

FGM SURVIVOR'S GUIDE

— TO —

LEGAL REMEDIES

IN THE STATE OF
CALIFORNIA

DEVELOPED FOR [AHA](#) FOUNDATION

THROUGH THE PRO BONO ASSISTANCE OF

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DISCLAIMER

THE CONTENTS OF THIS MEMORANDUM ARE INTENDED TO CONVEY GENERAL INFORMATION ONLY AND ARE NOT INTENDED TO PROVIDE LEGAL ADVICE OR OPINIONS FOR ANY PURPOSE OR PARTICULAR CIRCUMSTANCE.

THE CONTENTS OF THIS MEMORANDUM SHOULD NOT BE CONSTRUED AS NOR RELIED UPON FOR LEGAL ADVICE IN ANY PARTICULAR CIRCUMSTANCE OR SITUATION.

AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF CALIFORNIA SHOULD BE CONTACTED FOR ADVICE ON SPECIFIC LEGAL ISSUES.

THIS MEMORANDUM IS NOT A SUBSTITUTE FOR AN IN-PERSON OR TELEPHONE CONSULTATION WITH AN ATTORNEY LICENSED TO PRACTICE LAW IN CALIFORNIA CONCERNING ANY SPECIFIC LEGAL ISSUE.

INTRODUCTION

THIS GUIDE AIMS TO PROVIDE SURVIVORS OF FEMALE GENITAL MUTILATION (“FGM”) WITH AN UNDERSTANDING OF THE THREE MAIN REMEDIES AVAILABLE TO THEM IN THE COURTS OF CALIFORNIA.

FIRST, California has enacted anti-FGM laws creating a criminal cause of action against FGM’s perpetrators.

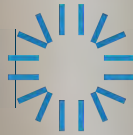
SECOND, survivors can potentially recover under several California state laws not directly related to FGM.

THIRD, California law provides survivors with various rights and protections in California’s criminal justice system.

PLEASE NOTE THAT CALIFORNIA LAW PROVIDES THAT MINORS CANNOT SUE ON THEIR OWN AND MUST BE REPRESENTED BY AN ADULT.¹

HOW DO I KNOW IF I AM A SURVIVOR OF FGM?

FGM is a practice that spans many different countries and communities, each with their own customs that occur at different ages. For example, in the Somali community, most girls are cut between the ages of 5 and 10 years old, while in some Nigerian communities, girls are often cut when they are christened at 8 days old. A description of the different types of FGM can be found at www.who.int, and the different practices in various communities and countries of origin can be found at www.28toomany.org. If you are unsure whether you have been the victim of FGM, you should consult your OB/GYN or contact help@theahafoundation.org.



REMEDIES AVAILABLE TO SURVIVORS UNDER CALIFORNIA LAW

CALIFORNIA IS ONE OF 40 STATES THAT HAS CRIMINALIZED THE PRACTICE OF FGM. THIS MEANS THAT PERPETRATORS OF FGM CAN BE PROSECUTED UNDER **CRIMINAL** LAW. VICTIMS OF THE CRIME ALSO HAVE MANY LEGAL REMEDIES AT THEIR DISPOSAL TO PUNISH THEIR PERPETRATORS AND RECEIVE FORMS OF COMPENSATION. WHILE THERE IS CURRENTLY NO **CIVIL** ACTION SPECIFIC TO FGM, SURVIVORS MAY BE ELIGIBLE TO SEEK REMEDIES UNDER SEVERAL RELATED **CIVIL** CAUSES OF ACTION.

A **CIVIL** LAWSUIT IS BROUGHT BY A PRIVATE CITIZEN (THE “PLAINTIFF”). IN THE CASE OF FGM, THE PLAINTIFF IS USUALLY THE VICTIM, AND THE PERSON BEING SUED (THE “DEFENDANT”) IS USUALLY THE CUTTER OR SOMEONE WHO ASSISTED THE CUTTER. IF THE DEFENDANT IS FOUND LIABLE IN A **CIVIL** CASE, HE OR SHE MAY BE ORDERED TO PAY MONEY TO THE PLAINTIFF.

A **CRIMINAL** CASE IS A LAWSUIT BROUGHT BY A PUBLIC PROSECUTOR, WHO IS AN EMPLOYEE OF EITHER THE FEDERAL, STATE OR LOCAL GOVERNMENT. VICTIMS MAY PARTICIPATE IN THE TRIAL, BUT ONLY AS WITNESSES AND ONLY IF THE PROSECUTOR ALLOWS THEM TO. IF THE DEFENDANT IS FOUND GUILTY IN A **CRIMINAL** CASE, HE OR SHE MAY BE PUNISHED WITH FINES OR TIME IN PRISON.

THE SAME WRONGFUL CONDUCT MAY GIVE RISE TO BOTH **CRIMINAL** AND **CIVIL** CHARGES, AND SO SURVIVORS SHOULD ALWAYS CONSIDER PURSUING BOTH FORMS OF RELIEF.

WE WILL DISCUSS THE **CRIMINAL** AND **CIVIL** OPTIONS IN TURN.

CRIMINAL PROSECUTION OF FGM PERPETRATORS:

1. CRIMINAL PROSECUTION UNDER THE ANTI-FGM STATUTE CAL. PEN. CODE § 273.4

Criminal prosecutions against perpetrators of FGM under California law can be brought only by state prosecutors. While victims of FGM cannot themselves bring criminal actions, they can provide valuable assistance to the prosecuting attorneys bringing those actions. California law defines FGM as the excision or infibulation of the labia majora, labia minora, vulva or clitoris for nonmedical purposes.² While the statute only punishes FGM performed on minors, it provides broad protections to victims.

Any adult can be found guilty of FGM regardless of their relationship to the victim, so long as they either (i) performed the FGM or (ii) willingly allowed it to happen.³ Guardians can be found guilty under the FGM statute even if they were not present when FGM was performed, so long as they willfully caused or permitted the victim to be placed in a situation resulting in FGM being performed.⁴ Accordingly, a parent or guardian could potentially be found guilty of violating the FGM statute if they left their child unattended for a prolonged time with a person known to perform FGM.

The FGM statute expressly states it does not preclude prosecution under Sections 203, 205 or 206 of the California Penal Code, or “any other provision of law.” Thus, perpetrators of FGM may be prosecuted for a less specific offense (such as torture, mayhem or aggravated mayhem, among others), despite the existence of the statute directly penalizing FGM. This is advantageous for victims, as it allows a cause of action to be strategically chosen based on the specific circumstances under which the FGM occurred and the available evidence, and potentially increases the likelihood of obtaining a conviction. Several of the alternative criminal causes of action available to victims of FGM are discussed in greater detail in Section 4. FGM is a felony and is punishable by up to seven years in jail.⁵

The most important way a survivor can assist a prosecuting attorney is by providing evidence, especially in the form of live testimony at trial. However, there are other forms of evidence that prosecuting attorneys may request from the survivor, including medical records, documented correspondence with the defendant, the names of other witnesses, the identities of other victims, and information about the defendant.

OTHER CRIMINAL AND CIVIL CAUSES OF ACTION AVAILABLE TO SURVIVORS OF FGM IN CALIFORNIA:

ADDITIONAL CRIMINAL LAWS

IN ADDITION TO THE ANTI-FGM LAW, THERE ARE SEVERAL OTHER CRIMINAL LAWS FOR WHICH A PERPETRATOR OF FGM MAY BE CONVICTED. THE STATUTE OF LIMITATIONS FOR EACH OF THE BELOW CRIMES IDENTIFIED AS A FELONY IS THREE YEARS, WHILE THE STATUTE OF LIMITATIONS FOR ALL OTHERS IS ONE YEAR.⁶

1. MAYHEM (CAL. PEN. CODE § 203)

Mayhem occurs when a person maliciously deprives the victim of her body, or disables, disfigures or renders it useless. Since California courts have found defendants to be guilty of mayhem where they disfigured, severed or destroyed an appendage or body part of the victim,⁷ it's likely that a "prick" or "nick" to the clitoris would not be sufficiently severe to bring a charge under this cause of action. Mayhem is a felony and is punishable by up to eight years in prison.

2. AGGRAVATED MAYHEM (CAL. PEN. CODE § 205)

Aggravated Mayhem occurs when the perpetrator unlawfully and under circumstances demonstrating extreme indifference to the physical or psychological well-being of the victim, intentionally causes permanent disability or disfigurement to the victim or deprives her of a limb, organ or member of her body. Aggravated Mayhem requires specific intent, meaning that the perpetrator must have intended to perform FGM on the victim.⁸ California courts consider a variety of factors in determining whether a perpetrator had the necessary intent, including (i) the circumstances surrounding the act, (ii) the manner in which it was performed and (iii) the means used.⁹ They have even held that a defendant's "repeated systematic abuse to that body part over time" demonstrated the required level of intent for purposes of Aggravated Mayhem.¹⁰

Examples where California courts have found a defendant to be guilty of Aggravated Mayhem include (i) the repeated slashing of the victim's face with a razor blade knife,¹¹ (ii) a parent consciously deciding to beat his child for a prolonged period with a garden hose having a metal fitting on the end¹² and (iii) the attacker slamming a victim to the ground, beating her with a hammer and refusing to bring her to the hospital afterwards.¹³

Aggravated Mayhem is a felony punishable by up to life imprisonment with the possibility of parole.

3. ASSAULTS WITH INTENT TO COMMIT FELONY, OTHER THAN ASSAULTS WITH INTENT TO MURDER (CAL. PEN. CODE § 220)

A defendant commits this offense when they assault the victim with intent to commit any one of an enumerated list of felonies, including mayhem. This offense is a felony and is punishable by up to six years' imprisonment.¹⁴

A perpetrator could be found guilty of this offense, even if they never actually performed FGM on the victim. However, the victim must show that the perpetrator intended and attempted to perform FGM on the victim and had the present ability to do so. To show attempt, the prosecution must demonstrate the defendant (i) had a specific intent to commit FGM and (ii) undertook an act in furtherance of performing FGM.¹⁵ With respect to the second element, California courts have held an attempt occurred where the defendant undertook, "an unequivocal overt act that could be said to be a commencement of the commission of the intended crime."¹⁶ Thus, whether a defendant attempted to commit FGM hinges on whether his or her conduct included an overt act in furtherance of cutting the victim's clitoris for non-medical purposes. This offense is a felony and is punishable by up to six years' imprisonment.

4. BATTERY (CAL. PEN. CODE. §§242-243)

Battery occurs when there is a willful and unlawful use of force or violence upon another person. Battery is punishable by a fine of up to \$2,000 or a jail sentence of not more than six months.

ADDITIONAL CIVIL CAUSES OF ACTION

IN ADDITION TO THE CRIMES SUMMARIZED ABOVE, VICTIMS MAY COMMENCE A CAUSE OF ACTION IN CIVIL COURT. CIVIL COURT MAY BE MORE CONVENIENT, AS VICTIMS ONLY NEED TO SHOW THAT IT IS MORE LIKELY THAN NOT THAT THE DEFENDANT IS RESPONSIBLE FOR THE ALLEGED FGM. ADDITIONALLY, CIVIL COURTS MAY BE MORE WILLING TO ALLOW CERTAIN TYPES OF EVIDENCE THAT WOULD NOT BE PERMITTED IN A CRIMINAL TRIAL.

WHILE VICTIMS CAN RECEIVE COMPENSATION IN CIVIL COURT FOR THE HARMS THEY HAVE SUFFERED, SUCH COMPENSATION IS GENERALLY LIMITED TO THE DEFENDANT'S ACTUAL RESOURCES. NOTE THAT VICTIMS OF FGM MAY CHOOSE TO PURSUE BOTH CRIMINAL AND CIVIL CAUSES OF ACTION. THE STATUTE OF LIMITATIONS FOR EACH OF THE BELOW LISTED CAUSES OF ACTIONS IS TWO YEARS FROM THE OCCURRENCE.¹⁷

1. ASSAULT

Assault happens when the defendant unlawfully attempts to inflict immediate injury on another person.¹⁸ It is worth noting that physical contact is not a necessary element of assault; however, the threat of violence (and the victim's belief that violence is imminent) is.¹⁹ This means that, an assault could occur even if FGM was never performed, so long as the defendant made an intentional and unlawful attempt to cause bodily injury to the plaintiff, the plaintiff had a well-founded fear of immediate danger, and the defendant was readily able to carry out the act.²⁰ Please see #3 above for a discussion of the elements of "attempt."

2. BATTERY

Battery is any intentional, nonconsensual contact of another person that is harmful or offensive.²¹ In other words, (i) the defendant must have intended to perform the act resulting in the harmful or offensive contact²² (in the case of FGM, cutting), (ii) the contact must have been harmful or offensive to a reasonable person,²³ (iii) the victim did not consent to the contact²⁴ and (iv) the contact caused injury, damage, loss or harm.²⁵

3. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional infliction of emotional distress happens when the defendant intentionally or recklessly engages in extreme and outrageous conduct which causes severe emotional distress to the plaintiff.²⁶ The distress must actually be caused by the defendant's outrageous conduct²⁷ and must be serious or severe.²⁸ In determining whether a victim's distress is sufficiently severe, California courts have looked to the degree and length of the distress experienced, stating that it must be so substantial and enduring that "no reasonable man in a civilized society should be expected to endure it."²⁹ While evidence of a physical injury is helpful to show the victim has suffered severe emotional distress, it is not necessary.³⁰

4. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Negligent infliction of emotional distress is a claim pursuant to which close relatives of a victim may recover against the perpetrator of FGM. As this cause of action is based in negligence, the plaintiff must first show that the defendant's breach of a duty of care owed to the victim caused the victim's injuries.³¹ Next, the plaintiff must show that (i) the plaintiff was present at the scene of the accident at the time it occurred,³² (ii) the plaintiff witnessed or sensed the accident³³ (for example, by hearing the victim's screams), (iii) the plaintiff is an immediate family member of the primary victim³⁴ and (iv) the plaintiff has severe emotional distress as a result.³⁵

Any claim for negligent infliction of emotional distress must be brought by a close relative of the survivor, not the survivor herself. Also, the plaintiff must show causation between the defendant's actions and the plaintiff's emotional distress.³⁶ It should be noted that this is a separate and independent cause of action, which may be maintained regardless of whether the victim has recovered money from the defendant.



RIGHTS OF ALL SURVIVORS UNDER THE CALIFORNIA CRIMINAL JUSTICE SYSTEM

SURVIVORS OF FGM ARE PROVIDED NUMEROUS PROTECTIONS UNDER BOTH THE CALIFORNIA CONSTITUTION AND STATE LAW.

The California Constitution requires that the crime victim be treated with fairness and respect for her privacy and dignity and be free from intimidation, harassment and abuse, throughout the criminal justice process. The California Constitution also guarantees crime victims the right (i) to privacy and the protection of confidential information that could be used to locate or harass the victim or their family, (ii) to confer with the prosecution upon the arrest and filing of charges against the defendant and (iii) to be informed upon the defendant's conviction, sentencing and place of incarceration.³⁷

Additionally, while victims have the right to participate and be heard at any proceeding involving a plea, sentencing, post-conviction or release decision or any proceeding where the rights of the victim are at issue, they are by no means required to do so.³⁸

The California Constitution also explicitly provides all victims who have suffered a loss with the right to restitution (compensation) from the persons convicted of the crimes causing such losses. The California Constitution states that restitution shall be ordered from the convicted wrongdoer in every case where the victim suffers a loss, regardless of the sentence or disposition imposed.³⁹

Further, California law requires that law enforcement officers provide victims⁴⁰ with information summarizing their rights under the California Constitution at initial contact or as soon as deemed appropriate, at no cost to the victim. Except in the case of a narrow set of extenuating circumstances, victims have the right (but are not required) to be present at any court proceeding where the prosecuting attorney and the general public are entitled to be present.⁴¹

CONCLUSION

FOR MORE INFORMATION, PLEASE CONTACT AHA FOUNDATION AT INFO@THEAHAFOUNDATION.ORG.



ENDNOTES

1. Minors can institute and prosecute a legal action through the representation of a guardian, a guardian ad litem or by the judge overseeing the matter. A guardian ad litem is a court-appointed neutral party who is responsible for representing the best interests of the child in a court matter. See Cal. CCP §§ 3.372; 3.373(a).
2. CAL. PEN. CODE. § 273.4(b).
3. CAL. PEN. CODE §273a(a).
4. *Id.*
5. CAL. PEN. CODE § 273.4(a).
6. CAL. PEN CODE §801.
7. See *Iiams v. Superior Court of Orange County* (Cal. App. 4th Dist. July 26, 1965); *People v. Alexander* (Cal. App. Feb. 14, 1922); *People v. Bryan* (Cal. App. 1st Dist. Apr. 4, 1961).
8. *People v. Ferrell* (Cal. App. 1st Dist. Mar 12, 1990).
9. *People v. Lee* (Cal. App. 1st Dist. May 16, 1990).
10. *People v. Horvath* (Cal. App. 3d Dist. Mar. 8, 2012).
11. *People v. Quintero* (Cal. App. 4th Dist. Jan 24, 2006).
12. *People v. Szadziejewicz* (Cal. App. 2d Dist. Apr. 1, 2008).
13. *People v. Assad* (Cal. App. 3d Dist. Oct. 15, 2010).
14. Assault is defined as an unlawful attempt, coupled with a present ability, to commit a violent injury to another person. CAL. PEN. CODE §240. See clause A of this Section 4.1 for a discussion of the elements of mayhem.
15. CAL. PEN. CODE §21A.
16. *People v. Luna* (Cal. App. 1st Dist. Jan 15, 2009).
17. Cal. CCP §335.1.
18. *Lowry v. Standard Oil Co. of California*, 63 Cal. App. 2d 1, 146 P. 2d 57 (Dist. App. 2d Dist. 1944).
19. *Id.*
20. *People v. Williams*, 26 Cal. 4th 779 (Cal. 2001).
21. *Barouh v. Haberman*, 26 Cal. App. 4th 40, 45-46, 31 Cal. Rptr. 2d 259 (1994).
22. *Id.*, at 44.
23. *Id.*, at 46.
24. *Id.*, at 46-47.
25. *Id.*, at 45-47.
26. *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, 129 Cal. App 4th 1228 (2005).
27. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78 (1970).
28. *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 617, 210 Cal Rptr. 578, 587 (1985).
29. *Id.*
30. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P. 2d 282, 286 (1952).
31. *Marlene F. v. Affiliates Psychiatric Medical Clinic, Inc.*, 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98 (1989).
32. *Bird v. Saenz*, 28 Cal. 4th 910 (2002).

ENDNOTES



33. *Thing v. La Chusa*, 48 Cal. 3d 644, 668, 257 Cal. Rptr. 865 (1989).

34. *Id.*

35. *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 617-18, 210 Cal. Rptr. 578, 588-89 (1985).

36. *Id.*

37. CAL. CONSTITUTION, Article I, §28.

38. *Id.*

39. *Id.*

40. CAL. PEN. CODE § 679.026.

41. CAL. CIV. CODE § 1102.6.