Sexual Violence Bench Guide

For Judicial Officers

Revised 2018

Washington State Supreme Court Gender & Justice Commission
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170
(360) 704-4031
www.courts.wa.gov
Published March 2019

Sexual Violence Bench Guide for Judicial Officers

This bench guide was originally developed as the *Sexual Offense Bench Guide* by the Washington State Supreme Court Gender and Justice Commission in 2013, in collaboration with judicial officers, King County Sexual Assault Resource Center (KCSARC), the Washington State Coalition of Sexual Assault Programs (WCSAP), and law students.

The 2018 edition updates all of the original chapters with new case law and statutory changes, and expands the guide to include chapters on civil sexual assault issues. It is the result of an extensive multi-year effort by judicial officers, attorneys, and law students to bring an updated, relevant, accessible resource on this important issue to Washington State judicial officers.

This project was supported by subgrant No. F18-31103-218 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women. Grant funds are administered by the Office of Crime Victims Advocacy, Community Services and Housing Division, Washington State Department of Commerce.

The Commission expresses appreciation to the following individuals and entities that contributed their time and expertise to writing and revising both the original 2013 guide and this *Sexual Violence Bench Guide 2018.*

Editors:

Laura Jones, J.D.
King County Sexual Assault Resource Center & Independent Consultant

Judge Dennis Yule, Retired
Benton/Franklin Counties Superior Court

2018 Edition Research & Content Revision:

Kelley Amburgey-Richardson, J.D., Senior Court Program Analyst, Washington State Supreme Court Gender and Justice Commission
Claudia Bayliff, J.D.
Judge Elizabeth Berns, King County Superior Court
Talcott Broadhead, MSW
Claire Carden, J.D., Northwest Justice Project
Yvonne Chin, J.D., Sexual Violence Law Center
Pam Dittman, Administrative Office of the Courts
Washington State Supreme Court Gender and Justice Commission Domestic and

Sexual Violence Committee (DSV)
Grace Huang, J.D., Asian Pacific Institute on Gender Based Violence
Monte Jewell, J.D., Sexual Violence Law Center
Laura Jones, J.D., Project Coordinator, King County Sexual Assault Resource Center
Riddhi Mukhopadhyay, J.D., Sexual Violence Law Center
Erin Moody, J.D., Co-Chair, Washington State Supreme Court Gender and Justice Commission Domestic and Sexual Violence (DSV) Committee
Judge Marilyn Paja, Vice Chair, Washington State Supreme Court Gender and Justice Commission, Kitsap County District Court
Judge Jackie Shea-Brown, Co-Chair, Washington State Supreme Court Gender and Justice Commission Domestic and Sexual Violence (DSV) Committee, Benton/Franklin Counties Superior Court
Adie Sherwood, J.D., King County Sexual Assault Resource Center
David Ward, J.D., Legal Voice

Law Students:
Asti Gallina, University of Washington School of Law
Alison Harper, University of Washington School of Law
Marlana Kuper, University of Washington School of Law
Madeline Lamo, University of Washington School of Law
Chloe Neely, New York University School of Law
Kelly Skahan, University of Washington School of Law

2013 Edition Research & Content Revision:

Kelley Amburgey-Richardson, J.D., Washington Coalition of Sexual Assault Programs
Claudia Bayliff, J.D.
Judge Elizabeth Berns, King County Superior Court
Judge Regina Cahan, King County Superior Court
Laura Contreras, J.D., Northwest Immigrant Rights Project
Pam Dittman, Project Coordinator, Administrative Office of the Courts
Judge Joan DuBuque, King County Superior Court
Theodore J. Hong, J.D., Bailiff for Judge Schapira
Judge Carol Schapira, Project Manager, King County Superior Court
Judge Catherine Shaffer, King County Superior Court
Judge T.W. "Chip" Small, Chelan County Superior Court
Externs for Judge Schapira:
Aaron Birk, University of Illinois Law School
Sarah Kelly, Seattle University School of Law
Aaron Tracy, University of Idaho Law School

Law Students:
Kathleen Kline, University of Washington School of Law
Emily Nelson, University of Washington School of Law
Rosa Pazhouh, University of Washington School of Law
Abigail Pearl, University of Washington School of Law

Alanna Peterson, University of Washington School of Law
Walter Smith, University of Washington School of Law

WASHINGTON COURTS

Gender and Justice Commission (GJCOM)

Sexual Violence Bench Guide

Scope and Purpose

This is the revised edition of the *Sexual Violence Bench Guide*. It is designed to serve as a resource for new and experienced judicial officers.

While this bench guide is as current as possible at the date of revision, laws, rules, references and caselaw change rapidly. Users are encouraged to verify.

Chapter Overview

Chapter 1 **Understanding Sexual Violence**
Provides a broad overview of the dynamics of sexual violence for the purpose of promoting a consistent and unbiased response to alleged victims of sexual violence in Washington's courts.

Appendix A **Washington Community Sexual Assault Programs**

Appendix B **Neurobiology of Trauma Bibliography**

Chapter 2 **Sexual Offenses**
Provides a list and chart of offenses identified as sexual offenses. The chart includes the crime, the RCW, a definition, and the statute of limitations.

Chapter 3 **Defenses to Sexual Offenses**
Covers the application of defenses to sexual offenses in Washington State including rules when instructing juries, certain defenses, impermissible defenses, and applicable statutes of limitations.

Chapter 4 **Pre-Trial Release and Discovery**
Presents information on the statutory provisions, case law, docket management practices, and pre-trial release procedures and discovery issues.

Chapter 5 **Preliminary Hearings and Trials**
Provides a general overview of the conduct of preliminary hearings and trials of defendants charged with a sex offense, and provides guidance for affording appropriate protections to both the victims and defendants.

Chapter 6 Evidence
Addresses evidentiary issues that arise during criminal cases involving allegations of sexual offenses.

Chapter 7 Post-Conviction and Sentencing in Felony Crimes
Focuses on special considerations that should be taken into account when sentencing persons convicted of sex offenses.

Chapter 8 The Juvenile Justice System and Sex Offenses
Presents an overview of the juvenile justice process and youth who sexually offend.

Chapter 9 Civil Protection Orders
Provides courts assistance in crafting effective orders and in developing effective and efficient procedures for handling cases of sexual violence in order to uphold the rights of all parties involved.

Appendix A Civil Orders for Sexual Offense Victims Chart

Appendix B Sexual Assault Protection Order (SAPO) Hearing Bench Card

Appendix C Procedural Justice Bench Card

Chapter 10 LGBTQ Minorities and Sexual Offenses
Explains how judges may contribute to a more balanced and responsive legal process in all sexual offense cases by examining commonly held stereotypes about sexual offenses.

Appendix A LGBTQ Sexual Assault Community Resources

Appendix B References

Chapter 11 Cultural Competency
Discusses the importance of cultural competency in the courtroom, specifically in cases involving sexual violence.

Chapter 12 Sexual Violence and Immigration Law
Identifies the intersection of immigration laws with state court proceedings related to sexual violence, as well as the implication of decisions made in those cases on the immigration status of a noncitizen.

Chapter 13 Title IX and State Court Proceedings
Provides an overview of Title IX and other related federal statutes as well as discussion of the different proceedings stemming from an alleged sexual assault within the jurisdiction of Title IX, and how these

processes may intersect with Washington state court proceedings and Washington law.

Chapter 14 **Sexual Violence and Landlord-Tenant Law**
Identifies landlord-tenant law issues that judicial officers may be confronted with in sexual assault-related court proceedings.

Addendum **"Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case"**

Addendum **"The Language of Sexual Violence"**

Table of Contents

Table of Contents

Table of Contents

Table of Contents

CHAPTER 1
Understanding Sexual Violence

I. Introduction

This chapter provides a broad overview of the dynamics of sexual violence for the purpose of promoting a consistent and unbiased response to alleged victims of sexual violence in Washington's courts. It begins with definitions of terms and an explanation of how they are used in the rest of the chapter. The remainder of this chapter first provides statistics about the prevalence of sexual violence in Washington compared with national statistics. This section also includes information about the prevalence of sexual assaults within specific populations and cultural communities. Second, it explores the dynamics of sexual violence perpetration. Third, it addresses the characteristics of victims of sexual violence, dispelling some of the most common myths. Fourth, it details the physical, psychological, and emotional impacts that the trauma of sexual violence can have on victims. Finally, this chapter explains the role of the sexual assault advocates and describes the structure of sexual assault service provision in Washington, including statewide and local resources.

Understanding sexual violence is essential to the administration of justice. Most victims of sexual offenses do not report the offense to the police. For example, a study of Washington women found that only 15 percent of women who were sexually assaulted reported their assault to the police and 50 percent of those reports resulted in charges being filed.[1] A comprehensive national study confirms that this phenomenon, known as the justice gap,[2] is a national problem. The National Violence Against Women Survey found that just over 19 percent of rapes of women and about 13 percent of rapes of men were reported to the police.[3] Of those rapes that are reported, very few are prosecuted, and fewer still result in convictions.[4] In the national study, just under eight percent of the women whose rapes were reported said their rapist was criminally prosecuted, about three percent said their rapist was convicted, and just over two percent said their rapist was incarcerated.[5]

Victims choose not to report for a variety of reasons, which will be discussed in depth later in this chapter. However, two of the main reasons that victims of sexual offenses consistently cite for not reporting are (1) the fear that they will be not be believed by the

---

[1] Lucy Berliner, David Fine & Danna Moore, "Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women", 21 - 22 (Seattle: Harborview Medical Center 2001)

[2] Jennifer Temkin & Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008)

[3] Patricia Tjaden & Nancy Thoennes, "Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey", Special Report (U.S. Department of Justice, National Institute of Justice & the Centers for Disease Control and Prevention 2006)

[4] David Lisak, "Understanding the Predatory Nature of Sexual Violence" (University of Massachusetts at Boston 2008)

[5] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 33

system and (2) the fear that they will be blamed.[6] This holds true for victims in Washington. The Washington State Gender & Justice Commission, in conjunction with the Washington Coalition of Sexual Assault Programs, conducted a survey of 91 certified sexual assault advocates across the state of Washington to inform this bench guide. One out of five advocates (20 percent) who support victims of sexual assault at criminal and civil proceedings reported that judicial officers in criminal proceedings were accusatory to the victim and used blaming statements. One out of seven (13 percent) reported this response to victims in civil proceedings. In addition, 27 percent of all advocates responding to the survey disagreed with the statement, "Judicial officers here [in the specific area of the state I currently work in] understand the dynamics of sexual assault."

The purpose of this chapter is to increase the judicial system's understanding of the dynamics of sexual violence, including its pervasive nature across the spectrum of sexual offenses, thereby enabling judges to more effectively close the justice gap. This bench guide is intended as a useful resource for judicial officers across the state of Washington when presiding over cases that involve sexual violence issues.

II. Understanding the Problem

Sexual violence is a highly pervasive problem, therefore these issues may arise in a wide variety of cases, including criminal matters, family law matters, and claims of sexual harassment in the workplace or in the rental of a dwelling.

A. Defining the Problem

The first step in understanding sexual violence is to define what it is and to understand how often it occurs.

1. What is sexual violence?

Sexual violence is an umbrella term that includes a wide range of victimizations. In the anti-sexual violence field, the term *sexual violence* is used to describe a continuum of behaviors, ranging, for example, from making sexist jokes, to dealing in or possessing depictions of minors engaged in sexually explicit conduct, to touching someone sexually without consent, to coercing someone into sexual activity, to rape. The behaviors along the continuum of sexual violence combine to create a culture in which victims are devalued, sexual violence is tolerated, and perpetrators are not held accountable.

The term "sexual assault" is sometimes used interchangeably with the term "sexual violence." However, sexual violence refers to more than those sexual offenses that are specifically defined as sexual assaults or that involve a physical attack or threatened physical attack by a specific perpetrator against a specific victim. For the purposes of this bench guide every sexual offense listed in Chapter 2 is considered to be an offense involving sexual violence because each sexual offense, by its inherent nature, involves a perpetrator

[6] Id. at 34

fundamentally violating the basic security, dignity, value, integrity and autonomy of an individual victim or distinct group of victims. Throughout, the terms "sex offense" and "sexual violence" are used interchangeably to refer to all the crimes listed in Chapter 2. When the term "sexual assault" is used, it refers to a subset within the range of sex offenses that represents offenses defined in Chapter 9A.44 as sexual assaults or for which there is a specific element of actual assault.

2. Washington law

Sexual assault is defined in the Victims of Sexual Assault Act[7] as: (1) rape or rape of a child[8], (2) assault with intent to commit rape or rape of a child[9], (3) incest or indecent liberties[10], (4) child molestation[11], (5) sexual misconduct with a minor[12], (6) custodial sexual misconduct[13], (7) crimes with a sexual motivation[14], or (8) an attempt to commit any of the aforementioned offenses.

B. How Big Is the Problem?

Accurately quantifying the problem of sex offenses is sometimes made difficult by a lack of uniformity in the definitions of the offenses. This is illustrated in Washington with respect to the offense of rape. The Washington definition of rape is broad, in that it encompasses victims of any gender and acknowledges that perpetrators can be the same sex as their victims. Until recently, the FBI definition of rape (established in 1927) was, "carnal knowledge of a female, forcibly and against her will."[15] Since this definition was used to track statistics for the FBI's annual Uniform Crime Report, those statistics excluded all male victims, victims of oral or anal rape, rape by an object or other body part, persons raped by female perpetrators, and victims of non-forcible rape. Uniform Crime Report data prior to the definition change in 2012 are therefore not an accurate representation of the prevalence of sexual assault in the United States. The revised FBI definition now mirrors the Washington statute; this change was necessary to capture a more complete picture of sexual assault in the United States.

---

[7] RCW 70.125.030(7) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.030
[8] RCW 9A.44.040 – 9A.44.079 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.040
[9] RCW 9A.36.011, 9A.36.021 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.011; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.021
[10] RCW 9A.64.020, 9A.44.100 respectively http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.64.020; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100
[11] RCW 9A.44.083, 9A.44.089 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.089
[12] RCW 9A.44.093, 9A.44.096 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.093; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096
[13] RCW 9A.44.160, 9A.44.170 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.160; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.170
[14] RCW 9.94A.835 http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.835
[15] FBI, National Press Releases, "Attorney General Eric Holder Announces Change to the Uniform Crime Report's Definition of Rape", (January 6, 2012) http://www.fbi.wgov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape

Several reliable national studies have reported on the prevalence of incidents of sexual assault in the United States, specifically the National Women's Study,[16] the National Violence Against Women Survey,[17] and the recent National Intimate Partner and Sexual Violence Survey.[18] In 2001, the Office of Crime Victims Advocacy collected Washington-specific data on the incidence and prevalence of sexual assault and its characteristics.

1. Sexual violence against women in Washington

The survey reported in "Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women"[19] was conducted using the same methodology as the National Women's Study and the National Violence Against Women Survey. The survey focused on adult women, and, in addition to asking the same screening questions as the national studies, asked questions to learn more about other sexual assault experiences of Washington women. Some of the keys findings were:

- Twenty-three percent of Washington women have been raped, as defined by Washington law, during their lifetime.[20]
- More than one in three Washington women have been victims of sexual assault—defined as rape, attempted rape, forced sexual contact, or child sexual abuse—at some time in their lives.[21]
- One in five women has had more than one sexual assault experience.[22]
- Of the women who were sexually assaulted, 92 percent were sexually assaulted by a family member, current or former intimate partner, or an acquaintance. Only eight percent were sexually assaulted by a stranger.[23]
- Almost one in ten of the women were sexually assaulted when unable to consent due to the influence of alcohol or drugs.[24]

2. Sexual violence against children

[16] Dean G. Kilpatrick, Christine N. Edmunds & Anne Seymour, "Rape in America: A Report to the Nation", (Crime Victims Research and Treatment Center and the National Victim Center 1992)
[17] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 7 (One in six women has been raped at some point in her life. About 18 percent of women who were raped before the age of 18 also reported being raped since their 18th birthday. Over 92 percent of rapes of female victims were committed by a current or former intimate partner, a family member other than a spouse, or an acquaintance)
[18] Michele Black, Kathleen Basile, Matthew Breiding, Sharon Smith, Mikel Walters, Melissa Merrick, Jieru Chen, & Mark Stevens, "The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report, Executive Summary" (Centers for Disease Control and Prevention, National Center for Injury Prevention and Control & Division of Violence Prevention, November 2011) (Nearly one in five women and one in 71 men have been raped in their lifetime. Most female victims were raped before the age of 25, about 42 percent before the age of 18. Twenty-eight percent of male victims were raped before the age of ten and 35 percent of women who were raped as minors were also raped as adults.)
[19] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions"
[20] Id. at 12
[21] Id.
[22] Id. at 13
[23] Id. at 19
[24] Id. at 39

Since perpetrators target vulnerable victims,[25] children and youth are especially vulnerable to sexual violence. Multiple studies have shown that the rate of sexual assault of boys and girls is exceedingly high:

- One in four girls is sexually abused before the age of 18.[26]
- One in six boys is sexually abused before the age of 18.[27]
- Twenty-eight percent of male victims were raped when they were ten or younger.[28]
- Eighty percent of Washington women who were sexually assaulted reported that their sexual assault experiences happened before they reached the age of 18.[29]
- Seventy-four percent of sexual abuse incidents perpetrated against 12 to 17-year-olds were committed by someone the victim knew well,[30] according to one study on youth victimization.
- Ninety percent of sexual assaults on children younger than 12 years old are perpetrated by someone the victim knows.[31]

3. Sexual violence against men

Men are also victims of sexual violence, and not just men in prison or homosexual men.[32] While we know that men are victims, there is unfortunately less research about the prevalence and characteristics of male victimization. In the survey of certified sexual assault victim advocates, 28 percent of the advocates responding disagreed with the statement, "The justice system [in the specific area of the state I currently work in] gives fair/equal treatment to sexual assault cases when the victim is male."

Some national studies have surveyed men. Some of the findings about male victims were:

- Seventeen percent of the men surveyed were sexually abused before the age of 18.[33]

---

[25] Harborview Center for Sexual Assault and Traumatic Stress, "Information About Sexual Offenders", http://depts.washington.edu/hcsats/PDF/infobrochures/sexual_offenders.pdf 2

[26] Centers for Disease Control and Prevention, "Adverse Childhood Experiences (ACE) Study, Data and Statistics, Prevalence of Individual Adverse Childhood Experiences", http://www.cdc.gov/ace/prevalence.htm

[27] Id.

[28] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control & Division of Violence Prevention, "The National Intimate Partner and Sexual Violence Survey, Fact Sheet"

[29] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 38

[30] Dean Kilpatrick, Benjamin Saunders & Daniel Smith, "Youth Victimization: Prevalence and Implications" (U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Research in Brief, (April, 2006) https://www.ncjrs.gov/pdffiles1/nij/194972.pdf

[31] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault" 11 (1997)

[32] Lynn Hecht Schafran, "Writing and Reading About Rape: A Primer," 66 *St. John's L. Rev.* 979, 998 (1993)

[33] Centers for Disease Control and Prevention, "Adverse Childhood Experiences (ACE) Study"

- One in every 33 men surveyed has been raped.[34]
- Nearly three in four of the male rape victims were raped before turning 18.[35]
- About 81 percent of the rapes of male victims were committed by an acquaintance, current or former intimate partner, or family member other than a spouse.[36] About 85 percent of these male rape victims reported being raped by a male.[37]

Sexual violence impacts these male victims in some of the same ways it affects female victims (see, "Understanding the Victim," section V., p. 15 below), but also in other ways that are specific to men. An informal survey of 200 male victims of sexual assault found that 81 percent were afraid that people would think they were or would become perpetrators.[38] In addition, many men who have been sexually assaulted may experience confusion about their gender identity or sexual orientation.[39]

4. Sexual violence against specific populations

Although sexual violence can happen to anyone, and affects all cultural communities, research shows that minority and other underserved populations often experience sexual violence at higher rates. The findings are staggering:

- Native American/Alaska Native women were significantly more likely to be raped at some point in their lifetime.[40] In fact, Native American women were two-and-one-half times as likely to experience rape/sexual assault as compared to all other races in the United States.[41]
- Washington Hispanic women experienced higher rates of rape than white women.[42]
- Forty-three percent of lesbian and bisexual women, and 30 percent of gay and bisexual men, reported having experienced at least one form of sexual assault victimization.[43]
- Women with disabilities are raped and abused at a rate at least twice that of the general population of women.[44]

---

[34] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 7
[35] Id. at 18
[36] Id. at 21
[37] Id.
[38] The Oprah Winfrey Show, "A Two Day Oprah Show Event: 200 Adult Men Who Were Molested Come Forward" (Harpo Productions November, 2010) (TV series)
[39] 1in6, "*M*yths & Facts" http://1in6.org/therapists-and-other-professionals/myths-facts/
[40] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 13
[41] Steven Perry, "American Indians and Crime: 1992-2002" (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics)
[42] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 39
[43] Emily F. Rothman, Deinera Exner & Allyson L. Baughman, "The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review", *Trauma Violence, & Abuse*, 12(2) 55-66 (Sage 2011)
[44] Dick Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance* (Paul H. Brooks Publishing Co, Inc. 1994)

- A 2007 study found that five percent (or 60,500) of the more than 1.3 million inmates held in federal and state prisons had been sexually abused in the previous year.[45]

Victims of sexual violence who come from communities that are oppressed or discriminated against may experience additional trauma. The oppression they experience may affect their interest in engaging with the justice system and their willingness or ability to participate in an ongoing criminal justice process. They may be reluctant to seek services that are not culturally or linguistically appropriate.[46] In addition, they may be more reluctant to access the legal system or seek help in general because of cultural values or past negative experiences.[47]

Since Washington has many diverse communities, judicial officers will see members of these communities in their courtrooms. The survey of certified sexual assault advocates referenced above indicates that judicial officers may lack an understanding of sexual assault of members of specific cultural communities. Twenty-six percent of advocate respondents disagreed with the statement, "The justice system [in the specific area of the state I currently work in] gives fair/equal treatment to sexual assault cases when the victim is gay/lesbian/bisexual/transgender." Twenty-one percent of the advocates disagreed with the same statement in regard to members of particular cultural groups. Examples of cultural groups named included: immigrant community, disabled, senior, and Native American. Nineteen percent of the advocates also disagreed that the justice system gives fair/equal treatment to "sexual assault cases when the victim speaks a language other than English."[48]

If a judicial officer is not familiar with a particular cultural community, it is important to avoid assumptions, and seek the information necessary to make an informed and unbiased decision. See Chapter 11 (Cultural Competency) of this bench guide.

III. Washington Statutes

Many Washington statutes address issues of sexual violence. While several of these statutes will be covered in depth in later chapters, and criminal sexual offense statutes are listed and discussed in Chapter 2, the following list of other relevant criminal and civil statutes, court rules and constitutional provisions is provided here (the online version of this bench guide contains links to the full text of the following provisions for ease of reference):

A. Sex Offenses – RCW 9A.44,

---

[45] Allen Beck & Paige Harrison, "Sexual Victimization in State and Federal Prisons Reported by Inmates", (Office of Justice Programs, Bureau of Justice Statistics, National Inmate Survey 2007) http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1149

[46] Women of Color Network, "Facts & Stats Collection, Sexual Violence Factsheet" (2006)

[47] Kimberly Lonsway, Joanne Archambault, & David Lisak, "False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault", The *Voice* (The National Center for the Prosecution of Violence Against Women 2009)

[48] Results compiled from an unpublished survey of Washington sexual assault advocates conducted by the Washington State Gender and Justice Commission and the Washington Coalition of Sexual Assault Programs in March & April, 2012

http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44

B. Harassment and Stalking – RCW 9A.46, http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46
C. Sexual Exploitation of Children – RCW 9.68A, http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A
D. Indecent Exposure – RCW 9A.88.010, http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.88.010
E. Criminal Limitations of Actions – RCW 9A.04.080, http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.04.080
F. Rape Shield
   1. Civil – Evidence Rule 412, http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0412
   2. Criminal – RCW 9A.44.020, http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
G. Criminal Records Privacy Act – RCW 10.97, http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97
H. Address Confidentiality for Victims of Domestic Violence, Sexual Assault, and Stalking – RCW 40.24, http://apps.leg.wa.gov/rcw/default.aspx?cite=40.24
I. Polygraph Examinations – Victims of Alleged Sex Offenses – RCW 10.58.038, http://apps.leg.wa.gov/rcw/default.aspx?cite=10.58.038
J. Abuse of Children – RCW 26.44, http://apps.leg.wa.gov/rcw/default.aspx?cite=26.44
K. Protection Orders
   1. Sexual Assault Protection Order – RCW 7.90, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90
   2. Domestic Violence Protection Order – RCW 26.50, http://apps.leg.wa.gov/rcw/default.aspx?cite=26.50
   3. Anti-Harassment Protection Order – RCW 10.14, http://apps.leg.wa.gov/rcw/default.aspx?cite=10.14
   4. Vulnerable Adult Protection Order – RCW 74.34.110, http://apps.leg.wa.gov/rcw/default.aspx?cite=74.34.110
L. Housing
   1. Victim Termination of Rental Agreement – RCW 59.18.575, http://apps.leg.wa.gov/rcw/default.aspx?cite=59.18.575
M. Employment
   1. Discrimination – RCW 49.60, http://apps.leg.wa.gov/rcw/default.aspx?cite=49.60
   2. Family Leave – RCW 49.78, http://apps.leg.wa.gov/rcw/default.aspx?cite=49.78
   3. Domestic Violence Leave (applies to victims of domestic violence, sexual assault, or stalking) – RCW 49.76, http://apps.leg.wa.gov/rcw/default.aspx?cite=49.76
N. Family Law
   1. Restrictions in Temporary or Permanent Parenting Plan – RCW 26.09.191, http://apps.leg.wa.gov/rcw/default.aspx?cite=26.09.191

O. Victims' Rights
   1. Crime Victims, Survivors, Witnesses – Washington State Constitution Article 1, Sec. 35; RCW 7.69.030, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.030
   2. Child Crime Victims and Witnesses – RCW 7.69A.030, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69A.030
   3. Dependent Persons – RCW 7.69B.020, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69B.020

P. Victims of Sexual Assault Act – RCW 70.125, http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125
   1. Records of Community Sexual Assault Program and Underserved Populations Provider Not Available as Part of Discovery – RCW 70.125.065, http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065
   2. Right to be accompanied by a personal representative during treatment or proceedings – RCW 70.125.060, http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020

Q. Sexual Assault Advocate-Victim Privileged Communication – RCW 5.60.060(7), http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

IV. Understanding the Dynamics of Sexual Violence Perpetration

Understanding offender behavior is essential to comprehend sexual violence victimization and to determine appropriate offender sanctions and treatment. Individuals who sexually offend make a conscious choice to victimize another person.[49] Perpetrators of sexual violence can be any age, gender, race, or marital status. They can come from any socioeconomic, educational, cultural, or family background. While offenders include both males and females, the majority of perpetrators are male.[50]

Sex offenders are not easily categorized because the individual and his offending behavior, patterns and predilections vary with the individual. However, there are a number of factors that may increase a person's likelihood of offending that fall within the following general categories:

- "Physiological/biological (e.g., imbalanced hormones, being sexually attracted to children);
- Sociocultural (e.g., being exposed to broader social messages supportive of aggression);
- Developmental/environmental (e.g., having witnessed domestic violence);

[49] Center for Sex Offender Management, "Understanding Sex Offenders: An Introductory Curriculum, Section 3: Common Characteristics of Sex Offenders" http://www.csom.org/train/etiology/3/3_1.htm
[50] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 21

- Situational/circumstantial (e.g., having easy access to victims, extreme levels of stress)"[51]

In addition, researchers have found that some sex offenders have deviant sexual arousal, interests, or preferences. In other words, they are aroused by things that are outside the realm of healthy sexual behavior. Some examples of these interests are:

- Engaging in sexual contact with young children or adolescents;
- Having sexual contact with others against their will or without their consent;
- Inflicting pain or humiliation on others;
- Participating in or watching acts of physical aggression or violence;
- Exposing oneself in a public setting;
- Secretly watching others who are undressing, unclothed, or engaging in sexual activities.[52]

These deviant sexual preferences are very strong, and "it is believed that they are a significant driving force behind the initial onset of sexually abusive behaviors for some offenders."[53] They are also linked to recidivism.[54]

A. For the Vast Majority of Perpetrators, Sexual Offenses Are Acts of Power and Control, Not Acts of Sexual Desire

It is imperative to understand that for the vast majority of perpetrators, sexual assault is not about sexual gratification; it is about one person using sexual assault to exert power and control over another person.[55] Also, the majority of perpetrators has access to consensual sex and is not motivated by sexual frustration. [56] As discussed above, they often are married or dating and have biological children.

B. Most Sexual Offenses Are Committed by Someone the Victim Knows

Contrary to common belief and typical media portrayals of a sexual offender as an evil-looking stranger, 80 percent of sexual assaults are perpetrated by someone the victim

[51] Center for Sex Offender Management, "Fact Sheet: What You Need to Know About Sex Offenders" at 3 http://www.csom.org/pubs/needtoknow_fs.pdf
[52] Center for Sex Offender Management, "Understanding Sex Offenders: An Introductory Curriculum, Section 3: Common Characteristics of Sex Offenders"
[53] Id.
[54] Id.
[55] See Lisak, "Understanding the Predatory Nature of Sexual Violence" at 4; Washington Coalition of Sexual Assault Programs, "Understanding Sexual Assault: What is Sexual Violence, Sexual Abuse and Sexual Assault?" http://www.wcsap.org/what-sexual-violence-sexual-abuse-and-sexual-assault
[56] Diana Scully, "Understanding Sexual Violence: A Study of Convicted Rapists," 3 *Perspectives on Gender* 74 (Unwin Hyman 1990); Schafran, "Writing and Reading About Rape: A Primer", at 1001

knows and trusts.[57] This number increases to 90 percent for children younger than 12.[58] Perpetrators are thus often normal appearing spouses, partners, neighbors, friends, community members, or family members. Although sexual violence by strangers does occur, it is uncommon.[59] Non-stranger sexual assaults are at least as devastating as stranger sexual assaults.[60] In addition to the trauma of sexual assault, victims must cope with the breach of trust caused when someone they know assaults them.

C. Most Perpetrators of Sexual Assault Do Not Use a Weapon

In the Washington study, only eight percent of the sexual assault experiences involved the use of a weapon.[61] This is consistent with the National Violence Against Women Survey, which found that the perpetrator used a weapon in just under 11 percent of the sexual assaults against women and about eight percent of the sexual assaults against men.[62]

Dr. David Lisak, a clinical psychologist and one of the leading researchers on perpetrators of sexual assault, has served on the faculty for the National Judicial Education Project. His research found that perpetrators, "exhibit strong impulse control and use only as much violence as is needed to terrify and coerce their victims into submission…use psychological weapons – power, control, manipulation, and threats – backed up by physical force, and almost never resort to weapons such as knives or guns."[63]

D. Most Perpetrators of Sexual Assault Are Not Caught or Convicted

Most sexual assaults are not reported to the police. The Washington study found that 15 percent of the female victims reported their assault to the police.[64] The National Violence Against Women Survey found that just over 19 percent of the rapes of women and about 13 percent of the rapes of men were reported to the police.[65]

---

[57] See Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 39; Schafran, "Writing and Reading About Rape" at 984-986

[58] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault" at 11 (1997)

[59] See Center for Sex Offender Management, "Myths and Facts About Sex Offenders" at 1 (2000); Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault" at 19 (only eight percent of the offenders were strangers to the victims); Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 21 (16.7 percent of the women and 22.8 percent of the men were raped by a stranger); Black et al., "The National Intimate Partner and Sexual Violence Survey" (13.8 percent of the females and 15.1 percent of the men were raped by strangers; 93.4 percent of the female victims of alcohol or drug-facilitated rape were raped by someone they knew)

[60] Schafran, "Writing and Reading About Rape" at 1031

[61] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 18

[62] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 26

[63] Lisak, "Understanding the Predatory Nature of Sexual Violence" at 7

[64] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 21

[65] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 33

Of those rapes that are reported, very few are prosecuted, and fewer still result in convictions.[66] The National Violence Against Women Survey found that of the women whose rapes were reported, just under eight percent said their rapist was criminally prosecuted, about three percent said their rapist was convicted, and just over two percent said their rapist was incarcerated.[67]

It is estimated that the total number of sex offenders under the authority of corrections agencies, including those under community supervision, represents only ten percent of all sex offenders living in communities nationwide.[68]

E. Perpetrators of Sexual Violence Target Their Victims and Premeditate Their Attacks.

The great majority of perpetrators of sexual violence do not commit acts of sexual violence impulsively. These acts, for most offenders, are associated with a cycle of behavior and planning that begins hours, days, weeks, or even months before the violent act.[69] Perpetrators target vulnerable victims, including the very young and the very old, [70] and create situations in which they have access to these victims in order to commit sex crimes.

Both stranger and non-stranger rapists plan their attacks.[71] Dr. David Lisak spent 20 years interviewing, in research and forensic settings, "undetected rapists," a term that he coined for perpetrators who are living in our communities and have not been caught or convicted. The perpetrators he interviewed fell into the category of "date or acquaintance rapists." Lisak explains that the use of these terms is problematic because it implies that these rapes are less serious and less harmful to the victims. On the contrary, these rapists use strategies similar to stranger rapists, and the impact is just as harmful to victims.

> These undetected rapists: are extremely adept at identifying "likely" victims, and testing prospective victims' boundaries; plan and premeditate their attacks, using sophisticated strategies to groom[72] their victims for attack, and

[66] Lisak, "Understanding the Predatory Nature of Sexual Violence" at 1
[67] Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 35 – 36
[68] Center for Sex Offender Management, "Myths and Facts About Sex Offenders" at 2
[69] Center for Sex Offender Management, "An Overview of Sex Offender Management" at 2
[70] See Schafran, "Writing and Reading About Rape" at 994-995; Harborview Center for Sexual Assault and Traumatic Stress, "Information About Sexual Offenders" at 2
[71] Schafran, "Writing and Reading About Rape" at 1007
[72] Grooming is a term that describes a tactic that perpetrators of sexual assault use to gain access to victims for the purpose of committing a sex offense. It is often used in the context of perpetration of child sexual abuse. Perpetrators identify a vulnerable child and build a relationship with that child long before they ever sexually abuse the child. In addition to grooming the child, perpetrators go to great length to groom the child's parent(s)/caregiver(s) and the community. This why a common reaction to allegations of child sexual abuse is that the parents and/or community cannot believe the alleged perpetrator could have done it. See Carla Van Dam, *Identifying Child Molesters: Preventing Child Sexual Abuse by Recognizing the Patterns of the Offenders* (Routledge, 2001)

to isolate them physically; use alcohol deliberately to render victims more vulnerable to attack, or completely unconscious.[73]

F. Sex Offenders Do Not Commit Sexual Crimes Because They Are Under the Influence of Alcohol[74]

Excessive alcohol use is not a root cause of sexual assault. Although alcohol may heighten the risk that someone will act on an impulse to commit a sexual assault, "it is unlikely that a person who otherwise would not commit a sexual assault would do so as a direct result of excessive drinking."[75]

G. Most Perpetrators of Sexual Violence Are Not Mentally Ill

Sex offenders do not commit sex crimes because they are mentally ill.[76] Diana Scully's comprehensive study of convicted rapists included a detailed psychiatric history. She found that only 26 percent of rapists had received some type of outpatient care for an emotional problem (of any kind, not limited to mental illness). This was less than the percentage in the control group and was similar to other felons. The majority of rapists did not have a history of mental illness, which was consistent with other research reviewed by Scully.[77]

H. Perpetrators of Sexual Assault Often Perpetrate Against Multiple Victims.

A study of 1,882 men that identified 120 "undetected rapists" found that 76 of the men (63% percent) were serial offenders who were responsible for a total of 439 rapes.[78] This finding is consistent with research on incarcerated rapists that found that, "when researchers have granted immunity to offenders in exchange for a truthful accounting of their sex offending history the reality of rape emerges. In one study, the average number of victims for each rapist was seven, and in another study, it was 11."[79]

---

[73] See Lisak, "Understanding the Predatory Nature of Sexual Violence" at 7; Schafran, "Writing and Reading About Rape" at 1009

[74] Center for Sex Offender Management, "Myths and Facts About Sex Offenders" at 4

[75] Id.

[76] Center for Sex Offender Management, "Understanding Sex Offenders: An Introductory Curriculum, *Section 3: Common Characteristics of Sex Offenders,"* http://www.csom.org/train/etiology/3/3_1.htm (accessed September 4, 2012)

[77] Scully, "Understanding Sexual Violence" at 75

[78] David Lisak & Paul M. Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," 17 *Violence and Victims* 73, 78 (2002)

[79] Lisak, "Understanding the Predatory Nature of Sexual Violence" at 6

I. Perpetrators of Sexual Assault Often Commit Other Acts of Interpersonal Violence

In the same study referenced above, the researchers found that 58.3 percent of the rapists had also committed 1,225 other acts of interpersonal violence. About 14 percent committed sexual assault other than rape, about 38 percent committed battery of an adult intimate partner, fewer than 11 percent committed physical abuse of a child, and 17.5 percent committed sexual abuse of a child. [80]

Multiple studies on the subject have documented that between 33 percent and 66 percent of rapists have also sexually assaulted children; up to 82 percent of child molesters have also sexually assaulted adults.[81]

J. Most Children Who Are Sexually Abused Do Not Grow Up to Sexually Offend Against Others

It is a common myth that children who are sexually abused will become sex offenders. Some people who commit sex offenses have been victims of sexual abuse themselves, but many have not. Being sexually abused does not cause people to become sex offenders, and most children who were sexually victimized do not go on to sexually abuse others.[82]

K. Sex Offender Treatment is Specialized and Offense Specific

In order for sex offender treatment to be effective, it must be targeted to the deviant behavior and individualized for the particular offender.[83] According to the Center for Sex Offender Management:

> The majority of sex offender treatment programs…now use a combination of cognitive-behavioral treatment and relapse prevention (designed to help sex offenders maintain behavioral changes by anticipating and coping with the problem of relapse). Offense specific treatment modalities generally involve group and/or individual therapy focused on victimization awareness and empathy training, cognitive restructuring, learning about the sexual abuse cycle, relapse prevention planning, anger management and assertiveness training, social and interpersonal skills development, and changing deviant sexual arousal patterns. Different types of

[80] Lisak & Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists" at 78-79
[81] Lisak, "Understanding the Predatory Nature of Sexual Violence" at 5
[82] Center for Sex Offender Management, "Fact Sheet: What You Need to Know About Sex Offenders" at 2
[83] Center for Sex Offender Management, "Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses" at 4-5

offenders typically respond to different treatment methods with varying success.[84]

Effectiveness of treatment depends on many factors, including type of offender, treatment model, treatment modalities, and related community interventions.[85] Juveniles, in particular, appear to respond to treatment and demonstrate lower rates of recidivism.[86] There is no "one size fits all" model. It is important for judicial officers to understand that the specialized nature of treatment and the many variables that contribute to its success make it different from other types of therapy that may be suggested for perpetrators. Washington State requires that professionals who provide treatment for sex offenders undergo specialized certification from the Department of Health.[87]

V. Understanding the Victim

Sexual violence affects people from all backgrounds. Victims are of every race, class, culture, gender, sexual orientation, and sexuality. Having an understanding of some common impacts of the trauma of sexual violence and common characteristics of victims is useful, but not all victims react in the same ways. In particular, it is important to understand that sexual violence may impact men differently than women. Society tells men to behave in certain ways in order to conform to a masculine ideal; this may include not showing vulnerability or expressing emotions.[88]

In a study comparing victims of sexual assault with victims of nonsexual assault, victims of sexual assault were found to experience more unsupportive behavior from society. Researchers also found that lack of support makes it more difficult for victims to adjust post-assault.[89] In the study of certified sexual assault victim advocates referenced above, 35 percent of the advocates responding reported that judicial officers in criminal proceedings are professional, attentive, and informative toward defendants. In contrast, only 22 percent of the advocates reported observing these qualities in the judicial officers' demeanor toward the victim. The justice system's treatment of victims can help or hurt their recovery process.[90]

A. Impact of Sexual Violence on the Victim

[84] Center for Sex Offender Management, "Myths and Facts About Sex Offenders" at 5
[85] Id.
[86] See Center for Sex Offender Management, "Fact Sheet: What You Need to Know About Sex Offenders" at 7; Center for Effective Public Policy, "The Role of Judges in Managing Juvenile Sex Offense Cases: Keys to Informed Decision making, A Judicial Education Curriculum" 32, 44 (2009)
[87] RCW 18.155 https://apps.leg.wa.gov/rcw/default.aspx?cite=18.155&full=true
[88] 1in6, "How Being Male Can Make it Hard to Heal", http://1in6.org/men/get-information/online-readings/masculinity-self-esteem-and-identity/how-being-male-can-make-it-hard-to-heal/
[89] P. A. Resnick & P. Nishith, "Sexual Assault" 39, *Victims of Crime* ,2nd edition, eds. R. C. Davis, A. J. Lurigio, & W. G. Skogan (Sage 1997)
[90] See Schafran, "Writing and Reading About Rape" at 1022; Resnick & Nishith, "Sexual Assault" at 45

Rape Trauma Syndrome is a term coined by Ann Wolbert Burgess, a psychiatrist, and Lynda Lytle Holstrom, a sociologist, in 1974.[91] It describes the reactions reported by victims of sexual assault. These emotional, physical, and behavioral reactions were grouped into an immediate stage and a long-term stage. Professionals who have worked with victims often describe a third stage, in between these two, referred to as the "underground stage," where victims attempt to forget the assault and move on with their lives without adequately dealing with the trauma.[92]

1. Emotional

Some common emotional reactions to the trauma of sexual violence are: guilt, shame, self-blame, embarrassment, fear, distrust, sadness, vulnerability, isolation, lack of control, anger, numbness, confusion, shock, disbelief, and denial.[93]

Thirty-eight percent of the women responding in a survey of Washington women who were sexually assaulted reported that the assault had a negative impact on how trusting they were of other people.[94] In another study, victims of rape reported significantly greater fear and anxiety than non-victims over a three-year post-rape period.[95]

Victims often blame themselves for the violence, thinking that they could have done something to prevent it from happening. As discussed above, perpetrators make a choice to sexually assault victims and this choice is not based on the victim's actions. When the justice system focuses on the victim's actions and behavior rather than the perpetrator's behavior, it engages in victim-blaming that reinforces the victim's self-blame. Victims who blame themselves experience more negative reactions to the violence.[96]

2. Psychological

Some common psychological reactions to the trauma of sexual violence are: nightmares, flashbacks, depression, difficulty concentrating, posttraumatic stress disorder (PTSD), anxiety, eating disorders, substance use or abuse, phobias, and low self-esteem.[97]

Washington women who had been sexually assaulted were six times more likely than women who had not been sexually assaulted to meet the diagnostic criteria for PTSD and three times more likely to meet the diagnostic criteria for major depressive disorder in their lifetime.[98] Another study found that over the two-year period immediately following an

---

[91] King County Sexual Assault Resource Center, "Rape Trauma Syndrome," http://www.kcsarc.org/sites/default/files/Resources%20-%20Rape%20Trauma%20Syndrome.pdf
[92] Id.
[93] National Sexual Violence Resource Center, "Impact of Sexual Violence, Fact Sheet," (2010) http://www.nsvrc.org/sites/default/files/NSVRC_Publicication_Factsheet_Impact-of-sexual-violence.pdf
[94] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 28
[95] Resnick& Nishith, "Sexual Assault" at 30
[96] Id. at 39
[97] National Sexual Violence Resource Center, "Impact of Sexual Violence, Fact Sheet"
[98] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 42

assault, victims of rape had significantly lower self-esteem than non-victims.[99] "Some victims…experience chronic problems for an indefinite time in the areas of fear/anxiety, depression, social adjustment, sexual functioning, and self-esteem."[100]

The justice system often fails to take into account these reactions by not showing as much sensitivity as is permissible to the victim's ongoing healing process.

3. Physical

A 2010 study by the Centers for Disease Control and Prevention found that both male and female victims reported significant short-term or long-term health impacts, such as PTSD symptoms, and overall poorer health than non-victims.[101] Although victims experience the effects of sexual violence in varying ways, the trauma of sexual violence has a profound impact on any victim's life.

Some common physical reactions to the trauma of sexual violence are: changes in eating or sleeping patterns, increased startle response, concerns about physical safety, and concerns about pregnancy or contracting an STI or HIV.[102] In addition, about half of Washington women victims of sexual assault surveyed reported changing their daily routines due to safety concerns.[103]

B. Characteristics of the Victim

An understanding or lack of understanding of the dynamics of sexual violence colors reactions to and beliefs about the victim. If judicial officers or jurors assume that the victim will appear a certain way on the stand, or should exhibit particular behavior when giving testimony, it can affect the listeners' ability to understand or find credible a victim who appears or behaves differently. This concept of implicit bias may need to be explained to the fact-finder. See WPI 1.01 and Comment (Rev. Dec 2017).

1. About half of the victims of sexual assault display a flat affect (little or no emotional expression) when giving testimony.

One of the main expectations that jurors and judicial officers often have is that the victim will appear frightened or emotional when testifying about the sexual assault. About half of the victims do testify in an expressive style that exhibits such emotion. However, the other half displays a controlled style, appearing calm and not showing emotion while testifying. This may be the result of intentional control, numbness, or of the victim having a naturally flat affect. The victim may also have had to tell the story so many times that he or

[99] Resnick& Nishith, "Sexual Assault" at 30
[100] Id. at 31
[101] Black, et al. "The National Intimate Partner and Sexual Violence Survey" at 1-3
[102] National Sexual Violence Resource Center, "Impact of Sexual Violence, Fact Sheet"
[103] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 43

she is unable to relate it with emotion.[104] In addition, because of the increased likelihood that adult victims of sexual violence were also sexually abused as children, they may have learned to detach themselves emotionally from the experience of victimization.[105]

Judges or jurors who are expecting the victim to appear emotional may find a controlled victim's testimony not credible because it is not consistent with how they expect a victim to react. On the other hand, victims who are too emotional may appear hysterical.[106] It is reasonable to expect victims of sexual violence to react in a variety of ways, as everyone does, to a traumatic event. The testimony of victims should not be discounted simply because it is not expressed in the manner in which listeners believe they would express it or expect the victim to express it.

2. Most victims of sexual violence do not have physical injuries.

Most victims of sexual violence do not experience lasting, visible physical injuries.[107] The fact that there are no physical injuries does not mean that a sexual offense was nonviolent, however. Sexual offenses are inherently violent and discounting the psychological injury of sexual violence does a disservice to victims.[108]

Although most victims do not experience physical injuries, many fear serious injury or death. The National Violence Against Women Survey found that, during sexual assaults, about 43 percent of the women victims surveyed thought that they or someone close to them would be seriously injured or killed.[109] In a survey of Washington women victims of sexual assault 45 percent of those who were rape victims feared death or serious harm and one-third of those who were victims of sexual assaults other than rape had such fears.[110] Such fears of serious injury or death have been found by several studies to predict increased psychological impacts for victims.[111]

3. Many victims of sexual violence do not report the violence to the police or delay in doing so.

It is commonly assumed that a victim of sexual violence will immediately report it to the police. However, data shows that sexual assault is rarely reported. In the Washington

---

[104] See Schafran, "Writing and Reading About Rape" at 1024-1025; Lynn Hecht Schafran, "Maiming the Soul: Judges, Sentencing, and the Myth of the Nonviolent Rapist", 20 *Ford. Urban L. Jour.* 439, 451 (1992)

[105] Jeremy Coid, Ann Petruckevitch, Gene Feder, Wai-Shan Chung, Jo Richardson & Stirling Moorey, "Relation Between Childhood Sexual and Physical Abuse and Risk of Revictimisation in Women: A Cross-sectional Survey", 358 *The Lancet* 450 (2001)

[106] Schafran, "Writing and Reading About Rape" at 1024-1025

[107] See Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 18 (20 percent of victims experienced physical injury); Tjaden & Thoennes, "Extent, Nature, and Consequences of Rape Victimization" at 26 (31.5 percent of females and 16.1 percent of males were physically injured)

[108] Schafran, "Maiming the Soul: Judges, Sentencing, and the Myth of the Nonviolent Rapist" at 441, 443

[109] U.S. Department of Justice, National Institute of Justice & the Centers for Disease Control and Prevention, Special Report, "Extent, Nature, and Consequences of Rape Victimization" at 27

[110] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 18

[111] Resnick& Nishith, "Sexual Assault" at 31

study, the women who did not report their sexual assault included the following as reasons: concern about not being believed, shame, fear, and not being sure it was a crime. In addition, victims of sexual assault were significantly more likely than non-victims to think that the police and legal response to sexual assault victims was poor, with 19 percent rating it as fair or poor and only nine percent rating it as excellent.[112]

Those victims who do report are likely to delay doing so.[113] This is because of the considerations above and also because of factors such as the stage they are at in their healing process; their ability to begin processing the trauma; and the possible continued power and control, both emotional and financial, a perpetrator may have over them (e.g. a victim of a sexual assault by an intimate partner may continue to be dependent on the perpetrator for financial support and may weigh reporting the assault against the need for that support).

4. Victims of sexual violence may not be able to recall details of the violence or may make inconsistent statements.

During a traumatic event, such as an act of sexual violence, victims may dissociate in order to cope with what is happening to them. Dissociation is "a disruption in the normal flow of consciousness that results in a lack of integration between thoughts, feelings, and physical sensations and our ongoing flow of awareness of the world around us."[114] A victim may "check out" in order to endure the assault, making it difficult to later recall details of the assault.[115] Like dissociation, shock, denial, and suppression may make some details of a victim's account inconsistent.[116] The effects of victim dissociation, shock, denial, and suppression should be carefully considered in determining whether inconsistent statements by a victim give reason to question the victim's credibility

5. Many victims of sexual violence do not physically resist the assault.

Jurors and judicial officers may expect a victim of sexual violence to physically resist the violence or fight back. One study found that 32 percent of the jurors in the study believed resistance was a critical factor in determining if the defendant was culpable, and 59 percent believed that a woman "should do everything she can to repel her attacker."[117] In fact, many victims do not resist for a variety of reasons.

Some studies have shown that resistance can increase the violence of the attack.[118] As noted above, many victims fear that they or someone close to them will be seriously injured or killed. Other victims are too afraid to move; they dissociate (see above) or black out.[119]

---

[112] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 34 -35
[113] Schafran, "Writing and Reading About Rape" at 1016
[114] Resnick& Nishith, "Sexual Assault" at 31
[115] Id.
[116] Schafran, "Writing and Reading About Rape" at 1017
[117] National Judicial Education Project, "Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases, Voir Dire, What the Research About Rape Jurors Tells Us" 3 (2000)
[118] Schafran, "Writing and Reading About Rape" at 989
[119] Id. at 990

Since most victims know and trust the person who assaulted them, they may be caught off guard and may not have the opportunity to fight back.[120]

In addition, some sexual assaults occur when the victim is unable to give or withhold consent due to disability or mental incapacity.[121] These victims are likely to be unable to offer physical resistance.

6. Contrary to popular belief, most rape allegations are truthful.

Public perceptions of rape include the belief that many rape allegations are false. One survey found that 49 percent of men and 42 percent of women agreed with the statement: "Many women cry rape – saying they have been raped when it really hasn't happened."[122] However, a comprehensive review of reliable research on the percentage of false reports determined that only two to eight percent of rape reports are false[123]

7. Victims of sexual violence by an intimate partner are as traumatized as victims of non-intimate perpetrators.

When the perpetrator is someone that the victim knows and trusts, it can have very serious negative consequences. For example, in the Washington study, if the perpetrator was an intimate partner, this was associated with worse impacts and women were significantly more likely to have developed PTSD.[124] For victims of sexual violence by an intimate partner the trauma of the sexual violence includes coping with the impact of the perpetrator being someone the victim knows, loves, trusts, and may depend on for financial support or co-parenting of children. Also, intimate partner sexual violence is often a repeated crime, with 79 percent of women victims reporting repeated episodes of forced sex.[125]

8. Some victims experience a sexual response during rape.

Although a small number of victims experience a sexual response during rape, jurors and judicial officers should not equate a sexual response with consensual sex. This sexual stimulation and response is purely a physical reaction over which the victim does not have control.[126] Victims who experience this may feel betrayed by their own bodies.

9. Victims have a variety of reasons for engaging with the criminal justice process, not all of them retributive.

Although some victims report sexual violence and go through the criminal justice process because they want their perpetrator to be punished, many do not have this goal.

---

[120] Schafran, "Writing and Reading About Rape" at 991
[121] RCW 9A.44.050 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050
[122] National Judicial Education Project, "Understanding Sexual Violence" at 3
[123] Lonsway, Archambault & Lisak, "False Reports: Moving Beyond the Issue" at 2-3
[124] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 22, 29
[125] Judith McFarlane & Ann Malecha, "Sexual Assault Among Intimates: Frequency, Consequences and Treatments" (2005)
[126] Schafran, "Writing and Reading About Rape" at 997-998

Many victims access the legal system because they want, "acknowledgement of wrongdoing and repair of the damage caused."[127] This means different things to different victims. For some victims, it is enough that someone other than themselves acknowledges that they were sexually assaulted. They want validation from their community that the crime happened and they were harmed by it.[128] Even victims who desire punishment for the perpetrator are more interested in consistency from victim to victim than they are with the severity of punishment.[129] Since the criminal justice process is, by nature, retributive, judicial officers should be mindful that victims may have other goals and needs.

C. Recognizing the Traumatic Effect of Court Proceedings Upon Victims

In addition to the devastating impacts of sexual violence described above, the legal process itself can be traumatizing. Victims often experience what has been called "secondary victimization" by the justice system. This term is used because victims often report that the system's treatment of them feels like a second assault, in that it is hurtful, invasive, and traumatizing.[130] When legal system personnel ask victims what they were wearing, or whether they were drinking, such questions can often be perceived as excusing the perpetrator's behavior and blaming the victim for violence that was not the victim's fault. In the survey of certified sexual assault victim advocates referenced above, 34 percent of the advocates responding disagreed with the statement, "The justice system [in the specific area of the state I currently work in] gives fair/equal treatment to sexual assault cases when the victim has been under the influence." Approximately half of all victims of rape report experiencing this secondary victimization.[131]

As discussed above, very few victims report being sexually assaulted to the police. A review of research on the subject found that many victims who did report said they would not have reported if they had known what the experience was going to be like.[132] In fact, many victims predicted that they would never seek help from the criminal justice system again.[133]

Two key points about the justice system's treatment of victims are important. First, the system should not engage in blaming the victim for the violence.[134] Sexual violence is the result of a perpetrator's choices, not a victim's actions or behavior.

Second, continuances and other delays have a negative impact on the victim's ability to process and heal from the sexual violence.[135] Victims cite delay as a primary reason why

---

[127] Mary P. Koss, "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action", 1087 Annals *of the New York Academy of Sciences* 206, 207 (2006)
[128] Judith Herman, "Justice from the Victim's Perspective", 11 Violence *Against Women* 571, 585 (Sage 2005)
[129] Id. at 595
[130] Debra Patterson, "The Linkage Between Secondary Victimization and Rape Case Outcomes," 20 *Journal of Interpersonal Violence* 1, 2 (2010)
[131] Id. at 13
[132] Id. at 2
[133] Id. at 14
[134] Resnick& Nishith, "Sexual Assault" at 31
[135] Id.

they do not follow through with the process.[136] If delay cannot be avoided, the person who informs the victim of the delay should do so with concern and acknowledge the impact it may have.[137]

When victims of sexual assault are treated with compassion by the justice system, they show an increased commitment to participating in the judicial process.[138] Cases with victims who are committed to participating in the process are less likely to put a strain on limited court resources. Doing everything permissible to reduce the traumatic impact of court proceedings is a necessary step.

VI. Victims' Rights

In Washington, victims of crime have certain rights that are afforded them by statute and the state constitution:

> A. Victims of Crime – Rights – Washington State Constitution: Article I, Section 35
> A. Rights of Victims, Survivors, and Witnesses – RCW 7.69.030, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.030
> C. Rights Enumerated – RCW 7.69B.020, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69B.020
> D. Rights of Child Victims and Witnesses – RCW 7.69A.030, http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69A.030

VII. Jury Selection in Sex Offense Trials

The National Judicial Education Project canvassed judges who had attended their judicial education programs and compiled the report, "Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case." One of the things judges who were canvassed wished they had known was that "a thorough voir dire that includes questions about the rape myths relevant in the case at bar is essential to seating an impartial jury."[139]

A rape myth is a belief about the dynamics of sexual assault that is not based in fact. For example, the belief that the clothing a victim wears has an impact on the likelihood that the victim will be raped is a rape myth. Belief in this myth easily translates into the belief that a victim who wears particular types of clothing deserves to be raped and thus, the perpetrator is not at fault because "[the victim] was asking for it." Many of these rape myths are addressed above in the sections on perpetrators and victims.

---

[136] Schafran, "Writing and Reading About Rape" at 1032
[137] Id.
[138] Patterson, "The Linkage Between Secondary Victimization and Rape Case Outcomes" at 15
[139] National Judicial Education Project, "Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case" at 15 (2010). As to Implicit Bias, see also WPI 1.01 and Comment (Rev. Dec 2017).

Studies have found that jurors make their decisions based on the victim's character and lifestyle, disregarding the evidence and deciding cases based on personal values.[140] "Juror adherence to rape myths presents a major barrier to fairness in these trials" because these biased jurors cannot be impartial.[141] Thus, it is essential to know if potential jurors adhere to rape myths and are likely to decide cases based on those beliefs.

VIII. Resources

A. Washington Coalition of Sexual Assault Programs

The Washington Coalition of Sexual Assault Programs (WCSAP) is a nonprofit organization, founded in 1979 to address sexual assault in Washington. WCSAP's mission is to unite agencies engaged in the elimination of sexual violence, through education, advocacy, victim services, and social change. WCSAP is a statewide membership organization of community rape crisis centers/sexual assault programs and supportive individuals committed to the elimination of sexual violence.

WCSAP supports the rights of people to have access to quality information, advocacy, crisis intervention, treatment, education, and prevention services. The organization also supports the right of a victim to make choices about reporting, prosecution, healthcare, future safety, and other issues raised by the experience. To these ends, WCSAP:

- provides technical assistance and training on sexual assault issues and service provision to program and individual members who support victims, victims' family and friends, the general public, and all those whose lives have been affected by sexual assault;
- develops and publishes educational materials on relevant advocacy and prevention topics, including addressing current research;
- advocates for public policy changes on a state and national level;
- promotes awareness and education about the impact of sexual assault on individuals and communities through an annual statewide Sexual Assault Awareness Month (April) campaign;
- operates a Prevention Resource Center to provide technical assistance, trainings, and resources on the prevention of sexual violence

WCSAP is located in Olympia, Washington. Connect with WCSAP or learn more about what communities are doing to end sexual assault in Washington at www.wcsap.org.

---

[140] National Judicial Education Project, "Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases, Voir Dire, What the Research About Rape Jurors Tells Us" at 1 (2000); see also Christopher Mallios & Toolsi Meisner, "Educating Juries in Sexual Assault Cases: Part 1: Using Voir Dire to Eliminate Jury Bias" (2010) http://www.aequitasresource.org/EducatingJuriesInSexualAssaultCasesPart1.pdf

[141] Schafran, "Writing and Reading About Rape" at 1029, 1033

B. Community-based Efforts That Address Sexual Assault[142]

Rape crisis centers/sexual assault programs are available in every community in Washington. Advocates work directly with victims of sexual assault, using an individual and community empowerment model. Empowerment means promoting a sense of power from within by supporting a survivor's self-determination and autonomy. Advocates create conditions for empowerment by supporting a survivor's safety and healing and by educating their individual communities about sexual violence.

Sexual assault programs provide a myriad of services to individual survivors, survivors' friends and family, and their communities. In Washington, some of the services that advocates provide include:

- crisis intervention, including operating a 24-hour hotline;
- general advocacy in the form of ongoing support, psycho-educational support groups, resources, and referrals for other services;
- medical advocacy, which includes accompaniment to forensic exams;
- system advocacy;
- legal advocacy, which includes accompaniment to legal proceedings, assistance understanding the justice system and processes, and acting as a liaison between the victim and the legal system

Sexual assault advocates' communication with the victims with whom they work is privileged under RCW 5.60.060(7). The statute provides that "A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate."

Although there is limited research on the effectiveness of advocacy, a recent study compared victims of rape who worked with an advocate to those who did not, to determine if victims with advocates received more services or had fewer negative experiences with system personnel.[143] Victims of rape who had advocates reported receiving more services, and reported less secondary victimization from system personnel.[144] Secondary victimization has been defined as "insensitive, victim-blaming treatment" from system personnel that "exacerbates the trauma of the rape."[145] Another study reported that victims were treated better when advocates were present during interviews, and that detectives did not engage in secondary victimization behavior.[146] Since this same study found a linkage between secondary victimization and worse case outcomes, it seems that the presence of an advocate may improve case outcomes.

---

[142] See Appendix A starting on p. 26 of this chapter for a list of community sexual assault programs by county

[143] Rebecca Campbell, "Rape Survivors' Experiences With the Legal and Medical Systems: Do Rape Advocates Make a Difference?", 12 *Violence Against Women* 30, 32 (2006)

[144] Id. at 38

[145] Id. at 30 – 31

[146] Debra Patterson, 'The Linkage Between Secondary Victimization and Rape Case Outcomes", 20 *J. Interpers. Viol*. 1, 16 (2010)

The 2002 Washington study referenced above found that 39 percent of women who reported to the police had a legal advocate and that the large majority of victims who contacted a rape crisis line found it helpful.[147] A 2011 report by CourtWatch, a program of the King County Sexual Assault Resource Center, found a strong correlation between a victim having an advocate and the victim obtaining a full Sexual Assault Protection Order (SAPO) .[148] Victims with advocates obtained full orders in 80 percent of SAPO cases, while victims without advocates obtained full orders only 34 percent of the time.[149] Two of the reasons cited by the report that the presence of an advocate may improve outcomes for victims were: (1) advocates can explain the protection order process, and (2) there is less likelihood that a victim will not appear for a hearing if he or she is working with an advocate.[150]

IX. Conclusion

Sexual violence is prevalent in Washington and the impact of sexual violence on victims is devastating. Often the dynamics of sexual violence and the negative impacts that secondary victimization has on victims are not well understood within the justice system. This lack of understanding is part of what causes the justice gap – the tiny number of convictions that result from the already very small number of reported sexual assaults. Too often Washington's justice system fails to hold sex offenders accountable. Without accountability, perpetrators of sexual violence, most of whom research shows are serial offenders of interpersonal violence, are likely to continue to perpetrate.

Expanded judicial education resources and increased judicial leadership are yielding promising practices in courtrooms. However, continued improvement is critically needed. In the survey of certified sexual assault victim advocates referenced above, only 25 percent of the advocates responding who accompany victims of sexual assault to criminal and civil proceedings reported that judicial officers are respectful, kind, and compassionate to victims in civil proceedings. Similarly, in criminal cases, only twenty percent of the advocates reported that judicial officers are respectful, sensitive, and patient to victims.

Judicial officers have the power and authority to create an atmosphere in which fair and impartial justice is both perceived and administered. Judicial leadership will continue to be critical in better understanding the dynamics of sexual offenses in order to maintain the delicate balance between the rights of victims, the accused and the public that will foster that atmosphere.

---

[147] Berliner, Fine & Moore, "Sexual Assault Experiences and Perceptions" at 20 - 21
[148] Court form SA 3.015 http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=65
[149] CourtWatch, A Program of KCSARC, "Analyzing the Impact and Application of the Sexual Assault Protection Order in King County" 17, http://www.kcsarc.org/courtwatchreports
[150] Id.

APPENDIX A
Washington Community Sexual Assault Programs-By County[1]

Adams & Grant Counties
New Hope DV/SA Services
Hotline: (888) 560-6027
Office Phone: (509) 764-8402
Website: www.grantcountywa.gov/GrIS/New-Hope/

Asotin & Garfield Counties
Quality Behavioral Health
Hotline: (888) 475-5665
Office Phone: (509) 758-3341
Website: www.qualitybehavioralhealth.com

Benton & Franklin Counties
Support, Advocacy & Resource Center
Hotline: (509) 374-5391
Office Phone: (509) 374-5391
Website: bfcac.org/home-base/emergency-services-sarc

Chelan & Douglas Counties
SAGE, Safety Advocacy Growth and Empowerment
Hotline: (509) 663-7446
Office Phone: (509) 663-7446
Website: www.findsafety.org

Clallam County
Healthy Families of Clallam County
Hotline: (360) 452-HELP
Office Phone: (360) 452-3811
Website: www.healthyfam.org

Clallam County
Forks Abuse Program
Hotline: (360) 374-2273
Office Phone: (360) 374-6411
Website: www.forksabuseprogram.org

[1] http://www.wcsap.org/find-help, Last visited April 28, 2017

Clark County
YWCA - Clark County - Sexual Assault Program
Hotline: (800) 695-0167
Office Phone: (360) 696-0167
Website:
http://www.ywcaclarkcounty.org/site/c.brKRL6NKLnJ4G/b.9240777/k.66E3/Sexual_Assault_Program.htm

Columbia & Walla Walla Counties
YWCA - Walla Walla County
Hotline: (509) 529-9922
Office Phone: (509) 525-2570
Website: www.ywcaww.org

Cowlitz County
Emergency Support Shelter
Hotline: (360) 636-8471
Office Phone: (360) 425-1176
Website: www.esshelter.com

Grays Harbor County
Beyond Survival
Hotline: (888) 626-2640
Office Phone: (360) 533-9751
Website: www.ghbeyondsurvival.com

Island County
Citizens Against Domestic and Sexual Abuse
Hotline: (800) 215-5669
Office Phone: (360) 675-7057
Website: www.cadacanhelp.org

Jefferson County
Dove House Advocacy Services
Hotline: (360) 385-5291
Office Phone: (360) 385-5292
Website: www.dovehousejc.org/

King County
Harborview Center for Sexual Assault & Traumatic Stress (HCSATS)
Hotline: (206) 744-1600
Office Phone: (206) 744-1637
Website: www.hcsats.org

King County
King County Sexual Assault Resource Center (KCSARC)
Hotline: (888) 998-6423
Office Phone: (425) 226-5062
Website: www.kcsarc.org

King County
Abused Deaf Women's Advocacy Services
Hotline: (206) 812-1001
Office Phone: (206) 922-7088
Website: www.adwas.org

Kitsap County
Kitsap Sexual Assault Center
Hotline: (360) 479-8500
Office Phone: (360) 479-1788
Website: www.ksacservices.com/

Kittitas County
Aspen Victim Services of Kittitas County
Hotline: (509) 925-9384
Office Phone: (509) 925-9384

Klickitat County
Washington Gorge Action Programs - Programs For Peaceful Living
Hotline: (800) 352-5541
Office Phone: (509) 493-1533
Website: www.wgap.ws

Lewis County
Human Response Network
Hotline: (800) 244-7414
Office Phone: (360) 748-6601
Website: www.hrnlc.org/

Lincoln County
Family Resource Center of Lincoln County
Hotline: (800) 932-0932
Office Phone: (509) 725-4358
Website: www.facebook.com/pages/Family-Resource-Center-of-Lincoln-County/162645347098987

Mason County
Prevention, Advocacy & Specialized Services
Hotline: (360) 490-5228
Office Phone: (360) 426-6925
Website: pass2012.wix.com/pass

Okanogan County
The Support Center
Hotline: (888) 826-3221
Office Phone: (509) 826-3221
Website: www.thesupportcenter.org

Pacific County
Crisis Support Network
Hotline: (800) 435-7276
Office Phone: (360) 875-6702
Website: www.crisis-support.org

Pend Oreille County
Pend Oreille Crime Victim Services-Family Crisis Network
Hotline: (509) 447-5483
Office Phone: (509) 447-2274
Website: www.pofcn.org

Pierce County
Rebuilding Hope! Sexual Assault Center for Pierce County
Hotline: (253) 474-7273
Office Phone: (253) 597-6424
Website: www.sexualassaultcenter.com

San Juan County
SAFE San Juans
Hotline: (360) 376-5979
Office Phone: (360) 376-5979
Website: www.safesj.org

San Juan County
DV/SA Services of the San Juan Islands, Lopez Island
Hotline: (360) 468-4567
Office Phone: (360) 468-3788
Website: www.dvsassanjuans.org

San Juan County
DV/SA Services of the San Juan Islands, Friday Harbor
Hotline: (360) 378-2345
Office Phone: (360) 378-8680
Website: www.dvsassanjuans.org

Skagit County
Skagit Domestic Violence and Sexual Assault Services
Hotline: (888) 336-9591
Office Phone: (360) 336-9591
Website: www.skagitdvsas.org

Skamania County
Skamania County Council on DV and SA
Hotline: (877) 427-4210
Office Phone: (509) 427-4210

Snohomish County
Providence Intervention Center for Assault and Abuse
Hotline: (425) 252-4800
Office Phone: (425) 297-5780
Website: washington.providence.org/hospitals/regional-medical-center/services/assault-abuse/

Spokane County
Sexual Assault & Family Trauma (SAFeT) Response Center
Hotline: (509) 624-7273
Office Phone: (509) 747-8224
Website: www.lcsnw.org/spokane/SAFeT.html

Stevens County
Rural Resources Victim Services
Hotline: (509) 684-6139
Office Phone: (509) 684-8421
Website: www.ruralresources.org/get-help/sexual-assault/

Thurston County
SafePlace
Hotline: (360) 754-6300
Office Phone: (360) 786-8754
Website: www.safeplaceolympia.org

Wahkiakum County
St. James Family Center
Hotline: (360) 795-6400
Office Phone: (360) 795-6401
Website: www.stjamesfc.org

Whatcom County
DV/SA Services of Whatcom County
Hotline: (360) 715-1563
Office Phone: (360) 671-5714
Website: www.dvsas.org

Whitman County
Alternatives to Violence of the Palouse
Hotline: (509) 332-4357
Office Phone: (509) 332-0552
Website: www.atvp.org

Yakima County
Lower Valley Crisis & Support Center
Hotline: (509) 837-6689
Office Phone: (509) 837-6689

Yakima County
Aspen Victim Advocacy Services
Hotline: (509) 452-9675
Office Phone: (509) 452-9675
Website: http://www.comphc.org/

APPENDIX B
Neurobiology of Trauma–Bibliography

This Appendix contains a multimedia list of references related to the neurobiology of trauma.

Articles:

Hopper, James, Ph.D., "Why many rape victims don't fight or yell," The Washington Post (June 23, 2015) Available at https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/?utm_term=.175b9087125f

Hopper, James, Ph.D. and Lisak, David, Ph.D., "Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories," Time Magazine (December 9, 2014) Available at http://time.com/3625414/rape-trauma-brain-memory/

Wilson, Christopher, Psy.D., Lonsway, Kimberly, Ph.D., and Archambault, Sergeant Joanne (Ret.), Hopper, James, Ph.D "Understanding the Neurobiology of Trauma and Implications for Interviewing Victims," (November 2016) Available at https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=842

Webinars:

Campbell, Rebecca, Ph.D., "The Neurobiology of Sexual Assault" (December 3, 2012) Available at https://www.nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx

Hopper, Jim, Ph.D., "Neurobiology of Sexual Assault 2-Part Webinar Series," (September 15, 2016) Available at https://www.evawintl.org/WebinarArchive.aspx#hopper See also Accompanying "Neurobiology of Trauma FAQ" available at http://www.evawintl.org/PAGEID28/Best-Practices/FAQs/Neurobiology-of-Trauma

CHAPTER 2
Sexual Offenses

I. Index

* This offense is included in this chapter because of the alternative element of exposing or administering the HIV virus.

* Sexual motivation is not a separate offense, but rather a special allegation accompanying a non-sexual offense charge that, if proven, constitutes an aggravating factor that may result in an exceptional sentence. Because the allegation adds a sexual factor to a non-sexual offense, it is listed here and its application is discussed in Chapter 7, Post Conviction and Sentencing, Section X.

II. Offense Information

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Allowing Minor on Premises of Live Erotic Performance RCW 9.68A.150 *Gross Misdemeanor*	A person knowingly allows a minor to be on the premises of a commercial establishment open to the public if there is a live performance containing erotic material.	2 years after the crime
Assault in the First Degree RCW 9A.36.011 *Class A Felony* *Three strike offense*	A person with intent to inflict great bodily harm (a) assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or (b) administers, exposes, or transmits to or causes to be taken by another, poison, the HIV virus, or any other destructive or noxious substance; or (c) assaults another and inflicts great bodily harm.	3 years after the crime
Child Molestation in the First Degree RCW 9A.44.083 *Class A Felony* *Two strike offense* [RCW 9.94A.030 (38)(b)] or *Three strike offense* [RCW 9.94A.030 (38)(a)]	A person has, or knowingly causes another person under age 18 to have, sexual contact with another who is less than 12 years of age and not married to the perpetrator, and the perpetrator is at least 36 months older than the victim.	Up to the victim's 30th birthday

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Child Molestation in the Second Degree RCW 9A.44.086 *Class B Felony* *Three strike offense*	A person has, or knowingly causes another person under age 18 to have, sexual contact with another who is 12 or 13 years of age and not married to the perpetrator, and the perpetrator is at least 36 months older than the victim.	Up to the victim's 30th birthday
Child Molestation in the Third Degree RCW 9A.44.089 *Class C Felony*	A person has, or knowingly causes another person under age 18 to have, sexual contact with another who is 14 or 15 years of age and not married to the perpetrator, and the perpetrator is at least 48 months older than the victim.	Up to the victim's 30th birthday
Commercial Sexual Abuse of a Minor (formerly Patronizing a Juvenile Prostitute) RCW 9.68A.100 *Class B Felony* Note: RCW 9A.88.130 requires the court to impose specific restrictions and requirements on an offender	A person (a) pays a fee as compensation for a minor having engaged in sexual conduct with him or her; (b) pays or agrees to pay a fee pursuant to an understanding that the minor will engage in sexual conduct with him or her in return; or (c) solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.	3 years after the crime
Communication with a Minor for Immoral Purposes RCW 9.68A.090 *Class C Felony* [if (a) prior conviction of this offense or felony sex offense or (b) the communication is by electronic means] *Gross Misdemeanor*	A person communicates with a minor or person he or she believes to be a minor for immoral purposes of a sexual nature.	If felony, 3 years after the crime If gross misdemeanor, 2 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Criminal Attempt RCW 9A.28.020 *Class A Felony* [if crime attempted is first degree child molestation, indecent liberties by forcible compulsion, first or second degree rape, first or second degree rape of a child] *Class B Felony* [if crime attempted is any other Class A felony] *Class C Felony* [if crime attempted is a Class B Felony] *Gross Misdemeanor* [if crime attempted is a Class C Felony] *Misdemeanor* [if crime attempted is a gross misdemeanor or misdemeanor] *Three strike offense* [if attempt to commit Class A felony, Class B felony with a finding of sexual motivation, or any felony with a finding of a deadly weapon]	A person, with intent to commit a specific crime, does any act which is a substantial step toward commission of that crime.	If felony, 3 years after the crime If gross misdemeanor, 2 years after the crime If misdemeanor, 1 year after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Custodial Sexual Misconduct in the First Degree RCW9A.44.160 *Class C Felony*	A person has sexual intercourse with a victim who (a) is a resident of an adult or juvenile correctional facility, the perpetrator is an employee or contract personnel of a correctional agency, and the perpetrator has, or the victim reasonably believes the perpetrator has the ability to influence the terms, conditions, length or fact of incarceration, or (b) is being detained, under arrest or in custody of a law enforcement officer and the perpetrator is a law enforcement officer.	3 years after the crime
Custodial Sexual Misconduct in the Second Degree RCW9A.44.170 *Gross Misdemeanor*	A person has sexual contact with a victim who (a) is a resident of an adult or juvenile correctional facility, the perpetrator is an employee or contract personnel of a correctional agency, and the perpetrator has, or the victim reasonably believes the perpetrator has the ability to influence the terms, conditions, length or fact of incarceration, or (b) is being detained, under arrest or in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.	2 years after the crime
Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree RCW9.68A.050(1)(a) *Class B Felony*	A person (a) knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells visual or printed matter depicting a minor engaging in sexually explicit conduct defined in RCW 9.68A.011(4) (a) through (e), or (b) possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter depicting a minor engaging in sexually explicit conduct defined in RCW 9.68A.110 (4) (a) through (e).	3 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct in the Second Degree RCW9.68A.050(2)(a) *Class C Felony*	A person (a) knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances or attempts to finance, or sells visual or printed matter depicting a minor engaging in sexually explicit conduct defined in RCW 9.68A.110 (4) (f) or (g), or (b) possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter depicting a minor engaging in sexually explicit conduct defined in RCW 9.68A.110 (4) (f) or (g).	3 years after the crime
Failure to Report Depictions of Minors Engaged in Sexually Explicit Conduct Submitted for Processing or Producing RCW 9.68A.080(1) *Gross Misdemeanor*	A person fails to immediately report to law enforcement visual or printed matter submitted for processing or producing that the person has reasonable cause to believe depicts a minor engaged in sexually explicit conduct.	2 years after the crime
Incest in the First Degree RCW 9A.64.020 *Class B Felony* *Three strike offense* [if committed against a child under 14 years]	A perpetrator has sexual intercourse with a person known to the perpetrator to be related to him or her as an ancestor, descendant (including minor step and adopted children), or sibling (including half siblings).	3 years after the crime if the victim is 18 or over at the time of the offense Up to the victim's 30th birthday if the victim is younger than 18 at the time of the offense
Incest in the Second Degree RCW 9A.64.020 *Class C Felony* *Three strike offense* [if committed against a child under 14 years]	A perpetrator has sexual contact with a person known to the perpetrator to be related to him or her as an ancestor, descendant (including minor step and adopted children), or sibling (including half siblings).	3 years after the crime if the victim is 18 or over at the time of the offense Up to the victim's 30th birthday if the victim is younger than 18 at the time of the offense

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Indecent Exposure RCW 9A.88.010 *Class C Felony* [if prior conviction of indecent exposure or a sex offense under RCW 9.94A.030] *Gross Misdemeanor* [if first offense and the victim is under the age of 14] *Misdemeanor* [if first offense and victim is 14 or older]	A person intentionally makes an open and obscene physical exposure of one's own body or that of another, knowing that it is likely to cause reasonable affront or alarm.	If Class C felony, 3 years after the crime If gross misdemeanor, 2 years after the crime If misdemeanor, 1 year after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Indecent Liberties RCW 9A.44.100 *Class A Felony* [if by forcible compulsion] *Class B Felony* [if not by forcible compulsion] *Two strike offense* [if by forcible compulsion] *Three strike offense* [if not by forcible compulsion]	A person knowingly causes another person to have sexual contact by (a) forcible compulsion, or (b) when the victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless, or (c) when the victim is developmentally disabled, the perpetrator is not married to the victim and has supervisory authority over the victim or was providing transportation to the victim within the course of the perpetrator's employment, or (d) when the perpetrator is a health care provider, the victim is a client or patient, and the contact occurs during treatment or services, or (e) when the victim is a resident of a facility for mentally disordered or chemically dependent persons and the perpetrator has supervisory authority over the victim, or (f) when the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and has a significant relationship to the victim or was providing transportation to the victim within the course of the perpetrator's employment.	Up to the victim's 30th birthday if incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless and the victim was under 18 at the time of the offense 10 years after the crime if the victim was incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless and the victim was over 18 at the time of the offense Otherwise, 3 years after the crime
Luring RCW 9A.40.090 *Class C Felony*	A person orders, lures, or attempts to lure a person under the age of 16 or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle or away from a transportation terminal; does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and is unknown to the child or developmentally disabled person.	3 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Patronizing a Prostitute RCW 9A.88.110 *Misdemeanor*	A perpetrator (a) pays another person as compensation for such person or a third person having engaged in sexual conduct with the perpetrator; or (b) pays or agrees to pay another person pursuant to an understanding that in return such person will engage in sexual conduct with the perpetrator; or (c) solicits or requests another person to engage in sexual conduct with the perpetrator in return for a fee.	1 year after the crime
Permitting Commercial Sexual Abuse of a Minor RCW 9.68A.103 *Gross Misdemeanor*	A person, having possession or control of premises he or she knows are being used for commercial sexual abuse of a minor, fails to make reasonable effort to halt or abate such use and to make reasonable effort to notify law enforcement.	2 years after the crime
Permitting Prostitution RCW 9A.88.090 *Misdemeanor*	A person, having possession or control of premises he or she knows are being used for prostitution, fails to make reasonable effort to halt or abate such use.	1 year after the crime
Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree RCW 9.68A.070(1) *Class B Felony*	A person knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011 (4)(a) through (e).	3 years after the crime
Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in the Second Degree RCW 9.68A.070(2) *Class C Felony*	A person knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011 (4)(f) or (g).	3 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Promoting Commercial Sexual Abuse of a Minor RCW 9.68A.101 *Class A Felony* *Three strike offense*	A person knowingly (a) advances commercial sexual abuse or a sexually explicit act of a minor or (b) profits from a minor engaged in sexual conduct or a sexually explicit act.	3 years after the crime
Promoting Prostitution in the First Degree RCW 9A.88.070 *Class B Felony*	A person knowingly advances prostitution by (a) compelling a person by threat or force to engage in prostitution, or profits from prostitution resulting from threat or force; or (b) compelling a person, with a mental incapacity or developmental disability rendering the person incapable of consent, to engage in prostitution, or profits from prostitution resulting from the compulsion.	3 years after the crime
Promoting Prostitution in the Second Degree RCW 9A.88.080 *Class C Felony*	A person knowingly (a) profits from prostitution or (b) advances prostitution.	3 years after the crime
Promoting Travel for Commercial Sexual Abuse of a Minor RCW 9.68A.102 *Class C Felony*	A person knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in or promoting commercial sexual abuse of a minor if occurring in Washington.	3 years after the crime
Promoting Travel for Prostitution RCW 9A.88.085 *Class C Felony*	A person knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of patronizing a prostitute or promoting prostitution occurring in Washington.	3 years after the crime
Prostitution RCW 9A.88.030 *Misdemeanor*	A person engages in or agrees or offers to engage in sexual conduct with another person in return for a fee.	1 year after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Rape in the First Degree RCW 9A.44.040 *Class A Felony* *Two strike offense* *Three strike offense*	A person has sexual intercourse with another person by forcible compulsion where the perpetrator or accessory (a) uses or threatens to use a deadly weapon; (b) kidnaps the victim; (c) inflicts serious physical injury; or (d) feloniously enters into the building or vehicle where the victim is situated.	Up to the victim's 30th birthday if victim was younger than 18 at time of the rape 10 years if reported to law enforcement within 1 year and the victim was 18 or older at time of the rape 3 years if not reported to law enforcement within 1 year and the victim was 18 or older at time of the rape

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Rape in the Second Degree RCW 9A.44.050 *Class A Felony* *Two strike offense* *Three strike offense*	A person has sexual intercourse with another person under circumstances not constituting first degree rape (a) by forcible compulsion; or (b) when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; or (c) when the victim is developmentally disabled and the perpetrator is not married to the victim and has supervisory authority over the victim or was providing transportation to the victim in the course of employment; or (d) when the perpetrator is a health care provider and the intercourse occurs during a treatment session, consultation, interview, or examination; or (e)when the victim is a resident of a facility for mentally disordered or chemically dependent persons and the perpetrator is not married to the victim and has supervisory authority over the victim; or (f) when the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and has a significant relationship with or was providing transportation to the victim in the course of employment.	Up to the victim's 30th birthday if victim was younger than 18 at time of the rape. 10 years if reported to law enforcement within 1 year and the victim was 18 or older at time of the rape. 3 years if not reported to law enforcement within 1 year and the victim was 18 or older at time of the rape.
Rape in the Third Degree RCW 9A.44.060 *Class C Felony* *Three strike offense*	A person has sexual intercourse with another person under circumstances not constituting first or second degree rape (a) where the victim did not consent to sexual intercourse and such lack of consent was clearly expressed by the victim's words or conduct, or (b) where there is threat of substantial unlawful harm to property rights of the victim.	3 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Rape of a Child in the First Degree RCW 9A.44.073 *Class A Felony* *Two strike offense* *Three strike offense*	A person has sexual intercourse with another person who is less than 12 years of age and not married to the perpetrator, and the perpetrator is at least 24 months older than the victim.	Up to the victim's 30th birthday
Rape of a Child in the Second Degree RCW 9A.44.076 *Class A Felony* *Two strike offense* *Three strike offense*	A person has sexual intercourse with another person who is 12 or 13 years of age and not married to the perpetrator, and the perpetrator is at least 36 months older than the victim.	Up to the victim's 30th birthday
Rape of a Child in the Third Degree RCW 9A.44.079 *Class C Felony*	A person has sexual intercourse with another person who is 14 or 15 years of age and not married to the perpetrator, and the perpetrator is at least 48 months older than the victim.	Up to the victim's 30th birthday
Sending, Bringing into the State Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree RCW 9.68A.060(1) *Class B Felony*	A person knowingly sends or brings, or causes to be sent or brought, into the state for sale or distribution, visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in 9.68A.011(4) (a) through (e).	3 years after the crime
Sending, Bringing into the State Depictions of Minors Engaged in Sexually Explicit Conduct in the Second Degree RCW 9.68A.060(2) *Class C Felony*	A person knowingly sends or brings, or causes to be sent or brought, into the state for sale or distribution, visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in 9.68A.011(4) (f) or (g).	3 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Sexual Exploitation of a Minor RCW 9.68A.040 *Class B Felony* *Three strike offense*	A person (a) compels a minor by threat or force to engage in sexually explicit conduct, knowing that it will be photographed or part of a live performance, or (b) aids, invites, employs, authorizes or causes a minor to engage in sexually explicit conduct, knowing that it will be photographed or part of a live performance, or (c) is the parent, legal guardian, or custodian of a minor, and permits the minor to engage in sexually explicit conduct, knowing that it will be photographed or part of a live performance.	Up to the victim's 30th birthday
Sexual Misconduct with a Minor in the First Degree RCW 9A.44.093 *Class C Felony*	A perpetrator (a) has, or knowingly causes a minor to have, sexual intercourse with a victim who is at least 16 years old but less than 18, is at least 60 months younger than and not married to the perpetrator, and the perpetrator abuses a supervisory position within a significant relationship with the victim; or (b) has, or knowingly causes a minor to have, sexual intercourse with a victim who is at least 16 years old and not more than 21 years old, is at least 60 months younger than and not married to the perpetrator, and the perpetrator is a school employee at the school in which the victim is enrolled; or (c) has, or knowingly causes a minor to have, sexual intercourse with a minor who is at least 16 years old and is a foster child of the perpetrator.	3 years after the crime

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Sexual Misconduct with a Minor in the Second Degree RCW 9A.44.096 *Gross Misdemeanor*	A perpetrator (a) has, or knowingly causes a minor to have, sexual contact with a victim who is at least 16 years old but less than 18, is at least 60 months younger than and not married to the perpetrator, and the perpetrator abuses a supervisory position within a significant relationship with the victim; or (b) has, or knowingly causes a minor to have, sexual contact with a victim who is at least 16 years old and not more than 21 years old, is at least 60 months younger than and not married to the perpetrator, and the perpetrator is a school employee at the school in which the victim is enrolled; or (c) has, or knowingly causes a minor to have, sexual contact with a minor who is at least 16 years old and is a foster child of the perpetrator.	2 years after the crime
Sexual Motivation RCW 9.94A.835 *Special Allegation* *Two strike offense* [if a finding in convictions of Assault in 1st or 2nd degree, Assault of a Child in the 1st Degree, Burglary in the 1st Degree, Homicide by Abuse, Kidnapping in the 1st or 2nd Degree, Murder in the 1st or 2nd Degree, or conviction for attempt of any of the foregoing] *Three strike offense* [if a finding in any other Class B felony]	A person commits a crime other than a sex offense with a sexual motivation.	

Crimes (Listed alphabetically)	**Definition**	**Statute of Limitations** RCW 9A.04.080
Sexually Violating Human Remains RCW 9A.44.105 *Class C Felony*	A person has sexual intercourse or sexual contact with a dead human body.	3 years after the crime
Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree RCW 9.68A.075(1) *Class B Felony*	A person intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).	3 years after the crime
Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree RCW 9.68A.075(2) *Class C Felony*	A person intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).	3 years after the crime
Voyeurism RCW 9A.44.115 *Class C Felony*	A person, for the purpose of arousing or gratifying the sexual desire of any person, knowingly views, photographs or films (a) another person without that person's knowledge and consent while that person is in a public or private place where he or she has a reasonable expectation of privacy; or (b) the intimate areas of another person without that person's knowledge and consent under circumstances where that person has a reasonable expectation of privacy, whether in a public or private place.	The later of: 3 years after the crime **or** 2 years after the victim first discovers he or she was being viewed, photographed, or filmed if the victim was not aware of such act or acts at the time they occurred.

CHAPTER 3
Defenses to Sexual Offenses

I. Introduction

This chapter covers the application of defenses to sexual offenses in Washington State; rules when instructing juries on the burden of proving an affirmative defense; certain defenses permitted in sexual offense trials; impermissible defenses to sexual offense charges; and statutes of limitations applicable to sexual offenses.

II. The Burden of Proof as to Defenses

A. Determining Who Has the Burden of Proof

The Washington Supreme Court uses a two-prong inquiry, known as the *McCullum/Acosta* test[1], to determine whether the burden of proof for a defense lies with the state or the defendant. Under the first prong, a court will analyze the relevant criminal statute and inquire "[o]n whom did the Legislature intend that the burden of proof should lie?"[2] Legislative silence on this matter is a strong indication to courts that the legislature did not intend for a defendant to have the burden.[3] When the legislature is clear that a defendant bears the burden of proving a defense, the burden will lie with the defendant unless proof of the defense could negate an element of the offense.[4]

The second prong of the inquiry is constitutional and arises from the U.S. Supreme Court decision in *In re Winship*,[5] which requires the state to prove every element of a crime beyond a reasonable doubt. Washington courts will determine whether one or more elements of the defense negate one or more elements of the offense.[6] If the court so finds, the state bears the burden of proving the inapplicability of the defense beyond a reasonable doubt.[7] Shifting the burden of proof to the defendant in such circumstances would unconstitutionally require the defendant to disprove an element of the offense.[8] Conversely, a defendant will be required to prove a defense by a preponderance of the evidence if the defense *does not* negate an element of the crime.[9]

---

[1] *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983)
[2] *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989)
[3] *State v. Acosta* at 615-16
[4] Id.
[5] 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)
[6] See *State v. McCullum* at 494-96
[7] Id.
[8] *State v. Lively*, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996)
[9] See *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994)

B. Instructing Juries on the Burden of Proof Applicable to Defenses

1. When the burden is on the state

When the state bears the burden of proving the inapplicability or absence of a defense, the burden of proof with respect to the applicable defense should be explained in the instruction defining the defense. This is the procedure that has long been suggested by the Washington Supreme Court Committee on Jury Instructions and is reflected in the Pattern Instructions.[10]

2. When the burden is on the defendant

When the defendant must prove an affirmative defense, the burden of proof is a preponderance of the evidence standard.[11] The Washington Pattern Jury Instructions incorporate that standard.[12]

III. Defenses in Sexual Offense Trials

A. Alibi

1. No due process right to alibi defense

Whether single or multiple incidents of sexual offenses are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense.[13] An information is sufficient if inter alia it imparts that the crime was committed Before the information was filed and within the statute of limitation and if the crime is stated with enough certainty for the court to pronounce judgment upon conviction.[14] With regard to child victims, although defendants cannot use a child's inability to recall dates to escape a trial, he or she can use the long time frame to attack the credibility of the child witness.[15] In *State v. Cozza*, the court noted further:

> …if Mr. Cozza had had a constitutional right to a reasonable opportunity to raise an alibi defense, it would be difficult to find that he was not prejudiced by the long time frame. Washington case law has approved 1 to 3–month time frames when sexual charges are brought and the victims are young and unable to establish calendar dates. *State v. Jordan*, 6 Wn.2d 719, 721, 108 P.2d 657 (1940) (60–day time frame adequate in

[10] Pt. IV Intro, 11 Wash. Prac. Pattern Jury Instr. Crim. (WPIC 14.00) (4th ed. 2016).
[11] See *State v. Riker*, 123 Wn.2d at 366-69
[12] 11 *Wash Prac. Pattern Jury Instr. Crim.* supra
[13] *State v. Cozza*, 71 Wn. App. 252, 259, 858 P.2d 270 (1993)
[14] RCW 10.37.050(5), (7) https://app.leg.wa.gov/rcw/default.aspx?cite=10.37.050
[15] Id.

> charge of carnal knowledge of mentally deficient 15–year–old).[16]

2. Burden of proof

When the state makes out a case that would sustain a guilty verdict and the defendant offers alibi evidence, the burden is upon the defendant to make out his or her alibi defense, but it is not incumbent upon the defendant to prove an alibi beyond a reasonable doubt.[17]

3. Instruction to Jury about Alibi Defense

Deciding whether to instruct a jury on an alibi defense requires caution by the court in view of the somewhat confusing and inconsistent case law on the subject. The Washington Supreme Court Committee on Jury Instruction recommends that no instruction be given on the alibi defense.

> …[No] alibi instructions should be given in the future when requested by either the prosecution or the accused. [A] set of general instructions adequately covers the law governing the trial and gives both parties ample scope to present their respective views as to alibi evidence without risking the introduction of possibly confusing judicial comments on the subject.[18] Citing *State v. Adams*[19] and *State v. Kubicek*[20]

The comment also advises, relying upon *State v. Pitts*,[21] that though "not [an] inflexible" rule, "[w]hen the evidence focuses on the commission of a crime on a specific date and the defendant asserts an alibi, the instruction defining the elements of the crime should not contain the usual reference to an act "on or about" a certain date. The jury should be instructed that the state must prove that the act was committed on a specific date."[22]

A comment by the Sixth Circuit Court of Appeals also illuminates the dangers with respect to assertion of an alibi defense and the court's responsibilities. "The defense can easily backfire, resulting in a conviction because the jury didn't believe the alibi rather than because the Government has satisfied the jury of the defendant's guilt beyond a reasonable doubt, and it is the trial judge's responsibility to avoid this possibility."[23]

B. Consent

---

[16] Id. at 260, n.4
[17] *State v. Adams*, 5 Wn. App. 366, 367, 487 P.2d 218 (1971), affd. 81 Wn.2d 468, 503 P.2d 111 (1972)
[18] Comment, 11 *Wash. Prac. Pattern Jury Instr. Crim*. WPIC 18.15 (4th ed. 2016)
[19] *State v. Adams* at 367
[20] 81 Wn.2d 497, 502 P.2d 1190 (1972)
[21] 62 Wn.2d 294, 382 P.2d 508 (1963)
[22] 11 *Wash. Prac. Pattern Jury Instr. Crim.*, supra
[23] *United States v. Robinson*, 602 F.2d 760, 762 (6th Cir. 1979), cert. denied, 444 U.S. 878, 100 S. Ct. 165, 62 L. Ed. 2d 107 (1979)

In Washington, "consent means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."[24] Consent is not a defense to a charge of rape of a child,[25] incest[26] or child molestation.[27] Moreover, a victim's consent to consensual sex is not a defense to the offense of exposure to or transmission of HIV with intent to inflict great bodily harm.[28]

1. Charges based on forcible compulsion

Consent is a common defense to charges of rape or indecent liberties, when the charges are based on forcible compulsion.[29] Once the defendant has produced sufficient evidence of consent to create a reasonable doubt, the state bears the burden of proving lack of consent beyond a reasonable doubt, as the defense raised negates an element of the offense. [30] Further, where the defense has produced sufficient evidence of consent, the jury may not be instructed that the defendant bears the burden of proving consent by a preponderance of the evidence. [31]

When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination, it is an affirmative defense to second degree rape that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment.[32] The defendant must prove this affirmative defense by a preponderance of the evidence.[33]

"It is an affirmative defense to prosecution under RCW 9A.44.160 [Custodial Sexual Misconduct in the First Degree] or RCW 9A.44.170 [Custodial Sexual Misconduct in the Second Degree], to be proven by the defendant by a preponderance of the evidence, that the act of sexual intercourse or sexual contact resulted from forcible compulsion by the other person."[34]

2. Charges based on mental incapacity

When "consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant reasonably

---

[24] RCW 9A.44.010(7) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010
[25] *State v. Birgen*, 33 Wn. App. 1, 9–10, 651 P.2d 240 (1982)
[26] *State v. Nugent*, 20 Wash.522, 523-24, 56 Pac. 25 (1899)
[27] *State v. Moss*, 6 Wn.2d 629, 631-32, 108 P.2d 633 (1940)
[28] *State v. Whitfield*, 132 Wn. App. 878, 899, 134 P.3d 1203 (2006)
[29] *State v. Buzzell*, 148 Wn. App. 592, 600, 200 P.3d 287 (2009)
[30] *State v. W.R.*, 181 Wn.2d 757 (2014), overruling *State v. Camara*, 113 Wn.2d 631, at 638 (1989)
[31] *Id*, overruling *State v. Gregory*, 158 Wn.2d 759, 801–04, 147 P.3d 1201 (2006)
[32] RCW 9A.44.050(d) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050
[33] Id.
[34] RCW 9A.44.180 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.180

believed that the victim was not mentally incapacitated and/or physically helpless."[35] "Mental incapacity" is "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse."[36] "Mental incapacity" can be caused by the "influence of a substance," such as alcohol or drugs.[37]

Washington courts have interpreted the word "understand" broadly, to require a "meaningful," not merely "superficial," understanding of the nature or consequences of sexual intercourse.[38] The "nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death."[39] "Evidence which establishes a rape victim's inability to understand the nature and consequences of sexual intercourse is not the kind of technical evidence which requires medical testimony to decipher…. [A] witness' comprehension of the basic consequences of his or her actions can be proved or disproved from his or her testimony and testimony as to behavior."[40]

Evidence of mental incapacity is often circumstantial.[41] In *Al-Hamdani*, the defendant alleged that the act was consensual, but the victim testified that "she awoke to find [the defendant] lying on top of her . . . [and] was unaware that they had sexual intercourse until she was examined at the hospital."[42] "She also testified that when she woke to find [the defendant] on top of her 'the whole thing was dream-like to me."[43] Considering her testimony that she had at least 10 drinks that evening and was "stumbling, vomiting, and passing in and out of consciousness," the court held that there was sufficient evidence that "she was debilitatingly intoxicated at the time of sexual intercourse."[44]

3. Evidence of past sexual behavior

Washington's rape shield law (RCW 9A.44.020) permits a defendant to present evidence of the victim's past sexual behavior only "on the issue of consent to the offense" and only in two situations: (1) "when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may

[35] RCW 9A.44.030(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.030
[36] RCW 9A.44.010(4) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010
[37] Id.
[38] *State v. Ortega Martinez*, 124 Wn.2d 702, 711-12, 881 P.2d 231 (1994)
[39] *Id.* At 712
[40] *State v. Summers*, 70 Wn. App. 424, 429-30, 853 P.2d 953 (1993)
[41] *See, e.g., State v. Al-Hamdani*, 109 Wn. App. 599, 36 P.3d 1103 (2001)
[42] Id. at 602
[43] Id. at 609
[44] Id.

be admissible on the issue of consent to the offense."[45] (2) With respect to charges of rape, attempted rape or assault with the intent to commit rape, the rape shield law provides:

> …evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards … is admissible on the issue of consent only pursuant to the following procedure:
>
> (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
>
> (b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
>
> (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
>
> (d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.[46]

4. Jury instructions related to consent

[45] See RCW 9A.44.020(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[46] See RCW 9A.44.020(3)

WPIC 18.25, Consent—First or Second Degree Rape or Indecent Liberties—Defense, states:

> Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have [sexual intercourse] [sexual contact].

NOTE that prior versions of this instruction should not be used in light of *State v. W.R.*[47] In addition, the instruction should not be given unless requested or agreed to by the defense.[48]

C. Double Jeopardy

1. Constitutional and statutory protections

Article I, section 9 of the Washington State Constitution provides, in relevant part, that "[n]o person shall be…twice put in jeopardy for the same offense." This protection is also enshrined in the Double Jeopardy Clause of the Fifth Amendment of the U. S. Constitution. Statutorily, RCW 10.43.020 applies the protection to include offenses and lesser degrees of the offense charged: "When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein."

2. Convictions of multiple violations of the same statute

When a defendant is convicted of violating the same statute multiple times, "the proper inquiry…is what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute…When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime."[49]

However, in *State v. Smith*,[50] the court found that convictions for first degree rape and second degree child rape, although arising out of one act of sexual intercourse with the same victim, were not "legally comparable offenses because of unique elements in each offense" and held that in situations such as these the "legislature did not intend to prohibit multiple convictions arising from a single sexual act."[51]

---

[47] *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)
[48] See 11 *Wash. Prac. Pattern Jury Instr. Crim.*, WPIC 18.25 (4th ed. 2016) (citing *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013) https://govt.westlaw.com/wcrji/Document/Iefa085b2e10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1
[49] *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 83-84, 75 S. Ct. 620, 99 L. Ed. 905 (1955))
[50] 165 Wn. App. 296, 321, 266 P.3d 250 (2011) review granted, 173 Wn.2d 1034, 277 P.3d 669 (2012)
[51] Id. at 324

Additionally, the Washington Supreme Court determined in *State v. Tili*[52] that two separate digital penetrations of a victim's anus and vagina followed by penile penetration of the victim's vagina, "constitute three separate units of prosecution... [and therefore the defendant's] three first-degree rape convictions do not violate double jeopardy." Quoting the Wisconsin Supreme Court, the court clarified:

> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual offense on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed.
> *Harrell v. State*, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979).[53]

The court also held that the unit of prosecution for rape is "sexual intercourse" with another individual.[54]

3. Conviction or acquittal of sexual offense in another county

RCW 10.43.030 provides: "Whenever, upon the trial of any person for a crime, it shall appear that the defendant has already been acquitted or convicted upon the merits, of the same crime, in a court having jurisdiction of such offense in another county of this state, such former acquittal or conviction is a sufficient defense." Division III of the Washington Court of Appeals clarified, in *State v. Gary J.E.*, [55] that the dismissal of a child rape charge in one county did not permit the defendant to raise a double jeopardy defense to bar prosecution for another child rape charge in another county, which the evidence indicated was an entirely separate incident from the one originally charged.

4. Foreign conviction or acquittal

Under the doctrine of dual sovereignty, separate sovereigns may successively punish a defendant for the same crime without offending constitutional double jeopardy protections as long each sovereign punishes the defendant only once.[56] However, Washington's double jeopardy clause extends double jeopardy protections beyond those afforded under the dual sovereignty doctrine.[57] RCW 10.43.040 provides:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had

---

[52] 139 Wn.2d 107, 119, 985 P.2d 365 (1999), affd. 148 Wn.2d 350, 60 P.3d 1192 (2003)
[53] Id. at 119
[54] Id.
[55] 99 Wn. App. 258, 263-64, 991 P.2d 1220 (2000)
[56] *State v. Ivie*, 136 Wn.2d 173, 178, 961 P.2d 941 (1998) (citing *State v. Kenney,* 83 Wn. 441, 443, 145 P. 450 (1915))
[57] Id. (citing *State v. Caliguri*, 99 Wn.2d 501, 511, 664 P.2d 466 (1983))

> jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, in a judicial proceeding conducted under the criminal laws of such state or country, founded upon the act or omission with respect to which he or she is upon trial, such former acquittal or conviction is a sufficient defense. Nothing in this section affects or prevents a prosecution in a court of this state of any person who has received administrative or nonjudicial punishment, civilian or military, in another state or country based upon the same act or omission.

The United States military qualifies as the equivalent of another state or country for the purposes of Washington's double jeopardy statute.[58] However, the statute does not shield tribal members from Washington prosecutions where their actions violate the laws of both sovereigns.[59]

Washington courts have not analyzed, in the context of sexual offenses, the application of a foreign conviction or acquittal defense when the elements of a crime charged in a foreign jurisdiction are not the same as the elements of a crime charged in Washington. However, a comparative analysis by the Washington Court of Appeals of theft charges would seem to be applicable. In *State v. Mathers*[60] the court found that a defendant convicted of first-degree theft in Oregon could be prosecuted in Washington for second degree theft because the two offenses were not the same "in fact." The Oregon statute under which the defendant was convicted included the element that the item stolen was a firearm as well as the other elements of theft. In contrast, Washington's statute required intent to deprive but did not require that the stolen item be a firearm.

The double jeopardy clause of the Fifth Amendment of the U.S. Constitution clearly prohibits retrial of a defendant who has been acquitted of the crime charged. In *State v. Hennings*[61], that protection is extended to other degrees of the crime of which a defendant was acquitted by RCW 10.43.050, which provides, in part: "Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he or she cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof." RCW 10.43.020 also extends that protection to crimes of a lower degree and lesser included offenses: "When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein."

---

[58] Id. at 177

[59] *State v. Moses*, 145 Wn.2d 370, 378-379, 37 P.3d. 1216 (2002)

[60] 77 Wn. App. 487, 493, 891 P.2d 738 (1995) (citing *In re Cook*, 114 Wn.2d 802, 816, 792 P.2d 506 (1990))

[61] 100 Wn.2d 379, 670 P.2d 25 (1983) (citing *United States v. DiFrancesco*, 449 U.S. 117, 129–30, 101 S. Ct. 426, 66 L. Ed.2d 328 (1980))

However, RCW 10.43.050 also provides an exception: "No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense."

D. Duress

RCW 9A.16.060 provides:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) That such apprehension was reasonable upon the part of the actor; and
>
> (c) That the actor would not have participated in the crime except for the duress involved.
>
> (2) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.
>
> (3) The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.
>
> (4) The defense of duress is not established solely by a showing that a married person acted on the command of his or her spouse.

Washington's duress statute does not require that it be actually possible for the perceived harm to be immediate; rather, the defense requires reasonable apprehension of immediate death or grievous bodily injury, and thus the appropriate inquiry is the reasonableness of the defendant's belief.[62]

E. Entrapment

[62] *State v. Williams*, 132 Wn.2d 248, 937 P.2d 1052 (1997) (holding that trial court improperly excluded instruction on the duress defense where defendant's husband inflicting abuse was out at sea and not in her immediate physical vicinity); see also WPIC 18.01 (Duress) and Comment (4th ed. 2016)

Regarding the defense of entrapment, RCW 9A.16.070 provides:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime. See discussion at WPIC 18.05 and Comment.

F. Insanity

RCW 9A.12.010 provides:

> To establish the defense of insanity, it must be shown that:
>
> (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
>
> (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or
>
> (b) He or she was unable to tell right from wrong with reference to the particular act charged.
>
> (2) The defense of insanity must be established by a preponderance of the evidence. See also WPIC Chapter 20 – Insanity.

In *Greene v. Lambert* [63] the Ninth Circuit Court of Appeals noted that "Under Washington law, [the insanity and diminished capacity defenses] require that a defendant connect the claimed mental illness with the defendant's capacity to understand the nature and quality of the acts committed, or with the defendant's ability to tell right from wrong." The court ruled that in a prosecution for sexual assault, the defendant's constitutional right to present a defense was impermissibly infringed upon when evidence of the defendant's

[63] 288 F.3d 1081, 1089 (9th Cir. 2002) (citing *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987))

multiple personality disorder from which he was allegedly suffering at the time he sexually assaulted the psychiatric nurse who was treating him was excluded. [64]

Consistent with the ruling in *Greene*, supra, a defendant accused of first-degree rape of a child was held to have the right to plead insanity on the basis that a "mental disease or defect caused him to be unable to perceive the nature and quality of the act charged."[65]

In *State v. Gough*, 53 Wn.App. 619, 768 P.2d 1028 (1989), the court discusses the differences between the defense of diminished capacity and the defense of insanity and holds that the defense of diminished capacity is not a "lesser included defense" encompassed within the defense of insanity. See WPIC 18.20 (Diminished Capacity) and Comment.

G. Reasonable Belief of Victim's Age

RCW 9A.44.030(2) and (3) provide:

> (2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.
>
> (3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:
>
> (a) For a defendant charged with rape of a child in the first degree, that the victim was at least twelve, or was less than twenty-four months younger than the defendant;
>
> (b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;
>
> (c) For a defendant charged with rape of a child in the third degree, that the victim was at least sixteen, or was less than forty-eight months younger than the defendant;

[64] Id. at 1091-92

[65] *State v. Swagerty*, 60 Wn. App. 830, 834, 810 P.2d 1 (1991)

(d) For a defendant charged with sexual misconduct with a minor in the first degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant;

(e) For a defendant charged with child molestation in the first degree, that the victim was at least twelve, or was less than thirty-six months younger than the defendant;

(f) For a defendant charged with child molestation in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;

(g) For a defendant charged with child molestation in the third degree, that the victim was at least sixteen, or was less than thirty-six months younger than the defendant;

(h) For a defendant charged with sexual misconduct with a minor in the second degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant.

(emphasis added)

Reasonable belief of a victim's age may not be based on inferences arising from the victim's general behavior, appearance, or demeanor.[66] If a victim gives a false age that is nevertheless younger than the age of consent, only a partial defense is recognized: the crime will be treated as if the victim's declarations were true.[67]

A rape of a child defendant's reasonable mistake as to the victim's age is not a complete defense if the defendant believed the victim was less than 16 at the time the crime was committed.[68] It is no defense to prosecution for the crime of statutory rape that the victim subsequently married the defendant.[69]

H. Other Special Statutory Defenses

The Washington Pattern Jury Instructions Criminal provides instructions relating to other special statutory defenses at WPIC Chapter 19, including but not limited to the following:

[66] *State v. Bennett*, 36 Wn. App. 176, 181–82, 672 P.2d 772 (1983)
[67] See *State v. Dodd*, 53 Wn. App. 178, 180-81, 765 P.2d 1337 (1989)
[68] Id. at 180; see also *State v. Heidari*, 125 Wn. App. 1009 (2005) (not reported in P.3d)
[69] *State v. Falsetta*, 43 Wash. 159, 86 Pac. 168 (1906)

(a) WPIC 19.02.01. Luring—Defense

(b) WPIC 19.03. Rape (Second Degree) or Indecent Liberties (Victim Helpless or Incapacitated)—Defense

(c) WPIC 19.03.01. Statutory Rape—Indecent Liberties—Before July 1, 1988—Defense

(d) WPIC 19.03.02. Rape (Second Degree) or Indecent Liberties (Health Care Provider)—Defense

(e) WPIC 19.04. Rape of a Child—Defense

(f) WPIC 19.04.01. Sexual Misconduct with a Minor—Defense

(g) WPIC 19.04.02. Child Molestation—Defense

(h) WPIC 19.04.03. Communication with a Minor For Immoral Purposes—Sexual Exploitation of a Minor—Commercial Sexual Abuse of a Minor—Promoting Commercial Sexual Abuse of a Minor—Defense

(i) WPIC 19.04.04. Possession of or Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct—Defense

(j) WPIC 19.04.05. Custodial Sexual Misconduct—Forcible Compulsion—Defense

(k) WPIC 19.04.06. Prostitution—Defense

IV. Defenses in a Sexual Exploitation of a Minor Case

A. Reasonable Belief of Age or Attempt to Determine Age

RCW 9.68A.110 (2) and (3) provide:

> (2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.080, it is not a defense that the defendant did not know the age of the child depicted in the visual or printed matter. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant was not in possession of any facts on the basis of which he or she should reasonably have known that the person depicted was a minor.
>
> (3) In a prosecution under RCW 9.68A.040, 9.68A.090, 9.68A.100, 9.68A.101, or 9.68A.102, it is not a defense that the defendant did not know the alleged victim's age. It is a

> defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

B. Unwitting Possession

In a prosecution under chapter 9.68A RCW, evidence that the defendant did not know he or she was in possession of the contraband or that he or she did not know the nature of the contraband possessed may support the defense of unwitting possession.[70]

C. Special Circumstances

1. Participating or assisting in the investigation of a sex crime against a minor

RCW 9.68A.110 (4) provides:

> In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.075, it shall be an affirmative defense that the defendant was a law enforcement officer or a person specifically authorized, in writing, to assist a law enforcement officer and acting at the direction of a law enforcement officer in the process of conducting an official investigation of a sex-related crime against a minor, or that the defendant was providing individual case treatment as a recognized medical facility or as a psychiatrist or psychologist licensed under Title 18 RCW. Nothing in chapter 227, Laws of 2010 is intended to in any way affect or diminish the immunity afforded an electronic communication service provider, remote computing service provider, or domain name registrar acting in the performance of its reporting or preservation responsibilities under 18 U.S.C. Secs. 2258a, 2258b, or 2258c.

2. Academic Research

RCW 9.68A.110 (6) provides:

[70] *State v. Garbaccio*, 151 Wn. App. 716, n. 5, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027, 230 P.3d 1060

In a prosecution under RCW 9.68A.070 or 9.68A.075, it shall be an affirmative defense that:

(a) The defendant was employed at or conducting research in partnership or in cooperation with any institution of higher education as defined in RCW 28B.07.020 or 28B.10.016, and:

i. He or she was engaged in a research activity;

ii. The research activity was specifically approved prior to the possession or viewing activity being conducted in writing by a person, or other such entity vested with the authority to grant such approval by the institution of higher education; and

iii. Viewing or possessing the visual or printed matter is an essential component of the authorized research; or

(b) The defendant was an employee of the Washington state legislature engaged in research at the request of a member of the legislature and:

i. The request for research is made prior to the possession or viewing activity being conducted in writing by a member of the legislature;

ii. The research is directly related to a legislative activity; and

iii. Viewing or possessing the visual or printed matter is an essential component of the requested research and legislative activity.

Nothing in this section authorizes otherwise unlawful viewing or possession of visual or printed matter depicting a minor engaged in sexually explicit conduct.

V. Impermissible Defenses to Sexual Offenses

A. Impossibility

RCW 9A.28.020 (2) provides: "If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission."

1. Attempted sexual assault

In *State v. Townsend* [71] the court held that the defendant took a substantial step toward rape of a 13–year–old child when he met an adult male detective posing as a 13–year–old girl in an on-line chat room, because impossibility is not a defense to criminal attempt. In *State v. Johnson,*[72] the court again confirmed that impossibility is not a defense if the intended victim was fictitious and the crime was impossible to complete noting that "our legislature has rejected both factual and legal impossibility as a defense to criminal attempt.... We similarly reject Johnson's attempt to raise an impossibility defense here."[73]

2. Attempted possession of child pornography

"If a person attempts to obtain actual child pornography but the crime is not completed because the individual does not in fact receive the images sought or receives images that turn out to be images that are not of actual minors, the individual can nevertheless be convicted of the attempt crime because factual impossibility is not a defense."[74]

B. Intoxication

RCW 9A.16.090 provides:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

The court, in *State v. Gallegos,*[75]held: "[A] criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state."

A defendant accused of attempted second-degree rape could not raise the defense of voluntary intoxication because "there was no evidence presented that the drinking impaired …[the defendant's] ability to acquire the intent to engage in sexual

---

[71] 147 Wn.2d 666, 57 P.3d 255 (2002)
[72] 173 Wn.2d 895, 900-901, 270 P.3d 591 (2012)
[73] Id.
[74] *State v. Luther,* 157 Wn. 2d 63, 73-74, 134 P.3d 205 (2006)
[75] 65 Wn. App. 230, 238, 828 P.2d 37 (1992) (citing *State v. Simmons,* 30 Wn. App. 432, 435, 635 P.2d 745 (1981))

intercourse with T.G. by forcible compulsion."[76] Similarly, a defendant accused of first-degree rape of a child could not plead voluntary intoxication because "the legislature's definition of statutory rape did not require proof of specific intent or any other mental state…."[77]

C. Involvement in Law Enforcement Activities in Sexual Exploitation of a Minor Cases

RCW 9.68A.110 (1) provides:

> In a prosecution under RCW 9.68A.040 [Sexual exploitation of a minor—Elements of crime—penalty], it is not a defense that the defendant was involved in activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses. Law enforcement and prosecution agencies shall not employ minors to aid in the investigation of a violation of RCW 9.68A.090 or 9.68A.100 through 9.68A.102, except for the purpose of facilitating an investigation where the minor is also the alleged victim and the:
>
> (a) Investigation is authorized pursuant to RCW 9.73.230(1)(b)(ii) or 9.73.210(1)(b); or
>
> (b) Minor's aid in the investigation involves only telephone or electronic communication with the defendant.

VI. Statute of Limitations

A summary of the limitations periods and strike offenses for certain sexual offenses set forth in RCW 9A.04.080 can be found in Chapter 2. Below, the following pertinent parts of RCW 9A.04.080 prescribe limitations periods for certain sexual offenses:

> (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
>
> ….
>
> (b) The following offenses shall not be prosecuted more than ten years after their commission:
>
> ….
>
> (iii) (A) Violations of RCW 9A.44.040 [rape in the first degree] or RCW 9A.44.050 [rape in the second degree] if the rape is reported to a law enforcement agency within one year of its commission; except that if the victim is under fourteen years of age when the rape is

[76] Id. at 239

[77] *State v. Swagerty*, 60 Wn. App. 830, 833, 810 P.2d 1 (1991)

committed and the rape is reported to a law enforcement agency within one year of its commission, the violation may be prosecuted up to the victim's twenty-eighth birthday.

(B) If a violation of RCW 9A.44.040 [rape in the first degree] or RCW 9A.44.050 [rape in the second degree] is not reported within one year, the rape may not be prosecuted: (I) More than three years after its commission if the violation was committed against a victim fourteen years of age or older; or (II) more than three years after the victim's eighteenth birthday or more than seven years after the rape's commission, whichever is later, if the violation was committed against a victim under fourteen years of age.

(c) Violations of the following statutes may be prosecuted up to the victim's twenty-eighth birthday: RCW 9A.44.073, [rape of a child in the first degree] RCW 9A.44.076, [rape of a child in the second degree] RCW 9A.44.083, [child molestation in the first degree] RCW 9A.44.086 [child molestation in the second degree] *RCW 9A.44.070, [statutory rape in the first degree] RCW 9A.44.080, [statutory rape in the second degree] RCW 9A.44.100(1)(b), [indecent liberties with a person incapable of consent] RCW 9A.44.079 [rape of a child in the third degree] RCW 9A.44.089, [child molestation in the third degree] or RCW 9A.64.020 [incest]…

(2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

(3) In any prosecution for a sex offense as defined in RCW 9.94A.030, the periods of limitation prescribed in subsection (1) of this section run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing, whichever is later.
If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.
(crime names added)

CHAPTER 4
Pre-Trial Release and Discovery

I. Introduction

This chapter presents information on the statutes, case law, and docket management practices that permit a court, before trial, to protect all parties, including alleged sexual offense victim, the defendant, and the public. This chapter also includes discussion of pre-trial release procedures and discovery issues that arise in sexual offense cases.

Within existing rules and procedures, the court should take steps before trial to keep alleged sexual offense victims safe and enable them to engage in positive collaboration with law enforcement, legal advocates, and the prosecutor's office. Only 16-36 percent of all sexual assaults are reported to the police, and fear of law enforcement disbelief is a consistent barrier to victim reporting.[1] With such low reporting rates it is important for key players in the criminal justice system to recognize that they can make significant impacts on an alleged victim's experience. Being treated with respect is often cited as helping sexual offense victims to continue with the criminal justice process.[2]

Note: This chapter is intended to be a supplement to matters of general criminal procedure covered in criminal bench books. This chapter does not cover issues particular to juvenile offenders. Information relating to juvenile offenders can be found in Chapter 8 of this bench guide.

II. Pre-Trial Release

A. Scope

In Washington the law, including court rules, governing personal recognizance, bail, conditions of release, and related matters is the same in sexual offense cases as it is in other criminal cases.

Among other legal resources, court rules pertaining to criminal cases in Washington are covered in the *Washington State Judges Bench Book, Criminal Procedure, Superior Court* and the *Washington State Judges Bench Book, Criminal Procedure, Courts of Limited Jurisdiction* published by the Washington Administrative Office of the Courts. These bench books cover in detail matters such as:

- Constitutional provisions, statutes, and court rules
- Respective rights of defendant and state
- Personal recognizance

[1] Debra Patterson and Rebecca Campbell, "Why Rape Survivors Participate in the Criminal Justice System," issue 38 *Journal of Community Psychology* (2)191-205, (2010)
[2] Id. at 200

- Bail
- Conditions of release
- Factors to be considered by court
- Delay of release
- Release in capital cases
- Violation of conditions
- Failure to appear

Washington court rules can be found at http://www.courts.wa.gov/court_rules/. The discussion in this chapter focuses on the special considerations that should be taken into account in sexual offense cases. Attention is also given to no-contact orders and other special procedures that are available to assist victims.

B. Victim Rights and Safety Concerns

1. **Court responsibility**

A sexual offense can shatter a victim's sense of personal safety and victims are terrified of retaliation. This fear is real, not only because many victims can experience repeated victimization (a particular risk where perpetrators are former intimate partners) but also because victims, post-offense, experience higher levels of fear in general.[3]

Trial judges are empowered by both federal and state law to take steps that can mitigate such fear. For instance the federal Crime Victims' Rights Act (CVRA) grants crime victims some rights including, "[t]he right to be reasonably protected from the accused."[4] The Washington State Crime Victims' Rights Act similarly provides statutory protection to victims, stating they have the right "[t]o receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available."[5] This language suggests that both the state and federal governments have assumed some duty to protect victims from further harm and that judges have a responsibility to carry out this duty.[6]

Under Washington law, judges are specifically empowered to employ pre-trial release conditions and no contact orders that can ease a victim's fears.

2. **Advisement and enforcement of release order conditions**

Release orders with special conditions are most effective if the defendant knows clearly what the conditions are and understands that violations will result in detention and/or

---

[3] Patricia A. Resick, Lois J. Veronen, Karen S.Calhoun, Dean G.Kilpatrick, et al, "Assessment of Fear Reactions in Sexual Assault Victims: A Factor Analytic Study of The Veronen-Kilpatrick Modified Fear Survey" 8 *Behavioral Assessment* (3) 271-283 (1986)

[4] 18 U.S.C. § 3771(a)(1) (2006)

[5] RCW 7.69.030(4) http://apps.leg.wa.gov/r cw/default.aspx?cite=7.69.030

[6] Mary Margaret Gianni, **"**Redeeming an Empty Promise: Procedural Justice, the Crime Victims Rights Act, and the Victims' Right to be Reasonably Protected from the Accused", 78 *Tenn. L. Rev*. 47, 48 (2010)

other sanctions. The court should ensure, by making appropriate inquiries of counsel and/or the defendant and victims, that the defendant has been advised of and understands his/her responsibilities under the order, and that victims understand how to report violations of the order. If victims are not present in court when a release order is entered, the court should confirm with the prosecutor, a victim advocate or a law enforcement representative that the victims will be promptly and thoroughly advised of the order and its conditions and promptly notified if the defendant is released from custody. When possible, victims should be given advance notice of pre-trial release hearings so that they can be present.

To promote victim safety and offender accountability, swift enforcement of release order violations is important, particularly in sex offense cases. The court should encourage victims to report violations quickly. The court should establish published rules and procedures that permit prosecutors and court personnel to expedite violation hearings.

Additionally, Appendix C [Advancing Procedural Justice on Your Protection Order Docket] in Chapter 9 of this bench guide includes information about the positive impact procedural justice practices have on the defendant's compliance with court orders.

C. Court Rules

1. Personal recognizance release

In Washington, release without bail is required unless the court makes findings consistent with the court rules. The Washington Supreme Court has adopted identical court rules for courts of general and limited jurisdiction concerning pre-trial release. CrR 3.2 and CrRLJ 3.2, require release all defendants, other than those charged with a capital offense, on their personal recognizance unless the court makes specific findings. Bail may be set only if the court finds that (a) release on personal recognizance will not reasonably assure the defendant's appearance as required, or (b) there is a likely substantial danger that the defendant will commit a violent crime or seek to intimidate a witness or otherwise interfere with the administration of justice. Court Rule 3.2 sets out non-exclusive factors for the court's consideration.[7]

2. Relevant factors relating to finding of likely failure to appear

If the court finds that a release on personal recognizance will not reasonably assure the defendant's appearance as required by the court, it is required to consider the following nonexclusive factors in determining the appropriate conditions of release:

a. The defendant's history of response to court orders and legal process;

b. The defendant's employment status and history, participation in education, training, counseling or treatment, community volunteer work, participation in

[7] CrR 3.2
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.2

school or cultural activities, or receipt of financial assistance from the government;

c. The defendant's family ties and relationships;

d. The defendant's reputation, character and mental condition;

e. The length of the defendant's residence in the community;

f. The defendant's criminal record;

g. The willingness of responsible members of the community to vouch for the defendant's reliability and assist the defendant in complying with conditions of release;

h. The nature of the charge, if relevant to the risk of nonappearance;

i. Any other factors indicating the defendant's ties to the community.[8]

3. Least restrictive conditions of release required by a finding of likely failure to appear

Upon a finding of likely failure to appear, the court must impose upon the defendant the least restrictive of the following conditions that will reasonably assure appearance as required:

a. Place the defendant in the custody of a designated person or organization;

b. Place restrictions on the defendant’s travel, association, or place of abode;

c. Require the defendant to execute a non-secured or secured bond;

d. Require the defendant to return to custody during specified hours or electronic monitoring;

e. Impose any other condition except detention deemed reasonably necessary to assure appearance as required.[9]

4. Relevant factors relating to a finding of substantial danger

If the court finds that there is a substantial danger that the defendant will commit a violent crime or interfere with the administration of justice, it is required to consider the following nonexclusive factors in determining the appropriate conditions of release:

[8] CrR 3.2(c)
[9] CrR 3.2(b)

a. The defendant's criminal record;

b. The willingness of responsible members of the community to vouch for the defendant's reliability and assist the defendant in complying with the conditions of release;

c. The nature of the charge;

d. The defendant's reputation, character and mental condition;

e. The defendant's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;

f. Whether or not there is evidence of present threats or intimidation directed to witnesses;

g. The defendant's past record of committing offenses while on pretrial release, probation or parole;

h. The defendant's past record of use of, or threatened use of deadly weapons or firearms, especially to victims or witnesses.[10]

Of these factors, the nature of the charge, a defendant's past record of threats to the victim, and other intimidation toward the victim, may be particularly relevant in sexual assault cases.

5. Conditions of release permitted by a finding of substantial danger

Upon a finding of substantial danger, the court may impose one or more of the following nonexclusive conditions of release:

a. Prohibit approaching or communicating with particular persons or class of persons;

b. Prohibit presence in designated geographic areas or premises;

c. Prohibit the defendant from possessing any dangerous weapons or firearms, engaging in described activities or possessing or consuming any intoxicating liquors or drugs not prescribed;

d. Require regular reporting and supervision;

e. Prohibit any criminal law violations;

[10] CrR 3.2(e)

f. Require the posting of a bond or deposit of cash, if the least restrictive alternative that will reasonably assure community safety;

g. Place in the custody of a designated person or organization;

h. Place restrictions on the travel, association, or place of abode;

i. Require the return to custody during specified hours or electronic monitoring; or

j. Impose any other condition except detention to assure noninterference with the administration of justice and community safety.[11]

6. No contact as a condition of release

In sexual offense cases, the court should order, as a condition of release, no contact with the victim or other witnesses as authorized in CrR 3.2(d). It is particularly important to include a no-contact provision in the release order if the victim and alleged assailant know each other or if the victim expresses fear of the alleged perpetrator, because these situations present an increased likelihood of victim-defendant contact and detrimental outcomes for victims. In considering a no-contact order the court should also consider who, in addition to the victim, may need protection from contact, such as witnesses who are the victim's family members or friends.

The court should consider, in addition to CrR 3.2 no-contact orders, other protection orders that may also be available that differ in scope or means of enforcement. For instance, in CrR 3.2 release orders courts cannot impose protections for non-witness family members of the victim, whereas they are able to do so in other no-contact orders.

Enforcement mechanisms are also different. For example, violation of a CrR 3.2 no-contact order may result in revocation of release but does not constitute a separate crime, whereas violation of a RCW 9A.46.040 criminal harassment protection order is a gross misdemeanor. Because of the lower standard of proof required for revoking conditional release (the clear and convincing standard), additional protection is afforded the victim when both types of "no-contact" orders are entered.

D. Criminal No-Contact Orders

In addition to no-contact provisions contained in a CrR 3.2 pre-trial release order, the court may impose separate no-contact orders *sua sponte* under chapter 9A.46 RCW,[12] Washington's harassment statute, or under chapter 7.90 RCW,[13] Washington's Sexual

[11] CrR 3.2(d)
[12] RCW 9A.46.040 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46.040
[13] RCW 7.90.150 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150

Assault Protection Order Act. The court should order no-contact under these statutes during arraignment or when a person charged with a sex offense is released from custody.[14]

1. Harassment statute - chapter 9A.46 RCW

Chapter 9A.46 RCW defines "harassment" as including many of Washington's defined sex crimes under chapter 9A.44 RCW (including first, second, and third degree rape, indecent liberties, child rape, and child molestation)[15]. The statute cites the likelihood of repeated harassment directed at victims, and permits courts to require defendants to:

> (a) stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other locations, as shall be specifically named by the court order;
>
> (b) refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named in the court order.[16]

Note: This statute allows courts to assign protection to persons other than the victim(s) and witnesses who may need protection.

2. Sexual Assault Protection Order Act – chapter 7.90 RCW

RCW 7.90.150 allows a court to prohibit contact between the defendant and alleged victims when the defendant has been charged with or arrested for a sex offense defined in RCW 9.94A.030. Under this statute the no-contact order may be issued telephonically but must be issued in writing as soon as possible.[17] Criminal no-contact orders entered pursuant to this statute:

a. may be issued prior to pre-trial release or arraignment;

b. must include a specific legend as set forth in the statute;

c. must be provided by copy to the victim at no charge;

d. may require electronic monitoring as a condition of release;

e. must, if ordered as part of arraignment proceedings, be entered into the state's Criminal Intelligence Information System; and

---

[14] Id.
[15] RCW 9A.46.060 http://app.leg.wa.gov/RCW/default.aspx?cite=9A.46.060
[16] RCW 9A.46.040(1)(a)-(b)
[17] RCW 7.90.150(1)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150

f. terminate if the defendant is acquitted or the charges are dismissed but will remain in place for up to two years after the end of a sentence if the defendant is found guilty

Judges have been awarded considerable discretion under these statutes to provide important protections to victims and others affected by the alleged criminal conduct.

E. Civil Protection Orders

The court (either on the record or through clearly established clerk or victim advocate protocols) should advise a victim of sexual offense that civil protection orders may be available to them even if a criminal no-contact order is entered.

For example, criminal no-contact orders are valid only while the court has jurisdiction over the defendant, and, consequently, if charges are dismissed, a criminal no-contact order is no longer in effect and victims may find themselves without continuing protection. Moreover, criminal no-contact orders do not offer the same types of restrictions as some civil orders. For instance, the civil sexual assault protection order statute allows courts to order an assailant to transfer schools, an option not specified in other statutes.

Civil protection orders are available to victims under the sexual assault protection order statute, chapter 7.90 RCW, the domestic violence statute, chapter 26.50 RCW, the anti-harassment protection order statute, chapter 10.34 RCW, and the vulnerable adult protection order statute, chapter 74.34 RCW.

Note: Chapter 9 of this bench guide includes detailed information about civil sexual assault protection orders.

III. Discovery Issues in Sexual Offense Cases

A. General

CrR 4.7 establishes the ground rules for discovery in criminal cases. For more in-depth analysis of CrR 4.7 and other general discovery rules see the Washington Practice Series on Criminal Practice and Procedure.[18]

Although the criminal discovery rule applies uniformly to all criminal cases, including sexual offense cases, some discovery issues may arise with particular frequency in sexual offense cases. In sexual offense cases, for example, it is more common than in most other criminal cases for there to be little or no corroborating evidence to support a victim's testimony. Consequently, in sexual offense cases the focus is often on the credibility of the victim as much or more than on the defendant. Defense efforts to discover evidence that defendants claim is relevant to victim credibility may conflict with protections provided by

[18] 12 *Wash. Prac*, Criminal Practice and Procedure Chapter 13 (3d ed)

Washington's rape shield law[19] or with the confidentiality of privileged communications. It is important for the court to determine that there is a legal basis for discovery that is allowed in sexual offense cases, and that it is not allowed as a tactic to harass, intimidate, or fish for information.

B. Specific Issues

1. Nondisclosure of victims' addresses

In those cases in which the defendant may not know the victim's address, if the court finds that the victim may be at risk from disclosure or if the victim expresses fear of disclosure the court should consider including in a protective order a prohibition of disclosure of the victim's home address to the defendant.[20]

Some sexual offense victims may be participants in the Washington state address confidentiality for victims program.[21] Under this statute, information for participants in the address confidentiality program may only be released if the court finds probable cause that the information is "legally necessary (1) In the course of a criminal investigation or prosecution or (2) To prevent immediate risk to a minor and meet the statutory requirements of the Washington child welfare system."[22]

2. Access to witnesses

It is misconduct for counsel to instruct a witness not to speak to opposing counsel or to an opposing party's investigator or to instruct a witness not to grant the opposing party an interview unless that counsel is present.[23] However, counsel may inform witnesses that they may choose whether to provide an interview and that they have the right to determine who shall be present at such an interview.[24] If a victim or witness has retained counsel, interviews will be coordinated through counsel. The court should take steps to ensure that a sexual offense victim's right to have a support person present during interviews is protected.[25]

3. Psychiatric examinations of victims

---

[19] RCW 9A.44.020. http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020

[20] CrR 4.7(h)(4) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.07; *State v. Mannhalt*, 68 Wn. App. 757, 766-67, 845 P.2d 1023 (1992) (keeping witness' address secret did not violate the defendant's right to confrontation)

[21] Chapter 40.24 RCW http://apps.leg.wa.gov/rcw/default.aspx?cite=40.24

[22] RCW 40.24.075

[23] CrR 4.7(h)(1)

[24] *State v. Hofstetter*, 75 Wn. App. 390, 402, 878 P.2d 474 (1994)

[25] RCW 7.69.030 (Rights of victims, survivors, and witnesses) http://app.leg.wa.gov/rcw/default.aspx?cite=7.69.030; RCW 7.69A.030 (Rights of child victims and witnesses) http://app.leg.wa.gov/RCW/default.aspx?cite=7.69A.030; RCW 70.125.060 (Victims of Sexual Assault Act) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.060

Psychiatric examinations of sexual offense victims may be ordered only upon a showing of a "compelling reason" for doing so. The substantial nature of the "compelling reason" standard is illustrated by the Court of Appeals decision in *State v. Weisberg*,[26] in which the court upheld the trial court's denial of a motion for psychiatric examination of the victim. After an *in camera* review of the victim's mental history, the trial court in *Weisberg* concluded that psychiatric evaluation of a mentally retarded rape victim would be of little value in establishing or impeaching the victim's credibility.[27]

4. Polygraph testing of victims

Law enforcement officers, attorneys and "other governmental officials" are barred from asking or requiring victims of sexual offenses to undergo polygraph testing as a condition of case investigation, charging, or prosecution.[28]

5. Information not subject to disclosure

Attorney work product and the identity of confidential informants are not subject to disclosure.[29]

6. Information identifying minor victims of sexual assault

Although information related to the identity of child victims of sexual assault may be released to law enforcement, prosecutors, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault, such information is otherwise confidential and may not be released to the press or public.[30] The court must therefore exercise care to file any documentation related to a child victim's name, address, location, or photographs under seal and caution counsel accordingly.

C. Privileges and Protective Orders Related to Discovery

1. Confidential information regarding victims

a. Background

Due to the paucity of physical evidence in some cases of sexual assault,[31] there may be a heightened focus on the credibility of the victim. This often results in defendants seeking access to personal, confidential, and even privileged information regarding victims and witnesses, including counseling records. The law regarding privilege and rape shield is well-settled in statute and case law, as discussed below and in Chapter 6 [Evidence] of this guide.

---

[26] 65 Wn. App. 721, 829 P.2d 252 (1992)
[27] Id. at 727
[28] RCW 10.58.038 http://apps.leg.wa.gov/rcw/default.aspx?cite=10.58.038
[29] CrR 4.7(f) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.07
[30] RCW 10.97.130 http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97.130
[31] See Chapter 1 of this guide [Understanding Sexual Violence] for a more detailed discussion on this subject.

b. *Richie* analysis

Confidential or medical records of a victim may be disclosed only upon appropriate finding by the court following an in camera review. Washington case law requires that a defendant, in order to seek release of confidential records through an *in camera* review, must "advance some factual predicate which makes it reasonably likely" that the records contain information material to the defense.[32] To make the necessary showing of materiality, the defendant must show more than that the records have some value to the defense or would lead to the discovery of other evidence, and *in camera* review should be denied if the defendant's showing is based on "considerable speculation and little factual basis or foundation" or merely shows that the records "might lead to other evidence or may contain information critical to the defense…."[33]

The precedent for allowing the release of confidential records to a defendant absent a victim's consent is found in federal case law. The seminal case concerning the confidentiality of a victim's records is *Pennsylvania v. Richie*,[34] in which the Supreme Court held that when those records are sufficiently material and favorable to the defense, their release may be justified, and the court noted that materiality exists only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[35]

c. Sexual assault advocates and rape crisis center records

Communications between a sexual offense victim and a sexual assault advocates are privileged. Sexual assault advocates may not be compelled to testify about any conversations between themselves and a victim without the victim's consent. The only statutory exception is when "failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person.[36]

The term "sexual assault advocate" refers to any employee or volunteer from a community-based sexual assault program or victim assistance program that provides information, medical or legal advocacy, counseling, or other support to victims of sexual assault, designated by the victim to accompany the victim to a health care facility, police or prosecution interviews or court proceedings.[37]

The Washington Victims of Sexual Assault Act[38] provides that records maintained by a community sexual assault program may be provided to defense counsel only if:

i. the defendant files a pretrial motion requesting the records;

---

[32] *State v Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)
[33] *State v. Diemel*, 81 Wn. App. 464, 469, 914 P.2d 779 (1996)
[34] 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987)
[35] Id. at 57
[36] RCW 5.60.060(7) http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060
[37] Id.
[38] Chapter 70.125 RCW http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125

ii. the motion is supported by affidavits explaining the basis for the request;

iii. the court, by *in camera* review, determines that the records are relevant, and their probative value outweighs the victim's privacy interest, taking into account the trauma releasing the records to the defendant would cause the victim; and

iv. the court enters an order stating what portions of the records are discoverable, including the basis for the court's findings.[39]

D. Rape Shield Law

Washington's rape shield law prevents certain information about a victim's past sexual history, marital history, and divorce history from being admitted in evidence. Although this law applies to the admissibility of evidence rather than whether such evidence is discoverable, it is noted here because the defense often seeks such information during pretrial discovery.

In considering discovery motions for a victim's past sexual, marital or divorce history, the court should consider the likelihood of emotional harm to the victim by the requirement to answer questions or provide information about their past sexual history. For further discussion of the rape shield law, see Section III of Chapter 3, Defenses to Sexual Offenses, and Section II of Chapter 6, Evidence, in this bench guide.

[39] RCW 70.125.065 http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065

CHAPTER 5
Preliminary Hearings and Trials

I. Introduction

A. Purpose

This chapter gives a general overview of the conduct of preliminary hearings and trials of sex offenders and provides guidance for affording appropriate protections to both the victims and perpetrators of sex offenses by effectively balancing the constitutional protections of the defendant with the statutory protections mandated for the victims.

B. Index of Topics

The following topics are covered in this chapter:

1. public access to courtrooms, and to sex offense trials and proceedings specifically (section II)
2. media coverage in courtrooms (section III)
3. the defendant's right to a speedy trial (section IV)
4. exclusion of victims and witnesses during trials and other proceedings (section V)
5. rights and protections of victims, survivors and witnesses while testifying (section VI)
6. admission of child victims' statements (section VII)
7. the confrontation clause in the context of sex abuse cases (section VIII)
8. the defendant's right to self-representation and cross-examination of alleged sexual offense victims (section IX)
9. testing and counseling for sexually transmitted diseases (section X)
10. jury selection (section XI)

II. Public Access to Courtrooms

A. Public Access to Criminal Trials in Washington Generally

Washington State's constitution provides both the right to public access to criminal trials and a criminal defendant's right to "a speedy public trial."[1] Prejudice is presumed where a violation of the public trial right occurs.[2] However, "the public's right of access to open proceedings is not absolute, and…may be outweighed by the necessity of ensuring a criminal defendant's right to a fair trial…."[3]

When considering a motion to close proceedings to the public, the trial court must conduct its analysis on the open record and involving all persons and parties who are present. The trial court must carefully consider the following criteria set forth in *Bone-Club* to determine if the need for closure sufficiently outweighs the constitutional guarantees mentioned above:

1. whether the proponent of the closure has shown a compelling interest in doing so, and, when the interest is based on a right other than a defendant's right to a fair trial, whether there is a "serious and imminent" threat to that right;

2. whether those present during the motion for closure have had an opportunity to object;

3. whether the proposed method for curtailing open access is the least restrictive means available to protect the threatened interests;

4. the competing interests of the proponent of closure and the public; and

5. whether the order is broader in its application or duration than necessary to serve its purpose.[4]

When the state "attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[5]

---

[1] Washington Const. art. I, §§ 10 and 22; note also that the Sixth Amendment of the U.S. Constitution guarantees a criminal defendant's right to a public trial

[2] *State v. Bone-Club*, 128 Wn.2d 254, 261-262, 906 P.2d 325 (1995)

[3] *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210, 848 P.2d 1258 (1993) (citing *Federated Publications, Inc. v. Kurtz,* 94 Wn.2d 51, 60, 615 P.2d 440 (1980))

[4] *State v. Bone-Club*, 128 Wn.2d at 258-259

[5] *Globe Newspaper Co. v. Superior Court for Norfolk Cnt'y,* 457 U.S. 596, 606-07, 102 S. Ct. 2613, 73 L. Ed.2d 248 (1982)

> "The public trial right applies to the evidentiary phases of the trial, and to other 'adversary proceedings.' (*citation omitted*) Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire."[6] However, "[a] defendant does not...have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts."[7] Therefore, the right to a public trial does not necessarily extend to motions in limine unless they require the resolution of disputed facts.[8]

B. Public Access to Sex Offense Trials and Proceedings

Washington's strongly articulated constitutional protections of the right of the defendant and of the public to open proceedings extends to sex offense cases. There are some exceptions designed to protect victims of sexual violence and those convicted of such crimes.

1. Courts should close sex offense trials when considering an offer of proof regarding relevancy of victim's past sexual behavior

RCW 9A.44.020(3),[9] Washington's rape shield statute, provides:

> In any prosecution for the crime of rape…or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:
> a. A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
> b. The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
> c. **If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the**

[6] *State v. Rivera*, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001)
[7] *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)
[8] *State v. Castro*, 159 Wn. App. 340, 344, 246 P.3d 228 (2011)
[9] http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020

> **necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.**
> (Emphasis added**)**

2. Probable cause hearings for sexually violent predators are presumptively closed

Probable cause proceedings under chapter 71.09 RCW (Washington's sexually violent predator act), like other civil commitment proceedings, are presumptively closed. "[D]uring the initial probable cause determination, a party to a civil commitment proceeding under RCW 71.09 is similarly situated to a party to commitment proceedings under RCW 71.05…[and therefore] equal protection requires that the same confidentiality and closure protections apply to both."[10]

3. Jury selection

See the discussion in Section XI of this chapter.

III. Media Coverage in Courtrooms

A. Judges Hearing High Profile Sex Offense Cases Should Consult GR 16 of the Washington State Court Rules of General Application

Sexual assault cases can garner significant media attention. Court rules and case law generally presume an open and accessible courtroom. GR 16[11] of the Washington State Court Rules of General Application (Courtroom Photography and Recording by the News Media) provides:

> a) Video and audio recording and still photography by the news media are allowed in the courtroom during and between sessions, provided (1) that permission shall have first been expressly granted by the judge; and (2) that media personnel not, by their appearance or conduct, distract participants in the proceedings or otherwise adversely affect the dignity and fairness of the proceedings.
> b) The judge shall exercise reasonable discretion in prescribing conditions and limitations with which media personnel shall comply.
> c) If the judge finds that sufficient reasons exist to warrant limitations on courtroom photography or recording, the judge shall make particularized findings on the record at the time of

[10] *In re Det. of D.A.H.*, 84 Wn. App. 102, 107, 924 P.2d 49 (1996) (citing *In re Young*, 122 Wn.2d 1, 49, 857 P.2d 989 (1993))
[11] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr16

> announcing the limitations. This may be done either orally or in a written order. In determining what, if any, limitations should be imposed, the judge shall be guided by the following principles:
> 1) Open access is presumed; limitations on access must be supported by reasons found by the judge to be sufficiently compelling to outweigh that presumption; (2) Prior to imposing any limitations on courtroom photography or recording, the judge shall, upon request, hear from any party and from any other person or entity deemed appropriate by the judge; and (3) Any reasons found sufficient to support limitations on courtroom photography or recording shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views.

The court may prohibit the press from photographing juvenile witnesses without the witnesses' and/or their parents' consent because it may dampen the witnesses' ability to speak or report the facts.[12] Any court restriction on photography should be no broader in its application or duration than necessary.

B. Use of the "Fire Brigade" to Resolve Sixth Amendment and First Amendment Conflicts

Judges are encouraged to consult the Bar-Bench-Press Committee of Washington's all-volunteer Liaison Committee (known colloquially as the "Fire Brigade") to assist in resolving a defendant's Sixth Amendment right to a fair trial with the public's and press's First Amendment right to unfettered reporting. Article IV, section 3, of the Bylaws of the Bench-Bar-Press Committee of Washington provides:

> Liaison Committee assistance may be provided to any lawyer, judge or media professional requesting it. Assistance shall be limited to those involved in disputes resulting from conflicts between rights of fair trial and free press. Assistance may consist of consultation, mediation and/or the provision of information to requesting parties.[13]

The "Fire Brigade" was most notably utilized in 1990 when the Vancouver newspaper, *The Columbian*, published an interview and several writings of accused (and eventually convicted) sex offender and murderer Westley Allan Dodd.[14]

IV. Right to a Speedy Trial

[12] *State v. Russell*, 141 Wn. App. 733, 739, 172 P.3d 361 (2007)
[13] http://www.courts.wa.gov/committee/?fa=committee.display&item_id=64&committee_id=77
[14] Rob Phillips, "A child murderer grants an exclusive" (includes related article on Westley Allan Dodd), *The Quill* (Sept. 1, 1990)

The right to a speedy trial operates as a control on the time limits by which most stages of a criminal proceeding must take place. The right may be asserted generally through the United States and Washington State constitutions or under Washington State Superior Court Rules.

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…." This guarantee "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[15] The United States Supreme Court has determined that deprivation of the constitutional right is to be measured by four factors including the length of the delay, the prejudice to the defendant, the reason for the delay, and whether the defendant has demanded a speedy trial.[16]

Article I, Section 22 of the Washington State Constitution provides in part: "In criminal prosecutions the accused shall have the right … to have a speedy public trial." The allowable time for "a speedy public trial" is determined in accordance with CrR3.3[17] (time for trial) and CrR 4.1[18] (time for arraignment).

Unlike some other jurisdictions[19], Washington does not guarantee a crime victim's right to a speedy trial, even if that victim is a child.

V. Exclusion (Sequestration) of Victims and Witnesses

As a limitation on the general rule that trials and other judicial proceedings are presumptively open to the public, Washington Rule of Evidence 615[20] (ER 615: Exclusion of witnesses) provides in part: "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." If a witness does not respect an exclusion order and enters the courtroom anyway, he or she may be barred from testifying.[21]

ER 615 further provides, in relevant part: "This rule does not authorize exclusion of…a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause." In a sexual assault case, victims are likely "reasonably

---

[15] *Klopfer v. State of N.C.*, 386 U.S. 213, 222-23, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) (citing *Pointer v. State of Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965))

[16] *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)

[17] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.3

[18] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.01

[19] *See* http://www.ndaa.org/pdf/NCPCA%20Speedy%20Trial%202011.pdf

[20] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0615

[21] *Jerry Parks Equip. Co. v. Se. Equip. Co., Inc.*, 817 F.2d 340, 342-343 (5th Cir. 1987) (testimony excluded); but see *State v. Dixon*, 37 Wn. App. 867, 877, 684 P.2d 725 (1984) (testimony allowed)

necessary" to the presentation of the state's cause. Additionally, when applying ER 615 Washington courts should take into account RCW 7.69.030 (Rights of victims, survivors, and witnesses), which provides "victims and survivors of victims" the right "to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified."[22] Victims in sexual assault cases also have the right to have a support person of their choosing, present at any judicial proceedings related to criminal acts committed against the victim.[23] Although Washington courts have yet to rule on whether the statute prevails over ER 615, "[t]he statute was enacted in 1985, later than Rule 615, so the statute at least arguably prevails on the theory that later in time controls."[24]

VI. Rights and Protections of Victims, Survivors of Victims and Witnesses

A. Victims' and Witnesses' Rights in General

The Washington constitution makes specific provision for crime victims' rights:

> [A] victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights.[25]

Chapter 7.69 RCW is intended

> to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system…[and] ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no

[22] RCW 7.69.030(11) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.030
[23] RCW 7.69.030(10)
[24] Karl B. Tegland, 5A *Wash. Prac., Evidence Law and Practice* § 615.3 (5th ed. 2012)
[25] Washington Constitution, art. I, §35

> less vigorous than the protections afforded criminal defendants.[26]

There shall be a "reasonable effort" to ensure that victims have specific enumerated rights of victims that are set forth in RCW 7.69.030,[27] and that those rights can be harmonized with a criminal defendant's due process rights.[28]

B. Victims of Sexual Assault Act

In the preface to the Victims of Sexual Assault Act, chapter 70.125 RCW, the Washington state legislature found that "[p]ersons who are victims of sexual assault benefit directly from continued public awareness and education, prosecutions of offenders, a criminal justice system which treats them in a humane manner, and access to victim-centered, culturally relevant services."[29] The Act provides that "a personal representative of the victim's choice may accompany the victim to the hospital or other health care facility, and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings,"[30] and requires specific considerations for court review of defense discovery requests in sexual assault cases for records of a community sexual assault program and underserved populations provider.[31]

C. Rights of Child Victims and Witnesses

When enacting Chapter 7.69A (Child victims and witnesses) the Washington state legislature intended to

> …insure that all child victims and witnesses of crime are treated with the sensitivity, courtesy, and special care that must be afforded to each child victim of crime and that their rights be protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded the adult victim, witness, or criminal defendant.[32]

In addition to the rights of all victims and witnesses provided for in RCW 7.69.030, rights specific to child victims and witnesses are enumerated in RCW 7.69A.030.[33] The rights specifically afforded to child victims and witnesses include additional emphasis on promoting privacy, security, and understanding of the process.[34]

---

[26] RCW 7.69.010 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.010
[27] http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.030
[28] *State v. McDonald*, 183 Wn.2d 1, 18, 346 P.3d 748 (2015)
[29] RCW 70.125.020(7) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.020
[30] RCW 70.125.060 http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.060
[31] RCW 70.125.065 http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065
[32] RCW 7.69A.010 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69A.010
[33] http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69A.030
[34] Id.

D. Preserving Courtroom Decorum

1. **Trial court discretion**

"It is well settled in Washington that the trial court has broad discretion 'to conduct [a] trial with dignity, decorum and dispatch and [to enable it to] maintain impartiality.'"[35]

Washington Rule of Evidence 611 (ER 611: Mode and Order of Interrogation and Presentation)[36] directs in part:

> (a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Courts should exercise care to ensure that language used in the courtroom is respectful and neutral. Victims and witnesses, for example, should not be addressed by their first names.

When appropriate, in preliminary proceedings the judge should consider discussing with the parties their preferred gender pronouns. The court should model such use. See Ch. 10 of this bench guide.

2. **Exceptions for minor victims and witnesses in sex offense cases**

In *State v. Hakimi*,[37] Division I of the Washington Court of Appeals found that the trial court acted within its discretion under ER 611 in allowing two seven-year-old girls to hold a doll while testifying against the man who was alleged to have molested them. The court pointed to the girls' reluctance to testify and their relative youth as good reasons for allowing them to carry a doll to the witness stand, even though they did not carry a doll while being interviewed by a child interview specialist. The court distinguished the case before them from *State v. Harper*,[38] in which Division III of the Washington Court of Appeals referred, in dicta, to allowing an 11-year-old victim to hold a teddy bear while

---

[35] *State v. Hakimi*, 124 Wn. App. 15, 19, 98 P.3d 809 (2004) (citing *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969))

[36] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0611

[37] 124 Wn. App. at 22

[38] 35 Wn. App. 855, 862, 670 P.2d 296 (1983)

testifying against her stepfather in a similar sexual molestation case as an "other alleged error" that was unlikely to recur on appeal.

VII. Admission of Child Victims' Statements

The admission of out-of-court statements by child victims is governed by RCW 9A.44.120[39] (Admissibility of child's statements—Conditions), which provides as follows:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if: (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b)Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

VIII. The Confrontation Clause

In the seminal case *Crawford v. Washington*, [40] the U.S. Supreme Court held that testimonial hearsay evidence is admissible under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution only if the declarant witness is unavailable and the defendant has had a prior opportunity to cross-examine him or her. The Supreme Court expressly rejected the reliability of a declarant-witness's statements as a determinative factor in the admissibility of such statements under the Confrontation Clause.[41] For a more

[39] http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.120
[40] *Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding that admitting a defendant's wife's out of court statements made to police violated the Confrontation Clause)
[41] Id. at 68-69

detailed discussion of the Confrontation Clause within the context of sexual offense cases, please refer to Chapter 6 (Evidence).

IX. Defendant's Right of Self-Representation and Cross-Examination of Alleged Sexual Offense Victims

A. Self-Representation

A defendant in a state criminal trial has a constitutional right to proceed without counsel when he/she voluntarily and intelligently elects to do so, and a lawyer may not be forced upon a defendant who insists upon conducting his/her own defense.[42] There is no requirement that the court notify the defendant of the right to self-representation. As the court noted in *State v. Fritz*,[43] "Unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool." The right to waive counsel does not include a right to be immune from the consequences of self-representation.[44]

B. Cross-Examination

The United States Supreme Court has held that "[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety or interrogation that is repetitive or only marginally relevant."[45] Likewise, Washington Rule of Evidence 611 (ER 611: Mode and Order of Interrogation and Presentation)[46] provides that cross-examinations "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

In *State v. Estabrook*,[47] the Court of Appeals ruled that a trial court properly exercised its discretion under ER 611(a) in requiring a pro se defendant accused of taking indecent liberties with a developmentally disabled minor to submit his cross-examination questions to the court rather than ask them of the child directly. The Court of Appeals considered the conflicting interests that the trial court had to balance, "Estabrook's right to

---

[42] *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)
[43] 21 Wn. App. 354, 359, 585 P.2d 173 (1978)
[44] *State v. DeWeese* 117 Wn.2d 369, 382, 816 P.2d 1 (1991)
[45] *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); see also *Crawford v. Washington*, 541 U.S. at 62; Alanna Clair, "An Opportunity for Effective Cross-Examination: Limits on the Confrontation Right of the Pro Se Defendant", 42 *U. Mich. J.L. Reform* 719, 726 (2009)
[46] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0611
[47] 68 Wn. App. 309, 314, 842 P.2d 1001 (1993)

dignity of self representation and the reasonable concern for a vulnerable and scared developmentally delayed child witness," and noted that pursuant to ER 611(a), "the trial court was entitled to control the mode of witness interrogation so as to more effectively ascertain the truth and to protect the witness from harassment or undue embarrassment."[48]

Other jurisdictions have noted, in holding that a defendant's right to self-representation did not include the right to personally cross-examine an adult victim, that "[i]n certain cases, the intimidation of the witness during cross-examination and the tactical advantage gained by it may exceed what the Constitution and fundamental fairness in the adversarial process require."[49]

X. Testing and Counseling for Sexually Transmitted Diseases

Chapter 70.24 RCW:

- authorizes state and local public health officers to "examine and counsel or cause to be examined and counseled persons reasonably believed to be infected with or to have been exposed to a sexually transmitted disease"[50];

- requires local health departments to conduct pretest counseling, HIV testing, and posttest counseling of all persons convicted of a sexual offense under Chapter 9A.44 RCW;

- requires that "testing…be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge"[51]; and

- authorizes jail administrators, with the approval of the local public health officer, to order pretest counseling, HIV testing, and post-test counseling for persons detained in the jail whose actual or threatened behavior is determined by the public health officer to present a possible risk to the staff, general public, or other persons.[52]

The Washington Supreme Court, in *In the Matter of Juveniles A, B, C, D, E,*[53] held that the requirement in RCW 70.24.340 of mandatory HIV testing of sexual offenders, including juvenile sexual offenders, properly applies even to offenders whose actions involve no passing of bodily fluids, and does not violate the Fourth Amendment. In Washington State, only the victims of convicted sexual offenders may learn the attacker's HIV status.[54]

---

[48] Id. at 316

[49] *Partin v. Commonwealth*, 168 S.W.3d 23, 29 (Ky. 2005) (citing Lane, "Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials: Fields v. Murray," 74 *N.C. L. Rev.* 863, 894 (March 1996))

[50] RCW 70.24.024 (1) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.024

[51] RCW 70.24.340(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.340

[52] RCW 70.24.360 http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.360

[53] 121 Wn.2d 80, 87-95, 847 P.2d 455 (1993)

[54] http://www.doh.wa.gov/portals/1/Documents/Pubs/410-007-KNOWCurriculum.pdf

XI. Jury Selection

The court should be especially attentive in sex offense trials to possible biases among prospective jurors. For example, studies have shown that juror judgments in rape cases are influenced more by their own attitudes and beliefs about rape than the facts presented.[55] Additionally, because potential jurors' biases and the reasons for them are often very personal and potentially embarrassing in sexual offense cases, the court must direct jury selection with particular caution and delicacy. Recommendation # 20 by the Washington State Jury Commission[56] states as follows:

> During jury selection in cases such as sexual harassment or sex crimes, counsel often will ask potential jurors whether they have ever been sexually harassed, assaulted, or molested. Jurors may find such questions embarrassing and intrusive and be less willing to speak publicly about their prior experience. In sensitive cases, the court should consider using written questionnaires and examining jurors outside the presence of other jurors. The questionnaires would identify which jurors should be separately questioned. Jurors' privacy would thereby be protected while allowing the parties effective jury selection. The trial court has this discretion and should use it in appropriate cases.

Whether or not questionnaires are used, biases are also likely to be identified during general voir dire in open court, and the court must be alert to the dangers of public voir dire eliciting information or comments from prospective jurors that may prejudice or taint other prospective jurors or unintentionally invade privacy or cause embarrassment, and the court should be prepared to intervene if the discussion between counsel and prospective jurors appears to risk either danger occurring. The court should consider giving attorneys more time and leeway during sexual offense cases.

The Washington State Supreme Court's Committee on Jury Instructions has recently revised WPI (Civil Advance Oral Instruction—Beginning of Proceedings) 1.01 to include reference to jury restraint from conscious or implicit bias:

> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

---

[55] See e.g. Natalie Taylor, "Juror attitudes and biases in sexual assault cases," Trends & Issues in crime and criminal justice No. 344, Australian Institute of Criminology (2007) http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi344.pdf

[56] https://www.courts.wa.gov/programs_orgs/pos_jurycomm/?fa=pos_jurycomm.showreport&id=rec20

> However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.
>
> ….
>
> Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[57]

Although as of the publication date of this Sexual Violence Bench Guide, the WPIC (Criminal) Pattern Instruction has not yet been revised with similar language, practitioners may wish to consider this language in appropriate voir dire of jurors.

Determining the nature and extent of biases identified and their impact upon a prospective juror's ability to serve impartially requires special caution. The competing interests of the defendant's and public's constitutional right to a public trial and the protections against undue invasions of privacy or embarrassment to which potential jurors are entitled and which are necessary to accommodate the seating of impartial juries are directly implicated. Although individual questioning of jurors in chambers is not permitted unless the defendant waives his/her right to a public trial,[58] referring to potential jurors only by initials and not requesting identifying information during questioning are additional ways to prevent invading a prospective juror's privacy. The court has discretion to determine how much or little identifying information about prospective jurors is disclosed to the parties; however, there is a strong presumption in favor of juror privacy.[59]

In sex offense trials, invariably some prospective jurors will have biases or beliefs that may affect their ability to serve. For this reason, in sex offense trials it is generally advisable to inform prospective jurors at the beginning of jury selection that if there are matters or issues that may interfere with their ability to weigh the evidence impartially and follow the instructions of law but that involve sensitive private information that they would be uncomfortable disclosing in open and public proceedings they may request that the court

---

[57] *WPI 1.01 (Civil Advance Oral Instruction-Beginning of Proceedings) and Comment* (4th ed. 2016)
[58] *See State v. Herron*, 183 Wn.2d 737, 356 P.3d 709 (2015)
[59] Washington State Jury Commission, Protecting Juror Privacy, Recommendation 18: https://www.courts.wa.gov/committee/?fa=committee.display&item_id=277&committee_id=101

consider conducting voir dire regarding such matters in chambers. However, the constitutional right to an open trial extend to the jury selection phase and require that the trial court consider alternatives to closed, in chambers voir dire. Questioning prospective jurors individually in the courtroom is one way that the court may be able to balance these concerns.

As noted above in Section II, trial courts must carefully consider the criteria set forth in *State v. Bone-Club*[60] (repeated below for ease of reference) before closing preliminary proceedings such as voir dire to determine if the need for closure sufficiently outweighs the constitutional guarantees to a public trial, provided for in Washington State's Constitution:

1. whether the proponent of the closure has shown a compelling interest in doing so, and, where the interest is based on a right other than a defendant's right to a fair trial, whether there is a "serious and imminent" threat to that right;

2. whether those present during the motion for closure had an opportunity to object;

3. whether the proposed method for curtailing open access is the least restrictive means available to protect the threatened interests;

4. the competing interests of the proponent of closure and the public; and

5. whether the order is broader in its application or duration than necessary to serve its purpose.[61]

The *Bone-Club* analysis must be made on the record and with input from any parties or persons present In *State v. Wise*, the Washington Supreme Court clarified that the public trial right applies to jury selection,[62] and that failing to conduct a *Bone-Club* analysis before closing voir dire is structural error presumed to be prejudicial.[63] As a result of this error, the court in *Wise* granted the defendant a new trial after finding that he had not waived his right to a public trial by failing to object to the closed voir dire.[64]

The court applied the rule in *Wise* to voir dire closure in *State v. Paumier*, [65] and again granted the defendant in that case a new trial. The court distinguished its rulings in *Wise* and *Paumier* from *State v. Momah*, [66] another case involving allegedly improper closure of voir dire, but in which the court reached the opposite result from the other two cases. In *Momah*, the court found that the defendant "affirmatively accepted the closure,

[60] 128 Wn.2d 254
[61] Id. at 258-59
[62] *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113, 1117 (2012) (citing *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 725, 175 L.Ed.2d 675 (2010)
[63] Id. at 14
[64] Id. at 15
[65] 176 Wn.2d 29, 32, 288 P.3d 1126 (2012)
[66] 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, __ U.S. __, 131 S. Ct. 160, 178 L. Ed.2d 40 (2010)

argued for the expansion of it, actively participated in it, and sought benefit from it" and that the "trial court recognized the competing article I, section 22 interests…. [and] carefully considered the defendant's rights…."[67]

The court could also consider providing a list of resource numbers to all prospective jurors in the event any prospective jurors have experienced past traumatic experiences and would benefit from seeking additional support. Appendix A to Chapter 1 contains a list of community resources, by county.

[67] Id. at 147

CHAPTER 6
Evidence

I. Introduction

This chapter addresses evidentiary issues that arise during criminal cases involving sexual offense charges. This chapter is not intended to provide a comprehensive overview of criminal evidence issues.

For a more complete discussion of general evidentiary issues, see 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence (2018-19 ed.) and Tegland, 5A Washington Practice: Evidence Law and Practice (6th ed). The volume includes many Washington statutes concerns evidence (including Sexual Assault Protection Order (RCW Ch. 7.90) and Sex Offenses (RCW Ch. 9a.44), as well as the Evidence Rules and Author's Commentary. Citations to Tegland in this Chapter of the Sexual Violence Bench Guide refer to the Courtroom Handbook above.

II. Washington Rape Shield Law

As is discussed in Chapter 1 of this Bench Guide, sexual violence is dramatically underreported. A significant barrier to victims reporting is concern for their privacy.[1] This is particularly critical in the age of the Internet, where access to information about legal cases is readily available.

Rape shield protections play a critical role in the criminal justice system by protecting sexual assault victims' privacy and encouraging the reporting and prosecution of sexual assault cases.[2] The state legislature enacted the rape shield statute to encourage victims to report sexual assault and to ensure that the jury is not unduly influenced by a victim's irrelevant prior sexual history.[3] Before the legislature enacted this statute, defendants had routinely produced evidence of victims' prior sexual conduct to prove the false premise of a "logical nexus between chastity and veracity."[4]

A. Rape Shield Statute

Washington's rape shield law is codified as RCW 9A.44.020 and addresses the admissibility of evidence of a victim's past sexual behavior to challenge credibility or show consent. ER 412(a) essentially restates the rape shield law and includes useful case law

[1] Nat'l Victim Ctr & Crime Victim Research & Treatment Ctr., *Rape in America: A Report to the Nation*, 5 (1992)
[2] *People v. Bryant*, 94 P.3d 624, 636 (Colo. 2004); Paul S. Grobman, Note, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. Rev. 271, 275 (1986)
3 *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006)
[4] *State v. Peterson*, 35 Wn. App. 481, 667 P.2d 645 (1983)

summaries within the Author's Commentary. The rule has been applied somewhat differently in civil and criminal cases.[5]

Evidence of a victim's past sexual behavior offered for any other purpose is not covered by the rape shield statute, but is still subject to the general relevancy requirements of ER 403.[6] Past sexual behavior includes, "but [is] not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards…."[7]

1. Evidence of victim's past sexual behavior inadmissible to challenge credibility

"Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is *inadmissible on the issue of credibility*…"[8] [Emphasis added].

2. Evidence of the victim's past sexual behavior to show consent

Evidence of the victim's past sexual behavior *may* be admissible on the issue of consent when "the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent…"[9]

Before admitting evidence of a victim's past sexual behavior offered to prove consent, the court must determine that the probative value substantially outweighs the probability that its admission will "create a substantial danger of undue prejudice." This rule applies to any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime. In this context, a victim's past sexual behavior includes but is not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards."[10]

The process the court must follow to make this determination is mandated by the statute and necessarily quite formal:[11]

> a. A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual

---

[5] *Tegland*, supra.
[6] *State v. Harris*, 97 Wn. App. 865, 871, 989 P.2d 553 (1999) (For example, in *State v. Harris*, the victim's past sexual behavior was offered to show non-paternity on the part of the defendant.)
[7] RCW 9A.44.020(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[8] RCW 9A.44.020(2) https://app.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[9] Id.
[10] RCW 9A.44.020(3) https://app.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[11] Id.

behavior proposed to be presented and its relevancy on the issue of the consent of the victim.
b. The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
c. If the court finds that offer of proof is sufficient, the court shall order a hearing outside of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
d. At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

3. Opening the door to evidence of a victim's past sexual behavior

When the state presents evidence tending to prove the nature of the victim's past sexual behavior the defendant may cross-examine the victim regarding such behavior.[12] This statute excludes evidence that may be prejudicial to the victim and has little or no relevance, but does not exclude such evidence if it is highly relevant.[13] The state retains the burden of proof on the issue of consent.[14]

C. Case Law

1. Balancing the rape shield statute with constitutional rights to present a defense

a. Relevance of evidence of past sexual behavior

The court must first determine if the evidence of past sexual behavior is relevant to the charge. In *State v. Hudlow,*[15] the court noted, with respect to the trial court's threshold determination of the relevance of evidence of a victim's past sexual behavior, that factual similarities between prior consensual sex acts and the questioned sex acts claimed by the

[12] RCW 9A.44.020(4) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[13] *State v. Sheets*, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005)
[14] *State v. Kalamarski*, 27 Wn. App. 787, 791, 620 P.2d 1017 (1980)
[15] 99 Wn.2d 1, 11, 659 P.2d 514 (1983)

defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401.

In *State v. Gregory* [16] the court noted that "The factual similarities between the past sexual acts and the acts at issue in the case must be particularized, not general."[17] The court held that evidence that a victim had engaged in prostitution was inadmissible to prove consent because (1) the prior sexual activity was of a different character than the incident at issue in the case and (2) the prostitution, which occurred more than two years prior to the alleged rape, was remote in time.[18]

b. Prejudicial effect of evidence of past sexual behavior

Once the court has found that the evidence is relevant, the probative value must be balanced against the potentially prejudicial effect.[19] In *Hudlow,* supra, the court clarified that:

> …the balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truthfinding process itself…. The prejudice to the factfinding process itself must be considered to determine whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.[20]

c. Probative value of evidence of past sexual behavior

The case law clarifies that although balancing by the court is required, highly probative evidence will be admissible under Constitutional principles. The *Hudlow* court concluded that the state's interest in excluding evidence of past general promiscuity, to avoid distracting and inflaming the jurors, was "compelling enough to permit the trial court to exclude minimally relevant prior sexual history evidence if the introduction of such evidence would prejudice the truthfinding function of the trial."[21]

In *State v. Jones* [22]the defendants, charged with rape, sought to present evidence that the victims participated in an all-night sex party with the defendants, during which they consented to the sex acts which were the bases of the charged rapes. Although the court held that the evidence was not barred by the rape shield act because the evidence involved present, not past, sexual behavior, it also reiterated its analysis in *Hudlow* of the balancing required by the rape shield act and expressly stated what it had suggested in *Hudlow:* "If the evidence

[16] 158 Wn.2d 759 (2006)
[17] Id. at 785
[18] Id.
[19] 99 Wn.2d at 12
[20] Id. at 13
[21] Id. at 15
[22] 168 Wn.2d 713, 717, 230 P.3d 576 (2010)

is of high probative value… 'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, section 22.'"

2. Electronic mail evidence

Evidence Rule 901(10) – Authentication, Identification, and Admission of Exhibits – Electronic Mail (E-Mail) governs admissibility of electronic evidence and was amended in 2013 to suggest methods of authentication of e-mails.[23] The Author's Comments at Sec. 901.17 include recent case law and analysis.

For example, a defendant's emails were authenticated by recipients who recognized the defendant's telephone number and the substantive content of the messages. A prima facie case of authenticity was established over the defendant's argument that the messages were forgeries.[24]

In *State v. Posey*,[25] the police discovered an email on the victim's computer that suggested the victim would have consented to violent sexual acts. In the email, the victim wrote that she would "enjoy" being raped and that she wanted a boyfriend who would "choke" and "beat" her. The Supreme Court of Washington held that this e-mail was inadmissible to rebut the state's theory that the juvenile defendant, who was 16 years old, was violent and abusive. Under the rape shield statute, the email was inadmissible because (1) the victim had not addressed or sent the email to the defendant; and (2) the victim only discussed possible sexual misconduct, not prior sexual abuse, in the email.

3. "Opening the door" to evidence of the victim's past sexual conduct

If the state "opens the door" to evidence of the victim's past sexual conduct during its case-in-chief, the defendant may introduce that evidence.[26] The state only "opens the door" to evidence of the victim's prior sexual conduct if the state introduces evidence that casts the victim's sexual history in a favorable, but false, light. If the state does so, the defendant can introduce evidence to rebut that favorable impression about the victim's sexual past. *State v. Camara.*[27] In *Camara* the victim testified that he had not wanted to have anal sex with the defendant because anal sex was unsafe and not pleasurable. This testimony did not "open the door" to evidence of the victim's past sexual conduct because (1) the testimony did not cast his sexual history in a favorable light and (2) evidence that the victim had engaged in anal sex with other men would not rebut the substance of the victim's direct testimony.

III. Privileged Communications and Records

A. Communications

[23] *Tegland*, supra.
[24] *State v. Young*, 192 Wn.App. 850, 369 P.3d 205 (2016) and subsequent determination, 198 Wn.App. 797, 296 P.3d 386 (2017).
[25] 161 Wn.2d 638, 167 P.3d 560 (2007)
[26] *State v. Gregory*, 158 Wn.2d at 787
[27] 113 Wn.2d 631, 643-44, 781 P.2d 483 (1989)

For discussion and case law as to all statutory privileges, see generally Tegland at Part 5, ER 501 and 502.[28]

1. Marital privilege – RCW 5.60.060(1)
http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

RCW 5.60.060(1) provides that a spouse or domestic partner cannot, without the consent of the other spouse or domestic partner, be examined for or against the other or be examined about communications made during the marriage or domestic partnership by one to the other. This privilege applies both during and after the marriage or domestic partnership.[29] This privilege does not apply to quasi-marriages or meretricious relationships.[30]

The privilege does not apply to a criminal proceeding (a) for a crime committed by one against the other; (b) if the marriage or partnership began after the filing of formal charges; or (c) if the crime was committed against a child of whom the spouse or domestic partner is the parent or guardian.[31]

2. Sexual assault advocate privilege – RCW 5.60.060(7)
http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

RCW 5.60.060(7) provides that a sexual assault advocate may not, without the consent of a victim, be examined regarding communications between the advocate and victim. A "sexual assault advocate" is an employee or volunteer from a rape crisis center, victim assistance unit, or any other program that provides information, advocacy, and counseling to a sexual assault victim.[32]

A sexual assault advocate may disclose a confidential communication without the victim's consent if the failure to disclose that communication "is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person."[33] The court shall presume that the advocate who disclosed the confidential communication acted in good faith.[34]

3. Domestic violence advocate privilege - RCW 5.60.060(8)
http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

A "domestic violence advocate" is an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to

---

[28] *Tegland*, supra.
[29] RCW 5.60.060(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060
[30] *State v. Cohen*, 19 Wn. App. 600, 609, 576 P.2d 933 (1978)
[31] RCW 5.60.060(1)
[32] RCW 5.60.060(7)(a)
[33] RCW 5.60.060(7)(b)
[34] Id.

victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.[35]

A domestic violence advocate may disclose a confidential communication without the consent of the victim if the failure to disclose that communication "is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person."[36] The court shall presume that the domestic violence advocate acted in good faith in disclosing the confidential communication.[37]

4. **Mental health therapist and client privilege - RCW 18.225.105**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=18.225.105

5. **Psychologist - patient privilege - RCW 18.83.110**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=18.83.110

6. **Clergyman or priest privilege - RCW 5.60.060(3)**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

B. Records

1. **Confidentiality of rape crisis center records - RCW 70.125.065**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065

RCW 70.125.065 protects records maintained by a community sexual assault program from discovery by the defense in a sexual assault case. Such records may only be disclosed if: (a) the defense makes a written pretrial motion to request the discovery; (b) the defense provides an affidavit or affidavits setting forth the specific reasons why the defense is requesting the records; and (c) the court reviews the requested records in camera to determine (1) whether the records are relevant and (2) whether the probative value of the records outweighs the victim's privacy interest in keeping the records confidential. The court must also take into account what further trauma the victim may suffer if the records are disclosed to the defense, and enter an order stating whether the records, or any part of the records, are discoverable and setting forth the basis for that finding.[38]

In *State v. Espinosa*,[39] the appellate court found that the trial court acted within its discretion in refusing to order disclosure of certain information to defense counsel, who argued that the privilege had been waived because a police officer was present during the rape counselor's interview with the victim. And, in *State v. Kalakosky*,[40] the Washington State Supreme Court found that the trial court acted within its discretion in deciding not to

[35] RCW 5.60.060(8)(a)
[36] RCW 5.60.060(8)(b)
[37] Id.
[38] RCW 70.125.065 http://apps.leg.wa.gov/RCW/default.aspx?cite=70.125.065
[39] 47 Wn. App. 85, 90, 733 P.2d 1010 (1987)
[40] 121 Wn.2d 525, 550, 852 P.2d 1064 (1993)

review rape crisis center records *in camera* when there was no affidavit that established the specific reasons why such review was appropriate.

The U.S. Supreme Court observed, in *Pennsylvania v. Richie*,[41] that records that are conditionally privileged should be reviewed by the court *in camera* when the appropriate showing of potential materiality has been made.

2. **Client records of domestic violence programs - RCW 70.123.075**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=70.123.075

3. **Washington State Criminal Records Privacy Act - chapter 10.97 RCW**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97

4. **Washington Uniform Healthcare Information Act - chapter 70.02 RCW**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=70.02

5. **Public Disclosure Act - RCW 50.13.015**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=50.13.015

6. **Address confidentiality for victims of domestic violence, sexual assault and stalking - chapter 40.24 RCW**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=40.24

7. **Child victims of sexual assault, identification confidential - RCW 10.97.130**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97.130

8. **Victim polygraphing - RCW 10.58.038**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.58.038

9. **Interpreter in legal proceeding - RCW 2.42.160**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=2.42.160

10. **Federal HIPAA regulations (Health Insurance Portability and Accountability Act of 1996.** See *Tegland* at 501:36 (Author's Commentary).

IV. Evidence of a Victim's Prior Complaint of Sexual Assault

The trial court has the discretion to limit the defendant's cross-examination of the victim regarding prior false rape complaints.[42] In *State v. Demos*[43] the court found that the trial court acted within its discretion by denying admission of evidence that the victim had filed two prior, and arguably false, rape complaints, holding that the evidence did not tend to prove any issue in dispute and was highly prejudicial.

[41] 480 U.S. 39, 61, 107 S. Ct. 989, 94 L. Ed.2d 40 (1987)
[42] *State v. Williams*, 9 Wn.App. 622, 623, 513 P.2d 854 (1973)
[43] 94 Wn.2d 733, 737, 619 P.2d 968 (1980)

V. Character Evidence and Prior Bad Acts of the Defendant

A. Generally

The admissibility of general character evidence is governed by ER 404(a):

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.[44]

ER 607 permits the impeachment of witnesses by any party. ER 608 provides for the admission of evidence referring to a witness' character for truthfulness. ER 609 governs the admission of evidence of a witness' criminal conviction for purposes of impeachment.

B. Evidence of Prior Bad Acts

The admissibility of evidence of other crimes, wrongs or acts is governed by ER 404(b), which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[45]

To admit such evidence the trial court must 1) find by a preponderance of the evidence that the misconduct occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value of the evidence against its prejudicial

---

[44] ER 404(a) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0404

[45] ER 404(b) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0404; see *State v. Gresham*, 173 Wn.2d 405,428, 269 P.3d 207 (2012), in which the court ruled unconstitutional RCW 10.58.090, which provided for the admission, in sex offense cases, of evidence of the defendant's prior sex offenses "notwithstanding Evidence Rule 404(b) if the evidence is not inadmissible pursuant to Evidence Rule 403."

effect.[46] The Washington Supreme Court held, in *State v. Kilgore*,[47]that the trial court may rely upon the state's offer of proof of other wrongs in determining the admissibility of such evidence. The trial court has discretion to decide whether an evidentiary hearing should be held to determine if there is a preponderance of such evidence.

If evidence of a defendant's prior crimes, wrongs, or acts is admitted, the trial court must, if requested by the defendant, give a limiting instruction that informs the jury of the purpose for which the evidence is admitted and that "the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character."[48]

A trial court may admit evidence that the defendant has physically assaulted the victim in the past, even if those physical assaults did not happen at the same time as the alleged sexual assault. In *State v. Wilson*,[49]the trial court's admission of evidence of past physical assaults was upheld because that evidence (1) illustrated why the victim may not have reported the sexual assault; (2) demonstrated the defendant's intent to dominate and control the victim; and (3) rebutted the implication that the defendant did not molest the victim.

VI. Hearsay Rules and Exceptions

A. Hearsay and the Confrontation Clause: *Crawford v. Washington*

1. Background

Part XII of *Tegland*, supra, is an extensive examination of the Sixth Amendment Right to Confrontation in light of the evolving case law since the decision in *Crawford v. Washington*.[50]

The U.S. Supreme Court has held that a defendant's right to confront the witnesses and evidence against them may only be restricted if: 1) the purpose of the Confrontation Clause is "otherwise assured"; and 2) the "denial of such [face-to-face] confrontation is necessary to further an important public policy." The Court articulated this proposition in *Maryland v. Craig*,[51] finding that Maryland's law permitting victims of sexual abuse to testify against their abusers via closed-circuit television did not violate a defendant's right to confront witnesses under the Confrontation Clause.[52]

---

[46] *State v. Pirtle*, 127 Wn.2d 628, 428, 904 P.2d 245 (1995)
[47] 147 Wn.2d 288, 295, 53 P.3d 974 (2002)
[48] *State v. Gresham*, 173 Wn.2d at 423-24
[49] 60 Wn. App. 887, 808 P.2d 754 (1991)
[50] 41 U.S. 36, 124 S. Ct. 1354, 158 L Ed. 2d 177 (2004), 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence (2018-19 ed.) and Tegland, 5A Washington Practice: Evidence Law and Practice (6th ed).
[51] *Maryland v. Craig*, 497 U.S. 836, 837, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)
[52] Id.

Washington State provides a hearsay exception to child victims of sexual abuse "where non-testimonial hearsay statements of a child are at issue."[53] A child victim-witness's hearsay statements can be testimonial when made to a detective or a Child Protective Services investigator.[54] In Washington, if a child witness recants or cannot remember his or her initial testimony on the stand, he or she is still considered "available" for purposes of the Confrontation Clause.[55]

In addition to complying with the provisions of RCW 9A.44.120, set forth in subsection C below, non-testimonial statements of child victims are admissible if there is compliance with the factors to determine reliability of such statements, articulated in *State v. Ryan*.[56] These include:

1. whether there is an apparent motive to lie
2. the general character of the declarant
3. whether more than one person heard the statements
4. whether the statements were made spontaneously
5. the timing of the declaration and the relationship between the declarant and the witness
6. whether the statement contains an express assertion about a past fact
7. whether cross-examination could show the declarant's lack of knowledge
8. the possibility that the declarant's faulty recollection is remote
9. the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement[57]

Before applying the hearsay exception under RCW 9A.44.120, the state must attempt to procure the child's testimony by other means.[58] For example, as in *Maryland v. Craig*, testimony by child abuse victims under the age of ten may be presented by closed-circuit television, when determined to be necessary and presented in accordance with the provisions of RCW 9A.44.150 (testimony of child by closed-circuit television). The court must find that requiring the child witness to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably

[53] *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006)
[54] *State v. Beadle*, 173 Wn.2d 97, 119, 265 P.3d 863 (2011)
[55] *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (holding that child was not "effectively unavailable" for confrontation clause purposes because the child was "not only sworn in as a witness at trial, asked about the alleged incidents, and provided answers to the questions put to her, but she was actually cross-examined. She was not only available but was probably the best witness for the defense"); *State v. Price*, 158 Wn.2d 630, 651, 146 P.3d 1183 (2006) (holding that "because all of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall, an inability to remember does not render a witness unavailable for confrontation clause purposes")

[56] 103 Wn. 2d 165, 691 P.2d 197 (1984)
[57] Id. at 175-76.
[58] *State v. Smith*, 148 Wn.2d 122, 130, 59 P.3d 74 (2002) (even though trial court had no closed-circuit television, court should have at least investigated the cost of renting a closed-circuit television system for defendant's trial); 5C *Wash. Prac., Evidence Law and Practice* § 1300.22 (5th ed.)

communicating at the trial.[59] In *State v. Foster*[60] the Washington Supreme Court held that the closed-circuit testimony hearsay exception for child witnesses does not violate a defendant's rights under either the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, or article 1, section 22 of the Washington State Constitution. Washington State has yet to directly apply *Crawford*'s holding to its closed-circuit television testimony statute.

In *Crawford v. Washington* the U.S. Supreme Court overruled *Ohio v. Roberts*[61] and shifted the trial court's analysis from the reliability of a hearsay statement to whether that statement was "testimonial." The Supreme Court held that a trial court may not admit testimonial statements unless (1) the declarant is unavailable and (2) the defendant had an opportunity to cross-examine the declarant. After *Crawford*, the reliability of such testimonial statements plays no role in determining their admissibility.

2. "Testimonial" statements

In *State v. Walker*,[62] the Washington Court of Appeals noted that testimonial statements may include "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" or "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[63]

The U.S. Supreme Court provided some additional definition of "testimonial statements" in *Davis v. Washington.*[64] In that case, the Court held that the statements made in a 911 call were not "testimonial" and were therefore not inadmissible under *Crawford.* The Court explained that

> …statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[65]

In applying the foregoing distinction between testimonial and non-testimonial statements to the facts in *Davis,* the court noted the following factual distinctions between

---

[59] RCW 9A.44.150(1)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.150
[60] 135 Wn.2d 441, 467, 957 P.2d 712 (1998)
[61] 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980)
[62] 129 Wn. App. 258, 267, 118 P.3d 935 (2005)
[63] Id.
[64] 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006)
[65] Id. at 822

that case and *Crawford*: (a) in *Davis* the declarant was speaking about events while they were happening, in contrast to *Crawford,* in which the declarant's statement was given "hours after the events she described had occurred";[66] (b) the declarant in *Davis,* unlike the declarant in *Crawford,* was facing an on-going emergency and calling for help; (c) "the nature of what was asked and answered in *Davis,* again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past;"[67] (d) "the difference in the level of formality between the two interviews….*Crawford* was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers;" the declarant's statements in *Davis* "were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."[68] The court in *Davis* cautioned, however, "that a conversation which begins as an interrogation to determine the need for emergency assistance" could become testimonial "once that purpose has been achieved."[69]

In *State v. Ohlson,*[70] decided subsequent to the *Crawford* and *Davis* decisions, the Washington Supreme Court summarized *Davis* as follows:

> *Davis* announced that whether statements made during police interrogation are testimonial or nontestimonial is discerned by objectively determining the primary purpose of the interrogation. If circumstances objectively indicate that the primary purpose is to enable police assistance to meet an ongoing emergency, the elicited statements are nontestimonial. If circumstances indicate that the primary purpose is to establish or prove past events, the elicited statements are testimonial. Characteristics to consider when objectively assessing the circumstances of the interrogation include the timing of the statements, the threat of harm, the need for information to resolve a present emergency, and the formality of the interrogation.[71]

If a party seeks to admit a statement the court determines is not testimonial, the court must then determine if the statement is sufficiently reliable to be admissible consistent with the hearsay rule and the exceptions thereto.

B. Hearsay Exceptions

1. Standard of appellate review of admissions of hearsay statements

[66] Id. at 827
[67] Id.
[68] Id.
[69] Id. at 828
[70] 162 Wn.2d 1, 168 P.3d 1273 (2007)
[71] Id. at 15

"A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed…under an abuse of discretion standard."[72] The trial court only abuses its discretion if its decision is "manifestly unreasonable" or based on "untenable" grounds.[73]

If the admitted hearsay statement is testimonial, and also implicates the defendant's Confrontation Clause rights, appellate review applies a harmless error analysis.[74]

2. Excited utterances (ER 803(a)(2))

An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[75] A sexual assault is a "startling event."[76]

To be an excited utterance, the declarant must make the statement while "under the influence of external physical shock" and must not have had time to "calm down enough to make a calculated statement based on self-interest."[77]

a. Voice on 911 tape must be authenticated

If an excited utterance is contained in a 911 tape, the proponent of its admission must lay the proper foundation by establishing the authenticity of the voice of the person allegedly making the statement.[78] Evidence used to authenticate the voice can be direct or circumstantial.[79]

b. Approved time frames for admission as excited utterances

In several cases, the Washington courts have upheld the admission as excited utterances of statements made hours after the "exciting event": *State v. Woodward*,[80] (a child's statement that the defendant had sexual intercourse with her, made 20 hours after the incident, in response to her mother's question); *State v. Guizzotti*,[81] (a rape victim's statement made after hiding under a tarp in fear of the defendant for seven hours**);** *State v. Flett*,[82] (a statement by a rape victim to her daughter seven hours after the event); *State v. Fleming*,[83] (a statement by a rape victim to a friend three hours after the event, and to the

---

[72] *State v. Woods*, 143 Wn.2d 561,595, 23 P.3d 1046 (2001)
[73] *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)
[74] *State v. Davis*, 154 Wn.2d 291, 304, 168 P.3d 1273 (2005) (aff'd by *Davis v. Washington*, 547 U.S. at 834)
[75] ER 803(a)(2)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[76] *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)
[77] *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)
[78] *State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949 (1996)
[79] Id. (citing *State v. Deaver*, 6 Wn. App 216, 219, 491 P.2d 1363 (1971))
[80] 32 Wn. App. 204, 207, 646 P.2d 135 (1982)
[81] 60 Wn. App. 289, 803 P.2d 808 (1991)
[82] 40 Wn. App. 277, 699 P.2d 774 (1985)
[83] 27 Wn. App 952, 621 P.2d 779 (1980)

police three to six hours after the event); *State v. Strauss*[84](a rape victim's statement three-and-a-half hours after the assault when she encountered a policeman at a gas station).

c. Statements not considered excited utterances

In *State v. Doe*,[85] the Washington Supreme Court ruled that a child victim's description of the incident to her foster mother three days afterward was inadmissible as an excited utterance, noting that no Washington court had ever allowed such a long period of time to lapse between event and statement.

In *State v. Bargas*,[86] the victim's statements to police one day after the rape were ruled inadmissible as excited utterances. The court noted that statements by rape victims are only admissible while the victim is in a "state of emotional turmoil," and found it dispositive that the victim had made the statements after going to sleep, taking a shower, and talking to a friend.

In *State v. Dixon*,[87] a rape victim's four-page written statement was ruled inadmissible as an excited utterance because the statement was so lengthy and comprehensive that it was indistinguishable from the statements that police regularly collect from crime victims. A crime victim's statement is not an "excited utterance" merely because the victim is upset.[88]

d. The admissibility of excited utterances containing false information

The court in *State v. Brown*[89]held that the trial court abused its discretion in admitting as an excited utterance a statement in which the declarant had intentionally included a false claim that she had been kidnapped.

In *State v. Owens*,[90] a child's statements about her sexual abuse in response to her mother's and grandmother's lengthy questioning were not considered excited utterances because they differed from her earlier statements to a physician, and indicated that "a declarant…has necessarily reflected upon the previous response." These statements were still admitted, as they were deemed harmless.[91]

3. Present sense impressions (ER 803 (a)(1))

[84] 119 Wn.2d 401, 832 P.2d 78 (1992)
[85] 105 Wn.2d 889, 893-94, 719 P.2d 554 (1986)
[86] 52 Wn. App. 700, 704, 763 P.2d 470 (1988)
[87] 37 Wn. App. 867, 873, 684 P.2d 725 (1984)
[88] Id. at 873-74
[89] 127 Wn.2d 749, 759, 903 P.2d 459 (1995)
[90] 128 Wn.2d 908, 913, 913 P.2d 366 (1996)
[91] Id. at 913-14

A present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[92]

In *State v. Powell*,[93] a victim's statement that the defendant was "drinking, drugging, and getting violent" was not a present sense impression exception to the hearsay rule because the defendant was not present when she made the statements.

4. Then-existing mental, emotional, or physical condition (ER 803(a)(3))

A statement of then-existing mental, emotional or physical condition is "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed…."[94]

In *Powell*, supra,[95] the victim's statements also did not fall under this exception because it is generally only applicable where the state of mind of the victim is at issue, such as during an accident or in a self-defense case.

5. Statements made for the purpose of medical diagnosis or treatment (ER 803(a)(4))

"Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible under this exception.[96] Therapy for sexual abuse, as far as it is intended to help the healing process, does not differ from other medical treatment for the purposes of this rule.[97]

Statements made for the purpose of, or "reasonably pertinent to," medical diagnosis or treatment, including psychological treatment, are not objectionable as hearsay.[98] To be admissible, such statements must (1) be consistent with the purposes of promoting the treatment; and (2) be of the kind "reasonably relied on" by the person giving the medical diagnosis or treatment.[99]

Statements as to causation of injuries, symptoms or pain are generally admissible under this exception, whereas statements attributing fault are generally not admissible

---

[92] ER 803(a)(1)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[93] 126 Wn.2d 244, 267, 893 P.2d 615 (1995)
[94] ER 803(a)(3)
[95] 126 Wn.2d 244, 266 (1995) (citing *State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980))
[96] ER 803(a)(4)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[97] *D.P. v. Dep't of Social & Health Servs.*, 76 Wn. App. 87, 92-93, 882 P.2d 1180 (1994)
[98] *State v. Woods*, 143 Wn.2d at 602
[99] *D.P. v. Dep't of Social & Health Servs.*, 76 Wn. App. 87 at 93

because they are not usually pertinent to diagnosis or treatment.[100] However, in sexual abuse cases the identity of the perpetrator will sometimes be admissible because it is relevant to prevent future injury. In *State v. Bouchard*[101] a child sexual abuse victim's statements to a doctor that "grandpa did it," are admissible because they are relevant to the "cause or external source of the injury and necessary to proper treatment." This exception applies to statements made to health professionals, including physicians and others, such as emergency room nurses.[102]

6. When prior statements by a witness are not hearsay (ER 801(d)(1))

A prior statement by a witness who testifies and is subject to cross examination regarding the statement is not hearsay if (a) the statement is inconsistent with the witness' testimony and was given under oath at a trial or hearing or in a deposition; (b) the statement is consistent with the witness' testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive; or (c) the statement "is one of identification of a person made after perceiving the person."[103] It is also not hearsay if the witness's prior statement is not offered to prove the truth of the matter asserted.[104]

In *State v. Smith,*[105] the court held that defense counsel's cross-examination of a witness, including questions suggesting that the victim had falsely accused the defendant of misconduct before, justified the admission of the victim's prior consistent statements to other individuals about the alleged incident involving the defendant.

In *State v. Osborn,*[106] prior consistent statements of a victim were held admissible even though the defendant had attempted to reveal the victim's alleged conspiracy to falsely accuse the defendant on cross-examination of her mother, not the victim. The appellate court saw "no problem" with the fact that the prior consistent statements were offered to rebut inferences during the cross-examination of a different witness.

In *State v. Walker,*[107] the trial court properly allowed six different witnesses to relay the child victim's story about the assault, even though those witnesses were one step removed from hearing the child's recital of the event. The testimony of these witnesses was not hearsay, but was "admissible as proof of the fact recited by the declarant to the witness."[108]

---

[100] Id.
[101] 31 Wn. App. 381, 384, 639 P.2d 761 (1982) (abrogated as to a different issue by *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 1379 (2009))
[102] *State v. Robinson*, 44 Wn. App. 611, 616 n.1, 722 P.2d 1379 (1986)
[103] ER 801(d)(1)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0801
[104] ER 801(c)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0801
[105] 30 Wn. App. 251, 255, 633 P.2d 137 (1981)
[106] 59 Wn. App. 1, 7, 795 P.2d 1174 (1990)
[107] 38 Wn. App. 841, 845, 690 P.2d 1182 (1985)
[108] Id. at 844-45

And, in a federal Eighth Circuit case, *United States v. Red Feather*,[109] the prosecution was allowed to introduce a rape victim's diary to corroborate her testimony after the defendant implied on cross that the victim's testimony had been coached.

7. Complaint of sexual abuse

Washington recognizes the common law "fact of complaint" rule that an out-of-court complaint of a sexual offense is admissible, although the details of the offense and the identity of offender are not.[110] This is an uncodified exception to the hearsay rule.[111] INSERT FN: ER 807; Tegland supra at Author's Commentary 807:8.

C. Out-of-Court Statements of Child Victims - RCW 9A.44.120

1. Statute

The admission of non-testimonial[112] out-of-court statements by child victims is governed by RCW 9A.44.120.[113] That statute provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110 is admissible, even if inadmissible under any other court rule, if:
> (1) The court finds that the "time, content, and circumstances" of the non-testimonial statement "provide sufficient indicia of reliability" and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to

[109] 865 F.2d 169, 171 (8th Cir. 1989)
[110] *State v. Ackerman*, 90 Wn. App. 477, 953 P.2d 816 (1998)
[111] ER 807; *Tegland* supra at Author's Commentary 807:8.
[112] See the discussion of "non-testimonial" statements under *Crawford v. Washington* in section V. A of this chapter.
[113] See ER 601 and 807, *Tegland*, supra.

provide the adverse party with a fair opportunity to prepare to meet the statement.[114]

2. "Reliability" test for non-testimonial hearsay

For child witnesses in sexual abuse cases, the court must find that the "time, content, and circumstances" of the statement provide sufficient indicia of reliability before admitting the statement.[115] *State v. Ryan*[116]sets forth nine factors the trial court should weigh to determine if a child's non-testimonial statement is reliable: (1) whether there is motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statements contain any express assertions about past fact; (7) whether cross examination could not show the declarant's lack of knowledge; (8) whether the possibility of the declarant's faulty recollection is remote; and (9) whether "the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement."[117] The trial court has considerable discretion in determining if a statement is reliable.[118]

Although RCW 9A.44.120 has withstood constitutional challenge, the Washington Supreme Court has clarified that it does not waive the requirement that the child be unavailable to testify.[119] As long as a child's non-testimonial statements have satisfied the requirements of reliability and corroboration, the child does not have to be competent to testify.[120] Further, non-testimonial hearsay statements may still be reliable, and admissible, even if the court has found that the child is incompetent.[121]

VII. Competency of Witnesses

A. Statute and Rules

RCW 5.60.050(2) establishes the legal standard for witness competency by defining incompetence: "The following persons shall not be competent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."

---

[114] 9A.44.120 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.120
[115] Id.
[116] *State v, Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (citing *State v. Parris*, 98 Wn.2d 140, 146 (1982))
[117] Id. at 176
[118] *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990)
[119] *State v. Ryan*, 103 Wn.2d 165 at 170
[120] *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765 (2003)
[121] Id.

Evidence Rule 601 provides a presumption of competency. There are exceptions to ER 601 that have grown from case law that are discussed below and at greater length within *Tegland*, supra. Evidence Rule 807 refers to the statute concerning Child Victims or Witnesses and provides substantial discussion and case law analysis in the context of the Hearsay Rules.

B. Competency of Minor Witnesses

1. Trial court analysis

The party calling a child witness has the burden to establish competency. The child should be examined out of the presence of the jury.[122] The court does not need to question the child about the actual events at issue in the case.[123] If a child is deemed incompetent to testify, out of court statements may still be admissible under a hearsay exception.[124] See, e.g., *State v. Tate*,[125] (competency established by psychiatric testimony); *State v. Leavitt*,[126] (competency of child established when child responded to prosecutor's questions by whispering answers to social worker, who then relayed those answers to the court).

2. Testimony via closed circuit television

RCW 9A.44.150 authorizes the trial court to permit child victims to testify by closed circuit television in cases where the child is testifying concerning an act or attempted act of "sexual contact" or "physical abuse" on that child. There must be substantial evidence that testifying in the presence of the defendant will cause the child severe emotional or mental distress that will prevent the child from reasonably communicating at trial.[127]

C. Competency of Witnesses with Mental Disabilities

RCW 5.60.020 provides that a witness cannot testify if not "of sound mind and discretion." "Unsound mind" refers only to witnesses with "no comprehension at all, not to those with merely limited comprehension.[128] The party opposing the witness has the burden of proving that the witness is incompetent.[129]

A person with a history of mental disorders is not *per se* incompetent.[130] A witness is competent to testify if: (1) the witness understands the nature of the oath; and (2) the witness is capable of giving a "correct account" of what was witnessed.[131] In *State v. Smith*, the court

---

[122] *State v. Tuffree*, 35 Wn. App. 243, 246-47, 666 P.2d 912 (1983)
[123] *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)
[124] *State v. Robinson*, 44 Wn. App. 611, 616 (1986); *State v. Justiniano*, 48 Wn. App. 572, 574, 740 P.2d 872 (1987); *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006)
[125] 74 Wn.2d 261, 266, 444 P.2d 150 (1968)
[126] 111 Wn.2d 66, 70, 758 P.2d 982 (1988)
[127] *State v. Foster*, 135 Wn.2d 441, 451, 957 P.2d 712 (1998)
[128] *McCutcheon v. Brownfield*, 2 Wn. App. 348, 354-55, 467 P.2d 868 (1970)
[129] *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982) (per curiam)
[130] *State v. Watkins*, 71 Wn. App. 164, 169, 857 P.2d 300 (1993)
[131] Id. (citing *State v. Allen*, 67 Wn.2d 238, 241, 406 P.2d 950 (1965))

held that a witness alleged to be of unsound mind was competent when the witness "was able to understand the obligation to tell the truth on the witness stand, and . . . was able to relate the basic facts of the incident."[132]

VIII. Corroboration of Victim's Testimony in Sexual Assault Cases Not Required

The testimony of a victim of a sex offense defined in chapter 9A.44 RCW does not need to be corroborated to convict the defendant.[133]

IX. Expert Testimony

Expert testimony is often essential to challenge rape myths in the courtroom. Pursuant to Evidence Rule 702, a witness may qualify as an expert by their knowledge, skills, experience, training, or education. An expert witness' "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue."[134] Expert testimony is admissible under Evidence Rule 702 "if the matter at issue is beyond the common knowledge of the average layman, the witness has sufficient expertise, and the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion."[135]

A. *Frye* Rule

1. General acceptance test

The *Frye* general acceptance test,[136] rather than the *Daubert* standard,[137] is used by Washington courts in determining the admissibility of scientific testimony.[138] The "general acceptance" test looks to the scientific community to determine whether the evidence in question has a valid, scientific basis.[139] If there is a significant dispute among experts in the relevant scientific community as to the validity of the scientific evidence, it is not admissible.[140] If expert testimony does not concern novel theories or sophisticated and technical matters, it need not meet stringent requirements for general scientific acceptance.[141]

2. Evidence considered by the court

---

[132] 30 Wn. App. at 254
[133] RCW 9A.44.020(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[134] Id.
[135] *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984) citing McCormick's Handbook of the Law of Evidence, Sec. 13 at 29-31 (E. Cleary 2d ed. 1972)
[136] *Frye v. United States*, 293 F. 1034 (D.C. Cir. 1923)
[137] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)
[138] *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996)
[139] *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)
[140] Id.
[141] *State v. Ortiz*, 119 Wn.2d 294, 310-11, 831 P.2d 1060 (1992)

In determining whether scientific evidence meets the *Frye* test, the court may consider, in addition to materials presented to it, sources outside the record such as scientific literature, law articles, and decisions in other jurisdictions.[142] However, the relevant inquiry by the court is whether there is acceptance by scientists, not by courts or legal commentators.[143]

3. Standard of proof for the *Frye* test

Whether the *Frye* test is met is initially a question of preliminary fact decided by the trial court according to ER 104(a) and the preponderance of the evidence standard.[144] Note, however, that the preponderance standard, as it is applied in the application of the *Frye* test, requires a higher degree of certainty than the concept of probability used in civil matters, as the Washington Supreme Court explained in *Anderson v. Akzo Nobel Coatings, Inc*.[145] In order to establish a causal connection in most civil matters, the standard of confidence required is a "preponderance of the evidence" standard, or more likely than not, or more than 50 percent[146]. In contrast, "[f]or a scientific finding to be accepted, it is customary to require a 95 percent probability that is not due to chance alone."[147] The difference in degree of confidence to satisfy the *Frye* "general acceptance" standard and the substantially lower standard of "preponderance" required for admissibility in civil matters has been referred to as "comparing apples to oranges."[148]

The *Anderson* court noted:

> This court has consistently found that if the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the plaintiff's theory of causation. *See, e.g., Gregory*, 158 Wn.2d at 829, 147 P.3d 1201; *Copeland*, 130 Wn.2d at 255, 922 P.2d 1304; Reese, 128 Wn.2d at 309, 907 P.2d 282; *Cauthron*, 120 Wn.2d at 887, 846 P.2d 502. Of course, the evidence must also meet the other evidentiary requirements of competency, relevancy, reliability, helpfulness, and probability.[149]

Once the *Frye* standard is satisfied, the evidence must still satisfy the two-part inquiry under ER 702. The expert witness must qualify as an expert and the testimony must be

---

[142] *State v. Cauthron, supra*, at 888
[143] Id.
[144] *State v. Carlson* 80 Wn. App. 116, 125, 906 P.2d 999 (1995) (in reference to *Daubert v. Merrell Dow Pharmaceuticals, Inc. supra*)
[145] 171 Wn.2d 593, 260 P.3d 857 (2011)
[146] See Lloyd L Wiehl., "Our Burden of Burdens," 41 *Wash. L. Rev*. 109, 110 & n.4
[147] Marcia Angell, *Science on Trial: The Clash of Medical Evidence and The Law in The Breast Implant Case* 114 (W.W. Norton, 1997)
[148] *Anderson v. Akzo Nobel Coatings, Inc*., 171 Wn.2d 593, 608, 260 P.3d 857 (2011)
[149] Id. at 609

helpful to the trier of fact.[150] Expert testimony will be helpful to a jury only if its relevance has been established.[151]

4. Appellate review is de novo

Questions as to the admissibility of scientific evidence under *Frye* are reviewed de novo.[152]

B. Child Sex Abuse Syndrome

Evidence of a child sex abuse profile or syndrome through expert testimony that behaviors of the victim are common behaviors of sexually abused children, has been ruled inadmissible on grounds that it has not been shown to be supported by accepted medical or scientific opinion.[153] It may, nevertheless, be admitted to explain the victim's reluctance to report abuse or to rebut a defense theory that the victim's behavior was inconsistent with sexual abuse by the defendant, so long as the expert does not offer an opinion that the victim has been abused by the defendant or that the defendant is guilty.[154] An observation that a victim exhibits behavior typical of a group constitutes neither a direct inference of the guilt of the defendant nor a conclusion that the child was in fact sexually abused, and thus does not invade the province of the jury.[155]

C. Victim Responses to Trauma

1. Rape Trauma Syndrome

The Supreme Court, in *State v. Black,*[156] held that the state may not present expert testimony that a victim is suffering from rape trauma syndrome because it is not established as a reliable means to prove rape occurred; however, the court expressed that its holding applied only to expert testimony. Thus, a lay witness may testify that an alleged rape victim exhibited signs of emotional or psychological trauma following the alleged rape.

In *Carlton v. Vancouver Care LLC,*[157] the Court of Appeals held that expert testimony concerning the rape trauma syndrome was admissible under ER 702 as relevant to a determination about whether rape caused a victim with dementia to experience psychological harm when the defendant had already admitted rape, and that the expert's testimony was beyond the experience of the common person and would assist the jury.

---

[150] *State v. Cauthron,* 120 Wn.2d 879, 889 (1993)
[151] *State v. Riker*, 123 Wn.2d 351, 364, 869 P.2d 42 (1994) (in reference to *State v. Petrich,* 101 Wn.2d 566, 575, 683 P.2d 173 (1984))
[152] *State v. Copeland,* 130 Wn.2d 244, 255, 922 P.2d 1304 (1996)
[153] 13B *Wash.Prac., Criminal Law §2414*
[154] Id.
[155] Id.
[156] 109 Wn.2d 336, 745 P.2d 12 (1987)
[157] 155 Wn. App.151, 231 P.3d 1241 (2010)

D. Battered Woman Syndrome

In Washington, the battered woman syndrome defense is not codified but is approved in case law.[158] Evidence relating to the syndrome is generally admissible if it is both relevant and not unfairly prejudicial. However, there are limitations to the use of this evidence.[159]

In *State v. Allery*[160] the court ruled that expert testimony on the battered woman syndrome was admissible when offered by the defendant, charged with murdering her husband, to explain the syndrome generally, "to provide a basis from which the jury could understand why defendant perceived herself in imminent danger at the time of the shooting," and to explain why a battered woman would stay in a physically and psychologically dangerous relationship.[161] However, while expert testimony on the battered woman syndrome is admissible to support a woman's claim of self-defense against her batterer, it is not admissible if it is being offered to explain the defendant's actions against a person outside the battering relationship.[162]

The defendant in *Allery* did not put her character in issue by introducing evidence of battered woman syndrome. Accordingly, such evidence does not "open the door" to evidence of the defendant's bad reputation or specific instances of misconduct.[163]

In *State v. Ciskie,*[164] a rape case, the court held that expert testimony on battered woman syndrome is admissible to assist the jury in understanding the victim's delays in reporting the alleged rape and failing to discontinue her relationship with the defendant. It also held, however, that under ER 403, the trial court properly refused to allow the expert to express an opinion on the ultimate issue of whether the victim had been raped.

Despite the name, evidence of battered woman syndrome is not restricted to women. In particular, a child who is abused by a parent may exhibit the same behavior patterns. If the child assaults or kills the abuser, evidence of this "battered child syndrome" is admissible for the same purposes as evidence of battered woman syndrome.[165]

E. Delayed Reporting

Expert witnesses may testify that sexually abused victims delay reporting rapes in order to rebut a defense argument that the alleged victim's delay in reporting the incident

---

[158] See WPIC 17.02 and Comment.
[159] See 30 *Wash. Prac., Motions in Limine §5.33*
[160] 101 Wn.2d 591, 682 P.2d 312 (1984)
[161] Id. at 597
[162] *State v. Riker*, 123 Wn.2d 351 (1994)
[163] 13B *Wash. Prac., Criminal Law §3311*
[164] 110 Wn.2d 263, 751 P.2d 1165 (1988)
[165] *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993)

demonstrates that the defendant did not rape the victim.[166] See also discussion of *State v. Ciskie*, in Subsection D above.

F. Victim Grooming

In child sex abuse cases, expert testimony relating to the "grooming process" has been held unduly prejudicial when the evidence implies that the crime was in fact committed because the defendant engaged in similar behaviors.[167] However, the Court of Appeals has suggested that such testimony might be admissible to rebut a defense claim that the defendant's conduct was inconsistent with the behavior of those who commit child sex offenses.[168]

G. Examining Physician

Although a doctor or other expert may not diagnose sexual abuse based only on the victim's statements, a physician who has examined the victim of a sexual offense may testify that a victim's physical condition is consistent with sexual abuse.[169]

X. Testimony of Witnesses Who Have Been Hypnotized

A person, once hypnotized, is barred from testifying concerning information recalled while under hypnosis or testifying as to a fact which became available following hypnosis.[170] Accordingly, the testimony of a witness who has been previously hypnotized is limited to facts and events recalled before undergoing the hypnosis, and a party seeking to admit such testimony has the burden of establishing what the witness remembered prior to the hypnosis (e.g., providing some independent verification of the pre-hypnotic memory, such as a record preserved prior to hypnosis).[171] Any uncertainties in testimony of a witness as to facts that occurred before hypnosis should be resolved in the opponent's favor.[172]

If the court admits testimony as to what a witness remembers before hypnosis, the opponent must be given the opportunity to show the manner in which the hypnosis was conducted and the possible effect of hypnosis on the witness' testimony. Special jury instructions regarding hypnosis may also be warranted.[173]

---

[166] *State v. Graham*, 59 Wn. App. 418, 798 P.2d 314 (1990) (the court held that expert testimony that sexually abused girls often delay up to one year before reporting the abuse is admissible on the grounds that the testimony was not offered to prove that the defendant committed the rape, but rather to rebut the defense theory that the delay was inconsistent with rape)
[167] See 13B *Wash. Prac., Criminal Law §2414*
[168] *State v. Braham*, 67 Wn. App. 930, 841 P.2d 785 (1992); see also *State v. Quigg*, 72 Wn. App. 828, 837, 866 P.2d 655 (1994) (qualifications of expert to give opinion on "grooming")
[169] 13B *Wash. Prac., Criminal Law §2414, 60*
[170] *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984)
[171] 13B *Wash. Prac., Criminal Law §2307*
[172] *State v. Martin*, supra at 722
[173] Id.

XI. DNA Evidence

A. Trace Analysis Requested by Convicted Felons

RCW 10.73.170(1)[174] provides that a person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

B. DNA Testing

1. CrR 4.7(b)(2)

CrR 4.7(b)(2) states:

> Notwithstanding the initiation of judicial proceedings, and subject to constitutional imitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:
> …
> (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof.

2. Search and seizure issues

The taking of DNA constitutes a search and seizure under both the United States and Washington State constitutions.[175] In *State v. Gregory*,[176] the Washington Supreme Court held that a court order issued pursuant to CrR 4.7(b)(2)(vi) for a blood draw complies with the Fourth Amendment so long as it is supported by probable cause. Citing the seminal case, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966), the *Gregory* court listed three requirements to determine whether a blood draw is reasonable: (1) there must be a clear indication that in fact the desired evidence will be found; (2) the chosen test must be reasonable; and (3) such test must be performed in a reasonable manner.[177] While the determination of historical facts relevant to the establishment of probable cause to order blood drawn is subject to the abuse of discretion standard, the legal determination of whether qualifying information as a whole amounts to probable cause is subject to de novo review.

C. DNA Evidence

---

[174] http://apps.leg.wa.gov/rcw/default.aspx?cite=10.73.170
[175] U.S. Const. amend IV; Wash. Const. art I, §7. See *State v. Garcia-Salgado*, 149 Wn. App. 702, 705, 205 P.3d 914 (2009)
[176] 158 Wn.2d 759, 147 P.3d 1201 (2006)
[177] Id. at 822

1. General acceptance and admissibility

The underlying theory of DNA testing and typing is generally accepted and admissible.[178]

2. Evidence required

Once a positive laboratory result is obtained, the declaration of a "match" requires statistical analysis to be meaningful. Statistical evidence of genetic profile frequency probabilities must be presented to the jury when DNA evidence is admitted, and the methodology underlying the probability estimate must satisfy the *Frye* standard.[179] Use of the "product rule" in establishing statistical probabilities of genetic profile frequency in the human population is generally accepted within the relevant scientific community, and testimony based on the rule is admissible under *Frye*.[180] Questions about the size of the database underlying genetic frequency go to weight and the admissibility rule governing expert testimony in general, and not to admissibility under *Frye*. If the principle that frequency calculations can be made from an adequate database is generally accepted, then whether the particular database is large enough is a question of application of the science to the particular case, i.e., a matter of weight.[181] Complaints about the quality of population databases, used to support genetic frequency testimony, go to weight and admissibility under ER 702, governing expert testimony in general, and not to admissibility under *Frye*.[182]

3. Evidence from other jurisdictions

Although Washington courts have not fully explored the admissibility of DNA evidence from other jurisdictions, such evidence gathered and analyzed in accordance with the law of the other jurisdiction, is admissible, even though it may not have been gathered and analyzed in accordance with Washington law. This general rule is sometimes called the "silver platter doctrine."[183]

XII. Alcohol/Drug-Facilitated Sexual Assault

In *State v. Lough*, evidence of a defendant's previous sexual assaults on other women was admissible in a prosecution for attempted rape and indecent liberties to prove that the defendant was the mastermind of an overarching plan, scheme, or design to drug and sexually abuse a series of women; the crimes were causally connected because, over period of many years, the defendant utilized his specialized knowledge and skill as a paramedic for

[178] *State v. Cauthron*, 120 Wn.2d 879 (1993)
[179] *State v. Copeland*, 130 Wn.2d 244 (1996) (in reference to *State v. Cauthron*, supra)
[180] Id at 270
[181] Id at 272
[182] Id at 273
[183] 13B *Wash. Prac., Criminal Law §2411*; see also 5B *Wash. Prac., Evidence Law and Practice §702.38*

the purpose of drugging and sexually assaulting women who knew and trusted him, thus rendering them somnolent and wholly or partially amnesiac.[184]

A. Substances

Perpetrators of sexual assault may use alcohol and/or drugs to facilitate sexual assault. RCW 9A.44.010(7) states: "Consent means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." The statute defines "mental incapacity" as "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the *influence of a substance* or from some other cause."[185] (emphasis added).[186]

Below is a list of substances commonly-used to facilitate sexual assault:

1. Alcohol

2. Marijuana

3. Benedryl (Diphenhydramines) https://www.drugs.com/benadryl.html

4. Opioids
   http://www.webmd.com/pain-management/guide/narcotic-pain-medications#1

5. Opiates
   http://www.webmd.com/pain-management/opioid-analgesics-for-chronic-pain

6. Benzodiazepines https://www.drugs.com/article/benzodiazepines.html

7. GHB/GBL, aka gamma-hydroxybutyric acid, Schedule I, RCW 69.50.204(d)(1)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.204

8. Amphetamine/Methamphetamine Schedule II, RCW 69.50.206(d)(1) and (d)(2)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.206

9. Ecstasy, aka 3, 4-methylenedioxy amphetamine (MDMA), Schedule I, RCW 69.50.204(c)(11)
   http://apps.leg.wa.go0v/rcw/default.aspx?cite=69.50.204

[184] 70 Wn. App. 302, 853 P.2d 920 (1993)
[185] http://app.leg.wa.gov/RCW/default.aspx?cite=9A.44.010
[186] Id.

10. Rohypnol, aka flunitrazepam, Schedule IV, RCW 69.50.210(b)(22)
http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.210

11. Ketamine, Schedule III, RCW 69.50.208(b)(7)
http://app.leg.wa.gov/RCW/default.aspx?cite=69.50.208

12. Lysergic Acid Diethylamide (LSD), Schedule I, RCW 69.50.204(c)(21)
http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.204

B. Crimes Alternatively Charged in Alcohol/Drug-Facilitated Sexual Assault

1. Indecent Liberties RCWA 9A.44.100
http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100

> A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:
> …
> (b) when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;
> (2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

2. Rape in The Second Degree RCWA 9A.44.050
http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
> ….
> (b) when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;
> (2) Rape in the second degree is a class A felony.

XIII. Polygraphs

A. Generally

Washington courts limit polygraph evidence because polygraph testing has not attained general acceptance by the scientific community.[187] The Washington Supreme Court has suggested that it might reconsider whether unstipulated polygraph evidence is admissible if the proffering party demonstrates that polygraphy meets the *Frye* general acceptance

[187] *State v. Ahlfinger*, 50 Wn. App. 466, 468, 749 P.2d 190 (1988)

standard.[188] However, the court has also observed that polygraph examinations are intrusive and implicate constitutional concerns.[189] Because the polygraph measures psychophysiological response, its scientific validity is assessed by psychologists.[190]

A law enforcement officer, prosecuting attorney, or other government official may not request or require a victim of an alleged sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense. The refusal of a victim to submit to a polygraph examination or other truth telling device shall not by itself prevent the investigation, charging, or prosecution of the offense.[191]

None of the rules discussed in this section restrict the admissibility of statements made during a polygraph test.

B. Stipulated Admissibility

Polygraph results may be admissible if both parties sign a written stipulation, providing for defendant's submission to the test and for the subsequent admission at trial, before the test is administered. The stipulation alone, however, does not assure admissibility. The trial judge has discretionary power to refuse to accept such evidence.

Once offered into evidence, the opposing party has the right to cross-examine the polygraph examiner with respect to "(a) the examiner's qualifications and training; (b) the conditions under which test was administered; (c) the limitations of, and possibilities for error in, the technique of polygraphic interrogation; and (d), at the discretion of the trial judge, any other matter deemed pertinent to the inquiry". If such evidence is admitted, the trial judge should instruct the jury that the examiner's testimony, at most, tends only to indicate that defendant was not telling the truth at the time of the examination; and that it is for the jury to determine what corroborative weight and effect such testimony should be given.[192]

C. Evidence of Administration of Test

Occasionally issues arise, not as to the admissibility of the results, but as to the admissibility of the fact that a polygraph test was or was not given, or the fact that a witness was or was not willing to submit to a test. It is prejudicial error to permit the prosecutor to cross-examine a defendant concerning his or her failure to take a polygraph test.[193] Even evidence that a party has taken a polygraph is considered prejudicial and is inadmissible.[194] The fact that the defendant was willing to take a polygraph test is irrelevant and inadmissible

---

[188] Id. at 469
[189] *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 116, 821 P.2d 44 (1991)
[190] Id. at 470
[191] 5D *Wash. Prac. Courtroom Handbook on Washington Evidence, §10.58.038*
[192] *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982)
[193] *State v. Descoteaux*, 94 Wn.2d 31, 614 P.2d 179 (1980) (overruled on a different point in *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982)
[194] *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186, 796 P.2d 416 (1990)

on behalf of the defendant.[195] A federal court has ruled that, likewise, the state is not allowed to bolster the credibility of its witness by showing that the witness is willing to take a polygraph test.[196]

XIV. Sexual Assault Nurse Examiners (SANEs)

Sexual Assault Nurse Examiners (SANEs) are registered nurses who have completed specialized education and clinical preparation in the medical forensic care of a patient who has experienced sexual assault.[197] In *State v. Hudson*,[198] Division Two of the Court of Appeals held that a sexual assault nurse examiner was properly allowed to testify regarding the extent of the victim's injuries, but that the trial court erred in allowing the SANE nurse to testify that the injuries were the result of "nonconsensual" sex, which constituted an impermissible opinion on the defendant's guilt.

[195] *State v. Rowe*, 77 Wn.2d 955, 468 P.2d 1000 (1970)
[196] *U.S. v. Herrera*, 832 F.2d 833 (4th Circ. 1987)
[197] International Association of Forensic Nurses, http://www.forensicnurses.org/?page=aboutsane
[198] 150 Wn. App. 646, 208 P.3d 1236 (2009)

CHAPTER 7
Post-Conviction and Sentencing in Felony Crimes

I. Introduction

Much of the Washington law governing sentencing is the same in sex offense cases as it is in other criminal prosecutions. Washington's general felony sentencing provisions are covered in the *Washington State Judges Benchbook, Criminal Procedure, Superior Court* and the *Washington Adult Sentencing Manual,* which is issued annually by the Washington Sentencing Guidelines Commission. Those two publications contain information about sentencing-related topics, including:

- constitutional provisions, statutes, and court rules
- respective rights of defendants and the state
- pre-sentence investigations and reports
- forms of sentence provisions for sentencing components and alternatives, such as imprisonment, community service, treatment, and other provisions
- credit for time served
- consecutive and concurrent sentences
- procedure at sentencing hearing
- probation, suspended sentences, and deferred sentences
- scripts for judges

In this Bench Guide, the discussion focuses on special considerations that should be taken into account when sentencing persons convicted of felony sex offenses.

Limited Jurisdiction Courts. While this chapter of the Bench Guide primarily refers to felonies, some sex offenses are defined by statute as a gross misdemeanor, or the prosecuting authority will reduce a sexual violence offense to a misdemeanor or gross misdemeanor offense and refile the case in the District Court. This can also occur for an attempted Class C felony, which is considered a gross misdemeanor. These reduced or 'drop down' charges might occur due to a variety of factors, including but not limited to lack of prior criminal history, substance use, mental health of the victim or defendant, victim availability or wishes of the victim's family.

If a limited jurisdiction court is faced with sentencing and supervision of a defendant in a case originating with allegations of sexual violence, considerations raised in this chapter concerning appropriate treatment and monitoring will be useful. The judicial officer may also refer to judicial guides and bench books available through the Administrative Office of the Courts, including the Criminal Caselaw Notebook (2016); Criminal Procedure – courts of Limited Jurisdiction (2006); DV Manual for Judges (2016).

To ensure compliance with state laws concerning issues such as mandatory DNA collection, HIV testing, offender registration, and Interstate Compact for Adult Offenders compliance, care should be taken to use AOC-provided forms for plea and sentence.[1]

II. Sex Offender Sentencing Policy[2]

1984	The Sentencing Reform Act (SRA) went into effect, replacing indeterminate sentencing with determinate sentencing, using statewide sentencing guidelines. The Special Sex Offender Sentencing Alternative (SSOSA) is available as a sentencing option.
1990	The Community Protection Act was enacted. This act increased prison terms for sex offenders, established registration and notification laws, authorized funds for treatment of adult and juvenile sex offenders, and provided services for victims of sexual assault. It also authorized civil commitment of sexually violent predators.
1993	Voters passed a "Three Strikes" initiative requiring life in prison without the possibility of release for offenders who have been convicted of three "most serious offenses."
1996	Two strikes legislation passed, requiring life in prison without the possibility of release for offenders who have been convicted of two or more serious sex crimes.
2001	Determinate Plus Sentencing was adopted for sex offenders convicted of certain sex offenses who are subject to a life sentence in prison with discretionary release by the Indeterminate Sentencing Review Board (ISRB).
2005	SSOSA eligibility requirements changed for crimes committed after July 1, 2005. The changes included: no prior adult violent convictions committed within five years of the current offense; offense did not result in substantial bodily harm to the victim; and offender had prior relationship or connection to the victim. Also, the court must give "great weight" to the victim's opinion about imposing SSOSA.
2006	Sentencing ranges are increased, failure to register penalties are increased.

III. Post-Conviction Bail

The rules related to post-conviction release for sex offenders are discussed in this section. All other rules governing pre-and post-conviction release can be found in CrR 3.2.[3]

A. Release/Detention Before Sentencing

[1] http://www.courts.wa.gov/forms/

[2] Lucy Berliner, "Sex Offender Sentencing Options: Views of Child Victims and Their Parents," Washington State Institute for Public Policy Document No. 07-08-1201 (2007) http://www.wsipp.wa.gov/rptfiles/07-08-1201.pdf

[3] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.2

1. Presumptive Detention

A defendant who has been found guilty of a felony and is awaiting sentencing shall be detained unless there is "clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if released."[4]

Likewise, a defendant convicted of certain gross misdemeanor offenses involving a sex offense must be presumptively detained to await sentence. RCW 10.64.025(2). This includes but is not limited to Sexual Misconduct with a minor in the second degree (RCW 9A.44.096) and certain other Class C felonies charged as an attempt.

For any offenses listed in RCW 10.64.025 (1) or (2), a new bond or a rider and a "French order are required after conviction if the court finds release is appropriate.[5]

2. Mandatory detention

A defendant who has been found guilty of one of the following offenses shall be detained pending sentencing:[6]

- child molestation in the first, second, or third degree (RCW 9A.44.083, 9A.44.086, 9A.44.079) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44
- communication with a minor for immoral purposes (felony) (RCW 9.68A.090) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.090
- human trafficking in the first or second degree (RCW 9A.40.100) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.100
- incest (RCW 9A.64.020) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.64.020
- indecent liberties (RCW 9A.44.100) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100
- luring (RCW 9A.40.090) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.090
- promoting commercial sexual abuse of a minor (RCW 9.68A.101) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.101
- rape in the first or second degree (RCW 9A.44.040 and RCW 9A.44.050) http://app.leg.wa.gov/rcw/default.aspx?cite=9a.44

---

[4] RCW 10.64.025(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=10.64.025
[5] *State v. French*, 88 Wn. App. 586, 945 P.2d 752 (1997)
[6] RCW 10.64.025(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=10.64.025; *State v. Blilie*, 132 Wn.2d 484, 939 P.2d 691 (1997)

- rape of a child in the first, second, or third degree (RCW 9A.44.073, RCW 9A.44.076, and RCW 9A.44.079)
  http://app.leg.wa.gov/rcw/default.aspx?cite=9a.44

- sexual misconduct with a minor in the first or second degree (RCW 9A.44.093 and RCW 9A.44.096)
  http://app.leg.wa.gov/rcw/default.aspx?cite=9a.44

- any class A or B felony that is a sexually motivated offense under RCW 9.94A.030
  http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030

- any offense that is, under chapter RCW 9A.28, a criminal attempt, solicitation, or conspiracy to commit one of the foregoing offenses
  http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.28

In order to minimize trauma to the victim, "the court may attach conditions on release of a defendant under RCW 10.64.025 regarding the whereabouts of the defendant, contact with the victim, or other conditions."[7]

B. Release After Sentencing and Pending Appeal

While there is no constitutional guarantee to bail pending an appeal,[8] RCW 10.73.040[9] provides that bail shall be set pending appeal in all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great.

A defendant who is found guilty of a non-capital felony and who has filed an appeal is eligible for release on bail unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community, in which case the defendant may be detained while the appeal is pending.

However, RCW 9.95.062(1) provides, in pertinent part:

> (1) … an appeal in a criminal action shall not stay the execution of the judgment of conviction if there is a preponderance of the evidence that:
>
> (a) The defendant is likely to flee or to pose a danger to the safety of any other person or the community if the judgment is stayed; or
>
> (b) Delay resulting from the stay will unduly diminish the deterrent effect of the punishment; or

[7] RCW 10.64.027 http://apps.leg.wa.gov/rcw/default.aspx?cite=10.64.027
[8] *State v. Smith*, 84 Wn.2d 498, 499, 527 P.2d 674, 676 (1974)
[9] http://app.leg.wa.gov/RCW/default.aspx?cite=10.73.040

(c) A stay of judgment will cause unreasonable trauma to the victims of the crime or their families; or

(d) The defendant has not undertaken to the extent of the defendant's financial ability to pay the financial obligations under the judgment or has not posted an adequate performance bond to assure payment.

Section (2) of RCW 9.95.062 provides that an appeal by a defendant convicted of one of the offenses listed in Section III. A.2 above (p. 8-3) shall not stay execution of the judgment of conviction.

Section (3) provides that if the defendant is convicted of a felony, and is unable to obtain release pending the appeal by posting an appeal bond, cash, adequate security, release on personal recognizance, or any other conditions imposed by the court, the time the defendant has been imprisoned pending the appeal shall be deducted from the sentence term if the judgment is affirmed[10]

IV. Sentencing Under the Sentencing Reform Act (SRA)

This section discusses the options available to the court when sentencing offenders convicted of a felony sex offense. A court imposing a misdemeanor or gross misdemeanor sentence is not bound by the SRA and may impose up to the maximum misdemeanor or gross misdemeanor sentence, subject to the Eighth Amendment prohibition on cruel and unusual punishment.[11]

A. Sentencing Guidelines

1. Minimum-maximum sentence range required

Upon a finding that the offender is subject to sentencing under RCW 9.94A.507, the court must impose a sentence that sets a maximum term and a minimum term.[12] The maximum term must consist of the statutory maximum sentence for the offense.[13]

2. Mandatory minimum term for rape of a child 1 and 2, child molestation 1

[10] http://app.leg.wa.gov/RCW/default.aspx?cite=9.95.062

[11] *State v. Bowen*, 51 Wn. App. 42, 48, 751 P.2d 1226 (1988) review denied, 111 Wn. 2d 1017 (defendant acquitted on the felony and convicted of the lesser-included misdemeanor could be sentenced to a sentence greater than that of the presumptive range on the felony)

[12] "For offenders sentenced under the "determinate plus" sentencing system, the Indeterminate Sentencing Review Board (ISRB) holds a hearing several months before the earliest possible release date. This date is calculated based on the minimum term and offender earned time. A number of factors are considered before the ISRB makes a decision. If the decision is for release, a plan is made to transfer the offender to community custody. If the decision is against release, time is added, and a new minimum term is set. No more than 60 months can be added at one time." ISRB FAQ's located at http://www.doc.wa.gov/corrections/isrb/faq.htm.

[13] RCW 9.94A.507(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507

If the offense that caused the offender to be sentenced under RCW 9.94A.507 was rape of a child in the first degree (RCW 9A.44.073), rape of a child in the second degree (RCW 9A.44.076), or child molestation in the first degree (RCW 9A.44.083), and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.[14]

Note, however, that an offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under RCW 9.94A.507.[15]

3. Mandatory minimum term for rape 1 and 2, indecent liberties by forcible compulsion, kidnapping 1 with sexual motivation

If the offense that caused the offender to be sentenced under RCW 9.94A.507 was rape in the first degree (RCW 9A.44.040), rape in the second degree (RCW 9A.44.050), indecent liberties by forcible compulsion (RCW 9A.44.100), or kidnapping in the first degree (RCW 9A.40.020) with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, or there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.[16]

The minimum terms described above do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under RCW 9.94A.507(c) (i).[17]

B. Aggravating and Mitigating Circumstances

The court may impose a sentence outside of the standard range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.[18]

Whenever a sentence outside the standard range is imposed, the court must set out the reasons for its decision in written findings of fact and conclusions of law. A sentence outside of the standard sentence range shall be a "determinate sentence."[19]

---

[14] RCW 9.94A.507(3)(c)(ii).
[15] RCW 9.94A.507(2).
[16] Id.
[17] RCW 9.94A.507(3)(d) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507
[18] RCW 9.95A.537 http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.537
[19] Id.

1. Aggravating circumstances determined by the court

The trial court may impose an aggravated exceptional sentence *without* a finding of fact by a jury under the following limited circumstances:

> (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
>
> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of… [the Sentencing Reform Act] as expressed in RCW 9.94A.010.
>
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
>
> (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient. [20]

2. Aggravating circumstances determined by a jury

Under *Blakely v. Washington*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[21] Additional aggravating factors to be considered by the jury are set forth in RCW 9.94A.535 (3). A discussion of the Sentencing Reform Act (and Blakely is contained within WPIC 300.00- Exceptional Sentences—Aggravating Circumstances—Introduction.

The following is a list of those statutory factors most likely to apply in the prosecution of a sex offense:[22]

> a. The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

---

[20] RCW 9.94A.535(2)

[21] *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); see also *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)

[22] The letters before these listed factors correspond with the subsections of RCW 9.94A.535(3) in which they are contained; http://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.535

b. The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

c. The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

f. The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

g. The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.

h. The current offense involved domestic violence, as defined in RCW10.99.020, and one or more of the following was present:

i. The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;[23]

ii. The offense occurred within sight or sound of the victim's or the offender's minor children under the age of 18 years; or

iii. The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

i. The offense resulted in the pregnancy of a child victim of rape.

m. The offense involved a high degree of sophistication or planning.

n. The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

o. The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.[24]

p. The offense involved an invasion of the victim's privacy.[25]

q. The defendant demonstrated or displayed an egregious lack of remorse.

---

[23] See *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001) (two-week period of abuse is not a prolonged period of time)

[24] See also *State v. Barnes*, 117 Wn.2d 701, 712, 818 P.2d 1088 (1991); *State v. Pryor*, 115 Wn.2d 445, 454, 799 P.2d 244 (1990)

[25] *State v. Falling*, 50 Wn. App. 47, 55-56, 757 P.2d 1119 (1987)

r. The offense involved a destructive and foreseeable impact on persons other than the victim.

t. The defendant committed the current offense shortly after being released from incarceration.

y. The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530 (2).

3. Mitigating circumstances determined by the court

The following non-exclusive list of mitigating factors must be established by a preponderance of the evidence:[26]

a. To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

b. Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

c. The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

d. The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

e. The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

f. The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

g. The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of… [the Sentencing Reform Act], as expressed in RCW 9.94A.010.

h. The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

[26] RCW 9.94A.535(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.535

i. The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

j. The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

V. Special Sex Offender Sentencing Alternative (SSOSA)

SSOSA is a sentencing alternative that gives convicted sex offenders convicted for the first time the opportunity to serve all or part of their sentence out of custody while they participate in a sexual deviancy treatment program. This is the only instance under the Sentencing Reform Act in which a felony sentence can be suspended.[27] Part of the rationale behind creating this alternative was to increase victims' willingness to report sexual assault and participate in the criminal justice process,[28] while still holding offenders accountable.[29]

This sentencing alternative has been in existence since 1984, and was re-codified in 2001 as an independent statute.[30] The SSOSA statute was subsequently amended in 2004, and the changes that went into effect in 2005 provide additional restrictions on a defendant's eligibility for SSOSA, increase the term of incarceration, increase court supervision, and impose a longer term of treatment.[31]

A. Eligibility Requirements

1. The offender has been convicted of a sex offense other than Rape in the Second degree or a sex offense that is defined by RCW 9.94A.030(46) as a serious violent offense.[32] A person convicted of attempted rape in the second degree is eligible for SSOSA.[33]

2. If the conviction results from a guilty plea, the offender must, as part of the plea of guilty, voluntarily and affirmatively admit that he or she committed all elements of the crime.[34] An offender entering an *Alford* plea is not eligible for SSOSA.

---

[27] RCW 9.94A.670 http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670
[28] Victims may have concerns about the consequences to offenders and their family if the crimes are reported (e.g. economic consequences) and want an option other than prison.
[29] Berliner, "Sex Offender Sentencing Options: Views of Child Victims and Their Parents"
[30] Laws of 2000, ch. 28, §§ 5, 20, 46; *State v. Osman*, 157 Wn.2d 474, 481 n. 6, 139 P.3d 334 (2006)
[31] Laws of 2004, ch. 176, § 4
[32] RCW 9.94A.670(2)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670 (Rape in the First Degree is defined as a "serious violent offense")
[33] *State v. Jackson*, 61 Wn. App. 86, 809 P.2d 221 (1991)
[34] RCW 9.94A.670(2)(a)

3. The offender has no prior sex offense convictions as defined in RCW 9.94A.030 or prior felony sex offenses in this or any other state.[35] An offender cannot receive a SSOSA if he or she has a conviction in another state for a felony sex offense, even if that offense is not comparable to any Washington offense.[36]

4. The offender has no adult convictions of a violent offense within five years of the date of the current offense.[37]

5. The offense did not result in "substantial bodily harm" to the victim.[38] This means that there is no bodily injury that involves temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any body part or organ, or that causes a fracture of any body part or organ.[39]

6. The offender must have an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime.[40] A "victim" under the SSOSA statute is more narrowly defined.[41] In *Landseidel,* the court, in finding that the defendant's wife did not meet the statutory definition of "victim" when she suffered emotional or psychological harm as a result of his internet crimes against children, reasoned that SSOSA is an "alternative" not intended to be available to everyone, and such a literal application of the term "victim" would " render the statute meaningless."[42]

7. The offender's standard range for the offense must include the possibility of confinement for less than 11 years.[43]

B. Evaluation for Amenability to Treatment

If the court finds that the offender meets the above-listed eligibility requirements, it may order an examination on its own motion, or on the motion of the state or the offender, to determine whether the offender is amenable to treatment.[44]

---

[35] RCW 9.94A.670(2)(b)
[36] *State v. McInally,* 125 Wn. App. 854, 861-66, 106 P.3d 794 (2005) review denied, 155 Wn.2d 1002, 126 P.3d 1279
[37] RCW 9.94A.670(2)(c)
[38] RCW 9.94A.670(2)(d)
[39] RCW 9.94A.670(1)(b)
[40] RCW 9.94A.670(2)(e)
[41] *State v. Landsiedel,* 165 Wn. App. 886, 269 P.3d 347 (2012), review denied 174 Wn.2d 1003, 278 P.3d 1111
[42] Id. at 892-93
[43] RCW 9.94A.670(2)(f) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670
[44] RCW 9.94A.670(3)

The decision whether to order expenditure of public funds for the evaluation is within the trial court's discretion.[45] However, if the offender is less than 18 years of age when the charge is filed, the state shall pay for the cost of the initial evaluation and treatment.[46]

Under a recent Washington State Supreme Court opinion, these SSOSA evaluations may be disclosed to the public under RCW 42.56 (The Public Records Act).[47]

At a minimum, under RCW 9.94A.670(3)(a)(i)-(v) the evaluation report shall include:

1. the offender's version of the facts and the official version of the facts;

2. the offender's offense history;

3. an assessment of problems in addition to alleged deviant behaviors;

4. the offender's social and employment situation; and

5. other evaluation measures used.

The examiner must report on the offender's amenability to treatment and relative risk to the community in a report that sets forth the sources of the information.[48] A proposed treatment plan must also be provided that includes:[49]

1. frequency and type of contact between offender and therapist;

2. specific issues to be addressed in treatment and description of planned treatment modalities;

3. monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

4. anticipated length of treatment; and

5. recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

The court may, on its own motion, or on the motion of the state or the offender, order a second examination regarding the offender's amenability to treatment. The examiner shall

---

[45] *State v. Young*, 125 Wn.2d 688, 88 P.2d 142 (1995)
[46] RCW 9.94A.670(13)
[47] *Koenig v. Thurston County*, No. 84840-4 (September 27, 2012)
[48] RCW 9.94A.670(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670
[49] RCW 9.94A.670(3)(b)

be selected by the party making the motion. The offender shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent, in which case the state shall pay the cost.[50]

C. Deciding Whether to Grant a SSOSA

When the court receives the report(s) on the offender's amenability to treatment, it must decide whether the defendant and community will benefit from SSOSA, considering the following factors set forth in RCW 9.94A.680 (4):

1. whether a SSOSA is too lenient in light of the extent and circumstances of the crime;

2. whether the offender has other victims;

3. whether the offender is amenable to treatment; and

4. the risk the offender presents to the community, the victim, or other persons of similar ages and circumstances.

The court must also give "great weight" to the victim's opinion about whether the offender should receive a SSOSA. If the court grants a SSOSA against the victim's opinion, the court is required to enter written findings that state its reasons for imposing the treatment disposition.[51]

The decision to grant a SSOSA rests completely within the trial court's discretion.[52] The court may also consider such factors as the offender's social situation. For example, if the defendant is a non-citizen, the court can consider whether deportation would render SSOSA unworkable.[53]

D. Imposing a SSOSA

As conditions of a suspended sentence under SSOSA, the court must impose the following:

1. **Confinement**[54]

The court must impose a term of confinement up to 12 months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than 12 months or the maximum term if there are aggravating factors

[50] RCW 9.94A.670(3)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670
[51] Id.
[52] *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992); *State v. Ziegler*, 60 Wn. App. 529, 534, 803 P.2d 1355 (1991), review denied, 116 Wn.2d 1029, 813 P.2d 582
[53] *State v. Ramirez*, 140 Wn. App. 278, 165 P.3d 61 (2007)
[54] RCW 9.94A.670(5)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670

as enumerated in RCW 9.94A.535(3). The term of confinement may not exceed the statutory maximum for the offense.

The court may order the offender to serve all or part of his or her term of confinement in partial confinement. Offenders sentenced under SOSSA are not eligible for earned release from confinement for good behavior under RCW 9.94A.728.

2. **Community custody**[55]

The term of community custody shall be equal to the length of the suspended sentence, the length of the maximum term imposed pursuant to 9.94A.507, or three years, whichever is greater, and the offender must be required to comply with any conditions imposed by the Department of Corrections under RCW 9.94A.703.

3. **Sex offender treatment for up to five years**[56]

The court has discretion to order outpatient or inpatient sex offender treatment. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment.

Before an offender changes sex offender treatment providers, he or she is required to notify the prosecutor, the community corrections officer, and the court. If any party or the court objects to the change, the offender may not change providers or conditions without court approval after conducting a hearing.

The offender's sex offender treatment provider may not be the same person who completed the evaluation of the offender's amenability to treatment. The treatment provider cannot employ, be employed by, or share profits with the person who completed the evaluation of the offender's amenability to treatment unless the court enters written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical.[57]

Treatment may only be conducted by certified sex offender treatment providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW unless the court finds:[58]

a. that the offender has moved or is moving to another state for reasons other than circumventing the certification requirements; or

b. no certified sex offender treatment providers or certified affiliate sex offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and the evaluation and

[55] RCW 9.94A.670(5)(b)
[56] RCW 9.94A.670(5)(c)
[57] RCW 9.94A.670(13) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670
[58] Id.

treatment plan comply with this section and the rules adopted by the department of health.

E. Additional Sentencing Conditions

The court may impose specific prohibitions or affirmative conditions relating to known precursor activities or behaviors identified in the proposed treatment plan.[59] The court may also impose crime related prohibitions and the following additional sentencing conditions requiring the offender to:[60]

1. devote time to specific employment or occupation
2. remain within prescribed geographical boundaries
3. report to the court and community corrections officer
4. pay all court-ordered legal financial obligations
5. perform community service
6. reimburse the victim's counseling costs for counseling required due to the crime

F. Ensuring Compliance

1. **Quarterly reports**[61]

The sex offender treatment provider shall submit quarterly reports on the offender's treatment to the court and the parties to the case. The report shall reference the treatment plan and include, at a minimum, dates of attendance, offender's compliance with requirements and treatment activities, the offender's relative progress in treatment, and any other material specified at the sentencing hearing.

2. **Annual hearings**[62]

Hearings shall be conducted on the offender's progress in treatment at least once per year. At least 14 days prior to the hearing, the victim shall be given notice and opportunity to make statements to the court regarding the offender's supervision and treatment.

At the annual hearing, the court may modify conditions of community custody, including but not limited to crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to, precursor activities and behaviors in the offender's offense cycle, or may revoke the suspended sentence.

---

[59] RCW 9.94A.670(5)(d)
[60] RCW 9.94A.670(6)
[61] RCW 9.94A.670(8)(a)
[62] RCW 9.94A.670(8)(b) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670

3. **DOC sanctions for violations**

The Department of Corrections may impose sanctions for sentence violations pursuant to RCW 9.94A.633 (1) if:

a. the offender violates a sentencing requirement that is not a condition of the suspended sentence,[63] or

b. the offender violates the prohibitions or affirmative conditions of the suspended sentence for the first time.[64]

G. SSOSA Treatment Termination or Extension

At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment.[65]

At least 14 days prior to the termination hearing, the victim shall be given notice of the hearing and the opportunity to make statements to the court about the offender's supervision and treatment.[66]

Prior to the termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions.[67]

The court may order an evaluation regarding the advisability of terminating treatment. Such an evaluation must be conducted by a sex offender treatment provider who did not treat the offender, and who does not employ, is not employed by, and does not share profits with the person who treated the offender, unless the court enters written findings that such an evaluation is in the best interest of the victim and that a successful evaluation of the offender would be otherwise impractical. The offender shall pay the cost of such an evaluation.[68]

At the termination hearing, the court may terminate treatment or extend treatment in two-year increments for up to the remaining period of community custody and/or modify the conditions of community custody.[69]

H. SSOSA Revocation

[63] RCW 9.94A.670(12)
[64] RCW 9.94A.670(10)(a)
[65] RCW 9.94A.670(7)
[66] RCW 9.94A.670(9)
[67] Id.
[68] Id.
[69] Id.

The Department of Corrections **may** refer the first violation of the prohibitions or affirmative conditions of the suspended sentence to the court and recommend revocation of the suspended sentence.[70]

The Department of Corrections **must** refer to the court any violations of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed that the defendant commits during community custody subsequent to the first such violation and recommend revocation of the suspended sentence.[71]

The court may revoke the suspended sentence if, at any time during the period of community custody, the offender violates the conditions of the suspended sentence or the offender is failing to make satisfactory progress in treatment.[72]

An offender whose SSOSA is revoked is not entitled to credit against the maximum sentence for "non-confined time" while his or her sentence was suspended.[73]

VI. Other Sentencing Conditions

A. Community Custody/Probation

1. **Department of Corrections (DOC)**

During a sex offender's community custody term, the court may impose and enforce an order extending any of the court-imposed conditions for a period up to the maximum allowable sentence for the crime if it finds that public safety would be enhanced.[74] Additionally, prior to or during a sex offender's term of community custody, DOC may impose any appropriate conditions of supervision, including prohibiting the offender from having contact with specified individuals or a specific class of individuals.

Community custody ranges are found in WAC 437-20-010.[75]

The Department of Corrections (DOC) shall supervise the following offenders who are sentenced to supervised probation/community custody:

a. Offenders who committed a felony pursuant to RCW 9.94A.701 (prison) or RCW 9.94A.702 (jail) and who are classified by DOC at the time of release as high risk to reoffend.[76]

---

[70] RCW 9.94A.670(10)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670
[71] RCW 9.94A.670(10)(b)
[72] RCW 9.94A.670(11)
[73] *State v. Pannell*, 173 Wn.2d 222, 234, 267 P.3d 349 (2011)
[74] RCW 9.94A.709(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.709
[75] http://apps.leg.wa.gov/wac/default.aspx?cite=437-20-010
[76] RCW 9.94A.501(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501

b. Offenders with a current misdemeanor conviction in Superior Court for the following[77]:

   i. Sexual misconduct with a minor in the second degree (RCW 9A.44.096)

   ii. Custodial sexual misconduct in the second degree (RCW 9A.44.170)

   iii. Communication with a minor for immoral purposes (RCW 9.68A.090

   iv. Failure to register as a sex offender (RCW 9A.44.130)

c. Offenders with a current **felony conviction for a sex offense** or a **serious violent offense**:[78]

   i. Assault in the First Degree;

   ii. Child Molestation in the First, Second, and Third Degree;

   iii. Commercial Sexual Abuse of a Minor;

   iv. Communication with a Minor for Immoral Purposes;

   v. Criminal Trespass Against Children;

   vi. Custodial Sexual Misconduct in the First Degree;

   vii. Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct in the First and Second Degree;

   viii. Incest in the First and Second Degree;

   ix. Indecent Liberties;

   x. Kidnapping in the First Degree;

   xi. Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the First and Second Degree;

   xii. Promoting Commercial Sexual Abuse of a Minor;

   xiii. Promoting Travel for Commercial Sexual Abuse of a Minor;

   xiv. Rape in the First, Second, and Third Degree;

[77] RCW 9.94A.501(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[78] RCW 9.94A.501(4)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501 (Note: Only sexual offenses as enumerated in Chapter 2 of the Bench Guide are listed)

xv. Rape of a Child in the First, Second, and Third Degree;

xvi. Sending, Bringing into State Depictions of Minor Engaged in Sexually Explicit Conduct in the First and Second Degree;

xvii. Sexual Exploitation of a Minor;

xviii. Sexual Misconduct with a Minor in the First Degree;

xix. Sexually Violating Human Remains;

xx. Viewing Depictions of Minor Engaged in Sexually Explicit Conduct in the First and Second Degree;

xxi. Voyeurism;

xxii. A **felony** that is a criminal attempt, solicitation, or conspiracy to commit one of the above-listed offenses;

xxiii. Any conviction for a felony offense in effect prior to July 1, 1976, that is comparable to one of the above-listed offenses;

xxiv. Any **felony** with a finding of **"sexual motivation"**[79];

xxv. Any federal or out-of-state conviction for an offense that under Washington law would be a felony classified as a sex offense or serious violent offense.

d. Offenders classified by DOC as **dangerous mentally ill offenders** under RCW 72.09.370.[80]

e. Offenders under the jurisdiction of the **Indeterminate Sentencing Review Board** and subject to parole pursuant to RCW 9.95.017.[81]

f. Offenders with a current felony conviction for **Failure to Register as a Sex Offender**.[82]An offender convicted of Failure to Register for the first time will be supervised if sentenced under RCW 9.94A.701 (prison), and will not be supervised if sentenced under RCW 9.94A.702 (jail), unless that offender is classified as high risk.

[79] Assault in the Fourth Degree with Sexual Motivation will not be supervised
[80] RCW 9.94A.501(4)(b) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[81] RCW 9.94A.501(4)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[82] RCW 9.94A.501(4)(d) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501

g. Offenders with a **current conviction for a felony DV offense** (pled and proven after 8/1/2011) with a **prior conviction** for a repetitive DV offense or DV felony offense (pled and proven after 8/1/2011).[83]

h. Offenders sentenced under **First Time Offender Waiver, Parenting Sentencing Alternative (PSA), Drug Offender Sentencing Alternative (DOSA), Special Sex Offender Sentencing Alternative (SSOSA).**[84]

i. Offenders supervised under the **Interstate Compact.**[85]

Misdemeanor and gross misdemeanor offenders supervised by DOC shall be placed on community custody.[86]

1. **Court supervision**

For non-felonies that are not included in the definition of a sex offense, the maximum jurisdiction of the court is two years, and this period cannot be increased by agreement or stipulation.[87] If the court originally imposes a period of probation shorter than the two-year period, the defendant is entitled to notice and a hearing before the length of probation can be increased.[88]

B. Restitution

Restitution must be determined at the sentencing hearing or within 180 days of the sentencing hearing unless good cause is shown.[89] When the court determines restitution, a minimum monthly payment must be ordered, giving consideration to the offender's economic situation.[90] Restitution does not limit civil remedies available to the victims, survivors of victims, or offenders.[91]

1. **Jurisdiction**

Convictions prior to July1, 2000, remain under the court's jurisdiction for ten years, and the court has discretion to extend its jurisdiction for an additional ten years. Convictions

---

[83] RCW 9.94A.501(4)(e) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[84] This subsection applies only to offenses committed prior to July 24, 2015. RCW 9.94A.501(4)(f) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[85] RCW 9.94A.501(4)(g) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[86] RCW 9.94A.501(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501
[87] RCW 3.66.067,.068 http://apps.leg.wa.gov/rcw/default.aspx?cite=3.66.067; http://apps.leg.wa.gov/rcw/default.aspx?cite=3.66.068; RCW 35.20.255 http://apps.leg.wa.gov/rcw/default.aspx?cite=35.20.255; see *In re Wesley v. Schneckloth*, 55 Wn.2d 90, 94, 346 P.2d 658 (1959)
[88] *State v. Campbell*, 95 Wn.2d 954, 958-59, 632 P.2d 517 (1981)
[89] RCW 9.94A.753(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.753
[90] Id.
[91] RCW 9.94A.753(9)

after July 1, 2000, remain under the court's jurisdiction until the obligation for restitution is completely satisfied. The court may modify restitution as to amount, terms, or conditions, but may not reduce the total amount based on lack of ability to pay.[92]

2. Rape of a child

Restitution for a conviction of rape of a child in the first, second or third degree, in which the victim becomes pregnant, shall include all medical and child support for the victim's child.[93]

3. Non-felony cases

In non-felony cases, restitution is imposed as a condition of probation at the discretion of the court.[94] As with felony cases, the restitution must be easily ascertainable and restitution for future medical expenses, future earnings, or lost retirement benefits is not appropriate.[95] Restitution may be up to the amount of actual loss.[96]

C. Court-Initiated Sexual Assault Protection Orders

When a person has been convicted of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096 or RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, solicitation, or conspiracy to commit a sex offense, a no contact order issued at sentencing is recorded as a sexual assault protection order.[97]

A final sexual assault protection order entered in conjunction with a criminal prosecution remains in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.[98]

The sexual assault protection order issued at sentencing must state the following: "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."[99]

A certified copy of the order shall be provided to the victim at no charge.[100] Whenever a sexual assault protection order is issued, the clerk of the court shall forward a

---

[92] RCW 9.94A.753(4)
[93] RCW 9.94A.753(6)
[94] RCW 9.95.210 http://apps.leg.wa.gov/rcw/default.aspx?cite=9.95.210
[95] *State v. Lewis*, 52 Wn. App. 921, 926, 791 P.2d 250 (1990)
[96] *State v. Rogers*, 30 Wn. App. 653, 658, 638 P.2d 89 (1981)
[97] RCW 7.90.150(6)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150
[98] RCW 7.90.150(6)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150
[99] RCW 7.90.150(6)(b)
[100] RCW 7.90.150(6)(d)

copy of the order on or before the next judicial day to the appropriate law enforcement agency specified in the order.[101]

D. Deviancy Evaluation and Treatment

Regulations concerning sex offender treatment providers can be found in Chapter 246-930 WAC. A court sentencing an offender for a non-felony crime may impose treatment or other conditions that are reasonably related to that offender's rehabilitation.[102]

E. Sex Offender Registration

A person convicted of a sex offense is required to register as a sex offender.[103] This means that the offender must register with the sheriff for the county in which he or she resides.[104] For the purposes of the registration statute, a "sex offense" includes the following:[105]

1. a conviction under chapter 9A.44 RCW (sex offenses) except RCW 9A.44.132 (failure to register as a sex offender or kidnapping offender)[106];

2. a repeat conviction under of RCW 9A.44.132[107];

3 a felony conviction under chapter 9.68A RCW (sexual exploitation of children) except RCW 9.68A.080 (reporting of depictions of a minor engaged in sexually explicit conduct)[108] or a conviction under RCW 9.68A.090 (felony or gross misdemeanor communication with a minor for immoral purposes)[109];

4 a conviction under RCW 9A.64.020 (incest)[110];

5. a felony that is an attempt, solicitation, or conspiracy to commit any of the foregoing violations;

6. a conviction under a statute in effect prior to July1, 1976, that is comparable to any of the foregoing violations[111];

7. a felony conviction with a finding of sexual motivation[112];

---

[101] RCW 7.90.150(8)
[102] *State v. Barklind*, 12 Wn. App. 818, 823, 532 P.2d 633 (1975), aff'd. 87 Wn.2d 814, 557 P.2d 314
[103] RCW 9A.44.130(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130
[104] Id.
[105] RCW 9A.44.128 (10) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.128
[106] RCW 9.94A.030(46) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030
[107] Id.
[108] Id.
[109] RCW 9A.44.128 (10)
[110] Id.
[111] Id.
[112] Id.

8. a repeat conviction under RCW 9A.88.070 (promoting prostitution in the first degree) or RCW 9A.88.080 (promoting prostitution in the second degree)[113]

9. a gross misdemeanor conviction that is an attempt, solicitation, or conspiracy to commit a sex offense[114];

10. an out-of-state conviction that would require registration in that state as a sex offender, or would be classified as a sex offense in this state[115];

11. a federal or military conviction of a sex offense[116]; and

12. a conviction of a sex offense in a foreign country obtained with safeguards for fairness and due process as prescribed in 42 U.S.C. Sec. 16912[117]

Juveniles who are convicted of a sex offense are required to register,[118] as are those who have been found not guilty by reason of insanity under chapter 10.77 RCW.[119] However, people found civilly liable for acts that constitute a sex offense are not required to register.[120]

VII. Testing and Counseling for HIV and Sexually Transmitted Diseases

A. Testing

In general, under RCW 70.24.024 (1), "the state and local public health officers or their authorized representatives may examine and counsel or cause to be examined and counseled persons reasonably believed to be infected with or to have been exposed to a sexually transmitted disease."[121]

Additionally, RCW 70.24.340, which applies only to offenses committed after March 23, 1988, states that local health departments are required to conduct pretest counseling, HIV testing, and posttest counseling of all persons convicted of a sexual offense under chapter RCW 9A.44, or convicted of prostitution or related offenses under chapter RCW9A.88. The provision also requires that "Such testing…be conducted as soon as possible after sentencing

---

[113] Id.
[114] Id.
[115] Id.
[116] Id.
[117] Id.
[118] *State v. Acheson*, 75 Wn. App. 151, 152-55, 87 P.2d 217 (1994)
[119] RCW 9A.44.130(1)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130
[120] *Oostra v. Holstine*, 86 Wn. App. 536, 543-46, 937 P.2d 195 (1997), review denied 133 Wn.2d 1034, 950 P.2d 478
[121] RCW 70.24.024(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.024

and shall be so ordered by the sentencing judge."[122]

Mandatory testing naturally raises Fourth Amendment issues addressed by the Washington Supreme Court in *Matter of Juveniles A, B, C, D, E*, [123] holding that the testing requirement of RCW 70.24.340 does not violate the Fourth Amendment; that the statute requiring mandatory HIV testing of sexual offenders properly applies even to offenders whose actions involve no passing of bodily fluids;[124]and that the provision of the public health laws mandating HIV testing for all persons convicted of sexual offenses applies to juvenile sexual offenders.[125]

B. Counseling

WAC 246-100-011[126] provides the following definition of counseling:

> …
> (2) AIDS counseling" means counseling directed toward: (a) Increasing the individual's understanding of acquired immunodeficiency syndrome; and (b) Assessing the individual's risk of HIV acquisition and transmission; and (c) Affecting the individual's behavior in ways to reduce the risk of acquiring and transmitting HIV infection.

RCW 70.24.360[127] provides:

> Jail administrators, with the approval of the local public health officer, may order pretest counseling, HIV testing, and posttest counseling for persons detained in the jail if the local public health officer determines that actual or threatened behavior presents a possible risk to the staff, general public, or other persons. Approval of the local public health officer shall be based on RCW 70.24.024(3) and may be contested through RCW 70.24.024(4). The administrator shall establish, pursuant to RCW 70.48.071, a procedure to document the possible risk which is the basis for the HIV testing. "Possible risk," as used in this section, shall be defined by the [state] board [of health] in rule. Documentation of the behavior, or threat thereof, shall be reviewed with the person to try to assure that the person understands the basis for testing.

---

[122] RCW 70.24.340(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.340
[123] *Matter of Juveniles A, B, C, D, E*, 121 Wn.2d 80, 93, 847 P.2d 455, 460 (1993)
[124] Id. at 95
[125] Id. at 87
[126] http://apps.leg.wa.gov/WAC/default.aspx?cite=246-100-011; for further commentary on HIV testing in correctional facilities see James Lee Pope, "HIV Testing in State Correctional Systems," 22 *J.L. & Health* 17 (2009)
[127] http://app.leg.wa.gov/RCW/default.aspx?cite=70.24.360

WAC 246-100-207 through WAC 246-100-209 further outline standards for providers. The Department of Corrections Policy on HIV Infections and AIDS lists WAC 246-100-207 and WAC 246-100-209 as applying to sex offenders.[128]

C. Disclosure of Test Results

RCW 70.02.220 (2) provides that

> No person may disclose or be compelled to disclose information and records related to sexually transmitted diseases except as authorized by this section, RCW 70.02.210, 70.02.205, or chapter 70.24 RCW. A person may disclose information related to sexually transmitted diseases about a patient without the patient's authorization, to the extent a recipient needs to know the information…,

if the disclosure is to recipients designated in subsections (a) through (i) of the foregoing section.

RCW 70.02.220(3) provides: "No person to whom the results of a test for a sexually transmitted disease have been disclosed pursuant to subsection (2) of this section may disclose the test results to another person except as authorized by that subsection."

RCW 70.02.220(4) provides:

> The release of sexually transmitted disease information regarding an offender or detained person…is governed as follows:
> (a) The sexually transmitted disease status of a department of corrections offender who has had a mandatory test conducted … must be made available . . . to the department of corrections health care administrator or infection control coordinator of the facility in which the offender is housed. The information . . . shall be used only for disease prevention or control and for protection of the safety and security of the staff, offenders, and the public. The information may be submitted to transporting officers and receiving facilities, including facilities that are not under the department of corrections' jurisdiction according to the provisions of (d) and (e) of this subsection.
> (b) The sexually transmitted disease status of a person detained in a jail who has had a mandatory test conducted…shall be made available by the local public health officer to a jail health care administrator or infection control coordinator. The information… shall be used only for disease prevention or control and for protection of the safety and security of the staff, offenders, detainees, and the public. The information may be submitted to transporting

[128] "HIV Infection and AIDS," State of Washington Department of Corrections, Doc 670.020 (Aug. 8, 2011)

officers and receiving facilities according to the provisions of (d) and (e) of this subsection.
(c) Information regarding the sexually transmitted disease status of an offender or detained person is confidential and may be disclosed by a correctional health care administrator or infection control coordinator or local jail health care administrator or infection control coordinator only as necessary for disease prevention or control and for protection of the safety and security of the staff, offenders, and the public. Unauthorized disclosure of this information to any person may result in disciplinary action, in addition to the penalties prescribed in RCW 70.24.080 or any other penalties as may be prescribed by law.
(d) Notwithstanding disclosure limitations in subsections (a), (b), and (c), whenever any member of a jail staff or department of corrections staff has been substantially exposed to the bodily fluids of an offender or detained person, then the results of any tests conducted pursuant to RCW 70.24.340(1), 70.24.360, or 70.24.370, shall be immediately disclosed to the staff person in accordance with the Washington Administrative Code rules governing employees' occupational exposure to blood borne pathogens. Disclosure must be accompanied by appropriate counseling for the staff member, including information regarding follow-up testing and treatment. Disclosure shall also include notice that subsequent disclosure of the information in violation of this chapter or use of the information to harass or discriminate against the offender or detainee may result in disciplinary action, in addition to the penalties prescribed in RCW 70.24.080, and imposition of other penalties prescribed by law.
(e) The staff member shall also be informed whether the offender or detained person had any other communicable disease, as defined in RCW 72.09.251(3), when the staff person was substantially exposed to the offender's or detainee's bodily fluids.
(f) The test results of voluntary and anonymous HIV testing or HIV-related condition may not be disclosed to a staff person except as provided in subsection (2)(h) of this section and RCW 70.24.340(4). A health care administrator or infection control coordinator may provide the staff member with information about how to obtain the offender's or detainee's test results under subsection (2)(h) of this section and RCW 70.24.340(4).

VIII. DNA Testing

A. Upon Sentencing

RCW 43.43.754[129] requires that a biological sample be collected for DNA identification analysis from every adult or juvenile individual who is required to register under RCW 9A.44.130 [130] and every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses):

1. assault in the fourth degree with sexual motivation (RCW 9A.36.041 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.041, RCW 9.94A.835 http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.835)

2. communication with a minor for immoral purposes (RCW 9.68A.090 http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.090)

3. custodial sexual misconduct in the second degree (RCW 9A.44.170 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.170)

4. failure to register (RCW 9A.44.130 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130)

5. harassment (RCW 9A.46.020 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46.020)

6. patronizing a prostitute (RCW 9A.88.110 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.88.110)

7. sexual misconduct with a minor in the second degree (RCW 9A.44.096 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096)

8. stalking (RCW 9A.46.110 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46.110)

9. violation of a sexual assault protection order granted under chapter 7.90 RCW http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90

If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.

B. Post-Conviction Petition for DNA Testing

RCW 10.73.170(1) -(3)[131] provides:

> (1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified

[129] http://apps.leg.wa.gov/rcw/default.aspx?cite=43.43.754
[130] http://app.leg.wa.gov/RCW/default.aspx?cite=9A.44.130
[131] RCW10.73.170 http://app.leg.wa.gov/RCW/default.aspx?cite=10.73.170

written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

(2) The motion shall:

(a) State that:

(i) the court ruled that DNA testing did not meet acceptable scientific standards; or

(ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or

(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; and

(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and

(c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form above, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

C. Court Action When DNA Testing is Requested

RCW 10.73.170(4) -(6)[132] provides:

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington State Patrol Crime Laboratory.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time

[132] Id.

the samples must be preserved.

IX. Victim Impact Statements

Victims of felony crimes have a constitutional right to make a statement at sentencing.[133] In addition, RCW 7.69.030[134] requires that a reasonable effort be made to ensure that right in all criminal court and/or juvenile court proceeding." By its terms, application of these rights of victims enumerated in RCW 7.69.030 are subject to the sound discretion of the judge. See also RCW 7.69A.030 concerning the rights of child victims and witnesses.

While there is no mandate for judges to allow statements of victims of misdemeanor crimes, it is advisable in order "to achieve a balanced criminal justice system that treats crime victims fairly and with sensitivity."[135] Moreover, the 1982 President's Task Force on Victims of Crime stated:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime … [E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice … Defendants speak and are spoken for often at great length before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.[136]

X. Strike Offenses

"[T]the Persistent Offender Accountability Act (POAA) is neither an exceptional sentencing statute subject to a *Blakely* analysis nor is it an enhanced sentence statute."[137] Pursuant to RCW 9.94A.570,[138] a "persistent offender" shall be sentenced to life in prison without the possibility of release. There are two principal types of "persistent offenders" as defined in RCW 9.94A.030(38):[139] "three strike" offenders and "two strike" offenders.

A. Three Strike Offenses

[133] Washington State Const., article I, § 35
[134] http://app.leg.wa.gov/RCW/default.aspx?cite=7.69.030
[135] M. Hook and A. Seymour, "A Retrospective of the 1982 President's Task Force on Victims of Crime" (Office for Victims of Crime, Office of Justice Programs, & U.S. Department of Justice, December 2004)
[136] "The President's Task Force on Victims of Crime, Final Report," December 1982 (Washington, D.C., December 1982)
[137] *State v. Ball*, 127 Wn. App. 956, 957, 113 P.3d 520, 521 (2005)
[138] http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.570
[139] http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030

RCW 9.94A.030(38)(a)[140] classifies an offender who has been convicted on at least two separate previous occasions of a "most serious crime" as defined in RCW 9.9A.030(33) and then is convicted of a third "most serious offense," including any of the following sex offenses, as a "persistent offender" who RCW 9.94A.570, [141] requires be sentenced to a term of total confinement for life without the possibility of release.

1. child molestation in the first or second degree (RCW 9A.44.083, .086)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.086

2. incest in the first or second degree against a child under age 14 (RCW 9A.44.096)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096

3. indecent liberties (RCW 9A.44.100)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100

4. promoting prostitution in the first degree (9A.88.070)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.88.070

5. rape in the first, second, or third degree (RCW 9A.44.040, .050, .060)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.040
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.060

6. rape of a child in the first or second degree (RCW 9A.44.073, .076)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.073
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.076

7. sexual exploitation of a minor (RCW 9.68A.040)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.040

8. any other class B felony with a finding of sexual motivation

B. Two Strike Offenses

RCW 9.94A.030(38)(b) classifies an offender who has been convicted of one of the following offenses and was previously convicted of a second one of the following offenses as a "persistent offender" who RCW 9.9A.570 requires be sentenced to a term of total confinement for life without the possibility of release:

1. rape in the first or second degree (RCW 9A.44.040, 050)
   http://app.leg.wa.gov/RCW/default.aspx?cite=9A.44.040

[140] RCW 9.94.030; http://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.030
[141] RCW 9.94A.570; http://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.570

2. rape of a child in the first degree (**Note:** this offense counts as a first strike only if the offender was 16 years or older at time of the offense) (RCW 9A.44.073) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.073

3. rape of a child in the second degree (**Note:** this offense counts as a first strike only if the offender was 18 years or older at time of the offense) (RCW 9A.44.076) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.076

4. child molestation in the first degree (RCW 9A.44.083) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083

5. indecent liberties by forcible compulsion (RCW 9A.44.100) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100

6. the following offenses committed with sexual motivation:

    a. murder in the first or second degree (RCW 9A.32.030, 050) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.32.030 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.32.050)

    b. homicide by abuse (RCW 9A.32.055) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.32.055

    c. kidnapping in the first degree or second degree (RCW 9A.40.020 , 030) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.020 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.030

    d. assault in the first or second degree (RCW 9A.36.011, 021) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.011 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.021

    e. assault of a child in the first or second degree (RCW 9A.36.120, 130) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.120 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.130

    f. burglary in the first degree (RCW 9A.52.020) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.130

7. any attempt to commit any of the foregoing offenses

For both "three strike" and "two strike" convictions, out-of-state convictions for comparable sex offenses and prior Washington convictions for comparable sex offenses shall be used to determine whether an offender meets the definition of a "persistent offender."[142]

[142] RCW 9.94A.030(38); http://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.030

XI. Special Allegations

A. Sexual Motivation

When the state charges a non-sex offense misdemeanor, gross misdemeanor or felony and "sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder," RCW 9.94A.835(1)[143] requires the state to file a special allegation of sexual motivation. "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification."[144]

The state must prove sexual motivation beyond a reasonable doubt with evidence of identifiable conduct by the defendant while committing the offense. *State v. Vars*[145] A sexual motivation allegation may be withdrawn only by an order of dismissal. The court may dismiss the special allegation only if it finds it necessary to correct a charging decision or "there are evidentiary problems which make proving the special allegation doubtful."[146]

If the trier of fact finds that sexual motivation has been proven beyond a reasonable doubt, the finding represents an aggravating factor which permits the court to impose an exceptional sentence above the standard sentence range.[147] If the court imposes an exceptional sentence outside the standard sentence range, it must set forth the reasons for its decision in written findings of fact and conclusions of law.[148]

B. Predatory Offenses

When the state charges first or second degree rape of a child or first degree child molestation and "sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was predatory" RCW 9.94A.836(1)[149] requires the state to file a special allegation that the offense was predatory "unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction."

The state must prove the special allegation beyond a reasonable doubt. If filed, the special allegation may be withdrawn only by an order of dismissal, and dismissal can be

---

[143] http://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.835
[144] RCW 9.94A.030(48) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030
[145] 157 Wn. App. 482, 493-94, 237 P.3d 378 (2010)
[146] RCW 9.94A.835(3).; http://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.835
[147] RCW 9.94A.535(3)(f) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.535
[148] RCW 9.9A.535
[149] RCW 9.94A.836;http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.836

ordered by the court only if the court finds that it is necessary to correct a charging decision or that there are "evidentiary problems" that make proving the allegation doubtful.[150]

> 'Predatory' means:
> (a.) The perpetrator of the crime was a stranger to the victim, as defined in this section;
> (b)the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or
> (c)the perpetrator was:
> (i)A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision…
> (ii)a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision;
> (iii)a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority; or
> (iv)a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision.[151]
> ….

If the trier of fact finds that the offense was a predatory offense beyond a reasonable doubt, the court must sentence the offender to a minimum term of confinement that is the greater of the maximum under the standard range of sentence or 25 years,[152]unless the offender was a juvenile at the time of the commission of the offense.[153]

C. Victim Under the Age of Fifteen

When the state charges first or second degree rape, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation and "sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the victim was under fifteen years of age at the time of the offense" RCW 9.94A.837 (1)[154] requires the state to file a special allegation that that

[150] RCW 9.94A.836(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.836
[151] RCW 9.94A.030(39) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030
[152] RCW 9.94A.507(1)(c)(ii) http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507
[153] RCW 9.94A.507(2)
[154]RCW 9.94A.837(1); http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.837

the victim was under fifteen years of age at the time of the offense "unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction."

The state must prove the special allegation beyond a reasonable doubt. If filed, the special allegation may be withdrawn only by an order of dismissal, and dismissal can be ordered by the court only if the court finds that it is necessary to correct a charging decision or that there are "evidentiary problems" that make proving the allegation doubtful.[155]

If the trier of fact finds, beyond a reasonable doubt, that the victim was under age fifteen at the time of the offense, the court must sentence the offender to a minimum term of confinement that is the greater of the maximum under the standard range of sentence or 25 years,[156] unless the offender was a juvenile at the time of the commission of the offense.[157]

D. Victim with Diminished Capacity

When the state charges rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation and "sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult" RCW 9.9A.838(1)[158] requires the state to file a special allegation of such diminished capacity "unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction."

The state must prove the special allegation beyond a reasonable doubt. If filed, the special allegation may be withdrawn only by an order of dismissal, and dismissal can be ordered by the court only if the court finds that it is necessary to correct a charging decision or that there are "evidentiary problems" that make proving the allegation doubtful.[159]

If the trier of fact finds, beyond a reasonable doubt, that the victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense, the court must sentence the offender to a minimum term of confinement that is the greater of the maximum under the standard range of sentence or 25 years,[160] unless the offender was a juvenile at the time of the commission of the offense.[161]

E. Sexual Conduct with a Victim in Exchange for a Fee

---

[155] RCW 9.9A.837 (3)
[156] RCW 9.94A.507(1)(c)(ii); http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507
[157] Id.
[158]RCW 9.9A.838(1); http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.838
[159] RCW 9.94A.838(3)
[160] RCW 9.94A.507(1)(c)(ii)
[161] RCW 9.94A.507(2)

When the state files a charge of first, second or third degree rape of a child, first, second or third degree child molestation, or an attempt to commit one of those crimes, if "sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage the victim in the sexual conduct in return for a fee," RCW 9.94A.839(1)[162] provides that the state may file a special allegation to that effect.

The state must prove the special allegation beyond a reasonable doubt. If the trier of fact finds, beyond a reasonable doubt, that the defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage the victim in the sexual conduct in return for a fee, the court must add a one-year enhancement to the standard sentence range.[163] "If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement."[164]

[162]RCW 9.94A.839; http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.839
[163] RCW 9.94A.533(9); http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.533
[164] Id.

CHAPTER 8
The Juvenile Justice System & Sex Offenses

I. Introduction

The purpose of this chapter is to provide an overview of Juvenile Justice and youth who sexually offend. One in ten children in the United States experiences sexual abuse before the age of 18.[1] Child sexual abuse is not perpetrated by adults only, in fact, the younger the child victim, the more likely it is that the perpetrator is another juvenile.[2] Youth offenders account for more than one third of sexual offenses against other minors, with early adolescence being the peak age for offenses against younger children.[3] Understanding the rights, characteristics, and risk factors of youth who sexually offend is critical to sex offense prevention, youth accountability, and community protection. This chapter will discuss victim support concerns, interactions with the courts, jurisdictional issues, and rehabilitation and recidivism rates of youth who sexually offend. The Prison Rape Elimination Act, (PREA) will also be referred to.[4]

Washington State Juvenile Justice is governed by the Juvenile Justice Act of 1977.[5] Juvenile Rehabilitation in Washington State employs a rehabilitative and accountability-based model that uses evidence-based integrative treatment[6] across all levels of intervention and care.[7] This chapter will touch on this integrated treatment model which "views all behavior, including a youth's criminal behavior as occurring in a larger social and historical context, serving a specific function."[8] In addition to how socialization impacts criminal behavior, there are distinct developmental features that affect youth behavior and thinking. Advances in the study of developmental neurobiology reveal that child and adolescent brains experience the world differently than adult brains do.[9] The brain development of a youth is marked by changes to the parts of the brain that control impulse, reasoning, and reactivity. While the brain of a young child is developing an awareness of negative consequences, at adolescence this awareness regresses.

---

[1] Townsend, C., & Rheingold, A.A., (2013). *Estimating a child sexual abuse prevalence rate for practitioners: studies*. Charleston, S.C., Darkness to Light www.D2L.org

[2] Snyder, H. N. (2000). *Sexual assault of young children as reported to law enforcement: Victim, incident, and offender characteristics.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics

[3] Id.

[4] Pub. L. 108-79, Sept. 4, 2003, 117 Stat. 972 (42 U.S.C. 15601 et seq.)

[5] Title 13 RCW

[6] Juvenile Rehabilitation Administration. (2002). *Integrated Treatment Model report*. Olympia, WA: Washington State Department of Social and Health Services

[7] Lucenko, B., Mancuso, D., *Integrated Treatment Model improves employment and re-arrest outcomes for youth served in Washington State's Juvenile Rehabilitation Administration*. Olympia, WA: Washington State Dept. of Social & Health Services, Research & Data Analysis Division (2011) https://www.dshs.wa.gov/sites/default/files/SESA/rda/documents/research-2-22.pdf

[8] Juvenile Rehabilitation Administration, Integrated Treatment Model report. Olympia, WA: Washington State Department of Social and Health Services at p. 4 (2002)

[9] Somerville, L. H., & Casey, B. J. (January 01, 2010). Developmental neurobiology of cognitive control and motivational systems. *Current Opinion in Neurobiology, 20*, 2, 236-41.

The susceptibility to peer pressure increases.[10] As courts come to understand these unique attributes in children and particularly in adolescents, views on the culpability and rights of youth who sexually offend shift.

II. Competing Interests in Juvenile Justice

The Washington State Partnership Council on Juvenile Justice (WA-PCJJ) is the primary planning council for Juvenile Justice related issues in Washington State. In its mission statement, WA-PCJJ outlines the challenge of competing interests in juvenile justice. Judges are encouraged to bear in mind both offender rehabilitation and victim protection. The Juvenile Justice Act highlights the particular importance of providing support and restitution for the victims of juveniles, who in instances of sexual offenses are frequently juveniles themselves[11] [12]. The Act also clearly articulates the importance of rehabilitation rather than solely the punishment of youth who have offended.[13]

The WA-PCJJ seeks to promote and support partnerships that improve outcomes for juveniles who offend, and their victims. Through community capacity, research, and innovation, WA-PCJJ provides expertise and analysis to state and local policymakers."[14] To increase fairness, victim restoration, community protection, youth accountability, and rehabilitation the organization adheres to the following principles, all consistent with State law:[15]

- **Prevention:** Reducing the involvement of youth in the juvenile justice system begins with prevention, and prevention requires collaboration among all youth-serving systems.

- **Rehabilitation:** Adjudicated juvenile offenders have strengths, are capable of change, can earn redemption, and can become responsible and productive members of their communities. Fundamental developmental differences in adolescents must be taken into account when designing programs of prevention and intervention.

- **Community Protection:** All Washington's citizens deserve to be and feel safe from crime.

---

[10] Id.
[11] Anda, R.F., Felitti, V.J., Bremner, J.D. et al. "The enduring effects of abuse and related adverse experiences in childhood. Eur Arch Psychiatry Clin Neurosci 256:174. Doi: 10.1007/s00406-005- 0624-4 (2006)
[12] Finkelhor, D. (2012). Characteristics of crimes against juveniles. Durham, NH: Crimes against Children Research Center, cites statistics related to sexual abuse of children, including that as many as 40% of children who are victims of sexual abuse are abused by other, older, or more powerful children.
[13] RCW 13.40.010 articulates several ways in which juvenile justice should provide support for rehabilitation rather than focusing solely on punishment of juvenile offenders, including "Provide for the rehabilitation and reintegration of juvenile offenders" (RCW 13.40.010(f)); "Provide necessary treatment, supervision, and custody for juvenile offenders" (RCW 13.40.010(g)); "Provide for the handling of juvenile offenders by communities whenever consistent with public safety" (RCW 13.40.010(h))
[14] *The Washington State Partnership Council on Juvenile Justice*, Office of Juvenile Justice, Rehabilitation Administration, DSHS https://www.dshs.wa.gov/ra/office-juvenile-justice/washington-state-partnership-council-juvenile-justice-wa-pcjj
[15] Id.

- **Youth Accountability/Restorative Justice:** Youth who offend should understand how their actions impact the victim and the community, accept responsibility for their actions and experience consequences that balance the impact of their actions with what will be effective for their rehabilitation.

- **Victim Support:** A juvenile who commits a crime harms the victim and the community and thereby incurs an obligation to repair harm to the greatest extent possible.

- **Fairness:** All hearings and decisions under the Juvenile Justice Act and all services and strategies implemented to achieve system missions should be provided in a fair and unbiased manner to all participants.

- **Racial and Ethnic Disparities:** The juvenile justice system must be free of any bias based on race or ethnicity; the well-being of minority communities and of our whole society requires affirmative steps to reduce racial and ethnic disparities in the justice system.[16]

- **Juvenile Justice System Operations:** Washington's juvenile justice system should be driven by its mission, focused on outcomes, and measured by its performance.

III. Juvenile Sexual Offense Statistics

Sexual offenses by juveniles do not share all of the same characteristics of those committed by adults.

A. Relevant Statistics

- Juveniles commit 23.2% of all reported sexual assaults.[17] [18]

- In cases in which the victim was younger than 6 years old, 40% of the persons who offended were juveniles.[19]

- For cases in which the victim was 6–11 years old, 39% of the persons who sexually offended were juveniles [20]

---

[16] Disproportionate over-representation of Youth of Color in JR is being intentionally addressed through the JR program, "Models for Change." *Disproportionate Minority Confinement | DSHS*, (22 May 2014), Washington State. www.dshs.wa.gov/ra/juvenile-rehabilitation/disproportionate-minority-confinement; Id. at "In Washington State, youth of color between the ages of 10 – 19 represent 39% of the general population but 55% of the youth involved in JR."

[17] U.S. Department of Health and Human Services, Administration on Children, Youth, and Families, (2007). Child Maltreatment 2005. Washington, DC: U.S. Government Printing Office http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf

[18] Snyder, H. N. (2000). *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*. United States

[19] Id.

[20] Id.

- For older juvenile victims aged 12–17, 27% were victimized by juvenile offenders.[21]
- Only 4% of adult victim cases involve juveniles who sexually offend.[22]

B. Recidivism Rates

Studies show that most adolescents who have engaged in sexually abusive behavior do not continue to engage in these behaviors once detected.[23] [24] When provided with appropriate treatment and supervision, juveniles do not tend to offend into adulthood.[25] An aggregation of several studies on sex offense recidivism rates among juveniles, showed a range of 7% across a 5 year follow up period.[26] Statistics based on re-arrest, re-conviction, or re-incarceration note that if these youth do re-offend, the offenses are more likely to be non-sexual than sexual.[27] Despite relatively low demonstrated recidivism, early intervention and treatment are still important tools in preventing adult perpetration.[28]

C. History of Victimization

Although childhood sexual victimization can inform sexually aggressive behavior, it does not automatically lead victims to perpetrate sexual offenses. Statistics on the victim-to-offender cycle are difficult to calculate, but one study found that 88% of men who were sexually abused as children did not become individuals who sexually offended, either as youth or adults.[29] It is noted that while not all offenders have themselves been sexually assaulted, many have experienced some kind of trauma or lack of significant emotional support in their childhood.[30]

---

[21] Snyder, H. N. (2000). *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*. United States

[22] Id.

[23] Caldwell, M. F. (2010). Study characteristics and recidivism base rates in juvenile sex offender recidivism. *International Journal of Offender Therapy and Comparative Criminology, 54*, 197-212

[24] Tabachnick, J. & Klein, A. (2011) ATSA: *A Reasoned Approach: Reshaping Sex Offender Policy To Prevent Child Sexual Abuse.* Beaverton, OR: Associate for the Treatment of Sexual Abusers http://www.atsa.com/sites/default/files/ppResonableApproach.pdf

[25] Association for the Treatment of Sexual Abusers (ATSA). (2000). *The effective legal management of juvenile sex offender* www.atsa.com/ppjuvenile.html

[26] Caldwell, M. F. (2010). Study characteristics and recidivism base rates in juvenile sex offender recidivism. *International Journal of Offender Therapy and Comparative Criminology, 54*, 197-212.

[27] Id.

[28] Troy Allard, James Ogilvie and Anna Stewart, *The Efficacy of Strategies to Reduce Juvenile Offending*, Griffith University (25) https://www.griffith.edu.au/__data/assets/pdf_file/0013/208120/Efficacy-of-Strategies-to-Reduce-JJ-Offending-2007-Report.pdf (finding that early intervention programs resulted in 18–91% reduction in recidivism)

[29]*Addressing the Victim to Offender Cycle*, Living Well https://www.livingwell.org.au/managing-difficulties/addressing-the-victim-to-offender-cycle/

[30] Ian Lambie, Fred Seymour, Alan Lee and Peter Adams, *Resiliency in the Victim—Offender Cycle in Male Sexual Abuse*, Sexual Abuse, A Journal of Research and Treatment, Vol. 4, No. 1, 31–48, 44 (2002)

D. Risk Factors and Protective Factors

Longitudinal studies of risk and protective factors associated with criminal behaviors in youth, reveal that similar factors are associated with both youth who sexually offend and youth who commit non-sexual offenses.[31] [32]

Protective factors are "the events, opportunities and experiences in the lives of young people that diminish or buffer against the likelihood of involvement in behaviour risky to youth and/or to others."[33] It is notable that these factors are also known to decrease the likelihood of suicide and substance use.[34] Among these are:

- positive family functioning to include supervision and consistent and fair discipline;
- healthy peer social group(s) and access to a supportive adult;
- a commitment to school and educational activities;
- access to and participation in pro-social activities;
- emotional maturity; and
- resilience characteristics such as problem-solving skills, self-management and emotional regulation.

Because both risk and protective factors are similar among youth who commit all kinds of offenses, experts doubt the validity of tests designed to determine a youth's risk of sexual reoffense.[35] [36]

These tools demonstrate an incapacity to control for social and cultural influence. Among the ethical issues that may arise in using physiological risk assessments are questions concerning gender identity and biological sex and what influence either may have upon risk and protective factors. While we know that male-identified youth are at highest risk to sexually offend, we cannot empirically attribute this to biological distinctions. It has been suggested that socio-cultural notions of hyper-masculinity or toxic-masculinity[37] could be an influential risk factor

---

[31] Worling, J. R., Litteljohn, A., & Bookalam, D. (2010). *20-year prospective follow-up study of specialized treatment for adolescents who offended sexually.* Behavioral Sciences and the Law, *28,* 46-57

[32] Elliott, D. S. (1994). *Serious violent offenders: Onset, developmental course, and termination.* The American Society of Criminology 1993 President Address. *Criminology, 32,* 1-21

[33] Resnick MD, Ireland M, Borowsky I. *Youth violence perpetration: what protects? What predicts?* Findings from the National Longitudinal Study of Adolescent Health. Journal of Adolescent Health 2004; 35: 424.e1−e10

[34] Id. at 424.e7

[35] Id.

[36] Chaffin, M. (2010). *The case of juvenile polygraphy as a clinical ethics dilemma.* Sexual Abuse: A Journal of Research and Treatment, *23,* 314-328

[37] The term "toxic masculinity" can be used to describe a set of very rigid expectations and norms for boyhood, manhood, and masculinity. These standards value dominance, power, and control, and actively devalue

regardless of sex assigned at birth, given that mainstream U.S culture associates masculinity with power.[38] [39]

Any risk assessment tool that is limited in its accuracy and usability across identities could have a detrimental effect on long-term outcomes for youth who have sexually offended. Similarly, biases and myths related to risk factors for sexually offending must be explored. In an effort to combat the myth that gay males are more likely to sexually offend, PREA Standard 115.342 (c) states explicitly that "LGBTQI status must not be treated as an indicator of likely sexual abusiveness." In conclusion, when significant determinations about placement, registration, or release are to be made, comprehensive and evidence-based risk assessments that also consider the individual's protective factors, should be used.[40]

IV. Juvenile Probation Counselors

Juvenile Probation Counselors (JPCs) are employed by the court and are assigned to work with the juvenile defendant and their family from intake through disposition of the case. Pursuant to RCW 13.04.040, JPCs' duties include:

- arranging and supervising diversion agreements;
- preparing predisposition studies;
- attending disposition hearings and responding to questions regarding the predisposition study; and
- supervising court orders of disposition.

JPCs can be a helpful resource to the court as they are uniquely situated to look at the whole pre-disposition picture prior to making their recommendations.

V. Juvenile Court Jurisdiction

A. Original jurisdiction

RCW 13.04.040(e) provides that Washington juvenile courts have original jurisdiction over matters relating to juveniles alleged or found to have committed criminal offenses or civil

femininity, empathy, and the acknowledgment of emotions. Thompkins-Jones, MSW, LLMSW, R. (2017). *Toxic Masculinity is a Macro Social Work Issue,* The New Social Worker, White Hat Communications http://www.socialworker.com/feature-articles/practice/toxic-masculinity-is-a-macro-social-work-issue/

[38] Katz, J. (2006). *The macho paradox: Why some men hurt women and how all men can help*. Naperville, Ill: Sourcebooks, Inc.

[39] Kimmel, M. S. (2008). *Guyland: The perilous world where boys become men*. New York: Harper

[40] Viljoen, J. L., Mordell, S., & Beneteau, J. L. (2012, February 20). *Prediction of adolescent sexual reoffending: A meta-analysis of the J-SOAP-II, ERASOR, J-SORRAT-II, and Static-99.* Law and Human Behavior. Advance online publication. Doi: 10:1037/h0093938

infractions. In certain criminal cases however, the juvenile court may or must decline to exercise its jurisdiction and instead refer the case to adult criminal prosecution.

B. Cases in which the defendant is automatically tried as an adult

"Auto-adult" cases are cases in which the juvenile courts lack jurisdiction and must refer the case to adult criminal court, satisfying the requirements of RCW 13.04.030(e)(v). The following two criteria must be met for a case to be deemed "auto-adult":

- The defendant is 16 or 17 years old on the date of the alleged offense, *and*
- The alleged offense is one of the following:
    - A serious violent offense, as defined by RCW 9.94A.030.
    - A violent offense, as defined by RCW 9.94A.030, *and* the defendant has a criminal history including:
        - One or more prior serious violent offenses;
        - Two or more prior violent offenses; or
        - Three or more of any combination of the following offenses:
            - Any class A felony,
            - Any class B felony,
            - Vehicular assault,
            - Or manslaughter in the second degree,
                - All of which must have been committed after the juvenile's thirteenth birthday and prosecuted separately.
    - A violent offense, as defined by RCW 9.94A.030, *and* the defendant is alleged to have been armed with a firearm.
    - Rape of a child in the first degree, robbery in the first degree, or drive-by shooting (committed after July 1, 1997).
    - Burglary in the first degree (committed on or after July 1, 1997), *and* the juvenile has a criminal history consisting of one or more prior felony or misdemeanor offenses.

In these matters, juvenile courts are not permitted to exercise their jurisdiction and must refer the case for prosecution in adult criminal courts. However, RCW 13.04.030(e)(v)(E)(II) provides that if a juvenile's case is transferred to adult criminal court pursuant to the above requirements and the juvenile is found not guilty of the offense that required transfer, *or* if the

juvenile is convicted in adult criminal court of a lesser offense not listed above, then the juvenile courts have exclusive jurisdiction over any remaining charges in that case.

C. Declination hearings and the *Kent* factors

Juvenile courts may decline to exercise their jurisdiction over a case pursuant to a declination hearing. RCW 13.40.110 provides that there are two types of declination hearings:

Discretionary decline hearings may occur if the prosecutor or respondent files a motion for a hearing requesting the court transfer the proceeding to adult criminal court. The court may also set such a hearing on its own motion prior to a hearing on the information on the merits.

Mandatory decline hearings must occur, absent waiver by the court, the parties, and their counsel, if any of the following are true:

- the respondent is sixteen or seventeen years old and the crime alleged is a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony;
- the respondent is seventeen years old and the crime alleged is assault in the second degree, extortion in the first degree, indecent liberties, child molestation in the second degree, kidnapping in the second degree, or robbery in the second degree; or
- the information alleges an escape by the respondent and the respondent is serving a minimum juvenile sentence to age twenty-one.

At a declination hearing, the court must determine whether declining jurisdiction is in the best interest of the juvenile and the public.[41] In making this determination, the court should consider the eight factors set out in *Kent v. United States.*[42] Those factors are:

- the seriousness of the alleged offense and whether the protection of the community requires prosecution in adult court;
- whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- whether the alleged offense was against persons or property;
- the prosecutive merit of the case;
- whether the defendant had an adult accomplice;
- the defendant's sophistication and maturity;

[41] RCW 13.40.110(3) http://apps.leg.wa.gov/RCW/default.aspx?cite=13.40.110
[42] 383 U.S. 541 (1996)

- the defendant's prior record; and

- the prospects for adequate protection of the public and rehabilitation of the juvenile in the juvenile system.

The *Kent* factors need not all be met in order for a juvenile court to decline jurisdiction. They simply provide guidance to the court in determining whether, by a preponderance of the evidence, decline of jurisdiction is in the best interest of the juvenile and the community.

Finally, any juvenile tried in adult court—whether pursuant to the "auto adult" statute or a decline hearing—retains statutory and constitutional rights to have the trial court exercise discretion in sentencing. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (consistent with Eighth Amendment protections for juvenile offenders, trial court must "consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable [standard] range and/or sentence enhancements"); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) (under the Sentencing Reform Act, youth itself can be a mitigating factor justifying an exceptional sentence below the standard range).

D. Jurisdictional issues for offenders ages 18-21

Because juvenile court jurisdiction is based on the age of the respondent at the time of the alleged crime, respondents ages 18 and older may find themselves in the juvenile court system. RCW 13.40.300(1) provides that a juvenile court only has jurisdiction over a respondent age 18 or older if one the following occurs prior to the respondent's 18th birthday:

- Proceedings are pending seeking the adjudication of a juvenile offense and the court extends jurisdiction of the juvenile court over the juvenile beyond his or her eighteenth birthday. This must be done by written order setting forth the court's reasons for doing so.

- The juvenile has been found guilty after a fact finding or after a guilty plea and an automatic extension is necessary to allow for the imposition of disposition.

- Disposition has been held and an automatic extension is necessary to allow for the execution and enforcement of the court's order of disposition.

- While proceedings are pending in a case in which jurisdiction has been transferred to the adult criminal court pursuant to RCW 13.04.030, the juvenile turns eighteen years of age and is subsequently found not guilty of the charge for which they were transferred, or is convicted in the adult criminal court of a lesser included offense, and an automatic extension is necessary to impose the disposition as required by RCW 13.04.030(1)(e)(v)(E).

RCW 13.40.300(2) further notes that if the juvenile court has already extended its jurisdiction past the juvenile's 18th birthday and the extension period has not yet expired, it may further extend its jurisdiction by means of a written order. However, RCW.13.40.300(3)

prohibits any juvenile courts from extending their jurisdiction past a juvenile's 21st birthday except for restitution or penalty assessment proceedings. When a juvenile court has jurisdiction over a defendant age 18 or older, RCW 13.40.300(1) prohibits commitment of the defendant to juvenile correctional facilities past their 21st birthday.

VI. Prison Rape Elimination Act (PREA)

The Prison Rape Elimination Act (PREA, P.L. 108-79) is a federal law passed in 2003 to prevent and deter sexual abuse in public and private correctional facilities for both adults and juveniles. The major provisions of PREA include:

- adherence to a zero-tolerance standard for inmate or staff sexual assault;
- a development of standards for detection, prevention, reduction, and discipline of prison sexual assault and rape;
- collection and dissemination of information on incidents; and
- grant awards to assist governments implementing the Act.[43]

PREA sets forth Juvenile Facility Standards for preventing, detecting, and reporting rape, sexual abuse and sexual harassment as well as investigating allegations. The Washington State Juvenile Justice and Rehabilitation Administration has codified these standards in Policy 5.90 (49) "Applying The PREA Juvenile Standards In JR." In this policy, staff and youth conduct, sanctions, reporting, response, investigations, staff training, administrative structure, post-incident review, and data collection are all clearly outlined.[44] Additionally, in response to alarming national statistics documenting the particular vulnerability of LGBTQI (Lesbian, Gay, Bisexual, Transgender, Queer, Intersex) people in correctional facilities,[45] Washington State JR issued an update to their Policy 4.60, " Ensuring the Health and Safety of LGBTQI Youth in JR." This policy seeks to directly address the disproportionate rate of sexual harassment, abuse and rape against LGTQI youth through gender-identity and sexual orientation-affirming prevention, education, guidance, and on-going training. This policy acts as an enhancement to the PREA standards and requires that all Washington State JR Staff will "protect youth from discrimination, physical and sexual harassment or assault, and verbal harassment by other youth, based on a youth's actual or perceived sexual orientation, gender identity or gender expression."[46]

---

[43] https://nicic.gov/prea

[44] JR Policy 5.90, *Applying PREA Juvenile Standards in JR* , JR Policy 5.91 *Reporting Abuse and Neglect of JR Youth*

[45] Allen, J., Beck & Page M. Harrison, (2007) *Bureau of Justice Statistics, Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1149

[46] JR Policy 4.60 § 3.2

VII. Juvenile Offender Rights

As it is the purpose of Juvenile Justice to implement an effective, developmentally appropriate rehabilitative treatment model, juvenile offenders retain certain rights that adult offenders do not. This section describes several categories of juvenile offender rights.

A. Juvenile Detention

There are two types of disciplinary consequences for convicted juveniles: local sanctions and detention at juvenile facilities.[47]

Local sanctions may include immediate release to the community or release after a short (up to 30 day) detention. Typically, local sanctions involve up to 150 hours of community service, community supervision for as long as 12 months, and/or a fine of up to $500.

The Department of Social and Health Services (DSHS) runs the State's Juvenile Rehabilitation facilities. Detention at a juvenile facility is usually ordered by number of weeks.

Declined youth committed to the custody of the Department of Corrections (DOC) become part of the Youthful Offender Program.[48] This program is jointly operated by the DOC and JR. Generally, declined youth less than 18 years of age are housed at a JR facility. If the youth is expected to complete the term of confinement before age 21, that youth remains in a JR facility. If the youth is expected to serve a term of confinement beyond age 21, the case is reviewed when the youth turns 18 to determine if that youth is able to serve the remaining time at an adult DOC facility.

B. *Decker* Orders

Decker Orders are a narrow exception to the general rule that granting immunity is normally a prosecutorial function. Based on *State v. Decker*,[49] a court may issue a protective order granting immunity to a juvenile with regard to psychological evaluations ordered before charges are pending against the youth.[50]

C. Case-sealing procedures

Unlike most states, Washington does not automatically seal juvenile case records. These records remain open and available to the general public until they are sealed by order of the court. In order to have one's juvenile records sealed, a previous offender must comply with procedural requirements. An individual wishing to seal their records must go through the following process:[51]

---

[47] Juvenile Disposition Manual 2015, p. 19–20
[48] http://www.doc.wa.gov/information/policies/showFile.aspx?name=320500
[49] 68 Wn. App. 246 (2007)
[50] Sexually/mentally Dangerous Persons, 25 Mental & Physical Disability L. Rep. 481 (2001)
[51] http://www.teamchild.org/docs/uploads/SealingPacket2015rev_112015.pdf

1. First, the individual must obtain a complete copy of their criminal history from a Superior Court clerk or juvenile court.

2. Second, the juvenile offenses must each be considered for determination of whether they may be sealed. Juvenile offenses are categorized on a scale from A+ to E pursuant to RCW 13.40.0357. For each offense an individual wishes to have sealed, the answer to the following questions must be *yes*:

    i. I do not have any criminal charges pending in juvenile or adult court;

    ii. I am not currently completing a diversion agreement;

    iii. I do not owe any restitution to the named victim (excluding insurance companies) for the case I want to seal;

    iv. For juvenile Class A felonies:

        a. It has been more than five years since the date of my last sentencing (disposition) and the date I was released from confinement, whichever is later; and

        b. The Class A felony I am trying to seal is not Rape 1, Rape 2, or Indecent Liberties with Forcible Compulsion;

    v. For other juvenile charges: It has been more than two years since the date of my last sentencing (disposition) and the date I was released from confinement, whichever is later; and

    vi. If the charge is classified as a sex offense: In addition to meeting all of the requirements above, I no longer have to register as a sex offender under RCW 9A.44.130 or RCW 9A.44.143.

3. Third, if the answer to all relevant questions is *yes*, then the individual may proceed to complete the required forms to file a sealing request and notify necessary parties. Requests to seal must be filed in the county where the case took place. For each case an individual wants sealed, the following forms are required:

    - Motion and Declaration to Seal Records of Juvenile Offender Pursuant to RCW 13.50.260(3) and (4)

    - Notice of Respondent's Motion to Seal Records of Juvenile Offender

    - Order on Motion to Seal Records of Juvenile Offender Pursuant to RCW 13.50.260(3) and (4)

- Certificate of Service

4. Fourth, an individual must schedule a hearing.

5. Fifth, all motions must be filed, and all motions and notices must be delivered to the following agencies:

    - The juvenile court prosecutor in the county where the case was heard

    - The juvenile court administrator in the county where the case was heard

    - Law enforcement agencies that have records of the case, such as Washington State Patrol and local police departments

    - The Juvenile Rehabilitation Administration, if the individual was incarcerated in one of its facilities pursuant to the case in question

6. Sixth, the individual must attend the hearing before a Juvenile Court judge or commissioner.

7. If the Court approves the Motion(s) and signs the Order(s), the individual must get a certified copy of the Order(s). Certified copies must be mailed to all the agencies listed in step #5.

Only after the completion of all of the above-listed steps can juvenile records be sealed.

D. The YEAR Act

Under Washington's traditional requirements for juvenile record sealing, individuals seeking record sealing were required to pay all fines and fees at 12% interest.[52] However, the Youth Equality and Reintegration Act (YEAR Act, SB 5564), passed in 2015, provides for administrative sealing hearings that now make it much easier to have one's juvenile records sealed by removing most fees and not collecting interest. These hearings should be scheduled by the court at the disposition of eligible cases. At the administrative hearings, the court should seal the records unless someone objects or the court finds that there is a compelling reason not to seal the record. If there is an objection, the court should schedule a full judicial hearing. Sex offenses are excluded from the YEAR Act, however they may still be sealed under the abovementioned procedures for normal record sealing.

The justification for the YEAR Act is that it allows people with juvenile convictions to overcome significant financial hurdles that prevent them from getting their records sealed. Victims are still paid restitution thereby maintaining victim protection.

[52] http://columbialegal.org/Gov-Inslee-Signs-YEAR-Act

E. Sexually Aggressive Youth

Sexually aggressive youth are defined by RCW 74.13.075(1) as those who:

(a) Have been abused and have committed a sexually aggressive act or other violent act that is sexual in nature; and

i. Are in the care and custody of a state or federally recognized Tribe; or
ii. Are the subject of a proceeding under chapter 13.34 RCW or a child welfare proceeding held before a Tribal court located within the state; or

(b) Cannot be detained under the juvenile justice system due to being under age twelve and incompetent to stand trial for acts that could be prosecuted as sex offenses as defined by RCW 9.94A.030 if the juvenile was over twelve years of age, or competent to stand trial if under twelve years of age.

Special funding is allocated to provide services and treatment to sexually aggressive youth, regardless of whether the child is the subject of a proceeding. When considering how funds shall be allocated, DSHS should consider factors such as the juvenile's age, the type and extent of abuse suffered by the juvenile, and the ability of the juvenile's parents to pay for treatment.[53]

When the child is in the care of a Tribe or the subject of a proceeding in a Tribal court, DSHS may only provide funds for services and treatment of the youth if (a) the Tribe uses the same or equivalent definitions and standards for determining which youth are sexually aggressive; and (b) the department seeks to recover any federal funds available for the treatment of youth.[54]

F. Special Sex Offender Disposition Alternative (SSODA)

The Special Sex Offender Disposition Alternative (SSODA) is a two-year probation program focused on rehabilitating youth who have committed sex offenses.[55] Rather than serving time in a juvenile correctional institution, eligible youth may receive a suspended sentence and participate in a SSODA instead. The court should determine whether the juvenile is able to be rehabilitated in the community, as well as whether they pose a serious risk to the community. Factors to include when making this determination include assessment results, the individual's motivation to comply with SSODA requirements, and family support and ability to supervise.

A juvenile pleads not guilty at arraignment when being granted a SSODA probation. A SSODA probation carries the requirement of extensive supervision of the juvenile, as well as many other restrictions and requirements. These may include but are not limited to:

[53] RCW 74.13.075(3) http://apps.leg.wa.gov/RCW/default.aspx?cite=74.13.075
[54] RCW 74.13.075(4)
[55] https://www.co.pierce.wa.us/DocumentCenter/Home/View/233

- No contact with the victim, witnesses, or co-defendants;
- No unsupervised contact with any youth more than 24 months younger;
- Constant supervision and restriction to home, school, or other determined, supervised locations;
- Travel restricted to local counties;
- Participation in adolescent sex offender treatment; and
- No possession of pornographic material.

G. Relief from Duty to Register as a Sex Offender

RCW 9A.44.143 provides that an offender required to register as a sex offender under RCW 9A.44.130 may be relieved of that duty if (1) the offense was committed when the offender was a juvenile and (2) the offender has not been determined to be a sexually violent predator pursuant to chapter 71.09 RCW. If both of these factors are satisfied, the offender may petition the superior court to be relieved of the duty to register. This relief should only be granted in keeping with the following:

1. For Class A sex offenses or kidnapping offenses committed when the petitioner was 15 years of age or older:

    a. At least 60 months have passed since the petitioner's adjudication and completion of any term of confinement for the offense, and the petitioner has not been adjudicated or convicted of any additional sex offenses or kidnapping offenses within the 60 months prior to the petition;

    b. The petitioner has not been adjudicated or convicted of failure to register pursuant to RCW 9A.44.132 in the 60 months prior to the petition; and

    c. The petitioner shows by a preponderance of the evidence that they are sufficiently rehabilitated to warrant removal from the central registry of sex offenders and kidnapping offenders.

2. For all other sex offenses or kidnapping offenses:

    a. At least 24 months have passed since the petitioner's adjudication and completion of any term of confinement for the offense giving rise to the duty to register and the petitioner has not been adjudicated or convicted of any additional sex offenses or kidnapping offenses within the 24 months before the petition;

    b. The petitioner has not been adjudicated or convicted of failing to register pursuant to RCW 9A.44.132 during the 24 months prior to filing the petition; and

c. The petitioner shows by a preponderance of the evidence that they are sufficiently rehabilitated to warrant removal from the central registry of sex offenders and kidnapping offenders.

The Court should consider the following factors in concert, when determining whether the petitioner has been sufficiently rehabilitated to warrant removal from the central registry:

- The nature of the offense, including the number of victims and the length of the offense history;
- Subsequent criminal history;
- The petitioner's compliance with supervision requirements;
- The length of time since the offenses;
- Input from community corrections offers, juvenile parole or probation officers, law enforcement, or treatment providers;
- Participation in sex offender treatment;
- Participation in other treatment and rehabilitative programs;
- The petitioner's stability in employment and housing;
- The petitioner's community and personal support system;
- Risk assessments, examinations, or evaluations prepared by qualified professionals;
- Victim input;
- And any other relevant factors.

An adult prosecuted for an offense committed as a juvenile may, after the juvenile court loses jurisdiction due to the passage of time, petition the superior court pursuant to this section. However, these provisions do not apply to juveniles prosecuted and convicted of sex offenses as adults. They must comply with RCW 9A.44.142 provisions for relief from registration requirements.

VIII. Non-Offender Programs

Washington State JR serves the state's highest risk youth through multiple levels of intervention. Of the services provided, there are programs that do not classify accused juveniles as offenders. These are discussed in this section.

A. Diversion

Juvenile Diversion Programs are community-based corrections programs that apply the principles of Restorative Justice and function as an alternative to court proceedings for juveniles charged with an offense.[56] Participation in diversion is optional. Youth who are invited by the Prosecuting Attorney's office to participate must enter into Diversion Agreements that are designed to balance the needs of the victim, the community, and the offender. The agreement serves as a contract between the juvenile and the diversion unit which is typically comprised of a Community Accountability Board (CAB). Victims are contacted by the CAB and invited to participate if they wish. This contract sets forth requirements designed to repair the harm done by the youth who offended.

Diversion Agreements may require an individual to attend counseling, participate in community restitution, observe home curfews, refrain from contact with certain victims and witnesses, pay restitution fees, and meet other requirements. The Diversion Agreement cannot require the individual to go to jail, but if the youth does not complete their agreement, the Prosecuting Attorney's office may require a hearing for the offense.

Individuals whose criminal history contains only Diversion Agreements can request at age 18 to have their records destroyed rather than simply sealed.[57] Should a juvenile participate in a Diversion Agreement for a sex offense, as defined in RCW 9.84A.030, the court must notify the juvenile's school principal.

B. At-Risk Youth Petitions and Child in Need of Services Petitions

For children and youth who have either demonstrated an extreme unwillingness to cooperate at home or a wish to leave home due to unsafe circumstances, Washington law provides multiple legal options.

At-risk Youth petitions may be filed by a parent or guardian of a juvenile who meets one of the following criteria to request assistance from the courts in providing care, treatment, and supervision to such youth:[58]

- the youth has been a runaway for at least 72 hours;
- the youth is beyond parental control such that the child's behavior endangers the health, safety and welfare of the child or another person; or
- the youth has a substance use disorder and there are no pending criminal charges related to substance abuse.

[56] JU 06.0100, (2016) https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=23
[57] JuCR, 6.4, *Advice About Diversion Process*
[58] JU 05.0600, (2017) https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=19

Child in Need of Services (CHINS) petitions may be filed by parents or guardians or by juveniles themselves. These petitions are used to request that a child be permitted to reside outside their home for a period of time. The child is in need in services in that:

- the child is beyond the control of their parent(s) or guardian(s) such that the child's behavior endangers the health, safety, or welfare of the child or other person;

- the child has been reported as absent without consent for at least 24 consecutive hours on two or more separate occasions from the parent's home, a crisis residential center, an out-of-home placement, or a court-ordered placement; and has exhibited a serious substance abuse problem; or has exhibited behaviors that create a risk of serious harm to the health, safety, or welfare of the child or any other person;

- the child is in need of necessary services (including food, shelter, health care, clothing, education, or services designed to maintain or reunite the family); and the child lacks access to, or has declined to utilize these services; and the child's parents have evidenced continuing but unsuccessful efforts to maintain the family structure or are unable or unwilling to continue efforts to maintain the family structure;

- the child is a "sexually exploited child"; or

- the requirements of RCW 13.32A.140 are met.[59]

The filing of an At-Risk Youth or CHINS petition is followed by fact-finding and a disposition hearing in order to determine whether the juvenile meets the requirements for the respective petitions. The court determines whether it is appropriate for the child to reside elsewhere, and to be provided therapeutic treatment such as counseling, and/or other appropriate measures to meet the child's needs. In each of these temporary measures, family preservation and reconciliation is an ultimate goal if safe and appropriate. Special services to meet this end may be provided by the State.

X. Conclusion

Understanding how socialization, history, and emotional development impact a youth's capacity to demonstrate appropriate judgement is critical to serving the needs of those youth who come into contact with the courts. Equally important is balancing the needs of the victim(s) and community. Keeping the unique attributes of youth development in mind as well as how identity impacts the offender's own experience with oppression will help guide our state to provide the most comprehensive, therapeutic, and effective rehabilitation for juveniles who sexually offend.

[59] RCW 13.32A.030(5) http://apps.leg.wa.gov/RCW/default.aspx?cite=13.32A.030

CHAPTER 9
Civil Protection Orders

I. Introduction

The effects of sexual assault are devastating. As the Washington State Legislature has acknowledged, "Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims."[1] This is especially true if the perpetrator continues to have contact with the victim after the assault.

Prior to 2006, civil protection orders were not available to many sexual assault victims. Their options consisted of petitioning the court for a Domestic Violence Protection Order or an Antiharassment Protection Order. However, based on the eligibility requirements for these two orders, victims who were assaulted one time by someone outside their family or household were unable to meet the requirements of either protection order. This gap in protection was significant because many sexual assaults are perpetrated by acquaintances or persons known to, but not related to, the victim.[2]

Passage of 7.90 RCW, the Sexual Assault Protection Order Act[3], filled the gap that had existed for many sexual assault victims by providing them with an avenue to obtain "stay away" protection from the alleged perpetrator. Currently, twenty-eight other states and the District of Columbia have civil protection orders for sexual assault victims.[4]

This chapter is intended to assist the court in crafting effective orders and in developing effective and efficient procedures for handling cases of sexual violence in order to uphold the rights of all parties involved.

---

[1] RCW 7.90.005 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.005

[2] Lucy Berliner, David Fine and Danna Moore, "Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women" (Seattle: Harborview Medical Center 2001)

[3] http://app.leg.wa.gov/RCW/default.aspx?cite=7.90

[4] Other states with civil sexual assault protection orders are: Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin, and Wyoming. American Bar Association Commission on Domestic Violence. "Sexual Assault Civil Protection Orders (CPOs) By State." April 2015 http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf

II. Chapter Overview

A. Protection Orders Available in Washington

Washington statutes provide for the following protection orders:

1. sexual assault protection orders- civil & criminal (chapter 7.90 RCW)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90

2. domestic violence protection orders (chapter 26.50 RCW)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=26.50

3. antiharassment protection orders (chapter 10.14 RCW)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.14

4. vulnerable adult protection orders (chapter 74.34 RCW)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=74.34

5. stalking protection orders (chapter 7.92 RCW)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=7.92

6. extreme risk protection orders (chapter 7.94 RCW)
   http://app.leg.wa.gov/RCW/default.aspx?cite=7.94

7. criminal no-contact orders

8. domestic relations restraining orders
   (RCW 26.09.060 and
   26.09.300) http://apps.leg.wa.gov/rcw/default.aspx?cite=26.09.060
   http://apps.leg.wa.gov/rcw/default.aspx?cite=26.09.300
   (RCW 26.10.040)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=26.10.040
   (RCW 26.44.063)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=26.44.063
   (RCW 26.26.130)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=26.26.130

B. Scope of this Chapter and Cross-References

This chapter is primarily concerned with civil sexual assault protection orders (SAPOs) issued pursuant to chapter 7.90 RCW. Although the policy concerns addressed in this chapter apply whenever a court is considering issues of sexual violence, the procedural discussions contained in this chapter apply only to orders initially obtained pursuant to chapter 7.90 RCW. Court-initiated SAPOs that are issued in conjunction with a criminal case are discussed in Chapters 4 and 7.

Domestic violence protection orders are discussed in detail in Chapter 8 of Washington's *Domestic Violence Manual for Judges (2016)* and guidelines for domestic violence protection and antiharassment protection orders are discussed in Appendix J of the manual. The *Domestic Violence Manual for Judges* is available at http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index

Because the Sexual Assault Protection Order Act incorporates RCW 26.50.110 by reference with respect to enforcement of SAPOs, please refer to Chapter 8, pp. 28-34, of Washington's *Domestic Violence Manual for Judges* for a detailed discussion of civil and criminal enforcement.

Appendix A to this chapter contains a chart which summarizes the significant attributes of the types of civil orders available to alleged sexual assault victims. Appendix B to this chapter contains a bench card for judges conducting SAPO hearings. Appendix C to this chapter contains a bench card for judges related to advancing procedural justice at protection order hearings.

C. Distinction Between "Ex Parte" and "Final" Orders

"Sexual assault protection order" is defined as an ex parte temporary order or a final order[5], which include remedies authorized by RCW 7.90.090. This chapter will distinguish between the two types of orders as follows:

1. Ex parte orders

RCW 7.90.110 & .120[6] provide for the issuance of an "ex parte temporary sexual assault protection order." Because the distinguishing characteristic of these orders is not their temporary nature, but the fact that they may be issued ex parte, they will be referred to throughout this chapter as "ex parte orders."

2. Final orders

RCW 7.90.090[7] provides for the issuance of a "sexual assault protection order" upon notice to the respondent and after a hearing. References to these orders as "permanent orders" are misleading because they may be either "effective for a fixed period of time or be permanent"[8]. Instead, orders issued following notice and a hearing will be referred to throughout this chapter as "final orders."

---

[5] http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.010
[6] http://app.leg.wa.gov/RCW/default.aspx?cite=7.90.110; http://app.leg.wa.gov/RCW/default.aspx?cite=7.90.120
[7] http://app.leg.wa.gov/RCW/default.aspx?cite=7.90.090
[8] RCW 7.90.120(2)

III. Standard Forms

A. Statutory Authority

RCW 7.90.180 directs the Administrative Office of the Courts to develop standard forms and instructional brochures to be available in all court clerk offices. These forms are available at: http://www.courts.wa.gov/forms/?fa=forms.contribute&formid=65

B. Use of Mandatory Forms Ensures that the Orders Will Be Enforceable

Courts should use the standard Washington State forms developed by the Administrative Office of the Courts in order to meet all state and federal requirements regarding sexual assault cases. The Sexual Assault Protection Order, SA 3.015,[9] is a mandatory form. Law enforcement officers, judicial and criminal information gathering agencies, and other courts are familiar with and rely upon the standard forms.

If the court enters a sexual assault protection order other than the mandatory standard order, the standard order should be attached to and/or incorporated by reference in the order entered to ensure that the order contains all necessary language, including in a conspicuous location of the following required statement:

> A knowing violation of this sexual assault protection order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.[10]

A protection order that does not contain the above language is legally insufficient and a violation of the order cannot be criminally enforced.[11]

C. List of Current Forms[12]

SA 1.015	Petition for Sexual Assault Protection Order (2018)
SAi-1.015	Instructions for Petition for Sexual Assault Protection Order
	WPF AllCases 01.0400 Law Enforcement Information Sheet (2018)
FL All Family 001	Confidential Information (2016)
FL All Family 002	Attachment to Confidential Information (2016)

[9] SA 3.015 is available at http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=65
[10] RCW 7.90.130(e)(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.130
[11] See *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461(2000), review denied, 141 Wn.2d 1026 (2000) (statutory language not contained in criminal no-contact order)
[12] These forms are available at: http://www.courts.wa.gov/forms/?fa=forms.contribute&formid=65

SA 2.015	Temporary Sexual Assault Protection Order and Notice of Hearing (2018)
SAi-2.015	Instructions for Temporary Sexual Assault Protection Order and Notice of Hearing (2017)
SA 3.015	Sexual Assault Protection Order (2017)
SAi-3.015	Instructions for Sexual Assault Protection Order (2017)
SA 3.070	Appendix A: School Transfer (2006)
SA 4.020	Return of Service (2017)
WPF All Cases 02-010	Motion for Surrender of Weapons (2018)
WPF All Cases 02-030	Order to Surrender Weapons Issued Without Notice (2018)
WPF All Cases 02-040	Order Re Motion for Surrender of Weapons (2018)
WPF All Cases 02-050	Order to Surrender Weapons (2018)
WPF All Cases 02-060	Proof of Surrender (2018)
WPF All Cases 02-065	Receipt for Surrendered Weapons and Concealed Pistol License (2018)
WPF All Cases 02-070	Declaration of Non-Surrender (2018)
All Cases 02-080	Motion and Declaration for Order to Release Weapons (2014)
All Cases 02-090	Order to Release Weapons (2018)
SA 5.010	Reissuance of Temporary Sexual Assault Protection Order and Notice of Hearing (2006)
SA 5.020	Order Transferring Sexual Assault Protection Order Case and Setting Hearing (2006)
SA 5.030	Motion and Declaration for Renewal of Sexual Assault Protection Order (2017)
SA 5.040	Order Setting Hearing – Sexual Assault (2017)
SA 5.060	Order on Motion for Renewal of Sexual Assault Protection Order (2017)
WPF DV 6.020	Denial Order (2014)
SA 6.050	Respondent’s Petition to Reopen Temporary Sexual Assault Protection Order (2006)
SA 6.060	Order on Respondent’s Petition to Reopen Temporary Sexual Assault Protection Order (2006)
SA 7.010	Motion to Modify/Terminate Sexual Assault Protection Order (2017)
SA 7.025	Finding of Adequate Cause and Order for Hearing on Respondent’s Motion to Modify/Terminate Sexual Assault Protection Order (2017)
SA 7.030	Order Modifying/Terminating Sexual Assault Protection Order (2017)

SASTMT	Statement (2006)
SA 8.030	Judgment (2017)
SA 8.070	Declaration (2017)
SA 9.010	Motion and Declaration for Service of Summons by Publication (2013)
SA 9.020	Order for Service of Summons by Publication (2013)
SA 9.030	Summons (2013)
SA 9.040	Declaration of Mailing (2013)
SA 9.050	Motion and Declaration for Service of Summons by Mail (2013)
SA 9.060	Order for Service of Summons by Mail (2013)

IV. Statute of Limitations

There is no time limit within which a party must file for a SAPO; however, the petitioner must allege a reasonable fear of future dangerous acts in the petition.[13] The Washington State Legislature recognizes that "[v]ictims who do not report the crime still desire safety and protection from future interactions with the offender."[14] Therefore, petitioners do not need to report a sexual assault to law enforcement to be eligible for a SAPO.

V. Issuance of a Sexual Assault Protection Order

A. Grounds

Any person may seek relief by filing a petition that alleges that he or she has been the victim of nonconsensual sexual conduct or nonconsensual sexual penetration committed by the respondent.[15] The petition "shall be accompanied by an affidavit… stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought." [16] The "specific statements or actions" are required to be separate from the sexual assault itself.[17] In a recent opinion, the Washington State Supreme Court held that at the final sexual assault protection order hearing, the respondent may contest the sufficiency and validity of the petition and temporary order.[18]

[13] RCW 7.90.020 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.020
[14] RCW 7.90.005 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.005
[15] RCW 7.90.040(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040
[16] RCW 7.90.020(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.020
[17] *Roake v. Delman*, 194 Wn. App. 442, 377 P.3d 258 (2016)
[18] *Roake v. Delman*, 408 P.3d 658 (2018)

B. Definitions

1. **"Nonconsensual"** means "lack of freely given agreement."[19] Note, however, that under the following circumstances, because of the age differential or the nature of the relationship between the petitioner and the respondent, the petitioner is considered to be incapable of freely giving agreement to sexual contact or sexual penetration as a matter of law:[20]

   a. The petitioner is under 12 years of age and the respondent is at least two years older (1st degree rape of a child)[21]

   b. The petitioner is under 12 years of age and the respondent is at least three years older (1st degree child molestation)[22]

   c. The petitioner is 12 or 13 years of age, is not married to the respondent and the respondent is at least three years older (2nd degree rape of a child; 2nd degree child molestation)[23]

   d. The petitioner is 14 or 15 years of age, is not married to the respondent and the respondent is at least four years older (3rd degree rape of a child; 3rd degree child molestation)[24]

   e. The petitioner is a resident at a correctional facility and the respondent is an employee or contractor at the facility (1st and 2nd degree custodial sexual misconduct)[25]

   f. The petitioner is (i) at least 16 years of age and is a foster child of the respondent, or (ii) 16 or 17 years of age, not married to the respondent and the respondent is at least five years older than the petitioner and is in a supervisory position, or (iii) is a student at least 16 years of age but not more than 21 years of age and the respondent is a school employee at least five

---

[19] RCW 7.90.010(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.010
[20] Such conduct is a "strict liability offense." See *State v. Knutson*, 121 Wn.2d 766, 775, 854 P.2d 617 (1993) (purpose of these statutes is to "protect persons who, by virtue of their youth, are too immature to rationally or legally consent;") also see *State v. Clemens*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (citing *State v. Dodd*, 53 Wn. App. 178, 181, 765 P.2d 1337 (1989)
[21] RCW 9A.44.073, http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.073
[22] RCW 9A.44.083 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083
[23] RCW 9A.44.076, .086 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.076; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.086
[24] RCW 9A.44.079, .089 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.079; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.089
[25]RCW 9A.44.160, 170 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.160; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.170

years older than the student (1st and 2nd degree sexual misconduct with a minor)[26]

2. **"Sexual conduct"** is defined as:

> (a) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing;
> (b) Any intentional or knowing display of the genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent;
> (c) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing, that the petitioner is forced to perform by another person or the respondent;
> (d) Any forced display of the petitioner's genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent or others;
> (e) Any intentional or knowing touching of the clothed or unclothed body of a child under the age of thirteen, if done for the purposes of sexual gratification or arousal of the respondent or others;
> (f) Any coerced or forced touching or fondling by a child under the age of thirteen, directly or indirectly, including through clothing, of the genitals, anus, or breasts of the respondent or others.[27]

3. **"Sexual penetration"** is defined as:

> …any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.[28]

C. Parties to Sexual Assault Protection Order Cases

1. Petitioner

An alleged victim of nonconsensual sexual conduct or nonconsensual sexual penetration, *including a single incident*, may petition the court for a sexual assault protection order if they do not qualify for a domestic violence protection order under chapter 26.50

---

[26] RCW 9A.44.093, .096 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.093; http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096; see *State v. Hirschfelder*, 170 Wn.2d 536, 242 P.3d 876 (2010)
[27] RCW 7.90.010(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.010
[28] RCW 7.90.010(5)

RCW, are at least 16 years of age.[29] However, a petitioner who is in a dating relationship with the respondent, or a family or household member of the respondent, as defined by RCW 26.50.010, is entitled to seek a domestic violence protection order as provided in chapter 26.50 RCW, and is excluded from seeking a SAPO.[30]

A parent or guardian may file for a SAPO on behalf of a minor child, a vulnerable adult, or any other adult who, because of age, disability, health, or inaccessibility, cannot file the petition.[31] The court may appoint a guardian ad litem for the petitioner as it deems necessary.[32]

2. Respondent

No guardian or guardian ad litem need be appointed on behalf of a respondent who is 16 or 17 years of age; however, the court may appoint a guardian ad litem for the respondent as it deems necessary. The appointment of a guardian ad litem shall be at no cost to either party.[33]

See section XIV, D of this chapter for a discussion of the parties' Fifth Amendment rights against self-incrimination in the context of a SAPO hearing.

VI. Jurisdiction and Venue

A. Court Jurisdiction

1. Ex parte orders

Washington municipal, district, and superior courts have jurisdiction to issue ex-parte SAPOs pursuant to RCW 7.90.040(5) and domestic violence protection orders pursuant to RCW 26.50.020(5)[34]

2. Final orders

Washington municipal, district and superior courts have concurrent jurisdiction to issue final orders in most situations. However, only superior courts have jurisdiction to issue final orders if:

a. A superior court has exercised or is exercising jurisdiction over a proceeding under title 26 RCW or chapter 13.34 RCW involving the parties; or

---

[29] RCW 7.90.030 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.030; RCW 7.90.040 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040
[30] RCW 7.90.030
[31] RCW 7.90.030(b)
[32] RCW 7.90.040
[33] Id.
[34] RCW 26.50.020 http://apps.leg.wa.gov/rcw/default.aspx?cite=26.50.020

b. The petition for relief presents issues of residential schedule of and contact with the children of the parties; or

c. The petition for relief under chapter 7.90 RCW requests the court to exclude a party from a dwelling which the parties share.[35]

B. Venue

Venue lies in the county or municipality within which the petitioner resides.[36]

C. Personal and Subject Matter Jurisdiction

Washington State generally has personal jurisdiction over its residents. Personal jurisdiction over a non-resident respondent is based upon the fact that a sexual assault, which constitutes a tortious injury, was committed in the state of Washington.[37] Subject matter jurisdiction lies within any state in which any part of the sexual assault was committed, regardless of whether either of the parties actually resides in the state where the act was committed. Washington can obtain jurisdiction over a non-resident by using the state's long arm statute.[38] A person who resides within the state, even if on a federal enclave, is still subject to the jurisdiction of a Washington court.[39]

VII. Fees

No fees for filing or providing necessary certified copies may be charged to a petitioner seeking relief under chapter 7.90 RCW.[40]

VIII. Notice and Service of Process

A. No Notice of Ex Parte Hearing Required

A hearing on a petition for an ex parte order does not require service of notice of the

[35] RCW 7.90.040(5), 26.50.020(5)
[36] RCW 7.90.040(6)
[37] RCW 4.28.185(1)(b) http://app.leg.wa.gov/RCW/default.aspx?cite=4.28.185
[38] RCW 4.28.185
[39] See, e.g., *Tammy S. v. Albert S.* 408 N.Y.S.2d 716 (1978) (court has jurisdiction over the residents although they lived in a federally owned installation); *Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989) (wife's status as a member of Armed Forces residing and working at a military installation in an area ceded to the federal government did not preclude the issuance of an abuse protection order. Further, protection order was effective in a ceded area, absent any indication that order interfered with federal function)
[40] RCW 7.90.055 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.055

hearing on the respondent.[41] If the respondent appears at the hearing he or she may enter a general appearance and testify. In any event, however, at the conclusion of the hearing the court may enter an ex parte order.[42]

B. Notice of Hearing on Final Order

1. Personal Service

A hearing on a petition for a final order requires personal service upon the respondent not less than five court days prior to the hearing.[43]

If timely personal service cannot be made, the court shall either require additional attempts to obtain personal service, or permit service by publication or service by mail.[44] If the court authorizes service by publication or mail, the court shall set a hearing date not less than 24 days from the date of the order.[45] The court shall not require more than two attempts at obtaining personal service unless the petitioner so requests.[46]

2. Service by Publication

The court may allow service by publication under the following circumstances:

a. The sheriff or municipal peace officer files an affidavit stating that the officer was unable to complete personal service, describing the number and type of attempts the officer made to complete service;

b. The petitioner files an affidavit stating that he/she believes the respondent is evading service, including the reasons for that belief;

c. The server has mailed a copy of the summons, notice of hearing, and ex parte order of protection to the respondent's last known address, unless the server states that he/she does not know the respondent's address; and

d. The court finds reasonable grounds exist to believe the respondent is concealing him/herself to avoid service, and that further attempts to personally serve the respondent would be futile or unduly burdensome.[47]

Publication must be made in a newspaper of general circulation in the county in which the petition was brought and in the county of the last known address of the respondent once a week for three consecutive weeks. The selected newspaper must be one of the three

[41] RCW 7.90.110(1)(b) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.110
[42] RCW 7.90.110(2)
[43] RCW 7.90.050 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.050
[44] Id.
[45] Id.
[46] Id.
[47] RCW 7.90.052 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.052

most widely circulated papers in the county. Service of the summons is considered complete when the publication has been made for three consecutive weeks.[48]

The summons must be signed by the petitioner, it must contain the date of the first publication, and it must require the respondent to appear and answer the petition on the date set for the hearing. The summons must also contain a brief statement of the reason for the petition and a summary of the provisions under the ex parte order.[49]

3. Service by Mail

The court may order service by mail if the circumstances justifying service by publication (as described above) apply, if the court determines that service by mail is just as likely to give actual notice as service by publication, and if the serving party is unable to afford the cost of service by publication.[50]

The service must be made by a competent person over age 18, who is not a party to the case. Copies of the order and other process must be mailed, postage prepaid, one by ordinary first-class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender.[51] Service is deemed complete upon the mailing of the two copies.

C. No Service Fees for Personal Service by Public Agency

No service of process fees may be charged by a public agency to petitioners seeking relief under chapter 7.90 RCW and petitioners shall be provided with the necessary number of certified copies at no cost.[52]

The sheriff of the county or the peace officers of the municipality in which the respondent resides shall serve the respondent personally unless the petitioner elects to have the respondent served by a private party.[53]

IX. Relief Available

A. Restraint from Contact

The respondent may be restrained from having any contact, including nonphysical contact, with the petitioner directly, indirectly, or through third parties regardless of whether those third parties know of the order.[54]

---

[48] RCW 7.90.052(3)
[49] Id.
[50] RCW 7.90.053 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.053
[51] Please refer to Chapter 4, Section III(B)(1) for a discussion of the Address Confidentiality Program
[52] RCW 7.90.055 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.055
[53] RCW 7.90.140 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.140
[54] RCW 7.90.090(2)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090

B. Exclusion from Premises

The respondent may be excluded from the petitioner's residence, workplace, school, or from the day care or school of a child, if the petitioner is a child.[55]

C. Distance Prohibition

The respondent may be prohibited from knowingly coming within, or knowingly remaining within, a specified distance from a specified location.[56]

D. Transfer of Schools

The court, when issuing a protective order in cases in which the petitioner and respondent are both under 18 years of age and attend the same public or private elementary, middle, or high school, **must** consider among the other facts of the case "the severity of the act, any continuing physical danger or emotional distress to the petitioner, and the expense difficulty and educational disruption that would be caused by a transfer of the respondent to another school."[57]

The court, when issuing a protective order in such cases, **may** order that the respondent transfer to another school. If the court orders a transfer the parents or legal guardians of the person restrained are responsible for transportation and other costs associated with the school transfer. The court must send notice to the school that the petitioner attends and the school that the respondent will attend. that the respondent may not attend the same school as the petitioner.[58]

E. Other Injunctive Relief

The court may "order any other injunctive relief as necessary or appropriate for the protection of the of the petitioner." [59]

F. Monetary damages are not recoverable.[60]

G. Surrender of weapons or licenses

RCW 9.41.800 [61]provides:

---

[55] RCW 7.90.090(2)(b)
[56] RCW 7.90.090(2)(c)
[57] RCW 7.90.090(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090
[58] Id.
[59] RCW 7.90.090(2)(d)
[60] RCW 7.90.090(5)
[61] RCW 9.41.800 http://app.leg.wa.gov/rcw/default.aspx?cite=9.41.800

(1) Any court when entering an order authorized under… RCW 7.90.090… shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040:
(a) Require the party to surrender any firearm or other dangerous weapon;

(b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon;

(d) Prohibit the party from obtaining or possessing a concealed pistol license.

(2) Any court when entering an order authorized under… RCW 7.90.090… may, upon a showing by a preponderance of the evidence but not by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040:
(a)Require the party to surrender any firearm or other dangerous weapon;

(b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon;

(d) Prohibit the party from obtaining or possessing a concealed pistol license.

(3) During any period of time that the person is subject to a court order issued under chapter 7.90 RCW… that:
(a)Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

(b) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(c)(i) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and

(ii) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury, the court shall:

(A) Require the party to surrender any firearm or other dangerous weapon;

(B) Require the party to surrender a concealed pistol license issued under RCW 9.41.070;

(C) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon; and

(D) Prohibit the party from obtaining or possessing a concealed pistol license.

(4) The court may order temporary surrender of a firearm or other dangerous weapon without notice to the other party if it finds, on the basis of the moving affidavit or other evidence, that irreparable injury could result if an order is not issued until the time for response has elapsed.

(5) In addition to the provisions of subsections (1), (2), and (4) of this section, the court may enter an order requiring a party to comply with the provisions in subsection (1) of this section if it finds that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

(6) The requirements of subsections (1), (2), and (5) of this section may be for a period of time less than the duration of the order.

(7) The court may require the party to surrender any firearm or other dangerous weapon in his or her immediate possession or control or subject to his or her immediate possession or control to the sheriff of the county having jurisdiction of the proceeding, the chief of police of the municipality having jurisdiction, or to the restrained or enjoined party's counsel or to any person designated by the court.

X. Duration of Orders

A. Ex Parte Orders

Ex parte orders shall be effective for a fixed period not to exceed 14 days if there is personal service, or not later than 24 days if service by publication or mail is permitted.[62]

***Note**: The reason ex parte orders cannot exceed 14 or 24 days is to prevent a due process violation against a respondent who does not have notice of the proceedings against him or her. However, if both parties appear and either agree to a continuance or the respondent requests a longer continuance, arguably the respondent's due process rights are no longer in jeopardy, the temporary order before the court is no longer an ex parte order, and it is within the discretionary authority of the court to extend the temporary SAPO beyond fourteen or twenty-four days to a continued hearing date.*

B. Final Orders

Upon a full hearing, a final order may be granted for a fixed period or be permanent.[63] ***Note:*** This provision of the statute was amended by the legislature in 2017; previously, SAPOs could only be granted for a maximum of two years.

XI. Findings Required If Ex Parte Order Not Granted

If the court denies issuance of an ex parte order, the court shall state the particular reasons for its denial.[64]

XII. Evidence

A. Rules of Evidence Need Not Be Applied in Protection Order Hearings

The rules of evidence, except for the rules and statutes concerning privileges, need not be applied during sexual assault protection order hearings. Thus, for example, hearsay is admissible at such hearings.[65]

---

[62] RCW 7.90.120(1)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120
[63] RCW 7.90.120(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120
[64] RCW 7.90,110(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.110
[65] ER 1101(c)(4)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer1101

The rationale for not applying the rules of evidence in such hearings is to make the process more accessible to pro se litigants, who represent the majority of the parties in protection order proceedings.

Procedural fairness exercised by judges is well understood to increase the satisfaction of court participants with the proceedings itself, and also in the perceived justice in the result.[66] In order to make the proceedings accessible to all parties, especially those not represented by counsel, it is helpful for the court to announce and explain its policy on applying the rules of evidence at the beginning of the calendar. If the court will not consider hearsay, for example, such an announcement affords the parties the opportunity to request a continuance to enable them to bring witnesses or documentation to be considered at the full hearing.

B. Prior Sexual Activity or Reputation of the Petitioner is Generally Inadmissible

Evidence of a petitioner's prior sexual activity or reputation may only be admitted as it relates to past sexual conduct between the petitioner and respondent on the issue of consent to the alleged sexual assault, or when constitutionally required.[67]

A party intending to offer such evidence must 1) file a written motion at least 14 days before the hearing specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during the hearing, and 2) serve the motion on all parties and notify the petitioner or, when appropriate, the petitioner's guardian or representative.[68]

The court may not admit such evidence until it has held an *in camera* hearing to determine 1) that the information is reasonably specific as to date, time, or place and 2) that the probative value of the evidence outweighs the danger of unfair prejudice.[69]

The petitioner and other parties have the right to attend the hearing and be heard, and the motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.[70]

C. Burden of Proof

---

[66] Burke and Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction," ABA 44 Court Review 4 (2007). http://www.proceduralfairness.org/~/media/Microsites/Files/procedural-fairness/Burke_Leben.ashx

[67] RCW 7.90.080(1)(a)-(b) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.080; ER 412 http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0412

[68] ER 412(d)(1) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0412

[69] RCW 7.90.080(2), ER 412(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.080; http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0412

[70] ER 412(d)(2)

1. Ex parte orders

The court shall issue an ex parte order if the petitioner shows by a preponderance of the evidence that

> (a) The petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent; and
> (b) There is good cause to grant the remedy, regardless of the lack of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief.[71]

2. Final orders

The court shall issue a final order if the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent.[72] At this point, it is unclear whether the petitioner must prove, with specific statements or actions, a reasonable fear of future dangerous acts by the respondent in order to obtain a final SAPO. Division I rejected this argument[73] and the Supreme Court declined to answer this question in the majority opinion.[74] It is clear that, in the petition, the petitioner must allege a specific statements or actions that give rise to a reasonable fear of future dangerous acts by the respondent.[75]

D. Limitations Upon Consideration of Evidence

The petitioner must not be denied a sexual assault protection order because either party is a minor or because the petitioner did not report the assault to law enforcement.[76]

The court may not require proof of physical injury of the petitioner or proof that the petitioner has reported the sexual assault to law enforcement.[77]

Denial of a remedy may not be based, in whole or in part, on evidence that the respondent was voluntarily intoxicated, the petitioner was voluntarily intoxicated, or the

---

[71] RCW 7.90.110(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.110
[72] RCW 7.90.090(1)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090
[73] *Roake v. Delman,* 194 Wn. App. 442, 377 P.3d 258 (2016)
[74] *Roake v. Delman,* 408 P.3d 658 (2018)
[75] Id. See also court form SA 1.015 http://www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=65
[76] RCW 7.90.090(1)(b) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090
[77] Id.

petitioner engaged in limited consensual sexual touching.[78] Where there is evidence of intoxication, the court has an obligation to determine the petitioner's capacity to consent.[79]

XIII. Discovery

When one or both parties to a SAPO case are represented by an attorney, discovery requests, including interrogatories and requests for production, may be made. The civil rules make special provision for discovery in protection order cases, expressly giving the court the authority to limit discovery when "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…."[80] CR 26(c) also states that the court may place the following limitations on discovery:

- that discovery may not be allowed;
- that discovery may be limited to specific terms and conditions;
- that only certain methods of discovery may be allowed;
- that certain matters may not be inquired into;
- that discovery be conducted with no one present except persons designated by the court;
- that the contents of a discovery deposition not be disclosed or be disclosed only in a designated way;
- that a trade secret or other confidential research, development, or commercial information may not be disclosed or be disclosed only in a designated way;
- that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.[81]

Good cause for limiting discovery in SAPO cases is established by showing the threat of annoyance, embarrassment, oppression, or undue burden or expense, and that these harms can be avoided without impeding the discovery process.[82] There are no specific provisions within chapter 7.90 RCW that provide for discovery or trial in a SAPO case.

XIV. Conducting the Hearing

[78] RCW 7.90.090(4)(a)-(c)
[79] *Nelson v. Duvall*, 197 Wn. App. 441, 387 P.3d 1158 (2017)
[80] CR 26(c)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CR&ruleid=supcr26
[81] Id.
[82] See the non-precedential decision in *Kantola v. Juvinall*, 150 Wn. App. 1007 (2009 unpublished) citing *Rhinehard v. Seattle Times Co.*, 98 Wn.2d 226, 256, 654 P.2d 673 (1982)

A. Protecting the Safety and Privacy of the Parties

As in all cases involving alleged interpersonal violence, there are additional safety concerns when both parties must appear in the same courtroom.

Practice Tip*: The court should consider these safety concerns when determining how to elicit testimony from the parties. It may be inappropriate, for example, to allow pro se parties to conduct questioning through direct or cross examination.*

The court should arrange for the positioning of the parties and the deployment of court and security personnel within all courtroom areas to prevent contact between the parties. The court should also stagger release times of the parties from the courtroom.

Practice Tip*: If court facilities do not have a separate waiting area for petitioners and respondents, contact between the parties can be minimized if there are separate and clearly-marked seating areas for petitioners and respondents on the gallery benches.*

B. Scheduling Hearings

Due to the especially sensitive nature of SAPO proceedings, two important scheduling issues arise.

1. Uncontested hearings for default or continuance

Attention should be given to minimizing the time SAPO parties are required to wait if the hearing will involve only the entry of a default or an uncontested order of continuance by identifying those cases and calling them at the beginning of the calendar. Parties to SAPO proceedings are very often nervous and apprehensive, and requiring parties to sit through a full calendar until their case is called for a brief, non-contested hearing unnecessarily exacerbates their stress and can discourage petitioners from following through with the protection order process.

Courts should be cautious about entering default orders against a petitioner at the beginning of the calendar for the petitioner's failure to appear. Frequently, petitioners will be apprehensive about proceeding with a SAPO, may be fearful of encountering the respondent at court, and may find the process confusing and intimidating, which can contribute to a petitioner appearing late. In the cases in which the petitioner arrives after the court has entered a default and dismissal, and the respondent has not appeared at the hearing, the court may find it appropriate to simply vacate the default and dismissal. However, in those cases in which the respondent was present when the court entered a default and dismissal, then left before the petitioner later arrived, the court is faced with the choice of vacating the default and dismissal without notice to the respondent who appeared and was present when the default and dismissal were ordered or requiring the petitioner to file a new petition. To avoid such a problematic choice, the court should consider identifying those cases in which the respondent is present but the petitioner is not and, in those cases, directing the respondent to

remain present for a period of time it deems appropriate, to determine if the petitioner will appear.

2. Contested hearings

If SAPO hearings are set on a calendar that includes other types of cases, full SAPO hearings at which both parties will be present should be scheduled at the end of the calendar, when persons involved in other types of cases have left the courtroom, to protect the privacy of the parties involved.

***Practice Tip**: A recommended best practice for scheduling SAPO hearings is the following sequential order:*

1st Cases in which there is no proof of service

2nd Cases in which only one party is present and the case will be dismissed or a default order entered

3rd If both SAPO cases and non-SAPO cases are scheduled on the same calendar, the non-SAPO cases in which both parties are present and ready to proceed with a full hearing

4th SAPO cases in which both parties are present and ready to proceed with a full hearing

C. Telephonic Hearing

The court may schedule a hearing by telephone pursuant to local court rule to reasonably accommodate a disability, or in exceptional circumstances to protect a petitioner from further nonconsensual sexual conduct or nonconsensual sexual penetration. The court shall require assurances of the petitioner's identity before conducting a telephonic hearing.[83]

D. Existence of Criminal Investigation or Charge

Whether there is an ongoing criminal investigation or charge should be a standard inquiry in SAPO cases to identify potential Fifth Amendment issues.

***Practice Tip**: If there is a pending investigation or if criminal charges have been filed, a best practice is to advise respondents of their Fifth Amendment rights and, if requested, grant a continuance to allow the respondent time to consult with an attorney regarding those rights.*

Continuances of SAPO hearings pending the outcome of criminal investigations or charges should be avoided, if possible, because investigations often take many months. This

[83] RCW 7.90.050 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.050

places an undue burden on the petitioner to continue coming back to court to get the temporary protection order reissued or to re-file the petition without resolution in his or her case. Moreover, the outcome of the criminal investigation and the prosecutor's filing decision should not impact the outcome of a civil SAPO case. The state must make a charging decision based on whether it believes it could prove "beyond a reasonable doubt" that a sexual offense was committed, whereas the burden of proof in a civil SAPO case is a "preponderance of the evidence" standard.

However, if Fifth Amendment rights are asserted, the court should carefully consider the application of the analysis prescribed in *King v. Olympic Pipeline.*[84] The competing interests that must be balanced include:

1. implication of the Fifth Amendment privilege[85]
2. similarities between civil and criminal cases[86]
3. status of the criminal case[87]
4. plaintiffs' interests and potential prejudice[88]
5. the burdens on the party asserting the privilege[89]
6. convenience and efficiency of the court[90]
7. interests of non-parties to civil litigation[91]
8. public interest in civil and criminal litigation[92]

E. Sexual Assault Advocates

A "sexual assault advocate" is an employee or volunteer from a rape crisis center, victim assistance unit, program, or association that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the alleged victim to accompany them to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.[93]

---

[84] 104 Wn. App. 338, 16 P.3d 45(2000)
[85] Id. at 353-57
[86] Id. at 357-58
[87] Id. at 358-59
[88] Id. at 359-62
[89] Id. at 362-65
[90] Id. at 365
[91] Id. at 366
[92] Id. at 366-68
[93] RCW 5.60.060(7)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

The petitioner must be allowed to receive assistance from a sexual assault advocate in preparing the petition, and is also allowed to confer with an advocate and have one accompany him/her to court. Sexual assault advocates are not engaged in the unauthorized practice of law when providing the foregoing assistance.[94]

Communications between the petitioner and a sexual assault advocate are privileged.[95]

F. Appointment of Counsel

RCW 7.90.070 states: "The court may appoint counsel to represent the petitioner if the respondent is represented by counsel."[96]

This statutory provision is intended to maintain fairness in the proceedings, which is often jeopardized when a respondent appears with counsel. The danger is illustrated in a study conducted in King County in 2010 which found that all SAPO cases in which the respondent had an attorney and petitioner did not were dismissed.[97]

This statistic illustrating the benefit of access to counsel may be remedied in some cases by use of RCW 7.90.070. The court may wish to consult with its justice partners in this area to establish a method by which counsel might be appointed (and either paid by the court, through an available non-profit, or work on contingent fees subject to attorney fee reimbursement also contemplated by the SAPO statute. RCW 7.90).

G. Non-English-Speaking Parties

Non-English-speaking parties may be unable to articulate relevant facts or the relief that they are requesting due to language or cultural barriers, putting them at a disadvantage during legal proceedings.

The court shall appoint a qualified interpreter to assist a non-English speaking person or a person who cannot readily understand or communicate in spoken language due to a hearing or speech impairment.[98]

Currently, the Administrative Office of the Courts has translated information about sexual assault protection orders into Russian, Spanish, Korean and Vietnamese. This informational brochure is available in those languages in PDF format. To access the

---

[94] RCW 7.90.060
[95] RCW 5.60.060(7)
[96] http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.070
[97] CourtWatch, A Program of KCSARC, "Analyzing the Impact and Application of the Sexual Assault Protection Order in King County" 17, http://www.kcsarc.org/sites/default/files/CourtWatch-Report%20April%202011.pdf
RCW 2.42.120 http://apps.leg.wa.gov/rcw/default.aspx?cite=2.42.120, 2.43.030 http://apps.leg.wa.gov/RCW/default.aspx?cite=2.43.030

brochure in those languages and a list of translations underway into other languages go to http://www.courts.wa.gov/forms/.

XV. Multiple Protection Orders

A petitioner protected by an order entered in a criminal proceeding under RCW 7.90.150 or by a criminal no-contact order may also seek a civil SAPO because protection orders entered in a criminal proceeding will be dismissed if the criminal proceeding is dismissed.

***Practice Tip**: If the defendant is acquitted of criminal charges, a SAPO issued in conjunction with the criminal case will be terminated unless the alleged victim files an independent action for a civil SAPO, in which case the court may keep the SAPO in the criminal case in place until a full hearing is conducted in the civil SAPO case.*[99]

XVI. Mutual Protection Orders Strongly Disfavored

The court should not enter a SAPO on behalf of a party who has not properly filed and served a petition prior to the hearing. Mutual protection orders can lead to (a) due process violations when issued against a petitioner without prior notice; (b) lack of clarity for law enforcement in determining whose conduct is prohibited by court order; (c) opportunity for a manipulative respondent to entrap the petitioner in a situation that could lead to the petitioner's arrest; and (d) the impression that the court believes the alleged victim is responsible for the sexual assault.

XVII. Modification or Termination of Final Orders

Either party may petition the court to modify or terminate the terms of an existing sexual assault protection order before its expiration date. The court may modify or terminate the order upon notice and hearing.[100]

A respondent's motion to terminate or modify a sexual assault protection order must include a declaration setting forth the facts that support their request, and nonmoving parties may have the opportunity to file opposing declarations.[101] The court shall deny the motion unless it finds adequate cause, in which case it shall order a hearing on the respondent's motion, no later than 14 days from the date of the order.[102]

In order for the SAPO to be modified or terminated, the respondent must prove by a preponderance of the evidence that there has been "a material change in circumstances such that the respondent is not likely to engage in or attempt to engage in physical or nonphysical contact with the persons protected by the protection order if the order is terminated or

[99] RCW 7.90.150(2)(b) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150
[100] RCW 7.90.170 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.170
[101] RCW 7.90.170(2)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.170
[102] RCW 7.90.170(3)

modified."[103] The petitioner does not bear a burden to prove a current reasonable fear of harm by the respondent to prevent termination or modification.[104]

A respondent is limited to filing no more than one motion to terminate or modify a SAPO in every twelve-month period that the order is in effect.[105]

The court may require the respondent to pay the petitioner for costs incurred to respond to a motion to modify or terminate, including reasonable attorneys' fees.[106]

XVIII. Renewal of Final Orders

There is no limit to the number of times a final order for a fixed period may be renewed. A petitioner may apply for renewal of the sexual assault protection order by filing a petition for renewal at any time within three months prior to the order's expiration date.[107]

The court shall grant the motion for renewal unless the respondent proves by a preponderance of the evidence that there has been "a material change in circumstances such that the respondent is not likely to engage in or attempt to engage in physical or nonphysical contact with the petitioner when the order expires."[108]

In determining whether there has been a material change in circumstances, the passage of time and compliance with an existing protection order shall not, alone, be sufficient to meet the respondent's burden of proof.[109] The court may consider the following unweighted factors:[110]

> (i) Whether the respondent has committed or threatened sexual assault, domestic violence, stalking, or other violent acts since the protection order was entered;
>
> (ii) Whether the respondent has violated the terms of the protection order and the time that has passed since the entry of the order;
>
> (iii) Whether the respondent has exhibited suicidal ideation or attempts since the protection order was entered;
>
> (iv) Whether the respondent has been convicted of criminal activity since the protection order was entered;

---

[103] RCW 7.90.170(2)(b)
[104] Id.
[105] RCW 7.90.170(2)(c)
[106] RCW 7.90.170(d)
[107] RCW 7.90.121(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.121
[108] RCW 7.90.121(3)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.121
[109] RCW 7.90.121(3)(b)
[110] RCW 7.90.121(3)(c)

(v) Whether the respondent has either acknowledged responsibility for acts of sexual assault that resulted in entry of the protection order or successfully completed sexual assault perpetrator treatment or counseling since the protection order was entered;

(vi) Whether the respondent has a continuing involvement with drug or alcohol abuse, if such abuse was a factor in the protection order;

(vii) Whether the respondent or petitioner has relocated to an area more distant from the other party, giving due consideration to the fact that acts of sexual assault may be committed from any distance such as via cybercrime;

(viii) Other factors relating to a material change in circumstances.

XIX. Law Enforcement Information System

A copy of a SAPO granted under chapter 7.90 RCW must be forwarded by the clerk of the court to the appropriate law enforcement agency specified in the order on or before the next day. Upon receipt, the law enforcement agency shall immediately enter the order into any computer-based criminal intelligence system available in this state used by law enforcement agencies to list outstanding warrants.[111]

Entry into the law enforcement information system serves as notice to all law enforcement agencies that the order exists. The SAPO is fully enforceable in any county in Washington.[112]

XX. Enforcement of Protection Orders

A knowing violation of a SAPO is punishable under RCW 26.50.110.[113] A detailed discussion of civil and criminal enforcement of SAPOs is contained in Chapter 8, pp. 28-34, of Washington's *Domestic Violence Manual for Judges* available at: http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index

XXI. Full Faith and Credit

A protection order from another state may be enforced in Washington so long as (a) it was issued to prevent violent or threatening acts, harassing behavior, sexual violence, or to prohibit contact; (b) the court that issued the order had jurisdiction over the parties; and (c) the respondent received notice and opportunity to be heard.[114]

---

[111] RCW 7.90.160(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.160
[112] Id.
[113] RCW 7.90.090(6) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090
[114] 18 U.S.C. §§ 2265(a) & (b), 2266(5)

XXII. Sealing Court Records

The petitioner or respondent may bring a motion to seal certain documents in the court file so that they are not a part of the public record. For example, medical or counseling records, photos, or declarations referencing such content may be information that the parties do not want the public to access. The respondent may even bring a motion to seal or redact the original petition if the SAPO is dismissed.

In considering a motion to seal, the court must apply GR 15 and the *Ishikawa*[115] factors before issuing a ruling.[116] There is a presumption of openness for court records in Washington;[117] however, GR 15(c)(2) provides that the court may find that this presumption is outweighed by compelling privacy or safety concerns of the parties, including findings that"

(A)The sealing… is permitted by statute; or (B) The sealing… furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or…. (F) Another identified compelling circumstance exists that requires the sealing…."[118]

If some or all of the factors enumerated under GR 15(c)(2) are found to exist, the court must follow these steps outlined in *State v. Ishikawa*:[119]

a. The proponent of sealing must make some showing of the need therefor, showing a "serious and imminent threat to some other important interest." [120]

b. Anyone present at the motion hearing must be given the opportunity to object.

c. The court and the parties should carefully analyze whether the motion to seal is the least restrictive means to protect the threatened interest.

d. "The court must weigh the competing interests of the defendant and the public."[121]

e. "The order must be no broader in its application or duration than necessary to serve its purpose."[122]

---

[115] *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982)
[116] *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009)
[117] *See Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005)
[118] GR 15(c)(2)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr15
[119] *State v. Ishikawa*, supra at 37-39; see also *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)
[120] Id. at 37
[121] Id. at 38
[122] Id.at 39

APPENDIX A
Civil Orders in Washington State

Order Type	Sexual Assault Protection Order	Domestic Violence Protection Order	Antiharassment Protection Order	Vulnerable Adult Protection Order	Stalking Protection Order	Restraining Order	Extreme Risk Protection Order
Statute	RCW 7.90	RCW 26.50	RCW 10.14	RCW 74.34.110	RCW 7.92	RCW 26.09, 26.10, 26.26	RCW 7.94
Petitioner	A victim of nonconsensual sexual conduct or penetration, including a single incident, committed by someone outside the family or household At least 16 years of age, or with parent/guardian	A person who fears, or has been the victim of, sexual violence or stalking by a family or household member At least 16 years of age, or with parent/guardian	A person who has been harassed by the respondent's unlawful course of conduct including stalking, threats to commit a sexual assault, communications of a sexual nature, voyeurism, or indecent exposure At least 18 years of age, or with parent/guardian	A vulnerable adult who has been sexually abused Guardian on behalf of vulnerable adult DSHS may also obtain an order on behalf of a vulnerable adult	A victim of stalking conduct or cyberstalking committed by someone outside the family or household At least 16 years of age, or with parent/guardian Vulnerable adult where the petitioner is an "interested person"	A person who is married to the respondent or has children in common with the respondent	A family or household member of the respondent or a law enforcement officer or agency
Jurisdiction	Municipal, District, or Superior Court for application and enforcement Cases involving minors under 18 are forwarded to Superior Court after filing	Municipal, District, or Superior Court for application and enforcement in most cases Only Superior Court if case involves children or order to vacate home or pending family law action	District Court for application unless the respondent is a minor, then Superior Court only Municipal, District, and Superior Court for enforcement	Superior Court for application and enforcement	Municipal, District, or Superior Court for application and enforcement Cases involving minors under 18 are forwarded to Superior Court after filing	Superior Court only	Municipal, District, and Superior Court for ex parte proceedings Superior Court only for full hearings. proceedings

Order Type	Sexual Assault Protection Order	Domestic Violence Protection Order	Antiharassment Protection Order	Vulnerable Adult Protection Order	Stalking Protection Order	Restraining Order	Extreme Risk Protection Order
Fees	No filing or service fees, and appointment of GAL at no cost to either party	No filing or service fees	Basic Superior Court filing fee unless victim of stalking, sexual assault, or domestic violence, or proceeding in forma pauperis	Basic Superior Court filing fee unless proceeding in forma pauperis	No filing or service fees	Same filing fees as for dissolution or other family law action Filing fee waived if indigent	No fees for filing or service
Service Required	Personal service, notice by certified mail or publication authorized in limited circumstances	Personal service, notice by certified mail or publication authorized in limited circumstances	Personal service, notice by publication authorized in limited circumstances	Personal service, notice by certified mail or publication authorized in limited circumstances	Personal service, notice by certified mail or publication authorized in limited circumstances	Personal service, service by mail, facsimile, or electronic means	Personal service, notice by certified mail or publication authorized in limited circumstances
Remedies Available	Restrain respondent from having any contact with petitioner. Exclude respondent from knowingly coming or remaining within a specified distance from a	Electronic monitoring of respondent Respondent to surrender weapons Restrain respondent from committing acts of domestic violence Restrain respondent from having any contact with petitioner	Respondent to surrender weapons Respondent to transfer schools Restrain respondent from having any contact with petitioner Restrain respondent from	Exclude respondent from knowingly coming or remaining within a specified distance from a specified location Restrain respondent from committing or threatening to commit physical harm, bodily	Restrain respondent from having any contact with petitioner. Exclude respondent from knowingly coming or remaining within a specified distance from a specified location Prohibit respondent from keeping petitioner and/or the	Exclude respondent from knowingly coming, or remaining within, a specified distance from a specified location Restrain respondent from transferring, removing,	Require respondent to surrender all firearms in their custody, control, or possession, as well as any concealed pistol license

Order Type	Sexual Assault Protection Order	Domestic Violence Protection Order	Antiharassment Protection Order	Vulnerable Adult Protection Order	Stalking Protection Order	Restraining Order	Extreme Risk Protection Order
Remedies Available (cont.)	specified location Respondent to transfer schools Respondent to surrender weapons Other injunctive relief as necessary Costs incurred, including attorney fees, for responding to respondent's motion to modify or terminate	or petitioner's children Exclude respondent from knowingly coming or remaining within a specified distance from a specified location Prohibit contact with respondent's children or require supervised contact Domestic violence treatment for respondent Require respondent to pay petitioner's court costs, service fees, attorney fees Allow petitioner to use vehicle Allow petitioner's possession and use of personal effects Civil stand-by assistance to allow petitioner to recover home, personal effects, or children	making attempts to keep petitioner under surveillance Exclude respondent from knowingly coming or remaining within a specified distance from a specified location Require respondent to pay petitioner's court costs and service fees	injury, or assault against the vulnerable adult and from molesting, harassing, or stalking the vulnerable adult Respondent to surrender firearms if vulnerable adult's current or former spouse or intimate partner Restrain respondent from transferring property Restrain respondent from committing or threatening to commit acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult Require respondent to provide accounting of	petitioner's minor children under surveillance Mental health and/or chemical dependency evaluation Respondent to transfer schools Other injunctive relief as necessary Require respondent to surrender weapons Require respondent to pay court costs, service fees, and attorney fees	encumbering, concealing, or in any way disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained or enjoined, requiring him or her to notify the moving party of any proposed extraordinary expenditures made after the order is issued Restrain respondent from disturbing the peace of the other party or of any child Restrain respondent from going onto the grounds of or entering the home, workplace, or school of other party or the day care or school	

Order Type	Sexual Assault Protection Order	Domestic Violence Protection Order	Antiharassment Protection Order	Vulnerable Adult Protection Order	Stalking Protection Order	Restraining Order	Extreme Risk Protection Order
Remedies Available (cont.)				disposition of vulnerable adult's income Judgment against respondent Exoneration of the bond posted Petitioner may apply ex parte for an order to disburse other security		of any child upon a showing of the necessity therefore Restrain respondent from removing a child from jurisdiction of the court Restrain respondent from molesting, assaulting, harassing, or stalking protected person. If this remedy is granted and the parties are intimate partners, the restrained person may not possess a firearm or ammunition	
Evidentiary standard	Preponderance of the evidence	Unspecified	Preponderance of the evidence	Unspecified	Preponderance of the evidence	Unspecified	Preponderance of the evidence

Order Type	Sexual Assault Protection Order	Domestic Violence Protection Order	Antiharassment Protection Order	Vulnerable Adult Protection Order	Stalking Protection Order	Restraining Order	Extreme Risk Protection Order
Does protection extend to others (e.g. children)?	No	Yes	Yes	No	Yes	Yes	No
Penalty for Violation	Mandatory arrest for violating. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise gross misdemeanor	Mandatory arrest for violating. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise gross misdemeanor	Possible criminal charges or contempt. Gross misdemeanor	Mandatory arrest for violating. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise gross misdemeanor	Mandatory arrest for violating. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise gross misdemeanor	Mandatory arrest for violating. Possible criminal charges or contempt. Gross misdemeanor	Possible criminal charges Gross misdemeanor for first violation, Class C felony for subsequent violations. Prohibited from possessing firearm for a period of five years after the order expires.
Maximum Duration of Ex Parte Order	14 days with personal service, 24 days with service by certified mail or publication	14 days with personal service, 24 days with service by certified mail or publication	14 days with personal service, 24 days with service by publication	14 days with personal service, 24 days with service by certified mail or publication	14 days with personal service, 24 days with service by certified mail or publication	14 days	14 days with personal service, 24 days with service by certified mail or publication
Maximum Duration of Final Order	A fixed period of time up to permanent	1 year if respondent's children are protected. Court can extend expiration date, up to permanent, if the respondent's children not involved	1 year unless court finds respondent likely to resume harassment. Then court can extend expiration date, up to permanent	1 year unless court finds respondent likely to resume abuse. Then court can extend expiration date, up to permanent	A fixed period of time up to permanent	Permanent, unless modified	1 year

Order Type	Sexual Assault Protection Order	Domestic Violence Protection Order	Antiharassment Protection Order	Vulnerable Adult Protection Order	Stalking Protection Order	Restraining Order	Extreme Risk Protection Order
Burden of Proof on Reissuance **Burden of proof on reissuance (cont.)**	The court shall grant the petition for renewal unless the respondent proves by a preponderance that there has been a material change in circumstances such that the respondent is not likely to engage in or attempt to engage in physical or nonphysical contact with the petitioner when the order expires.	The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that he/she will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires.	The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume harassment of the petitioner when the order expires.	Unspecified	The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of stalking conduct against the petitioner or the petitioner's children or family or household members when the order expires.	N/A	If the court finds by a preponderance of the evidence that the requirements for issuance of an extreme risk protection order continue to be met, the court shall renew the order. However, if, after notice, the motion for renewal is uncontested and the petitioner seeks no modification of the order, the order may be renewed on the basis of the petitioner's motion or affidavit stating that there has been no material change in relevant circumstances since entry of the order and stating the reason for the requested renewal.

APPENDIX B
Sexual Assault Protection Order (SAPO) Hearing Bench Card

- ✓ The **rules of evidence** need not be applied. ER 1101(c)(4) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer1101, see Sec. XII (A), Ch.9, (p. 9-16)

- ✓ The respondent must be **personally served** at least 5 days prior to the hearing. If personal service has not been made, the court may continue the hearing for 14 days to require additional attempts at personal service, or the court may continue the hearing for 24 days if it authorizes **service by publication or mail**. The court shall not require the petitioner to make more than two attempts at obtaining personal service, unless the petitioner so requests. RCW 7.90.050 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.050, 7.90.120(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120, see Sec. VIII, Ch. 9, (p. 9-10)

- ✓ Evidence of a **petitioner's prior sexual conduct or reputation** is admissible only as it relates to past sexual conduct of the petitioner with the respondent, offered by the respondent on the issue of whether the petitioner consented to the sexual conduct alleged, and only upon a written offer of proof and an *in camera* hearing thereon. RCW 7.90.080 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.080, ER 412 http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0412, see Sec. XII (B), Ch. 9, (p. 9-16)

- ✓ If the court finds by a **preponderance of the evidence** that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order. It is unclear whether the petitioner must also prove, with specific statements or actions, a reasonable fear of future dangerous acts by the Respondent in order to obtain a final sexual assault protection order. The petitioner must allege specific statements or actions that give rise to a reasonable fear of future dangerous acts by the respondent in the petition, and the petition form contains a section for the petitioner to describe those statements or actions. RCW 7.90.090(1)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090, *Roake v. Delman*, 408 P.3d 658 (2018), *Roake v. Delman*, 194 Wn. App. 442, 377 P.3d 258 (2016), SA 1.015 http://www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=65, see Sec. XII (C), Ch. 9, (p. 9-18)

- ✓ The court may order that a respondent under age 18 who attends the same school as the petitioner **transfer to another school** after weighing the safety and distress of the petitioner against the burden on the respondent. RCW 7.90.090(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090, see Sec. IX (D), Ch. 9 (p. 9-12)

- ✓ The court **shall not deny an order** due to: (1) the **minor status** of either party; (2) the petitioner's **failure to report the assault** to law enforcement; or (3) the **absence of proof of physical injury** to the victim. RCW 7.90.090 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090, see Sec. XII (D), Ch. 9, (p. 9-18)

- ✓ The court **may not deny an order** due to the **voluntary intoxication** of either party or the petitioner's engagement in **limited consensual touching**. RCW 7.90.090 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090, see Sec. XII (D), Ch. 9, (p. 9-18)

- ✓ Where there is evidence of the petitioner's intoxication, the court has an obligation to determine the petitioner's **capacity to consent**. *Nelson v. Duvall*, 197 Wn. App. 441, 387 P.3d 1158 (2017), see Sec. XII (D), Ch. 9, (p. 9-18)

- ✓ A final SAPO may be effective for **a fixed period of time or be permanent**. RCW 7.90.120(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120, see Sec. II (C), Ch. 9, (p. 9-3)

- ✓ **Mutual protection orders are disfavored** due to due process and enforcement concerns, see Sec. XVI, Ch. 9, (p. 9-23)

- ✓ A best practice is to **call uncontested SAPO hearings involving only entry of a default, dismissal or continuance at the beginning of the calendar** and to **schedule contested SAPO hearings at the end of the calendar**, see Sec. XIV (B)(2), Ch. 9, (p. 9-20)

- ✓ The court should position the parties and assign court and security personnel in courtroom areas to **prevent contact between the parties**, see Sec. XIV (A), Ch. 9, (p. 9-19)

- ✓ A **sexual assault advocate** must be allowed to accompany the victim to court. RCW 7.90.060 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.060, see Sec. XIV (E), Ch. 9, (p. 9-22)

- ✓ If the respondent is represented, the court may **appoint an attorney for the petitioner**. RCW 7.90.070 http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.070, see Sec. XIV (F), Ch. 9, (p. 9-22)

- ✓ The court should **identify potential Fifth Amendment issues** by inquiring in every case whether there is a criminal charge or continuing criminal investigation and, if so, advising the respondent accordingly. *King v. Olympic Pipeline*, 104 Wn. App. 338, 16 P.3d 45(2000), see Sec. XIV (D), Ch. 9, (p. 9-21)

Advancing Procedural Justice on Your Protection Order Docket

Procedural justice refers to the perceived fairness of court procedures and interpersonal interactions during the pendency of a case.

Research has shown that when litigants perceive the court process to be fair, they are more likely to comply with court orders and follow the law in the future, regardless of the outcome of their cases.[1] As a judicial officer, you are in a position of authority to advance procedural justice within your courtroom. The checklist below includes practical suggestions that will support the four key components of procedural justice[2]—1) understanding of legal language, court processes, and expectations; 2) respect; 3) the opportunity to be heard; and 4) neutrality—on your protection order docket.

Courtroom Checklist

- **Setting up the courtroom to be accessible and predictable for participants:**
  - **Label seating** in the gallery; petitioners and respondents on **separate** sides
  - Consider having **parties sit/stand as physically far apart as possible** to present their cases
  - Include a **list of cases** outside of the courtroom
  - Ensure that there is **correct signage** about where the calendar will be held
  - **Stagger dismissal** of the parties from your courtroom to minimize potential for interaction
  - Confirm that **security personnel and measures** suitable for potentially high-conflict dockets are in place during the docket, and at least 15 minutes before and after the docket
  - Post a **"check-in" sign** where the parties are required to check in before the hearing

- **Setting clear expectations for participants:**
  - **Greet the participants** when you come out to the bench
  - **Notify the gallery about what calendar** you are presiding over and let people know where they can go for more information if they are in the wrong place
  - Review **courtroom rules** regarding conduct and proceedings
  - Announce the **order in which the cases will be called.** Consider the following order:
    1. Cases in which there is **no proof of service**
    2. Cases in which only **one party is present** and the case will be dismissed or a default order entered
    3. Full hearings where **both parties are present** and ready to proceed, holding more sensitive cases (e.g. sexual assault and domestic violence) until the end of the calendar. Consider giving expedited consideration to cases where there is an interpreter or where an attorney is representing either party

- State **where the parties will sit/stand to present their cases** when their cases are called and label accordingly
- Notify the parties **where to wait while paperwork is completed.**
- Read **key elements of the relevant statutes aloud** (e.g. definitions, what must be proven by a preponderance)
- **Announce your policy on the application of the rules of evidence** (e.g. if the Court will not consider hearsay, such an announcement affords the parties the opportunity to request a continuance to bring in witnesses or documentation)
- In a **Sexual Assault Protection Order case,** consider **appointing counsel** for the petitioner where a respondent is represented[3] to level the playing field
- Inform the parties about **whether the Court reviewed the petition and subsequent filings**
- Announce any **time limits** that the Court will set for case presentation
- When recording a continuance/reissuance, **include detail about the reason why a continuance was granted** so judges presiding over future hearings know the case history
- Demonstrate active listening through **body language** and by **making eye contact** with the parties
- Explain your **rationale for asking questions** of the parties
- When possible, provide explanations using **plain language**

---

[1] E.g., Paternoster et al. 1997; Tyler and Huo 2002; Gottfredson et al. 2009, see also http://www.courtinnovation.org/topic/procedural-justice

[2] Rossman et al (2011)

[3] RCW 7.90.070

This project was supported by Grant No. 2015-FJ-AX-0002 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/ program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

CHAPTER 10
LGBTQ Minorities and Sexual Offenses

I. Introduction

A. Sexual Minorities – Definitions

Sexual minorities are groups whose sexual identity, orientation or practices differ from the majority of the surrounding society.[1] References throughout this chapter refer to **"LGBTQ" people**, the letters of which refer to *lesbian* (meaning female persons primarily attracted to females), *gay* (meaning male persons primarily attracted to males), *bisexual* or *bi* (meaning persons attracted more or less equally to both males and females), *transgender* or *trans* (meaning persons whose gender assigned at birth is not the gender with which they identify), and *genderqueer, or questioning* (meaning persons who do not identify with or are exploring current sexual orientation or gender identity descriptions; those who do not identify with being solely male or solely female).

B. Overview & Topics Covered

> [O]nce we started working into the case, and actually speaking to the people that were gay and finding out what their underlying fears were, well, then it sort of hit home. This is America. You don't have the right to feel that fear. And we're still going to have people who hold with the old ideals, and I was probably one of them fourteen months ago. I'm not gonna put up with it, and I'm not going to listen to it. And if they don't like my views on it, fine... I already lost a couple of buddies. I don't care. I feel more comfortable and I can sleep at night.
>
> – Moisés Kaufman, *The Laramie Project*[2] (2001)

Why should judges be concerned about sexual offenses committed against the relatively small number of lesbian, gay, bisexual, transgender, and genderqueer or questioning (LGBTQ) people in the United States? One reason is that researchers have repeatedly found rates of lifetime sexual assault victimization to be higher among LGBTQ individuals than in the overall population. Several studies have found that LGBTQ

---

[1] Suresh Bada Math & Shekhar P. Seshadri, "The invisible ones: Sexual minorities," 137 *Indian J Med Res (1)* 4 (2013).

[2] The Laramie Project, http://www.laramieproject.org/ (last visited 3/31/13) (*The Laramie Project*, a play written by Moisés Kaufman and later adapted to film for HBO, focuses on the community of Laramie, Wyoming, following the brutal beating of a young man named Matthew Shepard. Shepard was targeted for his homosexuality and died in the hospital six days after his attack. *The Laramie Project* arose from interviews between members of the Tectonic Theater Project and more than 200 residents of Laramie, conducted five weeks after Shepard's death)

individuals are overrepresented among sexual assault survivors,[3] although LGBTQ people make up a relatively small part of the overall population.[4] Additionally, the LGBTQ population can face prejudice or hostility as a result of unexamined stereotypes—a phenomenon particularly dangerous in the context of legal proceedings relating to sexual offenses. While many questions about sexual orientation or gender identity and sexual offenses remain unanswered, this chapter explains that judges may contribute to a more balanced and sensitive legal process in all sexual offense cases by examining commonly held stereotypes about sexual offenses and sexual minorities.

In keeping with Washington law, this chapter focuses on the social context of sexual offenses against sexual minorities, rather than considering whether unique legal doctrines might apply to sexual offense cases involving the LGBTQ population. In Washington, key components of sex offenses—sexual intercourse and sexual contact—are defined in a gender-neutral manner. Washington's statutes incorporate an expansive definition of sexual intercourse, including not only vaginal sexual intercourse but also "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another *whether such persons are of the same or opposite sex*"[5] *(emphasis added).* Sexual contact is also defined without reference to gender as "any touching of the sexual or other intimate

---

[3] Compare Emily Rothman, Deinera Exner & Allyson Baughman, "The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review," 12*Trauma, Violence, & Abuse* (2), 55-66 (Sage, 2011) (meta-analysis of all population-based studies estimating rates of sexual-assault prevalence between 1989 and 2009 suggests lifetime sexual assault rates of 20-30.4% for gay men and 15.6-55% for lesbians and a rate for all U.S. men of 2-3%) (citation omitted) with Kathryn Moracco, Carol Runyan, J. Michael Bowling & Jo Anne Earp, "Women's Experiences with Violence: A National Study," 17*Women's Health Issues* (1), 3-12 (2007) (in a random sample of 1,800 adult U.S. women in households with a telephone, self-identified lesbian or bi women were 3.89 times as likely as other women to report sexual assault by a stranger, 4.19 times as likely to report sexual assault by a known person, and 9.12 times as likely to report sexual assault by a known person within the last year); and see Rebecca Stotzer, "Violence Against Transgender People: A Review of United States Data," 14*Aggression and Violent Behavior* (3), 170-79 (Elsevier, 2009) (in a meta-analysis of all known self-report surveys on transgender sexual assault, 10-86% of transgender respondents reported sexual assault motivated by transgender identity; in meta-analysis of needs assessment and academic surveys, 14-66% of transgender subjects had been sexually assaulted; the article notes, at 171, that "the most common finding across surveys and needs assessments is that about 50% of transgendered persons report unwanted sexual activity")

[4] See Patricia Tjaden, Nancy Thoennes & Christine Allison, "Comparing Violence over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants," 14 *Violence and Victims* (4), 413-25 (Springer, 1999) (review of literature suggests "between 4.1% and 10% of men and 2.6% and 4.1% of women have had at least one same-sex sexual experience in their lifetime;" sample of 8,000 U.S. men and 8,000 U.S. women selected via random-digit dialing of residential telephone numbers revealed .8% of men and 1% of women had cohabited with a same-sex partner "as a couple" at some point in their lifetime); Gary J. Gates and Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT: Inaugural Gallup findings based on more than 120,000 interviews* (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx (citing that 3.4% of the U.S. population identifies as LGBT; women are 0.3% more likely to report as LGBT than men, and 53% of the LGBT population consists of women; younger Americans are more likely to report as LGBT than those older, with 6.4% of the 18-29 year old population identifying, as opposed to 3.2% of the 30-49 year old population, 2.6% of the 50-69 population, and 1.9% of the 65+ population)

[5] RCW 9A.44.010(1)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010

parts of a *person* done for the purpose of gratifying sexual desire of *either party or a third party*" [6] (emphasis added). Although traditional sexual offense statutes can raise nuanced doctrinal questions about how such laws apply to same-sex or transgender victims, such questions are not considered in this chapter due to Washington's gender-neutral statutes.

Additionally, this chapter will look to the relationship between victims' sexual orientation or gender identity and the risks associated with sexual offense victimization in order to explore how victim identity is relevant to sexual offenses. LGBTQ sexual offense survivors face unique challenges as they navigate the legal system and seek to live offense-free, healthy lives. As sexual minorities, LGBTQ survivors can be misunderstood or humiliated by the authorities as a result of stereotypes when they seek to report sexual offenses. Victims may also face discriminatory assumptions relating to sexual offenses when their reports are investigated and litigated. Survivors can face prejudicial attitudes of homophobia and transphobia on the part of government and other service-providing organizations, as well as psychological or medical difficulties responding to their own traumatic experiences. The relative social isolation of some LGBTQ individuals, which may raise the risk of victimization in the first place, can create additional challenges following victimization.[7] Isolated LGBTQ survivors may not know what resources are available to them or may be averse to contacting public agencies or service providers for assistance, given their perception that society considers them less worthy of compassion or respect because they are lesbian, gay, bisexual, transgender, genderqueer or questioning.

This chapter seeks to build upon existing sexual offense resources available in Washington by examining problems in the legal response to sexual offenses against LGBTQ people with an eye toward relevant issues identified in scholarly research and commentary on the topic. Judges are uniquely positioned to improve society's response to sexual offenses against LGBTQ people by familiarizing themselves with common gender and sexuality-related sexual offense myths that may arise in legal proceedings. Judges who address these issues model behavior which may in turn influence attorneys and public servants who handle sexual offense investigations and litigation.

Section II of this chapter reviews research suggesting LGBTQ individuals experience high rates of childhood sexual abuse, adult sexual offenses, and, to some extent, intimate partner sexual offenses relative to the overall population. Section III describes a number of common gender and sexuality-related myths which may arise in proceedings surrounding sexual offenses against LGBTQ victims. Section IV discusses how, in light of these myths, judges should view their role as working to educate and dispel common gender-based assumptions in working alongside court staff, attorneys, and jurors. Judges should also maintain a critical perspective throughout the trial to improve the investigation and litigation of sexual assault cases involving LGBTQ victims or survivors. Finally, Section V's conclusion seeks to briefly summarize the contents of this chapter. It is followed by Appendix A, which provides a list of community resources that may be helpful to

[6] RCW 9A.44.010(2)

[7] See Lisa Waldner-Haugrud & Linda Vaden Gratch, "Sexual Coercion in Gay/Lesbian Relationships: Descriptives and Gender Differences," 12 *Violence and Victims* (1), 87-98 (Springer, 1997) (citing both gay men and lesbians as examples of "a community limited in visibility and relationship resources")

professionals working with LGBTQ sexual assault survivors, and by Appendix B, which provides a list of reference materials.

II. Contextualizing the Problem: What Does Research Reveal About Sexual Offenses Against LGBTQ People?

Medical and social science research suggests that LGBTQ people experience high rates of sexual offenses relative to the overall population. Studies have repeatedly suggested that, over their lifespan, LGBTQ people are more likely to experience sexual offense victimization than are heterosexual people.[8] Moreover, researchers have observed evidence of pronounced rates of sexual offense victimization of LGBTQ people both during childhood and adolescence[9] and during adulthood.[10] The high number of sexual assaults against

[8] See, e.g., Rothman, Exner & Baughman, "The Prevalence of Sexual Assault Against People…" supra at 59-60, (concluding that "currently available literature suggests that *GLB people are likely at elevated risk for lifetime sexual violence victimization*.") (emphasis added); Sari Gold, Benjamin Dickstein, Brian Marx & Jennifer Lexington, "Psychological Outcomes Among Lesbian Sexual Assault Survivors: An Examination of the Roles of Internalized Homophobia and Experiential Avoidance," 33*Psychol. of Women Q.* (1), 54-66 (2009) (studies suggest 18% to 22% of lesbians report childhood sexual assault [CSA] and 21% to 40% report adult sexual assault [ASA]; 11% to 32% of heterosexual women self-report CSA, and 12% to 22% report ASA) (citations omitted); Sari Gold, Brian Marx & Jennifer Lexington, "Gay Male Sexual Assault Survivors: The Relations Among Internalized Homophobia, Experiential Avoidance, and Psychological Symptom Severity," 45 *Behaviour Research and Therapy* (3), 549-62 (2007) (noting studies "have suggested that at least 30% of gay men experience childhood, adolescent, and/or adult sexual assault," which rate of prevalence is "somewhat comparable to [that] of heterosexual women, [whose own] rates range from 14% to 59%") (citations omitted); Elizabeth Saewyc, Carol Skay, Sandra Pettingell, Elizabeth Reis, Linda Bearinger, Michael Resnick, Aileen Murphy & Leigh Combs, "Hazards of Stigma: The Sexual and Physical Abuse of Gay, Lesbian, and Bisexual Adolescents in the United States and Canada," 85 *Child Welfare* (2), 195-213 (2006) (among studies specifically measuring bisexual survivor prevalence rates, "bisexual adolescents or those with both gender attractions appeared to be at higher risk for victimization … *than gay and lesbian peers*.") (emphasis added) (citations omitted); Stotzer, "Violence Against Transgender People…" supra at 178, ("What is beginning to emerge from [existing] sources of data [is] the increased risks of [a] variety of types of violence, … in particular sexual violence, faced by transgender people. This risk starts early in life and continues throughout the lifetime.")

[9] Saewyc, Skay, Pettingell, Ries, Bearinger, Resnick, Murphy & Combs, "Hazards of Stigma…" supra at 203, (in surveys asking U.S. and Canadian teenaged subjects to self-report sexual abuse and either a predominantly gay, lesbian, or bisexual orientation, "lesbian or bisexual girls self-reported the highest prevalence of sexual abuse [of all girls], with 1 in 4 to nearly half reporting a history of sexual abuse," while rates for predominantly heterosexual girls "ranged from just under 10% to just over 25%;" "[f]or most surveys, more than 1 in 4 bisexual boys and 1 in 5 gay boys reported sexual abuse," while rates for predominantly heterosexual boys were "well under 10%."); see Shannon Wyss, "'This was my hell': the violence experienced by gender non-conforming youth in US high schools," 17 *International Journal of Qualitative Studies in Education* (5), 709-30 (2004) (in qualitative study including mostly white, transgender subjects recruited through internet in U.S., six of 27 subjects "reported surviving sexual assault or rape in high school")

[10] Gold, Marx & Lexington, "Gay Male Sexual Assault Survivors…," supra, (studies suggest 21-40% of U.S. lesbians report ASA histories, compared with 12-22% of heterosexual women) (citations omitted); compare Rothman, Exner & Baughman, "The Prevalence of Sexual Assault Against People…" supra at 62, (analysis of all population-based U.S. studies on sexual assault prevalence from 1989 to 2009 suggests 22.2-47.1% of lesbian and bisexual women report *ASA*) with id. at *55* (11-17% of U.S. women overall experience *LSA*) (citations omitted); (10.8-15% of

LGBTQ youth may be a sign that sexually or gender-nonconforming children and adolescents are targets for violence, including violence perpetrated by family members and close friends, even before recognizing or "coming out" to others about their own LGBTQ status.[11] While previous research suggested a disparity between rates of sexual violence in gay or lesbian relationships and those in heterosexual intimate partner relationships,[12] more recent studies have shown that incidents of violence are committed as frequently in LGBTQ intimate partner relationships, with relatively equal rates of self-reported violence in gay and lesbian relationships.[13] Although studies have suggested varying rates of sexual offense prevalence, and the evidence is not yet statistically robust enough to be conclusive regarding the exact rates (particularly those for transgender people),[14] repeated findings of heightened sexual violence at least suggest that sexual orientation and gender identity are highly relevant

---

gay/bi men report *ASA*) (2-3% of *all* U.S. men report *LSA*) (citations omitted); see Stotzer, "Violence Against Transgender People…" supra at 173 (14-66% of trans people have experienced sexual assault according to needs assessment and academic surveys)

[11] See Saewyc, Pettingell, Ries, Bearinger, Resnick, Murphy & Combs, "Hazards of Stigma…" supra at 198-199, "[S]tigma from gender atypicality or some as-yet unmeasured trait of emerging gay or bisexual orientation may decrease family protection and support for LGB teenagers *even before they recognize and self-identify* and, thus, may help explain higher risk for maltreatment during childhood and adolescence.") (citation omitted) (emphasis added); see also id. at 208 (noting that, while many surveys fail to "disentangle the complexity of timing and determining causality, such as a teen being abused because of her lesbian or bisexual status…. [s]exual and physical abuse … clearly are not the *cause* of developing a gay, lesbian, or bisexual orientation…. [T]he majority of adolescents who identify as gay, lesbian, or bisexual do not report any abuse, and the overwhelming majority of adolescents who report sexual or physical abuse identify as heterosexual.")

[12] See Waldner-Haugrud & Gratch, "Sexual Coercion in Gay/Lesbian Relationships…" supra at 88, (existing research in 1997 suggested that "gays and lesbians have higher rates of sexual coercion than what is experienced by their heterosexual counterparts."); Tjaden, Thoennes & Allison, "Comparing Violence over the Life Span…" supra at 421 (study using population-based sample found "same-sex cohabitants reported significantly more intimate partner violence [although at the hands of both same-sex and opposite-sex current or former partners] than did opposite-sex cohabitants; for example, 23.1% of same-sex cohabiting men said they were raped and/or physically assaulted by a spouse or cohabiting partner at some time in their lives, compared with 7.7% of opposite-sex cohabiting men, and 39.2% of same-sex cohabiting women said they experienced such violence, compared with 20.3% of opposite-sex cohabiting women"); id. at 413("The study … confirms previous reports that intimate partner violence is more prevalent among gay male couples than heterosexual couples."); but see id. at 421(11.4% of women cohabiting with female partners reported sexual and/or physical assault by a female intimate partner at any point in their lives, while 20.3% of opposite-sex cohabiting women reported such violence by a male intimate partner); Waldner-Haugrud & Gratch, "Sexual Coercion in Gay/Lesbian Relationships…", supra at 87, ("[T]he results of this study suggest lesbians are not more likely than gay men to be classified as victims of sexual coercion.")

[13] Joanna Bunker Rorhbaugh, "Domestic Violence in Same-Gender Relationships," 44 *Fam. Ct. Rev.* 287, 287-88, 290, 297 (April 2006); see id. at 295 (where characteristics of "severe abuseds in same-gender relationships are like the severe abusers in cross-gender relationships in that they often have severe mental illnesses or were themselves abused as children"); but see id. at 293 ("types of abuse in same-gender relationships are the same as for cross-gender relationships, except for…threat of 'outing,' or exposing partner's sexual orientation…[and] extreme isolation due to being 'in the closet,' lack of civil rights protections, and lack of access to the legal system")

[14] *See* Stotzer, "Violence Against Transgender People…" supra at 171, (noting common use of convenience sampling and snowball selection procedures in transgender subject research)

when considering individuals' risks of sexual assault.[15] As with sexual offenses in general, evidence surrounding sexual offenses against sexual minorities suggests that sexual offenses across the board are primarily committed by men.[16]

While quantitative studies serve to provide a sense of the number of LGBTQ people who experience sexual offenses, these studies face common limitations. Studies of sexual offenses against sexual minorities may tempt readers to draw misguided conclusions. This is particularly due to the tendency of such studies to categorize people exclusively by sexual orientation or gender identity rather than provide readers with a more robust understanding of LGBTQ victims and their abusers. Observations of starkly contrasting sexual assault victimization rates in the LGBTQ population as compared with the heterosexual population, or the overall U.S. population, may actually obscure more subtle correlations (for example, between sexual assault victimhood and socioeconomic status). Although some researchers confront this problem by testing for correlations between various aspects of survivors' identities and sexual offense histories,[17] lurking variables can at times be overlooked in overbroad conclusions about subjects defined by sexual orientation or gender identity categories.

At its most extreme, hyper-focusing on sexual minority status as the sole variable of interest can lead to fallacious reasoning that, due to the strong correlation between membership in a sexual minority group and a history of sexual offenses, being LGBTQ "causes" sexual offenses. But the evidence of such a correlation does not explain what causes the higher rates of sexual offenses. Research using familiar sexual identity categories, when combined with stark statistical disparities, may also tempt readers to draw other simplistic conclusions (e.g. "all transgender people must be at a[n equally] high risk of sexual offenses"). Sexuality is likely one among many variables relevant to individuals' risks of lifetime sexual offense victimization.

Studies suggesting a high rate of sexual offenses among sexual minorities can also face methodological limitations relevant to understanding their conclusions.[18] Three distinct themes

---

[15] *See* Moracco, Runyan, Bowling & Earp, "Women's Experiences with Violence…" supra at 10, (in national population-based sample of 1,800 female U.S. telephone users, lesbian or bisexual orientation correlated more closely with sexual assault by a known perpetrator than did young age, nonwhite race, residence in a "city," receiving public assistance, or educational attainment of less than high school diploma/GED)

[16] Tjaden, Thoennes & Allison, "Comparing Violence over the Life Span…"supra at 419-420, ("The study also found that the vast majority of rape victims—regardless of gender or cohabitation history—were raped by men."); Waldner-Haugrud, & Gratch, "Sexual Coercion in Gay/Lesbian Relationships…", supra at 89, (review of literature suggests "lesbians often are the victims of rape or attempted rape by male dates") (citation omitted); Leslie Moran & Andrew Sharpe, "Policing the Transgender/Violence Relation", 13 *Current Issues in Criminal Justice* (3), 269-85 (2002) (in the U.S. GenderPAC survey, 68% of reported incidents of violence against transgender people in the U.S. were committed by white people and 84.1% were committed by men) (citation omitted)

[17] See footnote 13, supra

[18] For example, it is difficult to tell how reliable self-reporting of sexual assault history is as a method for measuring prevalence, as subjects may not draw a connection between their own experiences and the definition of "sexual assault" that researchers have in mind. Additionally, the relevant experience of victimization may take place decades before research begins, which may affect reporting accuracy. Furthermore, researchers often face an uphill battle in recruiting LGBT,

emerge from existing research on sexual minorities and sexual offenses. One is a consistent picture of high rates of sexual violence against LGBTQ people. This violence may be considered especially noteworthy because it appears to be yet higher than the level of sexual violence committed in comparison populations—for example, the U.S. population overall—and because some evidence suggests LGBTQ identity correlates more closely than other possible risk factors with reports of sexual offense history.[19]

A second key theme is that the high rate of sexual offense victimization among sexual minorities is not attributable to a single source of abuse—for example, most lesbian and gay survivors' experiences of sexual offenses do not take place at the hands of same-sex intimate partners.[20] Rather, the high rate of lifetime sexual offenses is a product of a range of forms of sexual offenses, including sexual abuse in childhood and adolescence, sexual offenses as an adult, in intimate partner relationships, and by family members, acquaintances, and strangers.

A third key theme is explored below; LGBTQ sexual offense victims often face responses that treat their victimization as more trivial than that of heterosexual victims.

III. Myths and Realities Surrounding Sexual Offenses Against LGBTQ People

A set of commonly encountered myths compounds the problems facing LGBTQ sexual offense survivors. Some of these myths arise from common, gender related stereotypes about male and female roles relating to sexual offenses. Other myths are more closely related to widely held stereotypes that can deprive LGBTQ people of compassion or respect as a result of their sexual orientation or gender identity. Some notable myths relating to sexual offenses against sexual minorities are considered briefly below in the context of observations from relevant research on sexual offenses. These myths are worth exploring because, as the quotations below indicate, victims themselves, law enforcement, and perpetrators—indeed, just about anyone—may have similar thoughts at times without pausing to consider their deeper implications.

A. How Gender-Related Stereotypes Trivialize LGBTQ Sexual Assault Victims

Gender-related stereotypes about the dynamics of sexual offenses are particularly harmful to sexual minority victims, although these assumptions can also have detrimental effects in sexual offense proceedings in general. One set of myths arises from the belief that

---

and especially transgender, subjects for studies. As a result, researchers sometimes resort to convenience samples based upon word-of-mouth recruitment starting from a community center or other obvious gathering place. Due to the nonrandom selection procedure, these methods may provide skewed samples from which to draw any inferences regarding the larger LGBT population. Population-based samples, which can support valid statistical inferences, have been used in a number of sexual assault studies cited in this chapter.

[19] See footnote 13, supra

[20] Tjaden, Thoennes & Allison, "Comparing Violence over the Life Span…" supra at 421; see footnote 11, supra

men are generally in a better position than women to protect themselves from sexual offenses.

Transgender male and female experiences raise major questions about this commonly held notion. In one study of the relationship between transgender people in Sydney, Australia, and the local police, Kirk, a female-to-male transgender focus group subject, described his house being vandalized, with words like "fag" spray-painted across its front. When Kirk went to the authorities to address his fear of a physical or sexual assault subsequent to the vandalism, "they said to me, 'but you're a bloke. What would you be scared for?'"[21] Transgender survivors' perceptions that police are unfamiliar with and unsympathetic to transgender people may discourage survivors from reporting sexual offenses or cooperating in investigations and the legal process. As Steven, a focus group member in the Sydney study, said, "'there's no way I would walk into that [police] station and say I've been raped as a man, as a transgender man'." He continued:

> Number one, why should I have to walk in there and educate them? I've just been raped or bashed or stabbed. Why should I have to as a trannie boy walk in there and ... educate the policeman or ... the police woman that I am transgender when I'm suffering all these ... other pains? .... [B]eing transgender and walking in there with a beard ... they'd just think I was a freak. I mean, look at this guy he's got a vagina you know.... [I]t's none of their ... business whether I've got a vagina or a penis anyway.[22]

As the above quotes suggest, transmen's ability to "pass," or present to others as a man, may actually render their transgender status invisible. Appearing male may force some victims to come out as trans in order to be taken seriously when describing sexual offense experiences or fears. For these transgender survivors, gendered stereotypes and assumptions relating to sexual assault may translate into an offensive fixation on the survivors' anatomy which distracts from the victim's assault. For other transgender survivors, the fear of negative responses to the victim's transgender status may deter the victim from reporting an assault.

Such gendered assumptions relating to sexual offenses cut against transwomen as well, although perhaps in different ways than how such expectations affect transmen. As one outreach worker in the Sydney study opined, "many transgender women '…approach the world with the same sense of safety that the average man would.'"[23] The heightened sense of security in public which certain transwomen instinctively feel based upon their socialization as males "may make M to F trans people particularly vulnerable to violence as they transgress gendered expectations of spatially specific behaviour."[24] And, in contrast to

[21] Leslie Moran & Andrew Sharpe, "Violence, identity and policing: The case of violence against transgender people," 4 *Criminology & Criminal Justice* (4), 395-417 (2004)
[22] Moran & Sharpe, "Violence, identity and policing…" supra
[23] Moran & Sharpe, "Violence, identity and policing…" supra at 408
[24] Id.

transmen, transwomen are at a higher risk of encountering unsympathetic reactions to sexual assault complaints or fears to the extent that they *do not* "pass," or present as females.

Transgender people are not, of course, the only ones affected by gendered stereotypes relating to sexual offenses. Gay and lesbian sexual offense survivors may have their experiences trivialized or overlooked by many professionals, who are accustomed to seeing gendered patterns of abuse among heterosexual couples and may assume that sexual offenses are always crimes committed by males against females. [25]

In the absence of the familiar relationship between a controlling male partner and a controlled female partner, professionals working in the field of domestic violence and sexual assault may fail to recognize cues of abusive behavior or adequately address abusive situations. One study found that crisis-line workers "tended to rate same-sex [domestic violence] abuse as less serious, less likely to recur, and less likely to get worse over time than opposite-sex abuse. They also believed that it was easier for victims in same-sex relationships to leave their partners."[26] Corollary to the observation above is that law enforcement has been considered less likely to intervene in same-sex abusive relationships. Furthermore, largely "heterosexist beliefs" held by many mental health service providers can impact the assistance same-sex sexual abuse victims receive.[27] Even where the authorities do not themselves hold such beliefs, sexual minority victims' fears of an unsympathetic or uncomfortable response to the victim's LGBTQ status can deter sexual offense reporting.[28]

B. How Widely-Held Myths May Deprive LGBTQ People of Compassion and Respect

Two distinct myths regarding sexuality markedly affect the LGBTQ community: first, the myth that rape can "correct" sexually nonconforming people by causing them to change their behavior and become heterosexual; and second, the belief that sexual minorities either deserve victimization or bring assaults upon themselves. As one female-to-male transgender focus group member in the Sydney study related, "I got raped at 18 because they wanted to send me straight. I went to the police and the police said to me, 'he who lays with dogs should expect to get fleas', that's what I got."[29] This comment speaks directly to the "desire to correct" and "deserved victimization" attitudes.

The first of these myths, so called "corrective rape," may cause a perpetrator to select and sexually assault a victim out of the belief that doing so will either "cure" the victim of LGBTQ status, or discourage the victim from acting on same-sex attractions or expressing

---

[25] Mika Albright & DeAnn Alcantara-Thompson, "Contextualizing Domestic Violence from an LGBTQ Perspective," Northwest Network of Bisexual, Trans, Lesbian and Gay Survivors of Abuse; (Sexual violence among heterosexual couples often takes place against the background of a dynamic of domestic violence in which, approximately 90% of the time, a male partner seeks to assert power and control over a female partner.)

[26] Michael Brown & Jennifer Groscup, Perceptions of Same-Sex Domestic Violence Among Crisis Center Staff," 24 *Journal of Family Violence* (2), 87-93 (2009)

[27] Id.

[28] Id.

[29] Moran & Sharpe, "Violence, identity and policing…", supra

their gender in nonconforming ways. Corrective rape against LGBTQ people, and women in particular, has been observed internationally as rates of those identifying as LGBTQ have risen.[30]

The second myth is that of "blaming the victim", a fallacy recognized in many sexual offense contexts.[31] Blaming the victim takes place when a victim's conduct or lack of precautions is cited in order to explain his or her victimization. In the context of LGBTQ sexual offenses, victim blaming is used to justify or to dismiss reports of abuse. This myth is reflected in the following three examples: First, some perpetrators may rationalize their own sexual offenses as what the victims "deserve," which ties back in with the other myth of "corrective" rape.[32] Second, some teachers hearing reports of sexual offenses from LGBTQ students may choose not to respond, due to a belief that "queer teens bring this harassment on themselves."[33] Third, police officers may fail to investigate violence against transgender people who deal drugs or engage in other criminalized conduct (e.g. sex workers) because the victim's criminal conduct is assumed to explain (and perhaps justify) the assault.[34]

Sexual offenses can also take place in the context of a more pervasive experience of homophobic or transphobic harassment. For instance, "out" gender-nonconforming high school students may receive frequent and invasive sexual touching and comments from other students at school, with their sexuality cited as an "excuse" for provoking such behavior.[35]

Victim-blaming is not solely the work of non-victims. After being sexually assaulted in high school, one survivor describes feeling

> like i (sic) deserved all of it because i wasn't normal, like i was sick, bad, wrong, diseased ... and also, ... it made me feel like i was somehow a perpetrator—because i knew that the nature of what was 'wrong' with me was sexual/about my sex, i felt like i was criminal in some way, or i was perpetrating unwholesomeness on all of the normal people around me, just by being there.[36]

As this quotation displays, survivors can experience profound feelings of guilt and shame surrounding not only their victimization, but also the sexual minority identity that they sense motivated their abuse.

---

[30] See generally, "Violated Hopes: A nation confronts a tide of sexual violence," *The New Yorker*, May 28, 2012 (describing corrective rape in South Africa)

[31] For a further discussion of blaming the victim, see Section V., Chapter 1: Understanding Sexual Violence, of this bench guide

[32] See footnote 27, supra

[33] Wyss, "This was my hell…" supra

[34] See Moran & Sharpe, "Violence, identity and policing…" supra (police end investigation of assault against transgender victim when they discover that victim deals drugs)

[35] See generally Wyss, "This was my hell…" supra

[36] Id.; see also Gold, Marx & Lexington, "Gay Male Sexual Assault Survivors…" supra at 559 (mere awareness of myths relating to sexual assault can "cause individuals to react to their sexual assault histories with shame, self-blame, and guilt")

Myths relating to sexual offenses can harm LGBTQ sexual offense survivors from the moment they choose to bring their complaints to the legal system. Although many who experience sexual offenses choose not to report them to the authorities, those who do report can face an insensitive or traumatically intrusive investigative and litigation process. A court process sensitive to gender and sexuality-related sexual offense myths will be of benefit to a significant number of survivors who struggle to overcome the rationalizations for their own abuse.

IV. What Judges Can Do: Confronting Myths in the Courtroom and Beyond

Under Washington law the essential elements of sexual assault crimes are gender neutral, and there is little in the way of unique legal doctrine relating to sexual assault against sexual minorities in Washington.[37] Because of the legislature's conscious decision to remain gender-neutral in its statutes, judges should employ the same best practices relevant in any sexual offense case: whether a victim or defendant is lesbian, gay, bisexual, transgender, or genderqueer does not require additional statutory guidance. This does not mean the court should not consider such cases carefully and with heightened sensitivity.

For many LGBTQ sex offense survivors, the prospect of revisiting experiences of victimization during the litigation process remains deeply traumatic. The act of reporting an offense may subject survivors to ridicule, or may force the survivor to confront hostile or stereotype-driven questions and assumptions during the investigation and/or litigation processes.

Through sensitive courtroom management, judges can make significant contributions towards how sexual offenses against sexual minorities are investigated and, especially, how they are litigated. As one researcher has recently concluded, "[l]egal efforts … must be augmented with advocacy and interventions to increase respect for diversity and reduce community acceptance of violence toward those marginalized."[38] The legal system—and the judiciary in particular—are uniquely situated to contribute to increased respect for diversity and diminished community acceptance of sexual violence against marginalized people, including the LGBTQ population.

Gender or sexuality-related myths like those discussed in Section III may be especially hurtful or distracting to jurors, or prejudicial to both victim and defendant. They should therefore be dispelled to the extent possible by the court, through court rules and

---

[37] See RCW 9A.44.010(1)(c) (gender neutral definition of sexual intercourse) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010, RCW 9A.44.010(2) (gender neutral definition of sexual contact); for a unique analysis applying the gender-neutral sexual assault definitions, see generally *State v. A.M.*, 163 Wn. App. 414, 260 P.3d 229 (2011) (rejecting government's argument that, since the labia are considered part of the vagina, the buttocks should be considered part of the anus under RCW 9A.44.010(1)(a), and holding that sexual penetration of the buttocks but not the anus does not constitute sexual intercourse under that section)

[38] Saewyc, Pettingell, Ries, Bearinger, Resnick, Murphy & Combs, "Hazards of Stigma…" supra at 210-211

procedures, general information and instructions to lawyers and litigants, and specific jury instructions where necessary.

Consistent with the sexual myths explored in Section III, jurors' own societal perceptions may lead them to be more sympathetic to female victims than males.[39] In a 2000 study, mock jurors were found to assign less "blame" to females assaulted by a male, than to males assaulted by a female. [40] This may have dire consequences in how jurors address cases regarding transgender individuals, where gender-based assumptions are at play.

Although female victims may find a more sympathetic audience, a "general pattern" of leniency towards female defendants has also been identified.[41] However, in dealing with same-sex sexual assaults, heterosexual men are reportedly more negative in their perceptions of victim or abuser than are heterosexual women.[42] This may provide insight as to the "differences in men and women jurors' decisions in same-gender assault cases and that direct associations should exist between homophobic attitudes and case results."[43]

Because much of what jurors believe is based upon societal perceptions and judgments, it would not be surprising for such beliefs to be present among court staff, judges, and attorneys. It is particularly important that both judges and lawyers be aware of such assumptions and myths.

Judges and lawyers should not only be cognizant of such societal perceptions, but should also strive to work with jurors in dispelling harmful stereotypes and dismantling common myths. During voir dire, narrowly tailored questions addressing sexual offense myths may help identify juror biases relevant to a sexual offense trial involving an LGBTQ survivor (judges should also be mindful that members of the jury pool, witnesses, or others in the courtroom may identify as LGBTQ). Furthermore, a thoughtfully constructed voir dire may serve to educate not only those harboring gender-based stereotypes, but also those who are largely apathetic. Being mindful of language used and references made is essential to communicating in a neutral and impartial manner.

It is important for judges to be mindful of a LGBTQ victim's fear of isolation. Due to only a small percentage of the American population identifying as LGBTQ, many LGBTQ people can feel marginalized by society. LGBTQ victims may be much more invested in their communities or networks of peers, and may be reluctant to cease those interactions despite a strong possibility of coming in to contact with their abusers.[44] Understanding this

---

[39] Jodi A. Quas, Bette L. Bottoms, Tamara M. Haegerich, & Kari L. Nysse-Carris, "Effects of Victim, Defendant, and Juror Gender on Decisions in Child Sexual Assault Cases," 32 J. *Applied Soc. Psycho*l. 1993, 1995 (2002)

[40] Id.

[41] Id. at 1996, (where "the combination of a general leniency toward women sexual abuse perpetrators, [and] a bias against same-gender sexual abuse… leads to the hypothesis that there will be fewer guilty verdicts when jurors are presented with an abuse allegation that involves a woman defendant.")

[42] Id. at 1998

[43] Id.

[44] Albright & Alcantara-Thompson, "Contextualizing Domestic Violence…" supra

dynamic within the LGBTQ community may be helpful when ordering SAPOs or confronting violations of such protection orders.

Finally, courts should at least be aware of a number of community resources that either specifically aid, or are friendly to, the LGBTQ community. Information regarding these resources may be passed along to others appearing in a judge's court, as the judge sees fit. Appendix A to this chapter lists some of those resources.

V. Conclusion

Sexual offenses against lesbian, gay, bisexual, transgender, and genderqueer, or questioning people remain a problem of great proportion, both because sexual offenses are perpetrated against LGBTQ people frequently and because social norms and assumptions about sexual offenses tend to marginalize sexual minorities. Gender and sexuality-related sexual offense myths are likely to compound the difficulties facing LGBTQ survivors within the courts.

Section I provided the framework for understanding Washington law in how it relates to LGBTQ victims in the context of sexual assault, and broadly introduced the reader to the contents of the following sections.

Section II provided the backdrop and context for the pervasiveness of sexual assault in our society. Three themes emerged from this: (1) the high rates of sexual violence against sexual minorities; (2) the high rate of sexual offense victimization among sexual minorities is not attributable to a single source of abuse; and (3) LGBTQ sexual offense victims often have their experiences trivialized.

Section III discussed ways in which gender-based assumptions play down the abuse of same-sex assaults. It then explained that two common myths are primarily responsible for the trivialization of LGBTQ victimization. The first of these is "corrective rape," where the abuser seeks to "cure" the victim of LGBTQ status, or discourage the victim from acting on same-sex attractions. The second myth is in "blaming the victim," operating under the notion that the victim merely got what he/she deserved.

Section IV explored how judges can pave the way for more fair and respectful treatment of litigants in sexual offense investigations and litigation. By understanding common myths and juror perceptions based on societal influence, judges can effectively address a jury pool, conduct a sensitive voir dire, execute unbiased jury instructions, and be mindful in ordering conditions or resolving violations of SAPOs.

It is important to remember that gender and sexuality-related sexual offense myths are also likely to influence juries in cases involving no sexual minorities at all, meaning that working to minimize their effect on juries could reduce the risk of prejudice across the board. Maintaining an awareness of and respect for diversity within the courtroom can significantly improve LGBTQ survivors' experiences on the witness stand and in the jury box, and could even promote better reporting of, and responses to, sexual assault crimes in the future.

Moreover, such mindfulness also promotes the fair administration of justice as well as a bench that more accurately reflects the diversity of the community that it serves.

A list of resources for the LGBTQ community is provided in Appendix A, along with a brief description of the services each provides. These may be helpful in supplying further information for judges looking to broaden their knowledge and understanding of LGBTQ issues. Appendix B provides reference materials utilized in the preparation of this chapter that are also helpful sources of additional information.

APPENDIX A
LGBTQ Sexual Assault Community Resources

A. **Northwest Network** http://www.nwnetwork.org

A Washington organization dedicated to raising awareness about LGBTQ sexual assault, offering support to LGBTQ sexual assault survivors, and "creating the conditions to support equitable relationships

B. **Washington Coalition of Sexual Assault Programs** http://www.wcsap.org

A Washington organization with web resources on sexual assault in lesbian, gay, bisexual, and transgender communities. The webpage features links to WCSAP guides at http://www.wcsap.org/lesbian-gay-bisexual-transgender-queer-community regarding topics related to LGBTQ sexual assault and links to other online resource providers. See also WCSAP's "Find Help" page, including links to sexual assault victim service providers in every county in Washington.

C. **Pandora's Project** pandys.org

An online resource guide for lesbian, gay, bisexual, and transgender survivors of sexual assault, including resource provider links and information for sexual assault survivors.

D. **Lambda** http://www.lambda.org/DV_background.htm

An online information sheet regarding differences between LGBTQ sexual assault/domestic violence and sexual assault/domestic violence in the overall population.

E. GLBTQ Domestic Violence Project www.glbtqdvp.org

The website of a Massachusetts organization providing services to GLBTQ victims related to domestic violence.

E. **The National Online Resource Center on Violence Against Women's Special Collection on Sexual Violence in Lesbian, Gay, Bisexual, Transgender, Intersex, or Queer (LGBTIQ) Communities** https://www.nsvrc.org/publications/online-special-collections/sexual-violence-lesbian-gay-bisexual-transgender-intersex

A comprehensive online resource relating to LGBTIQ sexual assault topics.

F. **Forge** http://forge-forward.org/about/our-mission-and-history/

A national organization dedicated to supporting, educating, and advocating for the interests of transgender individuals, including trans survivors of domestic violence and sexual assault.

APPENDIX B
References

Mika Albright & DeAnn Alcantara-Thompson, "Contextualizing Domestic Violence from an LGBTQ Perspective" *Northwest Network*.

Michael J. Brown & Jennifer Groscup, "Perceptions of same-sex domestic violence among crisis center staff," 24 *Journal of Family Violence* (2), 87-93 (2009) https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=248000

Lynne Carroll, Paula J. Gilroy & Jo Ryan, "Counseling transgendered, transsexual, and gender-variant clients," 80 *Journal of Counseling and Development* 131-39 (Spring 2002) https://www.deepdyve.com/lp/wiley/counseling-transgendered-transsexual-and-gender-variant-clients-0SBu4TnEtH

Joyce P. Doyle, Erica Frank, Linda E. Saltzman, Pamela M. McMahon & Brooke D. Fielding, "Domestic Violence and Sexual Abuse in Women Physicians: Associated Medical, Psychiatric, and Professional Difficulties," 8 *Journal of Women's Health and Gender-Based Medicine* (7), 955-65 (1999) https://www.researchgate.net/publication/12766941_Domestic_Violence_and_Sexual_Abuse_in_Women_Physicians_Associated_Medical_Psychiatric_and_Professional_Difficulties

Gary J. Gates and Frank Newport, "Special Report: 3.4% of U.S. Adults Identify as LGBT: Inaugural Gallup findings based on more than 120,000 interviews" (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx

Sabrina Gentlewarrior & Kim Fountain, "Culturally Competent Service Provision to Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Violence," *National Online Resource Center on Violence against Women* (Sept. 2009). (Retrieved on 11/29/2012 from https://www.haven-oakland.org/assets/media/pdf/culturally-competent-service-provision-to-LGBT_survivors-of-sexual-violence.pdf

Sari D. Gold, Benjamin D. Dickstein, Brian P. Marx & Jennifer M. Lexington, "Psychological Outcomes Among Lesbian Sexual Assault Survivors: An Examination of the Roles of Internalized Homophobia and Experiential Avoidance," 33 *Psychology of Women Quarterly* (1), 54-66 (2009) http://onlinelibrary.wiley.com/doi/10.1111/j.1471-6402.2008.01474.x/references

Sari D. Gold, Brian P. Marx & Jennifer M. Lexington, "Gay male sexual assault survivors: The relations among internalized homophobia, experiential avoidance, and psychological symptom severity," 45 *Behaviour Research and Therapy* (3), 549-62 (2007) https://contextualscience.org/system/files/Gold,2007.pdf

Gretchen P. Kenagy, "Transgender Health: Findings from Two Needs Assessment Studies in Philadelphia," 30 *Health & Social Work* (1), 19-26 (2005) https://academic.oup.com/hsw/article-abstract/30/1/19/691625

The Laramie Project, http://www.laramieproject.org/

Kenneth H. Mayer, Judith B. Bradford, Harvey J. Makadon, Ron Stall, Hilary. Goldhammer & Stewart Landers, "Sexual and Gender Minority Health: What We Know and What Needs to Be Done," 98 *American Journal of Public Health* (6), 989-95 (2008) http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2007.127811

Kathryn E. Moracco, Carol W. Runyan, J. Michael Bowling & Jo Anne L. Earp, "Women's experiences with violence: a national study," 17 *Women's Health Issues* (1), 3-12 (2007) https://uncch.pure.elsevier.com/en/publications/womens-experiences-with-violence-a-national-study

Leslie J. Moran & Andrew N. Sharpe, "Violence, identity and policing: The case of violence against transgender people," 4 *Criminology & Criminal Justice* (4), 395-417 (2004) http://journals.sagepub.com/doi/abs/10.1177/1466802504048656?journalCode=crja

Leslie J. Moran & Andrew N. Sharpe, "Policing the Transgender/Violence Relation," 13 *Current Issues in Criminal Justice* (3), 269-85 (2002) http://www.academia.edu/843488/Policing_the_Transgender_Violence_Relation_2002_13_3_Current_Issues_in_Criminal_Justice_269-285

Jodi A. Quas, Bcette L. Bottoms, Tamara M. Haegerich, & Kari L. Nysse-Carris, "Effects of Victim, Defendant, and Juror Gender on Decisions in Child Sexual Assault Cases," 32 *J. Applied Soc. Psychol*. (10), 1993-2021 (2002) http://onlinelibrary.wiley.com/doi/10.1111/j.1559-1816.2002.tb02061.x/full

Joanna Bunker Rorhbaugh, "Domestic Violence in Same-Gender Relationships," 44 *Fam. Ct. Rev*. 287, 287-88, 290, 297 (April 2006) http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2006.00086.x/full

Emily F. Rothman, Deinera Exner & Allyson L. Baughman, "The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review," 12 *Trauma, Violence, & Abuse* (2), 55-66 (2011) http://journals.sagepub.com/doi/abs/10.1177/1524838010390707

Elizabeth M. Saewyc, Carol L. Skay, Sandra L. Pettingell, Elizabeth A. Reis, Linda Bearinger, Michael Resnick, Aileen Murphy & Leigh Combs, "Hazards of stigma: the sexual and physical abuse of gay, lesbian, and bisexual adolescents in the United States and Canada," 85 *Child Welfare* (2), 195-213 (2006) http://routledgesw.com/files/hbse/9.4Saewyc.pdf

Rebecca Stotzer, “Violence Against Transgender People: A Review of United States Data,” 14 *Aggression and Violent Behavior* (3), 170-79 (2009) http://www.academia.edu/4513690/Violence_against_transgender_people_A_review_of_United_States_data

Patricia Tjaden, Nancy Thoennes & Christine J. Allison, “Comparing Violence over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants,” 14 *Violence and Victims* (4), 413-25 (1999) https://www.questia.com/article/1P3-1459293721/comparing-violence-over-the-life-span-in-samples-of

Lisa K. Waldner-Haugrud & Linda Vaden Gratch, “Sexual Coercion in Gay/Lesbian Relationships: Descriptives and Gender Differences,” 12 *Violence and Victims* (1), 87-98 (1997) https://www.questia.com/article/1P3-1470323861/sexual-coercion-in-gay-lesbian-relationships-descriptives

Shannon E. Wyss, “‘This was my hell’: the violence experienced by gender non-conforming youth in US high schools,” 17 *International Journal of Qualitative Studies in Education* (5), 709-30 (2004) http://drjkoch.org/Intro/Readings/Gender%20Hell.pdf

CHAPTER 11
Cultural Competency

I. Introduction

Culture can play a significant role in a victim's response to sexual violence, and in the reactions of his or her family or broader community. Without an awareness of how culture intersects with sexual violence and informs victim or witness behavior, a court may make assumptions that can cause misunderstanding or offense, at best, and risk the miscarriage of justice, at worst.

This chapter discusses the importance of cultural competency in the courtroom, specifically in cases of sexual assault. It begins with a brief overview of cultural competency and how it relates to the law and the courtroom. Then, it explores the ways in which culture and sexual violence intersect and why cultural competency is essential to maintaining an unbiased courtroom. Finally, this chapter addresses ways in which judges can develop cultural competency and cultivate it in their courtrooms.

II. What is Cultural Competency?

Washington is increasingly diverse and therefore, Washington courtrooms are increasingly diverse. International immigration to Washington doubled between 1990 and 2013[1] and today roughly 30% of the state's population identifies as non-white.[2] The Tukwila School District has been dubbed the most diverse school district in the country, with high percentages of immigrant and refugee families, significant levels of poverty and homelessness among students, and large numbers of English Language Learners representing over 80 languages.[3] Significant socio-economic disparities exist throughout the State[4] and roughly one in eight Washingtonians lives below the poverty line.[5] As diversity in Washington grows, cross-cultural encounters become more frequent. The Washington Court system strives to provide access to justice for all Washingtonians and judges regularly interact with individuals and families of different cultural

---

[1] See *New Americans in Washington State*, American Immigration Counsel (Jan. 1, 2015) https://www.americanimmigrationcouncil.org/sites/default/files/research/new_americans_in_washington_2015.pdf

[2] See generally *QuickFacts: Washington*, United States Census Bureau https://www.census.gov/quickfacts/map/IPE120213/53033

[3] See, e.g., *The Most Diverse District in the Nation: A Closer Look at Tukwila School District*, Puget Sound Educational Service District https://www.psesd.org/news/the-most-diverse-district-in-the-nation-a-closer-look-at-tukwila-school-district

[4] See generally *Socioeconomic Position in Washington*, Washington State Dep't of Health (Mar. 25, 2014) http://www.doh.wa.gov/Portals/1/Documents/5500/Context-SEP-2014.pdf; see also Andy Nicholas, *All Income Growth is Going to the Richest 1 Percent of Washingtonians*, Washington State Budget & Policy Center (June 23, 2016) http://budgetandpolicy.org/schmudget/all-income-growth-is-going-to-the-richest-1-percent-of-washingtonians

[5] Elena Hernandez, *Scraping By Isn't Enough: What the Poverty Data Doesn't Show*, Washington State Budget and Policy Center (Sept. 17, 2015) http://budgetandpolicy.org/schmudget/scraping-by-isnt-enough

and socioeconomic backgrounds on a daily basis. Cultural identities are comprised of many different elements and to understand and effectively engage with cultural differences requires cultural competency.

These types of diversity—racial, ethnic, linguistic, and socio-economic—represent some of many factors that contribute to the development of culture and cultural identity. Although the term "culture" often conjures ideas of race or ethnicity, in reality culture encompasses any ideas, customs, and social behavior that is generally attributed to a group of people:

> Culture is often described as the combination of a body of knowledge, a body of belief and a body of behavior. It involves a number of elements, including personal identification, language, thoughts, communications, actions, customs, beliefs, values, and institutions that are often specific to ethnic, racial, religious, geographic, or social groups.[6]

The term "culture" should not be misunderstood to refer only to minority cultures. "Culture"—in this chapter and more broadly—denotes not only minority communities, but also embraces dominant cultures. Thus, in the United States, the term "culture" includes white culture, Christian culture, English-speaking culture, and other majority groups. Many would argue that white culture does not exist,[7] while others maintain that such an argument is in fact a key component of white culture.[8] Although the extent of debates over the meaning and extent of white culture exceed the scope of this chapter, the most important takeaway is that "culture" refers not only to minority cultures, but also to the dominant, often invisible, white culture in the United States.[9]

Cultural competence does not require fully understanding all cultural differences and norms. Rather, to be culturally competent requires "having an awareness of one's own cultural identity and views about difference, and the ability to learn and build on the varying cultural and community norms of others."[10] Culture cannot be defined as a static or fixed notion, but rather changes and evolves over time, especially in an increasingly globalized world.[11] Nor can an individual's cultural identity be assumed solely based on the most visible markers of identity,

---

[6] *Cultural Respect*, National Institute of Health (Feb. 15, 2017) https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liaison/clear-communication/cultural-respect/

[7] See generally The Making & Unmaking of Whiteness (Birgit Brander Rasmussen et al., eds. 2001); *see also* Adam Cornford, *Colorless All-Color: Notes on White Culture* (1997) http://isites.harvard.edu/fs/docs/icb.topic545410.files/Cornford.pdf; Jeff Hitchcock, *When We Talk Among Ourselves: White-on White Focus Groups Discuss Race Relations*, Center for the Study of White American Culture, Inc. (Mar. 1995) http://www.euroamerican.org/library/whenwetalk/WhenWeTalk002_Intro.asp

[8] See, e.g., Mikhail Lyubansky, *Going Where Glenn Beck Wouldn't: Defining White Culture*, Psychology Today (July 28, 2010) http://www.euroamerican.org/library/whenwetalk/WhenWeTalk002_Intro.asp

[9] See, e.g., Gita Gulati-Partee & Maggie Potapchuk, *Paying Attention to White Culture & Privilege: A Missing Link to Advancing Racial Equity*, 6 The Foundation Review 25 (2014) http://www.racialequitytools.org/resourcefiles/2_Gulati_AB3.pdf

[10] *Why Cultural Competence?* National Education Association http://www.nea.org/home/39783.htm

[11] See generally *Culture Handbook*, Family Violence Prevention Fund (2005) http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf

such as race and gender. Intersectionality—the interaction of various aspects of identity, such as race, gender, and class—highlights the importance of considering differences *within* cultural groups, in addition to differences among groups.[12] Above all, cultural competence cultivates "the ability to adapt, work and manage successfully in new and unfamiliar cultural settings"[13] without reducing an individual to a specific cultural identity based on stereotypes or other limited factors.[14]

Cultural competency helps to ensure confidence in the judiciary from the parties and the public at large.[15] Specifically, a judge has the responsibility to avoid any manifestation of bias or prejudice in performing judicial duties, even inadvertently.[16] Thus, to avoid even inadvertent bias requires understanding one's own cultural perspective and approaching cross-cultural interactions with sensitivity and self-awareness. A judge has the added responsibility of ensuring that lawyers in his or her courtroom abide by the same standards."[17]

While some expressions of bias or prejudice may be obvious, others can be subtle and thus be made inadvertently:

> Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.[18]

However, while seeking to eliminate bias in courtroom proceedings, a judge must also keep in mind that references or distinctions based on race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status that are relevant to the legal issues of the case do not fall within the meaning

---

[12] See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stanford L. Rev. 1241 (1993)

[13] Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty?* Oregon State Bar Bulletin (Jan. 2009) https://www.osbar.org/publications/bulletin/09jan/barcounsel.html

[14] Aastha Madaan, *Cultural Competency & the Practice of Law in the 21st Century*, The American Bar Association (2016) http://www.americanbar.org/publications/probate_property_magazine_2012/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.html

[15] "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Washington State Court Rules: Code of Judicial Conduct, Canon 1, Rule 1.2 https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=CJC&ruleid=gacjc1

[16] Washington State Court Rules: Code of Judicial Conduct, Canon 2, Rule 2.3 https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=CJC&ruleid=gacjc2

[17] Id; Rule 2.3 (C)-(D)

[18] Id. Rule 2.3 cmt. 2 (emphasis added) https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=CJC&ruleid=gacjc2

of "prejudice or bias."[19] To fully understand the contours of bias or prejudice in the courtroom, understand how actions or words could be perceived by others as bias or prejudice, and identify the line between legitimate and illegitimate references to certain cultural factors require cultural competence.

The court system as a public institution is based on equal access to justice for everyone. A judge has the duty to ensure that "every person with a legal interest in a proceeding has the right to be heard,"[20] and the responsibility to maintain decorum, civility, and professionalism in his or her courtroom.[21] The latter includes the duty to supervise court staff or other judges to ensure they "act with fidelity and in a diligent manner consistent with the judge's obligations" under court rules.[22] To fulfill all of these duties and manage a culturally competent courtroom, a judge must cultivate her or his own cultural awareness and sensitivity toward the broad diversity of cultures among the many people who enter her or his courtroom.

It can be difficult for members of a dominant culture to perceive their own cultural traits. As the majority culture in the United States, white culture is largely defined by the unquestioned dominance, normalization, and privilege that derives from belonging to the majority group.[23] Because whiteness occupies a position of norm or status quo in our country, it can be difficult to see or define, or may simply be conflated with "U.S. culture" more broadly.[24] White identity may be seen as a "neutral race identity,"[25] as white people rarely have occasion to reflect on their whiteness.[26] In fact, the failure to acknowledge or discuss whiteness, and the tendency to relate to other white people as individuals "devoid of race"[27] are all features of white culture.

III. How Does Cultural Competency Intersect with Sexual Violence?

Sexual violence is perpetrated within and among all racial, ethnic, religious, socio-economic, gender, and sexual orientation identities. Anyone can be affected by sexual violence and therefore, in the criminal justice context, judges will encounter parties and witnesses from all backgrounds. Sexual violence can be an extremely complex and personal experience, often affecting deeply the identity of a victim or family. The literature shows that every victim of sexual assault has a unique experience, and that culture and cultural differences can impact the

[19] Id. Rule 2.3 cmt. 5
[20] Id. Rule 2.6
[21] Id. Rule 2.12(A)
[22] Id. Rule 2.12(A)
[23] See Gulati-Partee & Potapchuk, *Paying Attention to White Culture & Privilege: A Missing Link to Advancing Racial Equity* at 27 (2014) http://www.racialequitytools.org/resourcefiles/2_Gulati_AB3.pdf
[24] Id.
[25] Nell Irvin Painter, *What is Whiteness?* The New York Times (June 20, 2015) https://www.nytimes.com/2015/06/21/opinion/sunday/what-is-whiteness.html?mcubz=0&_r=0
[26] *Whiteness*, The Critical Media Project http://www.criticalmediaproject.org/cml/topicbackground/race-ethnicity/white/
[27] Lyubansky, supra note 9

way a victim experiences sexual violence, communicates about the experience, and relates to the court system. [28]

A. Cultural Beliefs About Sex, Gender Roles, and Sexual Violence

Beliefs about sex, gender roles, and sexual violence all inform the experiences of sexual assault victims and their families and broader communities.[29] Such beliefs may also influence a person's willingness to engage with the legal process. Many of these beliefs derive from cultural identities; thus, cultural competence is a key component of understanding or relating to alleged victims of sexual violence.

A culturally competent approach to the problem of sexual violence involves recognizing one's own beliefs—beliefs that are largely influence by cultural norms and narratives—about how a victim "should" act. Popular awareness of sexual violence has increased in the United States dramatically in the past decade, which in turn has begun to shift many deeply rooted stereotypes and attitudes toward victims.[30] There has been growing recognition of the perils of imposing expectations of a how a "real" rape victim "should" act, for example in understanding of the realities of delayed reporting.

Nonetheless, victim behaviors stemming from fundamental cultural differences can continue to present challenges for judges, jurors, and lawyers. Many cultures, including popular culture in the United States, perpetuate attitudes and beliefs that women may not legitimately or safely refuse male sexual advances.[31] Thus, women may be culturally conditioned to believe that they cannot refuse sexual advances, and may therefore be unable to say "no" or otherwise indicate lack of consent. Such behaviors, absent cultural considerations, may lead outsiders to believe contact was consensual, when in fact it was not. Through the lens of cultural competency, however, one can begin to understand otherwise counterintuitive responses.[32]

In communities or cultures that value masculinity and male superiority, sexual assault may be considered more socially acceptable.[33] Some cultures may have traditions of marrying young girls to older men[34] or viewing marriage as a man's ownership of a woman, expecting

---

[28] See *Culture Handbook*, Family Violence Prevention Fund (2005) at 7-8 http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf

[29] See, e.g., Gurvinder Kalra &Dinesh Bhugra, *Sexual Violence Against Women: Understanding Cross-Cultural Intersections*, 55 Indian J. Psychiatry 244 (2013) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3777345/

[30] See, e.g. Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?* American Prosecutors Research Institute (2007) http://www.ndaa.org/pdf/pub_victim_responses_sexual_assault.pdf

[31] See *Chapter 6: Sexual Violence* in World Report on Violence & Health http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf

[32] Fanflik, supra note 32

[33] *Sexual Assault & Cultural Norms*, Stop Violence Against Women (Feb. 1, 2006) http://www.stopvaw.org/sexual_assault_and_cultural_norms

[34] *Sexual Violence*, supra note 33

married women to be submissive and sexually available to their husbands at all times.[35] Such cultural norms can influence the ways in which victims, perpetrators, their families, and broader communities understand sexual violence, sometimes to the extent that sexual violence becomes normalized and women may not consider themselves to be victims. At the same time, cultures that value masculinity and male dominance may silence male victims of sexual abuse or sexual violence, equating victimization with weakness.[36]

Cultural understandings of honor can deeply impact beliefs and attitudes toward sexual violence. Cultures and religions that equate women's sexual purity with "honor" may also view women as embodying family "honor."[37] As such, an act of sexual violence against a woman can become a violation of her family, which in turn can increase her feelings of shame or responsibility. Attitudes toward virginity play a significant role in responses—by victims, families, or communities—to sexual violence. Many cultures and religions place a premium on a woman's virginity,[38] expecting women to remain "pure" until marriage.[39] In the extreme, some cultures subject women and girls to "virginity testing."[40] In these contexts, loss of virginity outside of marriage, even in the context of sexual violence, correlates directly to a woman's future marriage prospects and place in her community.[41] Religious beliefs about virginity can deeply impact the way a victim relates to the experience of sexual violence.[42] These attitudes may compound a victim's feelings of shame, guilt, or denial, increasing reluctance or refusal to engage with the legal process.[43]

Family circumstances and dynamics, many of which are culturally informed, can also account for responses sexual violence, particularly when abuse is committed within a family.[44]

---

[35] Id; See also *Communities of Color & the Impacts of Sexual Violence*, Univ. of Michigan Sexual Assault Prevention & Awareness Center https://sapac.umich.edu/article/57

[36] See e.g. Carol O'Brien, et al., *Don't Tell: Military Culture & Male Rape*, 12:4 Psychological Services 357 (2015) https://www.apa.org/pubs/journals/releases/ser-ser0000049.pdf; Gabrielle Lucero, *Military Sexual Assault: Reporting & Rape Culture*, 6:1 Sanford J. of Pub. Policy 1 (2015) https://sites.duke.edu/sjpp/files/2015/01/Military-sexual-assault.pdf

[37] *Defining "Honour" Crimes & "Honour" Killings*, United Nations Entity for Gender Equality & The Empowerment of Women (2012) http://www.endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html; *Chapter 6: Sexual Violence* in World Report on Violence & Health http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf

[38] Daniel L. Chen, *Gender Violence & the Price of Virginity: Theory & Evidence of Incomplete Marriage Contracts* (2005) http://users.nber.org/~dlchen/papers/Gender_Violence_and_the_Price_of_Virginity.pdf

[39] Shadab Shahali, et al., *Barriers to Healthcare Provision for Victims of Sexual Assault: A Grounded Theory Study*, 18:3 Iran Red Crescent Med. J. (2016) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4879759/

[40] *UN: WHO Condemns 'Virginity Tests'*, Human Rights Watch (Dec. 1, 2014) https://www.hrw.org/news/2014/12/01/un-who-condemns-virginity-tests

[41] Shahali, et al., supra note 41

[42] Jill Filipovic, *Purity Culture: Bad for Women, Worse for Survivors of Sexual Assault*, THE GUARDIAN (May 9, 2013) https://www.theguardian.com/commentisfree/2013/may/09/elizabeth-smart-purity-culture-shames-survivors-sexual-assault; Lisa Aronson Fontes and Carol Plummer, *Cultural Issues in Disclosures of Child Sexual Abuse*, 19 J. of Child Sexual Abuse 491 (2010)

[43] Shahali, et al., supra note 41

[44] S. Shafe & G. Hutchinson, *Child Sexual Abuse & Continusous Influence of Cultural Practices: A Review*, 63:6 West Indian Med. J. 634 (2014) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4663956/

In the United States, minority children are more likely than white children to be removed from their families and placed into the foster care system.[45] Community experiences with disproportionate treatment can cultivate distrust or suspicion toward law enforcement and the legal system. When their family faces other struggles, such as poverty, homelessness, or illness, children may remain silent about abuse in order to avoid creating more problems.[46] Finally, many cultures value preserving the family's reputation over addressing the consequences of abuse and thus believe that situations of sexual violence should be kept private within the family.[47] These factors can lead to reluctance to disclose abuse or a tendency, once it has been disclosed, to deal with the issue inside the family rather than engage with the legal system.[48]

Cultural attitudes toward homosexuality may also shape responses to sexual violence. As discussed above, for example, cultures that have strict definitions of masculinity or gender roles can create significant barriers to male victims coming forward, especially in cases where the assailant is another man. Regardless of the actual sexual orientation of the victim, perceptions of male-on-male sexual violence can create fear of disclosing abuse or assault. A male survivor who identifies as straight may fear the implications of being perceived as gay in his community or may have internalized concerns that abuse by another man threatens his masculinity or will make him gay. These attitudes can lead to feelings of shame, guilt, or moral failure, which further complicate a victim's experience of sexual violence. On the other hand, a victim who identifies as LGBTQ and belongs to a culture with negative attitudes toward homosexuality may lack family support or be reluctant to engage with the legal system for fear of being outed, which in turn may have significant collateral consequences.[49]

Sexual violence within the LGBTQ community has also been historically overlooked and misunderstood for lack of cultural competence.[50] In particular, intra-community violence often draws discouraging responses due to denial that sexual violence is committed against same-sex partners.[51] Much of the dialogue around sexual assault focuses on violence committed against women by men, which in turn reinforces the gender binary and ignores the experiences of non-gender-conforming people.[52] Sexual violence can be targeted at LGBTQ individuals because of their actual or perceived gender identity or sexual orientation; thus, in some cases there is a direct link between cultural identity and victimization.[53] And yet homophobia and transphobia

---

[45] Lisa Aronson Fontes and Carol Plummer, *Cultural Issues in Disclosures of Child Sexual Abuse*, 19 J. of Child Sexual Abuse 491 (2010)
[46] Id.
[47] Id.
[48] Id.
[49] *LGBTIQ Survivors of Sexual Assault*, Oregon Attorney General's Sexual Assault Task Force Advocacy Manual (2010) http://www.doj.state.or.us/victims/pdf/lgbtiq_survivors_of_sexual_assault.pdf
[50] Lauren Paulk, *Sexual Assault in the LGBT Community*, National Center for Lesbian Rights (Apr. 30, 2014) http://www.nclrights.org/sexual-assault-in-the-lgbt-community/
[51] Id.
[52] *Communities of Color & the Impacts of Sexual Violence*, Univ. of Michigan Sexual Assault Prevention & Awareness Center https://sapac.umich.edu/article/57
[53] *LGBTIQ Survivors*, supra note 51

within the legal system may cause victims to be reluctant to disclose information pertaining to sexual orientation or gender identity.[54]

Attitudes toward sex and gender roles can differ strongly among generations. Teens and young adults have their own forms of culture, which are often disregarded or devalued by older generations. Teens and young adults are often accused of encouraging sexual violence through "hookup culture"[55] or being increasingly narcissistic in social media use.[56] Sexual and cultural norms shift from generation to generation[57] and judgmental attitudes toward casual sex can lead to victim-blaming in cases of sexual violence.

Many people, regardless of culture, tend to blame or disbelieve victims of sexual violence. However, some studies suggest that victims in minority communities may be subject to a greater degree of victim-blaming.[58] This can lead to increased hesitance to report or participate in the legal system. The same studies have found that members of racial minority groups in the United States—both men and women—are more likely than white people to hold victim-blaming attitudes or believe that sexual violence is correlated to a woman's promiscuity.[59] At the same time, white Americans are more likely to perpetuate stereotypes or attribute rape myths in situations involving minority victims.[60] In general, communities that society has historically viewed or continues to view as hypersexualized, such as people of color or the LGBT community, receive disproportionate blame for their sexual assaults.[61]

Finally, members of discrete, minority cultural groups may face additional cultural challenges based on the nature of their community. A small, tight-knit community, such as an immigrant or refugee population, may rely heavily on social networks for support and survival. When sexual violence is perpetrated within those insular groups, exposing the assault or abuse may cause the victim or their family to lose that support.[62]

B. Misunderstanding and Distrust of Law Enforcement or the Court System

---

[54] *Sexual Violence & Individuals who Identify as LGBTQ*, National Sexual Violence Resource Center (2012) http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf

[55] Conor Friedersdorf, *How Does Hookup Culture Affect Sexual Assault on Campus*, The Atlantic (June 28, 2016) https://www.theatlantic.com/politics/archive/2016/06/how-does-hookup-culture-affect-sexual-assault-on-campus/489098/

[56] *See, e.g., Me, Me, Me: The Rise of Narcissism in the Age of the Selfie*, NPR (July 12, 2016) http://www.npr.org/2016/07/12/485087469/me-me-me-the-rise-of-narcissism-in-the-age-of-the-selfie

[57] Justin R. Garcia, Chris Reiber, et al., *Sexual Hookup Culture: A Review*, 16 Rev. of Gen. Psychol. Rev. 161 (2012)

[58] Devonae Robinson, *Ethnic Differences in the Experiences of Sexual Assault Victims*, NYU Dep't of Applied Psych. (2017) http://steinhardt.nyu.edu/appsych/opus/issues/2015/spring/robinson

[59] "For example, minority men and women tend to have more victim-blaming attitudes than White Americans." Id. (citing Jimenez & Abreu, 2003; Wyatt, 1992)

[60] Id.

[61] Paulk, supra note 52

[62] Lisa Aronson Fontes and Carol Plummer, *Cultural Issues in Disclosures of Child Sexual Abuse*, 19 J. of Child Sexual Abuse 491 (2010)

Judicial encounters with sexual assault victims and their families by definition occur within the court system. It is important to remember the context in which these encounters take place and acknowledge the relationships between culture and the law. Culture can play a central role in how or if a victim accesses the justice system or other services. Basic accommodations, such as the availability of interpreters for non-English speakers or the sensitive use of gender pronouns, can encourage equal access to justice. But a deeper knowledge of how culture interacts with the legal system can provide a more holistic understanding of a victim's behavior and experience in that system.

Culture can strongly influence one's trust or distrust of legal institutions.[63] For example, immigrant communities may form beliefs or understandings of U.S. legal institutions based on their knowledge of or familiarity with legal institutions in their countries of origin. Attitudes toward legal or political institutions can be based on a variety of factors, such as levels of general stability, effectiveness, rule of law, and prevalence or control of corruption.[64] On the other hand, socially isolated groups, such as immigrant, refugee or rural communities, may simply lack familiarity or understanding of the system, which in turn can cause fear. In some cases, distrust or fear of the legal system can be used as an intimidation mechanism to keep victims silent. For example, victims from immigrant or undocumented communities may react with universal distrust of the legal system for fear of negative immigration consequences.[65] Fear of deportation, of oneself or family member, may be a more pressing concern than addressing sexual violence.

In addition to distrust of the integrity of the court system, many cultures have deep distrust of law enforcement more generally. Cultural identities often form in relation to historic and current power differentials and oppression among different cultural groups or by formal institutions. Trauma or oppression at the hands of law enforcement or bias in the criminal justice system, whether historic, current, or both, can lead to fear, suspicion, or distrust of such institutions.[66] Whether that distrust derives from experience with law enforcement in other countries or police in the United States, such fundamental suspicion can deeply impact reporting dynamics for sexual assault victims. Minority groups in the United States are more likely to distrust law enforcement.[67] In communities of color, suspicion of law enforcement and the justice system often results from high levels of police violence or racial profiling.[68] Such

---

[63] Alberto Alesina & Paola Giuliano, *Culture & Institutions* (2014) http://scholar.harvard.edu/files/alesina/files/cultureandinstitutions_jel_2014.pdf

[64] Id. See generally Legal Culture in the Age of Globalization (Lawrence M. Friedman and Rogelio Pérez-Perdomo, eds., Stanford University Press, 2003)

[65] Jeanine Beiber & Kristi VanAudenhove, *Working with Immigrant Survivors*, 4 Revolution 2 (2011) http://www.nhcadsv.org/Revolution_4FINAL%5B1%5D.pdf

[66] *Communities of Color & the Impacts of Sexual Violence*, Univ. of Michigan Sexual Assault Prevention & Awareness Center https://sapac.umich.edu/article/57

[67] *Race, Trust & Police Legitimacy*, Nat'l Institute of Justice (July 14, 2016) https://www.nij.gov/topics/law-enforcement/legitimacy/Pages/welcome.aspx; Conor Friedersdorf, *Addressing Distrust Between Cops & Communities of Color*, The Atlantic (June 28, 2016) https://www.theatlantic.com/politics/archive/2016/06/addressing-distrust-between-cops-and-communities-of-color/488966/

[68] *Race, Trust & Police Legitimacy*, supra note 69

suspicion may be prevalent regardless of the capacity in which an individual engages with the system:

> The juxtaposition of an overwhelmingly Caucasian criminal justice infrastructure with the low socio-economic profile and varied cultural backgrounds of those brought before the criminal justice system—whether as victims, witnesses, defendants, or otherwise—has combined with other factors to generate increasing skepticism from many communities about the integrity and reliability of the criminal justice system.[69]

In communities of color, victims of sexual violence may fear that reporting will reinforce stereotypes of men of color as "criminals" or "predators"; they may decline to report as a way of protecting their broader communities.[70] Conversely, in cases where the accused is a white male, especially one of upper-class background, the victim may encounter a system reluctant to view the defendant as a dangerous offender.[71] These same cultural assumptions are amplified in situations where the victim and the offender are of different races. Women of color experience sexual violence at a higher rate than white women,[72] yet are less likely to report or access services following an assault.[73]

Distrust of the legal system or law enforcement may also be influenced by gender. Police and law enforcement have a long history of mistreating or disbelieving victims of sexual assault and domestic violence, who are primarily women. For example, a recent report by the Department of Justice of policing in Baltimore revealed patterns of "undue skepticism" toward sexual assault victims, including dismissive, insensitive, or harassing attitudes toward those making reports.[74]

Enforcement violence—that is, violence or abuse of authority by law enforcement agents—is experienced far more often by women of color and may lead to a greater distrust of

---

[69] American Bar Association Criminal Justice Section, *Building Community Trust: Improving Cross-Cultural Communication in the Crimnal Justice System* (2010) http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf

[70] *Communities of Color & the Impacts of Sexual Violence*, Univ. of Michigan Sexual Assault Prevention & Awareness Center https://sapac.umich.edu/article/57; Lisa Aronson Fontes and Carol Plummer, *Cultural Issues in Disclosures of Child Sexual Abuse*, 19 J. of Child Sexual Abuse 491 (2010)

[71] See, e.g., Chardonnay Madkins, *White, Male Privilege is Killing Us All*, END RAPE ON CAMPUS (July 19, 2016), http://endrapeoncampus.org/eroc-blog/2016/7/19/white-male-privilege-is-killing-us-all (reflecting on the now-infamous Stanford rape case as "a perfect model that showcases white supremacist capitalist patriarchy where white male plus wealth equals power.")

[72] *Domestic & Sexual Violence & Communities of Color* Oregon Coalition Against Domestic & Sexual Violence https://www.pcc.edu/resources/illumination/documents/domestic-violence-communities-color.pdf; *The Impact of Gender-Based Violence on Women of Color*, The Blackburn Center (Feb. 8, 2017) http://www.blackburncenter.org/single-post/2017/02/08/The-Impact-of-Gender-Based-Violence-on-Women-of-Color

[73] Id.

[74] See, e.g., Soraya Chemaly, *How Police Still Fail Rape Victims*, The Rolling Stone (Aug. 16, 2016) http://www.rollingstone.com/culture/features/how-police-still-fail-rape-victims-w434669

law enforcement or the criminal justice system.[75] Among female sex workers, a strong distrust of police or the legal system is also pervasive.[76] This distrust can stem from negative interactions with law enforcement, the reluctance or inability of officers to view sex workers as potential victims, or the increased prevalence of abuse of authority.[77]

In Washington State, Native American communities and tribal courts create a unique jurisdictional challenge. There are 26 federally recognized tribes within Washington, each of which operates its own court or belongs to the Northwest Intertribal Court System.[78] However, state and tribal courts at times exercise concurrent jurisdiction over criminal prosecutions.[79] American Indian women experience sexual violence at a rate 2.5 times higher than any other race.[80] The high prevalence of sexual violence against Native women, combined with jurisdictional complexities, can create a difficult situation for state judges to navigate. "The different cultures, legal traditions, political systems, histories, and economic positions of state and tribal courts" amplify the potential conflicts and misunderstandings.[81] In 2013, the Tribal State Court Consortium (TSCC) was created as a collaboration among the Minority and Justice Commission, the Gender and Justice Commission, the Administrative Office of the Courts, and tribal courts across the state with the goal of increasing communication and corporation between state and tribal court systems.[82] Meaningful collaboration, however, must begin from a place of cultural competence and awareness of the ways in which tribal culture, including legal systems, factor into experiences of Native Americans in the state court system.

Behaviors or attitudes expressed in a courtroom may have little or nothing to do with the underlying sexual violence or assault, but rather indicate distrust or misunderstanding of the U.S. legal system. Awareness and sensitivity to these dynamics and cultural differences are especially important for judges, who many see as the embodiment of the legal system. Judges have the power to control their courtrooms and ensure equal treatment for all.

---

[75] See generally Anannya Bhattacharjee, *Whose Safety? Women of Color & the Violence of Law Enforcement*, American Friends Service Committee (2001) https://www.afsc.org/sites/afsc.civicactions.net/files/documents/whose%20safety.pdf

[76] See, e.g., Susan G. Sherman et al., *"What Makes You Think You Have Special Privileges Because You're a Police Officer?" A Qualitative Exploration of Police's Role in the Risk Environment of Female Sex Workers*, 27:4 AIDS Care 473 (2015)

[77] Id.

[78] See Ralph W. Johnson & Rachael Paschal, eds., *Tribal Court Handbook for the 26 Federally Recognized Tribes in Washington State*, Washington State Bar Association (1992) http://www.msaj.com/papers/handbook.htm

[79] See generally *Promising Strategies: Tribal-State Court Relations*, Tribal Law & Policy Institute (Mar. 2013) https://www.walkingoncommonground.org/files/Promising%20Strategies%20Tribal-State%20Court%20Final%203-13.pdf

[80] *Tribal Communities*, Office on Violence Against Women, U.S. Dep't of Justice (Nov. 29, 2016) https://www.justice.gov/ovw/tribal-communities#about-ovw-indian-country

[81] Id.

[82] See 2016 Minority & Justice Commission Annual Report https://www.courts.wa.gov/committee/pdf/2016MJCAnnualReport.pdf

IV. How Can Judges Be Culturally Competent and Cultivate Cultural Competence in Their Courtrooms?

Cultural competence is not the same as cultural knowledge; to be culturally competent does not require one to know everything about every culture. Rather, cultural competence refers to a "set of knowledge, skills and attitudes that can be developed over time in order to work with those who appear and may be different from us."[83]

Cultural competence does not develop overnight, but rather is a complex process that must be cultivated over time and requires continual reconsideration.[84] Recognizing the role culture plays in sexual violence and access to justice, particularly in the experiences and reactions of victims, is an important first step in developing cultural competence in the courtroom. To begin developing and strengthening cultural competence, consider the following:

- **Recognize and cultivate awareness of your own biases and prejudices.** [85] Self-awareness is the foundation for cultural competence and requires recognizing how your beliefs and assumptions about sexual violence are influenced by your cultural perspective.[86] Learn about your own cultural background. Recognize ways in which you have privilege and how that impacts your perceptions and experiences.[87] Many biases or assumptions about others can exist unconsciously and be communicated through subtle verbal or non-verbal cues.[88] Everyone has unconscious beliefs and attitudes, known as "implicit bias."[89] You can begin to

[83] *Culture Handbook*, Family Violence Prevention Fund http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf
[84] Bronheim S, Goode, T. *Climate of the Learning Environment: Cultural and Linguistic Competence Checklist for MCH Training Programs*. Washington, DC: National Center for Cultural Competence, Georgetown University Center for Child and Human Development; 2013
[85] Rebecca Clay, *How Do I Become Culturally Competent?* American Psychological Association http://www.apa.org/gradpsych/2010/09/culturally-competent.aspx; Susan Bryant, *Five Habits of Cross-Cultural Lawyering*, 8 Clinical L. Rev. 33 (2001); Cynthia Pay, *Teaching Cultural Competency in Legal Clinics*, 23 J.L. & Social Policy 188, 205 (2014)
[86] *Culture Handbook*, Family Violence Prevention Fund http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf
[87] See, e.g., Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1989) https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf; See also American Bar Association Criminal Justice Section, *Building Community Trust: Improving Cross-Cultural Communication in the Crimnal Justice System* (2010) http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf
[88] Hon. Gail S. Tusan & Sharon Obialo, *Cultural Competence in the Courtroom: A Judge's Insight*, From the Bench (2010) http://www.mobar.org/uploadedFiles/Home/Publications/Precedent/2010/Fall/Cultural%20Competence%20in%20the%20Courtroom%20A%20Judge's%20Insight.pdf
[89] *Implicit Bias*, Perception Institute (Mar. 31, 2017) https://perception.org/research/implicit-bias/

examine those biases using implicit bias tests, such as Project Implicit, run by Harvard.[90]

- **Develop awareness and acknowledge others' cultural similarities and differences between the dominant culture.**[91] Assess the significance of both the similarities and differences and how those may affect someone's interactions and experiences in the legal system.[92] Consider if you were unfamiliar with the court system or spoke a different language, would you feel comfortable in your courtroom?[93]

- **Do not impose your own values or assumptions on others.**[94] Recognize when you disagree with others' beliefs or behavior and consider how culture may be at play. Do not assume your perspective is superior.[95] Consider alternative explanations for behavior that might seem unusual or counterintuitive to you.[96]

    - If you feel frustrated, confused, or uncomfortable with an interaction, take a minute to assess what you are feeling, what specifically makes you frustrated/confused/uncomfortable, and whether the other person with whom you are engaging is doing or saying something you do not understand.[97]

    - Use inclusive language. For example, don't assume heterosexuality by asking about someone's "husband" or "wife." Instead use "partner" or "spouse."[98] Avoid using male pronouns to refer to a generic person; instead use "he or she," "they," or "one." Ask how individuals prefer to be addressed and be sure to continue addressing them as they wish to be addressed.[99]

---

[90] See Project Implicit, https://implicit.harvard.edu/implicit/
[91] Sue Bryant and Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, 8 Clinical L. Rev. 33 (2001); Tusan
[92] Bryant, supra note 93
[93] *C.f. Six Steps Toward Cultural Competence*, UCARE Minnesota (2000) https://www.ucare.org/providers/documents/6stepsculturalcompetence.pdf
[94] *Culture Handbook*, Family Violence Prevention Fund http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf
[95] *Cultural Competency*, Crisis Center http://crisiscenterbham.org/_pdfs/rape_response/Vol9-cultural-competency.pdf
[96] Bryant, supra note 93
[97] *Strategies for Individuals*, Community Advancement Network (2017) http://canatx.org/strategies-for-individuals/
[98] *C.f. Communication Guide: All Cultures*, Univ. of Washington Medical Ctr. (2011) https://depts.washington.edu/pfes/PDFs/CommunicationGuideAllCultures.pdf
[99] Id.

- Pay attention to cues and follow the lead of the person you are interacting with.[100] This can be especially important in situations involving physical touch, such as shaking hands, or making eye contact.[101]

- **Recognize the power that judges have in the legal system and the degree to which your actions and decisions can impact the lives of victims and families in the courtroom.**[102] Victims of sexual violence often feel revictimized by their experiences in the criminal justice system.[103] Being treated with respect, in a culturally competent way, can significantly improve a victim's experience in the legal system. Watch for red flags that an interaction is not going well and consider whether it may be the result of a cultural misunderstanding.[104]

    - Explain what you are doing. Negative experiences can be the result of lack of information. Even if you are doing or saying something that seems obvious to you, consider that others may not understand or know why. For example, explain prior to witness questioning what it means when a lawyer objects and that any arguments between the lawyers are not because of what the witness has done.

    - Explain who the people in the courtroom are and what their jobs are. Remember that even the basic aspects of courtroom procedure may be completely foreign to many people. Explaining to someone what you are doing and why you are doing it, can ease anxiety or fear that stems from not understanding.

- **Develop culturally competent communication skills.** Language is one of the central markers of culture and most obvious barriers to accessing the court system.[105] When communicating with non-English speakers through interpreters, remember to make eye contact and talk to the individual, rather than to the interpreter.[106] Be patient with individuals with limited English proficiency and remember that body language and non-verbal signals communicate a lot.[107] Simple acts, such as the correct pronunciation of names or use of preferred pronouns shows respect and increases comfort in the courtroom.[108]

---

[100] Id.
[101] Id.
[102] *Cf. Culture Handbook*, Family Violence Prevention Fund http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf
[103] Victims Committee, Criminal Justice Section, American Bar Association, *The Victim in the Criminal Justice System* (2006) apps.americanbar.org/dch/thedl.cfm?filename=/CR300000/newsletterpubs/...pdf
[104] Bryant, supra note 93
[105] *Culture Handbook*, Family Violence Prevention Fund http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/new_directors/Culture-Handbook.pdf
[106] Crisis Center, supra note 98
[107] Tusan, supra note 90
[108] Crisis Center, supra note 98

- **When in doubt, ask.** [109] One key element of cultural competence is to avoid making assumptions. It is important to respect how people self-identify, which may not always correspond to how you perceive them.[110] Develop sensitive and respectful ways to engage with difference and ask questions, rather than assume.[111]
    - Ask open-ended questions, when possible, to allow for answers that you may not expect or may not fit into your framing of the question.[112]
    - Ask if individuals in your courtroom are comfortable and, if the answer is no, ask why or what could help them feel more comfortable. Asking about or offering accommodations expresses inclusion and awareness that people may have different experiences of the court system.[113]
    - Ask whether individuals in your courtroom have any questions throughout your interactions, rather than waiting until the end, especially when presenting information.[114]
    - If you don't understand an answer to a question, consider asking it in another way or following up with an open-ended question such as "could you say more?" to encourage the individual to continue explaining what he or she means.

V. Conclusion

As with any skill, cultural competence must be practiced and developed. Improving cultural competence should be considered as an ongoing process requiring self-awareness, self-assessment, and critical thinking, rather than a goal with fixed end or the result of a one-time training. This chapter should be the beginning of the conversation, rather than the end, to ensure equal access to justice for people from all cultural backgrounds.

---

[109] See, e.g., Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. Rev. Disc. 140, 155 (2014)
[110] *Some Do's & Don'ts for Working with LGBQ/T Folks*, The Network/La Red http://avp.org/wp-content/uploads/2017/04/TNLR_Dos_and_Donts_Working_with_LGBTQ.pdf
[111] Patel, supra note 112
[112] *C.f. Six Steps Toward Cultural Competence*, UCARE Minnesota (2000) https://www.ucare.org/providers/documents/6stepsculturalcompetence.pdf
[113] *C.f.* Billy Vaughn, *The Top Ten Culturally Competent Interviewing Strategies*, Diversity Officer Magazine http://diversityofficermagazine.com/cultural-competence/the-top-ten-culturally-competent-interviewing-strategies/
[114] *C.f.* Deborah Dixon, *How to Develop—and Apply—Your Cultural Competence*, 19 The ASHA Leader 26 (2014) http://leader.pubs.asha.org/article.aspx?articleid=1921134

CHAPTER 12
Sexual Violence and Immigration Law

I. Introduction

Washington State court judges may not have jurisdiction over immigration cases, but their decisions in a state court matter can make a lasting impact on a noncitizen's immigration status. Where immigration issues may present in state court proceedings, basic knowledge of how cases of sexual violence affect immigration remedies and status for noncitizens can better inform state court judges of pitfalls and unintended barriers to justice. The possibility of encountering noncitizen parties in Washington state court proceedings is far from remote—roughly one in seven residents of Washington State is an immigrant, while one in eight residents is a native-born U.S. citizen with at least one immigrant parent.[1]

Sexual violence includes a continuum of sexualized coercive conduct that includes rape, abuse, assault, harassment, stalking and trafficking.[2] Sexual violence can be encompassed in domestic violence but can also present itself in non-intimate partner relationships as well, such as between classmates, with an employer, or neighbors. A perpetrator[3] may use a survivor's immigration status, cultural taboos, or fears about the United States legal system to further intimidate or prevent reporting. State courts understanding this dynamic of coercion and intimidation, and in response, providing clarity about the state legal process can ensure immigrant survivors have greater access to justice.

Issues related to immigration law may arise in a variety of sexual violence-related court proceedings, including criminal cases, protection order cases, family law cases, employment discrimination cases, and civil lawsuits. This chapter discusses those immigration issues that may arise for judges within the context of proceedings in state court. The topics covered include: 1) barriers to reporting; 2) admissibility of immigration status; 3) U-Visa and T-Visa process; 4) VAWA confidentiality in the context of immigration proceedings; 5) VAWA protections and 6) Special Immigrant Juvenile Status.

---

[1] Fact Sheet: "Immigrants in Washington", American Immigration Counsel (2017) available at: https://www.americanimmigrationcouncil.org/research/immigrants-in-washington

[2] Kelly, Liz. Surviving Sexual Violence. University of Minnesota Press: 1989

[3] The terms "perpetrator," "abuser," or "offender" and "survivor" or "victim" used herein, and relative to court proceedings, do not reflect that a person alleging abuse by another, without adjudication, is a survivor or victim and a person accused of abusing another, without adjudication, is an abuser or offender. However, it is recognized that abuse can and does occur without any subsequent court involvement wherein there is a survivor or victim and an abuser or offender. Additionally, adjudicated studies based on domestic violence or other abuse, may justifiably use such terms as "survivor" and "abuser" and the reader is encouraged and entitled to exercise independent thought and judgment as to the meaning of the term used given the context of the study and the data involved. The content of this chapter should be read with those caveats in mind.

II. Barriers to Reporting Sexual Assault for Immigrant Victims

Noncitizen litigants can have inaccurate perceptions about the legal system in the United States that prevent them from accessing the courts. These misconceptions may stem from differences between the United States legal system and those from their home countries, misrepresentations by a perpetrator, or ignorance of resources.[4] The court has an obligation to be aware of these barriers and to have practices in place that do not deter noncitizen litigants from accessing the legal system.

The U.S. Department of Justice estimates that only about one-third of all sexual assaults are reported to the police,[5] and additional barriers to reporting for immigrant victims could skew that number even further. Even before entering the United States, migrants are at an increased risk for sexual victimization. Another consideration is that some noncitizens may even have entered the United States as a result of sex trafficking.[6] Noncitizen survivors of sexual violence face a variety of barriers that lead to them reporting these crimes at an even lower rate than victims who are citizens.[7]

A. Fear of Deportation

Distrust and fear of law enforcement officials, the criminal justice system, and removal often keep noncitizen victims from reporting sexual violence or seeking legal protections, especially among undocumented immigrants.[8] This fear has increased with the advent of the "Secure Communities" program, which sends the fingerprints of arrestees to United States Immigration and Customs Enforcement (ICE), who can then place an immigration hold on anyone it believes to be undocumented.[9] Migrant workers, often within the agriculture[10] and service[11] industries, also fear employment consequences when reporting assaults by supervisors or co-workers. Loss of a job could mean loss of an employment-based visa, which could lead to

---

[4] Mindlin, Jessica et. al., "Dynamics of Sexual Assault and Implications for Immigrant Women" (2013) http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf

[5] Truman, Jennifer L., Ph.D, and Rachel Morgan, Ph.D., "Criminal Victimization", Bureau of Justice Statistics (2015) https://www.bjs.gov/content/pub/pdf/cv15.pdf

[6] "Trafficking in Persons Report", Department of State (2015) https://www.state.gov/documents/organization/245365.pdf

[7] Mindlin, Jessica et. al., "Dynamics of Sexual Assault and Implications for Immigrant Women" (2013) http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf

[8] Childress, Sarah, "For Shadow Victims of Violence, the "U Visa" Can Help", Frontline (June 24, 2013) http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/for-shadow-victims-of-violence-the-u-visa-can-help/

[9] Yeung, Bernice and Grace Rubenstein, "Female Workers Face Rape, Harassment in U.S. Agriculture Industry", Frontline (June 25, 2013) http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/female-workers-face-rape-harassment-in-u-s-agriculture-industry/

[10] Id.

[11] Yeung, Bernice, "Rape on the Night Shift", Frontline (June 23, 2015) http://stories.frontline.org/night-shift-english

removal and separation of families.[12] The fear of deportation can also be instilled by the perpetrator of the sexually offensive conduct and used as a weapon to intimidate or coerce a victim during the sexual assault and prevent the reporting or disclosure after the perpetration.

B. Cultural Issues

The stigma surrounding sexual assault may subject the victim to more dire social consequences than his or her assailant, particularly in tight-knit immigrant communities.[13] Immigrant survivors often face community pressure to remain silent about their victimization for complex reasons ranging from cultural norms about the role of women in the community or the importance of resolving conflicts internally within the community to the perpetrator's higher status in that particular community. Where cultural traditions are quite different than "mainstream" American customs, noncitizen survivors may fear ostracism by members of their community if they seek assistance from outside their community, which may include all of their friends or family members in the United States.[14] Additionally, the disclosure of a sexual assault, abuse, or rape often requires the sharing and detailed explanation of intimate, humiliating specifics that many survivors have been told should never be spoken of publicly or may not have the language to describe, such as terminology for genitalia or specific sexual conduct.

C. Unfamiliarity with the Legal System

Sexual assault as an aspect of domestic abuse is also a significant concern in immigrant communities, and barriers to reporting, especially fear of immigration status change and cultural differences, may be amplified in this context.[15] Some victims, especially those from countries where marital rape is not prohibited or punished, may not know that such acts are illegal in the United States.[16] Additionally, many noncitizen victims may seek sexual violence as a "private" matter where courts have no role and that should be dealt with individually or within the immigrant community.

In addition, depending on a noncitizen's background, they may be more familiar with the systems of their country of origin where the courts serve as an arm of a repressive government and where the prevailing party is the person with the most money or the strongest connections to the government.[17] Many refugees who have fled their native countries have associated any contact with the legal system with persecution and terror.

---

[12] Mindlin, Jessica et. al., "Dynamics of Sexual Assault and Implications for Immigrant Women" (2013) http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdfe

[13] Id.

[14] Raj, Anita, and Jay Silverman, "Violence Against Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence," (March 2002)

[15] Id.

[16] Id.

[17] Orloff, Leslye E. et. al., "Battered Immigrant Women's Willingness to Call for Help and Police Response" (2003)

Many noncitizens distrust the United States legal system because of misinformation from the perpetrator or the larger community. Abusers may tell victims that they will never be believed in court or that they will be deported if they call the police or go to court. These allegations are often exacerbated by court personnel who believe that non-citizens are not entitled to protections under state law against abuse or lack of interpretation services for limited English-speaking litigants.

D. Language Barriers

Language barriers and cultural differences may also significantly discourage victims from reporting sexual violence.[18] An inability to communicate may prevent a battered immigrant from seeking necessary legal, shelter, or emergency services. For example, the immigrant may be unable to communicate with law-enforcement officers responding to an emergency call. Even if a victim does call law enforcement, he or she may not be able to make a report without access to an interpreter.[19] However, use of an interpreter may seem to a victim like a further invasion of privacy, first because he or she must disclose his or her assault to an additional person, but also because, in small or close immigrant communities, the interpreter may know one or both of the parties involved.[20]

Furthermore, the lack of ability to read or understand English impacts every part of a noncitizen survivor's encounter with the legal system: forms must be translated. Hearings become meaningless where a litigant is unable to prepare and present evidence in support of their case because of language barriers, unless an interpreter or translator is available. The presence of well-trained interpreters and culturally competent court staff can breakdown many of the cultural and linguistic barriers a noncitizen may be facing when accessing the legal system.

In Washington State judicial officers have access to interpreters who are certified, registered and otherwise trained under the auspices of the Washington State Supreme Court's Interpreter Commission.[21] In addition, our state has adopted rigorous rules concerning the ethical responsibilities of interpreters. (GR 11, 11.1, 11.2, 11.3) Judges should carefully qualify each interpreter serving in the courts in accordance with these requirements.

Courts may be able to address some of the barriers encountered by non-English speaking persons by making materials from local immigration advocacy programs available at the courthouse, including brochures on VAWA Self-Petitioners and U and T Visas[22], Special

---

[18] Mindlin, Jessica et. al., "Dynamics of Sexual Assault and Implications for Immigrant Women" (2013) http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdfe

[19] Id.

[20] Id.

[21] Interpreter Commission http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=interpreterCommission

[22] See e.g. http://library.niwap.org/wp-content/uploads/2015/CULT-Bro-DHSEnglishImmOptionsVictimsofCrime.pdf

Immigrant Juvenile Status[23], and protections for immigrant victims generally.[24] To help remove these barriers, courts can learn more about the dynamics of domestic and sexual violence experienced by immigrants. In addition, courts can work to develop strategies for instituting culturally-appropriate policies and procedures. For example, courts can work on adopting culturally competent assumptions including:[25]

- All cultures are contradictory in that there are both widespread acceptance of domestic violence as part of society and traditions of resistance.

- Each victim is not only a member of her or his community, but also a unique individual with her or his own responses. The complexity of a person's response to sexual violence is shaped by multiple factors.

- Each individual comes into any encounter with cultural experiences and perspectives that might differ from those present in the system.

All institutions should develop specific policies and procedures to systematically build cultural competence by: learning to recognize and reject preexisting beliefs, biases, and prejudices about a particular culture; focusing on understanding information being provided by individual litigants within the context at hand; and foregoing labeling persons by using fixed or generalized information.

III. Admissibility of Immigration Status

Washington State has recognized immigration status not only as a barrier for noncitizens accessing the courts but also to receiving a fair outcome. "Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."[26] As a result, on November 8, 2017, the Washington Supreme Court approved a new evidence rule that makes evidence about a person's immigration status generally inadmissible in civil and criminal courts statewide, unless a party can establish a compelling reason for admissibility.[27]

ER 413 limits the introduction of immigration evidence (with some exceptions) to ensure equal and impartial access for noncitizens to Washington's court system. ER 413 gives the state court discretion to review this evidence when it is directly probative to a particular civil or criminal case. The new evidence rule took effect on September 8, 2018.

Effective since 1983, RCW 10.40.200 (Deportation of aliens upon conviction) provides that a defendant shall be advised of special consequences to a noncitizen that may follow. The

[23] See e.g. http://library.niwap.org/wp-content/uploads/PED.SIJ_.1015_Brochure_M-1114B_Revised_05.19.16.pdf
[24] See e.g. http://library.niwap.org/wp-content/uploads/DHS-Protections1.6-links-121516.pdf
[25] Domestic Violence Manual for Judges (Appendix F-3)
[26] *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010)
[27] ER 413
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=GAER0413

statute further provides: "It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court." Therefore it has long been recommended that judges simply inquire of defense counsel at the time of entry of a plea: "Have you had an opportunity to speak to your client about potential immigration or naturalization consequences of this plea?"

IV. VAWA Confidentiality

The Violence Against Women Act (VAWA) outlines certain confidentiality protections under federal law for immigrants who have been victimized by not only by their spouses and partners but also non-intimate perpetrators.[28] The goals of these protections are both to weaken the ability of perpetrators to threaten victims with removal and use immigration enforcement officials to back up these threats, as well as to protect victims by safeguarding their personal information.[29] Abusers' threats of deportation consequences are not hollow—the National Immigrant Women's Advocacy Project found that 25-33% of perpetrators are actively involved in trying to get their victims removed.[30] There are three main prongs of immigration VAWA confidentiality:

1. Protection against disclosure or use of confidential information by federal officials;

2. Prohibition against federal officials seeking or relying on information provided by perpetrators; and

3. Restriction of locations where federal immigration enforcement actions can be conducted.[31]

The covered confidential information includes the existence of an immigration case as well as personal information contained in the case.[32] Confidentiality extends to VAWA self-petitioners and U or T visa applicants (described further below); however, there is pending litigation related to whether something that is protected under federal confidentiality protections should be subject to disclosure in state cases.[33]

---

[28] Hussain, Alina and Leslye E. Orloff, "VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy" (2017) http://library.niwap.org/wp-content/uploads/VAWA-Confidentiality-Statutes-Leg-History-Policies-2.23.17.pdf

[29] Id.

[30] Szabo, Krisztina and Leslye E. Orloff, "The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending" (2014) http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf

[31] United States Immigration and Customs Enforcement Memorandum re: Enforcement Actions at or Focused on Sensitive Locations (October 24, 2011) https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf

[32] Id.

[33] In an unpublished decision, *State v. Ochoa* (2017), Division II of Washington's Court of Appeals held that excluding evidence in a criminal trial of the victim's U-Visa application violated the defendant's Sixth Amendment rights. The case was appealed to the Washington State Supreme Court, and oral argument is scheduled for January 15, 2019.

Immigration authorities may not seek or rely on information from a perpetrator or his family to make adverse determinations regarding admissibility or deportability of a noncitizen victim.[34] Finally, there is a location prohibition that prevents immigration enforcement action at a variety of safe locations for victims, including domestic violence shelters and victim services programs. The Department of Homeland Security (DHS) must disclose the fact that any part of an enforcement action took place at a prohibited location, which is grounds for a dismissal in immigration court.[35] However, the location prohibition ban does not apply to state courts, though Washington State's Chief Justice sent an advisory letter in 2017 requesting that DHS designate courthouses as a "safe" place and not conduct immigration enforcement actions so that victims may have unfettered access to the courts.[36] Government officials who willfully violate these confidentiality protections are subject to disciplinary action and a fine of up to $5,000 for each violation.[37] Complaints regarding confidentiality violations may be filed with DHS.[38]

A perpetrator may try to assert the limited exceptions to this confidentiality provision to obtain protected information about victims from their immigration files.[39] The exceptions allow for disclosure for legitimate law enforcement purposes, census information, congressional oversight, national security purposes, or to assist with an immigrant victim's eligibility for certain public benefits.[40] However, information contained within or regarding the existence of a VAWA, T visa, or U visa application is "absolutely privileged information" that cannot be compelled to be disclosed in a criminal[41] or civil[42] case. In a criminal case, this may not cover the law enforcement certification that accompanies a U visa application, which will likely be discoverable.[43] The remainder of the application will likely remain privileged if police and prosecutors have not had access to it.[44] In a civil or family court case, the court should deny requests for information about or contained in cases protected by VAWA confidentiality.[45]

V. Protection Orders

[34] Id.
[35] Id.
[36] https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf
[37] United States Immigration and Customs Enforcement Memorandum re: Enforcement Actions at or Focused on Sensitive Locations (October 24, 2011) https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf
[38] Id.
[39] Id.
[40] 8 U.S.C. § 1367(b)(2013)
[41] *Hawke v. U.S. Dep't of Homeland Sec.*, NO. C-07-03455, 2008 WL 4460241 at *7 (N.D. Cal. Sept. 29, 2008) (denying petition for review of DHS denial of request to produce wife's immigration records, including VAWA application, for use in criminal case alleging misdemeanor battery against his wife)
[42] *Demaj v. Sakaj*, No. 3:09-CV-255, 2012 WL 476168 at *5 (D. Conn. Feb. 14, 2012) (denying motion to compel disclosure of U visa application in child custody case because, though relevant, "disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367, the purpose of which is to protect the confidentiality of the applications by preventing disclosure of these documents to alleged criminals as disclosure would allow [them] to interfere with or undermine Petitioner's immigration case")
[43] Orloff, Leslye E. and Benish Anver, "Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality" (2013) http://library.niwap.org/wp-content/uploads/2015/pdf/CONF-VAWA-BchCrd-FamCtConfidentiality-10.11.2013.pdf
[44] Id.
[45] Id.

Civil protection orders provide courts with an opportunity to counter immigration-related abuse and order culturally helpful remedies. All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child.[46] The issuance of a protection order has no effect on immigration status.[47] The order can also provide an immigrant victim with evidence of abuse for use in a VAWA, T visa or U visa application, as described below.[48] A conviction or finding of violation of a protection order involving credible threats of violence, repeated harassment, or bodily injury to a protected person is a deportable offense.[49] Mutual protection orders are not permitted under VAWA, and victims cannot be convicted of violating an order than was issued to protect them.[50]

In addition to traditional protection order remedies, immigrant victims of abuse and their children often need creative protection order remedies using the "catch-all" provisions to help curb future abuse and harassment, interfere with abusers' ability to exert power and/or coercive control over their victims, offer victims remedies or relief for past abuse, and help the victim overcome his or her victimization and build a new life post-abuse.[51] Such provisions might include requiring that victims' identity documents are returned, that the abuser does not report the victim to immigration enforcement, or does not attempt to withdraw or hinder their immigration application.[52]

Despite the potential for helpfulness of civil protection orders, this resource is underutilized by the immigrant community. The National Institute for Justice funded a civil protection order study, which found that, with support, immigrant victims will use and benefit from justice system assistance.[53] At the beginning of the study, 60.9% of those surveyed did not know about the existence of civil protection orders.[54] When assisted by an advocate[55] or attorney, 80% obtained a civil protection order, and 96% of them found the order to be helpful.[56]

---

[46] Carcamo Cavazos, Andrea and Leslye E. Orloff, "Immigrants and Protection Orders Bench Card" (2013) http://library.niwap.org/wp-content/uploads/2015/FAM-BchCrd-ImmigrantsCPOs-8.27.13.pdf

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Id.

[52] Id. See also *In re the Marriage of Meredith*, 148 Wn. App. 887 (2009) where Division II found that the trial court's entry of a protection order restraining the respondent from contacting any agency regarding the petitioner's immigration status, "including but not limited to the Department of Homeland Security (citizenship and Immigration Services, Immigration and Customs Enforcement or Customs and Border Protection), the Executive Office of Immigration Review (the immigration court system), or the Department of State" without court approval was an unconstitutional restraint on free speech.

[53] Szabo, Krisztina and Leslye E. Orloff, "The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending" (2014) http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf

[54] Id.

[55] Refer to Appendix A to Chapter 1 of this bench guide for a list of community sexual assault programs in Washington, by county

[56] Szabo, Krisztina and Leslye E. Orloff, "The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending" (2014) http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf

On the whole, 68.3% of the violations were immigration-related.[57] The court's knowledge of using immigration status as a coercive tool can impede further attempts at victimization and abuse of immigrant survivors.

VI. VAWA Protections

In 2011, the director of ICE issued a memorandum articulating the agency's policy of exercising "all appropriate prosecutorial discretion" in removal cases involving victims and witnesses of crime.[58] This policy aimed to "minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice."[59] Those guidelines, however, are not enforceable. The guidelines do reinforce the purpose of VAWA to protect particularly vulnerable immigrants who are subjected to abuse in the U.S., providing certain types of immigration relief, as further described below:

A. VAWA Self Petitions

Federal immigration law permits United States citizens (USCs) and lawful permanent residents (LPRs) to petition for lawful status for certain family members through a "family visa petition." The Violence Against Women Act (VAWA), allows undocumented immigrants who have been victims of domestic or sexual violence by a spouse, parent, or child who is a U.S. citizen or lawful permanent resident to petition for lawful permanent resident status independently.[60] This ensures that a noncitizen survivor does not continue to remain dependent on their perpetrator for immigration status, which often the perpetrator will continue delaying, or never apply for. Once a self-petition is approved, the self petitioner will not be deported, will be qualified to work legally in the U.S., will be eligible for certain public benefits, and will be eligible to eventually adjust status (get a green card). Noncitizen victims who are eligible to file a VAWA self-petition are:[61]

1. Abused noncitizen spouses of a USC or a LPR (green card holder);

2. The non-abused spouse of a USC or LPR where the child of the noncitizen is abused;

3. Abused noncitizen children of a USC or LPR; or

4. Abused noncitizen parents of a USC.

---

[57] Id.
[58] United States Immigration and Customs Enforcement Memorandum re: Prosecutorial Discretion (June 17, 2011) https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf
[59] Id.
[60] 8 USC § 1154(a)(1) https://www.law.cornell.edu/uscode/text/8/1154
[61] Id.

To apply for a VAWA self-petition, the applicant must demonstrate that they experienced "extreme cruelty," that they lived with the abuser, that the marriage or relationship was in "good faith, and that the applicant has "good moral character."

B. T and U Visa

If an undocumented victim of a violent crime is before the court, it is very likely that he or she is eligible to apply for either a T or U visa. Both applications require a certification from a fact-finding agency, which can include law enforcement, prosecutors, and judges, stating that the victim was helpful or will be helpful in the case.[62] The Safety and Access for Immigrant Victims Act (HB 1022), which went into effect June 7, 2018, [63] imposes certain requirements on certifying agencies when responding to U and T visa certification requests from noncitizen victims of crimes. HB 1022 requires certifying agencies (defined as any state or local law enforcement agency, any state or local prosecutor, any state or local administrative judge or hearing officer, any state or local agency that has investigative jurisdiction in its respective area of expertise) to sign and complete a U visa certification when a crime victim, or their certified representative, requests one; is a victim of a criminal activity; and has been, is being, or is likely to be helpful to the detection, investigation, or prosecution of the qualifying criminal activity.[64] Specifically, HB 1022 also:

- Requires that the certifying agency processes the certification within ninety (90) days of the request;

- Requires that if the victim is in federal immigration removal proceedings that the request is processed no later than fourteen (14) days after the request is received;

- Establishes that certifying agencies shall not withdraw the certification unless the victim unreasonably refuses to provide information and assistance related to the detection, investigation, and prosecution of criminal activity;

- Requires that certifying agencies develop a language access protocol for limited English proficient and deaf and hard of hearing victims of criminal activity; and

- Provides that a current investigation, the filing of charges, and a prosecution or conviction are not required for a victim to request and obtain certification.[65]

---

[62] "U and T Visa Law Enforcement Resource Guide", Department of Homeland Security https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf

[63] Safety and Access for Immigrant Victims Act, HB 1022, signed March 15, 2018, codified at Revised Code of Washington (RCW) 7.98.030 http://apps2.leg.wa.gov/billsummary?BillNumber=1022&Year=2017&BillNumber=1022&Year=2017

[64] Safety and Access for Immigrant Victims Act, HB 1022 Sec. 3(2)

[65] Safety and Access for Immigrant Victims Act, HB 1022, Sec. 4(4)

A judge or magistrate in any forum that decides legal matters may sign a certification.[66] A conviction for the qualifying criminal activity is not required.[67] However, there is often confusion in the law enforcement community about implications of this certification. Some mistakenly believe that they are making the ultimate decision about whether the applicant receives the visa, while others impose extraneous deadlines or restrictions on types of crimes that are not found in the actual eligibility criteria.[68] In fact, the criminal activity may have occurred at any time in the past.[69] Signing the Certification is not a determination of immigration relief. It solely indicates that the noncitizen was a victim and had attempted to assist investigative authorities. Additionally, the victim must still meet all the eligibility criteria for the full application that is submitted to DHS. DHS is responsible for granting the petition, and the victim must work his or her way through the wait list before he or she actually receives his or her visa which solely grants work authorization—the law enforcement certification is by no means the last word and is only the first step in starting a long, complicated immigration application process.

1. T Visa

The T visa allows undocumented victims of human trafficking who were trafficked into the United States to apply for temporary work authorization.[70] In order to be eligible, the victim must show that he or she complied with any reasonable request from law enforcement to assist in the investigation or prosecution of human trafficking and that he or she would suffer extreme hardship upon removal to his or her home country.[71] The T visa is for victims of both labor and sex trafficking. Annually, DHS caps the number of applicants who can receive a T visa to 5,000 per year. If a T visa is granted, the applicant will have temporary work authorization for a period of 4 years.

2. U Visa

Undocumented victims of a variety of violent crimes who do not have lawful status, who do not have an intimate partner relationship with their perpetrator, or whose abusive partner is not a USC or LPR may be eligible to apply for a U visa.[72] This can help immigrants, especially those who were victims of sexual assault in conjunction with domestic violence, to secure legal status independent of their abusers. The temporary visa is available to noncitizens who have endured substantial physical or mental abuse as a result of victimization of certain crimes

[66] http://library.niwap.org/wp-content/uploads/2015/IMM-Tkit-UVisaCertification-02.03.14.pdf
[67] Id.
[68] http://www.wnyc.org/story/why-immigrant-victims-may-be-afraid-report-crime-despite-federal-program-help/; http://www.usatoday.com/story/news/nation-now/2017/02/08/u-visa-immigrant-police-relationship/97666590/
[69] http://library.niwap.org/wp-content/uploads/2015/IMM-Tkit-UVisaCertification-02.03.14.pdf
[70] "Victims of Human Trafficking: T Nonimmigrant Status", United States Citizenship and Immigration Services https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status
[71] Id.
[72] Id.

(including sexual assault) and assist with the investigation or prosecution of that crime.[73] The annual cap for U visas is 10,000, which has resulted in a wait time of three or more years.[74] Similar to the T visa, the U visa allows temporary work authorization for a period of four years.

VII. Asylum

Asylum is based on a well-founded fear of persecution or torture a noncitizen has based on their experience in their home country and due to their race, nationality, religion, political opinion or social group.[75] Asylum, though a familiar term for many, also has strict eligibility requirements that not all noncitizen survivors can meet. Besides being able to show that a noncitizen is within one of the protected classes and has experienced persecution and torture, there is a strict one-year deadline that an application must be received based on the date of entry into the U.S.[76] There is an exception to the one year filing deadline for noncitizen children under the age of 18 who are deemed "unaccompanied."[77] There are also waivers for the one year filing deadline if the noncitizen can show "changed or extraordinary circumstances."[78]Asylum eligibility is often based on victimization that occurred in the noncitizen's home country, but if the victimization has continued for the noncitizen in the U.S., such as stalking, physical, or sexual violence, it can further strengthen a victim's request for relief.

VIII. Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) provides non-citizen children living in the United States the possibility of permanent residency if the child has experienced maltreatment by one or both parents.[79] The statutory basis for SIJS is the Immigration and Nationality Act ("INA") at § 203(b)(4), which allocates a percentage of immigrant visas to individuals considered "special immigrants," and § 101(a)(27)(J) which defines Special Immigrant Juveniles.

In order to qualify, the applicant must be under 21, unmarried, and present in the United States.[80] Additionally, a state court must decide that the applicant is a dependent of the court, that it is not in the applicant's best interest to return to his or her home country, and that he or she cannot be reunited with a parent because of abuse, neglect, or abandonment.[81] Courts can assist in identifying child victims who may qualify and ensuring that the child submits a timely petition.[82] Family court judges can streamline the process for potential petitioners by including a

---

[73] Id.
[74] Id.
[75] 8 USC §§ 1158 https://www.law.cornell.edu/uscode/text/8/1158; 8 USC 1231(b) https://www.law.cornell.edu/uscode/text/8/1231
[76] 8 USC § 1158(a)(2)(B)
[77] 6 USC § 276(g); adopted by TVPRA § 235(g)
[78] Id.
[79] 8 U.S.C. § 101(a)(27)(J) https://www.law.cornell.edu/uscode/text/8/1101
[80] "Eligibility Status for SIJ", United States Department of Citizenship and Immigration Services https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij
[81] Id.
[82] http://library.niwap.org/wp-content/uploads/PED.SIJ_.1015_Brochure_M-1114B_Revised_05.19.16.pdf

reasonable factual basis in their orders on dependency or custody, parental reunification, and best interests.[83] The Administrative Office of the Courts provides greater detail about SIJS proceedings in the state courts with a sample Findings and Order through its SIJS bench book.

IX. Conclusion

Though this chapter identifies specific types of immigration visas and applications for status, it is important to recognize that immigration status is fluid. Under the Immigration and Nationality Act (INA), there are all kinds of non-citizens who may temporarily be out of status but may eventually be able to stay in the U.S. This fluid characteristic can change over the course of an immigrant's lifetime owing to personal experiences (such as employment or marriage) and shifting federal policies. An example is the deferred action for childhood arrivals (DACA) program, which has provided temporary legal status to more than a half-million undocumented youth for a renewable period of two years starting as of 2012. Many of these DACA youth may have since gained or are the path to lawful permanent residency through marriage, employment, or other visa programs. Thus, legal status should not be viewed simply as a rigid or stigmatizing status for a noncitizen.

Although the current environment is one of harsher immigration enforcement, statutory forms of relief for noncitizen victims are still in effect. Deferred action for approved VAWA self-petitioners is provided by statute and to those on the U and T Visa waitlists pursuant to regulations. VAWA confidentiality still prohibits enforcement actions against victims in shelters, courthouses, and other sensitive community locations.

[83] Id.

CHAPTER 13
Title IX and State Court Proceedings

I. Introduction

This Chapter provides a brief overview of Title IX of the Education Amendments of 1972, including its origins and interpretation, as well as other relevant Federal statutes. Also included are definitions, discussions of the different types of proceedings that may stem from an alleged sexual assault within the jurisdiction of Title IX, and examples of how these processes may interact with State Court proceedings and State Law.[1]

Title IX of the Education Amendments of 1972 is a Federal law that prohibits sex discrimination in all educational institutions, educational programs, or educational activities that receive Federal financial assistance.[2] Title IX scope includes both state and local educational agencies. The law also prohibits retaliation against any person who has participated in any complaint action under Title IX.[3] Title IX is enforced by the Office of Civil Rights (OCR) to ensure that educational programs and institutions under its jurisdiction comply with the Law.

Under Title IX, sex discrimination includes sexual harassment. This chapter will present the definition of and a brief history of the Department of Education's guidance on sexual harassment. The Department of Education's Office of Civil Rights provides broad guidance to schools and programs on how to implement policy and respond to Title IX complaints through adjudication process and remedies.[4] [5] Procedural elements of adjudication processes often vary from civil and legal proceedings, which may occur simultaneously. By understanding the intricacies of jurisdictional issues, simultaneous proceedings, and overlapping interactions, judges can better address the needs of all parties involved.

II. A Brief History and Scope of Title IX

Title IX is part of the United States Education Amendments of 1972. The substantive text of the law itself is brief; it reads: "No person in the United States shall, on the basis of sex, be

---

[1] 34 U.S.C § 106.6 (a), (b), (c) (Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[2] 20 U.S.C § 1681(a) https://www.law.cornell.edu/uscode/text/20/1681

[3] 34 U.S.C § 106 https://www.law.cornell.edu/cfr/text/34/106.6

[4] Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) https://www.govinfo.gov/content/pkg/FR-2007-01-25/pdf/E7-1066.pdf

[5] *Questions and answers on Title IX and sexual violence,* (April 29th, 2014). United States, United States Department of Education, Office of Civil Rights https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; Id. at footnote 1: "The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations."

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[6]

While Title IX most frequently enters the public discourse in relation to postsecondary institutions such as colleges and universities, the law applies to any vocational rehabilitation program, school district, charter school, for-profit school, library or museum that accepts federal funding for educational activities. Though perhaps best known for its impact on students engaged in college athletics,[7] Title IX's scope is wide; it aims to protect all students, employees, parents and guardians at many levels of educational programming— elementary, middle school, high school, undergraduate and graduate level— from discrimination based on sex.[8] Schools that do not receive federal assistance are not covered by Title IX nor are those who can demonstrate that their membership or religious practices qualify for an authorized exemption from Title IX. [9]

Sex discrimination can be expressed in many forms with a spectrum that encompasses sex disparity in admissions procedures [10] [11] to sexual harassment or sexual violence. As per the Office of Civil Rights, "sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX."[12] [13] Under Title IX, an educational institution or program is obligated to take immediate steps to prevent, address, and remedy all incidents of sex discrimination.

A. Oversight and Interpretation

1. The Office of Civil Rights (OCR)

Since Title IX's enactment in 1972, the Department of Education's Office of Civil Rights (OCR)has been charged with enforcing the federal law. The law has been officially interpreted by the OCR via a number of administrative issuances. Through the decades, the Office of Civil Rights has developed and released grievance procedure manuals[14], resource guides[15], and

---

[6] 20 U.S.C § 1681(a) https://www.law.cornell.edu/uscode/text/20/1681

[7] Steve Wulf, *Title IX: 37 Words That Changed Everything*, ESPN W, (April 29, 2012), http://www.espn.com/espnw/title-ix/article/7722632/37-words-changed-everything ("The number of women playing varsity sports in college rose from 29,972 in 1971-72 to 186,460 in 2009-10, a 622 percent increase.")

[8] *Title IX and Sex Discrimination*, U.S. Department of Education, Office of Civil Rights, (April 2015) https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

[9] 20 U.S.C. § 1681 (a (3)-(9))

[10] Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV.473, 474 (2007)

[11] Secs. 901, 902, 86 Stat. 373, 374 https://www.law.cornell.edu/cfr/text/34/106.33; 20 U.S.C § 1681, 1682

[12] Russlynn Ali, *Dear Colleague Letter*, U.S. Department of Education, (April 4, 2011) https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html

[13] Id. at "Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature."

[14] First issued in 1987, see *The Living Law*, The Margaret Fund of the NWLC, http://www.titleix.info/History/The-Living-Law/Living-Law-in-the-80s.aspx, but now included in Office of Civil Rights resource guides

[15] See e.g. U.S. Department of Education, Office of Civil Rights, *Title IX Resource Guide* (Apr. 2015)

guidance to support implementation of Title IX. The United States Government Accountability Office (GAO) explains this about guidance:

> "Guidance documents, sometimes referred to as sub-regulatory guidance, set forth policy on or interpret statutory, regulatory, or technical issues and come in a variety of formats and names. Agencies rely on guidance documents- which are not legally binding—to clarify statutes or regulatory text and to inform the public about complex policy implementation topics."[16]

A number of guidance documents have been released in the history of Title IX:

In 1997, OCR released a document entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."[17] This document is significant as the first guidance document in which the OCR explains an institution's responsibility under Title IX to address sexual assault. This document affirms that Title IX covers quid pro quo sexual harassment of a student by an employee, that which conditions a student's participation in or admission into an educational program on submitting to "unwelcome sexual advances, requests, favors, or verbal, nonverbal, or physical conduct of a sexual nature".[18] An institution is liable for quid pro quo sexual harassment whether they were aware of the incident(s) or not. The OCR explains that peer-to-peer or third-party sexual harassment holds a different standard for liability. This is when the OCR first defines the standard of "hostile environment sexual harassment."[19] A hostile environment may transpire when a sexually harassing behavior occurred that was sufficiently severe enough to limit a student's ability to benefit from or participate in an educational program. A hostile environment can be found to exist for the victim(s) as well as witnesses. For a Title IX institution to be found liable of hostile environment sexual harassment, the school must have or should have known that a hostile environment existed and then subsequently failed to take immediate and/or appropriate action.

In 2001 the OCR released revised guidance on sexual harassment in response to two Supreme Court cases that occurred after the 1997 guidance document was issued.[20] [21] The revised guidance explains by highlighting the outcomes of the Supreme Court cases, how schools may be liable for monetary damages based on the handling of sexual harassment complaints. It clarifies that OCR investigations do not have the authority to request nor redeem payment of

---

[16] *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices,* GAO-15-368: Published: Apr 16, 2015. Publicly Released: May 18, 2015

[17] ''*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*'' (62 Fed. Reg. 12034, March 13, 1997) https://www.govinfo.gov/app/details/FR-1997-03-13/97-6373

[18] Alexander, 459 F.Supp. at 4 (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); Kadiki, 892 F.Supp. at 752 (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment); see also *Karibian v. Columbia University*, 14 F.3d 773, 777-79 (2nd Cir. 1994) (Title VII case). Cited in Id. at footnote 5

[19] ''*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*'' (62 Fed. Reg. 12034 (March 13, 1997), Id. at 1, 2

[20] Office for Civil Rights, *Revised Sexual Harassment Guidance*, (66 Fed. Reg. 5512, Jan. 19, 2001) https://www.govinfo.gov/app/details/FR-2001-01-19/01-1606

[21] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

monetary damages, though private suits against an institution do possess that authority. Also revealed is the understanding that the investigation process itself may create a hostile environment for a victim. Importantly, this revision expands the quid pro quo and hostile environment harassment section to emphasize institutional obligation to prevent, address, eliminate and remedy incidents of sexual harassment.[22]

On April 4th, 2011, in response to national statistics that reported alarming rates of campus-based sexual assault,[23] as well as campus requests for additional guidance from the OCR, the Assistant Secretary of Education issued a "Dear Colleague Letter."[24] This guidance was crafted to clarify Title IX obligations while also providing examples of proactive prevention efforts and remedies. The Letter clearly defined "sexual violence" for the recipients:

> Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.[25]

The new guidance states that if schools become "reasonably knowledgeable"[26]of an incident of sexual violence, they must conduct an investigation, regardless of whether a complaint is made by the alleged victim. Schools were informed that they must adopt and publish grievance procedures that are effective and timely in addressing sexual violence. A school is obligated to take prompt steps to ensure a that a hostile environment does not exist, end the harassment if it does exist, prevent its recurrence, and explore manners by which to remedy its effects. In all of this the confidentiality and privacy concerns of the victim must be honored by the institution.

In 2016, the OCR released the "Dear Colleague Letter on Transgender Students."[27] This letter, signed by both the Department of Education and the Department of Justice, explains that gender identity is covered under Title IX. The letter states that for the purpose of Title IX, gender identity will be interpreted as "sex" in rules and regulations. The letter explains that the measure of an individual's gender identity is self-affirmation. This is understood to mean that a person protected under Title IX need not possess nor be required to show any document attesting to their gender identity if it differs from their sex assigned at birth. The letter advises that a school or educational program that requests such documentation or demands that an individual "prove"

---

[22] United States Department of Education. (2001). *Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties Title IX*. (sec V.)

[23] Christopher P. Krebs et. al., The Campus Sexual Assault Study: Final Report (Nat'l Criminal Justice Reference Serv., Oct. 2007), http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol.

[24] Russlynn Ali, (April 4, 2011), *Dear Colleague Letter: Sexual Violence*, U.S. Department of Education

[25] Id. at 1, 2

[26] Id. at 4

[27] Lhamon, C. E., & Gupta, V. (2016, May 13). *Dear Colleague Letter on Transgender Students*, U.S Department of Education and U.S Department of Justice

their gender identity may be in violation of Title IX. Detailed guidance related to implementing non-discriminatory gender identity practices are included in the letter. The OCR explains that complaints, concerns, or objections of other members of the community are not sufficient to justify any policy that would disadvantage a group of students based upon identity.[28]

On February 22, 2017, the Department of Education and the Department of Justice issued a Dear Colleague Letter[29] rescinding the "2016 Dear Colleague Letter on Transgender Students."[30] The 2017 letter describes concerns about litigation following the 2016 guidance as it was interpreted to "require access to sex-segregated facilities based on gender identity,"[31] under Title IX. The letter explains that the Departments have elected to rescind "the above-referenced guidance documents in order to further and more completely consider the legal issues involved."[32] The OCR website Laws and Guidance page, "Resources for LGBTQ Students," states:

> Every school and every school leader has a responsibility to protect all students and ensure every child is respected and can learn in an accepting environment. Title IX protects all students, including LGBTQ students, from sex discrimination. Title IX encompasses discrimination based on a student's failure to conform to stereotyped notions of masculinity and femininity. Schools should also be aware of their obligation under Title IX and the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of their students when maintaining education records.[33]

2. The Washington State Human Rights Commission

The Washington State Human Rights Commission (WSHRC) is the state agency charged with administering, applying, and enforcing the Washington State Law Against Discrimination (WLAD).[34]

---

[28] 34 C.F.R. § 106.31(b)(4); see G.G., 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981,984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). See also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action). Quoted in Lhamon, C. E., & Gupta, V. (2016, May 13). *Dear Colleague Letter on Transgender Students,* U.S Department of Education and U.S Department of Justice.

[29] Battle, S., & Wheeler II, T.E., (2017, February 22nd). *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students,* U.S Department of Education and U.S Department of Justice

[30] Lhamon, C. E., & Gupta, V. (2016, May 13). *Dear Colleague Letter on Transgender Students,* U.S Department of Education and U.S Department of Justice

[31] Battle, S., & Wheeler II, T.E., (2017, February 22nd). *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students,* U.S Department of Education and U.S Department of Justice; Id. at 1

[32] Id.

[33] "LGBTQ Resources," (11/17/2017). In *OCR, Laws & Guidance*. https://www2.ed.gov/about/offices/list/ocr/lgbt.html

Similar to the Title IX requirement that school districts and colleges appoint a Title IX coordinator/equity officer, Washington state law requires school districts to appoint at least one employee to monitor and coordinate the district's compliance with state nondiscrimination laws[35] This employee is often known as the Civil Rights Compliance Coordinator.[36] This employee may dually be the Title IX equity officer, though if these positions are held by two individuals then collaboration is expected.

The WLAD and the Washington Administrative Code[37] both explicitly prohibit sex discrimination including sexual harassment. WLAD prohibits sex discrimination in all places of public accommodation, which includes schools, while the WAC governs public schools, districts, colleges, and public charter schools. Neither of these diminish nor modify a harmed individual's right to bring action under state or federal law.[38]

Students, their families, and employees may file a discrimination complaint with the WSHRC if they believe they have experienced sex discrimination, including sexual harassment and sexual assault in a place of public accommodation. The WSHRC defines discrimination as occurring, "whenever someone is treated differently or denied equal treatment or access because of their membership in a Protected Class."[39] Both sex (including pregnancy status) and gender identity are protected classes under WLAD.[40]

Due to the differences in guidance related to Title IX protections for transgender students, as issued by the Department of Education and the Department of Justice,[41] Washington State judges may seek to study how the Washington Law Against Discrimination[42] interacts with Title IX and its capacity to protect a Washington State student from sex discrimination, including sexual harassment, on the basis of gender identity or gender expression.[43] The WLAD defines "gender identity or gender expression" as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."[44] The WLAD protects transgender individuals from discrimination based on their transgender status. Further, the Washington Administrative Code has established procedures to meet the requirements for implementing Equal Opportunity/Title

---

[34] Chapter 49.60 RCW https://apps.leg.wa.gov/RCW/default.aspx?cite=49.60
[35] Chapter 28A.640 RCW https://apps.leg.wa.gov/RCW/default.aspx?cite=28A.640; Chapter 28A.642 RCW https://apps.leg.wa.gov/rcw/default.aspx?cite=28A.642; Chapter 392-190 WAC https://apps.leg.wa.gov/WAC/default.aspx?cite=392-190
[36] Title IV of the Civil Rights Act of 1964, also prohibits public school districts from discriminating against students on the basis of sex. Sexual harassment in schools may also be found to violate Title IV of the Civil Rights Act.
[37] WAC 392-190-0555 https://app.leg.wa.gov/WAC/default.aspx?cite=392-190-0555
[38] Id. (3)
[39] Washington State, Human Rights Commission., *File a Complaint.* https://www.hum.wa.gov/discrimination-complaint
[40] Id.
[41] See footnotes 29 and 30
[42] RCW 49.60.040 https://apps.leg.wa.gov/RCW/default.aspx?cite=49.60.040
[43] WAC 162-32-010 https://apps.leg.wa.gov/wac/default.aspx?cite=162-32-010
[44] RCW 49.60.040(26)

IX policy.[45] In these procedures, gender identity and gender expression are both included as protected classes when defining harassment.[46]

3. Courts

In addition to the Office of Civil Rights and the Washington State Human Rights Commission, Courts have also played a crucial part in interpreting Title IX. The cases highlighted and summarized below are only some of the many cases that have impacted Title IX and shaped its legal interpretation.

- In 1979, the Supreme Court ruled that an implied private right of action exists to enforce Title IX;[47]

- In 1982, the Supreme Court held that Title IX regulations prohibit sex discrimination for employees as well as students;[48]

- In 1999, the Supreme Court held that Title IX allows students to sue schools for monetary damages should student-on-student sexual harassment be severe and pervasive enough that it both interferes with the victims' educational environment, and the school knew about the harassment but responded unreasonably to it;[49]

- In 2005, the Supreme Court held that Title IX allows for retaliation lawsuits when victims face adverse action for reporting sex discrimination.[50] The Opinion of the Court held that as retaliation is an intentional act, it constitutes a form of discrimination because the complainant is subjected to differential treatment. The retaliation was in violation of Title IX specifically because it was in response to a complaint of sex discrimination.[51]

- In 2008 the Washington State Court of Appeals held that under Title IX, a single act of rape committed upon a victim is sufficient to support a claim against an institution for damages based on injury done after the reported the rape;[52]

- In 2017 the Third Circuit held that a medical residency is an educational program or activity within the meaning of Title IX and that the capacity of a party to bring a Title VII claim against an institution obligated to Title IX, does not preclude the party from also bringing a claim for the same conduct under Title IX.[53]

---

[45] WAC 132E-120-385
[46] Id. at (f)(i)(A)
[47] *Cannon v. University of Chicago*, 441 U.S. 677 (1979)
[48] *North Haven Bd. Of Educ. v. Bell*, 456 *.S. 512 (1982)
[49] *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 628 (1999)
[50] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)
[51] *Jackson v. Birmingham Bd. of Educ.*, (02-1672) 544 U.S. 167 (2005) 309 F.3d 1333, reversed and remanded
[52] *SS. v. Alexander*, 148 Wn. App. 75, 113, 177 P.3d 724, 743 (2008)
[53] *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017)

III. Other Federal Statutes

Since Title IX's enactment, a number of related federal statutes have been passed that inform how courts may interpret and assess Title IX claims.

A. Clery Act

Passed in 1999, the Clery Act requires that all colleges and universities receiving federal funding document and disclose accurate and complete crime statistics of crimes committed on or near campuses as reported to Campus Security Authorities (CSA's) and Local Law Enforcement. This report is called an Annual Security Report (ASR). The Clery Act aims to ensure that campus members and members of the broader community, including potential students, staff and faculty, are informed of the campus climate in a transparent and accessible manner. K-12 schools do not fall within the scope of the Clery Act.

There are four general crime categories included in Clery reporting requirements. These are: Criminal Offenses, Hate Crimes, Arrests and Referrals for Disciplinary Action, and Violence Against Women Act (VAWA) Offenses. The Clery Act and VAWA are related to Title IX because the 2013 reauthorization of the VAWA (Campus SAVE Act), amended the Clery Act to require institutions to disclose statistics related to any incidents of domestic violence, dating violence, and stalking. These disclosures overlap with Title IX compliance requirements, though while sexual assault is also a VAWA offense it is included in the Criminal Offenses category for Clery Act reporting purposes.[54] What must be included in the report are statistics based on reports of alleged criminal incidents, it is not necessary for an investigation or finding to be made to be included in the crime statistics. Additionally, it is not the job of a Clery reporter (CSA) to investigate a report nor insist that a victim report to law enforcement if they do not wish to.

While institutions designate mandated Clery reporters (CSAs), professional and pastoral counselors are exempt from the reporting requirement. In light of this important protection of the counselor-client relationship, institutions are strongly encouraged to establish a voluntary, confidential reporting process so that crimes reported to those who are not Clery-mandated can still be counted. The Clery Act also mandates "timely reporting," in instances where crimes reported represent a serious and immediate threat to campus safety. "To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act."[55]

B. Family Education Rights and Privacy Act (FERPA)

The Family Education Rights and Privacy Act (FERPA)[56] passed in 1974 "generally forbids disclosure of information from a student's education record without the consent of the student," (or their parents if the student is a minor). While schools cannot disclose records that

[54] U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting, 2016 Edition*, Washington, D.C., 2016

[55] White House Task Force to Protect Students from Sexual Assault, *Intersection of Title IX and the Clery Act*, Department of Justice, (April 2014), https://www.justice.gov/ovw/page/file/910306/download

[56] 20 U.S.C. §1232(g); 34 C.F.R. 99

have personally identifiable information without appropriate consent, FERPA does not eliminate a school's duty to prevent, address, and remedy sex discrimination under Title IX. Likewise, FERPA also does not compromise a school's capacity to report accurate campus safety statistics required by the Clery Act, as this can be done without the inclusion of identifying information.

Concerns about how FERPA and Title IX interact have been raised in regards to a harassed student's right to information about the outcome of sexual harassment claims against another student, and in regard to the due process rights of individuals accused of sexual harassment (including teachers) to obtain information about the identity of the complainant and the nature of the allegations against them.[57] The Office of Civil Rights interprets FERPA privacy protections "as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation,"[58] because the information provided directly affects the victim. Critically, an institution's adherence to an outcome notification plan is essential or they might be found to have violated explicit statutory and regulatory mandates of not only the Clery Act and FERPA, but also OCR guidance.

The Department of Education has issued guidance indicating that when FERPA and Title IX are perceived to conflict, Title IX supersedes FERPA.[59] The Department also stated "that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment,"[60] and that "schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[61]

IV. Different Types of Proceedings and Remedies

Under Title IX, victims of sexual assault may pursue both on-campus and legal remedies. A campus grievance process is mandated under Title IX; however, a victim may also engage with a private Title IX action, a civil protection order, and/or criminal proceedings. It is not uncommon for some or all of these methods to occur simultaneously. Procedure, jurisdiction, evidentiary standards, and burdens of proof differ from venue to venue. Due to the potential for concurrent processes to be pursued at the same time, developing a Memorandum of Understanding (MOU) with all participating jurisdictions can streamline the investigation and discovery processes for all parties. Understanding the complexities and differences between sexual assault proceedings will allow judges to better address the concerns of the parties involved.

A. Grievance Procedures for Campus Sexual Assault

On-campus grievance procedures vary from school to school, and administrative

[57] United States Department of Education. (2001). *Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties Title IX.* (sec V.)
[58] Id.
[59] Id., interpreting 20 U.S.C. 1221(d), which provides that "[n]othing in [the General Education Provisions Act] shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972."
[60] Id.
[61] Id.

guidance regarding the burden of proof and evidentiary standards for such proceedings is frequently challenged in court.[62] A school may reach their Title IX investigation findings through the application of either the preponderance of the evidence standard, or a clear and convincing evidence standard. Postsecondary institutions must state which evidentiary standard will be used in any disciplinary procedure that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking in their Annual Security Report.[63] While grievance procedures may look different across institutions, every school is obligated to respond to and protect all students from sexual violence regardless of the sex of the complainant or the alleged perpetrator.

Under Title IX, a school's procedure for responding to sexual violence must include prompt, impartial, adequate, and reliable complaint investigations, including equal access to any process of the grievance procedure for complainant and alleged perpetrator.[64] The procedure must include clear and reasonable time frames for the major stages of the complaint process, as well as written notice to each party involved of the outcome of the complaint.[65]

The OCR guides schools to notify complainants of their right to file a criminal complaint or police report before the conclusion of on-campus investigations, and mandates that schools not wait for criminal or police proceedings to begin before starting their own proceedings.[66] Campus Title IX investigations focus on whether a school rule or policy has been violated. Each school's definition of sexual misconduct will differ; in some cases, the school's policy may prohibit conduct beyond what is deemed criminal in a court of law.

Title IX investigators typically do not have subpoena or search warrant powers, so the evidence available to them may be different than that available in civil or criminal court. Unlike criminal complaints, Title IX complaints are not discretionary. All Title IX complaints must be investigated and resolved. The evidentiary standard and procedures of a criminal investigation are different and the termination of a related criminal investigation does not relieve the school of their Title IX duty to resolve the campus complaint.[67] Complainants have the right to confidentiality and schools cannot require a victim participate in a grievance procedure. A school may not use a victim's absence in a Title IX complaint hearing as an excuse to terminate the hearing or investigative process.[68] Campus Title IX investigations are not to serve as substitutes for criminal proceedings or civil remedies.

Campuses have an obligation to inform students of their protections under Title IX, including that it is unlawful for the school to retaliate against an individual for participating in

---

[62] Tyler Kingkade, *Another Lawsuit Challenges Feds on Title IX Rules for Sexual Assault,* The Huffington Post, (June 17, 2016), http://www.huffingtonpost.com/entry/uva-grad-title-ix-lawsuit_us_57640874e4b015db1bc8ffc9

[63] 34 C.F.R. § 668.46(k)(1)(ii) https://www.law.cornell.edu/cfr/text/34/668.46

[64] *Id.* at (k)(3)(i)(B)(3)

[65] United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence.* (sec. C-5). http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[66] Id.

[67] United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence.* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[68] Id.

any aspect of a Title IX complaint or OCR investigation. It is also the institution's responsibility to take necessary steps to protect a student involved in a Title IX complaint or OCR investigation from retaliation that may be directed at them by other students for cooperating as a witness or for bringing forth a complaint.[69]

A school's jurisdiction is not limited by geography.[70] If a school determines that the alleged off-campus sexual misconduct occurred within the context of an education program or activity of the school, the school must investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus[71]

Campus Title IX grievance procedures may be challenged in State court; in Washington, Division III of the Court of Appeals recently ruled that schools should use a full adjudicative process, as set out by the Administrative Procedure Act, when deciding cases where a student faces expulsion or is charged with sexual misconduct that would amount to a felony under criminal law.[72] [73]

When a Title IX investigation and grievance process concludes, Title IX requires that both parties be notified of the outcomes of the investigation and, if there had been one, the appeal. It is suggested by the OCR that the notifications to each party happen concurrently and in writing. Like the hearing processes, the post-hearing appeals process also varies by school. Campus Title IX findings of sexual violence must include remedies. Such remedial actions may include but are not limited to disciplinary action against the offender (e.g. sanctions) and additional services/support to the victim (e.g. academic support, relocation of housing, campus escort, and counseling).

B. Title IX Complaints

Discrimination on the basis of sex by a recipient of Federal Department of Education funding is prohibited by Title IX of the Education Amendments of 1972. Any person can file a Title IX complaint with the OCR. The complainant need not be the victim of the alleged discrimination, they may file on behalf of, or pertaining to another person(s). If filing on behalf of another, the complainant is responsible for securing any written consent necessary for the OCR to take action.

A complainant must file the complaint within 180 days of the alleged act; however, waivers for this time restriction may be submitted. There is no requirement that an individual interact with the school or institution's grievance procedure in order to file an official complaint with OCR. A complaint can be filed online, via mail using an OCR form, or in the form of a

---

[69] United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence.* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
[70] Paula A. Barran and Jeffrey D. Jones, *Off-Campus Harassment: Identifying the Geographical Reach of Title IX Compliance* (2013)
[71] United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence.* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
[72] *Abdullatif Arishi v. Washington State University*, 196 Wn. App. 878, 385 P.3d 251 (2016)
[73] WAC 504-26-401 https://app.leg.wa.gov/WAC/default.aspx?cite=504-26-401

letter. The complaint must include the complainants name and contact information, information about the person(s) or class of persons harmed by the alleged discrimination (names not required), the name and location of the institution that committed the alleged discriminatory act(s), and a description of the alleged incident(s) in sufficient detail to enable the OCR to understand when and what occurred, and the basis for the alleged discrimination.[74] OCR will contact the complainant to acknowledge receipt and to provide information on whether they will proceed with an investigation.

OCR functions as a neutral fact-finder in the investigation of the complaint. OCR uses a number of different methods by which to seek resolution when a Title IX violation has been found to have occurred. Typically, complaints are resolved through a form of settlement with the school or district known as a Voluntary Resolution Agreement (VRA). When OCR cannot obtain voluntary compliance, it refers cases to the Department to Justice for initiation of proceedings before an administrative law judge.[75]

C. Civil Suits

Title IX allows victims a private right of action against schools that fail to adequately protect them from sexual violence on campus[76] or in an educational program. A lawsuit may be filed by the victim or the victim's parents/legal guardian if the victim is below the age of 18.[77] To prevail in a Title IX suit, the victim must show by a preponderance of the evidence that the school had actual knowledge of the sexual violence and deliberately ignored it.[78] Available civil remedies might include injunctive relief, monetary compensation and attorney's fees, and/or a consent decree/compliance plan outlining the steps that the school will take to rectify Title IX violations and ensure a discrimination-free educational environment for all students.

Title IX lacks a universal statute of limitations; therefore, the law of the state where the defendant institution is located applies. In Washington, the statute of limitations for a Title IX suit requires that a suit be filed "within two years after the cause of action shall have accrued."[79]

D. Proceedings in State Court

1. Criminal Proceedings

A criminal case focuses on the guilt of the defendant; any liability on the part of the institution is typically not a factor in evaluating a sexual assault charge. As discussed earlier in

---

[74] United States Department of Education, Office for Civil Rights, (2017, October 24), *How to File a Discrimination Complaint with The Office of Civil Rights.* https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt

[75] United States Department of Education, Office for Civil Rights, (2015, November 05), *Questions and Answers on OCRs Complaint Process.* https://www2.ed.gov/about/offices/list/ocr/qa-complaints.html

[76] *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[77] Id.

[78] For more information and several examples of the interplay between criminal courts, civil courts, and on-campus adjudication in practice, *see generally* Jon Krakauer, *Missoula: Rape and the Justice System in a College Town* (Reprint edition 2016)

[79] RCW 4.16.100 https://apps.leg.wa.gov/RCW/default.aspx?cite=4.16.100

this chapter, criminal investigations do not relieve schools of their duty to resolve Title IX complaints, and schools should notify complainants of their right to report the crime to law enforcement.[80] After a report is made to law enforcement, criminal proceedings may be ongoing during the pendency of any on-campus grievance proceedings, Title IX complaints, or lawsuits. A memorandum of understanding agreeing to cooperation among law enforcement organizations can aid concurrent proceedings.

In the discovery phase of criminal proceedings, FERPA and state statutes governing privilege of records may limit evidence to document complaints. The Department of Education has issued guidance for handling conflicts between FERPA and criminal proceedings, stating "neither FERPA nor Title IX override any federally protected due process rights."[81]

2. Civil Protection Orders

A civil protection order proceeding may also co-occur with a Title IX complaint or lawsuit, an on-campus grievance procedure, or a criminal proceeding. Issues that may arise for the court to consider include:

- Should the court order a school transfer (as authorized in Anti-harassment Protection Order and Sexual Assault Protection Order statutes) or defer to the school to implement a safety plan? Remedies in Title IX cases—including but not limited to relocation of students, changes in classes, and transportation accommodation—must be made in a way that mitigates the burden on the victim; however, what is the enforcement mechanism for any on-campus remedy?[82]

- Should an on-campus grievance procedure that does not result in disciplinary action have any impact on the civil protection order case? Should one be stayed during the pendency of the other? Similarly, does a school's decision not to implement a safety plan affect the court's decision to implement a civil protection order? Will one supersede the other?

- Judges must weigh school interests when considering how to interpret a school's implementation of a safety plan and other remedies. Institutions may protect reputational interests when handling Title IX grievances in on-campus hearings and disciplinary proceedings. The court should consider the possibility of underlying motivations when taking campus procedural outcomes into account during civil hearings.

---

[80] United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence*. http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[81] *Revised Sexual Harassment Guidance*, Department of Education Office of Civil Rights, (January 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html, interpreting 20 U.S.C. 1221(d), which provides that "[n]othing in [the General Education Provisions Act] shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972."

[82] *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, Department of Education Office of Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf

V. Conclusion

The Department of Education's efforts to address sex discrimination including sexual assault through Title IX have had mixed outcomes. Though sexual assault statistics are difficult to compare from decade to decade, there have been measured increases in reporting.[83] Accordingly, it is crucial that judges understand the interplay between Title IX and state court proceedings.

[83] Melissa Korn, *Reports of Sexual Assault Rising Sharply on College Campuses*, The Wall Street Journal, (May 4, 2016), https://www.wsj.com/articles/reports-of-sexual-assault-rising-sharply-on-college-campuses-1462375421 ("The number of forcible sex crimes reported on U.S. college and university campuses more than doubled to 5,000 between 2001 and 2013, likely due in part to more diligent reporting of such offenses by victims and by institutions.")

CHAPTER 14
Sexual Violence and Landlord-Tenant Law

I. Introduction

Sexual violence intersects with landlord-tenant law in several ways. First, a tenant-victim may seek early termination of a lease to escape abuse. This may be because the abuser lives in the residence or because the abuser knows the tenant-victim lives there. The tenant-victim may also be the victim of sexual assault or harassment by their landlord or one of their landlord's employees. In any of these circumstances, the tenant-victim no longer feels safe in the residence. Second, a landlord may want to terminate a victim's lease, notwithstanding the victim's desire to stay. Finally, landlords may seek to avoid renting to individuals known to be victims of sexual assault. Washington's residential landlord tenant act addresses each of these issues. Judicial officers in Washington State may be confronted with these issues directly within the context of unlawful detainer proceedings, or discrimination lawsuits, and they may also arise in relation to protection order cases.

II. Landlord's Failure to Enter into or Renew a Lease

A. Unlawful to Discriminate Based on Status as Sexual Assault Victim

1. Federal Law

The Violence Against Women Act (VAWA) protects sexual assault, domestic violence, and stalking victims (victims) who receive publicly assisted housing benefits. [1] It states that the Housing Authority and a victim's landlord may not deny voucher assistance because a person is a victim of violence, and that a victim's housing may not be terminated because of threats or violence committed against them.[2] A victim may only be evicted or terminated on the basis of violence against them if there is an actual threat to other tenants or employees at the property if the victim remains in their unit.[3]

The Fair Housing Act (FHA) provides broader protection, applying to all types of housing at all steps of the process. The FHA prohibits discrimination on the basis of race, color, religion, sex, familial status, disability, or national origin in the housing or rental market.[4] While a victim of sexual assault, domestic violence, or stalking is not a protected class under the FHA, denial of housing based on a person's status as a victim may be tied to a claim for sex discrimination based on either intentional discrimination or disparate impact.

---

[1] 42 U.S.C. 136 § 14043e-11 https://www.law.cornell.edu/uscode/text/42/14043e-11

[2] Id.

[3] Id.

[4] 42 U.S.C. 42 § 3604 https://www.law.cornell.edu/uscode/text/42/3604

2. Washington Law

Washington law prohibits a landlord from refusing to enter into a rental agreement based on the applicant's or a household member's status as a victim of sexual assault, domestic violence, or stalking.[5] Tenant screening service providers may not disclose an applicant's or household member's status as a victim of sexual assault, domestic violence, or stalking, or knowingly disclose that a tenant, applicant, or household member has previously terminated a rental agreement for that reason.[6] Landlords are also prohibited from failing to renew a tenant's lease based upon the applicant's or a household member's status as a victim of sexual assault, domestic violence, or stalking.[7]

B. Cause of Action for Discrimination

Housing applicants or tenants whose rental agreements have been terminated due to sexual assault, domestic violence, or stalking have a cause of action under RCW 59.18.580 if they are denied tenancy based on their status as a victim. There are no published cases in Washington addressing this statute, and while this may suggest that most of these cases are resolved outside of court, it leaves open questions about how tenants can establish causation and damages for an action under this statute.

C. Privacy Concerns and Redaction of Court Records for Victims of Sexual Assault

Although the law prohibits tenant screening services from disclosing an applicant's status as a victim of sexual assault, domestic violence, or stalking, landlords may still have access to public court records regarding an applicant's status as a defendant in an unlawful detainer action or as a person who received a civil protection order. The law provides an affirmative defense to victims of sexual assault who refuse to relinquish their tenancy in response to an eviction notice based on being a victim of sexual assault, domestic violence, or stalking. However, asserting these rights requires the tenant to participate in a judicial proceeding, which creates a public record of the dispute. Many landlords screen for tenants who have been parties to unlawful detainer actions, regardless of whether they successfully defended on the merits of the claim.

In *Indigo Real Estate Servs. v. Rousey*,[8] the court considered the implications of public court records for victims seeking future housing. In that case, although the parties agreed to the dismissal of an unlawful detainer action against a domestic violence victim because it was in violation of RCW 59.18.580(1), a public record of the action remained. The victim moved under GR 15 to replace her full name with her initials, claiming that her privacy interest in preserving her future rental opportunities outweighed the public

[5] RCW 59.18.580 https://app.leg.wa.gov/rcw/default.aspx?cite=59.18.580
[6] Id.
[7] Id.
[8] 151 Wn. App. 941, 215 P.3d 977 (2009)

interest in accessing her name through public records. The superior court denied her motion; however, the Court of Appeals reversed and remanded, holding that it could not determine whether the trial court applied the appropriate standard.[9] The court held that GR 15 authorizes courts to redact information in SCOMIS and that GR 15 and the factors established in *Seattle Times Co. v. Ishikawa*[10] provide the legal standard for evaluating a party's motion to redact his or her information.[11]

II. Early Lease Termination

A. Early Termination of Lease by Landlord

Landlords are prohibited from terminating a tenant's tenancy based on the tenant's or a household member's status as a victim of sexual assault, domestic violence, or stalking.[12]

B. Early Termination of Lease by Tenant

1. Procedures for Termination of a Rental Agreement - Generally

If a tenant has been a victim of sexual assault, domestic violence, unlawful harassment, or stalking, that tenant may have grounds to terminate the rental agreement.[13]

a. Notice Required

To trigger the protections of RCW 59.18.575, the tenant must provide a qualifying notice of termination to the landlord. Notice to the landlord has two components:

i. The tenant must notify the landlord in writing the he or she or a household member was a victim of an act that constitutes sexual assault, domestic violence, unlawful harassment or stalking.

---

[9] Id.

[10] 97 Wn. 2d 30, 640 P.2d 716 (1982); see also Chapter 9, Section XXII (pp. 9-26, 9-27) of this guide for further discussion of the *Ishikawa* factors

[11] Id., but see *Hundtofte v. Encarnacion*, 181 Wn. 2d 1, 330 P.3d 168 (2014) (denying tenants' motion to redact court records and substitute initials for their full names after parties settled unlawful detainer action). Notably, despite the differing outcomes, the Court's decision in *Hundtofte* does not necessarily contradict its holding in *Indigo*. In *Hundtofte*, the Court held that the tenants did not meet their burden of establishing that the availability of public records presented a sufficiently imminent threat to an interest or right. In *Indigo*, the court held that the tenant met her burden of establishing that the threat of housing discrimination based on her status as a victim of domestic violence or sexual assault outweighed the public right to open records. Thus, the tenant's status as a victim of domestic violence or sexual assault may elevate the tenant's interest in privacy in public records.

[12] RCW 59.18.580 https://app.leg.wa.gov/rcw/default.aspx?cite=59.18.580

[13] RCW 59.18.575 http://app.leg.wa.gov/rcw/default.aspx?cite=59.18.575

ii. The tenant or household member must also provide to the landlord either a copy of a valid order for protection or produce a report the tenant made to a qualified third party acting in his or her official capacity.

The tenant must provide this notice to the landlord within ninety days of the reported act, event, or circumstance that gave rise to the protective order or report to a qualified third party.

b. Third Party Report

A record of a report to a third party must consist of a written report signed and dated by the qualified third party.[14] A "qualified third party" means any of the following people acting in their official capacity: (a) law enforcement officers; (b) health professionals subject to the provisions of RCW 18.120; (c) employees of a court of the state; (d) licensed mental health professionals or other licensed counselors; (e) employees of crime victim/witness programs as defined in RCW 7.69.020 who are trained advocates for the program; and (f) members of the clergy as defined in RCW 26.44.020.[15]

The report must include a statement that the tenant or household member notified him or her that he or she was a victim of acts that constitute a crime of sexual assault, domestic violence, unlawful harassment, or stalking. The report must also include the time and date of the reported act or acts, the location where the acts were committed, a brief description of the act or acts, and a statement that the tenant or household member informed the qualified third party of the name of the alleged perpetrator of the acts. The qualified third party must keep a copy of the record of the report that contains the name of the alleged perpetrator of the acts.

c. Payment of Rent, Deposit Refund

Upon receipt of proper notice, the tenant may terminate the rental agreement and quit the premises without further obligation under the rental agreement.[16] The tenant is discharged from payment of rent for any period following the last day of the month of the quitting date. Other persons obligated on the lease who are not subject to acts of sexual assault, domestic violence, unlawful harassment, or stalking remain bound by their obligations on the lease.

A tenant who terminates under RCW 59.18.575 is entitled to the return of the full deposit.[17] This is true even if the lease contains provisions for forfeiture of deposit upon early termination. However, the landlord retains the right to deduct portions of the deposit based on damages beyond reasonable wear.[18]

---

[14] RCW 59.18.575(1)(b)
[15] RCW 59.18.570(5) http://app.leg.wa.gov/rcw/default.aspx?cite=59.18.570.
[16] RCW 59.18.575(1)(b)
[17] RCW 59.18.575(2)
[18] RCW 59.18.280(3) https://app.leg.wa.gov/rcw/default.aspx?cite=59.18.280.

2. Termination Based on Assaultive Acts Committed by the Landlord

a. Notice Required

When a tenant is subject to sexual assault, stalking, or unlawful harassment by a landlord the procedures for termination vary slightly. The tenant may quit the premises without providing notice to the landlord so long as notice is provided within seven days of quitting the premises.[19] Notice must include either a copy of a valid order for protection or written record of a report signed by a qualified third party. The tenant may deliver these documents by mail, fax, or personal delivery by a third party. If a tenant provides a record of a report to a qualified third party, the report must be in substantially the form specified in RCW 59.18.575(1)(b), however it does not need to include the name of the alleged perpetrator. On written request by the landlord, the third party shall provide the name of the alleged perpetrator of the act to the landlord only if the alleged perpetrator was a person meeting the definition of landlord under RCW 59.18.570. The agency must provide the name of the perpetrator to the landlord within seven days of the landlord's request.

b. Discharged from Payment of Rent, Deposit Refund

When a tenant terminates his or her rental agreement based on acts committed by the landlord, the tenant is discharged from payment of rent for any period following the date the tenant vacates the unit or the date the landlord receives proper notice, whichever is later. The tenant is entitled to a pro rata refund of any prepaid rent and return of the deposit. The landlord must provide a full and specific statement for retaining any of the deposit in accordance with 59.18.280.

c. Automatic Termination of Rental Agreement after Changing or Adding Locks

If a tenant or household member is a victim of sexual assault, stalking, or unlawful harassment by a landlord, the tenant may change or add locks to the dwelling unit at the tenant's expense.[20] If the tenant exercises this right, she or she must deliver written notice of the lock change to the landlord and a copy of a valid order for protection or a written record of a report signed by a qualified third party. This notice must be provided to the landlord within seven days of changing or adding locks.

After the tenant provides notice to the landlord that he or she has changed the locks, the tenant's rental agreement will terminate on the ninetieth day after the landlord receives notice.[21] There are two exceptions to this rule. First, the tenant may notify the landlord within sixty days of providing notice that the tenant does not wish to terminate his or her rental agreement.[22] If the alleged perpetrator of the acts has been identified by a

[19] RCW 59.18.575(3) http://app.leg.wa.gov/RCW/default.aspx?cite=59.18.575
[20] RCW 59.18.575(4)
[21] Id.
[22] Id.

qualified third party and is no longer an employee or agent of the landlord and does not reside on the property, the tenant must provide the landlord a copy of the keys to the new locks at the same time he or she provides notice of intent to continue the tenancy.[23] However, if the tenant has a valid protection order against the owner of the premises or against an employee or agent of the landlord or owner, the tenant is not required to provide a key to the new locks until the order expires or the tenant vacates.[24] A second exception to the ninety-day termination occurs when the tenant exercises his or her rights to terminate the rental agreement under RCW 59.18.575(3) within sixty days of providing notice to the landlord of the lock change.[25]

Upon receipt of notice that the tenant has changed or added locks to his or her dwelling unit under RCW 59.18.575(4), the landlord is generally barred from entering the unit. However, the landlord may enter in case of an emergency or upon written notice in compliance with RCW 59.18.150. Upon vacating the dwelling unit, the tenant must deliver the key and all copies of the key to the landlord by mail or personal delivery by a third party.

III. Changing or Adding Locks Based on Acts of Cotenants

A tenant may request that a lock be replaced or configured for a new key at the tenant's expense if that tenant has obtained a valid court order granting him or her possession of a dwelling unit to the exclusion of one or more cotenants. If the landlord receives the tenant's request and a copy of the court order, the landlord must comply with the request. The landlord may not provide copies of the new keys to the restrained tenant. A landlord who replaces a lock or configures for a new key in accordance with RCW 59.18.585 shall not be held liable for any damages directly resulting from the lock change. Changing or adding locks does not release a cotenant from obligations under the rental agreement. [26]

IV. Unlawful Detainer Actions

RCW 59.12.030(4) establishes the general rules governing unlawful detainer actions. Under this section, a tenant of real property is guilty of unlawful detainer when he or she continues in possession after failure to keep or perform a condition or covenant of the lease after notice in writing requiring performance or surrender of the property. A tenant who refuses to perform must vacate the residence within ten days of service. RCW 59.12.030(5) also includes in the definition of unlawful detainer a tenant who remains on the property after setting up or carrying on unlawful business, or creates any nuisance on the premises, and remains on the premises for more than three days' after notice to quit the premises.[27]

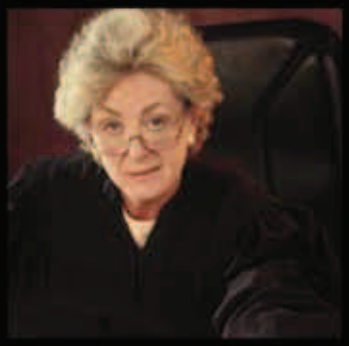
---

[23] Id.
[24] Id.
[25] Id.
[26] RCW 59.18.585 http://app.leg.wa.gov/RCW/default.aspx?cite=59.18.585
[27] RCW 59.12.030 http://app.leg.wa.gov/RCW/default.aspx?cite=59.12.030

RCW 59.18.580 provides an affirmative defense for unlawful detainer actions for tenants who can show that the landlord's action to remove the tenant is based on the tenant's status as a victim of sexual assault, domestic violence, stalking, or harassment.[28]

[28] RCW 59.18.580 http://app.leg.wa.gov/RCW/default.aspx?cite=59.18.580

JUDGES TELL:



What I Wish I Had Known **Before** I Presided in an Adult Victim Sexual Assault Case

NJEP National Judicial Education Program*

*A project of Legal Momentum in cooperation with the National Association of Women Judges

The National Judicial Education Program*

Lynn Hecht Schafran, Esq.
Director

Claudia J. Bayliff, Esq.
Project Attorney

Tracy Vris
Program Associate

Jillian Weinberger
Program Associate

Gemma Striker
Fellow

Rachel Goot
Intern

Lauren Jamiolkowski
Intern

Laurel Sisler
Intern

This project was supported by Grant No. 2008-TA-AX-K051, awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

***A project of Legal Momentum in cooperation with the National Association of Women Judges**

JUDGES TELL:
WHAT I WISH I HAD KNOWN BEFORE I PRESIDED IN AN ADULT VICTIM SEXUAL ASSAULT CASE
by the
National Judicial Education Program*

"They are crimes like no other."

HON. J. RICHARD COUZENS & HON. TRICIA SUN BIGELOW, CALIFORNIA BENCHBOOK: THE ADJUDICATION OF SEX CRIMES (2006).

"Sex offense trials are "more difficult…to preside [over] from a legal and technical standpoint, a personal and emotional viewpoint, and a public scrutiny and public pressure perspective."

Kurt M. Bumby & Marc C. Maddox, *Judges' Knowledge About Sexual Offenders, Difficulties Presiding Over Sexual Offense Cases, and Opinions on Sentencing, Treatment and Legislation*, 11 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 305 (1999).

Sexual assault cases present a unique challenge for the judiciary. They are unique in that they are beset with a myriad of deeply held stereotypes and misconceptions that can undermine the judicial process. Since 1980, the National Judicial Education Program (NJEP) has created and presented judicial education programming about adult victim sexual assault cases, focused on providing the accurate factual information judges need to conduct a fair process and suggesting procedures to minimize victim retraumatization without undermining defendants' rights. To assist new judges, NJEP canvassed judges across the country who had attended NJEP programs to ask what these judges wished they had known before they presided in an adult victim sexual assault case, or a case of co-perpetrated sexual abuse and domestic violence. These judges' twenty-five points are listed below followed by commentary and sources.

1. The widespread misconception that rape is about sexual desire – rather than power and control – colors every aspect of the justice system's response to sexual assault.

2. Sexual assault, including marital/intimate partner rape and male victim rape, is far more prevalent than the general public believes.

3. The vast majority of sexual assaults are committed by someone the victim knows.

4. Sexual assault co-perpetrated with domestic violence is a significant problem and a key factor for risk assessments of all kinds.

5. Few rapes are ever reported to law enforcement.

6. The absence of serious, observable physical injuries is not inconsistent with a sexual assault.

* A project of Legal Momentum in association with the National Association of Women Judges

7. Victims of stranger and nonstranger rape almost always sustain profound, long-lasting psychological injury.

8. Marital and intimate partner rape victims suffer particularly severe psychological injury because of the betrayal of trust by the person they should most be able to trust, and the fact that the rapes are usually repeated.

9. Victim behaviors that are commonplace during and after a rape (not physically resisting, delayed reporting, post-assault contact, etc.) appear counterintuitive to those not knowledgeable about sexual assault.

10. Expert witness testimony is often essential to enable jurors to understand a sexual assault case.

11. Traumatic memories are developed, stored and retrieved differently than non-traumatic memories.

12. It is common for a sexual assault victim to display a flat affect while testifying.

13. On occasion a sexual assault victim, female or male, will have a physical response during the attack, but this is not a sexual response in the sense of desire and mutuality.

14. The widespread belief in rampant false allegations of rape is erroneous.

15. The typical rapist is neither a brutal stranger nor a "good guy" who had a bit too much to drink one night. Rather, he knows his victims, premeditates and uses little overt violence.

16. Like stranger rapists, most nonstranger rapists are serial offenders.

17. Most sex offenders are crossover offenders, committing a variety of sex crimes as well as other interpersonal offenses against adults and children.

18. When evaluating sex offender risk, actuarial assessments are more accurate than clinical assessments.

19. Sex offender treatment is rigorous and specialized. Traditional outpatient psychotherapy is NOT appropriate for these types of offenders.

20. Because of the high incidence of child and adult sexual victimization among women and men in the population at large, sexual assault case jury pools will almost always include victims – often a surprising number – and require special treatment.

21. A thorough *voir dire* that includes questions about the rape myths relevant to the case at bar is essential to seating an impartial jury.

22. Do not let counsel equate the Rape Shield Law and Prior Bad Acts evidence.

23. Scheduling and continuance decisions in rape cases can have a significant impact on victims' recovery.

24. Be prepared for the rape case defendant who demands to appear *pro se*.

25. Always expect the unexpected – these cases can be fraught with peril for the trial judge.

COMMENTARY AND SOURCES

Below are commentary and sources for each of the 25 points on the previous pages. The sources cited below that are provided in full on the *Challenges of Adult Victim Sexual Assault Cases* Resources CD are listed in **bold.**[*]

1. The widespread misconception that rape is about sexual desire – rather than power and control – colors every aspect of the justice system's response to sexual assault.

Justice Richard Andrias, in his article *Rape Myths: A Persistent Problem in Defining and Prosecuting Rape,* provided on the Resources CD, writes, "Rape myths are false and stereotyped views about rape, rape victims and offenders. Among the most common…is that [r]ape is an expression of sexual (albeit misplaced) desire." Viewing this crime through this mistaken lens has produced deeply flawed police investigations, prosecutions, jury deliberations, media reporting and public response. Although written in 1992, Justice Andrias' article is in no way dated.

Source: **Hon. Richard T. Andrias, *Rape Myths: A Persistent Problem in Defining and Prosecuting Rape,* CRIMINAL JUSTICE, Summer 1992 at 2.**

2. Sexual assault, including marital/intimate partner rape and male victim rape, is far more prevalent than the general public believes.

According to the National Intimate Partner and Sexual Violence Survey: 2010 Summary Report, published by the National Center for Injury Prevention and Control of the Centers for Disease Control, "[n]early 1 in 5 women (18.3%) and 1 in 71 men (1.46%) in the United States have been raped at some time in their lives, including completed forced penetration, attempted forced penetration, or alcohol/drug facilitated completed penetration." "Nearly 1 in 10 women in the United States (9.4%) has been raped by an intimate partner in her lifetime, and an estimated 16.9% of women and 8.0% of men have experienced sexual violence other than rape by an intimate partner at some point in their lifetime." The incidence figure for the 12 months preceding the survey was 1.27 million women raped.

These data match those documented in prior research. According to the most highly-regarded researchers in this field – Dr. Dean Kilpatrick and his team at the Crime Victims Research and Treatment Center at the Medical University of South Carolina – 18% (20 million) of U.S. women have been raped at least once in their lifetime. Kilpatrick's study concluded that in 2006,

[*] This document is designed to be distributed along with the Resources CD for the *Challenges of Adult Victim Sexual Assault Cases: Materials for New Judges* judicial education module. The Resources CD is not just a bibliography. It contains an Annotated Table of Contents with hyperlinks to the full text of each resource. We encourage you to burn a copy of the Resources CD for yourself and to distribute copies to your colleagues. If you obtained this document without a copy of the Resources CD, we encourage you to visit the National Judicial Education Program's website www.njep.org (click on "Sexual Assault Resources") where the Annotated Table of Contents and the full content for the Resources CD can be downloaded for free. On the Sexual Assault Resources page, click on the "Resources Available for Download" link which will direct you to the registration and login page for NJEP's materials for in-person education. Registration is free and open to all.

1.4 million women over 18 were subjected to 800,000 forcible rapes, 300,000 drug-facilitated rapes, and 300,000 incapacitated rapes, meaning rapes perpetrated when the victim was unable to give consent because of voluntarily ingesting drugs or alcohol. Some of the drug-facilitated and incapacitated rapes also involved force.

Sources:
Michele C.Black, et al., National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.;

Dean Kilpatrick et al., DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY (2007) at 2, http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf;

National Judicial Education Program, Web Course/Resource: *Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases: Module 1: Defining Intimate Partner Sexual Abuse and Assessing its Prevalence*, (2008), www.njep-ipsacourse.org

Note: The National Judicial Education Program's web course/resource, *Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases* was funded by the State Justice Institute and the Office on Violence Against Women. Registration at www.njep-ipsacourse.org is free and open to all.

3. The vast majority of sexual assaults are committed by someone the victim knows.

The stereotyped image of rape involves a stranger jumping from the bushes. The reality is far different. Dr. Kilpatrick and his team found that 89% of forcible rapes and 81% of drug-facilitated and incapacitated rapes of women over 18 were perpetrated by someone known to the victim. The relationship of offender to victim was as follows:

	Forcible	**Drug Facilitated & Incapacitated Rapes**
(Ex) Husband	10%	3%
(Step) Father	11%	1%
Boyfriend	14%	13%
Other Relative	18%	4%
Friend	12%	31%
Classmate	2%	6%
Other Nonrelative	22%	21%
Stranger	11%	19%

Source: Dean Kilpatrick et al., DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY, 30 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.

4. Sexual assault co-perpetrated with domestic violence is a significant problem and a key factor for risk assessments of all kinds.

Until recently, intimate partner sexual abuse in the context of domestic violence was nearly invisible. Recent studies with battered women and battering men document a widespread problem that presages escalating violence and potential lethality. Studies of domestic violence murders, attempted murders and potentially fatal assaults document an extremely high incidence of rape along with the physical violence. Taking all risk factors into account, a batterer who subjects his partner to forced sex in addition to physical violence is twice as likely to kill her as the batterer who subjects his partner to physical violence only. Sexual assault of a mother poses an elevated risk to her children's safety and should be considered in custody/visitation determinations.

Sources: National Judicial Education Program, Web Course/Resource: *Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases Module 1: Defining Intimate Partner Sexual Abuse and Assessing its Prevalence and Module 3: Risk Assessment* (2008), www.njep-ipsacourse.org; Jacquelyn Campbell et al, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AMERICAN J. OF PUBLIC HEALTH 1089 (2003); DAVID ADAMS, WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNER, 171-172 (2007)

5. Few rapes are ever reported to law enforcement.

Dr. Kilpatrick's study found that in 2006 only 18% of forcible rape victims and 10% of drug-facilitated/incapacitated rape victims reported the crime to law enforcement.

Source: Dean Kilpatrick et al., DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY, 43 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.

6. The absence of serious, observable physical injuries is not inconsistent with a sexual assault.

Another rape myth holds that "real" rape victims sustain serious physical injuries, especially in the genital area. In fact, observable physical injuries are uncommon. According to Dr. Kilpatrick's national study:

- 70% of drug-facilitated/incapacitated and 48% of forcible rape victims reported no injuries;
- 23% of drug-facilitated/incapacitated and 34% of forcible rape victims reported minor injuries; and
- 6% of drug-facilitated/incapacitated and 16% of forcible rape victims reported serious injuries.

There are few observable serious physical injuries because most rapists use instrumental violence, which means they use only the threats and level of physical violence necessary to compel acquiescence and many victims do not physically resist, as explained in #9, below.

Source: Dean Kilpatrick et al., DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY, 31-32 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.

7. Victims of stranger and nonstranger rape almost always sustain profound, long-lasting psychological injury.

Almost every rape victim, female or male, suffers severe psychological injury and a high percentage suffers from long-term Posttraumatic Stress Disorder (PTSD). Rape victims have far higher rates of contemplated and attempted suicide than do nonvictims. Many turn to alcohol and drugs to self-medicate their trauma.

Clinical studies document that victims raped by someone they know often have a more difficult psychological recovery than victims of stranger rape. Nonstranger rape victims are less likely to report the crime, more likely to blame themselves and be blamed by others, and less likely to believe themselves deserving of sympathy or professional help. Nonstranger rape victims often have difficulty forming relationships because, according to one clinical study, they have strong doubts about their ability to discern who is truly trustworthy. They tend to isolate themselves socially.

AS a victim raped by a former boyfriend related, "Every time I walk into my bedroom I see him standing over me and telling me to take off my clothes and not to say a word. I can't get it out of my head. It's as if it's happening right now."

Sources: Dean Kilpatrick et al., DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY (2007) at 4, http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf; Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Services*, 7 AGGRESSION AND VIOLENT BEHAVIOR (2002) at 203l; **Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist,* 20 FORDHAM URBAN LAW JOURNAL 439 (1993)**; CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA 7-8 (1992); Sally Bowie, et al, *Blitz and Confidence Rape: Implications for Clinical Intervention*, 44 AM. J. PSYCHOTHERAPY 180 (1990); Case records of Veronica Reed Ryback, Director, Beth Israel Hospital Rape Crisis Intervention Center, Boston (1992-1994).

8. Marital and intimate partner rape victims suffer particularly severe psychological injury because of the betrayal of trust by the person they should most be able to trust, and the fact that the rapes are usually repeated.

There is a myth that intimate partner rape victims are not harmed because they are used to having consensual sex with the perpetrator. Extensive research with marital and intimate partner rape victims documents that this is completely untrue. The harm is profound.

A woman whose husband subjected her to physical violence and death threats in addition to rape stated:

> "He was sexually abusive, and I think of all of it that was probably the most painful, and still probably, the hardest to get past. [Y]ou know, when you're in a relationship with somebody that you love and they use sex forcefully, it's devastating…"

Sources: National Judicial Education Program, Web course/Resource: *Intimate Partner Sexual Abuse: Adjudicating the Hidden Dimension of Domestic Violence Cases: Module I: Victims and Offenders*, (2008), www.njep-ipsacourse.org; RAQUEL BERGEN, WIFE RAPE (1996); DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE (1985). Quotation drawn from U.S. Dept. of Justice, Office for Victims of Crime, VICTIM IMPACT: LISTEN AND LEARN (2005) DVD.

9. Victim behaviors that are commonplace during and after a rape appear counterintuitive to those not knowledgeable about sexual assault.

Not physically resisting:

At one time rape law required victims to prove they physically resisted the rapist. Although the law no longer requires resistance, the public, including jurors, still consider physical resistance and injuries as the hallmarks of "real" rape. This mindset seriously undermines the judicial process because it is commonplace for rape victims to not offer physical resistance.

There are several reasons why victims do not physically resist. Many victims freeze with fright, known as "tonic immobility." Some retreat into a mental state called dissociation in which it feels to them as if the rape is happening in a dream, as if they are standing outside their own bodies and observing the assault. Dissociation produces extreme passivity. Other victims make a strategic decision not to resist in order to avoid physical injury or death, or because they are protecting someone else, for example, a sleeping child in another room, or a family member the rapist has threatened to rape if the victim does not comply. Acquiescence out of fear is not consent.

Source: **David Lisak, *The Neurobiology of Trauma* reprinted in NATIONAL JUDICIAL EDUCATION PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (2000); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979 (1993) at 988.**

Delayed reporting:

Among the few victims who do report, victims of stranger rape tend to report very close to the time of assault whereas victims of nonstranger rape tend to delay. There are many reasons for this delay including:

- Not immediately recognizing the assault as rape (especially in the case of nonstranger rape)
- Fear of retaliation
- Fear of being disbelieved or blamed
- Fear of loss of privacy
- Fear of the criminal justice system
- Denial/Suppression

- Psychogenic Amnesia (i.e., loss of memory of part or all of an assault)

Below is a victim's explanation of why she delayed reporting:

> "I can't believe this happened to me. It still doesn't seem real. It's taken me a week to report it to the police – I can't remember the exact details of what happened. I guess I'm afraid that people won't believe me." *–Maria, a high school senior, raped by a classmate with whom she was studying for final exams*

Sources: Dean Kilpatrick et al., DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY, 48 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf; Crime Victims Research and Treatment Center, RAPE IN AMERICA: A REPORT TO THE NATION 5 (1992); **Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1013 (1993)**; Mary P. Koss et al., *Stranger and Acquaintance Rape*, 12 PSYCHOL. OF WOMEN QUART. 1 (1988); Quotation drawn from the case records of Veronica Reed Ryback, Director, Beth Israel Hospital Rape Crisis Intervention Center, Boston (1992-1994).

Post-Assault Contact with Attacker:

Another misconception is that "real" victims would never initiate contact with their attacker after the assault. In fact, in nonstranger cases post-assault contact between the victim and offender is not unusual. Victims who make post-assault contact with the offender are seeking a way to understand exactly what happened – "how could someone I thought was a friend turn on me?" – and as a way to take control and normalize the assault.

10. Expert witness testimony is often essential to enable jurors to understand a sexual assault case.

Jurors often have profound misconceptions about rape victims, offenders, and rape itself. Expert witness testimony may be needed to explain that, for example, absence of injury and delayed report are not inconsistent with sexual assault. Expert testimony may be essential to challenge rape myths in the courtroom and uphold fairness for the victim.

Experts qualified to testify in sexual assault cases include both those with academic credentials and those with extensive direct experience with victims, such as police officers or professionals at victim advocacy organizations.

Judges need accurate factual information about sexual assault in order to evaluate the qualifications of experts and the soundness of their proposed testimony.

Note: Experts may not testify that they believe there was a sexual assault. They may testify as to the common behaviors of victims with whom they have worked and as described in the literature.

Source**: Hon. Richard T. Andrias,** ***Rape Myths: A Persistent Problem in Defining and Prosecuting Rape,*** **CRIMINAL JUSTICE, Summer 1992 at 2.**

11. Traumatic memories are developed, stored and retrieved differently than non-traumatic memories.

Just as brain chemistry dictates the "frozen fright" response to a traumatic event described in #9 above, it also dicates the way traumatic memories are laid down and recalled. People assume that a person subjected to a traumatic event will remember every detail and be able to recount it perfectly on demand. However, because of the effects of trauma on brain chemistry, many victims forget all or parts of the assault or recount the assault differently at different times. Traumatic memories are actually developed, stored and retrieved differently than non-traumatic memories. The fact that a victim recounts the assault somewhat differently from one retelling to the next should **not** be assumed to mean she is lying.

Source: **David Lisak,** ***The Neurobiology of Trauma,*** **reprinted in NATIONAL JUDICIAL EDUCATION PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: PROSECUTING ADULT RAPE AND SEXUAL ASSAULT CASES (2000).**

12. It is not unusual for a sexual assault victim to display a flat affect while testifying.

Many people assume that a "real" rape victim will display a certain type of behavior while testifying. She must not cry too much lest she be labeled hysterical. But if she displays a flat affect, others may assume that nothing happened to her. Victims' behavior during trial varies widely according to their personality, stage of recovery, life circumstances and other factors. Some testify in a "controlled style," which means they hide their feelings and appear calm or emotionless. Others testify in an "expressive" style in which they cry, sob, smile, act restless and tense. Some victims display anger which is a good thing from a recovery point of view but juries do not like it. Flat affect often results from the fact that the victim has had to repeat her account to so many people. Some victims rein in their emotions because they do not want the perpetrator to have the satisfaction of knowing how much he has harmed them. An expert witness may be necessary to help the jury understand that flat affect is not inconsistent with a sexual assault.

Source: **Lynn Hecht Schafran,** ***Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist,*** **20 FORDHAM URBAN LAW JOURNAL 439, 450-451 (1993).**

13. On occasion a sexual assault victim, female or male, will have a physical response during the attack, but this is not a sexual response in the sense of desire and mutuality.

Victims who have a physical response during a rape are likely to have their assault perceived as being either consensual or merely "bad sex." To the contrary, this response does not in any way signify enjoyment or consent. Rather, it is an entirely physiological response. The human genital system is designed to respond to friction, no matter the source. This automatic response is true for male as well as female victims.

Sources: TIMOTHY BENNEKE, MEN WHO RAPE 133-34 (1982); Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Services*, 7 AGGRESSION AND VIOLENT BEHAVIOR 203 (2002); Roy J. Levin & Will Van Berlo, *Sexual Arousal and Orgasm in Subjects Who Experience Forced or Non-Consensual Sexual Stimulation – A Review*, 11 JOURNAL OF CLINICAL FORENSIC MEDICINE, 82-88 (2004).

14. The widespread belief in rampant false allegations of rape is erroneous.

It is widely and erroneously believed that many if not most sexual assault allegations are false. In an article in the journal *Violence Against Women*, Dr. David Lisak and his colleagues review the six most methodologically sound studies of false allegations and detail the results of their own new study of sexual assaults reported over ten years at a major northeastern university. The findings of these six studies ranged from 2.1% to 10.9% reported false allegations. The new study found that 5.9% of the cases were false allegations.

Source**: David Lisak, et al, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16, VIOLENCE AGAINST WOMEN 1318 (December 2010) and FALSE ALLEGATIONS OF RAPE: FACT SHEET (2010).**

OFFENDERS

15. The typical rapist is neither a brutal stranger nor a "good guy" who had a bit too much to drink one night. Rather, he knows his victims, premeditates, uses little overt violence and is a serial offender.

The misconceptions about rape that can undermine the judicial process include two equally false stereotypes about who typically commits rape: The Brutal Stranger and the Nice-Guy-Who-Drank-Too-Much.

Until recently it was believed that rapists were overtly violent men who attacked strangers, used weapons, and inflicted brutal injuries. As awareness of the nonstranger rapist grew, and the trivializing terms "date rape" and "acquaintance rape" became popular, the stereotype evolved of a "nice guy" who drank too much, had some miscommunication with his date, did not premeditate a rape, and would not do it again. Moreover, the myth evolved that victims of nonstranger rape were not as harmed as victims of stranger rape.

We now have extensive research with incarcerated stranger and nonstranger rapists, as well as men in the general population who freely acknowledge committing acts that meet a conservative definition of rape and attempted rape – all against women they knew. Most of these rapes were never reported. These men feel free to acknowledge their acts because they do not consider themselves rapists -- they are not violent men in ski masks.

It is clear that these undetected nonstranger rapists comprise the vast majority of rapists and they have typical characteristics. As Dr. David Lisak, an internationally known researcher in this field writes in a short paper on the Resources CD, ***Understanding the Predatory Nature of Sexual Violence****:*

> "In the course of 20 years of interviewing these undetected rapists, in both research and forensic settings, it has been possible for me to distill some of the common characteristics of the modus operandi of these sex offenders. These undetected rapists:
>
> - are extremely adept at identifying "likely" victims, and testing prospective victims' boundaries;
> - plan and premeditate their attacks, using sophisticated strategies to groom their victims for attack, and to isolate them physically;
> - use "instrumental" not gratuitous violence; they exhibit strong impulse control and use only as much violence as is needed to terrify and coerce their victims into submission;
> - use psychological weapons – power, control, manipulation, and threats – backed up by physical force, and almost never resort to weapons such as knives or guns;
> - use alcohol deliberately to render victims more vulnerable to attack, or completely unconscious;
> - are as likely to be serial and multi-faceted offenders as are incarcerated rapists."

As a consequence of these rapists' *modus operandi*, the strategies they use to groom their victims and make them vulnerable often look like ordinary social interactions. It is only by looking carefully at the way these offenders operate, for example strategically and repeatedly maneuvering their victims into an isolated situation where no one will intervene, that the pattern and premeditation become clear.

Sources: **David Lisak, *Understanding the Predatory Nature of Sexual Violence* (2008)**; David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73 (2002).

16. Like stranger rapists, most nonstranger rapists are serial offenders.

With respect to serial offending, in l987 Dr. Gene G. Abel and his colleagues published a landmark study in which 561 nonincarcerated, self-reported adult male sex offenders were given complete immunity to disclose all their offenses to researchers. The offenders who perpetrated adult victim rape disclosed an average of 7.2 completed rapes each.

Dr. David Lisak and his colleagues have conducted several studies of what he calls "the undetected rapist," described in Point 15, above. Their findings on the serial nature of nonstranger rape perpetration are captured in the following paragraph:

> "In a study of 1,882 university men conducted in the Boston area, 120 rapists were identified. These 120 undetected rapists were responsible for 483 rapes. Of the 120 rapists, 44 had committed a single rape, while 76 (63% of them) were serial rapists who accounted for 439 of the 483 rapes."

The researchers calculated the percentage of rapes documented in this study and concluded that 91% were committed by serial rapists.

The Abel and Lisak findings were most recently corroborated in a study of newly enlisted male Navy personnel. The researchers surveyed 1,146 men. Thirteen percent (13%) had committed a completed or attempted rape since the age of 14. Of the rapes documented in this study, 95% were committed by serial rapists.

Sources: Gene Abel, et al, *Self-reported Sex Crimes of Non-Incarcerated Paraphiliacs*, 2 JOURNAL OF INTERPERSONAL VIOLENCE 3 (1987); **David Lisak, *Understanding the Predatory Nature of Sexual Violence* (2008)**; David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73 (2002); Stephanie K. McWhorter, et al, *Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel*, 24 VIOLENCE AND VICTIMS 2004 (2009).

17. Most sex offenders are crossover offenders, committing a variety of sex crimes as well as other interpersonal offenses against adults and children.

"Crossover" denotes sexual offending or interests outside the parameters of the offense for which an offender was arrested or came to the attention of authorities or researchers. It was once thought that sex offenders specialized in sex crimes only, and within that category, committed only one type of sex crime, e.g., voyeurs were thought not to commit rape. It is now known that sex offenders tend to commit a spectrum of sex crimes and other interpersonal offenses against related and unrelated adults and children.

The Abel study cited in Point 16 above that gave immunity for full disclosure to 561 nonincarcirated adult males, found a high percentage of crossover sexual offenses:

> "Specifically, 66% of intrafamilial child molesters concurrently sexually assaulted children outside the home. Twenty-three percent of child molesters who were convicted of sexually molesting female children also sexually molested male children, and 63% of child molesters who sexually molested males also admitted to sexually molesting females. Forty percent of child molesters admitted to sexually assaulting an adult, and 50% of rapists admitted to molesting a child."

The Lisak/Miller study cited in Points 15 and 16 above found that:

> "These 76 serial rapists [who had committed 439 rapes] had also committed more than 1,000 other crimes of violence, from nonpenetrating acts of sexual assault, to physical and sexual abuse of children, to battery of domestic partners."

With respect to sex offenders' battery of domestic partners, as discussed in Point 4 above, there is a high incidence of sexual abuse and assault in domestic violence cases, with important implications for risk assessment.

Many of the undetected crimes committed by sex offenders have been discovered through polygraph testing, the most effective way to obtain admissions respecting repeat and crossover sex offenses. In one study of crossover offending utilizing polygraphs "On average, offenders revealed three additional categories of sexual assault types that had not been identified in official records." Polygraph testing reveals that sex offenders are most often repeat sexual offenders who have a variety of prior sexual offenses that may or may not have been reported. These studies demonstrate that the more previous sex offenses someone has committed, the more likely the person will commit another offense in the future.

The findings about crossover offending are extremely important in considering the risk to children of a sex offending parent. It cannot be assumed that offenders arrested for incest are not a danger to the community, or that offenders arrested for the rape of adult victims or the molestation of unrelated children are not a danger to their own children.

Sources: Gene Abel, et al, *Self-Reported Sex Crimes of Non-Incarcerated Paraphiliacs*, 2 JOURNAL OF INTERPERSONAL VIOLENCE 3, 14 (1987); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73 (2002); National Judicial Education Program, Web Course/Resource: *Intimate Partner Sexual Abuse: Adjudicating the Hidden Dimension of Domestic Violence Cases*, www. njep-ipsacourse.org; Peggy Heil, Sean Ahlmeyer & Dominique Simons, *Crossover Sexual Offenses*, 15 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 5 (2003)*;* Daniel T. Wilcox & Daniel E. Sosnowski, *Polygraph examination of British sexual offenders: A pilot study on sexual history disclosure testing*; 11 JOURNAL OF SOCIAL AGGRESSION 3 (2005).

18. When evaluating sex offender risk, actuarial assessments are more accurate than clinical assessments.

It was once believed that the most effective way to assess sex offenders' risk was to ask the clinicians working with them in sex offender treatment. We now know this belief to be erroneous. Much more accurate are actuarial assessments that evaluate offenders based on objective factors independent of clinical judgment. These factors include the offender's age when the present offense was committed, the sex and age of the victim, and the number, sex and age of prior victims. These data are placed on a grid and scored by specialists trained to utilize these instruments.

A difficulty with all current assessment instruments is that they are normed on offenders who were reported and adjudicated. Given that only a small fraction of rapes are reported and adjudicated, it is likely that when a previously undetected nonstranger rapist is adjudicated and assessed, he will appear less dangerous on conventional instruments because the static factors, such as previous convictions, do not apply as well to this population.

For a detailed discussion of actuarial instruments now in use, their limitations and suggestions for how to evaluate an evaluator's report, see **David Lisak, *A Judge's Guide to Evaluation Instruments* (2010)**, on the Resources CD.

19. Sex offender treatment is rigorous and specialized. Traditional outpatient psychotherapy is NOT appropriate for these types of offenders.

It is essential that judges imposing treatment as a sentencing condition require specialized, rigorous sex offender treatment. Optimally, this treatment should be coupled with incarceration. Traditional, individual, insight-oriented counseling is never appropriate for sex offenders. This type of therapy aims to make individuals feel good about themselves. The therapist is used to dealing with people who want to change and may be unaccustomed to the capacity for total denial and manipulation that characterizes sex offenders. The result is that sex offenders treated with traditional psychotherapy by nonspecialists emerge even more rooted in denial and other thinking errors than when they began. Nonspecialized treatment does not create victim empathy or teach the offender to understand his own cycle of deviance and how to stop himself when he begins to relapse into that pattern.

Psychopaths should never be considered for any kind of treatment as it only makes them more skilled at offending.

The effectiveness of specialized sex offender treatment is a subject of much debate. Current research indicates that it may reduce recidivism in the motivated offender. However, since very few rapes are reported, this data must always be questioned.

Source: Kurt Bumby, Center for Sex Offender Management, UNDERSTANDING TREATMENT FOR ADULTS AND JUVENILES WHO HAVE COMMITTED SEX OFFENSES (2006), available at http://www.csom.org/pubs/treatment_brief.pdf

JURIES

20. Because of the high incidence of child and adult sexual victimization among women and men in the population at large, sexual assault case jury pools will almost always include victims – often a surprising number – and require special treatment.

- Call for a larger jury pool than usual to allow for high attrition and challenges for cause**.** Individuals who have been sexually victimized, or whose family members or close friends have been victimized, often feel they cannot be impartial in a sexual assault case. Even victims willing to serve are usually presumed by counsel to be incapable of impartiality and are challenged for cause.
- Use confidential questionnaires and private interviews in chambers to identify victims and discuss their possible service with maximum privacy and minimum retraumatization. [**Note:** Observe your jurisdiction's practice for protecting juror confidentiality. Some jurisdictions use juror numbers and some jurisdictions seal the questionnaires entirely.]
- Be able to direct individuals who disclose victimization to counseling services. Some of those who disclose have never told anyone before and the disclosure is traumatizing. Even survivors who have disclosed in the past may be deeply upset by confronting this again.
- Be sure potential jurors understand that a sexual victimization counts for purposes of jury selection even if it was never reported. A Wisconsin sexual assault case had to be retried because during deliberations a juror said she believed the victim because something similar

happened to her. When asked to explain why she did not disclose this during *voir dire*, she said it was never reported and so she thought it did not count as a crime.

- Jury questionnaires should also be crafted to identify those who have perpetrated or been accused of perpetrating sexual assault.

On the Resources CD there are two examples of jury questionnaires:

- **Hon. William Hughes, *Jury Questionnaire,* NATIONAL JUDICIAL EDUCATION PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT (2005).**

- **Hon. Richard J. Couzens & Hon. Tricia Bigelow, *Jury Questionnaire,* CALIFORNIA BENCHBOOK: THE ADJUDICATION OF SEX CRIMES 122-124 (2006).**

When Judge Hughes began using a questionnaire the number of potential jurors self-identifying as victims of child or adult sexual violence rose by 20.3%.

21. A thorough *voir dire* that includes questions about the rape myths relevant to the case at bar is essential to seating an impartial jury.

> "The more participants endorsed rape myths, the less credible…and more blameworthy…they found the [victim]."

Source: Sarah Ben-David and Ofra Schneider. "Rape Perceptions, Gender Roles Attitudes, and Victim-Perpetrator Acquaintance." 53 SEX ROLES 385, 399 (Sept. 2005).

Seating an impartial jury in a sexual assault case is a challenge. Large-scale research with rape case jurors has repeatedly shown that they often ignore the facts and law and decide cases based on their beliefs about how "real" victims should behave, their assessments of victims' lifestyle and character and their own psychological needs to deny their own vulnerability or past offending. A study involving 90 minute interviews with 331 individual rape case jurors found they were less likely to believe in the defendant's guilt when the victim knew the defendant, reportedly drank or used drugs, or engaged in sex outside marriage. Many jurors define rape in terms of what they perceive as the victim's assumption of risk. For example, a Colorado juror speaking at a judicial education program about sexual assault in his state explained the "not guilty" verdict in the case on which he sat this way:

> "The fact that she testified that she was a lesbian who did not have sex with men was not relevant. She willingly consented to go to their apartment. Having placed herself in this situation, she [sic] was guilty of something." And, "When she got in their truck she gave consent."

Thanks to the "CSI" effect, jurors expect DNA evidence even in cases where the victim and defendant were closely acquainted or married. Misconceptions regarding victim behavior during trial frequently come into play. Another Colorado rape case juror said of the victim, "She did not show the emotion a victim should show." With respect to the public from which rape case

jurors are drawn, opinion polls and research have documented adherence to rape myths, "assumption of risk," and ideas such as "A man has the right to have sexual intercourse against the women's consent if they are married."

To try to identify potential jurors who cannot listen and deliberate impartially, some judges permit the prosecution and defense an expanded *voir dire*. Some judges, if they believe key questions are not being asked, will direct counsel to ask them or will pose them themselves. Arizona Judge Ron Reinstein observes:

> "Note that many potential jurors will be reluctant to talk about their sexual history or views as it may pertain to sexual assault, such as the victim 'invited' the assault, that the word 'no' invites the perpetrator to be more aggressive because the victim 'really wants it' (even where violence is used—this has been seen in both male and female jurors)—So it's often useful to use a short questionnaire dealing with accusations of uninvited sexual contact and the like—follow-up questions based on their answers should be done in chambers when you sense a potential juror may have issues one way or another."

Sources**: Hon. Richard T. Andrias, *Rape Myths: A Persistent Problem in Defining and Prosecuting Rape*, CRIMINAL JUSTICE, Summer 1992 at 2**; Gary La Free, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (l989), at 217-218, 222; Harry Kalven & Hans Zeisel, THE AMERICAN JURY 254 (1966); National Judicial Education Program, Understanding Sexual Violence Program for Colorado Judges (1997).

EVIDENCE:

22. Do not let counsel equate the Rape Shield Law and Prior Bad Acts evidence.
In cases where the defense wants evidence admitted under an exception to the Rape Shield Law and the prosecution wants to admit Prior Bad Acts evidence, defense attorneys often assert that these rules of evidence are related, arguing that if the Rape Shield Law evidence does not come in, the Prior Bad Acts evidence may not be introduced. Not so. These evidentiary rules are independent of one another.

Rape Shield Laws:

Rape shield laws bar questioning victims about their prior, consensual sexual history apart from specified exceptions. While these laws vary from state to state, all allow judges discretion to admit aspects of a complainant's sexual history, such as evidence that someone other than the defendant is the source of an injury. The defendant must make an offer of proof demonstrating why this evidence is relevant and necessary to a fair trial and the prosecution must have the opportunity to challenge that claim.

Rape Shield Laws came into existence nationwide beginning in the l970s because evidence that should have been excluded as irrelevant was routinely admitted, turning rape trials into a character assassination for the victims, making convictions all but impossible and persuading other victims that it would be folly to report and engage with the criminal justice system. In most rape cases the issue is whether the complainant consented to sex with a specific person on a specific occasion. Who she had consensual sex with on prior occasions does not answer that

question. In the past, courts assumed that a woman who had said "yes" to any man other than her husband after their marriage would say "yes" to every man at any time, thus it was appropriate to cross-examine an alleged rape victim about her entire sexual history. This 1955 holding by the Georgia Supreme Court was typical.

> "In prosecutions for rape, the defense may introduce evidence tending to prove the previous unchaste character of the female; this evidence is admissible for two purposes: one, to discredit her as a witness, and the other to disprove the charge that the intercourse was forcible and against her consent." *Frady v. State*, 90 S.E. 2d 664, 665 (Ga. 1955).

Rape shield laws were enacted to provide sex offense victims with heightened protection against surprise, harassment and unnecessary invasions of privacy, and to encourage victims to participate in legal proceedings to hold offenders accountable.

Prior Bad Acts Evidence:

Defendants must be convicted on the evidence respecting the particular crime with which they are charged, not on their propensity to commit this type of crime as evidenced by their criminal history. Thus, the circumstances under which defendants' "prior bad acts" may be admitted are limited.

Despite law reform efforts, rape complainants are still viewed with unique skepticism, making it difficult to secure a conviction on the testimony of one victim alone. Recognizing that, Congress, as part of the 1994 Violence Against Women Act, amended the Federal Rules of Evidence to provide that, "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." (FRE 413). Many states have followed these changes in the Federal Rules and become more open to admitting evidence of prior sexual assaults, whether or not the victim reported to the police, if the judge is satisfied that the claims are credible and admitting the evidence would be "more probative than prejudicial." If a state does not have a rule of evidence analogous to FRE 413, prior bad acts evidence may be admitted to show common scheme or plan and to refute defenses of consent or lack of intent. In deciding whether to admit Prior Bad Acts evidence it is essential to make clear in the record that this evidence is being admitted for a permissible purpose, not to allow the jury to make the prohibited inference that because the defendant did it before, he did it this time, too.

Careful Analysis is Necessary with Respect to Admitting Both Rape Shield Law Evidence and Prior Bad Acts Evidence:

In determining whether to admit either Rape Shield Law or Prior Bad Acts evidence, careful analysis of the offer of proof is necessary. For example, if the defense claims that someone other than the defendant is the source of injury, consider the age of the victim, the nature of the injury, and when the defense claims that the injury for which the defendant is blamed actually happened. Both consensual and non-consensual intercourse can result in small, internal genital tears, but in

a young woman tears of that kind heal quickly. Is the defense wanting to admit evidence that she had intercourse with her boyfriend the morning of the alleged assault or two weeks before?

With respect to Prior Bad Acts, note the commentary from Dr. David Lisak in #15, above. Nonstranger rapists' common scheme and plan often look like ordinary social activity, and it is only by taking the proffered prior bad acts apart bit by bit and seeing the *modus operandi* repeated that the premeditation and intent emerge. For example, a fraternity party at which a woman drinks too much and ends up in bed with someone seems, on the face of it, unexceptional. But when investigation reveals that each week the defendant joins his fraternity brothers in scouting the campus for naïve young women to invite to their weekend parties, and that at these parties the men get these women drunk as fast as possible with sweet-tasting punch and then take them to designated rooms stripped of all identifiable furnishings, the intent, motive and/or common scheme and plan emerge.

Sources: Harriet Galvin, *Shielding rape victims in state and federal courts: a proposal for the second decade,* 70 MINN. L. REV. 763 (1986); National Judicial Education Program, *Understanding Sexual Violence: The Judge's Role in Stranger and Nonstranger Rape and Sexual Assault Cases,* DVD, Prior Bad Acts Unit, available at http://www.legalmomentum.org/our-work/njep/njep-sexual-assault.html.

PROCEDURES:

23. Scheduling and continuance decisions in rape cases can have a significant impact on victims' recovery.

As the Illinois Task Force on Gender Bias in the Courts observed, "[c]ontact with the criminal justice system acts as a reminder of the sexual assault during the recovery process and reliving the event can cause emotional turmoil for the victim. The protracted [trial] process and repeated continuances are a primary reason why victims fail to follow through." The longer a trial date is postponed, the greater the emotional distress for the victim. Testifying in court reawakens painful feelings associated with the trauma and increases symptoms of Posttraumatic Stress Disorder. Delays persuade the victim that she is better off dropping out of the justice system. A rape victim whipsawed by the constant scheduling and rescheduling of her case said,

> "I finally went crazy…I called the victim witness office out of the D.A's office and I said, 'I'm not coming in. You can send a police car for me. I'm not coming in….I was under control for the attack, but the system made me crazy."

Sources: 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS 120 (1990); Case records of Veronica Reed Ryback, Director, Beth Israel Hospital Rape Crisis Intervention Center, Boston (1992-1994).

24. Be prepared for the rape case defendant who demands to appear *pro se*.

Some rape case defendants choose to represent themselves in an attempt to cross-examine and intimidate the victim. To contain this but retain balance, set strict guidelines for both sides, such

as requiring that all questions be asked from a counsel table or a podium rather than allowing counsel for either side to have the run of the courtroom. Advise the defendant in advance that he will not be allowed to have his standby attorney take over the case after the cross-examination, which *pro se* defendants in these cases typically try to do. British courts have a rule prohibiting *pro se* counsel in a sexual assault case from cross-examining the victim. At least one U.S. state legislator has submitted a bill to establish a similar rule in his jurisdiction. Consider permitting the defendant to submit questions to the standby counsel to pose, thereby preventing a direct encounter between the defendant and the victim.

25. Always expect the unexpected – these cases can be fraught with peril for the trial judge.

- A judge needs to be clearly in control of the potential for misconduct by anyone and everyone.
- If court personnel are new to sexual assault cases, take time to prepare them and remind them of the need for impartiality and good conduct, e.g., watch your body language.
- Don't assume jurors have a grasp of the terminology used (e.g., cunnilingus, fellatio).
- Let the attorneys know their boundaries when asking permission to approach a witness.
- Judge and court staff should closely monitor the defendant, his friends and family for any hostile or intimidating looks or gestures.
- Some jurors will have a difficult time hearing the details of a sensitive case. The court should offer jurors resources for post-verdict counseling.
- At sentencing, be prepared for a victim too overcome to express herself. Allow a victim advocate, friend or relative to read a written victim impact statement while standing next to the victim.

SUGGESTIONS FROM JUDGES NATIONWIDE:

1. Among the items on the Resources CD is **NATIONAL JUDICIAL EDUCATION PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT - *Participating Judge's Recommendations.*** These suggestions were developed by judges from more than twenty-five states who attended National Judicial Education Program's two-day *Understanding Sexual Violence* program. During these programs, judges were asked how they would incorporate the material they explored with the expert faculty into their role as judges in the pre-trial, trial and sentencing phases of an adult victim sexual assault trial, and as leaders in the criminal justice system and the community. Their responses are summarized in this *Recommendations* document. See also on the Resources CD, **Lynn Hecht Schafran, *Writing and Reading about Rape: A Primer*, 66 ST. JOHN'S LAW REVIEW 979, 1026 *et seq* (1993).**

The Language of Sexual Violence[1]

Judges' words matter – a great deal. Witnesses, attorneys, and jurors pay close attention to what judges say and how they say it. Judges need to remain neutral and impartial in their demeanor and in their language. They are also required to strictly adhere to the presumption of innocence in all criminal cases. Because they are so laden with myths and stereotypes, sexual assault cases present a unique challenge to judges. Much of the language commonly used in talking and writing about sexual violence is neither neutral nor impartial.

The language of sexual violence is challenging for everyone, but it is particularly important for those working within the legal system to get it right. "Written judgments not only express current law, but also shape future law and society itself."[2] Language is especially important in the legal system. "[T]he language in which events are described becomes the official version of those events, in the courtroom and beyond."[3] Legal language "represents a 'public discourse (and not uncommunicated thoughts, attitudes, or motivations) that has an impact and is acted upon.'"[4] For instance, in a large-scale study of 230 media articles discussing domestic violence homicides or attempted homicides, one in four articles relied on court records and one in five cited law enforcement sources.[5]

This chapter discusses the language of sexual violence and how the language we use often fails to reflect the seriousness or gravity of these crimes. Topics include: (1) the use of the language of consensual sex to describe assaultive acts; (2) the use of victim blaming language; (3) linguistic avoidance, or "the invisible perpetrator;" (4) other common examples of minimizing language; (5) language restrictions in the courtroom (word bans); and (6) recommendations for judges to help them use language that more accurately reflects the realities of these crimes, while still maintaining their neutrality and impartiality and respecting the presumption of innocence. The goal is to provide judges with the social science research on how the language we use helps shape our response to sexual violence.

For many years, linguists and others have studied the importance of language and the word pictures created as a result of our choice of words. Their conclusion: "Language can never be neutral; it creates versions of reality. To describe an event is inevitably to characterize that event."[6] For example, consider the term "comfort women." That term is commonly used to describe women and girls "recruited" to "work in brothels" by the Japanese military during World War II. The term implies affectionate care and consolation.[7] In fact, soldiers kidnapped

---

[1] Written by Claudia J. Bayliff, Attorney at Law, Falls Church, Virginia, an attorney and educator with more than 29 years of experience working on issues related to sexual violence.

[2] Clare MacMartin, (Un)reasonable Doubt? The Invocation of Children's Consent in Sexual Abuse Trial Judgments, 13 Discourse & Soc'y 9, 11 (2002).

[3] Janet Bavelas & Linda Coates, Is It Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments, 10 J. Soc. Distress & Homeless 29, 30 (2001).

[4] MacMartin, (Un)Reasonable, supra, at 11.

[5] Judge Chuck Weller, Needed: A Guide for Media Coverage of Domestic Violence (2009) (unpublished M.J.S. thesis, University of Nevada) (on file with the University of Nevada, Reno Library).

[6] Bavelas & Coates, Is it Sex or Assault?, supra, at 29.

[7] *Id*.

these women and girls from their homes and serially raped them for years. Nearly 200,000 women and girls were forced to live in "comfort stations" throughout East Asia from 1932 through the end of the war. The euphemism "comfort women" conveys none of the brutality the soldiers inflicted on these women and girls. The women's violent ordeal is "silenced and hidden."[8]

Using the Language of Consensual Sex to Describe Assaultive Acts: Much of the language used to describe sexual violence ends up ascribing blame to the victims and minimizing the perpetrator's responsibility. One common practice is to describe violent sexual assaults using the language of consensual sex. In other words, we are more likely to describe sexual assaults as sex, rather than as assaults. Describing assaultive behavior using the terms usually used for pleasurable or affectionate acts minimizes and hides the intrinsic violence of the assault. It also makes it harder to visualize the acts as unwanted violations. By not describing the violence, this language also tends to normalize the acts, allowing society to rationalize, justify, and even excuse sexual aggression. The victim's fear, objectification, and pain are completely hidden.[9]

Language of Consent: Consider the difference between the following two sentences: He had sex with her" versus "he forcefully penetrated her vagina with his penis." The first sentence paints the incident as a mutual, consensual act, negating the factors of power and violence. The second sentence focuses on the offender's unilateral and forceful actions against another person.

Researchers Janet Bavelas and Linda Coates did an extensive analysis of the language Canadian judges used in their written trial judgments in sexual offense cases. The researchers looked at seven years of written judgments. The fact that Canadian judges write formal trial judgments at the conclusion of their trials makes it easier for researchers to study the judges' language. Bavelas and Coates found that the judges often used eroticized language that created an intimate and non-threatening scene.[10] Examples of the judges' language include: "He fondled her breasts," "he kissed her holding her tight," "they had sex on the bed," "oral sex," and "the first episode of intercourse."[11] The judges' most frequent descriptions used erotic or affectionate language. These terms "ignore the difference between sexual activity and the crime of sexual assault."[12] The judges were much less likely to use terms describing the acts as violent.[13]

Language of Mutuality: The Canadian judges also used statements that implied consent, without the context of either physical or emotional force. In addition, the judges often used language that suggested the acts were mutual, rather than a forceful act perpetrated by one individual against another. The researchers found phrases such as "they had intercourse" and "she performed oral sex" in the trial judgments.[14] The word "perform" is particularly

---

[8] Bavelas & Coates, Is It Sex or Assault?, supra, at 29-30.
[9] Bavelas & Coates, Is It Sex or Assault?, supra, at 38.
[10] Other examples of case law in which appellate judges use the language of consensual sex to describe the acts of convicted defendants can be found at the Judicial Language Project website, at https://student.nesl.edu/centers/clsr_jlp.cfm.
[11] Bavelas & Coates, Is It Sex or Assault?, supra, at 33-34.
[12] Bavelas & Coates, Is It Sex or Assault?, supra, at 31.
[13] Bavelas & Coates, Is It Sex or Assault?, supra, at 35.
[14] Bavelas & Coates, Is It Sex or Assault?, supra, at 31.

problematic because it implies the victim was the actor, rather than the recipient of someone else's violent act.

Bavelas and Coates described the problem with using these types of terms as follows:

> [O]nly when both individuals agree to participate in sexual activity can their actions be accurately called, for example, *intercourse*. In contrast, if one of them has put a body part inside the body of the other without his or her consent, then the action is more accurately described as an *assault* or *forced penetration*. It is a unilateral rather than mutual activity even though the same parts of the body and somewhat similar actions are involved. Similarly, consider the difference between describing certain acts as *touching* or *rubbing* versus describing them as *fondling* or *caressing*. What has been added in the latter terms is a characterization of the acts as positive, consensual, mutually pleasurable, erotic, and even affectionate. The second set of terms ignores the difference between sexual activity and the crime of sexual assault.[15]

Using the language of consensual sex to describe assaultive acts "does not just euphemize; it actively misleads and misdirects. Rather than naming or describing the violence, sexual language may even normalize the acts, bringing them discursively into the range of everyday human behavior."[16] One particularly troubling aspect of the analysis of the Canadian judges' language is that there was no statistically significant difference in the way the judges described acts in cases in which the defendant was acquitted or convicted. Judges were equally likely to use the language of consensual sex to describe acts that were legally found to be assaults as they were when describing acts that were deemed consensual and not criminal.[17] Even in cases of sexual assault on a child, where there is no possibility of consent, judges were just as likely to use eroticized language. As a matter of fact, familial assaults on children were twice as likely to be described using the language of consensual sex as assaults on adult women by former husbands or boyfriends.[18]

With the widespread availability of DNA evidence, consent is now the most likely defense in a sexual assault case. Defense attorneys often categorize the incident as consensual, creating images of an affectionate or romantic act. Once a category is established in the courtroom, others, including judges, are also likely to adopt it, which is a phenomenon called "semantic contagion."[19] However, if the same language is used to describe both consensual and nonconsensual acts, "then a crucial distinction in the law has been obscured."[20] Therefore, judges must be careful not to just adopt the language of consensual sex to describe assaultive acts.

---

[15] *Id*. (emphasis in original).
[16] Bavelas & Coates, Is It Sex or Assault?, supra, at 38.
[17] Bavelas & Coates, Is It Sex or Assault?, supra, at 35.
[18] Bavelas & Coates, Is It Sex or Assault?, supra, at 38.
[19] Andrew Taslitz, Rape and the Culture of the Courtroom 85 (1999).
[20] Bavelas & Coates, Is It Sex or Assault?, supra, at 31.

Presumption of Innocence: On the other hand, judges must be also mindful of the presumption of innocence, one of the cornerstones of our criminal jurisprudence. The context is particularly important. For instance, if a judge is taking a plea or sentencing a defendant, the judge should avoid using the language of consensual sex to describe the defendant's actions. In those instances, the judge should make clear that the defendant was solely responsible for his or her actions. Prior to conviction, judges must be careful to use neutral and impartial language. They must take care not to just automatically use the language of consensual sex, which is neither neutral nor impartial.

Victim Blaming Language: In another fascinating study of Canadian judges' sentencing decisions, researchers analyzed trial court judges' sentencing language over a seven-year period to determine how the judges apportioned responsibility for crimes of sexual violence. The researchers focused on how the judges characterized the defendants and how the judges wrote their accounts of the crimes. What the researchers found is that "judges typically mitigated offenders' responsibility for sexualized violence by portraying them as compelled by forces beyond their control (e.g., alcohol, sexual urges, pathology, emotion, stressful experiences, or past experiences)."[21] The judges often relied on psychological explanations or causal attributions that resulted in them minimizing the perpetrators' responsibility and reformulating deliberate acts of violence into non-deliberate and non-violent acts.[22]

The researchers also concluded that, in sentencing sex offenders, judges often blamed or pathologized victims.[23] As part of the study, the researchers also reproduced one entire sentencing judgment and reviewed it line-by-line, dissecting the language used in each part of the opinion. In that case, an elementary school teacher pleaded guilty to two counts of sexual assault against two of his students (who were both seven-year-old girls).[24] The victims were portrayed as "the catalysts who excited the sexual desire of a good man who [was] among the 'best' of teachers."[25] In the sentencing judgment, the judge reformulated the child victims into perpetrators who were responsible for the acts committed against them, while describing the perpetrator – an adult male teacher – as a victim who was not responsible for his actions.[26]

Most of the sexual assault cases in which judges end up on the front page of the newspaper or on the receiving end of negative media attention involve these types of victim blaming statements, often from sentencing hearings. For example, a Montana judge was publicly reprimanded and suspended for inappropriate comments he made in sentencing a former high school teacher to 30 days in jail for raping a 14-year-old child.[27] The teacher pled guilty and was being sentenced for violating the plea. The child committed suicide prior to the hearing. During the sentencing, the judge referred to the victim as "older than her chronological age" and

---

[21] Linda Coates & Allan Wade, Telling It Like It Isn't: Obscuring Perpetrator Responsibility for Violent Crime, 15 Discourse Soc'y 499, 514 (2004).
[22] Coates & Wade, Telling It Like It Isn't, supra, at 499.
[23] *Id*.
[24] Coates & Wade, Telling It Like It Isn't, supra, at 514.
[25] Coates & Wade, Telling It Like It Isn't, supra, at 520.
[26] *Id*.
[27] Maya Srikrishnan, *Montana judge publicly reprimanded for comments about rape victim*, LOS ANGELES TIMES (Jul. 22. 2014), http://beta.latimes.com/nation/nationnow/la-na-nn-montana-judge-censured-rape-comments-20140722-story.html.

stated that the child was "in as much control" as the 49-year-old rapist.[28] A Utah judge described a convicted rapist as "an extraordinarily good man," and went on to say, "but great men sometimes do bad things."[29] A Dallas judge received a public warning from the State Commission on Judicial Conduct after she said that a 14-year-old sexual assault victim was "not the victim she claimed to be" and sentenced the perpetrator to probation.[30]

In a recent series of studies of victim blaming, researchers found that something as simple as shifting the position of the victim's name and the offender's name in an experimental scenario can have a statistically significant impact on the amount of blame ascribed to a victim.[31] The researchers used identical scenarios, but changed whether the victim's or the perpetrator's name was first in the majority of the sentences in the scenario. When researchers gave participants scenarios that contained the victim's name first, the study participants "imbued victims with more responsibility, reported more ways that victims could have changed the outcome…and perceived victims as less forced."[32] However, "shifting focus off victims and onto perpetrators reduce[d] victim responsibility and, as a result, victim blame."[33] Although the study primarily demonstrated that the participants' moral judgments had the greatest impact on victim blaming, it is important to also recognize that the linguistic manipulation of focus also played a significant role. These studies reinforce the importance of language in sexual assault cases by showing that a subtle shift in language, with its resultant shift in focus, actually impacts the amount of blame ascribed to the victim.

Judges also need to be sensitive to the impact of class and race or ethnicity on victim blaming. Research on rape and the criminal justice system demonstrates a devaluation of women of color—crimes against women of color are often not taken as seriously as other crimes. For example, in a comprehensive study of rape cases from the initial report to the conclusion of the case, sociologist Gary LaFree found, "It is clear from the analysis that black offender-white victim rapes resulted in substantially more serious penalties than other rapes…. Moreover, black intraracial assaults consistently resulted in the least serious punishment for offenders."[34] Native Americans, both female and male, are subjected to interpersonal violence at much higher rates than other racial and ethnic groups. In addition, many Native Americans carry with them vestiges of historical trauma. Although most victims of sexual violence are women and girls, sex offenders also prey on men and boys. Men are much less likely to report sexual assault. In addition, they are often left out of the discussion and may have more difficulty obtaining assistance and services. Finally, it is important for judges to be sensitive to the unique challenges for victims of same-sex sexual violence.

---

[28] *Judge apologizes for rape victims [sic] comments*, NBC NEWS, https://www.nbcnews.com/video/judge-apologizes-for-rape-victim-comments-45717571550 (last visited Aug. 18. 2017).
[29] *The latest: victim shocked by Utah judge remark in rape case*, ASSOCIATED PRESS, https://www.usnews.com/news/best-states/utah/articles/2017-04-14/the-latest-victim-shocked-by-utah-judge-remark-in-rape-case (last visited Apr. 14, 2017).
[30] John Council, *Judge warned over young rape victim comments*, TEXAS LAWYER, (Sept. 16, 2015), https://www.law.com/texaslawyer/almID/1202737344055.
[31] Laura Niemi & Liane Young, When and Why We See Victims as Responsible: The Impact on Attitudes Towards Victims, 42 J. of Personality and Sociology 1, 1 (2016).
[32] Niemi & Young, Impact Attitudes, supra, at 14.
[33] *Id*.
[34] Gary LaFree, Rape and the Criminal Justice: The Social Construction of Sexual Assault 145 (1989).

Linguistic Avoidance: "The Invisible Perpetrator": "Language both reflects and shapes our understanding" of an issue.[35] One of the most significant problems with the language we use in discussing sexual and domestic violence is what linguists call linguistic avoidance or "the invisible perpetrator." Linguistically, responsibility for an action "is assigned by naming agents of acts (*i.e.*, subjects of verbs)."[36] However, when discussing sexual and domestic violence, we often use passive voice, "which presents acts without agents, harm without guilt."[37] This is problematic because:

> The 'degree of responsibility' apportioned to any offender depends only in part upon his or her actions. It hinges also on how both the offender's and victim's actions are represented linguistically in police reports, legal arguments, testimony, related judgments, and more broadly in professional and public discourse.[38]

Accounts written in the passive voice reduce attributions of responsibility. Readers of passive constructions are more likely to attribute significantly less responsibility to the offender and less harm to the victim.[39] Consider, for example, the difference between these two sentences: "Jen was raped" versus "Daniel raped Jen." Another example is the word "occur." We often talk about how rapes "occur," which suggest that they just happen, and which also allows the perpetrator to remain invisible.

Two ways in which linguistic avoidance can obscure perpetrators' responsibility are: (1) using language to deflect responsibility away from the perpetrator; and (2) diffusing responsibility by describing a situation in which there is no identified perpetrator.[40] Under the first scenario, victims are described as objects of acts for which there are no specified agents. For example, they are depicted as "abused women" or "battered women." In the second instance, language is used to nominalize the violence so that no agent is necessary, such as by talking about "the violence" or "the abuse."[41] Researchers have found a direct correlation between use of these particular linguistic strategies and attribution of responsibility. Individuals who use more passive language and employ these distancing strategies tend to ascribe greater responsibility to the victim and less responsibility to the assailant.[42]

Another common linguistic devise used in sexual and domestic violence cases is to identify the subjects together in a way that suggests mutual responsibility for the criminal acts. Examples include: "marital aggression," "violent relationship," and "family violence." In each of these instances, a criminal act perpetrated by one individual on another is described in such a

---

[35] Sharon Lamb, Acts Without Agents: An Analysis of Linguistic Avoidance in Journal Articles on Men who Batter Women, 61 Am. J. Orthopsychiatry 250, 250 (1991).
[36] Lamb, Linguistic Avoidance, supra, at 251.
[37] *Id*.
[38] Coates & Wade, Telling It Like It Isn't, supra, at 514.
[39] Coates & Wade, Telling It Like It Isn't, supra, at 502.
[40] Gerd Bohner, Writing About Rape: Use of the Passive Voice and Other Distancing Text Features as an Expression of Perceived Responsibility of the Victim, 40 Brit. J. Soc. Psychol. 515, 518 (2001).
[41] Lamb, Linguistic Avoidance, supra, at 251.
[42] Bohner, Writing About Rape, supra, at 527.

way to suggest that the acts were mutual, thus obscuring responsibility for the perpetrator's violence.[43]

The goal when talking about sexual and domestic violence is to use accountable language that focuses attention on the person committing the crime. However, language commonly used does the exact opposite. The evolution of "the invisible perpetrator" is demonstrated in the following series of sentences:[44]

- *Andrew beat Jessica.* In this simple declarative sentence, the actor, Andrew, is the subject of the sentence, so responsibility for the act is clearly attributed to him. But that is not the way we talk about domestic violence.
- *Jessica was beaten by Andrew.* In this version, Jessica is now the subject and the construction is more passive.
- *Jessica was beaten.* In this sentence, Andrew is completely invisible, therefore, his responsibility is obscured completely.
- *Jessica was battered.* In this sentence, the word "beaten" is replaced with the word "battered." This construction is much more commonly used in discussions of domestic violence and suggests that the violence is not quite as serious.
- *Jessica is a battered woman.* In this sentence, Jessica is completely defined by what Andrew did to her, but he is completely out of the picture. This common type of language functions to keep the attention off of the perpetrator and allows him to remain invisible and unaccountable.

Other Common Examples of Minimizing Language: There are numerous other examples of words or phrases commonly used in relation to sexual violence that serve to minimize the seriousness of the crime and to reinforce pervasive myths and stereotypes. We often use these terms without even thinking about the word picture they create or their impact. These phrases appear most often in media accounts, but they have been used in the criminal justice system as well. Here are several examples of this type of language:

- **Accuser:** This term has become the accepted term used to describe sexual assault victims by the media. It is not used to describe victims of other crimes, such as robberies or burglaries. This term is actually "an act of subtle but profound victim blaming…."[45] Referring to an alleged victim as an "accuser" shifts the dynamics. The victim is now "the one who is doing something to him – she's accusing him. It is her actions – not his – that become the object of critical scrutiny. And he is transformed into the victim – of her accusation. Thus, the use of the word 'accuser' effectively shifts public support from the alleged victim to the alleged perpetrator."[46] Referring to the person by her or his name, or by using

[43] Lamb, Linguistic Avoidance, supra, at 253.
[44] These examples are based on the excellent TED talk, *Violence and Silence: Jackson Katz, Ph.D.*, TEDX TALKS (Feb. 11, 2013), http://www.youtube.com/watch?feature=player_embedded&v=KTvSfeCRxe8 (which cites Julia Penelope, Speaking Freely: Unlearning the Lies of the Father's Tongue (1990)).
[45] Jackson Katz, *Let's stop calling Bill Cosby's victims "accusers"*, WOMEN'S NEWS (Jan. 15, 2015), http://womensenews.org/2015/01/lets-stop-calling-bill-cosbys-victims-accusers/.
[46] *Id*.

the term "victim" or "alleged victim," depending on the context, can easily solve this problem.

- **He Said/She Said:** This phrase, which seems to be used most often by law enforcement and prosecutors to explain why they are not proceeding with a sexual assault case, also appears to only be used in cases involving sexual violence. No one refers to a drug deal or a robbery as a "he said/he said" case even though they are often crimes involving two people with competing accounts of what happened. Besides, the legal system is designed to resolve credibility disputes. No one is suggesting that sexual assault cases are easy to investigate, prosecute, or try, but the phrase "he said/she said" is often used as an excuse and serves to minimize the seriousness of the crime.
- **Date Rape:** This is another extremely common term, which serves to distinguish nonstranger rape from "real (stranger) rape." It minimizes the harm and also includes an element of victim blaming.[47] "You went on a date with him?" One participant in a lecture on the language of sexual violence described it as "rape light."
- **Domestic Dispute:** This phrase is frequently used to describe serious acts of domestic or sexual violence. It implies a mutual problem or dispute. It also implies a verbal disagreement, not a physical assault. "When a mugger assaults and robs a cab driver, it is not described as a 'fare dispute.'"[48]
- **Abusive Relationship:** This common phrase avoids placing the blame on the abuser. A relationship can't be abusive; a person is. Using the term "partner" instead keeps blame focused on the abuser and takes the blame off the victim. In this context, the term "relationship" also misrepresents how the problem can be solved, by putting the partners in the role of "provoker" and "provokee," rather than "abuser" and "victim."[49]
- **Victims "Confessed" They Were Sexually Abused as Children:** As more celebrities, politicians, and other famous people have disclosed that they were subjected to sexual abuse as children, media accounts often describe how these victims "confessed" to sexual abuse. This phrase obviously suggests that the victims have done something wrong or should be ashamed or feel guilty about what someone else did to them.
- **Child Pornography or "Kiddie Porn":** These terms, particularly the phrase "kiddie porn," imply that the children are actually active participants in their own victimization. The phrases minimize and sanitize the violence and criminal nature of the acts depicted. The current phrase preferred by some experts in the field is

[47] Linda Wood & Heather Rennie, Formulating Rape: The Discursive Construction of Victims and Villains, 5 Discourse Soc'y 125, 145 (1994).
[48] Phyllis Frank & Barry Goldstein, *The Importance of Using Accountable Language*, NATIONAL ORGANIZATION FOR MEN AGAINST SEXISM, http://nomas.org/the-importance-of-using-accountable-language/ (last visited Dec. 5, 2017).
[49] James St. James, *It's Not Your Relationship That's Abusive, It's Your Partner – Here's Why That Distinction Matters*, EVERYDAY FEMINISM (Mar. 19, 2015), https://everydayfeminism.com/2015/05/its-not-your-relationship-thats-abusive-its-your-partner-heres-why-that-distinction-matters/.

"child sexual abuse images," which more accurately depicts the true nature of the acts.[50]

- **Child Prostitute:** With the increased attention on trafficking, the phrase "child prostitute" appears in media coverage more and more frequently. This phrase is a legal oxymoron: a person cannot be both a child and a prostitute. By definition, a child cannot consent to any type of sexual contact. A prostitute is one who engages in sexual conduct in exchange for money. Washington statutes used to criminalize "patronizing a juvenile prostitute," but the statute was revised in 2007 to redefine the crime as "commercial sexual abuse of a minor."[51] The phrase "child prostitute" should not be used.[52]

Word Bans: Language Restrictions in the Courtroom: Defense attorneys often file motions asking trial judges to prohibit witnesses and prosecutors from using certain terms at trial. These word bans make it difficult for witnesses to testify and inhibit prosecutors' ability to argue their case.

Background – The Nebraska Case:[53] On October 30, 2004, a 21-year-old college student left a downtown bar in Lincoln, Nebraska with a 33-year-old Army reservist she met that night. The student said she did not leave willingly and that she had no memory of the rest of the night. She believed she was incapacitated with a rape facilitation drug. The defendant was charged with first-degree sexual assault, and the case went to trial. Following a motion in limine by defense counsel, the Nebraska judge entered an order to exclude the use of the following words at trial: "rape," "victim," "assailant," "sexual assault kit," and "sexual assault nurse examiner." The judge held that these words might be unfairly prejudicial to the defendant. The judge also held that the use of the word "rape" would allow the witness to testify to a legal conclusion. The victim was encouraged by the judge to use words like "sex" or "intercourse." She said being forced to use the word "sex" to describe her experience was like being assaulted all over again. The Sexual Assault Nurse Examiner was required to refer to the evidence kit as the "sexual examination kit" and to herself as the "sexual examiner."

---

[50] Washington defines the crime as child pornography, so judges must use the statutory language when discussing or referring to this crime. The example is just included here to alert judges to the connotations of the commonly used phrases.

[51] RCW 9A.44.190(5)(a).

[52] *See also,* Yasmin Vafa, *There's No Such Thing as a "Child Prostitute"*, NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, http://www.ncjfcj.org/there-no-such-thing-child-prostitute (last visited Dec. 5, 2017).

[53] Sources for this case summary include: *Bowen v. Cheuvront*, 516 F. Supp. 2d 1021 (D. Neb. 2007), *vacated*, 521 F. 3d 860 (8th Cir. 2008), *cert. denied*, 555 U.S. 970 (2008); Randah Atassi, Comment, Silencing Tory Bowen: The Legal Implications of Word Bans In Rape Trials, 43 J. Marshall L. Rev. 215 (2010); Tony Rizzo, *Judge's Ban On the Use of the Word 'Rape' At Trial Reflects Trend*, KANSAS CITY STAR (June 7, 2008), www.kansascity.com/105/v-print/story/654147.html; Dalia Lithwick, *Gag Order: A Nebraska Judge Bans the Word "Rape" From His Courtroom*, SLATE (June 20, 2007), http://www.slate.com/id/2168758/; Meg Massey, *Putting the Term "Rape" On Trial*, TIME U.S. (July 23, 2007), http://www.time.com/time/nation/article/0,8599,1646133,00.html; and Alissa Skelton, *Judge Restricts Use of Word 'Rape,' 'Sexual Assault,' In Bowen Trial*, THE DAILY NEBRASKAN (July 15, 2007) http://www.dailynebraskan.com/news/judge-restricts-use-of-words-rape-sexual-assault-in-bowen-trial-1.283175.

The first case ended in a mistrial because the jury could not reach a unanimous verdict. The case received a great deal of national media attention and protesters picketed the courthouse. The second trial ended with the judge declaring a mistrial because protesters had interfered with jury selection. Prosecutors declined to pursue a third trial with the word bans in place, so they dismissed the charges against the defendant. The victim filed a lawsuit in federal court, challenging the judge's actions on the grounds that the word bans violated her constitutional rights. A federal district court judge dismissed the lawsuit, ruling that the victim failed to prove that the federal court should intervene in an ongoing state court prosecution. The 8th U.S. Circuit Court of Appeals upheld the dismissal, finding that the federal court did not have jurisdiction. The U.S. Supreme Court declined to hear the case.

As a result of the national attention the case received, defense attorneys across the country began seeking word bans, filing motions to prohibit witnesses, prosecutors, and judges from speaking certain words or phrases in sexual assault trials. This represented a significant change in criminal sexual assault trials. There are many instances in criminal cases in which specific *subject matter* is excluded because it is deemed to be prejudicial to the defendant's rights, such as prior bad act evidence, certain confessions, or other evidence that has been suppressed. These word bans, however, are different because they exclude specific *words* used to describe subject matter that is otherwise admissible. "There is considerable difference between the usual exclusion of prejudicial 'subject matter' and the exclusion of specific words used to describe perfectly permissible subject matter."[54]

Word Bans Against Victims/Witnesses: This is particularly problematic in a sexual assault case, where the defense will most likely be consent. In those instances, a victim is forced to describe a non-consensual act using the language of consent. As the federal judge in the Nebraska case found:

> For the life of me, I do not understand why a judge would tell an alleged rape victim that she cannot say she was 'raped' when she testifies in a trial about rape. Juries are not stupid. They are very wise. In my opinion, no properly instructed jury is going to be improperly swayed because a woman uses the word 'rape' rather than some tortured equivalent for the word.[55]

In an interesting article on the legal implications of word bans in rape trials, the author made a similar point, stating:

> Jurors expect accusations to be made at trial. They expect a person who is alleging to be a victim of a crime to make that allegation on the stand. A witness telling a jury that she was raped would not be unfairly prejudicial because it would merely tell the jury what they already know, that the victim believes [she was] raped.[56]

---

[54] Atassi, Silencing Tory Bowen, supra, at 225.

[55] *Bowen*, 516 F. Supp. 2d at 1029 (held that federal court did not have personal jurisdiction over the state court judge and that dismissal of the state's case rendered the federal case moot).

[56] Atassi, Silencing Tory Bowen, supra, at 230.

There are not similar bans on words like "robbed," "murdered," "mugged," or "embezzled," even though they are also "ultimate conclusions" in criminal trials.[57] These bans are especially problematic in sexual violence cases because, "[p]erhaps, more so than any other crime, the crime of rape heavily depends on the narrative that takes place in the courtroom."[58]

In addition, these bans on victims or witnesses' language act as a prior restraint on their speech. This is particularly troublesome in sexual assault cases were the victim's credibility is key. The Nebraska victim explained that she had to pause and reformulate her answers to comply with the judge's word bans. As a result, she was concerned that it made her appear that she was fabricating details or that she did not know what really happened.[59]

Washington Case Law on Word Bans: Washington case law on word bans centers on the use of the word "victim" in a criminal trial. In every case identified, the Washington courts have rejected the defendant's argument that the use of the word "victim" constituted reversible error. The first, and only published case on the topic, is *State v. Alger*, 640 P.2d 44 (Wn. App. 1982). In that case, the trial court made one reference to the victim while reading a stipulation to the jury. The court rejected the defendant's argument that the reference constituted reversible error, holding, "In the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." *Alger,* 640 P.2d at 47. The court also held that while the judge's use of the term was neither "encouraged nor recommended," it did not prejudice the defendant's right to a fair trial. *Id.*

Washington appellate courts do not appear to have addressed the issue of word bans again until 23 years after the *Alger* case. Starting in 2005, after the outcry about the Nebraska case, Washington courts have issued at least ten unpublished cases denying the defendants' arguments that the use of the word "victim" constituted reversible error. Although unpublished cases do not have any precedential value, they are addressed here briefly so that judges can see the context in which the issues are raised and the reasoning applied by the court in rejecting the defendants' arguments.

Most of these cases deal with the trial court's use of the word "victim" in jury instructions or in special verdict forms. The defendants claimed that the judge's use of the word "victim" constituted an impermissible comment on the evidence. In *State v. Wiatt*,[60] the Court of Appeals held that the trial court was not commenting on the evidence, but was "merely defining the elements of the crime" by using the word "victim." In *State v. Smith*,[61] the instruction used closely followed an instruction approved by the Washington Supreme Court, so the instruction did not constitute an impermissible comment on the evidence by the trial court. *See also*, *State v. Sanchez-Flores*, No. 63718-5-I, 2010 WL 3103056, at *1 (Wash. Ct. App. Aug. 9, 2010) (trial court's use of the word "victim" in aggravated domestic violence instruction was not an impermissible comment on the evidence); and *State v. Seth*, No. 42215-8-II, 2013 WL 992330, at *6 (Wash. Ct. App. Mar. 12, 2013) (use of the word "victim" in several jury instructions neither

[57] Atassi, Silencing Tory Bowen, supra, at 229.
[58] *Id*.
[59] Atassi, Silencing Tory Bowen, supra, at 237, 239.
[60] No. 30168-7-II, 2005 WL 950673, at *14 (Wash. Ct. App. Apr. 26, 2005).
[61] No. 63546-8-I, 2010 WL 2670863, at *3 (Wash. Ct. App. Jul. 6, 2010).

presupposed that the witness was a victim nor in any way removed that question of fact from the jury's consideration). The Washington Court of Appeals also rejected a similar argument when the word "victim" was used in a special jury verdict form. *State v. Dunn*.[62]

The Court of Appeals has also rejected defendants' claims that other witnesses' use of the word "victim" constituted reversible error. In *State v. Parks*, a law enforcement officer testified that another officer had "interviewed a victim and some witnesses." The court held that the officer's testimony was not improper.[63] In another case in which a law enforcement officer referred to a child as "the victim," the court rejected the defendant's argument that the officer's testimony was an impermissible opinion regarding the defendant's guilt or veracity. *State v. Sanchez.*[64] In *State v. Wilson*, [65] the court held that even though the prosecutor and a law enforcement officer referred to the child as "the victim" a total of six times, the comments were not impermissible opinions on the defendant's guilt.

In the most recent case addressing the use of the word "victim" in a criminal trial, the defendant filed a pre-trial motion to prohibit witnesses from referring to other witnesses as "victims," which the trial court denied.[66] The Court of Appeals affirmed, holding, "We believe that in some circumstances it could be error for a witness to use the word 'victim' to express an opinion or for a judge to use the word to refer to a disputed fact. That does not justify a blanket prohibition on use of the word."[67]

Other Jurisdictions' Decisions: Other jurisdictions have also rejected defendants' arguments that the use of the word "victim" is reversible error in criminal cases, using rationales similar to the ones used by the Washington Court of Appeals.[68] The only case we found in which a conviction was reversed for use of the word "victim" is a Connecticut case in which the word "victim" was used in the jury instructions over 76 times and the judge refused to give a curative instruction.[69] That case was recently distinguished on the facts.[70]

---

[62] No. 42149-6-II, 2013 WL 2106953, at *7 (Wash. Ct. App. May 14, 2013).
[63] No. 41534-8-II, 2012 WL 3202110, at *3 (Wash. Ct. App. Aug. 8, 2012).
[64] No. 72807-5-I, 2016 WL 3281048, at *3 (Wash. Ct. App. Jun. 13, 2016).
[65] No. 45398-3-II, 2015 WL 786853, at *2-3 (Wash. Ct. App. Feb. 24, 2015).
[66] *State v. McFarland*, No. 32873-2-III, 2016 WL901088, at *1 (Wash. Ct. App. Mar. 8, 2016), *rev'd on other grounds*, 189 Wn.2d 47, 399 P.3d 1106 (2017).
[67] *Id.*, at 4.
[68] *See, e.g.*, *State v. Rodriguez*, 946 A.2d 294 (Conn. App. Ct. 2008), *appeal denied*, 953 A.2d 650 (Conn. 2008) (judge's use of word "victim" in instruction, with curative instruction, and prosecutor's use of word "victim" permissible here); *Gallegos v. State*, No. 13-14-00135-CR, 2015 Tex. App. LEXIS 6763 (Tex. Crim. App. July 2, 2015) (unpublished) (permissible for attorneys & witnesses to use the word "victim"); *State v. Bombo*, No. COA09-1339, 2010 N.C. App. LEXIS 1099 (N.C. Ct. App. July 6, 2010) (unpublished), *review denied*, 702 S.E.2d 493 (N.C. 2010) (judge's use of "victim" in instruction not error); *United States v. Spensley*, No. 09-CV-20082, 2011 U.S. Dist. LEXIS 5024 (C.D. Ill. Jan. 19, 2011) (unpublished) (jury not unfairly inflamed or prejudiced against defendant if victim is referred to as "victim"); and *Commonwealth v. Pierre*, No. 10-P-2254, 2012 Mass. App. Unpub. LEXIS 911 (Mass. App. Ct. July 23, 2012), *review denied*, 2012 Mass. LEXIS 966 (Sept. 27, 2012) (unpublished) (defendant not prejudiced when witnesses used "victim").
[69] *State v. Cortes*, 851 A.2d 1230 (Conn. Ct. App. 2004), *aff'd*, 885 A.2d 153 (Conn. 2005).
[70] *State v. Ciullo*, 314 Conn. 28, 100 A.3d 2014 (Conn. 2014) (use of term "victim" was not sufficiently excessive to be improper); *Rodriguez*, 946 A.3d at 304.

Courts in other jurisdictions have also rejected defendants' arguments that the use of other words or phrases, such as "rape," is reversible error. For example, the North Carolina Supreme Court held that it was permissible for a victim to testify that the defendant "was raping her."[71] Another court found that use of the word "rape" by the prosecutor and witnesses was not prejudicial.[72] In California, a court ruled that the victim's references to "rape" were not prejudicial error because the prosecutor made it clear that when the victim said "rape," she meant that the defendant was putting his penis into the victim's vagina.[73]

What's a Judge To Do?: Courts across the country have held that the use of words such as "victim" and "rape" do not undermine defendant's rights, violate the presumption of innocence, or constitute impermissible comments on the evidence, the defendant's guilt, or the defendant's veracity. Courts and experts also recognize that these types of terms allow prosecutors to argue their theory of the case and allow witnesses to testify about their experiences. There are numerous cases in Washington, and throughout the country, that hold that the use of the word "victim" in jury instructions does not violate the prohibition on trial judges' commenting on the evidence.

Requiring victims to use the language of consensual sex to describe criminal assaults in sexual violence cases puts an undue burden on them. Particularly since the defense is usually consent, it prohibits victims from describing what they experienced. As long as the subject matter is permissible, victims should be allowed to use their own language to describe the incident. The same guidelines should apply to other witnesses and prosecutors. "Jurors understand the respective roles between the prosecutor and defense counsel. It should not be assumed that jurors will be unduly influenced by the prosecutor's use of the word victim."[74] Therefore, word bans should be avoided.

During trial, judges should be cautious about their use of language. It is also important for judges to use limiting instructions, explaining to jurors that the judge's words and counsel's word are not evidence in the case. Appellate courts consistently uphold jury instructions that use the word "victim." Special jury verdict forms require a finding of guilt before jurors need to complete them, so use of the word "victim" in these forms is also permitted. After a defendant is convicted or has entered a guilty plea, it is important for judges to use language that reflects the unilateral, criminal nature of the defendant's acts and places responsibility for the criminal behavior squarely where it belongs: with the defendant.

Written Orders, Appellate Opinions, and Court Records: A Cautionary Tale: In 2011, the Wisconsin Supreme Court issued its opinion in *State v. Denson*,[75] a case in which the defendant was convicted of first degree reckless endangering the safety of a child and false imprisonment. In the opinion, the court identified the child victim by her initials. However, the

[71] *State v. Goss*, 235 S.E.2d 844 (N.C. 1977) (permissible for victim to testify that defendant was "raping" her).
[72] *People v. Pernell*, No. 12CA0510, 2014 Colo. App. LEXIS 1946 (Colo. App. Nov. 20, 2014), *cert. granted in part*, 2015 Colo. LEXIS 829 (Colo. Aug. 31, 2015) (cert. granted on unrelated issue) (use of the word "rape" by the prosecutor and witnesses was not prejudicial).
[73] *People v. Perez*, No. H038986, 2014 Cal. App. Unpub. LEXIS 3527 (Cal. Ct. App. May 19, 2014) (unpublished).
[74] *State v. Rodriquez*, 946 A.2d at 307.
[75] 335 Wis. 2d 681, 799 N.W.2d 831 (2011).

opinion included the child's mother's full name and where the mother worked, including the location. The opinion contained graphic details about how the defendant beat, threatened, and tied up the mother. In addition, the court noted that the mother was responsible for taking the nightly deposit to the bank from the fast food restaurant where she worked, but that she had not made the deposit on the night in question. Although the mother had done nothing wrong, the way the opinion was worded suggested that she had stolen the money. As a result, when anyone searched for the mother's name on the internet, the opinion showed up. The mother was unable to find a job because potential employers thought she had stolen the money. The mother had to hire an attorney, who requested that the court remove the identifying information from the original opinion and release a redacted one that included only those background facts necessary to the disposition of the legal issues on appeal.[76] As a result, the Wisconsin Supreme Court adopted a new administrative rule that prohibited the identification of crime victims by their names in appellate briefs in certain types of cases.[77]

Obviously, the Wisconsin Supreme Court did not intend to harm the mother. The case is included here because it illustrates how important judges' language is in appellate courts, as well as in trial courts. Judges should be careful about using identifying language in sexual assault cases. Although appellate judges need to provide sufficient factual information to explain and support their legal conclusions, they should use caution in cases involving sexual violence about which facts they disclose. It is also important for judges to educate law clerks and court clerks about these language issues and protecting victims' privacy, to the extent possible.

Clever Example of Accountable Language: Much of this chapter has focused on what language to avoid. The following is a good example of the use of accountable language to discuss sexual violence. This list, called *Sexual Assault Prevention Tips Guaranteed to Work!*,[78] originally appeared in a blog titled *Feminally*, written by Colleen Jamison. She had attended a sexual assault prevention program for resident advisors at her college campus. She was frustrated by the presentation and decided to post her own prevention tips. Her goal was to counter the "condescending tips" that focuses solely on what potential victims should or should not do. She noted, "It's fun to turn the tables." Many readers find this list to be a humorous way to counter "the invisible perpetrator" language. Here is her list:

Sexual Assault Tips Guaranteed to Work!

- Don't put drugs in people's drinks in order to control their behavior.
- When you see someone walking [alone], leave them alone!
- If you pull over to help someone with car problems, remember not to assault them.
- NEVER open an unlocked door or window uninvited.
- If you are in an elevator and someone else gets in, DON'T ASSAULT THEM.

[76] Interview with Meg Garvin, M.A., J.D., Executive Director, National Crime Victim Law Institute, and Clinical Professor of Law at Lewis & Clark Law School, in Portland, OR (June 23, 2015).
[77] Sarah Burgundy, *New Rule Protects Crime Victim Identity and Privacy in Appellate Briefs,* STATE BAR OF WISCONSIN INSIDE TRACK, May 2015, at 1.
[78] Colleen Jamison, *Sexual Assault Prevention Tips Guaranteed to Work!*, FEMINALLY, (Aug. 21, 2009), http://feminally.tumblr.com/post/168208983/sexual-assault-prevention-tips-guaranteed-to-work.

- Remember, people go to the laundry to do their laundry, do not attempt to molest someone who is alone in a laundry room.
- USE THE BUDDY SYSTEM! If you are not able to stop yourself from assaulting people, ask a friend to stay with you while you are in public.
- Always be honest with people! Don't pretend to be a caring friend in order to gain the trust of someone you want to assault. Consider telling them you plan to assault them. If you don't communicate your intentions, the other person may take that as a sign that you do not plan to rape them.
- Don't forget: you can't have sex with someone unless they are awake.
- Carry a whistle! If you are worried that you might assault someone '[by] accident' you can hand it to the other person you are with so they can blow it if you do.
- And, ALWAYS REMEMBER: if you didn't ask permission and then respect the answer the first time, you are committing a crime—no matter how 'into it' others appear to be.

Responding to Media Coverage: Judges need to be careful when dealing with the media, but one project undertaken by a Nevada judge demonstrates an interesting way for judges to help educate the media. It is described here in case any Washington judges would like to develop a guide for media coverage of sexual assault cases.

The Judge's Personal Tragedy: On June 12, 2006, a litigant shot Reno, Nevada Family Court Judge Chuck Weller in the chest. The assailant, who had a divorce pending in Judge Weller's courtroom, shot the judge from 170 yards away, through the window in the judge's chamber, using a sniper rifle. An hour earlier, the man stabbed his wife to death while their 8-year-old child watched television in another room.[79] Judge Weller was extremely frustrated by how the media covered the murder and his shooting. In his Master's thesis entitled, *Needed: A Guide for Media Coverage of Domestic Violence*, Judge Weller wrote:

> From my perspective as a judge who deals daily with family abuse, it was a tragic and too familiar story of planned domestic violence. Unfortunately, the story was the subject of typical domestic violence reporting. The societal problem of domestic violence was rarely mentioned in the coverage. The perpetrator was portrayed as a good guy who 'snapped.' The killer's justification that his violence was caused by the deceased wife's and my conduct was reported. His previous history of controlling behavior targeted at his now murdered wife remains largely unreported today. Headlines like 'On Trial: Family Court' tended to excuse the murderer and blame the 'system' for his crimes.[80]

The Judge's Response: In response to the perpetrator's violence and the subsequent media coverage, Judge Weller took several actions. He wrote his Master's thesis on the topic of media coverage of domestic violence, documenting the need for more accurate coverage and a media guide. In addition, Judge Weller wrote a media guide, *Covering Domestic Violence: A*

[79] Judge Chuck Weller, Needed: A Guide for Media Coverage, supra.
[80] *Id.* at 1-2.

Guide for Informed Media Reporting in Nevada.[81] The *Guide* is written for judges to use to educate the media about covering domestic violence.

Recommendations for Judges: The following recommendations are provided for judges to help them use more accurate, accountable language when speaking and writing about sexual violence, while maintaining their neutrality and objectivity. The goal is to assist judges in protecting defendants' rights, including the presumption of innocence, while also protecting victims' rights and their privacy:

- Choose your language carefully.
  - Use language that reflects the unilateral nature of sexual violence.
  - Avoid victim blaming language.
- Avoid using the language of consensual sex to describe assaultive acts.
  - Instead, use language that describes body parts and what the victim was forced to do.
- Place agency for criminal acts where it belongs. Avoid "the invisible perpetrator."
- Use "person first" language, whenever possible.
  - For example, use "woman with a disability," rather than "disabled woman," to avoid defining her by her disability.
- Avoid word bans.
  - Use limiting instructions, as needed.
- Educate about these issues, whenever possible.
  - Educate law clerks and court clerks about appropriate language and privacy.
- Be careful about using identifying information and factual details in written orders and opinions.
- Respond to media coverage, good and bad, when possible within the constraints of judicial ethics.

Judges Can Make a Difference: The Judicial Language Project at New England Law | Boston, a project that focuses on judicial language in appellate decisions about sexual violence, did an analysis of how Georgia appellate judges wrote about sexual assault on a child. The Co-Director, Judith Greenberg, and others wrote to the Chief Justice of the Georgia Supreme Court and the Chief Judge of the Georgia Court of Appeals about the language used in Georgia appellate opinions, particularly the use of the word "perform" to describe the actions of child victims in sexual assault cases. The letter stated, "When used to describe the actions of a child, this commonly understood term suggests that the child was morally responsible for his or her

[81] Judge Chuck Weller, *Covering Domestic Violence: A Guide For Informed Media Reporting In Nevada*, Office of the Nevada Attorney General, http://ag.nv.gov/uploadedFiles/agnvgov/Content/Hot_Topics/Victims/DVPC/MEDIAGUIDE.pdf (Oct. 2009).

own victimization."[82] Used with the term "oral sex," Ms. Greenberg wrote, suggests mutuality, pleasure, and consent and obscures the sexual violence involved.[83]

Chief Justice Hunstein wrote back, thanking the Judicial Language Project for the critique and promising the Georgia courts would be more mindful of the issue in the future. The next year, the Judicial Language Project did another study of Georgia appellate cases and found that the appellate judges had actually changed the language they used. In one case, instead of describing a child "performing oral sex" on the rapist, the court wrote, "The defendant attempted to anally rape the victim, orally sodomized him, and put his penis in the victim's mouth."[84] The revised language provides a much more accurate description of the defendant's actions.

Conclusion:[85] The goal of this chapter is to give judges the latest research on the language of sexual violence and how it helps shape our response to these difficult crimes. We do not often quote Mark Twain when discussing sexual violence, but this quote seems particularly apt here: "The difference between the almost right word and the right word is really a large matter – it's the difference between the lightening bug and the lightening."[86]

[82] Letter from Judith G. Greenberg, Co-Director, The Judicial Language Project, New England Law, to Chief Justice Carol W. Hunstein, Supreme Court of Ga., and Chief Judge M. Yvette Miller, Court of Appeals of the State of Ga. (Sept. 23, 2010) (on file with the author).
[83] *Id*.
[84] Letter from Wendy J. Murphy, Co-Director, The Judicial Language Project, New England Law (Apr. 7, 2011) (on file with the author).
[85] This chapter is based, in part, on a judicial education module the author developed for Legal Momentum, under a grant from the Office on Violence Against Women, entitled *Raped or "Seduced"? How Language Helps Shape Our Response to Sexual Violence*, Copyright © 2013 by Legal Momentum.
[86] Letter from Mark Twain to George Bainton, Oct. 15, 1888.