Protecting, Enforcing, and Advancing Victims' Rights

ews

11th Edition

NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL

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USE OF THE TERM "VICTIM" IN CRIMINAL PROCEEDINGS by Terry Campos, J.D.

In the past thirty years there has been an explosion of state constitutional amendments and federal and state statutes that afford victims participatory rights in the criminal justice system. Notably, these legal rights to participation are only available to those who meet the relevant law's definition of "victim." While "victim" is a legal status that does not have any relationship to a defendant's guilt or innocence, courts are often hesitant to permit the use of the term "victim" during trial. This hesitancy stems from a concern that the term "victim" conclusively states a crime has occurred; and, therefore, that its use is prejudicial, and violates a defendant's constitutional due process right to a fair trial. This article discusses why "victim" is a legal status term and why other terms used to describe victims are inaccurate; analyzes the current state of the law surrounding use of the term at trial; and demonstrates how, when properly treated as a legal status term, "victim" can be used during criminal proceedings without violating a defendant's fair trial rights.

"Victim" is a Legal Term

In the criminal justice system, the term "victim" no longer merely describes a witness who the prosecution holds out to have suffered harm due to defendant's criminal conduct. "Victim" now defines an individual who is an independent participant in the criminal case under federal or state victims' rights laws.¹ Thus, the term "victim" denotes a person's legal status and defines the level and extent of participation that the individual is entitled to in the criminal case. This status is significant because, just as constitutional protections attach once a person accused of a crime gains the legal status of "defendant," a statutory and/or constitutional "victim" can exercise certain participatory rights unavailable to the general public. The criteria for obtaining victim status varies among jurisdictions; however, since many victims' rights attach pretrial, if not pre-charging,² the determination of who is a "victim" cannot be a factual determination dependent on defendant's guilt or innocence. For this reason, using the term "victim" during court proceedings is proper, as it accurately identifies a victim's legal role in the proceeding.

The Improper Use of Alternative Terms to Identify Crime Victims

Defendants and courts have voiced concern that the use of the term "victim" may prejudice a defendant. For this reason, some courts suggest

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¹ See, e.g., 18 U.S.C. § 3771(e) ("[T]he term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia); Ariz. Rev. Stat. Ann. § 13-4401(19) ("Victim' means a person against whom the criminal offense has been committed"); Idaho Code Ann. § 19-5306(5)(a) ("Victim' is an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime or juvenile offense.").

² Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, *Victims in Criminal Procedure* 52 (2d Ed. 2006).

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OVC Grant

Preparation of NCVLI News was supported by Grant No. 2008-DD-BX-K001, awarded by the Office for Victims of Crime (OVC), Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions expressed in this newsletter are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice. OVC is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics. the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention.

MESSAGE FROM THE DIRECTOR by Meg Garvin, M.A., J.D.

This year marks the 25th anniversary of the Victims of Crime Act. Twentyfive years ago the victims' rights movement dared to envision a better world for victims, a world in which they had access to services and rights. Because of victims' and advocates' hard work, much of the vision has come true. The battle for a better future is not yet won, however. We must re-dedicate ourselves to envisioning a still better future. This edition of *NCVLI News* identifies some of the hurdles facing victims, and helps us imagine how to overcome these hurdles and achieve the vision.

First, in *Use of the Term "Victim" in Criminal Proceedings*, Terry Campos analyzes one of the most significant, yet subtle attacks on victims' rights – the attack on the word "victim." Nationwide, defendants are asserting that use of the word "victim" infringes upon their fair trial rights. This may seem a semantic disagreement with little real world implications, yet it is a critical battle ground for victims' rights. "Victim" is a term of art, identifying the individual to whom rights attach; thus losing the semantic battle may have implications on the very rights for which we have fought so hard. Additionally, the use of other terms to identify victims, such as "alleged victim," fundamentally undermines the experience of victims. Terry deconstructs defense arguments, and establishes why the term is properly used pretrial and at trial.

In *ABA Endorses Attorneys for Child-Victims in Criminal Cases*, Mary J. Boland discusses the recent resolution of the American Bar Association (ABA), and its accompanying report, recognizing that child-victims have rights and that those rights are best protected by independent counsel. The ABA's recognition of the need for victim attorneys is a critical one for envisioning the future of victims' rights. The ABA's call to courts to appoint counsel for victims may be limited to child-victims at this point, but the seed has been planted for a world in which the ABA supports appointment of counsel for all crime victims.

Sarah LeClair presents a concrete image of the future of victims' rights in *Effectuating Crime Victims' Rights through Courthouse Design: Maricopa County Court Tower*, by highlighting Maricopa County's efforts to design and build a new courthouse that accommodates victims' rights and interests.

Finally, Lewis & Clark Law School student Kristin Asai-Mackewich discusses the question of how victims' rights interact with court orders that govern the conduct of the parties to a proceeding in *A Victim's Right To Confer in the Face of a Gag Order*. Specifically, Kristin presents the reasons why gag orders that curtail party communications with the public cannot properly be interpreted to diminish a victim's right to confer with the prosecution. This seemingly narrow issue is a first step to our system coming to grips with how non-party victim participants with legal rights are to interact with the traditional bi-partisan criminal practice.

As poet Thomas Campbell wrote, "Coming events cast their shadows before." This edition of *NCVLI News* reveals some of the shadows of the future – we can repossess the term "victim"; we can work with the largest legal membership institution in the country (the ABA) to secure support for appointment of victim attorneys; we can teach the legal system how the rights of non-parties co-exist with those of parties; and we can literally build a future that better accommodates victims' rights and interests. While there is certainly much more we have to envision to advance victims' rights, this edition of *NCVLI News* is a first step.

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using terms such as "alleged victim" or "complainant" to identify those who meet the relevant jurisdiction's constitutional and/or statutory definition of victim.³ These alternative labels are inappropriate as they fail to recognize a victim's legal status. Moreover, these labels are often legally incorrect and their use violates the right that many victims have under constitutional and state law: to be treated with fairness, dignity, and respect.

The use of "alleged victim" incorrectly asserts that victim status has not been determined. Similarly, "complainant" is over-broad and, based on the jurisdiction, often legally incorrect.⁴ More importantly, the use of these terms violates a victim's right to be treated with fairness, dignity, and respect. Under federal law, as well as almost every state victims' right constitutional amendment and/or statute, a victim has the right to be treated with fairness, dignity, and respect, or some version thereof.⁵ Synonyms for "alleged" include "dubious," "questionable," "suspect," "suspicious," and "so-called."⁶ Referring to a victim in such a manner implies that the victim is not truly a victim, but is instead fabricating the charges. This connotation is a clear violation of a victim's right to be treated with dignity and respect. For a victim to truly be a respected participant in the criminal justice system, a court must allow use of the term "victim" in court proceedings as acknowledgment that the individual occupies an important legal role in the process.

Common Objections to Use of the Term "Victim"

The most common objection to use of the term "victim" is that it presupposes that a crime has occurred.⁷ Since a jury or judge is charged with deciding the facts necessary to convict a criminal defendant, the argument is that the term's use is premature, as the fact-finder has not yet determined that a crime was committed.⁸ Proponents of this position also argue that, because the word implies

that the defendant has harmed the victim, it biases the fact-finder, thereby denying the defendant a fair trial.⁹

While courts have routinely upheld defendants' convictions in the face of these objections,¹⁰ courts have also sympathized with these arguments, noting in dicta that the term "victim" is best avoided.¹¹ Significantly, while some courts disfavor the term, no appellate court has summarily barred its use in criminal prosecutions. And research has revealed only two cases in which the reviewing court found use of the term "victim" so prejudicial as to warrant a new trial: *State v. Cortes*¹² and *Talkington v. State*¹³.

In *Cortes*, the judge, prosecutor, and numerous witnesses used the term "victim" at trial.¹⁴ The judge, in instructing the jury, used the term 76 times, and indicated that it would not provide a curative instruction to the jury on its use of the term.¹⁵ The *Cortes* court reasoned that, in cases where the fact that a crime has been committed is contested and the defendant has objected to the trial court's use of the term "victim" without a subsequent curative instruction, a court's use of the term may constitute reversible error.¹⁶ Limiting its holding to the particular circumstances of the case, the court found that use of the term was reversible error as it may have invaded the fact-finding of the jury. Subsequent cases have distinguished *Cortes* based on its extraordinary facts, and rejected arguments that use of the term constituted reversible error.¹⁷ In *Talkington*, the sole issue was whether the victim consented to sexual intercourse; all parties agreed that sexual intercourse had occurred.¹⁸ The reviewing court, relying on the provision of the state code of criminal procedure that barred judges from commenting on the evidence, held that for the court to use the term "victim" when the issue is whether she

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³ See, e.g., State v. Frey, No. 06-1081, 2007 WL 1827423, at *3 n.3 (Iowa Ct. App. June 27, 2007); Commonwealth v. Alves, No. 99-P-1559, 2001 WL 275346, at *1 (Mass. App. Ct. Mar. 20, 2001).

⁴ See generally 22 C.J.S. Criminal Law § 439 (2009) (detailing persons entitled to make a "complaint"). For instance, in some jurisdictions, only the prosecutor can be the complainant. *Id*.

 $^{{}^5}See, e.g., 18$ U.S.C. § 3771 (right to be treated with fairness and with respect for the victim's dignity and privacy"); Ariz. Const. art. 2, § 2.1(A)(1) (right to be treated with fairness, respect, and dignity); Tenn. Code Ann. § 40-38-102(a)(1) (right to be treated with dignity and compassion). Full collection of relevant state and federal laws on file with author.

⁶ http://thesaurus.reference.com/browse/alleged?qsrc=2889.

⁷See, e.g., State v. Nomura, 903 P.2d 718, 721 (Haw. Ct. App. 1995).

⁸ See, e.g., State v. Warholic, 897 A.2d 569, 583 (Conn. 2006).

⁹ See, e.g., id.

¹⁰ See, e.g., State v. Robinson, 838 A.2d 243, 246 (Conn. Ct. App. 2004); Agee v. State, 544 N.E.2d 157, 159 (Ind. 1989).

¹¹ See, e.g., People v. Dudgeon, Nos. E037537, E0395242006, WL 1305184, at *7 (Cal. Ct. App. May 12, 2006); *Birbeck v. State*, 665 S.E.2d 354, 364 (Ga. Ct. App. 2008); *State v. Devey*, 138 P.3d 90, 95 (Utah Ct. App. 2006).

^{12 851} A.2d 1230 (Conn. App. Ct. 2004).

^{13 682} S.W.2d 674 (Tex. Ct. App. 1984).

¹⁴ Cortes, 851 A.2d at 1240.

 $[\]cdot$ ¹⁵ *Id*.

¹⁶ *Id.* at 1241.

¹⁷ See, e.g., State v. Rodriguez, 946 A.2d 294, 305 (Conn. Ct. App. 2008); State v. Sandiago, 917 A.2d 1051, 1063 n.10 (Conn. Ct. App. 2007).

¹⁸ Talkington, 682 S.W.2d at 675.

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consented to sexual intercourse, was reversible error.¹⁹ Notably, *Talkington* predates most of the case law dealing

with the issue of whether the term "victim" is prejudicial, as well as Texas' crime victims' rights laws.

Survey of Case Law

When the use of the term "victim" is at issue, courts tend to distinguish cases in which it is uncontested that a crime has occurred and only the identity of the perpetrator is at issue, from those cases that involve a question of whether a crime occurred at all.

Identity of Perpetrator at Issue

Courts have consistently found that it cri is appropriate to use the term "victim" in a criminal trial where the commission of a crime is not contested.²⁰ In these cases, defendants' objection to the term loses most, if not all, merit because it is clear that harm has occurred and there is a "factual" – as well as legal – victim. For this reason, courts have concluded that the term "victim" carries no more implication of defendant's guilt than the facts of the crime, and have permitted its use accordingly.²¹

Commission of Crime Contested

Use of the term "victim" is more controversial in cases where the defendant is contesting that a crime occurred. These cases generally involve sexual assault, where the defendant is arguing that the victim consented to the sexual act, or homicide, where the defendant claims the act at issue was committed in self-defense.²² Defendants in such cases argue that, since the jury is charged with determining whether the victim consented, using the term "victim" denies the defendant a fair trial as it assumes facts properly left to the jury. Reviewing courts' analyses of this argument vary, depending on whether a witness, prosecutor, or court uses the term.

Witnesses' Use of the Term "Victim." Criminal defendants have a right under the Sixth Amendment of the United States Constitution to a have a fair and impartial jury determine their guilt or innocence.²³ It is improper

²¹ See, e.g., State v. Wolfe, No. 20534, 2005 WL 742506 (Ohio Ct. App. Apr. 1, 2005); Agee, 544 N.E.2d at 159.

²³ U.S. Const. amend. VI.

for a witness to give an opinion on a defendant's guilt, as it invades the province of the jury and may violate this

Concealing a victim's legal status is an improper and unnecessary way to protect a defendant's rights as it trivializes a victim's role in the criminal proceedings. In order to fulfill the purpose of victims' rights laws, courts need to permit the use of the term "victim" as recognition of a victim's unique and important position in the criminal justice system. right. Courts generally agree that when a police officer uses the term "victim", there is little risk that such use will impermissibly sway the jury because jurors understand that, in this context, "victim" is a term of art synonymous with "complaining witness."²⁴ Significantly, courts have found that any potential risk that

a witness's use of the term might affect the jury's deliberations is curable with standard jury instructions.²⁵

Prosecution's Use of the Term "Victim." Generally, a prosecutor may not express his or her personal opinion on a defendant's guilt. Defendants often object to a prosecutor's use of the term "victim", arguing that it reflects the government's belief that the defendant is guilty. Specifically, they argue that the jury will give special weight to this opinion based on the prestige of the prosecutor and the fact-finding facilities available to the office. However, courts have rejected this argument based on jurors' knowledge of the criminal justice system and the role of prosecutors in the criminal trial.²⁶ Any reference by the prosecutor to a victim will be viewed as merely part of the state's contention that, based on the state's evidence, the complainant was a victim of the alleged crimes.²⁷ For these reasons, courts have concluded that it is not reasonably likely that a jury would interpret the prosecutor's use of the term to reflect a personal belief in a defendant's guilt. Even courts that have found that the prosecutor's use of the term "victim" was in error have concluded that a standard jury instruction – that the comments of prosecutor are not

See TERM VICTIM, page 19

¹⁹ Id.

²⁰ See, e.g., Cortes, 851 A.2d at 1240; State v. Chism, No. 54895-6-I, 2005 WL 3529123, at *3 (Wash. Ct. App. Dec. 27, 2005); Jackson v. State, 600 A.2d 21, 24 (Del. Super. Ct. 1991).

²² See, e.g., Jackson, 600 A.2d at 24; Mason v. State, 692 A.2d 413 (Del. Super. Ct. 1997) (table).

 ²⁴ See, e.g., Jackson, 600 A.2d at 24-25; State v. Then, 2009 WL
 815453, at *18 (N.J. Super. Ct. App. Div. Mar. 31, 2009).
 ²⁵ See, e.g., State v. Silve, No. 27044, 2007 WL, 1074702, etc. 470

²⁵ *See, e.g., State v. Silao*, No. 27044, 2007 WL 1874792, at *1 (Haw. Ct. App. June 28, 2007).

²⁶ See, e.g., Rodriguez, 946 A.2d at 307; People v. Mata, No. B193922, 2007 WL 4216867, at *7 (Cal. Ct. App. Nov. 30, 2007); State v. Jackson, No. 32397-4-II, 2006 WL 331373, at *6 n.3.

²⁷ See, e.g., Mata, 2007 WL 4216867, at *7; People v. Gillam, No. 266893, 2007 WL 2189056, at *3 (Mich. Ct. App. July 31, 2007); Weatherly v. State, No. 09-07-00407-CR, 2008 WL 5780705, at *3 (Tex. Crim. App. April 1, 2009); Warholic, 897 A.2d at 584.

ABA ENDORSES ATTORNEYS FOR CHILD-VICTIMS IN CRIMINAL CASES by Mary L. Boland, J.D.*

At its 2009 Midvear Meeting, the American Bar Association (ABA) endorsed the appointment of independent attorneys for child-victims in criminal and juvenile cases to ensure the ability of children to assert their legal rights and to gain access to specialized services and protections.¹

As victims' attorneys well know, the law is not self-executing. The assertion of one's rights requires knowledge that those rights exist and that they can be claimed. Victims' attorneys have proven essential to victims' rights enforcement in criminal cases. But, most often, those rights have been litigated in the context of adult victims.

Unique Legal Issues in **Child-Victim Representation**

When the victim in a criminal or juvenile justice proceeding is a child, there are a host of unique issues that may arise. For example, children are often abused within the family and may have an emotional attachment to their abuser; offenders, family or not, may intimidate or threaten the family or child into not testifying or cooperating with the prosecution; and children may fear facing the perpetrator in court, and may need the assistance of reasonably protective evidentiary and trial procedures to ensure their cooperation.² Additionally, criminal conduct against a child may trigger abuse and neglect actions and lead to adult criminal proceedings or juvenile delinquency proceedings. Each legal context may have different rules, different locations, different participants; and each court proceeding presents

⁶ Mary L. Boland is an Assistant State's Attorney in Cook County, Illinois. Ms. Boland is in her final year of a 3-year term as a member of the Criminal Justice Section Council of the American Bar Association.

¹A.B.A. Crim. Just. Sec., Resolution, *Child Victims in the Criminal* Justice System, Feb. 2009, http://www.abanet.org/crimjust/policy/ my09101d.pdf (hereinafter "Resolution"). The Resolution was the result of much hard work by the Victims Committee of the ABA's Criminal Justice Section, spearheaded by committee co-chairs Russell Butler (Maryland Crime Victim Resource Center) and Meg Garvin (NCVLI), vice-chair Angela Downes (MADD), and the excellent research and drafting of Law Professor Wendy Seiden (University of Baltimore). Law Professor Myrna Raeder (Southwestern Law School), Eva Klain (ABA Center for Children & the Law), and I rounded out the advisory board for a child-victims' grant, secured by the Criminal Justice Section, to make recommendations on improving the treatment of children in criminal cases.

² See Myrna S. Raeder, Enhancing the Legal Profession's Response to Victims of Child Abuse, 24 Crim. Just. Mag. 12, 14 (Spring 2009) (discussing sexual abuse victims).

distinct legal challenges to rights enforcement. These complexities make the need for an attorney for the childvictim all the more compelling.

These unique needs of child-victims are accompanied by the need for unique legal protections. In the Report³ accompanying the ABA Resolution, many of the legal interests and rights of child-victims and child-witnesses in criminal and juvenile cases were identified as follows:

- To obtain counseling and address safety and protective order concerns during investigation;
- To obtain age-appropriate notice of court proceedings and of the status of the defendant/ respondent;
- To be present or to have a representative present at all proceedings and to be consulted before a case is dismissed or a plea agreement is entered;
- To assert special protections, such as the use of age-appropriate questioning and remote testimony when necessary;
- To expeditious case handling and to have the victims' interests considered in resolving continuance requests;
- To present evidence at a competency hearing;
- To consult with the prosecution;
- To assert any statutory privacy and/or confidentiality interests regarding name and identifying information;
- To obtain protective orders if private and/or confidential information is admitted into evidence;
- To request that the courtroom be closed to all nonessential persons;
- To refuse to be interviewed by defense counsel;
- To have consideration be given to the best interests of the child in scheduling interviews, meetings, or hearings;
- To have an advocate or representative present at every interview, meeting, or hearing;
- To be reasonably protected throughout the proceedings;
- To make a victim impact statement at sentencing • and release proceedings; and
- To obtain appropriate restitution.⁴

Moreover, because children may be victimized in

See CHILD-VICTIMS, page 6

³A.B.A. Crim. Just. Sec., Report, *Child Victims in the Criminal Justice* System, Feb. 2009, http://www.abanet.org/crimjust/policy/my09101d. pdf (hereinafter "Report"). ⁴ *Id.* at 9-12.

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the presence of other children, or may be witnesses to domestic violence crimes, they are often witnesses to cases, which presents additional unique considerations. A recent Illinois case illustrates this point. In In re K.S., a 12-year old respondent was adjudicated delinquent for aggravated criminal sexual abuse involving the commission, at school, of fellatio on a victim under nine years of age.⁶ K.S. attended a therapeutic school, and three of his classmates were eyewitnesses to the crime. In discovery, defense counsel subpoenaed the school, seeking "all incident reports, Individualized Education Programs (I.E.P.'s), statements, psychological reports and disciplinary reports" of the three classmates.⁷ After the Chicago Board of Education refused to release the records without the students' consent or a court order, defense counsel moved for an order directing the release of the records.8

Defense counsel argued that because the witnesses "attended a therapeutic day school, it was reasonable to assume that they had mental or cognitive impairments."9 The prosecutor objected, asserting that the records were privileged under the Illinois School Student Records Act¹⁰, and that the mere fact that the three witnesses attended a therapeutic school did not make any of the records material or relevant.¹¹ The trial court suggested that a competency hearing should be scheduled to enable the court to observe and examine the witnesses' demeanor and how they responded to questions, but defense counsel objected.¹² Defense counsel admitted that he did not know what the school records contained, but argued that he was entitled to the records "to examine the possibility of competency and to prepare for cross-examination of the witnesses."¹³ The trial court disagreed, terming defendant's request a "fishing expedition," and finding that defendant had not alleged any factual basis for release of this statutorily protected information.¹⁴

Ultimately, defendant's challenge to the competency of these witnesses was a thinly disguised attack on their credibility. Under Illinois law, every person is presumed competent to testify, unless incapable of expressing

- ¹³ Id.
- 14 Id.

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himself or herself, or incapable of understanding the duty of a witness to tell the truth.¹⁵ Defense counsel in *In re K.S.* made no such claim. The appellate court nonetheless reversed, finding that a witness's credibility is especially important in deciding the guilt or innocence of the accused.¹⁶

This conclusion - that credibility is an issue that overrides all privacy and confidentiality protections because it is important to determining guilt or innocence - is simply wrong. Nonetheless, the appellate court decided that "a reasonable inquiry of a witness'[s] mental health history" would be permitted, and ordered an *in camera* review of all of the requested records.¹⁷ Yet, merely being a witness to a crime does not open the door to a full-scale fishing expedition into a child's school records. Defendant did not state any basis for his challenge other than the fact that these children attended the same school as the offender and were evewitnesses to his crimes. As a result, these children, who lack independent legal representation, will have all of their school incident reports, IEP statements, psychological reports, and school disciplinary records scrutinized by a court for release to defense counsel, without any showing that their competence, motive, or bias is at issue, but merely because defendant seeks to uncover evidence to challenge their credibility.

Need for Appointment of Independent Attorneys for Child-Victims

Prosecutors, like the one in *In re K.S.*, will often object on behalf of victims and witnesses as a matter of public policy. In some jurisdictions, the advent of Child Advocacy Centers has made multidisciplinary case coordination, including advocates, routine in certain cases. Prosecutors may also have specialized victimwitness personnel to work with children. But, given the caseloads, the need for specialized knowledge, the time intensity, and the limited resources of the public prosecutor's offices, many prosecutors welcome the assistance of child attorneys who can assert the varied independent rights and interests of child-victims and child-witnesses. As the ABA Report notes, "[p]rosecutors ensure that justice is done for the community; they do not and cannot always represent the individual needs of the child victim or witness, particularly when those needs conflict with the safety

⁵900 N.E.2d 1275 (Ill. App. Ct. 2008).

⁶ Id. at 1276.

⁷ Id. at 1277.

⁸ Id.

⁹ Id.

¹⁰ 105 Ill. Comp. Stat. 10/1 to 10/10.

¹¹ In re K.S., 900 N.E.2d at 1277.

 $^{^{12}}$ *Id*.

¹⁵ 725 Ill. Comp. Stat. 5/115-14.

¹⁶ *In re K.S.*, 900 N.E.2d at 1280.

 $^{^{17}}$ Id.

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needs of the community."18

Still, as Professor Myrna S. Raeder notes in her recent article on this topic, some judges, prosecutors, and defense counsel may be concerned and hostile to the notion of the presence of a child-victim's attorney in the case.¹⁹ Ultimately, however, she concludes that federal law already provides for victim attorneys, and that this practice has given voice to the most vulnerable of victims and benefited the justice system by giving courts the power to appoint an attorney where a child's interests are not otherwise protected.²⁰

In addition to attorneys, the law may provide for representation of child-victims through a guardian ad litem (GAL). There are conceptual differences between these roles. A child-victim's attorney represents his or her client's interests, whereas a GAL may make recommendations based on his or her view of the best interests of the child. These differences, of course, may not result in the same advocacy strategies.²¹

Courts have inherent power to protect witnesses, and, even in the absence of positive law, can appoint an attorney or GAL where it is in the best interest of a child.²² The Adam Walsh Child Protection and Safety Act provides that, to protect the best interests of the child, a court may appoint a GAL for a child-victim or childwitness of a crime involving abuse or exploitation.²³ Under the statute, the GAL does not have to be an attorney.²⁴ The statute also provides that the GAL has access to records; may attend all depositions, hearings, and trial proceedings in which the child participates; may not be compelled to testify, but may make recommendations to the court regarding the welfare of the child.²⁵ It further provides that GALs have immunity from civil and criminal liability.²⁶ Additionally, the Child Abuse Prevention and Treatment Act (CAPTA)²⁷ requires that states that receive funding under CAPTA must ensure the appointment of a GAL or other representative for a child in cases involving child abuse or neglect,²⁸ but few do so in criminal or juvenile delinquency proceedings. State victims' rights laws may also provide victims with the right to have a representative, without identifying the status of that representative.²⁹

Need for Specialized Training

Given the complexities and challenges of cases involving child-victims or child-witnesses in criminal and juvenile delinquency proceedings, as more attorneys begin to represent children in these settings, it is important to obtain specialized training or form collaborations with experienced attorneys, such as those who represent children in abuse and neglect courts. For example, one expert in child law recommends that child attorneys should be competent in: "(1) understanding child and adolescent development from a psychological and legal perspective; (2) communication, consultation, and confidentiality issues; (3) issues relating to the child-parent relationship; and (4) issues regarding the determination of the objectives of the representation."³⁰

In addition to raising these concerns about the unique needs of child-clients, the representation of child-victims also gives rise to a distinct set of ethical considerations. Marvin R. Ventrell, the former Executive Director of the National Association of Counsel for Children, notes that, in addition to ordinary ethical rules, attorneys for child-victims and witnesses should adhere to a set of "fundamental ethical advocacy rules that specifically address the special considerations of age, maturity and needs of their minor clients.³¹

²⁹ See, e.g., Report at 6-7 (discussing Arizona, Florida, and Oklahoma state laws that allow or mandate the appointment of representatives, GALs, or attorneys in criminal cases).

See CHILD-VICTIMS, page 19

¹⁸ Report at 12.

¹⁹ See Raeder, *Enhancing the Legal Profession's Response*, 24 Crim. Just. Mag. at 19-20 (noting that some prosecutors are particularly concerned that the pool of available "child" attorneys is comprised of those from the defense bar).

²⁰ Id. (citing 18 U.S.C. §3771(c)(2)).

²¹ See, e.g., Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship* 26 Loy. U. Chi. L.J. 259, 268-69 (1995) (stating that a guardian ad litem considers the child's wishes, but makes decisions based on his or her view of the child's best interests, and that an attorney owes the same duty to a child as to an adult client and therefore represents the child's expressed desires). *But see* Shari Shink, *Justice For Our Children: Justice For a Change*, Denv. U. L. Rev. 629, 644 (2005) (arguing that there is no single definition of the child attorney's role).

²² See, e.g., John E. B. Myers, Karen J. Saywitz & Gail S. Goodman, Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony, 28 Pac. L.J. 3, 61-62 (Fall 1996).

^{23 18} U.S.C. § 3509(h).

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ 42 U.S.C. §§ 5101 et seq.

^{28 42} U.S.C. § 5106(b)(2)(A)(xiii).

³⁰ Ventrell, *Rights and Duties*, 26 Loy. U. Chi. L. J at 272-73; *see also* Erik Pitchal, *Buzz in the Brain and Humility in the Heart: Doing It All, Without Doing Too Much, on Behalf of Children*, 6 Nev. L.J. 1350, 1360 (2006) ("Advocacy is strengthened when other professionals [such as social workers] are brought into the effort, and it is weakened when lawyers do what they are not trained to do.").

³¹ Ventrell, *Rights and Duties*, 26 Loy. U. Chi. L.J. at 270-72. This article also provides an appendix of additional readings for children's

EFFECTUATING CRIME VICTIMS' RIGHTS THROUGH COURTHOUSE DESIGN: MARICOPA COUNTY COURT TOWER by Sarah LeClair, J.D.

Many crime victims and their supporters find the courthouse experience to be intimidating, confusing, and stressful. Crime victims are generally required to testify a few feet away from the people who victimized them, sit near to and cross paths with defendant's family and friends during long court proceedings, and otherwise navigate an often complex and chaotic criminal justice system. But at least one jurisdiction in the United States – Maricopa County, in Arizona – is determined to improve this experience through the integration of victims' interests and rights into the design of its new courthouse building.

The decision to build a new court tower stemmed from the increasing demands that population growth has placed on the Maricopa County court system, and from the concern that, with felony filings projected to grow by approximately 50 percent over the next 10 years, case backlogs may become unmanageable.¹ As described by Maricopa County Superior Court Presiding Judge Barbara Rodriguez Mundell: "Our goal, in resolving the court's critical need for more courtrooms, is to provide a state-of-the-art justice center for all court users."2 Although the project began as an effort to build needed courtroom capacity, it took on greater significance for crime victims when Maricopa County's Judicial Branch decided that victims' rights would "play a significant role in the planning" of the courthouse and that the courthouse environment "should integrate crime victims' rights guaranteed by the state's constitution."³

Arizona's Victims' Bill of Rights provides for the right of a crime victim "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."⁴ Of particular relevance to courthouse design, Arizona's criminal code further mandates that "[b]efore, during and immediately after any court proceeding, the court shall provide appropriate safeguards to minimize the contact that occurs between the victim, the victim's immediate family and the victim's witnesses and the

defendant, the defendant's immediate family and defense witnesses."⁵

In recognition of the interrelationship between courthouse design and these important rights, Maricopa County's Judicial Branch worked with consultant Dr. Judith H. Heerwagen to ensure that crime victims were included in the design process. Dr. Heerwagen, an environmental and evolutionary psychologist, whose work focuses on the links between building design and human health, well being, and productivity, assisted in organizing nine focus groups in October and November 2008. Focus group participants included thirteen crime victims; attorney Mischa Hepner from Arizona Voice for Crime Victims; and victim advocates from the Maricopa County Attorney's Office, Arizona's Attorney General's Office, and the Federal Bureau of Investigation.

Dr. Heerwagen analyzed and summarized the results of the focus groups in a 15-page Report.⁶ In Report, Dr. Heerwagen explained the practice of designing with victims' rights in mind as follows:

> From a design standpoint, the victim as a client for services means creating a customer interface that is speedy, polite, understanding, empathic, and competent. From the perspective of the victim as an active customer, the design should reflect their thoughts and ideas about creating a courthouse that reduces the stresses and concerns they experience and provides an atmosphere that conveys respect, dignity, and justice for all.⁷

As input from the focus groups made clear, victims do not believe that the current courthouse addresses their stresses and concerns, and instead "they felt intimidated and re-victimized as a result of their experience."⁸

As detailed in the Report, the primary concerns of the focus group participants were feelings of helplessness and lack of control, issues of safety and security, and the need to unreasonably hold emotions in check at all <u>times.⁹ The focus</u> groups identified the main sources of ⁵ Ariz, Rev. Stat. § 13-4431.

See C(

¹ Yvonne Wingett, *County Going Ahead with \$360 Million Court Tower*, The Arizona Republic, Mar. 19, 2008, http://www.azcentral.com/news/articles/0319countyproject0319.html.

 $^{^{2}}$ Id.

³ Judge Barbara Rodriguez Mundell, *Message From the Presiding Judge*, The Judicial Branch News 2 (Feb. 2008), http://www.superiorcourt.maricopa.gov/MediaRelationsAndCommunityOutreach/docs/newsletters/Feb08.pdf.

⁴Ariz. Const. art. II, § 2.1(A)(1).

⁶ Judith Heerwagen, Ph.D., *Designing a Courthouse with Victims' Rights in Mind, Report prepared for the Maricopa County Superior Courthouse* 2 (Jan. 2008) (on file with author).

⁷ Id.

⁸*Id.* at 3. ⁹*Id.* at 5.

COURTHOUSE DESIGN, continued from page 8

these concerns as follows:

- Finding and Navigating the Courthouse: waiting in long lines to enter the building; entering a chaotic space with little or no signage; navigating crowded hallways; and the possibility of unwanted encounters with defendant's family members or media in the elevator, outside the courtroom, or in the restroom.
- **Courtroom Proceedings:** difficulty in knowing when a case will be called; confusion about where to sit; unwanted intermingling between the victim's and the defendant's families; feeling pressure to maintain composure at all times; and difficulty seeing and hearing the proceedings.
- Where to Eat and Take Breaks: a lack of privacy in the cafeteria and other public spaces; and no access to windows or doors.¹⁰

After summarizing these concerns, Dr. Heerwagen provided a number of general and specific design recommendations, including the following:

- Finding and Navigating the Courthouse: a central entrance; highly visible signs and a centrally located information desk; a notification system for cases; access to daylight and views of the outdoors in public spaces; and separate elevators, restrooms, and small meeting and rest areas for victims.
- **Courtroom Proceedings:** a clearly marked seating area in each courtroom for victims, their families and supporters; and a separate room for victims in every courtroom for use during especially stressful times.
- Where to Eat and Take Breaks: a lounge off of the central lobby for victims to rest and talk privately, and which would offer telephone and internet access, work tables, comfortable chairs, a refrigerator, a microwave, and a child play area; and a cafeteria inside the courthouse.¹¹

According to Jessica Funkhouser, Special Court Counsel for the Maricopa County Superior Court, the majority of these recommendations have been incorporated into the new building's design. The selected innovations include the separate lounge and rest area for victims with chairs, tables, work stations, internet access, televisions, a microwave, and a refrigerator.¹²

¹² Email from Jessica Funkhouser, Special Court Counsel for the Maricopa County Superior Court (Apr. 29, 2009) (on file with author). Some of the most exciting design innovations that will be implemented for victims will be in the place they identified as the most stressful: the courtroom. According to Ms. Funkhouser, the new courtrooms will include rooms with separate entrances into the courtroom and access to private restrooms. Victims will be able to view and hear court proceedings from these rooms by a live video feed, which gives them the option to turn off the equipment if they do not wish to see or hear some part of a proceeding. When testifying, victims will be able to approach the witness chair from an aisle on the jury-side of the courtroom.¹³ The court has invited focus group participants to tour full scale mock-ups of the planned courtroom design and to provide additional feedback as smaller design refinements are made.

Notably, these design plans have not met with resistance from the defense bar. Defense attorneys have been invited to view and offer feedback about the courtroom mock-ups. According to Ms. Funkhouser, feedback from this group of attorneys reflected an understanding that the new design will benefit all courtroom participants –including defendants, their witnesses, and their families – as it minimizes the likelihood of confrontations. Some attorneys requested the addition of a room for defendants' families, similar to that provided for victims in each courtroom, and this room has been incorporated into the courtroom design.¹⁴

Construction began on the new courthouse in April 2009, and is projected to end in November 2011. The courthouse designed with victims' interests and rights in mind is likely to provide a safer and less stressful environment for all courthouse visitors. As explained by Judge Mundell:

A well-designed courthouse with improved traffic patterns, effective signage, enhanced security and other improvements will assist not only victims, but all courthouse visitors. Defendants and their families will benefit from a relaxed ambiance because unexpected interactions between the victims and their families are minimized. Heightened comfort and safety improves equal access to the court and justice for everyone.¹⁵

More information about the courthouse is available at http://www.maricopa.gov/courttower/descript.htm.

¹⁰ *Id.* at 5-9.

¹¹*Id.* at 11-15.

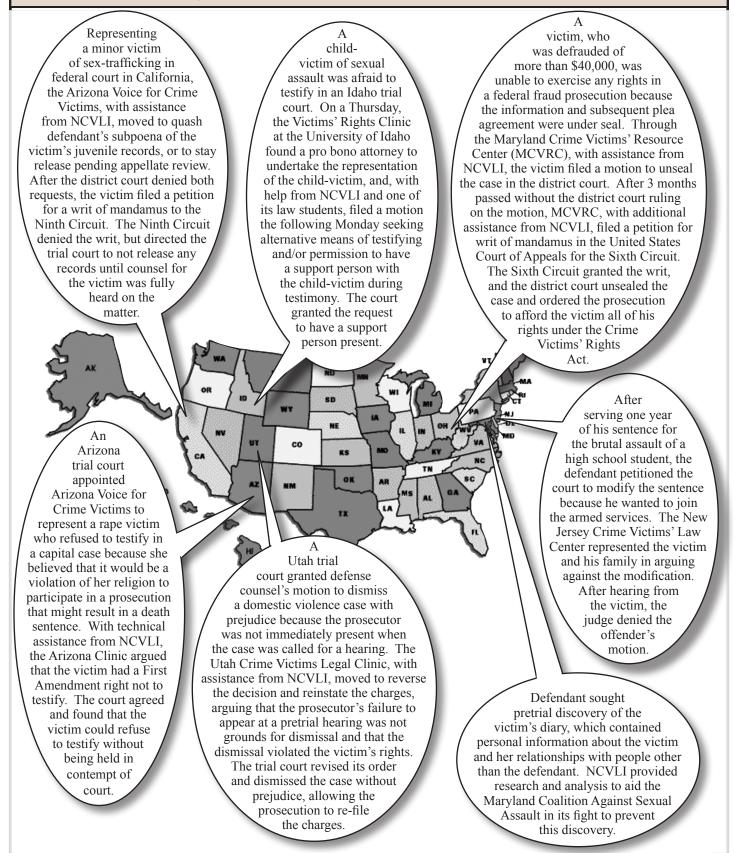
¹³ Id.

¹⁴ Telephone Interview with Jessica Funkhouser, Special Court Counsel for the Maricopa County Superior Court (May 19, 2009).

¹⁵ Judge Mundell, *Message From the Presiding Judge* at 2.

IN THE TRENCHES

In this column, NCVLI publishes news from the frontlines of the crime victims' rights movement – information about cases we all want and need to know but that are not published in any of the reporters. Several of these cases are pending and will be updated in future columns, as information is available. If you know of a victims' rights case that should be included in our "In the Trenches" column, please e-mail us at ncvli@lclark.edu.



A VICTIM'S RIGHT TO CONFER IN THE FACE OF A GAG ORDER by Kristin Asai-Mackewich*

Recently, victims' rights attorney, law school professor, and former federal judge Paul Cassell was gagged. While serving as counsel for two victims in an environmental pollution prosecution, the district court judge issued an order "reminding" Professor Cassell of his duty to comply with the gag order in place in the case.¹ The original order did not explain the scope of the gag on extrajudicial statements, but the judge explained "I don't want this case tried in the newspaper. . . . And this case will not be tried in the press."² Although the judge's statement in the original gag order was not aimed at a particular party, the addition of "pro hac vice" counsel in the subsequent order was clearly directed at Professor Cassell and his co-counsel representing the victims. This case presents a number of interesting questions about: whether crime victims inherently fall within the scope of a gag order governing the parties to a criminal prosecution; the scope of permissible communications between those who are expressly gagged by the order and other participants in the case; and the impact of a gag order on crime victims' constitutional and statutory rights. The issue discussed in this article is whether and how victims can assert their right to confer with the prosecution while a gag order is in place.

Victims have the right to confer with the prosecution in a criminal case under federal and most states' law. Although no case law exists expressly addressing the interaction between gag orders and victims' rights, a review of case law regarding gag orders in general illustrates that victims should be able to assert their right to confer even when a gag order is in place. Courts issue gag orders to control pretrial or trial publicity by preventing trial parties and participants – such as attorneys, court staff, witnesses, and law enforcement – from discussing aspects of the case with the public. The orders are primarily designed to protect the criminal defendant's right to an impartial jury, as well as the right of the government, the court, and the public to the fair administration of justice. Because a victim is not a "party" to a criminal prosecution, he or she may be viewed as outside the scope of the gag order – neither bound by its terms, nor allowed to communicate with those who are. Importantly, however, because crime victims have specific rights in the criminal justice process, gag orders cannot properly be construed to terminate a victim's legal rights, including the right to confer with the prosecution.

The Purpose of Gag Orders

The primary purpose of a gag order is to prevent out-of-court publicity from interfering with the fairness and integrity of criminal proceedings, especially trial.³ Courts often issue such orders to protect juror impartiality when a change of venue or other procedural device is unavailable.⁴ Gag orders generally arise out of the criminal defendant's right to an impartial jury under the Sixth Amendment of the United States Constitution.⁵ Control of publicity in a criminal case has often been recognized by the United States Supreme Court as essential to a defendant's Sixth Amendment right to a fair trial.⁶ Without a gag order in place, extrajudicial statements could violate the defendant's fundamental right to have his or her trial decided by impartial jurors.7 In addition to protecting the fair trial rights of criminal defendants, a gag order "also protects the interest of the public and [government] in the fair administration of criminal justice" by guarding against the prejudicial effects of pretrial publicity.⁸ Importantly, courts may also issue gag orders to protect crime victims' interest in the non-disclosure of certain information to the public.⁹

See RIGHT TO CONFER, page 12

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¹The order specifically stated: "all Counsel in this case, including those admitted *pro hac vice* for any purpose, are advised that the Court's Orders regarding public statements by Counsel remain in effect." *United States v. W.R. Grace,* No. CR 05-07-M-DWM, Order at 1-2 (Feb. 24, 2009).

² United States v. W.R. Grace, 401 F. Supp. 2d 1057, 1058-59 (D. Mont. 2005).

³ United States v. Brown, 218 F.3d 415, 423 (5th Cir. 2000).

⁴ Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 Ohio N.U. L. Rev. 755, 765 (2008) (stating that the United States Supreme Court prefers such remedial procedural approaches because a gag order completely freezes speech).

⁵ U.S. Const. amend. VI.

⁶ Brown, 218 F.3d at 424.

⁷ Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991).

⁸Brown, 218 F.3d at 424.

⁹ See Fischetti v. Scherer, 840 N.Y.S.2d 575, 577 (N.Y. App. Div.

RIGHT TO CONFER, continued from page 11

For instance, courts have found that victims' interests in privacy and emotional well-being may necessitate the issuance of an order barring trial participants from discussing a case with the media.¹⁰

A Victim's Right to Confer with the Prosecution

Victims have both a federal statutory right and, in many states, a constitutional and/or statutory right to confer with the prosecution.¹¹ The right to confer generally allows a victim to speak with the prosecution about the status of the case, the government's direction, and possible disposition of the matter.¹² It also provides victims with the opportunity to form and express opinions about the case to the government and court.¹³ The right is expansive and requires that the communication between prosecutor and victim be meaningful.¹⁴ However, the right to confer does not bestow party status onto the victim, and the prosecutor retains all discretion regarding the charging decision and recommendations regarding the disposition of the criminal proceedings.¹⁵

Ethical and Constitutional Limitations on the Prosecution's Speech

Gag orders restrict First Amendment rights to free speech and press. These constitutional freedoms are "not absolute but must instead be 'applied in light of the special characteristics of the [relevant] environment."¹⁶ Courts have found that the free speech rights of trial participants may be limited to ensure a fair trial.¹⁷ For

¹¹ See, e.g., 18 U.S.C. § 3771(a)(5); Alaska Const. art. 1, § 24; Cal. Const. art. 1 § 28(6); N.M. Const. art. 2, § 24(A)(6); S.C. Const. art. 1 § 24(A)(7); Ariz. Rev. Stat. Ann. § 13-4419; Ind. Code § 35-40-5-3(b).

12 See, e.g., State v. Stauffer, 58 P.3d 33, 37 (Ariz. Ct. App. 2002); Reed

¹⁶ Brown, 218 F.3d at 424.

the purposes of First Amendment analysis, a gag order prohibiting parties, lawyers, and potential witnesses from making extrajudicial statements is considered a "prior restraint" on speech.¹⁸

In general, a "prior restraint" will only be upheld if the government can show that the restrained activity poses "either a clear and present danger or serious and imminent threat to a protected competing interest"; that the restraint is narrowly tailored; and that the restraint is the least restrictive means of protecting such an interest.¹⁹ Thus, if the goal of protecting the fairness and integrity of trial can be accomplished without restricting free speech rights, a gag order restricting the speech of trial participants, including the prosecuting attorneys who the law obligates to confer with victims, will be invalid on First Amendment grounds.

Courts recognize that, for the purposes of First Amendment analysis, there is a distinction between gag orders that restrict the speech of the participants in a case and those that apply to the press; orders that apply to participants are evaluated under a less stringent standard than those that apply to the press.²⁰ The Circuit Courts of the United States Court of Appeals are split on the exact nature of this distinction with respect to the "prejudice" prong of the prior restraints test.²¹ Despite this split, prosecutors are often already required to comply with a "substantial likelihood" standard based on their own state ethics rules.²² Most states follow the American Bar Association's model rule governing an attorney's extrajudicial statements, which restricts an attorney from making an extrajudicial statement that the "lawyer knows or reasonably should know will be disseminated ... and will have a substantial likelihood of materially prejudicing [the trial]."²³ Thus, if a prosecutor speaks

²⁰ Gentile, 501 U.S. at 1073; Brown, 218 F.3d at 425.

See RIGHT TO CONFER, page 13

^{2007) (}stating that there are "important interests" other than fair trial concerns that may warrant a gag order, such as the privacy interests of a victim of sexual abuse and the interests of the state in encouraging victims of sex crimes to report such offenses without fear of exposure). ¹⁰ *See*, *e.g.*, *In re J.S.*, 640 N.E.2d 1379, 1383 (III. App. Ct. 1994); *In re A Minor*, 595 N.E.2d 1052 (III. 1992).

v. Becka, 511 S.E.2d 396, 400 (S.C. Ct. App. 1999).

¹³ United States v. BP Products North America Inc., Crim. No. H-07-434, 2009 WL 677653, at *61 (S.D. Tex. Mar. 12, 2009).

¹⁴ See United States v. Heaton, 458 F. Supp. 2d 1271 (D. Utah 2006) (noting that the CVRA's guarantee to victim's of the "reasonable right to confer" with the prosecution is "intended to be expansive") (quoting 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl)).

¹⁵ See In re Dean, 527 F.3d 391, 395 (5th Cir. 2008) (noting that a victim's right to confer "is not an infringement . . . on the government's independent prosecutorial discretion . . .; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion").

¹⁷ Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 n.18 (1984).

¹⁸ *Brown*, 218 F.3d at 424-25. A "prior restraint" is an administrative or judicial order that restrains certain communications before such communications are to occur. *Id*.

¹⁹ Id. at 425.

²¹ The Supreme Court has not yet established a standard for evaluating when a gag order on trial parties or participants is proper. *Brown*, 218 F.3d at 426-27.

²² *Brown*, 218 F.3d at 428 ("An attorney's ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not."); *see also In re Morrissey*, 168 F.3d 134, 138 (4th Cir. 1999) (noting that local professional conduct rules governing extrajudicial statements further "the important governmental interest of protecting both the accused and the public's right to a fair trial.").

²³ Model Rules of Prof'l Conduct R. 3.6(a); see, e.g., Ariz. Rules of

RIGHT TO CONFER, continued from page 12

with the press or a victim, he will be in violation of the ethics rule if he knows or reasonably should know that the information will be released to the public *and* that the statement will prejudice the trial.

How a Victim's Right to Confer Coexists with a Gag Order

The right to confer exists regardless of whether a gag order is in place. The right to confer gives victims the right to be given information and to express opinions.²⁴ If victims are prohibited from receiving information and expressing their opinion to the prosecutor through a gag order, this right is violated. As a demonstrated below, case law related to the right to confer, as well as the purpose of and obligations imposed by gag orders, reveal

that a gag order cannot strip victims of their right to confer.

Although few courts have expressly addressed the issue of whether a gag order can interfere with a victim's right to confer with the prosecution,²⁵ case law demonstrates that a gag order cannot prevent a crime victim from exercising his or her statutory and/ or constitutional right to confer. For instance, one federal court found that the prosecution was allowed to speak with victims as required by a victim's rights statutes even where a gag order was in place. In *United States v. W.R.* Because a victim is not a "party" to a criminal prosecution, he or she may be viewed as outside the scope of the gag order – neither bound by its terms, nor allowed to communicate with those who are. Importantly, however, because victims have specific rights in the criminal justice process, gag orders cannot properly be construed to terminate a victim's legal rights, including the right to confer with the prosecution.

finding that the government had not violated any rules.²⁸ The court held the government's statements were necessary to comport with the victims' right to be notified of all proceedings under the Crime Victims Rights Act (CVRA)²⁹.³⁰ Although public statements to victims that are not required by the CVRA could violate the gag order, those statements would only be sanctioned if they commented on the defendant's guilt or had a "substantial likelihood of prejudicing the proceedings."³¹

Courts have also found that a defendant's fair trial rights can coexist with a victim's right to confer with the prosecution.³² Even when "extensive media coverage" could potentially prejudice the defendant, the Fifth Circuit held that prosecutors should still confer in some

meaningful way with the victims prior to a plea negotiation.³³ Although a gag order was not in place in this Fifth Circuit case, the court rejected the argument that public notice of the negotiation would prejudice the defendant, and noted that the victims should have been allowed to communicate meaningfully with the prosecution.³⁴

Additionally, as gag orders serve only to control publicity and protect juror impartiality, open communication between victim and prosecutor is unlikely to frustrate an order's purpose, unless the victim discloses to the public information that falls within the order's scope.

Grace, the court found that a gag order was not violated when a Victim Witness Specialist from the United States Attorney's Office met with prosecutors and made a public statement requesting that more victims come forward.²⁶ After the public statement was made in this case, defendants sought an order requiring the government attorney to comply with rules prohibiting extrajudicial statements.²⁷ The district court judge denied the motion,

Prof'l Conduct R. 3.6(a) (following ABA Model Rule 3.6(a)); Or. Rules of Prof'l Conduct R. 3.6(a) (same).

²⁴ *BP Products*, 2008 WL 501321, at *15.

²⁷ Id. at 1058.

²⁸*Id.* at 1064.

speaking with one another; instead, they are designed to

prevent these individuals from speaking to the public.³⁵

trial parties and participants from discussing a case

Indeed, for the most part, gag orders are used to prohibit

See RIGHT TO CONFER, page 14

²⁵ Perhaps this is because most gag orders are challenged by media persons who want to exercise their right to document a high profile trial, or because gag orders often include "witnesses" in the list of people who are prohibited from speaking with the media, and victims often fall into that category.

²⁶ W.R. Grace, 401 F. Supp. 2d at 1064.

²⁹ 18 U.S.C. 8 U.S.C. § 3771.

³⁰ W.R. Grace, 401 F. Supp. 2d at 1064.

³¹ Id.

³² See, e.g., 18 U.S.C. § 3771(a)(5) (providing victims the "reasonable right to confer with the attorney for the Government in the case").
³³ In re Dean, 527 F.3d 391, 395 (5th Cir. 2008).

³⁴ Id.

³⁵ See, e.g., In re Benton, 238 S.W.3d 587, 592 (Tex. Ct. App. 2007) (quoting trial court's gag order, which expressly allowed the attorneys to "[communicate] with the parties or their witnesses in order to prepare for trial").

RIGHT TO CONFER, continued from page 13

with the media. Presumably, gag orders never restrict communication between trial participants because the goal of a gag order is to prevent potential jurors from becoming biased. Victims have independent participatory rights under federal and state law, and often serve as witnesses in a criminal proceeding. And, although a court lacks authority to gag a victim who is not participating in the case whatsoever,³⁶ a victim could arguably be considered a "participant" in the case upon exercising his or her right to confer. As such, it is unlikely that a gag order on all trial participants could bar victims and prosecutors from communicating with one another. Also, in those situations where the victim falls within the scope of the gag order, enforcing the right to confer cannot undermine the order's purpose because the

disclosure of protected information is already barred by the order. Indeed, even where the victim does not fall within the bounds of the gag order, the right to confer can still be enforced without undermining the purpose of the gag order.³⁷

Moreover, on a practical level, it is unlikely that statements that the prosecutor makes to the victim in the course of conferring will result in the type of prejudice that gag orders are designed to guard against. First, the timing of a public statement may affect the potential for prejudice.³⁸ For instance, an attorney's statement on the eve of *voir dire* is more likely to result in prejudice than one that is made six months prior to trial.³⁹ Because many victims exercise their right to confer long before trial, it is unlikely that statements that the prosecutor makes

³⁸ Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*,
 58 Fordham L. Rev. 865, 894-95 (1990).

LOCAL SPONSORS

NCVLI thanks the businesses who support our work by donating goods and/or services. In this issue we thank two local businesses who donated to two different NCVLI events this spring.

Bellagio's Pizza. Bellagio's donated pizza to our National Sexual Assault Awareness Month event, held on the Lewis & Clark Law School campus in April. The pizzas were enjoyed by a student audience as they watched an informative movie and learned about the legal rights of sexual assault victims.

Saint Cupcake. Saint Cupcake donated assorted cupcakes to NCVLI's open house reception in June. Community partners, alumni, Lewis & Clark Law School faculty, staff, and friends of NCVLI all enjoyed the cupcakes while learning more about the work of NCVLI and how they can help crime victims.

while meeting with the victim would result in prejudice. Second, if the prosecutor makes an innocuous statement about the trial unrelated to the defendant's guilt, that statement also has little to no likelihood of prejudicing the potential jury. The content of the prosecution's conversations with the victim about the status of the trial will most likely not be disseminated to the press. Even if they were, this kind of innocuous statement about trial procedure would not affect the defendant's fair trial rights.⁴⁰ For these reasons, statements that the prosecutor makes while conferring with the victim about procedural matters, such as trial schedule or trial status, or the victims opinions about the case, are unlikely to result in prejudice if disclosed to the public.⁴¹

Conclusion

Although the law on whether victims are – or even can be – automatically included in a gag order issued against the parties to a criminal proceeding is uncertain, it is clear that crime victims are interested persons with clear rights in the criminal process, including the right to confer with the prosecution. Neither a criminal defendant's fair trial rights, nor the state and public's interests in the fair administration of justice are violated simply because a victim exercises his or her statutory right to confer with the prosecution. Because a gag order is used to prevent prejudicial pretrial publicity, a statement made between prosecution and victim does not undermine the order's purpose. Prosecutors should freely speak with the victim as required by the right to confer.

³⁶ See In the Interest of J.G., 660 A.2d 1274, 1283 n.12 (N.J. Super. Ct. Ch. Div. 1995) (noting that "a gag order upon the victim, who is only a private citizen in this [criminal prosecution], would most likely raise some serious First Amendment problems."); *Commonwealth v. Mulholland*, 94 P.3d 624, 645-46 (Pa. 1997) (rejecting argument that statements to media by victim's attorney amounted to prosecutorial misconduct where gag order prohibited parties, their witnesses, and their counsel from making extrajudicial statements, because statements of a private attorney were not attributable to the prosecutor).

³⁷ See United States v. Rubin, 558 F. Supp. 2d 411, 425 & n.10 (E.D.N.Y. 2008) ("Any information-gathering aspect of the right to confer is necessarily circumscribed, in the first instance, by its relevance to a victim's right to participate in the federal criminal proceedings at hand and to do so within the bounds demarked by the CVRA.").

³⁹ See Gentile, 501 U.S. at 1044.

⁴⁰ See id.

⁴¹ See id.

COLLABORATION AND CONFIDENTIALITY: CHALLENGES TO VICTIM CONFIDENTIALITY WITHIN MULTI-DISCIPLINARY RESPONSES TO DOMESTIC VIOLENCE by Lauren Robertson*

The benefits of collaboration between law enforcement and community-based advocates providing intervention to domestic violence cases have been recognized throughout the country. In Portland, Oregon, we have had the opportunity to observe those benefits first-hand through the work of the Multnomah County Domestic Violence Enhanced Response Team (DVERT)¹. However, when criminal defendants started issuing subpoenas to multiple members of the DVERT team, we started to see the potential risks that such a collaboration poses to victim confidentiality.

The response of DVERT partner agencies to these subpoenas ultimately highlighted the necessity of balancing two competing interests within the collaboration: the need to share information among DVERT partners in order to plan and provide effective services to victims of domestic violence and the need for confidentiality to protect the safety of those victims.

These competing interests were brought into focus when defense counsel in a recent domestic violence prosecution issued subpoenas to community-based advocates assigned to DVERT, seeking any records relating to the victim. Defense counsel claimed that they had a right to review the victims' statements made to community-based victim advocates before trial as part of the discovery process. Although criminal defendants do not have a right to engage in pretrial discovery in Oregon, they argued that the District Attorney's Office

* Lauren Robertson is the Response Advocacy and Volunteer Program Coordinator at the Raphael House of Portland. The Raphael House of Portland has been in operation since 1977, providing supportive services to survivors of domestic violence. Programming offered by Raphael House of Portland includes: emergency shelter; response advocacy via advocates out-stationed with the Multnomah County Domestic Violence Enhanced Response Team (DVERT) and the Portland Police Bureau; safety planning and advocacy on a 24-hour crisis line; transitional housing; and educational outreach in the community. Ms. Robertson also serves as an agency representative on the Multnomah County DVERT team.

¹DVERT is a nationally recognized model of intervention that places an emphasis on identifying and providing coordinated, multi-disciplinary responses to high-priority/high-risk domestic violence cases. This model was adopted in Portland, Oregon, in 2004, and is coordinated by the Multnomah County Domestic Violence Coordinator's Office. Partners of this DVERT program include: community-based advocacy agencies; county and city law enforcement; legal aid services; the District Attorney's Office; the State Department of Human Services, Child Welfare and Self Sufficiency; and county parole and probation departments. had a duty to produce the records because they were in the prosecutor's "possession and control." They further argued that the collaboration between law enforcement

and communitybased advocates on DVERT meant that the advocates were. in effect, under the direction and control of the police, which, in turn, meant they were under the direction and control of the prosecution. According to defense counsel, because the advocates were under the direction and control of the District Attorney, the prosecutor had a pretrial duty to disclose discoverable information supposed to be in the advocates' files. The District Attorney's Office agreed and joined in the defendants' motion to release the advocates' material as part of pretrial discovery.

Communitybased victim advocacy agencies filed motions Under *Brady v. Maryland*, 373 U.S. 83 (1963), criminal defendants have a federal constitutional right to the pre-trial disclosure of any exculpatory evidence in the prosecution's possession or control. A prosecutor's *Brady* obligations often implicate issues of victim confidentiality, privacy, and safety.

Importantly, *Brady* did not create a general constitutional right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545 (1977). Nonetheless, defendants often argue that *Brady* entitles them to obtain discovery from crime victims and victim service providers directly, and some prosecutors contend that their *Brady* obligations entitle them to access confidential victim information that is not otherwise in their possession or control. These arguments too raise concerns about victim confidentiality, privacy, and safety.

The implications of *Brady* on the rights and interests of crime victims are especially complicated in the context of multi-disciplinary victim services programs. In this article, one such multi-disciplinary group, the Multnomah County Domestic Violence Response Team (DVERT), shares its recent experience with this issue. Members of this DVERT program presented on this topic at NCVLI's 8th Annual Crime Victim Law & Litigation Conference in a session entitled "Victim Confidentiality within a Collaborative Response to Domestic Violence: Lessons Learned."

opposing disclosure of the records. While domestic violence advocates do not have state protected privilege in Oregon, they argued that their agency obligations under the federal Violence Against Women Act of 2005 (VAWA) prohibited the requested disclosure. Moreover, they

See VICTIM CONFIDENTIALITY, page 16

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argued that they were neither a party to the litigation nor under the direction and control of the prosecution, who never had access to their files. Advocates also raised concerns about the potential danger to the victim and the potential that the offender might use information from an advocate's file to intimidate victims to keep them from testifying or reporting abuse.

After a two-day evidentiary hearing, the judge ruled that the advocates were not required to release their files. The judge held that the mere fact of collaboration between the advocates and police did not mean that the advocates were under the direction and control of the prosecution. Because the advocates worked for entities that were not parties to the litigation, the judge held that the defendant did not have a right to seek the advocate file prior to trial. However, the judge ordered that any information that had been shared with the police and prosecutors be turned over to the defense. Before release of this information to the defense, the judge allowed for a reasonable period of time for advocates to provide notification to the victim in the case regarding this judgment.²

Although the records at issue here were ultimately protected, this case raised concerns within the advocate community about the potential vulnerability of their files. Among other things, advocates recognized the need for a careful review of the DVERT policies and practices to avoid any misconceptions about their independence and their victim-centered approach. The partners decided to temporarily stop their daily operations within DVERT and began an intensive restructuring of the program. A special team of law enforcement, prosecutors, parole and probation, legal aid, department of human services, and victim rights advocates from our community and from around the country came together to restructure the DVERT program so as to reduce the possibility of future challenges.

Some of the questions that this team grappled with included: How closely can community-based advocates work with law enforcement without being considered part of the investigation? What are the implications of co-located services in regards to record keeping and confidentiality? Does the structure of <u>multi-disciplinary</u> team meetings make records more ² In this case, subpoenas were also issued to other members of the DVERT team, including the DVERT Project Coordinator and the Multnomah County Domestic Violence Coordinator's Office. Motions opposing disclosure of these records were filed by the Senior Assistant County Attorney. The result of these motions were discussed at NCVLI's 8th Annual Crime Victim Law & Litigation Conference. vulnerable to exposure? Are there legitimate answers for how and why case information is collected and stored? Is there information currently collected that would put victims at risk if disclosed, and, if so, is this information necessary for successful job completion? Is each agency involved in the collaboration aware of each other's professional roles and responsibilities as guided by law and agency policy? Are these policies understood and transparent to victims who access DVERT services?

Many of these questions were answered, and some we are still addressing. However, we are confident that this restructuring process resulted in improved program policies honoring victim confidentiality. This process also rejuvenated our commitment to examining our approach to the work we do on a regular basis, knowing that successful collaboration is an ever evolving process.

Our team is honored to have had the opportunity to present at NCVLI's 8th Annual Crime Victim Law & Litigation Conference this summer.³ At the conference we discussed the details of this restructuring process, the framework of VAWA, and where we hope to go in the future.

³ An audio recording of this presentation will be available to NAVRA members later this summer at www.navra.org.

PRO BONO CORNER

NCVLI thanks the outstanding attorneys who serve as pro bono counsel to help crime victims. In this issue we thank three attorneys who have recently served as local counsel in our amicus curiae efforts.

Brent Bailey. Mr. Bailey, of Dixon, Scholl & Bailey, P.A., in Albuquerque, New Mexico served as local counsel in *State v. Gallegos*, a case in which NCVLI filed an amicus opposing defendant's trial court motion to strike all of the victims' pleadings filed and to otherwise limit their participation.

Professor Douglas A. Berman. Professor Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at Ohio State University, served as local counsel in *In re Nathan Simons*, a case in which NCVLI, as amicus curiae, successfully moved to publish a recent decision of the Sixth Circuit Court of Appeals interpreting the federal Crime Victims' Rights Act.

Nina Ashford. Ms. Ashford, of the Law Office of Nina Salarno Ashford, in Auburn, California, served as local counsel in *Talbot v. Superior Court of the State of California, County of Yolo*, a case in which NCVLI filed an amicus curiae brief in support the crime victim's right to be present during the trial of the man who murdered her son.

CASE SPOTLIGHTS:

RECENT CASES DISCUSSING THE DEFINITION OF "VICTIM" UNDER THE CRIME VICTIMS' RIGHTS ACT (CVRA)

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). Although this statutory language is seemingly clear, courts across the country continue to grapple with its meaning.

United States v. W.R. Grace, 597 F. Supp. 2d 1157 (D. Mont. 2009), and In re Parker, Nos. 09-70529, 09-70533 (9th Cir. Feb. 27, 2009) (order). The government and victim-witnesses in United States v. W.R. Grace, moved the district court to recognize the victim-

witnesses as "crime victims" under the CVRA, and to accord them their rights under the CVRA. Defendants, charged with, among other things, violating the Clean Air Act's "knowing endangerment" provision, opposed. The trial court denied the motions, reasoning that the movants were not "crime victims" under the CVRA because defendants were only charged with placing the movants in "imminent danger" of harm, not actually harming them. After the district court denied their motions, the victim-witnesses and the government petitioned the appellate court for a writ of mandamus. Without analysis, the Ninth Circuit granted the mandamus petitions upon finding that the district court erred in its conclusion that the thirty-four victim-witnesses did not meet the definition of "crime victims" under the CVRA.

In re Antrobus, 563 F.3d 1092 (10th Cir. 2009). Vanessa Quinn was one of six people killed in the Trolley Square Shopping Center massacre in Salt Lake City in 2006. In the prosecution of the man who sold the under-age shooter one of the guns used in the rampage, the Antrobuses, Ms. Quinn's parents, filed a motion pre-sentencing seeking status as victims so that they could assert rights under the CVRA. The district court denied the motion on the grounds that the Antrobuses failed to establish proximate cause between the sale of the gun and their daughter's death. After defendant's sentencing, the Antrobuses uncovered evidence that established that defendant "knew" at the time he sold the gun to the shooter that the shooter intended to use the gun to rob a bank. Based on this statement, they moved the district court for a new evidentiary hearing. The district court denied the motion and the Antrobuses petitioned for a writ of mandamus. The appellate court denied the petition, noting that the "law of the case doctrine" barred reopening this question, which was already decided at an earlier stage of the litigation. The court concluded that because the CVRA is relatively new, the criminal justice system is still struggling with its scope and meaning, and that "[d]istrict courts and prosecutors must become sensitive to Congress's new demand that victims have a seat at the table."

United States v. Atlantic States Cast Iron Pipe Co., No. 03-852(MLC), 2009 WL 792046 (D.N.J. Mar. 23, 2009). Four employees of a cast iron pipe foundry were convicted of, among other things, conspiracy and substantive offense charges in connection with their obstruction of proceedings conducted by the federal Occupational Safety and Health Administration (OSHA) relating to the serious or fatal workplace injuries of other foundry employees. On behalf of six such injured employees, the government moved, under the CVRA, to afford the victims the right to speak at defendants' sentencing. Defendants opposed designating the injured employees as "victims." In determining whether such a designation was proper, the court engaged in a comprehensive review of the CVRA, Victim and Witness Protection Act, and the Mandatory Victim Restitution Act, as well as a thorough analysis of case law interpreting each statute. The court concluded that the injured employees were not statutory "victims" because the harm that the government argued was the "direct and proximate" result of the OSHA-related offenses was too attenuated. The court stated that its conclusion did not preclude "the possibility that in a rare factual setting, an obstruction or false statement offense involving OSHA could be found to have the requisite causal nexus to an injury in the workplace."

United States v. Keifer, No. 2:08-CR-162, 2009 WL 414472 (S.D. Ohio Feb. 18, 2009) (slip op.). After the district court sealed the information and plea agreement in a criminal fraud prosecution, the victim moved to unseal the case so that he could assert his rights under the CVRA. In determining whether the victim was entitled to the protections afforded by the CVRA, the court considered the victim's assertions that defendant defrauded him of \$36,730 and stole his identity, causing him to incur \$428,524 in charges to the accounts fraudulently established in his name. The court held that because defendant pleaded guilty to fraud and related activities, the victim appeared to have been directly and proximately harmed as a result of defendant's actions; and, as such, met the definition of "victim" under the CVRA.

United States v. Okun, Crim. No. 3:08cr132, 2009 WL 790042 (E.D. Va. Mar. 24, 2009) (slip. op.) The government moved *in limine*, pursuant to the CVRA, to permit up to 577 victims to be present at trial, eight of whom the government intended to call as witnesses. Defendant opposed the motion on the ground that, among other things, there were no "victims" in the case because had not yet been proven guilty. The court found this argument to be "simply incorrect" because it would "eviscerate the rights given under the CVRA to victims in any pre-conviction proceeding."

HUMAN RIGHTS WATCH'S RECENT REPORT ON THE RAPE KIT BACKLOG IN LOS ANGELES by Ali Wilkinson, J.D.

Human Rights Watch recently published *Testing Justice, The Rape Kit Backlog in Los Angeles City and County*, which summarizes problems associated with Los Angeles's rape kit backlog and recommendations toward its elimination.¹ A rape kit contains DNA and other evidence from a rape victim's body, clothing, and other possessions. Test results from the kit can be entered into federal and state databases to compare the evidence to that found at other crime scenes, or it can be compared to a specific suspect's DNA.

A rape kit backlog implicates numerous protections afforded to victims under the federal and state victims' rights laws. For instance, a victim's right to be reasonably protected from the accused may be implicated if the backlog prevents her rapist's arrest; her right to proceedings free from unreasonable delay may be affected when the backlog means that years will go by before the offender is charged; and her right to be treated with fairness, dignity, and respect is implicated when the victim undergoes the mentally and physically grueling process of a rape exam for no purpose.

Los Angeles County has a low rape arrest rate,² so it is especially imperative that it avails itself of investigative tools like rape kits. However, as the Report notes, Los Angeles County has the largest known rape kit backlog in the United States, with at least 12,669 rape kits untested.³ Hundreds of these kits are more than ten years old, and thus outside the statute of limitations for rape prosecution in California – meaning that, even if a match were found, prosecution would no longer be possible. Moreover, in many cases, as many as 12 months may pass from the date the police send the kit to the lab before they receive results.⁴ The wait can be even longer if the police delay in requesting that the kit be tested. By this point, the rapist may have offended again – a crime that may have been prevented had the kit been tested sooner.

Most victims do not know that their rape kits have not been tested, and often assume that, if they do not hear from the police after the rape kit is performed it is because the kit yielded no useful results. As Human Rights Watch reported, the director of a rape treatment

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¹ Testing Ju.	stice, The Rape Kit Ba	acklog in Los Angeles City and
County, Hu	uman Rights Watch Re	eport, http://www.hrw.org/en/
reports/200	09/03/31/testing-justice	e-0 (hereinafter "Report").
² Approxim	ately 25% of all repor	rted rapes result in an arrest. Id. at 6.
³ <i>Id.</i> at 10.		
⁴ <i>Id.</i> at 12.		

center stated that "not hearing from the police can contribute to the self-blame and doubt that victims are feeling about the rape."⁵ Additionally, because the backlog creates such a large delay in prosecution, the victim may no longer wish to participate in the case because she "'just wants to put it behind her."⁶ Despite the dire consequences of failing to eliminate the backlog, the number of untested rape kits in Los Angeles continued to grow from 2004 through 2008.⁷

Human Rights Watch issued several pages of recommendations to eliminate the backlog, which included: establishing an oversight board to address the nature and scope of the backlog; identifying the resources necessary to eliminate the backlog; testing every rape kit; keeping victims informed of the status of the testing; creating a sexual assault unit to handle all sex crimes investigations; and requiring the police to report to the mayor on the status of the backlog.⁸

In issuing its recommendation, Human Rights Watch looked at New York City's model for eliminating its rape kit backlog. In 1999, New York City had a backlog of 16,000 untested rape kits.⁹ The backlog was eliminated in 2003, mainly by sending the untested kits to private labs.¹⁰ While the kits were being tested, New York initiated procedures going forward to prevent the backlog from happening again.¹¹ Such procedures included requiring the police to send every rape kit for testing, hiring additional DNA criminalists, establishing a cold case unit, and creating a notification system for cold hits. Since the backlog has been eliminated, New York City's rape arrest rate has increased from 40% to 70%.¹²

NCVLI concurs with Human Rights Watch that the backlog is a serious issue demanding immediate attention. With the help of Human Rights Watch's recommendations and the New York City case study as a model, NCVLI is hopeful that Los Angeles and other cities will soon see improvements similar to New York's, and that victims will be afforded the protections that they deserve.

- 10 Id.
- ¹¹ Id.
- 12 Id.

⁵*Id.* (quoting interview with Gail Abarbanel, director of the Rape Treatment Center at Santa Monica-UCLA Medical Center).

⁶ *Id*. at 15.

⁷*Id.* at 13-14.

⁸ Id. at 17-19.

⁹ Id.

TERM VICTIM, continued from page 4

evidence and should be disregarded – will remove any prejudice that may arise.²⁸

Courts' Use of the Term "Victim." It is improper for the judge to indicate his or her opinion as to the weight and sufficiency of any evidence in the case. When trial courts comment on the weight of the evidence during trial, they risk violating the defendant's constitutional right to a fair and impartial jury. On this basis, defendants argue that the court's use of the term "victim" improperly conveys to the jury the court's belief that a crime was committed or that such use constitutes commentary on the weight of the evidence.²⁹

Courts most often use the term "victim" when giving jury instructions. When deciding if a challenged instruction prejudiced a defendant, reviewing courts examine whether, given the entire charge, the instruction had a probable effect on the jury's finding of guilt. Appellate courts have found no error when the term "victim" is included in the challenged instruction, where the trial court used standard instructions, as promulgated by legislature.³⁰ Courts have also found the use of "victim" harmless where the court issued a curative or standard jury instruction to inform regarding the presumption of defendant's innocence.³¹ As this case law makes clear, curative instructions provide courts with a means of allowing victims to exercise their rights while also defendants from prejudice.

Conclusion

"Victim" is a legal status term. This legal term of art precisely describes a victim's independent status in the criminal justice system. Other terms such as "alleged victim" and "complainant" do not. A victim has the right to be treated with fairness, dignity and respect, and to call a legal victim something other than "victim" denigrates the victim's proper role in the criminal justice process and violates his or her legal rights. Once an individual is accused of a crime, he or she acquires the legal status of "defendant." Just as a jury is instructed that the legal status of "defendant," cannot be viewed as evidence of defendant's guilt,³² a jury can also be instructed that the legal status of "victim" cannot be viewed as evidence of defendant's guilt. As shown by the majority of the case law on the subject, curative instructions are a simple and effective way of allowing a victim to exercise his or her rights in the criminal proceedings while eliminating prejudice to the defendant. Concealing a victim's legal status is an improper and unnecessary way to protect a defendant's rights as it trivializes a victim's role in the criminal proceedings. In order to fulfill the purpose of victims' rights laws, courts need to permit the use of the term "victim" as recognition of a victim's unique and important position in the criminal justice system.

³² See, e.g., 3rd Cir. Model Criminal Jury Instructions 1.11 (2009).

CHILD-VICTIMS, continued from page 7

The ABA Resolution recognizes that the effective representation of child-victims requires training in how to address such unique concerns. Accordingly, it calls upon government and bar associations to initiate pilot programs or demonstration projects to provide for child rights enforcement; it also calls upon bar associations, law schools, and victim and child rights organizations to initiate pilot programs or demonstration projects to develop standards of practice and training requirements to provide for child-victims' rights enforcement.

Conclusion

Effective child-victim advocacy requires an attorney to understand the capacities and limits of a child. Confidentiality and communication concerns pose additional challenges to a child-victim attorney. The limits and scope of the parent-child relationship also add to the challenge of representing child-victims in criminal and juvenile court.

The reality remains, however, that a child-victim has little chance of successfully navigating a court system without legal representation. The need for victims' rights attorneys in this area is undeniable. Perhaps more than anywhere else, there is a need for collaborative relationships between attorneys and social and community service providers in this context. Hopefully, the ABA Resolution urging courts to appoint attorneys for children to ensure they have prompt access to legal advice and counsel will move from paper to practice with the assistance of the expertise of NCVLI and the attorneys in its clinical network.

²⁸ See, e.g., Mata, 2007 WL 4216867, at *7; State v. Garcia-Dorantes, No. 239306, 2003 WL 22416511, at *2 (Mich. Ct. App. 2003); State v. Sobir, No. 56295-9-I, 2006 WL 2126333, at *4 (Wash. Ct. App. July 31, 2006).

²⁹ See, e.g., Devey, 138 P.3d at 96 n.5; State v. McCarroll, 445 S.E.2d 18, 22 (N.C. 1994).

 ³⁰ See, e.g., State v. Henderson, 574 S.E.2d 700, 704 (N.C. Ct. App. 2003); State v. Richardson, 434 S.E.2d 657, 663 (N.C. Ct. App. 1993).
 ³¹ See, e.g., Robinson, 838 A.2d at 246-247; Nomura, 903 P.2d at 722; State v. Ricker, No. 97APC01-96, 1997 WL 606861, at *9 (Ohio Ct. App. Sept. 30, 1997); McCarroll, 445 S.E.2d at 22.

attorneys. More current material appears on the National Association of Counsel for Children's webpage: http://www.naccchildlaw.org.

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NCVLI News 11th Edition

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FOUR NEW VICTIMS' RIGHTS CLINICS JOIN THE CRIME VICTIMS' RIGHTS ENFORCEMENT PROJECT

NCVLI is thrilled to announce that four clinics are joining the Crime Victims' Rights Enforcement Project. Please join us in welcoming to the work of crime victims' rights enforcement in state, federal, and tribal courts: California Voice for Crime Victims, District of Columbia Crime Victims' Resource Center, New York Women's Clinic for Victim Protection, and Oregon Crime Victims' Law Clinic.

We look forward to helping these legal clinics grow, to being amazed by their work, and to benefiting from their contributions to our collective enterprise.