



Beyond the Criminal Justice System

CRIMINAL JUSTICE AND SEXUAL ASSAULT SURVIVORS

© 2025 by Victim Rights Law Center.

This project was supported by Grant No. 15JOVW-21-GK-02205-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice.

Criminal Justice and Sexual Assault Survivors

- I. Introduction
- II. Your Role: Advising Your Client
 - A. Preparing Your Client for Interviews with Law Enforcement
 - 1. The Importance of Candor in Reporting Details of the Assault
 - 2. Exculpatory Evidence
 - 3. The Survivor's Potential Criminal Liability
 - 4. Rape Shield Laws
 - 5. Immigration Status
- III. The Criminal Justice Process
 - A. An Overview of a Criminal Prosecution
 - B. Probable Cause Hearings and Grand Jury Proceedings
 - C. Arraignment
 - D. Pretrial Motions and Hearing
 - E. Pleas, Trial, and Sentencing
- IV. Victims' Rights Laws
- V. Survivors' Common Questions about the Criminal Process
 - A. Reporting to Law Enforcement
 - B. The Decision to Pursue Criminal Charges: Survivor Autonomy
 - C. Privacy Concerns
 - D. Duration of a Criminal Prosecution
 - E. Likelihood of Conviction
- VI. Conclusion

I. INTRODUCTION

Most perpetrators of sexual violence face no accountability in our criminal justice system. The majority of sexual assaults are not reported – studies suggest that only 310 out of every 1000 sexual assaults are reported, indicating that almost 70% of all sexual assaults go unreported.¹ Survivors often cite fear, embarrassment, loyalty to the perpetrator, or a belief that the criminal justice system cannot or will not help them as the primary reason for their choice not to report.² Even if a survivor chooses to report, however, the likelihood that criminal charges will issue is low. Only 16% of sexual assault cases reported to police are charged.³ For those cases that do go forward, the criminal justice system can be a complex maze of laws and procedures that, without proper support, can leave a sexual assault survivor feeling confused, intimidated, or even revictimized. While advocates based in prosecutors' offices, law enforcement agencies, and community-based non-profit agencies have assisted survivors in criminal court for decades,⁴ a survivor can benefit from having their own attorney to

Victim Rights Law Center thanks AEquitas, particularly Jennifer Newman, Esq., Jon Kurland, Esq., and Holly Spainhower, Esq. for their contributions to this chapter. VRLC also thanks Michelle Harper, Esq., Angela Lehman, Esq., Paula Finley Mangum, Esq., Sarah Boonin, Esq., and Lydia Watts, Esq., who contributed to a previous version of this chapter.

Preparation of this material was supported by grant number 15JOVW-21-GK-02205-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, and conclusions expressed are those of the author(s) and do not necessarily represent the views of the U.S. Department of Justice.

¹ See The Criminal Justice System: Statistics, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited June 14, 2024).

² See Amy Cohn, et al., Correlates of Reasons for Not Reporting Rape to Police: Results from a National Telephone Household Probability Sample of Women with Forcible or Drug-or-Alcohol Facilitated/Incapacitated Rape, 28(3) J. Interpersonal Violence 455-73 (2013).

³ See The Criminal Justice System: Statistics, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited June 14, 2024). Notably, studies suggest that the percentage of false reports of sexual assault is 2-10%. See False Reporting, National Sexual Violence Resource Center, https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf (last visited June 14, 2024).

⁴ While victim assistance advocates in prosecutors' offices provide many excellent services to victims of crime, they are employed by prosecutors' offices and are limited in the services they can offer a victim. Importantly, system-based advocates cannot provide confidential services because in some circumstances they must disclose information to prosecutors, who may in turn be obligated to disclose that information to the defense under *Brady v. Maryland* and other

protect their interests and enforce their rights in the criminal justice process.

For attorneys who do not regularly practice criminal law, advising a sexual assault survivor on when and how to enforce their rights can be a daunting task. This chapter provides an overview of how a criminal case proceeds and highlights how you can both protect and empower sexual assault survivors in the criminal justice system.

II. YOUR ROLE: ADVISING YOUR CLIENT

Criminal charges against a perpetrator can be prosecuted by the state, territory, Tribal court, or federal government, depending on where the assault took place and what agency claims jurisdiction. Attorneys for survivors can help ensure that a survivor understands the criminal process and is able to make informed decisions about how to proceed.

Your primary role in representing a survivor who is a witness in a prosecution is to ensure that they understand the various stages in the criminal process and to help them protect their privacy and enforce their rights. You should discuss your role and the scope of your representation with your client, the prosecutor, and any victim witness advocate assigned to the case.⁵ You may also need to educate the judge and judicial staff about your role and the victim's right to have their own attorney to represent their interests in a prosecution. Clarifying your role as a private

applicable discovery rules. The services may also be limited in scope where they are grounded in the victim's prosecution-related needs rather than their civil legal needs.

⁵ Victim witness advocates are typically employed by a prosecutor's office or law enforcement agency to assist victims and other witnesses of violent crime. A victim witness advocate may assist a victim from the time a case is first referred to the prosecutor's office until the conclusion of the investigation or court proceedings. Generally, the goal of victim witness assistance programs is to: 1) assist victims in their recovery from the crime; 2) reduce the level of secondary injury associated with the aftermath of the crime and participation in the criminal justice system; and 3) aid in the prosecution of criminal cases by ensuring that crime victims, other witnesses, and family members are supported. Although individual programs vary, assistance may include one or more of the following: crisis intervention and referrals; assistance with financial compensation, including restitution and the crime victim compensation programs; notification of scheduled hearings, including pre-trial, bail, release status, and sentencing matters; trial preparation; in-court advocacy and support; assistance with right to allocution; and post-sentencing advocacy.

attorney can help all participants be clear about the distinction between the role of the government prosecutor and the role of the survivor's attorney.

You represent the survivor and are ethically obligated to advocate zealously for their interests. In contrast, the prosecutor, who represents the government's interests, is governed by different legal and ethical obligations with respect to the survivor and the perpetrator.

There will be times when your client's interests do not align with the prosecutor's. For example, prosecutors may want to access medical, counseling, or other records a survivor may want to keep private. They may want access to personal information (such as your client's phone, private social media accounts, or other sources of information) to gather evidence to assist in the prosecution. In some rare circumstances, prosecutors may seek to compel a reluctant witness to testify against their will.⁶ Conflicts may not come up in every case, and depending on the reason for the prosecutor's request, a compromise may be possible, but you should always remember the difference between your client's interests and those of the prosecutor and maintain a survivor-centered practice.

Despite these fundamental differences, you and the prosecutor can often work together. You can help your client articulate their goals in the criminal justice process and determine how best to accomplish them. You can advise your client about the prosecutor's discovery obligations,⁷ so that your client does not inadvertently share personal information that can lead to a defendant seeking third party medical, therapeutic, education, or immigration records. You can help your client prepare for testifying in a

⁶ See, e.g., *S.A. v. Sup. Ct. In and For Cnty. Of Maricopa*, 171 Ariz. 529 (Ariz. App. Div. 1992) (crime victim who failed to appear in court pursuant to a subpoena arrested after refusing to testify); See also, Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No-Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZA WOMEN'S L.J. 281, 287 (2003); John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J. at 4 (Aug. 22, 1983) (discussing case in Anchorage, Alaska in which a victim was jailed for failing to testify).

⁷ Prosecutors have an obligation to turn over all evidence – both inculpatory and exculpatory evidence – that the prosecution team has in its possession. That team at minimum includes prosecutors, law enforcement, and victim witness advocates.

criminal case.⁸ You can help them prepare their victim impact statement. And, you can keep in regular contact with the prosecutor to ensure that a survivor's rights are respected and that their preferences are considered.

[CHECK YOUR LAW: Most victim witness assistance personnel are employed by the prosecutor's office or a law enforcement agency. Even if there is a victim-advocate privilege in your jurisdiction, in most jurisdictions it will apply only to community-based victim advocates. It will not protect the confidentiality of information disclosed to law enforcement or prosecution victim assistance personnel. Furthermore, information disclosed to such a government-based victim assistance advocate will likely have to be provided to the defense. Like prosecutors, these victim assistance personnel must turn over to the defendant any potentially exculpatory material in their control or custody.⁹]

A. Preparing Survivors for Interviews with Law Enforcement

Survivors should be prepared for law enforcement officers to carefully examine their reports of sexual assault. A survivor may be subjected to an intensive interview process that can take from a few days to several months. When a survivor reports an assault, they will usually be interviewed by a police investigator several times; this is generally due to the level of detail required by police investigations as well as trauma-informed practices that acknowledge that disclosures unfold over time. The case may then be referred to a prosecutor who, depending on the local practice, may interview the survivor again, either by themselves or with

⁸ Testifying in a criminal case can be terrifying for many survivors. In addition to describing the sexual assault to a courtroom of people, they also face cross-examination from a defense attorney who will attempt to discredit them. Prepare your client for what to expect. Consider taking your client to the courtroom where the trial will take place as part of this preparation so that they can see the room before the trial date. A victim witness advocate from the prosecutor's office can also facilitate this visit.

⁹ See, e.g., *Commonwealth v. Liang*, 434 Mass. 131, 135-136 (2001) (noting that prosecutors' duty to disclose exculpatory evidence includes evidence obtained by victim advocates who serve as prosecutors' agents). Cf. A.R.S. §§ 8-409, 13-4401, 13-4430 (A crime victim advocate shall not disclose as a witness any communication between the advocate and victim without victim's written consent.)

victim services personnel from their office. Other evidence will also be collected and evaluated during this process.

The most common types of sexual assault evidence include statements by the survivor about the assault, statements by secondary witnesses, results from sexual assault forensic exams, electronic and digital evidence, and physical evidence gathered from crime scenes. Depending on the jurisdiction, a prosecutor may be involved with the case during the investigation phase.

1. The Importance of Candor in Reporting Details of the Assault

Advise your client to describe all relevant details of the assault as accurately, consistently, and truthfully as they are able. Survivors of trauma often forget or suppress certain facts, and it is not uncommon for survivors of sexual assault to omit details of their assault.¹⁰ In particular, survivors are more likely to withhold information that they fear will get them into trouble, such as underage drinking, drug use, or an extra-marital affair.¹¹ Survivors may also find that trauma causes them to remember details in bits and pieces, or that they are unable to relay events in a linear fashion, leaving perceived gaps or causing their disclosure to bounce between details that may appear to be irrelevant.¹² In some cases, the omissions or scattered retelling may lead law enforcement, the prosecutor, or the trier of fact to conclude that the survivor deliberately withheld or lied about more significant facts. However, prosecutors who specialize in crimes of sexual violence, domestic violence, and related crimes should be able to evaluate the reasons for and materiality of any omissions or inconsistencies.

¹⁰ See Bessel A. Van Der Kolk, *Trauma and Memory*, Wiley (Jan. 4, 2002), available at: <https://doi.org/10.1046/j.1440-1819.1998.0520s5S97.x> ("the loss of recollections for traumatic experiences is well documented").

¹¹ As the survivor's attorney, you need to recognize if any disclosure will implicate a survivor's Fifth Amendment rights and open your client to potential criminal liability. If you do not have a criminal defense background, you should consult with a criminal defense attorney for guidance on how to proceed. See information regarding The Survivor's Potential Criminal Liability later in this section.

¹² David Thomas, *First, Do No Harm: The Neurobiology of Trauma, and Trauma Informed Investigations*, AEquitas, (last updated October 12, 2021), available at: https://www.youtube.com/watch?v=0AX9KN_1Nac

Civil attorneys may also help educate prosecutors and judges, either verbally or through motion (depending on the jurisdiction), about why survivors may omit or mix up details related to their assault. When cases proceed, prosecutors can educate judges and juries about these issues through jury selection, direct survivor testimony, the use of survivor behavior experts, and other strategies. The more the survivor can remember and share from the outset, however, the more likely it is that the criminal case against their perpetrator will proceed. A survivor should be advised to be candid about the details of the assault to the best of their ability.

Law enforcement investigators may ask survivors questions about their personal lives or other details that may not appear to be relevant to an assault. In some cases, information that seems irrelevant may be key to understanding a case or countering a defense. For example, law enforcement may need to know about recent intimate partners to rule out alternative sources of DNA. Sexual assault survivors may feel compelled to answer every question that is asked of them; however, if a survivor does not understand why a particular question or set of questions is relevant, they should know that they can decline answering until they have an opportunity to speak to their attorney.¹³

One of your tasks as the survivor's attorney is to protect your client's privacy rights. You play a key role in ensuring that they understand their rights and make informed decisions about what information to release and what information to keep private. A survivor needs to understand that the information they provide to law enforcement may be included in the police report which, in turn, will be provided to the defense. Clients should be cautioned to not share personal information related to their medical and mental health to prevent a defendant from seeking those records in the criminal case.

[PRACTICE TIP: Preventing disclosure of privileged and/or confidential information is critically important during the investigation stage. Once released, personal information can be

¹³ The survivor also can ask law enforcement why they are asking the question. However, it's important to realize that the answer they receive may not contain the full reason.

impossible to protect. Consider scripting a sentence that the survivor can remember and repeat when they feel that they are being asked invasive questions: “I’m sorry, but I’m uncomfortable answering that question. I’d like to talk to my lawyer first.”¹⁴ While law enforcement and a prosecutor’s office should respect the survivor’s answer, it is possible that they will not respond positively. Prepare your client for that possibility. Depending on the circumstances, you may want to consider attending the interview to support the survivor and ensure that their wishes are respected.] See *Protecting Sexual Assault Survivors’ Privacy*.

2. Exculpatory Evidence

Every survivor should know that any information they provide to police, victim witness advocates, or prosecutors must be disclosed to the defense if it is potentially exculpatory or is potential impeachment evidence.¹⁵ Exculpatory evidence is any evidence which absolves or tends to absolve the defendant of guilt or mitigates the defendant’s potential sentence. For example, exculpatory evidence in a sexual assault case might include a comment by the survivor that their memory was hazy due to alcohol or information that suggests an alternative cause of an injury sustained during the assault.

Information must also be disclosed to the defense if it can be used to impeach the survivor to try and demonstrate that they are biased, inconsistent, or not truthful. Because defense attorneys can use small inconsistencies to attempt to impeach a survivor’s credibility, any survivor statement may turn out to be “potentially exculpatory.” However,

¹⁴ Some states specifically authorize the presence of a support person to accompany a crime victim. See, e.g., ORS § 147.425, *et seq.* (a victim of a crime who is 15 years of age or older may select an adult as their personal representative (PR) so long as the representative is not a suspect in, party, or witness to the crime; the PR may accompany the victim through the investigation and prosecution process (except grand jury proceedings and certain child abuse assessments); the health care provider, law enforcement agency, protective service worker or court may not prohibit the PR from accompanying the victim unless they believe the PR would compromise the process). Of course, an attorney may be present to assist a victim, too.

¹⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

prosecutors can explain minor inconsistencies at trial. Remember that information provided to the defense during discovery is not automatically admissible at trial. As discussed below, it may be subject to exclusion on grounds of relevance, privilege, rape shield, or other rules that prevent the defense from introducing that evidence. However, for the purpose of advising your client, it is good practice to assume anything they have provided or told the police will eventually be shown to the defendant and may be used at trial.

[PRACTICE TIP: You may be able to protect your client's privacy rights by being present at the interview with law enforcement, the prosecutor, or a victim witness advocate, and as the case is developed for trial. However, depending on the circumstances, sitting in on an interview may hinder the prosecutor's ability to establish one-on-one rapport with your client. Consider your client's preferences and the circumstances of the individual case and provide your client with information regarding the potential advantages and risks of you attending the interview so that they can make an informed decision.]

3. The Survivor's Potential Criminal Liability

If the sexual assault occurred while your client was engaged in a criminal act (such as underage drinking or possessing, using, or selling drugs), a disclosure could compromise their Fifth Amendment rights. If you do not have a criminal defense background, you and your client should consult with an experienced criminal defense attorney before determining how to proceed.

Consider working with the prosecution to secure immunity for your client for any illegal activity in which they may have been engaged. If the prosecutor provides immunity, they will work with your client to prepare them for questions that they may have to face from the defense attorney at trial regarding immunity protection. In some cases, a prosecutor may decline to provide immunity in order to avoid diminishing the survivor's credibility in the eyes of the factfinder.

Even absent a formal granting of immunity, prosecutors will undergo a nuanced assessment of the survivor's culpability and may decline to charge the survivor for engaging in criminal activity.¹⁶ If this occurs, it is recommended that you again consult with an experienced criminal defense attorney in your jurisdiction to understand any potential risks of proceeding without a formal agreement.

In some cases, a survivor's criminal activity may be relevant to their own victimization—for example, when an abuser has provided substances to the survivor to keep them submissive and compliant. Depending on the case, a prosecutor may file motions to prevent such information from being disclosed at trial, or they might use the survivor's criminal activity to support their theory of the case.

If the defendant is aware of the survivor's criminal activity, it will likely come to the prosecutor's attention. In such cases, the prosecutor needs to be aware of the evidence as soon as possible so they can address the issue head-on.

[PRACTICE TIP: If you think that your client might face criminal charges, ensure they make an informed decision about whether and what to disclose, as well as the potential consequences that stem from disclosure or lack of disclosure. If your client is represented by a defense attorney in a pending criminal matter, consult with that attorney before advising them to speak to law enforcement about further criminal acts. Where a client has potential criminal exposure, it is highly recommended that you attend any law enforcement interview or meeting with the prosecutor.]

4. Rape Shield Laws

Every state and the District of Columbia has enacted a "rape shield law," which generally prohibits the admission of evidence of a survivor's past

¹⁶ Ethical standards state that "[t]he prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." AM. BAR ASSOC. STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION 3.9 (2017).

sexual conduct or their reputation for sexual behavior. These laws, however, have exceptions. Tell your client about the protections that are available through rape shield laws but caution that these protections are not absolute and that they may be neutralized by the defendant in a criminal case.

Typically, evidence about a survivor's past sexual history is allowed if it purports to explain: (1) a source of biological evidence; (2) a source of injury; (3) an issue around consent; or (4) bias, ulterior motive, prior false reports, or other such evidence.¹⁷ Explain to your client that, although the rape shield law governs the admissibility of evidence at trial, they may still be interviewed pre-trial about their sexual history by the prosecution and/or the defense.

In some jurisdictions, a survivor has the right to refuse to submit to a defense interview, but the defense is not required to advise the survivor of this right. Be sure to advise your client whether they are required to submit to a defense interview and help them prepare for how they want to respond if they are approached for a defense interview that is not mandatory. The survivor may also want to prepare their friends and family for this possibility. While it should be a survivor's choice whether to participate in a non-mandatory defense interview, it is important to explain the inherent risks in consenting to such an interview and to analyze whether there are any advantages to participating.

[CHECK YOUR LAW: Research your jurisdiction's rape shield laws so that you can best advise your client on what protections are available, the scope of those protections, and how they can best protect their privacy. You may want to collaborate with the prosecutor to determine if they will be filing a rape shield motion. As the survivor's attorney, depending on the jurisdiction, you may be able to file and argue your own rape shield motion on behalf of your client. See *Protecting Sexual*

¹⁷ Rape shield law exceptions differ depending on the jurisdiction. Be sure to consult your jurisdiction's rape shield law before advising your client.

Assault Survivors' Privacy for more information.

5. Immigration Status

If your client is an undocumented immigrant, is “out of status” (*i.e.*, they do not have a current visa or green card), or has any other immigration concern, an experienced immigration attorney in your jurisdiction should be consulted prior to reporting to police. You may want to investigate what your local police department’s policy is regarding immigration law enforcement. However, even a policy of non-enforcement is not a guarantee that a survivor’s immigration status will not be disclosed and reported to the Department of Homeland Security.

If your client reports the sexual assault to police, law enforcement may inquire into their immigration status because it may be relevant to the case. For example, a perpetrator may threaten to have the survivor deported to coerce them into sexual contact or to prevent them from reporting the assault to police. Information about immigration status will also be important if the survivor seeks documentation from law enforcement to pursue immigration relief like a T visa or a U visa.¹⁸ Relief of this type will generally need to be disclosed to the defense but may help your client with the security they need to go through the criminal justice process. See *Serving Immigrant Survivors of Sexual Assault*.

[PRACTICE TIP: If your client has immigration concerns and is at risk of being asked about their immigration status, advise them of how to proceed before they participate in any law enforcement interview. It is recommended that you attend the interview with them.]

¹⁸ Immigration Center for Women and Children, “U and T visas (Victims of Trafficking and Violence Protection Act)” Last visited, November 30, 2022, available at <https://www.icwclaw.org/u-and-t-visa-victims-of-trafficking-violence>.

III. THE CRIMINAL JUSTICE PROCESS

A. An Overview of a Criminal Prosecution

Criminal law and procedure vary from jurisdiction to jurisdiction. The types of offenses, the elements of each crime, and even the process followed once a defendant is charged are unique to each jurisdiction. However, there are some commonalities. For example, sex offenses are commonly titled “sexual assault,” “rape,” “sexual offenses,” “sodomy,” “sexual contact,” or “indecent liberties.” In every jurisdiction, the prosecutor decides whether and how to proceed with criminal charges. With the increasing gravity of the offense, the severity of the possible punishment also increases. Some sex crimes are misdemeanors (*e.g.*, indecent exposure or statutory sexual assault where the parties are close in age), but most sex crimes are felonies. Felony cases are typically more complicated and complex, and the consequences for the defendant are more significant. For example, in addition to increased sentencing exposure, a convicted felon may be denied the right to carry a firearm, to vote, or to hold certain jobs. In addition, a convicted sex offender is often required to register their personal information (*e.g.*, where they live, where they work, and where they go to school) in the jurisdiction’s sex offender registry for a period that can extend years or even through the offender’s lifetime.

[CHECK YOUR LAW: To represent a survivor effectively, you should be familiar with your jurisdiction’s penal code, and the proper name and elements of each sexual offense with which the defendant may be charged. Many jurisdictions have standard jury instructions. These instructions may be useful because they set out every element of the crime (*e.g.*, whether intent is required, the definition of force, the requisite age difference between the parties, whether penetration is required, etc.).]

What follows is an overview of how criminal cases typically proceed. Although specific procedures may vary, the overall process is similar for most jurisdictions.

B. Probable Cause Hearings and Grand Jury Proceedings

Each jurisdiction has its own procedures for commencing the felony process (variously called preliminary hearings, probable cause hearings, grand jury proceedings, etc.). Felony charges may be filed after a defendant is “bound over” or “held over” following a probable cause or preliminary hearing, or after a “true bill” is returned by a grand jury.¹⁹ While some jurisdictions have a procedure for remanding certain criminal cases to a higher court, in other jurisdictions the prosecutor may elect which process to pursue.

Several jurisdictions take all felony cases directly to the grand jury for indictment.²⁰ In all states, grand juries meet in secret. The grand jury hearing is an opportunity for the survivor to testify about what happened to them without being subjected to cross-examination. It is important to understand, though, that if a case is indicted, the survivor’s testimony does not remain secret, and the transcript of the survivor’s testimony is almost guaranteed to be produced as part of the prosecutor’s discovery obligations. Typically, the defendant does not appear before the grand jury. Some defense attorneys have their clients testify at a grand jury proceeding to prevent criminal charges from being filed in the first place. Even if the defendant testifies to the grand jury, it will not be in the survivor’s presence.

As a practical matter, a prosecutor may seek to have the case indicted by the grand jury before the defense attorney has a chance to get a probable

¹⁹ For example, in Colorado, a preliminary hearing is held within 30 days of the date charges are filed on every felonious sexual assault, and grand jury indictments are rare and usually reserved for major homicide cases or racketeering cases. (*Colo. Crim. P.* 5.) In New Hampshire, a probable cause hearing will normally be held, although a defendant may waive in writing his right to a probable cause hearing if he is represented by counsel. (*N.H. Dist. & Mun. Cts. R.* 2.19.) Occasionally, a case will go straight to the grand jury in what is called a “secret indictment.” Finally, while there is a grand jury proceeding in Wisconsin, it is almost never used. For serious sexual assault cases, the prosecutor simply issues a written complaint detailing the facts of the crime to initiate the criminal process.

²⁰ In Massachusetts, probable cause hearings are rarely held. If the defendant is arrested, the case will generally be given a probable cause hearing date at the arraignment and the prosecutor has until then to go to the grand jury for an indictment. (*Mass Crim. P.* 3). The same is true for New York; however, the defendant does have a right to a prompt preliminary hearing (called a felony hearing) on whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury. (NY CLS CPL § 180.10.)

cause hearing scheduled. The frequency of probable cause hearings varies widely from jurisdiction to jurisdiction. If a probable cause hearing is scheduled, the survivor may be called to testify,²¹ though there are exceptions (e.g., a defendant's spouse may not be compelled to testify in most cases and a minor may or may not be required to testify, depending on their age and whether they are deemed competent). Although cross-examination is more limited at a probable cause hearing than at trial, being cross-examined by the defense can be intimidating and/or traumatic for a survivor. For some survivors, this is their first post-assault encounter with the perpetrator. Some prosecutors prefer to proceed with a probable cause or preliminary hearing because it is an opportunity to preserve the survivor's testimony, should they be unavailable for future proceedings.

[PRACTICE TIP: Prepare clients who may be subject to cross-examination for this experience by conducting mock examinations in a survivor-friendly environment, such as your office or another private location where the survivor feels comfortable. Prior to the session, advise your client that you will be asking them questions in the same way they may expect the perpetrator's attorney to conduct the examination. Let your client know that your arguments and accusations are for simulation purposes only and do not represent your personal beliefs. Schedule enough time for the practice session so that you can support your client afterward. Be sure they have additional supports in place, including a social network and/or mental health professionals. Be ready to provide contact information for mental health professionals if the survivor requests a referral. You may also want to consult with the assigned prosecutor on the case for insight into potential lines of defense questioning.]

Depending on the jurisdiction's criminal procedures, a preliminary hearing or grand jury proceeding may result in a survivor's privacy being compromised. A survivor's attorney should determine what options they have to protect the survivor's privacy in their jurisdiction and determine

²¹ A victim may also have the right to attend the hearing pursuant to the jurisdiction's crime victims' rights laws, should the survivor wish to be present.

whether they can file a notice of appearance at this juncture to help protect their client's privacy.

A probable cause hearing allows defense counsel to examine the survivor, learn about the case, and observe how the survivor responds to testifying. Too often, no one advises a survivor ahead of time that they may refuse to answer certain questions if the answer implicates a privilege. Be familiar with what privileges exist in your jurisdiction and what privileges(s) may apply to your client's case, so that you can properly advise your client. If a probable cause hearing is held, the attorney should make sure the survivor knows what questions they can refuse to answer based on privilege.

Regardless of whether a case proceeds following a grand jury or a probable cause hearing, an attorney should be present if there are significant privacy or Fifth Amendment concerns. Then, if a question is asked that requires the survivor to waive a privilege or raises a Fifth Amendment concern, they can privately consult with their attorney.

C. Arraignment

If an indictment is returned, the police typically will arrest the perpetrator or allow them to turn themselves in to the police department for processing (also referred to as the "booking" process). The defendant will later be arraigned in court.

An arraignment is a court proceeding where the defendant formally hears the criminal charges against them. The defendant is advised of their rights, including their right to an attorney. If they cannot afford an attorney, an attorney is appointed for them. The defendant may be asked to enter a plea, or the judge may automatically enter a plea on the defendant's behalf. The typical response entered is "not guilty," which can be jarring and upsetting for a survivor who is present. It can be helpful to warn a survivor ahead of the arraignment so that they are not surprised.

At arraignment, a prosecutor can ask for the defendant to be held, or the prosecutor can argue for bail to ensure the defendant's presence at future court appearances. In evaluating whether the defendant can be released, the court will consider the nature of the charges and the seriousness of the

underlying allegations. The perpetrator's past criminal record is considered, particularly whether the defendant has been convicted of similar offenses or has a history of defaulting in other court cases. The court also considers whether the defendant has ties to the community and whether there are other circumstances that support whether the defendant is likely to appear in court or should be considered a flight risk or dangerous. Depending on the jurisdiction's standards for pretrial release, any evidence that the perpetrator is a serial offender—for example, a DNA hit to another case or reports from other sexual assault survivors—may also be relevant to demonstrate that the perpetrator is a danger to the community. The defendant will either be released (on bond or bail, on their own recognizance, or to the custody of a third party) or they may be held in custody pending the disposition of the case. The prosecutor can also request pretrial conditions of release (*e.g.*, GPS monitoring with exclusion zones, stay away from the victim witness, abide by any restraining orders with the victim witness, drug or alcohol screens, etc.) at the time of arraignment. An arraignment initiates the beginning of the criminal court process for the defendant. *See Safety and Protection Orders.*

D. Pretrial Motions and Hearing

There are often many court dates between arraignment and trial. It's important to warn a survivor that the criminal justice process typically moves slower than most survivors expect. It is helpful to be familiar with and know the typical length of criminal case in your jurisdiction. You can then help set expectations and support your client as they prepare for a potentially lengthy court process – the majority of which does not require their involvement.

After arraignment, the court process generally involves pretrial hearings, motion hearings, and status dates. The prosecutor and the defense attorney will exchange evidence, and the court will hear any evidentiary issues in dispute. The survivor will be notified if their presence is required. State crime victim rights laws may also grant a victim the right to attend certain pretrial hearings, even if their presence is not required.

The court may also hear motions, including motions to dismiss specific charges or the entire case and motions to suppress statements and

evidence. Be on the alert for hearings scheduled by the defendant as part of an effort to gain access to the survivor's privileged communications, such as their mental health, medical, or counseling records or their communications with a sexual assault crisis counselor. A prosecutor may also try to access these records without the survivor's permission. From a practical perspective, if the prosecutor has reason to believe the records they are attempting to obtain may be helpful in achieving your client's underlying goal, they might arrange to have such records reviewed *in camera* by the judge to limit the amount of information ultimately provided to the defense.

Be familiar with privacy case law in your jurisdiction and analyze these motions very carefully. Determine what arguments support your objection to these motions to protect your client's privacy. In some cases, you may discuss with your client their willingness to provide some or all the information requested, but it's important to recognize and identify any risks associated with waiving any privilege.

[PRACTICE TIP: Check your jurisdiction's privilege laws and be prepared to ensure that the survivor asserts any applicable privileges to prevent disclosure of these records.]

E. Pleas, Trial, and Sentencing

The defendant can choose to resolve the criminal case at any point prior to a trial verdict. The survivor can ask a prosecutor what their recommendation is if the defendant resolves a case prior to trial and provide feedback on that recommendation. While prosecutors should consider the victim witness' feedback in crafting a recommendation and resolving a case, they can disagree and offer a recommendation that is not fully supported by the victim witness. A survivor's attorney can play a critical role in helping survivors communicate their thoughts and be heard.

The defendant can also choose to go to trial. While a defendant can elect to have a bench trial in front of a judge, many defendants elect to have a jury trial in front of their peers. Juries are typically made up of 12 peers along with some alternates, though some jurisdictions allow juries of smaller sizes. The defendant must be present for trial. The survivor will

likely need to testify and will be cross-examined by the defendant's attorney. Cross-examination can be stressful and traumatic for the survivor. While the defendant can choose to testify, they are not required to do so. After hearing all the evidence, the jury deliberates. The jury's verdict must be unanimous.

If the jury finds the defendant not guilty, the defendant is free to go, and any pretrial conditions of release will end. The defendant cannot be retried for the same crime.

If the jury returns a guilty verdict, the defendant will be sentenced. Both the prosecutor and the defense attorney will present arguments in support of their recommendations. Victims' rights laws typically allow the survivor to offer a victim witness statement where the survivor can explain how the crime impacted them and offer their opinion on what type of sentencing is appropriate. The judge will sentence the defendant. While sentencing varies in each case, it can include prison time, probation with conditions, restitution, fines, and sex offender registration.

IV. VICTIMS' RIGHTS LAWS

Every state and the District of Columbia affords victims of crime certain statutory or constitutional rights. Victims have standing to enforce their rights in some jurisdictions, whereas in others the prosecutor must enforce those rights. In addition, some victims' rights are automatic, while others initiate only upon the victim's request. Victims' rights laws typically include the right to:

- Confer or consult with the prosecutor.²² This right may include a right to confer with the prosecution concerning a plea bargain.²³ In other

²² See, e.g., **Illinois**: ILL. CONST. ART. I, § 8.1 (3) (victims have the right to communicate with the prosecution); **Texas**: TEX. CONST. ART. I, § 30 (2)(b)(3) (victims have the right to confer with a representative of the prosecutor's office).

²³ See, e.g., **Minnesota**: MINN. STAT. ANN. §§ 609.115, 611A.031 (prosecutor must make reasonable efforts to consult with victim about plea bargain); **New Jersey**: N.J. STAT. ANN. § 2C:14-2.1 (victim shall have opportunity to consult with prosecutor prior to conclusion of any plea negotiations); **New York**: N.Y. CRIM. PROC. LAW § 390.90 (prosecutor should consult with victims of violent crimes before plea bargaining with defendant); **South Carolina**: S.C. CODE REGS. § 16-3-1530(B)(12) (victim has right to discuss views with prosecutor before plea bargain)

jurisdictions, the right to confer includes the right to consult with the prosecution regarding a contemplated dismissal of the case.²⁴

- Be heard.²⁵
- Deliver a victim impact statement at sentencing and parole proceedings.²⁶
- Be notified of the defendant's release.²⁷

Some jurisdictions also provide for victim notification when sex offenders are released from custody following incarceration. At least one state,

is offered); **South Dakota**: S.D. CODIFIED LAWS ANN. § 23A-7-8 (victim must have opportunity to comment on plea bargain).

²⁴ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (6) ("To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition); **Louisiana**: LA. CONST. ART. I, § 25 ("the right to confer with the prosecution prior to final disposition of the case")

²⁵ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (3) ("To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present."); **Texas**: TEX. CONST. ART. I, § 30 (2)(B)(2) ("the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial..."); **Illinois**: ILL. CONST. ART. I, § 8.1 (8) ("The right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.").

²⁶ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (4) ("To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing."); **California**: CAL. PENAL CODE § 679.02 (2, 5) (2006) ("For the victim, the victim's parents or guardian if the victim is a minor, or the next of kin of the victim if the victim has died, to be notified of all sentencing proceedings, and of the right to appear, to reasonably express his or her views, have those views preserved by audio or video means...and to have the court consider his or her statements..." "Upon request by the victim or the next of kin of the victim if the victim has died, to be notified of any parole eligibility hearing and of the right to appear, either personally...or by other means...and...to reasonably express his or her views, and to have his or her statements considered..."); **Illinois**: ILL. CONST. ART. I, § 8.1 (4) ("The right to make a statement to the court at sentencing"). Every state and Washington, D.C. affords a victim the right to make a victim impact at sentencing. A complete list is *available through* www.ncvli.org.

²⁷ See, e.g., **Arizona**: ARIZ. CONST. ART. II, § 2.1 (A) (2) ("To be informed, upon request, when the accused or convicted person is released from custody or has escaped."); **California**: CAL. PENAL CODE § 679.02 (2006) ("Upon request by the victim or the next of kin of the victim if the crime was a homicide, to be notified of an inmate's placement in a reentry or work furlough program, or notified of the inmate's escape"); **Texas**: TEX. CONST. ART. I, § 30 (2)(b)(5) ("the right to information about the conviction, sentence, imprisonment, and release of the accused.").

Alabama, mandates that a victim be notified automatically when a sex offender is released from custody.²⁸ In other jurisdictions, the victim may carry the burden of specifically requesting that they receive such notification.²⁹ Depending on the jurisdiction, a victim may also be entitled to automatic notification if a sex offender has been designated a sexually violent predator.³⁰

While these victims' rights laws represent continuing efforts to protect the rights of crime victims, victims are often unable to assert their rights and/or the remedies are unenforceable. For example, victims whose rights are denied do not always have standing to enforce their rights.³¹ Even modern crime victims' rights bills do not always create a civil cause of action for

²⁸ **Alabama:** CODE OF ALA. § 15-20-26. In Alabama, the Attorney General's Office is charged with notifying the victim of the sex offender's release and where the offender plans to reside. In addition, the offender is restricted from establishing residence within 1000 feet of the victim or the victim's immediate family. Furthermore, the offender is prohibited from having contact with the victim – the sex offender must not come within 100 feet of his former victim.

²⁹ **Washington:** WASH. REV. CODE § 4.24.550(3). **Ohio:** OHIO REV. CODE ANN. § 2950.10(A)(1) (provides for victim notification if the victim requests notification through the state Attorney General's Office. If the victim has requested notification, they receive information regarding the offender's name, address, school attended, and/or the offender's place of employment.)

³⁰ See, e.g., **Pennsylvania:** 42 PA. CONSOL. STAT. § 9797 (A)(1). Although every state provides for some sort of public access to sex offender registry information, the general rule is that the public's access to information does not include identifying information about the victim. A majority of the states surveyed contained a provision in their sex offender laws mandating that information identifying the victim should not be subject to disclosure and should remain confidential. Of the states surveyed, Alabama (CODE OF ALA. § 15-20-34(A)); California (CAL. PENAL CODE § 290.4 (2004)(A)(2)-(3)), Massachusetts (MASS. GEN LAWS CH. 6, § 178I), New York (N.Y. CORRECT. § 168-Q), Pennsylvania (42 Pa. Consol. Stat. § 9798(a)(2)), South Dakota (S.D. CODIFIED LAWS § 22-22-40), and Texas (TEX. CRIM PROC. CODE ANN. ART. 62.08(b)(3)) all mandate that sexual assault victims' information shall not be released to the public.

³¹ See generally, John W. Gillis and Douglas E. Beloof, *The Next Step for A Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690-691 (2002) ("...the legislation should be evaluated to determine whether the right is effective. If the legislation is not effective, the cycle should begin again - back to the legislative drawing board to revise the right and make it meaningful and enforceable"); see also, Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 864 (1997) ("With unwavering uniformity, the courts have consistently converted each such legislative effort into a hollow statutory promise of a right without a remedy.")

victims,³² though some provide that a victim may petition for a writ of mandamus to have their rights enforced, a writ which if then violated is punishable by contempt of court.³³ Even if a victim has standing, the remedy may be limited, or the victory may provide an insufficient remedy. Where standing is granted to victims, case law or statutory limitations often curtail their ability to pursue a remedy in criminal court against the defendant or to bring a civil action against the government actors who denied them their rights.³⁴

Survivors seeking to assert and enforce their crime victims' rights at the federal level have specifically articulated and enforceable rights. In 2004, Congress passed the Federal Crime Victim Rights Act (CVRA),³⁵ most recently updated in 2016, which provides that the victim of a federal offense or an offense in the District of Columbia has:

- The right to be reasonably protected from the accused.

³² See, e.g. *In Re Wild*, 994 F.3d 1244 (11th Cir. 2021), cert. denied sub nom. *Wild v. U.S. Dist. Ct. for S. Dist. of Fla.*, 212 L. Ed. 2d 54 (Feb. 22, 2022) (holding that the CVRA did not create a private right of action authorizing crime victim to file stand-alone civil lawsuit to enforce CVRA rights.); and see *In re Doe*, 57 F.4th 667 (9th Cir. 2023) (holding that the victim had standing to petition for a writ of mandamus pursuant to the CVRA to enforce her right to restitution).

³³ See, e.g. MD Constitution, Declaration of Rights, Art. 47 (“Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.”); S.C. CONST Art. I, § 24: Victims' Bill of Rights (“Nothing in this section creates a civil cause of action on behalf of any person against any public employee, public agency, the State, or any agency responsible for the enforcement of rights and provision of services contained in this section.”); W.S.1977 § 1-40-210 (“Nothing in this act shall be construed to create any civil cause of action for monetary damages against any person nor shall it constitute grounds for any claim or motion raised by either the state or defendant in any proceedings.”)

³⁴ For example, Arizona (ARIZ. REV. STAT. § 13-4437(A)), Florida (FLA. STAT. CH. 960.001(7)), Indiana (IND. CODE § 35-40-2-1), and Texas (TX CONST. ART. I, § 30) explicitly grant victims standing to enforce their rights. However, the Arizona Supreme Court has held that, although a victim has standing to seek an order or to bring a special action, a victim does not have standing to argue before an appellate court that the trial court's ruling in a criminal proceeding was in error or to bring the types of action against the defendant that the State can bring). *State v. Lamberton*, 899 P.2d 939 (Ariz. 1995). Similarly, in both Indiana and Texas, the legislative provisions granting standing expressly limit and qualify a victim's standing to enforce their rights.

³⁵ 18 U.S.C. § 3771.

- The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- The reasonable right to confer with the attorney for the Government in the case.
- The right to full and timely restitution as provided in law.
- The right to proceedings free from unreasonable delay.
- The right to be treated with fairness and with respect for the victim's dignity and privacy.
- The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

In contrast to most state crime victims' rights laws, the federal CVRA includes specific enforceability provisions.³⁶

[PRACTICE TIP: Review your jurisdiction's crime victims' rights laws to ascertain what rights your client has and what, if any, statutory mechanisms are available to enforce them.³⁷ You may

³⁶ See 18 U.S.C. § 3771(f)(1) and 18 U.S.C. § 3664 (Crime Victim Mandatory Restitution Act).

³⁷ Links to the state and federal crime victims' rights laws are *available online at* www.ncvli.org/ncvlilibrary.html. The National Crime Victim Law Institute (www.ncvli.org) and the

want to speak with organizations in your area who work with victims, such as crime victim assistance programs or crime victims' rights organizations.]

V. SURVIVORS' COMMON QUESTIONS ABOUT THE CRIMINAL PROCESS

Survivors need accurate information to make informed choices about whether to report an assault to a law enforcement official. Many survivors ask questions about reporting to law enforcement, survivor autonomy if the case proceeds, privacy concerns, how long it takes for the case to go to trial, and the likelihood of conviction.

A. Participating in a Criminal Investigation

There are multiple reasons a survivor may wish to file a police report even if they are not ready to proceed with a criminal investigation. These include qualifying for victim compensation benefits, establishing an evidentiary record, or documenting an assault as required for certain civil remedies (such as early termination of a lease or employment leave, obtaining an order of protection, or other relief). Some police departments may accommodate this choice by allowing the survivor to file an incident report without pressing them to go further. Because police protocol will vary by department, contact your local police department to discuss this option before advising your client to report the assault if they know they do not wish to proceed or are unsure if they want to proceed with a criminal prosecution. Advise them that, if they later wish to proceed with the prosecution, that option may be preempted by the tolling of any applicable statute of limitations and/or a defense motion to dismiss based on pre-indictment delay.

B. Testifying at Trial

While the survivor does not control whether a case is prosecuted, most prosecutors will not be able to proceed with an adult sexual assault prosecution without the survivor's testimony due to the challenge of proving

National Center for Victims of Crime (www.ncvc.org) offer technical assistance to crime victim advocates and attorneys.

lack of consent. Although it is rare for a sexual assault survivor to be forced to participate as a witness in criminal proceedings, and such coercion has been recognized as inconsistent with best prosecution practices, it is possible. Prosecutors typically consider a variety of factors in determining whether to compel the survivor's testimony, including the seriousness of the crime, the risk that the perpetrator will harm the survivor again, the dangers to the community if the perpetrator is not prosecuted (*i.e.*, the risk of re-offense), the impact of the proceedings on the victim, and the availability of other opportunities to hold the perpetrator accountable. In the rare event that a prosecutor decides to seek a bench or material witness warrant, civil attorneys must work with system actors to advocate for the least restrictive means possible to secure their client's testimony at trial.³⁸

C. Privacy Concerns

Depending on the law in your jurisdiction, the name of a survivor of sexual assault may be protected from publication in court records.³⁹ In addition, some jurisdictions protect the confidentiality of sexual assault survivors in police reports by deeming police reports to be non-public records or by exempting the name and other identifying information of the survivor from

³⁸ For more information, see Teresa Garvey et al., AEquitas, *Guiding and Supporting the Victim's Choices Regarding Participation in the Prosecution of Sexual and Intimate Partner Violence 20 STRATEGIES 1* (2023), <https://aequitasresource.org/wp-content/uploads/2023/01/Guiding-and-Supporting-the-Victims-Choices.pdf>.

³⁹ See, e.g., **Alaska**: ALASKA STAT. § 12.61.140 ("The portion of the records of a court or law enforcement agency that contains the name of the victim of an offense . . . shall be withheld from public inspection . . . except with the consent of the court in which the case is or would be prosecuted."); **Louisiana**: See LA. REV. STAT. ANN. § 44.3(A)(4)(D) ("Nothing herein shall be construed to require the disclosure of information which would reveal the identity of the victim of a sexual offense . . . held by the offices of the attorney general, district attorneys, sheriffs, police departments, Department of Public Safety and Corrections, marshals, investigators, public health investigators, correctional agencies, communications districts, intelligence agencies, or publicly owned water districts of the state"); **New York**: N.Y. CIV. RIGHTS LAW § 50-B ("The identity of any victim of a sex offense shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim."); **Florida**: FLA. STAT. § 794.03 ("No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense. . . . Such identifying information is confidential . . . An offense under this section shall constitute a misdemeanor of the second degree. . .").

disclosure as part of the report.⁴⁰ A survivor may also request that additional personal information be kept out of the public record, such as their residential address, telephone number, place of employment or school. However, this privacy cannot be guaranteed. Disclosures are sometimes made pursuant to a Freedom of Information Act (FOIA) request or “sunshine laws” that require government transparency and disclosure. Even previously sealed court records are sometimes later opened to the media.⁴¹

A defendant may publish information they obtained through the legal process as a method of retaliation or to intimidate the survivor. While there are criminal remedies for such action,⁴² your client’s information may still remain public, especially if posted by the defendant onto any type of social media.

In addition, while many newspapers as well as television and radio stations have a policy of not publishing the names or pictures of sexual assault survivors without their consent, this policy is often unwritten and not legally required. To the contrary, the media have well established First Amendment rights in this regard.⁴³ However, an attorney may be able to file motions to help protect a survivor’s privacy, including motions to keep a survivor’s name or image out of the public record, to restrict access to the survivor or their identity, to keep private the names and images of a

⁴⁰ See, e.g., **Florida**: FLA. STAT. ANN. § 119.071(2)(H) (name, address and other identifying information of victim in police report is deemed confidential and exempt from public inspection and copying); **Illinois**: 5 ILCS 140/8 (law enforcement agency must redact the private identifying information of a victim before making the remainder of the document available for public inspection); **New York**: MCKINNEY’S CIVIL RIGHTS LAW § 50-B(1) (any report (including a police report) in the custody or possession of any public officer or employee that reveals the identity of a sexual assault victim, shall not be made available for public inspection).

⁴¹ See, e.g., *People v. Bryant*, 94 P.3d 624 (Colo. 2004) (previously sealed court records in a criminal sexual assault case unsealed and released for inspection by the media).

⁴² I.e., revocation of bail if the case is active, a probation violation hearing if the case has been concluded, criminal contempt, and/or additional criminal charges like witness intimidation.

⁴³ The *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (state may not sanction newspaper for publishing name of sexual assault victim when the name was lawfully obtained from publicly released police report); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (broadcasting company may not be held liable for publishing truthful information obtained from court records that were open to the public).

survivor's children or other family members, etc. Be familiar with what options you have in your jurisdiction.

D. Duration of a Criminal Prosecution

Although jurisdictions vary, on average a criminal prosecution may take between six months and two years to come to trial. It is not unusual for cases to take longer than 2 years in some jurisdictions. Survivor participation is most active in the beginning stages (*i.e.*, during the investigation and grand jury proceedings) and in the later stages as trial approaches and occurs. During the middle stages when pretrial hearings and motions occur, survivor participation may be sporadic or not required at all. During this period of relative inactivity, some survivors find it relatively easy to put the court proceedings out of their minds; others find it difficult to move beyond the criminal case so long as criminal charges against the defendant are pending. Ask your client how they want to be involved in the ongoing criminal justice process—do they want to be updated on every hearing and motion, or do they wish to be left alone until it's time for trial? You can collaborate with the prosecutor and victim witness advocate assigned to the case to ensure that the victim's preferences are respected.

E. Likelihood of Conviction

Sexual assault cases can be difficult to prosecute and even more difficult to win. Out of every 1000 sexual assaults that occur, only 310 are reported, only 50 of those reports lead to a criminal case, and only 28 of those charged cases result in a conviction.⁴⁴ While 56% of charged cases result in a conviction, studies suggest as few as 9% of reported cases of sexual violence result in a conviction.⁴⁵ Survivors need to understand these odds, but they also need to understand that every case is unique. Statistics do not predict what will happen in an individual case. Every case and every jury is different, and so too are all prosecutors, judges, and defense attorneys. Ensure that your client is prepared for any outcome, whether the

⁴⁴ See The Criminal Justice System: Statistics, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited June 14, 2024).

⁴⁵ *Id.*

defendant is convicted or acquitted, and that there is a plan in place to protect their physical and mental well-being and their privacy.

VI. CONCLUSION

The criminal justice system can be frustrating, confusing, and difficult to navigate, even for seasoned legal practitioners and especially for survivors. As an attorney for survivors involved in the criminal process, you need to understand both the underlying trauma that they have experienced and the ways in which you can help them navigate this system to minimize their frustration and re-victimization. For sexual assault survivors, participating in a criminal prosecution can be healing, empowering, and a venue for reclaiming their autonomy and sense of self. It can also be a profoundly humiliating, frustrating, and painful process that violates their privacy and results in further trauma. Your representation and advocacy are critically important in making the process easier for survivors. You can help a survivor navigate these difficult waters and ensure that their decisions are informed, their privacy is protected, and their rights are respected.