

THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

Attorneys have an obligation to their clients, to their profession, and to justice itself. They are obligated to use their expertise to guarantee that the system does not stray from the principle that lies at the heart of the law: justice for all who seek it.

Final Report
President's Task Force on Victims of Crime (1982)

**Prepared by the Victims Committee
Criminal Justice Section
American Bar Association
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Although crime has been steadily declining for over a decade in the United States, in every minute of 2005, five new violent crimes and 20 property crimes were reported to law enforcement.¹ No one is spared from the devastating effects of crime. Homicide is the 4th leading cause of death for children under 12; teens are most likely to be killed by their own peers. In more than 2/3 of reported sexual assaults, the victims were under 18; in 34% of those cases, the victim was under 12.

The criminal justice system depends on crime victims to come forward, report their crimes, and cooperate in seeking to hold offenders accountable. The American Bar Association is committed to ensuring that victims are treated with fairness and respect in the process.

Introduction

In common law – and in early America -- victims who sought to bring their perpetrators to justice generally conducted their own investigations and argued their own cases or hired someone to investigate and prosecute for them. As time passed, a distinction was drawn between offenses against the social order (crimes) and offenses between individuals (civil wrongs). While victims could pursue money damages from their perpetrators in the civil justice system, within the context of the criminal justice system their role was relegated to serving as witnesses for the state. The assumption seemed to be that because the state represented all members of the public -- including victims -- victims had no special interests and certainly no rights within the criminal justice system.

¹ Preliminary law enforcement data for 2005 shows a 2.5% increase in reported violent crime over 2004 statistics. Federal Bureau of Investigation, *Crime in the U.S.* Washington, DC: U.S. Dept. of Justice (2005 data released June 2006).

Frustrated by what some characterized as a “revictimization” by the criminal justice process, a grassroots victim’s rights movement grew in the late 1960s out of the civil rights movement of the previous decade. When President Reagan established a Task Force that led to a landmark report on crime victims in 1982, few states granted any rights to victims and only one (California) referred to victims in its constitution. Congress, in enacting the Victim and Witness Protection Act in 1982, recognized that “without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.”

Of the many recommendations of the Task Force, one of the lasting accomplishments was the recommendation of a stable federal funding source for victim services. In 1984, the federal Victims of Crime Act (VOCA) was passed which established the Crime Victims Fund that is funded not by tax dollars, but by fines, fees and assessments in federal criminal cases. The United States, Department of Justice, Office for Victims of Crime (OVC) administers the fund which supports thousands of programs nationwide. Each year OVC focuses initiatives on several fronts such as human trafficking, identity theft and fraud, international terrorism, sexual violence, and victim’s rights and services.

National advocacy efforts have also resulted in astounding progress to recognize the legal status of victims. Today, thirty-three states have incorporated victim rights into their constitutions, and legislatures have enacted over 27,000 statutes pertaining to victims. Federal law and every state provide that victims have the right to information

and notice of proceedings, the right to be present and heard in certain circumstances on victim impact or preferences. In 2002, Congress enacted the Crime Victims Rights Act, providing enforceable participatory rights for victims in federal court.

The ABA and Victims Rights

The ABA is the largest membership organization of attorneys in the United States. Its entities include those related to judges, law schools, criminal justice participants, children, and pro bono services. The ABA has long had a commitment to giving victims a voice in the legal system, establishing a Victims Committee as part of its Criminal Justice Section in 1976 to identify victim concerns and to make recommendations on victims interests in light of the constitutional rights of the accused and public safety concerns of society at large. To ensure that ABA policy represents the most advanced thinking about the role of victims in the criminal justice system, that Committee continues today to spearhead ABA efforts to improve the status of crime victims within the criminal justice system. The Victims Committee of the Criminal Justice Section is currently engaged in a comprehensive review of the ABA's Fair Treatment Guidelines.

ABA policies reflect the commitment that victims are an integral part of the justice system. Initial ABA policies addressing victim interests in the criminal justice process included a package of recommendations for Reducing Victim /Witness Intimidation approved in 1980, Fair Treatment Guidelines for Crime Victims and Witnesses approved in 1983, and Case Continuance Guidelines for Crime Victims approved in 1986. More recent efforts have involved incorporating victim-related policies into its prestigious multi-volume set of Criminal Justice Standards, including

volumes addressing the prosecution function, guilty pleas, and sentencing. The Standards are relied on by many prosecutors, judges, and defense attorneys, and are often cited in court pleadings and decisions. It has also supported federal funding for victim compensation and for victim/witness assistance programs.

The ABA works with other national, state and local organizations and task forces, legislators, administrators, victim/witness advocates, service providers and many, many others who have been crucial to the advancement of victim interests. Over the past two decades, the number of lawyers helping crime victims has grown, and the United States expects to see even greater involvement of attorneys in shaping justice for crime victims with the passage in 2004 of the federal Justice for All Act which permits victims to have their own attorney and file motions to reopen pleas and sentences under certain circumstances in federal cases.

The ABA's wide-ranging and unique contribution to advancing the rights of victims is reflected in the first of its eleven goals: "to promote improvements in the American system of justice." Representatives of the 400,000 attorneys who comprise the ABA membership and especially the representatives of the 10,000 prosecutors, judges, defense attorneys, other criminal justice professionals and legal scholars who comprise the membership of the Association's Criminal Justice Section – ensure that ABA policy which promotes the rights of victims is thoroughly "vetted" in light of the rights of defendants and the safety of the public. The involvement of all criminal justice disciplines in the development of ABA policies and the rigorous approval process accords such policies special respect in the eyes of the policymakers who adopt them and by professionals in the criminal justice system charged with implementing them.

Many ABA policies are relevant to the five areas addressed in this report, and the most pertinent of these will be pointed out in the relevant sections. Some areas where more work might be done – perhaps in an expanded version of the Fair Treatment Guidelines currently being drafted by the Criminal Justice Section’s Victims Committee - will also be noted.

Charging and Disposition of the Criminal Case

Although historically, victims were primarily responsible for initiating criminal prosecution, the advent of the public prosecutor in the early nineteenth century America replaced private prosecution as the method for initiating the criminal case. Today, most often, it is the prosecutor who decides who to charge and what crime to charge. This view is reflected in ABA’s Prosecution Standards (3-3.4) which states that the decision to charge should be the responsibility of the prosecutor. ABA policy does recognize that some jurisdictions do permit citizen complaints, but holds that in such cases the complaint should be presented to the prosecutor whose action or recommendation should then be communicated to the issuing body (judge or grand jury). *Id.* at 3-3.4(d).

Prosecutors also have great discretion to decide whether to engage in plea negotiations or whether a case should proceed to trial or be dismissed. *Id.* at 3-3.9 (noting that Prosecutors have discretion not to charge if the victim is reluctant to testify).

In many cases, the prosecutor will determine whether a case will be the subject of a plea offer and whether to make a plea agreement. ABA policy is that appropriate consideration should be given to the interests of victims and the interests of the public in the effective administration of justice during the plea process. ABA Guilty Plea Std. 14-1.1. This means that prosecutors should make every effort to be advised of the victim’s

views on a plea agreement. Id. at 14-3.1. Victims should have the opportunity to confer with the prosecutor prior to dismissal of the case or submission of the plea agreement to the court. ABA Fair Treatment Guidelines. Prosecutors are directed to give timely notice of plea bargains, sentencing or any decision that results in the release of an accused or offender. Pros. Function Std. 3-3.2.

The Victims Committee is examining newer state laws and the new federal Crime Victims Rights Act to ensure that expanded notice and participatory rights for victims are considered in ABA policies. For example, many states now mandate that victims are provided notice and an opportunity to confer with prosecutors before and during plea negotiations; some jurisdictions require judges to inquire whether victims have been notified and what their views are regarding a plea.

The right to consult does not mean that victims have a right to direct the prosecution. The ABA guidelines provide that a victim may submit a written statement or confer with probation for purposes of providing impact information at sentencing (see Sentencing Stds. 18-5.4; 18-5.10-12), while the ABA's Model Code of Judicial Conduct Canons provide that judges accord to every person (victims) with a legal interest the right to be heard. ABA Model Code of Judicial Conduct Canon 3(B)(7). As a corollary, a court may consider, as a mitigating factor, in sentencing on a plea, that the defendant has demonstrated genuine remorse or consideration for his victim in foregoing a public trial. See ABA Guideline 11 and Guilty Plea Std. 14-1.8.

Today, many states and the newer federal Crime Victims Rights Act provide that victims have expansive rights to be heard in a victim impact statement presented orally or in writing at sentencing. In January 2006, the first test case under the new federal law

established that Congress intended to allow victims to speak at sentencing hearings and if that right was denied, a victim had the right to have the sentence vacated and a new sentencing hearing held. See Kenna v. U.S., 435 F.3d 1011 (9th Cir. 2006). Kenna involved a father and son who defrauded dozens of victims out of close to \$100 million dollars. The defendants pled guilty and more than 60 victims submitted victim impact statements. At the father's sentencing, victims spoke, but at the son defendant's sentencing, the judge denied victims the right to speak. The appeals court held that the victims were entitled to speak at the new sentencing hearing. See also ABA Sentencing Stds.18-5.12; 18-5.17 (providing that a victim have an opportunity to present a statement to the sentencing court, but that it shall not be used as the basis for finding fact if not under oath).

The Role of the Victim in Trial Proceedings

Although the law has moved from victims as party to victims as interested persons and victims are no longer considered a party to the criminal case, more recent federal laws are beginning to re-establish the importance of the victim's participation in the case. The ABA criminal justice standards emphasize the importance of notice to victims and the establishment of a mechanism for providing notice to victims throughout the legal process, including information regarding their participatory rights. See ABA Fair Treatment Guidelines and Sentencing Stds. 18-5.9 (notice to victims). Federal law explicitly requires prosecutors to use their best efforts to accord victims' their rights and prosecutors have long played a key role in providing victims and witnesses with their basic constitutional and statutory rights to information and participation in the criminal justice process. Though required to be impartial, ABA standards also require that judges

must treat victims fairly and with respect for their interests throughout the proceedings. ABA Spcl. Functions of the Trial Judge Stnds. 6-1.1 & 6-1.5.

Recent technological advances have greatly expanded the victim's ability to gain timely information about the status of their case and the location of an offender. In April 2006, a national victim notification telephone number was activated that allows victims in 40 states to call (1-866-US-4-VINE) and find out the status of any offender in the database.

Victims have a keen interest in timely criminal proceedings. Undue delay prolongs the trauma and denies closure to victims. ABA policy recognizes that a victim's interest in the prompt resolution of a case differs from a defendant's interests and encourages the development of policies which speed resolution to reduce the anxiety to victims of a lengthy trial process. ABA Speedy Trial Stnds. 12-1.1; 12-3.1.

More recently, victim participatory rights have been expanded. Historically, as noted earlier, victims controlled the trial of their victimizer, but as the state took on the role of public prosecutor, the victim's presence was limited to that of a witness. Today, more than 40 states and the federal law protect a victim's right to attend and participate in the trial process. Under the newly enacted federal Crime Victims Rights Act, victims have a right to attend a proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."

The right to participate does not give the victim the right to direct the prosecution. However recent federal law establishes that victims may choose to have their own attorney and seek to assert their rights to be present and participate in the criminal

proceeding. They may also seek to enforce those rights by access to a prompt review in the appellate courts when their rights are not afforded. The prosecutor must inform a victim of this right of independent representation. ABA is currently working on developing policy on point as part of the Fair Treatment Guidelines review project.

Protection of the Victim

Protection of the victim was one of the earliest identified needs of victims in the criminal justice system and the ABA's Fair Treatment Guidelines incorporate this right as an embodiment of the principle that the foremost role of government is to protect its citizens from intimidation and harm. State constitutions and statutes incorporate this right and the federal Crime Victims Rights Act is representative when it provides that this right is a broad and open-ended right to be "reasonably protected from the accused."

The right to protection has been implemented in various ways from establishing secure waiting areas for victims to including victim considerations in release decisions. For example, the safety of the victim should be considered during bail hearings and in sentencing. To ensure that victim input is present, victims must have notice of such proceedings. The ABA Fair Treatment Guidelines generally provide that victims should get notice of the status of the case, but may require a victim to request such information. Currently the Federal Rules of Criminal Procedure are being reviewed to address victim notice. Strengthening the ABA guidelines regarding notice and protective remedies is also a part of the review project of the Victims Committee of the ABA.

Another mechanism to deter violence against victims is available in both civil and criminal court proceedings where judges have the power to issue protective orders. Most often these are used in domestic violence and stalking cases. However, more recently

states have expanded the class of victims eligible for such orders to employees or even businesses that are the subject of harassing conduct.

Criminal sanctions are commonly used to enforce violations of such orders. These sanctions may be felonies (one year or longer punishment) or misdemeanors (up to one year). Violations of protective orders may result in bail forfeiture, denial of pretrial release or probation revocation, or the violation itself may constitute a new offense. In addition to traditional corrections remedies, some states impose counseling for a violation of a protective order. Recognizing that the harm to victims is not limited to state boundaries, federal legislation has been enacted so that all jurisdictions recognize, and give full faith and credit to, protective orders entered in other jurisdictions. To track the entry and enforcement of protective orders, federal law provides that orders be entered into national databases.

Victim Reparation

Victims suffer overwhelming losses as a result of crime. The tangible cost of personal crime (medical expenses, lost earnings, and public victim assistance costs) has been estimated to be well over \$100 billion a year in the United States. When pain, suffering and the reduced quality of life are added, the estimate raises to nearly \$450 billion annually. The ABA Fair Treatment Guidelines provide broad notice rights to victims of the availability of compensation and its standards on restitution are the subject of review with respect to newer approaches to restitution remedies outlined in research conducted by the Victim's Committee and published in its guide to a national strategy on restitution. Compare ABA Guidelines¹ &¹² and Sentencing Std.18-3.15 with

Restitution for Crime Victims: A National Strategy (2004).

Crime victims can seek to recover their losses through an order for restitution, crime victim compensation or by pursuing a civil suit.

Restitution is a remedy ordered as part of the criminal sentencing process and is available in every state and mandatory in many. Federal law mandates restitution for violent crime and certain other crimes. The ABA's Criminal Justice sentencing standards require consideration of the restitutionary interests of victims, especially when the offense resulted in personal injury or loss of money or property. See ABA Sentencing Stds. 18-2.2; 18-3.13; 18-3.15. ABA policy on prisoners also request that wages for prisoners take note of the fact that many have restitution obligations. Legal Status of Prisoners Stnd. 23-4.5.

For some victims, meaningful restitution is unrealistic and crime victim compensation programs are a legislative attempt to provide a minimum threshold of reimbursement to eligible victims for eligible losses. Crime victim compensation programs are funded primarily from the Crime Victims Fund through VOCA and state allocations. These programs reimburse a victim for designated losses even if the offender is not caught or prosecuted, however, these programs provide relatively small amounts to pay for specified victim expenses. Although the average cap on reimbursements is \$35,000, the average payout on a crime victim compensation claim was \$2,450. Even factoring for insurance coverage, nearly 60% of victims had approximately \$800 of out-of-pocket losses. Medical expenses account for nearly half of all reimbursements; lost wages and lost support in homicides comprise a quarter of disbursements, and approximately 15% is devoted to mental health counseling.

Victims do have an option to file individual civil suits against the offenders in an effort to collect on their losses. Some states provide that an order for restitution is entered as a civil judgment and may be collected as such. However, many victims do not have the resources to file civil suits. Usually any recovery may be reduced by the amount received in crime victim compensation funds. Unlike restitution and compensation awards, pain and suffering is compensable.

Conclusion

Victim participation is essential for the administration of justice in the United States. Respect and dignity for victims in the process is the key to obtaining that participation. The American Bar Association is strongly committed to the development of a true balance between prosecution, defense and victims interests so that justice is a reality for all who come before the criminal justice system.

APPENDIX A Bibliography

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APPENDIX B

Selected Federal Crime Victim Rights Act Provisions

CRIME VICTIMS SHALL HAVE THE FOLLOWING RIGHTS:

NOTICE - 18 U.S.C. § 3771

(a)(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law.

PRESENCE - 18 U.S.C. § 3771.

(a)(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

HEARD - 18 U.S.C. § 3771.

(a)(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

PLEA – 18 U.S.C. § 3771.

(a)(5) The reasonable right to confer with the attorney for the Government in the case.

APPENDIX C

Selected ABA Policies

ABA Criminal Justice Standards on:

- Fair Trial, Free Press (approved February 1991)
- Pleas of Guilty (approved August 1997)
- Prosecution Function (approved February 1992)
- Sentencing (approved February 1993)
- Special Functions of the Trial Judge (approved February 1999)
- Speedy Trial and Timely Resolution of Criminal Cases (approved

Resolution to continue support of victim rights and the adoption of statutory measures to protect those rights while ensuring the rights of defendants are not diminished and the discretion of the prosecutor is not curtailed (approved August 1997)

“Guidelines for Fair Treatment of Crime Victims and Witnesses,” American Bar Association (1983) www.abanet.org

“Suggested Guidelines for Reducing Adverse Effects of Case continuances and Delays on Crime Victims and Witnesses” (approved February 1986)

“Reducing Victim/Witness Intimidation: A Package” (approved August 1980)