

## **The Survivor's Legal Rights**

### **A. Right to Support Person/Advocate**

The survivor<sup>1</sup> has a right to have a support person of her or his choosing at interviews by police, the prosecutor or defense attorney, but the support person may be excluded from the exam or interview if the medical provider, law enforcement officer, or prosecutor believes that the support person's presence would be detrimental to the process. The term "support person" refers to a family member or friend of the survivor—not the victim advocate. **(Penal Code § 679.04)**

When the survivor reports a sexual assault to police, the agency must immediately notify the local rape crisis center and will transport the survivor to and from the hospital and inform them about of their right to have a sexual assault victim advocate accompany him or her for any services at the hospital and at subsequent law enforcement interviews. (Pen. Code §§ 264.2 and 679.04.) Before a medical examination begins the survivor must be notified of the right to have present a certified sexual assault counselor and one other support person chosen by the survivor. **(Penal Code § 264.2)**

A sexual assault survivor may have up to two support persons present in the courtroom during the preliminary hearing and trial. **(Penal Code § 868.5)**

A survivor who is a minor under age 11 or who has a disability has the right to special precautions to protect them from coercion, intimidation or undue influence as a witness by the court, including breaks in testimony and relocation of proceedings from the courtroom to another location, when needed. **(Penal Code § 868.8)**

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<sup>1</sup> California law refers to the survivor as the "victim."

Testimony by a minor may be limited to school hours, in the court's discretion, if there is no good cause to require it during other hours. (**Pen. Code, § 868.6(e).**)

A survivor who is an elder or dependent adult has a right to up to two support persons at a preliminary hearing or trial, including accompanying the person to the witness stand; one of the support persons may be a witness. (**Penal Code § 868.5** )

### **B. California Law Governing Consent In a Sexual Assault Case**

Consent is defined, for purposes of a criminal prosecution<sup>2</sup> in the California judicial system, as "positive cooperation in act or attitude pursuant to an exercise of free will; [t]he person must act freely and voluntarily and have knowledge of the nature of the act... involved." A current or previous dating or marital relationship is not sufficient to constitute consent. (**Penal Code § 261.6**)

Evidence that the survivor requested that defendant use condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent. (**Penal Code § 261.7**)

Evidence of the survivor's sexual conduct with anyone other than the defendant is not admissible by the defendant to prove consent.

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<sup>2</sup> For purposes of a disciplinary or other judicial conduct proceeding on a campus, the definition of consent is as follows. All campus sexual assault policies in California must be based on the following affirmative consent standard:

- Consent must be given by both parties
- Affirmative, conscious, and voluntary agreement are required to engage in sexual activity
- Each person involved is responsible for ensuring he or she has the affirmative consent of the other(s) to engage in the sexual activity
- Lack of protest or resistance is not consent
- Silence is not consent
- Affirmative consent must be ongoing and can be revoked at any time
- A dating relationship, or history of past sexual relations between the parties, should never by itself be assumed to be an indicator of consent

The manner in which the survivor was dressed at the time of the assault is generally not admissible on the issue of consent.

**(Evidence Code § 1103(c))**

For purposes of a disciplinary or other judicial conduct proceeding on a campus, which is not a criminal proceeding, the definition of consent is different than the standard used in a criminal prosecution in court. **(Educ. Code § 67386)**. Campus disciplinary proceedings use the following affirmative consent standard:

- Consent must be given by both parties
- Affirmative, conscious, and voluntary agreement are required to engage in sexual activity
- Each person involved is responsible for ensuring he or she has the affirmative consent of the other(s) to engage in the sexual activity
- Lack of protest or resistance is not consent
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- Affirmative consent must be ongoing and can be revoked at any time
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## **C. Other Legal Rights of Survivors**

### **1. Medical Examinations and Treatment**

Victims have the right under state and federal law to receive a medical examination anonymously, at no cost to them, even if they are not choosing to make a report to law enforcement at the time of the exam. **(Penal Code § 13823.95; 79 C.F.R. at 62761)**

Victims of attempted and completed sexual assaults have the right to an exam, but they can also refuse to consent to the forensic physical examination. Even if a survivor chooses not to consent to

an examination for evidence of sexual assault, refusal is not a ground for denial of treatment of injuries and for possible pregnancy and transmitted diseases. (**Pen. Code § 13823.11**)

Survivors have the right to receive postcoital contraception (e.g., morning-after pill) upon request. (**Pen. Code, § 13823.11**)

No victim of sexual assault shall be required to participate or to agree to participate in the criminal justice system, either prior to the examination or at any other time. (**Pen. Code, § 13823.95**)

A minor may consent to hospital, medical, and surgical care related to a sexual assault without the consent of a parent or guardian. (**Pen. Code § 13823.11**) A juvenile older than 12 years can consent to (or refuse) medical treatment for a sexually related health problem without parental notification. (**Fam. Code § 6927**)

A report of injuries and suspected domestic violence must be made to law enforcement by medical personnel, although a survivor may refuse to consent to an examination for evidence of domestic violence, including the collection of physical evidence, but that refusal is not a ground for denying the survivor treatment for injuries and disease, if the survivor consents to treatment. (**Pen. Code, § 11161.2**)

A survivor is entitled to use paid sick days for medical care related to an incident of domestic violence, sexual assault or stalking, including mental health counseling. (**Lab. Code, § 246.5.**)

## **2. Confidentiality**

Survivors who disclose that their medical exam is due to sexual assault or spousal rape cannot be guaranteed confidentiality because hospitals and health care providers are required to report to the local law enforcement agency all cases in which medical

care is sought or suspected where injuries have been inflicted upon the victim. The report must be made by phone and in writing, and include the name of the injured person, her or his current whereabouts, and the character and extent of injuries. **(Penal Code sections 11160–11161.1)**

If a survivor chooses to go forward with judicial proceedings in a court law, he or she may ask to be identified in all records and in all proceedings as Jane or John Doe. The court must grant this request if it is reasonably necessary to protect the privacy of the person and it will not unduly prejudice the prosecution or the defense. **(Penal Code § 293.5)**

The defense is required to follow certain procedures when attempting to offer evidence of the sexual conduct of the survivor. **(Evidence Code § 782)**

Survivors of sex offenses or forced prostitution due to human trafficking have the right to request that their names remain confidential throughout the investigation and legal proceedings so as not to become a matter of public record. Law enforcement should assure the survivor that by exercising this right, law enforcement agencies will be prohibited from disclosing her or his name and address to any persons or public agencies except where authorized or required by law, such as to the prosecutor. **(Penal Code § 293)**

### **3. Rights of Campus Sexual Assault Survivors**

Survivors of campus sexual assault are entitled to reasonable accommodations, including changes in academic schedule, exam schedule, housing, or other assistance even if no formal report is made to law enforcement or no request for the campus disciplinary process is initiated. The campus must provide a written explanation of the survivor's rights and options regardless of

whether the crime occurred on or off campus. **(20 U.S.C. § 1092; regulations at 79 C.F.R. 62751; Educ. Code § 67386.)**

Survivors may also request changes to sports schedules, campus jobs or extracurricular activities and clubs to enable ongoing education free from discrimination, harassment or violence, before a formal complaint, investigation, hearing or final decision is made in the case. **(Title IX, 20 U.S.C. §§ 1681 et seq.; regulations at 34 C.F.R. Part 106.)**

Survivors of campus sexual assault who decide to participate in campus disciplinary proceedings are entitled to have an advisor present during the disciplinary process. **(20 U.S.C. § 1092; regulations at 79 C.F.R. 62751.)**

#### **4. Other Rights of Survivors**

A survivor who reports to police cannot be compelled to take a polygraph examination as a prerequisite to filing charges. **(Penal Code § 637.4)**

A survivor cannot be compelled to submit to a psychiatric or psychological examination for the purpose of assessing credibility. **(Pen. Code § 1112)**

Victims of rape and other sex crimes have the right to request HIV testing of perpetrators charged with these crimes and to receive test results. **(Health & Safety Code § 121055.)**

Survivors have the right to request a search warrant for HIV testing, which may be issued even if charges are not filed. **(Pen. Code, § 1524.1.)**

Victims of sexual assault are protected from specified civil and criminal actions resulting from alcohol or drug testing done in connection with a sexual assault. **(Penal Code § 13823.11.)**

The Sexual Assault Victims' DNA Bill of Rights creates a right for the survivor to be kept informed about DNA results obtained from rape kit evidence. The victim must request to be kept informed and if the evidence is not analyzed within the time frame set by law, must be informed of that fact within six months. **(Penal Code § 680)**

An employer shall not discharge, discriminate or retaliate against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child. Reasonable notice to the employer is required for taking time off. **(Labor Code § 230, subd. (c).)**

Larger employers (with more than 25 employees) must give job-protected time off for victims to obtain services such as doctor visits, counseling, safety planning, or meeting with an advocate. **(Lab. Code § 231.)**

A sex offender who is required to register for his offense must be ordered, prior to release, not to contact or communicate with the survivor or the survivor's family if the survivor (or his or her parents, if the survivor is a minor) requests the no-contact order be made. **(Penal Code §§ 3053.6)**

Survivors of domestic violence, stalking, rape, and sexual battery may apply for new and different license plates. **(Veh. Code § 4467)**

A victim may terminate a lease with 30 days notice and proof of victim status. **(Civ. Code § 1946.7)**

A landlord cannot end or refuse to renew a tenancy based upon the fact that the tenant or member of the tenant's household is a victim of a documented act of domestic violence, sexual assault, or stalking. **(Code of Civ. Proc. § 1161.3)**

A court can order, as a condition of probation, that a defendant convicted of spousal rape reimburse the victim for reasonable costs of counseling and other expenses which the court finds are a direct result of the offense. **(Pen. Code § 262(d))**

Victims of sexual assault are entitled to restitution for medical and psychological treatment. **(Pen. Code, § 203.1g: minors; Pen. Code § 1202.4f, all victims.)** Note that a victim seeking restitution for the cost of therapy does not waive his or her psychotherapist-patient privilege. (*People v. Garcia* (2010) 185 Cal.App.4<sup>th</sup> 1203.)

A victim's address or phone number cannot be disclosed to a defendant without a court hearing and showing of good cause. **(Pen. Code § 1054.2)**

**Marsy's Law:** In November 2008, California voters approved Proposition 9, the Victims' Bill of Rights Act of 2008, Marsy's Law. This law provides all survivors with important rights and due process requirements, including the right, upon request, to reasonable notice of, and to reasonably confer with the prosecuting agency regarding, the arrest of the defendant (if known by the



prosecutor), the charges filed, the determination whether to extradite the defendant, and, upon request, to be notified of and informed before any pretrial disposition of the case.

The survivor must be given notice and reasonable opportunity to be heard on any bail matter for a serious felony. The survivor also has due process rights to a speedy trial and prompt and final conclusion of the case and any related post-judgment proceedings.

See [http://ag.ca.gov/victimservices/marsys\\_law.php](http://ag.ca.gov/victimservices/marsys_law.php) for the most recent information on Marsy's Law.

Victims have the right under Marsy's Law:

1) To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.

(2) To be reasonably protected from the defendant and persons acting on behalf of the defendant

4) To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.

(5) To refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions. (**Section 28, Article I, Cal. Const.**)

There are programs that can assist victims of sexual assault either with safety concerns or financial benefits:

Safe at Home – a program which provides confidential mail service for victims of sexual assault and other services:

<https://www.sos.ca.gov/safeathome/dv-sa-stalking-program-law.htm>

Victim Comp: Benefits for sexual assault victims:

<http://www.vcgcb.ca.gov/victims/eligibility.aspx>

and that they have recently changed their policy regarding denial of applications for failure to report for military personnel:

[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB2545](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2545).