

NOTE

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TABLE OF CONTENTS

PART I: PROSECUTING SEXUAL VIOLENCE IN LIBERIA

CHAPTER 1: OVERVIEW OF THE LIBERIAN CRIMINAL JUSTICE RESPONSE TO GBV **13**

| | |
|---|----|
| 1. KEY ACTORS AND THEIR ROLES..... | 13 |
| 2. ROLE OF THE PROSECUTOR IN A SEXUAL ASSAULT OR ABUSE CASE | 19 |
| A. RESPONSIBILITIES | 19 |
| B. PROFESSIONAL ETHICS..... | 22 |
| 3. THE ROLE AND RIGHTS OF THE VICTIM | 27 |
| 4. RIGHTS OF DEFENDANTS..... | 30 |
| 5. INAPPROPRIATE RESPONSES TO CASES: COMPROMISING CASES, OBSTRUCTING JUSTICE, SASSYWOOD, AND TRIAL BY ORDEAL..... | 34 |
| 6. THE CRIMINAL PROCESS..... | 44 |

CHAPTER 2: SIX PHASES OF PROSECUTING A SEXUAL OFFENSE **47**

| | |
|---|-----------|
| PHASE 1 – REPORTING | 49 |
| 1. FIRST STOP: HEALTH CLINIC | 50 |
| 2. TREATING VICTIMS WITH DIGNITY | 52 |
| 3. MAKING A COMPLAINT TO THE POLICE | 54 |
| 4. MEASURES TO MINIMIZE RETALIATION | 56 |
| 5. COMMUNICATING NEXT STEPS..... | 57 |
| PHASE 2 – INVESTIGATION & ARREST | 59 |
| 1. LNP INVESTIGATIONS..... | 60 |
| 2. TAKING STATEMENTS | 61 |
| 3. SEARCH AND SEIZURE / GATHERING EVIDENCE | 67 |
| 4. DRAFTING THE CHARGING SHEET | 74 |
| 5. MAKING AN ARREST..... | 77 |
| 6. PRESENTATION TO A MAGISTRATE | 81 |
| 7. BAIL..... | 83 |
| PHASE 3 – BRINGING THE CASE TO CIRCUIT COURT | 89 |
| 1. JURISDICTION AND VENUE..... | 89 |
| 2. REFERRAL OF OFFENSES TO CIRCUIT COURT | 94 |
| 3. CHARGING | 95 |
| 4. INDICTMENT | 98 |
| 5. GRAND JURY..... | 103 |
| 6. ARRAIGNMENT AND PLEAS..... | 105 |
| 7. FEES AND COSTS..... | 106 |

| | |
|--|------------|
| PHASE 4 – PREPARING YOUR CASE..... | 107 |
| 1. EVALUATING THE CASE AND GATHERING EVIDENCE..... | 107 |
| 2. MEDICAL EVIDENCE..... | 119 |
| 3. INTERVIEWING VICTIMS OF SEXUAL VIOLENCE..... | 131 |
| 4. PREPARING WITNESSES TO TESTIFY..... | 141 |
| 5. PRE-TRIAL PRACTICE..... | 144 |
| 6. PREPARING A TRIAL NOTEBOOK..... | 150 |
| | |
| PHASE 5 – TRIAL AND SENTENCING | 155 |
| 1. EMPANELING THE JURY..... | 157 |
| 2. OPENING STATEMENTS..... | 162 |
| 3. DIRECT EXAMINATION..... | 164 |
| 4. EVIDENCE..... | 174 |
| 5. THE DEFENSE..... | 187 |
| 6. CROSS EXAMINATION..... | 188 |
| 7. PROSECUTION REBUTTAL..... | 193 |
| 8. CLOSING ARGUMENT..... | 194 |
| 9. JURY DECIDES..... | 196 |
| 10. SENTENCING..... | 200 |
| | |
| PHASE 6 – POST-TRIAL PRACTICE..... | 203 |
| 1. POSTTRIAL MOTIONS..... | 203 |
| 2. CONTEMPT..... | 204 |
| 3. APPEALS..... | 206 |
| 4. EXTRADITION..... | 209 |

PART II: LEGAL PROHIBITIONS ON GENDER-BASED VIOLENCE

| | |
|--|------------|
| 1. INTERNATIONAL INSTRUMENTS PROHIBITING GENDER BASED VIOLENCE | 213 |
| A. BACKGROUND | 215 |
| B. UNITED NATIONS INSTRUMENTS..... | 215 |
| C. REGIONAL INSTRUMENTS..... | 218 |
| 2. LIBERIAN CRIMINAL OFFENSES RELATING TO GENDER BASED VIOLENCE | 221 |
| A. SEXUAL OFFENSES..... | 221 |
| B. OTHER SEXUAL OFFENSES..... | 226 |
| C. OTHER OFFENSES RELATING TO GENDER-BASED VIOLENCE (NON-SEXUAL)..... | 242 |
| D. OFFENSES RELATING TO CUSTOMARY MARRIAGE..... | 255 |
| E. TRAFFICKING IN PERSONS | 260 |
| F. PROSTITUTION OFFENSES..... | 263 |
| G. KIDNAPPING AND RELATED OFFENSES..... | 270 |
| H. OTHER CRIMINAL CONDUCT | 276 |
| SOURCES | 285 |

INTRODUCTION

LETTER FROM THE MINISTER OF JUSTICE

The Ministry of Justice is happy to introduce the Sexual Assault and Abuse Prosecution Handbook. This Handbook is designed to be a comprehensive guide to the prosecution of sexual assault and abuse. It is intended both as a day-to-day resource for prosecutors and as a training tool. The Handbook is a part of the Ministry of Justice's ongoing efforts to improve prosecution services, support the rights of victims, increase access to justice, and uphold the Rule of Law. The new Ministry of Justice Sexual and Gender Based Violence Crimes Unit is a part of the effort to enhance prosecution services for these crimes, providing a concentrated prosecution unit, specially trained in the prosecution of these crimes, and in providing support for victims.

The Ministry of Justice would like to thank its local and international, governmental and non-governmental partners in the preparation of this excellent resource. Thank you to the Ministry of Gender and Development, which is a close partner of the Ministry of Justice in its work to combat Gender Based Violence. Special thanks must go to The Carter Center and the United Nations High Commission for Refugees, as well as the International Senior Lawyers Project and Pacific Architects and Engineers Justice Sector Support for Liberia, for their work on and support of this project. Finally our thanks go to the hard-working prosecutors who will use this Handbook. May this resource on the prosecution of sexual assault and abuse be of assistance to you, enhance your work, and help us all in providing equal and effective access to justice for sexual assault and abuse.

Yours sincerely

Cllr. Philip A. Z. Banks, III
Minister of Justice / Attorney General / R. L.

LETTER FROM THE MINISTER OF GENDER

The Ministry of Gender and Development, mandated to advocate for and protect the lives of women and children, is pleased to have participated in the development of the Sexual Assault and Abuse Prosecution Handbook. On behalf of the Ministry of Gender and Development, I would like to congratulate and thank the Ministry of Justice, the Carter Center, and UNHCR for the technical and financial support to making this handbook a reality. Your various contributions, tireless efforts and guidance have enabled this process to reach this far.

It is our hope that this handbook, as a tool to embolden the prosecution of assault and abuse crimes, will serve as a significant step forward in Liberia's response to ending the plague of gender based violence in our society. Sexual and gender based violence (SGBV), especially sexual assault, is a crime against humanity that continues to destroy lives, families and communities.

I call upon all those who are involved in the prosecution of sexual assault cases to use this handbook to ensure that justice is granted to victims in accordance with our laws. Our national response to sexual assault and abuse will be incomplete without your efforts and work as prosecutors.

May this handbook assist you and enhance your work, such that we may build greater confidence in our judicial sector and its capacity to confront the issue of sexual abuse. In doing so, I am confident that survivors will show greater courage to bring their cases to court and we will succeed in providing greater access to justice for victims of sexual abuse.

Sincerely,

Vabah K. Gayflor
Minister of Gender and Development

LETTER TO THE READER

It is with great humility that we present this Sexual Assault and Abuse Prosecution Handbook as a comprehensive tool for your work as a prosecutor. The handbook is designed to be accessible so that you can easily flip to a relevant section during a case. In many ways, it is a general handbook on prosecution, including tips on how to work with the police to investigate crimes, how to prepare witnesses to testify, or how to give an opening statement. These skills apply to the prosecution of all crimes. But we also recognize that prosecuting sexual assault and abuse is uniquely challenging. The handbook provides guidelines for these cases in particular, such as how to investigate a sexual assault, how to obtain and maintain medical evidence, and how to interview victims and prepare their testimony.

And yet the most challenging aspect of prosecuting sexual assault and abuse is not the technical details of case management, but rather the deeply personal nature of these crimes. Many women in Liberia experienced sexual violence during the conflict – and the reality of violence in women’s lives has persisted beyond the war. Our own experiences with violence and our own attitudes about gender and relationships shape our response to victims and their perpetrators. One of the greatest responsibilities of a prosecutor, then, is to learn how to deal with our own feelings about violence and gender even as we learn how to treat victims with respect and compassion. And this lifelong challenge is beyond the scope of a handbook.

Sincerely Yours,

The SGBV Crimes Unit Advisory Board

PART I:

**PROSECUTION OF SEXUAL ASSAULT AND
ABUSE**

CHAPTER 1: OVERVIEW OF THE LIBERIAN CRIMINAL JUSTICE RESPONSE TO GBV

1. KEY ACTORS AND THEIR ROLES

i. POLICE

The Liberian National Police are the primary government agency responsible for enforcing the laws relating to GBV through investigation and arrest. Where a crime has been committed or a law has been broken, the police are generally the first responders to the scene or to speak with the complainant(s). They investigate reports of crimes by gathering physical evidence and interviewing witnesses in order to determine whether a crime did in fact occur and if it did, who committed it and where, when, how and why was it committed. Police are responsible for documenting the results of their investigation and where the evidence is sufficient under law, arresting the perpetrator(s). They are responsible for obtaining the evidence needed for prosecution of perpetrators of crimes and for coordinating with prosecution officials on criminal cases. The police are also responsible for making every effort to provide for the safety of the victim, the witnesses and the alleged perpetrator of a crime.¹

Women and Children Protection Sections (WCPS) have been established by the Liberian National Police in many areas of Liberia. These units are responsible for investigating gender-based and sexual violence, along with other crimes effecting women and children. WCPS personnel have received training in investigating sexual assault, abuse and exploitation cases and where they are operational, they

¹ Note that this legal handbook uses the legal term “victim” for those who have been sexually assaulted. This term is used only to avoid confusion in the legal system, where “victim” is used to describe a person against whom a crime has been committed.

Outside of the legal context, men and women who have been sexually violated are often called “survivors.” The term “survivor” acknowledges that these individuals have the inner strength to overcome trauma and make their own decisions about how to confront their perpetrators.

will generally take the lead in responding to and investigating these crimes, along with referring the victim to available medical and psycho-social services.

Police officers often work in partnership with international police advisors from the United Nations Mission in Liberia (UNMIL).

ii. **MEDICAL PRACTITIONERS**

Medical professionals working in hospitals, clinics, doctor's offices and other health care facilities provide medical treatment to victims of sexual assault and abuse. While the decision to seek medical treatment is always the decision of the victim or where the victim is a child, of a responsible adult, victims who have been sexually abused or assaulted should be encouraged to seek medical treatment.

Medical professionals may also play a role in the criminal justice process by gathering evidence from the victim's body, such as samples of bodily fluids, hairs, fibers and fingernail scrapings, which may be used as evidence in a criminal prosecution. Such evidence is not available in every case of sexual assault or abuse and where there is such evidence, it must be properly collected, preserved and submitted for analysis by trained technicians working in properly equipped laboratory facilities in order to be of evidentiary value.

Medical professionals perform an important function on behalf of victims of sexual assault and abuse by completing the required national standardized sexual offense Medical Report Form documenting the survivor's injuries and treatment. With the survivor's consent, this form may be a key exhibit at trial, and the medical practitioner, or a representative, may be called to testify to its content. (*See Chapter 2, Trial – Evidence*)

iii. **MINISTRY OF JUSTICE SGBV CRIMES UNIT INVESTIGATORS**

The newly established Ministry of Justice SGBV Crimes Unit is designed to improve the prosecution response to sexual assault, abuse and exploitation. When fully operational, the Unit will be staffed with investigators. These investigators will work with police in various ways to ensure that complaints of sexual assault, abuse and exploitation are responded to quickly and are investigated thoroughly.

In addition, SGBV Crimes Unit investigators will serve as liaisons between the prosecutors and the police. SGBV Crimes Unit investigators will be specially

trained and available to provide education and training to police on the proper investigation of SGBV crimes, including the types of evidence that are necessary for a prosecutor to prove a case beyond a reasonable doubt as required for conviction at a criminal trial.

SGBV Crimes Unit Investigators work directly with prosecutors from the SGBV Crimes Unit and under certain circumstances with prosecutors from the County Attorney's Office to monitor designated sexual assault and abuse cases from the start and to maintain contact with victims. Investigators from the SGBV Crimes Unit will also assist Unit prosecutors to prepare cases for court by tracking evidence, following up with the police to ensure proper investigation and briefing the prosecutor on the evidence. Once the prosecutor has begun to prepare a case for trial, the investigator will coordinate the witnesses and ensure that they are available to testify.

The SGBV Crimes Unit investigators are also responsible for monitoring cases in other counties beyond Montserrado. When investigators learn of sexual assault and abuse cases either through police or media reports or from other sources such as advocacy groups, they will contact the investigating and prosecuting authorities to obtain information on the status of the case and provide assistance as needed.

iv. **VICTIM ADVOCATE**

Victim Advocates or Victim Support Officers are individuals trained to provide support services to victims of GBV crimes including sexual assault, exploitation and abuse. The Victim Advocate may work for a local NGO or directly for the SGBV Crimes Unit. Police and prosecutors handling sexual assault, abuse and exploitation cases should work in close coordination with victim advocates and support services providers to guide the victim through the legal process. Victim Advocates assist police and prosecutors by providing emotional support for the victim during both the investigation of his or her case and legal proceedings. Ideally, Victim Advocates work in partnership with prosecutors to develop rapport with the victim by keeping him or her informed about the status of his or her case and the legal process, helping him or her to communicate his or her wishes regarding prosecution of the case and providing moral and emotional support during investigative and legal proceedings. If the victim wishes, the Victim Advocate will accompany him or her to meetings with police and prosecutors and

court proceedings. Victim Advocates also work closely with other providers of services to GBV victims to assist victims with their recovery.

v. **DEFENSE ATTORNEY**

Defense Attorneys represent individuals suspected or accused of crimes by providing legal advice and representation in order to protect their legal rights and provide a legal defense against a criminal accusation or charge. Defense Attorneys may be hired privately by an individual or may be provided by a public or non-profit legal services provider.

The Liberian Constitution guarantees legal representation of persons accused of committing a crime and provides free legal representation when an accused lacks the financial resources to hire an attorney (indigent defendants). The lawyers providing legal services to individuals unable to afford an attorney are employed by the Public Defenders Office of the Judiciary. Non-profit legal aid or assistance organizations may provide legal representation to persons accused of crimes for a reduced fee or at no cost.

The primary duty of a defense attorney is to vigorously defend his/her client and protect that client's legal rights within the legal and ethical limits established by the Constitution, laws of Liberia and the Code of Ethics.

vi. **PROSECUTING ATTORNEY**

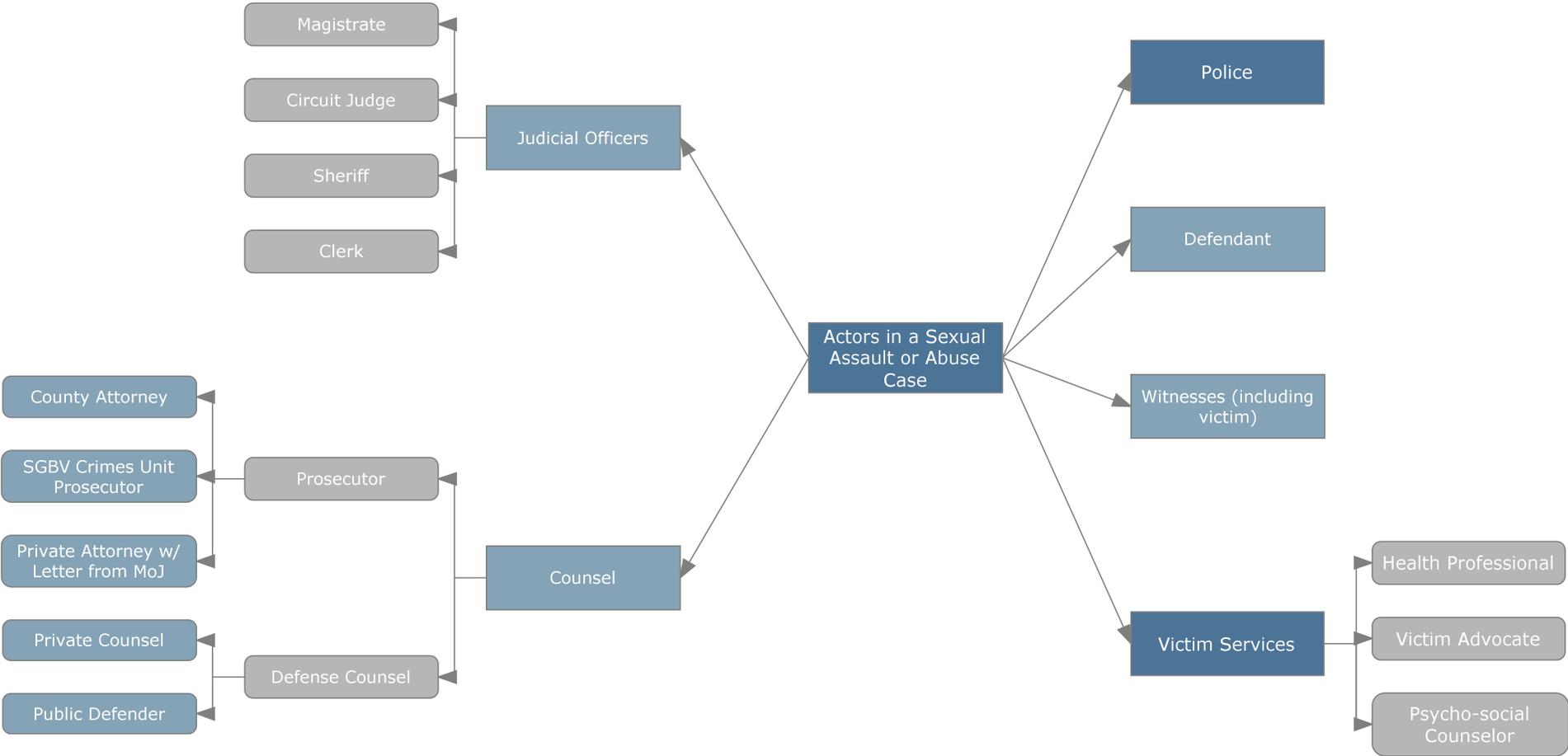
Public Prosecutors or Prosecuting Attorneys are individuals employed by the Ministry of Justice's Prosecution Division under the direction of the Solicitor General or his deputies and charged under law with representing the Republic of Liberia in criminal cases. Public Prosecutors who work on the level of the Magistrate Courts hold the title of City Solicitors while public prosecutors working in the Circuit Courts and the Supreme Court hold the title of County Attorney or Assistant County Attorney. Prosecutors are responsible for presenting criminal cases in court on behalf of the government and people of Liberia and are obligated to enforce the Constitution and laws of the Republic of Liberia. This means that Prosecutors have an obligation to seek justice. Prosecutors are held to a high ethical standard requiring that they fairly evaluate the evidence against an accused and proceed with prosecution when charges are supported by reliable evidence. Prosecutors also owe a duty to victims and to society at large to attempt by all legal

means to bring perpetrators of crimes to justice according to the Constitution and laws of Liberia.

Private attorneys. Liberian law provides for the issuance of letter patent by the Ministry of Justice to attorneys not employed by the Ministry of Justice permitting them to prosecute criminal cases on behalf of the Government of Liberia. Letter patents have been issued to attorneys in private practice and employed by non-governmental, not-for-profit organizations to serve as prosecutors in sexual assault and abuse cases.

The following section will explore the role of a prosecutor in more detail.

ACTORS IN A SEXUAL ASSAULT OR ABUSE CASE



2. ROLE OF THE PROSECUTOR IN A SEXUAL ASSAULT OR ABUSE CASE

The role of the prosecutor is to ensure that justice is done pursuant to the Constitution and laws of the Republic of Liberia and in accordance with ethical standards. In a sexual assault or abuse case, the prosecutor provides for the safety of the community and survivor by holding offenders accountable through the prosecution of criminal cases. Because of the sensitivities and difficulties involved in prosecuting sexual offenses, the role of the prosecutor is more involved and more challenging than in other types of cases.

A. RESPONSIBILITIES

i. Keep the victim informed about the case.

The prosecutor should work with the police and victim service providers to guide the victim through the legal process, explain whether and why the prosecutor has decided to prosecute the case, and notify him or her of any progress or delays in court proceedings. The prosecutor should ensure that the survivor is made aware of and is able to attend hearing and trial proceedings, arranging transportation to and from court, if needed as required by the Rules of Criminal Procedure. *See Criminal Procedure Law, s.17.3.*

ii. Coordinate with police and others.

To effectively respond to sexual assault, abuse and exploitation cases, prosecutors must coordinate effectively with police and other actors working to address sexual and gender based violence such as health professionals, victim advocates, advocacy groups and psycho-social counselors.

Coordination between prosecutors and police is particularly essential in sexual assault and abuse cases. This coordination must continue from the outset of an investigation to final legal resolution to ensure the criminal justice system fairly, justly and effectively

addresses sexual and gender based violence and prevents further victimization of survivors by the legal system. When police communicate with prosecutors during the early stages of investigation into a complaint of sexual assault, abuse or exploitation, police are able to share information about the facts of a case, allowing prosecutors to guide the police to collect evidence needed to build a strong case.

For example, the prosecutor may educate the police about the elements of a sexual offense under Liberian law, how to draft a complaint that establishes these elements, and how to gather and preserve the right type of evidence to establish that a sexual assault took place. When prosecutors and police work within their respective roles, but as a team with victims and witnesses, they build strong cases supported by reliable evidence. And where these strong cases result in conviction, they build public confidence in the criminal justice system as a whole.

iii. Evaluate the evidence to determine whether or not to prosecute.

Prosecutors must decide whether there is sufficient evidence to support prosecution of a criminal case. This is a heavy responsibility that requires prosecutors to know the applicable law, the facts and the evidence in each case they evaluate. In cases involving allegations of sexual assault, abuse or exploitation where the stakes are high for the victim, the accused and the community, prosecutors must act in a timely fashion and take every step necessary to access all legally available information and evidence to evaluate a case.

In order to accurately assess the strength of a case and determine whether sufficient evidence exists to proceed with a prosecution, the prosecutor must analyze all police reports, statements of victims, witnesses and suspects, review the physical evidence and analysis of that evidence, and meet with the victim and witnesses. After thoroughly reviewing the facts of the case, the available evidence and the applicable law, the prosecutor will compare the evidence with the elements of the crime and determine whether or not the evidence is sufficient to proceed with prosecution. Where sufficient evidence exists the prosecutor will proceed to preliminary hearing or grand jury proceedings presenting only such evidence as to demonstrate that probable cause exists to support further prosecution.

iv. Try the case.

After analyzing the evidence, the prosecutor identifies the elements of the crime, and then devises a strategy to prove each of the elements to the jury. The prosecutor will interview and prepare the victim and other witnesses for testifying at trial and ensure that all available evidence is available and ready for presentation at trial. In addition, the prosecutor will prepare each aspect of his or her case thoroughly and present the case to the judge or judge and jury.

v. Appeal cases or represent the government on appeal.

Prosecutors are required to file and argue appeals from preliminary rulings and to file and argue responses to appeals by the defense against preliminary rulings and convictions. Final decisions in appeals become law. Therefore, prosecutors should be aware of appellate issues throughout a case and present their case in such a way as to prevent “bad law” from being made through appellate decisions.

vi. Educate the community.

The prosecutor also has a broader role within the community – to educate the community about the law and raise community awareness about the damaging effects of sexual assault in Liberia. The prosecutor educates and raises awareness by using jury selection as an opportunity to inform prospective jurors that victims are not responsible for the crimes against them.

Prosecutors may also play a key role in prevention efforts by increasing public awareness of sexual violence and the criminal justice system’s response. Prosecutors may participate in GBV task forces, protection core groups, or other inter-agency programs that coordinate service providers’ responses to GBV in the community. Prosecutors may also join other partners in conducting outreach to women’s groups, caregivers, youth groups, school children and community leaders. Such measures build confidence and trust between the public and law enforcement and demystify the criminal justice process.

Note that Chapter 2 will explore many of these responsibilities in more detail – providing the law and strategy to effectively prosecute a case.

B. PROFESSIONAL ETHICS

The prosecutor is at all times bound to uphold the highest standard of conduct. In Liberia, the Code of Moral and Professional Ethics sets forth the professional responsibility of attorneys generally. The UN Havana Guidelines on the Role of Prosecutors provide additional guidance for the ethical obligations of prosecutors. Review this summary regularly to remind yourself what conduct is required of prosecutors.

CODE OF MORAL AND PROFESSIONAL ETHICS

Lawyer's Duty to the Courts

1. A lawyer shall not advise, initiate, or participate in any act that undermines the authority, dignity, and integrity of the courts. (Rule 1)
2. A lawyer shall not converse privately with a judge about a case that is either in trial or pending trial. (Rule 2)
3. A lawyer shall never attempt to gain professionally from a personal relationship with the judge. (Rule 3)
4. A lawyer shall never bribe a judge. (Rule 3)
5. A lawyer shall be punctual – s/he shall always be on time for court appearances, shall be prompt in filing motions, and shall avoid tardiness in all of his or her responsibilities as attorney. (Rule 21)
6. A lawyer shall ensure that court records, minutes, precepts, and other legal documents are always legally prepared and handled. A lawyer shall be disbarred if he is found to have engaged in the illegal preparation or falsification of court records or documents. (Rule 25)

Prosecutor's Duty to the Republic

1. The prosecutor's client is the government of Liberia. And the prosecutor's duty is not to convict, but to see that justice is done. Therefore, the prosecutor shall never suppress evidence that is favorable to the defendant, including witness testimony. (Rule 7)

2. If the defendant is represented by counsel, the prosecutor shall never communicate with the defendant directly. If the defendant is not represented, the prosecutor shall avoid misleading the pro se defendant. (Rule 12)
3. The attorney shall always treat adverse witnesses with fairness and due consideration. (Rule 18)

Prosecution and the Press

The prosecutor shall not discuss a pending or anticipated criminal prosecution with a reporter or the public. In the rare event that extreme circumstances justify a statement to the public, the prosecutor shall only refer to the facts and the papers on record with the court. (Rule 20)

Duty of Honesty and Candor

The prosecutor shall be candid and fair, and therefore shall never:

1. Knowingly misquote the contents of a paper, the testimony of a witness, the language of the argument of opposing counsel, or the language of a decision or a text book.
2. Cite as authority a decision that has been overturned or recalled, or a statute that has been repealed.
3. Assert as fact that which has not yet been proved.
4. Offer evidence which he knows the court should reject. (Rule 22)

Dealing with the Jury

1. An attorney shall never attempt to flatter the jury during the trial to solicit their favor.
2. An attorney shall never converse privately with any member of the jury before the jury has returned a verdict.

3. An attorney shall never offer money or favors to any juror during the case. (Rule 23)

Duty of Confidentiality and Conflict of Interest

1. A lawyer has a duty to preserve the confidences of their client.
2. This duty extends beyond the life of the client and the current employment of the attorney. An attorney must not take clients in the future that would lead the attorney to disclose or rely on privileged information. (Rule 35)

Duty of Confidentiality in a Sexual Assault or Abuse Case

All personal information of a victim must be kept confidential. As a practical matter, this means:

1. The prosecutor should never disclose information about the victim to outsiders, the press, family members, or even psycho-social or health care providers without the victim's or minor victim's guardian's written permission.
2. The prosecutor shall keep records confidential: maintain all records of SGBV crimes in a secure area (such as a locked filebox) and never leave files unattended in the office or at court.
3. The prosecutor should redact personal information (such as the address of the victim) from any court documents that will be filed and made public.
4. All employees of the prosecutor's office or the SGBV Unit or County Attorney's office should sign a statement of confidentiality, pledging to keep this information private during and after employment. (See sample).

SAMPLE STATEMENT OF CONFIDENTIALITY

I, the undersigned, do hereby declare that I understand the principle of confidentiality will be strictly observed by both paid and volunteer staff members, consultants and all trainees of the SGBV Crimes Unit and/or the County Attorney's Office.

I therefore promise the following:

1. I will not disclose personal information of any victim or alleged victim of sexual assault, abuse, or exploitation, without written permission from the victim, except as required by law.
2. I will not disclose any information regarding a victim or a criminal case to the media.
3. I will maintain all victim records in a secure area.
4. I will be aware at all times that my personal opinions are my own but others may consider them to be official opinions of the Ministry of Justice, the SGBV Crimes Unit or the County Attorney's office. Therefore, I will make every effort to present and express myself as a representative of the Ministry of Justice.
5. In the event of my withdrawal or resignation, I will not disclose confidential information received during my involvement with the SGBV Crimes Unit or the County Attorney's Office.
6. Violation of this statement shall be cause for suspension and/or dismissal.

Signature of Employee, Volunteer, Consultant or Trainee

Date

Signature of Supervisor

Date

To be signed annually by all employees, volunteers, and consultants working with the County Attorney's Office or the SGBV Crimes Unit who have access to confidential information.

HAVANA GUIDELINES ON THE ROLE OF PROSECUTORS

According to the Havana Guidelines, prosecutors shall:

1. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
2. Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
3. Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
4. Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
5. Not initiate or continue prosecution, or make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
6. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

3. THE ROLE AND RIGHTS OF THE VICTIM

One of the purposes of the new SGBV Unit at the Ministry of Justice is to improve a SGBV survivor's access to and confidence in the criminal justice system. In prosecuting sexual offenses, every effort should be made to respect the wishes of the victim and to prevent further trauma to him or her.

In all types of cases, the prosecution is responsible for arranging for the attendance of witnesses, and notifying victims of upcoming trials. *See Criminal Procedure Law, s. 15.10.* This role is ever more important in the context of a sexual offense case, where extra measures may be necessary to protect the victim from further harm and to provide moral and emotional support for him or her during court appearances.

The prosecutor should work with the Magistrate, Circuit Court, Victim Advocate, the SGBV Investigators, and the LNP to:

- i. Give the victim an opportunity to be heard in court;
- ii. Assist the victim to understand the court proceedings;
- iii. Address the safety concerns of the victims, their families and witnesses;
- iv. Shield victims, their families and witnesses from any form of intimidation, harassment or inducement to withdraw or alter his/her complaint;
- v. Avoid unreasonable or unnecessary delay in the disposition of cases and the execution of orders granting awards to victims.

It is important for the prosecutor to remember, however, that the victim is neither a party to the case nor the prosecutor's client. The only parties of the criminal case are the Republic and the Defendant. Therefore, the victim of any crime, including sexual assault and abuse, should be treated as the Republic's key witness but not as a party. *See Firestone Planations Company and Williams v. Behye, 40 LLR 243 (2000).* This concept has two implications:

- i. The prosecutor's client is the Republic of Liberia, and therefore their primary responsibility is not to convict, but to see that justice is done. Republic v. Zoe and Warkie, 37 LLR 491, 495 (1994).
- ii. Because the victim is not the Plaintiff in the case, it is not his or her responsibility to push the case through each phase of the system. Once s/he has reported the case to law enforcement, the state has the responsibility to investigate the case, prosecute the offense where there is sufficient evidence, and ultimately punish the offender. The victim should not be asked to compensate the police for their time or resources to investigate the crime. Nor should the victim be asked to pay for an indictment. And if the victim is not able to attend a procedural hearing, the case should go forward as scheduled.

VICTIMS' RIGHT TO A REMEDY

Liberian law provides for restitution, compensation or another appropriate remedy for victims as compensation for the harm they have suffered. Victim compensation may be awarded either as part of the criminal proceedings in which the perpetrator is being prosecuted or through separate civil proceedings. This section deals with remedies in the criminal proceedings.

There are three types of remedies for the victim of a sex crime:

Incarceration of the offender. While incarceration of an offender is not a "right" of the victim, incapacitation of the offender does promote safety for the victim and prevents further harm to him or her by the offender.

Restitution. Restitution means that the offender has to pay the victim a sum of money for actual damages and/or costs incurred by the victim as a result of the offender's criminal conduct. A court may order restitution in addition to a prison sentence. Note that restitution is separate from civil damages, which may be sought in civil proceedings. The Criminal Procedure Law authorizes Circuit Courts to consider the issue of restitution to the victim at two stages in the criminal process:

- i. *Sentencing.* When sentencing the perpetrator the Court can issue an order for the restitution of property or equivalent compensation which

can then be enforced in the same way as a civil judgment. *Criminal Procedure Law, s. 31.1(4)*. See also Swen v. Republic, 40 LLR 138, 148 (2000) (restitution shall be ordered in addition to other forms of punishment). Note that if the victim is seeking a remedy other than a restitution or compensation order they are entitled to do so but this must be through a separate civil action in the appropriate jurisdiction.

- ii. *Conditions on Suspension of Sentence or Probation.* When the court suspends a convicted perpetrator’s sentence or sentences him to be placed on probation, it is empowered to attach a wide range of conditions to that suspension or probation.² The possible conditions include ordering the offender “to make restitution of the fruits of his crime or to make reparation (restitution) in an amount he can afford to pay, for the loss or damage” suffered by the victim. *Criminal Procedure Law, s. 33.2(2)(i)*

Other Conditions on Probation. The statute provides that the court can issue “any other conditions reasonably related to rehabilitation of the defendant and not unduly restrictive of liberty or incompatible with his freedom of conscience.” You, the prosecutor, could argue that the court should order that the offender not contact the victim, or come within a certain area of his or her home, so as to promote his or her safety and prevent another offense.

At sentencing, remind the judge that he or she may order restitution for the victim in addition to a prison sentence.

² Note that at the time of printing of this first edition, no mechanisms are currently in place for supervision of probation or enforcement of conditions on probation.

4. RIGHTS OF DEFENDANTS

As a prosecutor, you are an officer of the court. It is your responsibility, along with the other judicial officers, to ensure that the rights of the defendant are protected. As a practical matter, a violation of his or her rights will compromise the government's case and may result in a successful appeal resulting in the reversal of a conviction. This section outlines the rights of the defendant throughout the prosecution process.

A. PRESUMPTION OF INNOCENCE

A defendant in a criminal action is presumed to be innocent until proven guilty beyond a reasonable doubt. *Criminal Procedure Law, s. 2.1(4)*.

B. BURDEN OF PROOF

The prosecution must be able to prove beyond a reasonable doubt that the defendant committed the offense. In case of a reasonable doubt as to the defendant's guilt, s/he is entitled to an acquittal.

C. RIGHT TO COUNSEL

A defendant in any criminal action has the right to counsel, or representation by an attorney.

Advising defendant of rights

As soon as the accused arrives at the first place of custody upon arrest, the accused shall be advised:

1. That s/he has the right to hire an attorney of his or her choice. *Criminal Procedure Law, s. 2.2(1-2)*.
2. That the police may provide available facilities free of cost to allow the defendant to secure counsel, and that they will allow the defendant reasonable time and opportunity to consult privately with his counsel before any further proceedings. *Criminal Procedure Law, s. 2.2(3)*.
3. That s/he has a right to have counsel appointed if s/he cannot afford a private attorney. (Note that this right to appointment of counsel exists only in cases

that are subject to the jurisdiction of the Circuit Court, which includes all sexual offenses. *Criminal Procedure Law, s. 2.2(1)*.

When does the right to counsel attach?

A defendant in a criminal action has a right to representation by counsel at every stage of the proceeding from arrest to final judgment and, if relevant, final appeal. *Criminal Procedure Law, s. 2.2(1)*.

If no arrest was made, the right to counsel begins at the initial appearance of the defendant before the court. *Criminal Procedure Law, s. 2.2(3)*.

Note that this means the defendant has the right to counsel at interrogation. For more information on interrogation, *see Phase 2 -- LNP Investigation*.

Appointment of counsel

The Magistrate or Circuit Court shall appoint County Defense Counsel where:

1. The defendant is accused of committing a felony or misdemeanor that falls within the Circuit Court's jurisdiction;
2. The defendant has stated that he cannot afford legal counsel and that he wants to have legal counsel assigned to represent him; AND
3. After appropriate inquiry, the court is satisfied that the defendant is in fact financially unable to retain counsel. *Criminal Procedure Law, s. 2.2(4)*

The accused shall be allowed reasonable time and opportunity to consult privately with appointed counsel before any further proceedings are held. *Criminal Procedure Law, s. 2.2(4)*.

Appointed counsel serves without cost to the defendant and shall have access to the defendant, in private, at all reasonable hours. *Criminal Procedure Law, s. 2.2(4)*

However, the appointment of counsel shall not deprive the defendant of his right to hire another attorney at any stage of the proceedings. *Criminal Procedure Law, s. 2.2(4)*

Right to proceed without legal counsel

A defendant has the right to proceed without legal counsel and to be heard in person. However, when a defendant has been advised of the right to counsel and nevertheless appears in court without a lawyer, the court shall appoint an attorney unless the court determines that the defendant has voluntarily elected to proceed alone. *Criminal Procedure Law, s. 2.2(5)*

If the court allows the defendant to proceed without counsel, the court should make a record that the defendant was advised of his right and that the defendant voluntarily elected to proceed. *Criminal Procedure Law, s. 2.2(6)*

D. DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION

As a general rule, a defendant may not be compelled to incriminate himself.

The Supreme Court has interpreted the privilege against self-incrimination to protect a defendant's right not to testify in court. See Williams and Mulbah v. Republic, 34 LLR 180, 186 (1986) (Defendant's refusal to testify in own behalf is not evidence of guilt).

Where s/he does choose to testify, however, s/he waives this privilege. Therefore, s/he must answer any relevant question. *Criminal Procedure Law, s. 2.5*. And the defendant's silence on the stand in response to a question may be interpreted as an admission. See Republic v. Eid et al., 37 LLR 761, 776 (1995).

Note, however, that the right against self-incrimination does not apply to physical attributes. The defendant must submit to examination of his physical features or conduct, such as handwriting samples or fingerprints. *Criminal Procedure Law, s. 2.5(3)*.

E. PRESENCE OF THE DEFENDANT

The Defendant is to be present at all stages of the proceedings, including:

1. At his first appearance before court, when a plea is entered;
2. At every stage of the trial;
3. At the taking of any deposition at the insistence of the prosecution.

Defendant's presence not necessary: The defendant's presence is not necessary during the making of, hearing of, or ruling upon any motion or application addressed to the court. The defendant may be present at such proceedings if he/she so desires and requests.

5. INAPPROPRIATE RESPONSES TO CASES: COMPROMISING CASES, OBSTRUCTING JUSTICE, SASSYWOOD, AND TRIAL BY ORDEAL

The Ministry of Justice has made clear that perpetrators of sexual violence should be prosecuted by the criminal justice system. These cases should not be compromised, nor should they be subject to trial by ordeal or sassywood. This section describes MoJ policy against these alternative approaches to justice.

A. COMPROMISING CASES

It is the official policy of the Ministry of Justice that sexual assault or abuse cases shall not be compromised. A case is “compromised” when a legal officer, police officer, prosecutor, Magistrate, or judge receives money from a party to drop a case. Or a case is compromised when one of these officers arranges for the offender’s family to pay the victim in lieu of going to court.

B. COMPROMISING GOVERNMENT INTEGRITY

Consider the following laws against compromising government integrity. Some cases are “compromised” in a way that is actually criminal. As a prosecutor, not only should you refrain from engaging in the following activities, but you should also actively prosecute those who do.

1. OBSTRUCTING GOVERNMENT OPERATIONS

Physical obstruction of government function

A person commits a first degree misdemeanor by purposely obstructing, impairing or perverting the administration of law or other government function by physical interference or obstacle. *See Penal Law, s. 12.1.*

Preventing arrest or discharge of other duties

A person commits a first degree misdemeanor if he creates a substantial risk of bodily injury to a public servant or another for the purpose of preventing the public servant from lawfully arresting him or another. *See Penal Law, s. 12.2.*

Obstruction of government function by public servant

A public servant commits a first degree misdemeanor if he purposely obstructs, impairs or perverts the administration of law or other government function by breaching an official duty. *See Penal Law, s. 12.3.*

Hindering law enforcement

A person is guilty of hindering law enforcement if he purposely interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another for an offense by:

- a. Harboring or Concealing the Other;
- b. Providing the Other with a Weapon, Money, Transportation, Disguise or Another Means to Avoid Discovery or Apprehension;
- c. Concealing, Altering, Mutilating or Destroying a Document or Thing, Regardless of its Admissibility in Evidence; or
- d. Warning Another of Impending Discovery or Apprehension. *See Penal Law, s. 12.4*

Aiding consummation of a crime

A person is guilty of aiding consummation of a crime if he purposely aids another to secrete, disguise, or convert the proceeds of a crime, or otherwise profit from a crime. *See Penal Law, s. 12.5.*

Bail jumping

A person jumps bail if he fails to appear after having been released on bail under the condition that he will subsequently appear at a specified time or place. *See Penal Law, s. 12.6.*

Escape

A person is guilty of escape if he removes himself from official detention or fails to return following temporary leave. *See Penal Law, s. 12.7.*

Public servants permitting escape

A public servant working with official detention commits a first degree misdemeanor if he recklessly permits an escape and commits a second degree misdemeanor if he negligently permits an escape. *See Penal Law, s. 12.8.*

2. PERJURY AND FALSIFICATION

Perjury

A person commits a third degree felony if he makes a false statement or affirms the truth of a previous statement under oath in an official proceeding when such statement is material and he does not believe it to be true. *See Penal Law, s. 12.30.*

False statements

False swearing in official proceedings. A person commits a first degree misdemeanor if he makes a false statement or affirms the truth of a previous false statement, whether or not material, under oath, if he does not believe the statement to be true.

Other falsity in government affairs. A person commits a first degree misdemeanor if, in a government matter, he:

1. Makes a false statement, when the statement is material and he does not believe it to be true;
2. Purposely creates a false impression in a written application for a pecuniary or other benefit; or
3. Submits or invites reliance on any material writing which he knows to be forged.

False reports to law enforcement officials

A person commits an offense if he gives false information to an enforcement officer with the purpose of falsely implicating another; or falsely reports to a law enforcement officer or other security official a crime or incident calling for an emergency response when he knows it to be false. *See Penal Law, s. 12.33.*

Tampering with public records

A person commits a first degree misdemeanor if he knowingly alters or enters a false entry in a government record; or knowingly destroys, conceals, removes or otherwise impairs the verity or availability of a government record. *See Penal Law, s. 12.34.*

3. OBSTRUCTION OF JUSTICE

Tampering with witnesses and informants.

Tampering. A person commits a third degree felony if he threatens, deceives, or bribes another with the purpose of influencing the other's testimony or causing the other to withhold testimony, information, or documents. *See Penal Law, s. 12.40.*

Soliciting or Accepting Bribes. A person commits a third degree felony if he solicits, accepts, or agrees to accept money or other valuables in exchange for changing or withholding testimony. *See Penal Law, s. 12.40.*

Tampering in criminal investigations

Tampering. A person commits a third-degree felony if, believing another to have information relating to an offense, he deceives, threatens, bribes, or uses force against the other with intent to hinder, delay or prevent communication of such information to a law enforcement officer. *See Penal Law, s. 12.41.*

Soliciting Bribes. A person commits a third degree felony if, having information relating to an offense, he solicits, accepts, or agrees to accept money or other valuables in exchange for delaying or withholding communication of this information to the police. *See Penal Law, s. 12.41.*

Tampering with physical Evidence

A person commits a crime if he alters, destroys, mutilates, conceals, or removes a record, document, or thing with the purpose of impairing its verity or availability in an official proceeding or if he solicits another to do the same. (If the actor purposefully and substantially impairs the prosecution, then the crime is a felony. Otherwise, it is a misdemeanor.) *See Penal Law, s. 12.42.*

Harassment of and communication with Jurors

A person commits a first degree misdemeanor if he communicates, harasses, or alarms a juror outside the proceedings in a case with the purpose of influencing his decision. Conduct against the juror's spouse or family is deemed conduct directed against the juror.

4. BRIBERY AND INTIMIDATION

Bribery

A person commits a second degree felony if he knowingly offers, gives, or agrees to give to another, or solicits or agrees to solicit money or other valuables in exchange for the recipient's official action as a public servant; or the recipient's violation of a known duty. *See Penal Law, s. 12.50.*

Unlawful rewarding of public servants

A public servant commits a first degree misdemeanor if he solicits, accepts, or agrees to accept a thing of pecuniary value for having engaged in official action as a public servant or having violated a legal duty as public servant.

Similarly, a person commits a first degree misdemeanor if he knowingly offers, gives, or agrees to give a thing of pecuniary value to a public servant for engaging in official action or violating a duty. *See Penal Law, s. 12.51.*

Unlawful compensation for assistance in government matters

A public servant commits a first degree misdemeanor if he solicits, accepts, or agrees to accept money or other valuables as compensation for advice or other assistance in

preparing or promoting a bill, contract, claim, or other matter which is likely to be subject to his official action.

Similarly, a person commits a first degree misdemeanor if he offers, gives, or agrees to give money or valuables to a public servant as compensation this advice or other assistance. *See Penal Law, s. 12.52.*

Threatening public servants

A person commits a third degree felony if he threatens harm to a public servant to influence his official action in a pending or prospective proceeding or to influence him to violate his duty. *See Penal Law, s. 12.54.*

A person commits a third degree felony if he threatens to commit a crime or do something unlawful, accuse someone of a crime, or expose a secret or publicize an asserted fact, whether true or not, to influence another's official action as a public servant. *See Penal Law, s. 12.54.*

5. ABUSE OF OFFICE

Official oppression

A person acting or purporting to act in an official capacity commits a first degree misdemeanor if he i) subjects another to unlawful arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or ii) denies or impedes another in the exercise of enjoyment of any right, privilege, power or immunity. *See Penal Law, s. 12.70.*

Unlawful discharge of information

A person has committed a first degree misdemeanor if, in knowing violation of a duty imposed on him as a civil servant, he discloses confidential information which he has acquired as a civil servant. *See Penal Law, s. 12.71.*

C. TRIAL BY ORDEAL

Trial by ordeal is illegal and unconstitutional in the Republic of Liberia. Please refer to the legal directive of the Solicitor-General on Sassywood and Trial by Ordeal included here.

D. SASSYWOOD

The Supreme Court has declared Sassywood to be illegal. *See* the SG's directive for a summary of the law and the government's position on the following page.



Republic of Liberia
Ministry of Justice

Ashmun & Center Streets
Monrovia, Liberia

MEMORANDUM

OFFICE OF THE SOLICITOR GENERAL, R.L.

To: Hon. Ambulai Johnson
Minister of Internal Affairs

From: Tiawan S. Gongloe
SOLICITOR GENERAL, R.L.

Subj.: A LEGAL OPINION ON THE ILLEGALITY OF SASSYWOOD IN LIBERIA

Date: August 10, 2006

Sassywood has over the years proven to be harmful to a lot of people throughout the country. Yet sassywood continues to be practiced in many parts of the country, including Monrovia, the capital. The current situation is that sassywood is on the rise in many parts of the country, particularly in the Southeastern part of Liberia. For example, on the 4th and 5th of July 2006, six persons were murdered by some young men in Fleuroken, River Gee County, through the administration of sassywood and use brute force. The fourteen young men involved in that incident have been charged with murder and would soon be put on trial. There are other cases that are being investigated. If the practice of sassywood continues, many more innocent people will be killed.

The only law in support of trial by ordeal or sassywood is article 73 of the Revised Rules And Regulations Governing the Hinterland of Liberia of January 7, 2000. Although, it provides "Trial by native ordeal shall not be allowed in cases where the bark of sassywood which is generally made or concoction or preparation, with mineral or vegetables and administered internally; any person who shall administer, or who shall authorize, permit, order, aid, promote or otherwise participate in the administration of such an ordeal shall be deemed guilty of a misdemeanor and punishable according to law," it also provides "Ordeals however, of a minor nature and which do not endanger the life of the individual, shall be allowed and is hereby authorized." This last quotation from article 73 of Revised Rules and Regulations Governing the Hinterland, is what many have relied on to continue the practice of sassywood.

However, the practice of sassywood was declared illegal by the Supreme Court of the Republic of Liberia in the case JEDAH V. HORACE, decided on May 6, 1916. In that case the Court held, "the administration of sassywood in any case is illegal." The Court also held, "Any custom, which panders to the superstition of the natives of the country is in our opinion, contrary to the genius of our institutions and should therefore be discouraged. (see JEDAH V. HORACE, 2LLR 266 (1916).

This case grew out of an injunction filed by Jedah and others in the 2nd Judicial Circuit Court, Grand Bassa County against Jeffrey B. Horace, then Traveling Commissioner of that county for ordering them to drink sassywood, based on the suggestion of a native Medicine man or witch doctor. Jedah, Boyah, Geah, Gofar and others were accused of being members of the "Negoo" society. It is worth noting that the "Revised Rules and Regulations Governing the Hinterland of Liberia of January 7, 2000 has its origin in an act passed by the Legislature entitled "An Act making Regulations Governing the Interior Department of the Republic of Liberia." This act conferred upon the principal native chief, or chiefs of districts the power of a court to settle disturbances amongst the people in rural Liberia. The court held, "No department of government can exercise judicial functions but the court itself. Legislation, therefore, is unconstitutional which seeks to have other branches of government participate in judicial work." This act was, therefore, declared unconstitutional because it conferred judicial authority upon the chiefs and commissioners.

The position of the Supreme Court on sassywood has remained consistent throughout the years. In the case, POSUM V. PARDEE, 4LLR 299 (1935) the court maintained that sassywood was illegal. In that case the Court held, "The administration of sassywood is equivalent to a trial by ordeal and violates the Constitutional provision that, "No person shall be compelled to furnish or give evidence against himself." According to this opinion of the Supreme Court, sassywood or trial by ordeal is unconstitutional because it compels an accused to confess or produce evidence against himself or herself. Confirming this principle of constitutional law, the Supreme Court in the case TENTEAH V. REPUBLIC OF LIBERIA, 7LLR63 (1940) also held, "while it is provided that the native and district courts shall administer the native customary law, a proceeding calling for trial by ordeal, intended to extort a confession from the accused, is in conflict with the organic law of the state declaring that no one shall be compelled to give evidence against himself and is, therefore, illegal." In the same case, the court in a clearer and precise tone held, "Trial by ordeal is unconstitutional and illegal." In the foregoing seven words, the Supreme Court of Liberia clearly guided the people and Government of Liberia on the legal status of sassywood under Liberian law.

Sassywood is also unconstitutional because it subjects accused persons to torture or inhumane treatment. In this respect, sassywood is in violation of Article 21.c of the Constitution of Liberia, which provides, "No person charged, arrested, restricted, detained or otherwise held in confinement shall be subjected to torture or inhumane treatment."

In view of the clear, precise and unequivocal position of the Supreme Court of Liberia that sassywood is unconstitutional and illegal, and the harm it creates, every thing should be done by officials of Government, law enforcement officers, human rights and civil society advocates and our international partners to stop the practice of sassywood in every part of Liberia.

In order to speedily end the practice of sassywood, I recommend the following:

1. That the Ministry of Internal Affairs immediately stops the certification of Witch doctors or sassywood players and bans sassywood. Legally, the Ministry of Internal Affairs cannot maintain a category of persons on the payroll to perform an act which has been declared unconstitutional and illegal by the Supreme Court of Liberia, the highest court of the land.
2. That the Ministry of Internal Affairs informs all Superintendents and other Local government officials that sassywood is illegal and should not be permitted in any part of Liberia.
3. That the police be instructed to arrest and appropriately charge those who engage in the practice of sassywood with greater emphasis on the types that harm the body.
4. That programs be undertaken to create awareness throughout the country, about the illegality and unconstitutionality of sassywood.
5. That local government officials be told that witchcraft is not a crime under Liberian Law.

It is my ardent belief that these minimum steps will effectively put an end to practice of sassywood in Liberia.

Kind regards.

CC: Cllr. Frances Johnson Morris
MINISTRY OF JUSTICE/ATTORNEY GENERAL, R.L.

" Hon. Beatrice Munah Sieh
DIRECTOR/LIBERIA NATIONAL POLICE (LNP)

" The Head, UNMIL, Legal and Judicial System Support Division

" Liberia National Bar Association

" Association of Female Lawyers of Liberia (AFELL)

" Human Rights Groups

6. THE CRIMINAL PROCESS

The criminal process in a sexual assault or abuse case can be broken down into six phases of prosecution. The following chapter will explore each of these phases in more detail, but here is a very brief introduction to the process:

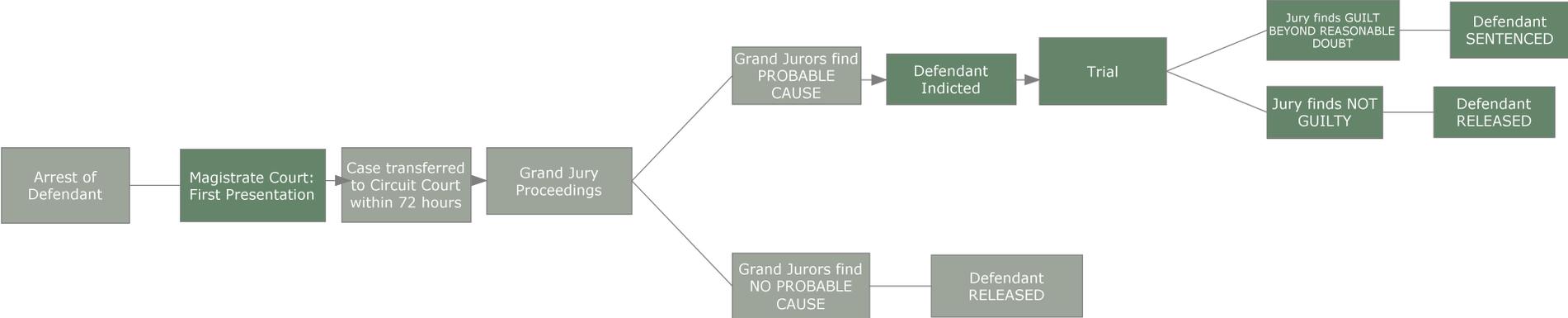
- i. **REPORTING.** First, the victim or a witness will report the crime to the police. They may have first consulted a family member, doctor, pastor, traditional birth attendant, attorney, or counselor who may have accompanied the victim to the police station. The police will take the victim's statement in the form of a complaint, which will later be attached to the charging sheet. The victim may bring a copy of a Medical Report Form that documents his or her injuries.
- ii. **INVESTIGATION.** The role of the police is to investigate whether the offense actually took place, to find and arrest the offender(s) and ultimately to build a case against him or her. They will interview witnesses, go to the crime scene, and gather evidence. Once they have gathered enough evidence to establish probable cause that a particular suspect committed the crime, they will prepare a charging sheet to obtain an arrest warrant. They may also seek a warrant to search a suspect's home or property for evidence. At this stage, the SGBV unit investigators should be following up with the police to ensure proper investigation.
- iii. **BRINGING THE CASE TO COURT.** Once an offender has been arrested, the police or sheriff will bring the defendant to the Magistrate for "Presentation" or "First Instance." The Magistrate will advise the offender of his or her rights and determine bail. If the defendant qualifies for and is able to pay bail, s/he may be released until trial. Because special rules apply in a sexual offense case and the defendant does not have the right to a preliminary hearing in Magistrate Court, the Magistrate will forward the sexual offense case to the Circuit Court within 72 hours of arrest.

The clerk of the Circuit Court will refer the file to the county attorney, who will evaluate the evidence and present the case to the grand jury for indictment.³ If they find probable cause and indict the defendant, then the county attorney will begin to prepare the case for trial.

³ Note that there will be a slightly different procedure in Montserrado County for the SGBV Crimes Unit and the new SGBV Court.

- iv. **PREPARING YOUR CASE.** The state has a high burden to prove to a jury that the sexual offense has occurred and that the defendant is responsible. The defendant will be presumed innocent unless you prove that s/he is guilty beyond a reasonable doubt. As such, you will need to put together a good case. You will start with the police file and, if you are in the SGBV Unit, information from the investigators. You will interview witnesses to get the best understanding of the events that transpired. You will also interview the victim, following the guidelines provided to you in the following section. With the victim's written consent, you will talk to the health professionals or counselors who treated the victim and request the Medical Report Form. You may conduct depositions to obtain additional evidence. Finally, you will decide who to call as a witness and prepare for their testimony.
- v. **TRIAL.** At trial, you will present your case to a jury, who will ultimately determine whether the defendant is guilty beyond a reasonable doubt. The prosecution presents its full case first. In this phase, you are telling the jury a story about what happened. You will give an opening statement and then present the testimony of witnesses, including the victim, who will recount their version of events. You will introduce documentary and physical evidence, including the medical report if available. The defense will have an opportunity to cross-examine your witnesses. And then the defense will present its own case, and you will have the opportunity to cross-examine their witnesses. You will also have an opportunity to provide rebuttal evidence. Finally, you and the defense attorney will make closing arguments summarizing your cases and urging the jury to return a verdict in favor of your respective clients. The jury will then deliberate and reach a verdict. And if the defendant is found guilty, the judge will issue a sentence.
- vi. **POST-TRIAL PRACTICE.** After the trial, the defendant may appeal the conviction or sentence to the Supreme Court as a matter of right. The prosecution has more limited rights to appeal. You may appeal an order granting a motion to dismiss an indictment or an order granting a motion for judgment of acquittal.

MASTER CASE FLOWCHART



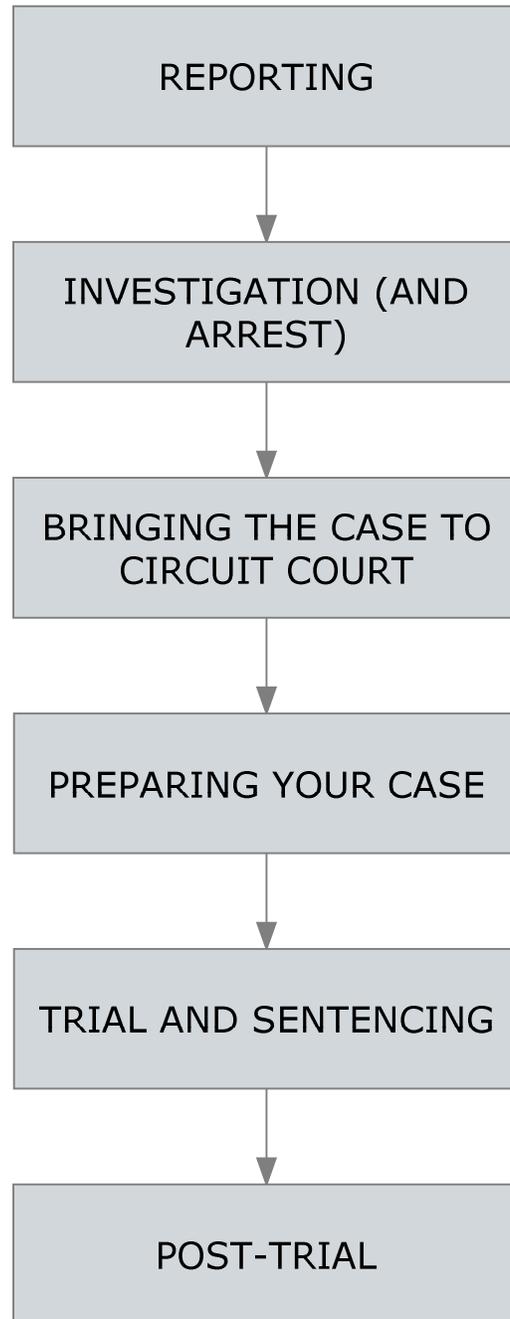
CHAPTER 2: SIX PHASES OF PROSECUTING A SEXUAL OFFENSE

Successfully prosecuting a sexual offense takes time and patience. It involves several steps, from investigation through sentencing. This chapter provides guidance to help you through the process.

Because these cases take time to investigate and prosecute, you may find that more than one prosecutor is involved in the case. Although the best practice is to have one prosecutor work with a victim and prosecute a case from beginning to end, you may take over a case in the middle of the process. This chapter is designed so that you can flip to the stage of prosecution you find yourself in at any given time:

1. Reporting
2. Investigation
3. Bringing the Case to Court
4. Preparing Your Case
5. Trial and Sentencing
6. Post-Trial Practice

Six Phases of a Sexual Assault and Abuse Case



PHASE 1 – REPORTING

There is no single way for a victim to disclose that s/he has been violated. S/he may tell a friend or family member. The victim, or his or her family, may approach a traditional birthing mother, a local NGO, a counselor, a pastor, a police officer, a county attorney, or a doctor. All of these people should be prepared to refer the victim to the resources s/he needs, including psychosocial or medical care. The goal is to provide an integrated, holistic response to the victim's needs, and the criminal process is only one part of such a response. And indeed, because it is the victim's choice to formally report a sexual offense, the police and prosecution may not be involved at all. While these offenses are always crimes against the Republic of Liberia, they are prosecuted only when the victim chooses to report the offense to the police. It is the victim's choice to report the crime and thereby initiate prosecution.

Once the victim has reported, however, then the state (not the victim) has the responsibility to investigate the case and prosecute the offense. It is not the victim's responsibility to push the case through each phase of the system.

At the county level, NGOs, police, and stakeholders should form one short list of resources, including local clinics, psycho-social counselors, police, and county attorneys who are trained to handle sexual offense cases. This list should be distributed to schools and other public places.

1. FIRST STOP: HEALTH CLINIC

The most important, or at least the most urgent, response to the victim is providing the appropriate medical care s/he needs. All actors should identify the county health clinics that have been trained to treat victims of sexual offenses.

a. Getting to the Clinic

If the offense has occurred recently, it is crucial that the victim be taken immediately to the health clinic to get treatment. For both medical and evidentiary reasons, a victim should be treated within 72 hours. However, a victim should still go to a clinic even if s/he cannot get there within this time frame. S/he may have untreated infections or health problems as a result of the violation. Where resources allow, the police, community members, NGOs, or other advocates should provide transportation to the victim so that s/he gets medical attention as soon as possible.

b. Testing and Treatment

The health practitioner will test and treat the victim and provide needed drugs to prevent pregnancy or HIV transmission. If available, the clinician may use a “rape kit,” which is a set of items used by medical personnel for treating a victim and gathering and preserving physical evidence following a sexual assault.

S/he will also fill out a standardized report that records the victim’s medical injuries and the treatment given. This Medical Report Form may later be used in a criminal proceeding if the case is brought to trial (*See Phase 4: Preparing Your Case – Medical Evidence*). The clinic is required to provide the victim with a copy of the medical report free of charge.

c. Health Records and Evidence

Health records are confidential and fall under the doctor/patient privilege; they cannot be released without the written consent of the patient (or the guardian of a minor) or a court order. To get the written consent of the victim or a minor victim’s guardian, law enforcement and health professionals should use the by the Ministry of Justice Release of

Health Information Form. For information about medical records and how to obtain the Medical Report Form, *see Phase 4: Preparing Your Case – Medical Evidence.*

There is no mandatory reporting of rape (or any crime) in Liberia. Health providers, community leaders, or psycho-social counselors are not required to report the offense. It is the victim's choice whether to pursue legal action and make a complaint to the police. A victim should feel that she is in control, and she should never be pressured or forced to report the crime.

2. TREATING VICTIMS WITH DIGNITY

Victims of sexual assault have been through an incredibly traumatic experience, and they may not trust the police or the criminal justice system. They are often scared to report the crime because they believe they will be blamed or shunned in their communities. Too often, they are right. Each actor in a victim's pathway to justice, from a friend or family member, to the police investigators, doctors, psychosocial counselors, Magistrates, judges, and prosecutors must do their part to build the trust of both this victim and future victims by treating victims with dignity and respect.

As a practical matter, this means:

1. **Never blame or judge the victim.** No one, under any circumstances, deserves to be violated.
2. **Tell the victim that the rape was not his or her fault.** Victims should be reminded and encouraged that the violation was not his or her fault and that s/he did nothing to deserve this offense.
3. **Never ask the victim about his or her prior sexual history.** It does not matter whether s/he has had other sexual partners. Although the previous sexual behavior of the victim was an affirmative defense in Liberia, that provision was repealed in the Rape Law of 2005. *See Act to Amend the New Penal Code Chapter 13, Sections 14.70 and 14.71, and to Provide for Gang Rape (2005), s. 5(b).*
4. **Never ask him or her to repeat his or her story unnecessarily or ask unnecessary questions.** Unfortunately, victims are often asked to repeat their story over and over again – to the doctor, psycho social worker, police, city solicitor, county attorney, jurors. Telling his or her story can be traumatic. Wherever possible, limit the number of times s/he is forced to recount the events of the crime.
5. **Be honest about the challenges of the legal process.** Prosecuting a case is often a long and painful process for a victim. If s/he testifies (and in most cases you will need his or her testimony), s/he will be subject to an unpleasant cross-examination. And because of the conditions of most courts in Liberia, s/he will likely have to see her perpetrator in the courthouse or courtroom while s/he is waiting for a hearing or trial. *For more on preparing victims for the legal process, see Phase 4: Preparing Your Case – Interviewing Survivors.*

6. **Confidentiality.** Keep personal information about the victim completely confidential. Redact personal information (such as the address of the survivor/victim) from any court documents that will be filed and made public. Only share information about the sexual offense when it is necessary to provide assistance and intervention (such as a referral), and even then, only with the written permission of the victim. In your own office, keep all written information in secured locked files. *See also Chapter 1 – Professional Ethics.*

As a prosecutor, you will need to interview the victim to get details about the crime that took place. *See Phase 4: Preparing Your Case – Interviewing Victims* for more information on how to sensitively interact with victims.

3. MAKING A COMPLAINT TO THE POLICE

The victim may choose, with the assistance of a friend, medical worker, or other community member, to bring a formal complaint to the police or to the court. This is his or her choice. A victim should never be forced to report the case if s/he does not wish to. If s/he does choose to pursue legal action, wherever possible, the police, the prosecutor, and others should encourage a counselor, family member, or friend to accompany the victim to the police and provide emotional support.

When the victim comes to the police station or calls the police and reports that s/he has been violated, the police will take his or her statement of the crime. This statement is called a complaint.

When taking the victim's statement, the police should:

1. Treat the victim with dignity (*See Treating Victims with Dignity*)
2. Interview the victim in private – in a separate room, outside the earshot of other police officers or people.
3. Never rush to record the statement – interview the victim first and get a story of what happened firmly in your mind and take notes.
4. Remember the elements of the crime(s) and make sure that that all necessary data has been included. The statement must be relevant to the crime or issue in question.
5. If the victim is illiterate, a third person should read the final statement to him or her and ask him or her if it is accurate. The victim may use a fingerprint as his or her signature.

It should always be the victim's choice to report the crime and thereby initiate prosecution. Once the victim has reported, however, then the state (not the victim) has the responsibility to investigate the case and prosecute the offense. It is not the victim's responsibility to push the case through the system. For example, the prosecution should not decide to drop the case if the victim is not able to attend a hearing or pay an unnecessary or illegal fee.

Requirements for a Complaint:

- ✓ The nature of the offense to be charged
- ✓ A concise statement of facts in chronological order, including:
 - the time and place of the crime
 - description of the offender's behavior constituting the crime
 - the name of the offender (if known)
 - a description of the offender (as complete as possible for later identification)
- ✓ Signature of the complainant under oath

A victim's statement alone is not sufficient.

Note that under Penal Law, s. 14.78, "No person shall be convicted of any felony under Sections 14.70 through 14.74 upon the uncorroborated testimony of the alleged victim." *See also Berry v. Republic of Liberia*, 3 LLR 24, 25 (1928) (the uncorroborated testimony of the prosecutrix is not sufficient to support conviction on charge of rape).

Therefore, police must investigate beyond the complaint of the victim to find evidence corroborating his or her story. *See T.V.A. Smith v. Republic of Liberia*, 3 LLR 58, 60 (1928) ("For the state to convict, [it] should have had evidence of...the prosecutrix and prime evidence for the prosecution, corroborated in all its material parts.")

4. MEASURES TO MINIMIZE RETALIATION

Research suggests that a victim who has reported rape is vulnerable to attack by his or her perpetrator or by the perpetrator's friends or family. The police's primary responsibility when a victim has reported, therefore, is to make sure that s/he is safe.

The police may work with the victim to create a safety plan. The police could encourage him or her to:

1. Tell a trusted person like a family member, counselor, doctor, or spiritual or community leader about his or her experience and why s/he feels s/he is at risk.
2. Think of safe places to go to in case of an emergency, like a police station or a church and talk to the religious leader or a shelter if there is one available.
3. Advise him or her to make an alarm so that neighbors can come to his or her rescue.
4. Keep away sharp instruments or weapons that could be used to hurt him or her.
5. Always have a packed bag of essential items at home and keep them in a safe place (e.g., important papers, extra clothes, identification, etc.)
6. Keep telephone numbers of close friends, relatives, police, religious leader or family doctor.

The police may also make referrals to: a safe house, a psycho-social counselor, or a health clinic. Police and prosecutors should keep on hand a list of local resources for victims, including safe houses.

Be aware that the location of a safe house is kept confidential to prevent further harassment to victims. If the victim is taken to a safe house, make sure that this information is not disclosed in any record.

5. COMMUNICATING NEXT STEPS

Often, the police will be the first responder to a victim of sexual violence. And like most community members, the victim may not be familiar with the details of a criminal justice response to sexual violence. Therefore, the police should:

1. Patiently explain the legal process to the victim and what will happen next.
2. Provide contact information for the officer who will be handling the investigation.
3. Explain that disclosure is a process and encourage the victim that s/he may contact them with more information at any time.
4. Make sure to get the contact information – and location – of the victim. Ask whether it is safe for someone to call or follow up with her.

Once the victim has made a formal complaint, it is the police’s responsibility (often with input from the prosecution) to investigate the crime. The following chapter will explore the process of investigation in more detail.

PHASE 2 – INVESTIGATION & ARREST

While investigation is principally the responsibility of the LNP, the prosecutor can play an important role in the investigation of the offense. As an attorney, the prosecutor understands the elements of the crime that must be proven in court. The prosecutor can work with the police to obtain the best evidence to establish each of these elements.

The means of obtaining the evidence, however, is as important in the prosecution of a crime as the evidence itself. If officers do not conduct the investigation properly, the evidence may not be admissible. For example, if the police mishandle evidence or forget to advise the defendant of his or her rights, the evidence or the confession will be excluded at trial, and the offender may go free.

Therefore, the prosecutor should work alongside the police to educate them about the legal implications of their investigation and to ensure that the proper legal procedures are followed.

This section includes the proper procedures for a police investigation:

1. LNP Investigations
2. Gathering Evidence / Search and Seizure
3. Drafting a Charging Sheet
4. Making an Arrest
5. Taking Statements

1. LNP INVESTIGATIONS

The LNP's Women and Children Protection Section has been charged with investigating sexual offenses against women and children. The police officers are often the first responders in the legal system to an offense, and their good work will provide the foundation for your case. They identify victims, gather evidence, find witnesses, determine the cause, manner, location, and time of a crime, and ultimately identify and apprehend perpetrators.

The charging sheet, complaint, and other police notes will be kept in the police file for the crime. When you, the prosecutor, are assigned to the case, you should request a copy of this file. If you seek more information or evidence, you should contact the police officer in charge of the investigation and request their assistance.

When you receive the police file, you may also identify areas for further investigation. An investigation of a sexual offense should be ongoing – it should continue long after the arrest of the suspect. And the police and the prosecution should work together through this process.

2. TAKING STATEMENTS

A. WITNESSES

The police will interview witnesses who were present before, during, or after the offense. As soon as possible after the crime, they will return to the crime scene and ask whether anyone saw or heard anything. They may talk to friends or family members, inquiring whether the victim mentioned anything about the incident or if they saw anything unusual. With the consent of the victim, the police may also interview health professionals about the treatment of the victim or any evidence that was obtained during the examination. (The police must use the MoJ Consent for Release of Information Form to get the written consent of the victim or his or her guardian). These witnesses may later testify at trial.

At this stage, the officers should confirm the age of the perpetrator and the victim, as ages are often manipulated out of fear or ill will.

The police will use the following form to take the statements of these witnesses. The statement itself is important, but the contact information is even more important. The prosecution will later need to track down these witnesses to testify at trial. If the SGBV Unit handles the case, the Unit Investigators will stay in touch with the witnesses up until trial.

Key Questions for Every Statement⁴

| | |
|---|---|
| WHAT | What happened - Before - During – After Exhibits such as Weapons. |
| WHEN | Dates (Day, Month, Year-approximate times) |
| WHERE | Where events took place - Address or general location |
| WHO | How many people - Distinguishing features or dress – Known people and how known - Identification - Names - Witnesses to the events |
| HOW | How event happened - details, threats either physical or mental - Was anything said - Any witnesses to the events and how or where they can be contacted |
| WHY | Why the event happened - Did anyone say anything prior to the event - Where any threats, either physical or mental, - What was said or done after the event |
| What happened after the offense? | Who was an eyewitness or who can corroborate your interview/statement? |

⁴ UNICEF, Training Manual for the Women and Children Protection Section (2007).

Witness Statement Number:.....

**LIBERIAN NATIONAL POLICE
Witness Statement**

Zone/Depot Name:.....

Case Number:..... Statement Number:.....

Statement of (full name):.....

Sex:.....Age:.....

Residential address:Telephone:.....

Business Address:.....Telephone:.....

National Identity Document:.....

Issued at:.....Date:...../...../.....

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Signature of witness:.....

Name of Officer Recording Statement.....

Date and Time Recorded:.....

Place Recorded:.....

(NB: If space provided not sufficient continue overleaf and on subsequent pages. Ensure recording officer and witness sign all copies of the statement)

B. STATEMENT OF THE ACCUSED

The police may also take the statement of the accused, if the accused agrees to speak with them. This statement must be voluntary. In fact, if the statement is not voluntary, it will not be admissible at trial. The police will begin by advising the suspect of his or her rights:

1. That he has the right to remain silent;
2. That anything he says can and will be used against him in court;
3. That he has a right to an attorney; and if he can't afford one, an attorney will be appointed for him.

The police may take a statement if i) the accused waives his or her right to remain silent and to legal counsel, or ii) the accused has counsel present.

It is crucial that the police advise the defendant of his or her rights before taking a statement. The Supreme Court has held that admissions by defendants should be excluded as evidence at trial where the defendant was not advised of his or her rights. Monie and Garzu v. Republic, 34 LLR 502, 517 (1987).

Confessions. The accused may admit to the crime in his or her statement. While a voluntary confession is helpful evidence in a prosecution, it is important to understand its limited legal significance. Under Liberian case law, a confession alone is not enough to secure a conviction; there must be corroborating evidence. *See, e.g., Kamarah v. Republic of Liberia*, 3 LLR 204 (1930). **Therefore, it is crucial that the police continue the investigation even if they have secured a confession.**

Defendants' Rights at Interrogation

Right to Counsel. Note that the defendant has a right to counsel at interrogation. The police shall advise the defendant of his or her rights before they question him or her. If s/he chooses to waive the right to an attorney, s/he will sign a waiver (see following page). If the accused cannot afford an attorney, the police should advise him or her that an attorney will be appointed for him or her. The police should never pressure the defendant to waive his or her right to counsel. In fact, if the police unduly coerce the defendant, the statement will likely be excluded at trial.

Right to remain silent. A defendant has the right to not incriminate himself or herself, which means s/he has the right to remain silent. S/he cannot be forced to answer questions by the police. Police must always respect this right to silence.

**LIBERIA NATIONAL POLICE
SUSPECT/ACCUSED STATEMENT FORM**

ZONE/DEPOT NAME _____

NAME: _____

SEX: _____ AGE: _____ TRIBE: _____

ADDRESS: _____ OCCUPATION: _____

NATIONALITY: _____ DATE OF BIRTH: _____ PLACE OF BIRTH: _____

DATE OF STATEMENT _____ TIME OF STATEMENT _____

I _____ of the above address having been duly cautioned that I have the right to remain silent and that I am entitled to a legal counsel being present at all times whilst being questioned and that any statement made by me may be used as evidence against me in a court of competent jurisdiction. I voluntarily elect to state as follows:

Signature of suspect: _____

SIGNATURE OF MAKER: _____

I certify that above statement was made freely and voluntarily by suspect/accused after I had duly informed him/her of his/her rights in terms of section 3 of chapter 2 of the Liberian Criminal Procedure Law.

Signed _____ (Recording Officer)

(Recording officer particulars in print)

Signed _____ (Witnessing Officer)

(Witnessing officer particulars in print)

N.B. If space provided above is not sufficient, continue overleaf. Maker must sign all pages.

3. SEARCH AND SEIZURE / GATHERING EVIDENCE

A. GATHERING PHYSICAL EVIDENCE

Evidence in sexual assault and abuse cases is most often found in three areas—on the victim, on the suspect and at the crime scene. When the police are timing their investigation, they are encouraged to consider the likelihood that the evidence will degrade or be lost completely and prioritize accordingly. A police officer or investigator should:

1. **Gather evidence from the victim.** Victims should always be encouraged not to change clothes before going to the health clinic. A victim's underwear may have blood or semen remnants from the violation, and health professionals using a rape kit may take a sample. If the victim consents, police may request that the victim bring his or her clothes and underwear to them after s/he has been to a clinic. This evidence should be kept in a secure place to later be used at trial. With the consent of the victim, the police may also take photographs of the victim's injuries. The police may take non-genital photos, but they should work with the health professionals to take photos of the genital area. If these photos require medical interpretation, they should be maintained as part of the medical record.
2. **Gather evidence from the suspect.** To gather evidence from the suspect, such as the clothes that he was wearing the day of the incident, the police may ask the accused to voluntarily turn over the evidence. If the accused refuses, the police will need to obtain a search warrant.
3. **Visit the crime scene.** A search warrant may also be necessary to search the location of the assault. The police should take photos of the crime scene, or if they do not have access to a camera, they should make sketches of the scene. In sexual assault cases, it may be difficult to determine what is relevant and what is not. Photos and sketches will provide documentation and evidence that may not be available later because of changes to the scene over time.

Important Evidence in a Sexual Assault or Abuse Case

Prosecutors and SGBV investigators should inform the police of the most important evidence to gather in a sexual offense case, including:

1. Identification of the offender and victim's description
2. Photos of the victim – any injuries (genital photos should only be taken by health professionals in a clinic)
3. Eyewitness statements
4. Statement by the offender
5. Any objects that were used during the offense
6. Description or photograph of the crime scene
7. The victim's undergarments
8. Any blood, semen, or other substance on the suspect's clothing or victim's clothing

B. WARRANTS

Where the case requires obtaining evidence that may be in the defendant's or another person's possession, police may conduct a search of that person's residence or belongings. Unless an exception applies, a search requires a warrant. This section outlines the requirements of obtaining and executing a search warrant:

Authority to issue warrant. A search warrant may be issued by a Magistrate whose jurisdiction encompasses the area wherein the property sought is located. *Criminal Procedure Law*, s. 11.1.

Property subject to search & seizure. The following property may be subject to search and seizure:

1. stolen or embezzled property;
2. illicit, forfeited, or prohibited property;
3. contraband;
4. instruments or other articles designed or intended for use, or which are or have been used, as a means of committing a criminal offense.

Procedure for obtaining a search warrant:

1. The police file an affidavit or written complaint, made under oath, that establishes one of the grounds to justify the warrant. *Criminal Procedure Law*, s. 11.3. In other words, the affidavit should establish that the police have probable cause to believe that stolen or embezzled, illicit, forfeited, prohibited property, contraband, or an instrument of the crime will be found in a particular place.
2. The Magistrate, justice of the peace, or other authorized judicial official shall issue a warrant if s/he is satisfied that grounds for the application exists, or there is probable cause to believe that they exist. *Criminal Procedure Law*, s. 11.3.

If the Magistrate refuses to issue a warrant

The law provides a remedy where the Magistrate fails to issue a search and seizure warrant: the police officer or prosecutor may bring the warrant before a Circuit Court judge. Any judge of the Circuit Court of the county in which the justice of the peace or the Magistrate exercises jurisdiction may issue a warrant himself. The judge will examine the affidavit or the complaint upon which the application for the warrant is based and may direct the justice of the peace or Magistrate to issue such warrant, or may himself do so. *Criminal Procedure Law*, s. 11.4.

Maintaining the chain of custody:

To present evidence at trial, the prosecutor must show that the evidence is what the prosecutor claims it to be and is in the same condition as it was at the time of the crime. To do so, the prosecutor will have to establish who had access to the item from the moment of crime to the time of trial. Police and prosecutors must document this “chain of custody” for each item. Law enforcement should:

1. Take actual physical possession of an object so that it is kept in the same condition until trial. (If possible, the evidence should be kept in a sealed container).
2. Label the evidence with the name of the defendant, description of the object, and a note on how and when it was obtained.
3. Keep this evidence in a secured area such as a locked drawer, file box, or cabinet.

According to the Criminal Procedure Law, the following procedures apply to property seized on the basis of a search and seizure warrant:

1. The officer executing the search shall safely keep the property lawfully seized under a search warrant. Or the officer may leave it with an appropriate prosecuting official so long as the officer obtains a receipt.
2. The evidence shall be kept safely so long as necessary for the purpose of producing the evidence at any trial in which it is involved.

3. As soon possible thereafter, all property seized shall be restored to the person entitled to it by the Magistrate, justice of the peace, or judge before whom it has been last produced or used in evidence at the trial. If, however, possession of this evidence / object is prohibited by law, it shall be confiscated or destroyed under the direction of the Magistrate, justice of the peace, or judge.

Requirements for Search Warrant

A warrant shall i) be in writing, ii) directed to a peace officer of the Republic of Liberia, and iii) shall:

- ✓ Identify the property to be searched;
- ✓ Name or describe the person/place to be searched;
- ✓ State the grounds for its issuance & the name(s) of the person(s) whose affidavits and sworn statements have been taken in support thereof.
- ✓ Command the officer to search the person or the place named for the property specified without unnecessary delay.
- ✓ Designate the court, the jurisdiction of which encompasses the area wherein the property sought is located, to which it shall be returned.

Criminal Procedure Law, s. 11.3.

Requirements for Execution of a Search Warrant

Time when execution permitted. A search warrant may be executed at any reasonable time of the day or night, within 21 days after its date of issuance. If practical, however, it shall be executed in the daytime. (No property validly seized under a search warrant shall be suppressed as evidence because the warrant was executed during the nighttime.)

Mode of procedure before entry. Before searching a person or entering upon premises to be searched by virtue of a search warrant, the officer executing it shall knock and announce his presence, informing the person to be searched or any person attending the premises to be searched of his authority and that a search warrant has been issued. If the person requests, the officer shall show the warrant to him or her.

Provide a copy of warrant. The officer shall provide a copy of the warrant and receipt for the property to the person from whom or from whose premises the property is taken. If such person is not present, he shall leave the copy of the warrant and the receipt at the place from which the property was taken.

Taking inventory. The officer shall take inventory in the presence of the applicant for the warrant and the person from whose possession or premises the property is taken or, if they are not present, in the presence of at least one credible person other than the applicant, and shall be verified by the officer.

Return of warrant with inventory. The warrant, with inventory, must be returned within 21 days after issuance. The Magistrate or justice of the peace, to whom the return is made, shall upon request deliver a copy of the inventory to the person from whose premises the property is taken and also to the applicant for the warrant. *Criminal Procedure Law, s. 11.3.*

Grounds to Exclude Evidence: A Reminder for Law Enforcement

Evidence will not be admissible at trial if:

1. The prosecution cannot establish the chain of custody;
 2. The warrant is insufficient on its face;
 3. The property seized is not that described in the warrant;
 4. The purported grounds set forth in the application for the warrant do not exist;
 5. There was not probable cause for believing the existence of the grounds on which the warrant was issued;
 6. The warrant was illegally executed;
 7. The property, if seized upon an arrest, was illegally seized;
- OR
8. The property was seized without a search warrant having been issued therefore, except when the property was lawfully seized in connection with a lawful arrest.

Confessions will not be admissible at trial if:

1. The confession was coerced by physical or mental force;
- OR
2. The defendant was not advised of his or her rights.

4. DRAFTING THE CHARGING SHEET

Once they have gathered evidence and identified the offender, the police will prepare a charging sheet. The charging sheet is the first identification of the crime. Later, in drafting the arrest warrant or the indictment, you, the prosecutor, will have an opportunity to review and revise the charge depending on the evidence before you at that time.

The prosecutor should remind the police that the charging sheet should establish all of the elements of the offense. For example, the elements of a rape are i) penetration, ii) without consent of the victim. The charging sheet, therefore, should establish that there was penetration and that the victim did not consent to sex.

Often, the perpetrator will have committed more than one offense. It is important for the police to charge **all offenses**. For example, the perpetrator may have forced the victim out of her home and raped her in captivity. He will have committed kidnapping in addition to the rape, and therefore he should be charged with both offenses. For a review of the elements of various crimes related to sexual violence, *see Part II: Prohibitions Against GBV*.

SAMPLE CHARGING SHEET

REPUBLIC OF LIBERIA
The Charles B. Alfonso Caine Building
Headquarters of the Liberia National Police
MINISTRY OF JUSTICE
Monrovia, Liberia

Central Case No: 4325-07

Date: July 20, 2007

POLICE CHARGE SHEET

| | | |
|---|--|----------------------------|
| Defendant: <u>Leroy Mvamvu</u> | Sex: <u>Male</u> | Age: <u>31</u> |
| Tribe: <u>Kpelle</u> | Address: <u>Stephen Tolbert ET.</u> | DOB: <u>8/11/76</u> |
| Nationality: <u>Liberian</u> | Father's Name: <u>Joseph M. David</u> | |
| Mother's Name: <u>Edina R. David</u> | Marital Status: <u>Divorced</u> | |
| Complexion: <u>Dark</u> | Build: <u>Stout</u> | Eyes: <u>Brown</u> |
| Hair: <u>Black</u> | Scars/marks: <u>None</u> | |
| Deformities: <u>None</u> | Accomplice(s): <u>None</u> | |
| Charge: <u>Kidnapping / First Degree Rape / Aggravated Assault</u> | | |
| Day/Date of Offence(s): <u>May 12-15, 2007; May 29, 2007</u> | | Time: <u>N/A</u> |
| Place of Occurrence: <u>home of victim</u> | Date of Arrest: <u>July 17, 2007</u> | |
| Arresting Officer: <u>Adam Paulema</u> | Rank: <u>Detective</u> | ID: <u>0029</u> |
| Complainant: <u>Sarah Survivor</u> | Nationality: <u>Liberian</u> | |
| Sex: <u>Female</u> Age: <u>44</u> | Address: <u>REDACTED</u> | |
| Place of Birth: <u>Harbel Firestone</u> | Tribe: <u>Lorma</u> | |

Details of Offense

May 12, 2007: Assault, Kidnapping and Rape

1. On Wednesday 12 May 2007 the accused and the complainant attended the Magistrate's court at Firestone for the hearing of a child maintenance complaint and a domestic violence dispute. At the conclusion of the hearing, a promissory note was issued against the accused by consent, in which the defendant promised not to come within the vicinity of the complainant.
2. After the hearing, the accused knowingly and willfully violated the promissory note and persuaded the complainant to travel with him in the same taxi. But when the taxi reached the complainant's destination, the defendant tried to prevent her from disembarking and begged her to return to his home. She refused and proceeded to get out of the taxi. He

also disembarked. She ran away, and he pursued her and caught up with her near a neighbor's house. He began to drag her away and a scuffle ensued. As he was trying to pull her towards him, she clung on to a pole supporting the neighbor's boundary fence. The pole gave in and was ripped out of the ground. She then broke away from him and ran into the neighbor's house, where he followed and again accosted her.

3. The accused then took her to his home by force. He kept her there against her will from Wednesday, May 12 until Friday, May 15.
4. During that period he knowingly and willfully had sexual intercourse with her without her consent by force on six occasions.
5. The complainant managed to escape on Friday 15 May, after the accused had left the house for a short period.

May 29, 2007: Rape and Aggravated assault

6. The accused visited the complainant at her brother's house armed with a knife. He asked to speak to her but the complainant's brother was only prepared to allow him to do so if this took place in his presence in the house. But shortly after the complainant's brother had left the house to seek help, the accused forcibly removed the complainant and dragged her into the bush to a place near an abandoned abattoir.
7. There, he forced her to have intercourse with him without her consent twice.
8. On this occasion he also assaulted the complainant by purposefully hitting her twice on her thigh with a stick, causing bodily injury.

Based on the foregoing, the accused is charged with one count of kidnapping, eight counts of rape, one count of aggravated assault, and one count of simple assault.

Signed _____

Commander

5. MAKING AN ARREST

An arrest is made by an actual restraint of the person to be arrested or by his or her submission to the custody of the person making the arrest. An arrest may be made by any peace officer: marshals, sheriffs, their assistants & deputies, constables, & policemen. *Criminal Procedure Law*, s. 1.5,

Arrest with Warrant. As a general rule, the officer should obtain a warrant to authorize the arrest. Once the police have identified a suspect and gathered enough evidence to establish probable cause that the suspect committed the crime, they will bring the charging sheet and complaint before the Magistrate to issue a warrant for the suspect's arrest.

Arrest without Warrant. There is, however, an exception to the warrant requirement. A suspect can be arrested without a warrant if the suspect has been caught in the act or attempting to escape (this is also known as making an arrest in "plain view of a crime" or in "hot pursuit"). A peace officer may also make an arrest if s/he "has reasonable grounds to believe that the person is committing or has committed an offense." *See Criminal Procedure Law*, s. 10.2.1(c).

Timing. Where an arrest requires a warrant, the warrant must be issued before an arrest is made. The officer need not have the warrant in his or her possession at the time of the arrest, but in that case, upon request after the arrest, he shall show the warrant to the person arrested as soon as possible.

Victim's Role in an Arrest

It could be very traumatic for a victim to encounter the perpetrator. At all points of the criminal process, prosecutors and other actors should try to prevent retraumatization. For example, a victim of rape should not be asked to accompany the sheriff or police officer in the vehicle to apprehend her offender. The victim should be asked for a good description of the offender, location, name, or other information that would be helpful for the officer to find the offender.

Note that it is illegal in Liberia to charge a fee to the victim to arrest a criminal defendant. There are no fees for criminal proceedings. *See Judiciary Law*, s. 3.14.

Requirements for Arrest Warrant

The writ or warrant of arrest shall i) be in writing ii) directed to all peace officers in the Republic or other authorized person and iii) include the following:

- ✓ Signature of the judicial officer authorized to issue the warrant (Clerk of Court) and the title of his office.
- ✓ Court seal or stamp
- ✓ Date and place of issue
- ✓ Case file number
- ✓ Name of the person to be arrested. (If his name is unknown, warrant shall designate such person by any name or description by which he can be identified with reasonable certainty.)
- ✓ Nature and substance of the offense charged.
- ✓ Order that the person be brought before the court.
 - i. If the offense charged is triable in the county in which the Writ is issued, the Writ shall command that the person arrested be brought forthwith before the court issuing the warrant.
 - ii. If the offense charged is triable only in another county, the warrant shall require that the person to be arrested be brought before a designated court of the county in which the offense is triable.

Criminal Procedure Law, s. 2.10(7)

Rules of Arrest

Where: An arrest may be made anywhere within the jurisdiction of the Republic.

Time of day: If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is any other offense (misdemeanor or infraction) the arrest cannot be made at night unless such a direction is endorsed upon a writ of arrest or the offense is committed in the presence of the arresting officer.

Permissible force: No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention.

Entry into buildings: All necessary and reasonable force may be used to affect any entry into any building or property or part thereof to make an authorized arrest.

Search for weapons: A peace officer or other authorized person making a lawful arrest may search for and take from the person arrested all weapons which may have about his person and shall deliver them to the court before which he is taken.

Criminal Procedure Law, s. 2.10

SAMPLE WRIT OF ARREST

REPUBLIC OF LIBERIA) IN THE OFFICE OF MONROVIA CITY COURT, TEMPLE OF
MONTSEERRADO COUNTY) JUSTICE, MONROVIA, LIBERIA

Before His Honor: Milton D. Taylor Stipendiary Magistrate

Assigned to His Honor _____ Associate Magistrate

Of the City of Monrovia

Republic of Liberia.....Plaintiff) CRIME:
VERSUS) KIDNAPPING, RAPE,
Leroy Mvamvu.....Defendant) AGGRAVATED ASSAULT

WRIT OF ARREST

Republic of Liberia, to Captain Fofie V. Kamara, Magistrate Police or his Deputy.

GREETINGS:

You are herby commanded to ARREST the living body of Leroy Mvamvu Defendant and forthwith to bring him before the Monrovia City Court, Temple of Justice Building, Montserrado County to answer the charge of Kidnapping, Rape, and Assault based upon the oath and complaint of the Republic of Liberia by and thru Sarah Survivor Private prosecutor in which substantially alleged as follows to wit:

That on the 12-15th days of May, 2007, in Firestone, Liberia, Defendant, Leroy Mvamvu did violate Sections 14.21, 14.50, and 14.70 of the Penal Law of Liberia respectively by assaulting, kidnapping, and raping the complainant. Defendant assaulted the complainant, physically forced her to go to his home, kept her captive against her will for three days, and forced her to have intercourse with him without her consent on six separate occasions.

That on the 29th of May, 2007 in Firestone, Liberia, Defendant did violate Sections 14.70 and 14.20 of the Penal Law of Liberia by raping and assaulting the complainant respectively. Defendant forced the complainant away from her brother’s home and took her by force to a bush, forced her to have intercourse with him twice against her consent, and beat her with a stick, causing injury to her body.

Hence, this writ of arrest.

CONTRARY TO THE FORM FORCE AND EFFECT TO THE STATUTORY LAWS OF LIBERIA IN SUCCESSFUL CASES MADE AND PROVIDED AGAINST THE PEACE AND DIGNITY OF THIS REPUBLIC, AND FOR SO DOING, THIS SHALL CONSTITUTE YOUR LEGAL AND SUFFICIENT AUTHORITY, AND HAVE YOU THERE THIS WRIT OF ARREST.

Issued this 20th day of July D. 2007
WIT _____Magistrate

6. PRESENTATION TO A MAGISTRATE

The sheriff or officer who makes the arrest is required to bring the suspect before the court designated in the arrest warrant. (If no warrant was issued, or if the designated magistrate is not available, the officer may bring the arrestee to the nearest available magistrate.) The arrestee has the constitutional right to be brought before a court of law within 48 hours of arrest.

The arrestee appears before the Magistrate in a hearing called “Presentation” or “First Instance,” where:

1. The Magistrate advises the Defendant of his or her rights, including:
 - i. The nature of the offense of which he is accused or suspected;
 - ii. That he has the right to have legal counsel present at all times while he is being questioned or is making any statement or admission (note that if a public defender is available in the Magistrate Court, the public defender may represent the defendant at this presentation hearing.);
 - iii. That he does not have to make any statement of admission regarding the offense of which he is accused or suspected;
 - iv. That any statement or admission made by him may be used as evidence against him in a criminal prosecution.⁵ *Criminal Procedure Law*, s. 12.2.
2. The Magistrate sets bail if the defendant is eligible. *See next section on Bail*.
3. The Magistrate forwards the case to the Circuit Court within 72 hours of arrest. *See Sexual Offense Divisions Act of 2008*, s. 25.3.

⁵ Note that at this stage, the Magistrate ordinarily would advise the Defendant of his or her right to a preliminary hearing. Note that at this stage, the Magistrate ordinarily would advise the Defendant of his or her right to a preliminary hearing. But in sexual offense cases, the Magistrate no longer has jurisdiction for preliminary hearings but must refer the case to the Circuit Court. *See An Act Amending Title 17 of the Revised Code of Laws of Liberia, Known as the Judiciary Law of 1972 by Adding Thereto a New Chapter to be Known as Chapter 25 Establishing Criminal Court “E” of the First Judicial Circuit, Montserrado County, and Special Divisions of the Circuit Courts and Other Counties of the Republic to have Exclusive Original Jurisdiction Over the Crimes of Rape, Gang Rape, Aggravated Involuntary Sodomy, Involuntary Sodomy, Corruption of Minors, Sexual Abuse of Wards and Sexual Assault Respectively*, s. 25.3 [hereinafter *Sexual Offense Divisions Act of 2008*].

Some police officers misunderstand this 48 hour requirement and believe that they only have 48 hours to investigate the crime. They believe that their investigation is complete when they bring the defendant before the court and present the charging sheet and complaint. But this should be only the beginning of the investigation. The police should continue to investigate and turn over evidence to the prosecution through grand jury proceedings and ultimately until trial.

7. BAIL

A. EXPLANATION OF BAIL

The purpose of bail is to insure that an arrestee will come to court as required. *Criminal Procedure Law*, s. 13.6.

When an arrested person (the accused) seeks to be allowed by the court to remain at liberty rather than being held in jail pending the resolution of his or her case, the court may according to law, permit the accused to post bail or a bond guaranteeing that the accused, if released from custody, will appear in court when required, submit to the orders and processes of the court and not flee the Republic of Liberia. *Criminal Procedure Law*, s. 13.2-4, 13.6.

An accused can post bail by turning over an amount of money set as bail by the judge according to law to the court to be held while his or her case is pending to guarantee that s/he will appear in court.

In the alternative, an accused can pay an insurance company to post a surety bond on his or her behalf obligating the insurance company to pay the amount of the accused's bail should the accused fail to appear in court as required.

In some circumstances, the law provides that the accused can guarantee his or her future appearance in court with real or personal property that will be forfeited to the court should the accused fail to appear in court as required.

B. THE RIGHT TO BAIL

The right to bail is set forth in Liberia's Constitution, Article 21(d) (i) which states:

“All accused persons shall beailable upon their personal recognizance or by sufficient sureties, depending upon the gravity of the charge unless charged for capital offenses or grave offenses as defined by law.”

The general rule is that the accused is entitled to have bail set, however when the offense charged is a **capital offense**, an accused can be held without bail if the proof is evident or the presumption great that the accused is guilty of the of the capital crime charged. *Criminal Procedure Law*, s. 13.1,2.

C. AMOUNT OF BAIL

The amount of bail in any criminal action depends on the crime(s) committed and the maximum penalties available for the crime(s):

penalty is a fine and restitution – amount of bail is equal to the amount of the maximum fine that an accused faces upon conviction. *Criminal Procedure Law*, s. 13.2.

penalty is imprisonment – amount of bail is equal to the maximum number of months imprisonment an accused faces upon conviction multiplied by twenty-five dollars. *Criminal Procedure Law*, s. 13.2.

penalty is imprisonment and/or a fine – amount of bail is equal to the maximum number of months of imprisonment plus the maximum fine that an accused faces upon conviction. *Criminal Procedure Law*, s. 13.2.

D. FORM OF BAIL

Bail can be posted in the following forms:

- An appearance bond secured as provided by Section 63.1 of the Civil Procedure Law.
- Cash or other personal property. *Criminal Procedure Law*, s. 13.3.

E. BAIL IN RAPE AND OTHER CAPITAL OFFENSES CASES

For the purposes of bail, First Degree Rape is treated as a capital offense permitting bail except when the proof against the accused is evident or the presumption great that he is guilty of the offense.

The burden of showing that proof of guilt is evident or the presumption great that the accused is guilty of the offense is:

- Before indictment – on the prosecutor as the representative of the Republic of Liberia.

- After indictment – on the defendant.

F. POST CONVICTION FOR A CAPITAL OFFENSE

An accused convicted of a capital offense is held without bail except where the court is satisfied that due to illness, the physical condition of the accused is such that continued confinement would result in death or permanent serious physical injury. Upon such a finding the court may order the removal of the accused to a place of confinement where his or her health may be better preserved or admit him to bail if satisfied that any confinement would endanger his or her life. *Criminal Procedure Law*, s. 13.1.

G. RELEASE WITHOUT BAIL

The court may release an accused without bail when of the opinion that the defendant will appear as required and may release an accused upon conditions to ensure his or her appearance including:

- Parole to the custody of a member of the family or any other person exercising moral influence over the accused; or
- Requiring the accused to report periodically to a court probation officer.

The court may release an accused without bail when satisfied that due to illness, the physical condition of the accused is such that continued confinement would result in death or permanent serious physical injury. Upon such a finding the court may order the removal of the accused to a place of confinement where his or her health may be better preserved or admit him to bail if satisfied that any confinement would endanger his or her life. *Criminal Procedure Law*, s. 13.1.

H. BAIL FOR WITNESSES

Where the testimony of a witness is material in a criminal proceeding and there is a showing that s/he will not appear in court voluntarily or under subpoena, the court may require that the witness post bail to guarantee his or her appearance to testify.

If the witness fails to post bail, the court may commit the witness to prison pending his or her testimony in court or the final disposition of the case. The court has discretion to

release the witness or modify his or her bail if s/he has been detained for an unreasonably long time without being presented in court to testify.

In lieu of requiring bail or detaining a material witness, the court can order that the witness's deposition be taken for use as evidence.

Prosecution Note

Seeking to have a witness held on bail or detained in order to ensure his or her testimony is an extreme measure likely to result in an adverse relationship between the witness and the prosecutor that negatively affects the quality of the witness's testimony. When a witness is opposed to testifying or refuses to come to court to testify, it is important for the prosecutor to meet with the witness in order to find out the reasons behind the witness's opposition to testifying. Often witnesses are opposed to testifying because of fear of reprisal from the accused or family or associates of the accused. Other reasons a witness may be reluctant to testify include fear of being shamed or humiliated in court, fear of making a mistake in testifying or a desire not to relive the trauma experienced as a victim or witness to a crime. It is important for the prosecutor to treat witnesses and victims with respect and to try to honestly allay their fears.

A prosecutor should never berate or threaten a victim of sexual assault or abuse in order to get him or her to testify.

I. PROSECUTOR'S RESPONSIBILITIES REGARDING RELEASE OF AN ACCUSED ON BAIL OR UNDER OTHER CONDITIONS

Arguing bail

In relation to bail the prosecutor has the responsibility to:

- Review the charges, the facts of the case and the applicable law and to take a position as to the appropriate bail or conditions of release. When necessary, the prosecutor may need to seek additional information from the police, victim and/or witnesses in order to be fully prepared to take a position on bail.
- In cases where the charge is First Degree Rape or another capital offense and the prosecutor is seeking to have the court deny the accused bail, present to the court proof that the guilt of the accused is evident and sufficient to support the presumption that the accused is guilty of a capital offense. *Criminal Procedure Law*, s. 13.1.
- Present to the court facts and law in support of the bail and/or conditions of release being advocated for including facts related to any risk of flight and/or risk that if the defendant is released s/he will reoffend.
- Verify that all the procedural requirements of bail are complied with *Criminal Procedure Law*, s. 14.3,4, including that:
 - Bond is properly secured;
 - Cash or other personal property received by the court as security for the bond is deposited in the government depository or a reliable bank;
 - Sureties are qualified and file the required certifications;
 - Security on the bond is adequate and genuine; and
 - Receipt has been issued showing the purpose and amount of the deposit
- File an exception with the court if surety is insufficient. *Criminal Procedure Law*, s. 13.4(2).

- Bring to the court's attention changes in circumstance warranting a review of bail such as failure of accused to comply with conditions of release, illness of accused, discovery of evidence which significantly affects the strength of the government's case.

PHASE 3 – BRINGING THE CASE TO CIRCUIT COURT

1. JURISDICTION AND VENUE

To hear a case, the court must have proper subject matter jurisdiction, personal jurisdiction, and proper venue. It is your responsibility as prosecutor to ensure that the case is before the proper court.

A. JURISDICTION

Jurisdiction means the power to act. In order to act, a court must have both "subject matter jurisdiction" and "territorial/personal jurisdiction." Courts acquire jurisdiction only by constitutional or statutory authority.

Subject Matter Jurisdiction is the authority of a court to hear the specific type of case before it. Circuit Courts have original subject matter jurisdiction over all sexual offense cases. That means that only Circuit Courts can hear evidence on a sexual offense matter, make a finding of guilt, and sentence the offender.

Magistrate courts, however, are generally the first entrée to the system for a defendant charged with a sexual offense. The Magistrate has the subject matter jurisdiction and authority to issue an arrest warrant, to read the offender his or her rights and set bail at Presentation.

Note that the law regarding Magistrates' jurisdiction in sexual offense cases has changed. Previously, at the defendant's request, the Magistrate would hold a preliminary examination to determine whether there was probable cause that the defendant committed the offense. If the Magistrate found that there was no probable cause, s/he would release the defendant. If, on the other hand, the Magistrate found probable cause, s/he would forward the case to the Circuit Court. Under the new *Sexual Offense Divisions Act of 2008*, however, the Magistrates no longer have authority over preliminary investigatory matters in a sexual offense case, including preliminary examinations. According to the Act, sexual offenses include: Rape, Gang Rape, Aggravated Involuntary Sodomy,

Involuntary Sodomy, Corruption of Minors, Sexual Abuse of Wards and Sexual Assault. **Magistrates must forward these cases to the Circuit Court (or in Montserrado County, to Court E) within 72 hours of arrest.** See Sexual Offense Divisions Act of 2008, s. 25.3.

Territorial/Personal Jurisdiction means jurisdiction or power to act over the person who appears in the case before the court. Magistrate Courts and Circuit Courts have personal jurisdiction over those within their magisterial areas.

Authority of Courts in a Sexual Assault or Abuse Case

Magistrate Court may:

1. Issue an arrest or search warrant.
2. Read the accused his rights.
3. Charge the accused.
4. Forward the case to the Circuit Court within 72 hours. The Magistrate does not have the authority to hear preliminary examinations in sexual offense cases.

Circuit Court may:

1. Formally indict the defendant (upon finding of probable cause by grand jury).
2. Upon an indictment, issue an arrest warrant.
3. Hear evidence to determine guilt beyond a reasonable doubt.
4. Sentence the offender.

B. VENUE

As a general rule, the prosecution of an offense shall be brought in any competent court of jurisdiction in the county in which the offense was committed. *Criminal Procedure Law, s. 5.1.*

The law provides clarification for a few special circumstances:

1. **Offenses committed in one county where persons committing the offense or accessories are in another:** Where a person in one county commits an offense in another county, or where a person in one county aids, abets, or procures the commission of an offense in another county, the offense shall be prosecuted in any competent court in either county. *Criminal Procedure Law, s. 5.2*
2. **Offenses committed partly in one and partly in another county:** Where several acts are requisite to the commission of an offense and occurred in two or more counties, the offense shall be prosecuted in any competent court in any county in which such acts occurred. *Criminal Procedure Law, s. 5.3*
3. **Offenses committed on or near county boundaries:** Where an offense is committed on or within five hundred yards of the common boundaries of two or more counties, the offense shall be prosecuted in any competent court in any of such counties. *Criminal Procedure Law, s. 5.4.*

CHANGE OF VENUE

If your case was brought in an improper venue or you believe that it would be impossible to have a fair trial, you may move the court to transfer venue.

Grounds. The court may order the proceedings in a criminal prosecution transferred to another competent court in another county in any of the following cases:

1. If the county in which the prosecution is pending is not one of the counties specified above; or

2. If there is a reason to believe that an impartial trial cannot be held in the county in which it is pending; or
3. If the parties agree and if the convenience of material witnesses and the ends of justice will be promoted thereby. *Criminal Procedure Law, s. 2.5.*

PROCEDURE FOR CHANGE OF VENUE

Time of motion: The prosecution or defense counsel must move for the transfer of proceedings to another county on or before arraignment (first appearance of the accused) before a Circuit Court. A motion for the transfer of proceedings on any other grounds must be made at any time before the jury is sworn, or, where trial by jury is not required or is waived, before any evidence is received. *Criminal Procedure Law, s. 5.7.*

When a motion for change of venue is granted:

1. The clerk of the court shall enter the order on the record and transfer all the papers and file to the new venue.
2. The prosecution shall continue in that court as if the proceedings had originated in that court.
3. The appropriate prosecuting attorney of the county in which the case has been transferred shall continue the prosecution.
4. Notice to the Defendant
 - a. Defendants in custody: If the defendant is in custody, the order shall direct that he be forthwith delivered to the custody of the sheriff of the county in which is located the court to which the proceeding is transferred.
 - b. Defendants not in custody (on bail): If the defendant is not in custody, the order shall direct that he appear before the court to which the case has been transferred at the time specified in the order.
5. Defendants who fail to appear: If the defendant fails to appear before the court to which the case has been transferred, he shall be liable to forfeiture of his or her bail unless excused by the court. If the court finds that his or her failure to appear was willful, the case shall be sent back to the court from which it was transferred and no further motion for change of venue shall be entertained.

6. Witnesses: Witnesses who have posted bail to appear at trial shall be given notice of the transfer of the proceeding and shall attend the court to which the proceeding is transferred at the time specified in the order of transfer. A failure to attend shall lead to the forfeiture of the bail posted by any such witness.

Note that the prosecutor transferring the case to the attorney in the other county should be careful to provide all of the paperwork, including information pertaining to the victim and the details of the crime. To the extent possible, the victim should not have to retell her story again – or at least the new prosecutor should be very informed about the details of the crime before meeting the victim.

2. REFERRAL OF OFFENSES TO CIRCUIT COURT

Magistrate courts will refer cases that are beyond their jurisdiction to the Circuit Court. The *Criminal Procedure Law and the Sexual Offense Divisions Act* provide the following procedure:

1. After first presentation, Magistrate Courts shall immediately forward case files for sexual offense crimes to the Circuit Court (or if in Montserrado County, to Court E) **within 72 hours of arrest**. (Note that the Magistrate Court no longer conducts preliminary hearings in sexual offense cases. *See Sexual Offense Divisions Act of 2008, s. 25.3.*)
2. The clerk of the magisterial court must forward all the documents, including minutes, writs, motions, bail, evidence, and all other materials connected to the case to the clerk of the Circuit Court and obtain a receipt.
3. The clerk of the Circuit Court will send the case file to the office of the County Attorney for the case to be presented to the Grand Jury for possible indictment.

First Steps

In Montserrado County, the SGBV Prosecutor will handle the case at the Magistrate Court level (for writs of arrest or first presentation) and will follow the case through the Circuit Court. But in other counties, the County Attorney will receive the file for the first time when the case is transferred from the Circuit Court. As soon as the County Attorney receives the file of a sexual offense case, s/he should:

1. Request and review the police file. (If this is not in the court file, contact the police officer who handled the case and request a copy.)
2. Compare the evidence to the charge, and determine whether more investigation is needed. Work with the police to retrieve additional evidence.
3. Contact the witnesses and request a meeting. (*See Phase 4 – Preparing Your Case*)

3. CHARGING

Charging involves deciding whether or not to prosecute a case and which crime(s) to charge. Ultimately this decision will be made based upon the specific facts of each case, including the physical evidence, witness statements, and expert testimony that could be presented to a jury.

You will evaluate the facts and evidence before you against the specific language of a criminal statute to determine if the evidence is sufficient to prove each element of the crime beyond a reasonable doubt. If you determine that the evidence does not support a reasonable belief that the charge can be proven beyond a reasonable doubt, you have a legal and ethical duty to decline to charge the defendant with the crime.

A. PROCEDURE

In Liberia, charging is a multi-step process. The police complete the first step by drafting a charging sheet, which includes the crime(s) charged. Upon review of the evidence, the City Solicitor or SGBV Prosecutor may alter these charges when s/he petitions the court for a writ of arrest.

This Writ of Arrest, issued by the Magistrate, will include the amended charges against the defendant. And when the defendant is brought before the Magistrate for first Presentation, the court will charge him according to the writ.

Formal charging also takes place through the process of indictment. You, the prosecutor, will draft an indictment, which will include all of the crimes charged against the defendant. At this point, you may reconsider what the Charging Sheet or the Writ of Arrest alleges. You may reconsider the evidence before you and determine whether each element of the crimes charged can be proved beyond a reasonable doubt.

Remember that you may charge more than one crime in an indictment. In fact, you should always consider what other crimes may be charged along with the main offense. For example, did the offender kidnap the victim? Did he commit an assault in addition to the rape? Review the elements of crimes in Part I of this handbook. You may charge the offender with another offense so long as each offense has at least one element that the other offense does not have.

In contrast, you may evaluate the evidence and determine that the evidence does not support the crime alleged, but the evidence does support a lesser offense. For example,

consider a case in which the defendant is accused of first degree rape because he allegedly used a weapon. But there is no evidence of a weapon and the victim cannot identify what kind of weapon was used. In this case, you may decide to charge the defendant with second degree rape because you don't believe you will be able to prove the element of "use of a weapon" beyond a reasonable doubt.

The Grand Jury makes the final determination on the charges. They may amend the draft that you have submitted to them, and their formal indictment is final. Once the Grand Jury has issued the indictment, there will be an arraignment in the Circuit Court. At arraignment, the clerk shall read the formal charge to the defendant and call upon him or her to plead thereto. An entry of the arraignment shall be made of record. *See Criminal Procedure Law, s. 16.2. See also Indictment.*

Unfortunately, the Rape Law of 2005, which criminalizes consensual intercourse with a person under the age of 18 by a person over the age of 18, conflicts with the Customary Marriage Law. Section 2.9 of the marriage law provides the age of consent for a legal marriage is 16 years of age. That means that under current law, anyone over 18 who legally marries a 16 or 17 year old woman technically commits rape by marital intercourse.

Prosecutors should therefore exercise discretion when deciding whether to prosecute married individuals for having consensual marital intercourse with a spouse who is 16 or 17.

B. CHARGING JUVENILE OFFENDERS

Special rules govern juvenile cases. As a prosecutor, it is important to understand what you can and cannot charge when a juvenile commits sexual assault or abuse.

a. Legal background

Rape Law. Under current Liberian law, someone under the age of 18 can commit rape (penetration without consent of the victim), but not statutory rape (sex with a minor). *See Act to Amend the New Penal Code Chapter 13, Sections 14.70 and 14.71, and to Provide for Gang Rape (2005).*

Age of Criminal Responsibility. The age of criminal responsibility, however, is 16. No person under the age of 16 may be tried in a criminal proceeding. Instead of criminal proceedings, children aged 16 or below who violate the law can be adjudicated by the Juvenile Court.

But because the juvenile court only has jurisdiction of children over the age of seven, children under seven are not prosecuted for crimes. *See Juvenile Court Procedural Code, s. 11.21.*

b. Implications

Therefore, anyone over the age of 16 may be tried for all sexual offenses except statutory rape. Their age and offense will determine which court hears the case.

Capital offenses

- i. Children aged 16 or 17 who commit a capital offense will be tried by the Circuit Court unless the Circuit Court refers the case back to the Juvenile Court for delinquency proceedings.
- ii. Children aged 7 – 15 who commit a capital offense will be tried for juvenile delinquency before the Juvenile Court

Noncapital offenses

Children aged 7 – 17 who commit a non-capital offense will be tried for juvenile delinquency before the Juvenile Court.

4. INDICTMENT

A. DRAFTING THE INDICTMENT

Once the case has been transferred from the Magistrate Court to the Circuit Court, or if the case first presents at the Circuit Court, the County Attorney (or SGBV Prosecutor if in Montserrado County) will draft an indictment to submit to the Grand Jury. An indictment serves to inform the defendant of the allegations of which he is accused.

An indictment should be detailed, including the facts that establish each one of the elements of each crime. In other words, the indictment should be sufficiently descriptive to allow the defendant to prepare a defense. For example, it is not enough to simply state “the Defendant caused the death of the victim.” Rather, one should state, “The Defendant used a rock to beat the victim behind the head, ultimately causing her death at 9pm on Friday, October 12, 2007.” Note that two or more offenses, and two or more defendants, may be charged in the same indictment.

B. PROCEDURE

Filing. The Prosecutor shall file the indictment in the Circuit Court, along with the names of the witnesses upon whose testimony the indictment is based.

Amendment. The indictment may be amended at any stage of the proceedings with permission from the court. Therefore, if you discover a defect in the indictment once you have already filed it, you may petition the court to amend the document. Similarly, if the judge concludes that the evidence presented does not conform to the allegations made in the indictment, the court may itself direct that the indictment be amended so long as the amendment will not prejudice the defendant.

Requirements for an Indictment

The indictment must be in writing and shall:

- ✓ Name the parties;
- ✓ Name the court in which the case is triable. (*See Jurisdiction and Venue*);
- ✓ State each count or offense that the defendant is alleged to have committed along with the appropriate legal provision;
- ✓ Concisely state the facts of the case, providing the defendant with fair notice of the offense charged; and
- ✓ Names of witnesses upon whose testimony the indictment is based.

SAMPLE INDICTMENT

REPUBLIC OF LIBERIA) IN THE FIRST JUDICIAL CIRCUIT, CRIMINAL ASSIZES “A” FOR
MONTERRADO COUNTY) MONTERRADO COUNTY, SITTING IN ITS FEBRUARY TERM, 2008 AD

BEFORE HIS HONOR: PETER W. GBENEWELLEH ASSIGNED CIRCUIT JUDGE

Republic of Liberia.....Plaintiff) CRIMES:
VERSUS) KIDNAPPING, RAPE,
Leroy Mvamvu.....Defendant) AND AGGRAVATED ASSAULT

INDICTMENT

The Grand Jurors for the County of Monterrado, Republic of Liberia, upon their Oath do hereby present Leroy Mvamvu defendant of the City of Monrovia, County and Republic aforesaid, heretofore, to wit:

COUNT 1

1. On the 12th May, 2007 the accused and the complainant, Sarah Survivor, attended the Magistrate’s court at Firestone for the hearing of a child maintenance complaint and a domestic violence dispute. At the conclusion of the hearing a promissory note was issued against the accused by consent, in which the defendant promised not to come within the vicinity of the complainant.
2. After the hearing, the defendant violated the promissory note, persuading the complainant to travel with him in the same taxi. When she reached her destination, he tried to prevent her from disembarking and begged her to return to his home. She refused and proceeded to get out of the taxi. He also disembarked. She ran away, and he pursued her and caught up with her near a neighbor’s house.
3. The defendant committed aggravated assault in violation of Section 14.21 of the Penal Law of Liberia when the defendant purposefully harmed the complainant by dragging her on the ground. A scuffle ensued, and as he was trying to pull her towards him she clung on to a pole supporting the neighbor’s boundary fence. The

pole gave in and was ripped out of the ground. She then broke away from him and ran into the neighbor's house, where he followed and again accosted her.

COUNT 2

4. The defendant committed the crime of kidnapping in violation of Section 14.50 of the Penal Law of Liberia by unlawfully taking the complainant to his home by force. He kept her there against her will from Wednesday, May 12 until Friday, May 15 with the purpose of terrorizing her and inflicting bodily injury.

COUNT 3

5. During that period he committed rape in violation of Section 14.70 of the Penal Law of Liberia. He knowingly and willfully had sexual intercourse with her without her consent by force on six occasions in violation of Section 14.70 of the Penal Law of Liberia.
6. The complainant managed to escape on Friday 15 May, after the accused had left the house for a short period.

COUNT 4

7. On the 29th May, 2007, the accused visited the complainant at her brother's house armed with a knife. He asked to speak to her but the complainant's brother was only prepared to allow him to do so in his presence in the house. But shortly after the complainant's brother had left the house to get help, the accused forcibly removed the complainant and dragged her into the bush.
8. There, he forced her to have intercourse with him without her consent twice, again committing rape in violation of Section 14.70 of the Penal Law of Liberia.

COUNT 5

9. On this occasion he committed aggravated assault by purposefully hitting the victim twice on her thigh with a stick, causing bodily injury, in violation of Section 14.20 of the Penal Law of Liberia.

And the Grand Jurors aforesaid, upon their Oath aforesaid, do present that: Leroy Mvamvu, defendant aforesaid, at the time, place and dates aforesaid, in the manner and form aforesaid, do say that the Crimes of Aggravated Assault, Kidnapping, and Rape the defendant did so commit, contrary to the form, force and effect or the Statutory Laws of Liberia, in such cases made and provided and against the peace and dignity of this Republic.

Republic of Liberia.....Plaintiff

By & Thru:

Samuel S. Smith, Esq.
County Attorney for Montserrado County, R.L.

Witnesses upon whose testimony this indictment is based:

1. Wanda Witness
2. Sarah Survivor
3. Nephew Witness
4. Brother Witness

5. GRAND JURY

A. PURPOSE

The role of the grand jury is to decide whether there is enough evidence against the defendant to justify a trial. Grand juries examine evidence presented to them by the prosecutor, and where they find that there is probable cause that the defendant committed the crime, they will issue an indictment.

You will bring the draft indictment before the grand jurors, and then present evidence to support the allegations in the indictment. Note that while you, the prosecutor, may draft the indictment, the final indictment will be determined by the Grand Jury.

B. PROCEDURE

On the opening day of court, the judge of the Circuit Court will designate fifteen of the venire of jurors to serve on the grand jury. The grand jury will be available throughout the term when the Court is in session. *See Criminal Procedure Law, s. 22.5.*

Emergent grand jury. If the grand jury is not available, or if Court is not in session, the prosecutor may make a special application to request that the Court appoint an emergent grand jury to protect the public interest. Note that if a high profile or urgent sexual offense case arises and the court is not in session, you may want to petition the court to appoint an emergent grand jury.

Grand Jury Proceedings:

1. **Charging the Grand Jury with Responsibility.** At an initial charging, the parties will gather in the courtroom. Here, the judge explains the duties of the Grand Jury, the Clerk administers the oath, and the Court appoints a foreman for the jury.
2. **Presentation of Evidence.** You, the prosecutor, and the grand jurors retire to a private room. (Note that neither the defendant nor the defense attorney has the right to attend these grand jury proceedings). The grand jurors appoint a clerk to take minutes of the proceedings and summarize the evidence presented. And then you, the prosecutor, present the evidence and answer any

questions from the grand jury about the legal elements of a crime. Where appropriate, you may call witnesses to testify, and you may introduce physical evidence related to the crime.

3. **Deliberations.** You will then leave the room, and the grand jurors will deliberate. To indict the defendant, at least twelve of the fifteen grand jurors must vote in favor of indictment.
4. **Indictment.** Upon finding of probable cause, you and the foreman will sign the indictment. Then you will file the indictment with the Clerk of the Court. If the grand jury does not find probable cause, the foreman will report to court that the investigation is incomplete.
5. **Serving the indictment.** The indictment must be served on the defendant as soon as possible.

Understanding Standards of Proof

| | |
|--------------------------|---------------------------------|
| Writ of Arrest: | Probable Cause |
| Preliminary Examination: | Probable Cause |
| Grand Jury Indictment: | Probable Cause |
| Jury Verdict: | Guilt beyond a reasonable doubt |

PROBABLE CAUSE: a reasonable belief that a person has committed a crime

GUILT BEYOND A REASONABLE DOUBT: being convinced to a moral certainty that a person has committed the crime

*Where the burden is probable cause, it might not be necessary to call the victim to testify. Because testifying is traumatic for a victim, try to limit the number of times s/he testifies.

6. ARRAIGNMENT AND PLEAS

Once the grand jury has issued an indictment and the defendant has been served, s/he will be called before the Court for arraignment. The Clerk of the Court will read out the formal charges, and the defendant will be asked to plead.

A defendant may plead guilty or not guilty, and the court may accept a guilty plea for any offense other than a capital offense. Before accepting the plea, the judge must address the defendant personally and make appropriate inquiries to satisfy judge that:

1. The defendant in fact committed the crime charged;
2. The defendant has plead guilty voluntarily and with understanding of the nature of the charge; and
3. If a defendant refuses to accept a guilty plea, the court shall enter a plea of not guilty.

If the defendant pleads guilty, the Court will impose a sentence immediately. If the defendant pleads not guilty, then the case will proceed to trial, and you will need to prepare your case. The following section provides detailed instructions and strategy on how to prepare for trial.

Note that the case proceeds rather quickly after arraignment, and you must be prepared to move forward. Within five days of the arraignment, you must provide the Court and the Defendant with a list of witnesses and their addresses. (*See Criminal Procedure Law, s. 4.1*). If the case is handled by the SGBV Unit, the unit investigator should provide assistance to locate witnesses.

7. FEES AND COSTS

There are absolutely no fees in a criminal proceeding. *See Judiciary Law, s. 3.14* (fees only payable in civil cases).

That means:

1. The victim shall not be asked to pay a fee to obtain his or her medical records from the clinic. These should be provided free of charge.
2. The victim is not required to provide any fees to the police to arrest the offender.
3. The victim shall never be asked to pay the Magistrate to get a Writ of Arrest.
4. The victim shall never be asked to pay the sheriff a fee to arrest the offender.
5. The victim shall not be asked to pay for the prosecution to subpoena any witnesses, nor for their accommodation during trial. Note that under §17.3 Crim. Proc. Law, the Republic shall cover the cost of travel and witness fees for any witnesses who are required to travel to testify.

Beware: if an officer of the court requests that the victim provide a fee, that officer may be committing a criminal offense. *See Chapter 1: Overview of Criminal Justice System Response to GBV – Inappropriate Approaches to Cases.*

PHASE 4 – PREPARING YOUR CASE

1. EVALUATING THE CASE AND GATHERING EVIDENCE

A. FIRST EVALUATION

There are several ways that a sexual offense case may come before you. The police may (and should) call you immediately when the victim or his or her family reports the incident, the victim may come directly to your office, or you may receive the case when it is forwarded to the Circuit Court from the Magistrate Court.

If the victim comes directly to you

You may be the first person that s/he has told about the incident. As this handbook discusses in *Phase 1—Reporting*, it is crucial that s/he go to a health clinic as soon as possible (within 72 hours for effective treatment and best evidence). You should keep a short list of referral phone numbers in your office, and you should refer him or her to a psycho-social counselor or a medical clinic. Always present the victim with his or her legal options. Describe the legal process of prosecuting such an offense, and explain that if s/he chooses to make a formal complaint, s/he will be called to testify about the offense at trial. This decision of whether or not to go forward with the case is uniquely hers to make.

If the victim decides to make a formal complaint and s/he has not yet been to the police, you should call the Women and Children Protection Unit. If there is a private place in your office, have the officer come to you to conduct an initial interview. The police are responsible for taking the victim's statement, investigating the case and making an arrest (with a warrant) if necessary. (*See supra, Phase 2*). It is a best practice for the police and the prosecution to conduct this interview together. This section will include best practices for conducting a victim interview. (*See, infra, Interviewing the Victim*)

Whether to prosecute

Prosecution is discretionary and at every point in a case, you will decide whether you have enough evidence to go ahead with the case. If there is enough evidence to establish probable cause, then you may present the case in a preliminary hearing or to the grand jury. And when there is enough evidence to establish proof beyond a reasonable doubt, then you may present the full case before a jury. If at any point, however, you do not have enough evidence to go forward, then you must drop the case and release the accused. If this is the case, explain to the victim (with the assistance of a psycho-social counselor if one is available) why the state cannot continue with the prosecution. Or you may find that the state has enough evidence to prosecute one of the crimes accused but not another. In this case, the state may drop one of the charges and pursue the other. *See also Phase 3: Bringing the Case to Court – Charging.*

Statute of Limitations

Prosecutors should pay special attention to the statute of limitations, the timeframe in which the state is required to prosecute an offense. For capital offenses (including first degree rape), there is no statute of limitations, and a person can be prosecuted at any time. But for felonies (including second degree rape), the statute of limitations is five years after the date of the offense. And for misdemeanors, the statute of limitations is three years after the date of the offense. *See Criminal Procedure Law, s. 4.1-2.*

Timing of prosecution

There is also a statutory time frame in which you must indict and prosecute an offense. Under the *Criminal Procedure Law*, unless good cause is shown, a court shall dismiss a complaint against a defendant who is not indicted by the end of the next succeeding term after his or her arrest for an indictable offense. Similarly, unless good cause is shown, the court shall dismiss an indictment if the defendant is not tried during the next succeeding term after the finding of the indictment. **As a practical matter, this means that you must indict during the first term after the arrest, and you must try the case during the second term.** Otherwise, the accused should be released. Note that the prosecution may be permitted to show good cause why a defendant should not be released after the stated number of court terms. *Criminal Procedure Law, s. 18.2.*

A County Attorney may have more cases on the docket than they can prosecute during a single term. Remember that the Ministry of Justice has prioritized sexual offenses over others. Wherever possible, the County Attorney should try these cases.

Next Steps

To prepare your case, you will need to:

- ✓ Research statutes and the elements of the crimes you will need to prove (*See Part I of this handbook*)
- ✓ Compare the evidence to the elements of the offense that must be proven.
- ✓ Then identify areas for further investigation and work with the police to develop the evidence
- ✓ Interview witnesses, including medical professionals who treated the victim
- ✓ Interview the victim
- ✓ Talk with defense counsel
- ✓ Prepare subpoenas and pretrial motions if necessary
- ✓ Review rules of evidence
- ✓ Create a trial notebook

The rest of this section will provide guidance for this phase of preparation.

B. GATHERING EVIDENCE

I. CREATING A LITIGATION CHART

As soon as you receive the file of the case, you should create a chart to help you assess the evidence that you will need to prove the elements of the crime(s) charged against the defendant. Note that you will have to prove each element of the crime beyond a reasonable doubt. See Kroma v. Republic, 32 LLR 198, 206 (1984) (Judgment of conviction must be supported by proof beyond a reasonable doubt of all the elements of a crime charged).

As you look through the documents before you, you can add to the chart, checking off those sources that are complete in the file. The chart will also provide guidance for your interviews with witnesses. Here is an example of a chart for a first degree rape where the rape resulted in serious bodily injury and the offender used a weapon:

| Elements of Offense | Sources of Proof | Informal Investigation |
|----------------------------------|--|--|
| Perpetrator | Victim testimony Police report | Interview Request letter / call |
| Sexual intercourse | Victim testimony Medical report Nurse testimony Defendant statement | Interview Victim or subpoena Interview Request - police |
| Without consent of victim | Victim testimony Neighbour testimony | Interview Interview |
| Serious bodily injury | Medical report Nurse testimony Photographs | Victim or subpoena Interview Request police / clinic |
| Use of a weapon | Victim testimony Medical report Police Report | Interview Victim or subpoena Request – police |

II. READING AND MAINTAINING A FILE

Next you will check your file and gather all the current evidence in the case. As you go through the evidence, you will add to your litigation chart. If possible, review all of these documents before you interview the victim. The more you know about the case before you meet victim, the more confident you will feel about asking only necessary questions.

The Initial File

Depending on when you receive the case, the following documents should already be in the file you receive:

- ✓ Police file:
 - Police Report
 - Statements – complainant, accused, other witnesses
 - Charging Sheet
 - Copies of any documents and evidence
- ✓ Writ of arrest
- ✓ Medical Report Form (If the medical information is not in the file, you may ask the victim for it. *See Evidence from the Health Clinic for procedures pertaining to the Medical Report Form*)

These documents are crucial to the case. If one of them is not in the file, it is important to obtain it as soon as possible.

Building and Organizing Your File

Throughout the case, it is important to maintain a good file with every document and your own notes. The following organization is recommended:

1. Court documents
 - a. Pleadings
 - b. Discovery
 - c. Motions
 - d. Orders
 - e. Warrants
 - f. Indictment
 - g. Subpoenas
2. Prosecutor records
 - a. List of witnesses and contact information
 - b. Chronological log of activity
 - c. Notes of interviews
 - d. Correspondence
 - e. Legal research
 - f. Miscellaneous
3. Evidence
 - a. Statements
 - b. Police report
 - c. Medical Report Form
 - d. Photographs, diagrams, maps, and charts

Remember that as you are building your file and your case, you will continue to fill out your master litigation chart. Always identify the weakest areas of the case for further investigation.

III. CONTACT LIST

Maintain a contact list for each case, including the following:

- a. Victim
- b. Investigating Police Officer
- c. Counselor / Victim Advocate (if NGO or civil society involved)
- d. Witnesses
- e. Health professional

One of the most challenging aspects of prosecuting cases is keeping track of contacts and witnesses. If you have all of this information at your fingertips, it will be easier to keep in touch with the witnesses throughout the case. A sample contact list is included here for your reference. For confidentiality reasons in a sexual assault case, note that it is marked “CONFIDENTIAL” and should be kept in a secure location.

Ministry of Justice – CONFIDENTIAL

| Name | Role (victim, counsellor, doctor, witness) | Telephone number (safe to call?) | Address / Location (attach map / diagram) | Contact log |
|---------------|--|--|--|---|
| Sarah Sirleaf | Investigating Police Officer | 06 894 578 | WACPS, LNP | 9/1/08 (for further investigation – search warrant) 10/1/08 (notification of next hearing) |
| Sarah Victim | Victim | 06 890 090 (safe to call but sister’s phone) | Map attached for location | 9/15/08 – initial interview |
| | | | | |
| | | | | |

IV. INFORMAL FACT INVESTIGATION

No matter how complete the police investigation may have been, you will always need more information than what you find in the file. It is crucial to gather as many facts as possible as early as possible.

As you go through the file and complete the litigation chart, identify areas where you need additional information. If you have lingering factual questions, you will need to identify the source of the fact you are missing. In other words, who or what would answer your question? Facts may come from five sources:

- a. Victim
- b. Witnesses
- c. Exhibits
- d. Experts
- e. Defendant

The most important source of information in a sexual assault or abuse case will be the victim. Unlike in other types of crimes or legal cases, however, you will want to limit your fact-inquiry with this key witness because your inquiry can be very traumatic. The next section will provide more guidance for interviewing victims, but it is important to gather as much information as possible from other sources.

To fill in the holes in a case, you should:

1. **Meet with the police officer.** Your first step should be a meeting with the police officer who investigated the offense. The officer may be able to answer your initial questions about the case, and s/he may have information not included in the file. If there is additional evidence that you need to acquire, you can use this meeting to initiate further investigation.
2. **Visit the crime scene.** The officer may be willing to go with you to the crime scene and show you what they discovered when they did their initial investigation. Ask where exactly the offense took place? Where was the victim, and where was the perpetrator? Were there any bystanders? Did anyone hear them? What exactly happened after the offense? Did the perpetrator flee? Did the victim tell anyone? Who did s/he approach and

where did s/he go? Did s/he change clothes? Is there any evidence that the police took from the scene? Did they take any photos or make any diagrams? All of this information should be in the police report, but the officer may give a more complete picture than the report.

3. **Identify and Interview witnesses.** The police should also be able to help you identify and locate any witnesses. Organize interviews in a private place, where the witness will be most likely to feel comfortable and tell the truth. Much of the advice about interviewing victims in the next section applies here as well. Before the interview, identify information that you need the witness to corroborate or new information that the witness might be able to share.

Typical witnesses in a sexual offense case include:

- i. Victim
 - ii. Investigating police officer
 - iii. Neighbors who heard or saw the crime or suspicious activity
 - iv. Health professional (nurse, midwife, doctor, or physician's assistant who treated the victim)
 - v. Psycho-social counselor
 - vi. Family-member or friend
4. **Acquire Exhibits.** In addition to obtaining all of the available documents and records from the police or court, you should also be gathering physical evidence. Do the police or the victim still have the undergarments that the victim was wearing? It is important to obtain physical evidence as early as possible to prevent tampering and to maintain the chain of custody. (For evidentiary rules on tangible evidence, *see Phase 5: Trial – Evidence.*)

To preserve physical evidence, the prosecution or the police should:

- i. **Take actual physical possession** so that it is kept in the same condition until trial. (if possible, the evidence should be kept in a sealed container); and
- ii. **Label the evidence** with the name of the defendant, description of the object, and a note on how and when it was obtained.

- iii. Keep a master exhibit log throughout the pre-trial process so that you know exactly where each piece is, when you received it, and where it has been kept.

SAMPLE EXHIBIT LOG

Republic of Liberia v. _____ Judge: _____

County Attorney: _____ Date: _____

| Item | Description | Date Received | Received from (+ contact info) | Stored | Offered into evidence | Accepted / Rejected | Trial Exhibit # |
|------|-------------|---------------|--------------------------------|--------|-----------------------|---------------------|-----------------|
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
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2. MEDICAL EVIDENCE

During your fact gathering, you will want to talk to the health clinic that treated the victim. As this section will illustrate, information from the clinic can be very helpful in a case. It is important, however, to understand i) the legal limitations to obtaining this information and ii) the legal limitations of medical evidence as proof in a sexual offense case.

A. ROLE OF HEALTH PROFESSIONALS IN PROSECUTION

Primary Role. The primary role of a health professional is to provide the victim with the medical help s/he needs, including testing and treatment for sexually transmitted infections, HIV/AIDS, or pregnancy.

Legal Role. Medical professionals, however, can also play an important role in the prosecution of a GBV case. Doctors, nurses, or physicians assistants can:

- i. Document the survivor/victim's injuries in a Medical Report Form, diagrams, or photographs.
- ii. With the consent of the survivor/victim or guardian, provide information to the police or prosecution about the survivor/victim's condition and treatment.
- iii. Gather physical evidence; and
- iv. Testify at trial through deposition or oral testimony.

B. MEDICAL PRIVILEGE AND CONSENT

The privacy of the victim must always be protected. When it comes to medical professionals, however, confidentiality is not just a best practice, it is a legal requirement. Health information is sensitive material, and the health records of a patient are privileged information. That means that a doctor or health clinic legally cannot provide any information or written documents to anyone, including the police or prosecutors, without the patient's written consent. Note that the victim may choose to report the crime to the police, and yet s/he may choose not to disclose his or her health records or health information. This is his or her choice.

Consent. To get the consent of the survivor/victim or guardian to provide medical information – including medical records, the Medical Report Form, or general information – to law enforcement, the health clinic, police officers, or prosecutors shall use the MoJ Consent for Release of Health Information Form.

C. INTERVIEWING HEALTH PROVIDERS

If you have obtained the consent of the victim, you should make an appointment to meet with the health provider who treated the victim. Again, prepare for this interview by reviewing the evidence and identifying what facts you need to obtain or corroborate. Remember to ask if they performed a rape kit or obtained any physical evidence during their examination. Work with the health providers over time to develop sound practices to obtain and preserve this evidence.

Remember that these providers are busy treating patients, so do everything possible to alleviate the stress and frustration involved in testifying and participating in the investigation. Wherever possible, go to the clinic rather than having the doctor come to you. If you have more than one case at a time with the same clinic, you may want to set up some case review meetings where you go through more than one case at a time.

D. THE MEDICAL REPORT FORM

The Medical Report Form is a standard form issued by the Ministry of Health to document a victim's injuries and treatment. With the survivor's consent, this form may be a key exhibit at trial, and the medical practitioner, or a representative, may be called to testify to its content. This section provides some legal guidance for the form and its use in the legal process:

Completing the Form

- i. **Who.** The form may be completed by a doctor, nurse, midwife, or physician's assistant who treats the survivor/victim.
- ii. **When.** When a patient or family member of a minor states that the patient has been sexually violated, the health professional shall complete the Medical Report Form. The nurse or doctor need not determine whether or not a sexual assault took place before s/he decides to fill out the form.

Confidentiality

- i. The Medical Report Form, like all health records, is confidential. A health professional shall not release the form to a third party without the written consent of the survivor/victim or guardian.
- ii. If the health professional does not have the consent of the survivor/victim or guardian and is subpoenaed by the court, s/he shall appear before the court and assert the confidentiality of medical records. If the judge rules against the health professional and orders production of the records, then s/he must produce the records.

Obtaining the form

- i. **Survivor/victim:** The health clinic shall provide a copy of the form to the survivor/victim without charge. If the clinic does not have a copy machine, the health professional should make two originals and give one copy to the survivor/victim.
- ii. **Third parties:** The health clinic shall not release medical records to police, prosecutor, or other individual without the survivor/victim or guardian's written consent or a court order. To obtain a copy, the police or prosecutor may i) ask the survivor/victim or guardian to photocopy his or her copy, or ii) obtain the survivor/victim's written consent in the MoJ Consent for Release of Health Information Form and present the signed consent form to the clinic.

Maintaining confidential records

Once law enforcement has possession of the Medical Report Form, or other private health information or evidence, law enforcement shall:

- i. Keep this evidence in a secured area such as a locked drawer, file box, or cabinet
- ii. Never leave medical files unattended in the office or at court
- iii. Never share health information of a survivor/victim unless absolutely necessary for prosecution.

E. LIMITATIONS OF MEDICAL EVIDENCE: ABSENCE OF A CLEAR DETERMINATION

Lack of medical report or lack of injury

In most sexual assaults, there is no medical evidence or visible injury. Law enforcement should therefore continue to investigate sexual assault or abuse even where there is no medical evidence, no medical report, or the medical report does not describe an injury. In these cases, the prosecution should continue to prosecute so long as sufficient non-medical evidence supports the allegation of sexual assault.

Testimony of the health professional

Remember that a health professional is not a forensic specialist. His or her role is primarily to examine and treat the survivor/victim. Based on his or her examination, s/he may not be able to determine whether or not a sexual assault took place. The medical report form, which is included here, allows the medical professional to document the injuries they saw and the treatment that they provided. The medical professional should never be pressured to state whether a rape did or did not occur, as that determination may not be possible. It is up to you as the prosecutor to explain to the jury, with the help of the medical professional, that the absence of injury or semen is not indicative of whether the patient was assaulted.

Hymens and virginity

A medical examination may determine if the victim's hymen is broken, but this information is not necessarily conclusive. Here's what it means:

- i. If the victim's hymen is not broken, she has not been penetrated vaginally. She may, however, have been assaulted in other ways.
- ii. If the hymen *is* broken, it is impossible to conclude whether or not the victim is a virgin. A broken hymen does not necessarily mean that she has been penetrated, either by rape or by consensual sex. Her hymen may have naturally broken by one of several other means.

While medical evidence is helpful for a sexual offense prosecution, it is not necessary. It is the victim's choice to seek medical attention and to consent to the use of her medical information in a criminal proceeding. Law enforcement should continue the investigation with or without medical evidence.

F. GUIDELINES FOR MAINTAINING PHYSICAL MEDICAL EVIDENCE

Physical Medical Evidence

In a GBV case, health practitioners may assist law enforcement by gathering physical evidence, including:

- i. Photos of the survivor/victim (genital photos shall only be taken by a health practitioner);
- ii. Clothing worn by the survivor/victim at the time of the crime, including undergarments; and
- iii. Blood, semen, or other substance on the survivor/victim's person

Storing evidence

Evidence gathered by the health clinic shall be:

- i. Placed in secure, sealed containers to prevent tampering;
- ii. Marked with the name of the survivor/victim, date of examination, and the name of the health practitioner who took the evidence; and
- iii. Stored in a secured location.

Release of physical evidence

- i. Like medical records, physical evidence shall not be released to law enforcement without the written consent of the survivor/victim or guardian by a signed MoJ Release of Health Information Form or a court order.
- ii. With signed consent or a court order, the clinic shall release the evidence to law enforcement or to the court. The clinic shall keep a record of the date and the name of the officer to whom the evidence was released.



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CONSENT FOR RELEASE OF HEALTH INFORMATION

To the person completing this form:

Read the entire form to the survivor. Explain that health records are confidential and only the patient may grant permission to a health clinic to release the records. The survivor may choose to release her records to the police, city solicitor, or county attorney to provide evidence for the prosecution.

Obtain the signature or “X mark” of a survivor/patient or a guardian if the survivor is under the age of 18. Gaining consent is mandatory before seeking to obtain or sharing any information. Please note that if consent is not given, no identifying information (name, contact details) may be disclosed.

Survivor (or parent or guardian of survivor under the age of 18):

I, _____, give my permission for the information shared regarding the incident described in this Medical Report Form, as well as other information regarding medical treatment to be forwarded

FROM: Health Clinic

TO: Police / Prosecution

for the purpose of investigating and prosecuting this offense.

I understand that permission is needed in order for legal officers to access this information. The information will be treated with confidentiality and respect, and shared only as needed to prosecute the offender.

I am aware that providing this information is not a guarantee that the case will be prosecuted or that a conviction will be achieved, but I have been informed that everything possible will be done to promote justice.

Signature or X mark: _____

Witness (for X mark): _____

Date _____

Ministry of Health and Social Welfare

Government of Liberia

MEDICAL REPORT FORM

THIS FORM IS TO BE PROVIDED FREE OF CHARGE TO THE PATIENT

Instructions for completion: This medical report has been specifically designed for reporting on the results of a medical examination following a complaint of sexual violence or abuse and is to be completed by the examining medical doctor, physician's assistant, registered nurse, certified nurse midwife or certified midwife. Please print legibly.

Section 1. Patient Information

Name: First _____ Last _____

Date of Birth: Month _____ Day _____ Year _____ Age _____

Town/Village and County of Residence _____

Name of Accompanying Individual _____

Relationship to Patient _____

Section 2. Examiner Information

Name: First _____ Last _____

Title/Position (check one):

Medical Doctor Physician's Assistant Registered Nurse

Certified Nurse Midwife Certified Midwife

Registration Number: _____ Type of Registration: _____

Date of Registration: _____ Expiration Date: _____

Date of Examination: _____ Place of Examination: _____

Section 4. Patient's Description of Violence Used by Perpetrator

| Type of violence | Yes | No | Description of type of violence used and area of body where applied, for example: <i>Hit with fist on head and face.</i> |
|-------------------------------|-----|----|--|
| Intimidation or threats | | | |
| Physical violence | | | |
| Restraints | | | |
| Weapons used or threatened | | | |
| Drugs or alcohol administered | | | |

Number of Assailants _____

Ejaculation: Yes No Not sure

If yes, location of ejaculation: vagina rectum mouth other location specify:

Section 5. Patient's Description of Penetration

| Penetration by | Yes | No | Not Sure | Description of penetration including what part of patient's body was penetrated |
|----------------|-----|----|----------|---|
| Penis | | | | |
| Finger | | | | |
| Object | | | | |
| Condom used | | | | |

Section 6. Forensic Evidence Collection

Complete the following section if patient arrives for treatment within 72 hours of incident and forensic evidence is collected.

Rape kit administered: Yes No

| After incident, did patient | Yes | No | | Yes | No |
|-----------------------------|-----|----|--|-----|----|
| Vomit? | | | Change clothes? | | |
| Urinate? | | | Wash, shower or bathe? | | |
| Defecate? | | | Use a pad or tampon? | | |
| Rinse mouth? | | | Engage in consensual sexual intercourse? | | |

Prior to incident, when was the last time patient engaged in sexual intercourse?

Are there any medical complaints related to the incident? If so, describe:

Section 7. Medical Examination

| | | | |
|---|---------|--------------|-------|
| • Height: | Weight: | Leave blank | |
| • Pulse: | BP: | Resp. rate: | Temp: |
| • Head & Face | | Mouth & Nose | |
| • Eyes & Ears | | Neck | |
| • Chest | | Back | |
| • Abdomen | | Buttocks | |
| • Arms & Hands | | Legs & Feet | |
| Appearance (state of clothing, hair, etc.) | | | |
| Mental Status (as observed by examiner i.e. crying, calm, agitated, etc.) | | | |

Section 8. Genital Examination

Date of last menstrual period: _____

Menstruating at time of incident: Yes No

| | |
|--------------------------------------|------------------------------------|
| Vulva/Scrotum | Introitus/Hymen |
| Anus/Rectum | Vagina/Penis |
| Cervix (Speculum examination) | Bimanual Pelvic Examination |

3. INTERVIEWING VICTIMS OF SEXUAL VIOLENCE

Once you have familiarized yourself with the documents in the file, including the victim's statement to the police if s/he has already made a complaint, you should make an appointment with the victim for an interview. This section provides guidance for this very delicate interview process.

A. PREPARE YOURSELF FOR THE INTERVIEW

Get to know the provisions of the law and best practices before the interview.

Make a directory with local resources where you could seek support for the care of the victim. Include contact information for NGOs who specialize in GBV and interviewing children and adult victims of sex crimes. Their social workers may be willing to support you in the interview process.

Review your litigation chart and other documents and determine what you need to ask the victim. You can divide the existing information into three categories:

- a. Information that needs to be confirmed
- b. Information that has already been corroborated
- c. Information that you think the victim is likely to have but you do not know the exact details

B. ORGANIZE A TEAM TO INTERVIEW

Best Practice: Police, Prosecutor, and Victim Advocate

If at all possible, the police and the prosecution should conduct an interview together. Having both the police and prosecution present for the initial interview will limit the trauma of the victim because s/he will only have to tell his or her story once.

In addition, the victim should have a counselor present, who will provide support as s/he goes through the trauma of recounting the violation. If the victim has already been working with a psycho-social counselor, the victim may wish to have that counselor with him or her for the interview. If the SGBV Unit is prosecuting the offense, the Victim

Advocate could serve this role. The Victim Advocate will provide support throughout the legal process, including explaining legal issues, helping to prepare the victim for the trial, and advising him or her of the progress of the case. This team should meet before the interview to acquaint themselves with each other and with existing information about the case.

Victim interviews should be as minimal as possible. Only one person should be interviewing the victim at all times. Identify the individual who will lead the interview ahead of time. And once the leader has finished asking questions, the others can follow up with any additional questions.

Minimum Standard: a Trained, Prepared Prosecutor

A County Attorney will likely get the file of a sexual offense case long after the police have interviewed the victim. In fact, the City Solicitor may have also interviewed the victim as s/he was preparing a writ of arrest or other preliminary matters in Magistrate Court. So you may be the third or the fourth law officer interacting with the victim. If this is the case, it is even more important to be prepared for the interview. Review the notes from these previous interviews in the file. And then only ask necessary questions to fill in the gaps.

C. PREPARE THE VICTIM FOR THE INTERVIEW

Explaining the victim's role in the legal process

A victim is most likely not familiar with the legal system. By the time you meet with him or her, s/he may already be frustrated by how many individuals have asked very personal questions. It is therefore important to patiently explain why s/he has been called for the interview.

Remember that the legal process can be emotionally, physically, and financially taxing for victims. Impress upon them the importance of their statements and the benefits others may gain as a result of their courage. They can help the state ensure that the person who committed this crime is brought to justice. Let them know that they are not 'taking revenge' but that the government prosecutes crimes to protect its citizens from harm. They are providing assistance because they were a witness (and a victim) of a crime

against the state. Remind and reassure them that they are not accused of having committed a crime themselves.

Preparing for the interview

Reassure him or her that s/he will have full control of the interview process. Before you begin the interview, introduce him or her to each person who will be present during the interview. Tell him or her that s/he may bring a counselor or a family member with him or her - a person whom s/he trusts to support him or her during the interview process.

Explaining what happens next

Explain to him or her that s/he will be asked to appear before a court to repeat what s/he says here. Let him or her know that there may be a considerable period of time between the present statement and the court appearance.

Explain the process and rationale of direct and cross examination. Let him or her know that the people who are accused of the crime will have access to his or her statement and may ask questions about what s/he has said in court.

Explaining defenses

Sometimes, a witness, and particularly a victim of a crime, can feel that s/he is on trial when s/he testifies. Defense counsel will try to challenge the victim's version of events and undermine his or her credibility.

Take time with the victim in advance to explain that the legal process allows the defendant to present a defense and often that process can be uncomfortable for a victim. For example, the defendant in a rape case may argue that the victim consented to sexual intercourse. The defense may point to the previous sexual relationship of the parties or to the behavior of the victim before or after the offense to prove that s/he had indeed wanted to have sexual intercourse with the defendant. Questions about what s/he said, what s/he was wearing, what his or her body language was like can be extremely intrusive for a victim and indeed is not permitted in many countries. But depending on the judge, this testimony may be tolerated to the extent that it is relevant to establishing or challenging consent, a crucial element of the crime of rape.

Note, however, that while the “promiscuity” of the victim was an affirmative defense in Liberia, that provision was repealed in the Rape Law of 2005. *See Act to Amend the New Penal Code Chapter 13, Sections 14.70 and 14.71, and to Provide for Gang Rape (2005), s. 5(b).*

Alternatively, the defendant may argue that there was no penetration, and therefore no crime of rape. Or in certain scenarios, the defendant might argue that the victim was or is mistaken as to the defendant’s identity. Explain to the victim that she can help the prosecution prepare for the defense by sharing details of the crime in this interview. Can s/he think of any defenses that s/he believes that the defendant will raise?

D. CHOOSE AN APPROPRIATE PLACE FOR THE INTERVIEW

Ideally the interview should take place in a neutral environment, where the victim feels safe and comfortable. The interview location should:

- a. Not be in a custodial environment (such as an interrogation room at a police office or a prison);
- b. Not be a place where the perpetrator has access to the victim;
- c. Not be used for other purposes during the course of the interview; AND
- d. Not allow access other than to those directly responsible for the interview

E. CONDUCTING THE INTERVIEW

GENERAL GUIDELINES

1. Don’t judge the victim.

All of us are judgmental from time to time. Adult victims of sex crimes are often considered to have participated in the activity, and some of us may think that we would never have “put ourselves” in that position. Since sex crimes revolve around the aspect of consent and/or the lack of consent, it is important for the prosecutor to refrain from forming judgments.

The prosecution should be aware, however, of standard defenses that often arise in sexual offense cases, whether or not they are legal arguments in a court of law:

- ✚ She likes it.
- ✚ She wanted it; she was just being coy.
- ✚ She is characterless and she deserves what happened to her.
- ✚ She could have stopped these people from harming her if she wanted to.
- ✚ She could have run away.
- ✚ All of them are a part of the gang.
- ✚ She is used to lying.
- ✚ She is habituated to sex.
- ✚ She comes from a bad family.

2. Listen to the victim

You should listen intently to the victim. Here are some tips of what not to do while you are listening:

- a. **Do not keep on speaking while you are trying listen:** If you do not give space or time to the victim when you are interviewing and you keep asking questions and answering them yourself or narrating your own experiences it becomes difficult for the victim to say what s/he wants to. Allow silence in the conversation for the victim to compose their thoughts.
- b. **Do not be inflexible:** While it is important to know what topics you need to cover, you do not have to go sequentially through a structured form. Allow the victim to take the lead in what they want to say. Follow him or her and explore what s/he is saying as you would in any conversation. If there are things that are left out of what you wanted to explore you can always come back to it. The best way to learn and document the case of the victim will be through an unstructured interview with a very few clarifying questions.
- c. **Do not be straight faced:** Listening without reacting and showing any emotions is not helpful when you are listening to a victim of a sex crime. However, in your response be sure that you are not suggesting or directing the victim to a particular statement. The challenge is to respond to the pain and

anguish by validating it and yet refrain from guiding the victim about what s/he should say.

- d. **Do not become over emotional in your response:** Sometimes the story told by the victim during the course of the interview may make you angry or frustrated. It is important to recognize this response early and take a break in the interview at that point and refrain yourself from expressing the response in front of the victim.
- e. **Do not make promises that you cannot keep:** The victim may seek reassurances from you that you cannot provide. For example the victim might want you to promise that you will not share some parts of what s/he tells with anyone. It will be difficult to make a commitment to that effect. It is best to be transparent and say that you understand his or her anxiety and whatever s/he gives as a statement will only be available to those who are legally required to have access to it.

Moreover, never promise that there will be justice for the crime committed – despite your best intentions, you may not be able to secure a conviction in this case, often for reasons outside of your control.

- f. **Do not get into a mental argument with the victim:** If the victim says something that you think is not true or which contradicts what you already know, make a mental note of it, and come back to it when you are clarifying the details of his or her story. His or her statement may not actually be a lie, but rather a misunderstanding of legal terms and meanings. Do not get into an argument with him or her even in your mind. Such a mental argument will prevent you from listening carefully to what s/he subsequently tells you.

3. **Advise the victim about the statement that s/he may have to make before the jury.**

Example

You: Till now you have shared with me how badly the people whom you lived with have behaved with you. I have to talk to you about what will happen in the court tomorrow. So, can I briefly remind myself about what you have told me about the behavior and then we talk about the court? We can talk about the policeman's behavior again if you wish to, either later today or tomorrow.

4. **Be careful to make sure that s/he understands your language.** You may realize late in the interview that the silence that you attributed to the victim being sad is actually due to the victim not knowing what was being said.

UNDERSTANDING VICTIMS' CHALLENGES

It is important to keep in mind that the victim might have multiple problems. Often, perpetrators choose victims who are already vulnerable. And victims might be anxious about expressing these problems. Victims often face some of the following challenges:

- a. Difficulties in making a choice about being a witness
- b. Relationship difficulties at the protection or shelter home
- c. Reliving the past
- d. Feeling low about themselves
- e. Being very anxious about the future
- f. Being aggressive
- g. Being isolated
- h. Being unable to control their anger
- i. Being unable to express their needs
- j. Being unable to plan a future
- k. Having negative thoughts and feelings about themselves and their future
- l. Trying to please everyone
- m. Not being able to say 'no'
- n. Being addicted to tobacco, and/or alcohol, and/or drugs
- o. Living with HIV/AIDS

BLOCKING

Victims may impede the interview by making “blocking” statements. A victim may block because talking about the issue is difficult for them or they feel threatened. A few examples of possible blocking questions and statements include:

- a. “It’s a secret”
- b. “I can’t tell you”
- c. “What else could I have done?”
- d. “I did not do anything”
- e. “He said I’ll go to prison”
- f. “Can I live with you?”
- g. “No one in family will talk to me if I talk to you”
- h. “Promise you won’t tell anyone else?”
- i. “Will you look after me now?”

It is best to acknowledge these statements. Unless you respond to their satisfaction, the victim may repeat the statements over and over again.

Note that you should take any statement by a victim that s/he wants to hurt herself very seriously. Most people who want to hurt themselves do so. At some point, they may have shared their intent with someone they trust. Consult your contact list of resources in the area, and refer the victim to a psycho-social counselor. Ask for the victim’s consent to call the counselor on their behalf and try to arrange a meeting as soon as possible.

If the victim starts crying or becomes silent you could try the following strategies to help the situation. If the victim does not respond to these techniques, it may be appropriate to take a break and discuss as a team what needs to be done to help the victim to continue with the interview process.

If the victim is silent:

- a. If you are meeting him or her for the first time:
 - i. Introduce yourself and your role.
 - ii. Give him or her space to say something.
 - iii. If s/he still does not speak, repeat the information in different words. If s/he still does not talk:
- b. **Reflect:** *“You may be finding it difficult to say what you want to. It is difficult to talk to a stranger about what you are feeling, but sometimes it may help.”*
- c. **Give space, if the silence continues.** You can use the silence by just being with the person. Remember, if you are thinking about the victim and trying to be with him or her, your posture and tone of voice will convey that. It will be easier for the victim to respond.
- d. **Highlight the need:** *“I know that you are trying to make a decision whether to talk or not. It may be helpful to at least say what you are feeling about that; it may help you clarify some things.”*
- e. **Reestablish credibility** by talking about how people feel when they are able to work with the prosecution and **normalize the experience** of not being able to talk.

If the victim cries:

Reassure him or her that crying is normal, and get some water and a tissue. Tell him or her that you can stop the interview and continue at another time if s/he would prefer – s/he is in charge of the interview.

Since interviewing and preparing the victim is the most difficult part of prosecuting a sex crime, gaining the victim’s confidence is the most crucial job of all law enforcement agencies and prosecutors.

CONCLUDING THE INTERVIEW

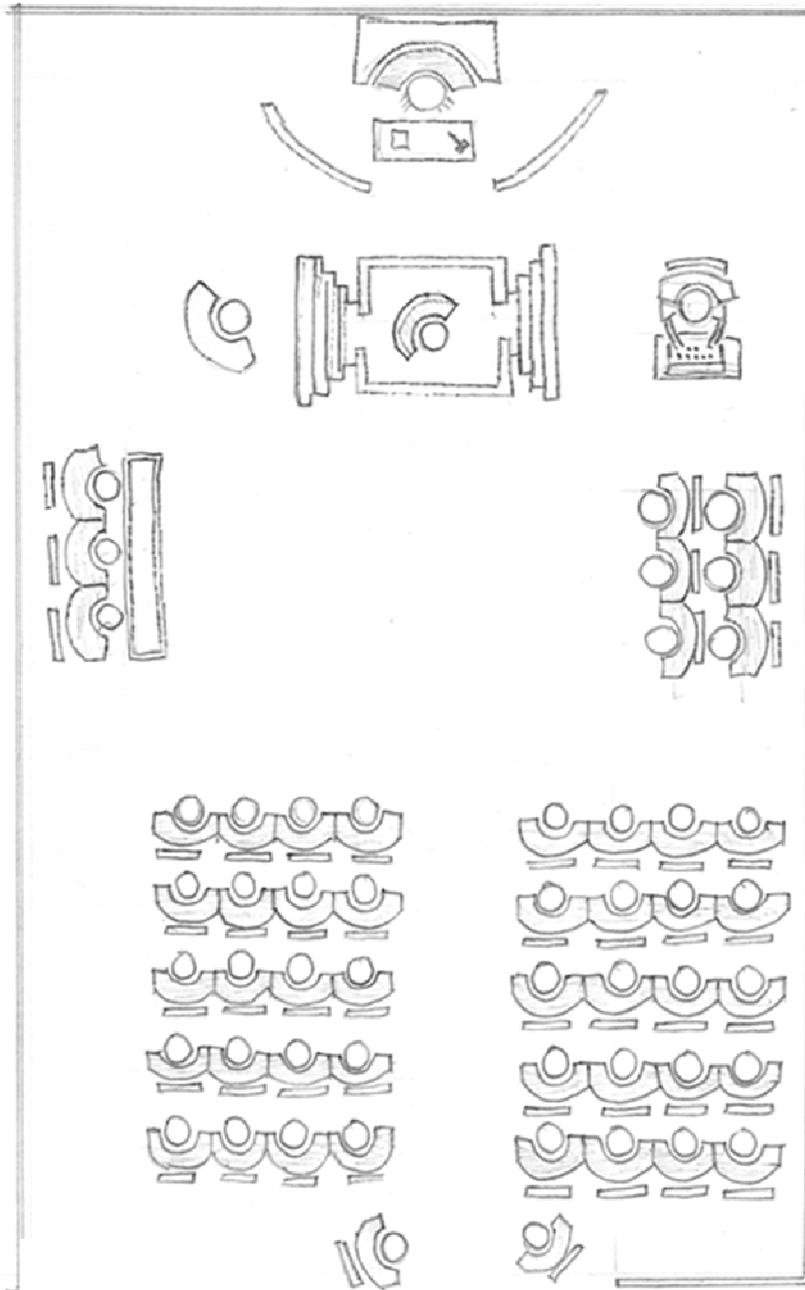
- i. Thank him or her for their time and acknowledge that you understand that this is a painful process.
- ii. Make sure that s/he has your contact information if s/he has any questions later and that you have his or her most recent contact information. (It is crucial that you can get in touch with him or her with the approaching trial.)
- iii. Tell him or her that you will meet again before the trial to prepare for his or her testimony.

4. PREPARING WITNESSES TO TESTIFY

Notify witnesses as soon as a trial date is set and make appointments to prepare their testimony. To make the most of the time, prepare your direct examination questions before this meeting and identify any additional information you need from the witness. Here are some guidelines for this preparatory meeting:

1. **Introduction.** If you have not met previously, introduce yourself and describe your role in the legal process.
2. **Explain the role and rights of a witness.** Thank the witness for serving the state and the victim in this way. Ask whether s/he has any safety concerns. (If s/he is concerned about his or her own safety, contact the police and contemplate a safety plan.)
3. **Explain witness tampering.** Explain that witnesses are not to accept bribes. Explain what a bribe is: any exchange of money or something of pecuniary value for the witness's promise to say or do something. In Liberia, "compromising" a case by accepting or offering money to the victim, Magistrate, judge, or other public official, so that s/he will drop the charges against the perpetrator/defendant, is bribery and is illegal.
4. **Advise the witness how to answer questions.** Explain that s/he should try to respond to questions with an answer that s/he knows to be true to the best of his or her knowledge and memory. There is no right or wrong answer. If s/he does not understand, s/he can ask for the question to be repeated. If you are preparing the victim, tell him or her that the questioning may be upsetting. S/he should let you know if s/he is upset by the questions that the prosecutor or defense counsel is asking.
5. **Practice the testimony.** Practice the whole testimony with the witness at least once, and several times if possible. Begin with the oath. Explain what the oath means, and ask the witness to repeat after you for practice. Go through the direct examination and then act as the role of the defense attorney and practice cross-examination.
6. **Explain basic logistics.** Tell the witness what time they should arrive in court and where they should wait. Advise them that they are welcome to visit the courthouse before the trial if they would like to see what a trial is like. Use a drawing of the courtroom, such as the one here to show the witness where he or

s/he will sit during testimony. Explain who the various players will be in the courtroom (the judge or Magistrate, defense counsel, defendant, clerk, stenographer, etc..)



(13)

BY GEORGE MOORE, MARYLAND COUNTY

10 Tips for Witnesses

1. **Listen carefully to the question.** If you don't understand, ask the attorney to clarify.
2. **Don't interrupt the attorney or judge.** Make sure that the lawyer has finished asking the question before you answer.
3. **Tell the truth.**
4. **Don't guess.** You can always say, "I don't know." or "I'm not sure."
5. **Don't volunteer information.** Answer the question, and then stop.
6. **Don't argue with the defense attorney during cross-examination.**
7. **Never get angry or lose your temper.**
8. **Talk loud enough.**
9. **Never say "never" or "always."** These exaggerations are usually not correct and will subject you to cross-examination.
10. **If you need a break, say so.**

5. PRE-TRIAL PRACTICE

A. DEPOSITIONS

If one of your witnesses will not be able to testify at a trial, you may petition the court to allow you to depose the witness and later introduce their deposition as testimony at trial. For example, depositions may be a good solution for short-term NGO workers or medical professionals who will no longer be living in Liberia by the time of trial. This section outlines the requirements under the *Criminal Procedure Law*, s. 17.1.

Requirements to use a deposition: The court may allow either party to introduce a deposition (or any part thereof) in lieu of live testimony at the trial or at any hearing, so long as the court finds:

- a. That the witness is dead; or
- b. That the witness is outside the Republic of Liberia, unless it appears that the absence of the witness was procured by the party offering the deposition; or
- c. That the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment under sentence; or
- d. That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; and
- e. That the testimony is otherwise admissible under the rules of evidence.

Production of Documents. The court may order that the individual to be deposed bring designated books, papers, documents, or other items that are not privileged. *Criminal Procedure Law*, s. 17.1.

Defendant's right to attend. If a deposition is initiated by the prosecution, the defendant has a right to attend the deposition, at the Republic's expense. *See Criminal Procedure Law*, s. 17.2.

Use of depositions by other party: Any deposition may be used by any party for the purpose of impeaching the deponent's testimony. If only a part of deposition is read in

evidence by a party, an adverse party may require him to read all of it which is competent and relevant to the part read and any party may read other parts.

Objections to admissibility of depositions: Objections to receiving in evidence a deposition or part thereof may be made in accordance with the *Civil Procedure Law of Liberia*, s. 13(A).

B. NOTICE TO THE DEFENSE

According to Rule 7 of the *Code of Moral and Professional Ethics*, the prosecutor shall never suppress evidence that is favorable to the defendant, including witness testimony. You must therefore make any and all exculpatory evidence available to the defendant upon request.

List of witnesses

In addition, the Criminal Procedure Law requires that you provide the defense with a list of your witnesses. Within five days of the arraignment, you are required to file a list of witnesses (with their addresses) with the Clerk of the Court and serve the list on the defendant. *See Criminal Procedure Law*, s. 17.4.

The SGBV Unit Investigator should have been keeping track of witnesses and their contact information, and s/he may help you put together this information.

Do not include the address of the victim if this disclosure would jeopardize his or her safety – especially if s/he is residing at a safe house or other location unknown to the defendant.

Amending the list of witnesses

Generally: You may later seek permission from the court to amend the list of witnesses. To do so, you will file a motion for a court order allowing amendment. If your motion is granted, you will serve the order on the Defendant, along with a new list of witnesses.

During the trial: As a general rule, for a witness to testify at trial, notice must have been provided to the defendant before trial. However, in the rare event that you discover a new material witness during the trial, you may seek permission from the Court to allow

their testimony. The Court has discretion to allow the unlisted witness to testify if it finds that the interests of justice require it.

C. SUBPOENAS

A subpoena compels an individual to come to court to testify or to provide documents at a particular time. At the request of either the prosecution or the defense, the court may issue a subpoena commanding the individual to attend and give testimony at a specified time and place or to produce books, documents, or other things, or both. *See Criminal Procedure Law*, s. 17.3

Who to subpoena. Most of your witnesses will not require a subpoena to provide testimony. If they have agreed to come to testify in court, you will simply need to notify them of the time of the hearing or trial. Some witnesses, however, including police officers or health professionals, may require a subpoena for their records. Or alternatively, you may subpoena a witness who would not come to court voluntarily.

Disobedience of subpoena: Failure by a person without adequate excuse to comply with a subpoena served upon him or her shall be punishable as contempt of court.

Payment of fees and travel expenses: No fees shall be charged for the issuance or service of a subpoena in a criminal action and the Republic of Liberia shall furnish transportation to the witness subpoenaed or pay his or her authorized traveling expenses. *See Criminal Procedure Law*, s. 17.3

D. PRE-TRIAL MOTIONS

Both the prosecution and the defense may make motions *in limine*, or motions before the trial. These motions allow the parties to resolve issues before trial and provide the court more time to consider legal issues.

MOTION TO DISMISS

The defense may file a Motion to Dismiss, in which s/he may raise any objection or defense that is capable of determination without trial. *See Criminal Procedure Law*, s. 16.7(1).

Requirements:

1. If the defense files a motion to dismiss, the motion must include:
 - a. Any objections to the indictment or the initiation of the prosecution, other than lack of jurisdiction; and
 - b. Any defense available to the defendant.
2. Waiver: If they do not raise an objection or defense in the Motion to Dismiss, then they waive the objection or defense and they may not raise the issue later without showing cause for the omission. *See Criminal Procedure Law, s. 16.7(2).*
3. Timing: the motion shall be made before a plea is entered, or within a reasonable time thereafter. *Criminal Procedure Law, s. 16.7(3).*

Hearing and determination: A hearing on the Motion to Dismiss will be held before trial.

1. **If the court denies the motion:** the defendant shall be permitted to plead if he has not already entered a plea. If he has entered a plea, then his or her plea will stand (*Criminal Procedure Law, s. 16.7(5)*) and the case will proceed to trial.
2. **If the court grants the defendant's motion** based on a defect in the institution of the prosecution or in the indictment, the court may order that the defendant be held in custody or that his or her bail be continued to allow the prosecution to file a new indictment. *Criminal Procedure Law, s. 16.7(5).* Note that the prosecution may challenge a defense motion that is based on the form of the indictment rather than the substance. The prosecution may invoke *Criminal Procedure Law, s. 14.3*, which provides that “an indictment shall not be held insufficient because it contains any defect or imperfection of form which does not prejudice a substantial right of the defendant upon the merits.”

MOTIONS ON EVIDENCE

Motions on Evidence Obtained under a Search Warrant:

The following procedures apply to motions made to return property or suppress evidence obtained under a search and seizure warrant:

1. **Grounds:** a person aggrieved by an unlawful search and seizure may make a motion for the return of the property and to suppress for use as evidence anything so obtained on the grounds that:
 - a. The warrant is insufficient on its face;
 - b. The property seized is not that described in the warrant;
 - c. The purported grounds set forth in the application for the warrant do not exist;
 - d. There was no probable cause for believing the existence of the grounds on which the warrant was issued;
 - e. The warrant was illegally executed;
 - f. The property, if seized upon an arrest, was illegally seized; or
 - g. The property was seized without a search warrant having been issued therefore, except when the property was lawfully seized in connection with a lawful arrest.
2. **Jurisdiction:** The motion may be made in the court, the jurisdiction of which encompasses the area in which the property involved is seized, or in the court where the trial is to be held.
3. **Time limitations on making of motion:** The motion shall be made before the trial unless there was no opportunity or the defendant was not aware of the grounds for the motion. The court in its discretion may entertain the motion at trial.
4. **Issues of fact triable by court:** The court may receive evidence on any issue of fact necessary to the determination of the motion.
5. **Relief on granting of motion:** If the motion is granted, the property shall be restored to the person entitled thereto unless otherwise subject to lawful detention. *See Criminal Procedure Law, s. 11.10.*

Motion to Exclude Inadmissible Evidence

Either party may also make a motion to exclude evidence under the more general rules of evidence. If you expect the opposing party to introduce evidence that you believe to be hearsay, or otherwise objectionable, you may file a motion before the trial to request that the court exclude this evidence.

Filing the motion in limine has an advantage: it prevents the opposing party from bringing the evidence before the jury for you to object in open court. For the grounds upon which to base this motion, *see Phase 5: Trial – Evidence*.

6. PREPARING A TRIAL NOTEBOOK

A trial moves quickly, and you are often on your feet trying to listen to the witness or the judge and think ahead to what is coming next. It helps to have a trial notebook with all of the information you need at your fingertips. A trial notebook is a binder with all the documents that you will need in the trial organized strategically. Preparing the notebook will also help you prepare mentally for trial.

There is no one way to make a trial notebook, and you will find a system that works best for you. But here is one recommended way to set up the notebook:

i. Facts and Charts

- a. Trial chart (See sample)
- b. Litigation chart (*See supra Gathering Evidence*)
- c. Timeline of offense / case
- d. Master contact list
- e. Exhibit list

ii. Motions

- a. Motions, responses, and orders
- b. Anticipated trial motions

iii. Jury

- a. Voir dire questions and answers

iv. Opening statement

- a. Outline of your opening statement
- b. Blank pages for notes of the defense's opening statement

v. Witnesses – Direct Examination

- a. Outline of each witness direct examination
- b. Blank pages for notes on defense counsel's cross exam
- c. Notes for re-direct

vi. Witnesses – Cross Examination

- a. Blank pages for notes on direct exams
- b. Outline of cross-examinations

vii. Closing argument

- a. Blank pages to note ideas during trial for closing argument
- b. Outline of your planned closing
- c. Blank pages for notes on opponent's closing

viii. Jury instructions

- a. Your proposed jury instructions
- b. Defense counsel's proposed jury instructions

ix. Law for reference

- a. Rules of evidence
- b. Copy of key statutes and cases

Trial Notebook Outline



SAMPLE: TRIAL CHART

Elements of Charge

Count I—Rape

1. Victim dead
2. Defendant purposely (knowingly)
Caused the death of victim

Witnesses and Exhibits

Exhibits

1. Pistol (Pl. Ex. #1)
2. Bullets (Pl. Ex. #2)
3. Autopsy Report (Pl. Ex. #3)
4. Police Report (Pl. Ex. #4)

Witnesses

1. Testimony of Victim’s Mother
2. Testimony of Victim’s Friend
3. Testimony of investigating police officer
4. Testimony of Ballistics Expert
5. Testimony of Pathologist

PHASE 5 – TRIAL AND SENTENCING

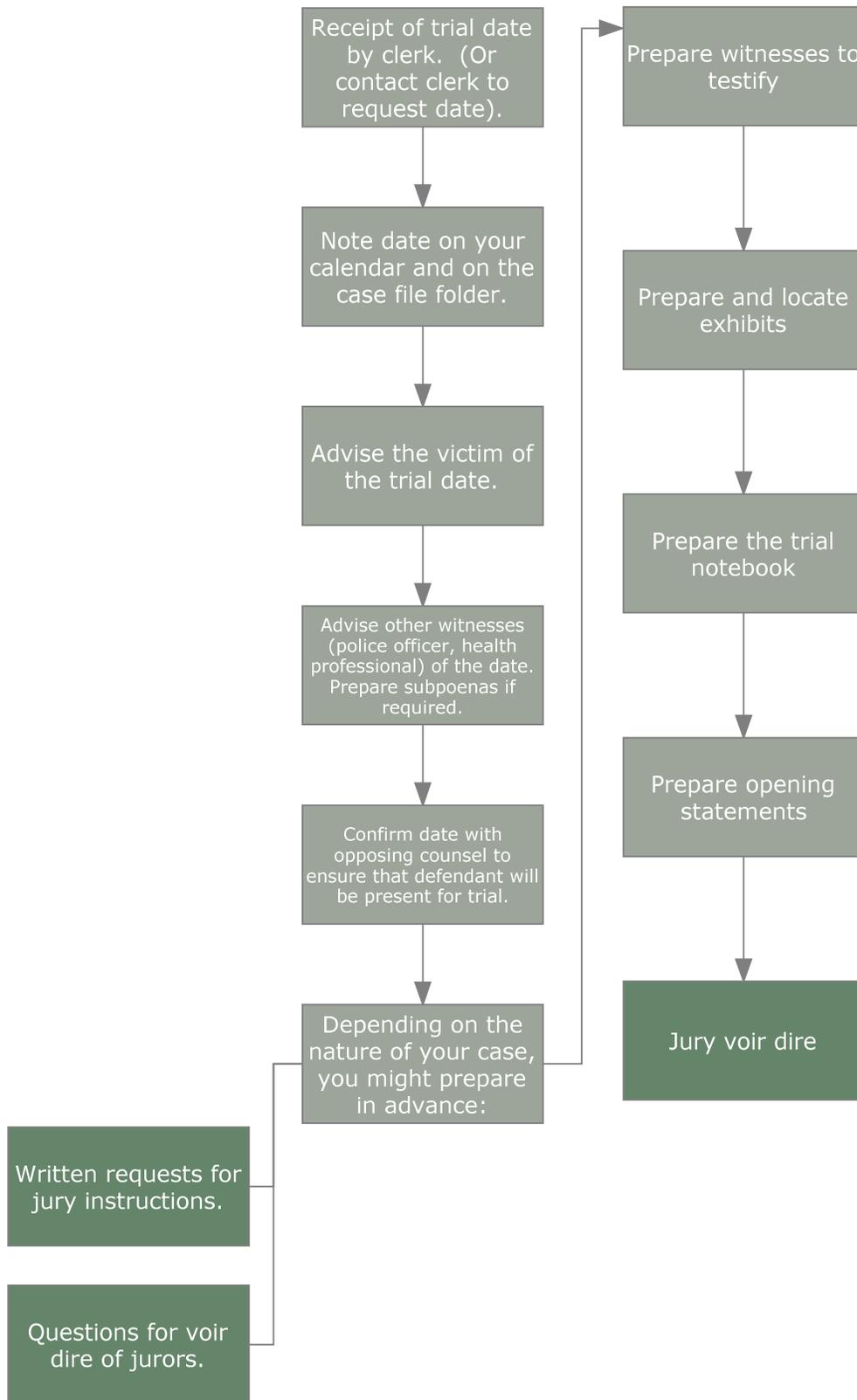
This section provides basic strategies for each part of a trial. As you prepare, keep in mind some guiding principles:

- a. Know what the court permits and how the judge operates the courtroom. If you will come before a particular judge for the first time, visit the court on another day and sit in for a hearing.
- b. Know and use people's names (witnesses, opposing counsel, judge).
- c. Exhibit common courtesies before, during, and after hearings.
- d. Always be on time. This establishes integrity with the court and the jury.
- e. When called, stand up and deliver an answer clearly.
- f. Demonstrate sincerity through your body language and confidence.
- g. Always listen to what the witness or judge is saying.

In camera proceedings:

Remind the judge that all trials for sexual offenses in the Circuit Court are to be held in camera. *See An Act To Amend the New Penal Code Chapter 14 Sections 14.70 And 14.71 and to Provide for Gang Rape, s. 1.5(a).* Trials may be held in the courtroom, but the judge may clear both the courtroom and the environs to ensure that the public does not crowd the windows.

Commencing a Trial



1. EMPANELING THE JURY

A defendant in a sexual offense case is entitled to a trial by jury. He may, however, waive this right. If he chooses to waive the right to a jury, then the Circuit Court judge will serve as the trier of fact. *See Criminal Procedure Law*, s. 20.1-2.

This section will summarize the law on jury selection and provide some tips on strategy.

A. JURY SELECTION

Jury Pool. A county official will submit to the clerk of the Circuit Court a list of people from their county who are qualified to sit as jurors. Of these, the clerk will choose forty-two to compose a venire of grand and petit jurors for the following term of court. Fifteen of these will be chosen to sit on the grand jury. The remaining 27 will form the jury pool for a trial. *See Civil Procedure Law*, s. 22.3.

Qualifications

Note that under the *Civil Procedure Law*, s. 22, as amended in 2006, jurors must:

1. be over 21 years old;
2. have no criminal record;
3. be able to speak, read, write, and understand English;
4. have mental and physical capacity; and
5. not have served on a jury within the last year

Jury selection

The sheriff will write the names of the remaining 27 potential jurors on separate pieces of paper and pull names anonymously for examination by the court. The first twelve candidates who are acceptable to the court shall form the jury, and the next three shall become alternate jurors. *See Civil Procedure Law*, s. 22.3.

B. VOIR DIRE

Voir dire is the questioning of jurors for selection. The judge may either ask the questions herself, or the judge may allow the prosecution or defense attorneys to pose the questions. See *Criminal Procedure Law*, s. 19.2 and *Civil Procedure Law*, s. 22.5.

Research suggests that voir dire may be the most important part of a sexual offense case for prosecutors. The members of the jury – and their attitudes about women, men, family, marriage, sexuality, and violence – will determine the ultimate outcome of the case.

The purpose of voir dire, therefore, is to discover information about the juror to reveal prejudice or reason to challenge for cause. There are some common background characteristics and indicators that may reveal the juror's particular biases and may predict how they will approach your case:

1. age
2. education
3. employment history
4. residence history
5. marital and family history
6. hobbies and interests
7. participation in organizations; and
8. experiences in life related to the case on trial

There is an art to the process of interviewing a juror about these or other topics. Consider the following general tips:

1. Advise jurors that you will ask some sensitive questions, but that it's not personal. It is your duty to empanel a fair jury.
2. Briefly explain trial procedures – this will build rapport and establish that you are there in part to guide them through the process.
3. Use simple questions and simple language.
4. Prepare open-ended questions that have a purpose.
5. Always be polite – jurors will be more likely to respond positively. Remember that this juror may be sitting through your trial, and this is their first impression of you as the prosecutor.

6. Maintain eye contact.
7. Learn and use jurors' names.
8. Never embarrass a juror or start an argument with the juror.

You will want to craft your voir dire questions to address each of those categories that might affect the juror's approach to a sexual assault or abuse case. Many people have misperceptions of victims of sexual assault or of the law pertaining to sexual violence. Your job in voir dire is twofold: i) weed out the potential jurors who are particularly hostile or misinformed about the law; and ii) educate the jurors about the law and begin to correct misperceptions.

Here are some sample questions that you might wish to ask in a sexual assault, abuse, or exploitation case:

1. Do you think that explicit discussion of sex acts will bother you or affect your ability to be fair?
2. Did you have any emotional or other reaction when you first heard what this case was about?
3. Can you think of any circumstance where the victim of sexual assault brought the event on by his own conduct?
4. Some people think that if a woman drinks, then s/he is responsible if something bad happens to her. Do you think that?
5. Some people think that if a woman dresses a certain way it means a man can take liberties with her. That is not the law in Liberia. Would you be able to follow the law and look at the behavior of the accused here and not the behavior of the victim?
6. Some people think that a woman loses her right to say no to sexual activity when she goes into a man's apartment or home. If she didn't want to have sex, she shouldn't have gone into his house. Do you agree?
7. Some people think that if the victim hadn't consented, s/he would have suffered serious physical injury. Do you believe that's true in most cases?
8. Do you believe that a person can rape their spouse or girlfriend/boyfriend?

9. Sometimes victims of rape or sexual assault do not immediately report to the police. Can you appreciate how the trauma of rape can – together with fear – prevent rape victims from promptly reporting the crime or telling someone?
10. There is a severe penalty for people who have committed sexual offenses in Liberia. Would you be able to follow the law and convict someone who you find beyond a reasonable doubt to have committed the crime – even though you know that the penalty will be harsh?
11. Do you regard the current punishment for sexual offenses to be too light, about right, or too harsh?
12. Do you belong to any organization that advocates on behalf of victims of sexual assault or GBV?

C. CHALLENGES

Selecting a jury is a process of elimination. Both the prosecution and the defense may object to a juror i) for cause or ii) as a peremptory challenge.

i. Cause

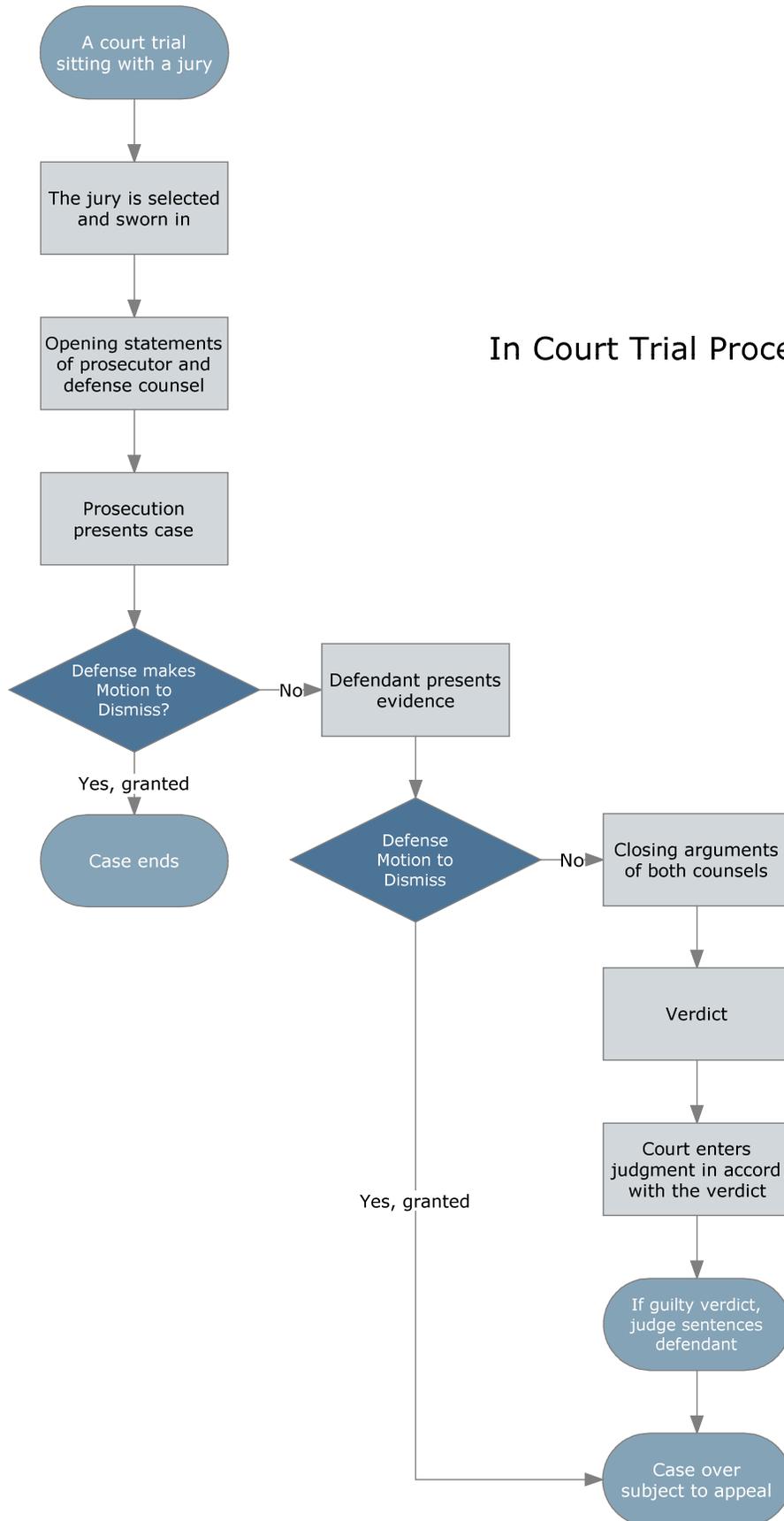
You may challenge a juror for cause where:

1. The juror is not qualified under the requirements specified in the *Civil Procedure Law*, such as s/he is not the appropriate age, cannot read or write, has a criminal record, or has committed perjury; or
2. The juror is biased and would not fairly and objectively evaluate the facts of a case.

ii. Peremptory Challenge

A peremptory challenge is a party's right to challenge a juror without having to provide the court with a reason for the challenge. In a capital offense, the prosecution has the right to six peremptory challenges, while the defense has the right to twelve. In other cases, the prosecution and the defense have the right to three peremptory challenges each. *See Criminal Procedure Law*, s. 19.3(6).

In Court Trial Procedures



2. OPENING STATEMENTS

Each side is entitled to make an opening statement to the court, summarizing what that party expects the evidence to show. You, the prosecutor, will be the first to present your opening statement to the court. This is your opportunity to tell the jury what the case is about. Consider the following strategies:

a. Start strong

Your first sentence can make all the difference in a case. Because you are the first to present, these are the first words that the jury will hear. They will set the tone for the trial. Try to be as specific as possible. For example, consider the following two possible introductions:

Statement 1: *“This case is about rape.”*

Statement 2: *“Sarah Victim was asleep in her bed when she heard a loud bang and the door flew open. She didn’t have time to run or move before a stranger pinned her to the bed. She thought she was having a nightmare.”*

The first statement is clear and common. But the second statement makes this case real for the jurors and begins to lay the story line of a tragic crime.

b. Tell a story

Once the trial begins, witnesses will recount various details about the victim’s health, the crime scene, the investigation, and what that particular witness heard or saw. The opening statement is your opportunity to craft a story, and a clear lens through which to see the rest of this testimony and evidence. It is therefore important for your opening statement to be chronological and clearly present the story of what happened.

c. Focus on the actions of the offender

Experienced litigators have advised that the best approach to a sexual assault or abuse jury trial is to focus on the offender rather than the victim. Begin the case by highlighting

the atrocity that has been committed. This is particularly important in the beginning of the case when you are beginning to frame the issue.

d. Do not argue

You will have an opportunity to present an argument at closing. But in the opening statement, you must be objective and state only the facts. You cannot express a personal view of the evidence, argue the merits, or impeach the defense's evidence. Some key phrases will help you remain objective:

“Evidence will show that...”

“X will testify, and you will hear that...”

“You will see the medical report, which will show that...”

e. Request a verdict

Tell the jury what a favorable verdict is from your point of view. Make sure that you end the opening statement with a specific request for a verdict, such as:

“Members of the jury, at the end of this case, I will ask that you return the verdict that this evidence demands: a verdict of guilty for the rape of Sarah Victim.”

3. DIRECT EXAMINATION⁶

After the opening statements, the judge will ask if you are ready to go forward with your case and you will call your first witness to testify. This section provides some guidance for direct examinations.

i. Keep it simple.

Research suggests that people have a short attention span when they are learning information orally (listening to someone speak). Therefore, it is best to keep testimony short and focused. Identify the topics that are most important while you are preparing. And then at trial, get to those topics as quickly as possible, go through them thoroughly, and then stop.

ii. Ask short non-leading questions.

The prosecutor may direct examine witnesses with non-leading questions only. *See Civil Procedure Law*, s. 25.22. In other words, you may ask questions that direct the witness to a particular subject, but your question may not suggest the answer. For example:

Ask: *“Please describe what the offender looked like.”*

Not: *“Was he tall and around 20 years old?”*

Ask: *“What happened after he came in the house?”*

Not: *“Did he come into the bedroom while you were asleep?”*

In Liberia, attorneys have tended to ask very open-ended questions and allow the witness to speak at length. Sometimes this practice results in rambling testimony, and jurors may lose interest or have difficulty sorting the relevant information from the irrelevant.

County attorneys have begun to shift to the model of short, non-leading questions. When you ask questions to solicit short answers, you are able to direct the testimony of the witness and ensure that your witness shares the specific information that you want

⁶ Note that this section is largely adapted from Thomas A. Mauet’s well-known guide, *Trial Techniques*, now in its seventh edition.

without distracting the jury. This is particularly important in the direct examination of a victim who may be nervous on the stand.

iii. Organize logically.

It is important to prepare the testimony carefully. You may wish to write out all of the questions. At the very least, you should have a clear outline for each witness of the topics that you want to cover. Organize these topics in a logical order. For example, the testimony of a victim might be organized like this:

1. Introduce the witness and personal background
2. Description of the location / scene of the sexual offense
3. What occurred just before the incident
4. How the offense actually took place
5. What happened immediately after
6. Health clinic and initial treatment
7. Continued treatment
8. Present physical limitations

iv. Have the witness explain their answers.

If the witness gives an answer that would not be clear to a juror, ask the witness to clarify their answer or explain. Use follow up questions, such as, “what do you mean when you say ...”

v. Write out answers in advance for key areas.

If there is a particular fact or statement that you need a witness to state on the record, write out the statement in your notes for direct examination. Keep asking questions until you get the answer you need for your case.

vi. Victim testimony

Often, the victim of a sexual offense does not seem credible to the jury. This may be because of the jurors' own biases about sexual violence or women. Or alternatively, the victim may have been chosen by the offender precisely because s/he is vulnerable and perceived to be untrustworthy. You will need to educate the jury and overcome these biases. You can use the opportunity of direct examination to introduce the victim to the jury by explaining the victim's background and the context for the assault.

vii. Remember the rules of evidence and anticipate objections.

The defense counsel will object if your witness provides an answer that violates the rules of evidence. Always study the rules of evidence before a trial and avoid violating the rules. For example, do not ask leading questions or ask for a narrative answer. For more substantive concerns, think through possible objections in advance and how to respond.

See the following section for a summary of the rules of evidence. (See also Chapter 25 of the Civil Procedure Law.)

SAMPLE VICTIM TESTIMONY

DIRECT EXAMINATION OF SARAH SURVIVOR

Q. Ms. Survivor, please state your full name.

A. Sarah Survivor.

Q. Ms. Survivor, on May 12, 2007, where were you at approximately 2pm?

A. I was at the Magistrate Court in Firestone.

Q. What were you doing there?

A. I had a child maintenance and a domestic violence case against my ex-husband.

Q. What is the name of your ex-husband?

A. Leroy Mvamvu.

Q. And is he present here?

A. Yes.

Q. Can you point him out?

A. Yes, he is there at that table.

Q. Thank you. Let the record reflect that she is pointing to the defendant. What happened at the hearing?

A. The court made an order of child maintenance. And then my ex-husband signed a promissory note, promising not to come close to me for the foreseeable future.

Q. Has he kept that promise?

A. Well, right after the hearing, he got into the same taxi with me to travel back to our neighborhood.

Q. Did you want him to get in the taxi with you?

A. No, but he forced his way in.

Q. And what happened next?

A. Well, we arrived at the place where I was staying. I have been staying with my brother, who lives about a half mile from my ex-husband. In the taxi, he was trying to convince me to go home with him. I said no. And at my stop, I got out of the taxi, and he got out, too.

Q. Did you ask him to get out?

A. No, I told him not to. I didn't want him to follow me.

Q. What did you do?

A. I ran, but then he ran after me. I ran to a neighbor's house, but he found me there, too. And I grabbed onto a fence, and then he grabbed me and pulled me away from it. The fence became uprooted, and he was able to carry me away.

Q. What did you do?

A. I screamed and clawed at him. But he grabbed me tight and carried me all the way to his house.

Q. What did you do when you were at his house?

A. He locked me in a room. He was very angry because he felt that I was disobeying him and bringing shame to him in the community.

Q. Did he ever come in the room?

A. Yes.

Q. What did he do when he came in the room?

A. He forced himself on me.

Q. What do you mean by that? I know this is difficult, but can you describe exactly what happened?

A. He came into the room, where I was on the bed. And he pinned me down. And he forced me to have sex with him.

Q. Did you scream?

A. I screamed at first, but there was no use. I know him. I know he would force me anyway. So sometimes I clawed, but then I just tried to turn my mind off.

Q. Could he have had any doubt that you wanted to sleep with him?

A. No. I begged him, pleaded with him not to.

Q. How many times did this happen?

A. Six times.

Q. How do you know that it happened on six separate occasions?

A. Because I was counting in my head. I was there for three days, and he forced himself on me two times each day.

Q. Did he talk to you?

A. Yes. He told me that I had caused him shame, and so he would shame me, too. He said that he would always have me in his grasp, that I belonged to him.

Q. And did there ever come a time when you were able to leave his house?

A. Yes. One day, he let his guard down, and he left to go to a church meeting.

Q. And what did you do then?

- A. I ran to my brother's house. I knew that Leroy would know where I was, but I thought that my brother would be able to protect me.
- Q. And did Mr. Mvamvu indeed come to find you?
- A. Yes.
- Q. When was that?
- A. On May 29, 2007.
- Q. And what happened on that date?
- A. He came to my brother's home.
- Q. Were you there?
- A. Yes.
- Q. And was there anyone else there?
- A. Yes, my nephew was there.
- Q. What happened when Leroy arrived?
- A. He wanted to talk to me, and he showed that he was carrying a knife.
- Q. What did you do?
- A. Well, my nephew told him that he would only allow him to talk to me if he was present. So we let him inside.
- Q. What happened next?
- A. He was ranting and angry with me, but then he seemed to calm down. Then my nephew left the house. And he became very angry again. He wanted to sleep with me.

Q. And did you want to sleep with him?

A. No! I was very, very scared.

Q. What happened next?

A. He asked me to come home with him. And when I refused, he told me, “You will come home with me!” And he dragged me outside.

Q. Where did he take you?

A. He dragged me to a bush. I was screaming and clawing at him again.

Q. What happened next?

A. He beat me with a big stick.

Q. Where did he hit you?

A. On my thigh. He hit me twice, very hard.

Q. Did it leave a mark?

A. Yes, it left a big black and blue mark on my thigh.

Q. Did he do anything else to you?

A. Yes, he raped me.

Q. Where were you when he raped you?

A. In the same place – outside in the bush.

Q. Did you consent to having intercourse with him?

A. No, I begged him again to stop. I tried to reason with him and tell him that it was not okay to do this outside, and that other people would hear us.

Q. Did he listen?

A. No. He tore my bottom clothes off and forced his way with me.

Q. And then what happened?

A. My brother came home and started screaming into the bush, yelling for me. He was screaming that he would call the police.

Q. And then what?

A. Leroy just left me there.

Q. And where were you at this point?

A. Still there – in the bush. I was half naked.

Q. And then what happened?

A. My brother came and found me there and brought me back to his house. He said that he would call the police.

Q. And did he?

A. Yes.

Q. And did they come?

A. Yes, an officer came the next day and took my statement.

Q. Did you go to the hospital?

A. Yes, the police recommended that I go. And he went with me to the hospital.

Q. Which hospital did you go to?

A. JFK.

Q. And did they complete a medical report form?

A. Yes.

Q. Did they give you a copy of it?

A. Yes.

Q. And did you suffer from physical injuries after this time?

A. Yes. The doctors treated me, but I was sore for a very long time. And I had those bruises from the beating.

Q. Thank you, Ms. Survivor. Is there anything else that you would like to tell the jury?

A. Yes. I came forward because I just could not do this any longer. I see now that what he was doing to me was very wrong. I hope that he is punished for what he did.

Q. No further questions.

4. EVIDENCE

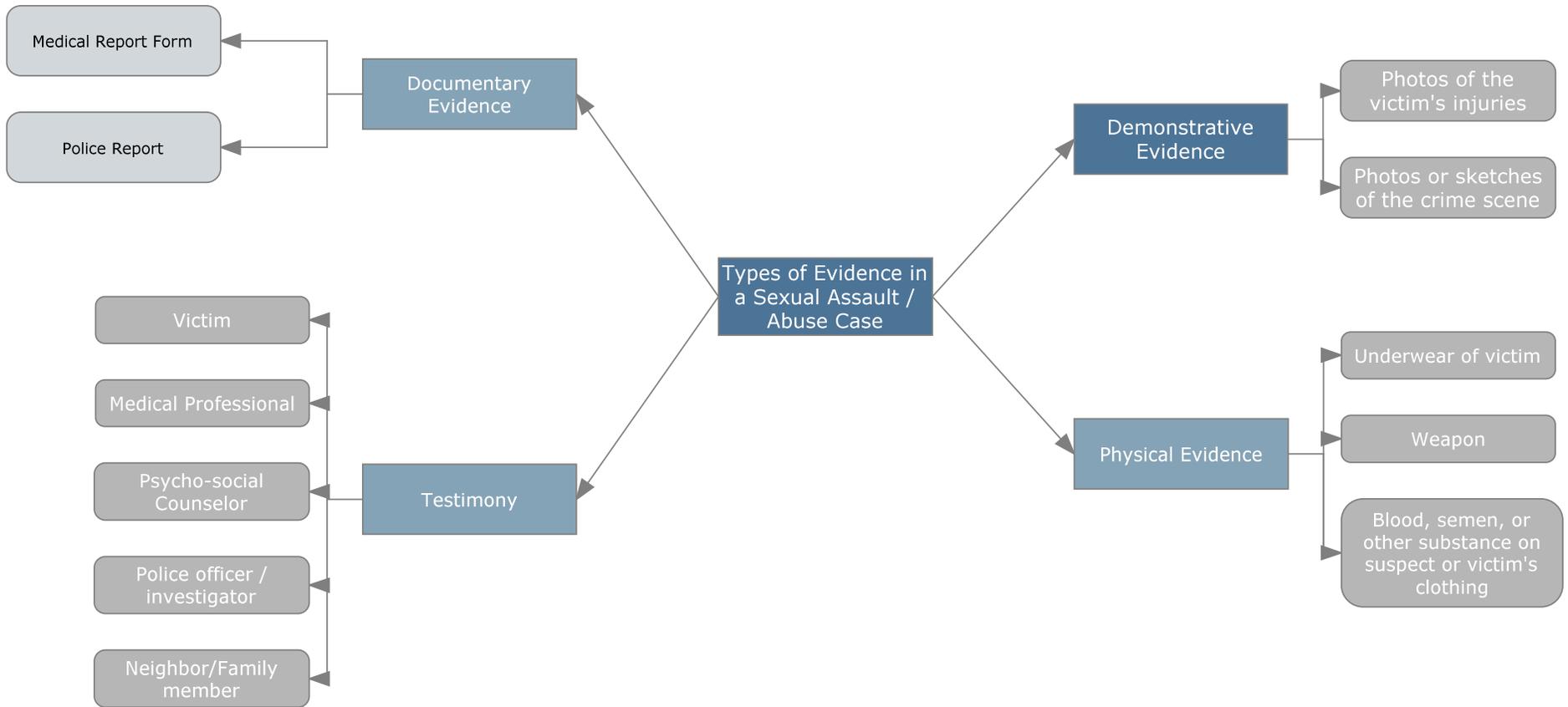
A. TYPES OF EVIDENCE

When you present your case in chief to the jury, you are presenting evidence to the court to prove the elements of the crime. There are four types of evidence:

1. Testimonial evidence – testimony of a witness based on personal knowledge. For a sexual offense case, testimonial evidence may include: the victim, the police officer, a health professional, an eyewitness or neighbor.
2. Real evidence – an object or physical condition which had a direct or indirect part in the incident, such as a murder weapon or physical injury or condition. For a sexual offense case, real evidence may include a knife or gun used to threaten the victim or an object that was used in the violation itself such as a stick.
3. Documentary evidence – written or other documents, such as a hospital record, the Medical Report Form, or a police report.
4. Demonstrative evidence – a visual aid to the jury to illustrate testimony or other evidence, such as a map or chart.

Part A of this section provided guidance for presenting testimonial evidence. This section focuses on the latter three types of evidence.

TYPES OF EVIDENCE



B. EXHIBITS

INTRODUCING AN EXHIBIT

During the course of trial, either party may offer documents or other real objects into evidence. Follow these steps to introduce an exhibit:

- i. **Have the evidence marked for identification.** Exhibits are marked with letters or numbers so that they can be differentiated from other exhibits. To have an exhibit marked, tell the clerk, *“Please mark this the Republic’s Exhibit #1.”* Hand the exhibit to the clerk, who will label it and then pass it back to you.
- ii. **Show the exhibit to opposing counsel.** To be fair, the defense attorney should see the exhibit before you show it to the witness, so that s/he knows what the evidence is and can make a timely objection. State out loud for the record, *“Let the record reflect that I am showing the exhibit to the defense attorney.”*
- iii. **Ask the court’s permission to approach the witness**
- iv. **Show the exhibit to the witness**
- v. **Lay a foundation for the exhibit** (see below for proper foundations for various types of evidence).
- vi. **Offer the exhibit into evidence.** State, *“Your honor, we offer the Republic’s Exhibit #1 into evidence.”* At this time, the defense attorney may object to the evidence, and you will respond to their objection. The judge will decide whether to admit the evidence.
- vii. **Have the exhibit marked as evidence.** If the judge admits the evidence, the clerk may now mark the document as admitted.

LAYING A FOUNDATION

There are three basic requirements for each exhibit:

- i. The qualifying witness must be competent to testify about the exhibit;
- ii. The exhibit must be relevant and reliable; and

- iii. The exhibit must be authenticated. (It must be shown to be what you claim it to be.)

The admissions procedure varies according to the type of exhibit presented to the court. This section presents some common evidence foundations.

a. Tangible objects.

To introduce a tangible object, you must show:

- i. That the object is relevant;
- ii. It can be identified visually or by touch;
- iii. The witness recognizes the exhibit;
- iv. The witness knows what the exhibit looked like at the relevant date; and
- v. The exhibit is in the same condition as when the witness saw it on that date.

You would ask the following questions to establish these elements:

I am showing you Exhibit 1. Have you seen it before?

When was the first time you saw it?

How are you able to recognize that it is the same object?

Is it the same or substantially the same as it was on the date of the incident?

Chain of custody. If the object is not unique, (there are others of its kind), then you will need to establish a chain of custody. You will have to show that it is indeed the same object by showing who has had possession of the object ever since it was found. For example, consider a knife used during a rape. The knife is not unique because other knives look similar, so you will have to show that it is indeed the knife that was used during the incident. You might ask the following:

Officer Doe, how did you obtain this item?

What did you do with it when you took it from the defendant when you arrested him?

Where did you store it?

How did you label it?

What did you do with the container once you labeled it?

Has it been in your possession since that time?

Has anyone else had access to the knife?

Who brought it here today?

If others have also handled the evidence, then you will need to examine each person who has handled the evidence and show that i) the exhibit was in their exclusive, continuous possession, and ii) the exhibit was not tampered with while it was in their possession.

b. Photographs

To introduce a photograph into evidence, you must show:

- i. That the photograph is relevant;
- ii. That the witness is familiar with the scene portrayed in the photograph;
- iii. That the witness is familiar with the scene at the relevant date and time; and
- iv. That the photograph “fairly and accurately” shows the scene as it appeared on that date.

For example, you might ask the following questions to establish these elements for a photograph of the victim’s bruises:

Mr. Officer, did you see Sarah Victim on the day of the incident?

I am showing you Plaintiff’s Exhibit 1. Do you recognize it?

What is it?

What does the photograph portray?

Does it fairly and accurately show how her face appeared on that date?

Note that the person who took the photograph does not need to be the person who introduces the evidence. Anyone who saw the scene, or the person photographed, around

the time that the photograph was taken may identify the photo and testify that it is a fair and accurate portrayal.

c. Business Records (e.g. the Medical Report Form)

Business records are admissible under an exception to the hearsay rule. Business records are defined as a i) writing or recording ii) made in the regular course of business iii) at the time of the act or event recorded. “Business” is defined as “a business, profession, occupation, and calling for every kind.” *See Civil Procedure Law*, s. 25.7(3).

To introduce business records, you will need to show:

- i. That the record is relevant and reliable;
- ii. The witness is the custodian of records or another qualified witness (who can testify as to how these records are made and kept);
- iii. The record was made by a person with knowledge of the facts;
- iv. The document is a memorandum or record of an act, transaction, occurrence or event;
- v. The record was made at the time of the act, transaction, occurrence, or event recorded; and
- vi. That the record was made in the regular course of business.

For example, in a sexual offense case, you may introduce the Medical Report Form as a business record. Note that the witness who introduces the business record need not have created the record. The witness need only have personal knowledge of how these records are made and kept. Therefore, even if the doctor who wrote the form is no longer in the country, you may call a nurse at the clinic as a witness and introduce the Medical Report Form through their testimony. You might ask the following questions of a nurse or record-keeper to lay a proper foundation for the Medical Report Form:

Ms. Nurse, please state your occupation.

What does your job involve?

Do you keep records of these patients?

Ms. Nurse, I am showing you Exhibit #1. Do you recognize it?

What is it?

Was this form written by a person who was present during the examination of the patient?

Was it made at the time of the examination?

Is it the regular practice of your clinic to fill out such a form?

Was this form completed in the course of regularly conducted activity at the clinic?

Note that police reports may also be introduced under the business records exception or under the public records exception to the hearsay rule.

d. Official Records

Official records that are certified are self-authenticating, and therefore you need not lay a foundation for them. Under the *Civil Procedure Law*, a public record is authenticated or certified if it is i) an official publication or ii) a copy with an attached certificate made by the officer having legal custody of the record. To introduce a certified record, you need only state, “Your honor, we offer into evidence the Republic’s Exhibit #1, a certified copy of a vehicle registration from Bong County.”

Note that to be admitted, a certified record must fall within an exception to a hearsay rule. Official documents, such as police reports, fall within the public records exception.

C. OBJECTIONS

Both parties may object to testimonial or physical evidence if its admission violates the rules of evidence. Knowing whether and how to object is a key trial skill that one develops over time. This section includes some tips:

WHETHER TO OBJECT:

It is not always advisable to make an objection, even when you have the legal authority to do so. Before raising an objection, consider the following:

- i. Jurors dislike objections.** When you make objections too often, jurors begin to believe that you are trying to keep the truth from them. Or they might perceive that you are being overly aggressive. So use objections sparingly.
- ii. Ask whether the witness's answer will hurt your case.** Do not object merely because you can. Think first whether the witness's answer to a question or the admission of a particular document will hurt your case. If not, then do not object, and let the information come before the jury. Although this is an adversarial process, the jury will notice if it seems that you are not playing fair.
- iii. Ask whether there a solid legal basis for your objection.** If you do not have a solid foundation, then your objection will likely be overruled. And having an objection overruled is often worse than not having made the objection at all.

D. GROUNDS FOR OBJECTIONS: RULES OF EVIDENCE

To make a proper objection, there must be sound legal grounds based on the rules of evidence. This section includes a summary of the most common rules and objections:

a. Relevance

All evidence must be relevant to the issue. It must have a “tendency to establish the truth or falsehood of the allegations or denials of the parties or it must relate to the extent of the damages.” *See Civil Procedure Law*, s. 25.4.

b. Opinion Testimony

A witness may testify or depose to such facts as are within his knowledge and recollection.

A **lay witness** may provide an opinion where the judge finds that his opinion

- i. may be rationally based on their perception, and
- ii. is helpful to his testimony.

Where a witness testifies to matters that are not rationally related to his or her perception, he is speculating. For example:

- i. “*The defendant was angry.*” Ordinary people have experience judging emotional states, so any layperson could testify whether someone was angry and this statement would be admissible. Compare with the following:
- ii. Neighbor: “*I wasn’t there and I couldn’t hear anything, but I know he raped her.*” The neighbour has no personal knowledge, and she is merely speculating about what happened. This statement is objectionable.

Objection: “*Objection, speculation.*”

An expert may provide an opinion where the judge finds that his opinion

- i. is based on facts or data perceived by or personally known or made known to the witness at the hearing and
- ii. within the scope of his special knowledge, skill, experience, or training. *Civil Procedure Law*, s. 25.21.

Objection: “*Objection, the witness is not competent to answer that question*”; or “*Objection, speculation. This opinion exceeds the scope of the witness’s expertise.*”

c. Improper Character Evidence

As a general rule, character evidence is admissible only to challenge the veracity of the witness, but not to prove propensity (that the witness acted in conformity with a particular character trait).

Character of Any Witness

Upon cross examination, a party may introduce character evidence to challenge the credibility or veracity of a witness. For example, a party may introduce a prior conviction for fraud, because this conviction shows that the witness is not truthful. Prior convictions for an offense not involving dishonesty or false statement, however, are inadmissible because they are offered to prove propensity rather than truthfulness. *See Criminal Procedure Law*, s. 21.2(1).

In a sexual assault or abuse case, the defense may try to portray the victim as a promiscuous woman or woman with loose morals. This is character evidence that does not relate to honesty and therefore is inadmissible.

Character of the Defendant

As a general rule, in a criminal case the prosecution may not introduce evidence about the defendant’s bad character to prove that he acted in conformity with that bad character trait. For example, the prosecution cannot introduce evidence that the defendant is known as a violent person within the community. In addition, the prosecutor cannot

introduce prior convictions of the defendant, including offenses involving dishonesty. *See Criminal Procedure Law*, s. 21.2(1).

There is, however, an exception to this general rule prohibiting character evidence. The defendant can introduce character evidence in his or her own defense to show that he acted in conformity with a good character trait. The defendant or one of his or her witnesses, for example, may suggest in testimony that he is a non-violent person. This is called “opening the door,” because the prosecution is then permitted to rebut this evidence. The prosecution can introduce character evidence to prove negative propensity pertaining to the particular trait or traits that the defendant raised. For example, the prosecution may only introduce a conviction for fraud if the defendant has claimed that he is known to be truthful.

Note that according to the CPL, the prosecution can impeach any witness with a fraud conviction to prove the untruthfulness of the witness except a defendant. The prosecution can only introduce the fraud conviction against the defendant if he or one of his or her witnesses has testified that he is truthful. *See Criminal Procedure Law*, s. 21.2(2).

Objection: “*Objection, calls for character evidence.*” or “*Objection, improper character evidence.*”

d. Leading questions

Leading questions – or questions that suggest the answer – are prohibited on direct examination of a witness. *See Civil Procedure Law*, s. 25.22. Note that they are permitted on cross examination

Objection: “*Objection, leading*”

e. Hearsay

Hearsay is an i) out of court statement ii) by a person other than the witness testifying iii) that is introduced in court to prove the truth of the matter asserted.

Example: “*The neighbour told me that the Defendant was home that night.*” This is a statement made to prove that the Defendant was in fact home that night and thus was not able to commit the crime. It is hearsay and inadmissible.

Statements that are not hearsay

- i. A statement that is made out of court that is offered in evidence through a witness or a writing not to establish the truth of the matter stated but to establish the fact that the statement was made is not hearsay and therefore admissible. *Civil Procedure Law*, s. 25.7.
- ii. **General reputation.** A person's character or that he has held public office may be established by evidence of general reputation. *Civil Procedure Law*, s. 25.7.

Exceptions to the hearsay rule

- i. **Entries in the regular course of business are admissible.** These admissible business records are defined as a i) writing or recording ii) made in the regular course of business iii) at the time of the act or event recorded. "Business" is defined as "a business, profession, occupation, and calling for every kind." *Civil Procedure Law*, s. 25.7(3).
- ii. **Family history.** Declarations of deceased persons concerning family history of which they were likely to have knowledge, such as marriages, births, deaths, and pedigrees, are admissible. *Civil Procedure Law*, s. 25.7(2).
- iii. **Party admissions.** A statement made by a party or his or her agent acting within the scope of his or her authority is admissible. Similarly, when several parties have a joint interest that has been proved, the admission of one is admissible against all; but the joint interest may not be proved by the admission of one or more against those not joining in the admission. *Civil Procedure Law*, s. 25.8.

Objection: "*Objection, hearsay.*"

f. Best Evidence (Original Documents Rule)

The rules of evidence require that the party introducing a document must introduce "the best evidence." This means that the party must introduce the original document. The *Civil Procedure Law*, s. 25.6 provides, "a copy of a writing is not admissible as evidence unless the original is proved to be lost or destroyed or to be in the possession of the

opposite party who has received notice to produce it or unless it is a copy of a public record.”

Objection: “*Objection, violates best evidence rule.*”

g. Authenticity of Documents

Handwriting may be proved by:

- i. oath of a person acquainted with the handwriting;
- ii. comparing the handwriting in this document with handwritings in other documents that were indisputably written by the alleged author before the dispute
- iii. admission by a party that the handwriting is theirs

Ancient documents: are presumed to be authentic if they are

- i. more than 30 years old and
- ii. have been in the possession of a person who may reasonably be supposed to access it. *Civil Procedure Law*, s. 25.17.

Objection: “*Objection, no authentication.*”

5. THE DEFENSE

A. DEFENSE'S MOTION FOR JUDGMENT OF ACQUITTAL

At the end of the prosecution's case, the defense may, but need not, move for judgment of acquittal. The judge will grant the motion only if the prosecution has failed in its case in chief to establish sufficient evidence to establish the guilt of the defendant beyond a reasonable doubt. *See Criminal Procedure Law*, s. 20.10.

If the judge grants the defendant's motion, then the defendant will be released. If not, the trial will continue and the defense will present its own evidence.

B. DIRECT EXAMINATION OF DEFENSE WITNESSES

The defense counsel will likely call his or her own witnesses. Remember that the defendant may not be compelled to take the stand in his or her own defense (*See Overview of the Criminal Justice System -- Rights of Defendants*). But he may choose to testify. The defense may also call expert witnesses or alibi witnesses to defend the innocence of the accused.

Your strategy during the direct examination is to:

1. **Listen intently.**
2. **Take notes.** Listen to any inconsistencies in the witness' statements to raise on cross-examination or in your closing argument.
3. **Make objections.** Review the previous section on evidence for advice on whether to object, how to object, and on what grounds to object.

6. CROSS EXAMINATION

You will then have an opportunity to cross-examine the defense witnesses. There are a few basic goals of a cross-examination:

1. Discredit the witness and impeach the testimony given on direct;
2. Reinforce the Republic's version of events; and
3. Create doubt about the defense's position.

Here are some tips for practice:

1. **Less is more.** The first question you should ask is whether you want to cross-examine the witness at all. Consider i) whether anything the witness has said hurts your case; and ii) can you get them to say something that will be helpful to your case? If the answer to both of those inquiries is no, then do not cross-examine the witness.
2. **Listen to the answer.** The most common mistake in a cross-examination is the attorney's failure to listen to the witness.
3. **Spend time preparing for cross-examination.** As soon as you know which witnesses the defense will call, spend time thinking about what you want to get out of each witness, and write an outline for cross examination accordingly. Design your cross so that you make the strongest points at the beginning and at the end of the cross-examination.
4. **In a cross-examination, you are in charge.** Remember the difference between direct and cross. In a direct examination, you want to let the witness speak for themselves. You stand to the side and have them speak to the jury. But in a cross-examination, you want to be the center of attention. You direct the questioning by asking leading questions – and only those questions to which you know the answer. Speak to the jury in the form of the questions to the witness.

5. **Don't argue with the witness.** Part of being in charge is refusing to allow the witness's testimony to make you upset or angry. Keep a level head and ask the next question without arguing with the witness.
6. **Don't ask the witness to explain.** When you ask the witness to explain an answer on cross-examination, you are allowing them free-reign to pontificate. To remain in control, ask questions that have a "yes" or "no" or another short answer. And then don't ask them to explain.

SAMPLE: CROSS-EXAMINATION

Q. Mr. Mvamvu, on May 12, 2007, you went to Magistrate Court to resolve a child maintenance and domestic violence case with your ex-wife, is that right?

A. Yes.

Q. And at the hearing, you signed a Promissory Note, promising never to come within her vicinity?

A. Yes.

Q. And that meant that you should never be in the same room with her or go to her house, is that right?

A. Yes.

Q. And yet when you were leaving the courthouse, you got into a taxi with her, didn't you?

A. Yes.

Q. And when she got out to go to the place where she was staying, you followed her, didn't you?

A. I wanted her to come home with me.

Q. But she didn't want to go home with you, did she?

A. She's my wife.

Q. You wanted her to go home with you, so you grabbed her arm, didn't you?

A. I was taking her home.

Q. And when she continued to resist, you grabbed her and carried her with you home?

A. Yes.

Q. And she stayed with you – at your home – for several days, isn't that right?

A. Yes.

Q. And you said on direct examination that you reconciled during this period – that you were happy together?

A. Yes.

Q. But then she ran away, didn't she?

A. Yes.

Q. When you had left the house?

A. Yes.

Q. You were so happy together, and yet at the moment she could, she ran for her life?

A. Yes, we were happy.

Q. And she went to her brother's house? And at this time, the promissory note was still in effect, correct?

A. I suppose so.

Q. And you followed her there on May 29?

A. I wanted to bring her home with me. I knew she wanted to come home.

Q. So you went to her brother's house, thinking that she would return with you – that she wanted to return.

A. Yes.

Q. But you brought a knife with you just in case?

A. Yes, I have a knife.

Q. And you wanted to take your wife home... is that right?

A. Yes.

Q. But first you took her outside.

A. Yes, we went outside.

Q. And you had intercourse with her there.

A. Yes. She is my wife.

Q. And did she want to have sex with you?

A. Yes, I believe she did.

Q. And then her brother came, and you left, is that right?

A. He was shouting and angry, so I left.

Q. And your loving wife didn't follow you? Did you ask her to?

A. Yes, I told her to come. But she disobeyed me.

7. PROSECUTION REBUTTAL

If the defense case has raised subjects not addressed in the prosecution's case in chief, the prosecution may present evidence in rebuttal. Rebuttal must be within the scope of evidence that has already been introduced at trial. Again, you may call witnesses and ask only non-leading questions, and the defense may cross-examine by leading questions.

Rebuttal is your opportunity to present your own “defense” to the defenses raised by opposing counsel. Defense counsel will have made every effort to discredit your witnesses or to cast doubt as to what happened on the day of the crime. Here, you have an opportunity to respond.

For example, the Defendant in the Sarah Survivor case, Leroy Mvamvu, claims that Sarah consented to have intercourse with him. And part of his argument is that she is his wife. To respond to his allegation, you could call Sarah Survivor back to the stand:

Q. Ms. Survivor, the Defendant testified that you reconciled on May 12 when he took you back to his home. He testified that you were happy with him. Is this true?

A. No. He forced me home with him. He locked me in a room, and I could never leave.

Q. Why did you leave?

A. He had me locked up, and he was torturing me. He came into my room twice a day and forced himself on me. I had to escape.

Q. And when he came to find you at your brother's house – did you want to leave with him?

A. No.

Q. Were you glad that he came to find you?

A. No.

8. CLOSING ARGUMENT

Each party is entitled to closing argument: a combination of facts, law and emotion to tell a compelling story leading the jury to come to your conclusion.

The prosecution will give their closing argument first followed by the defense. Then the prosecution has the opportunity to rebut the defense argument.

Here are some tips for closing argument:

1. **Argue.** A closing argument is not a summation of the evidence, but rather your opportunity to argue your case. Take your themes and theory of the case, and the supporting evidence, and mold them into a coherent argument.
2. **Draw the testimony and evidence together in a story.** There is no set structure for a closing argument, but your goal is to take the jury through the state's theory of the incident. Refer to witness testimony, quoting them directly if possible.
3. **Highlight strengths.** You should argue the strengths of your case, not just the weaknesses of the defense's position. Remember that you have a very high burden of proof -- proof beyond a reasonable doubt -- so you want to focus on the evidence that meets this burden.
4. **Confront weaknesses in your case.** At the same time, the defense may have introduced evidence that raises doubts in the jury's mind. Confront these weaknesses head on. Since you argue first, you present your own interpretation of a particular fact before the defense presents it as its own.
5. **Focus on the sex offender, not the victim.** A jury might not be as sympathetic to the victim's plight as you think. They might, for example, blame the victim or think that they would never be in his or her position. The better strategy, therefore, is to build your case and your closing argument around the wrong that the offender committed. Explain the law and how the defendant's actions broke that law, placing society and this particular victim in danger. Make the case about the violence of the offender that deserves retribution, rather than the poor state of the victim.
6. **Conclude.** End the closing argument on a strong point, and be sure to ask the jury for the verdict that you want.

7. **Rebuttal.** You may reserve time for a rebuttal. Here, you should focus on addressing any weak points in the defense closing.

9. JURY DECIDES

The jury is the fact finder. Their role is to find whether the evidence put before them proves that the defendant is guilty beyond a reasonable doubt. Liberia requires a unanimous decision to find the defendant guilty. *See Criminal Procedure Law*, s. 20.11.

A. JURY INSTRUCTIONS

After the parties finish their closing arguments, the judge will give the jury instructions on the law as it relates to the case. While the judge will ultimately decide which instructions to give to the jury, both parties have an opportunity to draft their own versions of instructions for the judge to consider. The judge may finalize these jury instructions before the parties finish presenting evidence and provide them to counsel.

If possible, jury instructions should be drafted and decided as soon as possible so that both counsel can craft their arguments (and particularly closing arguments) around the instructions that will be provided to the jury.

B. JURY DELIVERS THE VERDICT

The jury shall deliver its unanimous verdict of “guilty” or “not guilty” in open court. At that time, either party or the judge may move that the jury be polled. If the verdict is not unanimous upon the poll, then the court shall discharge the jury and award a new trial. *See Criminal Procedure Law*, s. 20.11.

If the defendant is found not guilty, he shall be immediately released from custody. *See Criminal Procedure Law*, s. 20.11.

If the defendant is found guilty:

- a. If he is at large on bail, then he may remain at large under the conditions of the bail bond until sentencing.
- b. If he is in custody, then he shall be remanded to custody.
- c. If he is at large and not on bail, then he may either be permitted to remain at large or he may be arrested and released on bail so long as he has not committed a capital offense.

A lesser included offense. Note that the jury may find that the defendant is not guilty of the offense with which he is charged, but he is guilty of a lesser included offense. *See Criminal Procedure Law*, s. 20.11. For example, if the jury decides that a defendant who is charged with first degree rape did not actually use a weapon as alleged, the jury might find the defendant guilty of second degree rape.

SAMPLE JURY INSTRUCTIONS

Republic of Liberia

Before his Honor, Judge XXX

REPUBLIC OF LIBERIA,)

)

Vs.

)

REQUEST OF PLAINTIFF, REPUBLIC

)

OF LIBERIA FOR JURY INSTRUCTIONS

LEROY MVAMVU)

The plaintiff, Republic of Liberia, hereby request this Honorable Court to instruct the Jury as follows:

INSTRUCTION NO. 1

The defendant in this matter has been charged with eight counts rape. In order to find the defendant guilty of rape, the Republic must prove, beyond a reasonable doubt, that the defendant intentionally penetrated the vagina of the victim with his penis without the victim's consent.

INSTRUCTION NO. 2

A person may commit rape against his wife or ex-wife if she does not consent to intercourse on the specific occasion for which he is accused of rape.

INSTRUCTION NO. 3

A person may commit multiple counts of the same crime if the crimes are committed on separate occasions, even where the offense is committed against the same victim.

INSTRUCTION NO. 4

The defendant in this matter has also been charged with kidnapping. In order to find the defendant guilty of kidnapping, the Republic must prove, beyond a reasonable doubt, that the defendant unlawfully confined the victim for a substantial period of time in a place of isolation, with one of the following purposes: i) to hold her in a condition of involuntary

servitude, ii) to facilitate commission of any felony, or iii) to inflict bodily injury or to terrorize the victim.

INSTRUCTION NO. 5

A person commits the crime of kidnapping if he confines the victim for a substantial period of time in a place of isolation with the purpose of raping her.

INSTRUCTION NO. 6

The defendant in this matter has been charged with aggravated and simple assault. In order to find the defendant guilty of aggravated assault, the Republic must prove, beyond a reasonable doubt, that the defendant purposefully or knowingly caused bodily injury to the victim with a deadly weapon.

INSTRUCTION NO. 7

In order to find the defendant guilty of assault, the Republic must prove, beyond a reasonable doubt, that the defendant purposely, knowingly or recklessly caused bodily injury to the victim.

INSTRUCTION NO. 8

Bodily injury is “physical pain, illness or any impairment of physical function.”

INSTRUCTION NO. 9

A person engages in conduct purposely if when he engages in the conduct, it is his conscious object to engage in conduct of that nature or to cause the result of that conduct (citation omitted).

INSTRUCTION NO. 10

A person engages in conduct knowingly if when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so (citation omitted).

10. SENTENCING

The jury decides and delivers the verdict, but the judge is ultimately responsible for sentencing the defendant according to the jury's finding and conviction. Your role at this stage is to remind the judge of the law pertaining to sentencing sexual offenses and the harm suffered by the victim. Remember that the judge has the authority to order restitution in addition to a jail sentence, and you may wish to advocate for restitution for the victim at this stage. *See also Chapter 1 – Role and Rights of the Victim.*

A. SENTENCES FOR SEXUAL OFFENSES

This section includes a short summary of the law and applicable sentences:

1. **First-degree rape** occurs where the perpetrator:

- Uses a weapon,
- Causes serious bodily injury or permanent disability,
- Has sex with a minor (statutory rape), or
- Acts with other perpetrators (gang rape).

→ **Maximum sentence = Life in prison**

2. **Second-degree rape**

- Any rape that does not meet the above conditions

→ **Maximum sentence = 10 years in prison.**

Act to Amend the New Penal Code, Chapter 14, Sections 14.70 and 14.71 and to Provide for Gang Rape

3. **Sexual assault**

Sexual assault pertains to “sexual contact” in the following conditions:

- Offensive contact when victim is not a voluntary social companion or has not previously allowed sexual contact
- Victim suffers from incapacity

- Victim is less than 12, perpetrator 16+
- Victim drugged
- Victim is less than 21 years, under guardianship of perpetrator
- Victim in custody of perpetrator
- (spouses excluded)
- Second-degree misdemeanor

→ **Maximum sentence = one year imprisonment**

4. Attempted crimes

- **Grades of attempted offenses:** reduce by one degree. E.g. if the offense is a first-degree felony, then attempting that offense is a second-degree felony.
- The maximum sentence for **attempted first-degree rape** is ten years in prison.
- The maximum sentence for **attempted second-degree rape** is three years in prison.

B. SENTENCING GENERALLY

Forms of Sentence: For crimes generally, the court may suspend the imposition of the sentence on a person who has been convicted of a crime or may sentence him or her as follows:

- i. To pay a fine authorized by law;
- ii. To be placed on probation;
- iii. To imprisonment for a term authorized by law; or
- iv. To both fine & probation or fine and imprisonment as authorized by law.

Suspended sentences may be imposed only for a noncapital offense in the following cases:

- i. When the defendant is under the age of 16 years (by a Juvenile Court);
or
- ii. When the defendant has never before been convicted of a crime.

Restitution: The court may include in the sentence an order of restitution. It shall be enforced in the same manner as a civil judgment, or after the provisions of the Criminal Procedure Law relating to probation becomes effective. But no sentence of imprisonment shall be imposed if the defendant fails or is unable to comply with the order of restitution.

Further powers of the court: the court is not deprived of any of its authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any civil penalty. Such a judgment or order may be included in the sentence.

PHASE 6 – POST-TRIAL PRACTICE

Criminal cases often continue even after a verdict has been reached and the defendant has been sentenced. This section includes a summary of the law pertaining to post-trial practice.

1. POST-TRIAL MOTIONS

In addition to appealing a case, the defense may file a series of motions after trial, including:

- a. Motion for New Trial
- b. Motion in Arrest of Judgment
- c. Motion to Withdraw a Plea of Guilty
- d. Motion to Vacate or Correct an Illegal Sentence

The prosecution may file a Motion to Rescind Judgment.

2. CONTEMPT

Contempt of Court is any act which is calculated to embarrass, hinder, or obstruct the court in administration of justice, or which is calculated to lessen the court's authority or dignity. A party may be held in contempt of court during or after a court hearing.

Criminal contempt vs. Civil contempt

1. **Criminal contempt.** When the court exercises contempt to preserve the court's authority and to punish someone for disobedience, the **contempt is criminal**. This form of contempt involves no element of personal injury. It is directed against the power and dignity of the court. Private parties have little, if any, interest in the proceeding for punishment.
2. **Civil contempt.** When the court exercises contempt to provide a remedy for an injured party and to force the other party to comply with a court order, the **contempt is civil**. This is to ensure compliance with court order or to compensate for losses or damages caused by non-compliance.

Who may be liable for contempt?

1. **Generally:** Anyone who by his or her conduct obstructs the effective administration of justice is guilty of contempt. Similarly, anyone who disobeys or refuses to comply with orders of the court proceeding out of a civil matter is liable for contempt.
2. **Individuals:** Lawyers, administrators and other court appointed commissioners, jailers, sheriffs, witnesses, party litigants, public servants when acting in their official capacities, may all be held for contempt of court. Defendants in criminal cases may also be held for contempt. Anyone who aids procures, or advises the disobedience of a lawful mandate of a court is as guilty of contempt as is the one who actually disobeys it.

Punishment for contempt

1. **Constitution:** Article 74 of the Liberian Constitution provides that the National Legislature shall fix the penalty to be imposed in all matters of contempt of court. The National Legislature has not yet determined the punishment for contempt, and therefore the current punishment for contempt rests within the discretion of the judge presiding and the rules of court as adopted by the Supreme Court.
2. **Methods of punishment:** the Courts of Liberia have historically punished contempt through the following methods:
 - a. Fines;
 - b. Imprisonment for a reasonable period;
 - c. Written & publicized apologies; or
 - d. A combination of two or more of the above as deemed appropriate in the discretion of the court to vindicate its integrity from disrespect and public ridicule.
3. **Limitations on the imposition of imprisonment & fines as punishment for contempt:** Section 44.73(2) of the Revised Civil Procedure Law of Liberia provides *“If the contempt consisted of an omission to perform an act which is yet within the power of the offender to perform, he may be imprisoned only until he has performed it. If the act is no longer in his power to perform, the offender may be imprisoned for a reasonable time not exceeding six months, unless otherwise provided by statute. The order and the warrant of commitment shall specify the duration of the imprisonment. If a fine is imposed it shall not exceed an amount which will reasonably indemnify the complainant for any loss he may have suffered including costs of the contempt proceeding, or, in the absence of a showing of loss, the fine shall not exceed two hundred fifty dollars (\$250) and the costs of the contempt proceeding. The fine shall be paid to the complainant.”*
4. **Judicial Liability:** A Magistrate or justice of the peace may be held liable in damages for improperly committing to imprisonment for contempt. Prohibition is available as a remedy to restrain a judge from punishing for contempt, where s/he is proceeding beyond the court’s jurisdiction or is proceeding erroneously within the court’s jurisdiction.

3. APPEALS

A. RIGHT TO APPEAL

Defendants have the right to appeal:

1. A final judgment or conviction; or
2. A sentence on the grounds that it is excessive or illegal. *Criminal procedure law*, s. 24.2.

The Republic, however, has a more limited right to appeal. The prosecution may appeal:

1. An order granting a motion to dismiss an indictment; or
2. An order granting a motion for judgment of acquittal. *Criminal Procedure Law*, s. 24.3.

*Note that the Republic cannot appeal a jury verdict.

B. TIMING OF APPEAL

An appeal must be taken in open court at the time of the judgment, sentence, or order to be appealed. If the defendant is not represented by counsel, the court rendering judgment shall advise the defendant of his or her right to appeal and ask whether he would like to claim that right. *Criminal Procedure Law*, s. 24.8.

C. PROCEDURE TO APPEAL

There are three requirements to appeal. The appellant must:

1. Announce that you are appealing the case;
2. File the bill of exceptions; and
3. Serve and file the notice of completion of the appeal.

Failure of any of these three requirements will be grounds for dismissal of the appeal. *Criminal Procedure Law*, s. 24.7.

Bill of exceptions and notice of completion. A bill of exceptions specifies and enumerates the appellant's objections to the order, judgment, decision, ruling or other matter to be appealed. The *Criminal Procedure Law*, s. 24.9 provides the following procedure:

1. The appellant must present a signed bill of exceptions to the trial judge within ten days of the judgment or order;
2. The judge shall sign the bill of exceptions within ten days of receiving the bill and note any reservations that he may wish to make;
3. The appellant shall file the signed bill of exceptions with the clerk of the trial court within sixty days of the order or decision that is appealed; and
4. At this time, the clerk shall issue a notice of completion of the appeal, a copy of which shall be served by the appellant on the appellee, and another copy of which shall be filed with the clerk of the Supreme Court. The original shall be filed in the office of the clerk of the trial court

Record of Appeal. The clerk of the trial court shall make a record of the appeal, including the certified copies of all:

1. Papers in the proceeding;
2. The indictment;
3. Entries of record made by the clerk;
4. Writs and returns;
5. Notices;
6. Motions;
7. Orders;
8. Instructions to the jury;
9. Verdict or finding;
10. Judgment and sentence;
11. Bill of exceptions, and

12. Transcript of the testimony.

13. Copy of any presentence report or any statement filed by the sentencing judge concerning his or her reasons for the sentence – to be included if the defendant is appealing from a sentence on the grounds that it is excessive.

The clerk will forward six copies of the record to the appellate court within ninety days after the judgment upon which appeal is taken. And a copy shall be served upon the appellee during the same timeframe. The clerk of the court will then docket the case.

No fees are payable to the clerk of any court for preparation or transmission of the record on appeal or for filing or docketing the appeal. *Criminal Procedure Law*, s. 24.11.

Scheduling Appeal for Argument. When an appeal is docketed, the case shall be scheduled for argument. Criminal cases have priority over all other appeals, and appeals in death penalty cases shall have absolute priority. *Criminal Procedure Law*, s. 24.14.

Briefs. Immediately after the case is scheduled for argument, both sides shall file six copies of their briefs in the office of the clerk of the Supreme Court. Counsel shall also serve a copy of his or her brief on counsel for opposing parties at the call of the case or before. The briefs shall include: a statement of the issue and the points to be argued with supporting legal authorities. References to testimony shall include a statement of the authority cited. *Criminal Procedure Law*, s. 24.15.

Dismissal for failure to proceed. An appeal may be dismissed by the trial court on motion for failure of the appellate to complete the appeal and file notice or by the appellate court for failure of the appellant to appear on the hearing of the appeal. *Criminal Procedure Law*, s. 24.17.

D. LEGAL ISSUES

Extent of review. The appellate court shall not consider points of law not raised in the court below and argued in the briefs except upon plain error apparent in the record. *Criminal Procedure Law*, s. 24.18.

4. EXTRADITION

Extradition has recently become a significant issue in Liberian criminal law. An extradition arrangement means any treaty, convention, or executive agreement providing for reciprocal rights to the surrender of fugitives. According to these treaties, those who are apprehended in one signatory country and are wanted for crimes in another signatory country must be released to the latter.

Extraditable offenses: A requisition for the surrender of a fugitive shall only be recognized if the offense charged is:

- i. Included in the provisions of the applicable extradition agreement; and
- ii. Is not a political offense.

During extradition proceedings, the court may not inquire into the guilt or innocence of the fugitive as to the extraditable offense with which he is charged except:

- i. To identify the person held as the person charged with the extraditable offense; or
- ii. To establish a defense of political offense.

Procedure governing the requisition for the surrender of a fugitive:

- i. A requisition for the surrender of a fugitive is to be made to the Minister of Foreign Affairs by a recognized diplomatic representative of the requesting country, in writing and accompanied by documents showing that the fugitive is charged with having committed an extraditable offense. The requisition shall appoint an agent to receive the fugitive in the event a warrant of surrender is issued by the Minister of Foreign Affairs.
- ii. Upon receipt of the requisition the Minister of Foreign Affairs is to request the Minister of Justice (Attorney General) secure the arrest of the fugitive.

PART II:

**LEGAL PROHIBITIONS ON GENDER
BASED VIOLENCE**

TABLE OF CONTENTS: LEGAL PROHIBITIONS

| | |
|--|------------|
| 1. <u>INTERNATIONAL INSTRUMENTS PROHIBITING GENDER BASED VIOLENCE</u> | 215 |
| A. BACKGROUND | 215 |
| B. UNITED NATIONS INSTRUMENTS | 215 |
| Universal Declaration of Human Rights | 215 |
| International Covenant on Civil and Political Rights | 216 |
| Convention on the Elimination of All Forms of Discrimination Against Women | 216 |
| Declaration on the Elimination of Violence Against Women..... | 216 |
| Convention on the Rights of the Child | 217 |
| Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime | 217 |
| C. REGIONAL INSTRUMENTS | 218 |
| African Charter on Human and Peoples’ Rights | 218 |
| Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women In Africa . | 218 |
| African Charter on the Rights and Welfare of the Child..... | 219 |
| 2. <u>LIBERIAN CRIMINAL OFFENSES RELATING TO GENDER BASED VIOLENCE</u> | 221 |
| A. SEXUAL OFFENSES | 221 |
| B. OTHER SEXUAL OFFENSES | 226 |
| Aggravated Involuntary Sodomy | 226 |
| Involuntary Sodomy | 229 |
| Voluntary Sodomy | 231 |
| Corruption of Minors..... | 232 |
| Sexual Abuse of Wards..... | 234 |
| Sexual Assault..... | 237 |
| Incest Or Deviant Sexual Intercourse Within Family Relationships | 239 |
| Defenses to Sexual Offenses | 241 |
| C. OTHER OFFENSES RELATING TO GENDER-BASED VIOLENCE (NON-SEXUAL) | 242 |
| Aggravated Assault | 242 |
| Simple Assault | 243 |
| Offensive touching | 246 |
| Recklessly Endangering Another Person | 247 |
| Terroristic Threats | 249 |
| Menacing..... | 250 |
| Defenses to Other Criminal Offenses | 251 |

| | |
|---|------------|
| D. OFFENSES RELATING TO CUSTOMARY MARRIAGE | 255 |
| Forced Marriage | 255 |
| Forced Imposition of Spouse By Parents..... | 256 |
| Forced Marriage of Widow to Husband’s Next of Kin..... | 257 |
| Prohibited Confession Damages | 258 |
| Prohibited Confession of Sexual Relations..... | 259 |
| E. TRAFFICKING IN PERSONS | 260 |
| Trafficking In Persons | 260 |
| Misuse of Commercial Transportation..... | 262 |
| Immunity For Victims of Trafficking | 262 |
| F. PROSTITUTION OFFENSES | 263 |
| Promoting Prostitution..... | 263 |
| Facilitating Prostitution | 265 |
| Prostitution..... | 268 |
| Patronizing Prostitutes | 269 |
| G. KIDNAPPING AND RELATED OFFENSES | 270 |
| Kidnapping..... | 270 |
| Felonious Restraint..... | 272 |
| False Imprisonment..... | 273 |
| Interference With Custody | 274 |
| H. OTHER CRIMINAL CONDUCT | 276 |
| Accomplices..... | 276 |
| Facilitation of Crime | 279 |
| Criminal Attempt..... | 280 |
| Criminal Conspiracy | 282 |

1. INTERNATIONAL INSTRUMENTS PROHIBITING GENDER BASED VIOLENCE

A. BACKGROUND

There are a number of international and regional instruments which provide the international context for the prohibition of sexual and gender based violence. Many may not explicitly mention sexual and gender based violence, but provide an international human rights framework. Liberia is party to a number of such international and regional agreements. Liberia is bound under international law to uphold those international obligations, however, international law is not generally enforceable domestically until enacted into domestic legislation. As a prosecutor, however, it is important that you are aware of these international standards, to which Liberia strives to adhere. The following summary provides a brief introduction to just a selection of relevant international instruments.

B. UNITED NATIONS INSTRUMENTS

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948. The Declaration is the core human rights treaty of the international system, proclaiming a basic set of requirements to ensure the protection of human rights. All member states of the United Nations – including Liberia – are party to the declaration as it was made by General Assembly resolution. Among other rights, the Declaration provides that there shall be no discrimination on the basis of sex, race and religion, there shall be equality for all under the law, and provides for the right to life, access to education, the right to marry, freedom of movement and expression. States are to prohibit illegal detention, ensure access to justice, and the right to a fair trial.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) is an international treaty based on the Universal Declaration of Human Rights. Provisions under the ICCPR include protection of the individual's physical integrity, procedural fairness in law, protection against discrimination, freedom of belief, speech, association, freedom of the press and the right to political participation. Liberia signed the ICCPR in 1967, and ratified the treaty in 2004.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has 118 parties, and was ratified by Liberia in 1984. The goal of the instrument is the elimination of discrimination against women, and it addresses equal treatment for women across diverse sectors; including, for example, the family, matrimony, employment, education, and political participation.

The Beijing Declaration and Platform for Action of 1995 also noted that it aims, *inter alia*, at “removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making.”

DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN

The Declaration on the Elimination of Violence Against Women was adopted by the United Nations General Assembly in 1993, and calls for national action to prevent and stop violence against women. Violence against women, under the Declaration, is defined as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” Article 3 of the Declaration also confirms that “women are entitled to the equal employment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The Declaration can be useful in interpreting relevant provisions of both international and national law aimed at protecting the physical and mental integrity of women.

While there is no treaty dealing expressly with gender-based violence at the international level, the Committee on the Elimination of Discrimination against Women has stated that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.” (General Recommendation No. 19).

CONVENTION ON THE RIGHTS OF THE CHILD

Liberia is also a party to the Convention on the Rights of the Child which it ratified in 1993. The treaty sets out the civil, political, economic, social and cultural rights of children. Article 34 of the Convention specifically requires State parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse. Article 35 requires State parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction, or the sale of, or trafficking in children for any purpose or in any form. There are also specific provisions pertaining to juvenile justice contained in articles 37 and 40.

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME.

The Protocol, adopted in 2000, requires of ratifying states to prevent and combat trafficking in persons, protecting and assisting victims of trafficking and promoting cooperation among states in order to meet those objectives. The convention and the protocol obligate ratifying states to introduce national trafficking legislation. Liberia ratified the protocol in 2004.

The Protocol provides, inter alia, for facilitating the return and acceptance of children who have been victims of cross-border trafficking, with due regard to their safety; prohibiting the trafficking of children for purposes of commercial sexual exploitation of children, exploitative labor practices or the removal of body parts; suspending parental rights of parents, caregivers or any other persons who have parental rights in respect of a child should they be found to have trafficked a child; ensuring that definitions of trafficking reflect the need for special safeguards and care for children, including appropriate legal protection; ensuring that trafficked persons are not punished for any offenses or activities related to their having been trafficked, such as prostitution and

immigration violations; and providing for proportional criminal penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offenses involving trafficking in children or offenses committed or involving complicity by state officials.

C. REGIONAL INSTRUMENTS

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights aims to promote and protect human rights and basic freedoms in the African Continent, including those rights civil and political in nature, as well as economic, social, and cultural. Of particular relevance in this context, is the Protocol to the African Charter on the Rights of Women in Africa.

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

This 1995 Protocol to the African Charter on Human and Peoples' Rights pertains specifically to the rights of women. It defines "discrimination against women" as any distinction, exclusion or restriction of any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life. "Violence against women" is defined as all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

The Protocol provides for, inter alia, the right to dignity, to life, integrity and security of the person, the elimination of harmful practices, provisions regarding marriage, access to justice and equal protection before the law, widows' rights and the right to inheritance, as well as a number of other social and economic rights. The Protocol also specifically notes the rights of the girl child, elderly women and disabled women.

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child was agreed upon in 1999 and recognizes the need for legal protection of the child with respect to freedom, dignity and security. Of particular relevance, the Charter specifically notes the need for states to take measures to protect children against sexual abuse and sexual exploitation.

2. LIBERIAN CRIMINAL OFFENSES RELATING TO GENDER BASED VIOLENCE

A. SEXUAL OFFENSES

2005 RAPE LAW – AN ACT TO AMEND THE NEW PENAL CODE CHAPTER 14
SECTION 14.70 AND TO PROVIDE FOR GANG RAPE

I. RAPE

A. RAPE

Penal Law, section 14-70

a person is guilty of rape if s/he:

has sexual intercourse with another person (male or female) and:

(a) (i) He intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female) with his penis without the victim's consent; or

(a)(ii) S/he intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of the body (other than the penis) without the victim's consent.

or

(b) The victim is less than eighteen years old, provided the actor is eighteen years of age or older

B. GANG RAPE

Penal law, section 14.70 2.

a person is guilty of gang rape if s/he:

purposely promotes or facilitates or agrees with one or more persons to engage in or cause the performance of conduct which shall constitute rape.

Gang rape is a felony of the first degree.

a. Definitions

Sexual intercourse is defined by section 14.70 3. (a)(i) as “Penetration, however slight, of the vagina, anus or mouth, or any other opening of another person by the penis; or by section 14.70 3. (a)(ii) as “Penetration, however slight, of the vagina or anus of another person by a foreign object or any other part of the body (other than the penis).

Consent is defined by section 14.70 3.(b)(i) as follows: “For the purposes of this felony, a person consents if s/he agrees by choice and has the freedom and capacity to make that choice.” Note that a person under the age of 18 may not legally consent to sexual intercourse.

Presumption of Lack of Consent. Section 14.70 3.(b)(ii) provides: “There shall be a presumption of lack of consent in the following circumstances:

- i. Any person, who at the time of the relevant act of immediately before it began, was using violence against the victim or causing the victim to fear that immediate violence would be used against him/her;
- ii. Any person, at the time of the relevant act of immediately before it began, was causing the victim to fear that violence was being used, or that violence would be used against another person;
- iii. The victim was detained at the time of the relevant act;
- iv. The victim was asleep or otherwise unconscious at the time of the relevant act;

- v. Because of the victim's physical disability, s/he could not have been able at the time of the relevant act to communicate to the perpetrator whether s/he consented;
- vi. Where the victim had been administered or caused to take without his or her consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling him or her to be stupefied or overpowered at the time of the relevant act;
- vii. The defendant intentionally induced the victim to consent to the relevant act by impersonating a person known to the victim.

b. Grading and sentencing and classification for bail purposes

Rape is a felony of the first degree under section 14.70 4.(a) where:

- i. The victim was less than 18 years of age at the time the offense was committed; or
- ii. The offense involves gang rape as defined in section 14.70 2.; or
- iii. The act of rape complained of results in permanent disability or serious bodily injury to the victim; or
- iv. At the time of the relevant act or immediately before it began the defendant threatened the victim with a firearm or other deadly weapon.

The maximum sentence for first-degree rape under section 14.70 4. (b) is life imprisonment,

And for the purposes of bail, it shall be treated the same as capital offenses under section 13.1.1 – Capital Offenses of the Criminal Procedure Law.

Rape is a second degree felony under section 14.70 4. (c) where the conditions set out in section 4(a)(i)-(iv) are not met.

The maximum sentence for second degree rape is ten years imprisonment.

c. Elements of the offense of rape

To establish that the offense of rape has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ intentionally
- ✓ had sexual intercourse with another by penetrating the vagina, anus, mouth or any other opening of another
- ✓ with his penis
- ✓ without the victim's consent
 - or with a victim less than eighteen years old provided the perpetrator was eighteen years of age or older.

OR

- ✓ the defendant
- ✓ intentionally
- ✓ penetrated the vagina or anus
- ✓ with a foreign object or any other part of the body than the penis
- ✓ without the victim's consent;
 - or with a victim less than eighteen years old provided the perpetrator was eighteen years of age or older.

d. Elements of the offense of gang rape

To establish that the offense of gang rape has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ purposely
- ✓ promoted, facilitated or agreed with one or more persons
- ✓ to engage in OR cause the performance of
- ✓ conduct constituting the crime of rape (non-consensual sexual intercourse or sexual intercourse with a victim under the age of eighteen years by a perpetrator age eighteen or older).

B. OTHER SEXUAL OFFENSES

I. AGGRAVATED INVOLUNTARY SODOMY

Penal law, section 14.72

a person who engages in deviant sexual intercourse with another, or who causes another to engage in deviant sexual intercourse has committed the offense of aggravated involuntary sodomy if:

- (a) S/He compels the other person to submit by force or by threats of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;
- (b) S/He has substantially impaired the other person's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance; or
- (c) The other person is less than sixteen years of age, provided the actor is sixteen years of age or older.

Aggravated involuntary sodomy is a first degree felony if in the course of the offense the actor inflicts serious bodily injury upon the other person, or if his conduct violates paragraph (1) (c) of this section, or if the other person is not a voluntary companion of the actor and has not previously permitted his sexual liberties. Otherwise, the offense is a second degree felony.

a. Definitions

Sexual contact is defined by Penal Law, s.14.79(c) as any touching of the sexual or other intimate parts of a person for the purpose of arousing or gratifying sexual desire.

Sexual intercourse is defined by Penal Law, s.14.79(a) as occurring upon penetration, however slight; ejaculation is not required.

Deviant sexual intercourse is defined by section 14.79 (b) as sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and

the penis, or the mouth and the vulva, anal or oral sex between persons who are not husband and wife or living together as man and wife.

b. Elements of the offense

To prove that the offense of aggravated involuntary sodomy was committed the prosecutor must present evidence that:

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse or caused another to engage in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner
- ✓ using force or threat of imminent death, serious bodily injury or kidnapping

OR

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse or caused another to engage in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner
- ✓ by substantially impairing the other person's power to appraise or control his/her conduct by administering or employing without his or her knowledge, intoxicants or other means
- ✓ with intent to prevent resistance

OR

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse or caused another to engage in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner
- ✓ the other person is less than sixteen years of age; **AND**
- ✓ the perpetrator is sixteen years of age or older.

Note:

There are three ways of committing aggravated involuntary sodomy.

Lack of consent is an element of all three.

Minors are deemed unable to consent under the law.

II. INVOLUNTARY SODOMY

Penal Law, section 14.73

a person is guilty of involuntary sodomy if s/he:

engages in deviant sexual intercourse with another person or causes another person to engage in deviant sexual intercourse and:

- (a) S/He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;
- (b) S/He knows that the other person is unaware that a sexual act is being committed upon him or her: or
- (c) S/He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

Involuntary sodomy is a third degree felony

a. Definitions

Deviant sexual intercourse is defined by section 14.79 (b) as sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, anal or oral sex between persons who are not husband and wife or living together as man and wife.

b. Elements of the offense

To establish that the offense of involuntary sodomy has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse or caused another to engage in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner; and

- ✓ s/he knew that the other person suffered from a mental disease or defect which rendered the victim incapable of understanding the nature of his or her conduct;

OR

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse or caused another to engage in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner; and
- ✓ he knew that the other person was unaware that a sexual act was being committed upon him or her;

OR

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse or caused another to engage in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner; and
- ✓ he compelled the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

Note:

There are three ways of committing the offense of involuntary sodomy.

Lack of consent is an element of all three.

In order to commit involuntary sodomy under (a) or (b) the perpetrator must be aware that the victim is unable to consent as a result of mental disease or defect or because the victim is unconscious.

III.VOLUNTARY SODOMY

Penal law, section 14.74

A person is guilty of voluntary sodomy when s/he:

Engages in deviant sexual intercourse under circumstances not stated in Section 14.72 or 14.73.

Voluntary sodomy is a first degree misdemeanor

a. Definitions

Deviant sexual intercourse is defined by Penal Law, s.14.79 (b) as sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, anal or oral sex between persons who are not husband and wife or living together as man and wife.

b. Elements of the offense

To establish that the offense of voluntary sodomy has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse
- ✓ with someone other than his or her spouse or cohabiting partner;
- ✓ voluntarily (consensually, without force, threat and with knowledge).

IV. CORRUPTION OF MINORS

Penal law, section 14.75

a male is guilty of corruption of minors if he has sexual intercourse with a female not his wife

or

any other person who engaged in deviant sexual intercourse with another and the other person is under sixteen years (of age) and the actor is at least five years older than the other person.

Corruption of minors is a third degree felony except when the actor (perpetrator) is less than twenty-one years old, in which event it is a first degree misdemeanor.

a. Definitions

Sexual intercourse is defined by Penal Law, s. 14.79 (a) as occurring upon penetration, however slight; ejaculation is not required.

Deviant sexual intercourse is defined by Penal Law, s. 14.79 (b) as sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, anal or oral sex between persons who are not husband and wife or living together as man and wife.

b. Elements of the offense

To establish that the offense of corruption of minors has been committed the prosecutor must establish that:

- ✓ a male (male perpetrator)
- ✓ had sexual intercourse with a female not his wife
- ✓ who was under the age of sixteen; and

- ✓ the male perpetrator is at least five years older than the victim/other person.

OR

- ✓ the defendant (perpetrator)
- ✓ had deviant sexual intercourse
- ✓ with another
- ✓ who was under the age of sixteen; and
- ✓ the perpetrator is at least five years older than the victim/other person.

V. SEXUAL ABUSE OF WARDS

Penal Law, section 14.76

a person is guilty of sexual abuse of wards if he:

has sexual intercourse with another or engages in deviant sexual intercourse with another or causes another to engage in deviant sexual intercourse when the parties to the sex act are not married to each other and:

(a) the other person is in official custody or detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over the other person or and the actor is his or her guardian or acts as a guardian

or

(b) the other person is less than twenty-one years of age and the actor is his or her guardian or acts as a guardian.

Sexual abuse of wards is a first degree misdemeanor.

a. Definitions

Sexual intercourse is defined by Penal Law, s. 14.79 (a) as occurring upon penetration, however slight; ejaculation is not required.

Deviant sexual intercourse is defined by Penal Law, s.14.79 (b) as sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, anal or oral sex between persons who are not husband and wife or living together as man and wife.

b. Elements of the offense

To establish that the offense of sexual abuse of wards has been committed the prosecution must establish that:

- ✓ the defendant
- ✓ had sexual intercourse with another
- ✓ who he was not married to; and
- ✓ the other person/victim was in official custody or detained in a hospital, prison or other institution and the perpetrator had supervisory or disciplinary authority over the other person/victim
- ✓ or the perpetrator was the victim's guardian or acted as guardian.

OR

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse with another or caused another to engage in deviant sexual intercourse
- ✓ who he/she was not married to; and
- ✓ the other person/victim was in official custody or detained in a hospital, prison or other institution and the perpetrator had supervisory or disciplinary authority over the other person/victim
- ✓ or the perpetrator was the victim's guardian or acted as guardian.

OR

- ✓ the defendant
- ✓ had sexual intercourse with another
- ✓ who he/she was not married to; and
- ✓ the victim was less than twenty-one years of age; and
- ✓ the perpetrator was or acted as the victim's guardian.

OR

- ✓ the defendant
- ✓ engaged in deviant sexual intercourse with another or caused another to engage in deviant sexual intercourse
- ✓ The perpetrator was not married to the victim;
- ✓ the victim was less than twenty-one years of age; and
- ✓ the perpetrator was or acted as the victim's guardian.

VI. SEXUAL ASSAULT

Penal Law, section 14.77

a person is guilty of sexual assault if he:

knowingly has sexual contact with another person or causes such other to have sexual contact with him or her, when they are not married to each other.

Sexual Assault is a second degree misdemeanor if:

- (a) The actor knows that the contact is offensive to the other person when such other person is not a voluntary social companion or has not previously permitted sexual liberties to be taken;
- (b) The actor knows that the other person suffers from a mental disease or defect which renders such person incapable of understanding the nature of such conduct;
- (c) The other person is less than twelve years of age, provided the actor is sixteen years of age or older;
- (d) The actor has substantially impaired the other person's power to appraise or control his or her conduct by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;
- (e) The other person is in official custody or detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over him or her;
- (f) The other person is less than twenty-one years of age and the actor is his or her parent, guardian or acts as his guardian; or
- (g) The other person is less than sixteen years of age and the actor is at least five years older than the other person.

a. Definitions

Sexual contact is defined by Penal Law, s.14.79 (c) as any touching of the sexual or other intimate parts of a person for the purpose of arousing or gratifying sexual desire.

b. Elements of the offense

To establish that the offense of sexual assault has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly
- ✓ had sexual contact with another or caused such other to have sexual contact with him or her
- ✓ when they were not married to each other;

AND

- i. The victim was not a voluntary social companion or has not previously permitted sexual liberties to be taken and the perpetrator knew the contact was offensive to the other person; OR
- ii. The actor knew that the other person suffered from a mental disease or defect which rendered such person incapable of understanding the nature of such conduct; OR
- iii. The other person was less than twelve years of age, provided the actor was sixteen years of age or older; OR
- iv. The other person was in official custody or detained in a hospital, prison or other institution; and the actor had supervisory or disciplinary authority over him or her; OR
- v. The other person was less than twenty-one years of age; and the actor was his or her parent, guardian or acted as his/her guardian;
- vi. The other person was less than sixteen years of age and the actor was at least five years older than the other person.

VII. INCEST OR DEVIANT SEXUAL INTERCOURSE WITHIN FAMILY RELATIONSHIPS

Penal Law, section 16.2

A person is guilty of incest or deviant sexual intercourse within family relationships if s/he:

knowingly marries or cohabits or has sexual intercourse or deviant sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood, or an uncle, aunt, nephew or niece of the whole blood.

The relationships referred to herein include blood relationships without regard to legitimacy, and relationships of parent and child by adoption, and step parent and step child during the existence of the marriage giving rise to such relationship.

Incest or deviant sexual intercourse within family relationships is felony of the third degree.

a. Definitions

Sexual intercourse is defined by Penal Law, s.14.79 (a) as occurring upon penetration, however slight; ejaculation is not required.

Deviant sexual intercourse is defined by Penal Law, s. 14.79 (b) as sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, anal or oral sex between persons who are not husband and wife or living together as man and wife.

b. Elements of the offense

To establish that the offense of incest or deviant sexual intercourse within family relationships has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly
- ✓ married or cohabited with or had sexual intercourse or deviant sexual intercourse
- ✓ with any of the following blood or half blood relatives:
 - ancestor
 - descendent
 - brother
 - sister
 - half brother
 - sister

OR

- ✓ with any of the following whole blood relatives:
 - uncle
 - aunt
 - nephew
 - niece

OR

- ✓ with any step child or adopted child when the sexual act was committed during the existence of the marriage giving rise to the parent-child relationship.

Note that the law applies regardless of legitimacy.

VIII. DEFENSES TO SEXUAL OFFENSES

Penal Law, section 14.78 General provisions relating to sections on sexual crimes against the person.

1. Lack of defense: mistake as to age. In Section 14.70 through 14.77

(a) When the criminality of conduct depends on child being below the age of sixteen, it is no defense that the actor did not know the child's age, or actually believed the child to be older than sixteen.

(b) When criminality depends on the child being below a critical age, older than sixteen it is an affirmative defense that the actor actually believed, with good reason therefore, that the child was of the critical age or older.

2. Defense: spouse relationships. In Section 14.70 through 14.77.

When the definition of an offense excludes contact with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship.

The exclusion shall be inoperative with respect to spouses or those who lived as man and wife though not legally married, living apart.

Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which s/he causes another person, not within the exclusion to perform.

3. Testimony of complainants.

No person shall be convicted of any felony under Sections 14.70 through 14.74 upon the uncorroborated testimony of the alleged victim.

C. OTHER OFFENSES RELATING TO GENDER-BASED VIOLENCE (NON-SEXUAL)⁷

I. AGGRAVATED ASSAULT

Penal Law, section 14.20:

a person is guilty of aggravated assault if he:

(a) Causes serious bodily injury to another purposely, knowingly or recklessly; or

(b) Purposely or knowingly causes bodily injury to another with a deadly weapon. Aggravated assault is a felony of the second degree.

a. Definitions

Purposely is defined by Penal Law, s. 2.2(a) as "if when he engages in the conduct, it is his conscious object to engage in conduct of that nature or to cause the result of that conduct."

Knowingly is defined by section 2.2(b) as "if when he engages in that conduct he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so."

Recklessly is defined by section 2.2(c) as "if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks."

Serious bodily injury is defined by section 1.7(p) as "bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement,

⁷ Note that this handbook includes several offenses that are non-sexual. In most cases, a sexual assault does not occur in isolation. Rape or other sexual abuse may be accompanied by assault, kidnapping, terroristic threats, reckless endangerment, or other offenses. A defendant who has committed multiple crimes should be prosecuted for multiple offenses. *See Phase III – Bringing the Case to Court – Charging.*

unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ.”

Bodily injury is defined by section 1.7(c) as “physical pain, illness or any impairment of physical function.”

Deadly weapon is defined by section 1.7(d) as “any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner is used or is intended to be used is known to be capable of producing death or serious bodily injury.”

b. Elements of the offense

To establish that the offense of aggravated assault has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ purposely, knowingly or recklessly
- ✓ caused
- ✓ serious bodily injury
- ✓ to another

OR

- ✓ the defendant
- ✓ purposely or knowingly
- ✓ caused
- ✓ bodily injury
- ✓ to another
- ✓ with a deadly weapon

II. SIMPLE ASSAULT

Penal Law, section 14.21:

a person is guilty of a simple assault if he:

- (a) Purposely, knowingly or recklessly causes bodily injury to another; or
- (b) Negligently causes bodily injury to another with a deadly weapon

Simple assault is a misdemeanor of the first degree unless committed in an un-armed fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the second degree.

a. Definitions

Purposely is defined by Penal Law, s. 2.2(a) as "if when he engages in the conduct, it is his conscious object to engage in conduct of that nature or to cause the result of that conduct."

Knowingly is defined by Penal Law, s. 2.2(b) as "if when he engages in that conduct he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so."

Recklessly is defined by Penal Law, s. 2.2(c) as "if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks."

Negligently is defined by Penal Law, s. 2.2(d) as "if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks."

Bodily injury is defined by Penal Law, s. 1.7(c) as "physical pain, illness or any impairment of physical function."

Deadly weapon is defined by Penal Law, s. 1.7(d) as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner is used or is intended to be used is known to be capable of producing death or serious bodily injury."

b. Elements of the offense

To establish that the offense of simple assault has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ purposely, knowingly or recklessly
- ✓ caused
- ✓ bodily injury
- ✓ to another

OR

- ✓ the defendant
- ✓ negligently
- ✓ caused
- ✓ bodily injury
- ✓ to another
- ✓ with a deadly weapon

Note: The difference between simple assault and aggravated assault is: under Penal Law, s. 14.21(a), no requirement of serious bodily injury; and under s. 14.2 (b), a lower standard of culpability whereby the person negligently causes the harm.

Note: You need to look at the context in which the alleged assault occurred in order to see whether it is a misdemeanour of the first or second degree.

III. OFFENSIVE TOUCHING

Penal Law, section 14.22: A person who, with the purpose of offending another person not a member of his household, by any means strikes or touches such other person, is guilty of an infraction, for which the maximum fine shall be \$25. (USD)

a. Definitions

Purposely or **with purpose**, is defined by Penal Law, s. 2.2(a), as "if when he engages in the conduct, it is his conscious object to engage in conduct of that nature or to cause the result of that conduct."

b. Elements

To establish that the offense of offensive touching has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ with the purpose of offending
- ✓ another person
- ✓ who is NOT a member of his household
- ✓ struck or touched
- ✓ such other person
- ✓ by any means

IV. RECKLESSLY ENDANGERING ANOTHER PERSON

Penal Law, section 14.23:

A person commits a misdemeanor of the first degree if he recklessly engages in conduct which creates a substantial risk of death or serious bodily injury to another. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized. Recklessness and a substantial risk shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believes the firearm to be loaded.

a. Definitions

Recklessly is defined by Penal Law, s. 2.2(c) as “if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks.”

Serious bodily injury is defined by Penal Law, s. 1.7(p) as “bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ.”

b. Elements of the offense

To establish that the offense of recklessly endangering another person has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ recklessly
- ✓ engaged in conduct
- ✓ which created a substantial risk of death or
- ✓ created a substantial risk of serious bodily harm
- ✓ to another

Note:

This section provides further guidance that:

Only the potential for harm needs to exist; it does not need to be shown that a person's safety was actually jeopardized.

In a case in which a person knowingly points a firearm at or in the direction of another, it does not matter whether or not the actor believed the firearm to be loaded; recklessness and a substantial risk shall be presumed.

V. TERRORISTIC THREATS

Penal Law, section 14.24:

A person is guilty of a felony of the third degree if he threatens to commit any crimes of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

a. Definitions

Recklessly or **with recklessness** is defined by Penal Law, s. 2.2(c) as “if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks.”

b. Elements of the offense

To establish that the offense of terroristic threats has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ threatened
- ✓ to commit any crimes of violence
- ✓ with the purpose of terrorizing another; OR
- ✓ to cause evacuation of a building, a place of assembly, or facility of public transportation; OR
- ✓ otherwise to cause serious public inconvenience; OR
- ✓ in reckless disregard of the risk of causing such terror or inconvenience.

VI. MENACING

Penal Law, section 14.25:

A person is guilty of a misdemeanor of the first degree if he knowingly places or attempts to place another human being in fear by menacing him with imminent serious bodily harm.

a. Definitions

Knowingly is defined by Penal Law, s. 2.2(b) as “if when he engages in that conduct he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so.”

b. Elements of the offense

To establish that the offense of menacing has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly
- ✓ placed or attempted to place
- ✓ another human being
- ✓ in fear
- ✓ by menacing him with imminent serious bodily harm.

VII. DEFENSES TO OTHER CRIMINAL OFFENSES

CONSENT

Penal Law, section 14.29:

Consent as a defense.

1. When a defense. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is an affirmative defense if:

- a. Neither the injury inflicted nor the injury threatened is a serious bodily injury;
- b. The conduct and the injury are reasonable foreseeable hazards of joint participation in a lawful athletic contest or competitive sports;
- c. The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

2. Ineffective consent. Assent does not constitute consent, within the meaning of this section if:

- a. It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor;
- b. It is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;
or
- c. It is induced by force, duress or deception.

Consent may, in the circumstances described by section 14.29(1)(a)-(c) be a defense. Section 14.29(2) further provides in which circumstances consent will be considered ineffective as a defense.

IMMATURITY

Penal Law, section 4.1:

Immaturity

A person is not criminally responsible for his behaviour when he was less than sixteen years of age. In any prosecution for an offense, lack of criminal responsibility by reason of immaturity is an affirmative defense. A person under eighteen years of age commits an act which would be an offense if committed by a person over eighteen shall be subject to the provisions of the Juvenile Court Procedural Code.

Section 4.1 provides that those less than sixteen years of age are not criminally responsible and that this is an affirmative defense in any prosecution for an offense. Further when a person under eighteen years of age who commits an act which would be considered an offense, the person shall be subject to the provisions of the Juvenile Court Procedural Code, to which the prosecutor should then refer.

INTOXICATION

Penal Law, section 4.2:

Intoxication.

1. Defense precluded. Except as provided in paragraph 4, intoxication is not, in itself a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the offense charged, except as provided in paragraph 2.
2. Recklessness. When recklessness establishes an element of the offense, if the actor is unaware of a risk because of self-induced intoxication, such awareness is immaterial.
3. Not mental disease. Intoxication does not itself, constitute mental disease within the meaning of section 4.3.
4. When a defense. Intoxication, by reason of which the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of law, is an affirmative defense if (a) it is not self-induced, or (b) it is caused by substances which the actor has introduced into his body under duress.

5. Definitions. In this section:

(a) “intoxication” means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs, or other substances into the body;

(b) “self-induced” means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which is to cause intoxication he knows or ought to know.

Section 4.2 details when intoxication may and may not be used as a defense to an offense.

MENTAL DISEASE OR DEFECT

Penal Law, section 4.3:

Mental disease or defect.

A person is not criminally responsible for his conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to form a rational judgment with regard to the criminality of such conduct or to conform his conduct to the requirements of law.

DURESS

Penal Law, section 5.20:

Duress

1. Defense to prosecution. In a prosecution for any offense it is an affirmative defense that the actor engaged in the prescribed conduct because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

2. When defense precluded. The defense defined in this section is not available to a person who by voluntarily entering into a criminal enterprise, or otherwise; wilfully or recklessly placed himself in a situation in which it was foreseeable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing

himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

3. Women acting on command of husband. It is not a defense that a woman acted on the command or in the presence of her husband, unless she acted under such coercion as would establish a defense under this section.

4. Conduct justifiable under section 5.10. When the conduct of the actor would otherwise be justifiable under section 5.10 this section does not preclude such defense.

Section 4.2 details when duress may and may not be used as a defense to an offense.

D. OFFENSES RELATING TO CUSTOMARY MARRIAGE⁸

I. FORCED MARRIAGE

Equal Rights of the Customary Marriage Law, section 2.9:

It shall be unlawful for any customary female under the age of 16 to be given in customary marriage to a man; any tribal person who violates this Section has committed a felony of the first degree, and upon conviction, shall be fined the amount of not less than LD\$500.00, nor more than LD\$1,000.00.

a. Definitions

Customary marriage is defined by the Customary Marriage Law, s. 1(a) as: “marriage between a man and a woman performed according to the tribal tradition of the locality.”

b. Elements of the offense

To establish that the offense of forced marriage has been committed, the prosecution must establish that:

- ✓ a customary female
- ✓ under the age of 16 years
- ✓ was given by the perpetrator
- ✓ in customary marriage
- ✓ to a man

⁸ Sexual violence often occurs within intimate-partner relationships and may be part of a larger pattern of abuse by a perpetrator-spouse. Where appropriate, the defendant may be charged with offenses relating to customary marriage along with the sexual offense.

II. FORCED IMPOSITION OF SPOUSE BY PARENTS

Equal Rights of the Customary Marriage Law, section 2.10:

Unlawful for Parents to Choose Daughter's Husband.

(a) Every customary female of legal age shall have the unrestricted right to marry the man of her choice. It shall be unlawful for any tribal parents to choose a husband for his/her daughter, or compel the daughter or other female relative to marry a man not her choice.

(b) Any tribal parent or next of kin who shall violate Section 2.10(a) of this Act has committed a felony of the first degree, and upon conviction, is punishable by a fine of not less than LD\$500.00 nor more than LD\$1,000.00.

a. Elements of the offense

To establish that the offense of choosing a daughter's husband has been committed, the prosecution must establish that:

- ✓ A tribal parent
- ✓ chose
- ✓ a husband
- ✓ for his/her daughter;

OR

- ✓ A tribal parent
- ✓ compelled
- ✓ his/her daughter or other female relative
- ✓ to marry
- ✓ a man not of her choice

III.FORCED MARRIAGE OF WIDOW TO HUSBAND'S NEXT OF KIN

Equal Rights of the Customary Marriage Law, section 3.4:

Compulsory Marriage of Widow to Deceased Husband's Kin Unlawful

(a) No family member of the deceased husband shall compel the widow or widows to remain within the family, or marry a kin or her/their late husband;

(b) Any family member who shall compel a widow to marry one of her late husband's relatives against her will in order for said widow to be able to subsist or earn a livelihood, has committed a felony of the first degree, and upon conviction in a court of competent jurisdiction, shall be fined the amount of not less than LD \$500.00, nor more than LD\$1,000.00.

a. Definitions

Widow is defined by Customary Marriage Law, s. 1(d) as "a woman whose husband is dead."

b. Elements of the offense

To establish that the offense of forced marriage of a widow to deceased husband's kin has been committed, the prosecution must establish that:

- ✓ a family member
- ✓ of a deceased husband
- ✓ compelled
- ✓ a widow
- ✓ to marry
- ✓ one of her late husband's relatives
- ✓ against her will
- ✓ in order for said widow to be able to subsist or earn a livelihood

IV. PROHIBITED CONFESSION DAMAGES

Equal Rights of the Customary Marriage Law, section 2.7:

Confession Damages Prohibited

No customary husband shall aid, abet, or create the situation for his customary wife to have illicit sexual intercourse with another man for the sole purpose of collecting damages. Any customary husband who shall violate this Section has committed a felony of the first degree, and upon conviction in a court of competent jurisdiction, shall be fined the amount of not less than LD\$200.00, nor more than LD\$500.00 including restitution of the damages collected, if any.

a. Elements of the offense

To establish that the offense of confession damages has been committed, the prosecution must establish that:

- ✓ a customary husband
- ✓ aided, abetted, or created the situation
- ✓ for his customary wife
- ✓ to have illicit sexual intercourse
- ✓ with another man
- ✓ for the sole purpose
- ✓ of collecting damages

V. PROHIBITED CONFESSION OF SEXUAL RELATIONS

Equal Rights of the Customary Marriage Law, section 2.8:

Confession Names Unlawful

It shall be unlawful for any customary person or husband to compel or demand any female of legal age, whether or not she is his customary wife, to “confess” or call the name of her lover with whom she has had illicit sexual intercourse in order to collect damages from said lover, for interference with domestic relations, either spouse may seek redress through a court of competent jurisdiction or tribal court. Any violation of this Section shall constitute a felony of the second degree, and the offender shall, upon conviction in court of competent jurisdiction be fined the amount of not less than LD \$500.00, nor more than LD\$1,000.00.

a. Definitions

To confess is defined by Customary Marriage Law, s. 1(j) as “for a women, whether married or not, to call the name of a man, other than her husband or boyfriend, with whom she has illicit sexual intercourse.”

b. Elements of the offense

To establish that the offense has been committed, the prosecution must establish that:

- ✓ any customary person or husband
- ✓ compelled or demanded
- ✓ any female of legal age, whether or not she is his customary wife
- ✓ to confess or call the name of her lover with whom she had illicit sexual intercourse
- ✓ in order to collect damages
- ✓ from said lover
- ✓ for interference with domestic relations

E. TRAFFICKING IN PERSONS

I. TRAFFICKING IN PERSONS

Anti-Trafficking Law, section 2:

Trafficking in persons

That from and immediately after the passage of this Act, recruitment, transportation, transfer, harboring or receipt of a person by means of the threat or use of force or other means of coercion or by abduction, fraud, deception, abuse of power or of a position of vulnerability, or by giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation shall be a criminal offense within the Republic of Liberia.

a. Definitions

Exploitation is defined by Anti-Trafficking Law, s. 1 as “(a) Keeping a person in a state of slavery; (b) Subjecting a person to practices similar to slavery; (c) Compelling or causing a person to provide forced labor or services; (d) Keeping a person in a state of servitude, including sexual servitude; (e) Exploitation of the prostitution of another; (f) Engaging in any other form of commercial sexual exploitation, including but not limited to pimping, pandering, procuring, profiting from prostitution, maintaining a brothel, child pornography; (g) Illicit removal of human organs.

Abuse of a position of vulnerability is defined by Anti-Trafficking Law, s. 1 as “such abuse that the person believes s/he has no reasonable alternative but to submit to the labor or service demanded of the person, and includes but is not limited to taking advantage of the vulnerabilities resulting from the person having entered the country illegally or without proper documentation, pregnancy, any physical or mental disease or disability of the person, including addiction to the use of any substance, or reduced capacity to for judgment by virtue of being a child.

Coercion is defined by Anti-Trafficking Law, s. 1 as including “violent as well as some forms of non-violent or psychological coercion, including: (a) Threats of serious harm to or physical restraint against any person; (b) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or

physical restraint against any persons; (c) Or the abuse or threatened abuse of the legal process.

b. Elements of the offense

To establish that the offense of trafficking in persons has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ recruited, transported, transferred, harbored, or received
- ✓ a person
- ✓ by:
 - means of the threat or use of force
 - or other means of coercion
 - or by abduction, fraud, deception, abuse of power or of apposition of vulnerability
 - or by giving or receiving of payments or benefits to achieve the consent of a person having control over another person
- ✓ for the purpose of exploitation

II. MISUSE OF COMMERCIAL TRANSPORTATION

Anti-Trafficking Law, section 10:

Misuse of commercial transportation

- (a) International transportation companies must verify that every passenger possesses the necessary travel documents, including passports and visas, to enter the destination country and any transit countries;
- (b) That requirement in (a) shall be applied to both staff selling or issuing tickets, boarding passes or similar travel documents and to staff collecting or checking tickets prior to or subsequent to boarding;
- (c) That companies which fail to comply with the requirements of this section will be fined the amount of LD 50,000 (fifty thousand Liberian Dollars), or its equivalent. Repeated failure to comply may be sanctioned by revocation of licenses to operate in accordance with the laws of the Republic of Liberia.
- (d) That company knowingly transports victim of trafficking into the country shall be liable for costs associated with providing accommodation and meals for the victim and any accompanying dependent for the duration of victim's stay in facilities designated.

III. IMMUNITY FOR VICTIMS OF TRAFFICKING

Anti-Trafficking Law, section 9:

Victim immunity

A victim of trafficking is not held criminally liable for any immigration-related offense, prostitution, or any other criminal offense that was a direct result of being trafficked.

F. PROSTITUTION OFFENSES

I. PROMOTING PROSTITUTION

Penal Law, section 18.1:

Promoting prostitution

A person has committed a first degree misdemeanor if he:

- (a) Operates a prostitution business
- (b) Induces or otherwise purposely causes another to become engaged in sexual activity as a business; or
- (c) Knowingly procures a prostitute for a prostitution business or a house of prostitution.

Penal Law, section 18.3:

A person who facilitates or promotes prostitution has committed a third degree felony if s/he purposely causes another to become or remain a prostitute by force or threat, or the prostitute is the actor's wife, child, or ward or a person for whose care protection or support the actor is responsibly, or the prostitute is, in fact less than sixteen years of age.

a. Elements

To establish that the offense of promoting prostitution has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ operates
- ✓ a prostitution business

OR

- ✓ the defendant
- ✓ induces or otherwise purposely causes
- ✓ another
- ✓ to become engaged in sexual activity
- ✓ as a business

OR

- ✓ knowingly
- ✓ procures
- ✓ a prostitute
- ✓ for a prostitution business or house of prostitution

II. FACILITATING PROSTITUTION

Penal Law, section 18.2:

Facilitating prosecution

A person has committed a second degree misdemeanor if he:

- (a) Knowingly solicits a person to patronize a prostitute;
- (b) Knowingly procures a prostitute for a patron;
- (c) Knowingly leases or otherwise permits a place controlled by the actor, alone or in association with others, to be regularly used for prostitution, promoting prostitution or facilitating prostitution;
- (d) Knowingly induces or otherwise purposely causes another to remain a prostitute. A person who is supported in whole or in part by the proceeds of prostitution, other than the prostitute's minor children or a person whom the prostitute is required by law to support, is presumed to be knowingly inducing or purposely causing another to remain a prostitute.

Penal Law, section 18.3:

A person who facilitates or promotes prostitution has committed a third degree felony if s/he purposely causes another to become or remain a prostitute by force or threat, or the prostitute is the actor's wife, child, or ward or a person for whose care protection or support the actor is responsibly, or the prostitute is, in fact less than sixteen of age.

a. Elements of the offense

To establish that the offense of promoting prostitution has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly
- ✓ solicited another

- ✓ to patronize
- ✓ a prostitute

OR

- ✓ the defendant
- ✓ knowingly
- ✓ procured
- ✓ a prostitute
- ✓ for a patron

OR

- ✓ the defendant
- ✓ knowingly
- ✓ leased or otherwise permitted a place
- ✓ controlled by the actor alone, or in association with others
- ✓ to be regularly used
- ✓ for prostitution, promoting prostitution, or facilitating prostitution

OR

- ✓ the defendant
- ✓ knowingly
- ✓ induced or otherwise purposely caused
- ✓ another

✓ to remain a prostitute

Note: A person who is supported in whole or in part by the proceeds of prostitution, other than the prostitute's minor children or a person whom the prostitute is required by law to support, is presumed to be knowingly inducing or purposely causing another to remain a prostitute.

III. PROSTITUTION

Penal Law, section 18.4:

Prostitution

A person has committed prostitution, an infraction, if s/he:

- (a) Is a resident in a house of prostitution, or engages in sexual activity therein or otherwise as a business; or
- (b) Solicits another person with the purpose of being hired to engage in sexual activity.

a. Elements of the offense

To establish that the offense of prostitution has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ was a resident
- ✓ in a house of prostitution
- ✓ or engaged in sexual activity
- ✓ in a house of prostitution
- ✓ or otherwise as a business

OR

- ✓ solicited
- ✓ another person
- ✓ with the purpose of being hired
- ✓ to engage in sexual activity

IV. PATRONIZING PROSTITUTES

Penal Law, section 18.5:

Patronizing prostitutes

A person has committed an infraction if her or she hires a prostitute to engage in sexual activity with him or her, or if s/he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

a. Grading

Patronizing prostitutes is an infraction.

b. Elements of the offense

To establish that the offense of patronizing prostitutes has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ hired
- ✓ a prostitute
- ✓ to engage_in sexual activity with him or her

OR

- ✓ the defendant
- ✓ entered or remained in a house of prostitution
- ✓ for the purpose_of engaging in sexual activity

G. KIDNAPPING AND RELATED OFFENSES

I. KIDNAPPING

Penal Law, section 14.50:

Kidnapping

1. Offense. A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for substantial period in a place of isolation, with any of the following purposes:

- (a) To hold for ransom or reward;
- (b) To use him as a shield or hostage;
- (c) To hold him in a condition of involuntary servitude;
- (d) To facilitate commission of any felony or flight thereafter;
- (e) To inflict bodily injury on or to terrorize the victim or another; or
- (f) To interfere with the performance of any governmental or political functions.

2. Grading. Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree.

3. When removal or confinement is unlawful. A removal or confinement is unlawful within the meaning of this section if it is accomplished by force, threat, or deception, or in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

a. Definitions

Penal Law, s. 14.50(3) defines unlawful removal or confinement: “if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.”

b. Elements of the offense

To establish that the offense of kidnapping has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ unlawfully removed
- ✓ another
- ✓ from his place of residence or business or a substantial distance from the vicinity where he is found

OR

- ✓ the defendant
- ✓ unlawfully confined
- ✓ another
- ✓ for a substantial period
- ✓ in a place of isolation
- ✓ for the purpose of any of these stated purposes (Penal Law, s. 14.50(a)-(f)):
 - (a) To hold for ransom or reward;
 - (b) To use him as a shield or hostage;
 - (c) To hold him in a condition of involuntary servitude;
 - (d) To facilitate commission of any felony or flight thereafter;
 - (e) To inflict bodily injury on or to terrorize the victim or another; or
 - (f) To interfere with the performance of any governmental or political functions.

II. FELONIOUS RESTRAINT

Penal Law, section 14.51:

Felonious restraint

A person commits a felony of the third degree if he knowingly:

(a) Restrains another unlawfully in circumstances exposing him to risk or serious bodily injury; or

(b) Restrains another with the purpose of holding him in a condition of involuntary servitude.

a. Elements of the offense

To establish that the offense of felonious restraint has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly
- ✓ unlawfully restrained
- ✓ another
- ✓ in circumstances exposing him to risk or serious bodily injury

OR

- ✓ the defendant
- ✓ restrained
- ✓ another
- ✓ with the purpose of holding him in a condition of involuntary servitude

III.FALSE IMPRISONMENT

Penal Law, section 14.52:

False imprisonment

A person commits a felony of the first degree if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

a. Elements of the offense

To establish that the offense of false imprisonment has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly
- ✓ unlawfully restrained
- ✓ another
- ✓ so as to interfere with his liberty

IV. INTERFERENCE WITH CUSTODY

Penal Law, section 14.53:

Interference with custody

1. Custody of children. A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parents, guardian or other lawful custodian, when he has no privilege to do so. It is an affirmative defense that

(a) The actor believed that his action was necessary to preserve the child from danger to his welfare; or

(b) The child, being at the time not less than 14 years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child.

Proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. The offense is a misdemeanor of the first degree unless the actor, not being a parent or person in equivalent relation with the child, acted with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm, in which case the offense is a felony of the third degree.

2. Custody of committed person. A person is guilty of misdemeanor of the second degree if he knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant as an incompetent person, any orphan, neglected or delinquent child, mentally defective or insane person or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law.

a. Elements of the Offense

To establish that the offense of interference with custody has been committed, the prosecution must establish that:

- ✓ the defendant
- ✓ knowingly or recklessly
- ✓ took or enticed
- ✓ any child under the age of 18
- ✓ from the custody of its parents, guardian or other lawful custodian
- ✓ when he had no privilege to do so

Note: the affirmative defense in Penal Law, s. 14.53:

It is an affirmative defense that

- a. the actor believed that his action was necessary to preserve the child from danger to his welfare; or
- b. the child, being at the time not less than 14 years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child.

H. OTHER CRIMINAL CONDUCT

I. ACCOMPLICES

Penal Law, section 3.1:

Accomplices

1. Liability defined. A person is guilty of an offense committed by the conduct of another person when:

(a) Acting with the kind of culpability required for the offense, he causes or aids an innocent or irresponsible person to engage in such conduct; or

(b) With the purpose that an offense be committed, he commands, induces, procures, or aids such other person to commit it or having a legal duty to prevent its commission, he fails to make proper effort to do so. A person is liable under this paragraph by the effort for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions, because he is a victim of the offense or because the offense is so defined that his conduct is inevitably incident to its commission.

2. Defense precluded. Except as otherwise provided, in any prosecution in which liability of the defendant is based upon the conduct of another person, it is no defense that:

(a) The defendant does not belong to the class of persons who, because of their official status or other capacity or characteristic are by definition of the offense the only persons capable of directly committing it; or

(b) The person for whose conduct the defendant is being held liable has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or for some other reason cannot be brought to justice.

3. Affirmative defense of renunciation and withdrawal.

It is an affirmative defense in a prosecution under paragraph (1) that, under circumstance manifesting a voluntary and complete renunciation of his culpable intent, the defendant

attempted to prevent the commission of the offense by taking affirmative steps which substantially reduced the likelihood of the commission thereof. A renunciation is not “voluntary and complete” if it is motivated in whole or in part by (a) a belief that the circumstances exist which increase the probability of detection or apprehension of the defendant or an accomplice or which make more difficult the consummation of the offense, or (b) a decision to postpone the offense until another time or to substitute another victim or another but similar objective.

a. Elements of the offense

To establish that a person is guilty of an offense committed by the conduct of another person (i.e. by way of acting as an accomplice), the prosecution must establish that:

- ✓ the defendant
- ✓ acting with the kind of culpability required for the offense
- ✓ caused or aided
- ✓ an innocent or irresponsible person
- ✓ to engage in such conduct

OR

- ✓ the defendant
- ✓ with the purpose that an offense be committed
- ✓ commanded
 - or induced
 - or procured
 - or aided
- ✓ another person
- ✓ to commit an offense

OR

- ✓ the defendant
- ✓ having a legal duty to prevent commission of an offense
- ✓ failed to make proper effort
- ✓ to prevent commission of an offense

Note: Subsections 2 and 3 with regard to defenses.

II. FACILITATION OF CRIME

Penal Law, section 10.2:

Criminal facilitation

1. Offense. A person is guilty of criminal facilitation who, believing it probable that he is rendering aid to a person who intends to commit a crime, engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony. This section does not apply to a person who is either expressly or by implication, made not accountable by the statute defining the felony facilitated or related statute.
2. Defense precluded. It is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or for some other reason cannot be brought to justice.
3. Grading. Facilitation of a felony of the first degree is a felony of the third degree. Facilitation of a felony of the second degree or felony of the third degree is a misdemeanor of the first degree.

a. Elements of the offense

To establish that the defendant is guilty of criminal facilitation, the prosecution must establish that:

- ✓ the defendant believed it probable that he was rendering aid to a person who intended to commit a crime,
- ✓ the defendant engaged in conduct which provided said person with means or opportunity to commit the crime
- ✓ and in fact aided such person to commit a felony

III. CRIMINAL ATTEMPT

Penal Law, section 10.1:

Criminal attempt

1. **Offense.** A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he purposely engages in conduct constituting a substantial step toward commission of the offense. A substantial step is any conduct, whether act, commission, or possession, which is strongly corroborative of the firmness of the actor's intent to complete the commission of the offense. Factual or legal impossibility of commission of the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be.
2. **Conduct designed to aid another to commit a crime.** A person who engages in conduct intending to aid another to commit an offense is guilty of criminal attempt if the conduct would establish his complicity under Section 3.1 were the offense committed by the other person, even if the other is not guilty of committing or attempting the offense.
3. **Renunciation.** It is a defense to prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of culpable intent, the defendant avoided the commission of the offense attempted by abandoning his culpable effort and, if abandonment was insufficient to accomplish such avoidance, by taking further steps which prevented the commission thereof. A renunciation is not "voluntary and complete" if it is motivated in whole in or in part by (a) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or an accomplice or which makes more difficult the consummation of the offense or (b) a decision to postpone the offense until another time or to substitute another victim or another but similar objective.
4. **Grading.** Criminal attempt is an offense of the same class as the offense attempted, except that (a) an attempt to commit a felony of the first degree shall be a felony of the second degree and (b) whenever it is established by the preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the offense, an attempt to commit felony of the second degree shall be a felony of the third degree and an attempt to commit a felony of the third degree shall be a misdemeanor of the first degree.

a. Definitions

A substantial step is defined by Penal Law, s. 10.1(1) as “any conduct, whether act, commission, or possession, which is strongly corroborative of the firmness of the actor’s intent to complete the commission of the offense.”

b. Elements of the offense

To establish that a person is guilty of criminal attempt, the prosecution must establish that:

- ✓ the defendant
- ✓ acting with the kind of culpability otherwise required for commission of an offense
- ✓ purposely
- ✓ engaged in conduct
- ✓ constituting a substantial step toward commission of the offense

Note:

The section further provides detail regarding circumstances in which the person should be found guilty, even if the person he is aiding is not guilty of committing or attempting the offense and detail regarding defenses.

IV. CRIMINAL CONSPIRACY

Penal Law, section 10.4:

Criminal conspiracy

1. **Offense.** A person is guilty of conspiracy to commit a crime if, with the purpose of promoting or facilitating its commission, he agrees with one or more persons to engage in or cause the performance of conduct which constitutes the crime, and any one or more of such persons does an act to effect the objective of the conspiracy.
2. **Scope of conspiratorial relationship.** If a person knows that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the others' identity.
3. **Conspiracy with multiple criminal objectives.** If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
4. **Duration of conspiracy.** A conspiracy shall be deemed to continue until the crimes which is its object is committed or the agreement that it be committed is abandoned by the defendant and by those with whom he conspired. A conspiracy shall be deemed to have been abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations. If an individual abandons the agreement, the conspiracy is terminated as to him only if and when he timely advises those with whom he has agreed of his abandonment or by timely informing a law enforcement officer of the existence of the conspiracy.
5. **Defense.** It is an affirmative defense to a prosecution under this section that, if the criminal object were achieved, the defendant would not be guilty under the statute defining offense or as an accomplice under section 3.1.
6. **Defense precluded.** It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or for some other reason cannot be brought to justice.
7. **Renunciation and withdrawal.** It is an affirmative defense to a prosecution under this section that the defendant after agreeing with another that one or more of the conspirators will engage in criminal conduct, persuaded him or them not to engage in such conduct or

otherwise prevented the commission of the crime under circumstances manifesting a voluntary and complete renunciation of his criminal intent. A renunciation is not “voluntary and complete” if it is motivated in whole or in part by (a) a belief that circumstance exists which increases the probability of detection or apprehension of the defendant or a conspirator which makes more difficult the consummation of the crime, or (b) a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

8. Liability as accomplice. Accomplice liability for offense committed in furtherance of the conspiracy is to be determined as provided in section 3.1.

9. Grading. The penalties provided for criminal attempt in section 10.1(4) shall be applicable to persons convicted of conspiracy.

a. Grading

Penal Law, s. 10.4(9) provides that the penalties provided for criminal attempt (section 10.1(4)) shall also apply to conspiracy.

b. Elements of the offense

To establish that a person is guilty of conspiracy, the prosecution must establish that:

- ✓ the defendant
- ✓ with the purpose of promoting or facilitating the commission of a crime
- ✓ agreed with one or more persons
- ✓ to engage in or cause the performance of
- ✓ conduct which constitutes the crime; AND
- ✓ any one or more persons
- ✓ did an act to effect
- ✓ the objective of the conspiracy

Note: Section 10.4 also provides detail as to the scope of the conspiratorial relationship, conspiracy with multiple criminal objective, the duration of the conspiracy, defenses, renunciation and withdrawal, and liability of accomplices.

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