

Addressing the Civil Legal Needs of Sexual-Assault Victims

Legal resources to stabilize the physical, emotional, and financial welfare of the victim

by Catherine A. Carroll

When most people think about rape and the law, they think of criminal justice. Yet few people understand the powerful effect sexual assault can have on a victim's entire social and economic life. One incident of sexual assault can destabilize a victim's housing, schooling, privacy, employment, immigration status, and basic long-term financial welfare.

To address the civil legal needs of victims and to prevent long-term socio-economic harm, our nation needs to change how it responds legally to allegations of rape. Instead of focusing our legal resources exclusively on the issue of criminal sanctions against the assailant, we need to concentrate our legal resources on stabilizing the physical, emotional, and financial welfare of the victim. We need to keep victims in school, keep them employed, and protect their privacy.

Yet, on a practical level, to accomplish this paradigm shift we must establish that sexual-assault victims are entitled to restorative civil remedies regardless of the status of criminal sanctions against the assailant. Today, many of the civil remedies that sexual-assault victims need depend either technically or discretionarily upon criminal-justice outcomes. On a technical level in Washington, for example, a victim cannot access state victim-compensation programs unless she¹ cooperates with law enforcement. On a discretionary level, most third-party institutions and decisionmakers, such as housing authorities, schools, and employers, are extraordinarily wary of imposing significant restrictions on an assailant unless criminal charges exist. Landlords, employers, and educators send the message, "I do not want to decide a rape case. That should be handled by the criminal courts."

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

First, rape remains the most underreported crime in America. In Washington, one in three adult women have experienced sexual assault in their lifetime.² Only 15 percent of those victims reported the crime to law-

enforcement authorities. Nationally only five percent of college victims report. Of those reports, approximately 24 percent result in an indictment and 12.5 percent result in conviction. This means that approximately 75 percent of the rapes reported to law enforcement are never prosecuted. Given this reality, if civil remedies are contingent on criminal justice outcomes, the vast majority of victims are left without any assistance.

Second, to have any meaning and to prevent serious harm, most civil remedies (housing, protection orders, privacy, education, employment, etc.) need to be secured quickly in the weeks to months following an assault. However, the time from indictment and arraignment to a plea or trial in a criminal case may take up to two years, and appeals can take even longer. Most victims will have left their jobs, their housing, or their educational institution by the time a criminal sanction is imposed.

Civil issues for sexual-assault survivors are a complex range of legal matters. Below is a general overview of the civil needs of sexual-assault survivors.

Privacy

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

Vital to protecting a sexual-assault victim's right to privacy is preventing the unauthorized disclosure of information about the victim. Attorneys can conduct preventive measures on behalf of victims by discouraging the unauthorized disclosure of private information. Sexual-assault victims often lack adequate representation to protect their privacy interests in criminal cases where they are a victim-witness. Prosecutors are limited in their ability to protect the privacy interests of victims, and often victims do not know what their rights are with respect to the criminal-justice system.

Protection

orders

A victim's sense of physical safety may be shattered, and she may remain hypervigilant, anxious, and frightened for months and even years after the assault. Therefore, safety planning is a critical element of any legal representation. Safety planning is a process a victim engages in to prepare herself in as many ways as possible if another assault or act of abuse should

occur. For guidance on comprehensive safety planning in your community, enlist the help of an experienced rape-crisis or domestic-violence advocate. Each victim will have different options depending upon her unique circumstances and her relationship to the assailant.

However, protection orders may not be an available remedy for sexual-assault victims, given the status of the relationship with the assailant. Although a victim may pursue an anti-harassment order if she does not meet the relationship requirements of a domestic-violence protection order, it may be difficult to obtain one if the assault has not risen to a "pattern of conduct." Therefore, safety planning is very important.

Financial

compensation

Sexual assault can have devastating economic consequences. Hospital and medical bills, lost wages, lost school tuition, psychotherapy bills, and housing relocation costs mount quickly, but very few victims ever recoup these losses. Potential avenues of recovery include Crime Victims' Compensation, restitution through civil protection orders or criminal conviction, and third-party tort liability.

In Washington, Crime Victims' Compensation covers the cost of all rape exams if conducted to collect evidence for possible prosecution. However, the reality is that victims need to do more than just report sexual assault to law enforcement to receive assistance. It is not uncommon for victims to experience challenges when attempting to receive victims' compensation benefits.

Employment

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

In Washington, unemployment benefits have been extended to victims of domestic violence and stalking — but not to victims of sexual assault.

Education

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

The victim must contend with disciplinary proceedings, housing issues, tuition issues, stay-away orders, and privacy concerns. Maintaining school attendance or securing a transfer to another educational institution is a baseline goal of any representation.

Appreciating a school's policies with respect to sexual assault is fundamental to representing victims in school disciplinary hearings. It is not uncommon for policies to call for mediation between the assailant and the victim. This is potentially very damaging to victims and can further traumatize them.

Housing

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

Immigration

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

Criminal

justice

Society generally expects the criminal-justice system to be the primary venue for "trying rape cases." For example, in a recent child-custody hearing in which the mother alleged that the child was a product of a "date rape," the judge stated, "I am not going to try a rape case in my courtroom." Universities, high schools, housing authorities, and employers expect the criminal-justice system to respond to rape. For this reason alone, it is vital for attorneys to understand what the criminal-justice process does and does not offer sexual-assault victims. In short, sexual-assault victims cannot be effectively represented in the civil realm if attorneys do not understand the basics of the criminal-justice system. The U.S. Constitution guarantees that all criminal defendants are entitled to zealous representation. Victims of sexual violence should be entitled to the same.

Suing the assailant, and third-party liability

Claims on behalf of adult survivors of childhood sexual abuse are governed by RCW 4.16.340. Actions may be based upon intentional tort theory, such

as battery, assault, or intentional infliction of emotional distress/outrage. In addition, negligence claims may be brought against a person or entity in a position of control over the assailant, or a person or entity with an obligation to protect the abused child.

The victim may have a right of action against third parties who owe the victim a duty of care and who failed to prevent the assault because of their negligence. Owners or operators of convenience stores, universities and colleges, commercial landlords, bus stations, hospitals, high schools, restaurants, bars, parking lots, hotels, and other third parties may be liable if the victim can establish that a legal duty exists to protect individuals from foreseeable violent acts. Such cases may include negligent hiring, retention, or supervision of an employee if the employer should have known the employee presented a risk of danger to others. Last, if a special relationship exists between an employer and the victim that requires a duty of reasonable care to protect the victim from all foreseeable harms — including sexual assault — there may be a basis for a vicarious-liability cause of action against the third-party employer. (*Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997).)

For additional information, see *Guide for Civil Law Suits*, a tool for victims of sexual assault, available on the legal page of the Washington Coalition of Sexual Assault Programs (WCSAP) website at www.wcsap.org.

Most attorneys do not enter the legal profession to work with rape victims. It is difficult work. It requires a degree of personal attention, patience, and compassion that our training in law school and beyond rarely provides. In Washington, victims of sexual assault are entitled to a support person to accompany them to all proceedings — legal and medical. Advocates can provide support to attorneys working with victims and are an invaluable resource. (RCW 70.125.030.)

Unfortunately, we live in a country where sexual assault is common. However, much of it is denied, shamed into silence and ultimately left to erode the emotional, physical, and financial welfare of many in our communities. Appreciating the complex range of civil issues that may impact a sexual-assault survivor is the first step towards shifting the current paradigm. As attorneys, we have great power to make a difference in people's lives. Working with rape survivors is an opportunity to provide civil representation in a complex and emerging area of law that attorneys can shape in order to meet the needs of sexual-assault clients. April is Sexual Assault Awareness and Prevention Month. It is my hope that our collective professional awareness rises to appreciate that sexual-assault victims are entitled to restorative civil remedies regardless of the status of criminal

sanctions against the assailant. Indeed, this is how we begin to transform our nation's response to rape beyond the criminal-justice system.

WCSAP is a membership coalition representing more than 40 rape-crisis programs throughout Washington. In the fall and winter of 2004, WCSAP's Legal Department will be providing a series of eight regional civil sexual-assault trainings throughout the state. The trainings will be no cost and are anticipated to provide four CLE credits in addition to a training manual adopted for Washington law. The training series will be presented in partnership with the Washington Association of Prosecuting Attorneys and the Northwest Women's Law Center. If you would like more information about the training series, please contact me at catherine@wcsap.org.

Catherine Carroll is staff attorney for WCSAP. WCSAP's legal program is funded by Legal Assistance for Victims Grant, U.S. Department of Justice, Office of Justice Programs, Office on Violence Against Women (Grant 2001-WL-BX-0036). Points of view in this article are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice. This article is excerpted and adapted from *Beyond the Criminal Justice System: Transforming Our Nation's Response to Rape, A Practical Guide to Representing Sexual Assault Victims*, published by the Victim Rights Law Center, Boston, MA, June 2003. In particular, portions of Chapter One, "Core Practice Dynamics," pp. 1-3, 23-25, authored by Susan H. Vickers, Esq., and Angela G. Lehman, Esq., are excerpted here with permission from the authors. To purchase a full copy of the Victim Rights Law Center's manual, including chapters covering sexual-assault victims' safety, privacy, housing, employment, immigration, and financial compensation rights, go to www.victimrights.org/html/purchase.htm. I wish to thank the editors for permission to publish portions of the manual free of charge for this article.

NOTES

1 According to the Bureau of Justice Statistics, the vast majority of rape victims are female and the vast majority of offenders are male. "Sex Offenses and Offenders: An Analysis of Rape and Sexual Assault," by Lawrence Greenfeld, BJS, 1997, NCJ-163392, p. iii.

2 Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women. Principal investigator: Lucy Berliner, Harborview Center for Sexual Assault and Traumatic Stress; research consultant: David Fine; survey research coordinator, Danna Moore, Washington State University/Social and Economic

Sciences. Research supported by: Office of Crime Victims Advocacy, Washington State Office of Community Development. November 2001. For the complete report, including methodology, see <http://depts.washington.edu/hcsats/pdf/research/sexualassaultexpr2001-11.pdf>.