

Tribal Sexual Assault Resource Series

# Judges Sexual Assault Bench Book

## Tribal Court Judges Bench Book: Sexual Assault

*Tribal Judicial Guide for  
Navigating Sexual Assault Cases*



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Tribal Sexual Assault Resource Series:

## **JUDGES SEXUAL ASSAULT BENCH BOOK**

### **Tribal Court Judges Bench Book: Sexual Assault**

(Including Sexual Assault Bench Card for Tribal Judges)

### ***Tribal Judicial Guide for Navigating Sexual Assault Cases***

**A Product of the Tribal Law and Policy Institute**

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## **COMMUNITY BASED LEGAL DEVELOPMENT SERIES: TRIBAL SEXUAL ASSAULT AND STALKING RESOURCES**

*With support from the Office on Violence Against Women (OVW), the Tribal Law and Policy Institute (TLPI), in collaboration with the Southwest Center for Law and Policy (SWCLAP) and other national leaders in tribal law, have developed a series of publications to assist tribal governments in creating a comprehensive, community based, victim-centered response to sexual violence and stalking against adult victims. Each publication is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. They are ideal for a community with a strong grassroots victim advocacy program.*

### **Tribal Legal Code Resource: Sexual Assault and Stalking Laws**

This guide for drafting or revising victim-centered tribal laws against sexual assault and stalking is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions which are designed to help tribal community members decide on the best laws for their community.

### **Tribal Law Enforcement Protocol Resource: Sexual Assault**

This guide for drafting or revising tribal law enforcement agency's protocols responding to sexual assault (including a model sexual assault protocol) is a tool for improving the investigation of sexual assault crimes. Effective investigations increase the likelihood of victim participation and increase the probability of convictions in tribal, state, and/or federal courts. This guide focuses on the development of an internal protocol for law enforcement. A law enforcement protocol can enhance the efforts of all community agencies in addressing sexual violence. Once your tribal government has strong laws in place, this publication will help you create policies and protocols for your law enforcement agency to enforce your laws.

### **Tribal Prosecutor Protocol Resource: Sexual Assault**

This guide for drafting or revising tribal prosecutor's protocols responding to sexual assault (including a model sexual assault protocol) is a tool for improving the prosecution of sexual assault crimes. Holding offenders accountable for their actions is a key part of making your community safe. This publication is designed to help your prosecutor's office ensure consistency and compassion for all survivors. This guide focuses on the development of an internal protocol for tribal prosecution. A prosecutor protocol can enhance the efforts of all community agencies in addressing sexual violence.

### **Tribal Sexual Assault Response Team (SART) Resource**

This guide for development of a Sexual Assault Response Team (SART) in tribal communities is a guide to creating cohesive policies between tribal agencies. Victims of sexual assault deserve a coordinated, comprehensive response from a variety of community agencies. This SART Resource provides a starting point for developing victim-centered SART teams in your community.

### **Tribal Judge's Sexual Assault Bench Book and Bench Card**

This is a resource for tribal judges who hear sexual assault cases in tribal courts. It provides background information on important sexual assault and tribal jurisdictional issues, as well as providing guidance in handling key issues at various stages of a sexual assault criminal trial.

## **VIOLENCE AGAINST NATIVE WOMEN RESOURCES COMMUNITY BASED LEGAL DEVELOPMENT**

*With support from the Office on Violence Against Women (OVW), the Tribal Law and Policy Institute (TLPI) has developed the following resources to assist tribal governments in creating a comprehensive, community based, victim-centered response to violence against Native women. Each resource is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. These resources are all freely available for downloading on the Tribal Court Clearinghouse ([www.tlpi.org](http://www.tlpi.org)) except the textbook.*

### **Tribal Legal Code Resource: Domestic Violence Laws**

This guide for drafting or revising victim-centered tribal laws against domestic violence is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions which are designed to help tribal community members decide on the best laws for their community.

### **Listen to the Grandmothers Video and Video Discussion Guidebook**

This video and discussion guide is designed to assist tribal programs with incorporating cultural traditions into contemporary responses to violence against Native women. The "Listen to the Grandmothers" video features Native elders speaking to the problem of violence against Native women. The video provides a historical overview of violence against Native women, traditional responses, and an analysis concerning the incorporation of cultural traditions into contemporary responses to violence against women.

### **Sharing our Stories of Survival: Native Women Surviving Violence**

This textbook is a general introduction to the social and legal issues involved in acts of violence against Native women, this book's contributors are lawyers, advocates, social workers, social scientists, writers, poets, and victims. In the U.S. Native women are more likely than women from any other group to suffer violence, from rape and battery to more subtle forms of abuse, and *Sharing Our Stories of Survival* explores the causes and consequences of such behavior. The stories and case-studies presented here are often painful and raw, but a countervailing theme runs through the book: Many of the women who appear in these pages are survivors, often strengthened by their travails, and the violence examined here is human violence, meaning that it can be changed, if only with much effort and education.

[www.TribalProtectionOrder.org](http://www.TribalProtectionOrder.org) This website is designed to provide both tribal and non-tribal entities with a clearinghouse of information and resources pertaining to the issuance and enforcement of tribal protection orders.

### **Tribal Domestic Violence Case Law: Annotations for Selected Tribal Cases Related to Domestic Violence**

This resource is designed to assist tribal judicial officers in understanding how some tribal governments have handled certain legal issues within the context of domestic violence cases. While a great deal of research has been done on case law in the state systems, little to no analysis has been done on the tribal judicial approach to domestic violence. This compendium, developed as part of an overall code-writing workshop curriculum for tribal governments, will assist tribal legislators as well. Understanding how laws are interpreted by the court systems may impact the development of laws that provide safety to tribal citizens

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## CHAPTER ONE

### INTRODUCTION

#### **A. What This Bench Book Can Do**

This Bench Book provides tribal judges with key legal and technical information specifically related to criminal sexual assault actions. It provides essential information on the common responses of sexual assault victims, as well as common characteristics of rapists. Additionally, many of the key issues in a sexual assault trial are discussed, including common evidentiary issues, procedural considerations and sentencing considerations. This Bench Book helps a judge navigate a sexual assault action in tribal court.

In addition, this Bench Book provides helpful information to tribal judges who face a sexual assault, charged as part of another crime. This may happen when the tribe has an inadequate sexual assault criminal law, or no law at all, or there is insufficient evidence to prove sexual assault and another crime is charged. Therefore, it is common in tribal courts for sexual assault to be prosecuted as other crimes, such as simple assault, and it is important for a tribal judge to be alert when this situation occurs.

Responding with an understanding of sexual assault victims and perpetrators is useful regardless of the charge. Using evidence, court rules, as well as other trial considerations in this Bench Book, which provide protection to complainants, are helpful in all cases involving sexual assault, regardless of the criminal charge.

The Bench Card (located in the Appendix) is a concise checklist of items which may be considered in a case involving sexual assault. It is something that can be easily copied for use during a trial. Each item in the Bench Card is discussed in more detail in the Bench Book.



## **B. What This Bench Book Cannot Do**

The Bench Book is not meant to be your sole legal resource. While this Bench Book is designed to be concise, many of the issues addressed are quite complex. Moreover, your tribe's specific law and customs on sexual assault trial and evidentiary procedures are not directly addressed.

Although protection orders may also be important in addressing sexual assault, we only briefly address this issue. For further research on tribal laws and resources pertaining to protection orders, we encourage you to review the Tribal Legal Code Resource: Domestic Violence and the Tribal Protection Order website at [www.TribalProtectionOrder.org](http://www.TribalProtectionOrder.org).

This resource guide cannot teach about the dynamics of sexual assault. If you do not have training in the dynamics of sexual assault and stalking, we strongly encourage you to contact one or more of the following organizations for information and training:

Sacred Circle  
National Resource Center to End Violence Against Native Women  
722 Saint Joseph Street  
Rapid City, SD 57701  
877-RED-ROAD  
[www.sacred-circle.com](http://www.sacred-circle.com)

Mending the Sacred Hoop  
202 East Superior Street  
Duluth, MN 55802  
218-623-4667  
[www.msh-ta.org](http://www.msh-ta.org)

Clan Star, Inc. P.O. Box 1835  
Cherokee, NC 28719  
828-497-5507  
[www.clanstar.org](http://www.clanstar.org)

Southwest Center for Law and Policy  
4055 E. 5th St. Tucson, AZ 85711  
520-623-8192  
[www.swclap.org](http://www.swclap.org)

### C. Helpful Resources for Further Research

A number of resources are referenced throughout this Bench Book. Some of these resources provide substantially more material and information on particular issues relating to a judge's management of cases involving sexual assault. They are recommended as first resources for further study of the topic.

Michigan has a very extensive Judges' Bench Book on sexual assault cases. Although it is specific to Michigan law, it provides extensive information on key issues in sexual assault criminal cases which may be applicable to other jurisdictions. This Bench Book is available online at <http://courts.michigan.gov/mji/resources/sabb/sabb.htm>. Last accessed November 17, 2010.

Sections from the *Tribal Law Enforcement Protocol Resource: Sexual Assault* are reprinted in part in this document. Hallie Bongar White, Executive Director of the Southwest Center for Law and Policy wrote most of the sections reprinted, in collaboration with the Tribal Law and Policy Institute. This resource is available free of cost on [www.tlpi.org](http://www.tlpi.org).

The DVD and curriculum, *Understanding Sexual Violence: The Judge's Role in Stranger and Nonstranger Rape and Sexual Assault Cases*, is a helpful resource for individual or group training of judges. A training guide and instructor's guide is provided with the DVD. It was developed by Legal Momentum in cooperation with the National Association of Women Judges. It is available for purchase on Legal Momentum's website: <http://www.legalmomentum.org/our-work/njep/>

Sarah Deer's article, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, was the main resource in information on civil protection orders in sexual assault cases. That article can be found at [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_4/violence,%20women/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_4/violence,%20women/index.php). Last accessed November 18, 2010.

## **D. Terminology Used in This Resource**

**Complainant/victim; defendant/perpetrator:** In the criminal justice system an individual alleging rape is called a “complainant”. She does not become a “victim” until there is a plea bargain or conviction. The individual accused is the defendant, not a perpetrator. Using the appropriate terminology for judges is extremely important. A judge calling a complainant a victim before conviction could present an assumption that the defendant is guilty and may violate due process rights of the defendant.

Information in this resource does use the term victim and perpetrator as it describes typical victims and perpetrators. We use the term complainant and defendant when discussing the legal process.

**Victim/survivor:** A victim/survivor is a person who suffers physical, mental, emotional, and/or spiritual harm due to the behavior of other(s). Throughout this resource, the term victim is the term most commonly used when referring to a person who has been sexually assaulted. Words carry a lot of power and their meaning can be interpreted in different ways. Some people may be offended by the use of the term “victim” while others may feel the term “victim” is an accurate depiction. As the victim moves through the healing process they hopefully move from victim to survivor.

The terms **rape** and **sexual assault** are used interchangeably in this text.

**Use of the female pronoun:** Based on statistical data and anecdotal evidence, it is clear that the overwhelming majority of victims that are sexually assaulted in Indian country are female and the majority of their perpetrators are male. In recognition of that fact, we use female pronouns when referring to victims and male pronouns when referring to perpetrators.

## **E. How to Use This Resource**

### **Introduction**

This section provides helpful information on use of the Bench Book and Bench Card.

### **Overview of Sexual Violence**

This section provides extensive information on sexual assault including defining sexual assault, understanding common victim responses, and understanding common characteristics of offenders.

### **Jurisdiction**

This chapter provides information on tribal jurisdiction. It includes information on federal and tribal cooperation and federal laws related to firearms.

### **Victims' Rights**

This section provides an overview of victims' rights, including a section on federal victims' rights and special considerations for disabled and elder Native victims.

### **Civil Protection Orders for Sexual Assault Victims**

The section discusses how to effectively use civil protection orders to keep victims safe, when sexual assault is involved.

### **Criminal Sexual Assault Trial**

The remaining chapters of the Bench Book review sections of a criminal trial involving sexual assault. These chapters address key considerations in pre-trial, jury selection, trial, general evidence, scientific evidence and sentencing and other post conviction matters.

### **Bench Card for Sexual Assault Cases**

There is a handy checklist – or Bench Card – included in the appendix to assist a tribal judge in criminal sexual assault cases. This Bench Card can be easily copied and used as a handy reminder of key considerations during a sexual assault trial.

**NOTES:**

## CHAPTER TWO

### OVERVIEW OF SEXUAL ASSAULT

#### A. Native Women and Sexual Assault<sup>1</sup>

Native women are sexually assaulted at more than twice the rate of other women in the United States.<sup>2</sup> They are also more likely:

- to be sexually assaulted by a man of another race;
- to be sexually assaulted by multiple perpetrators;
- to be sexually assaulted in a public space;
- to be sexually assaulted with a weapon used in the commission of the crime; and
- to suffer injuries as a result of the sexual assault.

Some scholars and law enforcement officers in Indian country believe that there are perpetrators who specifically target Native women for sexual assault *because* the victim is Native. Sexual assault against Native women can be both a crime of sexual violence as well as a hate crime. Historically, sexual violence against Native women has been used as a tool of colonialism. Native women throughout the history of the Americas have been raped, kidnapped, mutilated, and murdered by the colonizers as a means to gain Native lands and to destroy Native peoples. The perception and experience of many Native women today is that they continue to be dehumanized, devalued, and marginalized by the dominant culture. Because of the history of Native people in this country, there is often widespread mistrust of law enforcement and of the criminal justice system.

Tribal law enforcement officers investigating sexual assault crimes against Native women face additional professional challenges:

- Many tribal communities suffer from high rates of poverty, unemployment, and poor access to telephones, transportation and health care.

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<sup>1</sup> Reprinted Hallie Bongar White, James G. White, Sarah Deer, and Maureen White Eagle, *Tribal Law Enforcement Protocol Resource: Sexual Assault 9-13* (2008) available at <http://www.tribal-institute.org/lists/vaiw.htm>. Last accessed November 11, 2010.

<sup>2</sup> Steven W. Perry, *American Indians and Crime – A BJS Statistical Profile 1992-2002*, Bureau of Justice Statistics, US Department of Justice, Office of Justice Programs (2004) available at [http://www.justice.gov/otj/pdf/american\\_indians\\_and\\_crime.pdf](http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf). Last accessed November 11, 2010.

- The majority of tribes lack strong sexual assault codes.
- There is a widespread shortage of tribal law enforcement officers, 911 systems, and tribal jails.
- Often, tribal law enforcement officers must patrol large geographic areas alone.
- Tribal law enforcement officers have limited access to advanced training on sexual assault and to state of the art forensic evidence testing and equipment.
- The complex maze of criminal jurisdiction in Indian country challenges tribal law enforcement to develop effective collaborations with their state and federal counterparts.
- Some perpetrators of sexual assault may go free because of the complexities of criminal jurisdiction in Indian country.

The above factors may also contribute to the epidemic of sexual assault against Native women, particularly those sexual assaults committed by non-Native men.

The Tribal Law and Order Act of 2010 addressed and attempts to remedy some of these challenges in sexual assault criminal cases. Specifically, the Act is aimed at clarifying responsibilities of federal, state, tribal and local governments. The Act also encourages the coordination and communication among law enforcement agencies, the standardization in the collection of criminal data, and the sharing of criminal history information.

The Act allows tribes to increase the period of incarceration in their criminal statutes to a maximum of three years and a \$15,000 fine (previously limited to one year and \$5,000 fine) for serious crimes provided the tribe supplies certain guarantees of defendant's rights, such as the right to court appointed counsel for an indigent defendant. It allows for an increased imprisonment term of up to three years and an increased fine of up to \$15,000 if the defendant is a person accused of a criminal offense who:

- has been previously convicted of the same, or similar offense, by any jurisdiction in the US, or
- is being prosecuted for an offense comparable to an offense that would be punishable by more than one year of imprisonment if prosecuted by the US or any of the States.

## **B. What is Sexual Assault?**

*NOTE: If your tribal community does not already have strong laws in place to address sexual assault, it is recommended that you begin with the first publication in the series – A Resource Guide for Drafting or Revision of Tribal Laws Against Sexual Violence.*

Sexual assault is often defined as any “non-consensual sexual contact.” “Non-consensual sexual contact” is defined by the laws of each jurisdiction. Many jurisdictions criminalize any non-consensual sexual contact against women that includes one or more of the following types of conduct:

- Contact, touching, or penetration of a victim’s vulva or vagina by a penis, finger, mouth, or foreign object.
- Contact, touching, or penetration of a victim’s anus by a penis, finger, mouth, or foreign object.
- Oral contact with a victim’s vulva, vagina, or anus.
- Contact or touching of a victim’s breast by a finger, hand, mouth, or foreign object.

It is important to remember that sexual assault need not include penile-vaginal penetration. Perpetrators of sexual assault often use foreign objects in the commission of the crime. Foreign objects commonly include firearms, tools, and bottles.

Victims of sexual assault do not need to be unclothed during the assault. Over-the-clothes contact with a victim’s breast, vagina, or anus may also constitute sexual assault under the laws of many jurisdictions.

## **C. Myths and Facts about Sexual Assault**

Myths about sexual violence are powerful and pervasive in today’s society. The propagation and perpetuation of these myths keeps people from understanding sexual violence. Continued belief in this misinformation often keeps victims silent, creates a barrier to effective prevention, and keeps communities from identifying offenders and utilizing the justice system to



determine appropriate punishments. The following provide some of the more prevalent myths:<sup>3</sup>

**Myth:** Most sexual assaults are committed by strangers.

**Fact:** While these are the stories that are most likely to make the news, stranger assaults are statistically the rarest kind of sexual assault. The US Department of Justice cites that 70% of all sexual assaults are committed by someone the victim knows.

**Myth:** Some people ask to be sexually assaulted by their behavior or the way they dress.

**Fact:** This is one of the most prevalent and powerful myths. It asks us to blame the assault on the victim. No one asks or wants to be raped or assaulted. Sexual assault is always the responsibility of the perpetrator and never the responsibility of the victim. While some behaviors we choose may put us at some risk, they are only risky when there are perpetrators who are ready to take advantage of a vulnerable person. How someone dresses, where they go, what they do, or who they are in a relationship with is never justification for sexual assault.

**Myth:** People who are drunk or high have no one to blame but themselves when they are sexually assaulted.

**Fact:** The use of alcohol and other drugs is often a part of sexual assault scenarios. In some cases, victims are encouraged to use alcohol or drugs or are, unbeknownst to them, given intoxicating substances. Whether voluntarily or involuntarily intoxicated, neither the victim's nor the perpetrator's alcohol or other drug use is an acceptable defense in a sexual assault case. In some instances, a victim's intoxication can be understood to render her/him legally unable to give consent to sexual behavior.

**Myth:** Victims often falsely report sexual assault.

**Fact:** The Federal Bureau of Investigation reports that less than 2% of all sexual assault reports are false. This is the same rate of false reporting for

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<sup>3</sup> Minnesota Coalition Against Sexual Assault, *Myths & Facts*, available at [http://www.mncasa.org/about\\_myths.html](http://www.mncasa.org/about_myths.html). Last accessed November 11, 2010.

all other major crimes. Those rare instances of false reporting usually are connected with someone who is dealing with mental illness - not a vengeful "victim" intentionally trying to entrap another.

**Myth:** Most sexual assault is spontaneous and happens when people become so sexually aroused they are unable to stop themselves.

**Fact:** While sexual acts are the tools of the assault, sexual assault is less about the sexual contact and more about hurting, overpowering, or otherwise humiliating another. Most sexual assaults are not spontaneous but are, in fact, planned ahead of time. Studies of convicted assailants indicate that the vast majority of assaults are premeditated - either involving the stalking of a particular victim or targeting potential victims in a way to make them vulnerable to sexual assault. It is important to remember that sexual arousal is not the motivating factor for sexual assault. Finally, humans are able to interrupt sexual arousal. Sexual arousal does not need to culminate in intercourse.

**Myth:** Only young attractive women and girls are sexually assaulted.

**Fact:** This myth again fuels the misconception that sexual gratification is the motivator for sexual assault. Statistics show that victims can be attractive women and girls; they can also be infants, elderly women, or men. It is important to remember that anyone can be a victim of sexual assault; anyone can be an assailant.

**Myth:** The majority of sexual offenders are caught, convicted and in prison.

**Fact:** Only a fraction of those who commit sexual assault are apprehended and convicted for their crimes. Most convicted sex offenders eventually are released to the community under probation or parole supervision. Studies indicate that only 16% - 20% of victims ever come forward and report a sexual assault.

**Myth:** Children who are sexual assaulted will sexually assault others when they grow up.

**Fact:** Most sex offenders were not sexually assaulted as children and most children who are sexually assaulted do not sexually assault others.<sup>4</sup>

#### **D. Non-Consensual Contact: “No Means No”<sup>5</sup>**

The crime of sexual assault includes any “non-consensual” sexual contact. “Non-consensual” is a legal term. A person must possess the legal capacity to form consent to the sexual contact at the time of the sexual contact. It is important to recognize that a woman who is intoxicated or who has severe cognitive disabilities (developmentally disabled, an elder with dementia, etc.) may not have the legal capacity to consent to the sexual contact. Minors do not have the legal capacity to consent to sexual contact in many jurisdictions.

A woman may withdraw her consent from the sexual contact at any time. Any continued, non-consensual sexual contact constitutes the crime of sexual assault.

Sexual assault can be accomplished by the use of force, by the threat of force, by coercion, or by fraud (e.g. posing as a medical doctor). It is important to note that a victim is not required to fight or resist her attacker. Under the laws of most jurisdictions, a conviction for sexual assault can be secured if there is sufficient evidence that sexual contact occurred and that the contact was non-consensual.

#### **E. Spousal or Marital Rape**

Marriage is not a defense to the crime of sexual assault in most jurisdictions. In these jurisdictions, a spouse may be criminally prosecuted for the crime of sexual assault for any non-consensual sexual contact with his wife.

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<sup>4</sup> Center of Sex Offender Management, *Myths and Facts About Sex Offenders*, 2002, available at <http://www.csom.org/pubs/mythsfacts.pdf>. Last accessed November 11, 2010.

<sup>5</sup> Reprinted Hallie Bongar White, James G. White, Sarah Deer, and Maureen White Eagle, *Tribal Law Enforcement Protocol Resource: Sexual Assault 9-13*, 2008, available at <http://www.tribal-institute.org/lists/vaiw.htm>. November 11, 2010.

## F. Stalking and Sexual Assault

Many perpetrators stalk their victims before sexually assaulting them. Native women are stalked more than any other population in the United States.

Prosecutors may seek to introduce evidence of stalking in a sexual assault case as “404(b)” evidence (also known as “prior bad acts” or “other bad acts” evidence) to prove:

- motive
- opportunity
- intent
- preparation
- plan
- knowledge
- identity
- absence of mistake or accident

## G. Impact of Sexual Assault on Victims

The impact on the victim can be devastating regardless of the type of the assault, whether or not there was penetration. Power and control is the primary motive for sexual assault. Having lost her power, the victim feels powerless and believes that her life will never be the same. This is the reason victims of sexual assault refer to it as a *life-altering trauma*.<sup>6</sup> Following a sexual assault, victims are left with many feelings, some more obvious than other including but not limited to:

- fear
- terror
- embarrassment
- shock
- humiliation
- anger
- sadness<sup>7</sup>

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<sup>6</sup> Bonnie Clairmont, *Tribal Sexual Assault Response Team Resource*, 7-8 (2008), available at [http://www.tribal-institute.org/download/SART\\_Manual\\_09\\_08.pdf](http://www.tribal-institute.org/download/SART_Manual_09_08.pdf). Last accessed November 11, 2010).

<sup>7</sup> Id.

The impact of sexual assault on a victim differs and depends upon the situation underlying the rape and the victim's personal characteristics, including her support system and psychological history. However, although few rapes involve weapons or result in serious physical injury, the psychological consequences are profound.

The impact on victims affects their interactions with law enforcement officers. Few rapes are reported to law enforcement officers -- 16%. Stranger rape is much more likely to be reported. Delayed reporting to hospitals and/or police is far more likely in non stranger rapes. Reasons for not reporting or delayed reporting can include: fear of retaliation, fear of being disbelieved or blamed, psychogenic amnesia – unable to remember some or all details of the assault, denial and suppression of emotions related to rape, not knowing the assault was legally rape, fear of loss of privacy, fear of criminal justice system and embarrassment and shame when recounting details of rape.<sup>8</sup>

## **H. Victim Responses During the Assault**

Although impacts vary, there are some common reactions which help understand the victim's behavior. A prosecutor may desire to call an expert witness of sexual assault victims in order to explain the complainant's response in a particular case. However, some common immediate victim responses may lead to behavior that could be interpreted by the uninformed as consent and/or may lead to disbelief of the victim. Understanding dissociation and frozen fright which can occur during the assault is important if the victim did not fight back or make extraordinary efforts to resist.<sup>9</sup>

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<sup>8</sup> National Victim Center and Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation*, 1992, available at [http://academicdepartments.musc.edu/nvcv/resources\\_prof/rape\\_in\\_america.pdf](http://academicdepartments.musc.edu/nvcv/resources_prof/rape_in_america.pdf). Last accessed November 11, 2010.

<sup>9</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, (2005).

Dissociation is described as an altered state of consciousness when the victim perceives themselves to be helpless in these situations. It seriously impacts the victim's ability to respond. Dr. Judith Herman writes:

*Sometimes situations of inescapable danger may evoke not only terror and rage but also, paradoxically, a state of detached calm... The person may feel as though the event is not happening to her, as though she is observing from outside her body, or as though the whole experience is a bad dream from which she will shortly awaken.*<sup>10</sup>

Frozen fright is a feeling of complete paralysis. Fear is so intense that the victim is immobilized, like a deer in the headlight, and cannot offer any resistance. Dr Herman writes:

*When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender. The system of self-defense shuts down entirely. The helpless person escapes from her situation not by action in the real world but rather by altering her state of consciousness. Analogous states are observed in animals, who sometimes "freeze" when they are attacked. These are the responses of captured prey to predator or of a defeated contestant in battle.*<sup>11</sup>

A man's size or strength can be an intimidation factor causing women great fear. There may be little opportunity to fight. Additionally, victims may make a strategic decision not to resist, because they believe resisting will result in serious injury or death.<sup>12</sup> Additionally, the power of an employer, tribal leader, tribal police officer or other person in authority may cause women to conclude that nonresistance is safer than resistance.

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<sup>10</sup> Id. at 42-43, quoting Dr. Judith Herman, M.D., *Trauma and Recovery*, (Perseus Books Group, 1993).

<sup>11</sup> *Id.*, n. 9 at 42.

<sup>12</sup> *Id.* at 43.

## I. Characteristics of Offenders

There are a lot of stereotypes and myths of rapists. Reviewing common characteristics which are supported by studies helps expose some of the myths. Studies show that:

- The vast majority of sex offenders are male.<sup>13</sup>
- The majority of rapists have access to consensual sex.<sup>14</sup>
- Typical sex offenders are not mentally ill.<sup>15</sup>
- Most sex offenders were not sexually abused as children.<sup>16</sup>
- Most sex offenders commit other forms of physical violence and are recidivists.<sup>17</sup>

David Lisak, Ph.D.,<sup>18</sup> a leading researcher in the area of acquaintance rapists, has found that acquaintance rapists fit the following patterns:<sup>19</sup>

Rapists who attack acquaintances plan their crimes and chose a victim.

- They trick their victims into positions of vulnerability – alone in a room, or in a car, or in a secluded area.
- They often give their victims alcohol and/or drugs or target women who have already used alcohol and/or drugs.
- Like other kinds of criminals, rapists are also very good at identifying vulnerable women; women who are least likely to fight, least likely to scream, and least likely to report the crime once it has been committed.

Rapists who attack acquaintances only use the violence necessary.

- They may threaten the victim with violence.
- They may scare their victims into not telling anybody.
- They will escalate their level of threat as needed.

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<sup>13</sup> Lawrence A. Greenfeld, Bureau of Justice Statistics, *Sex Offenses and Offenders*, 2, 1997, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF>. Last accessed November 11, 2010.

<sup>14</sup> A Nicolas Groth, *Men Who Rape*, 5, Plenum Press, (1979).

<sup>15</sup> Diana Scully, *Understanding Sexual Violence: A Study of Convicted Rapists* 142 (1990)

<sup>16</sup> *Id.* at 68-69.

<sup>17</sup> David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *Violence and Victims* 1, 73-84 (2002). available at <http://www.innovations.harvard.edu/cache/documents/1348/134851.pdf>. Last accessed November 11, 2010.

<sup>18</sup> Dr. David Lisak is an Associate Professor of Psychology at the University of Massachusetts Boston and Director of the Men's Sexual Trauma Research Project.

<sup>19</sup> David Lisak, *The Rape Fact Sheet*, March 2002. Available at [http://www.sexualassault.army.mil/files/RAPE\\_FACT\\_SHEET.pdf](http://www.sexualassault.army.mil/files/RAPE_FACT_SHEET.pdf). Last accessed November 11, 2010.

- They usually do not need a weapon.
- They may use their body weight and arms to pin down their victims to instill a sense of helplessness.



**NOTES:**

## CHAPTER THREE

### JURISDICTION<sup>20</sup>

#### A. Criminal Jurisdiction Over Sexual Assault Crimes in Indian Country

Criminal jurisdiction in Indian country can be extremely complex. In general, tribal courts have criminal jurisdiction over any crime committed by a member of a federally recognized tribe that takes place in Indian country.

“Indian country” is a legal term that encompasses:

- all lands within the limits of any Indian reservation
- allotted land in trust
- rights-of-way running through a reservation
- all dependant Indian communities (such as a Pueblo) within the borders of the United States

Tribes can prosecute Indians for sexual assault crimes committed in Indian country regardless of whether the victim is Indian or non-Indian. Federal prosecution of a sexual assault crime does not preclude a parallel or concurrent prosecution of the same crime in tribal court.

#### B. Checkerboard Reservations

Tribal courts maintain criminal jurisdiction over any crime committed by an Indian on fee simple land that is owned by a non-Indian as long as that land is within the exterior boundaries of an Indian reservation. Thus, even on “checkerboard reservations” the tribal court may hear cases of sexual assault when the crime was committed within the exterior boundaries of the reservation.

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<sup>20</sup> Reprinted Hallie Bongar White, James G. White, Sarah Deer, and Maureen White Eagle, *Tribal Law Enforcement Protocol Resource: Sexual Assault* 20-27 (2008) available at <http://www.tribal-institute.org/lists/vaiw.htm>. Last accessed November 11, 2010.

### **C. State Criminal Jurisdiction Over Sexual Assault Crimes Committed In Indian Country**

All state courts have criminal jurisdiction over sexual assault crimes committed by non-Indians against non-Indian victims in Indian country. A federal law known as Public Law 83-280 (also known as “PL 280”) confers additional state court criminal jurisdiction in select jurisdictions.

PL 280 jurisdiction is extremely complicated (and often confusing). There are various categories of PL 280 status that affect the ability of a tribe to investigate and prosecute crimes of sexual assault. Continuing intensive, focused, and collaborative efforts between tribal and state jurisdictions are often required to ensure safety and justice for tribal communities located within PL 280 states.

In select PL 280 jurisdictions, state courts have *concurrent* criminal jurisdiction with tribes over Indian defendants of sexual assault crimes. In these select PL 280 jurisdictions, states also have exclusive jurisdiction over non-Indians who commit sexual assault crimes in Indian country.

In the six “mandatory” PL 280 jurisdictions listed below, the states have criminal jurisdiction over all crimes committed in Indian country except for those crimes of general national applicability (e.g. violation of the RICO Act, commission of an inter-state crime under the Violence Against Women Act, theft from the United States mail, treason, violation of federal immigration law, etc.). It is important to note that some reservations within the states listed below have also “retroceded” jurisdiction to the federal government. Retrocession is a state’s return to the federal government of some or all of the criminal and/or civil jurisdiction that was previously granted to the state under PL 280.

The six “mandatory” PL 280 states are:

- Alaska (except the Annette Islands with regard to the Metlakatla Indians)
- California
- Minnesota (except for the Red Lake reservation)
- Nebraska
- Oregon (except for the Warm Springs reservation)
- Wisconsin

Some states are considered to be “optional PL 280 states”. These “optional” states have adopted all or part of PL 280 jurisdiction over Indian country. It is also important to note that additional federal legislation exists that transfers jurisdiction from tribes to particular states.

The Tribal Law and Order Act of 2010 permits a tribe within the mandatory PL 280 states to request that the federal government enhance its criminal jurisdiction by accepting concurrent criminal jurisdiction with the states and tribes within Indian country of the tribe. This would include jurisdiction to prosecute violations of sections 1152 and 1153 of title 18, United States Code. The Attorney General must agree to the request.

#### **D. Federal Prosecution of Indian Offenders for “Major Crimes”**

In 1885 Congress enacted the Major Crimes Act, 18 U.S.C. § 1153. The Major Crimes Act allows for federal prosecution of Indians for the commission of any of the following crimes in Indian country:

- Murder
- Manslaughter
- Kidnapping
- Maiming
- Aggravated Sexual Abuse or Sexual Abuse (rape or sexual assault)
- Incest
- Assault With Intent To Commit Murder
- Assault With A Dangerous Weapon
- Assault Resulting In Serious Bodily Injury
- Assault Against A Person Under Sixteen
- Felony Child Abuse or Neglect
- Arson
- Burglary
- Robbery
- Felony Theft

The Major Crimes Act applies to crimes committed by Indians in Indian country regardless of whether the victim of the crime is Indian or non-Indian. It does not preclude parallel or concurrent tribal court prosecution for any of the above listed crimes.

The Tribal Law and Order Act of 2010 specifically provides for the appointment of tribal prosecutors and other qualified attorney's to serve as Special Prosecutors in the prosecution of crime in Indian country. It also requires the appointment of Assistant United States Attorney Tribal Liaisons, if the district includes Indian country. Among their various duties, the Tribal Liaisons coordinate the prosecution of federal crime with tribal prosecutors and tribal law enforcement agencies and provide technical assistance and training on evidence gathering.

Pursuant to the Tribal Law and Order Act, should the US Attorney General decide to prosecute, US Magistrates may hold the trial and other court proceedings in Indian country so the defendant and witnesses will not have to be transported to the nearest federal court.

### **E. Federal and Tribal Cooperation**

Crimes of sexual assault may potentially be prosecuted in both tribal and federal courts without the threat of double jeopardy. It is possible to prosecute and convict a defendant of sexual assault in two separate jurisdictions and to impose two separate criminal penalties for the crime.

Although the federal definition of sexual assault may differ from the definition of sexual assault contained in a tribal code, federal and tribal prosecutors will often be utilizing the same evidence, witnesses, and arguments at trial. It is important to coordinate access to evidence and witnesses so that they will be available for trial in each and every jurisdiction where the defendant can be prosecuted.

The Tribal Law and Order Act of 2010 requires federal officials engage in investigation coordination and data sharing with tribal officials. If an investigation of a violation of federal criminal law in Indian country is terminated without referral for prosecution, coordination with the appropriate tribal law enforcement officials is required. Thus, relevant evidence and information may be shared with tribal officials for possible tribal prosecution. If the United States Attorney declines to prosecute or acts to terminate prosecution of an alleged violation of federal criminal law in Indian country, coordination with the appropriate tribal justice officials is required for possible use of evidence in tribal court. Both the investigative and prosecutorial divisions are required to coordinate with tribal officials.

## **F. Firearms**

When considering the safety of the complainant in a criminal sexual assault case, the court may be concerned about the defendant's possession of firearms before trial if defendant is released on bond and after trial once a guilty defendant completes his period of incarceration, if one is imposed. In either case, the court may normally issue a no contact order or other form of protection order. Questioning defendant about his possession or easy access to firearms is good practice to help evaluate the complainant's safety. Determining whether a weapon was used or threatened in the commission of the crime and defendant's past criminal background is important, but not decisive in arriving at prohibitions against possession of firearms in the no contact order.

Consult your tribal code or tribal customs to determine the authority of the tribal court to have the defendant turn firearms over to another person or a law enforcement agency. Some tribes have specific statutes dealing with firearm removal while a criminal case is pending. A tribal statute may provide the court authority through a general catch-all provision which allows the court to impose any conditions which could reasonably keep the complainant or the public safe.

Most women who are sexually assaulted are assaulted by someone they know. The sexual assault may be a part of a pattern of intimate partner abuse. The sexual assault may be brought to the attention of the court as a petition for a protection order. Some tribes have developed specific provisions relative to firearms and protection orders. Some tribal protection order statutes specifically require the removal of firearms and others may give the judge authority to remove them. If the tribal protection order statute does not specifically refer to firearms, there may be a "catch all" provision within the statute which allows the judge to issue all relief necessary to protect the victim. This could be interpreted as authority for the court to restrict firearm possession. Additionally, if no statute exists the tribe may have customs which may allow for the restriction of firearms in certain circumstances.

Possession of a firearm or ammunition by Indians or non-Indians may also constitute a crime separate from the sexual assault. Under federal law it is a crime for certain enumerated persons to possess any firearms or ammunition.

Conviction under these federal “prohibited possessor” statutes carry a maximum penalty of up to 10 years of incarceration.

Some examples of persons who are prohibited possessors under federal law include:

- Convicted felons and persons under indictment for felonies
- Persons subject to qualifying orders of protection with an exemption for official use by law enforcement officers and military personnel
- Persons who have been convicted of misdemeanor crimes of domestic violence with no exemption for law enforcement officers and military personnel
- Persons who have been dishonorably discharged from the military
- Fugitives from justice
- Persons who have previously been committed to a mental institution by court order.

It is important to remember that possession of a firearm or weapon during the commission of the crime of sexual assault can result in enhanced or additional criminal penalties in many jurisdictions.

Persons subject to a qualifying protection order are prohibited from possessing firearms under federal law with some exceptions and those convicted of a misdemeanor crime of domestic violence are prohibited from possession with no exceptions under federal law. A qualifying protection order under the federal statute is one in which a respondent/defendant has had notice and an opportunity to respond. The order could be issued in either a criminal or civil action provided the following criteria are met.

The order must restrain a person from

- Harassing, stalking or threatening an intimate partner of the person, or a child of the person or of the intimate partner, or
- Engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.

A qualifying order also must include **either:**

- A finding that the person subject to the order represents a credible threat to the physical safety of an intimate partner or child, **or**

- An explicit prohibition against the use, attempted use, or threatened use of physical force against an intimate partner or child which would reasonably be expected to cause bodily injury.

This federal statute would apply to the sexual assault protection orders only against an intimate partner. Intimate partner is defined as a current or former spouse, co-parent, or one who cohabits or has cohabited with the subject of the protection order (18 U.S.C. § 921(a)(32)).

Although tribal courts do not enforce federal law, it is good practice for the court to notify the defendant/respondent of the requirements of federal law relative to firearms, in addition to any tribal or state requirements. Notification could be through a standard provision within an order. The following is possible language for a tribal court criminal protection order or civil protection order when federal law applies:

As a result of this order, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition pursuant to federal law under 18 U.S.C. § 922(g)(8) and/or state, tribal, territorial, or local law. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

Additionally, if a defendant is convicted of sexual assault or domestic violence in tribal court, a possible notification to the defendant of federal law is:

If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim, or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. § 922(g)(9) and/or state, tribal, territorial, or local law. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

Alternatively, courts may provide notification by distributing the brochure of the Bureau of Alcohol, Tobacco, and Firearms entitled, *Information Needed*



*to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence*<sup>21</sup>.

For further information on firearms and protection orders suggested reading includes *Enforcing Domestic Violence Firearms Provisions, A Report on Promising Practices*<sup>22</sup> and *Full Faith and Credit: A Passport to Safety, A Judge's Guide*.<sup>23</sup>

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<sup>21</sup> U.S. Department of Justice, *Information Needed to Enforce the Firearms Prohibition: Misdemeanor Crimes of Domestic Violence*, November 2007, available at <http://www.fbi.gov/about-us/cjis/nics/general-information/mcdvbrochure.pdf/view>. Last accessed March 21, 2011.

<sup>22</sup> National Center on Full Faith and Credit, Office on Violence Against Women, *Enforcing Domestic Violence Firearms Prohibitions*, September 2006, available at [http://www.bwjp.org/files/bwjp/articles/Enforcing\\_Firearms\\_Prohibitions.pdf](http://www.bwjp.org/files/bwjp/articles/Enforcing_Firearms_Prohibitions.pdf). Last accessed March 21, 2011.

<sup>23</sup> National Council for Juvenile and Family Court Judges [hereinafter NCJFCJ], *Full Faith and Credit: A Passport to Safety, A Judge's Guide* (VAWA 2005 Edition, 2010). For a copy of this publication, please contact NCJFCJ's Resource Center on Domestic Violence: Child Protection and Custody at (800) 527-3223.

## CHAPTER FOUR

### VICTIMS' RIGHTS

#### A. What Are Victims' Rights?

Many tribes, all states and the federal government have passed laws to create rights for victims. These laws require that victims have certain information, protections, and a limited role in the criminal justice process. Victims' rights depend on the laws of the jurisdiction where the crime is investigated and prosecuted.

A victim is usually defined as a person who has been directly harmed by a crime that was committed by another person. Some states allow a family member of a homicide victim or the parent/guardian of a minor, incompetent person, or person with a disability to exercise these rights on behalf of the victims.

#### B. General Victims' Rights

Below is a list of basic victims' rights provided by law in most jurisdictions. These rights vary, depending on federal, state, or tribal law.<sup>24</sup>

##### 1. Right to Be Treated with Dignity, Respect, and Sensitivity

Victims generally have the right to be treated with courtesy, fairness, and care by law enforcement and other officials throughout the entire criminal justice process. This right is included in the constitutions of most states that have victims' rights amendments and in statutes of more than half the states. This right encourages victims to participate fully and persevere through all stages of the criminal justice process, which may be difficult and frustrating for victims.

##### 2. Right to Attend Criminal Proceedings

The right to attend criminal proceedings allows victims to see for themselves the inner workings of the criminal justice process. Victims usually have the right to attend the offender's trial, sentencing, and

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<sup>24</sup> National Center for Victims of Crime, Reprinted from 2008 National Crime Victims Brochure, all rights reserved. Copyright © 2008. This information may be freely distributed, provided that it is distributed free of charge, reprinted in its entirety, and includes this copyright notice.

parole hearing. The right to attend the trial is not absolute, however. If a victim is a witness in the case, he or she may not be allowed to be present at the trial. Some states have passed laws to ensure that victims attending trials may bring a family member or victim advocate to court with them for support. Because victims may have to miss work when they attend criminal proceedings, some states also have laws to protect victims' employment when they exercise this right.

### **3. Right to Be Heard**

In all states, victims have the right to make a victim impact statement to the court. Victim impact statements allow crime victims, during the decision-making process on sentencing or parole, to describe to the court or parole board the impact of the crime on their lives. The victim impact statement may include a description of psychological, financial, physical, or emotional harm the experienced as a result of the crime. A judge may use information from these statements to help determine an offender's sentence; a parole board may use such information to help decide whether to grant a parole and what conditions to impose in releasing an offender. Many victims have reported that making victim impact statements improved their satisfaction with the criminal justice process and helped them recover from the crime.

In some states, the prosecutor is required to confer with the victim before making important decisions. In all states, however, the prosecutor (and not the victim) makes decisions about the case.

### **4. Right to Be Informed**

The purpose of this right is to make sure that victims have the information they need to exercise their rights and to seek services and resources that are available to them. Victims generally have the right to receive information about victims' rights, victim compensation, available services and resources, how to contact criminal justice officials, and what to expect in the criminal justice system. Victims also usually have the right to receive notification of important events in their cases. Although state laws vary, most states require that victims receive notice of the following events:

- the arrest and arraignment of the offender
- bail proceedings
- pretrial proceedings

- dismissal of charges
- plea negotiations
- trial
- sentencing
- appeals
- probation or parole hearings
- release or escape of the offender

Tribes and states have different ways of providing such information to victims. Usually, information about court proceedings is mailed to the victim. Some states have an automated victim notification system that automatically calls or e-mails the victim with updates on the status of the offender, while others require the victim to telephone the authorities to receive such updates.

### **5. Right to Protection**

In many states, victims have the right to protection from threats, intimidation, or retaliation during criminal proceedings. Depending on the jurisdiction, victims may receive the following types of protection:

- police escorts
- witness protection programs
- relocation
- restraining orders

Some states also have laws to protect the employment of victims who are attending criminal proceedings (see “Right to Attend Criminal Proceedings,” above).

### **6. Right to Apply for Compensation**

All states provide crime victim compensation to reimburse victims of violent crime for some of the out-of-pocket expenses that resulted from the crime. The purpose of compensation is to recognize victims’ financial losses and to help them recover some of these costs.

All states have a cap on the total compensation award for each crime, and not all crime-related expenses are covered. To be eligible for compensation, victims must submit an application, usually within a certain period of time, and show that the losses they are claiming

occurred through no fault of their own. Some types of losses that are usually covered include:

- medical and counseling expenses
- lost wages
- funeral expenses

Some states may cover cultural ceremonies needed for healing or support. Compensation programs seldom cover property loss or pain and suffering. Also, victim compensation is a payer of last resort; compensation programs will not cover expenses that can be paid by some other program, such as health insurance or workman's compensation.

### **7. Right to Restitution from the Offender**

In many states, victims of crime have the right to restitution, which means the offender must pay to repair some of the damage that resulted from the crime. The purpose of this right is to hold offenders directly responsible to victims for the financial harm they caused. The court orders the offender to pay a specific amount of restitution either in a lump sum or a series of payments. Some types of losses covered by restitution include:

- medical and counseling expenses
- lost wages
- property loss
- insurance deductibles

### **8. Right to Prompt Return of Personal Property**

Crime investigators must often seize some of the victim's property as evidence for a criminal case. In most states, authorities must return such property to the victim when it is no longer needed. To speed up the return of property, some states allow law enforcement to use photographs of the item, rather than the item itself, as evidence. The prompt return of personal property reduces inconvenience to victims and helps restore their sense of security.

### **9. Right to a Speedy Trial**

Many states set limits on court-ordered postponements or give priority to cases that involve particularly vulnerable victims. The purpose of

these limits is to prevent unreasonable delays of criminal proceedings, which may frustrate and upset victims.

### **10. Right to Enforcement of Victims' Rights**

To be meaningful, legal rights must be enforced. States are beginning to pass laws to enforce victims' rights, and several states have created offices to receive and investigate reports of violations of victims' rights. Other states have laws that permit victims to assert their rights in court.

The Judge's role is important in ensuring a complainant's rights are protected during a hearing or trial. Some states have implemented special court procedures to protect complainants and witnesses while testifying. In Michigan for example, trial courts are given broad statutory authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment."<sup>25</sup> Other measures include reasonable limits on cross-examination, special protections for children and developmentally disabled complainants-witnesses, the use of dolls or mannequins to aid in testimony, support persons to accompany or sit in close proximity to the witness during testimony, rearranging the courtroom and shielding or screening the witness from the defendant or other persons, and using videotaped depositions or closed-circuit television when other protections are inadequate.

### **C. Native Victims with Disabilities<sup>26</sup>**

Native women with disabilities are often specifically targeted for sexual assault. An overwhelming majority of perpetrators of sexual assault against women with disabilities are known to the victim. Women with disabilities may also be repeatedly victimized by the same perpetrator.

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<sup>25</sup> Mich. R. Evid. § 611(a) (2009).

<sup>26</sup> Reprinted Hallie Bongar White, James G. White, Sarah Deer, and Maureen White Eagle, *Tribal Law Enforcement Protocol Resource: Sexual Assault* 14-16 with minor modification to reference judges instead of law enforcement agents (2008) available at <http://www.tribal-institute.org/lists/vaiw.htm>. Last accessed November 11, 2010.

Native women with disabilities may be dependent upon caretakers who are the perpetrators of sexual violence against them. Women with disabilities are at risk for sexual assault whether they reside in an institutional setting (such as an assisted living facility), in their own home, or with relatives or other caretakers. It can be difficult for Native women with disabilities to initiate contact with law enforcement to report sexual assault crimes and to participate in the justice process. Inaccessible buildings and communication systems and a lack of interpreters on tribal lands can pose significant challenges to accessing the justice system.

Tribal judges can assist Native victims with disabilities by:

- Treating complainants with dignity and respect.
- Remembering that complainants may not have the legal capacity to form consent to sexual acts because of the nature of their disability.
- Recognizing that interpreters who are family members or caretakers may be the perpetrators of the sexual assault and utilizing other interpreters when possible.
- Providing copies of victim rights information in alternative formats.
- Understanding the power imbalance between a caregiver and a woman with disabilities and how that may make it more difficult for complainants to cooperate with the investigation and prosecution.
- Utilizing formats and communication styles that ensure that the complainant understands the criminal justice process.

It is important that sexual violence against Native women with disabilities be treated as a crime and not solely handled as a tribal court civil matter (e.g. moving the victim to another care-giving facility or appointing a new guardian for the victim).

#### **D. Elder Native Victims<sup>27</sup>**

Native communities traditionally hold elder women in extremely high regard. Native elders are respected for their knowledge and life experience and are often viewed as an important link in the chain of the people. Unfortunately, Native elders can still become victims of sexual assault.

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<sup>27</sup> Id.at 16.

There are few statistics addressing the prevalence of sexual violence against older Native women. Reporting may be low because of a heightened sense of shame, fear of the criminal justice system, language barriers, dependency on the caretaker/perpetrator, or a desire not to "air the family's dirty laundry" in closely knit tribal communities.

Tribal judges can assist tribal elders who are complainants of sexual assault by:

- Being respectful of the elder at all times and allowing the elder to retain her dignity and privacy throughout the trial.
- Recognizing that perpetrators may be family members, acquaintances, or caregivers.
- Being aware that some elders may have disabilities that prevent them from having the legal capacity to form consent to sexual acts (e.g. dementia, etc.).
- Recognizing that family members or caretakers who serve as language interpreters for elders who do not speak English may be the perpetrators of the sexual assault.
- Understanding that elders may be completely dependent upon their caregivers and that this power imbalance may make it more difficult for her to cooperate.
- Utilizing formats and communication styles that ensure that the complainant understands the criminal justice process.

## **E. Sexual Assault Victim Advocates**

Victim advocates working for community domestic violence or sexual assault programs, provide essential support to victims of sexual assault and should be allowed to support the complainant in the courtroom. They are trained to assess victim's needs and to provide counseling, advocacy, information, and support. Additionally, victim advocates working in prosecutors' offices can serve as important liaisons with law enforcement and prosecution throughout the entire criminal justice process.

Victim advocates often assist officers in explaining the medical examination process and in informing the complainant about how sexual assault criminal investigations are typically conducted. Tribal sexual assault victim advocates often work in concert with victim advocates from other jurisdictions and can assist complainants as their cases proceed through tribal and/or other



criminal justice systems. Victim advocates can be an important resource for explaining victim's rights. They can also assist in assessing ongoing victim safety issues and in providing medical, counseling, social services, and other referrals for complainants.

## CHAPTER FIVE

### CIVIL PROTECTION ORDERS FOR SEXUAL ASSAULT VICTIMS

#### A. Overview

The majority of sexual assault victims do not become involved in the criminal justice system. Those who are involved in a criminal proceeding may eventually have a tribal court issue a “no contact” order. However, the complainant in a criminal case may be left without any protection order during the investigation, before the defendant is arraigned in a criminal proceeding.

Civil protection orders in tribal courts have become common mechanisms to assist victims of domestic violence. A tribal judge may be asked to issue a protection order while a sexual assault is being investigated or even when the assault is not reported to law enforcement.

If a petitioner alleges sexual assault in a petition for a protection order, recognize that her failure to report to a law enforcement agency has no bearing on whether or not the assault took place, as most sexual assaults are not reported. Also, recognize that she has no obligation to file a criminal report, and there may be good reasons she has chosen not to report.

Many tribes have updated protection order laws. However, most tribal protection order statutes are specific to domestic violence, requiring that the petitioner have a history of intimacy with the respondent. Victims of sexual assault, who do not have a history of intimacy with their assailant, may not be eligible for a protection order.<sup>28</sup> However, some tribal protection order statutes are broad enough to cover people who do not have a history of intimacy, and others have specifically addressed sexual assault victims.

If your tribe does not have a protection order statute that covers a particular sexual assault case, it may have statutes for anti-harassment orders or general restraining orders that could provide some protection to the sexual assault victim when there is no history of intimacy. Civil anti-harassment

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<sup>28</sup> Sarah Deer, *Expanding the network of Safety: Tribal Protection orders for Survivors of Sexual Assault 2003/2004 Tribal Law Journal*, University of New Mexico. Available at [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_4/violence,%20women/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_4/violence,%20women/index.php). Last accessed November 10, 2010.

orders often require “a course of conduct,” which rape victims have difficulty in showing when there is one act of sexual violence, but some victims will be able to demonstrate a series of acts. It is possible that a victim who has been raped once, and who has no history of an intimate relationship may not have the option of a civil protection order.

## **B. How Can a Civil Protection Order Help?**

Safety of the victim is at the heart of any protection order statute. A sexual assault victim may re-experience the sexual assault each time she sees the perpetrator and experience trauma, fear, and pain. The vast majority of perpetrators are acquaintances. Protection orders can provide victims with a sense of security and safety. It also allows the victim to take back some control over her life after a trauma, where she had no control.

A protection order could require the following relief:

- Restrain the respondent from having any contact, including nonphysical contact, with the petitioner directly, indirectly or through third parties;
- Exclude the respondent from the petitioner’s residence, workplace, or school, or from the day care or school of a child, if the victim is a child;
- Exclude the respondent from tribal celebrations and/or ceremonies that the petitioner attends;
- Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location; and
- Order any other injunctive relief as necessary or appropriate for the protection of the petitioner.

Protection orders can be an alternative to the criminal justice system. The civil system does not require law enforcement to be involved. The victim has more control over the process. She does not need to wait for the prosecutor to act. She can take action herself.

A protection order hearing provides a forum for the stories of survivors to be heard. For many survivors, the opportunity to tell their story of survival to a judge may be integral to their healing and re-integration into the

community.<sup>29</sup> The fact that a lower standard of proof (preponderance of the evidence) applies to the civil proceeding, increases the likelihood that the court may take action. Carefully, listen and weigh the evidence presented. The issuance of a protection order can represent a public acknowledgement of what the survivor experienced.

The issuance of a protection order can also provide accountability for perpetrators of sexual assault. Although the order is civil, a violation of the order has criminal consequences, which are frequently enforced in tribal courts. Issuance of protection orders in a swift and consistent manner can send a strong message to the perpetrator and to the community.<sup>30</sup>

### **C. Limitations of Protection Orders in Sexual Assault**

Some victims of rape do not know who raped them. They therefore do not have sufficient information to seek a protection order. Others may not meet the specific requirements of the protection order statute.

Law enforcement agents are needed to enforce a protection order. Many reservations lack adequate numbers of law enforcement officers. Additionally, protection orders do not always prevent violence; they are just one tool that may be used. This should just be a part of the victim's safety plan.

The victim should also realize that the respondent may show up in court and have the right to cross-examine her at a protection order hearing. This may be very intimidating for a survivor. The tribal judge should control any explicit behavior of the respondent that could be considered intimidating during the hearing. Providing a safe place for the petitioner to wait prior to hearing is also important.

### **D. Full Faith and Credit of Tribal Protection Orders for Sexual Assault**

The full faith and credit provisions of the Violence Against Women Act (VAWA) include a very broad definition of “protection order”, which

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

includes sexual assault victims.<sup>31</sup> The tribal order is required to be enforced in other states and tribes. It allows the victim some sense of security as she travels from her home for work or pleasure.

For further information on Full Faith and Credit, a helpful resource is *Full Faith and Credit, a Passport to Safety, A Judges Guide* developed by the National Council of Juvenile and Family Court Judges.<sup>32</sup>

## **E. Tribal Protection Order Resources**

For further research on tribal laws and resources pertaining to protection orders, we encourage you to review the Tribal Legal Code Resource: Domestic Violence and the Tribal Protection Order website at [www.TribalProtectionOrder.org](http://www.TribalProtectionOrder.org).

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<sup>31</sup> 18 U.S.C. § 2265 (2006)

<sup>32</sup> National Council of Juvenile and Family Court Judges, *Full Faith and Credit, a Passport to Safety, a Judges Guide, Violence Against Women Act: Amended 2005* (2010), available at <http://www.vaw.umn.edu/documents/passporttosafety/passporttosafety.html>. Last accessed November 18, 2010.

## CHAPTER SIX

### CRIMINAL SEXUAL ASSAULT: PRE-TRIAL CONSIDERATIONS

#### A. Arraignment and Considerations in Setting Bond

The defendant's first appearance to face the charges against him provides an opportunity for the judge to consider whether the defendant should be released on bond. Setting conditions of bond that assures the complainant and public are safe and that the defendant appears for trial requires careful consideration. Non-stranger sexual assault and stranger sexual assault can be considered equally serious crimes.

Tribal judges may consider:<sup>33</sup>

- Defendant's prior criminal record, including juvenile offenses;
- defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
- defendant's history of substance abuse or addiction;
- defendant's mental condition, including character and reputation for dangerousness;
- the seriousness of the offense charged;
- the presence or absence of threats;
- the probability of conviction and likely sentence;
- defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
- the availability of responsible members of the community who would vouch for or monitor the defendant;
- facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
- any other facts bearing on the risk of nonappearance or danger to the public.

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<sup>33</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, *Judges Recommendations*, p.4. (2005).

If a defendant is released on bond, a judge should consider “no contact” or other provisions to protect the complainant. The complainant should be promptly notified of defendant’s release and bond conditions.

Considerations in a “no contact” provision to protect complainant:

- Define no contact to include any means of contact, including contact through others;
- prohibit entry in specified premises or areas;
- tethering<sup>34</sup> (house arrest, ankle bracelet with GPS device, reporting device) may be appropriate to promote safety;
- prohibit the purchase or possession of firearms;
- authorize law enforcement to remove firearms from defendants possession;
- violations should be acted upon swiftly with severe sanctions; and
- provide the complainant with a copy of the “no contact” order.

## **B. Probable Cause or Preliminary Hearing**

Some tribes may have Probable Cause or Preliminary Hearings for serious crimes like sexual assault. At the Probable Cause Hearing the prosecutor presents the basis of her case and the defense is permitted an opportunity to cross examine. If the prosecutor cannot prove “probable cause,” the judge must dismiss.

Judges considerations at Probable Cause Hearing<sup>35</sup> in a sexual assault case:

- Common responses of sexual assault complainant may be counter-intuitive;<sup>36</sup>
- treat non-stranger rapes as seriously as stranger rapes;
- view the issue of “force” from the complainant’s perspective;
- realize that lack of injuries is the norm in rape cases;
- lack of injuries does not prove consent;

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<sup>34</sup> There are two types of tethering systems: (1) Radio Frequency, known as “traditional” tethering, which creates a distance limitation for the defendant from a fixed geographical location (typically the defendant’s residence); and (2) Global Positioning System (GPS) tethering, which is a satellite surveillance system that creates off-limits geographical territories called “hot zones.” It is important to note that tethering does have its limitations.

<sup>35</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, (2005).

<sup>36</sup> *Id.*

- failure to flee does not prove consent;
- consider frozen fright reactions, if applicable;
- focus on defendant's behavior, not the complainant's; and
- do not let defense harass or intimidate the complainant.

### **C. Scheduling and Continuances**

Tribal judges may consider the following in developing a trial schedule and plan:<sup>37</sup>

- Recognize that defense delays may be a strategy to create stress for the complainant.
- Be aware that the complainant may suffer severe psychological trauma each time she needs to prepare for a hearing or appearance.
- Minimizing the complainant's court appearance may prevent some trauma.
- Providing separate waiting rooms for all hearings may be less traumatic for the complainant.
- Special dates such as anniversaries of the sexual assault should be avoided when setting trial and other court dates.
- Set a firm, realistic schedule and adhere to it.
- Require the prosecutor to keep the complainant informed.

### **D. Pre-Trial Motion to Exclude Expert Witness**

In some rape trials a prosecutor may seek to produce an expert witness at trial to explain reactions of the complainant which may be similar to common rape victims' reactions. A pre-trial motion may be made by defense to exclude the expert witness.<sup>38</sup>

Tribal judges may:

- Acknowledge the scientific validity of research on rape victims' reactions;
- recognize that many rape victims' reactions are counterintuitive;
- recognize that certain reactions and facts may require an expert's explanation, such as: "frozen fright", no physical injury, or

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<sup>37</sup> *Id.*

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



- delayed reporting;
- allow an expert to testify that the complainant's reaction was "consistent with" sexual assault victims' reactions; and
  - not permit experts to testify as to the complainant's credibility.<sup>39</sup>

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<sup>39</sup> Legal Momentum, *Understanding Sexual Violence: The Judicial Response*, Steps a Judge Can Take, Revised December 2005.

## CHAPTER SEVEN

### CRIMINAL SEXUAL ASSAULT: JURY CONSIDERATIONS

#### A. Jury Selection in Tribal Courts

Each jurisdiction has different approaches to selecting a jury. In some courts lawyers conduct the questioning or *voir dire*, sometimes limited by time and/or questions. Even when the attorneys conduct the questioning, in most jurisdictions it may be appropriate for a judge to ask additional questions. In other jurisdictions the judge conducts *voir dire* with the questions submitted by attorneys. The examination of potential jurors is important to identify potential prejudices and biases of jurors which would prevent a fair trial, not just for the defendant, but also for the complainant.

#### B. Jury Bias

The general population is commonly uninformed about sexual assault. Substantial research indicates that there is a tendency to victim blame and the jurors often have difficulty moving beyond a preconceived notion of what “real rape” is and who a “worthy victim” is.<sup>40</sup> Open ended questions are much more likely to uncover biases.

Judges may look for common jury biases such as:

- Juror may hold ideas about rape victims and rapists that are not true;
- may have preconceived ideas of a “real rape;”and
- may be a survivor of a sexual abuse/assault.<sup>41</sup>

Often a standard admonition to the juror to “set aside your personal feelings” does not correct biases. The juror may not be aware of his/her biases related to the proper mode of social and sexual behavior between men and women.

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<sup>40</sup> Id.

<sup>41</sup> Consider protection of the jurors privacy if questioned on history or childhood or adult sexual assault.

**NOTES:**

## CHAPTER EIGHT

### CRIMINAL SEXUAL ASSAULT: TRIAL CONSIDERATIONS

#### A. Attorneys' Behavior

It is important to set the appropriate tone in the courtroom to make sure there is an attitude of respect.

Possible ways to create an environment of respect:<sup>42</sup>

- Recognize and implement cultural customs and practices that are conducive for creating an atmosphere of respect;
- create awareness that you are in charge;
- require people to be polite at all times, even in cross-examination;
- require everyone to address all witnesses by surnames and refer to witnesses by surnames in all statements;
- maintain a formality in the proceedings; and
- do not permit comments that trivialize rape.

During Examination of Witnesses:

- Sarcasm is inappropriate;
- control abusive cross-examination;
- control treatment of witnesses by controlling repetition, badgering, misquoting, argumentative and intimidating behavior, or loud voice;
- stop inappropriate questioning immediately, such as questions relating to complainant's prior sexual history;
- limit and control objections
- do not require the complainant to provide their address; and
- it is possible that during questioning a complainant may experience flashbacks or trauma and have difficulty collecting their thoughts. Allowing the complainant time to take a drink of water or briefly pause may be helpful.

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<sup>42</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, *Judges Recommendations* (2005).

Demonstrations or re-enactments:

- Complainants should not be asked to show on their own bodies or use their own bodies for a re-enactment.

## **B. Legal/Evidentiary Issues**

- Allow expert witness testimony to explain a victim's general reactions to rape;<sup>43</sup>
- enforce rules of evidence including the rape shield law;<sup>44</sup>
- resolve issues of admissibility of complainants past sexual history out of the presence of the jury;
- deal with legal issues in *in limine* rulings to minimize conferences during trial; and
- draw sequestration orders as narrowly as possible, allowing complainant to stay in courtroom after her testimony.<sup>45</sup>

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<sup>43</sup> See section 6 (D) above for more discussion of this issue.

<sup>44</sup> See Chapter 9 (B) for more discussion of this issue

<sup>45</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, (2005).

## CHAPTER NINE

### CRIMINAL SEXUAL ASSAULT GENERAL RULES OF EVIDENCE

#### A. Rules of Evidence in Tribal Courts

Certain tribes have established detailed rules that address procedural and evidence rules within tribal courts. When tribal law does not address an issue, some tribal courts may authorize the application of state statutory law, while others specifically prohibit reliance on state law in favor of general common law and equitable principles.<sup>46</sup>

Many tribal courts have incorporated, as their own, federal or state rules of civil and criminal procedure with few or minor modifications.<sup>47</sup> Some tribal courts have adopted by reference the Federal Rules of Evidence or the Federal Rules of Civil Procedure concerning discovery, admissibility, and witness competency.<sup>48</sup> For example, the Navajo Tribal Courts have adopted “plain language” Rules of Evidence. These rules are similar to the Federal Rules of Evidence but written in a language that lay judges and lay advocates with some legal training can better understand.<sup>49</sup> Since many rules of evidence and procedure are simplified federal rules, tribal court judges may look to federal precedent if there is no tribal case law which applies to the issue.

Also, most tribal courts tend to adopt a more liberal interpretation of these rules with a disapproving eye toward dismissing or prejudicing claims for technical rules violations.<sup>50</sup> Unlike Anglo-American legal systems, tribal courts have evolved from courts where non-law-trained advocates and judges spoke more toward the merits instead of technical rules.<sup>51</sup>

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<sup>46</sup> William C. Watt, *Practicing Indian Law in Tribal Courts*, Federal Lawyer, (March/April 2005).

<sup>47</sup> See Kevin K. Washburn, *Reconsidering the Commission's Treatment of Tribal Courts*, 17 Fed. Sent. Rep. 209, 209-20 (2005).

<sup>48</sup> Watt, *supra* note 40.

<sup>49</sup> James Jay Mason, *Mineral Development on Indian Lands*, 23A RMMLF-INST 5 (1989).

<sup>50</sup> E.g., *Mathiason v. Gate City Bank*, No. TMAC 04-2002, at 4 (Turtle Mountain Band Ct. App. 2005). Available at <http://www.turtle-mountain.cc.nd.us/cases.htm>. Last accessed January 15, 2009.

<sup>51</sup> In the experience of the author, tribal court judges tend to overlook technical violations of court rules where no party can show prejudice. See, e.g., Matthew L.M. Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Band of Ottawa and Chippewa Indians*, 7 Tribal L. J. (forthcoming 2007) (manuscript at §§ 21.04[B]; 21.04(I)). Available at <http://www.law.msu.edu/indigenous/papers/2007-02.pdf>. Last accessed November 10, 2010.

In 1996 Nell Jessup Newton conducted a study of eighty-five tribal court opinions, looking in particular at the law applied in the opinions. In many of the cases in the sample, tribal courts did apply the rules of federal civil or appellate procedure or the Federal Rules of Evidence to resolve questions not clearly covered by the tribal rule,<sup>52</sup> although often stressing that while the rules may function as important guidelines, the court is not bound to apply them.<sup>53</sup>

A unique feature in many tribal courts is that they allow the use of tribal custom and tradition as the governing law for resolving disputes arising in Indian country. As Pat Sekaquaptewa notes, a good starting point is to look at the Federal Rules of Evidence provisions but also to look at comparative tribal imports and modifications of these same provisions and how they have been applied in real cases.<sup>54</sup> This tribal jurisprudence helps judges to fill gaps left by the Federal Rules of Evidence in a way that makes the evidence rules more applicable to the people of each particular nation. Further development will lead to a move away from reliance on federal precedent for guidance on interpretation of evidence rules and instead an internal look to tribal customs for direction.

Since the Federal Rules of Evidence are frequently used for guidance in tribal courts, specific Federal Rules are discussed in this section.

## **B. Rape Shield Provisions**

These provisions were created to prevent the defendant from introducing evidence of the complainant's past sexual conduct in a prosecution for criminal sexual conduct.

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<sup>52</sup> See, e.g., *Waters v. Colville Confederated Tribes*, 23 Indian L.Rep. 6120 (Colville Ct.App.1996) (adopting federal rules of evidence and attendant case law regarding hearsay and impeachment, while noting tribal council had expressed its intent that the court not adopt state law even where analogous); *Confederated Salish & Kootenai Tribes v. Devereaux*, 23 Indian L.Rep. 6099, 6100 (Confederated Salish & Kootenai Tribes Ct.App.1996) (applying Federal rule of Evidence § 606(b) and citing a federal case in discussing public policy behind the rule).

<sup>53</sup> See *Hitchcock v. Shaver Mfg. Co.*, 23 Indian L.Rep. 6137 (Confederated Salish & Kootenai Tribes Ct.App.1996) (discussing earlier decision by the court of appeals in the same case refusing to apply FRCP Rule 54 and thus permitting an appeal of the dismissal of the retailer in a products liability case in which the lower court had upheld jurisdiction over the manufacturer).

<sup>54</sup> Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 Am. Indian L. Rev. 319, (2007).

Although, reference is made to federal rules for illustrative purposes, tribal judges should refer to their own laws, procedures and customs. Federal rules are not binding on tribal judges unless the tribal code specifically makes these rules binding. Since many tribes reference the federal rules, adopt similar rules or otherwise consider the federal rules, the information may be helpful.

Federal Rule of Evidence 412 (Federal Rape Shield) aims to protect the complainant against:

- The invasion of privacy;
- potential embarrassment; and
- sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.

The rule bars evidence offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the complainant.

Past sexual behavior that is excluded includes all activities:

- That involve or imply actual physical conduct, i.e. sexual intercourse and sexual contact;<sup>55</sup>
- of the mind, such as fantasies or dreams;<sup>56</sup> and
- relating to a complainant's sexual misconduct that is offered to prove a sexual predisposition, such as complainant's mode of dress, speech, or life-style.

The following past sexual behavior is *not* barred by Rule 412:

- Evidence offered to prove allegedly false prior claims by the complainant;

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<sup>55</sup> See, e.g. *United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible).

<sup>56</sup> See 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure*, § 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").



- specific instances of sexual behavior with persons other than the defendant may be admissible if offered to prove that another person was the source of semen, injury or other physical evidence;<sup>57</sup>
- Evidence of past sexual behavior with the accused to prove consent or presented by the prosecution;<sup>58</sup> and
- Evidence which excluded would violate the constitutional rights of the defendant.<sup>59</sup>

Rule 412 requires the following procedure to determine admissibility. A party intending to offer evidence under Rule 412 must:

- File a written motion at least 14 days before trial;
- specifically describe the evidence;
- state the purpose for which it is offered;
- the court, for good cause may require a different time for filing or permit filing during trial;
- serve the motion on all parties; and
- notify the complainant.

Procedure required of Court under Rule 412:

- Must conduct a hearing in camera;
- afford the complainant and the defendant a right to attend and be heard; and
- motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

### **C. Prior Bad Acts of Defendant**

Another evidence issue relating to sexual assault is whether the defendant's prior convictions or “bad acts” can be admissible. Generally evidence of other crimes and bad acts are not admissible to prove the character of the defendant.<sup>60</sup> However, in sexual assault cases Federal Rule 413 recognizes that in certain sexual misconduct cases, propensity evidence<sup>61</sup> has special

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<sup>57</sup> See Federal Rule of Evidence 412 (b)(1)(A).

<sup>58</sup> See Federal Rule of Evidence 412 (b)(1) (B).

<sup>59</sup> See Federal Rule of Evidence 412(b)(1)(C).

<sup>60</sup> However, the evidence of bad acts or prior convictions is admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake.

<sup>61</sup> Prior bad acts and convictions show a tendency to commit similar crimes.

value warranting a decrease in the usual protections against propensity and character evidence.<sup>62</sup>

Although, reference is made to federal rules for illustrative purposes, tribal judges should refer to their own laws, procedures and customs. Federal rules are not binding on tribal judges unless the tribal code specifically makes these rules binding. Since many tribes reference the federal rules, adopt similar rules or otherwise consider the federal rules, the information may be helpful.

Rule 413 of the Federal Rules of Evidence:

- Provides that similar prior bad acts evidence are admissible if relevant where defendant is accused of sexual assault;<sup>63</sup>
- allows admission of other sexual assaults including those that are subject of uncharged conduct;<sup>64</sup> and
- requires the court to perform an analysis (weighing probative value against prejudice to defendant) with careful attention to both significant probative value and strong prejudicial qualities inherent in all evidence submitted under 413.<sup>65</sup>

Considerations in weighing probative value and prejudicial qualities:

- Similarity of past act to situation that has resulted in the trial of defendant;
- specific details of past act available or facts are vague;
- closeness in time of prior acts to charged acts;
- frequency of prior acts;
- presence or lack of intervening events; and

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<sup>62</sup> United States v. Stout, 509 F.3d 796, 801 (6th Cir. 2007); See also LeCompte I with United States v. LeCompte, 131 F.3d 767, 770 (8th Cir. 1997 (LeCompte II).

<sup>63</sup> Federal Rule of Evidence 413:

(a) 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.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

<sup>64</sup> *United States v Guidry*, 456 F3d 493, (5th Cir, 2006), cert den 127 S Ct 996 (2007).

<sup>65</sup> *United States v Guardia*, 135 F3d 1326, (10th.Cir, 1998).

- need for evidence beyond testimony of defendant and complainant.<sup>66</sup>

If the prosecutor intends to offer evidence under Rule 413, she is required

- to tell the defendant in advance
- to include in the disclosure statements of witnesses or a summary of the substance of any testimony that is to be offered
- to disclose at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.

## D. Selected Hearsay Rules (and Exceptions)

This section addresses selected hearsay rules (and exceptions) that may be applicable in criminal cases involving sexual assault.

Although, reference is made to federal rules for illustrative purposes, tribal judges should refer to their own laws, procedures and customs. Federal rules are not binding on tribal judges unless the tribal code specifically makes these rules binding. Since many tribes reference the federal rules, adopt similar rules or otherwise consider the federal rules, the information may be helpful.

### a. Hearsay Generally

Federal Rule of Evidence 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A statement “is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Federal Rule of Evidence 801(a).

Hearsay is not admissible in federal courts except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. Federal Rule of Evidence 802.

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<sup>66</sup> *Johnson v Elk Lake Sch. Dist.*, 283 F3d 138(3rd Cir. 2002). See also *United States v Medicine Horn*, 447 F3d 620, (8th Cir.2006) (District court did not abuse its discretion because court gave limiting instructions and evidence involved substantially similar offenses to crimes charged); *United States v Seymour*, 468 F3d 378, (6th Cir. 2006) (Appellate court agreed with district court's finding that prior-assaults evidence was highly probative based on closeness in time of prior acts to current charges of aggravated sexual abuse of adult by force); *United States v Sioux*, 362 F3d 1241, (9th Cir. 2004) (court did not err in admitting propensity evidence detailing defendant's sexual misconduct that occurred subsequent to event giving rise to pending trial because plain language of Fed. R. Evid. 413 permits admission of subsequent acts evidence to same extent it permits introduction of evidence tending to demonstrate prior acts of sexual misconduct).

## **b. The Crawford Rule and The Indian Civil Rights Act (ICRA)'s Confrontation Clause**

ICRA's confrontation clause parallels the same right to confront witnesses as is guaranteed by the Sixth Amendment of the United States Constitution. The confrontation clause gives the defendant the right to face witnesses against them and confront them through cross-examination. It prevents the admission of hearsay evidence that has not had its reliability tested through cross-examination. Should a defendant assert a violation to any of the rights afforded under ICRA, they may file a writ of habeas corpus in federal court. However, the Eighth Circuit Court of Appeals has expressly held that exhaustion of tribal remedies is required, with limited exceptions, prior to the filing of a habeas corpus petition under 25 U.S.C. § 1303.<sup>67</sup>

In *Crawford v. Washington*, the U.S. Supreme Court held that the Sixth Amendment Confrontation Clause renders testimonial, out-of-court statements inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>68</sup> The Court held that the Confrontation Clause is meant to "ensure reliability of evidence," a guarantee that is "procedural rather than substantive."<sup>69</sup> Where out-of-court statements are testimonial, "indicia of reliability" is insufficient; the only test of reliability that satisfies constitutional requirements is the one the Constitution specifically mandates: confrontation.<sup>70</sup>

The Court in *Crawford*, however, did not provide a comprehensive definition of the word "testimonial," nor did it furnish an exhaustive list of what types of out-of-court statements are considered testimonial.<sup>71</sup> *Crawford*, due to its broad impact and vague boundaries, left many questions unanswered. These questions take on increased importance in domestic violence prosecutions because prosecutors have come to rely so heavily on the admission of out-of-court statements by complaining witnesses.<sup>72</sup> The same circumstances could exist in a sexual assault case.

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<sup>67</sup> *Lavallie v. Turtle Mountain Tribal Court*, 2006 WL 3498559 (D.N.D.).

<sup>68</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>69</sup> *Id.* at 61.

<sup>70</sup> John M. Leventhal & Liberty Aldrich, *ARTICLE: The Admission of Evidence in Domestic Violence Cases after Crawford v. Washington: A National Survey*, 11 Berkeley J. Crim. L. 77, 79 (2006).

<sup>71</sup> *Crawford*, 541 U.S. at 60.

<sup>72</sup> Leventhal, *supra* note 66, at 79.

In *Davis v. Washington*,<sup>73</sup> the Supreme Court was asked to further define what circumstances render out-of-court statements “testimonial.”<sup>74</sup> The Supreme Court in *Davis* determined that courts must review out-of-court statements to determine their “primary purpose” in considering whether or not they are testimonial hearsay and therefore inadmissible.<sup>75</sup> The Court held that:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the 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.<sup>76</sup>

Determining whether a statement's primary purpose is to support an investigation may prove difficult to determine. Justice Scalia notes in the majority decision that *Davis* should not be read to bar all statements to responding officers.<sup>77</sup> *Davis* did not specifically address statements made to non-law-enforcement personnel.<sup>78</sup> Statements made to friends, neighbors, or others may still be admissible under traditional excited utterance exception.<sup>79</sup> Additionally, statements made to advocates or other non-law-enforcement personnel, who may work in conjunction with law enforcement, may also be considered outside of the scope of these decisions.<sup>80</sup>

If a defendant caused the declarant's unavailability, the Crawford Court recognized that the doctrine of forfeiture may allow such evidence in, even if the defendant had no prior opportunity for cross-examination.<sup>81</sup> According to the Court, “[T]he rule of forfeiture by wrongdoing (which we accept)

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<sup>73</sup> *Davis v. Washington*, 126 S. Ct. 2266 (2006).

<sup>74</sup> *Id.* at 2270.

<sup>75</sup> *Id.* at 2269.

<sup>76</sup> *Id.* at 2273.

<sup>77</sup> *Id.* at 2279 (the exigencies “of domestic disputes” may often mean that ‘initial inquires’ produce nontestimonial statements).

<sup>78</sup> *Id.* at 2285.

<sup>79</sup> Leventhal, *supra* note 66, at 97.

<sup>80</sup> *Id.*

<sup>81</sup> *Crawford*, 541 U.S. at 62.

extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”<sup>82</sup>

In *Melendez-Diaz v. Massachusetts*<sup>83</sup> the U.S. Supreme Court found that a common prosecution practice of submitting chemical drug test reports without the testimony of the scientist was a violation of the sixth amendment. It did however note that states with notice and demand statutes, which put a defendant on notice that the prosecution would be submitting a chemical drug test report without testimony of the scientist and giving the defendant sufficient time to object, was constitutional.

### **c. Hearsay Exceptions**

#### **1. Present Sense Impression Exception- Rule 803(1)**

A present sense impression is defined as “a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

#### **2. Excited Utterance Exception- Rule 803(2)**

An excited utterance is defined as “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.”

#### **3. Statements of Existing Mental, Emotional, or Physical Condition - Rule 803(3)**

FRE 803(3) allows admission of statements “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 unless it relates to the execution, revocation, identification, or terms of declarant's will.”

#### **4. Statements Made for Purpose of Medical Treatment or Diagnosis**

Federal Rule of Evidence 803(4) provides for statements that are “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

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<sup>82</sup> *Id. See State v. Fields*, 679 N.W.2d 341 (Minn. 2004) (relying on *Crawford*, held that “if a witness is unavailable because of the defendant's own wrongful procurement, 'he is in no condition to assert that his constitutional rights have been violated'”).

<sup>83</sup> *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527(2009)

thereof insofar as reasonably pertinent to diagnosis or treatment” as an exception to the hearsay rule regardless of the declarant’s availability as a witness,

## **5. Business Records of Medical and Police Personnel**

This section discusses two hearsay exceptions that may apply to medical and police records—the exception for records of a regularly conducted activity under Rule 803(6), and the exception for public records and reports under Rule 803(8). These exceptions apply regardless of the declarant’s availability as a witness.

### **1) Records of a Regularly Conducted Activity-Rule 803(6)**

Rule 803(6) contains a hearsay exception for records of a regularly conducted activity. Such records are described as follows:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Under Rule 803(6), properly authenticated records may be introduced into evidence without requiring the records’ custodian to appear and testify. Rule 902(11) governs the authentication of a business record by the written certification of the custodian or other qualified person:

“Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted

activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.”

## 2) Public records and Reports- Federal Rule of Evidence 803(8)

Federal Rule of Evidence 803(8) contains a hearsay exception for:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The hearsay exception does not allow the introduction of evaluative or investigative reports.

## 6. Former Testimony of Unavailable Witness

In cases involving allegations of sexual assault, the victim is sometimes unavailable to testify at trial or other court proceedings. In such cases, the prosecutor may seek admission of the witness’s earlier



testimony or other statement as substantive evidence under hearsay exceptions contained in Federal Rule of Evidence 804(b)(1) and (6).

Federal Rule of Evidence 804(a) defines unavailability as including situations where the declarant:

- 1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- 2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- 3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- 4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- 5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

### **E. Prosecutorial Discretion and the Non-Participating Complainant**

The prosecutor has exclusive authority to decide whether to go forward with a case when the complainant is absent or does not want to participate.

### **F. Corroboration of Complainant's Testimony**

To prove criminal sexual conduct, a prosecutor does not have to corroborate a complainant's testimony. Some tribal laws, which were modeled after older Anglo-Saxon laws, still require corroboration.

### **G. Resistance to Perpetrator**

To prove criminal sexual conduct, a prosecutor does not have to show that the complainant resisted the actions of the defendant.

### **H. Privileged Communications with Advocates**

Over the past 20 years, many jurisdictions have passed laws which protect private conversations between sexual assault and/or domestic violence victims and their advocates. This would not include victim advocates working with prosecutors or law enforcement, but rather community advocates working with sexual assault and domestic violence programs. Some of these jurisdictions have determined that these communications should always be strictly confidential. Other jurisdictions have decided that they should be made available to the defense in a criminal case under special circumstances.

Sexual assault advocates or domestic violence advocates perform many services to victims similar to the services provided by attorneys, social workers, psychologists or clergy. Most jurisdictions recognize the need for confidentiality in these relationships.

Confidentiality promotes trust between victim and advocate, which allows a victim to feel comfortable sharing information. Information can help the advocate promote healing and safety. A victim who is concerned that the advocate may have to tell the defendant what she said may be too afraid to seek help.

Four elements are generally considered necessary to justify establishing a testimonial privilege:

- The communications must originate in confidence;
- confidentiality must be essential to the proper maintenance of the relationship;
- the relationship must be one that society deems worthy of protecting; and
- disclosure must injure the relationship more than it benefits the litigation.<sup>84</sup>

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<sup>84</sup> John H. Wigmore, *Evidence in Trials at Common Law*, §2285 (John T. McNaughton rev. ed. 1961).

## CHAPTER TEN

### CRIMINAL SEXUAL ASSAULT: SCIENTIFIC EVIDENCE

#### A. Overview

Scientific evidence is often necessary in a criminal sexual assault case to obtain a conviction. However, it should be noted that convictions for rape and sexual assault occurred prior to the discovery of DNA identification and other high tech scientific proof. Clearly, such evidence is not required in all sexual assault cases.

In many sexual assault cases the defendant admits to having sex with the complainant. The issue is whether the sex was consensual. Some scientific evidence may still be important in those cases, but DNA is not important as there is no need to link the defendant to the complainant or scene by such evidence, since there is an admission.

This section briefly describes some common types of scientific evidence in criminal sexual assault cases.

#### B. Sexual Assault Nurse Examiner (SANE) as Expert Witness

A Sexual Assault Nurse Examiner (SANE) may be called as a medical expert witness in a case. SANEs are specifically trained to gather evidence from a victim after a rape and record her medical injuries, her state of being and sometimes her statements. They may offer evidence of the victim's medical injuries when examined.

Sexual Assault Nurse Examiner:

- May testify to the complainant's medical injuries when examined;
- may testify to statements made by complainant at the time examined;
- may testify to the state of being of the complainant when examined; and
- may not testify to whether a rape occurred.<sup>85</sup>

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<sup>85</sup> Com. v. McNickles, 491 N.E.2d 662 (1986). People v. Byrd, 350 N.W.2d 802 (1984).

### C. Sexual Assault Advocate as Expert Witness

A sexual assault advocate or other expert in the treatment of sexual assault complainants may be called as an expert witness when testimony is needed to understand common reactions of sexual assault victims. Many times a jury may interpret a delay to report, the lack of injuries, and other common victim reactions as indication that no rape took place. An expert testifying to common reactions of rape victims may help a jury overcome preconceived notions of how victims should act.

A sexual assault advocate:

- May testify that a complainant's reaction was "consistent with other victim's reactions;"
- may not testify as to whether or not the complainant was raped; and
- may not testify to the complainant's credibility.

### D. Bite Mark Evidence

The use of bite mark evidence rests on the premise that every person's dentition is unique,<sup>86</sup> and that a forensic dentist can identify an assailant by comparing a record of the assailant's dentition with a record of a bite mark left on a victim. Many commentators and defense attorneys have criticized bite mark identification, arguing that the scientific process involved is unproven.<sup>87</sup> Forensic dentists, prosecutors and judges, however, generally view bite mark evidence in a more positive light, regarding it as a valid method of conclusively identifying an assailant.<sup>88</sup> At least twenty-three appellate jurisdictions have explicitly or implicitly allowed bite mark evidence in criminal proceedings.<sup>89</sup>

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<sup>86</sup> This principle is well established in the forensic dental community. *E.g.*, A. MOENSSENS, F. INBAU & J. STARRS, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* § 16.04, at 752 [hereinafter A. MOENSSENS]; *People v. Milone*, 43 Ill. App. 3d 385, 395, 356 N.E.2d 1350, 1357 (1976).

<sup>87</sup> *E.g.*, Wilkinson & Gerughty, *Bite Mark Evidence: Its Admissibility is Hard to Swallow*, 12 W. ST. UNIV. L. REV. 519 (1985); Note, *The Admissibility of Bite Mark Evidence*, 51 S. CAL. L. REV. 309 (1978).

<sup>88</sup> *E.g.*, I. GLADFELTER, *DENTAL EVIDENCE: A HANDBOOK FOR POLICE* (1975); Levine, *Forensic Odontology Today-A 'New' Forensic Science*, 41 FBI L. ENFORCEMENT BULL. 16 (1980).

<sup>89</sup> Robert A. De La Cruz, Note: *Forensic Dentistry and the Law: Is Bite Mark Evidence Here to Stay?* 24 *Am. Crim. L. Rev.* 983, 983 (1987).

Expert testimony on bite marks:

- Should be offered by a witness qualified in the relevant area of expertise;<sup>90</sup>
- must be helpful to the factfinder's determination of a fact in issue;<sup>91</sup>
- the scientific basis of the testimony justifies the factfinder's reliance on the testimony;<sup>92</sup>
- police and medical examiners have procedures which preserved the bite mark evidence; and
- bite mark evidence is not error proof.

## E. Hair Sample Analysis

Associative head and pubic hair transfers can provide a circumstantial connection between persons and objects in sexual assault cases. Microscopic hair examinations have been often misused in the past; examiners frequently overstated the conclusions that could be reached using this type of examination.<sup>92</sup>

Hair analysis:

- can be a valuable specimen in drug-facilitated sexual assault;<sup>93</sup> and
- can provide circumstantial connection between persons and objects.

## F. Blood-Typing Evidence

Chemists examine evidence for the presence of blood. Chemists initially test a visible stain of what appears to be blood to determine whether it is in fact blood. The evidence available through blood typing is not as convincing as genetic fingerprinting, but it can readily prove innocence or increase the probability of a defendant being guilty.<sup>94</sup>

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<sup>90</sup> E. Cleary McCormick on Evidence § 13, at 33 (3d ed. 1984) [hereinafter McCormick on Evidence.

<sup>91</sup> McCormick on Evidence, *supra* note 1, § 13, at 33.

<sup>92</sup> See Paul C. Giannelli, *Splitting Hairs in the Shadow of the Gallows*, 17:4 Crim. Just. 30 (Winter 2003).

<sup>93</sup> Kintz P, Testing for the undetectable in drug-facilitated sexual assault using hair analyzed by tandem mass spectrometry as evidence, *The Drug Monit.* 2004 Apr;26(2):211-4.

<sup>94</sup> Forensic Science- Evidence and Tools Used In Forensic Science, Available at <http://science.jrank.org/pages/2824/Forensic-Science-Evidence-tools-used-in-forensic-science.html>. Last accessed November 17, 2010.

If the suspect's antigens (or blood type) don't match those in the sample found at the scene of the crime, then the incriminating trace does not consist of his blood. The majority position is that positive findings are neither irrelevant nor inherently prejudicial as to justify a rule against their admission.<sup>95</sup>

## **G. Rape Kits and DNA Admissibility**

When a victim of a stranger rape goes to a hospital or police station after the crime, evidence can be collected from her body and preserved in a rape kit. Sexual assault evidence collection kits, or rape kits, are cardboard boxes containing evidence gathering tools such as fingernail scrapers, microscope slides, combs and cotton applicators, etc. The kits preserve biological evidence left behind by perpetrators. DNA evidence, necessary to identify an unknown perpetrator, can be obtained from samples of blood, semen, skin cells, saliva, perspiration, and fingernails<sup>96</sup> collected by a forensic examiner. Therefore, proper collection of DNA evidence from the victim's body after a rape is crucial.

There are different methods of testing DNA. As new methods enter the courtroom, it becomes necessary to ask whether each such method rests on a solid scientific foundation or is generally accepted in the scientific community.<sup>97</sup> Before admitting DNA evidence it will be necessary to inquire into the biological principles and knowledge that would justify inferences from these new technologies or applications.<sup>98</sup>

Considerations in the admissibility of DNA testing results:

- Was the DNA properly collected?
- Was it properly preserved?
- Is the person qualified to do the testing?
- Does the method of testing have a sound scientific foundation or generally accepted in the scientific community?

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<sup>95</sup> McCormick on Evidence 6th ed. 2006 Kenneth S. Broun p.344.

<sup>96</sup> National Institute of Justice, What Every Law Enforcement Officer Should Know About DNA Evidence. Available at <http://www.dna.gov/audiences/investigators/know/>. Last accessed November 19, 2010.

<sup>97</sup> *Id.* at 347.

<sup>98</sup> *Id.*

## H. Drug Facilitated Sexual Assault Evidence

Drug-facilitated sexual assaults involve drugs that may produce amnesia in the victim. Rohypnol and GHB result in the loss of consciousness and memory, and the effects are increased when the drugs are surreptitiously deposited in alcoholic drinks.<sup>99</sup> Victims often do not remember the attack itself, but wake up only knowing that something is very wrong. It takes the victims hours and sometimes days to begin to piece together the information and to come to the realization that they have been raped. This results in delayed reporting (or failure to report) and in the failure to collect the victim's urine or blood sample while the drugs are still in her system.<sup>100</sup>

An expert witness on drug facilitated rapes may:

- Educate the fact finders on the effects of the drug;
- explain the reasons for the complainant's inability to remember all or any of the details about the incident;<sup>101</sup> and
- a doctor or sexual assault nurse examiner (SANE nurse) may testify about the reasons for the lack of injury.<sup>102</sup>

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<sup>99</sup> Diana M. Riveira and Angela L. Hart, DRUG-FACILITATED RAPE SERIES PART THREE: TRYING THE DRUG-FACILITATED RAPE CASE, 34-AUG Prosecutor 36 (2000).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



**NOTES:**

## CHAPTER ELEVEN

### CRIMINAL SEXUAL ASSAULT: SENTENCING AND POST CONVICTION CONSIDERATIONS

#### A. Sentencing Hearing – Victim’s impact

Scheduling considerations for sentencing hearing:<sup>103</sup>

- Set a firm date with adequate hearing time (don’t postpone);
- set at a time to minimize the victim’s exposure to the public; and
- invite victim to be present at sentencing.

Under certain tribal laws, a sexual assault victim, like any crime victim, has a right to submit an oral or written impact statement for inclusion in a presentence investigation report and to make an oral impact statement at sentencing.<sup>104</sup> Victim impact statements allow victims the opportunity to inform courts and corrections agencies of the physical, emotional, and financial effects of victimization. This direct participation by the victim in the proceedings often increases victim satisfaction with the courts and agencies. Victim impact statements also allow courts and corrections agencies to acknowledge the personal nature of the harm suffered, and to set appropriate sentences and juvenile dispositions, restitution amounts, and release conditions.

Action on victim’s impact statement:

- Remind prosecutor and probation officer, if involved, that you want the victim impact statement before the sentencing hearing;
- use victim impact statement at sentencing;
- acknowledge that you have read the statement;
- allow someone else to read the statement if victim is unable;
- make victim impact statement a part of the record; and
- inform victim of her right to give an oral statement at sentencing.

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<sup>103</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, (2005).

<sup>104</sup> See section 4 for a further discussion on Victims’ Rights.

The following are matters a tribal judge may consider during sentencing:<sup>105</sup>

- Use the same standards for stranger and nonstranger rape;
- set sentences matching the gravity of the crime, the trauma to the victim and the danger to the community;
- require a presentence investigation, if possible;
- don't accept plea agreements without a presentence investigation;
- consider the psychological trauma of the rape victim;
- allow the victim control over how they make their statement;
- reflect on, acknowledge and validate the victim's statement;
- consider victim's safety;
- realize the risk of re-offending is great in rape cases;
- testing for venereal disease, hepatitis and HIV;<sup>106</sup>
- consider restitution;<sup>107</sup>
- consider traditional tribal punishment or remedies;
- consider available sex offender treatment;<sup>108</sup> and
- sex offender registration requirements in your community.<sup>109</sup>

If the tribe has amended its sexual assault statute to increase incarceration to up to three years as permitted under the Tribal Law and Order Act of 2010, the court must afford the defendant the following rights and conditions:

- The right to effective assistance of counsel;
- the assistance of a defense attorney to an indigent defendant at the expense of the tribal government;
- the presiding judge must have sufficient legal training to preside over the criminal proceeding and be licensed to practice law by any jurisdiction in the U.S.;
- the criminal laws, rules of evidence and rules of criminal procedure of the tribal government must be publicly available, prior to charging the defendant; and
- a record of the criminal proceeding must be maintained.

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<sup>105</sup> National Judicial Education Program, project of Legal Momentum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, manual and DVD-ROM, (2005).

<sup>106</sup> For further information see section 11(D) Testing for Venereal Disease, Hepatitis and HIV.

<sup>107</sup> For further information see section 11(E) on Restitution.

<sup>108</sup> For further information see section 11(G) on Sex Offender Treatment.

<sup>109</sup> For further information see section 11(F) Sex Offender Registration.

Under the Tribal Law and Order Act of 2010, tribal courts also have the option of transferring the offender to the Bureau of Prisons Tribal Prisoner Pilot Program. Should the Court choose this route, it must submit a request for confinement of the offender to the Attorney General for offenders convicted of violent crimes for which the sentence includes a term of imprisonment of two or more years. The federal government will be responsible for all expenses but a maximum of 100 tribal offenders are permitted at any given time in the Bureau of Prisons confinement. The tribal government retains authority to rescind the request for confinement

### **B. Plea Agreement Considerations**

- Review a presentence investigation prior to ruling;
- ensure victim has been informed of plea agreement; and
- consider any objections victim may have to agreement.

### **C. Explanation of Sentence**

- Include a factual basis for the crime in the record;
- explain the sentence to the victim;
- give reasons for the sentence on the record; and
- if probation is a part of the sentence, assure victim that it will be revoked if need be. Explain the level of supervision

### **D. Testing for Venereal Disease, Hepatitis and HIV**

A number of jurisdictions have rules, regulations, or legislative enactments directly bearing on the subject of court ordered HIV testing. Where HIV testing has been challenged as an unreasonable search and seizure under the Fourth Amendment the courts have held the testing to be reasonable, where a criminal defendant was charged with or convicted of a sexual assault.<sup>110</sup>

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<sup>110</sup> Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

Certain courts, in ordering a criminal defendant to submit to an HIV test, have relied on the court's inherent authority to order such a test,<sup>111</sup> while other courts have held or stated that the trial court lacked inherent authority to issue such an order.<sup>112</sup>

The victim's input in this decision and the confidentiality of the testing results should be considered.

## **E. Restitution**

The court, when sentencing a defendant may order, in addition to any other penalty authorized by law, that the defendant make restitution to the victim or if the victim is deceased, to the victim's estate. The victim's input is invaluable.

Considerations in ordering restitution

- The amount of the loss sustained by the victim as a result of the offense;
- the financial resources of the defendant;
- the financial needs and earning ability of the defendant;
- the defendant's dependents;
- such other factors as the court deems appropriate;<sup>113</sup>
- restitution is mandatory in sentencing sexual offenders under federal law in federal courts<sup>114</sup> and tribal court may have restitution requirements; and
- courts can consider such things as lost wages, medical bills and rent when deciding on appropriate restitution.<sup>115</sup>

## **F. Sex Offender Registration**

The Sex Offender Registration and Notification Act (SORNA), also called the Adam Walsh Act became federal law on July 27, 2006. SORNA requires states, territories and tribes to become part of a national registry. SORNA

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<sup>111</sup> *Government of Virgin Islands v. Roberts*, 756 F. Supp. 898 (D.V.I. 1991).

<sup>112</sup> *State v. Abbott*, 79 Haw. 317, 901 P.2d 1296 (Haw. Ct. App. 1995).

<sup>113</sup> 18 U.S.C.A. § 3663(a)(1)(B)(i).

<sup>114</sup> 18 U.S.C.A. §§ 2248(b)(4)(A), 2259(a), 2264(b)(4)(a).

<sup>115</sup> *U.S. v. Hayes*, 135 F.3d 133 (2nd Cir.1998).

also standardizes and provides minimum standards for registration, notification, and minimum punishment for noncompliance. Sex offender registration is required throughout Indian country. Sometimes sex offenders are required to register in tribal offices and sometimes in state offices.

A new federal failure-to-register offense penalizes sex offenders who fail to register as a result of a conviction under federal or tribal law, or who travel in interstate or foreign commerce, or enter or leave or reside in Indian country.<sup>116</sup> A sex offender who knowingly fails to register or update a registration as required by SORNA can be fined or imprisoned for up to 10 years or both. If this person commits a crime of violence under federal or tribal law (while failing to register), he could be imprisoned for not less than 5 years and not more than 30 years in addition to the penalty for failure-to-register.

A tribal judge may notify a convicted sex offender:

- When he must register;
- where he must register;
- frequency and duration of his registration; and
- the consequences of not registering and updating his registration.

The judge should require the sex offender sign a proof of notification form.

## **G. Sex Offender Treatment**

Most convicted sex offenders are managed by the criminal justice system through a combination of methods, including incarceration, parole, probation, and some form of specialized sex offender treatment. Sex offender treatment can be administered while the sex offender is incarcerated in jail or prison, or after he or she is released into the community (or both). About 60% of convicted sex offenders in the United States are under some form of conditional supervision in the community.<sup>117</sup> All sex offender treatment programs, i.e., therapeutic interventions for sex offenders, share the same goals: deterring (or reducing) subsequent victimization and protecting society.<sup>118</sup>

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<sup>116</sup> 18 U.S.C. § 2250.

<sup>117</sup> Greenfeld, *Sex Offenses and Offenders* (Bureau of Justice Statistics, 1997), p vi.

<sup>118</sup> Schwartz, *The Sex Offender: Corrections, Treatment and Legal Practice* (Civic Research Institute, Vol. I, 1995) p 20-2.

The majority of sex offender treatment programs in the United States use a combination of cognitive-behavioral treatment and relapse prevention techniques.<sup>119</sup> Cognitive-behavioral treatment, which is typically used on people with addictive behaviors (e.g., alcoholics and drug users), is also used on sex offenders by focusing on their sexual issues. It uses a technique called relapse prevention to minimize recidivism.

Treatment programs for sex offenders have not demonstrated significant positive results. However several studies presented some effectiveness.<sup>120</sup> Different types of offenders typically respond to different treatment methods with varying rates of success. Treatment effectiveness is often related to multiple factors, including:

- The type of sexual offender (e.g., incest offender or rapist);
- the treatment model being used (e.g., cognitive-behavioral, relapse prevention, psycho-educational, psycho-dynamic, or pharmacological);
- the treatment modalities being used; and
- related interventions involved in probation and parole community supervision.<sup>121</sup>

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<sup>119</sup> Center for Sex Offender Management, *Myths and Facts About Sex Offenders* (2000), 5-6. Available at <http://www.csom.org/pubs/mythsfacts.html>. Last accessed November 10, 2010.

<sup>120</sup> Several studies present optimistic conclusions about the effectiveness of treatment programs that are empirically based, offense-specific, and comprehensive (Lieb, Quinsey, and Berliner, 1998). The only meta-analysis of treatment outcome studies to date has found a small, yet significant treatment effect—an 8% reduction in the recidivism rate for offenders who participated in treatment (Hall, 1995). Research also demonstrates that sex offenders who fail to complete treatment programs are at increased risk for both sexual and general recidivism (Hanson and Bussiere, 1998).

<sup>121</sup> Center for Sex Offender Management, *Myth and Facts About Sex Offenders*. Available at <http://www.csom.org/pubs/mythsfacts.html>. Last accessed November 10, 2010.

## APPENDIX

### SEXUAL ASSAULT BENCH CARD FOR TRIBAL JUDGES

#### General Victims' Rights

These rights vary, depending on federal, state, or tribal law.

1. Right to Be Treated with Dignity, Respect, and Sensitivity
2. Right to Attend Criminal Proceedings
3. Right to Be Heard
4. Right to Be Informed

Although laws vary, most require that victims receive notice of the following events:

- the arrest and arraignment of the offender
  - bail and pretrial proceedings
  - dismissal of charges
  - plea negotiations
  - trial
  - sentencing
  - appeals
  - probation or parole hearings
  - release or escape of the offender
5. Right to Protection  
Depending on the jurisdiction, victims may receive the following types of protection:
    - police escorts
    - witness protection programs
    - relocation
    - restraining orders
  6. Right to Apply for Compensation  
All states and some tribes provide crime victim compensation to reimburse victims of violent crime for some of the out-of-pocket expenses that resulted from the crime.
  7. Right to Restitution from the Offender  
The court orders the offender to pay a specific amount of restitution. Some types of losses covered by restitution include:
    - medical and counseling expenses
    - lost wages
    - property loss



- insurance deductibles
8. Right to Prompt Return of Personal Property  
The prompt return of personal property seized for evidence reduces inconvenience to victims and helps restore their sense of security.
  9. Right to a Speedy Trial  
The purpose is to prevent unreasonable delays of criminal proceedings, which may frustrate and upset victims.
  10. Right to Enforcement of Victims' Rights

## **Pre-Trial Considerations**

### **Arraignment and Considerations in Setting Bond**

Tribal judges may consider:

- defendant's prior criminal record, including juvenile offenses;
- defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
- defendant's history of substance abuse or addiction;
- defendant's mental condition, including character and reputation for dangerousness;
- the seriousness of the offense charged
- the presence or absence of threats
- the probability of conviction and likely sentence;
- defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
- the availability of responsible members of the community who would vouch for or monitor the defendant;
- facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
- any other facts bearing on the risk of nonappearance or danger to the public.

If a defendant is released on bond, a judge should consider "no contact" or other provisions to protect the complainant. The complainant should be notified of defendant's release and bond conditions.

Considerations in a "no contact" provision to protect complainant

- define no contact to include any means of contact, including contact through others.
- prohibit entry in specified premises or areas
- tethering (house arrest, ankle bracelet with GPS device, reporting device) may be appropriate to promote safety
- prohibit the purchase or possession of firearms
- authorize removal or surrender firearms from defendants (if authorized in jurisdiction)

Violations should be swift with severe sanctions

### **Probable Cause or Preliminary Hearing**

Tribal judges' considerations at Probable Cause Hearing:

- common responses of sexual assault victim may be counter-intuitive.

- treat non-stranger rapes as seriously as stranger rapes
- view the issue of “force” from the victim’s perspective
- realize that lack of injuries is the norm in rape cases
- lack of injuries does not prove consent
- failure to flee does not prove consent
- consider frozen fright reactions if applicable
- focus on defendant’s behavior, not the complainant’s
- do not let defense harass or intimidate the complainant

### **Scheduling and Continuances**

Tribal judges may consider the following in developing a trial schedule and plan:

- Recognize that defense delays may be a strategy to create stress for the complainant.
- Be aware that a complainant may suffer severe psychological trauma each time she needs to prepare for a hearing or appearance.
- Minimizing the complainant’s court appearance may prevent some trauma.
- Providing separate waiting rooms for all hearings may be less traumatic for the complainant.
- Special dates such as anniversaries of the rape should be avoided when setting trial and other court dates.
- Set a firm, realistic schedule and stick to it.
- Require the prosecutor to keep the complainant informed.

## **A Pre-Trial Motion to Exclude an Expert Witness**

A pre-trial motion may be made by defense to exclude the expert witness.

Tribal judges may

- Acknowledge the scientific validity of research on rape victims' reactions.
- Recognize that many rape victims' reactions are counter-intuitive.
- Recognize that certain reactions and facts may require an expert's explanation, such as: "frozen fright", no physical injury, or delayed reporting.
- Allow an expert to testify that the victim's reaction was "consistent with" other victims' reactions.
- Not permit experts to testify as to the victim's credibility.

## **Jury Bias**

The general population is commonly uninformed about sexual assault. Substantial research indicates that there is a tendency to victim blame and the jurors often have difficulty moving beyond a preconceived notion of what "real rape" is and who a "worthy victim" is. Open ended questions are much more likely to uncover biases.

Judges may look for common jury biases such as

- juror may hold ideas about rape victims and rapist that are not true
- may have preconceived ideas of a "real rape"
- look for victim blaming
- may be a survivor of sexual abuse/assault

## **Attorneys' Behavior**

It is important to set the appropriate tone in the courtroom to make sure there is an attitude of respect.

Possible ways to create an environment of respect

- identify and implement cultural customs that may establish an atmosphere of respect
- create awareness that you are in charge
- require people to be polite at all times, even in cross-examination
- require everyone to address all witnesses by surnames and refer to witnesses by surnames in all statements
- maintain a formality in the proceedings
- do not permit comments that trivialize rape

### During Examination of Witnesses

- sarcasm is inappropriate
- control abusive cross-examination
- control treatment of witnesses by controlling repetition, badgering, misquoting, argumentative, and intimidating or loud voice
- stop inappropriate questioning immediately, such as questions relating to complainant's prior sexual history
- limit and control objections
- do not require the complainant to provide their address

### Demonstrations or re-enactments

- Complainants should not be asked to show on their own bodies or use their own bodies for a re-enactment.

### **Legal/Evidentiary Issues**

- allow expert witnesses testimony to explain victim's general reactions to rape
- enforce rules of evidence including the rape shield law
- resolve issues of admissibility of complainant's past sexual history out of the presence of the jury
- deal with legal issues in *in limine* rulings to minimize conferences during trial
- draw sequestration orders as narrowly as possible, allowing complainant to stay in courtroom after her testimony

## Rape Shield Provisions

Refer to Tribal Rape Shield Laws. If tribal rules are similar to federal, the following information may be helpful.

Federal Rule of Evidence 412 (Federal Rape Shield) aims to protect the complainant against:

- the invasion of privacy,
- potential embarrassment,
- sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process.

Rule 412 bars evidence offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the complainant.

<b>Past Sexual behavior <i>excluded</i> includes all activities:</b>	<b>Past Sexual Behavior that <i>is</i> allowed:</b>
1. That involve or imply actual physical conduct, i.e. sexual intercourse and sexual contact	1. Evidence offered to prove allegedly false prior claims by the complainant
2. Of the mind, such as fantasies or dreams	2. Specific instances of sexual behavior with persons other than the defendant may be admissible if offered to prove that another person was the source of semen, injury or other physical evidence
3. That is offered to prove a sexual predisposition, such as complainant's mode of dress, speech, or lifestyle	3. Evidence of past sexual behavior with the accused to prove consent or past sexual behavior presented by the prosecution
	4. Evidence which, if excluded, would violate the constitutional rights of the defendant

Rule 412 requires the following procedure to determine admissibility

A party intending to offer evidence under Rule 412 must:

- file a written motion at least 14 days before trial
- specifically describe the evidence
- state the purpose for which it is offered
- the court, for good cause may require a different time for filing or permit filing during trial
- serve the motion on all parties
- notify the complainant

Court Procedures under Rule 412

- must conduct a hearing in camera
- afford the complainant an opportunity to be heard
- afford parties a right to attend and be heard
- motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

### **Prior Bad Acts of Defendant**

Generally evidence of other crimes and bad acts are not admissible to prove the character of the defendant. However, in sexual assault cases Congress recognized that in certain sexual misconduct cases, propensity evidence has special value or that the difficulty of and need for convictions for these crimes warrants a decrease in the usual protections against propensity and character evidence. Follow your tribal rules of evidence. If your tribal rules are similar to Federal Rules of Evidence, the following may be helpful.

Rule 413 of the Federal Rules of Evidence

- provides that similar prior bad acts evidence are admissible if relevant where defendant is accused of sexual assault.
- allows admission of other sexual assaults including those that are subject of uncharged conduct.
- requires the court to perform an analysis (weighing probative value against prejudice to defendant) with careful attention to both significant probative value and strong prejudicial qualities inherent in all evidence submitted under 413

Considerations in weighing probative value and prejudicial qualities

- similarity of past act to situation that has resulted in the trial of defendant
- specific details of past act available or facts are vague
- closeness in time of prior acts to charged acts,
- frequency of prior acts,
- presence or lack of intervening events,
- need for evidence beyond testimony of defendant and victim.

If the prosecutor intends to offer evidence under this Rule 413, she is required

- to tell the defendant in advance
- to include in the disclosure statements of witnesses or a summary of the substance of any testimony that is to be offered
- to disclose at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.

### **Complainant is Unavailable:**

The prosecutor has exclusive authority to decide whether to go forward with a case when the complaining witness is absent or does not want to participate.

### **Corroboration of Complainant' Testimony**

To prove criminal sexual conduct, a prosecutor does not have to corroborate a complainant's testimony. Some tribal laws, which were modeled after older Anglo-Saxon laws, still require corroboration.

### **Resistance to Perpetrator**

To prove criminal sexual conduct, a prosecutor does not have to show that the victim resisted the actions of the perpetrator.

### **Privileged Communications of Advocates**

Some jurisdictions have determined that communications between advocates and victims should be strictly confidential.

Four elements are generally considered necessary to justify establishing a testimonial privilege:

- the communications must originate in confidence
- confidentiality must be essential to the proper maintenance of the relationship



- the relationship must be one that society deems worthy of protecting
- a disclosure must injure the relationship more than it benefits the litigation

### **Expert Testimony in Sexual Assault Cases**

#### A Sexual Assault Nurse Examiner

- may testify to the complainant's medical injuries when examined
- may testify to statements made by complainant at the time examined
- may testify to the state of being of the complainant when examined
- may not testify to whether a rape occurred

#### A Sexual Assault Advocate

- may testify that a complainant's reaction was "consistent with other victims' reactions"
- may not testify as to whether or not the complainant was raped
- may not testify to the complainant's credibility

#### Expert testimony on bite marks

- should be offered by a witness qualified in the relevant area of expertise
- must be helpful to the fact-finder's determination of a fact in issue
- the scientific basis of the testimony justifies the fact-finder's reliance on the testimony
- police and medical examiners have procedures which preserved the bite mark evidence
- bite mark evidence is not error proof

#### Hair analysis

- can be a valuable specimen in drug-facilitated sexual assault
- can provide circumstantial connection between persons and objects

#### Considerations in the admissibility of DNA testing results

- DNA properly collected
- properly preserved
- person qualified to do the testing
- the method of testing has a sound scientific foundation or generally accepted in the scientific community

Expert witness on drug facilitated rapes may educate the fact-finders

- on the effects of the drug
- the reasons for the complainant's inability to remember all or any of the details about the incident
- a doctor or sexual assault nurse examiner (SANE nurse) may testify about the reasons for the lack of injury

### **Sentencing Hearing – Victim's Impact**

Scheduling considerations for sentencing hearing

- set a firm date with adequate hearing time (don't postpone)
- set at a time to minimize the victims exposure to public
- invite victim to be present at sentencing

Action on victim's impact statement

- remind prosecutor and probation officer, if involved, that you want the victim impact statement before the sentencing hearing
- use victim impact statement at sentencing
- acknowledge that you have read the statement
- allow someone else to read the statement if victim is unable
- make victim impact statement a part of the record
- inform victim of her right to give an oral statement at sentencing

The following are matters a tribal judge may consider during sentencing

- use the same standards for stranger and nonstranger rape
- set sentences matching the gravity of the crime, the trauma to the victim and the danger to the community
- require a presentence investigation
- do not accept plea agreements without a presentence investigation
- the psychological trauma of the rape victim
- allow the victim control over how they make their victim's statement
- reflect on, acknowledge and validate the victim's statement
- victim's safety
- the risk of re-offending is great in rape cases
- testing for venereal disease, hepatitis and HIV
- restitution
- traditional tribal punishment or remedies
- available sex offender treatment
- sex offender registration requirements in your community

### **Plea Agreement Considerations**

- review a presentence investigation prior to ruling
- ensure victim has been informed of plea agreement
- consider any objections victim may have to agreement

### **Explanation of Sentence**

- include a factual basis for the crime in the record
- explain the sentence to the victim
- give reasons for the sentence on the record
- if probation is a part of the sentence, assure victim that it will be revoked if need be. Explain the level of supervision

### **Considerations in Ordering Restitution**

A tribal judge may consider some or all of the following in ordering restitution:

- the amount of the loss sustained by the victim as a result of the offense; lost wages, rent, medical expenses, etc.
- the financial resources of the defendant
- the financial needs and earning ability of the defendant
- the defendant's dependents
- tribal court may have restitution requirements

## **Consideration in Sex Offender Registration**

A tribal judge may notify a convicted sex offender

- when he must register
- where he must register
- frequency and duration of his registration
- the consequences of not registering and updating his registration
- require the sex offender to sign a proof of notification

Treatment effectiveness is often related to multiple factors, including:

- the type of sexual offender (e.g., incest offender or rapist)
- the treatment model being used (e.g., cognitive-behavioral, relapse prevention, psycho-educational, psycho-dynamic, or pharmacological)
- the treatment modalities being used
- related interventions involved in probation and parole community supervision

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