

Section IV: Charging and the Court Process

Once a report has been made to law enforcement and the investigation is completed, the investigator may submit the reports to the prosecutor for consideration of charges. There are many factors the prosecutor must consider before charging a case, and many steps that will occur if a case is charged and proceeds to court. This section will consider the pre-charging and court process phases.

Part I: The Charging Process

Authority and Venue

In Minnesota, county-level authorities prosecute felony crimes such as most sexual assaults. In some states, and on television, this prosecutor is known as a "District Attorney" or "D.A.," but in Minnesota, the county-level prosecuting authority is the County Attorney's Office. The highest-ranking attorney within the office is the elected County Attorney. Assistant County Attorneys are hired by the elected County Attorney, and work for the county attorney's office. Assistant County Attorneys are directly responsible for carrying out the prosecution of most of the cases.

If the offense is a gross misdemeanor or misdemeanor, then the case will generally be prosecuted by a city or municipal attorney, with the exception of gross misdemeanor fifth degree criminal sexual conduct. Sometimes a village, township or other type of local municipal government does not have an attorney, usually because the municipality is very small. In these areas, the County Attorney's Office prosecutes the non-felonies as well.

The term "venue" refers to the prosecuting authority which has authority to charge the criminal offense. The city or county prosecutor has the authority (i.e. power) to prosecute a criminal case generally if the offense either took place in that city or county or terminated in that city or county. However, where juvenile offenders are involved, the venue might be either where the crime took place, or where the juvenile resides. (Some criminal offenses also provide for venue in other places, especially if it is difficult to determine where the crime took place.)

Statute of Limitations



Statute reference: Minn. Stat. §[628.26](#) (d) & (e) [Limitations Fact Sheet: Statute of Limitations](#)

For many types of crimes, there is a limited time period in which a prosecutor may file a complaint. This time limit on prosecution is referred to as the "statute of limitations."

In general, the statute of limitations for criminal sexual conduct is now nine years from the date the crime was committed. However, there are several exceptions. If the victim was less than 18 years old when the crime was committed and s/he did not report the assault within the nine-year period, then the case can be prosecuted within three years of his/her report to law enforcement. Also, first, second or third degree criminal sexual conduct may be prosecuted at any time if physical evidence has been collected and preserved which could be DNA tested. (This paragraph refers to the statute of limitations for criminal charges of sexual assault. The statute of limitations for civil lawsuits for damages from sexual assault are different and beyond the scope of this manual.)



Advocacy Sidebar: Statute of Limitations

In Minnesota, the statute of limitations for criminal charges of sexual assault has changed numerous times since the early 1980's. It is one of the most complicated and difficult issues for the prosecutor to determine in cases where the assault may have occurred several years earlier under a different statute of limitations. The proper statute of limitations is the one in place the year the assault took place. In some situations, even if the statute of limitations was shorter at the time of the assault, the ability to charge the case may carry over when new and longer statutes of limitations were passed.

As a result of the complexity of this issue even for trained attorneys, advocates should never try to advise a victim whether the statute of limitations has passed in a given case. It is a good idea to have a general idea what the time-frame is for charging, but a trained prosecutor should always make the decision after receiving all the information in the police reports.

Advocates should also understand that the statute of limitations only applies to limit the time when a prosecutor can file criminal charges against a suspect. It does not in any way apply to the time when a victim can give a statement to law enforcement. A victim can give a statement any time after the occurrence of the assault. Remember that, even if it is too late to charge the suspect regarding the assault against this victim, the suspect may have

assaulted others more recently. The police would then have his/her name on record in the event other victims come forward. This victim may be able to help a more recent victim seek justice against the same offender by showing a pattern of sexual assault.

Finally, while the time frames for charging sexual assault have become longer over the last few years, the ability to prove the case is usually diminished by the passage of even a short amount of time. Witnesses may be difficult to locate, their memories fade, and forensic evidence will disappear. This does not mean that a victim should not report if time has passed: s/he should always give the investigator a chance to prove the case. But if a victim is considering reporting to law enforcement, the sooner the better in most cases.

Filing Charges



Appendix Reference: See sample complaint, Appendix D

Once law enforcement has collected evidence, the prosecutor decides whether to prosecute the case. The investigator will compile the information in police reports, which are sent to the prosecutor to review whether to file charges, and determine which crimes to charge. The prosecution is initiated through submitting a charging document, such as an indictment or a complaint, to a court. The complaint names the person who is accused, gives a short description of the relevant events, and states the crime or crimes that the person is accused of committing.

The complaint will list the statutory maximum for any offense charged. This does *not* represent the likely sentence the defendant will receive. See the discussion on sentencing for more on this issue.

The prosecutor represents the State of Minnesota, not the victim of the crime. In deciding whether to file a complaint, the prosecutor knows that to obtain a conviction, he or she will eventually have to prove “beyond a reasonable doubt” that the crime occurred. While the crime victims rights statutes (see Section III) indicate that the prosecutor should seek victim input, the decision whether to file a complaint and pursue a case lies with the prosecutor.



Advocacy Sidebar: Filing Charges

Even though the law requires only “probable cause” of criminal conduct for the prosecutor to charge an offender, the reality is that the prosecutor must be satisfied that s/he can prove the case “beyond a reasonable doubt” at trial before proceeding. Thus, even though the prosecutor may personally believe that the report of sexual assault is valid and that the suspect is guilty of a crime, s/he must take into consideration how other people may view the situation – namely, a jury.

When reviewing a case for charging, or in plea negotiations, a prosecutor has to be aware of the “real world” problems that the case might present. Factors such as drinking or drug use, risky behavior, lying in the police reports, or even the occurrence of some consensual sexual activity by the victim must be considered by the prosecutor in relation to a jury’s likely reaction. These factors, unfortunately, are still used by juries to question the credibility of the victim, or to question his/her behavior before, during, or after the sexual assault. The factors, then, will come into play – not as to whether the prosecutor actually believes the victim – but as to whether the case could be won if tried to a jury.

Further, if the advocate knows the prosecutor is considering whether or not to charge a case, s/he may certainly request that the prosecutor meet with the victim before making a decision, to evaluate how the victim might come across on the witness stand, how cooperative the victim is willing to be, etc. This meeting might make the difference in the prosecutor’s decision. If the prosecutor has decided to turn down charging a case, the advocate may request that the prosecutor meet with the victim to explain the reasons for the “turn-down.”

Advocacy During Prosecution

With all the discretion accorded prosecutors in our system of criminal justice, advocates can sometimes feel at a loss when assisting victims through this phase. Aside from the voters in the county, the ethical rules for lawyers, and some general legal principles, the prosecutor answers to no one regarding charging or plea decisions. But that does not mean that the advocate has no role at this phase of proceedings.

The most important role the advocate can play during the phase when the prosecutor is making charging or plea decisions is to be sure the prosecutor has all the information available. Thus, the advocate should encourage and facilitate open communication between the victim and the prosecutor – arranging meetings before and after charging, conveying the victim’s wishes regarding going to trial, punishment, or even charging itself, and making sure that the victim did not give more information about the assault to the advocate than to the police investigator. (This is only, of course, with the permission of the victim.)

If the prosecutor refuses to meet with the victim or give information about the charging decision, his/her supervisor might be willing to intervene at the request of the advocate. A written letter to the prosecutor with the victim’s wishes is also a good idea if the advocate and victim feel they are not being heard. Finally, if all efforts at communication seem to have failed, the Minnesota Office of Justice Programs has staff who will take complaints about prosecutors who may not have followed the victim’s rights statutes. This should be a last resort, however, as open and effective communication between the advocate and prosecutor is best for this current victim, as well as future victims.



Advocacy Sidebar: Advocacy During Prosecution

Once the case has been charged by the prosecutor, and the defendant has hired an attorney, it is possible that a defense investigator or attorney may contact the victim or other witnesses. Often, if they do so, a defense investigator will not specifically identify him/herself as working for the defense to witnesses. The purpose of the contact is to re-interview witnesses and look for support for the defendant’s side of the case.

Victims and witnesses should be warned of this possibility, and notified that they do not have to speak to anyone about the case if they do not choose to do so. While a prosecutor cannot tell a victim or witness to whom they may talk, most prosecutors would prefer that witnesses not speak to defense personnel. Anyone contacted by an investigator should notify the prosecutor about it and find out whether the prosecutor wishes to express a preference.

Defense investigators are not police, and do not work under the same rules and procedures as police. They frequently do not tape interviews, but rather characterize the witness’ answers in their own words to suit their purposes. Witnesses should be cautious when speaking to anyone other than police about the investigation.

Privileged Communications – Advocate and Victim



Statute Reference: Minn. Stat. §[595.02](#) Subd. 1(k) - Testimony of witnesses;
Sexual Assault Counselors.
Fact Sheet: Advocate Privilege

For purposes of this statute, a sexual assault counselor is a person with at least 40 hours of crisis counselor training and under ongoing supervision whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault. The general rule is that communications between the victim and sexual assault counselor are “privileged.” This means that the advocate may not disclose information (written or verbal) obtained through her work with the victim unless the victim consents. However, the law allows the counselor to be called to testify about a child abuse or neglect investigation if good cause exists, i.e. the counselor possesses information so unique it cannot be gathered from another source. In making its determination, the court will weigh the public interest in needing the information versus the potential further harm to the victim.



Advocacy Sidebar: Privileged Communication – Advocate and Victim

Advocates should keep in mind that privileged communication is waived whenever the advocate, victim and a third party are conversing. The communication is no longer privileged due the presence of the third party. The advocate could be required to testify about the contents of that communication. A victim may also request that an advocate testify – and that also removes the protection of privilege. Unless the advocate has first hand information that no one else has, her testimony will usually not be productive or necessary.

Advocates should also keep in mind that, according to the contract between the sexual assault program and the Minnesota Office of Justice Programs, their communications with clients are confidential. The contracts signed to obtain grant funds mandate that sexual assault victim advocacy programs comply with Chapter 13 of the Minnesota Statutes – providing data practices for government funded entities. Finally, the by-laws created when the non-profit program was established will almost always require confidentiality.

Check your own by-laws regarding disclosure of communications you have had with victims.

SVJI recommends that each program develop an on-going relationship with a private attorney knowledgeable in business or non-profit management – your local prosecutor or legal services are not appropriate for this role. These attorneys may be willing to work for a free or reduced rate.

Criminal Sexual Conduct Statutes

In the complaint, the prosecutor officially alleges that a particular person has committed a particular crime. The prosecutor can only charge someone with a crime that the legislature has enacted as law. These laws are codified in Minnesota's criminal law statutes. An alternative process is sometimes used in particular cases and for particular reasons. A grand jury may be called to review the evidence and determine if enough exists to charge the suspect. The grand jury's determination is called an indictment and directs the prosecutor then to take the case into the trial court system.



Criminal Sexual Conduct



Statute References:

Minn. Stat. § [609.341](#) - Definitions

Minn. Stat. § [609.342](#) - Criminal sexual conduct in the first degree

Minn. Stat. § [609.343](#) - Criminal sexual conduct in the second degree

Minn. Stat. § [609.344](#) - Criminal sexual conduct in the third degree

Minn. Stat. § [609.345](#) - Criminal sexual conduct in the fourth degree

Minn. Stat. § [609.3451](#) - Criminal sexual conduct in the fifth degree

In Minnesota, the legal term used for "sexual assault, "sexual offense, or "rape" is "criminal sexual conduct." The criminal sexual conduct statutes begin by defining a number of terms. Then the statutes provide for five "degrees" of criminal sexual conduct.

First degree criminal sexual conduct carries the most severe penalties, and the severity of the penalty provided by the statute decreases with each successive degree of criminal sexual conduct down through fifth degree. First through fourth degrees criminal sexual conduct are felonies, while fifth degree criminal sexual conduct is a gross misdemeanor.

There are multiple ways that each of the first through fifth degrees of criminal sexual conduct can be committed, and each of the different ways is explained in subdivisions of each statute. However, one thing that first through fourth degrees of criminal sexual conduct have in common is that either "sexual penetration" (as defined at Minn. Stat. § [609.341, subd. 12](#)) or "sexual contact" (as defined at Minn. Stat. § [609.341, subd. 11](#)) must have occurred.



In Brief

There is a legal distinction between "sexual penetration" and "sexual contact." This distinction will determine which criminal sexual conduct statute will apply.

If the victim was an adult, first and third degree criminal sexual conduct require that "sexual penetration" have occurred, while second and fourth degrees criminal sexual conduct require that "sexual contact" have occurred. If the victim was a child, first degree criminal sexual contact may require only "genital to genital" contact rather than penetration (this manual does not give detailed information about child sexual assault.)

Legal professionals refer to the list of things that have to be proved to obtain a conviction as "elements" of the crime. It is like a checklist: each element must be checked off, or proven, beyond a reasonable doubt. In addition to the element of either "sexual penetration" or "sexual contact," at least one other element has to be satisfied for a defendant to be found guilty of first through fourth degree criminal sexual conduct. The victim's lack of consent, by itself, is not enough to charge first through fourth degrees. The prosecutor must show force or coercion or some other felony element (see charts below) to charge a felony for nonconsensual sexual conduct.

Chart A

	MORE FORCE	LESS FORCE
SIMILAR IN TYPE OF ASSAULT: PENETRATION	<p>CSC 1 Penetration – higher degree of force</p>	<p>CSC 3 Penetration – lower degree of force</p>
SIMILAR IN TYPE OF ASSAULT: CONTACT	<p>CSC 2 Contact – higher degree of force</p>	<p>CSC 4 Contact – lower degree of force</p>

Chart B

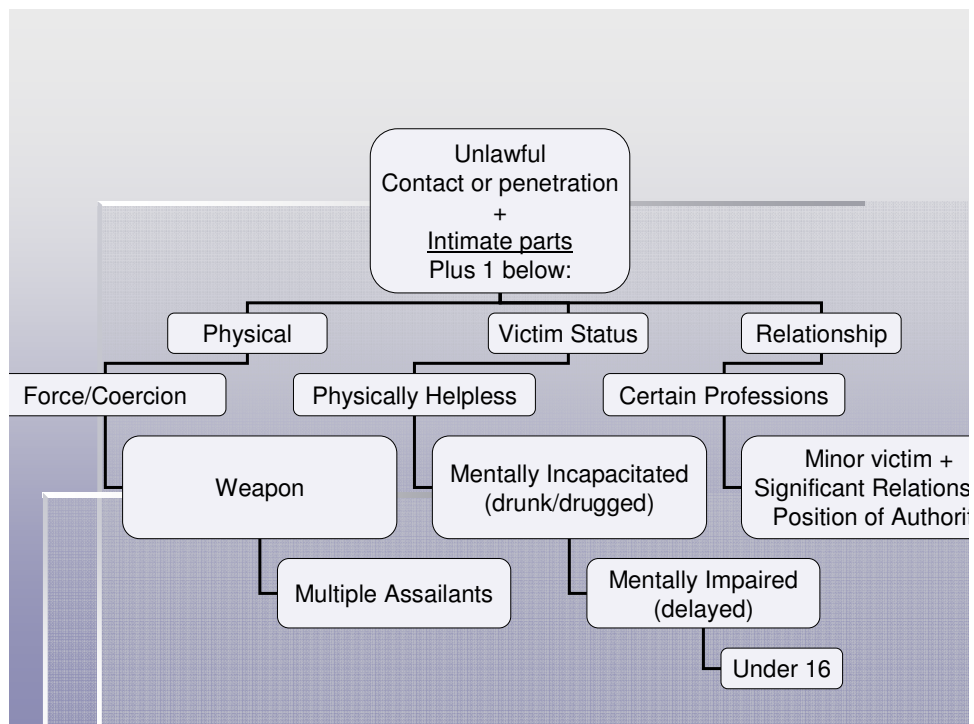


Chart A

Chart A demonstrates how the statutes differentiate between contact and penetration, and also more or less force used. The combination of these elements will determine which level of criminal sexual contact is appropriate for the crime.

Chart B

Chart B demonstrates the various ways the criminal sexual conduct statutes divide up the crime of sexual assault. Starting with unlawful contact or penetration of the intimate parts (which is a gross misdemeanor), this chart shows that if there is an additional element from the list below the first bubble, it could be a felony charge. The first option is a physical element, such as force or coercion. The second possibility is an element regarding the status of the victim – such as being under aged. The third category of felony elements has to do with the relationship of the offender and victim that is inappropriate.

Each case could be charged under one, two, or more categories or levels of criminal sexual conduct. Thus, you may see a complaint that has three or four counts for one incident of criminal sexual conduct. These charts demonstrate how many different charging options there are for prosecutors in criminal sexual conduct cases.

❖ Definitions

The criminal sexual conduct statutes begin by defining a number of terms. In particular, note the definitions of "force" ([609.341 subd. 3](#)) and "coercion" ([subd. 14](#)), "personal injury" ([subd. 8](#)), "consent" ([subd. 4](#)), "sexual contact" ([subd. 11](#)), sexual penetration" ([subd. 12](#)) and "intimate parts" ([subd. 5](#)). The following definitions are *not* word for word from the statute, in the interest of clarity.

Force

- ❖ infliction of bodily harm
- ❖ or the attempted or threatened infliction of bodily harm
- ❖ or the commission of any other crime or the threat of a crime
- ❖ against the complainant which causes the complainant reasonably to believe that the actor has the present ability to carry out the threat.
- ❖ and (if the actor is not a family member of a child) these things cause the complainant to submit

Coercion

- ❖ words or circumstances
- ❖ cause the complainant to reasonably fear
- ❖ the actor will inflict bodily harm or
- ❖ hold the complainant or another in confinement or
- ❖ force the complainant to submit to sexual penetration/contact or
- ❖ use of superior size or strength
- ❖ no specific act or threat need be proven

Personal Injury

- ❖ physical pain, injury, illness, or any impairment of the physical condition
- ❖ severe mental anguish
- ❖ pregnancy

Consent

- ❖ words or actions
- ❖ indicating a present agreement, freely given
- ❖ to perform a sexual act with another
- ❖ does *not* mean prior/current relationship with the actor or simply failing to resist a sexual act

Sexual Penetration*

- ❖ Sexual intercourse, cunnilingus, fellatio, or anal intercourse or
- ❖ any slight intrusion into the genital or anal openings of
- ❖ either the complainant's body or the actor's body
- ❖ using any body part of the complainant or the actor or
- ❖ using an object

**Sexual
Contact***

- ❖ the following with sexual or aggressive intent
- ❖ touching of complainant's intimate parts or
- ❖ touching the clothing over the complainant's intimate parts

**Intimate
Parts**

- ❖ primary genital area, groin, inner thigh, buttocks, or breast of a human being (male or female)

* Note - Sexual penetration and contact can have different meanings when children under 13 are the victims.

Other Relevant Minnesota Statutes

- ❖ Certain Voluntary Relationships Exempted – Sexual Relations by Married/ Cohabiting Minors/Vulnerable Adults Permitted



Statute Reference: Minn. Stat. § [609.349](#) - Voluntary relationships

In some states, a sexual assault that is committed against a spouse, commonly referred to as "marital rape," is not a crime. In these states, a defendant's marriage to the victim of a rape or sexual assault is a defense.

However, in Minnesota, even if the defendant and the victim were married or cohabitating at the time of the sexual assault, the defendant can still be found guilty of criminal sexual conduct against the victim. If the partner used force or had sexual contact with the victim without her permission, or in most other ways violated the statutes regarding criminal sexual conduct, the offender can still be prosecuted! The law in Minnesota only allows an exemption for certain *voluntary* marital/cohabiting sexual relationships which would be unlawful otherwise because of the age or disability status of one partner.

This statute – [609.349](#) – cannot be fully understood without reading the statutes listed which exempt married/cohabiting couples from certain types of criminal sexual conduct. If you look back at the statutes listed in that first sentence (i.e. parts of Minn. Stats. § [609.342](#), [609.343](#), [609.344](#), and [609.345](#)), you will see that the situations referred to are age-based offenses, or offenses involving vulnerable adults where sexual contact would normally be unlawful. However this statute *permits* that sexual contact so long as the couple was married or co-habiting (for vulnerable adults only). In other words, sexual

activity with certain minors and vulnerable adults would normally be unlawful, but is permitted by this statute so long as the two persons are married or cohabitating.



Advocacy Sidebar: Voluntary Relationships

Prosecutors in some jurisdictions have decided not to prosecute "marital rape" cases because these prosecutors mistakenly believed that "marital rape" is not a crime in Minnesota. If this happens in your county, work with the victim to communicate with the prosecutor, perhaps through a meeting or a letter. Refer to Minn. Stat. § [609.349](#) in your communication.

❖ Indecent Exposure



Statute Reference: Minn. Stat. § [617.23](#) - Indecent exposure

Indecent exposure is a misdemeanor. However, if the indecent exposure offender has violated certain criminal sexual conduct laws in the past, then the indecent exposure offense can be elevated to a gross misdemeanor or even a felony.

❖ Harassment/Stalking



Statute Reference: Minn. Stat. § [609.749](#) - Harassment; stalking; penalties

Some victims of sexual assault may also be victims of harassment or stalking. The term "harass" means intentional conduct which the actor knows or should know would make the victim feel frightened, threatened, oppressed, persecuted, or intimidated. The prosecutor must also prove that the victim actually has that reaction. The harassment/stalking statute contains numerous methods a person might use to harass a

victim – including, for example, manifesting an intent to injure the person, following or pursuing the person, making telephone calls or sending mail or e-mail to the person, or following or monitoring the victim. A basic violation of the statute is a misdemeanor.

A “pattern of harassing conduct” is a felony. This means committing two or more violations of certain statutes within 5 years, including the harassment/stalking statute or the criminal sexual conduct statutes.

Additionally, violations of the harassment/stalking statute are “enhanced,” meaning that with certain previous convictions, a new violation of the statute might be a gross misdemeanor or felony.

- Harassment Victim and Advocacy With Police, Prosecution

Often, a victim of harassment/stalking may feel that the prosecutor does not fully pursue the charges that they would like to see prosecuted, and advocates sometimes get frustrated that police do not respond as they would like when harassment/stalking is reported.

Initially, keep in mind that one act of harassment/stalking charge is a misdemeanor. If the offender committed other, more serious charges, a prosecutor may seek a conviction on the other offenses because they can get a more serious consequence for other crimes regarding this victim and offender. For example, an offender might sexually assault the victim with force. This would be a felony. If she reports that event, and then reports that he continues to harass and stalk her, the continued harassment is a misdemeanor and may be dismissed in favor of the felony charges.

Harassment/stalking can be difficult to prove, too. It often occurs anonymously - cards left on a windshield, phone calls with no one talking, friends of the offender driving by – all these things can make it difficult to connect the behavior to the offender. Remember that “proof beyond a reasonable doubt” means proof based on evidence – not the suspicion or hunch of the victim (however accurate s/he may be about the identity of the harasser). Thus, when these anonymous activities occur, it can be difficult for the police or prosecutor to tie them to the offender most suspected by the victim.

Further, to convict on one count of felony pattern of harassment/stalking, the prosecutor actually has to prove multiple incidents beyond a reasonable doubt. To prove a pattern of harassment/stalking, each separate act by the offender that must be proven beyond a reasonable doubt. By contrast, most other crimes involve one act committed in one setting – making them easier to prove than a series of actions over time.

All these factors do *not* mean that advocates should discourage a victim from reporting harassment/stalking to the police! Along with obtaining a Harassment Restraining Order (HRO) or Order for Protection (OFP), victims should absolutely report this conduct to the authorities. Even if the authorities do not take action after the first report, continued

contact by the offender should be reported to make a record of the problem. In the event the police or prosecutor does not act as swiftly or strongly as the victim wishes, however, it does help to understand some of the hurdles faced by professionals in light of their burden in these cases.



Advocacy Sidebar: Harassment/Stalking

An advocate can be of assistance to a victim of harassment/stalking before s/he reports the activities to authorities. Often, harassing events are reported to police out of context, and therefore do not gain the full attention of the officer. It is important to place the conduct in the full context that the victim knows about the situation – why s/he believes that one “simple” act is threatening to her safety.

Once a person feels that the offender’s behavior has started to cross a line, s/he should begin keeping records of the behavior. Even if the victim is not ready to report to law enforcement, s/he should write down the date, time, and circumstances of the behavior that bothers her. If there is a way to preserve things such as phone messages, caller ID, cards, flowers, etc – s/he should do so. Anyone who witnessed even only the victim’s end of a phone conversation, saw the offender drive by, or heard the victim complain about the offender’s behavior is a witness – and their name should be recorded.

If the victim is then ready to report to law enforcement, all this information should be provided to place the “final straw” in context – so that the officer understands why a seemingly innocent event is threatening to the victim. If the victim is aware that the offender has prior convictions for domestic violence, which can enhance the penalty for harassment/stalking, s/he should make the police aware of that, as well. A copy of the HRO or OFP, including the written application, are also helpful.

Within the proper context, harassment/stalking which frightens a victim should be pursued by the police. An advocate may simply need to assist the process by helping the authorities see the whole picture.

❖ Solicitation of children to engage in sexual conduct & communication



Minn. Stat. §[609.352](#)

This statute prohibits an adult, 18 years of age or older, from soliciting, persuading or requesting a child 15 years old or younger (or someone he believes to be a child) to engage in sexual conduct. It also prohibits adults from using the internet or computer to solicit sexual conduct or distribute materials portraying sexual conduct to a child of 15 or younger. Neither mistake as to the child's age, nor the fact that law enforcement was involved in the communications is a defense to this crime.

❖ Use of a Minor in a Sexual Performance



Minn. Stat. §[617.246](#)

It is prohibited for any person to use, employ or permit a minor (under age 18) to engage in any sexual performance or pornographic work, regardless of consent by the minor or the minor's parent. The statute has several definitions of sexual performance, including depicting actual or simulated sexual conduct, masturbation, or physical contact with intimate parts. It is a felony, and also creates a civil cause of action where the minor can sue for damages against the person who violated the statute.

❖ Sexual and Labor Trafficking Crimes



Minn. Stat. §[609.281](#) – [609.284](#)

Minn. Stat. §[609.321](#) – [609.322](#)

It is unlawful for a person to traffic another person for sexual or labor exploitation. Sex trafficking is a form of “promoting prostitution” under our statute. It carries a maximum penalty of 15 years and/or \$30,000 fine, or when the victim is under 18 years old, a maximum 20 years/\$40,000 fine. Further, simply confiscating or possessing the passport or other government identification of another person in order to force them to perform services is in itself a criminal offense. The penalty for that offense is a maximum five years and/or \$10,000 fine.

Victims of such offenses have civil claims against any person or corporation proven to have violated these sections.

Sexual Assault on Minnesota Indian Reservations

By Sarah Deer, Staff Attorney, Tribal Law and Policy Institute

One of the most misunderstood and confusing aspects in American law is the role of tribal governments as a “third sovereign.” As advocates working with survivors of sexual assault, it is extremely important to understand the role of tribal courts and Indian country jurisdiction. Persons who are assaulted in Indian country often face a maze of confusing laws and rules which can compound an already traumatic experience.

Originally, tribal governments, as sovereign nations, had full criminal and civil authority over all matters arising within their territory. Over the last 120 years, however, this jurisdiction has been curtailed by a combination of federal laws and U.S. Supreme Court decisions. The following is a very brief summary of some of the most important aspects of criminal jurisdiction in Minnesota Indian country. Keep in mind that there are always exceptions and variables which may not be fully reflected in this short summary.

❖ Major Crimes Act And Federal Jurisdiction

The Major Crimes Act (18 U.S.C. 1153), passed by Congress in 1885, marked the first time that the United States federal government was given authority to prosecute crimes in Indian country. The Major Crimes Act provided for federal jurisdiction over seven listed crimes committed by Indian defendants, including rape and other sex crimes. Over the years, the Major Crimes Act has been amended numerous times and now covers more than 16 major crimes.

It is important to note that the Major Crimes Act did not eliminate concurrent (simultaneous) tribal jurisdiction over the crimes listed. Therefore, a perpetrator of sexual assault in Indian country could theoretically face two separate prosecutions – one in federal court and one in tribal court.



In Brief

In Minnesota, the Major Crimes Act applies **only** to the Red Lake and Bois Forte Reservations. Likewise, P.L. 280 does **not** apply to Red Lake and Bois Forte.

In Minnesota today, the Major Crimes Act applies only to the Red Lake Reservation and the Bois Forte Reservation. Crimes such as homicide, sexual assault, and kidnapping which occur on the Red Lake or Bois Forte reservations are prosecuted by the United States Attorney, using federal laws. The state of Minnesota has no jurisdiction over crimes that occur at Red Lake or Bois Forte – unless both the victim and the perpetrator are non-Indian.

❖ Public Law 280 And State Jurisdiction

In 1953, Congress passed Public Law 280 (P.L. 280), which transferred to certain named states (including Minnesota), the federal jurisdiction over crimes occurring in the Indian country located within their borders. P.L. 280 does **not** apply to Red Lake or Bois Forte.

Like the Major Crimes Act, P.L. 280 did not eliminate concurrent (simultaneous) tribal jurisdiction over crimes. Therefore, a perpetrator of sexual assault in Indian country could theoretically face two separate prosecutions – one in state court and one in tribal court.

In Minnesota today, P.L. 280 applies to all Indian country within the state of Minnesota, with the exception of Red Lake and Bois Forte. Sexual assault which occurs on all other reservations is prosecuted by the state of Minnesota, and the state laws will apply to the prosecution.

❖ Tribal Jurisdiction Today

Today, there are significant limitations placed on tribal courts in criminal matters. Because of these barriers and restrictions, many tribal governments do not actively prosecute sexual assault crimes.

- Tribal courts have **no** jurisdiction over non-Indians. The Supreme Court ruled in *Oliphant v. Suquamish* (1978) that tribal governments can only prosecute Indians for criminal violations. Therefore, if a non-Indian commits a sexual assault in Indian country, the case can only be prosecuted in state court or federal court (depending on the reservation).

- Tribal courts are limited in their ability to sentence convicted offenders. The Indian Civil Rights Act (another federal law) limits penalties in tribal court to one year in jail and/or a \$5,000 fine for each offense. Thus, tribal courts are prevented from imposing more than 365 days incarceration for a crime, even in cases of sexual assault.
- Many tribal courts have extremely limited resources for law enforcement, prosecution, and corrections. As a result, it can be difficult for tribal governments to adequately investigate and prosecute serious crimes which occur on tribal lands. Many tribal governments work in partnership with state and/or federal officials in order to effectively respond to such crimes.

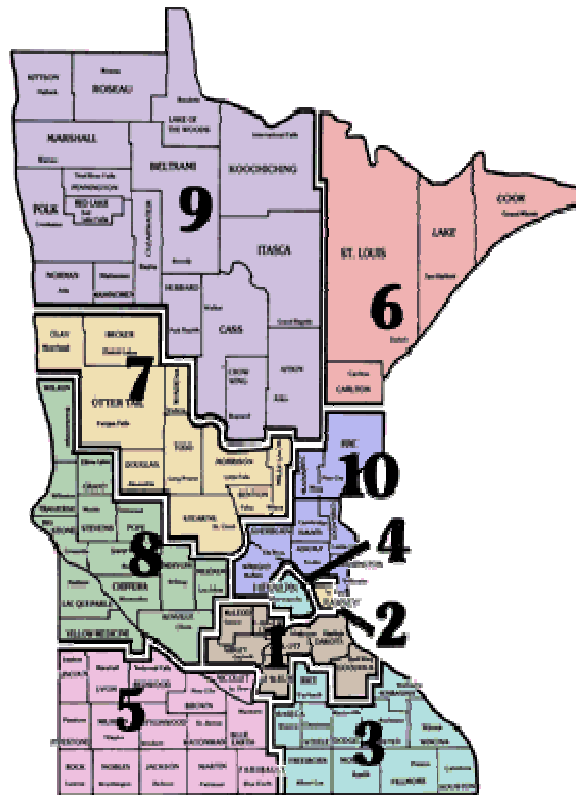
Part II: The Court

The court process is begun when the prosecutor files the complaint or grand jury indictment with a district court. In Minnesota, the trial court system is divided geographically into ten judicial districts. The court system will then schedule hearings and trials to keep the case moving through the system. Usually, more than one judge will preside over the various hearings in a given case. Only in serious cases like homicide is one judge normally assigned to hear the case all the way through, although if there is a trial, that same judge will almost always handle the sentencing hearing.

Pre-Trial Court Proceedings

The Minnesota Rules of Criminal Procedure govern what appearances the defendant will make and the timing of these appearances. The number used to name the hearing refers to these rules, written by the state Supreme Court.

As the criminal process moves along, it is very common to have some hearings or even the trial continued more than once. These continuances are a normal and expected part of the process. Continuances can happen for a variety of reasons, usually scheduling problems either for the prosecutor or defense attorney, or if a party has difficulty locating witnesses. The court will eventually limit the ability of either side to reschedule, but delays are more the rule than the exception.



Minnesota's Ten Judicial Districts

❖ Initial Appearance or Arraignment - Rule 5 Hearing



Appendix Reference: Rules of Criminal Procedure 5

The first time a defendant goes to court is usually called the "arraignment," "first appearance," or "Rule 5 hearing." The main purpose of the Rule 5 is to advise the

defendant what crimes he or she is accused of committing. The court assesses whether a language interpreter or other communication assistance is needed. The defendant receives a copy of the complaint and any documents attached to the complaint, if he or she has not already received it.

The prosecutor can request that the court order the defendant booked, photographed, and fingerprinted. If the defendant has been charged with a felony or gross misdemeanor, the defendant does not have to plead guilty or not guilty at the Rule 5 Hearing. The court will also inform the defendant that he or she has a number of rights, including the right to remain silent, the right to an attorney, and the right to a trial. The court also assesses the defendant's financial circumstances and decides whether to appoint a public defender. Public defenders are criminal defense attorneys who work for the government and represent low-income criminal defendants in their criminal cases.

If the defendant is in custody (jail) at the time of the Rule 5 hearing, the prosecutor will usually request that bail be set, with certain conditions of release. Bail or bond is an amount of money the defendant must post with the court to be released, and that money can be kept (forfeited) if the defendant fails to show up for future court appearances. In Minnesota, every criminal defendant has a right to bail before his or her guilt is decided. In other words, before the guilty plea or trial, the court must set bail that the defendant could post and get out of jail.

The conditions of release may be set even if the defendant is not in custody at the time of the Rule 5 hearing, and may include things like no contact with the victim, no leaving the state, no use of alcohol or drugs, use of an electronic home monitoring bracelet, or other conditions to try to ensure community safety. If the defendant violates any of these conditions, s/he may be brought back to court to consider whether bail should be set or increased as a result of the defendant's actions – defendants cannot be held without bail before trial even for violations of the conditions of release.



Advocacy Sidebar: Initial Appearance

The victim should be informed of the conditions of release, especially if they include a no contact order. The victim should notify the police immediately if s/he becomes aware of a violation of any of the conditions of release. These are public record and the victim can request a copy of the order from the prosecutor or the court.

In addition to the conditions of release, the victim should strongly consider applying for an OFP or HRO. A violation of an HRO or OFP is a new criminal offense, and will usually be treated more seriously by the court and police than a violation of conditions of release. See Section VI comparing the various types of no contact orders.

❖ Second Appearance - Rule 8 Hearing



Appendix Reference: Rules of Criminal Procedure 8

The second time a defendant appears in court is called the Rule 8 hearing. Normally, the defendant has either hired a private attorney or has been appointed an attorney and will appear with that attorney at the Rule 8. Many defendants decide to “waive” the Rule 8 Hearing, which means that a defendant can choose not to have a separate hearing after the Rule 5 appearance. If the defendant waives the Rule 8 Hearing, all of things that the Minnesota Rules of Criminal Procedure require to happen in the Rules 5 and 8 Hearings must all happen in one consolidated court appearance. If the Rule 8 is not waived, it should be held within 14 days of the Rule 5 hearing.

At a Rule 8 hearing, the defendant will plead “guilty” or “not guilty” to the complaint, which is referred to as the defendant’s “plea.” Most defendants plead not guilty at this stage and their attorney will decide whether or not to schedule an Omnibus Hearing.

❖ Omnibus Hearing



Appendix Reference: Rules of Criminal Procedure 11

In felony and gross misdemeanor cases, if the defendant has pled “not guilty,” the next step is to hold an Omnibus Hearing. Like the Rule 8 hearing, the defendant can “waive,” or choose not to have an Omnibus Hearing.

Rule 11 of the Rules of Criminal Procedure describes what happens at the hearing. The Omnibus Hearing must be held sometime in the first 28 days after the defendant's arraignment.

At the Omnibus Hearing, the court can make decisions about certain requests of the parties, including whether particular pieces of evidence are admissible and whether there is enough evidence to show probable cause to believe that the defendant is guilty. This is the hearing where the court will decide whether the law enforcement investigation violated any of the defendant's constitutional rights, and if so, whether that piece of evidence should be excluded from trial.

If the defendant wishes to introduce evidence regarding a victim's previous sexual history, as discussed below, the defendant must make a motion at the Omnibus Hearing. It is quite rare for either the prosecutor or the defendant to call the victim to testify at the Omnibus Hearing, although some attorneys will try to do so. Case law in Minnesota allows the court to make almost all decisions necessary at this Omnibus Hearing without hearing directly from the victim. Usually, the police reports and tape transcripts are submitted to support what the victim will ultimately testify to. This should suffice in almost all situations.



Advocacy Sidebar: Trial Proceedings

Importantly, compared to other parties in lawsuits, the criminal prosecutor has very little opportunity to appeal decisions of the trial court. If the prosecutor disagrees with a trial court ruling suppressing a piece of evidence before trial (see "Limits on Investigations"), for example, the rules allow the prosecutor to appeal that decision in only rare circumstances. Only if the prosecutor can show that the judge's decision had a "critical impact" on the ability of the prosecutor to bring the case to trial can s/he appeal the decision.

The same is not true when the prosecutor is unhappy with the decision of the jury – a prosecutor may not appeal a "not guilty" verdict. To do so would violate the "double jeopardy" clause of the U.S. Constitution, which prohibits the state from pursuing the same criminal charges twice against the same person.

By contrast, the defendant can and often does appeal a guilty verdict or a sentence, or both.

❖ Plea Negotiations

A defendant is convicted of an offense if the court accepts and records any of the following: 1) the defendant's guilty plea, 2) a guilty verdict after a jury trial, or 3) a court's finding of guilt after a "court" or "bench trial" (before a judge alone without a jury).



In Brief

Plea negotiations can happen before or during the trial process. About 98% of criminal cases result in guilty pleas after some type of plea negotiation.

A sexual assault case, like any other type of criminal case, may be resolved through a process that is called "plea bargaining" or "plea negotiation." Plea negotiation can take place at any point during the criminal court process – including during the trial. If the defendant has an attorney, the attorney will generally negotiate on the defendant's behalf, but the defendant must make the final decision regarding whether to enter a plea of guilty or not.

Plea negotiations lead to an agreement between the defendant and the prosecutor about how the case should be resolved, called a "plea bargain" or "plea agreement." About 98% of criminal cases result in a guilty plea of some type after plea negotiations. While some people think of this negotiation process as somehow allowing the defendant to "get away with it," the truth is that it can result in just as tough a conviction and sentence as if the defendant went to trial.

Two decisions are usually discussed in plea negotiations: which offense the defendant will plead to, and what sentence will be imposed. The prosecutor may require the defendant to plead guilty to one or more of the charges already charged in the complaint, or may agree to have the defendant plead guilty to a separate offense not initially charged in the complaint. Normally, the prosecutor then agrees to recommend a certain sentence to the court, and the defendant is free to argue to the court for a lesser sentence. Sometimes, though, the two sides reach an agreement as to the sentence to be imposed, and the court is basically expected to follow that sentencing agreement.

Like bargaining on the price for a house or car, plea negotiation generally involves some "give-and-take" between the prosecutor and the defendant. The prosecutor gives up the opportunity to take the case to trial, in which case the prosecutor might be able to obtain a

guilty conviction to the most serious charges and have the most severe sentence possible imposed on the defendant. In exchange for giving that up, the prosecutor gains the certainty of a conviction, even if the conviction is for a charge that is less serious than one of the charges in the complaint. The prosecutor also gains the opportunity to shape the defendant's punishment and obligations. By developing a correctional plan that will address the defendant's individual situation, the likelihood that the defendant will re-offend will hopefully decrease.

Similarly, the defendant is giving up the opportunity to be acquitted in a trial. However, the defendant avoids the risk that he or she will be found guilty after the trial of the most serious charges and have to serve the maximum penalties the law allows for those crimes.



Advocacy Sidebar: Plea Negotiations

Some victims of crime, including sexual assault victims, may find the plea negotiation process unjust, especially if it results in a plea bargain that does not lead to an outright conviction of the crime for which the defendant was charged and does not lead to a significant prison sentence or fine. They may feel that the defendant is "getting off easy" and that the defendant is not being punished enough for what he or she has done.

However, the plea agreements and the conditions imposed on the defendant are crafted to meet the varying, and sometimes conflicting, interests of the prosecuting authority. For example, some conditions are meant to punish the defendant and protect the victim, and other conditions are meant to deter and rehabilitate the defendant. The prosecutor must consider various factors in deciding what is the best final resolution of the case. Perhaps the first consideration is the strength of the case: what is the likelihood of success at trial? When the prosecutor and defense attorney enter plea negotiations, they are almost engaging in a hand of poker. Each one looks at the case to see how strong it is. Is it weak, like a pair of two's? Or is it really strong, like a royal flush? Or is it somewhere in between? The prosecutor must be mindful of how strong his/her poker hand is before taking the gamble of going to trial. No matter how strong the case, no one has any control over how a jury will decide a case, so it is absolutely always a "roll of the dice" to try a case.

Other considerations by the prosecutor include deterrence of others from committing this type of crime, deterrence of this offender from committing this crime, punishment of the offender, and rehabilitation of the offender to

hopefully prevent future criminal conduct. Reaching a resolution that includes probation with a stayed prison sentence can act as a “hammer” over the defendant, which could “drop” on the defendant if the defendant violates the conditions of probation. This “hammer” can be a powerful tool in influencing the defendant’s future conduct.

Finally, a conviction on any criminal sexual conduct charge is a success. These can be such difficult cases to win at trial that it can be difficult for a prosecutor to refuse a defendant who is willing to plead to a criminal sexual conduct count. The resulting sentence may be probation rather than prison, but obtaining a CSC conviction on the person’s record, gaining sex offender registration, and the potential for future prison are all very useful results of a CSC guilty plea. Thus, advocates are wise to help the victim see the gain in just simply obtaining a conviction without the risk of trial, rather than focusing entirely on the sentencing outcome. A victim may always consider exercising her/his right to object to the plea negotiations, however (see Section III).

❖ The Plea Hearing



Statute Reference: Minn. Stat. §[609.02](#) Subd. 5 - Definitions
Appendix Reference: Minnesota Rule of Criminal Procedure 15

When a defendant decides to plead guilty to an offense, the court will hold a plea hearing. (It will usually occur at a previously scheduled hearing of some other type.) At this hearing, the defendant will review and sign a “Rule 15 petition” with his/her attorney. This written petition sets out the rights that are being waived by the defendant by choosing to plead guilty – chief among these rights being the right to trial by jury. The court or one of the attorneys will usually review these rights on the record with the defendant before the guilty plea is entered. The more clear the record that the defendant fully understands what s/he is doing by pleading guilty, the less chance s/he can succeed at a later date in requesting to withdraw that guilty plea.

Once the defendant has been fully advised of his/her rights, s/he will give a factual basis for the offense(s). This means that s/he will admit to committing the elements of the offense to which s/he is pleading guilty. The record must show that the defendant actually did the criminal act to which s/he pleads guilty – even if it is only a bare admission of only the most basic acts necessary to violate the statute.

There is a particular type of guilty plea known as an Alford plea. In this type of plea, the defendant pleads guilty, admits that the state could likely convince a jury of his/her guilt, and says that s/he wishes to take advantage of a plea offer made by the state. However, in an Alford plea, the defendant does *not* admit to committing the facts of the offense. In other words, the defendant allows the court to enter a guilty plea but does not agree that the crime actually occurred.



In Brief

Alford Plea: The legal result of an Alford plea is the same as any other guilty plea: all of the sentencing options are available after an Alford plea.

The result of an Alford plea from a legal standpoint is exactly the same in all ways as any other type of guilty plea or conviction after trial – the sentencing and supervision are the same. The only difference is that the defendant has not said that s/he committed the offense. Traditionally, Alford pleas are disfavored in cases of sexual assault or other serious offenses like homicide because of the impact to victims.



Advocacy Sidebar: Alford Pleas

Alford pleas are disfavored by treatment providers and probation officers because the defendant does not commit having committed sexual assault. For sex offender treatment to be successful, the offender needs to admit that s/he committed a sexual offense! However, in rare circumstances (sometimes at the very strong request of the victim), prosecutors may accept an Alford plea as a way to avoid going to trial. This might be done when the chances of winning at trial appear slight.

Alford pleas are also avoided by many prosecutors in cases of criminal sexual conduct because of concern for the victim's reaction. In those difficult cases, prosecutors often want to give the victim the satisfaction of hearing the defendant admit what s/he did to the victim – it can be healing. Advocates should encourage a prosecutor to avoid accepting an Alford plea if the victim feels strongly about hearing the defendant admit his/her actions.

If a defendant will be entering an Alford plea over a victim's objection, the advocate can help the victim to be clear that the end result will be the same

– all sentencing and supervision options are the same in the end. Any guilty plea avoids the need for trial, which most victims prefer. Further, if the defendant reaches a point in treatment that he is ready to admit his/her offense to the victim (perhaps in writing), that remains an option with continued contact with the supervising agent.

Trial

In general, the purpose of a trial is to resolve a dispute of facts. Either a jury or a judge (in a “bench trial” or “court trial”) observes the evidence presented, evaluates and weighs that evidence, and based on that evidence, decides whether the defendant committed the acts alleged. Thus the jury or judge is the “finder of fact.”

In a criminal trial, if the judge or jury finds that the defendant engaged in the acts he or she was accused of doing, then the judge or the jury also decides whether those acts satisfy the definition of the crime provided for in the statute. Rule 26 of the Rules of Criminal Procedure explains the requirements for conducting a criminal trial.

❖ Trial by Jury or Judge

A criminal defendant has a right to a jury trial if the conviction could lead to a jail or prison sentence. Most criminal defendants choose not to waive this right and to have a trial by jury. In Minnesota state courts, a jury is made up of 12 persons for a felony trial, and 6 persons for a gross misdemeanor or misdemeanor trial.

If a criminal defendant decides to waive a jury trial, then a judge acts as the finder of fact. When the trial is presented to a judge, it is usually called a “court trial” or a “bench trial.” The prosecutor does not have the right to demand a jury trial if the defendant waives it.

❖ Stages of a Trial

Pre-trial Motions

Before the trial begins, the prosecutor or the defendant may ask the court to prevent the other side from being able to present certain types of evidence, or to permit certain evidence. These are called “motions in limine.” These motions are made outside the presence of a jury, usually before the jury is selected.

Voir Dire

If a jury will hear the case, the trial begins with the selection of a jury, a process called "voir dire." In cases involving criminal sexual conduct, this process is sometimes longer than with a more general crime, as it is a more controversial and personal issue. The prosecutor and defense may submit a written questionnaire to the jury pool regarding their past experiences involving sexual assault. Jury selection will normally be completed in one morning or afternoon session. Once the jury is selected, the judge will give the jury members preliminary instructions about their duties and role.



In Brief

Voir Dire: Literally translated, *voir dire* means, "to speak the truth." In the scope of a trial, it is the questioning and selection of jury members.

Opening Statements

The next step is for the prosecuting attorney to give his or her opening statement, explaining the facts that the state expects to prove. The purpose of the opening statement is not to *argue* a position, but to give an over-view of the evidence expected in trial. The defense attorney can either give the opening statement after the state's opening, waive opening altogether, or wait to give his or her opening statement until a later stage in the trial. The defendant's opening statement may only consist of a statement of the defense being presented and the facts the defendant expects to prove in the trial in support of that defense.

Prosecution Case in Chief

After the opening statements, the prosecution presents its case by questioning witnesses and seeking admission of exhibits. This is called the "case in chief." The defendant has the right to cross-examine each of the state's witnesses. The defendant may also object to the questions posed to witnesses, to parts of a witness's testimony, and to the admission of the state's exhibits into evidence – all of which are ruled upon by the court.

Defense Case in Chief

Once the prosecution has finished its case, it is the defendant's turn to present witnesses, if any, in the defense case in chief. Almost always, after the prosecutor rests, the defendant's attorney will make a motion to dismiss the case based upon a lack of evidence to go forward. This motion must be done so that the defendant can raise certain issues on appeal and should not be of concern – these motions are almost never granted.



In Brief

Under the Fifth Amendment, a defendant has the right to protection from self-incrimination. Therefore, a defendant can legally and without repercussion refuse to testify at trial.

Since the burden is on the prosecution to prove that the defendant is guilty beyond a reasonable doubt, the defense can choose not to present any evidence. The defendant has absolutely no burden to produce evidence or show his or her innocence. Thus, the defense may simply argue to the jury that the prosecution has not proven the case beyond a reasonable doubt.

The prosecution can object to the questions the defense poses to its witnesses, can object to the defense witnesses' testimony, and can object to exhibits the defense offers into evidence. The prosecution can also cross-examine the defendants' witnesses.

Rebuttal Cases

After the defense presents its case, the prosecution can present more evidence in order to rebut the defendant's evidence. Then the defense may offer additional evidence for the purpose of rebutting the prosecution's rebuttal evidence. Then the evidence is done – it does not go on forever!

Closing Argument

Once each side has finished presenting evidence, the prosecution makes a closing argument, or summation. Here is where the parties can *argue*, trying to *persuade* the jury why the evidence shows the defendant to be either guilty or not guilty. Then the defendant makes a closing argument. Next, the prosecution is permitted to make another argument to the jury, but only for the purpose of responding to, or rebutting, the defendant's argument. Under very limited circumstances, the defense may be able to make an additional closing argument in response to the prosecution's rebuttal argument.

The prosecution and the defense can object to each other's closing arguments. They can make these objections at any point during the closing argument process or at the end of all the arguments and outside the presence of the jury.

Jury Instructions

Before the jury leaves the courtroom to deliberate, the court must "charge the jury," by reading certain jury instructions out-loud to the jury. The jury instructions are based upon the statutes and some court rules and are intended to break down the legal requirements so that the jury understands what they must do to decide the case. The jury then leaves

the courtroom to deliberate in private. They must make a unanimous decision of guilty or not guilty on each count – or, if they cannot decide, they will be a “hung jury.”

❖ Preparing the Victim to Testify as a Witness

If the case goes to trial, the victim of the sexual offense will be required to testify. An advocate working with a victim or any other witness who is expected to testify can help prepare the witness for court. The following are some suggestions for doing so:

Meet with the Prosecutor – The prosecutor is the one who will call the victim as a witness. Ask if you and the victim can meet with him/her to discuss the trial, the expected testimony, and expected cross examination. The prosecutor may have some idea of topics which will *not* be included in the trial (for example, previous sexual conduct of the victim), and can discuss those as well. Even if it is last minute, the prosecutor should absolutely meet with any witness before they testify.

Review the Transcript – Most law enforcement agencies audio or video tape interviews with sexual assault victims. Transcripts of these tapes are often prepared, and can be shared with a witness before his/her testimony to refresh his/her memory. Often, this might not be done until immediately before trial, but it can help a witness recall details that s/he provided at the time of the interview.

Check out the Courtroom – Try to arrange to give the victim a tour of the courtroom, explaining where the parties sit and answering other questions. Show the victim the separate waiting area that should exist for his/her comfort. Perhaps the prosecutor will have time to meet you in the courtroom for a period of time.

Explain the Process – Using the information provided above, explain to the victim the order of events in trial, when his/her testimony might be expected, and how long the trial is likely to last. The prosecutor can estimate these things for you. Explain that witnesses are usually sequestered – meaning that the victim will be required to wait outside before s/he testifies, and possibly even after s/he is done. This is to keep witnesses from hearing each other and repeating information learned from other witness’ testimony.

Address Specific Concerns or Needs – Many witnesses have special concerns, such as a need to use the restroom frequently, or a hearing problem, or a huge fear of having the defendant look at them. Ask the victim if s/he has any special concerns, and bring them to the attention of the prosecutor or judge. It is possible that some remedy might be available to at least reduce if not eliminate the problem.

Discuss Appropriate Courtroom Attire/Demeanor – Discuss with the victim and his/her supporters the need for respect in the courtroom. It is best for everyone to dress modestly, in clothes that are clean and have no writing or graphics on them. The clothes should be comfortable and suit their lifestyles - presentable. Also, events might occur that are

upsetting, but witnesses and their supporters must remain quiet and calm. Before trial starts, remind them that everyone will have a chance to have their say in the end. The jury and judge know only what they see of these people inside the courtroom, and angry outbursts, gesturing or making faces – especially in the presence of the jury – will never be helpful to the case. The jury is judging witnesses and their supporters by everything they do inside or outside the courtroom.



Advocacy Sidebar: Testifying at Trial

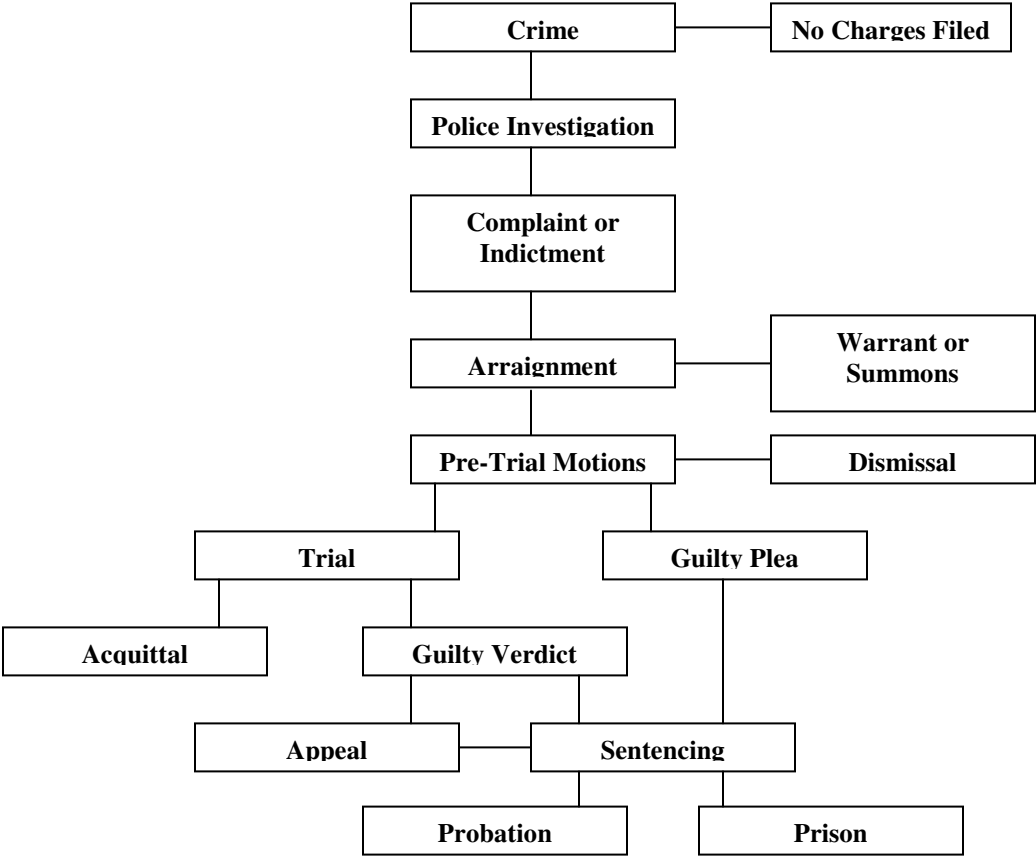
One thing that worries victims of sexual assault – or anyone, for that matter – is the possibility of testifying at trial. Especially with the way the media portrays sexual assault trials, victims in these cases are usually very fearful about testifying.

While that is certainly understandable, and is common to anyone who is called as a witness, some fears might be bigger than the reality of the situation. For example, victims often worry that their whole sex life will be brought up in court. Please see the discussion of the rape shield statute below to help them understand that often, the jury will hear nothing about their previous sexual conduct.

Victims often worry about cross examination by the defense attorney – especially when TV portrays it to be a harrowing experience. In Minnesota, the rules of court require that all the attorneys remain seated during questioning, and they must treat the witness with a reasonable amount of respect. In other words, defense attorneys don't yell or point in the victim's face as on TV.

After the cross examination, the prosecutor will have a chance to "re-direct" – or ask follow-up questions. Even if the defense attorney repeatedly focuses on points that may seem irrelevant or embarrassing, the victim can explain her behavior and thoughts in his/her own words, and the prosecutor should give him/her the chance to do.

FELONY PROCESS FLOW CHART



Evidence

Witness testimony and endless examples of objects, documents, records, medical samples, or photographs can serve as evidence at trial. The fact-finder can only consider exhibits that have been admitted into evidence during the trial and testimony that they have heard from witnesses – not the attorneys.

There are a number of rules that the parties must follow regarding the presentation of evidence, including the Minnesota Rules of Evidence, Minnesota Rules of Criminal Procedure, and decisions made by the judge at the Omnibus hearing about how the evidence was collected. Some statutes also specifically address evidence in criminal sexual conduct cases.

❖ Corroboration of the Victim's Testimony



Statute Reference: Minn. Stat. [§609.341, Subd. 4](#) – Definitions, Consent, Corroboration

By statute, the testimony of a victim of criminal sexual conduct is sufficient evidence for a conviction. The prosecution does not have to present other evidence or testimony to corroborate the victim's testimony in order to obtain a conviction. Examples of such corroborating evidence might be the testimony of other witnesses, the defendant's admissions, and DNA evidence.



Advocacy Sidebar: Corroboration

Even though a victim's testimony legally does not need to be corroborated to obtain a conviction, a prosecutor may be reluctant to go forward with a trial where the victim's testimony is the only evidence that the sexual assault took place. The prosecutor is aware that a fact-finder, which would be either a jury or a judge, has to find that the defendant is guilty beyond a reasonable doubt. This is complicated by the fact that the jury is usually not instructed by the court that corroboration is not necessary. The prosecutor may be concerned that the fact-finder will not find the victim believable or "credible," which could raise a reasonable doubt regarding the defendant's guilt and prevent a conviction.

As a result, corroborating evidence, while not legally necessary for a conviction, can bolster a victim's credibility, making a conviction more likely.

❖ Evidence of the Victim's Resistance

The prosecution also does not need to present evidence that the victim resisted the sexual assault in order to obtain a conviction. A defendant can be found guilty of criminal sexual conduct in cases where the victim did not resist the defendant.



Advocacy Sidebar: Victim's Resistance

Again, while the law is that a victim's lack of resistance is not a defense, in reality, stereotypes and myths about sexual assault can lead a jury to acquit a defendant in cases where the victim did not resist. For example, the defense may argue that a sexual encounter was consensual, and the jury may believe this defense if there is no evidence that the victim resisted.

❖ The "Rape Shield" Law



Statute Reference: Minn. Stat. §[609.347](#) Evidence
Appendix Reference: Minnesota Rules of Evidence, Rule 412

Both the Minnesota legislature and Supreme Court have adopted a system for determining the admissibility of the previous sexual conduct of the complainant in a sexual assault case. The statute and the rule of evidence are similar, but not identical. Generally, they both bar admission of evidence of the victim's previous sexual conduct or reference to that conduct in prosecutions for criminal sexual conduct. However, three exceptions to this general rule exist.

First, if the defendant has listed consent as the defense to the sexual assault charge, evidence of a common scheme or plan might be admissible to show other situations where the victim made prior allegations of sexual assault which were *fabricated*. The court must make an initial finding that these prior allegations were actually fabricated before

admitting them into the trial for the jury to hear. Second, if the defendant has listed consent as the defense, evidence of the victim's previous sexual conduct *with the defendant* might be admissible.

Third, no matter which defense is used, if the state is using evidence of pregnancy, semen or disease to prove sexual assault, the defense might be able to offer evidence of prior sexual conduct by the victim to show an alternative possible source of that evidence.

The defense is required to notify the prosecution at least 3 days in advance of the trial, if they want to introduce any prior sexual conduct by the victim. At that point, the court should conduct a hearing outside the presence of the jury to make a determination whether the defendant's offered evidence is probably true, and whether it is relevant to the issues at trial according to the three exceptions outlined above.

The rape shield statute and rule apply not only to previous consensual sexual activity by an adult sexual assault victim/survivor, but also to *allegations* of sexual assault s/he may have made previously. It also applies to child sexual abuse that might have been suffered and/or reported by the victim/survivor. Thus, when the defense wants to offer any of these types of information, the rape shield statute must be followed.

Conviction or Acquittal

Once the jury, (or the judge in a bench trial) reaches a decision about each of the counts on the complaint, the decision is called a verdict. Many times the trial will involve more than one count charged against the defendant, and the jury can find the defendant guilty or not guilty of any combination of those counts. Thus, for example, the defendant might be found guilty of Count II - Criminal Sexual Conduct in the Third Degree, but not guilty of Count I - Criminal Sexual Conduct in the First Degree. To reach a verdict, though, the jury's decision must be unanimous – meaning all persons agree on the guilty or not guilty verdict.

The fact finder (judge or jury) may also acquit the defendant altogether. This means that they did not believe the case was proven beyond a reasonable doubt and the criminal case is simply over. The state cannot appeal a finding of not guilty, as it would violate the double jeopardy clause of the constitution.

A jury can sometimes fail to reach a decision either way on one or more counts, a situation called a "hung jury." The court will usually try to convince the jury to reach a decision, but if they truly cannot decide unanimously, the judge will permit them to "hang," and the prosecution will have to decide whether to start again, take a plea to a lesser charge, or simply not pursue charges in the case again.



Advocacy Sidebar: "Not Guilty"

If a defendant is found "not guilty" by a judge or jury, it is important to help the victim understand that it does not necessarily mean the jury completely disbelieved her or his testimony. Because the burden of proof is so high, the jury many times believes that something "probably" happened, but that it had not been proven beyond a reasonable doubt. In other words, "not guilty" is not the same as "innocent" – it simply means that the case was not proven to the high standard required in criminal cases.

If a defendant is found not guilty, the court-ordered conditions of release will no longer be in place. Thus, a no-contact order ordered at the initial appearance will now expire. However, if the victim has obtained a Harassment Restraining Order, it will remain in place. She may now pursue an HRO even after the conviction – as the burden of proof is lower. The court may decide to follow the decision in the criminal case and deny the HRO, but s/he may also find by a preponderance of evidence that an HRO is appropriate.