



Civil Sex Assault Case Breakdown: Suing an Institution Versus an Individual

By Karen Blau

When a client seeks legal guidance regarding a civil claim for sexual assault, most personal injury attorneys focus solely on claims against the individual perpetrator. These claims are usually denied by the perpetrator and are considered intentional torts not covered by insurance. Individual claims are also difficult to recover since the perpetrator typically does not have sufficient assets to satisfy a judgment.

In some cases, there can be a civil remedy against an entity beyond the perpetrator in the form of an institutional claim. Institutional claims arise from a sexual assault committed in the context of an institution or group such as a church or synagogue,¹ Olympic sports team,² youth sports team, school, or day care center.³ It is important to consider institutional claims in addition to claims against the individual perpetrator so that survivors of these horrific attacks can be compensated. This article will serve as a guide for handling institutional claims.

Meeting the Client

Before getting into the content of the types of claims that can be made, it would be remiss if I did not first talk about what to do when a client who is a survivor of a sexual assault comes to your office. This article is not a substitute for taking a class or conducting further reading⁴ and research on the impact and nature of trauma and how to be trauma-informed, but I wanted to share some pieces of advice that are important when meeting a survivor of sexual assault. While our laws and vernacular label survivors of sexual assault as victims, it is important to use language that is affirmative. A person who survives sexual assault is a victim of a crime and will be labeled as a victim in a criminal case. However, these clients physically survived the crime and calling them survivors helps create a new perspective and can be empowering to them.

When you meet a client for the first time, they can be apprehensive about sharing what had happened to them. If they share what happened, that's fine, but it is especially important, especially in cases involving minors, that you **DO NOT** ask them about what happened. Reliving the trauma can be very difficult and when an attorney, who is

not a licensed professional counselor, asks about facts and circumstances specific to the trauma, it can cause retraumatization. Retraumatization "is defined as a consequence of multiple exposures to physically or psychologically traumatizing events."⁵ Again, retraumatization can be inadvertent, but detrimental to your client.

It is important to say—almost immediately in your first meeting with the client—that you will not be asking them any specifics of what happened. This simple act builds trust and allows the client to relax throughout the conversation being more open about other parts of the experience that can be helpful to you. During these first meetings, the only information that should be gathered is the name of the perpetrator (if known) the location, and any criminal case information if there has been any that has been filed.

What if a criminal case has not been filed?

A lack of criminal charges does not foreclose the possibility of a civil claim. Most survivors of sexual assault do not report the crimes committed against them. Some report later when the evidence is no longer available. It is important not to blame the survivor or imply that the survivor is lying for not reporting the crime.

What if there is a pending criminal case?

The Colorado Constitution, as well as other Colorado state laws, guarantee certain rights to victims of crimes including sexual assault.⁶ The Victim's Rights Act allows for victims of certain criminal cases to have a Victim's Advocate. In certain cases, it can be beneficial for a civil attorney to enter as a victims advocate on behalf of the client. This will provide an avenue to open communication with the District Attorney's Office regarding the case. A good relationship with the DA may be helpful once the case is over and you request the entire criminal file. However, if the criminal case goes to trial, most defense attorneys and public defenders will attempt to use your status as the victim advocate to imply to the jury that your client has a sole monetary purpose or gain in the criminal case. It is important to address these potential issues with your client

beforehand. As a general rule, it is prudent to wait to bring a civil claim until the statute of limitations is close to running so that the criminal case can take its natural course.

How do I learn about what happened?

If the client is in therapy, the best way to learn about what happened is to obtain a HIPPA release and talk to the therapist. If the client is not in therapy, then in most cases the best course of action is to recommend that the client go to a therapist. Therapists or other similar experts in trauma can later act as retained experts and can help generate a report about what happened and how it has affected the survivor.

Why shouldn't I ask about what happened?

In addition to retraumatization, survivors of sexual assault often change their stories. This is especially true with child survivors who have difficulty processing what happened, or who are so “groomed” (i.e., their abuser has constructed a strong emotional bond with the child so they can manipulate, exploit and abuse them) that they want to protect their abuser. An expert dealing in trauma can help uncover those types of situations and get to the underlying issues without doing harm. Again, this is critical—even good intentioned individuals can cause harm to the client without knowing it.

Claims against institutions

The most notable institutional claims have come from the Olympics: swimming,⁷ gymnastics,⁸ and taekwondo⁹ are examples of several United States Olympic sports that have recently made headlines, highlighting the insidious nature of sexual assault even in the highest echelon of sports. It is important to reiterate that since most perpetrators do not have the money or resources to

adequately compensate their victims, it is crucial to investigate all theories of potential liability against institutions.

The types of claims against institutions include negligence, premises liability act, negligent hiring and supervision claims, and in some cases the trafficking victim’s protection act “TVPA” 18 U.S.C. §§1589-96.¹⁰

Regardless of the type of claim, it is important to decipher who the perpetrator is and where the sexual assault occurred. These are the critical pieces in assessing whether there is a viable (i.e., compensable) civil remedy for your client.

Negligence theories:

General negligence claims are very common. These claims allege that the particular institution or group has a duty to exercise a reasonable degree of care in conducting or carrying out their business or organization. These claims further allege that the institution or group was entrusted to act for the benefit of the participants of the institution (including the client/plaintiff) who participated in activities carried out by the institution or group, and that the client/plaintiff suffered injuries as a result of the institution or group’s failure to exercise reasonable care.

Negligent hiring and supervision claims:

Another type of claim that can be made is one against the institution that hired the perpetrator. For instance, if a spa hires a massage therapist who sexually assaults a client; a landlord who hired a property manager or maintenance man who sexually assaults a tenant; a school who hires a coach or teacher who sexually assaults a student; or even a bar who hires a bartender who sexually assault a patron. In these types of cases, a claim can be made against the institution who hired the perpetrator. This applies to most em-

ployer-employee situations, where a claim can be made for negligent hiring and supervision of the individual. Of course, only with proper and thorough discovery will these claims remain through to trial. Discovery will be discussed below.

Premises Liability Claims:

Under the Colorado Premises Liability Act, a landowner can be liable for sexual assaults that occur on their property. If a CPLA claim is made, however, it is likely that it will be the ONLY claim that will be on the verdict form.¹¹ The burden on the plaintiff is to show that there was a dangerous condition (i.e., the perpetrator) on the property and that the landlord knew or should have known that there was a dangerous condition on the property. How your client is classified under the CPLA – i.e., an invitee, licensee or trespasser – must also be considered before filing your case.

Discovery in institutional cases

Once a case is filed and you enter the discovery phase, remember that the most important piece of these cases is notice. Notice to the defendant organization/institution/proprietor about the perpetrator’s propensities. Every document, statement, and act that is related to notice is not considered hearsay¹² and is therefore admissible. It is important to conduct discovery on the issue of placing dangerous people on the premises, failure to supervise, and failure to act. Notice that the perpetrator is assaulting people or had the propensity to do so is the general focus of discovery in these cases.

When a large institution is the defendant in these cases, they usually hire investigators and conduct internal investigations. It is important to propound discovery regarding their procedures, policies, how often they have conducted investigations and what they have

memorialized. Remember there is no work product protection for attorneys conducting investigations for institutions in the normal course of business.

When the defendant institution is a school, you can submit a Colorado Open Records Act request (even during pre-litigation) asking for the perpetrator's employment file, including any complaints made to the school or staff members about the employee.

In situations where you are unable to wait until the criminal case is concluded before bringing a civil case, be aware that anything you put in writing to the prosecution will be seen by the defense. Also consider that the perpetrator and his employer (the civil defendant in your case) may have an alliance in defending against your client's claims, and the employer may be paying legal fees for the perpetrator's criminal defense. Keep these issues in mind if you are forced to proceed with a civil case while the criminal case is still pending.

Preparing your client for their deposition is also important. It requires a lot of courage for survivors to come forward and file a lawsuit. A deposition will also be a difficult process for them. Almost every case has some issue involving a delay in reporting, allegations of false reporting, social media problems, credibility issues, or witness intimidation. In some cases, the survivor may still have mixed feelings for the perpetrator or feelings of self-blame. It is critical that you build a rapport with your client prior to their deposition so that you can successfully address these potential problems with your client. Survivors do not build trust overnight; the process takes time. Having frequent, positive, and meaningful communications with your client is vital to the success of your case.

Over time the trust grows, new information may come to light that is

important to your case (for better or worse). Remember they may have kept things from you to preserve their emotional state. It is important to find these "land mines" before the deposition. Collaborating with them and their support network (therapist, family, and friends), getting to know them and having them getting to know you is vital. When it is time for your client's deposition prepare them over a number of sessions maybe 2-3 (it should be cumulative but not overwhelming). Make sure that they have the support around them in the weeks before the deposition.

Another thing that can help is to contact opposing counsel prior to your client's deposition so that they, too, can become better informed about trauma. You cannot control opposing counsel, it may help your client hear what that person's temperament has been thus far and what the client can expect. Also emphasize that your client is in control of the deposition. A reminder that they have the information and they lived their story is often empowering to them.

While it is important to refrain from asking the client details about what happened during initial meetings, prior to any deposition it is necessary that you know the full details about what happened. As the client's advocate you need to know the story, including any explanations for why there was a delay in reporting, or why there as an initial denial. Talking to the client's friends and family is also helpful before preparing your client for a deposition. It is important to find out your client's underlying emotions and their fears. Hopefully, the deposition takes place years after the assault and they have been working with professionals, learning coping mechanisms to make this process easier. If your client seems obviously distressed, it may be better to wait until they are in a better position to be deposed.

Media

During the pendency of your case or even at the beginning of the case it is important to think about media coverage. Oftentimes survivors who come forward are one of dozens if not hundreds of victims. Whether media coverage will be effective in your case and getting the story out to the media are topics that should be discussed with your client. You should confer with your client, their therapist and sometimes their family. Putting the story out there can help other survivors come forward. It also allows you to control the message and frame the issues.

Trial

Finally, if a case goes to trial, you might be thinking about the verdict form. Should the perpetrator be on the verdict form? Yes. Obviously, the perpetrator is the one who committed this violent act. They should bear some of the responsibility. Giving a defense-oriented juror the opportunity to cast blame on the perpetrator will help the plaintiff-oriented jurors make your case.

Conclusion

Representing survivors of the most heinous crimes is robust process. It takes times, patience, and compassion. It can be difficult at times but can also unbelievably rewarding. ▲▲▲

After growing up in California, Karen Blau served two years in the Israel Defense Force. She returned to California for college and law school. She came to Colorado to clerk for Judge Edward Bronfin, then joined Parker Lipman as an associate. She works on a variety of civil cases including personal injury, sexual assault, premises liability, wrongful death, and medical malpractice. Karen is a member of the Executive Council of the Colorado Bar Association's Young Lawyers Division and a Co-Chair of the New Lawyers

Division of the Colorado Trial Lawyers Association. In 2021 and 2022, Karen was recognized as a Top 40-under-40 attorney by the National Trial Lawyers.

Endnotes:

- ¹ Catholic Church child sexual abuse scandal, BBC NEWS, Oct. 5, 2021, available at <https://www.bbc.com/news/world-44209971>.
- ² David Barron, *Former USA Gymnastics president says he ‘never tried to cover up’ the Larry Nassar abuse scandal* Houston Chronicle, Apr. 26, 2022, available at <https://www.houstonchronicle.com/texas-sports-nation/general/article/USA-Gymnastics-Larry-Nassar-Steve-Penny-cover-up-17127160.php>.
- ³ Michael Roberts, *Angel Alcaraz, Unchecked Sex Offender, Accused of Doing “Gross Stuff” to Child*, WESTWORD, Sept. 18, 2014, available at <https://www.westword.com/news/angel-alcaraz-unchecked-sex-offender-accused-of-doing-gross-stuff-to-child-5884353>.
- ⁴ The Rocky Mountain Victim Law Center may have training assistance. See <https://www.rmvictimlaw.org/training-technical-assistance> or reach out to them. And read Vivianne Mbaku, *Trauma-Informed Lawyering*, NAT’L CTR. ON LAW AND ELDER RIGHTS, at <https://ncler.acl.gov/files/trauma-informed-lawyering.aspx>.
- ⁵ Christine A. Courtois, *Retraumatization and Complex Traumatic Stress: A Treatment Overview*, in *RETRAUMATIZATION: ASSESSMENT, TREATMENT, AND PREVENTION* 163–190 (Melanie P. Duckworth & Victoria M. Follette eds., 2012).
- ⁶ C.R.S. §24-4.1-302(1); see also Colorado Crime Victim Rights, available at <https://cdpsdocs.state.co.us/dcj/DCJ%20External%20Website/OVP/2021%20VRA%20Brochure.pdf>.
- ⁷ Maya Salam, *Olympian Ariana Kukors Smith Sues USA Swimming, Claiming It Ignored Sex Abuse*, NY TIMES, May 21, 2018, available at <https://www.nytimes.com/2018/05/21/sports/olympic-swimmer-ariana-kukors-coach-abuse.html>.
- ⁸ Graves, *U.S. gymnastics, Olympics groups reach \$380-million settlement with sex abuse victims*, ASSOCIATED PRESS, Dec. 13, 2021, available at <https://www.latimes.com/sports/story/2021-12-13/u-s-gymnastics-olympics-groups-reach-380-million-settlement-with-sex-abuse-victims>.
- ⁹ SI Staff, *Fighting Back*, SPORTS ILLUSTRATED, Sept. 10, 2018, available at <https://vault.si.com/vault/2018/09/10/fighting-back>.
- ¹⁰ I will not be discussing TVPA claims in this article.
- ¹¹ *Casey v. Christie Lodge Owners Ass’n, Inc.*, 923 P.2d 365 (Colo. App. 1996) (“The standards of care for landowners set forth in § 13–21–115(3), C.R.S. (1995 Cum. Supp.) apply in any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property.”); C.R.S. § 13-21-115.
- ¹² C.R.E. 801 (d)



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