financing, controlling, managing, or supervising a prostitution enterprise that uses two or more people to offer their prostitution services

Offense Level:

- a. Third degree felony, except:
- b. First degree felony if the enterprise uses 1 or more persons as a prostitute who are younger than 18, regardless of whether the actor knew the person's age at the time the offense was committed.

COMPELLING PROSTITUTION, TEX. PENAL CODE § 43.05

1. Causing another to commit prostitution by force, threat, or fraud.
2. Causing a child younger than 18 to commit prostitution by any means, regardless of whether one knows the child is younger than 18

Offense Level:

- a. Second degree felony

FEMALE GENITAL MUTILATION PROHIBITED, TEX. HEALTH AND SAFETY CODE § 167.001
Knowingly circumcising, excising, or infibulating any part of the labia majora, labia minora, or clitoris of another person who is younger than 18.

Defense to Prosecution:

- a. The person performing the act is a licensed physician or other licensed health care professional,
- b. The act is within the scope of the person's license, AND
- c. The act is performed for medical purposes.

Offense Level:

- a. State jail felony

Bottom Line:

The Role of the Legal Advocate Regarding the Penal Code

Regarding the Penal Code, one might boil down the legal advocate's responsibilities to one word: stability. Often—but certainly not always—survivors won't know the first thing about the Penal Code or the criminal justice system. As a result, they might not understand what's good, what's bad, and what's altogether unimportant as it occurs. If that's the case, they'll take their cues from you, and they'll look to you for both little and big questions.

Therefore, the advocate must be prepared to explain things clearly and confidently, including specific crimes under Texas law. However, that doesn't necessarily mean being an expert or having encyclopedic knowledge of the Code. Victims don't need to be overwhelmed with all the details.

Instead, it's important for the advocate to be able to explain the general differences among crimes and their ramifications. For example, if the prosecutor is considering a plea bargain that would lessen the charge from a sexual assault to disorderly conduct, the survivor will need to understand what each offense means and their different consequences for the perpetrator.

Regularly use this manual and the Texas Codes themselves as references. The more familiar you are with substantive criminal law, the more quickly and easily you will be able to find the answers you need when questions arise.

Crime Victims' Rights

Introduction

Among the legal advocate's most important responsibilities are knowing survivors' rights within the criminal justice system and helping the survivor to assert them. That's because many people, including victims, are not aware that victims have any rights at all.

Most know from popular culture that the accused have many rights guaranteed by the United States Constitution, like the right to a lawyer and the right against self-incrimination. However, fewer people realize that the state of Texas has responded to those rights by guaranteeing victims' rights under the state Constitution, as well as by enacting "Crime Victims' Rights" and "Rights of Sexual Assault Victims" statutes.

Since the 1960s and continuing through present-day, victim advocates nationwide have struggled to expand crime victims' rights. Many advocacy groups sprang up during the 1970s and fought hard to raise awareness of shortcomings in victims' rights. That laid the foundation to establish the federal Office for Victims of Crime ("OVC") in 1983, and for the United States Congress to pass the Victims of Crime Act ("VOCA") in 1984. During the 1980s many states, including Texas in 1985, enacted crime victims' rights provisions in state law. By the end of the 1980s, five states had gone so far as amending their constitutions to guarantee rights to victims of crime. In 1989, Texas became one of those first states.

Today, every state in the country provides legal rights to crime victims, but only 33 states have passed constitutional amendments. Notably, in 2004 the United States Congress passed the Crime Victims' Rights Act, which provides victims in federal court many of the same protections guaranteed by Texas law. In Texas, we can be proud to say we have been and continue to be at the forefront of the victims' rights movement. That is important to remember, especially when people treat crime victims' rights as weak or unimportant.

For sexual assault survivors, some rights apply only inside the courtroom, but others kick in as soon as the assault occurs. Therefore, it is very important for advocates to know not only what rights victims have, but also when they apply and how to utilize them. It is that knowledge that makes legal advocates so valuable, both to survivors and the criminal justice system. The role of an advocate is to be an expert on crime victims' rights so that survivors do not have to be.

On the following pages you will find a comprehensive list of the rights of sexual assault survivors in Texas. Become very familiar with it. In many cases, it will be up to you, the legal advocate, to recognize when something is not happening the way it should.

ii. Crime Victims' Rights: Statutory and Constitutional Protections

WHO IS A "CRIME VICTIM" UNDER TEXAS LAW?

Crime victims' rights belong to anyone who is injured or killed as a result of a crime, as well as victims of the following specific crimes: sexual assault, kidnapping, aggravated robbery, human trafficking, injury to a child, injury to an elderly person, or injury to a person with a disability. (see p.14) If the victim is deceased or incapacitated as a result of the crime, the law gives the same rights to the victim's surviving spouse, parent, guardian, adult sibling, or child. (TEX. CODE CRIM. PROC. Art. 56.01)

CONSTITUTIONAL RIGHTS OF CRIME VICTIMS

Crime victims in Texas have enforceable rights under Article I, Section 30 of the Texas Constitution. Some of the constitutional rights overlap with statutory rights, but the constitutional rights are particularly important because survivors have individual standing to enforce them:

"The state, through its prosecuting attorney, has the right to enforce the rights of crime victims . . . A victim or guardian or legal representative of a victim has standing to enforce the rights enumerated in this section [. . .]." TEX. CONST. Art. I, § 30(d) - (e)

That means that even though prosecutors have the power to enforce victims' rights, survivors do not always have to rely on the prosecutor, judge, or anyone else to oppose a violation. Instead, a survivor can object to a violation of her or his constitutional rights directly, through a writ or motion filed by her or his personal attorney. The fact that the survivor is a witness in the case, and not a party, does not matter.

The Texas Constitution guarantees crime victims the following rights:

- **The right to be treated with fairness and with respect for the victim's dignity and privacy** throughout the criminal justice system. TEX. CONST. ART I, § 30(A)(1)
- **The right to be reasonably protected** from the accused throughout the criminal justice process. TEX. CONST. ART. I, § 30(A)(2)
- Upon request, **the right to notification of court proceedings.** TEX. CONST. ART. I, § 30(B)(1)
- Upon request, **the right to be present at all public court proceedings** related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial. TEX. CONST. ART. I, § 30(B)(2)
- Upon request, **the right to confer with a representative of the prosecutor's office.** TEX. CONST. ART. I, § 30(B)(3)
- Upon request, **the right to restitution.** TEX. CONST. ART. I, § 30(B)(4)
- Upon request, **the right to be informed about the conviction, sentence, imprisonment, and release of the accused.** TEX. CONST. ART. I, § 30(B)(5)

Attorney Representation

Enforcing constitutional crime victims' rights is a major reason personal representation by an attorney can benefit survivors during the prosecution. Some of the provisions listed above are very general, and the survivor probably will not recognize every time something happens that may have violated her or his rights. For example, what does it mean to offend the survivor's "dignity"? For survivors who can afford it, an attorney with expertise in crime victims' rights can effectively monitor the proceedings and creatively oppose violations. If cost is an issue, many lawyers will work with clients' budgets and use flexible pay scales.

Survivors and advocates should also be aware that enforcing crime victims' rights is an uncertain area of law. Victims' rights and standing clearly appear in the Texas Constitution, but Article I, Section 30 offers no guidance on exactly how victims and their lawyers should approach these issues. Moreover, Texas courts have not had many opportunities to answer those questions, because few survivors have attempted enforcement.

In addition, survivors who have retained lawyers for separate civil lawsuits often ask those same lawyers to handle victims' rights issues in the criminal trial. There is nothing wrong with that practice necessarily, but survivors should think about whether their civil attorneys could have conflicts of interest related to their rights as crime victims. For example, a survivor may wish to receive restitution in the criminal case, but her civil attorney might believe restitution would reduce the amount of a damages awarded in the civil lawsuit. Even if no conflict of interest arises, a civil plaintiff's lawyer may not have expertise in crime victims' rights. Therefore, survivors should choose their lawyers carefully. Those who are already represented in civil lawsuits should discuss potential conflicts and demand assurances from their lawyers before allowing them to work on their criminal cases.

The purpose of this information is not to discourage any survivor from hiring a lawyer to enforce her or his rights. Instead, survivors simply should be aware of complications that could arise and understand that there are no guarantees. Enforcement of crime victims' rights is unpredictable, yet potentially very beneficial.

For free legal assistance and representation on victims' rights issues anywhere in Texas, crime victims may contact the Victims Initiative for Counseling, Advocacy, and Restoration of the Southwest (VICARS) at the Texas Legal Services Center: 1-888-343-4414, Monday-Friday, 9am-5pm.

Protecting Survivors' Rights Without an Attorney

In any event, advocates can help survivors protect their constitutional rights even without attorney representation. Among the most important things survivors can do is to make a written request to the prosecutor's office. Survivors should always specifically request in writing that their rights as crime victims be honored. The request should be submitted early in the investigation stage, and again if and when a prosecution begins. Making a request and recording it in writing will help secure victims' rights that might otherwise have been neglected—especially those rights that kick in "upon request." (**See Appendix C**)

If any person violates a constitutional or statutory right of a sexual assault survivor, consider the following general checklist:

- The survivor or advocate should contact the person or a supervisor and attempt to correct it informally.

- Take careful notes on whom you spoke with, when you spoke with them, and what was said.
- Leave detailed messages if you cannot contact a person immediately, and take notes on the message you left.
- If the survivor is not satisfied after talking to officials about the rights violation, she or he still has the option to consult an attorney about formally enforcing her or his rights.

Enforcing crime victims' rights under the Texas Constitution is an under-utilized technique that has enormous potential to protect survivors' interests and promote meaningful participation in the criminal justice process.

Statutory Rights

Victims of sexual assault in Texas also have the following rights guaranteed by statute under the Code of Criminal Procedure:

Rights of Victims of Sexual Assault

- If requested, **the right to a disclosure of information regarding any evidence collected** during the investigation of the offense, unless disclosing the information would interfere with the investigation or prosecution of the offense, in which event the victim, guardian, or relative **shall be informed of the estimated date** on which that information is expected to be disclosed. TEX. CODE CRIM. PROC. ART. 56.021(A)(1)
- If requested, **the right to a disclosure of information regarding the status of any analysis being performed of any evidence** that was collected during the investigation of the offense. Tex. Code Crim. Proc. Art. 56.021(a)(2)
- If requested, **the right to be notified (1)** at the time a request is submitted to a crime lab to process and analyze any evidence collected during the investigation, **(2)** at the time of the submission of a request to compare any biological evidence collected during the investigation of the offense with DNA profiles maintained in a state or federal DNA database, and **(3)** of the results of such a comparison, unless disclosing the results would interfere with the investigation of prosecution of the offense, in which event the victim, guardian, or relative shall be informed of the estimated date on which those results are expected to be disclosed. TEX. CODE CRIM. PROC. Art. 56.021(a)(3)

Survivors requesting notification under Art. 56.021(a)(3) are responsible for providing and keeping current her or his contact information to the prosecutor and/or law enforcement officials working on the case. However, survivors may also designate another person or organization, including a rape crisis center, to receive the notifications.

- If requested, **the right to counseling regarding AIDS/HIV infection.** Tex. Code Crim. Proc. Art. 56.021(a)(4)
- For the victim, **testing for AIDS, HIV infection, HIV antibodies, or infection with any other probable causative agent of AIDS.** Tex. Code Crim. Proc. Art. 56.021(a)(5)
- **The right to a medical forensic examination** with or without police involvement, as long as the sexual assault occurred within 96 hours before the examination (abuse of children under 18

must involve authorities; (**see p.36**) Tex. Code Crim. Proc. Art. 56.021(a)(6)

Crime Victims' Rights

- **The right to police protection** from harm and threats of harm arising from the victim's cooperation with the investigation or prosecution. Tex. Code Of Crim. PROC. Art. 56.02(a)(1)
- **The right to an advocate or representative during a medical forensic examination** to provide counseling, support services, and information on crime victims' rights listed in this section. Tex. Code Of Crim. Proc. Art. 56.045
- **The right to receive information about payment for medical forensic examinations**, and, if requested, to receive referrals to social service agencies that may offer additional assistance. Tex. Code Of Crim. Proc. Art. 56.02(a)(6)
- **The right to be present at all public court proceedings** related to the sexual assault, subject to the approval of the judge in the case. Tex. Code Of Crim. Proc. Art. 56.02(b)
- Upon request, **to be informed by the prosecutor about relevant court proceedings** at both the trial and appeals levels, including prior notice of cancellations and reschedulings. Tex. Code Of Crim. Proc. Art. 56.02(a)(3)(A)
- Upon request, **to be informed by a peace officer about criminal investigation procedures**, and the defendant's right to bail. Tex. Code Of Crim. Proc. Art. 56.02(a)(4)
- Upon request, **to be informed by the district attorney's office about general procedures in the criminal justice system**, including guilty plea negotiations, restitution, and the processes for appeals and parole. Tex. Code Of Crim. Proc. Art. 56.02(a)(4)
- **The right to consideration of the victim's safety** by the magistrate when fixing the amount of bail for the accused. Tex. Code Of Crim. Proc. Art. 56.02(a)(2)
- Upon request, **to be informed by a court of appeals of its decisions**, after the decisions are entered but before the decisions are made public. Tex. Code Of Crim. Proc. Art. 56.02(a)(3)(B)
- **The right to a private waiting area in court** before testifying in any proceeding concerning the offender. If a private waiting area is unavailable, other safeguards should be taken to minimize the victim's contact with the offender and the offender's witnesses and relatives before and during court proceedings. Tex. Code Of Crim. Proc. Art. 56.02(a)(8)
- **The right to prompt return of any property** that is held by law enforcement or the prosecutor as evidence, when the property is no longer required for that purpose. Tex. Code Of Crim. Proc. Art. 56.02(a)(9)
- Upon request, **the right to have the prosecutor notify the victim's employer** that the victim must participate in a proceeding and might have to miss work for good cause. Tex. Code Of

Crim. Proc. Art. 56.02(a)(10)

- **The right to provide information to a probation department** before the defendant's sentencing regarding the impact of the crime on the victim and the victim's family. Tex. Code Of Crim. Proc. Art. 56.02(a)(5)
- Upon request, **to be informed about and participate in parole procedures**, including receiving notice of parole proceedings concerning the defendant in the victim's case, providing the Board of Pardons and Paroles information to be considered by the Board before releasing the defendant, and to receive notice of the defendant's release. Tex. Code Of Crim. Proc. Art. 56.02(a)(7)
- **The right to give a Victim Impact Statement**, to be informed about the uses and purpose of a Victim Impact Statement in the criminal justice system, and to have it considered during sentencing and parole proceedings. Tex. Code Of Crim. Proc. Art. 56.02(a)(13)
- **The right to receive information about the Crime Victim's Compensation program**, including which costs can be compensated, the amount of compensation available, eligibility requirements, and procedures for applying for compensation. Tex. Code Of Crim. Proc. Art. 56.02(a)(6)
- **The right to victim-offender mediation** coordinated by the victim services division of the Texas Department of Criminal Justice. Tex. Code Of Crim. Proc. Art. 56.02(a)(12)

As with constitutional rights, survivors should submit requests in writing to assert any rights under Articles 56.02 or 56.021, Code of Criminal Procedure. It is possible that officials will honor victims' rights without a written request, but putting everything in writing will help. That is especially true for those rights that kick in only "upon request" by the survivor.

On top of the ordeal of a criminal case, survivors should not also have to be a watchdog for their own legal rights. However, sometimes that is necessary, and it is a burden an effective advocate can help carry.

Bottom Line: The Role of the Legal Advocate Regarding Crime Victims' Rights

Clearly, knowing victims' rights isn't the same as protecting them. What's the role of the legal advocate when a survivor's rights are at risk? Here are some guiding principles:

- **Knowledge** – The single most important thing for an advocate to do concerning crime victims' rights is to know them, and know the difference between statutory and constitutional rights. We can't defend victims' rights if we don't recognize when they're threatened.
- **Confidence** – The better you know crime victims' rights, the more confident you'll be asserting them. Well-informed advocates should feel confident enough to educate those around them.
- **Cooperation** – When it comes to victims' rights, advocates are an important part of the system. Sometimes rights will be threatened accidentally, and advocates need to work with others in the system constructively to protect rights and prevent problems in the future.

Unfortunately, enforcing victims' rights is not always a straightforward matter. Under TEX. CODE CRIM. PROC. Art. 56.02(d), judges, prosecutors, and police cannot be sued for money damages for violating a crime victim's statutory rights. **However, that doesn't mean courts and service providers are free to ignore victims' rights, or that advocates are powerless to protect them.**

As discussed in the previous section, survivors themselves have standing to object to constitutional violations through their lawyers, even though they aren't technically parties to the criminal case. In addition, even for violations of statutory rights, an attorney for the survivor might be able to compel the court to honor the survivor's rights in a way not involving suing the offending official. Victims' rights enforcement is a little-developed and unpredictable body of law, but it has the potential to be enormously valuable to sexual assault survivors. Where informal communications with officials have proved unsuccessful, the advocate should refer the survivor to a victims' rights attorney.

But in many cases, the advocate will play a pivotal role less aggressively. Sometimes a lawyer, judge, nurse, or police officer will violate a victim's rights without realizing it. In such a case, an effective remedy might be nothing more than bringing it to the person's attention. Ensuring that people within the system recognize and respect crime victims' rights will sometimes simply amount to requesting they do so. Other times the advocate will need to demand action, pointing to the law for support. Whatever the case, persistence and vigilance are essential.

Because advocates can view the entire criminal justice process from closer to the survivor's point of view, they're often in a better position to protect survivors' rights than anyone else. **A well-trained legal advocate might be the only person involved in the case who even realizes a right is being violated or ignored.** Other individuals in the system have different responsibilities—and therefore different priorities—so they might not remember or be aware of all the crime victims' rights all of the time.

Although advocates are independent and stand outside the criminal justice system, the system depends on advocates to defend survivors' rights, just as survivors do. The bottom line, then, is that advocates must know the crime victims' rights well enough to be a confident, cooperative resource to both survivors and system players when violations occur.

The Criminal Investigation

Introduction: The Role of Law Enforcement

For many survivors of sexual assault, the process of reporting the crime to police and having it investigated is very traumatic—so much so that the idea of it discourages many from reporting at all. However, when survivors do come forward, the reporting and investigation stage is the time when legal advocates can often do a lot to protect victims' rights.

Criminal investigations take a long time, especially for serious crimes like sexual assault. There are a lot of things that can draw out the process. In many circumstances, constitutional safeguards might cause delays before police act. To protect the integrity of the case, police may have to take a lot of time obtaining search warrants, building evidence, and sometimes asking survivors to retell their stories multiple times. Because the safeguards often cause stress and trauma for survivors, it is important for advocates to understand the reasons things happen the way they do during criminal investigations. Having a good perspective on the system as a whole will help the advocate explain why police do certain things and to provide much-needed emotional support during the investigation. And, just as important, it also helps the advocate correct errors when things go wrong.

At the outset, it is important to step back and think about the criminal justice system as a whole. Our system is designed to maximize confidence in the convictions we dole out by minimizing the risk of punishing the innocent. And that makes sense: when we convict someone of a crime, we want to do it completely fairly. We want to be able to say we proved the defendant's guilt beyond a reasonable doubt, even in the face of all the defendant's very best defenses. By placing tough burdens on itself, the state is attempting to ensure certainty about its convictions. It is true that convictions would be easier to obtain without those burdens, but that would also make it easier for defendants to challenge them afterward.

In practice, all of that means police have to navigate a number of constitutional safeguards throughout the investigation process. They also need to be extremely careful with how they collect and handle evidence, because even small mistakes can prevent prosecutors from charging a defendant with a crime. For example, under the "exclusionary rule," due process requires that evidence collected illegally cannot be used against the defendant at trial (*Mapp v. Ohio*, 367 U.S. 643 (1961)).

Survivors should also be prepared for the general sequence of events during the investigation, including the actions the police will most likely take. Making a report to police is the first event that sets everything in motion. After that, police will begin collecting evidence of the crime. That often includes interviewing the survivor, a nurse administering a medical forensic examination (although this can be done without making a report at all if the victim wants) (**see p.39**), interviewing possible witnesses, asking the victim to identify the attacker, apprehending a suspect, and interrogating the suspect.

Finally, keep in mind that the role of law enforcement is slightly different from the role of the prosecutor. Instead of proving that a crime occurred or that a particular defendant is guilty, the role of investigators is to collect all the evidence, interpret the evidence, and pass that information on to prosecutors. As a result, even if investigators truly believe a survivor, they might not make an arrest if they know there is insufficient evidence to bring a criminal case in court. Therefore, providing them with as much accurate information as possible is critical to successful investigations. The more information a survivor can provide police, the better police will be able to do their jobs, and the better chance there is of ultimately convicting the perpetrator.

This chapter examines the entire process of reporting and investigating a sexual assault. Read and refer back to it when preparing survivors for the investigation process and to help explain the confusing things that may happen along the way.

i. Reporting

When sexual assault happens to children, the elderly, or people with disabilities the law requires a police report. (see p.36) However, when anyone else is attacked, the decision belongs entirely to the survivor. Whenever possible, an advocate should accompany a survivor when reporting a sexual assault to law enforcement. Advocates can provide invaluable support and reassurance during this intimidating and confusing process.

From a criminal justice system perspective, reporting a sexual assault to police is probably the most significant action a survivor can take. It is the single action that triggers all the rest of the system's responses. Until a survivor makes a report, nothing usually happens within the system.

There are many reasons survivors may choose not to report their assaults to police. As Part II of this manual will discuss, many survivors feel they have more immediate needs than seeing the perpetrator convicted, or they may not have the time and energy to deal with a criminal case. (see p.92) Another major reason a survivor may be reluctant to report an assault is the expectation that the perpetrator will not be punished. According to the FBI, only about half of sexual assault reports nationwide result in arrests, and about half of those charged with felonies are released prior to trial.³

aa **ADVOCACY ACTION:** In the event police refuse to conduct a full investigation, the survivor may still wish to seek another civil remedy, such as a sexual assault protective order or an administrative response from her school. Refer to Part II of this manual, "Civil Legal Remedies," for alternative measures to protect the survivor's interests.

It is important for advocates to recognize the reasonable and valid reasons many survivors have for choosing not to report to police. However, survivors may not know about the different options for filing a police report. To make a fully informed decision, survivors should understand the alternative reporting methods available in Texas.

Ordinary Crime Report

It is important for advocates to recognize the reasonable and valid reasons many survivors have for choosing not to report to police. However, survivors may not know about the different options for filing a police report. To make a fully informed decision, survivors should understand the alternative reporting methods available in Texas.

Pseudonym Report

A second option is making a "pseudonym report." When the survivor contacts police to make a report, she or he can also complete a pseudonym form, which allows the survivor to choose a false name to go by throughout the investigation and prosecution. The false name will appear on all public documents associated with the case, and only the court and lawyers for both sides will know the survivor's true name (see p.92). In fact, it is a class C misdemeanor (see p.9) for a public servant to disclose the name of a survivor who has filed a pseudonym form (TEX. CODE CRIM. PROC. § 57.03(d)).

Survivors can also complete a pseudonym form later, even if one isn't completed at the time of the initial report. If a law enforcement agency receives a pseudonym form after the investigation has begun, the law requires police, prosecutors, and court staff to replace the survivor's true identity with the pseudonym in all public records (TEX. CODE CRIM. PROC. § 57.02(e)). Aside from the survivor's name remaining confidential, this type of report is identical to a normal crime report.

³ Greenfeld, L. (February 1997). Sex offenses and offenders: An analysis of data on rape and sexual assault, Report for the Bureau of Justice Statistics, and National Center for Policy Analysis, Crime and punishment in America: 1999 (1999).

To obtain and file a pseudonym form, contact Sexual Assault Prevention or Crisis Services within the Office of the Attorney General's Crime Victim Services Division: (512) 936-1615 or sapcs@oag.state.tx.us.

Reporting for Incarcerated Survivors

If a correctional facility is located within your program's service area, you might receive letters from inmates who have been sexually assaulted there. Your agency may already have some relationship with the local jail or prison. However, many correctional facilities in Texas do not have established relationships with their local rape crisis centers or sexual assault programs.

If your program does not provide direct services to incarcerated survivors, you can refer TDCJ inmates to the **Safe Prisons Program**, which is administered by the Texas Department of Criminal Justice. The program is intended to prevent sexual assault in prison and encourage better response by correctional staff. For more information, contact the Program Manager's office in Huntsville at (936) 437-8918. In addition, an independent **Prison Rape Elimination Act Ombudsman** provides oversight for the program. Also based in Huntsville, the Ombudsman's office is available by phone at (936) 437-2133. Note that these offices have no authority in connection with survivors in federal, county, or local facilities.

TAASA is available to assist rape crisis centers in responding to incarcerated survivors. Since the publication of the Department of Justice's Prison Rape Elimination Act National Standards in June 2012, many programs across the country have been venturing into this service area for the first time. TAASA can help connect you with training, assistance developing MOUs with local facilities, and navigating relevant grant requirements.

Whatever the situation, if a legal advocate is fortunate enough to speak with a survivor before she or he reports, the advocate is in a unique position to provide the knowledge and support needed to make the best decision. Not only has the advocate been trained to support the survivor through a very difficult time, but the advocate also has important legal knowledge at her disposal. It is critical to understand the reporting process, but other legal issues can also impact the decision whether to report. One of the most important is the medical forensic examination, which Section iv will cover in detail.

Survivors can file pseudonym forms at any time during the investigation and prosecution, and officials must delete the true name from any public documents already created.

ii. Cases Involving Child Survivors and Mandatory Reporting

MANDATORY REPORTING

Even though it's generally the victim's decision whether to report a sexual assault, Texas law creates an exception in the case of child victims under 18, elderly victims over 65, and victims with disabilities.

Anyone who has reason to believe a person belonging to one of those categories has been harmed mentally or physically by abuse or neglect must immediately report that suspicion (TEX. FAM. CODE § 261.101(a)). Failing to report suspected abuse or neglect is a class B misdemeanor (TEX. FAM. CODE § 261.109). Professionals who suspect abuse must report it within 48 hours and may not delegate the responsibility to report to anyone else. Professionals who fail to report abuse or neglect with the intent to conceal the offense are subject to a state jail felony charge. No report is required by law when an adult discloses abuse or neglect experienced when the adult was a child.

What is Neglect?

Physical or verbal abuse does not have to occur in order to trigger the mandatory reporting law. Leaving a child at risk of harm, or providing inadequate food, clothing, shelter, and/or medical care for a child is neglect. For a person over 65 or a person with a disability, neglect can take the form of dangerously inadequate nourishment, medical care, living conditions, or personal hygiene.

Reporters Protected from Liability

Importantly, a person making a report does not have to worry about being sued if it turns out she or he is wrong. If a person makes a report in good faith, she is immune from civil and criminal liability—even if it turns out no abuse or neglect actually occurred. The reporter's name is also kept confidential.

Who to Call

In most cases of suspected child abuse or neglect, a report can be made either to the Texas Department of Family Protective Services (“DFPS”) or to police. However, if a person responsible for the care, custody or welfare of a child committed the abuse or neglect, the report must be made to DFPS. If someone else committed the abuse, the report can also be made to any local or state law enforcement agency.

DFPS Texas Abuse Hotline: 1-800-252-5400

DFPS Online Reporting: www.txabusehotline.org

IMPORTANT: If a child, person with a disability, or an elderly person is in immediate danger, call 911 immediately, and call DFPS afterward.

LEGAL ADVOCACY FOR CHILD SURVIVORS

As noted in this chapter's introduction, the criminal investigation can be extremely difficult on sexual assault survivors. Questioning by investigators often sounds like a challenge to the survivor's account, which is re-traumatizing. We try to make things easier for survivors by making sure they are prepared for the experience and understand, as much as necessary, the reasons behind the investigation process.

However, things are different—and often worse—for children. Young children are still learning from experience about trust, honesty, and the difference between right and wrong. If child survivors perceive that authorities do not believe them, it can create or exacerbate serious, lifelong psychological problems.

Luckily, legal advocates do not need to treat cases involving child survivors much differently from those involving adults. **Perhaps most importantly, crime victims' rights apply equally in child and adult cases. (see p.26)** The main difference is that the rights actually belong to the child's guardian, not the child survivor. The rights themselves, however, remain the same. One notable exception is that a child victim of crime has until her or his 21st birthday to file an application for Crime Victims' Compensation. **(see p.99)** Therefore, the discussions throughout this manual on protecting survivors' rights apply with equal weight in cases involving children.

The biggest differences in cases involving children pertain to the services legal advocates do not provide. Because of how traumatizing investigations are to children, investigators need to take a lot of special precautions that are not strictly necessary when dealing with adults. Informational interviews are conducted by experienced professional therapists and counselors. Those professionals have crucial skills that ordinary police investigators do not, such as special methods for asking about abuse, instead of direct questioning.

Prosecutors' offices and police in many Texas communities have Children's Advocacy Centers ("CACs"), which perform those functions and more. CACs provide specialized investigations in a child-friendly atmosphere, licensed therapy for children and secondary victims like parents, and medical professionals with experience testifying about child sex abuse in court.

Whereas rape crisis centers might typically fulfill some of those roles for adult survivors, child survivors need very specialized services during the criminal justice process. However, that does not mean the legal advocate does not have critical responsibilities to child survivors. As described above, most of the advocate's legal responsibilities remain unchanged. In addition to protecting crime victims' rights, advocates should also be prepared to provide families of child survivors with information on civil legal remedies and other legal issues. **(see p.92)**

If your community has a CAC, be sure to cultivate a good working relationship with them, just like any other criminal justice system institution. To find out about services in your area, contact **Children's Advocacy Centers of Texas at www.cactx.org** or by phone at **(512) 258-9920**.

iii. Polygraphs

Years ago, police departments in many places across the country required lie detector tests for rape victims before investigating. Fortunately, Texas has outlawed that practice.

Under TEX. CODE CRIM. PROC. § 15.051, police and prosecutors are forbidden from dismissing a sexual assault complaint because of the victim's unwillingness to undergo a polygraph test, or because of unsatisfactory results from such a test. The law protects victims of sexual assault (TEX. PENAL CODE § 22.011), aggravated sexual assault (TEX. PENAL CODE § 22.021), indecency with a child (TEX. PENAL CODE § 21.11), continuous sexual abuse of a young child (TEX. PENAL CODE § 21.02), or prohibited sexual conduct (TEX. PENAL CODE § 25.02) (**see p.14**).

Contrary to many people's assumptions, police and prosecutors are permitted to give sexual assault survivors lie detector tests. However, if they do, they must obtain a signed and written statement from the victim affirming that the victim understands two things:

1. The complaint cannot be dismissed because the victim refuses to take a polygraph, AND
2. The complaint cannot be dismissed on the basis of the results of a polygraph test (because results of a lie detector test cannot be conclusive proof that the survivor is lying).

Few law enforcement agencies or district attorney's offices administer polygraphs to victims regularly. Nevertheless, it can happen, and victims have important rights that must be respected if it does.

iv. Medical Forensic Examinations

WHAT IS A MEDICAL FORENSIC EXAMINATION?

A medical forensic examination (sometimes called a sexual assault examination) is a special exam typically conducted by a nurse, a physician, or a specially trained nurse called a Sexual Assault Nurse Examiner (SANE) or a Sexual Assault Forensic Examiner (SAFE).

The Code of Criminal Procedure gives sexual assault survivors a legal entitlement to an exam at medical facilities in their communities. (**see p.26**) There are only a couple restrictions on who is entitled to an exam. First, the survivor must request the exam within 96 hours (4 days) of the assault. Second, if a victim who reports a sexual assault to police has previously made a false report of sexual assault to a law enforcement agency, and there is no corroborating evidence of the present assault, police may decline to request a sexual assault exam for that person (TEX. CODE CRIM. PROC. § 56.06(a)). Unless one of those two exceptions apply, any survivor of sexual assault has the right to a sexual assault exam (TEX. CODE CRIM. PROC. § 56.03(a)(14)).

The purpose of a medical forensic exam is to provide medical treatment to sexual assault survivors while collecting evidence of the crime. Thus, as its name suggests, the exam has two parts: the medical portion and the forensic portion. The distinction is especially important for payment purposes, as explained at the end of this section.

The word “forensic” signals that something is related to proving a fact in court. So, the forensic portion of the sexual assault exam refers to anything related to evidence-collection. Photographs of injuries, samples of the attacker’s hair or bodily fluids, clothing fibers, and a toxicology test are all examples of the type of forensic evidence that may be collected.

On the other hand, the medical portion includes everything the nurse or physician does primarily for the survivor’s medical treatment. If the survivor needs medication, prophylaxes to prevent sexually transmitted infections, stitches, or treatment for any other injury, that treatment is available to the survivor as part of the medical portion of the exam.

EXAMPLES OF MEDICAL AND FORENSIC SERVICES

MEDICAL PORTION	FORENSIC PORTION
<ul style="list-style-type: none">• Medications• Stitches• STI prophylaxis• Treatment for sprains or broken bones• Emergency room services	<ul style="list-style-type: none">• Taking samples of hair or bodily fluids• Photographs of injuries• Taking samples of clothing fibers left on the survivor• Toxicology test for rape-facilitating drugs

The medical forensic exam is a vital tool for sexual assault survivors. Survivors need emergency medical treatment, and sexual assault exams fill that need. But the sexual assault exam is also a critical part of the reporting and investigation process, because it helps law enforcement get the evidence necessary to bring the attacker to justice.

THE IMPORTANCE OF PRESERVING EVIDENCE

Sexual assault is a unique crime, because the victim and perpetrator are very often the only eyewitnesses. Forensic evidence is always important in criminal cases, but it is absolutely critical when there are no other witnesses to support the survivor's account.

Forensic evidence can also be pivotal in cases involving a perpetrator who is known to the victim—the vast majority of cases. Probably the most common defense used by intimate partners, friends, and acquaintances who perpetrate rape is that sex occurred, but the victim consented to it. A good way to undermine that defense is to document any injuries to the victim, or any rape-facilitating drugs in her or his body. For example, a survivor may show signs of violence like bruises, cuts, abrasions, or evidence of strangulation. Without that evidence, the case may have little chance of proceeding to trial. And if there is not enough evidence to go to trial, the investigation could come to a halt.

The matter is further complicated because forensic evidence is very time-sensitive. Evidence a rapist leaves behind on the survivor's body is extremely vulnerable to contamination or being washed away. That is why sexual assault survivors should always be advised not to shower or bathe until they have received a sexual assault exam. In any case, the general rule is that if evidence is not collected within 96 hours of the assault, it cannot be collected at all. And the sooner a victim undergoes a sexual assault exam within that time, the more evidence can be collected. Note, however, that even if a survivor has taken a shower evidence may be present, and she or he should still go through with the medical forensic exam.

If a sexual assault survivor might someday want to see the attacker prosecuted, she or he should get a medical forensic exam as soon after the attack as possible. That is true even if the survivor is not yet prepared to make a police report. **Survivors who do not report have the same legal entitlement to exams as those who do.**

EXAMS FOR UNREPORTED AND REPORTED SEXUAL ASSAULTS

Legal Rights to a Forensic Medical Examination

As discussed earlier, in situations outside of Texas's mandatory reporting laws, the decision whether to involve law enforcement belongs entirely to the survivor. (see p.36) Fortunately, sexual assault survivors have the right to sexual assault exams regardless of whether they choose to report their assaults, at any hospital emergency room in the state. (see p.42) In addition, no matter whether a survivor reports the assault to police, she or he is entitled to have an advocate present during the exam at no cost (TEX. CODE CRIM. PROC. § 56.045).

aa ADVOCACY ACTION: During the exam the advocate's actions are limited to providing counseling, emotional support, and information about the legal rights of crime victims. (see p.26).

The Rationale

The idea of providing medical forensic exams to survivors who choose to keep police uninvolved may seem strange at first. After all, sexual assaults are already vastly underreported (82% of all sexual assaults go unreported in Texas⁴). It may be tempting to conclude that putting less pressure on victims to report would result in even fewer reports. However, there are very good reasons behind this policy.

As discussed above, it is extremely important to collect evidence of a sexual assault as soon as possible. Whether that happens can mean the difference between convicting the perpetrator and never even making an arrest. However, most sexual assault survivors are not ready to get involved with the criminal justice system within the first days after the assault. That does not mean they will never be ready. Instead, many survivors simply need time to process the traumatic event and reflect on the decision to report. Given that opportunity, many come forward later who would not have at the time of the assault.

Thus, providing sexual assault exams without police involvement represents a balance that benefits survivors, law enforcement, and public safety. And that encourages more crime reports. Survivors who are not ready to report their assaults right away still need the opportunity to collect vital evidence. And police need to have that evidence preserved in order to perform investigations later, when survivors eventually report. And finally, knowing that good evidence was collected soon after the assault will encourage survivors to report later. Without that evidence, it would be easy for a victim to think that reporting the crime is not worth it, because the attacker has little chance of being convicted.

Examinations Without Police Involvement

For survivors who report their assaults to police, the police department will simply request the exam and pay for the forensic portion. The process for survivors who choose not to involve law enforcement is a little more complicated, but it is still fairly straightforward.

The non-reporting survivor should simply go to a hospital that provides medical forensic exams, state that she or he is a victim of sexual assault, and request the exam. The survivor should inform personnel at the ER that she or he does not want to make a police report. The facility still might call the police as a matter of hospital policy, but it is up to the survivor whether to give police a statement. **In addition, survivors have the legal right to have an advocate from a rape crisis center present during the exam (TEX. CODE CRIM. PROC. ART. 56.045).**

aa **ADVOCACY ACTION:** Survivors have the right to a non-report exam even if police think the survivor is lying and refuse to request the exam. They shouldn't ordinarily do that, but if it happens, an advocate can cite the law and demand that the ER provides the exam without police involvement.

After the evidence is collected at the medical facility, it is sealed and sent to the Department of Public Safety. There, it is stored unopened for at least two years from the date of the exam unless the survivor decides to report the assault sooner. If the survivor eventually reports, she should contact the medical facility to find out how to connect her name to her evidence and release it to the law enforcement agency responsible for investigating the case. If the survivor does not report, DPS will destroy the evidence at the end of the two years.

⁴ Busch, Bell, DiNitto, and Neff, "A Health Survey of Texans: A Focus on Sexual Assault." (August 2003)

Limitations of Non-Report Examinations

For survivors who receive exams without filing police reports, there are some limitations on the type of evidence that DPS can store. DPS does not have refrigerated storage, so it cannot store “wet” evidence that is perishable. Most importantly, that means DPS cannot store bodily fluids in liquid form. Because the boxes of evidence will not be opened during the 2-year storage period unless the survivor reports, that evidence would go bad on the shelf. DPS can instead store “dry” evidence, like hair, clothing fibers, dried blood swabs, and buccal swabs (tissue taken from the inside of the cheek).

One important consequence is that urine cannot be collected. **Victims who wish to be tested for the presence of rape-facilitating drugs should know they cannot access that testing unless they file police reports at the time of the exam.** That is because toxicology tests performed at hospitals are far less sensitive than those conducted by DPS’s crime lab and cannot detect many drugs.

Where to Get an Examination

As a legal advocate, it is very important for you to know the nearest facilities in your community where survivors can be treated by a certified sexual assault nurse examiner (SANE). SANEs undergo extensive training and are equipped to provide the best possible care while preserving crucial evidence to be used in a criminal prosecution.

Neither the 3-year deadline for CVC nor the 2-year storage period at DPS affects the ordinary statute of limitations for any criminal offense.

Many communities in Texas have only 1 facility with a SANE program, and several others that do not. Helping survivors get to the SANE program first avoids unnecessary time and stress.

Texas law requires forensic medical examinations for adult sexual assault survivors to be available at every hospital in the state with an emergency department, excluding hospitals owned or operated by the federal government. (HEALTH AND SAFETY CODE § 323.002) This rule does not apply to minor survivors. That care is governed separately by multidisciplinary team protocols under Subch. E, Ch. 264, Family Code.

Facilities without SANE programs are allowed to ask survivors to accept a transfer to a different facility, but they cannot legally do so without first stabilizing the survivor’s medical condition and obtaining her or his consent. (HEALTH AND SAFETY CODE § 323.004(a-1)) Therefore, if SANEs in your community respond to only one or two specific ERs, survivors in your area may be asked to consent to a transfer if they first present at a non-SANE facility. **If a survivor in this situation can manage a transfer, it is highly recommended that she or he do so to receive the best possible treatment.**

However, in some cases the distance to the nearest SANE facility may be too great, or other circumstances beyond the survivor’s control might not permit a transfer. In these circumstances, the law requires the ER where the survivor first presented to have its staff trained in basic forensic evidence collection and to provide a forensic medical examination in accordance with Sec. 323.004(b), Health and Safety Code.

The law also requires the Department of State Health Services to publish on its website a list of each emergency department in Texas designated as its community’s “primary health care facility for treating sexual assault survivors.” (HEALTH AND SAFETY CODE § 323.008)

aa ADVOCACY ACTION: You can play an important role to ensure these processes run smoothly. Foremost, stay informed about what agreements there are among your community’s hospitals, SANEs, and law enforcement offices. That will enable you to help survivors weigh the costs and benefits of a transfer and to direct survivors to the best services the first time, avoiding the need for a transfer.

Payment for the Exam

Finally, under no circumstances should any survivor be charged for the forensic portion of the sexual assault exam. Texas law prohibits billing survivors for forensic services, regardless of whether they have reported to police (TEX. CODE CRIM. PROC. §§ 56.06-56.065). On the other hand, **survivors are responsible for the costs of the medical portion of the exam**, just like any other victim of violent crime who receives medical treatment.

Survivors who report their assaults can receive reimbursement for their medical costs from the Crime Victims’ Compensation (“CVC”) program, which is administered by the Office of the Attorney General. (see p.99) But, CVC is only available to crime victims who have filed formal crime reports, so survivors who receive sexual assault exams without involving police cannot apply. However, if a survivor reports the assault within three years, she or he can apply for CVC at that time.

PAYMENT FOR MEDICAL FORENSIC EXAMINATIONS		
	FORENSIC PORTION	MEDICAL PORTION
Sexual Assault Reported to Police at time of Exam	Local law enforcement pays	Survivor pays, but is eligible for CVC reimbursement
No Report Made to Police	DPS pays	Survivor pays, and is not eligible for CVC reimbursement unless s/he reports to police within 3 years

Bottom Line:

The Role of the Legal Advocate in the Criminal Investigation

Both before the police report and during the criminal investigation, a legal advocate's job centers around informing victims about their options and helping them to make decisions consistent with their needs. Some guiding principles to keep in mind are:

- **Knowledge** – There's no substitute for being an expert on the criminal justice issues that victims will have questions about.
- **Preparation** – There's a lot to know, and there can be a lot going on at once during an investigation. Anticipating what's likely to come your way next narrows your focus and makes everything more manageable.
- **Listening** – Most importantly, the victim's needs should guide everything you do. Provide all the necessary information and support, *but be careful not to substitute your own desires for the victim's*.

If an advocate talks with a victim before she or he has decided whether to report, the advocate has a great opportunity to help the victim make the best decision. Most obviously, the advocate can help the victim to weigh the consequences of reporting or not reporting, and explain the differences among the alternative reporting methods (of course, there is no choice in the matter if mandatory reporting laws apply). Listening is key. Before the advocate can help, the victim must express her or his desires and priorities, especially including safety and privacy concerns (see p.94). Although the victim might not want to do anything, the advocate should explain that doing nothing is a decision that has its own repercussions—specifically, the more time that passes, the less likely a conviction becomes.

Just as important, talking with an advocate probably will be the first time the victim learns that she or he has various reporting options, including receiving a sexual assault exam without police involvement. Thus, talking with a victim before a police report is a great early opportunity to empower the victim in the criminal justice experience.

But the advocate's role as an empowering supporter extends throughout the rest of the investigation process too. The investigation is a time when victims need experts on their sides. From the survivor's perspective, she or he has been thrown into the middle of the criminal justice system. There are experts all around, but they're each too busy with their own specialized duties to stop and help. Even though advocates are independent from the system, they play a vital role within it. The legal advocate is an expert who's there just for the survivor. During the reporting and investigation stage, the advocate needs to be prepared to take a bird's-eye view of the system as a whole, in order to help the survivor promote her or his interests at all times.

In most cases, the advocate will have more opportunities to assist the victim during the investigation stage than in any other. However, the information an advocate needs at her or his disposal during the investigation is not limited to that contained in this section. Advocates always need to be prepared to explain and caution about what lies ahead for victims. The following sections cover other stages of the criminal justice process, including the prosecution. While advocates have specific responsibilities *during* those stages, it's also important to understand them well enough to advise survivors about them ahead of time. Accordingly, consider revisiting the principles laid out on this page after you've become familiar with the entire criminal process.

The Prosecution

Introduction: Proving Guilt and Administering Punishment

Whereas the police investigation is all about collecting information, the prosecution is about putting that information to use. The criminal prosecution is the process of using all the information collected by investigators—the evidence—to officially accuse the defendant of a crime and prove his or her guilt. The way we prove guilt in our system is to confront the accused with the evidence in front of a judge or jury, allow the accused to respond, and finally have the judge or jury decide whether the accused committed the offense. That process is what we refer to as the criminal trial.

While survivors generally will participate as witnesses, their role in the prosecution often will not be as central as in the investigation. That is not to say victims' participation is unimportant. Testifying against the attacker is extremely important, and it can be very difficult. However, there are large portions of the prosecution in which victims participate very little, if at all. The main players in the prosecution are typically the state's attorney, the defendant, and the defendant's attorney.

Regardless of how much a survivor participates, she or he has important rights throughout the process that must be protected. Therefore, being well-informed and well-prepared for what happens during the prosecution are primary responsibilities for the legal advocate.

This chapter will examine the individual parts of the prosecution in detail, but, like the investigation, it is also useful to think about the process as a whole. Criminal defendants have important rights guaranteed by the U.S. Constitution that are designed to protect against government overreaching. A fundamental belief in our legal system is that if the government is going to punish someone by taking away life, liberty, or property, then the government's power needs to be regulated to prevent discriminatory or imprecise decision making. Logically, then, the greater the potential punishment, the stronger the rights the accused will have. For example, Texas's highest criminal court is required to review every death sentence in a separate appeal.

Sexual assault is not punishable by death, but it is one of the most serious crimes under our Penal Code. Therefore, defendants accused of sexual assault have strong constitutional rights during the prosecution. But in Texas we also recognize rights of crime victims in both statute and our state Constitution. (**see p.26**) This chapter will go through the prosecution step-by-step, observing which rights apply when, and how victims' rights interact with those of criminal defendants.

As always, preparation is vital for effective advocacy. One of the most important things advocates can do for survivors is to keep them informed about their ever-changing options and opportunities as the criminal justice system moves along. Thus, advocates must be prepared to apply a thorough knowledge of crime victims' rights at any time. For example, a survivor might not realize she has the right to use a pseudonym in the proceeding, or to have the perpetrator tested for HIV/AIDS. Knowing the prosecution process and anticipating which of the victim's rights are likely to be affected go hand-in-hand.

While reading this chapter, you might benefit from referring to the earlier chapter on Crime Victims' Rights from time to time. The better you know those rights—and what they mean in context—the better resource you will be for the survivors you assist.

i. The Charging Process and Prosecutorial Discretion

THE CHARGING PROCESS

Criminal cases are brought by the state against the defendant. They are different from civil lawsuits, in which the injured party personally brings the suit against the defendant. In criminal cases, it is the state's attorney—also called the prosecutor—who initially chooses which people to charge with crimes. Shortly after arrest, the accused goes before a magistrate for an “initial appearance,” as required by TEX. CODE CRIM. PROC. Art. 15.17. A few things happen at the initial appearance: the magistrate determines whether probable cause existed to make the arrest, informs the accused of the charges, and sets the bail amount. (see p.47) In Texas, the accused also has the option to demand an “examining trial,” which is longer than an initial appearance and is used to determine whether probable cause exists. Both sides present evidence during an examining trial (TEX. CODE CRIM. PROC. Art. 16.01).

For felonies like sexual assault (see p.14), that decision must also be ratified by a grand jury's decision to charge a person with a crime, which is called an “indictment.”

The victim might have to testify at either a grand jury proceeding or an examining trial, or both. After the grand jury issues an indictment, the accused will make a second appearance before a magistrate where he or she officially hears the charge, pleads “guilty” or “not guilty,” and the court may set bail again.

PROSECUTORIAL DISCRETION AND THE ROLE OF THE VICTIM

Prosecutors are among the most powerful of our public officials. They have almost total discretion to choose who to charge with crimes and to change their minds about which crimes to charge. Further, their decisions are virtually unreviewable. In any given case, therefore, the victim depends completely on the prosecutor to guide the case through the justice system. Prosecutors' broad decision-making authority is called “prosecutorial discretion.”

A major consequence of prosecutorial discretion is that, although survivors can consult with prosecutors and convey their wishes in a case, they generally cannot determine whether the state charges their attackers with crimes. And if the case goes to trial, the state's top priority is to convict the perpetrator. To that end, the role of the victim is as a witness to the crime, whose testimony can help secure the conviction. Beyond that, however, decisions about how to proceed with a criminal case belong entirely to the prosecutor and the grand jury. If a prosecutor decides there is not enough evidence to charge an attacker with a crime, there is no system to appeal or review that decision. Technically, grand juries have the authority to investigate crimes independently from police and prosecutors, but they rarely do so.

aa **ADVOCACY ACTION: Asserting the Survivor's Rights**

Despite the prosecutor's broad discretion, do not hesitate to confidently assert survivors' crime victims' rights. For example, survivors have the rights to confer with a representative from the prosecutor's office, to be informed about court proceedings, and to be treated with fairness and dignity. Although the victim is not a party to the case, those rights and more are guaranteed by the Texas Constitution, and the survivor has standing as a crime victim to enforce them (TEX. CONST. Art. 1, § 30(a)-(e)). Therefore, use the template Victim Rights Assertion Letter at Appendix C to assert those rights in writing at the beginning of the prosecution, and specifically request that the prosecutor consult the survivor before offering a plea bargain and notify the survivor of every public court proceeding.

ii. Bail and Pretrial Protection

BAIL

People accused of most non-capital crimes in Texas have a state constitutional right to bail (TEX. CONST., ART. 1, SEC. 11). Bail is the mechanism courts use to make sure those accused of crimes do not flee the jurisdiction before the case can proceed. The court decides an amount of money the accused must deposit with the court, and in order for the accused to get the money back he or she must return for the next proceeding. The first time a court will set bail for the accused is shortly after the arrest, to ensure he or she does not flee before the grand jury decides about an indictment. The second time is after the indictment to ensure the accused does not flee before the trial.

The bail amount will depend on how serious the crime is and how likely the accused is to flee. In addition, bail may be denied to the accused altogether if he or she has committed multiple prior felonies, has committed certain crimes while already on bail or community supervision, or has violated a protective order (TEX. CONST., ART. 1, SECS. 11A-11c). In any case, however, the federal and state constitutions both forbid “excessive” bail, which means the amount must be something the accused can realistically pay (TEX. CONST., ART. I, § 13; U. S. CONST., AMEND. 8).

BOND CONDITIONS AS PROTECTIVE MEASURES

Texas prosecutors often utilize the bail process to try to provide extra protection to sexual assault survivors while a criminal case is pending. As discussed earlier, crime victims have the right to have their safety considered by a magistrate or judge when setting the defendant’s bail amount.

However, in sexual assault cases, courts often place more restrictions on defendants than the money the defendant deposits. For victims’ safety, prosecutors can ask courts to place extra conditions on defendants’ bond, such as staying away from the victim; not communicating with the victim or members of her family or household; and staying away from places like residences, workplaces, and schools.

aa **ADVOCACY ACTION:** Art. 56.02(a)(2), Code of Criminal Procedure, requires magistrates to consider victims’ safety when fixing a bail amount. Encourage the survivor to inform the prosecutor if she or he would feel unsafe if the perpetrator were released on bond. (see p.26)

You may notice that those bond conditions sound a lot like provisions that are usually included in protective orders. (see p.97) That is not accidental. While a criminal case is pending, prosecutors generally like to use bond conditions to mimic the protections offered by protective orders.

Although Texas law designates prosecutors as the officials responsible for filing applications for protective orders,⁵ and there is no legal requirement that a survivor cannot obtain a full protective order while a criminal case is pending, some prosecutors cite strategic reasons for using bond conditions instead. A common concern among prosecutors is that, because a protective order hearing requires the survivor to testify on the record in the presence of the defense, it could provide the defense advance notice of the state’s evidence and create an opportunity for the survivor to make a mistake or contradict herself. Keeping the survivor off the witness stand until trial, some prosecutors argue, strengthens the criminal prosecution.

⁵ TEX. FAM. CODE § 81.007.

On the other hand, scholars and victim advocates have noted important limitations of bond conditions.⁶ **If you are assisting a survivor with an open criminal case, consider the following when determining whether bond conditions offer sufficient protection:**

- Bond conditions only last the length of the criminal case. If there is a dismissal, no-bill, plea bargain, acquittal, or a conviction without a prison sentence, bond conditions will no longer apply.
- Unlike a protective order, a defendant may not be arrested on the spot for violating a bond condition. Violating a bond condition is a crime,⁷ but depending on the offense charged, the court often must hold a hearing to decide whether the defendant violated bond, rather than arresting the defendant on the spot.⁸
- Because bond conditions expire at the end of the criminal case, they cannot be extended when the perpetrator is eventually released from prison. Protective orders are automatically extended for 1 year from the perpetrator's release if the perpetrator is in prison on the date the PO is scheduled to expire.⁹ Many survivors who had bond conditions in place mistakenly believe they have a PO, only to discover just before their rapist's release that an extension is not possible.

MAGISTRATES' ORDERS FOR EMERGENCY PROTECTION

Art. 17.292, Code of Criminal Procedure provides yet another mechanism to protect victims while proceedings are pending: the magistrate's order for emergency protection.

Magistrates' orders for emergency protection are available to victims of sexual assault, aggravated sexual assault, stalking, or any offense involving family violence. Their function is similar to that of protective orders, but for a much shorter time frame than protective orders. The magistrate can use the order for emergency protection to prohibit the accused from doing any or all of the following:

- Assaulting the survivor
- Stalking the survivor
- Communicating directly with the survivor or the survivor's family or household members
- Threatening the survivor or the survivor's family or household members through a third party
- Going near the residence, place of employment, or business of the survivor or a member of the survivor's family or household
- Possessing a firearm (unless the accused is a peace officer)
- Carrying a concealed handgun (license will be suspended)

The victim (or the victim's guardian) does not have to rely on the prosecutor to request an order for emergency protection. She or he can request it personally at the defendant's initial appearance following the arrest. The initial appearance must occur within 48 hours of the arrest. (**see p. 46**) However, even if the victim or guardian does not request it, the magistrate can still issue the order independently, or upon request by the prosecutor or a peace officer.

If the magistrate issues an order for emergency protection, then any violation of the order is a new and separate criminal offense. After the order issues, the police or sheriff's department in the survivor's jurisdiction will receive a copy to inform them of the restrictions on the defendant. Likewise, if the

⁶ See, e.g., Paula Pierce, No Contest: Why Protective Orders Provide Victims Superior Protection to Bond Conditions, 40 Am. J. Crim. Law 227 (2013).

⁷ TEX. PEN. CODE § 25.07.

⁸ TEX. CODE CRIM. PROM. ART. 17.40(B).

⁹ TEX. FAM. CODE § 85.025(c).

order prohibits the defendant from going near a school or child care facility, that location will receive a copy of the order. Finally, the magistrate will provide a copy to the defendant in open court to make him or her aware of what the order means.

If the defendant is accused of using or exhibiting a deadly weapon during a family violence offense, then the order will remain in effect at least 61 days, and up to 91 days, from the date the magistrate issued it. If the defendant is accused of sexual assault, aggravated sexual assault, stalking, or any other family violence offense, then the order will remain in effect at least 31 days, and up to 61 days.

aa **ADVOCACY ACTION:** Advocates should also note that survivors are free during that time to pursue longer-lasting protective orders in civil court. A full discussion of sexual assault protective orders follows in Part III, Civil Legal Remedies for Survivors of Sexual Assault.

iii. Confidentiality

Since the enactment of the Michael Morton Act in 2013, crime victims need to be especially cautious about their safety and privacy during criminal prosecutions. The law expands defendants' access to prosecutors' records. As a result, prosecutors must take prompt and effective action to remove sensitive information about victims before turning over records to the defense.

Texas law provides a couple useful tools to protect sexual assault survivors' privacy during court proceedings. When survivors testify as witnesses they cannot remain totally anonymous, but the following tools can help to make the prosecution safer and less invasive. Also, refer to the chapter in Part II entitled "General Civil Issues" for a more pointed discussion of the importance of protecting survivors' privacy. (**see p. 94**)

PSEUDONYMS

A survivor may use a pseudonym in public documents throughout the criminal justice process. Article 57 of the Code of Criminal Procedure guarantees the right to use a pseudonym to victims of almost any sex offense, including child victims.

If a survivor decides to use a pseudonym, she must complete a pseudonym form. The survivor will choose a name to be used in all public files and records associated with the case. That includes not only court documents, but also all police records and even press releases. In addition, survivors can complete the pseudonym form at any time. For example, if a survivor completes it after the police investigation is over, the police agency must change the survivor's name to the pseudonym in all their records (TEX. CODE CRIM. PROC. Art. 57.02(e)).

Using a pseudonym is helpful, but its benefits are limited. Because of the defendant's constitutional right to confront his or her accuser, the defendant and the defendant's lawyer will know the survivor's true identity. In addition, courthouse and police staff will necessarily see the survivor's true name while filing the pseudonym paperwork. Therefore, to protect victims' privacy, Texas law makes it a Class C misdemeanor to knowingly disclose a victim's true identity to anyone not assisting the investigation or prosecution (TEX. CODE CRIM. PROC. Art. 57.03).

In Appendix D of this manual, you'll find copies of pseudonym forms for victims of sexual assault, family violence, and human trafficking. You also obtain and file a pseudonym form by contacting Sexual Assault Prevention or Crisis Services within the Office of the Attorney General's Crime Victim Services Division: (512) 936-1615 or sapcs@oag.state.tx.us. The form is also available on the OAG's website at www.texasattorneygeneral.gov/victims/forms.shtml.

ADDRESS CONFIDENTIALITY PROGRAM

The Address Confidentiality Program (“ACP”) supplements the right to use a pseudonym and provides additional safety for victims. As noted above, the defendant in a sexual assault case will know the victim’s true identity even if she or he uses a pseudonym. Therefore, it is imperative to keep the victim’s address and other contact information confidential. ACP fills that gap.

If a survivor was attacked at home, address confidentiality is probably an inadequate remedy, because the perpetrator knows where the survivor lives. She or he may have other, better housing remedies. Always help survivors consider their full range of options for safe housing. (see p.103)

The Attorney General will designate a post office box for a participating survivor to use in place of her or his actual residence, business, or school address. All court notices and other mail associated with the case will go to the substitute address, with free forwarding to the survivor’s true address. Survivors can also use the post office box as their address for driver’s licenses, voter registrations, school registrations, and other court proceedings. However, banks, credit card companies, and private utility companies are not required to accept the confidential address.

ACP is available to victims of sexual assault, aggravated sexual assault, stalking, prohibited sexual conduct (incest), or family violence, but only if their attackers do not know where they currently live (TEX. CODE CRIM. PROC. Art. 56.82). For some survivors, that means they would need to relocate before enrolling in ACP, which is not always feasible. Therefore, there are many reasons ACP might not be the best option for every survivor.

Before enrolling in ACP, the law requires a survivor to meet with an advocate to discuss the program as part of an overall safety plan. The application to the Office of the Attorney General must include a sworn statement that the survivor fears for her or his safety or the safety of a child or household member because of a threat of immediate or future harm caused by the attacker.

DISCOVERY UNDER THE MICHAEL MORTON ACT

Effective January 1, 2014, the Michael Morton Act amended Art. 39.14 of the Code of Criminal Procedure to allow criminal defendants and their defense teams to access prosecutors’ entire investigative files, subject to certain restrictions.

Importantly, the law limits the rights of defendants to access victims’ and witnesses’ identifying information that may be found in the state’s files. **However, these protections do not occur automatically. Prosecutors must take action proactively to redact or remove sensitive information.**

aa **ADVOCACY ACTION:** It’s possible that your local prosecutor’s office has not yet developed policies and protocols to protect victim privacy under this new law. As an advocate, you might be the best-informed person on survivors’ privacy rights. And because the law is new, the practices adopted by prosecutors now might stay in place for years to come.

As a practical matter, the state’s file might be shared with the defendant very soon after indictment, so it is crucial to advocate as early as possible for the removal of survivors’ identifying information. You can also contact TAASA for technical assistance regarding Morton Act disclosures, subpoenas, and other privacy threats.

Art. 39.14(g) describes the following information as “information identifying any victim or witness”:

- Name
- Address
- Telephone number
- Driver’s license number
- Social security number
- Date of birth
- Bank account information
- Other identifying numbers contained in a document or witness statement
- Any other information that by reference would make it possible to identify a victim or a witness¹⁰

The law does not require prosecutors to remove this information from its records. In some circumstances, a court might even decide this information is so important to the defendant’s case that it must be turned over. But, by removing this information from the state’s records before discovery, prosecutors can create a first line of defense for survivors. Then, if the defense wants the information later, it is their burden to persuade the judge why they need it—similar to defending against a subpoena for counseling records, for example. And even if the defense obtains documents containing victim information, the law says they must redact it before allowing the defendant to see it.

Depending on what information is contained in the state’s file, using the Pseudonym Form and Address Confidentiality Program may be sufficient to protect survivors’ identifying information. Thus, a failure to provide survivors with early and accurate information about those privacy tools now has even more consequences. Because of the Morton Act’s new risks to victim privacy, we should encourage survivors to use pseudonyms and the ACP, as long as those measures don’t create additional risks.

Finally, because the Texas Constitution gives survivors standing to assert their rights as crime victims, survivors can also independently petition the court for privacy protections. If you believe the court is going to allow the defendant access to sensitive information and is not considering the survivor’s right to protection from the accused,¹¹ it may be appropriate for the survivor to seek representation to assist in enforcing her or his rights.

SUBPOENAS

Subpoenas for records are some of the most invasive and potentially legally damaging events in a criminal prosecution. Defense attorneys often demand to see the victims’ medical, educational, and other personal records to try to hurt the prosecution’s case. That is especially true when the perpetrator argues that the survivor consented to sex.

Usually, the prosecutor is the one who opposes those efforts. Often, they use “rape shield” statutes, which prevent defendants from presenting certain evidence of the victim’s sexual history. However, in many circumstances victims have the right to obtain personal representation to directly oppose the defendant’s subpoenas instead of relying on the state. In some circumstances there are advantages to opposing subpoenas independently, which is discussed later in this manual (**see p.96**)

¹⁰TEX. CODE CRIM. PROC. ART. 39.14.

¹¹TEX. CONST. ART. 1 § 30(2).

iv. The Right to Be Informed of Dates and Happenings

Survivors of sexual assault have constitutional and statutory rights to be kept informed about court dates, reschedulings, and cancellations. Article 1, Section 30(b)(1) of the Texas Constitution guarantees a survivor's right to be notified of court proceedings, if the survivor requests it. Further, Article 56.02(a)(3) of the Code of Criminal Procedure says that if a crime victim requests information about court dates, reschedulings, and cancellations, the prosecutor must provide it. Those rights also apply to courts of appeals. In addition to appellate scheduling information, a victim also has the right to be informed of the appellate court's decision before the decision is made public. **And as always, survivors and prosecutors each have the authority to legally enforce crime victims' rights under Article 1, Sections 30(d)-(e) of the Texas Constitution. (see p.26)**

You should always make a request in writing to be notified of court proceedings at the beginning of the prosecution. However, in practice, that single request is sometimes not adequate. Therefore, survivors should check with the prosecutor or the court the day before each scheduled proceeding. Court proceedings are frequently rescheduled, and making unnecessary trips to the courthouse on workdays can cause huge problems for victims. Therefore, helping victims stay informed about court dates is one way advocates can help immensely during the prosecution.

In addition, if there are several continuances or cancellations, survivors might fear the reason is that the case against the defendant is weak. Advocates can do a lot to relieve survivors' stress by countering those fears. One of the most common reasons a proceeding gets postponed is that an earlier trial goes on too long. For example, if a trial scheduled for Monday does not finish before the end of the day, it will resume on Tuesday, and the court will push back Tuesday's previously scheduled proceedings.

Another common cause for delay is the court's granting "continuances." A continuance is a postponement the court can grant if one side offers a good reason in the interest of fairness. For example, the defendant might request a continuance if he or she received late notification of the court date, or if more time is necessary to gather evidence. Postponements are common and can prolong the prosecution for weeks or months. That makes it all the more important for survivors to have assistance in keeping track of their court dates and to know the delays have nothing to do with the strength of their cases.

aa **ADVOCACY ACTION:** Judges Must Consider the Impact of Continuances on Juvenile Victims Continuances also raise an important victims' rights issue. Parties are never allowed to use continuances simply to wear down the other side, and the judge has discretion to grant or deny the requests as she or he sees fit. But when the case involves a survivor of sexual assault or assault who is under 17, or a survivor of family violence of any age, TEX. CODE CRIM. PROC. Arts. 29.14 and 56.02(a)(15) provide an additional right.

For those victims, if the prosecutor requests, the judge must consider the impact on the victim before granting a continuance. That does not guarantee the judge will deny any specific request, and it does not mean that the victim being upset will be a good enough reason to deny a continuance. However, judges must recognize that at some point granting a continuance becomes inappropriate because of the effect on survivors. Additionally, if the prosecutor requests, a judge must state on the record her or his reasons for granting or denying a continuance. An advocate should not hesitate to remind the prosecutor of this right if a continuance will negatively impact the victim.

v. The Right to HIV/STI Testing

Survivors of some sexually violent crimes have the right to have the defendant tested for HIV and other sexually transmitted infections and diseases. The right applies where the defendant is charged with sexual assault (TEX. PENAL CODE § 22.011), aggravated sexual assault (TEX. PENAL CODE § 22.021), continuous sexual abuse of a child (TEX. PENAL CODE § 21.02), or indecency with a child by contact (TEX. PENAL CODE § 21.11(a)(1)). (see p.14)

Article 21.31 of the Code of Criminal Procedure provides that after a person is indicted for one of the offenses listed above, the victim may request that the defendant undergo testing. If the victim makes that request, the court must order the defendant to do so within 48 hours of the request. The judge can also choose to require the test without a request from the victim. In any event, the law requires the test results to go to the local health authority, which then must notify the victim of the results (TEX. CODE CRIM. PROC. Art. 21.31(a)).

In addition, if the crime charged is “harassment by persons in certain secured correctional facilities” or “harassment of a public servant” (TEX. PENAL CODE § 22.11), the court will order testing for HIV and other diseases automatically.

In the event the court cannot locate the defendant for testing, the 48-hour clock does not begin running until the defendant can be located.

If the survivor fears the attacker may have a communicable disease, or if the survivor does not know, be sure to inform her or him of this right. It is not a very well-known law, and it is possible that no one else within the system will provide that information.

vi. Victim Impact Statement

FUNCTIONS

After indictment, (see p.46) all victims of sexual assault, or their close relatives if they are deceased, have the right to provide a detailed account of the emotional, physical, psychological, and financial impacts that the sexual assault had on them. The right is guaranteed by TEX. CODE CRIM. PROC. Arts. 56.02(a) (13) and 56.03. The Victim Impact Statement (“VIS”) is one of the ways survivors can participate most directly in the justice system.

The purpose of the VIS is to allow victims to lend a perspective on the crime that no one else can. The judge or jury cannot consider the impact on the victim when determining whether the defendant is guilty, because they are limited to the evidence admitted during trial. However, officials will consider the VIS at three different times after a conviction:

- **Sentencing:** The prosecutor will consider it when negotiating a plea bargain with the defendant, and the judge will consider the VIS when deciding on an appropriate sentence. (see p.55)
- **Prison Packet and Parole:** The VIS becomes part of the attacker’s record in prison. If the attacker becomes eligible for parole, the VIS is one of the items the Board of Pardons and Paroles will consider when making its decision. (see p.65)

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- **Probation:** If the defendant is put under community supervision (probation), the VIS is part of the record maintained by the community supervision officer. (see p.63)

In addition, one portion of the VIS form is also the survivor's ticket to stay informed about parole and release proceedings during the attacker's incarceration. If survivors would like to stay informed about those proceedings, they must complete the portion of the VIS form called the Confidential Information Sheet. Survivors may complete the Confidential Information Sheet without completing the rest of the VIS, but in that case officials will not learn about how the assault affected the survivor personally, which could benefit the perpetrator in later proceedings on his or her release from prison.

PROCESS

Although the VIS usually does not come into play until after the prosecution—during sentencing and parole proceedings—the victim should submit it to the prosecutor's office at the very beginning of the prosecution. Within 10 days after the defendant's indictment, the Victim Assistance Coordinator from the prosecutor's office should provide the victim with a VIS form to complete. Once the survivor completes the VIS form, she or he returns it to the Victim Assistance Coordinator, who then forwards it to the court (although the judge can only read the VIS if the defendant is convicted). It is very important to be completely truthful in the VIS, because if the defendant is convicted, he or she is allowed to present evidence during the sentencing phase to challenge its accuracy.

The VIS is not to be confused with the victim's "allocution." Article 42.03, Code of Criminal Procedure, gives a victim, victim's guardian, or close relative of a deceased victim to present an oral statement to the court and the defendant about her or his views about the crime. However, the law requires that statement to be given after the sentence is pronounced, and the allocution must not have any effect whatsoever on the determination of the defendant's sentence.¹²

If a survivor fails to include something in the VIS that she or he would like to add, the survivor can still do so after the defendant is found guilty. Following the guilty verdict, the judge receives sentencing recommendations in the form of a Pre-Sentence Investigation Report (often referred to as a "PSI Report"), which is prepared by a community supervision officer. The officer will use information the survivor provided in the VIS to complete the report, but the survivor has the right to provide additional information too. In fact, if the survivor did not complete a VIS following the indictment, she or he can still provide information about the crime's impact through the PSI Report. Survivors who want to provide more information for the report should contact the Victim Assistance Coordinator to get in touch with the community supervision officer responsible for preparing it.

BENEFITS

Providing a VIS is nothing for survivors to be worried about. Instead, it is an opportunity to be heard during a process that can often feel silencing. Perhaps most importantly, if a survivor would feel unsafe if the perpetrator were released on community supervision or parole, the VIS may be the only opportunity to communicate that fear to the decision maker. Therefore, the VIS is vital to the survivor's safety interests. Although the VIS cannot guarantee a satisfactory decision about punishment or parole, it does ensure that whoever makes the decision is aware of the crime's effect on the survivor, and in the survivor's own words. That level of direct and independent participation is not available to survivors in many other parts of the justice system, if any.

¹²JOHNSON V. STATE, 286 S.W.3D 346, 348-49 (TEX. CRIM. APP. 2009).

vii. Plea Bargaining

The vast majority of criminal prosecutions result in a plea bargain, or plea agreement. Therefore, it is very important for advocates to know how best to serve survivors in the process.

A plea bargain is a negotiated arrangement between the prosecutor and the defendant to secure a guilty plea. In exchange for pleading guilty, the prosecutor typically agrees to charge the defendant with a lesser crime than if the case went to trial, and/or pursue a lesser punishment. Plea bargains fall within the prosecutor's broad authority to decide which offenses to charge and how to prosecute them (**see p.46**).

Obviously, it is important for sexual assault survivors to participate in the plea bargaining process. If a plea bargain would result in the defendant not having to pay restitution, for example, the survivor would have a financial interest that the prosecutor should know about. If it would result in little or no imprisonment, the victim could have serious safety concerns. In addition, being consulted and listened to by the justice system provides a sense of significance and dignity that can aid in the survivor's psychological or emotional healing. Finally, survivors can provide intimate information about the defendant's crime that no one else can, and that means their input is vital for prosecutors and courts to reach just decisions. Nevertheless, the prosecutor always makes the final decision about offering a plea bargain.

aa **ADVOCACY ACTION:** Keep in mind the survivor's constitutional right to confer with a representative of the prosecutor's office, and consider asserting that right to promote the survivor's participation in the plea bargaining process.

In all cases, survivors have the right to participate in plea bargaining using the Victim Impact Statement ("VIS") (**see p.53**). Article 56.02(a)(13), Code of Criminal Procedure, guarantees survivors the right to have the VIS considered by the prosecutor and the judge before accepting a plea agreement.

Lesser Offenses

There is no single rule that controls which offenses a prosecutor can substitute for sexual assault as part of a plea bargain. The decision will depend on the specific facts of the case—what the defendant did and all the surrounding circumstances. However, lesser offenses often include any of the "Sexual Offenses" or "Assaultive Offenses" listed in Chapters 21 and 22 of the Texas Penal Code. (**see p.14**).

The crime the defendant is charged with matters, because different crimes have different legal effects. For example, a felony will have greater negative effects on the defendant's rights than a misdemeanor, including rights to gun possession¹³ (**see p.62**). In addition, some sexual offenses require registry as a sex offender. (**see p.68**)

Lesser Punishments

Regardless of what crime is charged, the defendant's punishment will be relevant and important to the survivor. Even if the plea bargain requires the defendant to plead guilty to a felony, it may also reduce the prison time by many years or eliminate it completely. As noted earlier, the defendant might also try to avoid paying restitution to the victim.

¹³ Federal law prohibits anyone convicted of an offense punishable by more than one year imprisonment from possessing a firearm (18 U.S.C. § 922(g)). Texas's law is much more lenient, but if the federal law applies it supersedes Texas law.

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ADVOCACY ACTION: The survivor has the right to receive restitution, upon request, under Article 1, Section 30(b)(4) of the Texas Constitution. The advocate should always alert the survivor to request restitution, and the prosecutor should assert the survivor’s constitutional right. In the event the prosecutor does not assert the right, the survivor has standing to assert it personally under Art. 1, Sec. 30(e) of the Texas Constitution.

If the prosecutor engages in plea negotiations with the defendant, there will be an array of punishment options available. Advocates should make sure survivors are fully informed about all of them and have the opportunity to weigh in on what punishment is appropriate. To that end, the advocate should help the victim open a line of communication with the prosecutor. Although survivors have no specific statutory right to be informed about the plea bargaining process, many prosecutors will communicate with victims directly and openly.

Survivors also have a state constitutional right, upon request, to “confer with a representative of the prosecutor’s office” (TEX. CONST. Art. 1, Sec. 30(b)(3)). When a survivor submits a written request for her or his rights as a crime victim, she or he should specifically request to confer with the prosecutor prior to any plea agreements.

In any event, survivors must understand that criminal convictions are not one-size-fits-all. Understanding the consequences of a plea bargain is crucial to the survivor’s ability to evaluate it. And, even though the prosecutor makes the final decision about what plea bargain is appropriate, survivors’ perspectives are critical to help prosecutors make those decisions. Therefore, advocates should help survivors in three specific ways to maximize their participation in a plea bargain:

1. Submit a Victim Impact Statement within 10 days after the indictment.
2. Submit a written request to the prosecutor’s office that all rights of the crime victim under Article 1, Section 30 of the Texas Constitution and Chapter 56 of the Code of Criminal Procedure be recognized and honored, specifically including conferring with the victim prior to any plea agreements.
3. Open an informal line of communication with the prosecutor about what charges and punishments are appropriate from the survivor’s perspective.

viii. Victim-Offender Mediation/Dialogue

Victim-offender dialogue programs provide an additional response to crime, separate and apart from the typical criminal prosecution. In Texas, Victim-Offender Mediation/Dialogue (“VOM/D”) is available to any crime victim. It is never required; VOM/D only occurs when both the victim and offender volunteer for it, and the offender admits guilt.

The purpose of VOM/D is not for the perpetrator to earn credit to lessen his or her punishment, or to affect parole or community supervision. Instead, its purpose is to help survivors get closure to aid in their healing and recovery. A 2002 study revealed the most common reasons violent crime victims in Texas chose to participate in VOM/D were to seek answers to lingering questions, to express the impacts the crimes had on them, to experience a more human interaction with the offender, and to advance healing. The study found that 95% of victims participating in Texas were satisfied or very satisfied with the experience.¹⁴

To learn more about participating in the VOM/D program, survivors and advocates can contact the Texas Department of Criminal Justice at 1-800-848-4284 or victim.svc@tdcj.state.tx.us.

¹⁴Koss, M. and Achilles, M. (2008, February). Restorative Justice Approaches to Sexual Violence. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence. Retrieved February 2, 2010, from <http://www.vawnet.org> (citing Umbreit, M.S., Coates, R.B., Vos, B., & Brown, K. (2002). Executive summary: Victim Offender Dialogue in crimes of severe violence: A multi-site study of programs in Texas and Ohio. Minneapolis, MN: Center for Restorative Justice and Peacemaking, University of Minnesota School of Social Work. http://rjp.umn.edu/img/assets/13522/Ex_Sum_TX_OH_VOD_CSV.pdf).

ix. The Trial

PREPARATION

Thorough preparation before court proceedings is crucial for survivors. The trial and pretrial proceedings can be the most invasive and traumatizing part of a survivor's experience in the justice system. The reason is that this stage is more directly adversarial than any other. The defense will attempt to discredit the survivor before and during trial by obtaining personal records and by cross-examining her or his testimony.

In some circumstances a survivor will have rights to privacy, but in almost all cases the process will feel aggressive and confrontational. There is no way to make court proceedings easy for survivors, but undoubtedly it is best for them not to be surprised by the harshness they may experience.

To that end, one of the advocate's chief roles leading up to and during the trial is, as always, to make sure the survivor understands the process and knows her or his rights at various times during the prosecution. Before trial, the advocate should spend as much time as the victim needs describing the proceedings—where everyone will sit, what roles they play, and the general sequence of events. Also, the victim should understand that what the advocate says is only a generalized description, and that every proceeding has unique events that can affect what happens.

IMPORTANT: If identifying the perpetrator is an issue in the case, never inform the survivor that the perpetrator will be in the courtroom. That information will compromise the survivor's in-court identification and will cause the case to be thrown out. If the survivor asks, you can respond by saying, "I don't know, but if you see him you can point him out when you're on the stand."

Whenever possible, the advocate should always call the judge's office to arrange a time before the trial when the survivor can visit the courtroom with the advocate. A courtroom visit will help the survivor visualize the proceedings, making the advocate's depiction clearer. If possible, the advocate can even take the survivor to see another criminal trial.

In addition to being mentally and emotionally prepared for the experience as a whole, preparing for the specific times the survivor will participate in proceedings is also essential. The rest of this section will discuss those individually.

PRETRIAL LITIGATION

Throughout the time between the indictment and trial, both the prosecutor and the defense attorney will investigate the facts of the case to try to make their arguments stronger. The defendant will usually request information, records, or access to locations from the survivor or other witnesses and agencies. This is a critical time in a sexual assault prosecution. It can be very traumatic, because the defense is focused on obtaining as much information as possible to discredit the survivor. For the same reason, the process has a significant impact on the outcome of the case.

Commonly, the defense will seek access to the survivor's private records, including those from therapy or counseling, school, work, and anything else available. To do that, the defense attorney will send the agency in possession of the record a "subpoena," which is a formal request sent under color of the court's

authority. If the information the defense seeks is not a physical record, but instead the substance of a conversation with the survivor, the defense attorney will send a subpoena to a person who spoke with the survivor, demanding they appear in court to testify.

Importantly, just because the defense attorney sends a subpoena, the recipient does not have to release the information if she believes it is confidential or privileged. In some circumstances the court can review the evidence out of court to determine whether the defense should see it. Sometimes, a subpoena may even be defective because of an error in the way it was drafted or served. Refer to the Civil Remedies chapter covering privacy issues and subpoenas for a full discussion on this issue. (**see p.96**)

Confidentiality vs. Privilege

Even though some records or communications might be “confidential,” that does not necessarily mean the defense cannot access them. Confidentiality simply means the record remains private unless a court orders otherwise. Generally, if the defense can persuade the court that a confidential record is relevant to the defendant’s argument, there is a good chance the judge will grant the defense the right to see it. Importantly, that can apply to some communications with doctors, nurses, rape crisis center staff, counselors, and advocates.

Some confidential records have an extra level of protection and are considered “privileged.” That means the defense generally has no right to see them at all, and the court will not order their disclosure except in very limited circumstances. Article V of the Texas Rules of Evidence only recognizes 3 categories of privileged communications in criminal cases:

Civil courts in Texas also recognize a physician-patient privilege, but it does not apply in criminal cases.

1. Attorney-Client Privilege: Communications with a person’s lawyer made as part of the legal services being provided
2. Spousal Privilege: Communications with a spouse made during marriage with the intention of being kept secret
3. Clergy Privilege: Communications with a clergy member made for the purpose of spiritual advice

Constitutional Right to Dignity and Privacy

Most often, prosecutors will argue that a confidential communication is irrelevant to the defense’s case in order to keep it out of court. However, victims also have an enforceable state constitutional right to be treated “with respect for [their] dignity and privacy throughout the criminal justice process” (TEX. CONST., Art. 1, Sec. 30(a)(1)). (**see p.97**) For example, private medical or counseling records are not privileged in criminal cases, but sometimes the prosecutor or a lawyer for the survivor can try to use the survivor’s constitutional right to privacy to oppose the defendant’s requests.

The survivor’s constitutional rights are important to keep in mind, because survivors have standing to assert them, even though they are not technically parties to the criminal case (they are considered witnesses) (TEX. CONST., Art. 1, Sec. 30(e)). That means survivors can hire their own lawyers to assert their constitutional rights, rather than relying on the prosecutor to oppose all subpoenas. There are both benefits and potential risks in retaining personal representation, and survivors should consider the decision carefully. Refer to the earlier chapter on Crime Victims’ Rights and the later chapter on General Civil Issues for a complete discussion. (**see p.94**)

Preparing for Pretrial Litigation

Because the pretrial process is conducted entirely through litigation, there is little for the legal advocate to do in court to protect the survivor's privacy directly. However, an effective advocate can lay the groundwork for protecting the victim's privacy by helping the victim prepare. Earlier in this chapter, we discussed system-based actions related to the Michael Morton Act, pseudonyms, and the Address Confidentiality Program. Here, let's consider some other strategies.

One problem victims might encounter is that the agencies that have private records sometimes turn the records over to defense attorneys, mistakenly believing the attorney's subpoena has the power of a court order. **When a victim or other entity believes the defense has requested confidential information, the information should not be turned over to the defense until the court has made a decision.**

aa **ADVOCACY ACTION:** Victims can often prevent that problem altogether by contacting the agency or agencies that have the records in advance and instructing them not to release any records without first speaking with the victim. That will give the victim the opportunity to notify the prosecutor and can prevent unnecessary and potentially damaging disclosures.

The advocate should also encourage the survivor to ask the prosecutor about privacy issues and how to protect personal information. Even though the prosecutor does not represent the victim, it will usually be in the prosecutor's interest to keep the victim's personal information out of the defense's hands.

However, keep in mind that prosecutors are sometimes less familiar with enforcing victims' rights than they are with prosecuting criminal offenses. Therefore, consulting with the prosecutor about privacy issues is not always an adequate substitute for private representation by a victims' rights expert. At the same time, not all civil plaintiffs' attorneys have expertise in victims' rights either. Therefore, survivors who want personal representation should take much care in selecting their lawyers. Whatever the situation, as an advocate with expertise in victims' rights, you can contribute meaningfully to an effective prosecution by always fostering cooperative relationships with your local prosecutors.

THE SURVIVOR'S TESTIMONY

For many survivors, testifying against the attacker in court is the single greatest source of anxiety and re-traumatization in the whole criminal justice process. This section offers guidance on how to minimize trauma and maximize effective testimony from the survivor.

Direct Examination

The direct examination is the time when the prosecutor questions the survivor on the witness stand. The purpose of the direct exam is for the prosecutor to help the survivor tell her story in a way that helps prove the criminal case. Therefore, the prosecutor will ask the survivor strategic questions, guiding the survivor to make necessary points. The survivor's answers are called the "testimony." The survivor will answer in front of the jury, the judge, the defendant, and the defendant's lawyer. The prosecutor will want to meet and interview the survivor before trial in order to prepare for the testimony, and the advocate should be present at that meeting. No one can tell the survivor how to answer; that is called "coaching the witness," and it can result in a dismissal. However, it is very appropriate for the prosecutor to let the survivor know what questions to expect and to let her practice answering openly and truthfully.

In addition to preparing for the questioning, the prosecutor and/or advocate should also talk with the survivor about objections from the defense attorney. The defense attorney will probably shout out “objection” in the middle of the direct examination, which can be jarring and confusing for the survivor. The survivor should know that an objection does not mean she or he has said something wrong. Instead, objections usually refer to something the lawyer has asked, or the way she or he asked it, and it merely signals to the witness that she or he should stop talking until instructed to continue. Survivors do not need to be concerned about objections at all; their only responsibility during the direct examination is to answer questions truthfully.

Finally, the survivor should know always to request an explanation if anyone asks something confusing, and to correct anyone who misinterprets what she or he has said. Even though the courtroom is fast-paced and intimidating, no one expects any testifying witness to understand everything that is said. Therefore, if the survivor needs clarification in order to answer any question from anyone—including the judge or defense attorney—she or he should always say so.

If the prosecutor does not seek out an interview with the survivor, the advocate should contact the prosecutor’s office to schedule a meeting. Because testifying in court is very difficult for survivors, any preparation is highly beneficial. The best thing survivors can do to prepare for trial is to know what to expect.

Cross-Examination

No other part of the prosecution involves a more direct and overt challenge to the survivor’s integrity than the defense attorney’s cross-examination. Recall the introduction to the “Reporting and Investigation” chapter, which discussed the reasoning behind encouraging defendants to offer their strongest defenses (**see p.33**). By cross-examining the victim, the defense attorney is performing his or her function in the system—aggressively testing the state’s case against the defendant in order to ensure certainty about the potential conviction.

The defense attorney’s goal is to place doubt in the minds of the jurors (or the judge if there is no jury). Unfortunately, to do that in the sexual assault context, the defense attorney will usually play on cultural prejudices about female sexuality, consent, and falsely “crying rape” during the cross-examination. The defense attorney might ask questions to try to provoke the survivor into anger, or she or he might be extremely kind in order to get the survivor to agree. The advocate and/or the prosecutor should prepare the survivor for those tactics.

The advocate can play a major role in preparing the survivor mentally and emotionally for the cross-examination. It is much more difficult to stay calm and composed when one is surprised than when one knows what to expect. The survivor should also feel free to ask the prosecutor about possible lines of questioning from the defense attorney. The more prepared the survivor is for the cross-examination, the less successful the defense attorney will likely be in throwing the victim off track or twisting her or his story.

In addition to mental preparation, the advocate can also be a great emotional support during the cross-examination. Although victims cannot receive help answering questions, simply knowing a compassionate and supportive person is there for them can make a huge difference. In court, the advocate should be sure to sit within view of the witness stand, so that the victim can look to her for support if the questioning becomes difficult. Sometimes the defense attorney will strategically position himself or

herself between the advocate and the victim to block the line of sight and throw the victim off. If that happens, the advocate should immediately move to reestablish the sightline.

Realistically, testifying in court will be difficult for the survivor, no matter what the advocate does. However, that does not mean advocates do not do a tremendous amount of good. Although preparing and supporting survivors will not make the process easy, it is worth the advocate's time and effort because it will make the process considerably easier. And, regardless of the outcome of the case, making the process easier on the survivor is one of the advocate's primary goals.

x. Verdicts and Sentencing

Criminal trials in Texas have two parts: the guilt-innocence stage and the punishment stage. The previous section discussed the guilt-innocence stage, in which the jury or judge determines whether the defendant is guilty of the charged offense. Following the guilt-innocence stage, the jury or judge will issue a final decision about the charge, called the "verdict."

There are a few different ways a case can turn out:

- **Acquittal:** The defendant is found "not guilty," receives no criminal punishment, and cannot be tried again for the same crime.
- **Dismissal:** For some reason before or during the trial, the court decides to drop the charges against the defendant before a verdict is issued. When this happens, it is often because of a mistake in collecting or presenting evidence against the defendant. Some dismissed charges can be re-filed and proceed to trial again, but others cannot.
- **Conviction:** The defendant is found "guilty" and is punished.
- **Deferred Adjudication:** The defendant pleads guilty without going to trial, but the judge does not immediately enter a finding of guilt. Instead, the judge imposes community supervision (probation) conditions that, if violated, will trigger an automatic guilty verdict.

There is less to say about acquittals and dismissals than the other outcomes, because they usually end the criminal justice process. Therefore, the remainder of this section focuses on convictions and deferred adjudications. However, it is very important for survivors to understand that neither an acquittal nor a dismissal necessarily means the jurors or judge thought they were lying. Instead, it means they had only some reasonable doubt about whether the defendant is guilty, or that another legal flaw unrelated to the crime itself required that the charges be dropped.

Remember that the state's burden of proof is extremely high, and sexually violent crimes are particularly difficult to prove beyond all reasonable doubt. In the difficult event that the court acquits the defendant or dismisses the prosecution, the survivor must understand that the result is not their fault, and the court is not calling them a liar—even if the defense attorney did.

SENTENCING

If the jury or judge finds the defendant guilty in the first part of the trial, then the case proceeds to the punishment stage. If the plea or trial is before a judge, then that same judge will determine punishment. However, at the beginning of a jury trial, the defendant can choose whether he or she wants a judge or jury to determine punishment. Whether a jury is present will depend on that choice.

The range of possible punishments for a particular crime depends on how the Penal Code categorizes it. For example, sexual assault is a second degree felony, which means a defendant convicted of sexual assault faces 2-20 years in prison and may also be fined up to \$10,000. (see p.9) Refer to the chart in the “Criminal Justice Foundations” chapter to determine the range of punishment for other crimes with which the prosecutor might have charged the defendant.

Within that large range, however, the judge or jury has considerable discretion to choose an appropriate punishment. That is why both sides will present more evidence during the punishment stage to try to persuade the decision maker to issue a more severe or lenient punishment. This is also when a judge considers the survivor’s Victim Impact Statement to better understand the harm the defendant caused (see p.53).

Defendants convicted of certain sexual offenses are also required to register as sex offenders. For those sex offenders who are civilly committed after serving their prison terms, Texas’s Office of Violent Sex Offender Management has its own comprehensive set of rules, which the next chapter will discuss in detail. (see p.68)

Concurrent Sentences vs. Consecutive Sentences

If the defendant was convicted of multiple offenses from a single trial, some special rules could apply. In that situation, TEX. PENAL CODE § 3.03(a) provides the general rule that the sentences for each offense will run concurrently. That means, for example, that a defendant sentenced to 10 years in prison for arson and 10 more years for robbery committed at the same time would spend a total of 10 years in prison (not 20), because the clocks for each sentence would run at the same time. However, the court can issue the sentences to run consecutively (i.e., one after the other) for certain sexual offenses against victims younger than 17. Those offenses include:

- Sexual assault of a child (TEX. PENAL CODE § 22.011(a)(2))
- Aggravated sexual assault of a child (TEX. PENAL CODE § 22.021(a)(1)(B))
- Continuous sexual abuse of a young child or children (TEX. PENAL CODE § 21.02)
- Indecency with a child (TEX. PENAL CODE § 21.11)
- Online solicitation of a minor (TEX. PENAL CODE § 33.021)
- Prohibited sexual conduct (incest) (TEX. PENAL CODE § 25.02)
- Sexual performance by a child (TEX. PENAL CODE § 43.25)
- Improper photography or visual recording (TEX. PENAL CODE § 21.15)
- Possession or promotion of child pornography (TEX. PENAL CODE § 43.26)

If the defendant is convicted of more than one of the above offenses in a single trial, the judge has the authority to issue the multiple sentences consecutively (also called “stacking” the sentences). That rule also applies if the defendant pleads guilty to the offenses as part of a plea agreement (see p.55), or if the defendant is convicted of multiple counts of the same offense (e.g., 2 sexual assaults).

Community Supervision

Under Texas law, probation is called “community supervision.” In some circumstances a convicted offender can be placed on community supervision instead of being incarcerated. The rules on which defendants are eligible for community supervision are complex, and it is not important for survivors to understand them completely. However, in some instances a defendant convicted of sexual assault could be eligible. And if the defendant pleads guilty to a lesser charge as part of a plea bargain, the chances he or she is eligible for community supervision are greater. In any event, if the defendant has requested community supervision, the survivor should know what that could mean.

Under community supervision, the defendant avoids time in jail or prison—or spends less time confined—and adheres to a set of rules the judge imposes. For example, the jury might sentence a defendant to 5 years in prison but recommend a 10-year community supervision instead. During that ten years, the defendant might have to pass drug tests, hold a steady job, and/or do community service. In every case the defendant will have to avoid committing another offense. If the defendant violates any of the conditions of the supervision, the prosecutor can request that the court put the defendant in jail pending a hearing on whether the defendant’s probation should be revoked. If revoked, the defendant can only be sentenced to a prison term less than or equal to the one originally part of the sentence, which may be less than the original duration of the supervision (5 years in the example above).

The court can usually make community supervision last for between five and ten years, depending upon the offense charged, with a possible extension of up to 20 years’ duration for some sex crimes. Typically, the judge or jury will impose a sentence less than the maximum, as in the example above, and recommend a longer supervision period.

aa **ADVOCACY ACTION:** If the survivor would feel unsafe with the perpetrator on community supervision, the advocate should talk with her or him about the possibility at the beginning of the prosecution, when the survivor has the chance to submit a Victim Impact Statement. The VIS is the survivor’s opportunity to tell the jury or judge about the victimization, including any continuing safety concerns. The survivor also has a separate right under TEX. CODE CRIM. PROC. Art. 56.02(a)(5) to provide information about the impact of the crime to the probation department as part of its Pre-Sentence Investigation (“PSI”). If the survivor wishes to speak with the probation department—especially if the survivor did not submit a Victim Impact Statement—the advocate should immediately put the survivor in touch with the Victim Assistance Coordinator in the prosecutor’s office. (see p.53)

Deferred Adjudication

Texas also has a second type of probation, called “deferred adjudication.” Deferred adjudication allows the defendant to avoid being officially convicted of the offense. First, the defendant admits guilt, and the judge determines whether sufficient evidence exists for a guilty finding. If so, the judge sets out conditions for the defendant to adhere to, just like a community supervision plan. Deferred adjudication is different, because if the defendant successfully completes the supervision, the original charge is dismissed without an official conviction. However, unlike regular or “straight” probation described earlier, if the defendant violates the terms of a deferred adjudication supervision, the judge can find the defendant guilty and sentence him or her to the maximum punishment for that crime.

The admission of guilt alone can have negative consequences for the defendant (e.g., gun possession, professional licensing, immigration), and it is actually considered a conviction under federal law. However, despite any negative collateral consequences, deferred adjudication is usually a much better deal for defendants than regular community supervision.

Courts typically reserve deferred adjudication for first-time offenders, and the judge must find it to be in the best interests of society and the defendant. Only the judge can order deferred adjudication (i.e., not a jury), and only after the defendant has admitted guilt. Therefore, if the defendant declines plea offers and chooses to go to trial, deferred adjudication is not an option.

aa ADVOCACY ACTION: In order for the judge to order deferred adjudication in a sexual assault, aggravated sexual assault, or indecency with a child case, the judge must first make a finding in open court that it is in the best interest of the victim. The judge must make that finding regardless of the victim's age. Therefore, if the court is considering deferred adjudication for a defendant charged with one of those three offenses, and the survivor opposes it, the advocate and survivor should consult with the prosecutor immediately about the effect that would have on the survivor.

Parole

If the defendant receives a prison sentence, he or she may be eligible for parole after some time has passed. Upon the recommendation of the Board of Pardons and Paroles after a formal hearing, the offender could be released from prison to serve the remainder of the original sentence under the supervision of a parole officer.

The Board's decision depends on a number of factors, including the offender's remorse for the offense, the impact the offense had on the victim and the community, and the offender's demonstrated rehabilitation. Parole hearings are another important time when the Victim Impact Statement comes into play. In addition to the offender's criminal history, his or her record in prison, and other evidence, the Board will also consider the Victim Impact Statement when deciding whether to recommend the offender's release. (**see p.53**)

Often, offenders who are eligible for parole are denied parole several times first. Unfortunately, that means survivors might receive notices of new parole hearings long after the conviction, and more frequently than they would like. Nevertheless, it may be in the survivor's safety interests to stay informed about parole proceedings while the offender is incarcerated. One of the simplest ways to stay informed is usually to contact the Texas Department of Criminal Justice Victim Services Division. TDCJ Victim Services can help survivors ensure their contact information is up to date and provide helpful instructions to make sure they hear about all parole and release proceedings. Survivors and advocates can contact TDCJ Victim Services at 800-848-4284 or victim.svc@tdcj.state.tx.us.

Survivors also have the constitutional right to be informed about the offender's release (TEX. CONST., Art. 1, § 30(b)(5)) and the statutory right to be informed about parole proceedings (TEX. CODE CRIM. PROC. Art. 56.02(a)(7)). In addition to contacting TDCJ Victim Services, the survivor may assert those rights by requesting the information from the prosecutor's office. (**see p.26**) As a general rule, the advocate should help the survivor submit a written request for those rights at the beginning of the prosecution, and again after sentencing.

Once the defendant is sentenced, the advocate should anticipate the need for the survivor to request information on parole and release, and advise the survivor of her or his rights.

xi. Appeals

If the prosecutor successfully convicts the defendant, the defendant often will appeal the conviction in a higher court. The main role of a court of appeals is to review what the lower court did during the trial to make sure everything was fair.

A court of appeals does not hear new evidence, so the victim and other witnesses do not testify again. Instead, lawyers for both sides present arguments about the trial process and procedures. Issues often include whether the defendant's constitutional rights were violated, whether the trial court heard sufficient evidence to convict the defendant, or whether the defendant received ineffective assistance from the defense attorney.

Although the survivor usually will not participate in the appeal, she or he likely will want to stay informed about the process. Fortunately, the survivor's constitutional rights still apply. Article 1, §§ 30(b)(1)-(2) of the Texas Constitution guarantee the rights to be notified of and to be present at all public court proceedings related to the offense. In addition, TEX. CODE CRIM. PROC. Art. 56.02(a)(3) grants victims the right to be informed about appellate proceedings. Finally, survivors also have the right under TEX. CODE CRIM. PROC. Art. 56.02(a)(4) to be informed of an appellate court's decision before it is made public. To assert any of those rights, the survivor must make a request to the prosecutor's office or the court of appeals. (**see p.26**)

Finally, even though defendants may appeal their convictions, the state cannot appeal an acquittal. To do so would violate the defendant's constitutional guarantee against "double jeopardy," or being tried more than once for the same offense. In some limited circumstances the prosecutor can appeal a court's decision to dismiss charges against the defendant, but if the court or a jury renders a "not guilty" verdict, then the prosecution is over.

Bottom Line: The Role of the Legal Advocate Concerning the Prosecution

Perhaps more than in any other stage of the criminal justice process, the prosecution can feel like something that happens to the survivor, not for the survivor. It mainly involves two other parties—the state and the defendant—arguing over something that impacted the survivor more seriously and intimately than anyone else. Therefore, as always, the advocate’s role centers on providing the survivor with knowledge and support, and making sure the survivor’s needs are acknowledged. When considering the survivor’s general needs during and surrounding the prosecution, the following principles are useful to keep in mind:

- **Privacy** – A big part of the defense’s strategy will be to find out as much about the survivor as possible and use it against her or him. You should be prepared to help the survivor recognize and assert the applicable privacy rights, and maintain lines of communication with the prosecutor.
- **Participation** – The prosecutor and the defendant tend to take center-stage during the prosecution phase, so the victim’s needs and voice often get lost in the shuffle. But as an advocate you can help ensure the survivor’s experience is acknowledged and valued by promoting her or his participation.
- **Courage** – In a sense, everything the survivor experiences in the justice system builds up to the in-court testimony. The experience is incredibly draining, both emotionally and mentally, and it requires immense strength. As an advocate you’re in a unique position to be survivors’ steadfast support at a time when they need to know someone is on their side.

As an advocate, probably the most important thing you can do regarding the prosecution is to have a solid grasp of how all the parts of the process fit together as a whole, including crime victims’ rights. Before the prosecutor even files charges against the defendant, you should think ahead about what the survivor needs to do to protect her interests during the various stages of the prosecution. As discussed in this chapter, that could mean contacting schools or hospitals about confidential records, thinking about a pseudonym and address confidentiality, submitting a Victim Impact Statement, or talking with the survivor’s employer about time off to appear in court. Each survivor’s needs will be unique, and you’ll likely be the only person who’s an expert on both the justice system and the survivor’s unique circumstances.

Your foundational knowledge about victims’ rights and the hazards survivors face during the prosecution will also serve you as the process moves forward. The prosecution can move quickly, and undoubtedly some things will happen before you’ve had the opportunity to explain them to the survivor. That’s OK, but you’ll want to know enough to answer the survivor’s questions as they arise, so that she or he views you as a reliable resource. Of course, always be honest. If you don’t know something, say so and find out the answer promptly. This manual and the resources in the Appendix are always there for you.

Finally, maintain good working relationships with your local prosecutors and other court officials. Their assistance will be critical to survivors on a regular basis, and you will see many of the same faces time and time again. That’s especially true in communities with smaller courthouses and prosecutors’ offices. Your reputation in the courthouse as a helpful and knowledgeable advocate can be as much of a help to survivors as some of the individual actions you take. But you don’t have to be a doormat, either. Know the law well, and ask questions when things don’t go the way you think they should. You can and should have a strong, mutually respectful relationship with officials while always putting the survivor first.

Sex Offender Monitoring and Treatment

Introduction

Like every other state in the country, Texas requires offenders who commit certain sexual crimes to register publicly as sex offenders. The overarching goal of the registration program is to promote public safety. In order to protect the community, the Legislature has determined that local law enforcement agencies should know which sex offenders are in their communities, where they live, and where they work. According to the Department of Public Safety, there were 61,000 sex offenders on DPS's registration database in June 2010. However, many different offenses trigger the registration laws, and some sex offenders are much less dangerous than others. The number and diversity of offenders in a community can be overwhelming, so it is imperative that authorities know how best to allocate their resources. To aid them, experts assign each offender a risk level.

Although a survivor usually does not participate in the monitoring and treatment process, information about the process will be relevant during and following the attacker's adjudication. Therefore, the advocate should be familiar with the process and act as a resource for the survivor. The purpose of this chapter is to provide you with a comprehensive overview of the state laws that govern the monitoring and treatment of sex offenders. What exactly does monitoring entail? Which offenders does it impact? What are the penalties for noncompliance? This chapter will address each of those questions thoroughly.

Whereas earlier chapters discussed victims' and advocates' defined roles and responsibilities, this chapter focuses simply on providing you with information. Information about sex offender management can be relevant at any time throughout the justice process. For example, before police get involved the survivor might want to know what could happen to the perpetrator if she or he makes a report. Likewise, if the prosecutor is considering a new or different charge for the defendant (**see p.46**), the survivor should understand the impact it could have on registration requirements.

Use this chapter to form a foundation of knowledge about sex offender monitoring and treatment, as well as a reference. You cannot always predict when you will need this information, but questions are likely to arise.

NOTE: This chapter is not intended to assist offenders in complying with registration requirements. Relying solely on the information contained herein could result in a violation, and possibly a new felony offense. Offenders with reportable offenses should contact their local law enforcement agencies for information and assistance.

i. Sex Offender Registration and Verification

REPORTABLE OFFENSES – TEX. CODE CRIM. PROC. § 62.001(5)

Mandatory registration and monitoring applies to many kinds of offenders in Texas. Section 62.001(5), Code of Criminal Procedure, lists all the “reportable offenses,” which require registration as a sex offender:

- Sexual assault (TEX. PENAL CODE § 22.011)
- Aggravated sexual assault (TEX. PENAL CODE § 22.021)
- Continuous sexual abuse of a young child or children (TEX. PENAL CODE § 21.02)
- Indecency with a child (only if involving sexual contact) (TEX. PENAL CODE § 21.11(a)(1))
- Compelling prostitution (TEX. PENAL CODE § 43.05)
- Sexual performance by a child (TEX. PENAL CODE § 43.25)
- Possession or promotion of child pornography (TEX. PENAL CODE § 43.26)
- Aggravated kidnapping (with intent to abuse victim sexually OR if the victim was under 17) (TEX. PENAL CODE § 20.04)
- Kidnapping (only if the victim or intended victim was younger than 17) (TEX. PENAL CODE § 20.03)
- Burglary (only if involving breaking into a habitation with intent to commit sexual assault, aggravated sexual assault, continuous sexual abuse of a child, indecency with a child, or aggravated kidnapping with intent to abuse the victim sexually) (TEX. PENAL CODE § 30.02(d))
- Unlawful restraint (only if the victim or intended victim was younger than 17) (TEX. PENAL CODE § 20.02)
- Repeat Indecent exposure (but not if the repeat violation results in deferred adjudication) (TEX. PENAL CODE § 21.08)
- Any attempt, conspiracy, or solicitation to commit any offense listed above
- Online solicitation of a minor (TEX. PENAL CODE § 33.021)
- Trafficking of persons for sex (TEX. PENAL CODE 20A.02(a)(3), (4), (7), and (8))
- Any offense under federal law or the Uniform Code of Military Justice having elements substantially similar to the elements of any offense listed above other than indecent exposure (but not if the offense results in deferred adjudication)
- A repeat offense under federal law or the Uniform Code of Military Justice having elements substantially similar to those of Texas’s indecent exposure statute (TEX. PENAL CODE § 21.08) (but not if the repeat offense results in deferred adjudication)

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- Finally, for any offenses under federal law or the Uniform of Military Justice having no substantially similar state-law counterpart, Texas law requires registration just as the offender would have to under the federal Adam Walsh Act.

Any of the situations listed above requires the offender to register as a sex offender and periodically verify his or her registration with authorities. The remainder of this section sets out the rules surrounding registration—the process, the duration, and the exceptions.

WHAT DOES REGISTRATION ENTAIL?

Registration and Public Notice

If a sex offender spends time in prison or jail, registration requirements will kick in when he or she is released; the requirements apply immediately for offenders who are not confined, such as those who receive deferred adjudication. Under TEX. CODE CRIM. PROC. § 62.051, within 7 days of a person with a reportable conviction arriving in the city or county where he or she intends to reside for longer than a week, a probation department, the Texas Department of Criminal Justice, or the court with relevant jurisdiction must submit a completed registration form to local law enforcement. The local law enforcement agency may also complete and file the form itself. Another state's laws might also require the offender to register there if he or she lives in Texas but works or goes to school in the other state. The registration form includes extensive identifying characteristics and information about the offender's crime(s). Identifying characteristics include the offender's full name, aliases, date of birth, sex, race, height, weight, eye color, hair color, social security number, driver's license number, shoe size, home address, all phone numbers, any online identifiers, recent color photograph, fingerprints, any occupational licenses the offender has, an indication of whether the offender is or will be employed, an indication of whether the offender is a student at any higher education institution, and the name and address of that institution. In addition to identifying information, the registration form also includes the following information on the offender's crime(s): the type of offense; the name of the victim; the date of the conviction; the punishment received; and an indication of whether the offender is discharged, paroled, or released on supervision or juvenile probation.

If the offender has no permanent residence within 7 days, he or she must report the address of a temporary residence to law enforcement and his or her supervision officer. Even if the offender is homeless, the offender still must describe the location or locations where he or she will reside. Offenders must continue to report weekly until they obtain a permanent residence, although homeless offenders must report every 30 days. Finally, any time an offender moves, he or she must report the new residence to local law enforcement no later than 7 days before the move. That information will then be forwarded to the offender's new local law enforcement agency.

Within 3 days of receiving an offender's registration, a local law enforcement agency is directed to forward the form to the Texas Department of Public Safety. If the offender lives on campus at a college, the law enforcement agency should also forward the registration to campus security. The offender must also report physically to the local law enforcement agency to sign the registration form and verify that all the information is complete and accurate. In addition, the local law enforcement agency should take a DNA specimen from the offender for Department of Public Safety records.

For crimes involving child victims, the local law enforcement agency should also provide the offender's information to the superintendent of the public school district where the offender resides, as well

as any private school administrators in that district. School officials must receive the offender's information if the victim was under 17, the offender is a student at a high school, or if the offender's crime was sexual performance by a child (TEX. PENAL CODE § 43.25) or possession or promotion of child pornography (TEX. PENAL CODE § 43.26). School officials cannot see the offender's driver's license number, telephone number, social security number, or any information that would identify the offender's victim(s).

Finally, officials should distribute additional public notices for offenders who are deemed particularly dangerous. Under Texas law, all registered sex offenders receive one of three risk assessments based on their dangerousness: Level 1 (low-risk), Level 2 (moderate-risk), or Level 3 (high-risk). Offenders with risk level 3—meaning they pose a serious risk to the community and will continue to engage in criminal sexual conduct—require additional public notice. For those offenders, local law enforcement are directed to distribute written notices in English and Spanish to all nearby addresses (within one-mile in rural communities, and within 3 blocks in urban communities). In this situation, local law enforcement might also choose to notify the community by publishing a notice in a newspaper or other periodical, on a website, or another method.

Verification

“Verification” refers to a sex offender's requirement to check in with authorities periodically in order to keep track of the offender and to keep the offender's information up to date. The exact verification requirements for an offender depend largely on the type of crime he or she committed.

Some of the reportable offenses listed previously are considered “sexually violent offenses.” Under TEX. CODE CRIM. PROC. § 62.058, offenders who committed sexually violent offenses must report to their local law enforcement agencies once per year for their lifetimes. That is stricter than offenders who commit other crimes, whose annual reporting is not a lifetime requirement. If a sexually violent offender fails to make an annual report, his or her reporting requirement enhances from annual reports to every 90 days. The sexually violent offenses are as follows:

- Sexual assault (only if offender was older than 17) (TEX. PENAL CODE § 22.011)
- Aggravated sexual assault (only if offender was older than 17) (TEX. PENAL CODE § 22.021)
- Continuous sexual abuse of a young child or children (only if offender was older than 17) (TEX. PENAL CODE § 21.02)
- Indecency with a child (only if offender was older than 17 and the offense involved sexual contact) (TEX. PENAL CODE § 21.11(a)(1))
- Sexual performance by a child (TEX. PENAL CODE § 43.25)
- Aggravated kidnapping (only with intent to abuse the victim sexually) (TEX. PENAL CODE § 20.04(a)(4))
- Burglary (only if involving breaking into a habitation with intent to commit sexual assault, aggravated sexual assault, continuous sexual abuse of a child, indecency with a child, or aggravated kidnapping with intent to abuse the victim sexually) (TEX. PENAL CODE § 30.02(d))

-
- Any offense in another state or country, under federal law, or under the Uniform Code of Military Justice having elements substantially similar to the elements of any offense listed above

Restrictions on Internet Usage for Certain Sex Offenders

The Legislature has imposed some special restrictions on Internet usage for certain registered sex offenders for the duration of their parole. The restrictions affect offenders to whom at least one of the following applies:

- 1) Convicted or granted deferred adjudication or community supervision for one of the following offenses:
 - Indecency with a child (TEX. PENAL CODE § 21.11)
 - Sexual assault of a child (TEX. PENAL CODE § 22.011(A)(2))
 - Aggravated sexual assault of a child (TEX. PENAL CODE § 22.021(A)(1)(B))
 - Online solicitation of a minor (TEX. PENAL CODE § 33.021)
 - Sexual performance by a child (TEX. PENAL CODE § 43.25)
- 2) Used the Internet to commit the offense
- 3) Was assigned a risk level of 3 (high-risk)

(Sec. 13E, Art. 42.12, Code of Criminal Procedure)

Under Section 13E(b), Art. 42.12, if the court grants the offender community supervision (**see p.63**), and any one of the three descriptions above applies, then there are 4 restrictions that must be part of the community supervision order:

- 1) The offender shall not use the Internet to access obscene material.
- 2) The offender shall not use the Internet to access any commercial social networking site.
- 3) The offender shall not use the Internet to communicate with any person about sexual relations with a person younger than 17.
- 4) The offender shall not use the Internet to communicate with any person the offender knows is younger than 17.

In addition, TEX. GOV. CODE § 508.1861 imposes the same restrictions on all offenders released from confinement for the same offenses on parole or mandatory supervision.

DURATION

For sexually violent offenses and certain offenses involving children, registration and verification requirements continue for the offender's entire lifetime. For the others, offenders must register for 10 years from the date of release from confinement, the date community supervision is discharged, or the date the offender satisfies the conditions of an adjudication of delinquent conduct.

The offenses for which offenders must register for their entire lives are as follows:

- Any "sexually violent offense" (listed above)
- Prohibited sexual conduct (incest) (TEX. PENAL CODE § 25.02)
- Compelling prostitution (only where victim is under 18) (TEX. PENAL CODE § 43.05(a)(2))
- Possession or promotion of child pornography (TEX. PENAL CODE § 43.26)
- Repeat Indecency with a child (involving exposure but no sexual contact) (TEX. PENAL CODE § 21.11(a)(2))
- Unlawful restraint (only if victim was under 17 and offender has a previous reportable conviction or adjudication, other than an adjudication of delinquent conduct) (TEX. PENAL CODE § 20.02)
- Kidnapping (only if victim was under 17 and offender has a previous reportable conviction or adjudication, other than an adjudication of delinquent conduct) (TEX. PENAL CODE § 20.03)
- Aggravated kidnapping (only if victim was under 17 and offender has a previous reportable conviction or adjudication, other than an adjudication of delinquent conduct) (TEX. PENAL CODE § 20.04)
- Obscenity (only if involving child pornography) (TEX. PENAL CODE § 43.23(h))

NOTE: For an offense of compelling prostitution that occurred before September 1, 2009, lifetime registration only applies where the victim was under 17. The Legislature changed the necessary age of the victim to 18 on that date.

However, if any of the "lifetime registration" offenses listed above were committed by a child under 17, and the case was transferred from juvenile court to a district court or criminal district court, the registration requirement ends 10 years from the date of release, the date community supervision is discharged, or the date criminal charges are dismissed following a deferred adjudication (whichever is latest).

PENALTIES FOR VIOLATING REGISTRATION REQUIREMENTS

Violating a registration requirement is a serious offense. Exactly how serious it is depends on the type of crime the offender committed, as well as how many times the offender has violated in the past.

If the offender committed a crime that resulted in a 10-year registration period, then failing to comply with any part of the registration requirement is a state jail felony. If the offender must register for life, and must report to local law enforcement once per year under TEX. CODE CRIM. PROC. § 62.058, then failing to comply with the registration requirement is a second degree felony. Finally, if the offender must register

for life, and must report to local law enforcement every 90 days because of a sexually violent or other offense, then failing to comply with a registration requirement is a first degree felony. (see p.9)

In addition, regardless of the level of the offense, registration violations will enhance one level for each repeat violation. For example, if an offender’s first violation was a second degree felony, his next violation will be a first degree felony, carrying the same possible range of punishment as any other offense at that level. Registration violators have received life prison sentences for violations at the first degree felony level.

	10-Year Registration Requirement	Lifetime Registration with Annual Verification	Lifetime Registration with 90-day Verification
First Violation	State jail felony	Second degree felony	First degree felony
Repeat Violation	Third degree felony	First degree felony	First degree felony

REGISTRATION EXEMPTION FOR CONSENSUAL SEX BETWEEN SOME MINORS AND YOUNG ADULTS

In some narrow circumstances, young adults aged 17 or 18 can petition to be entirely excused from registration. Article 62.301, Code of Criminal Procedure, sets out the rules on who is eligible to petition.

To be eligible, a young adult offender must satisfy 3 conditions:

- 1) He or she must have only one reportable conviction (other than adjudications of delinquent conduct).
- 2) That single conviction must have been for one of the following offenses: sexual assault, aggravated sexual assault, continuous sexual abuse of a child, indecency with a child, or sexual performance by a child.
- 3) At the time of the offense the offender must have been aged 17 or 18, and the victim must have been older than 13.

If those three conditions are true, then the young adult is eligible to petition the court to be excused from registration. For the petition to be successful, the young adult must persuade the judge of two things in court:

- 1) The conduct occurred with the victim’s consent, AND
- 2) Granting the offender an exemption would not threaten public safety.

If the judge finds that most of the evidence supports those two conclusions, then she or he has authority (but is not required) to issue an order excusing the young adult from registering as a sex offender. Subchapter H of Chapter 62, Code of Criminal Procedure, governs the court process for petitioning for and granting the exemption.

In addition, juvenile sex offenders younger than 17 can petition a court for registration exemption at any time and for any reason.

In practice, the likelihood that a court will grant a juvenile’s or young adult’s petition for exemption depends largely on geography. Courts in certain counties tend to grant such petitions liberally, while successful petitions are extremely rare in others.

EARLY TERMINATION FOR CERTAIN OFFENDERS

In some cases, where state and federal law are different, offenders can petition to end their registration periods early. To be eligible to petition for early termination of registration requirements, an offender must satisfy 6 conditions:

- 1) The offender must have only one reportable conviction or adjudication.
- 2) The minimum registration period for that offense under Texas law must be greater than the minimum registration period under federal law.
- 3) The offender must request and obtain an individual risk assessment from the Council on Sex Offender Treatment, evaluating his or her criminal history and likelihood to commit a reportable offense in the future.
- 4) The offender must not have been convicted of any offense requiring imprisonment for more than 1 year.
- 5) The offender must successfully complete any periods of supervised release, probation, and parole. Any revocation disqualifies the offender.
- 6) The offender must successfully complete an appropriate sex offender treatment program certified by his or her jurisdiction.

(TEX. CODE CRIM. PROC. §§ 62.402-62.403)

The offender can only petition the trial court if all 6 of those conditions are satisfied. In addition, the trial court does not necessarily have to grant the offender's request. If the offender petitions the court, the court might deny the request immediately, or it might hold a hearing before making a decision.

ii. Civil Commitment

The idea behind civil commitment is that for certain sex offenders who are particularly dangerous, the public needs additional safeguards beyond incarceration. The Legislature has determined that a small number of violent sex offenders have behavioral abnormalities that cause them to engage repeatedly in predatory acts of sexual violence, and that traditional mental health treatment is insufficient to treat their abnormalities.

The Legislature's conclusion is that, because of their behavioral abnormalities, this small group of sexual predators remains likely to commit sexually violent acts even after they complete their prison sentences or other criminal punishment. Therefore, civil commitment exists not as an additional criminal punishment, but as a measure to protect the public and manage the offender's behavior following the criminal punishment. The word "civil" in "civil commitment" signifies that the mechanism is separate and in addition to criminal punishment. Thus, there are many restrictions and safety precautions that would not apply to an ordinary criminal process.

In Texas, only sex offenders serving time in prison or mental health facility can be civilly committed as "sexually violent predators." This means if a sex offender is on probation or parole or only required to register as a sex offender the person cannot be considered for civil commitment. This section will define that group of offenders and examine how Texas's civil commitment program works, from beginning to end.

Who Are "Sexually Violent Predators"?

Section 841.003, Health and Safety Code, defines a "sexually violent predator" as a repeat sexually violent offender with a behavioral abnormality that makes the person likely to engage in sexually predatory acts. The law goes on to set out rules for determining (1) who qualifies as a repeat sexually violent offender and (2) which of those offenders have behavioral abnormalities.

Who Qualifies as a Repeat Sexually Violent Offender?

The most obvious way a person qualifies as a repeat sexually violent offender is to be convicted of more than one sexually violent offense (**see p.71**) (as long as the person receives a sentence for at least one of the offenses).

However, there are other circumstances that qualify offenders. Basically, the law will consider a person a repeat sexually violent offender if the person has some combination of (1) a criminal sentence for a sexually violent offense or a verdict of "not guilty by reason of insanity" and (2) any of the following stemming from a sexually violent offense:

- 1) A conviction with no sentence imposed, where the offender was eventually discharged from community supervision (**see p.63**)
- 2) A deferred adjudication following a plea of guilty of nolo contendere ("no contest")

A plea of nolo contendere means the offender technically does not admit guilt, but it has all the same immediate effects as a guilty plea. Nolo contendere pleas are usually better for defendants than guilty pleas for the purposes of later civil lawsuits.

3) A commitment to the Texas Youth Commission following an adjudication of delinquent conduct constituting a sexually violent offense (**see p.81**)

How Does a Sex Offender Get Civilly Committed?

Not every repeat sexually violent offender, as defined above, will be subject to civil commitment. In order to be civilly committed, TEX. HEALTH AND SAFETY CODE § 841.081 requires that the repeat sexually violent offender must also have a “behavioral abnormality” that makes him or her a “sexually violent predator.”

If a person is a repeat sexually violent offender, a procedure is set in motion before his or her release to determine whether the person is a sexually violent predator who should be civilly committed upon release. A prosecutor must petition the court to find that the offender is a sexually violent predator, and the offender can be civilly committed by a jury trial, a trial before a judge, or an agreed order. The remainder of this section will examine that procedure.

THE CIVIL COMMITMENT PROCESS

Preliminary Recommendations

Sixteen months prior to an offender’s release from prison or a mental health facility, TDCJ identifies all sex offenders who have more than one sexually violent offense. Section 841.022, Health and Safety Code, establishes a multidisciplinary team to evaluate which sex offenders may meet the qualifications as sexually violent predators. The multidisciplinary team consists of representatives from the Office of Violent Sex Offender Management, Council on Sex Offender Treatment, TDCJ, TDCJ-Victim Services, the Department of State Health Services Mental Health Division, and the Department of Public Safety.

In order to determine whether an offender might qualify as a sexually violent predator, it reviews offenders’ identifying information, criminal history, treatment history, behavioral record from the institution, victim impact statements, protest letters, and an assessment of the offender’s likelihood to commit another sexually violent offense upon release. Based on that information, the team assesses whether the person is a repeat sexually violent offender and determines whether the person is likely to commit a sexually violent offense after release. If a majority of the members agree, then the offender is recommended for the first behavioral abnormality assessment.

If, after an assessment, an expert believes the person suffers from a behavioral abnormality, TDCJ or MHMR will notify the attorney representing the state of the results of the assessment.

The Petition Alleging Predator Status and Trial

If the attorney representing the state receives a notification from TDCJ or MHMR as described above, she or he may choose to file a petition to have the offender classified as a sexually violent predator.

aa CVR/ADVOCACY ACTION: Importantly, during the discovery stage of any civil commitment court proceeding described in this section, an offender has no right to personal information identifying a victim. Under TEX. HEALTH AND SAFETY CODE § 841.1462, that information is privileged. (**see p.94 & 59**)

Experts from both sides will re-evaluate the offender for a behavioral abnormality prior to the trial. Most, if not all, the evidence presented during this trial will usually be from mental health experts who can testify about the offender's behavioral abnormality assessment.

At the trial, the judge or jury will determine whether the offender is a sexually violent predator. The state must prove that beyond a reasonable doubt, and if there is a jury, the verdict must be unanimous.

WHAT DOES CIVIL COMMITMENT ENTAIL?

Essentially, civil commitment in Texas is the most stringent form of supervision and treatment. It is similar to probation or parole. Unlike commitment programs in some other states, civilly committed offenders in Texas are not confined in any secure treatment facility. Instead, all treatment services are outpatient, and other provisions in the law address public safety. Nevertheless, failure to comply with civil commitment requirements could result in a new third degree felony conviction and may be enhanced if the offender is considered habitual. Section 841.082, Health and Safety Code, sets out the requirements and restrictions imposed on all sexually violent predators who are civilly committed:

- The offender must reside in a residential facility approved by the Office of Violent Sex Offender Management.
- The offender is prohibited from:
 - o Having contact with a victim or potential victim of the offender
 - o Possessing or using alcohol, inhalants, or any controlled substance
 - o Changing residences without prior authorization from the judge
 - o Leaving the state without prior authorization from the judge
- The offender must:
 - o Actively participate and comply with a specific course of mandated sex offender treatment
 - o Submit to global positioning satellite (GPS) tracking in real time
 - o Refrain from tampering with the GPS equipment
 - o Notify his or her case manager immediately of any change in job or health status
 - o Notify his or her case manager of any incarceration
- If deemed appropriate, the judge may establish a child safety zone that prohibits the offender from going near children under 17 (see Section 13B, Article 42.12, Code of Criminal Procedure)
- Any other requirements the judge determines are necessary for the specific offender

Because civil commitment is not intended as a criminal punishment, but instead aims to treat the offender for a behavioral abnormality, the law also requires the state to provide treatment for civilly committed offenders (TEX. HEALTH AND SAFETY CODE § 841.083(a)).

In addition to the restrictions listed above, civil commitment also involves intensive supervision and surveillance by a case manager, approval requirements for travel, restricted transportation, mandatory polygraphs and penile plethysmographs, and sex offender registration every 30 days. (see p.63).

The case manager is the chair of the interagency case management team. The team includes but is not limited to the licensed sex offender treatment provider, law enforcement, polygraph examiner, halfway house staff, mental health professionals (if applicable), and parole officials (if applicable). Case managers investigate possible violations of commitment orders and take action for non-compliance. The case manager is a liaison for the community and for the court. He or she makes recommendations to the judge regarding any modifications to the commitment order and periodically reports to the court about the offender's commitment status.

Section 841.085, Health and Safety Code, makes it a third degree felony for a civilly committed offender to fail to comply with any part of his or her commitment requirements.

HOW LONG DOES CIVIL COMMITMENT LAST?

Civil commitment continues until the offender's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence (TEX. HEALTH AND SAFETY CODE § 841.081(a)). Thus, hypothetically, an offender could remain civilly committed his or her entire life if authorities never determine that the abnormality is corrected.

However, the law requires the court to conduct a review of the civilly committed offender's status every two years. The court will hold a hearing on the offender's commitment if the judge determines one of two things, based on the case manager's report:

- 1) A requirement imposed on the offender should be modified.
- 2) There is probable cause to believe the offender's behavioral abnormality has been corrected.

The court can hold the hearing before a jury, and the burden is on the state to prove beyond a reasonable doubt that the offender's behavioral abnormality has not been corrected. As a result, an offender's commitment has a chance of ending every 2 years.

In addition to the mandatory biennial review, committed offenders can also petition the court themselves to terminate the commitment. If the case manager believes the offender's behavioral abnormality has been corrected, she or he can authorize the offender to petition the court at any time, and the judge must schedule a hearing just like the one described above. The offender can also petition the court without the case manager's authorization, but in that situation the judge is not required to hold a hearing.

Bottom Line:

The Role of the Legal Advocate Concerning Sex Offender Monitoring and Treatment

By the time a case proceeds to the point that the perpetrator faces classification as a sex offender, the survivor's participation in the justice system will be mostly over. The defendant will already have been convicted or have received some other adjudication, which means the investigation and trial are already over. Of course, the survivor has a role to play during the parole and/or probation process (**see p.53**), and there might be an appeal pending. However, sex offender registration proceedings do not require victims' involvement.

Nevertheless, information about Texas's registration and verification program is relevant and beneficial to survivors at various times throughout the justice process. Survivors often provide input on decisions that later affect the perpetrator's registration requirements. Therefore, the advocate must become familiar enough with the laws governing sex offenders to be a reliable source of information for survivors.

Legal advocates can be particularly effective in that role by anticipating the times survivors are likely to need that information. Probably the most obvious example is during discussions with the prosecutor about plea bargains. As described at length earlier in this chapter, the kind of registration requirements the state imposes on the perpetrator, if any, depends almost entirely on the offense committed and the type of adjudication (i.e., conviction, community supervision, deferred adjudication, or juvenile delinquent conduct). Plea bargains almost always involve a lesser charge than the original and/or an adjudication less severe than a conviction. Survivors have the right to confer with the prosecutor's office, but they cannot meaningfully communicate about plea offers unless they understand the potential effects on sex offender registration.

Knowledge about sex offender registration can be important to survivors at other times too. Issues may arise during safety planning discussions, during pre-report discussions about what could happen to the perpetrator if police get involved, when completing a Victim Impact Statement, or when deciding whether to stay involved in the case during parole or appeal proceedings. Of course, that list is not exhaustive because every case is different. As always, consider the survivor's unique circumstances and needs, and make sure she or he has all the information necessary to participate meaningfully.

Finally, the information the survivor needs will not always be technical. Frequently, so much happens all at once during the criminal process that post-conviction registration is not even on the survivor's radar. Thus, in order to explain why information about registration is relevant, you might first need to provide the survivor a general overview of what sex offender registration is.

Not every survivor will need that or any other information, but always listen and be attentive to what important knowledge the survivor lacks. Much of the information in this manual, and in this chapter specifically, is very specialized. Remember that you're the expert, and the survivor doesn't always need to know everything you know. This manual is comprehensive to give you a complete understanding and to allow you to use it as a reference. However, to a survivor with a specific need at a specific time, too much information will be overwhelming and confusing. In your role as an informational resource, always be sensitive to the survivor's need for concise and accurate assistance.

Juvenile Offenders

Introduction

When the perpetrator of sexual assault is a juvenile, some special rules apply. As a general rule, the juvenile justice system is more lenient toward perpetrators than the adult system, because it has elements of both the criminal and civil legal systems. In fact, juvenile court proceedings actually are civil cases, not criminal. Even in cases involving serious offenses like sexual assault, the response to crime sometimes can be more focused on rehabilitating the child-offender than on punishment. For all those reasons, juvenile proceedings are significantly different from adult criminal proceedings.

But in many ways, from the advocate's point of view, there will be similarities. The fact that the perpetrator is a minor does not necessarily mean the advocate's responsibilities will be drastically different than if an adult had committed the offense. For example, victims have statutory rights in juvenile proceedings, just like in adult criminal proceedings. In many respects, in fact, victims' rights are the same in both systems. In addition, sometimes juveniles who commit felonies can be prosecuted as adults in the ordinary criminal justice system, meaning nothing would be different at all.

There certainly will be differences in the juvenile system, however. The juvenile system offers many alternatives that are not available in the adult system, and the Family Code has extensive rules governing when each can apply. Thus, the bulk of this chapter will set out the various ways the state might address serious sexual offenses when committed by juveniles. Sometimes cases will result in a trial, and sometimes not. Sometimes the juvenile offender will be committed to an institution, and sometimes not. You and the survivor should know that the result of a juvenile case will depend on a lot of specific facts and details that, unfortunately, you may not have any control over.

Therefore, approach this chapter with an eye toward learning what facts will be relevant to courts and prosecutors when dealing with juvenile offenders. Also, use this chapter as a foundation of knowledge—and a reference—for helping survivors understand how the juvenile justice system works in general. This chapter is not a comprehensive guide to the advocate's role in juvenile cases; you will also need to apply the information you have learned thus far. This chapter focuses narrowly on the specific ways juvenile cases can differ from adult criminal cases, and how you should modify your advocacy.

NOTE: Many offenses involving juveniles occur at school or among classmates outside of school. In these cases, survivors usually have important civil rights in addition to their rights in the criminal justice process. Refer to the later chapter on Civil Remedies: Education for details.

i. Rights of Crime Victims' in Juvenile Proceedings

Knowing the survivor's basic rights is the best place to start learning about the juvenile justice system. For cases involving child perpetrators, the Texas Family Code sets out specific statutory victims' rights, which mirror those contained in the Code of Criminal Procedure.

WHO IS A "CHILD"?

First, who is a "child," for purposes of Texas's juvenile justice system? "Child" is defined in TEX. FAM. CODE § 51.02. In order for a juvenile court to have jurisdiction over a case, the alleged offender must be a person who is 10 or older but under 17. Juvenile court can also have jurisdiction over a person older than 17 (but under 18) if he or she committed delinquent conduct before becoming 17.

"Delinquent conduct" is a term describing certain acts committed by a child that violate criminal law (TEX. FAM. CODE § 51.03(a)). Because of a child's age, the state does not generally convict children of "crimes." It is true that a child's conduct must be criminal and meet the statutory definition of a crime in order to be adjudicated by the juvenile court, but the result is not technically a conviction in the same sense as a conviction in adult criminal court. Instead, the juvenile justice system usually treats the juvenile offender as someone in need of rehabilitation, not just punishment.

If the perpetrator is a child within the meaning of the Family Code, the case can go to juvenile court, and the rights listed below will apply.

VICTIMS' RIGHTS

The rights of victims of juveniles are found in Title 3 of the Family Code, entitled the "Juvenile Justice Code." Under TEX. FAM. CODE § 57.002, victims of juvenile offenders have the right:

- To protection by law enforcement from harm and threats of harm arising from cooperating with the prosecution (TEX. FAM. CODE § 57.002(1))
- To have their safety considered by the court when deciding whether to detain the juvenile before adjudication (TEX. FAM. CODE § 57.002(2))
- Upon request, to be informed about juvenile justice procedures, including those related to the preliminary investigation, deferred prosecution, and appeals (TEX. FAM. CODE § 57.002(4))
- Upon request, to be informed of relevant court proceedings, including appellate proceedings, cancellations, and reschedulings (TEX. FAM. CODE § 57.002(3))
- To be present at all public court proceedings related to the conduct of the offender, unless the court determines the victim must be sequestered during other witnesses' testimonies (TEX. FAM. CODE § 57.002(11))
- If requested, to have the prosecutor notify the victim's employer of the victim's need to miss work in order to participate in the juvenile proceedings (TEX. FAM. CODE § 57.002(10))
- To provide information about the impact of the crime on the victim by testimony, written statement, or any other method for use during a disposition hearing (TEX. FAM. CODE § 57.002(5))
- Upon request, to receive referrals to social service agencies for additional assistance (TEX. FAM. CODE § 57.002(6))

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- To be provided a waiting area separate from other witnesses and the offender before testifying in any proceeding, or, if that is not available, other safeguards to minimize the victim's contact with the child and the child's relatives (TEX. FAM. CODE § 57.002(8))
 - Upon request, to be informed about procedures for release under supervision, or transfer to the custody of the Texas Department of Criminal Justice pardons and paroles division (TEX. FAM. CODE § 57.002(7))
 - To participate in the process for release or parole (TEX. FAM. CODE § 57.002(7))
 - To provide information to the Texas Juvenile Justice Department to be considered before the offender's release or parole (TEX. FAM. CODE § 57.002(7))
 - If requested, to be notified of the offender's release or transfer for parole (TEX. FAM. CODE § 57.002(7))
 - To prompt return of any property held by law enforcement or a prosecutor as evidence, when the property is no longer needed for that purpose (TEX. FAM. CODE § 57.002(9))
 - To receive information on Crime Victims' Compensation, including compensation for medical expenses related to a sexual assault examination (TEX. FAM. CODE § 57.002(6))
 - Any other right appropriate to the victim contained in the Crime Victims' Rights section of the Code of Criminal Procedure (**see p.26**) (TEX. FAM. CODE § 57.002(12))

HIV/STI TESTING

In addition, a different provision in the Family Code requires testing of the juvenile offender for HIV and other sexually transmitted infections and diseases. Section 54.033, Texas Family Code, requires such testing of any juvenile adjudicated of delinquent conduct that constitutes sexual assault (Tex. Pen. Code § 22.011), aggravated sexual assault (TEX. PEN. CODE § 22.021), or indecency with a child (only if involving sexual contact) (Tex. Pen. Code § 21.11(a)(1)).

STRATEGIES FOR PROTECTING VICTIMS' RIGHTS

Refer to Section ii of the chapter covering "Crime Victims' Rights" for a complete discussion of strategies to protect survivors' legal rights.

As an advocate, you will be well-positioned to anticipate what will happen next in the juvenile proceedings, and which legal rights will likely apply. Help the survivor identify which rights can help protect her or his interests. In addition, especially for any right containing the phrase "upon request" or "if requested," be sure the survivor makes a request to the appropriate official in writing. (**see p.26**)

ii. Pre-Adjudication Detention

As noted in the introduction to this section, law enforcement and juvenile courts have many options for dealing with juvenile offenders. But no matter what measures authorities choose, there will be an initial decision about whether the child should be detained or released. For example, if the child is accused of a very serious offense like sexual assault, the court might decide to hold the child in detention while the case proceeds.

However, in general, there is a presumption in the juvenile system to release offenders to their parents or guardians. In order for a juvenile court to go against that presumption and detain a child before adjudication, the court must find at least one of five criteria during a formal detention hearing:

- 1) The child is likely to leave the court's jurisdiction.
- 2) Suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person.
- 3) The child has no parent, guardian, custodian, or other person able to return him to the court when required.
- 4) The child may be dangerous to himself or herself, or may threaten the safety of the public if released.
- 5) The child has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

(TEX. FAM. CODE § 54.01)

In cases where a child commits sexual assault or a related crime, the court might detain the child under the fourth criterion. Of course, if the child has committed an offense previously, the fifth criterion will apply. **In any juvenile case, however, the victim should be prepared for the possibility that the court will release the child-offender into the custody of his or her custodian.**

aa **ADVOCACY ACTION:** Always remember that victims have the statutory right to have their safety considered by the court when making this decision. (**see p.26**) If you are concerned the court is not honoring that right, encourage the survivor to speak up and assert it by telling the judge or prosecutor she or he feels unsafe.

In most cases, the detention hearing will be held, without a jury, within two working days from the time authorities take the child into custody.

iii. Informal Dispositions and Diversion

When a juvenile violates a criminal law, there are three general routes the case can follow. Which route a case takes depends on a variety of factors, and each route has its own set of rules and consequences. Chapter 59 of the Texas Family Code provides an extensive (and fairly complicated) scheme for administering punishments in juvenile cases called the Progressive Sanctions Model. Fortunately, as a legal advocate, you do not need to know everything about that complex system (the details are nevertheless set out in the Texas Juvenile Probation Commission’s comprehensive chart at the end of this chapter).

Instead, this section will examine the three general types of judicial responses in the juvenile system:

- 1) Police can dispose of a case without any referral to court at all
- 2) A court can hold an informal proceeding
- 3) The case can go through one of a few possible formal court proceedings.

This section focuses on the first two routes.

DISPOSITIONS WITHOUT REFERRAL TO COURT

A disposition without referral to court is the most lenient response to a juvenile’s offense. It has the least severe and least enduring consequences. Therefore, a disposition without referral to court typically is available only to juveniles who have no previous offenses, and it is mainly reserved for minor offenses. Therefore, juvenile perpetrators of sexual offenses likely will not have the opportunity for a disposition without referral to court. The practice is governed by TEX. FAM. CODE § 51.03-51.032.

Whether a juvenile can get a disposition without referral to court depends, in part, on the services available in the community. If the community has a “first offender program” or a “diversion” program, law enforcement officers can send first-time offenders to the administrator of the program.

Usually, such a program involves certain requirements on the child, such as community service hours or counseling. Upon satisfactory completion of those requirements, the police terminate the complaint against the child without ever filing it with the juvenile court—the case is “diverted” away from the court. In such a case, the diversion agreement might appear on the child’s juvenile record, but the child will avoid having a criminal record.

INFORMAL PROCEEDINGS

The consequences of informal proceedings are less severe than formal proceedings, so officials usually reserve this alternative for less serious offenses. Therefore, a juvenile who commits sexual assault or another serious sexual offense probably will not be granted an informal proceeding. Nevertheless, that is not a universal rule, so advocates should be familiar with informal proceedings in addition to the formal proceedings that are more typical for sexual offenses.

There are two types of informal proceedings in Texas's juvenile justice system: "supervisory cautions" and "deferred prosecutions."

Supervisory Cautions

Supervisory cautions are very much like dispositions without referral to court. The chief difference is that the juvenile justice system becomes directly involved in a supervisory caution. For a supervisory caution, the juvenile probation department receives the case from law enforcement and administers the supervisory caution, whereas a disposition without referral to court is independent from any judicial or law enforcement entity.

Usually, only first-time offenders who have committed minor offenses are eligible for supervisory cautions. A juvenile who has committed a serious sexual offense will not receive a supervisory caution. The effect of a supervisory caution is to provide counseling for the child-offender about the illegal conduct as well as referrals to any additional services the child or family needs. A supervisory caution often does not involve the kinds of requirements and restrictions (other than counseling) that are common in other dispositions, like deferred prosecutions, probation, and dispositions without referral to court.

Like a disposition without referral to court, a supervisory caution will appear on the child's juvenile record, but the child receives no criminal "conviction."

Deferred Prosecutions

Unlike supervisory cautions and dispositions without referral to court, deferred prosecutions are commonly available for juveniles who commit more serious offenses. It is a possibility for any alleged delinquent conduct (**see p.87**) or conduct indicating a need for supervision (**see p.91**) (TEX. FAM. CODE § 53.03). However, if the conduct constitutes a felony (**see p.9**), the juvenile prosecutor must consent to a deferred prosecution.

A deferred prosecution in juvenile court is very similar to a deferred adjudication in adult criminal court (**see p.64**). Essentially, the juvenile offender voluntarily agrees to submit to a set of requirements during a six-month deferral period. In exchange, the state agrees not to proceed with a formal court adjudication. However, if the juvenile violates any term of the agreement the state can choose to begin a formal proceeding, which can result in dramatically more severe punishments.

iv. Formal Court Proceedings

In most juvenile cases involving serious offenses, the prosecutor will opt for formal court proceedings instead of more lenient informal proceedings. If so, the prosecutor may choose one of four formal disposition options, depending on the particular circumstances of the case:

- Certification as an Adult
- Delinquency Petition
- Determinate Sentencing
- CINS Petition

This section will discuss each of those options and their ramifications.

CERTIFICATION AS AN ADULT

For felony offenses the juvenile prosecutor will often choose to send the case to the adult criminal justice system. That is true both for repeat and first-time juvenile offenders. If that happens, then the child will be treated virtually identically to any adult charged with the same crime. For advocates and victims, of course, that means all the rights and responsibilities described throughout the other chapters of this manual apply normally.

Certification as an adult is the most aggressive response available to the juvenile justice system. Once certified as an adult, a juvenile faces the same range of punishment for the offense that any adult would. That includes life imprisonment, but a juvenile cannot receive the death penalty for any offense committed before becoming 17 years of age.

For most felony offenses, a juvenile must have been at least 15 years old at the time of the crime in order to be certified as an adult. However, slightly younger juveniles can be certified as adults for certain crimes: for first degree felonies, capital felonies, and aggravated controlled substance felonies, a juvenile can be certified as an adult if he or she was 14 at the time of the crime. (**see p.9**)

DELINQUENCY PETITION

Most juvenile cases result in delinquency petitions. The delinquency petition is the default response to juvenile offenses, and it gives the juvenile court various options for punishing and rehabilitating the child. In cases involving serious offenses like sexual assault, the court might respond with a heavier hand, but a basic understanding of the ordinary delinquency petition is essential to understanding the juvenile justice system's more severe punishments.

Like any formal juvenile proceeding, the centerpiece is the adjudication hearing. As noted in the introduction to this chapter, juvenile cases technically are civil in nature, not criminal. Nevertheless, juvenile defendants in adjudication hearings are afforded all the statutory and constitutional rights afforded to criminal defendants (see, e.g., TEX. FAM. CODE § 51.10, guaranteeing juvenile defendants the right to assistance of counsel at all stages of juvenile proceedings). In addition, the adjudication hearing takes place before a judge or jury, just like an ordinary criminal trial, and both sides present evidence. In that sense, the experience will be the same for the victim and advocate in many ways (**see p.9**).

The biggest difference between a juvenile delinquency proceeding and a criminal trial is that if a child is found to have engaged in delinquent conduct, the conduct is not treated as a crime. Instead, the court views the juvenile's conduct as proof of the child's need for supervision, counseling, discipline, or some other rehabilitative measure. For more dangerous conduct, the court might also determine that the child should be confined to protect the safety of those around him or her. Basically, because the offender is a child, pure retribution against the offender is not the chief purpose of the juvenile justice system.

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The court can respond to delinquent conduct in several different ways:

- **Probation:** Juvenile probation can include any of the restrictions or requirements ordinarily associated with probation (see p.85). In addition, in the juvenile context, the court has 3 placement options for the juvenile to carry out his or her probation: (1) in the child's home or in the custody of a relative or other fit person, (2) in a suitable foster home, or (3) in a suitable public or private institution—but not a Texas Juvenile Justice Department (“TJJD”) facility. The placement decision will depend on the juvenile's particular circumstances, and the probation period cannot extend beyond the juvenile's 18th birthday.
- **TJJD Commitment:** The Texas Juvenile Justice Department is the institutional arm of the juvenile justice system. Its purpose is to provide for the care, custody, rehabilitation, and the reestablishment in society of juveniles who have engaged in delinquent conduct. Only juveniles who are adjudicated for felonies can be committed to TJJD's custody. TJJD has exclusive discretion as to how long the juvenile must stay in its custody, but the length of the commitment cannot extend beyond the juvenile's 21st birthday. Decisions by TJJD about when to release a juvenile depend on such factors as the nature of the juvenile's offense, the juvenile's history and background, and the juvenile's behavior while in TJJD. TJJD also sets minimum lengths of stay for all offenses.
- **Orders Affecting Persons Other Than the Child:** Because a major purpose of a delinquency adjudication is to improve conditions in the child's life that could be contributing to his or her delinquency, the juvenile court has authority to issue orders enforceable against the child's parents or guardians. The orders can require a parent to pay child support, enroll the child or the family in counseling, or refrain from doing something. The court can also order a parent or guardian to pay court costs and probation fees.
- **Orders for Restitution or Community Service:** These orders often fall under a juvenile's probation agreement. In fact, for any child placed on probation, the court must order community service (up to a maximum of 500 hours). On the other hand, an order to pay restitution may or may not be part of a child's probation. The court can also order the child's parents to pay restitution.
- **Driver's License Suspension:** In any formal delinquency proceeding, the juvenile court can choose to suspend the child's driver's license as part of the disposition. For certain offenses involving drugs or alcohol, in fact, the court must suspend the child's license.

Sex Offender Registration

Additionally, juveniles convicted of certain sexual offenses may be required to register publicly as sex offenders under Chapter 62, Code of Criminal Procedure. Refer to the previous chapter on Sex Offender Management and Treatment to see the specific circumstances where juveniles must register. (**see p.74**)

There are also some special requirements on juveniles who are required to register. Section 54.0405(a)(2)(B), Family Code, requires those juvenile offenders to provide a DNA sample as part of the registration. In addition, as a probation requirement, the court can also require the child to attend psychological counseling for sex offenders and submit to polygraph testing to monitor the child's treatment progress (TEX. FAM. CODE § 54.0405(a)(1)).

DETERMINATE SENTENCING

Prosecutors can invoke “determinate sentencing” for juveniles who commit particularly serious offenses. Essentially, the policy allows the state, if appropriate, to confine juvenile offenders for longer than the juvenile system would normally allow without certifying the child as an adult. Determinate sentencing does not necessarily result in a longer period of confinement, but it creates that possibility. It can also result in a juvenile offender who is on probation to be transferred to adult probation. One could think of it as a TJJD commitment with more teeth. Determinate sentencing is only available for juveniles who commit certain offenses. Those include:

- Sexual assault
- Aggravated sexual assault
- Indecency with a child
- Criminal solicitation of a minor
- Capital murder
- Attempted capital murder
- Murder
- Attempted murder
- Aggravated kidnapping
- Aggravated assault
- Aggravated robbery
- Injury to a child, elderly individual, or disabled individual (except state jail felonies)
- Arson with bodily injury or death
- Aggravated controlled substance offenses
- Criminal solicitation
- All offenses listed in Section 3(g), Article 42.12, Texas Code of Criminal Procedure:
 - o Sexual assault
 - o Aggravated sexual assault
 - o Indecency with a child
 - o Capital murder
 - o Murder
 - o Aggravated kidnapping
 - o Aggravated robbery
 - o Drug free zone enhanced controlled substance offenses
 - o Injury to a child, elderly individual, or disabled individual, if the offense is a first degree felony committed against a child
 - o Sexual performance by a child
 - o Criminal solicitation, if the offense is a first degree felony
 - o Compelling prostitution
 - o Trafficking of persons
 - o Burglary, if committed with intent to commit indecency with a child, continuous sexual abuse of a young child or children, sexual assault, aggravated sexual assault, or prohibited sexual conduct
- Any “habitual” felony conduct

The Process

If the prosecutor wants to invoke determinate sentencing, a grand jury must first approve the petition charging the juvenile with the offense (no grand jury involvement is required in an ordinary delinquency proceeding). If the grand jury approves the petition, and the juvenile is found to have committed the offense, then the court can commit the juvenile offender to a TJJD facility.

Notice that until this point, the proceeding is almost the same as an ordinary delinquency proceeding. The main difference with determinate sentencing is that the juvenile also has the possibility of later additional confinement in an adult TDCJ facility or adult probation. Note that even with determinate sentencing, TDCJ confinement is not automatic. The juvenile court may recommend probation instead.

Effects of Determinate Sentencing

The most obvious effect of determinate sentencing is post-TJJD confinement. The length of that confinement depends partly on how serious the offense was, and partly on the particular facts the case. The judge or jury will be allowed to consider all the surrounding circumstances in determining an appropriate sentence, but the law provides maximum durations for determinate TDCJ confinement:

- **Capital felonies, First degree felonies, and Aggravated controlled substance felonies:** up to 40 years after release from TJJD
- **Second degree felonies:** up to 20 years after release from TJJD
- **Third degree felonies:** up to 10 years after release from TJJD

TJJD can request a transfer to a TDCJ facility for a determinately sentenced juvenile older than 16 but younger than 21.

Every determinate sentence case does not have to result in transferring the child to an adult TDCJ facility. TJJD also has authority to administratively release a juvenile committed to its custody, if the juvenile has served the minimum length of time in TJJD and/or TDCJ for the particular offense. For third degree felonies, determinately sentenced juveniles must serve a minimum of one year. For second degree felonies, they must serve at least two years. For first degree felonies, they must serve at least three years. And finally, determinately sentenced juveniles who commit capital felonies must serve at least ten years before TJJD may administratively release them.

Finally, all juveniles who are determinately sentenced must be placed on parole upon their release. If the juvenile is released before reaching the age of 19, he or she is placed on TJJD parole until age 21, at which time the juvenile is transferred to adult parole. If the juvenile is older than 19 when released, he or she is immediately placed on adult parole.

Thus, determinate sentencing modifies the ordinary delinquency proceeding to allow for a more severe and comprehensive punishment system, without having to certify the juvenile as an adult.

CINS Petition

The last formal disposition available in juvenile court is to adjudicate the child for conduct indicating a need for supervision, or "CINS." Filing a CINS petition is a formal proceeding, but it is more lenient than a delinquency petition. Any of the measures available to the court regarding a delinquency adjudication is also available for a CINS adjudication, except the court cannot commit the juvenile to a TJJD facility for CINS.

Usually, a juvenile adjudicated for CINS will be placed on probation. If the juvenile then violates a term of the probation, the state can file a new delinquency petition. If that happens, then any of the measures normally available in a delinquency proceeding become available to the court—including TJJD commitment, and potentially determinate sentencing.

Bottom Line: The Role of the Legal Advocate in Juvenile Cases

The reality is that most sexual assault survivors you work with probably will not have been attacked by juveniles. Nevertheless, it is very important that legal advocates have basic knowledge of the juvenile justice system. The day a victim of a juvenile comes to your agency is a terrible time to start researching.

Despite the many differences between juvenile adjudications and adult prosecutions, the legal advocate's general responsibilities are not much different in either system. No matter what kind of case comes your way, it's always the advocate's job to relieve survivors' stress and confusion by keeping them informed and looking out for their rights and interests.

In addition, as always, maintain a big-picture perspective on what's likely to happen next in the proceeding. The better understanding you have of the justice process, the more effective you will be in guarding the survivor's rights. Many of the same considerations that you should think about during an adult proceeding also apply in juvenile cases. For example, you should ensure the survivor is prepared to provide a Victim Impact Statement if she or he wishes, or to explain to the juvenile court judge why the juvenile offender should be detained before the adjudication hearing to protect the survivor's safety. You should also assist the survivor in staying informed about court date reschedulings and cancellations, just like in an adult case. Importantly, many of the same crime victims' rights apply in the juvenile justice system. So, be sure to employ the same strategies as in the adult system to protect them.

The biggest differences in the juvenile system are related to punishments, but that also means the survivor might have the right to participate at more and different times throughout a probation or supervision period. Therefore, pay close attention to the court's orders in that regard.

In any event, however, don't get thrown off by the fact that a juvenile case takes place in a different court. There are differences both in procedure and in the substance of the law, but your responsibilities to the survivor remain largely the same—be a resource for information, and stay watchful for the times during the proceeding when the survivor may need to assert her or his rights.

Finally, use the Texas Juvenile Justice Department as a resource. Their legal help desk can provide a broad range of information and assistance regarding the juvenile justice system. The number for the TJJD legal help desk is (512) 490-7121. TJJD Victim Services is also available at 512-490-7289.

PART TWO: CIVIL LEGAL REMEDIES FOR SURVIVORS OF SEXUAL ASSAULT

The Importance of Civil Law

Introduction

People do not often associate the civil legal system with sexually violent crime. Civil law usually involves things like contract disputes, discrimination lawsuits, malpractice, and dollar awards. All of those can be very serious, but most people view crimes like rape as an entirely separate matter. However, the reality is that most sexual assault survivors will have needs arising under civil law as a result of the crimes against them. In fact, the vast majority of survivors will never see their attackers apprehended and convicted. Therefore, civil remedies often are much more important to the survivor than the criminal process.

To understand why, consider for a moment the purposes of the criminal justice system. What is it designed to accomplish? Primarily, it serves retribution by punishing offenders. That punishment also prevents and deters other potential offenders from committing crimes. In addition, convictions allow the state to keep victims and society safe from offenders by locking them away. Finally, the criminal justice system can provide the victims of crime with closure—the sense of completion that comes with seeing that the perpetrator has paid consequences for his or her actions.

Compare, then, the functions of the criminal justice system with the actual needs of victims. To be sure, many victims need the things the criminal justice system provides: safety, retribution, and closure. And the rest of us need the justice system's deterrent effects to discourage new assaults. However, survivors' needs do not end there. For example, unexpected financial burdens are almost universal for sexual assault survivors. Costs can arise as direct results of an attack, or they can arise along the road to addressing other civil needs, like medical treatment or new housing. Recouping costs, or making life changes in order to get by on less money, can be matters of civil law. This second part of the manual will examine the most common ways civil law becomes relevant to sexual assault survivors, as well as the roles of advocates in those circumstances.

Throughout the following discussions, bear in mind that often one or more of these civil legal issues will be much more important to survivors than seeing their attackers convicted in criminal court. A critical part of being a victim advocate is understanding that the remedies appropriate for some survivors are inappropriate for others. For example, trauma from a rape might cause a survivor to have trouble performing at work, and the survivor may not be able to afford the counseling and treatment she needs. In that case, she or he likely will not want to devote energy to a criminal prosecution at the expense of getting assistance with employment and healthcare.

Legal advocates need to be sensitive to survivors' diverse needs. As an advocate, you sometimes play a role within the criminal justice system, so it is very easy to become fixated on the criminal conviction as your goal—and therefore the survivor's goal. But despite the advocate's role in the criminal justice system, the advocate's more fundamental responsibility is to be whatever the survivor needs her to be. For some survivors that will mean focusing on the criminal investigation and prosecution, but many others will have vastly different non-criminal needs, which can be every bit as important to their safety, health, and financial stability. You might not always be equipped to provide the assistance yourself, but effective advocates are prepared to provide appropriate referrals outside of the criminal justice system.

Therefore, it is imperative from the very first day an advocate meets with a survivor to begin defining the survivor's needs with an open mind. The survivor often will not know about civil remedies, so the advocate must listen carefully to spot possible civil issues, not just make recommendations. Use the concepts in this chapter as a baseline for serving all survivors—especially those who don't know exactly what they need.

General Civil Issues

Every sexually violent crime has ripple effects that cause lasting problems for survivors. The following chapters will look at several specific contexts, but first we will consider some general concerns that are common to most survivors. Almost any decision a sexual assault survivor makes in response to an attack has consequences for privacy, finances, or safety. Too often, survivors endure all at once. This section considers some remedial measures useful in many different circumstances.

PRIVACY

For many survivors—perhaps most—privacy is the single most important concern. Nationally as well as in Texas, it is one of the top reasons survivors decide not to report sexual assault to police. In addition, lapses in the survivor’s privacy can very easily create serious safety risks. Therefore, protecting survivors’ privacy should be a top priority in every case.

Advocates should keep a few general points in mind regarding privacy. First, be as proactive as possible. Survivors and advocates can take many measures to protect privacy early in the process, even before the survivor’s privacy is threatened in any way. Being proactive is extremely important, because once private information becomes public, it is nearly impossible to repair the damage. Waiting until something goes wrong is often not good enough.

Second, be aware of the survivor’s unique privacy concerns, and the unique aspects of your community. Often, smaller or rural communities make privacy an even more serious problem. For example, more people may know and talk to one another than in larger communities, there might be longer distances to travel for victim services, or fewer law enforcement officers available. When planning for the survivor’s privacy, consider her or his specific concerns, but also think about how information might get back to others in the survivor’s life. From your experience in your community and local institutions, you may think of issues that had not occurred to the survivor.

As discussed at length in the chapters on criminal investigations and prosecutions, there are a number of measures survivors can take outside the criminal justice system to protect their privacy within the system. For many of those measures, personal representation by an attorney is not necessary. For example, the advocate can coordinate with the prosecutor’s office to ensure sensitive information is redacted from Morton Act disclosures and assist the survivor in submitting a pseudonym form early in the investigation process.

Advocates should also always adhere to their programs’ confidentiality policies when defense attorneys request information about services provided to the survivor. That will require being cautious about the records you keep. For example, keeping notes related to a survivor outside your crisis center—perhaps in a personal notebook or in the advocate’s car—does not prevent a defense attorney from accessing them.

In addition, advocates and survivors can sometimes weaken the impact of defense subpoenas by warning third parties not to disclose private information to the defense, before the defense sends the subpoena.

Rape Crisis Center Confidentiality

Employees and volunteers at rape crisis centers and sexual assault programs are bound by strict confidentiality requirements. The federal Violence Against Women Reauthorization Act of 2013 (VAWA) sets out very specific steps programs must follow in the event of a request for confidential information.

VAWA funding recipients:

- Shall not disclose any personally identifying information or individual information collected in connection with services requested, utilized, or denied through the recipient's programs, even if the information has been encoded, encrypted, hashed, or otherwise protected. "Personally identifying information" means first or last names; home or other physical addresses; any contact information; any identification numbers; and any other information that would serve to identify an individual, such as date of birth, racial or ethnic background, or religious affiliation.
- Shall not reveal individual client information.
- Must obtain the client's consent before disclosing any information described above. The consent must be (1) informed, (2) written, and (3) reasonably time-limited (i.e., the consent must end after a reasonable time period).
- If release of information is compelled by statute or court order, must make reasonable attempts to notify victims affected by the disclosure and must take steps necessary to protect the privacy and safety of any persons affected by the disclosure, including, e.g., affected members of the victim's family or household.

As an advocate, this responsibility will often fall to you. Verify that your program has official policies in place that align with these federal regulations, and make sure your colleagues understand one another's roles regarding confidentiality.

Proactive Measures to Protect Privacy

Survivors bear some responsibility for maintaining the confidentiality of their own records and information—usually without ever realizing it. If survivors are not careful and properly informed, they could inadvertently give the defendant the right to access sensitive information. One of the most common ways that happens is by inadvertently waiving a privilege.

In some circumstances a survivor can accidentally waive a privilege to keep information confidential. In criminal cases in Texas, courts recognize the attorney-client privilege, the husband-wife privilege, and the clergy communications privilege. That means the parties to those communications have the absolute right not to disclose what was said. However, if a party—including the survivor—chooses to disclose any of the communication to a third party, the privilege is destroyed.

One significant context for inadvertent waiver of privilege is the filing of a civil lawsuit or administrative complaint. For example, filing a complaint against a school for sex discrimination under Title IX (**see p.111**) might require the survivor to disclose privileged information that wouldn't have to be disclosed in a criminal trial. If so, the survivor may not be able to reassert that privilege later.

It is imperative that survivors identify communications they have had that may be privileged, and be very careful to protect the privilege. Therefore, if a survivor is thinking about making a written statement for any reason, ensure that she or he has considered what private information might be exposed and has consulted a lawyer about those privacy concerns. (see p.101, 111 & 103)

Responding to Subpoenas

Usually, the prosecutor is the one who opposes subpoenas by the defendant. In many situations, that causes no problems because the prosecutor's interests as the state's representative will be the same as the survivor's—to keep the information out of the defendant's hands. In such cases, be sure to communicate with the prosecutor right away if the defense attorney serves a subpoena for anything you believe is confidential. The defense attorney can serve a subpoena without the judge's signature, but if the judge has not yet approved it the prosecutor can oppose the request in court.

In addition, a subpoena may be defective because of an error in the way it was drafted or served. Consider the following whenever you receive a subpoena.

For civil cases in which your program is not a party to the lawsuit, if your program receives something but has not been personally served, it probably is not a valid subpoena. A civil subpoena does not have to be in a special form, but it must conform with some very strict rules.

A civil subpoena must:

- Be issued in the name of “the State of Texas”
- State the party requesting the subpoena
- List the parties to the lawsuit and case number
- Identify the court where the case is pending
- State the date the subpoena is issued
- Include the text of Texas Rule of Civil Procedure 176.8, “Enforcement of Subpoena”
- State the person or title of person who is under subpoena
- State when the person is to appear to testify and/or produce materials
- Be signed by the person issuing the subpoena
- If a personal subpoena, have a \$10 witness fee attached at the time of service
- Be issued in person
- Be issued by a sheriff, constable, process server, or other person 18 years of age or older

Unlike civil subpoenas, criminal subpoenas must be filed with the court and then served by a peace officer. Therefore, there are fewer issues to watch out for in their drafting. However, advocates should be aware that **criminal subpoenas usually do not have to be filed in person**. As a result, a person who receives a subpoena from a criminal court may receive it by mail, email, or other medium.

There are also times when the survivor's privacy interests will be at odds with the state's interest in obtaining a conviction. For example, certain confidential information might be important for the defendant to defend against a sexual assault charge, but the prosecutor may plan to reduce the charge to a different offense, for which the confidential information is less important. As a result, the prosecutor might not aggressively oppose the subpoena, even though the survivor desperately wants to keep the information private.

In these situations, personal representation can be a great benefit to survivors in many cases. Of course, there are risks inherent in hiring a lawyer, which any survivor should carefully consider. (see p.26) However, an attorney experienced with victims' privacy rights can greatly assist a survivor in defending against intrusive subpoenas. There is an array of possible responses to defendants' subpoenas, and the right argument can block the defendant's access. One promising strategy in many areas is for rape crisis centers to contact the pro bono coordinators at the larger nearby law firms about assisting in quashing subpoenas. Many firms view subpoena work as a good opportunity to provide pro bono assistance and may be willing to assist survivors on an ongoing basis. Advocates can also contact TAASA at 512-474-7190 ext. 38 for technical assistance in opposing subpoenas.

SAFETY

Sexual Assault Protective Orders

Following a sexual assault or other sexually violent crime, a survivor may fear for her or his safety for a number of reasons. If the survivor files a police report, the attacker or friends of the attacker might threaten retaliation. If the survivor does not report, she or he might fear another attack from a perpetrator on the loose. Countless dangerous situations can arise after a sexual assault, but regardless of the details, the civil protective order is the primary legal tool for protecting survivors' safety.

NOTE: Protective orders are not appropriate for every survivor. In some cases, applying for a protective order can even put the survivor in more danger—especially in situations involving intimate partner violence. Before recommending a protective order, an advocate or other qualified person should always discuss the process and a safety plan with the survivor and help her or him to decide whether it is safe.

• THE BASICS

A protective order does two main things to protect a survivor's safety, without going through the criminal justice system. First, it allows the civil court to order the perpetrator (called the "respondent") to do or refrain from doing certain acts, like communicating with the survivor or going near her or his school or workplace. Second, it gives local police authority to arrest the respondent for violating the order, and gives the criminal court authority to punish him for the violation (including fines or jail time).¹⁵ In addition, the protective order is immediately entered into TCIC, the police computer system, so officers can enforce the order if the survivor calls about a violation.

Note that a civil protective order prohibits the respondent from doing certain things, not the survivor. There is no such thing under Texas law as a "mutual" protective order. It is legally impossible for a survivor who has an order against her rapist, batterer, or stalker to violate the order or be punished for any violation.

Sexual assault protective orders can last for any amount of time that a judge determines, up to a lifetime order. If no specific time period is stated in the order, the default duration is 2 years. A person is eligible to apply for a sexual assault protective order if she or he is a victim of sexual assault (TEX. PENAL CODE § 22.011), aggravated sexual assault (TEX. PENAL CODE § 22.021), indecency with a child (TEX. PENAL CODE § 21.11), or continuous sexual abuse of a young child or children (TEX. PENAL CODE § 21.02).¹⁶ There is no minimum age to apply for a protective order, so minors may apply themselves. In addition, any adult, including a prosecutor, can apply on behalf of a minor victim. As of September 2013, protective orders under this chapter are also available to victims of stalking and human trafficking.

¹⁵ TEX. PEN. CODE § 25.07; TEX. PEN. CODE § 38.112.

¹⁶ TEX. CODE CRIM. PROC. ART. 7A.01(A).

• REQUIRED FINDINGS FOR A SEXUAL ASSAULT PROTECTIVE ORDER:

- To obtain a protective order, a survivor must prove to a judge that there are “reasonable grounds to believe” she or he is the victim of sexual assault or abuse, stalking, or human trafficking. Unlike family violence protective orders, there is no additional required finding that the survivor is the subject of a threat of further violence.¹⁷

• THE PROCESS

The first step to obtaining a sexual assault protective order is filing an application. An application may be filed in a county or district court in the county where the applicant resides, the county where the respondent resides, or in any county in which an element of the offense occurred. There does not have to be a criminal case, or even a police report.

The Family Code designates the county attorney or the criminal district attorney as the prosecuting attorney responsible for filing protective order applications.¹⁸ However, others can file the application, too. A parent or guardian of a victim may file the application on behalf of a child, but minors can also apply on their own—there is no minimum age to apply for a PO.¹⁹ In addition, a prosecuting attorney can file an application on behalf of any of the people described above.²⁰

The application will ask for the survivor’s and the respondent’s identifying information and contact information, as well as a brief description of what the respondent did to the survivor. It is very important that the advocate not complete the application for the survivor. The description section must be in the survivor’s own words.

aa ADVOCACY ACTION: If a survivor has relocated to a new county for safety but now wants to apply for a protective order, consider filing the application in the county where the perpetrator lives or where the offense occurred. That will help prevent the perpetrator from finding out where the survivor’s new residence is.

If, from the information contained in the application, the judge decides there is a clear and present danger to the survivor or a family member of the survivor, the judge will issue a temporary protective order, called an “ex parte” order. The judge will schedule a hearing to extend the length of the order (or possibly make it permanent), and the ex parte order will last until the date of that hearing.

During the time the ex parte order is in effect, police and the respondent will both receive notice of the order and its requirements. Therefore, it is very important not to submit an application if it is not safe for the attacker to be contacted.

• THE BENEFITS

Many people underestimate the effectiveness of protective orders. It is not uncommon to hear people say, “It’s just a piece of paper, and it can’t protect you if someone really wants to hurt you.” While nothing is 100% effective at preventing violence, advocates must recognize that protective orders are more effective than virtually any other legal measure available.

That is partially because, even though the order itself is “just a piece of paper,” it stands for more than that in the eyes of many perpetrators. It stands for accountability. Much sexual and domestic violence persists

¹⁷ TEX. CODE CRIM. PROC. ART. 7A.03

¹⁸ TEX. FAM. CODE § 81.007(A)

¹⁹ TEX. FAM. CODE § 82.002

²⁰ TEX. CODE CRIM. PROC. ART. 7A.01(A)

because perpetrators face no consequences from society and those near them. The simple fact that a protective order is a tangible, visible consequence can sometimes do as much to prevent further violence as the actual requirements the court gives the perpetrator. A judge's formal warning to the perpetrator and condemnation of his actions, separate from routine criminal procedures (e.g., bond hearings) and in the presence of the survivor and the perpetrator's own attorney, can weaken the perpetrator's sense of domination while empowering the survivor.²¹

Therefore, if a survivor fears for her or his safety and is eligible to apply for a sexual assault protective order, help the survivor seriously consider that option. Protective orders are not the safest, most appropriate choice for every survivor, survivors need all the information to make that decision. It is crucial to listen to survivors' instincts about their safety. In many instances POs save lives, but if applying is likely to provoke more violence it may not be a safe option.

Finally, a survivor should always notify local police immediately in the event the perpetrator does anything to violate the order. As noted above, when the court issues an order, it is also entered into TCIC, the police computer system. Therefore, when the police respond, they will be able to determine that the PO is in effect and what restrictions the respondent is subject to.

No-Contact Orders as Conditions of Bond

As discussed in the chapter on "The Prosecution," prosecutors in some jurisdictions do not pursue protective orders for sexual assault survivors. In some counties, prosecutors follow this policy when there are already criminal charges pending, fearing that what happens during the civil proceeding could damage the criminal case against the perpetrator. In other counties, the prosecutor's office might not file SAPO applications in any circumstances. Refer to the previous discussion for more on this issue. The State Bar of Texas Legal Services Division's Task Force on Best Practices for Civil Protective Orders has recommended that prosecutors seek protective orders for survivors who want them, regardless of whether there are criminal charges against the perpetrator.²²

FINANCIAL

Unfortunately, the aftermath of a sexual assault usually involves plenty of unplanned costs. Later chapters will examine some specific costs that often arise, but for now it suffices to say that being a survivor is not cheap. And, like privacy issues, financial problems can make survivors much more vulnerable to physical danger. Consider, for example, a survivor who loses her job and her apartment following an attack by a stalker.

However, there are a few important avenues for many survivors to ease their financial burdens, in addition to the economic counseling and safety planning they can receive at the local rape crisis center.

Crime Victims' Compensation

Essentially, the purpose of the Crime Victims' Compensation program ("CVC") is to put victims of crime back in the financial position they were in before they were victimized. To that end, CVC will reimburse a lot of the expenses survivors incur as a result of the crime. In addition, CVC is an example of how

²¹ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*. YALE J. L. & FEMINISM 3, 44 (1999); Leigh Goodmark, *The Legal Response to Domestic Violence: Problems and Possibilities: Law is the Answer? Do We Know That for Sure? Questioning the Efficacy of legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 24-25 (2004).

²² *Protective Orders in Texas: A Statewide Study of Policies and Practices*, Texas Council on Family Violence, Texas Association Against Sexual Assault, Texas RioGrande Legal Aid, and Texas Advocacy Project, 12 (2013). See *Best Practices for Lawyers Representing Survivors of Domestic Violence, Sexual Assault, Stalking, and Trafficking in the State of Texas*, Report from the State Bar of Texas, Legal Services Support Division Family Law Task Force (2014).

financial issues can overlap with safety concerns: for example, the reimbursement provided by CVC can be critical to a survivor's safety measures, like relocating or obtaining costly legal services.

CVC is available to any victim of a crime or attempted crime that causes or threatens to cause physical and/or emotional injury or death, up to a total of \$50,000 (TEX. CODE CRIM. PROC. § 56.32). The victim can be a Texas resident or a resident of another state or country who is victimized in Texas. Alternatively, if a Texas resident is victimized in another state or country that does not provide for compensation to crime victims, that resident can also apply for Texas CVC. All victims must satisfy a few eligibility requirements. The victim must:

1. Report the crime in a "reasonable time"
2. Cooperate with the investigation and prosecution
3. Apply within 3 years after the date of the crime (child victims have until their 21st birthdays to make claims)
4. Not have willingly participated in the commission of the crime

CVC can be used to cover a variety of expenses, called "pecuniary losses." Article 56.32(a)(9), Code of Criminal Procedure, provides a list of categories that CVC can cover:

1. Medical care
2. Psychiatric care or counseling
3. Physical therapy
4. Actual loss of past earnings, anticipated loss of future earnings, and travel expenses due to:
 - A disability resulting from the personal injury
 - Medical services related to such a disability
 - Participating in or attendance at investigative, prosecutorial, or judicial processes related to the crime, including post-conviction and post-adjudication proceedings
5. For a victim of sexual assault or family violence assaulted at home, up to \$2,000 for relocation expenses, including a rental deposit, utility connections, moving belongings, motor vehicle mileage expenses, and for out-of-state moves, transportation, lodging, and meals
6. For a victim of sexual assault or family violence assaulted at home, up to \$1,800 for rent
7. Care of a child or dependent
8. Funeral and burial expenses, including travel expenses to the funeral for an immediate family member
9. Loss of support to a dependent (but not if such a payment would benefit the offender or an accomplice)
10. Reasonable costs of cleaning the crime scene
11. Reasonable replacement costs for clothing, bedding, or property of the victim seized as evidence or made unusable during the investigation
12. For an immediate family member of a deceased victim, bereavement leave up to 10 days

-
13. Reasonable costs of traveling to and from the place of the offender's execution for the purpose of witnessing the execution, including 1 night's stay near the place of execution

If the survivor incurs any of the above expenses, she or he can apply to have them reimbursed through CVC. The limit on CVC for any individual is \$50,000, but an additional \$75,000 is available if the victim's injury is "catastrophic and results in a total and permanent disability to the victim" (TEX. CODE CRIM. PROC. § 56.42(a)-(b)). The additional \$75,000 can go toward lost wages, and various other expenses related to medical care and making the victim's surroundings accessible, including new job training.

Survivors have 3 years from the time of the offense to submit CVC applications to the Office of the Attorney General. Note, however, that the 3-year deadline for CVC does not affect the statute of limitations for any offense. The Crime Victims' Compensation office can provide specific information on how to apply for CVC reimbursement. The contact information for the CVC office is (800) 983-9933 (or (512) 936-1200 in Austin) or crimevictims@oag.state.tx.us.

Finally, survivors and advocates should be aware that many CVC applications are initially denied. A denial can happen for many reasons, and errors can often be corrected on appeal. Therefore, you should always pursue the CVC office's appeal process. Ideally, survivors can seek assistance from an attorney, including the VICARS program at the Texas Legal Services Center at 888-343-4414.

Civil Lawsuit

In some instances, a civil lawsuit against the perpetrator for money damages may be appropriate. Sometimes, even if the perpetrator is convicted of a criminal offense and ordered to pay restitution, that amount plus CVC still does not cover the survivor's damages. If the perpetrator has been convicted, the conviction can be used to prove liability to the survivor, leaving only the amount of damages to prove in court. However, if the perpetrator does not have that much money, the lawsuit might not be worthwhile. An award of money damages is only as useful to the survivor as the perpetrator is able to pay it.

Therefore, civil lawsuits are usually most appropriate against employers or other parties whose negligence contributed to a sexual assault or other subsequent injury to the survivor. Those entities typically have enough money to pay awards, so the lawsuit can actually be worthwhile to help the survivor defray her or his financial burden.

An attorney specializing in tort lawsuits who is also familiar with sexual assault and victims' rights can assist the survivor in the decision whether to file a civil lawsuit. In any case, however, the survivor should first seek reimbursement through CVC.

Unemployment Insurance for Survivors

Many survivors find that they must leave their jobs following a sexual assault for their safety or the safety of a family or household member. Unfortunately, taking that step can also lead to financial instability and even more obstacles on the road to recovery. (**see p.111**)

In general, if a worker leaves a job voluntarily, the worker is not eligible for unemployment insurance benefits through the Texas Workforce Commission. However, Texas law provides an exception for

survivors of sexual assault, domestic violence, and stalking. As of June 2013, survivors who voluntarily leave their jobs to protect themselves or an immediate family member are not disqualified from receiving unemployment.²³ Survivors must satisfy all other eligibility criteria and provide certain documentation of the violence or stalking to TWC upon request.

aa **ADVOCACY ACTION:** The Labor Code provides that a statement from a rape crisis center advocate is sufficient documentation for a survivor to prove her or his victim status to TWC. (**see Appendix B**) for a template documentation letter that advocates can submit to TWC for this purpose.

Asset Building – Individual Development Accounts (IDAs)

Individual development accounts are relatively new programs that assist people in building the assets they need for long-term financial stability. Often, they take the form of savings accounts that match the account holder's deposits dollar-for-dollar. The account holder usually must state a purpose for the account, such as owning a home, going to school, or opening a business. There are IDA programs in various Texas communities, including Bryan, Dallas, Houston, Uvalde, El Paso, San Antonio, Midland, Austin, Brownsville, Waco, and Abilene. For a full listing of organizations offering asset building programs, see the Center for Enterprise Development's website at: http://cfed.org/programs/idas/directory_search/.

²³ TEX. LAB. CODE § 207.046(A)(2).

Ripple Effects of Sexual Assault: Housing Issues

A sexual assault—especially one that occurs at home—can suddenly and permanently disrupt the survivor’s living situation. Moreover, housing issues for sexual assault survivors often implicate both safety and financial concerns simultaneously. Fortunately, Texas has some statutory provisions to assist survivors in finding safety and minimizing their out-of-pocket costs.

IMMEDIATE HOUSING REMEDIES

Crime Victims’ Compensation

As noted in the previous chapter, the Crime Victims’ Compensation program offers a one-time \$2,000 payment to survivors of sexual assault and family violence to assist with relocation costs. In addition, the program offers a one-time \$1,800 payment to cover rent expenses. Remember, however, that unlike the lease termination statute discussed below, CVC requires the survivor to report the crime to police and cooperate in the investigation and prosecution. Refer to the CVC section in the previous chapter for a complete explanation of the program (**see p.99**).

Lease Termination

Under Subchapter A, Chapter 92 of the Texas Property Code, victims or parents or guardians of victims of sexual assault or abuse, attempted sexual assault or abuse, domestic violence, and stalking can terminate their leases before the end of their lease terms without incurring a penalty for breaking the lease.

The right to terminate without penalty applies to the following sexual offenses:

- Sexual assault (TEX. PENAL CODE § 22.011)
- Aggravated sexual assault (TEX. PENAL CODE § 22.021)
- Indecency with a child (TEX. PENAL CODE § 21.11)
- Sexual performance by a child (TEX. PENAL CODE § 43.25)
- Continuous sexual abuse of a young child or children (TEX. PENAL CODE § 21.02)
- An attempt to commit any of the above offenses (TEX. PENAL CODE § 15.01)

To take advantage of the lease termination law, there are 3 requirements a sexual assault victim, or a parent or guardian of a victim, must satisfy:

1. The assault, abuse, or attempted assault or abuse must have occurred on the leased premises or in any dwelling on the leased premises within the past 6 months.
2. The survivor must give the landlord written notice of her or his intent to terminate the lease under the Property Code listed above 30 days before vacating the premises.
3. The survivor must provide the landlord with documentation of the assault, abuse, or attempted assault or abuse from one or more of the following:
 - A health care services provider who provided an examination,
 - A mental health services provider who provided an examination or evaluation,
 - A rape crisis center that provided services, OR

- A final sexual assault protective order issued under Chapter 7A, Texas Code of Criminal Procedure (**see p.97**)

If the survivor satisfies all the requirements listed above, she or he can break a lease contract without incurring any penalty for breaking the lease early. However, the law does not affect any other amounts the survivor might owe, such as back rent or damages to the property. The early termination penalty is the only part of the lease that this law affects.²⁴

aa ADVOCACY ACTION: Usually, the easiest form of documentation for a survivor to obtain is a statement from a rape crisis center. As an advocate, you can provide that documentation yourself. (**see Appendix A**) for a template Landlord Notice Form that you can complete and use for this purpose.

There are separate and slightly different provisions covering lease termination for survivors of family violence and stalking. For stalking victims, the law works the same as for sexual assault and abuse victims, but the required documentation is slightly different. Tenants who are stalked in their homes must provide 30 days' notice and the following documentation:

1. A final stalking protective order issued under Ch. 7A or Art. 6.09, Code of Criminal Procedure; or
2. A law enforcement incident report and one of the forms of documentation required for victims of sexual assault or abuse.

In other words, unless a stalking victim has a final stalking protective order, she must provide a police record documenting the stalking in addition to a statement from a rape crisis center or medical or mental health provider.²⁵

The family violence provision does not require the assault to have occurred within 6 months, but it does require a court-issued protective order (including a temporary ex parte order but **not** a magistrate's emergency protective order) or a temporary injunction under Subchapter F, Chapter 6 of the Texas Family Code (issued by courts in divorce proceedings). Medical, mental health, or crisis center documentation is **not sufficient** for lease termination under the family violence provision. In addition, where the family violence was committed by a co-tenant or occupant of the leased dwelling, there is no 30-day notice requirement.²⁶

Finally, for every residential lease in Texas, landlords have the legal obligation to include the following language, or substantially similar language, in the lease agreement:

“Tenants may have special statutory rights to terminate the lease early in certain situations involving certain sexual offenses or stalking.”

If that language is not included in the lease agreement, and one of the covered offenses occurs on the leased premises, then the tenant is not liable for any unpaid or late rent owed to the landlord at the time of the early lease termination²⁷ (in a family violence situation, the same rule applies for language related to family violence²⁸). Therefore, if a survivor seeking a lease termination owes back rent, always check the written lease agreement to see whether the landlord has failed to include the required statutory language.

aa ADVOCACY ACTION: Remember that for both sexual assault and family violence lease terminations, the termination is not effective until all the requirements are satisfied and

²⁴ TEX. PROP. CODE § 92.0161(c).

²⁵ TEX. PROP. CODE § 92.0161(c-1).

²⁶ TEX. PROP. CODE § 92.016.

²⁷ TEX. PROP. CODE § 92.0161(g).

²⁸ TEX. PROP. CODE § 92.016(f).

the tenant has vacated the residence. Vacating typically requires removing all personal property and returning all access devices and mailbox keys to the landlord. Survivors do not have to satisfy the requirements in any particular order—they can certainly vacate first (especially if there are ongoing safety concerns), then provide the necessary documentation and/or notices. No matter what, however, rent must be paid until all conditions are satisfied, and the lease is legally terminated. In addition, keep in mind that landlords may not know why a tenant has seemingly moved out of a property, so it is very important for the victim and/or advocate to communicate regularly with the landlord. If a unit is vacant for several days and the landlord does not know why, she could consider the property abandoned and legally dispose of the tenant’s property, re-let the unit, and report the broken lease to tenant tracking and credit reporting agencies. Victims and advocates should inform the landlord in advance of any intent to terminate the lease and explain any temporary or permanent absence.

Victims with roommates may encounter the opposite problem—a landlord may not realize a victim has vacated because there are still other tenants and property in the unit. This situation can be even more complicated if the perpetrator is a cotenant or occupant. Again, communication with the landlord is essential, and victims and advocates should always try to clearly document the date of move-out. And since landlords can usually consider the victim to still be occupying the residence if any of the victim’s property remains, the victim must either remove her property or inform the landlord that she is giving the property to her roommates or abandoning it. Texas law does not require the landlord to assist the tenant in removing her property, so if there is no way of moving the property safely, the tenant may have to accept that the property is lost. The landlord can also charge the tenant a reasonable fee to dispose of any abandoned property.

The sexual assault, stalking, and family violence lease termination laws apply to all residential tenancies in Texas, including non-profit and government-operated or subsidized housing.

Some tenants may be covered by a combination of these laws, or all three. Sexual assault, sexual abuse of a child, and stalking can also be forms of family violence. In those cases, the survivor can choose which provision to use to terminate their leases. Depending on the circumstances, such as how quickly the tenant must terminate or the forms of documentation available, one law might be easier to use than the others. Therefore, when discussing options with a survivor, consider all applicable provisions.

Sexual assault and stalking are often forms of family violence. If a survivor has experienced family violence, be sure to consider additional remedies that may be available as a result.

Eviction of Neighbor-Perpetrator

Sometimes if the perpetrator of sexual violence is the survivor’s neighbor, the landlord can simply evict the perpetrator. That may be an appropriate remedy for some survivors, especially if they are not covered by the lease termination laws (e.g., the criminal offense was categorized as less severe than stalking). Whether and in what circumstances the landlord has that authority depends entirely on what the perpetrator’s lease contract says.

Fortunately, however, the Texas Apartment Association’s standard lease—one of the most common residential lease contracts used in Texas—includes a helpful provision. Under that lease, any tenant who

is charged, detained, or arrested for committing a “sex-related crime” or a “felony offense involving actual or potential physical harm to a person” can be evicted. Additionally, any tenant or guest of a tenant who violates any criminal or safety law, or any apartment rule, regardless of whether or where any arrest occurs, can be evicted. The TAA and many other leases also usually contain language prohibiting a tenant from violating the peaceful enjoyment of the property by other tenants, which arguably includes violent and sexual criminal behavior. The lease allows the landlord to issue the perpetrator a 24-hour eviction notice.

In almost all cases, however, the landlord will have discretion whether or not to evict a tenant, even if the tenant has defaulted on the lease by committing a crime. Landlords generally have no legal duty to protect tenants by evicting other tenants. Therefore, a major advantage of using the lease termination statute instead of an eviction is that no negotiation with the landlord is required, as long as the requirements are satisfied.

One situation in which landlords may have a legal obligation to evict a perpetrator is when there is sufficient evidence to establish a tort claim against a landlord. In general, people can sue others for money damages if they were injured as a result of another’s negligence, such as causing a car accident or creating a dangerous condition on a property. If there is evidence that a landlord had notice or personal knowledge of criminal sexual behavior by a tenant and took no action, that landlord may be financially liable for any future injuries or other damages suffered by the victim. Such a case may be difficult to establish, however, so advocates and victims should consult an experienced plaintiffs’ attorney before pursuing such claims. As a result, the issue of the landlord’s liability may be more useful as a tool in negotiation rather than as the basis for an actual lawsuit. (see p.101)

Survivors living in public or subsidized housing may have additional federal rights, regardless of whether they live with the perpetrator, or whether the perpetrator is the only resident eligible to live in the housing.

FEDERAL PROTECTIONS UNDER THE VIOLENCE AGAINST WOMEN ACT (VAWA)

Survivors who seek public housing should also be aware of some federal protections that may apply. As of 2013, the federal Violence Against Women Act’s housing provisions cover survivors of sexual assault in addition to family violence and stalking victims. In addition, VAWA protections now cover many additional types of HUD housing programs beyond public and subsidized housing. Covered programs now include the following:

- Section 202 Supportive Housing for the Elderly
- Section 811 Supportive Housing for Persons with Disabilities
- Housing Opportunities for Persons with AIDS (HOPWA)
- HOME Investment Partnerships (HOME) program
- Homeless programs under title IV of the McKinney-Vento Homeless Assistance Act
- Federal Housing Administration (FHA) mortgage insurance for multifamily rental housing under section 221(d)(3) of the National Housing Act that is eligible for FHA mortgage insurance for single-room occupancy pursuant to the National Housing Act
- FHA mortgage insurance for multifamily rental housing under section 236 of the National Housing Act
- Public housing under section 6 of the US Housing Act of 1937
- Tenant-based and project-based rental assistance under section 8 of the US Housing Act of 1937

Survivors who live in any of the covered housing programs above are entitled to many protections under VAWA. Some of the most important ones are listed on the following page.

-
- **Eviction Protection:** Victims of sexual assault, domestic violence, dating violence, or stalking cannot be evicted from a covered housing program for any reason directly related to incidents of actual or threatened violence. Also, victims cannot have their housing assistance terminated based on their status as victims, unless there is an actual or imminent threat to other tenants or employees.
 - **Admission Protection:** Victims of sexual assault, domestic violence, dating violence, or stalking cannot be denied admission to a covered housing program because of their status as victims.
 - **Protective Orders:** VAWA specifically requires landlords, owners, and PHAs for covered housing programs to honor civil protective orders and other orders from family court or domestic violence judges regarding access to or control of the leased property.
 - **Eviction of Perpetrator:** Landlords, owners, and PHAs for covered housing programs may evict or terminate assistance to a sexual assault, family violence, dating violence, or stalking perpetrator while allowing the co-tenant who is a victim to stay. Even when the lease or Section 8 voucher is in the perpetrator's name and the victim is only listed as an occupant, the lease or Section 8 voucher can be put in the victim's name after the perpetrator is removed.
 - **Transferral of Voucher:** Victims of sexual assault, family violence, dating violence, or stalking can transfer their Section 8 vouchers to another jurisdiction, even if moving would terminate their current leases. Unfortunately, VAWA does not currently require Public Housing Authorities to transfer Section 8 vouchers within jurisdictions. That means that it is up to the PHA whether to allow the survivor's transfer to another location in the same city or county.
 - **Confidentiality:** PHAs, landlords, and managers must maintain the confidentiality of any information or documents belonging to victims of sexual assault, domestic violence, dating violence, or stalking.

When a survivor asserts any of these rights under VAWA, a landlord can request proof or documentation that she or he is a victim of domestic violence. The law requires the landlord to accept one of the following: a police record; a court record; or certification from an attorney, a medical professional, or a domestic violence service provider. The survivor will need to provide the documentation within 14 days.

aa **ADVOCACY ACTION:** In the past, advocates and survivors have reported that some landlords, owners, and PHAs have demanded multiple forms of documentation or forms of documentation not listed in VAWA. However, the law requires that any one of these documents is sufficient. If you run into resistance, you may cite the law to support your client's documentation or contact HUD directly for assistance.

As with other federal issues, if you believe a survivor may have a remedy under VAWA, inform the survivor of what the law says and refer her or him to a lawyer experienced with federal housing remedies for survivors, or contact TAASA for technical assistance.

PROTECTIONS FOR SEXUAL ASSAULT SURVIVORS WHO ARE ALSO FAMILY VIOLENCE SURVIVORS

The Texas Fair Housing Act applies to any victim of family violence in Texas, and the federal Fair Housing Act may provide similar protections. Unfortunately, the following protections may not cover a survivor who is not also a victim of family violence.

State Protections under the Texas Fair Housing Act

- **Sex Discrimination:** The Fair Housing Act prohibits sex discrimination and sexual harassment. In some circumstances, negative actions taken against a woman because she is a victim of domestic violence, dating violence, or stalking is considered discrimination. Therefore, if a survivor is evicted, denied a housing benefit, or denied rental housing by a landlord after the landlord learns she is a victim, the survivor should file a complaint through the Texas Workforce Commission Civil Rights Division. (<http://www.twc.state.tx.us/customers/jsemp/jsempsubcrd.html>).

Federal Protections under the Federal Fair Housing Act

- **Sex Discrimination:** Federal courts have held that housing discrimination on the basis of status as a domestic violence victim is illegal sex discrimination (*e.g., Alvera v. Creekside Villages Apartments*, No. 10-99-0538-8 (HUD 1999)). That protection under federal law is virtually identical to that set out above under the Texas Fair Housing Act. Keep in mind, however, that the federal court decisions establishing claims for sex discrimination by landlords against survivors have been from other federal circuits, so federal courts in Texas are not required to and may not necessarily follow the interpretations of other courts.
- **Sexual Harassment:** Landlords and managers who respond inadequately to a tenant's report of sexual harassment by another tenant might be liable under Title VIII of the Federal Fair Housing Act for sexual harassment. In addition, if a landlord or property manager demands sexual favors in exchange for a housing benefit, or threatens to evict a tenant who does not respond receptively to sexual advances, the tenant has a remedy under the Fair Housing Act. Finally, if a landlord or manager consistently behaves in an unwelcome and inappropriate sexual manner toward a tenant, the tenant could also have a remedy under the Fair Housing Act. In any of those situations, a successful lawsuit can result in compensatory and other money damages, including costs of alternative housing and damages from emotional distress.

If the survivor believes one of the federal protections listed above would help, she or he should contact a housing attorney or legal aid for assistance. As noted above, however, if the survivor wishes to file an administrative complaint under the Texas Fair Housing Act, she or he can do that without an attorney, through the Texas Workforce Commission. To report a federal Fair Housing violation in Texas, contact the regional U.S. Housing and Urban Development office, located in Fort Worth (in some of the large cities in Texas, tenants can report violations at local offices as well). Also, for many fair housing violations, tenants are free to file their own lawsuits without waiting for HUD to complete its administrative remedy.

FINDING NEW HOUSING

Transitional Housing

When sexual assault displaces a survivor from her or his home, transitional housing may be a vital step to recovery. Local branches of the United Way are good sources of information on transitional housing options in specific communities.

For many survivors with burdensome expenses, public housing can be the best option for cost-effective transitional housing. For information on public housing in your community, contact your local Public Housing Authority ("PHA"). The U.S. Department of Housing and Urban Development maintains a list of Texas PHAs on its website at: <http://www.hud.gov/offices/pih/pha/contacts/states/tx.cfm>.

aa **ADVOCACY ACTION:** If public housing seems like a good option to a survivor, advise her or him to apply as soon as possible, because there will be a waiting list. In addition, encourage the survivor to apply in any county where she or he is willing to live. Smaller counties often have shorter waiting lists and could provide more immediate housing. Also, if the survivor's application is denied, the advocate should help her or him appeal immediately. Appeals are often successful, and an advocate's presence is extremely helpful. At an appeal, the survivor should be prepared to explain the context of the original reason for the denial and how the situation has changed since that time. In addition, the federal Violence Against Women Act protects survivors from being denied admission on the basis of their status as victims

Whether a survivor applies for Section 8 or low-rent public housing, closed or long waiting lists are almost certain. However, there are some easy things advocates can do to help survivors in such a chaotic time. First, housing authorities usually maintain a book that lists each applicant's place in line. Advocates can periodically monitor the list for the survivor to keep them informed of their status. Second, a major pitfall for many applicants is failing to keep their current addresses up to date with the PHA. Applicants must submit a change of address form to the PHA each time they move. If they do not, they may not receive notification when their name comes up on the waiting list. Advocates should remind survivors to submit the change of address form whenever the survivor moves, even temporarily.

Finally, and perhaps most importantly, many PHAs have "preferences" for certain applicants that allow them to go directly to the top of the waiting list. Typically, preferences are available to applicants with disabilities, and sometimes they are also available to the elderly, homeless, or survivors of domestic violence. Contact local PHAs to find out what preferences, if any, they have adopted, and study them closely to decide whether a survivor might qualify. A preference completely eliminates the waiting list, so it has the potential to make a bigger difference for a survivor seeking transitional housing than any other single factor. Finally, if your local PHA does not have a domestic violence survivor preference, consider working with your PHA to include one.

MAINTAINING HOUSING

Utility Deposit Waivers

Survivors of family violence are eligible for waivers to assist with certain utility deposits. Therefore, if a family or household member committed sexual assault, the survivor is eligible for this waiver. The waivers can eliminate the need for deposits for gas, electricity, and a landline phone. They do not cover past debt, like back rent, but waiving the deposit can make a big difference for a survivor managing the high expenses of relocation. Not every electricity provider accepts deposit waivers, but if the company is regulated by the Public Utility Commission, it must accept them.

To obtain a utility waiver, a survivor must have an advocate sign the waiver verifying that they are a victim of family violence. The survivor does not need to be a client of the advocate's program. In addition, it does not matter when the family violence occurred. Therefore, a deposit waiver can be a great resource even for survivors who were assaulted long ago.

Survivors may also be eligible for other rent or utility assistance programs operated by non-profits or government agencies for low-income populations or other categories into which survivors may fall.

Asset Building – Individual Development Accounts (“IDAs”)

Some survivors may be able to use “individual development accounts” to help obtain long-term housing. In Texas, IDA programs are available in various communities across Texas. Refer to Chapter B of this part, “General Civil Issues,” for general information on IDAs. For a full listing of organizations administering IDA programs, visit the Center for Enterprise Development’s website at: http://cfed.org/programs/idas/directory_search/.

Ripple Effects of Sexual Assault: Employment Issues

Like many other “ripple effects” of sexual assault, employment issues usually are not what spur survivors to seek assistance from rape crisis centers. More often survivors voice concerns about their safety or privacy, and perhaps assume they simply have to “deal with” the problems they experience at work. However, employment issues can be central to a survivor’s needs. We have already discussed the burdensome expenses many survivors incur, and how important finances are to finding and maintaining housing. If a survivor’s job is also in jeopardy, that means she or he might lose the income necessary to address other issues or to care for children. And in addition to money, a survivor’s job might mean a lot on an emotional level—the workplace could be one of the only places where people don’t know about the assault and she or he is not seen as a victim.

Loss of employment following a sexual assault is a serious and widespread problem. Research verified and adopted by the United States Senate indicates almost 50 percent of sexual violence survivors lose their jobs or are forced to quit as a result of the crime.²⁹ Some common reasons include frequent absence from work due to trauma or court dates, faltering productivity, and perceived disruptions of the workplace.

Therefore, it is very important for advocates and anyone else performing intake, case evaluation, or safety planning to be knowledgeable about employment issues facing sexual assault survivors. It is very likely that you will be uniquely positioned to identify employment issues and potential solutions or strategies that have not occurred to the survivor.

IMPORTANT: Always consult an immigration lawyer before assisting an immigrant survivor with employment issues. Even if the survivor has a valid immigration status, any change or action taken regarding employment could seriously affect her or his status (see p.127).

BACKGROUND: TEXAS EMPLOYMENT LAW

The general rule for Texas employees is “at-will” employment. Simply put, that means employers in Texas have the right to terminate employees at any time, for almost any reason, or for no reason at all. Of course, there are some exceptions to that rule, which can sometimes provide protection to sexual assault survivors whose jobs are in danger or have been lost. This chapter will examine the various laws that create exceptions to the “at-will” rule and discuss their utility for sexual assault survivors. There are three sources that might provide survivors with legally enforceable job protection. One or more of the following may apply at the same time:

- 1. Employment contracts:** The employer’s contractual agreement with the employee
- 2. Union collective bargaining agreements:** The employer’s contractual agreement with the employee’s labor union
- 3. State and federal statutes:** Laws passed to address special issues, such as discrimination and medical leave

²⁹S. 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).

Initial Strategies

The first two sources listed above represent what the employer gives to the employee voluntarily. If an employment contract or a collective bargaining agreement gives an employee greater rights and protections than the ordinary at-will rule, the employer is legally bound to that agreement. Therefore, if a survivor indicates problems with employment, she or he should first consult the contract with the employer to see whether it provides assistance. For example, if the contract allows for paid leave for an injury, the survivor may have the added benefit of not having to disclose the cause of an injury to the employer.

Even if it doesn't, however, an informal discussion with the employer is often helpful. Certainly, not all employers will be sympathetic to the survivor's needs, but many will attempt to do what they can, even if it's not legally required. For example, an employer might be willing to adjust a survivor's work schedule, change the survivor's phone number or extension, allow her or him to transfer to a safer location, or beef up security (**see p. 100**). However, that strategy requires the survivor to disclose the assault to one or more people at work who have authority to make those decisions. An advocate can help decide who to talk to about specific accommodations, such as between an immediate supervisor and a human resources officer.

Whether an informal request for accommodations is a good option for a survivor depends heavily on the employer's attitude and the survivor's willingness to disclose the assault. But if the survivor chooses to make an informal request, she or he should **always** ask that private information remain confidential, and that the survivor will be notified if other parties must be informed. There may be limitations on how much confidentiality an employer can provide. For example, information may have to be shared with human resources personnel in order to obtain certain benefits or remedies. **However, if a survivor doesn't request confidentiality, it's very likely no precautions will be taken at all.**

Because individual employment contracts, collective bargaining agreements, and employers' willingness to assist voluntarily will vary from case to case, the remainder of this chapter will concentrate on the third category of job protections: those enacted in state and federal law.

FEDERAL EMPLOYMENT PROTECTIONS

Family Medical Leave Act

The federal Family Medical Leave Act ("FMLA") allows qualifying employees to receive unpaid leave for medical reasons, and job protection while taking the leave. A covered employee has the right to take up to 12 workweeks of unpaid leave within any 12-month period, for proper family or medical reasons. The employee cannot be fired for taking the FMLA leave, but the employee must use her or his vacation and sick time first. The employer must also continue whatever health benefits the employee had previously, and the employee must be allowed to return to the same or equivalent position at the end of the leave period.

FMLA's specific purpose is not to protect sexual violence survivors, but its protections cover people who have suffered physical or mental injuries. Therefore, survivors who need to miss work as a result of mental or physical injuries should be informed about FMLA's protections and to determine whether it covers them.

To be eligible for FMLA protections, an employee must satisfy 2 requirements: (1) the employee's position must qualify, and (2) she or he must take leave for a proper reason. For an employee's position to qualify for FMLA protection, the employee must:

- Work for an employer with at least 50 employees
- Have worked for the employer for at least 12 months
- Have worked at least 1,250 hours over the previous 12 months
- Work at a location in the United States (or in any U.S. territory or possession where at least 50 employees are employed by the employer at a single work site, or at multiple work sites within a range of 75 miles)

If those requirements are satisfied, then an employee is eligible for FMLA leave. However, leave does not fall under FMLA's protections unless the employee takes it for a proper family or health reason. Proper reasons for FMLA leave are:

- To heal from a "serious health condition"
- To aid a child, spouse, or parent in healing from a "serious health condition"
- Birth of the employee's child
- Placement of a child with the employee for adoption or foster care

In addition, for the purposes of FMLA, "serious health condition" has a very specific definition: an illness, injury, impairment, or physical or mental condition that causes incapacity and requires either or both (1) an overnight stay in a hospital or similar facility or (2) "continuing treatment" by a health care provider (29 C.F.R. § 825.114 (1995)). Further, "continuing treatment" is treatment that satisfies one of the following conditions:

- Pregnancy
- 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 regiment of treatment
- A chronic condition continuing over an extended period of time requiring periodic doctor's visits and which may cause episodic incapacity
- 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

Thus, in summary, FMLA protections will extend to eligible survivors who work for covered employers and who take leave because of a serious health condition, a family member's serious health condition, or the birth or adoption of a child. If a survivor suffered an injury from the assault or mental or emotional trauma requiring treatment, she or he may be eligible to take FMLA leave. Employees will need to provide documentation of any condition requiring FMLA leave. Note, however, that survivors cannot use FMLA leave for purposes other than those listed above, like court dates. To determine whether an employee's physical or mental injury is a "serious health condition," refer to the definitions set out above.

Title VII of the Civil Rights Act of 1964

Title VII is one of two federal anti-discrimination statutes that could provide employment protections for sexual violence survivors. Under Title VII, employers in the United States and American territories and possessions that have 15 or more employees may not discriminate in hiring, firing, or terms of employment based on sex (including pregnancy), race, color, or national origin (42 U.S.C. § 2000e (2004)). U.S. citizens working for U.S. companies abroad are also covered by Title VII (42 U.S.C. § 2000e(f)).

Importantly for many survivors, courts have interpreted “sex discrimination” to include sexual harassment (see, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)). There are a couple ways sexual violence can take the form of sexual harassment for the purposes of Title VII:

- The perpetrator is a supervisor or another agent of the employer and commits rape or sexual assault on the job.
- The perpetrator is a co-worker or non-employee, the employer knew or should have known that the abuse involved the workplace, and the employer failed to take prompt and appropriate remedial action.

In either situation, the employer’s liability under federal law depends on whether it exercised reasonable care to prevent and correct the violent behavior, and whether the survivor took reasonable advantage of the employer’s opportunities to correct the situation (42 U.S.C. § 2000e-2(a)(1) (2004)). Additionally, any relationship between the perpetrator and survivor does not matter for Title VII purposes. **Most importantly, the survivor must notify the employer or other person in a position of authority about the harassment or discrimination, preferably in writing, as soon as possible.**

Furthermore, Title VII prohibits employers from retaliating against employees for exercising their rights under Title VII. That means a survivor might have an additional remedy under Title VII if, after taking some action against sexual harassment, the employer fires, demotes, harasses, or retaliates in any way. Some examples of protected behavior are filing discrimination complaints; participating in a discrimination proceeding, investigation, or litigation; testifying; or opposing sexual harassment in the workplace.

If an employee’s rights under Title VII have been violated, the survivor may be entitled to the following relief:

- Back pay (from the time of firing to the time the case is resolved)
- Front pay (if the survivor was fired but going back to the old job is not appropriate, the survivor may receive the money she or he would have received by being reinstated)
- Compensatory damages (replace actual monetary losses, future losses, and damages for mental anguish, pain, and suffering; capped at \$50,000-\$300,000 depending on employer size; unavailable against government employers)
- Punitive damages (money award used to punish employers that acted maliciously or recklessly; capped at \$50,000-\$300,000 depending on employer size; unavailable against government employers)
- Court costs and fees (however, if the court finds the complaint was “frivolous,” the survivor could be ordered to pay the employers costs and fees)

-
- Injunctive relief (the court orders the employer to do or not do something that should have already happened, like hire or promote the survivor, or post multi-lingual notices of Title VII rights for employees)

Clearly, then, even though a Title VII investigation can take a lot of time and energy, in some cases a successful complaint can bring the survivor money and other relief at a time when it is most needed. In reality, returning to a hostile workplace will seldom be appropriate, but the most important function of a Title VII suit is to win money damages to help defray burdensome expenses. (**see p.99**)

However, employees should be aware that even in successful cases, money awards often are not very large. Courts do not always award punitive damages, and compensatory damages are sometimes relatively low. In addition, back- and front-pay awards are usually low for low-wage workers. And for those reasons, it is sometimes difficult to find an attorney to take the case.

• THE PROCESS

Fortunately, the advocate does not need to be an expert in civil rights litigation to assist a survivor who was assaulted or otherwise harassed at work. In fact, the survivor usually will not even need to hire her or his own attorney. The United States Equal Employment Opportunity Commission (“EEOC”) is a federal agency whose job it is to investigate and litigate Title VII cases. Therefore, the advocate’s main responsibility is to simply have a general understanding of how Title VII sex discrimination cases work and to alert survivor when it seems there might have been a civil rights violation. Then, if appropriate, the survivor’s main responsibility is simply to file a complaint with the EEOC, called a “charge.”

A charge generally must be filed with the EEOC within 180 days from the discriminatory act, or the EEOC will not be able to file a lawsuit later. In addition, a third party—including friends, relatives, co-workers, church members, etc.—can file an EEOC charge on behalf of another. Ten days following the charge, the employer will receive notification and will have the opportunity to respond. At that point, the EEOC performs an investigation and seeks to solve the problem appropriately.

The EEOC will first attempt a confidential negotiation with the employer and the survivor, called “conciliation,” but if that is unsuccessful it may opt to file a lawsuit in federal court. However, the EEOC does not take most cases to court; if the charge appears to have any merit, they usually will ask both parties to mediate the dispute themselves first. Often, if mediation fails, the EEOC will still decline to take the case to court, instead issuing the employee a “right to sue” letter, giving the employee 90 days to file suit individually.

Finally, note that Title VII makes no distinction based on immigration status, so undocumented workers and other non-citizen employees are protected. The EEOC has even been successful in the past in obtaining court orders barring a company from discovering the immigration statuses of parties and witnesses. **Nevertheless, before proceeding always seek advice from EEOC attorneys or an immigration attorney when the survivor is an immigrant, even if she or he is documented.**

Americans with Disabilities Act

The Americans with Disabilities Act (“ADA”) is the second federal anti-discrimination statute that can benefit survivors in the workplace. The ADA provides two general protections. First, it prohibits firing, demoting, harassing, or otherwise discriminating against employees on the basis of a disability (42 U.S.C. § 12112(b)). Second, in certain circumstances it requires employers to provide a disabled employee “reasonable accommodations” to enable her or him to perform the basic duties of the job (42 U.S.C. § 12111(9)).

The remedies available under the ADA are the same as those available under Title VII, but one important way the ADA differs from Title VII is that survivors can use the ADA's protections even if the sexual violence did not occur at the workplace. For example, the ADA is often useful for survivors who develop severe post-traumatic stress disorder following an attack, which affects their job performance. If there is some accommodation the employer can provide at work to help the survivor cope with the PTSD, the survivor may be entitled to it under the ADA. Likewise, if the employer decides to fire the survivor because of the effects of PTSD, the employer probably has violated the survivor's rights under the ADA.

aa **ADVOCACY ACTION:** Before disclosing any medical or psychological condition to an employer, survivors and advocates should consider the impact on the survivor's privacy. Survivors should be especially cautious if involved in separate civil lawsuits. The ADA requires employers to treat medical information as confidential, and Texas civil courts recognize a physician-patient privilege, but in some circumstances disclosing medical information may cause the survivor to inadvertently waive that privilege. (**see p. 97-98**) In many cases, the benefits of going through with an ADA claim will outweigh the privacy concerns, but survivors should be aware that personal medical information could become public.

STATE EMPLOYMENT PROTECTIONS

Texas Commission on Human Rights Act

In addition to the ADA, Texas has its own disability discrimination statute, called the Texas Commission on Human Rights Act ("TCHRA"). Its provisions are virtually identical to the federal ADA, except the Texas law provides no protection for employees who currently abuse or are addicted to substances. Therefore, many survivors whose rights under the ADA have been violated also have the option to pursue a remedy under TCHRA as well. The TCHRA's provisions are located in Title 2, Subtitle A, Chapter 21, Texas Labor Code.

To pursue claims under the TCHRA, employees should contact the Texas Workforce Division.

Other Sources of Compensation

We have already discussed some sources of monetary compensation for survivors in the Section B of this chapter, "General Civil Remedies." When an employer is somehow involved, a civil lawsuit for tort damages could be worthwhile. That is because employers usually have enough money to pay a damages award, unlike many individual perpetrators. (**see p.101**) In addition, Crime Victims' Compensation is highly beneficial for almost all survivors, regardless of any involvement with the workplace. (**see p. 102-103**) Beyond those, however, unemployment insurance is also available to certain survivors.

Unemployment Insurance

Unemployment insurance is a state program that pays temporary income to employees who leave their jobs through no fault of their own. In Texas, the Texas Workforce Commission ("TWC") administers unemployment insurance.

As of 2013, Texas law makes unemployment insurance available to survivors of sexual assault, family violence or stalking who are forced to leave their jobs as a result.³⁰ Survivors who apply for unemployment benefits based on sexual assault, family violence, or stalking will need to provide documentation in the form of a recently issued protective order, a police record documenting the family violence or stalking against the survivor, or medical documentation of violence.³¹ You can use the template UI

³⁰ Tex. Labor Code § 207.046(a)(2).

³¹ Subch. B, Ch. 207, Tex. Labor Code.

Documentation letter provided in Appendix B of this manual.

To use the new law, survivors should apply for unemployment benefits through the Texas Workforce Commission just as any worker would. When asked the “reason for no longer working,” the survivor may state that she or he had to quit. After applying, an officer from TWC will contact the survivor to get more information. At that time, the survivor can explain that she or he had to quit working for safety reasons related to sexual assault, domestic violence, or stalking. Also at that time, the survivor can submit the documentation described in the paragraph above.

In addition, survivors must satisfy the various other requirements for unemployment insurance eligibility. The requirements are fairly complicated and specific, but basically, a person must have earned a certain amount of money during the last year, left her or his previous job without fault (e.g., to protect her child from sexual assault), remain able to work, and actively search for new employment.

Notably, if an employee is fired because of a medical condition that prevented her from working but now can work, she may be eligible for unemployment insurance. If that is the case, the employee can apply for benefits through TWC anyway, and file an administrative appeal in the event the application is denied. Non-lawyer advocates can represent employees in those appeals, which can be conducted via telephone. But be sure to get all the facts from the employee, and **never provide legal advice if you are not licensed to practice law**. The employer may claim the firing resulted from some other policy violation, like chronic lateness or failing to call the office staying home sick.

Undocumented persons are not eligible for unemployment benefits. Because of their immigration status, the state does not consider them “available to work.”

Individuals can apply for unemployment insurance online at <http://www.twc.state.tx.us/ui/uiclaim.html> or by phone with a TWC local office. In addition, TWC provides answers to many unemployment insurance questions on its website at: <http://www.twc.state.tx.us/ui/bnfts/claimantinfo.html>. Refer to the Appendix for contact information for TWC local offices.

Economic Compensation vs. Other Accommodations in Legal Employment Remedies	
ECONOMIC COMPENSATION	OTHER ACCOMMODATIONS
<ul style="list-style-type: none">• Title VII (back or front pay, damages, court costs)• Americans with Disabilities Act (back or front pay, damages, court costs)• Texas Commission on Human Rights Act (back or front pay, damages, court costs)• Unemployment Insurance• Civil Lawsuit for Damages	<ul style="list-style-type: none">• Family Medical Leave Act (leave from work)• Title VII (injunctive relief)• Americans with Disabilities Act (reasonable accommodations, other injunctive relief)• Texas Commission on Human Rights Act (reasonable accommodations, other injunctive relief)

Ripple Effects of Sexual Assault: Educational Issues

An alarming number of sexual assaults occur at schools or are perpetrated by a victim's classmate—especially on college campuses. In 2000, the U.S. Department of Justice National Institute of Justice and the Bureau of Justice Statistics reported that 3% of college women are victims of rape or attempted rape during a typical college year. In addition, the overwhelming majority of sexual assault perpetrators on college campuses (90% are people known to their victims—usually classmates, friends, boyfriends, or acquaintances. That makes civil remedies especially important, because assaults by non-strangers are successfully prosecuted far less often than those by strangers.³²

Unfortunately, colleges and universities, as well as elementary and secondary schools, do not always respond to sexual assault effectively and appropriately. Therefore, a legal advocate can be instrumental in the educational setting to help survivors identify and obtain the relief they need.

By using legal tools like Title IX, survivors and advocates can often obtain accommodations or exceptions to policies, including safety and confidentiality measures. Other times the advocate might simply provide support during a disciplinary proceeding, or point out existing laws that might benefit the survivor. Or, in some circumstances, the advocate can help the survivor recognize when she or he may have a legal claim against the school.

This chapter will address some common problems that arise in the educational setting, survivors' needs, and strategies for assistance outside the criminal justice system.

INITIAL STRATEGIES

Regardless of the number and type of schools in your service area, it is important to become familiar with the policies of your local colleges, universities, and school districts regarding sexual assault, sexual harassment, and sexual misconduct. Some schools and school districts may have policies in place already that survivors can take advantage of. For example, a college may be very lenient in allowing survivors to add or drop classes following a sexual assault, to relocate, or to take leaves of absence. If you have trouble finding information about a school's policies, that is a major problem itself—schools and school districts must make their policies readily available to their students.

A school's administrative response to sexual assault is not a substitute for a law enforcement response. However, schools must respond separately from law enforcement, and if a school has special policies on sexual assault, it can support survivors more quickly and efficiently than most other avenues. Advocates who are familiar with such policies (or lack thereof) can quickly direct survivors to the best options available.

Also, keep in mind that most policies will require some form of report by the survivor to school officials, which is something the survivor might not be comfortable doing. Recent nationwide research suggests more than 95% of survivors on college campuses do not report their assaults to campus police or school officials.³³ Many student-survivors you encounter will not yet have notified their school, and many will not intend to. Nevertheless, a knowledgeable and effective advocate will help survivors see all available options and give them the opportunity to make an informed decision about disclosing sexual assault to their schools.

³² Fisher, B.S., Cullen, F.T., & Turner, M.G. (2000). "The sexual victimization of college women." *National Institute of Justice Research Report*.

³³ "Sexual Assault on Campus: A Frustrating Search for Justice," Center for Public Integrity (December 2009).

It is never too late to make a report to school officials. Even if other legal deadlines have passed, or if the survivor does not perceive any immediate danger, a school will still be legally obligated to take important action to increase safety, including using the report as evidence in other situations involving the perpetrator.

SEXUAL ASSAULT ON COLLEGE CAMPUSES

Certain federal laws offer crucial protection to survivors on campus. Arguably the most important of these are **Title IX of the Educational Amendments of 1972** and **Title IV of the Civil Rights Act of 1964**. Both laws prohibit discrimination on the basis of sex in educational environments. When sexual assault occurs in an educational setting, it is considered a form of sexual harassment in addition to being a crime. Title IX and Title IV protect survivors because sexual harassment is a form of sex discrimination.

Due to some high profile lawsuits, some people mistakenly believe these laws only help students if they file a lawsuit against their schools. Although the laws allow students to do that, they also provide many more possibilities. In the following sections, we'll take a look at some of those possibilities.

THE SCHOOL'S RESPONSE TO SEXUAL ASSAULT

The US Department of Education Office for Civil Rights—the office responsible for enforcing Title IX—has stated that a single instance of sexual assault is sufficient to create a hostile environment in an educational setting. That means that when a school official is put on notice that a student has been sexually assaulted, the school has a legal obligation to respond. Title IX requires the school to investigate the complaint promptly and thoroughly, eliminate the hostile environment, and take measures to ensure further harassment does not occur.³⁴

Those requirements are triggered any time a student is sexually assaulted on campus. They're also triggered if a student is sexually assaulted off campus by a fellow student, instructor, staff, or other person connected to the school (e.g., on a spring break trip). The perpetrator's prior relationship to the survivor does not matter. In addition, because sexual harassment is a civil matter, local or campus police jurisdiction to enforce criminal laws is irrelevant to the school's responsibility to respond.

When a school's Title IX responsibilities are triggered, the school must respond promptly. **The school may not wait for police to complete a criminal investigation before initiating its own sexual harassment investigation.** Likewise, the school may not base the conclusion of its investigation on the outcome of a criminal investigation. Criminal law uses a much higher standard of proof (“beyond a reasonable doubt”) than civil law (“preponderance of the evidence”), so a school may have sufficient evidence to satisfy its burden even if police do not. Finally, the **Campus Sexual Violence Elimination (SaVE) Act** requires schools' policies to include information on:

- Victims' option to, or not to, notify and seek assistance from law enforcement and campus authorities
- Victims' rights and the school's responsibilities regarding court-issued protective orders and no-contact orders

³⁴DEAR COLLEAGUE LETTER, ID.

Even though the information above must be included in written materials about school policies, school officials should also make students aware of these rights at the time a sexual harassment complaint is made.

So, when a student reports a sexual assault, what kind of response is required? The primary concern must be to ensure the survivor is able to stay in school. Remember, Title IX is an anti-discrimination law, and its purpose is to ensure a hostile environment does not deprive or limit students' access to educational and extracurricular programming. Some common needs that arise for college students after a sexual assault include:

- Protection from the perpetrator, including stay-away agreements, providing an escort on campus, enforcing protective orders, or modifying the perpetrator's class schedule
- Disciplinary action against the perpetrator
- Disciplinary action against the perpetrator or third parties for further harassment or retaliation against the survivor
- Adding or dropping classes
- Leaves of absence with accommodations for tuition or student loan payments, or for work-study credit
- Modified exam schedules
- Housing relocation
- Maintaining confidentiality of school records
- Containing gossip, which can be a form of post-assault harassment or retaliation (especially when the perpetrator is a classmate)

Crucially, the school must not wait until its full investigation is over before taking any action. **During the pendency of the investigation, the school must take reasonable interim steps to protect the survivor and address the hostile environment.** Those steps can be eliminated or modified upon the conclusion of the investigation. In addition, the law requires institutions to design its response whenever possible to minimize the burden on the survivor (e.g., The accused student's class schedule or housing assignment should be changed, not the survivor's.)

If any of the above would benefit the survivor, and the school does not have a clear policy addressing the situation, the survivor should request it. Support from an advocate can be a huge help in discussions with school staff and administrators. If the survivor does not feel comfortable making the requests personally, the advocate can contact the school on her or his behalf. There are no hard and fast rules for this kind of request. Instead, the goal is to find out who in the school's administration has authority to make a decision, and simply discuss how the school can meet the survivor's needs.

The Office of the Student Ombudsman may be helpful to you in the event the school responds inadequately. Also, do not hesitate to contact the Department of Education Office for Civil Rights (OCR) to make a complaint. The OCR regional office covering Texas is in Dallas and can be contacted at 214-661-9600 or OCR.Dallas@ed.gov.

Consider a hypothetical scenario:

A survivor needs to take a leave of absence from school following a sexual assault but cannot afford for her student loans to come due. An advocate may be able to speak with the head of the student billing department, or get the school's Title IX investigator to talk with the billing department, about a special deferment. That is especially true for loans administered by the college. As another example, a survivor may need to reschedule final exams, or move to a different residence for safety. The Title IX Coordinator can work with the registrar and the student housing department to obtain special accommodations for exams and housing.

With persistence, an advocate can sometimes obtain accommodations from a school that may seem minor to an outsider, but that are very important to a survivor's ability to continue and thrive in school. If issues like those above arise, address them with the school early and urgently. It may take time for the school to act. Additionally, if you feel the school is responding inadequately, do not hesitate to contact the student ombudsman or encourage the survivor to seek legal assistance and file an OCR complaint.

Confidentiality and Privacy

Many institutions have adopted blanket mandatory reporting policies, which require any school employee—including student employees like RAs—to report disclosures of sexual assault, domestic violence, dating violence, and stalking to the Title IX coordinator. As a result, a student can inadvertently trigger a mandatory report when attempting to disclose a rape in confidence.

It is not always clear to students exactly who is a safe and confidential resource to disclose sexual violence, and the school is not legally required to offer a confidential resource. The school's written policy might even be too vague to identify specific confidential employees. Typically, counselors and therapists on campus have confidentiality. On the other hand, instructors and graduate student assistants are usually required to report. Note that if a school has a rape crisis center with its own "advocates," it is possible that the school will require them to report to the Title IX coordinator. Although federal law does not require this, students and their advocates should clarify these requirements before making disclosures.

Formal Disciplinary Action

A formal disciplinary proceeding is typically the principal procedure colleges use to investigate and issue punishments for sexual assault. It is neither a criminal prosecution, nor a civil lawsuit. Instead, it is an internal procedure that helps the school decide whether and how to punish its students for violations of school policy. Like a civil lawsuit, however, the Department of Education requires institutions to use the civil "preponderance of the evidence" standard to adjudicate complaints. That means survivors (called "complainants" in administrative proceedings) should prevail if it is more likely than not that the sexual assault or sexual harassment occurred.

Some schools have one procedure for all types of violations, but ideally a school will have a separate policy to address sexual harassment, including sexual violence. Possible sanctions include suspension, expulsion, revocation of scholarships, and more.

The **Campus SaVE Act** was enacted in March 2013 as part of the fifth reauthorization of the Violence Against Women Act. One of the most important parts of the SaVE Act requires schools to provide training on sexual assault to any personnel who conduct disciplinary hearings for sexual assault complaints. As of this writing, it remains to be seen what improvements to disciplinary processes will occur. However, at a minimum, advocates and students can get involved in these training efforts and help ensure local schools are complying with the SaVE Act.

In addition, the **Campus Assault Victim's Bill of Rights** further provides a set of some requirements for educational institutions receiving federal financial aid to establish procedures for on-campus disciplinary proceedings for sexual assault. Individual schools might administer the proceedings differently in some ways, but the law sets out some basic requirements for all schools:

- The accuser and accused must have the same opportunity to have others present during the proceeding.
- The accuser and accused must both be informed of the outcome of the proceeding.
- The school must include any sanctions it awards regarding rape or any other forcible or non-forcible sex offenses in its annual security report, required under the Jeanne Clery Act. (**see p. 126**)

Federal law requires a statement of the institution's policies in the Annual Security Report. If a survivor has questions about how disciplinary proceedings work at her or his school, she or he should read the Annual Security Report or ask for a copy from the school's Title IX coordinator, the office of judicial or disciplinary affairs, or an on-campus counseling service. **And as always, survivors should expressly request absolute confidentiality, and always insist that the school address further harassment or retaliation after a complaint is made.**

Civil Protective Orders

The fact that a sexual assault occurs on a college campus or is perpetrated by a student does not affect the survivor's ability to pursue a sexual assault protective order under Texas law. In fact, the federal laws discussed above require that schools and school-based police enforce protective orders. Even if a student sexually assaults another student at his or her same school, a court can subject the perpetrator to a protective order without necessarily prohibiting the perpetrator from attending school. Refer to the earlier chapter on "General Civil Remedies" for a full discussion of legal requirements and other considerations related to sexual assault protective orders. (**see p. 100**)

Student Records: Family Education Right to Privacy Act (FERPA)

The Family Education Right to Privacy Act, (FERPA) is a well-established federal law that prohibits schools from releasing student educational records without consent. If a school has improperly released confidential records, the student must file a complaint with the U.S. Department of Education, which will then enforce the student's rights through administrative action. FERPA does not give students a cause of action to sue the school to enforce FERPA rights.

In the sexual assault context, there are some exceptions to FERPA that are designed to treat survivors with dignity and respect.

- Schools must disclose the results of disciplinary proceedings to both the accused and the accuser
- Schools cannot require the survivor to keep the outcome of a disciplinary proceeding confidential as a condition of disclosing the outcome to her or him
- Schools may publicly disclose the results of a disciplinary proceeding if the accused is found to have violated the school's rules or policies

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- Those public disclosures may contain the name of the perpetrator, but they cannot contain the survivor's name without her or his written consent

FERPA also requires schools to disclose information on registered sex offenders who are affiliated with the school to local law enforcement agencies, including campus police. Two other federal laws—the **Wetterling Act** and the **Jeanne Clery Disclosure Security Policy and Campus Crime Statistics Act**—contain similar requirements regarding sex offenders enrolled in or employed at colleges.

Services for Survivors: The Jeanne Clery Act & The Campus Assault Victim's Bill of Rights

The **Jeanne Clery Disclosure Security Policy and Campus Crime Statistics Act (Clery Act)** is a federal law that sets out comprehensive requirements for colleges to maintain statistics on crime on campus and in surrounding areas. The law's general purpose is to ensure all colleges keep accurate and transparent records regarding crime in their communities, and to keep students informed of the current crime situation.³⁵

The **Campus Assault Victim's Bill of Rights** is a 1992 amendment to the Clery Act. It guarantees certain basic rights to sexual assault survivors. At a minimum, colleges must provide their students with information on available educational programs to promote awareness of sexual violence on campus. In addition, the Campus Assault Victim's Bill of Rights requires colleges to have certain policies addressing the immediate response to sexual violence, continuing assistance for survivors, and for disciplinary proceedings:

• **Required Immediate Response Policies:**

1. Institutions must inform survivors of who to contact following a sexual assault.
2. Institutions must identify the importance of preserving evidence.
3. Institutions must identify to whom students should report sex offenses.
4. Institutions must inform survivors of options to notify law enforcement and provide assistance in contacting law enforcement.

• **Required Continuing Assistance for Survivors:**

1. Institutions must inform survivors of the option to change academic and living situations, if requested and reasonably available, and provide assistance with that transition.
2. Institutions must inform survivors of their rights as crime victims concerning U visas and T visas.
3. Institutions must notify students of existing counseling and mental health services for students, both on and off campus.

³⁵20 U.S.C. § 1092(f).

aa ADVOCACY ACTION: Note that Title IX imposes requirements on schools that go significantly further than what is required under the Campus Assault Victims' Bill of Rights—e.g., Title IX requires a school to take action to stop retaliation and harassment of a survivor after a complaint is made. When advocating for survivors who have made complaints to their schools, make sure the school is considering its obligations under all applicable laws.

If a school does not comply with a portion of the Clery Act, including the Campus Assault Victim's Bill of Rights, students can enforce their rights by filing complaints with the U.S. Department of Education. As with FERPA, students do not have the right to sue a school for violating these laws, but instead must rely on administrative action by the government. If a school is found to have committed a violation, it can be liable for civil penalties up to \$27,500 per violation, and suspension from participating in federal student aid programs.

Remedies for Elementary and Secondary School Students

Informal Measures

Title IX and Title IV apply with equal force in elementary and high schools. As in the higher education context, an advocate may be able to greatly help a high school or elementary student simply by requesting accommodations from the school. If specific policies are not in place already, schools still may be willing to take some important measures for the survivor's safety and wellbeing.

Some commonly useful accommodations include:

- Transferring the perpetrator or survivor to a different class within the same school to minimize further contact between the two
- If the perpetrator is a teacher or student assistant, removing the person from class pending a full investigation
- Adjusting the survivor's schedule or arranging specialized study (without penalty to the student) to avoid contact with the perpetrator

Home schooling the survivor

Sexual Harassment: Title IX

Title IX applies elementary and secondary schools, just as it does to colleges and universities. Refer to the section on Title IX above for ideas about how the law might assist elementary or secondary school students as well as college students.

The requirement to eliminate harassment and retaliation against survivors is of particular importance in middle and high schools. For example, the recording and distribution of photos and videos depicting victims has had devastating effects on students across the country. Some of these victims have taken their own lives. Title IX requires prompt and effective action to eliminate this kind of hostile environment by school districts, high schools, and higher education institutions alike.

aa ADVOCACY ACTION: No measure will be appropriate for every child survivor. As an advocate, listen carefully to identify even the smallest measures that could make the

child's life at school easier, and take whatever action possible to achieve it. An adjustment to a student's high school schedule may seem insignificant compared with a criminal conviction, so it may be tempting to neglect such small accommodations. However, those small things often have significant impacts on a child's life, so it is very important to always follow through on them.

Finally, no matter what accommodations or safety measures are appropriate for a student victim, there are a couple other general questions to consider. First, will the child need a guardian ad litem appointed to protect her or his interests? If the child's parents were involved in abuse or are otherwise absent or hostile to the child, a family court might need to appoint someone else to represent the child's interests. If you believe a child has been abused or neglected, always inform police and the Department of Family Health Services.

Relatedly, consider whether anyone at the school may have violated Texas's mandatory reporting laws. (see p. 37) Recall that under Texas law, an immediate report to police or Child Protective Services is required if a person suspects in good faith that a child has been physically or mentally harmed by abuse or neglect.³⁶ In addition, there are special provisions requiring teachers and other professionals who work with children to report suspected abuse within 48 hours.

In addition to informal requests and accommodations, state and federal law also provide some protections for elementary and secondary students.

Texas Law: Protective Orders and Stay-Away Agreements

Like college students, a student of an elementary or secondary school who is sexually assaulted has the right to pursue a sexual assault protective order (or a dating violence protective order, if applicable), even if the perpetrator is a student at the same school. See the earlier chapter on "General Civil Remedies" for a full discussion of legal requirements and other considerations related to sexual assault protective orders. However, if a civil protective order proves not to be a good option for a survivor, she or he can pursue a "stay-away agreement" through the school. Stay-away agreements are school-based alternatives to protective orders. They accomplish similar goals as a protective order issued by a court, except instead of going to court, the school facilitates both the survivor and perpetrator signing the agreement. A stay-away agreement can help protect the survivor at school not only by rearranging class schedules to minimize contact with the perpetrator, but also by directing patterns of passage in hallways, ensuring lunchtimes are safe, and ensuring the perpetrator does not attend after-school activities with the survivor. Section 37.0831, Education Code, requires each school district in Texas to implement a dating violence policy that addresses, among other things, school-based alternatives to protective orders.

aa ADVOCACY ACTION: You should check with school districts in your service area to find out what their dating violence policies entail. Some may already have experience with stay-away orders. Even if they do not, however, as an advocate you can educate school officials and push for one if a student survivor feels it would make her or him safer at school.

Student Safety: No Child Left Behind Act of 2001

A provision of the No Child Left Behind Act of 2001 ("NCLB") allows children who are victims of violent crime while on school grounds transfer to another public school. All schools receiving any funds under NCLB are required to comply with the provision, called the Unsafe School Choice Option.

³⁶TEX. FAM. CODE § 26.101.

The law requires states to collect and report information on school safety and drug use among youth. Making that information public helps parents assert their rights under the law, because children who are victims of violent crime on school grounds have the right to transfer to another public school.

In addition, any child who attends a “persistently dangerous school” can transfer. Under Texas law, a school is “persistently dangerous” if the number of mandatory expellable offenses during the last 3 years is 1% or more of the total student body. For schools with fewer than 200 students, there must be 2 or more mandatory expellable offenses during the last 3 years. If a school fits one of those descriptions, then it is considered “persistently dangerous” and must allow students to transfer under NCLB.

However, remember that a child who is a victim of violent crime on campus, including sexual assault, may request a transfer even if the school is not “persistently dangerous.” And for any child whose parents request a transfer, the school district must provide for the child’s transportation, subject to a funding cap.

Ripple Effects of Sexual Assault: Immigration Issues

Immigrant survivors of sexual violence often face particularly difficult obstacles to justice and relief. Many of the same social and legal issues weigh against immigrant victims and non-immigrant victims, but there are added factors in the immigration context that further complicate matters.

Always advise immigrant survivors to consult an immigration attorney about how legal proceedings could impact the survivor's immigration status. Never give specific advice on immigration issues. There are some very helpful resources for immigrant survivors listed at the end of this chapter. Immigration law is among the most complex areas of American law, and it is constantly changing. Furthermore, the consequences of mistaken advice can be as severe as permanent removal from the country or inability to obtain certain remedies. For example, obtaining a civil protective order might improve a survivor's safety, but it can also interfere with a VAWA self-petition if the court places restrictions on both the survivor and the perpetrator.

In addition, never advise immigrant survivors, especially undocumented persons, to speak with government officials about her or his immigration status without consulting an immigration lawyer. It is always best to speak with an immigration attorney and not an information officer from the Department of Homeland Security, who may not be able to give accurate advice regarding specific immigration cases. In addition, DHS officials do not have the same legal obligations that attorneys have to their clients.

It is also very important that survivors consult with immigration attorneys who also have expertise with sexual violence or, if applicable, family violence. Many immigration lawyers specialize in the needs of corporate clients or other employers and will not be sensitive to the unique needs of survivors. Take much care in finding an immigration lawyer who can provide the type of assistance survivors need.

There are a few significant legal rights and remedies advocates should be familiar with. However, remember that as an advocate, discussions about immigration-related remedies should only extend to making survivors aware of options so that they can inquire about them with an immigration specialist.

GENERAL RIGHTS OF NONCITIZENS

Federal law gives all noncitizens certain rights when dealing with governmental immigration officials. However, noncitizens must assert these rights themselves. If they fail to make these requests, the government does not have to honor them.

- **The right to speak with an attorney** before answering any questions or signing any documents. Immigrant survivors should never sign anything before consulting an immigration lawyer.
- **The right to a hearing** with an immigration judge.
- **The right to attorney representation** at that hearing, and during any interviews with government officials (the noncitizen must pay for her or his own attorney).
- **The right to request release** from detention, sometimes by paying bond, if eligible.

These rights belong to all noncitizens, even if undocumented. Therefore, all immigrant survivors of sexual violence should be advised of these rights and should understand that it is their responsibility to assert them.

LEGAL REMEDIES FOR SURVIVORS OF SEXUAL VIOLENCE

Federal law provides 3 important mechanisms that can provide safety, justice, and eventually Legal Permanent Resident status in the U.S. They are the U visa, the T visa, and self-petitions under the Violence Against Women Act (VAWA). VAWA petitions are only for individuals who are married to U.S. citizens or Legal Permanent Residents and have suffered extreme cruelty (including family violence and sexual assault) from their spouses.

U and T Visas

The U visa and the T visa are designed to grant immigration status to noncitizen victims of violent crime and to victims of human trafficking. They were created by the Victims of Trafficking and Violence Protection Act of 2000 and amended by the Violence Against Women Act of 2005 and the Trafficking Victims Protection Reauthorization Act of 2008. The idea behind the law is that if perpetrators and abusers can keep their victims silent with threats of deportation, then law enforcement cannot hold the perpetrators accountable. Thus, providing legal residency to survivors protects them from removal and, in turn, improves law enforcement.

For both U and T visas, the effect is to give noncitizen survivors temporary immigration status and work eligibility (up to 4 years) in exchange for their cooperation in investigating and prosecuting the perpetrator's crime. In addition, and just as important, survivors who qualify for U or T visas often can also obtain legal residency for certain family members, including children and spouses. Minor victims can obtain legal residency for their parents and siblings.

Eligibility requirements are different for U and T visas, largely because T visas are specifically designed for victims of human trafficking. The eligibility requirements are as follows:

• Eligibility to Apply for a U Visa

1. The survivor has suffered “substantial physical or mental abuse” as a result of one of the following crimes:
 - Rape; torture; trafficking; incest; domestic violence; sexual assault; stalking; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above
2. The survivor possesses information concerning the criminal activity, AND
3. The survivor provides a certification that states that she or he is, has been, or is likely to be helpful to the investigation or prosecution.
 - A law enforcement officer, prosecutor, judge, or other investigating authority can provide the certification.

-
- The certification can also provide information about the physical or mental abuse the survivor has suffered, and/or attest that she or he possesses information concerning the crime.

After 3 years of with the U visa, a survivor can apply for an “adjustment” up to Lawful Permanent Residency and get a “green card.” To be eligible for an adjustment, the survivor must satisfy the same requirements listed above and also show that she or he has been physically present in the United States for the past 3 years. For that reason, survivors considering a U visa should understand that consistent travel in and out of the United States could harm their chances for lawful permanent residency.

In addition, the residency application has other discretionary requirements that a survivor will want to go over with an immigration attorney before filing and application.

- **Eligibility to Apply for a T Visa**

1. The survivor must be a victim of “severe” trafficking, involving:
 - Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is younger than 18; OR
 - Using force, fraud, or coercion for the purpose of subjecting the survivor to involuntary servitude, peonage, debt bondage, or slavery; AND
2. The survivor would encounter extreme hardship involving unusual and extreme harm if removed from the United States.

As with the U visa, after 3 years with a T visa a survivor can apply to “adjust” her or his status to that of a Legal Permanent Resident and receive a green card. As with the U Visa or any other type of immigration case, it is very important that the survivor seek assistance from an immigration attorney.

It is easy to see how complicated it can be for a survivor to obtain a special visa. In addition to the above requirements, if the survivor has committed some crime in the past that makes her or him inadmissible to the United States (e.g., entering the country illegally or making a false claim to citizenship), she or he will need to persuade officials to make an exception by asking for a “waiver of inadmissibility.”

Despite their complexity, these laws can be extremely beneficial. For many people, a U or T visa represents an opportunity for legal residency that may never have been possible before. Therefore, legal advocates can be of great assistance to noncitizen survivors simply by making them aware of U and T visas and advising them to seek further assistance from others who can help with the filing process.

VAWA Self-Petitions

For certain survivors of family violence or extreme cruelty, there is an additional federal protection that can be very helpful. Self-petitions under the Violence Against Women Act can protect noncitizen survivors who are or were married to abusers who are U.S. citizens. A successful self-petition allows the survivor to remain in the U.S. as a Legal Permanent Resident, without the assistance of their abuser. The law also protects noncitizen children of abusers.

NOTE: Sometimes the perpetrator of family violence will be undocumented, but VAWA only provides a remedy where the perpetrator is a U.S. citizen or a Legal Permanent Resident. If the perpetrator in a family violence case is undocumented, a U visa may be the appropriate remedy, not a VAWA self-petition.

There are 4 main requirements a survivor must prove in order to win a self-petition case:

1. The survivor has one of 6 relationships with a U.S. citizen or lawful permanent resident (“LPR”):
 - The spouse or child of a U.S. citizen or LPR
 - The spouse or child of a U.S. citizen or LPR who lost his or her immigration status within the past two years because of domestic violence
 - The former spouse of a U.S. citizen or LPR whose divorce took place in the past two years and was related to domestic violence
 - The spouse of a U.S. citizen or LPR who was a bigamist (and therefore they were never legally married, but the survivor married in good faith)
 - The spouse of a U.S. citizen who died within the past two years
 - The parent of an adult US citizen son or daughter (over the age of 21)
2. The survivor and perpetrator have lived together and married in good faith (meaning they were not married solely to obtain immigration status in the U.S.). They need not have resided together in the U.S.
3. The perpetrator has subjected the survivor to “battery or extreme cruelty” (the abuse generally does not have to have occurred in the U.S.).
4. The survivor has good moral character (based on criminal history)
Regardless of a survivor’s immigration status, an advocate may be the first person a survivor meets who can provide meaningful guidance. Therefore, even though you cannot offer comprehensive advice about immigration issues, you can be a huge help simply by having a general knowledge about the law and making an appropriate referral.

APPENDIX AND REFERRAL RESOURCES

CRIME REPORTING

Mandatory Reporting

Department of Family Protective Services, Mandatory Reporting Hotline: 1-800-252-5400 / www.txabusehotline.org

Non-Report Sexual Assault Examinations

Texas Department of Public Safety: For full instructions on how to have evidence released to law enforcement as part of a police report, see: www.txdps.state.tx.us/criminal_law_enforcement/crime_laboratory/Non-ReportedSexualAssaultEvidenceProgram.htm

EMPLOYMENT

Unemployment Insurance

Texas Workforce Commission: 800-939-6631 / www.twc.state.tx.us/ui/bnfts/offices.html (for specific local office information)

Sexual Harassment and Discrimination

U.S. Equal Employment Opportunity Commission: 800-669-4000 / TTY: 800-669-6820

Texas Workforce Commission Employee Hotline: 800-832-2829 / www.twc.state.tx.us

FAMILY VIOLENCE

National Domestic Violence Hotline: 1-800-799-SAFE (7233) / TTY: 1-800-787-3224 / www.ndvh.org

Texas Council on Family Violence Statewide Service Directory: www.tcfv.org/service-directory/

FINANCIAL

Crime Victims' Compensation

Your local law enforcement's Crime Victim Liaison or prosecutor's office's Victim Service Coordinator, or

Office of the Attorney General, Crime Victim Services Division: 800-983-9933 / crimevictims@oag.state.tx.us / www.oag.state.tx.us/victims/about_comp.shtml

Individual Development Accounts

Center for Enterprise Development: 202-408-9788 info@cfed.org / http://cfed.org/programs/idas/ida_directory_list/ (for a listing of IDA programs in Texas)

HOUSING

Public Housing

Housing and Urban Development: 800-955-2232 www.hud.gov/local/index.cfm?state=tx&topic=offices (for specific local office information)

Public Housing Authorities: www.hud.gov/offices/pih/pha/contacts/states/tx.cfm (for information on all local offices)

Public Utilities

Public Utility Commission: 888-782-8477 / www.puc.state.tx.us

IMMIGRANT VICTIMS & HUMAN TRAFFICKING

American Gateways: 512-478-0546 / www.americangateways.org/email-american-gateways/ (serving central Texas)

SAHELI for Asian Families: 512-703-8745 / <http://www.saheli-austin.org/d6/>

Texas Civil Rights Project, VAWA Project: 512-474-5073 (general information) / find contact information for your region at www.texascivilrightsproject.org/?page_id=511

Catholic Charities: Find contact information for your local agency at www.catholiccharitiesusa.org/Page.aspx?pid=292

LEGAL AID

Texas Rio Grande Legal Aid: 888-988-9996 / 866-988-9996 / www.trla.org (serving south-southwest Texas)

Lone Star Legal Aid: 800-733-8394 / www.lonestarlegal.org (serving east Texas)

Legal Aid of Northwest Texas: 888-529-5277 (intake) 877-465-2698 (information) / www.lanwt.org (serving north-northwest Texas)

Sexual Assault Legal Services & Assistance (SALSA) a project of the Texas Legal Services Center and TAASA
1-888-343-4414
www.HopeLaws.org

GENERAL ASSISTANCE

TAASA Legal Support: 512-474-7190 ext. 38

APPENDIX A

30-Day Notice to Vacate for a Victim of Sexual Assault/Abuse or Attempted Sex Offenses

Date: _____

Dear _____, *(Name of Landlord or Property Manager)*

I am a tenant at _____ *(Your address and/or unit number)* and the following circumstance applies *(circle & complete all that apply)*:

- I am a victim of sexual assault, aggravated sexual assault, or an attempt to commit one of the above offenses, which occurred on the premises within the past _____ months.*
- I am a parent or guardian of a victim of sexual assault, aggravated sexual assault, indecency with a child, sexual performance by a child, continuous sexual abuse of a child, or an attempt to commit one of the above offenses, which occurred on the premises within the past _____ months.*

**The offense or attempted offense must have taken place during the last 6 months on the premises or at any dwelling on the premises. (Texas Property Code § 92.0161 (c))*

Pursuant to Texas Property Code § 92.0161(d) (2), this letter constitutes my 30-day notice that I will end my rental agreement and vacate the dwelling on _____ *(Enter a date at least 30 days from now)*, terminating my liability for future rent and any other sums due under the lease contract for terminating the lease and vacating the dwelling before the end of the lease term. I understand that I am still liable for any past-due rent or other sums I may owe under the lease.

I have enclosed the following relevant documentation *(circle all that apply)*:

- (1) documentation of the assault, abuse, or attempt from a licensed health care services provider who provided an examination;
- (2) documentation of the assault, abuse, or attempt from a licensed mental health services provider who provided an examination or evaluation;
- (3) documentation of the assault, abuse, or attempt from a rape crisis center that provided services; or
- (4) a final sexual assault protective order issued under Chapter 7A, Texas Code of Criminal Procedure.

Sincerely,

(Your name)

30-Day Notice to Vacate for a Victim of Stalking

Date: _____

Dear _____, *(Name of Landlord or Property Manager)*

I am a tenant at _____ *(Your address and/or unit number)* and the following circumstance applies *(circle & complete all that apply)*:

- I am a victim of stalking that occurred on the premises during the last _____ months.*

- I am a parent or guardian of a victim of stalking that occurred on the premises during the last _____ months.*

**The stalking must have taken place during the last 6 months on the premises or at any dwelling on the premises. (Texas Property Code § 92.0161(c-1))*

Pursuant to Texas Property Code § 92.0161(d)(2), this letter constitutes my 30-day notice that I will end my rental agreement and vacate the dwelling on _____ *(Enter a date at least 30 days from now)*, terminating my liability for future rent and any other sums due under the lease contract for terminating the lease and vacating the dwelling before the end of the lease term. I understand that I am still liable for any past-due rent or other sums I may owe under the lease.

I have enclosed the following relevant documentation of the stalking: *(circle all that apply)*

- 1) Documentation of a final protective order issued under Chapter 7A or Article 6.09, Texas Code of Criminal Procedure, **OR**

- 2) a law enforcement incident report (or, if a law enforcement incident report is unavailable, another record maintained in the ordinary course of business by a law enforcement agency), **AND** one of the following:
 - (a) documentation of the stalking from a licensed mental health services provider who provided an examination or evaluation,

 - (b) documentation of the stalking from a rape crisis center that provided services, or

 - (c) documentation of the stalking from a licensed health care services provider who provided an examination.

Sincerely,

(Your name)

30 Day Notice to Vacate for a Victim of Family Violence

Date: _____

Dear _____, (Name of Landlord or Property Manager)

I am a tenant at _____ (Your address and/or unit number) and the following circumstance applies (circle / complete all that apply):

- I am a victim of family violence.

- An occupant of this residence, _____ (Occupant's name), is a victim of family violence.

Pursuant to Texas Property Code §92.016 (c) (3) / §92.0161 (d) (2) this letter constitutes my 30-day notice that I will end my rental agreement and vacate the dwelling on _____ (Enter a date at least 30 days from now), terminating my liability for future rent and any other sums due under the lease contract for terminating the lease and vacating the dwelling before the end of the lease term.* I understand that I am still liable for any past-due rent or other sums I may owe under the lease.

**30 days' written notice is not required if a co-tenant or occupant of my dwelling committed family violence. (Texas Property Code Section 92.016 (c-1))*

I have enclosed the following relevant documentation (circle all that apply):

- (1) a final protective order issued under Chapter 85, Texas Family Code,
- (2) a temporary *ex parte* order issued under Chapter 83, Family Code, or
- (3) a temporary injunction listed under Subchapter F, Chapter 6 of the Family Code.

Sincerely,

(Your name)

Aviso de 30 Días Para Desalojar La Vivienda Por Una Víctima De Agresión/Abuso Sexual

Fecha: _____

Estimado (a) _____, (Nombre de Propietario/a o Administrador/a de la Propiedad)

Yo soy arrendatario (a) en _____ (su número de dirección o unidad) y aplican las siguientes circunstancias (circule/complete todas las que correspondan):

- Yo soy una víctima de agresión sexual o agresión sexual con agravantes dentro de los últimos _____ meses.*
- Yo soy el/la padre/madre o guardián de una víctima de agresión sexual, agresión sexual con agravantes o abuso sexual continuo de un niño en los pasados _____ meses.*

** La agresión/abuso sexual debe haber tenido lugar durante el período anterior de seis meses en los locales o en cualquier vivienda en los locales. Código de Propiedad de Texas §92.0161 (c)*

Conforme al Código de Propiedad de Texas §92.0161 (d) (2), esta carta constituye mi aviso de 30 días que quiero terminar mi contrato de hogar y desocupar la vivienda en _____ (una fecha al menos 30 días a partir de ahora), terminando mi responsabilidad para renta en el futuro y cualquier otra suma vencida del contrato de arrendamiento para terminar el contrato de arrendamiento y desocupar la vivienda antes de que finalice el plazo. **Entiendo que todavía soy responsable de cualquier alquiler vencida u otras sumas que debo bajo el contrato de arrendamiento.**

He incluido la siguiente documentación aplicable (circule todas las que apliquen):

- (1) documentación de la agresión o abuso adquirida por el proveedor de servicios de salud con licencia quien proporcionó un examen,
- (2) documentación de la agresión o abuso adquirida por el proveedor de servicios de salud mental con licencia quien proporcionó un examen o la evaluación,
- (3) documentación de la agresión o abuso adquirida por un centro de ayuda a víctimas de agresión sexual que proporcionó servicios
- (4) una orden de protección de agresión sexual final publicada bajo el capítulo 7A, código de procedimiento penal de Texas.

Sinceramente,

(Su nombre)

Aviso de 30 Días Para Que Una Víctima Del Acecho Pueda Desalojar La Vivienda

Fecha: _____

Estimado (a) _____, (Nombre del Propietario o Administrador de la Propiedad)

Yo soy inquilino (a) que reside en _____ (Su dirección y/o # de Apto) y las siguientes circunstancias aplican (marque y complete todas las que correspondan):

- Yo soy un/una víctima del accho el cual ocurrió en el edificio durante los últimos _____ meses.*
- Yo soy padre/madre o guardián de una víctima del accho, que ocurrió en el edificio durante los últimos _____ meses.*

* El accho debió tomar lugar *durante los últimos seis meses en el edificio o en cualquier vivienda del edificio. (Código de Propiedad de Texas §92.0161 (c-1))*

Conforme el Código de Propiedad de Texas §92.0161 (d) (2), esta carta constituye mi aviso de 30- días de que cesare mi contrato de renta y desocupare la vivienda en _____ (Escriba una fecha de por lo menos 30 días a partir de hoy), terminando mi responsabilidad por el pago de renta en el futuro y cualquier otra cantidad que se deba por terminar el contrato de arrendamiento y desocupar la vivienda antes de que finalice el plazo. Entiendo que todavía soy responsable de cualquier renta vencida u otra cantidad que deba bajo el contrato de arrendamiento.

Le adjunto la siguiente documentación relevante al incidente del accho (circule todas las que apliquen):

- (1) Documentación final de una orden de protección publicada bajo el Capítulo 7A o Artículo 6.09, Código de Procedimiento Penal de Texas, Q
- (2) Un reporte del incidente a la policía (o, si un reporte del incidente a la policía no esta al alcance, otro registro mantenido en el curso ordinario por una agencia de la policía), Y una de las siguientes:
 - (a) documentación del accho adquirido por el proveedor de servicios de salud mental con licencia que proporcionó un examen, o evaluación
 - (b) documentación del accho adquirido por un centro de ayuda a víctimas de agresión sexual que proporcionó servicios, o
 - (c) documentación del accho de un proveedor de servicios de salud con licencia que proporcionó el examen.

Respetuosamente,

(Nombre Completo)

Aviso De 30 Días Para Desalojar La Vivienda Por Una Víctima de Violencia Familiar

Fecha: _____

Estimado (a) _____, (Nombre de Propietario/a o
Administrador/a de la Propiedad)

Yo soy arrendatario (a) en _____ (su número de
dirección o unidad) y el siguiente caso aplica (circule/complete todas las que correspondan):

- Soy una víctima de violencia familiar.
- Un (a) ocupante de esta residencia, _____
(nombre del/de la ocupante), es una víctima de violencia familiar.

Conforme al Código de Propiedad de Texas §92.016 (c) (3) / §92.0161 (d) (2), esta carta constituye mi aviso de 30 días que quiero terminar mi contrato de hogar y desocupar la vivienda de _____ (escriba una fecha al menos 30 días a partir de ahora), terminando mi responsabilidad para alquiler en el futuro y cualquier otras sumas vencidas bajo el contrato de arrendamiento para terminar el contrato de arrendamiento y desocupar la vivienda antes que finalice el plazo * Entiendo que todavía soy responsable de cualquier alquiler vencida u otras sumas que debo bajo el contrato de arrendamiento.

** El aviso de 30 días por escrito **no es** necesario si un/a arrendatario/a o el/la ocupante de mi vivienda ha cometido la violencia familiar. (Sección de código de propiedad de Texas 92.016 (c-1))*

He incluido la siguiente documentación aplicable (circule todas las que apliquen):

- (1) una orden de protección final publicada bajo el capítulo 85, código de familia de Texas,
- (2) una orden de protección temporal (ex parte) publicada bajo el capítulo 83, código de familia de Texas, o
- (3) una orden de protección temporal enumerada en la sección F, capítulo 6 del código de familia.

Sinceramente,

(Su nombre)

APPENDIX B

Date: _____

RE: Documentation of eligibility for Texas unemployment insurance benefits

To Whom It May Concern:

_____ (*name of worker*) (“the Worker”) is a former employee of _____ (*name of employer*). The Worker or the Worker’s immediate family member has been the victim of sexual assault, which caused the Worker to leave the workplace. As a result, pursuant to Texas Labor Code § 207.046(a), the Worker is not disqualified for unemployment insurance benefits because the separation from employment was involuntary.

_____ (*name of agency*) is a rape crisis center or family violence center, as described by Texas Labor Code § 207.046(a)(2). In accordance with 42 U.S.C. 13925(b)(2)(B), I have obtained the Worker’s informed, written, and reasonably time-limited consent to disclose this client information.

Sincerely,

Signature: _____

Name: _____

Phone: _____

Agency: _____

Title: _____

Fecha: _____

RE: Documentos necesarios para ser elegible a recibir beneficios de seguro del desempleo en Texas

A Quien Interese:

_____ (nombre del empleado) ("el Empleado") es un ex - empleado de _____ (nombre de la empresa). El Empleado, o un miembro inmediato de la familia del Empleado ha sido víctima de un agravio sexual. Causando que el empleado abandonase su área de empleo. De conformidad a la resolución del Código Laboral de Texas § 207.046 (a), el Empleado no descalifica para recibir los beneficios del seguro de desempleo porque su ausencia de trabajo no fue voluntaria.

_____ (nombre de la agencia) es un Centro de Apoyo en una Crisis por un Agravio Sexual o de Violencia Intra-familiar, como se describe por los Códigos Laborales de Texas §207.046(a) (2). De Acuerdo con 42 U.S.C. 13925(b) (2) (B), yo he obtenido del Empleado el informe por escrito y durante el tiempo-limite razonable consentimiento para divulgar la información de dicho cliente.

Respetuosamente,

Firma: _____

Nombre completo: _____

Agencia: _____

Teléfono: _____

Título (Titular): _____

APPENDIX C

[Ms./Mr. _____]

[Address]

[Address]

[Date]

[Law Enforcement Agency or Prosecutor's Office]

[Address]

[Address]

Via Certified Mail, Return Receipt Requested

**Re: NOTICE OF INVOCATION OF RIGHTS OF VICTIM OF SEXUAL ASSAULT
PURSUANT TO TEXAS CONSTITUTION ART. 1, § 30 AND ARTICLES 56.02-
56.021, CODE OF CRIMINAL PROCEDURE**

Crime Victim: [Name]

Case No.: [Case Number]

Offense: Sexual Assault

To Whom It May Concern:

Pursuant to the Texas Code of Criminal Procedure, Articles 56.02 and 56.021, more commonly known as the Texas Crime Victims' Act, this letter is to advise you that I am the above-referenced crime victim in this sexual assault case.

I am invoking all of my legal rights as a victim of crime, including but not limited to the following enumerated rights.

TEX. CONST. Art 1, §30, RIGHTS OF CRIME VICTIMS:

- (a) The right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process;
- (b) The right to be reasonably protected from the accused throughout the criminal justice process;
- (c) The right to confer with a representative of the prosecutor's office.

**Art. 15.051 REQUIRING POLYGRAPH EXAMINATION OF COMPLAINANT
PROHIBITED:**

- (a) A peace officer or an attorney representing the state may not require a polygraph examination of a person who charges or seeks to charge in a complaint the commission of an offense under Section 21.02, 21.11, 22.011, 22.021, or 25.02, Penal Code.
- (b) If a peace officer or an attorney representing the state requests a polygraph examination of a person who charges or seeks to charge in a complaint the commission of an offense listed in Subsection (a), the officer or attorney must inform the complainant that the examination is not required and that a complaint may not be dismissed solely:
 - 1) Because a complainant did not take a polygraph examination; or
 - 2) On the basis of the results of a polygraph examination taken by the complainant.
- (c) A peace officer or an attorney representing the state may not take a polygraph examination of a person who charges or seeks to charge the commission of an offense listed in Subsection (a) unless the officer or attorney provides the information in Subsection (b) to the person and the person signs a statement indicating the person understands the information.
- (d) A complaint may not be dismissed solely:
 - 1) Because a complainant did not take a polygraph examination; or
 - 2) On the basis of the results of a polygraph examination taken by the complainant.

Art. 56.021, Code of Criminal Procedure. RIGHTS OF VICTIM OF SEXUAL ASSAULT:

- (a) [I]f the offense is a sexual assault, the victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:
 - (1) if requested, the right to a disclosure of information regarding any evidence that was collected during the investigation of the offense, unless disclosing the information would interfere with the investigation or prosecution of the offense, in which event the victim, guardian, or relative shall be informed of the estimated date on which that information is expected to be disclosed;
 - (2) if requested, the right to a disclosure of information regarding the status of any analysis being performed of any evidence that was collected during the investigation of the offense;
 - (3) if requested, the right to be notified:
 - (A) At the time a request is submitted to a crime laboratory to process and analyze any evidence that was collected during the investigation of the offense;

(B) at the time of the submission of a request to compare any biological evidence collected during the investigation of the offense with DNA profiles maintained in a state or federal DNA database; and

(C) Of the results of the comparison described by Paragraph (B), unless disclosing the results would interfere with the investigation or prosecution of the offense, in which event the victim, guardian, or relative shall be informed of the estimated date on which those results are expected to be disclosed.

Please direct all information and notices to me at my address and telephone number above. I wish to be consulted about the investigation of my assault and that you obtain my consent before you make any determinations in my case. I appreciate your consideration in this matter and look forward to hearing back from you.

Sincerely,

[Name]

CC: [County or Criminal District Attorney]
[Office of State Senator]
[Office of State Representative]
Texas Association Against Sexual Assault

APPENDIX D

PSEUDONYM FOR SEXUAL ASSAULT SURVIVORS

All information will be kept confidential

Law Enforcement Agency:	Phone Number
Case # or Cause #:	Pseudonym *
Real Name	
Real Address	
Real Phone # (day)	(evening)
Alternate Contact Name	
Alternate Contact Phone # (day)	(evening)
* This name will be used in all public files to take the place of your real name. Your correct address and phone number will also be protected. (Texas Code of Criminal Procedure, Chapter 57B).	

RELEASE OF INFORMATION

To assist law enforcement with their investigation and obtain further assistance, I give permission for specific limited release of my real name, address, and phone number. By checking the following, my real information may be released to these specified agencies.

<input type="checkbox"/> Local advocacy program <input type="checkbox"/> Local, State, or Federal Law Enforcement Agency <input type="checkbox"/> Crime Victims' Compensation Program	<input type="checkbox"/> Local, State or Federal Attorney's Office <input type="checkbox"/> Medical Insurance Carrier <input type="checkbox"/> Local, State, or Federal restitution payment office
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Survivor Signature (please use real name)

Date

Law Enforcement Officer Signature

Badge number

Date

The following program is available to you: _____
 Advocacy Program name and phone number (to be filled in by officer)

For more information please contact:

The Office of the Attorney General
 Crime Victim Services Division MC 011
 PO Box 12548
 Austin, TX 78711-2548

Phone: (512) 936-1200
 Email: crimevictims@texasattorneygeneral.gov

APPENDIX E



Minors, Consent, and Sexual Assault: Texas Laws

6200 La Calma, Suite 110 Austin, TX 78752 | 512.474.7190 | www.taasa.org

How old do you have to be to...	Age	Statutory Citation
Consent to sexual activity?	17	Tex. Pen. Code § 22.011(c) (aff. defense if minor is 14-16, partner is not more than 3 years older, and sex is factually consensual)
Make a police report without your parents?	Any age	Tex. Code Crim. Proc. Art. 2.13
Refuse to a sexual assault forensic examination?	16: Minors younger than 16 may be compelled.	Tex. Fam. Code 32.005
Consent to a sexual assault forensic examination without police involvement.	18	Tex. Code. Crim. Proc. 56.065(h) & Tex. Fam. Code Sec. 261.101.
Consent to the release of evidence collection kit to police?	14	Tex. Gov. Code § 420.0735(a)
Consent to counseling at a rape crisis center?	Any age	Tex. Fam. Code § 32.004
Consent to advocacy from a rape crisis center?	Any age	Tex. Code Crim. Proc. Art. 56.045
Decide whether your parents can participate in your counseling sessions at a rape crisis center or see your file?	18	Tex. Fam. Code § 32.004(b)(2)
Waive/choose not to waive confidentiality at a rape crisis center?	18	Tex. Fam. Code 261.101 Tex. Gov. Code § 420.071 42. U.S.C.A. § 13925
Apply for a protective order to protect you from sexual assault, dating violence, or stalking.	Any age; Guardian or prosecutor can file on minor's behalf	Tex. Code Crim. Proc. Art 7A.01 Tex. Fam. Code § 82.002
Consent to medical care from a physician or mental health care?	18; 16 if living separate from guardians and independently managing finances	Tex. Fam. Code § 32.003(a)(2)
Consent to pregnancy-related care, excluding abortion?	18	Tex. Fam. Code § 32.003(a)(4)
Consent to an abortion?	18; if no medical necessity, minors need parental consent or court order authorizing minor's consent.	Tex. Fam. Code §§ 33.002-33.004 Tex. Occ. Code § 164.052(a)(19)

* The information contained in this sheet provides general information only. It does not constitute specific legal

APPENDIX F

Progressive Sanctions Model

Key Rules and Principles

1 2 3 4 5 6 7

Initial Offense (IO) Calculation

Step 1: Determine the penal code classification of the disposition offense (DO).

Step 2: Determine the Guideline Level (i.e., Level 1-7) corresponding to the penal offense classification.

Subsequent Offense (SQO) Calculation

Step 1: Determine the penal classification of the disposition offense. Determine if the offense is <, >, or = to the previous DO.

Step 2: Determine the previous Assigned Level (AL) and apply the applicable rule for <, >, or = penal offenses.

Rule A: Less Severe Offense

If the SQO is < the initial or prior offense, the GL will be the greater of the current AL or the current DO level.

Exception 1: If the child's AL = 4 or 5 and the child's current DO is a felony, then the GL = AL + 1.

Exception 2: If the child is found to have engaged in delinquent conduct on 2 occasions that were each < the original or prior offense, then the GL = highest AL + 1.

Rule B: Same or Equal Severity Offense

If the SQO = the initial or prior offense, then the GL will be the AL+1.

Exception 1: If the child's AL = 5 and the child is not eligible for TYC commitment, then the GL = Current AL.

Exception 2: If the child's AL = 6 and the child's current DO is not a covered determinate sentence offense, the GL = Current AL.

Exception 3: If the child's AL = 6 and the child's age or current offense prohibit certification as an adult, the GL = Current AL.

Rule C: Greater Severity Offense

If the SQO > the initial or prior offense, then the GL will be the greater of:

- 1) the current DO level; or
- 2) the current AL + 1 unless prohibited by law in which case the GL = current AL

Prohibited Level Progressions

- **Rules A, B, or C:** If a child's AL = 5 and TYC commitment is prohibited for the current DO level or is otherwise prohibited by law, then the GL = AL.

Modification of Disposition

- Motion to modify based on violation of juvenile court-ordered probation is a Level 2 offense.
- GL calculated using current AL and new Level 2 offense of violation of reasonable & lawful order of juvenile court.

Plea Bargains/Lesser Included Offenses

- GL is based on most serious offense adjudicated

New Dispositions While Still Under Supervision

- If the disposition results in the following:
 - Supervisory Caution:
 - AL = current AL
 - Length of supervision = original time ordered
 - Modified/Extended:
 - AL = based on disposition
 - Length of supervision = new time ordered

NOTE: If the new disposition is modified/extended and GL=AL then no departure occurred even if the length of supervision does not fall within the specified guideline.

Dropped Offense Rule

- GL is only based upon the most serious offense adjudicated. A dropped offense has a GL=0 and an AL=0
- When determining whether Rule A, B, or C applies to a subsequent offense, previous dropped offenses are not counted in child's history.

General Reporting Rules

- Progressive Sanctions is assessed once per child per disposition event.
- The GL = 0 and the AL = 0 in the following circumstances:
 - When the child is found not guilty
 - When the case is dropped, non-suited or dismissed
 - When no probable cause is found
 - When a paper referral is disposed with no intake (i.e., no face-to-face meeting occurred)
 - When the child is transferred to another county for disposition
 - When a TYC parolee is revoked administratively by TYC
- If AL = 2 through 5, length of supervision must be indicated at the time of disposition
- If AL = 4, ISP must be shown on the program screen
- If AL = 5, the placement screen must contain a placement entry using a TJPC-created code for the secure registered facility
- If non-compliance with deferred prosecution terms result in an adjudication to probation (entered on the subsequent disposition screen), then the GL = GL of original deferred offense.

TYC Commitment Rule - Repealed

In 2007, the Legislature repealed the statutory provisions known as the "misdemeanor commitment rule". Pursuant to Family Code Section 54.04(d) (2), misdemeanor offenders can no longer be committed to the Texas Youth Commission. A child may be committed to TYC only if adjudicated for a felony or violation of felony probation.

The Progressive Sanctions Model is a recommended set of disposition guidelines contained in Chapter 59, Texas Family Code. Compliance with the guidelines is discretionary and is not mandated by law. Effective Date: Offenses committed on or after January 1, 1996 may be assigned a Progressive Sanctions Guideline Level

This document is produced as a service of the
Texas Juvenile Probation Commission - Austin, Texas
Revised September 2007 (512) 424-6700 - www.tjpc.state.tx.us

PROGRESSIVE SANCTIONS MODEL

Offense		Recommended Sanctions
Conduct Indicating a Need For Supervision, <i>excluding</i> expulsion from DAEP for serious or persistent misbehavior or a Class A or Class B Misdemeanor	1	<p>Require counseling; Inform child of progressive sanctions for future offenses; Inform parent(s) of responsibility to impose restrictions on child; Provide information to child & family on needed social services; Require child or parent(s) to participate in services from STAR (if program is available); Refer child to citizen intervention program; Release child to parent(s) or guardian(s).</p>
Expulsion from DAEP for serious or persistent misbehavior under 37.007(c), Education Code Contempt of JP, Municipal, or Fine Only County Court Violation of Court Ordered Probation Class A or B Misdemeanor, <i>excluding</i> a misdemeanor involving the use or possession of a firearm	2	<p>Deferred Prosecution for 3-6 months*; Inform child of progressive sanctions for future offenses; Inform parent(s) of responsibility to impose restrictions on child; Require restitution to victim or community service restitution (CSR); Require parent(s) or guardian(s) to identify restrictions to be imposed on child; Provide information to child & family on needed social services; Require child or parent(s) to participate in services from STAR (if program is available); Refer child to citizen intervention program; Additional conditions of probation as appropriate.</p> <p><i>*As of 9/1/2003, Section 53.03(j) authorizes two consecutive terms of deferred prosecution not to exceed one (1) year.</i></p>
Misdemeanor involving use or possession of a firearm State Jail Felony Third Degree Felony	3	<p>Court ordered probation for not less than 6 months; Require restitution to victim or community service restitution (CSR); Impose specific restrictions and requirements for child's behavior; Require probation officer to closely monitor child's activities and behavior; Require child or parent(s) to participate in programs or services as appropriate; Additional conditions of probation as appropriate (including placement in a non-secure residential treatment facilities).</p>
Second Degree Felony	4	<p>3-12 months intensive and regimented program PLUS Court ordered probation; Require restitution to victim or community service restitution (CSR); Impose highly structured restrictions and requirements on child's behavior; Require probation officer to closely monitor child; Require child or parent(s) to participate in programs or services, as appropriate; Additional sanctions, if appropriate.</p>
First Degree Felony, <i>excluding</i> a felony involving the use of a deadly weapon <i>or</i> causing serious bodily injury	5	<p>6-12 months court ordered placement in a post-adjudication secure correctional facility PLUS Court ordered probation; Require restitution to victim or community service restitution (CSR); Impose highly structured restrictions and requirements on child's behavior; Require probation officer to closely monitor child; Require child or parent(s) to participate in programs or services as appropriate; Additional sanctions, if appropriate.</p>
First Degree Felony involving the use of a deadly weapon <i>or</i> causing serious bodily injury Aggravated Controlled Substance Felony Capital Felony	6	<p>Commitment to Texas Youth Commission where Commission may impose the following: 9-24 months highly structured residential program; Require restitution to victim or community service restitution (CSR); Require child or parent(s) to participate in programs or services as appropriate; Additional sanctions, if appropriate; Parole with highly structured restrictions and requirements on child; Parole supervision for not less than 6 months; Other parole supervision conditions, as appropriate.</p>
First Degree Felony involving the use of a deadly weapon <i>or</i> causing serious bodily injury Aggravated Controlled Substance Felony Capital Felony	7	<p>Discretionary Certification and Transfer to Criminal Court or Determinate Sentence to the Texas Youth Commission where Commission may impose the following: 12 months to 10 years highly structured residential program; Require restitution to victim or community service restitution (CSR); Require child or parent(s) to participate in programs or services as appropriate; Additional sanctions, if appropriate; Parole with highly structured restrictions and requirements on child; Parole supervision for not less than 12 months; Other parole supervision conditions, as appropriate.</p>

* Primary sanction shown in red.



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