

***ABC'S of Representing
Victims of Crime***

Litigating Victims' Rights
In Arizona: Practical Skills Training

Presented By:
National Crime Victim Law Institute and
Arizona Voice for Crime Victims

March 2, 2012

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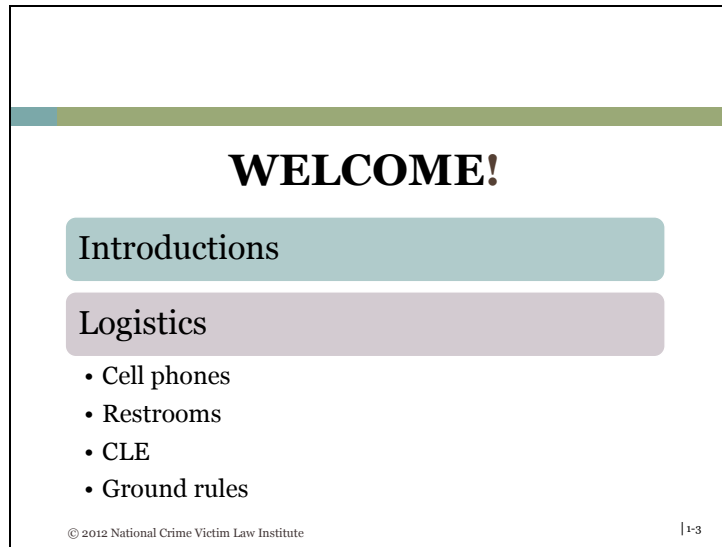
Slide 2

Overview of the Day

- WELCOME & LOGISTICS
- INTRODUCTION TO VICTIMS' RIGHTS
- INTRODUCTION TO THE LEGAL "VICTIM" AND STANDING
- INTRODUCTION TO PROCEDURES FOR RIGHTS ASSERTION
- **BREAK**
- RIGHT TO BE PRESENT
- RIGHT TO PRIVACY & PROTECTING THE VICTIMS' IDENTITIES IN COURT PROCEEDINGS
- **LUNCH**
- RIGHT TO PRIVACY & SUBPOENAS
- RIGHT TO PROTECTION
- RIGHT TO RESTITUTION
- **BREAK**
- RIGHT TO CONFER & NEGOTIATED PLEAS
- TRIAL
- SENTENCING, RESTITUTION & BEYOND
- REVIEW & EVALUATIONS

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Slide 3



WELCOME!

Introductions

Logistics

- Cell phones
- Restrooms
- CLE
- Ground rules

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Training Goal

Provide practitioners with the tools to effectively represent crime victims and protect the victims' rights in criminal cases.

How will we achieve the goal?

- ❖ Identify where to find sources of victims' rights.
- ❖ Highlight many of the common victims' rights issues that may arise in criminal cases.
- ❖ Articulate concrete strategies that can be used to help crime victims assert their rights.

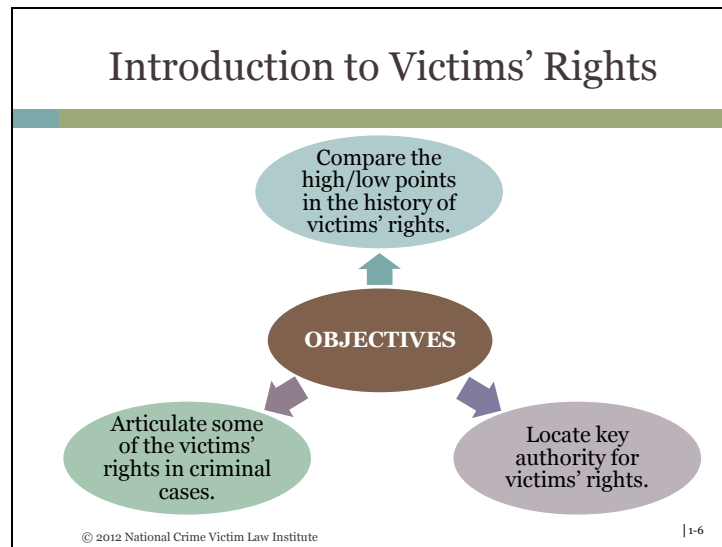
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Introduction to Victims' Rights

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Brief History in the United States

- From prosecutor
- To piece of evidence:
 - “[I]n American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (dictum).
 - Rule 615 of the Federal Rules of Evidence, as initially adopted in 1975, allowed for exclusion of crime victims from the courtroom unless their “presence is . . . essential to the presentation of a party’s cause.”
 - A majority of states then adopted rules that were similar or identical.

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See generally Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol’y 357, 359 (1986); Michael E. O’Neill, *Private Vengeance and the Public Good*, 12 U. Pa. J. Const. L. 659, 665-73 (2010).

See Douglas E. Beloof and Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 484-87, 498, 502 (2005) (discussing history and adoption of Rule 615); see also Douglas E. Beloof, Paul G. Cassell and Steven J. Twist, *Victims in Criminal Procedure* 11-17 (3d ed. 2010).

For additional citations, see NCVLI, *Fundamentals of Victims’ Rights: A Brief History of Crime Victims’ Rights in the United States* (2011), a copy of which is expected to be available online at www.ncvli.org in April/May 2012. (Please contact ncvli@lclark.edu if you need a copy of this bulletin before it is available online.)

The 1970s to the 1980s

- ❑ Growing crime victims' rights movement in the U.S.
- ❑ States enact victim compensation programs and rape shield legislation.
- ❑ Somewhere along the way, the American criminal justice system had become "appallingly out of balance," "serv[ing] lawyers and judges and defendants, [while] treating the victim with institutionalized disinterest." 1982 President's Task Force on Victims of Crime, Final Report vi (1982).
- ❑ Changes to state constitutions, statutes, and rules, as well as federal statutes and rules, to define and afford explicit legal status to crime victims.

See generally Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 Utah L. Rev. 861, 865-69 (2007).

For additional citations, see NCVLI, *Fundamentals Of Victims' Rights: A Brief History of Crime Victims' Rights in the United States* (2011), a copy of which is expected to be available online at www.ncvli.org in April/May 2012. (Please contact ncvli@lclark.edu if you need a copy of this bulletin before it is available online.)

Today

- ❑ Several federal acts have been enacted to protect victims, including the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771.
- ❑ Over 30 states have constitutional amendments that provide for crime victims' rights.
- ❑ Every state along with the District of Columbia have statutory and/or rule-based protections for crime victims.

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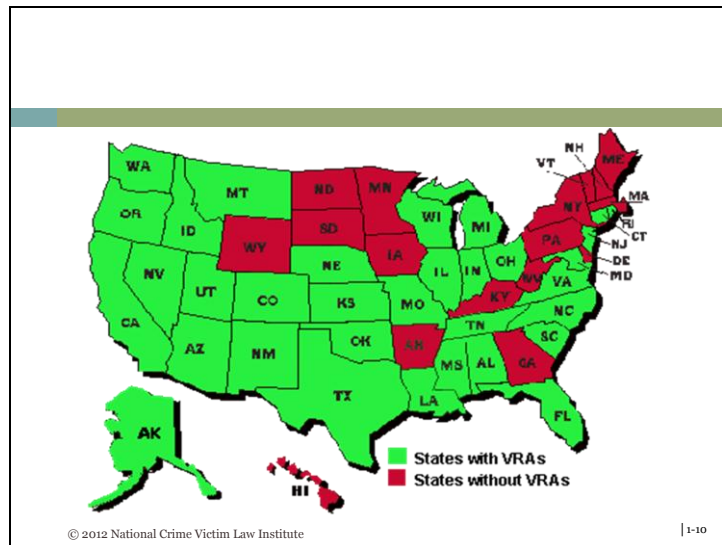
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See, e.g., Ala. Const. Amend. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. I, § 25; Md. Const. Decl. of Rights, art. 47; Mich. Const. art. I, § 24; Miss. Const. art. III, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

See, e.g., 18 U.S.C. § 3771 (the Crime Victims' Rights Act); Ala. Code §§ 15-23-60 to -84; Alaska Stat. Ann. §§ 12.61.010-.900; Ariz. Rev. Stat. Ann. §§ 13-4401 to -4441; Ark. Code Ann. §§ 16-90-1101 to -1115; Cal. Penal Code §§ 679-680, 1102.6; Colo. Rev. Stat. §§ 24-4.1-301 to -304; Conn. Gen. Stat. Ann. §§ 54-85b to -85d, 54-85f to 85g, 54-86d to -86e, 54-91c, 54-126a, ; Del. Code Ann. tit. 11, §§ 9401-9424; D.C. Code §§ 23-1901 to -1906; Fla. Stat. Ann. §§ 960.001, .0015, .0021; Ga. Code Ann. §§ 17-17-1 to -16; Haw. Rev. Stat. Ann. §§ 801D-1 to -7; Idaho Code §§ 19-5302 to -5307; 725 Ill. Comp. Stat. Ann. 120/2-120/9; Ind. Code Ann. §§ 35-40-1-1 to -14-4; Iowa Code Ann. §§ 915.1-.100; Kan. Stat. Ann. § 74-7333; Ky. Rev. Stat. Ann. §§ 421.500-.576; La. Rev. Stat. Ann. §§ 46:1841-.1846; Me. Rev. Stat. Ann. tit. 17-A, §§ 1171-1177; Md. Code Ann., Crim. Proc. §§ 11-101 to -619; Mass. Ann. Laws ch. 258B, §§ 1-13; Mich. Comp. Laws Ann. §§ 780.751-.834; Minn. Stat. Ann. §§ 611A.01-.06; Miss. Code Ann. §§ 99-43-1 to -49; Mo. Ann. Stat. §§ 595.200-.215; Mont. Code Ann. §§ 46-24-101 to -218; Neb. Rev. Stat. Ann. §§ 81-1843 to -1851; Nev. Rev. Stat. Ann. §§ 176.015(3)-(4), 178.569-.5698; N.H. Rev. Stat. Ann. § 21-M:8-k; N.J. Stat. Ann. §§ 52:4B-34 to -38; N.M. Stat. Ann. §§ 31-26-1 to -16; N.Y. Crim. Proc. Law §§ 380.50(2), 390.30(3), 440.50; N.Y. Exec. Law §§ 640-649; N.C. Gen. Stat. §§ 15A-825, -830 to -841; N.D. Cent. Code §§ 12.1-34-01 to -07, 12.1-35-01 to -06; Ohio Rev. Code Ann. §§ 2930.01-.19; Okla. Stat. Ann. tit. 21, §§ 142A-142B; Or. Rev. Stat. §§ 147.410-.430, .500 - .575; R.I. Gen. Laws §§ 12-28-1 to -13; S.C. Code Ann. §§ 16-3-1505 to -1565; S.D. Codified Laws §§ 23A-28C-1 to -9; Tenn. Code Ann. §§ 40-38-101 to -303; Tex. Code Crim. Proc. Art. 56.01-.15; Utah Code Ann. §§ 77-37-1 to -4, 77-38-1 to -14; Vt. Stat. Ann. tit. 13, §§ 5301-5321; Va. Code Ann. §§ 19.2-11.01 to .2; Wash. Rev. Code Ann. §§ 7.69.010-.032, .040, 7.69A.010-.050; W. Va. Code §§ 61-11A-1 to -8, 62-12-23; Wis. Stat. Ann. §§ 950.01-.055; Wyo. Stat. Ann. §§ 1-40-201 to -209.

ABC's of Representing Victims of Crime
March 2, 2012

Slide 10

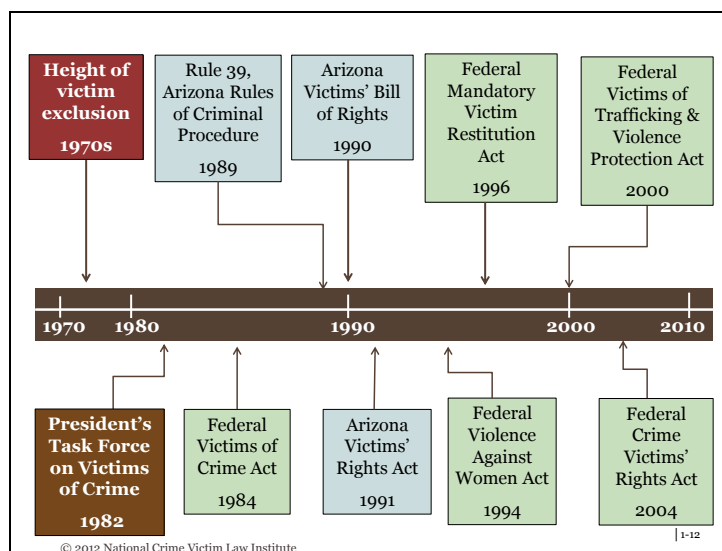


Brief History in Arizona

- ❑ An early leader in victims' rights.
- ❑ The Arizona Supreme Court promulgated its first rule-based protection for victims' rights in Arizona in 1989:
 - Rule 39 of the Rules of Criminal Procedure.
- ❑ Constitutional amendment:
 - Victims' Bill of Rights, Ariz. Const. art. II, § 2.1, adopted in 1990.
- ❑ Legislative action:
 - Victims' Rights Implementation Act (Victims' Rights Act), A.R.S. §§ 13-4401 *et seq.*, became effective in 1991.

ABC's of Representing Victims of Crime
March 2, 2012

Slide 12



18 U.S.C. §§ 3771 (the Crime Victims' Rights Act), 3663 (Violence Against Women Act), 1593(c) (mandatory restitution under the Victims of Trafficking and Violence Protection Act), 2259 (mandatory restitution for child-victims of sexual exploitation and other abuse under the Violent Crime Control and Law Enforcement Act).

For additional federal statutes, see slide 1-16.

Slide 13

Arizona's Victims' Bill of Rights

- **Ariz. Const. art. II, § 2.1(A)**, guarantees crime victims rights –
 - To justice and due process.
 - To be treated with fairness, respect, and dignity.
 - To be free from intimidation, harassment, or abuse.
 - To be present at all criminal proceedings where the defendant has the right to be present.
 - To confer with the prosecution and to be informed of the disposition.
 - To a speedy trial or disposition.
 - To refuse an interview, deposition, or other defense discovery request.

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Review slide points

Victims' Bill of Rights, cont.

- Rights –
 - To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
 - To be informed, upon request, when the accused or convicted person is released.
 - To read pre-sentence reports relating to the crime against the victim.
 - To receive prompt restitution.
 - To be heard at any proceeding when any post-conviction release from confinement is being considered.
 - To be informed of the constitutional rights.
 - To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights.

Ariz. Const. art. II, § 2.1 (A)

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| 1-14

Select Statutory & Rule-Based Rights

- **Victims' Rights Act, A.R.S. §§ 13-4401 to -4441**, grants, *inter alia*, the following rights:
 - Right for the victim's attorney to be present at all bench conferences and in chambers meetings with the trial court that directly involve a victim's constitutional right;
 - Right to keep private certain identifying or contact information.
- **Ariz. R. Crim. P. 39(b)(8),(9)**:
 - Right to have a non-witness support person accompany the victim at any interview, deposition, or court proceeding.

A.R.S. §§ 13-4437(D) (regarding the right to be present at all bench conferences and in chambers meetings), 13-4434(A) (regarding the right to keep private certain identifying or contact information).

FYI: Some Federal Rights

- ❑ The Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771.
- ❑ The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509.
- ❑ Mandatory Victim Restitution Act, 18 U.S.C. § 3663A.

For additional federal statutes, see slides 1-12.

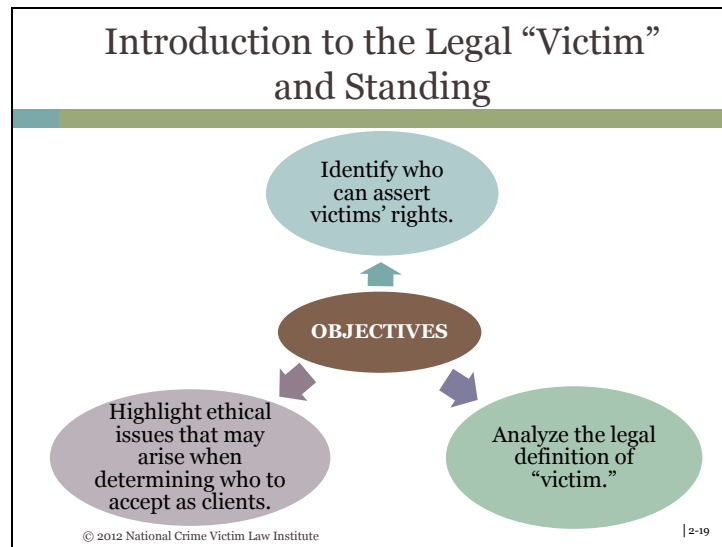


Slide 18

**Introduction to the Legal “Victim”
and Standing**

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Slide 19



Victim Standing

Who can assert a right?

- ❑ In some jurisdictions, you must analyze this issue under the applicable test for standing.
- ❑ In Arizona, the victim's trial-level and appellate standing is explicitly recognized by statute:
 - **"The victim has standing** to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding seeking to enforce any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights . . . , any implementing legislation or court rules."

A.R.S. § 13-4437(A)

Who Else Can Assert A Right?

- ❑ The prosecutor may, on behalf of the victim.
 - Upon the victim's request.
- ❑ The victim's designated lawful representative.
 - Where the representative is not a witness; and
 - Victim is "physically or emotionally unable to exercise any right but is able to designate a lawful representative."
- ❑ A court appointed representative.
 - Where the representative is not a witness; and
 - Victim is "incompetent, deceased or otherwise incapable of designating a representative to act in the victim's place."
- ❑ The victim's parent, child or other immediate family member.
 - ❑ If the victim is a minor or "vulnerable adult."

A.R.S. §§ 13-4437(C), -4403

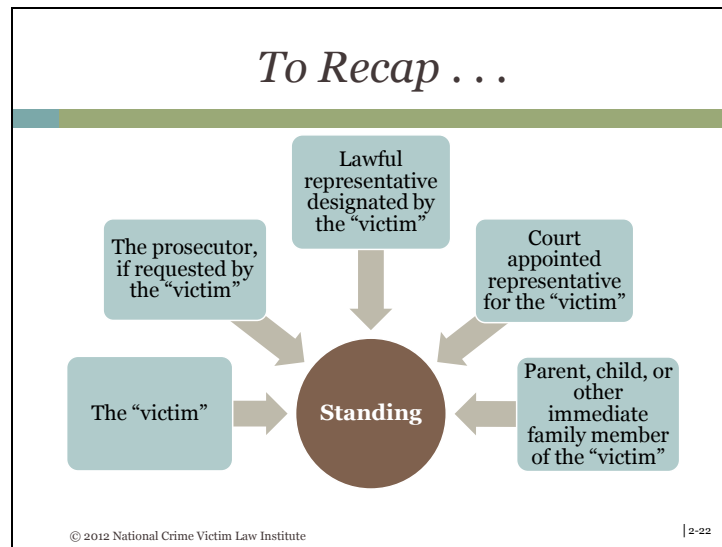
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| 2-21

A.R.S. §§ 13-4437(C) (concerning prosecutor), 13-4403(A)-(C) (concerning the victim's designated lawful representative, court appointed representative, or immediate family member).

See also Lincoln v. Holt, 156 P.3d 438, 441 (Ariz. Ct. App. 2007) (rejecting defendant's argument that § 13-4433(H) only grants to the parent or legal guardian the right to invoke victims' rights on *behalf of the child-victim* and affirming the trial court's denial of defendant's motion to depose the child-abuse victim's mother).

Slide 22



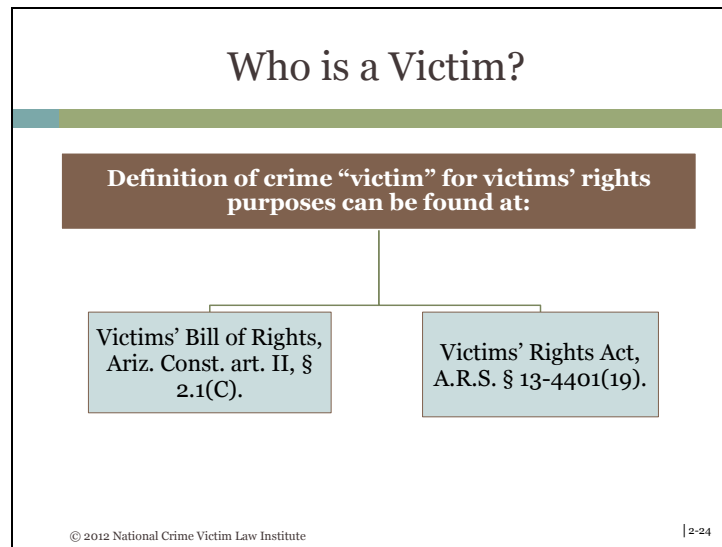
The Legal “Victim”

- ❑ **Who is a “victim”?**
 - Legal “victim” is not always synonymous with common sense “victim.”
 - In some jurisdictions, persons who are eligible as a “victim” may change depending on the phase of the case or the right at issue.
 - Determining who is a legal victim requires careful and regular analysis.
 - Regularly ask yourself this question: “Is this person a “victim” right now for purposes of asserting this right?”

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Compare Alaska Stat. § 12.55.185(19)(A) (defining “victim” for victims’ rights purposes as any “person against whom an offense has been perpetrated”) *with* N.M. Stat. Ann. § 31-26-3(B), (F) (defining “victim” for victims’ rights purposes as “an individual against whom a criminal offense is committed” and defining “criminal offense” to mean only the following offenses: (1) negligent arson resulting in death or bodily injury; (2) aggravated arson; (3) aggravated assault; (4) aggravated battery; (5) dangerous use of explosives; (6) negligent use of a deadly weapon; (7) murder; (8) voluntary manslaughter; (9) involuntary manslaughter; (10) kidnapping; (11) criminal sexual penetration; (12) criminal sexual contact of a minor; (13) armed robbery; (14) homicide by vehicle; (15) great bodily injury by vehicle; (16) abandonment or abuse of a child; (17) stalking or aggravated stalking; (18) aggravated assault against a household member; (19) assault against a household member with intent to commit a violent felony; (20) battery against a household member; or (21) aggravated battery against a household member”).

See generally NCVLI, Fundamentals of Victims’ Rights: An Overview of The Legal Definition of Crime “Victim” in The United States (2011), a copy of which is expected to be available online at www.ncvli.org in April/May 2012. (Please contact ncvli@lclark.edu if you need a copy of this bulletin before it is available online.)



See also Ariz. R. Crim. P. 39(a)(1) (referring to “a ‘victim’ as defined in accordance with the definition provided in the Arizona Revised Statutes”).

Constitutional Definition of “Victim”

“Victim” means “a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person’s spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.”

Ariz. Const. art. II, § 2.1(C)

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| 2-25

See also State v. Roscoe, 912 P.2d 1297 (Ariz. 1996) (addressing A.R.S. § 13-4433(F) and Rule 39(b)(11)’s exception to the definition of victim — which provides that “a peace officer shall not be considered a victim” for purposes of the right to refuse an interview “if the act that would have made the officer a victim occurs while the peace officer is acting in the scope of the officer’s official duties” — and holding the provisions unconstitutional because they conflict with and restrict the constitutional definition of “victim”); *State ex rel. Thomas v. Klein*, 150 P.3d 778 (Ariz. Ct. App. 2007) (addressing § 13-4401(6) — which defines “criminal offense” to mean “conduct that gives a peace officer or prosecutor probable cause to believe that one of the following has occurred: (a) A felony. (b) A misdemeanor involving physical injury, the threat of physical injury or a sexual offense” — and holding § 13-4401(6) unconstitutional because the statutory definition narrows the constitutional definition of “victim” by excluding a category of persons not excluded by the Victims' Bill of Rights).

Statutory Definition of “Victim”

“Victim” means “a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person’s spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person’s spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused”

A.R.S. § 13-4401(19)

The Legal “Victim” cont.

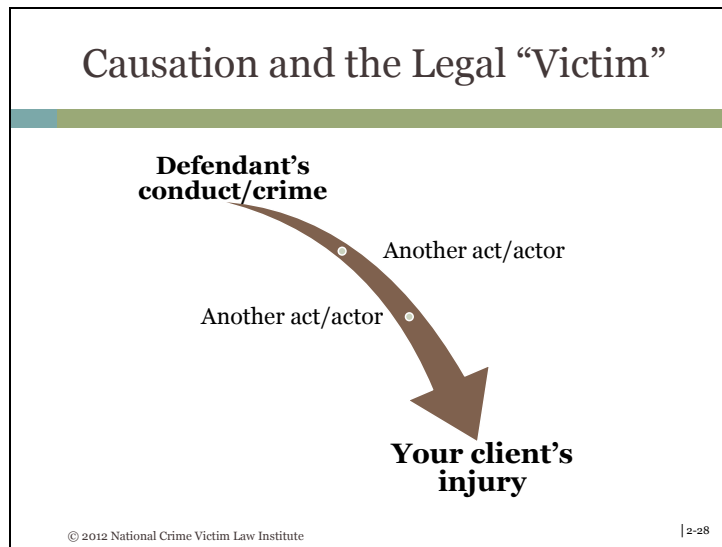
“Victim’ means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person’s spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.” Ariz. Const. art. II, § 2.1(C).

□ Consider —

- Can a bank be a victim?
- Can an incarcerated person be a victim?
- If a hit-and-run driver is charged with the crime of leaving the scene of a fatal accident (as opposed to negligent homicide), is the person killed by the accident a “victim” in the case?

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See A.R.S. § 13-4404 (providing some rights for entity-victims); *State. v. Nichols*, 233 P.3d 1148 (Ariz. Ct. App. 2010) (addressing “in custody for an offense” limitation in the definition of victim and concluding that the victim did not lose his victim status while he was arrested and incarcerated in another state following the criminal offense in Arizona); *State ex rel. v. Reeves*, 250 P.3d 196, 200 (Ariz. Ct. App. 2011) (concluding that the crime of leaving the scene of a fatal accident is not a “victimless” crime and the deceased — whom defendant had struck and left behind without rendering aid — was “a person against whom a criminal offense was committed”).



See, e.g., 18 U.S.C. § 3771(e) (CVRA) (defining “victim” to mean “a person directly and proximately harmed as a result of the commission of a[n] . . . offense”); *In re Fisher*, 640 F.3d 645, 648, *reconsideration denied*, 649 F.3d 401 (5th Cir. 2011) (discussing the CVRA’s causation requirement and noting that direct causation embodies the concept of “but for” cause — it asks whether but for this conduct, would the harm have occurred? — whereas proximate causation considers whether “the harm is a reasonably foreseeable consequence of the criminal conduct”).

But see Ariz. Const., art. II, § 2.1(C) (containing no explicit “direct” or “proximate” cause requirement); A.R.S. § 13-4401(19) (same).

Legal “Victim” Hypo

A dealer sold a gun to 17-year-old. Months later, after turning 18, the buyer used the gun and killed several people; the shooter died at the scene. The government prosecutes the gun dealer for the unlawful sale of a weapon to a minor. The parents of one of the shooting victims want to assert victims' rights in the case against the gun dealer.

□ Are the parents “victims” of the crime at issue?

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See *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008) (concluding that the trial court did not clearly err in finding that the murder victim was not a “victim” of the gun dealer’s crime and noting that (1) case law on the subject was “not well-developed,” and there was no controlling precedent; (2) the record showed defendant was unaware of the juvenile’s intentions for the gun at the time of the sale; and (3) the shooting didn’t happen until more than seven months after the sale when the shooter was over 18); see also *id.* at 1126-27 (Tymkovich, J., concurring) (stating that “[w]e live in a post-Columbine High School massacre world, [and] [i]n that world, juveniles are willing to procure guns and use them to commit violent, horrific crimes” and finding that the government should have cooperated and given the parents “reasonable access to evidence which could support their claim” because the record suggests that additional evidence could be developed to show that the crime was a reasonably foreseeable result of the illegal gun sale); see also *State v. Superior Court in and for Cnty of Maricopa (Coronado)*, 922 P.2d 927, 930 (Ariz. Ct. App. 1996) (addressing whether the parents of the deceased are “victims” under former Rule 39 of the Rules of Criminal Procedure and concluding that the relationship between defendant’s alleged conduct — sexual assault of the deceased — and the deceased’s suicide “is too speculative” in this case to permit a court to find that defendant’s actions caused the death). But cf. *Crown v. Raymond*, 764 P.2d 1146, 1149 (Ariz. Ct. App. 1988) (concluding, in a civil wrongful death action, that the trial court erred in determining as a matter of law that the minor’s use of a gun to commit suicide was not the reasonably foreseeable result of the gun dealer’s unlawful sale of the gun to that minor and explaining that the criminal statute prohibiting the sale of a weapon to a minor without the parents’ consent “expresses an awareness by the legislature that children in possession of guns are at risk of injuring either themselves or others, either negligently or intentionally” and therefore “the legislature [has] declared that injury to themselves or others is foreseeable when guns are sold to minors without their parents' knowledge or consent”).

Slide 30



**Ethics Alert:
Potential
Conflicts of
Interest**

- ❑ Multiple victims
- ❑ Other clients
- ❑ Dual roles — representing victim in related non-criminal proceedings

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Concurrent Conflicts of Interest

**Arizona
E.R. 1.7(a) –
Conflicts of
Interest:
Current
Clients**

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. **A concurrent conflict of interest exists if:**

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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Arizona Rules of Professional Conduct can be found at
<http://www.azbar.org/ethics/rulesofprofessionalconduct>.

Client's Informed Consent

**Arizona
E.R. 1.7(b) –
Conflicts of
Interest:
Current
Clients**

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client **if each** affected client gives **informed consent, confirmed in writing,** **and:**

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law; and
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Multiple Victims

**Potential
Conflicts of
Interest:
*Multiple
Victims***

- Some issues that could present potential conflicts of interest when representing multiple victims include:
 - Release recommendations.
 - Conferring with the prosecution re: seeking the death penalty or other decisions.
 - Restitution.

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Ethics Hypo # 1

The court appoints Ben to represent Dan, who is charged with sexually assaulting Vicky. Ben later learns that Ann, another attorney at his firm, currently represents Vicky in an unrelated criminal case. Ben briefly considered the possibility of using the criminal charge against Vicky to impeach her at trial. Days later, Ben sought to withdraw as Dan's counsel, citing the possible conflict. The court denied the motion upon Ben's assurance that he could refrain from discussing the case with Ann and from using anything from Vicky's case in Dan's case. The court issued an order barring Ben from discussing the case with Ann and requiring a "screen" at the firm.

- The attorneys followed the trial court's order. Can they ethically represent their respective clients?
- Does the answer change if they obtain a written waiver from each client?

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See Okeani v. Superior Court In & For County of Maricopa, 871 P.2d 727 (Ariz. Ct. App. 1993) (holding that the trial court abused its discretion when it denied the public defender's motion to withdraw); Ariz. Rules of Prof'l Conduct R. 1.7, 1.10(a), 1.16.

Ethics Hypo #2

As part of a fraudulent scheme, David swindled dozens of victims out of \$ millions. Vicky and Vince, siblings who jointly lost over \$100K in “investment” funds, have retained Attorney Ann to represent their interests in the criminal case. As a result of the crime, Vicky suffers from depression and her health is declining; thus, her medical expenses have increased. The case is still in its pretrial stage, and so far, Vicky and Vince have agreed on all issues. Today, Vicky tells Ann that a friend suggested filing a civil suit to increase the odds of receiving full compensation from David. Vince said that he doesn't want to deal with another lawsuit right now. Vicky asks Ann whether it would be a good idea for her to pursue a civil suit.

- Is there a conflict of interest?
- Assume that Vicky informs Ann that she has already retained her friend, a civil attorney, to file the civil case against David. Is there a conflict of interest?
- If there is a conflict, what must Ann do?

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| 2-35

See Ariz. Prof'l Conduct R. 1.7, 1.7 cmt. 1.16.

Slide 36

Competency

**Arizona E.R.
1.1. –
Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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| 2-36

Review slide.

Ethics Hypo #3

Andy started his own law practice a year ago, shortly after he passed the bar exam. So far, he has represented clients in simple divorce cases, criminal misdemeanor DUI cases, and civil tort cases. Yesterday, Veronica retained him to secure a divorce from Don. The couple have two young kids. Today, Veronica came to the office looking shaken. She said Don was in a rage because she had filed for divorce, and he threatened to kill her and the kids with a gun so they could “stay a family forever.” Andy recently attended a lunch CLE that addressed civil protection orders, so he discussed this option. Veronica agreed that he should proceed with a petition for a protective order. An hour later, Veronica reported Don's actions to the police, and Don was arrested that evening. The arresting officer informed Veronica of her rights as a crime victim. She asked Andy to represent her interests in the criminal case.

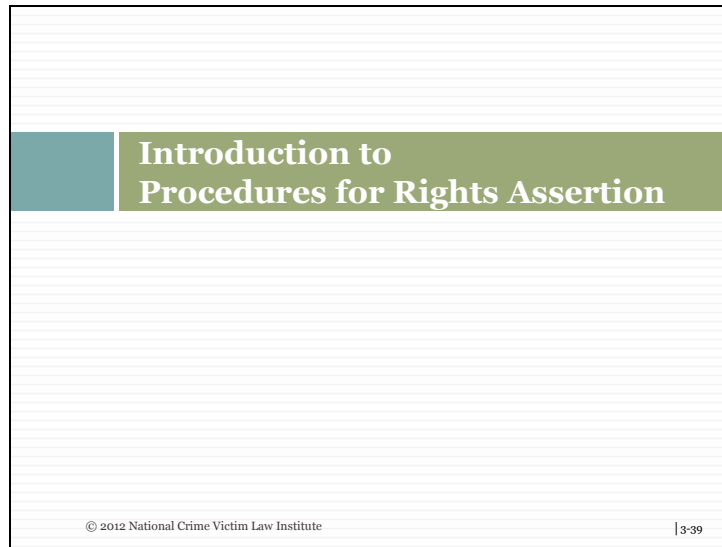
□ What should Andy do?

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See Ariz. Rules of Prof'l Conduct R. 1.1 & cmt.



Slide 39

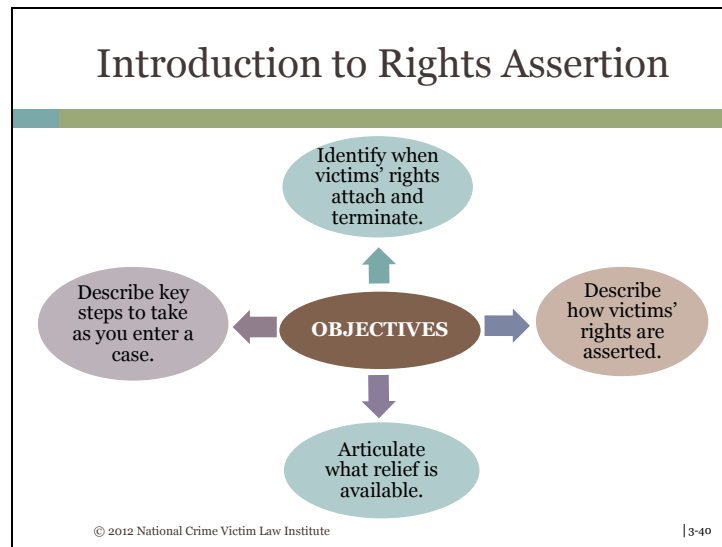


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**Introduction to
Procedures for Rights Assertion**

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Slide 40



Slide 41

When Do the Rights Attach?

<ul style="list-style-type: none">□ Right to receive information from law enforcement about rights and services attaches –<ul style="list-style-type: none">➤ “As soon after the detection of a criminal offense as the victim may be contacted without interfering with an investigation or arrest.”	<ul style="list-style-type: none">□ An entity-victim's limited rights attach –<ul style="list-style-type: none">➤ After arrest.	<ul style="list-style-type: none">□ All other rights attach –<ul style="list-style-type: none">➤ Upon “the arrest or formal charging of the person . . . alleged to be responsible for a criminal offense.”
A.R.S. § 13-4405(A)	A.R.S. § 13-4404	A.R.S. § 13-4402(A)

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The provisions on this slide only refer to a crime victim's statutory rights. *See, e.g.*, A.R.S. § 13-4402 (providing that “the rights and duties that are *established by this chapter* arise on the arrest or formal charging of the person”) (emphasis added).

When Do the Rights Terminate?

□ Final disposition –

- The rights are enforceable “until final disposition of the charges, including acquittal or dismissal of the charges, all post-conviction release and relief proceedings and the discharge of all criminal proceedings relating to restitution.”
- If restitution is ordered –
 - The victim's rights are “enforceable until restitution is paid or a criminal restitution order is entered in favor of the victim pursuant to § 13-805.”

A.R.S. § 13-4402(A)

See also A.R.S. § 13-805 (providing, *inter alia*, that “[t]he trial court shall retain jurisdiction of the case for purposes of modifying the manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires”).

Rights terminate “upon final disposition”

- Exception: If a charged offense involving this victim is dismissed “as the result of a plea agreement in which the defendant is pleading to or pled to other charges” –
 - The victim, upon request, “may exercise all the applicable rights of a crime victim throughout the criminal justice process **as though the count or counts involving the person had not been dismissed.**”

A.R.S. § 13-4402.01(A)

How are the Rights Asserted?	
Notice of Appearance	File a Notice of Appearance and Assertion of Rights. <ul style="list-style-type: none">• Asserts the victim's rights.• Helps to ensure that you receive copies of filings.
Motion Practice	File proactive/preemptive motions or responsive motions/oppositions. <ul style="list-style-type: none">• Protects the victim's rights.• Preserves the record.
Appellate Practice	File a Petition for Special Action. <ul style="list-style-type: none">• Challenges rights violations.• Sets precedent.
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Notice of appearance: *See, e.g.,* A.R.S. § 13-4437 (providing that “on the *filing of a notice of appearance* and if present, counsel for the victim shall be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim's [constitutional] right(s)”) (emphasis added); *see also United States v. Mahon*, No. CR 09-712-PHX-DGC, 2010 WL 94247, at *1 (D. Ariz. Jan. 5, 2010) (“The Court finds that the method chosen by [the victim’s] counsel — filing an appearance so he can receive notice of public documents filed in the case — is a reasonable procedure for ensuring protection of [the victim’s] CVRA rights.”). *Cf.* A.R.S. § 13-3347(A) (“In asserting any right, the victim has the right to be represented by personal counsel at the victim’s expense.”).

Forms: *See, e.g.,* A.R.S. § 4417(A) (referring to the need for crime victims to provide to the agency responsible for providing victim notification “a request for notice on a form that is provided by that agency”).

Special Action: *See* slide 3-48.

What Relief is Available?

When seeking enforcement, what should you ask for?



If the Victim Seeks a “Do Over”

□ **File a motion for reexamination —**

- Within 10 days unless leave of court for good cause.
- Thereafter, a reexamination proceeding must be afforded.
- “[T]he court shall reconsider any decision that arises from a proceeding in which the victim's right was not protected and shall ensure that the victim's rights are thereafter protected.”

A.R.S. § 13-4436(A)

Limits on Relief

- **The failure to perform a duty or provide a right is:**
 - Not ground for a new trial.
 - Not ground to set aside a conviction after trial.
 - Not ground to reopen a plea or sentence if the victim was given notice of a plea or sentencing proceeding unless —
 - The victim was not voluntarily absent; and
 - The victim has asserted the right to be heard before/during the proceeding and the right was denied; and
 - In the case of a plea, the accused has not pled to the highest offense charged.

A.R.S. § 13-4436(B)

Appellate Relief via Special Action

- ❑ Special action jurisdiction is appropriate when there is no “equally plain, speedy, and adequate remedy by way of appeal.”
- ❑ Many victims’ rights—*e.g.*, the right to be present at a hearing—would not be capable of protection if the matter were reviewed via post-trial appeal.

Ariz. R.P. Spec. Act. 1(a)

As You Enter the Case . . .

Step 1

- Identify the legal victims.

Step 2

- Identify the stage of the case.

Step 3

- Identify the rights implicated by developments before your involvement.
- Identify the rights implicated now/in future.

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Step 4

- Ask the client which rights he/she wishes to assert.

Step 5

- Identify whether a violation has occurred.

Step 6

- Prepare for future assertion of the rights.

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Re Step 5: Whether a violation has occurred is not always immediately obvious. *See, e.g., State ex rel. Hance v. Ariz. Bd. Of Pardons and Paroles*, 875 P.2d 824 (Ariz. Ct. App. 1993) (setting aside parole board's order releasing prisoner to home arrest and concluding that the victim's failure to request notice of release proceedings did not excuse the state from including her participation in those release proceedings because the state had failed to inform the victim of her right to request notice of and to participate in post-conviction release proceedings).

ABC's of Representing Victims of Crime
March 2, 2012

Slide 51

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Step 7

- Introduce yourself to defense counsel/the prosecutor.
- File a Notice of Appearance and Assertion of Rights.

Step 8

- File forms that may be required to trigger notice obligations from responsible agencies.

Step 9

- Strategy moment: Advise record holders that the victim is now represented by counsel and discuss certain best practices when served with a subpoena or other request for information.

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Agency Notice to the Victim

**Practice
Pointers:
*Ensuring
the Victim
Receives
Notice***

- Make sure the appropriate agencies have the victim's current contact information. *See* A.R.S. § 13-4417(A) (requiring the victim to provide and maintain current address and telephone number on the election of right to notice form; the failure to keep information current will be treated as if "the victim's request for notice is withdrawn").

When to Take Action

**Practice
Pointer:
*Pretrial
Litigation
Strategies***

- Don't take action only when your client's rights have been violated.
- Be proactive!

Pretrial Litigation Strategies

Anticipate issues for motion practice.

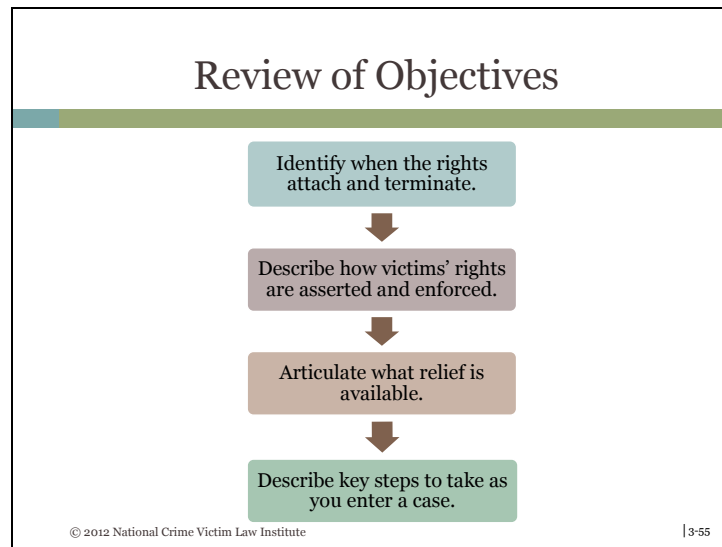
- Identify key grounds for supporting the victim's motions or opposing defense motions.

Prepare the victim for participating in court.


- Discuss the right to be heard and ways to exercise the right.
- Explain direct/cross-examinations procedures.

Prepare to seek victim restitution.

- Identify recoverable losses now.
- Identify key issues, *e.g.*, timing and plea bargains.



Slide 56



BREAK
15 minutes

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Slide 57

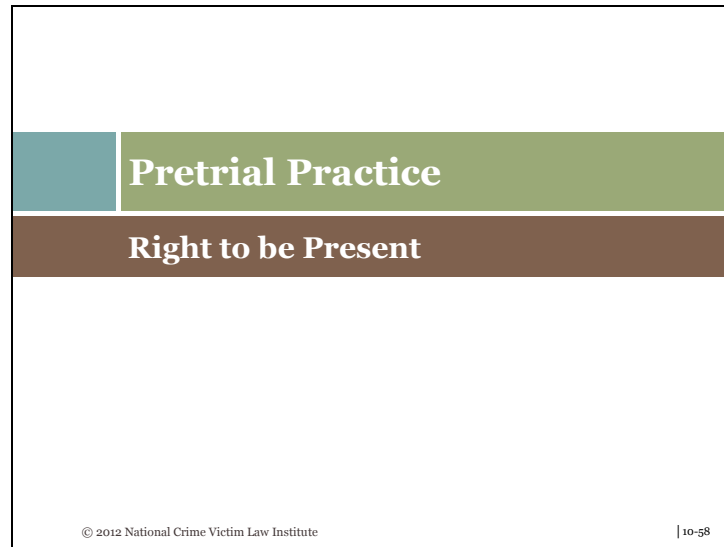


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Pretrial Litigation Practice

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Slide 58



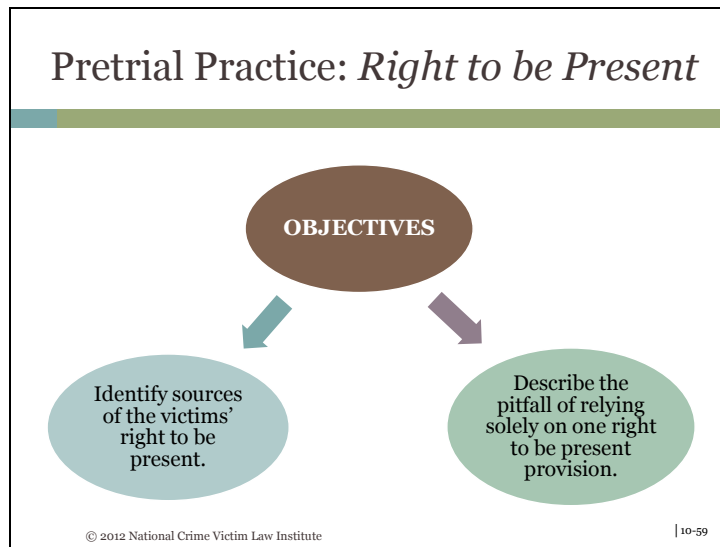
The slide features a title bar with a teal square on the left and a green rectangle containing the text "Pretrial Practice". Below this is a brown rectangle containing the text "Right to be Present". The main body of the slide is white and empty. At the bottom left, it says "© 2012 National Crime Victim Law Institute" and at the bottom right, it says "| 10-58".

Pretrial Practice

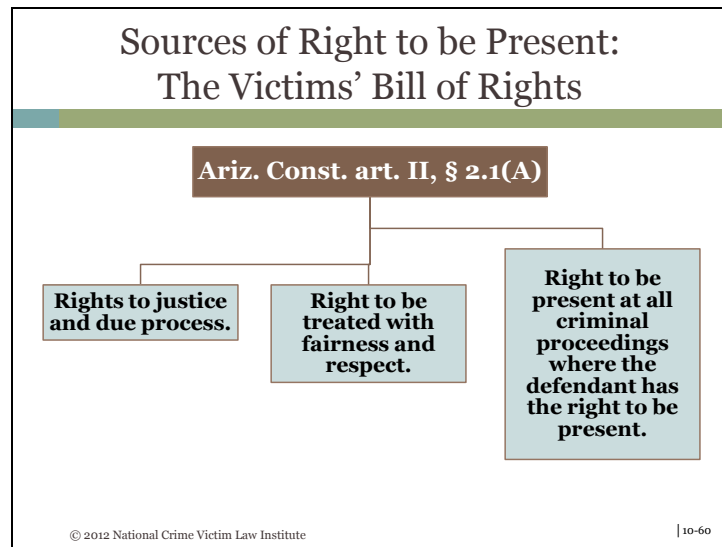
Right to be Present

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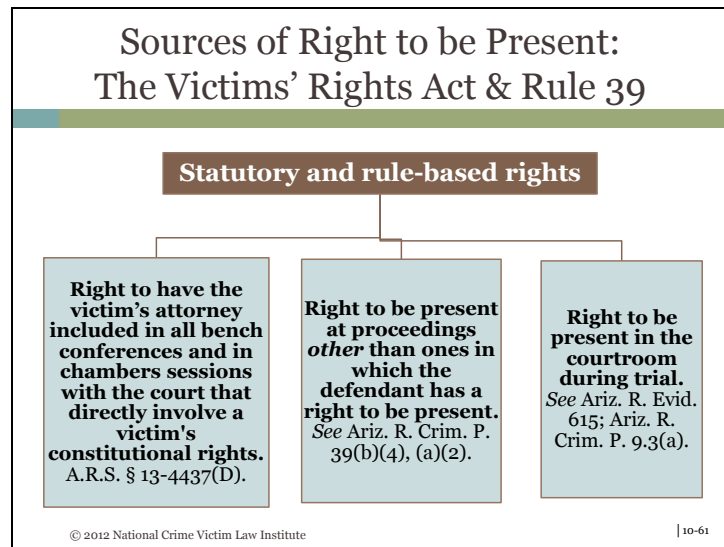
Slide 59



Slide 60



Slide 61



See also State v. Uriarte, 981 P.2d 575 (Ariz. Ct. App. 1998) (concluding that the child-victim's right to be present includes the right to have her parent's continuing presence in the courtroom, even though (i) the witness exclusion rule had been invoked, (ii) the parent would later be called to testify, and (iii) Evidence Rule 615 and Criminal Procedure Rule 9.3(a) does not expressly exempt a child-victim's *parent* from the general rule of exclusion); A.R.S. § 13-4071(D) (providing that "[t]he victim shall be given notice of and the right to be heard at any proceeding involving a subpoena for records of the victim from a third party," which implicitly includes the right to be present at the proceeding).

Litigating the Right to be Present

Practice Pointers: *Litigating the Right to be Present*

- Don't rely solely on the constitutional *right to be present at all criminal proceedings where the defendant has a right to be present*.
 - See *Morehart v. Barton*, 250 P.2d 1139 (Ariz. 2011).
- If appropriate, cite other rights implicated at a proceeding that are independent of defendant's right to be present.
 - Don't just look for the term "present" in the rights provisions.
 - Remember that the right to be present is also implied in the rights to receive notice and to be heard.

Hypo re Right to be Present

David is an indigent defendant charged with capital murder for the shooting deaths of several victims. The surviving family members of two of the deceased victims have retained an attorney and participated in all the proceedings held to date. Recently, the defense attorney filed a motion for an *ex parte* hearing (to be held outside the presence of the victims and the prosecutor) on the returns of out-of-state summonses issued as part of the defense's pretrial investigation of mitigation evidence. Possible mitigation evidence might include evidence to support a self defense claim. The victims opposed the *ex parte* nature of the proceeding on the ground that they have a right to attend this hearing. To alleviate defense concerns about possible disclosure of strategic information to the prosecution, the victims proposed that they attend the hearing under a protective order that forbids the disclosure of information to the prosecution.

□ What authority supports the victims' position?

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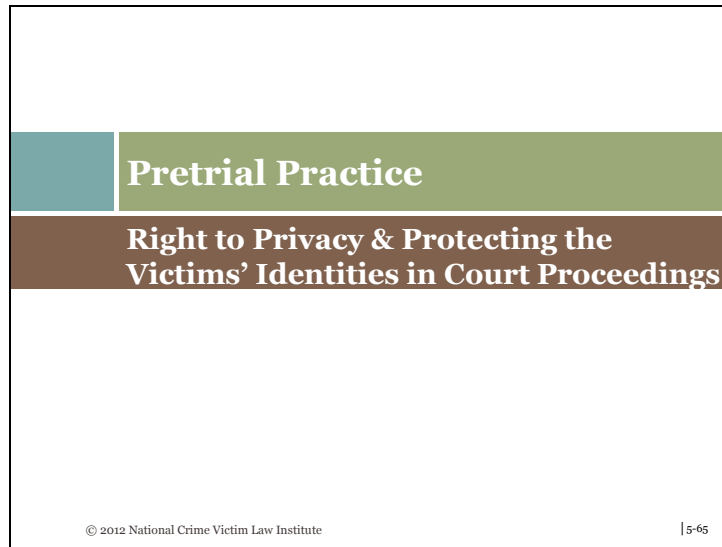
See Morehart v. Barton, 250 P.3d 1139, 1140 (Ariz. 2011) (construing the issue on appeal as solely “whether [article 2, section 2.1(A)(3) of the Arizona Constitution] entitles victims to attend an *ex parte* hearing on the return of summonses issued as part of defense counsel's pretrial investigation of mitigation evidence in a capital case” and concluding that “[b]ecause the defendant has no right to attend such a purely procedural hearing, victims also have no right to attend”); *but see id.* at 1145 (recognizing “that victims have various rights to participate in court proceedings that are independent of the defendant's right to be present” and stating that “[t]rial courts must consider if such rights are implicated in any *ex parte* proceeding sought under Rule 15.9(b)”).

See also Ariz. Const. art. II, § 2.1(A)(1), (3) (“rights to justice and due process,” right “[t]o be treated with fairness,” and right “[t]o be present at . . . all criminal proceedings where the defendant as the right to be present”); A.R.S. § 13-4071(D) (rights to receive notice, to be present and to be heard at “any proceeding involving a subpoena for records of the victim from a third party”); A.R.S. § 13-4487(D) (right to have their attorney “included in all bench conferences and in chambers sessions with the trial court that directly involve victims’ [constitutional] right”); Ariz. R. Crim. P. 39(b)(4) (“[t]he right to be present at all criminal proceedings”), (a)(2) (defining “criminal proceeding” as “a trial, *hearing*, (including hearing before trial), *oral argument*, or other matter scheduled and held before a trial court at which the defendant has the right to be present, or any post-conviction proceeding”) (emphasis added).

Slide 64



Slide 65

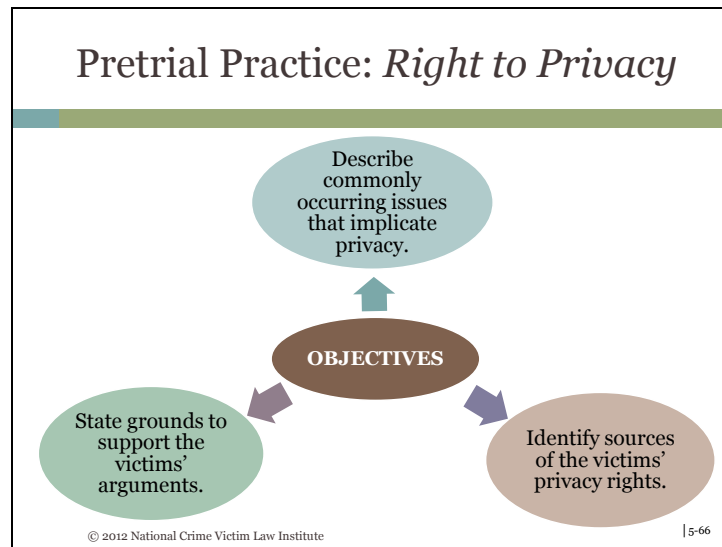


Pretrial Practice

**Right to Privacy & Protecting the
Victims' Identities in Court Proceedings**

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Slide 66



Right to Privacy: *An Exercise*

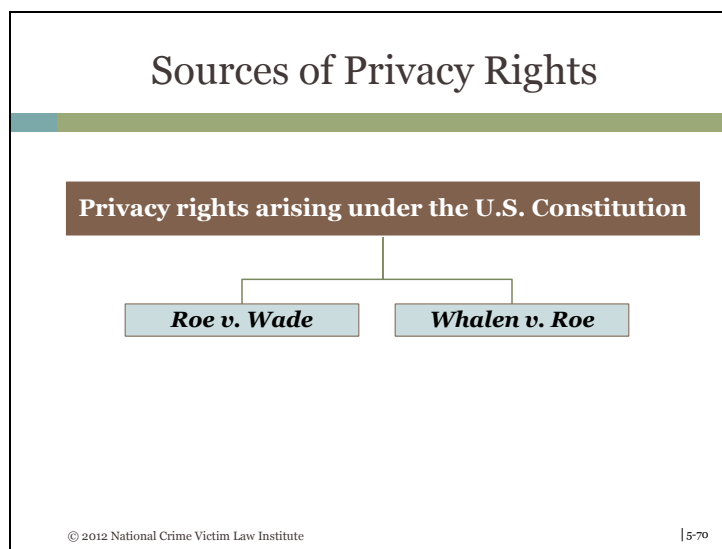
A crime victim's privacy rights are
implicated when

Overview of Right to Privacy

- ❑ Sources of Privacy Rights.
- ❑ Key Moments.
 - Protecting the Victim's Identity in Court Proceedings.
 - Pretrial "Discovery."

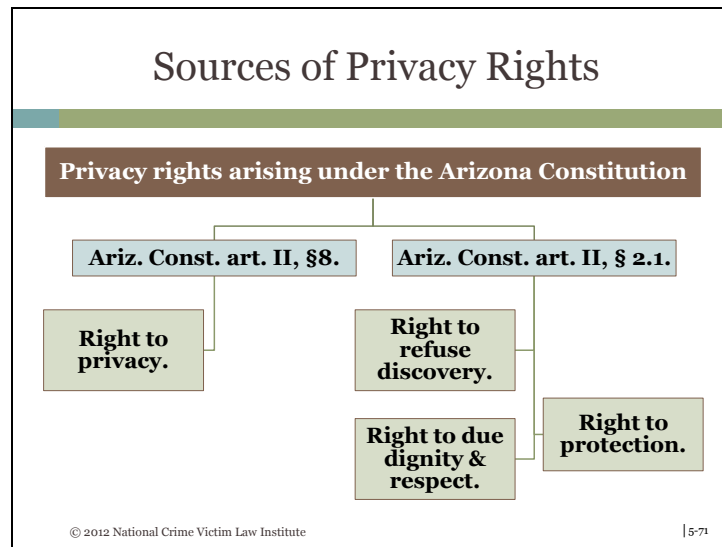
Where to Find Right to Privacy?

- The word “privacy” is not explicitly mentioned in –
 - The U.S. Constitution.
 - Arizona’s Victims Bill of Rights.
- Then where?



See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (concluding that “[a] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution”); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (stating that the right to privacy encompasses an “individual interest in avoiding disclosure of personal matters” as well as “the interest in independence in making certain kinds of important decisions”).

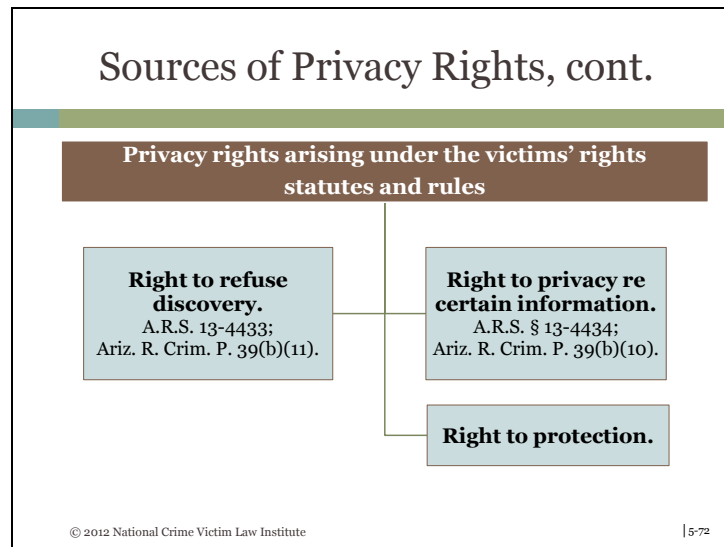
Slide 71



Re explicit right to privacy: *See also Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 788 (Ariz. 1989) (recognizing the tort of false light invasion of privacy, citing article 2 section 8 of the Arizona Constitution, and observing that “Arizona is one of the first states whose founders thought it necessary to adopt explicit protection for the privacy of its citizens”); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 721 (Ariz. Ct. App. 2007) (addressing the test for courts to apply when evaluating requests to discover the identity of anonymous internet speakers, citing article 2 section 8 of the Arizona Constitution, and explaining that “requiring a balancing of competing interests provides an additional safeguard that comports with Arizona’s broad protection given to free speech and individual privacy”).

Re implicit rights to privacy: *See* Ariz. Const. art. II, §§ 2.1(A)(5) (right “[t]o refuse [a defense-initiated] interview, deposition, or other discovery request”); 2.1(A)(1) (right “[t]o be treated with fairness, respect, and dignity”). *Cf. State v. Riggs*, 942 P.2d. 1159, 1162 (Ariz. 1997) (observing that the constitutional right to refuse an interview “stems from ‘the desire to *protect a victim’s privacy* and minimize contact with the defendant’ prior to trial”) (emphasis added).

Slide 72



Re statutory and rule-based sources of the right to protection: See slides 109 to 114.

Privacy Hypo #1

Virginia was sexually assaulted by a well known figure in the community. She is scared and nervous about reporting the crime, and she cannot imagine what life would be like with her name linked to this crime for all time on the Internet. She consults with Attorney Ann and asks whether she could report the crime and still remain relatively anonymous to the general public.

- What rights of Virginia and the offender are at issue?
- What are Virginia's options?

<i>Overview of Competing Rights at Issue</i>	
Defendants' & the Public's Rights	The Victims' Rights
<ul style="list-style-type: none">□ Open courts under the 1st, 6th, and 14th Amendments.□ Defendant be informed of the nature of the charges against him/her under the 6th and 14th Amendments.□ Defendant be protected from double jeopardy.	<ul style="list-style-type: none">□ Privacy.□ Access to courts protected by 1st and 14th Amendments as well as the Privileges and Immunities clause.<ul style="list-style-type: none">➢ Chilling effect.

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D's and the Public's rights

See generally *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) (addressing the scope of the presumption of open proceedings under the 1st, 6th, and 14th Amendments); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 175 (5th Cir. 2011) (explaining that courts have applied a two-part test to determine whether a right to open proceedings exist under the 1st and 14th Amendments in a particular case and observing that courts have recognized a public right of access to various pretrial proceedings, trials, and sentencing proceedings); see also *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606-07 (1982) (explaining that the public right of access to criminal trials under the 1st and 14th Amendments is not absolute but where the state "attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest"); see also Ariz. Const. art. II, § 11 ("Justice in all cases shall be administered openly").

Re indictment/information: See U.S. Const. amend. VI. ("[T]he accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]"); Ariz. Const. art. II, §§ 24, 30.

Victim's Rights

Privacy: see preceding slides. Access to courts: See, e.g., *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitution right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment"); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right); see also Ariz. Const. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); *New v. Arizona Bd. of Regents*, 618 P.2d 238, 239 (Ariz. Ct. App. 1980) (interpreting Arizona's Privileges and Immunities Clause "as a command that 'all citizens of our state, regardless of their financial status, must be afforded an equal opportunity to the courts'").

Protecting the Victims' Identities in Court Proceedings

- Use pseudonyms or initials.
- Redact identifying information.
- Seal records.
- Close courtroom.
- Limit media access.

Pseudonyms/Initials:
Requirements for a Sound Indictment

- **An indictment is sound if it:**
 - Contains the elements of the offense charged and fairly informs a defendant of the charge he must defend against; and
 - Provides a bar to future prosecutions for the same offense.

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See Hamling v. United States, 418 U.S. 87, 117-18 (1974) (explaining that “an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense”); *see also* Fed. R. Crim. P. 7; Ariz. R. Crim. P. 13.2.

Re victim’s use of pseudonyms/initials: *See, e.g., People v. Kossman*, 46 A.D.3d 1104, 1105 (N.Y. App. Ct. 2007) (finding that “[a] victim’s name need not be included in the indictment so long as sufficient information is included to enable the defendant to formulate a defense and to protect against future double jeopardy violations” and concluding that the indictment for statutory rape is sound where it included the date and time of the incident, the street address, and the child-victim’s birth date); *United States v. Powell*, 1 F. Supp.2d 1419, 1423 (N.D. Ala. 1998) (concluding that “there is no requirement that the name of alleged victims be disclosed in the indictment” and denying motion to dismiss superseding indictment where, *inter alia*, the counts of using the internet to attempt to persuade a minor to engage in a sexual act “specifies the dates of [the] alleged criminal activity, the facility and means of interstate commerce allegedly used, and the screen names of the persons [defendant] allegedly contacted”). *Cf. State v. Thompson*, No. 1 CA-CR 10-0778, 2011 WL 6140920 (Ariz. Ct. App. Dec. 8, 2011) (finding that the prosecution’s failure to amend the indictment to identify new or different victims who were identified during trial did not deprive defendant of notice of the fraudulent schemes and artifices charge because the identity of the victim is not an element of the offense); *State v. Howard*, No. 2 CA-CR 2009-0370, 2010 WL 3155257 (Ariz. Ct. App. Aug. 10, 2010) (concluding that the only required identification of a victim in an aggravated assault case is that the victim is “a person” — the required element of the offense — and the father’s testimony that his “son” was in the truck and was injured during the accident was sufficient to support the conviction).

Slide 77

Pseudonyms/Initials: *Weighing Rights*

- ❑ Child-victims
 - Victims are often allowed to proceed anonymously as a matter of course, without analysis.
- ❑ Adult victims
 - Courts may employ a weighing test, weighing the right to open access against the victims' privacy rights.

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Re child-victims: *See, e.g., United States v. Iron Cloud*, 312 F.3d 379, 380 n.2 (8th Cir. 2002) (stating that the court would not refer to the child-victim by name to protect her right to privacy under 18 U.S.C. § 3509(d)); *Gattem v. Gonzales*, 412 F.3d 758, 761 n.2 (7th Cir. 2005) (substituting “a pseudonym for the name of the [minor] victim in deference to her privacy interests” without explicitly relying on statutory authority). *But cf. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010) (noting the need for a weighing test in determining whether plaintiffs may proceed anonymously in a civil case, but finding district court did not abuse its discretion in finding minor plaintiffs did not have a reasonable fear of harm, despite the many threats made against them as a result of their suit alleging race discrimination in the admission process of a school).

Re adult victims: *Cf. Plaintiff B. v. Francis*, 631 F.3d 1310 (11th Cir. 2011) (employing a weighing test in determining that the trial court abused its discretion in requiring the adult victims to proceed by their real names in a civil case involving their appearance in *Girls Gone Wild* DVDs when they were underage); *James v. Jacobson*, 6 F.3d 233, 238-39 (4th Cir. 1993) (weighing the interest in nondisclosure against the presumption of open proceedings in finding that a couple could proceed anonymously in a civil case in which the mother was artificially inseminated with her doctor's sperm, rather than her husband's, in order to protect their children's well-being).

Re both and no explicit weighing for opinions: *See, e.g., State v. Bartlett*, 164 Ariz. 229, 230, n.1, 792 P.2d 692, 693, n.1 (Ariz. 1990), *vacated on other grounds*, 501 U.S. 1246, (1991) (noting that in 1989, “the Chief Justice advised all appellate judges ‘to avoid, where possible, referring by name in appellate opinions to individual victims or witnesses who are minors or victims of crimes, where naming them would cause them danger or unnecessary embarrassment’”); *State v. Sanders*, 1 CA-CR 09-0137, 2009 WL 4251098, n.2 (Ariz. Ct. App. Nov. 24, 2009) (noting the use of the adult burglary victims' initials “to protect their privacy” without further discussion).

Remedying Violations of a Victim's Privacy: *Redaction*

Practice Pointers:
Shielding the Victim from the Public

- What if pseudonyms or anonymous initials were not used?
 - Redact or ask court to redact documents that would permit people to identify the victim
 - If made public:
 - Seek redaction of the document
 - Send letter to search engine asking them to remove

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| 5-78

See, e.g., United States v. Gavin 959 F.2d 788, 792 (9th Cir. 1992) (granting motion to redact child-victim's name from the published opinion and all court records in the case to protect the child-victim's privacy); *United States v. Clark*, No. 08-1808, 2009 WL 1931172, *2 (3d Cir. July 7, 2009) (concluding that redaction of names of victims and their family members from victim impact statements was consistent with the provision of the Crime Victims' Rights Act guaranteeing the victim's right to be treated with respect for his or her dignity and privacy).

Cf. Phoenix Newspapers, Inc. v. Ellis, 159 P.3d 578 (Ariz. Ct. App. 2007) (vacating order quashing newspaper's request for a copy of the notice of claim that minor sexual assault victim filed with the school district, finding "no reason why disclosure of this information would violate Doe's privacy interests if her name is redacted" from the public record before disclosure, and directing the trial court on remand to determine whether additional parts of the notice should be redacted to protect the victim's privacy interests).

Redaction, cont.

- **A.** The victim has the right at any court proceeding not to testify regarding the victim's addresses, telephone numbers, places of employment or other locating information unless
- **B.** A victim's contact and identifying information that is obtained, compiled or reported by a law enforcement agency shall be redacted by the originating agency in publicly accessible records pertaining to the criminal case involving the victim.
- **C.** Subsection B does not apply to:
 1. The victim's name.
 2. Any records that are transmitted between law enforcement and prosecution agencies or a court.
 3. Any records if the victim has consented to the release of the information.
 4. The address or location at which the reported crime occurred.

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A.R.S. 13-4434

| 5-79

See sources of privacy rights cited in preceding slides.

See also Ariz. Const. art. II, § 2.1(A)(11) (granting victims the right to “have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims’ rights”); A.R.S. § 13-4418 (“This chapter shall be liberally construed to preserve and protect the rights to which victims are entitled.”).

Other Options

- File under seal.
 - Potentially problematic because sealing orders may be lifted at the conclusion of a case.
 - Use of a pseudonym/initials may be the only effective method of protecting identity of a victim.
- Close the courtroom.
- Limit media access.

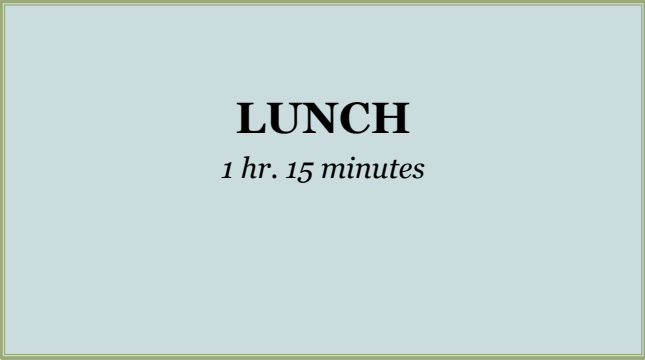
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File under seal: *See, e.g.*, 18 USC § 3509(d)(2) (“All papers to be filed in court that disclose the name of or any other information concerning a child[-victim] shall be filed under seal without necessity of obtaining a court order.”); *see also United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495 (W.D.N.C. May 26, 2009) (discussing the pitfalls of sealing because “[i]f the court were to grant to the government the sealed status which it seeks for such motions, the relief it seeks would be ineffectual inasmuch as such seal would be automatically lifted [in this district] – as it is in every case – at the conclusion of this criminal action, thereby publicly disclosing the name of the victim”).

Closing the courtroom: *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality) (finding that the guarantees of speech and press in the 1st and 14th Amendments prohibit the government from summarily closing courtroom doors); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (concluding that closure of the courtroom during testimony must be supported by the existence of a “compelling” interest; the closure is “narrowly tailored” to meet this interest; there are no alternatives to closure that would adequately protect this interest; and the trial court has articulated findings sufficient to support closure); *see also Waller v. Georgia*, 467 U.S. 39 (1984) (finding the same analysis as used in *Richmond* and *Globe* applies when considering defendant’s interests under the 6th Amendment).

Arizona’s public records laws: *See A.R.S. §§ 39-121 to -128*; *see also Carlson v. Pima County*, 687 P.2d 1242, 1246 (Ariz. 1984) (“While access and disclosure is the strong policy of the [public records] law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection.”); *A.H. Belo Corp. v. Mesa Police Dept.*, 42 P.3d 615 (Ariz. Ct. App. 2002) (involving the recording of a babysitter’s 911 call to report a toddler’s injury and concluding that the press’ public access interest in the recording is outweighed by the family’s privacy concerns).

Slide 81

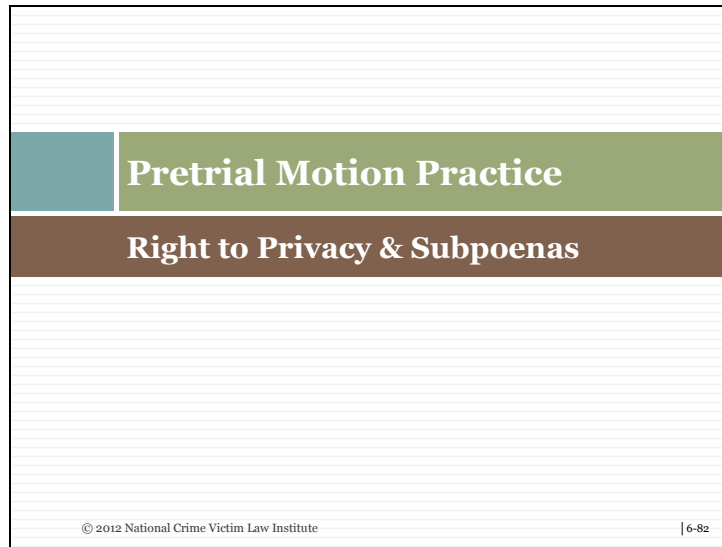


LUNCH
1 hr. 15 minutes

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The slide features a light blue rectangular area with a thin green border. Inside this area, the word "LUNCH" is written in a bold, black, serif font. Below it, the text "1 hr. 15 minutes" is written in a smaller, italicized, black, serif font. The entire slide content is enclosed in a black rectangular frame. At the bottom left of the frame, the copyright notice "© 2012 National Crime Victim Law Institute" is visible, and at the bottom right, the slide number "| 5-81" is displayed.

Slide 82



Pretrial Motion Practice

Right to Privacy & Subpoenas

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Privacy and Pretrial “Discovery”

- “Discovery” related to:
 - Interview/deposition of the victim.
 - Records of or concerning the victim.
- Victims’ rights at issue:
 - Right to refuse discovery.
 - Right to privacy.
 - Right to be free from harassment, intimidation and abuse.

“Discovery” of the Victims’ Records

- Methods —
 - Subpoenas; and/or
 - Motions to compel discovery.

Two Types of Subpoenas

Direct Subpoenas	Third Party Subpoenas
<ul style="list-style-type: none">□ These seek information from the victims or the victims' parents, family members or other representatives.□ May be sent to the victims' attorneys.	<ul style="list-style-type: none">□ These seek information from third parties.□ Third parties may include, but are not limited to:<ul style="list-style-type: none">➢ Cellular phone providers;➢ Schools;➢ Hospitals/Clinics;➢ Mental health providers; or➢ The victims' family members.

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Ethics Hypo #4

Defense counsel Derek was appointed to advise a defendant in his pro se criminal defense of rape charges involving a high school student. Derek filed a motion to obtain the student's DHS records, and the motion was denied because Derek failed to identify any potential exculpatory evidence in the records. An investigator working for Derek served an improper subpoena on the child-victim's school seeking educational records, which the school improperly provided. Derek used the information in the improperly obtained school records to file a second motion to obtain the DHS records, without disclosing how he obtained the information. The court provided Derek with redacted copies of the DHS records.

- Did Derek and/or the investigator commit ethics violations?
- What remedies might the child-victim pursue?

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Ethics rules that may be implicated include: Ariz. Rules of Prof'l Conduct R. 3.3 (Candor Toward the Tribunal); 4.4(a) (Respect for the Rights of Others); 5.3 (Responsibilities Regarding Nonlawyer Assistants); 8.4(a) (Misconduct Committed Using the Acts of Another); 8.4(d), (f) (Misconduct Prejudicial to the Administration of Justice).

See In re Taylor, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009) (reprimanding attorney for his investigator's unethical conduct that resulted in the release of the child-victim's school and DHS records).

**Arizona
E.R. 3.3 –
Candor
Toward
the
Tribunal**

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false.

(b) A lawyer who represents a client in an adjudicative proceeding and knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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| 6-87

See also Ariz. Rules of Prof'l Conduct R. 3.3 cmt. 12 (referring to the rule in subsection (b) as one that deals with "Preserving Integrity of Adjudicative Process").

Motions to Quash

“The law of evidence relating to civil actions shall apply to criminal proceedings, except as otherwise provided.”

Ariz. R. Crim. P. 19.3

The court must quash or modify a subpoena if, *inter alia*, “it requires disclosure of privileged or other protected matter.” And the court may quash or modify a subpoena if, *inter alia*, “justice so requires.”

Ariz. R. Civ. P. 45 (e)

Motions to Quash, cont.

Bases to Quash

- ❑ Defendant has no constitutional right to pretrial discovery; whereas the victim has constitutional right to refuse discovery.
- ❑ Relevance/right to be free from harassment or abuse.
- ❑ Privacy rights.
- ❑ Statutory privileges.

Bases for D's Opposition

- ❑ Defendant's constitutional right to due process includes:
 - Right to a fair trial.
 - Right to present a defense.
 - And, in Arizona, this may include the right to prepare for an *effective* cross-examination.

No Established Federal Constitutional Right to Pretrial Discovery

- Defendants have “no general federal constitutional right to discovery in a criminal case, and *Brady* did not create one.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).
- Defendants have no federal constitutional right to pretrial discovery under the Confrontation Clause. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987).
- Defendants have no federal constitutional right to pretrial discovery from *non-government* record holders under either the Compulsory Process Clause or the Due Process Clauses. See *Id.* at 55, 57-58.

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Re bullet #1: See also *State v. O'Neil*, 836 P.2d 393, 395 (Ariz. Ct. App. 1991) (observing that “it is well-established that there is neither a federal nor a state constitutional right to pretrial discovery”).

Re bullet #2: See *Pennsylvania v. Ritchie*, 480 U.S. at 52 (plurality) (rejecting defendant’s Confrontation Clause argument, finding that “[n]othing in the case law supports” “transform[ing] the Confrontation Clause into a constitutionally compelled rule of pretrial discovery,” and emphasizing “that the right to confrontation is a *trial* right”) (emphasis in the original); see also *In re Crises Connection, Inc.*, 949 N.E.2d 789, 797 (Ind. 2011) (concluding that the “the predominate view” *post-Ritchie* is that the denial of pretrial discovery does not violate the Confrontation Clause).

Re bullet #3: See also *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998) (distinguishing *Ritchie* and concluding that the Due Process Clause does not entitle defendant to an *in camera* review of the witness’s medical records that detail her history of alcohol and drug abuse because “if the documents are not in the government’s possession, there can be no ‘state action’ and consequently, no violation of Fourteenth Amendment”); *Goldsmith v. State*, 651 A.2d 866, 872-73 (Md. 1995) (concluding that *Ritchie*’s due process analysis does not “constitutionally require the pre-trial discovery sought” by defendant where the records “were not kept by a state agency or required to be kept by a state agency”). But see *State ex rel. Romley v. Superior Court (Roper)*, 836 P.2d 445 (Ariz. Ct. App. 1992) (concluding that defendant’s due process rights may in some circumstances require pre-trial discovery of the victim’s mental health records).

Privacy and Pretrial “Discovery”: *Interview/Deposition/Other Requests*

The victim has the right “[t]o refuse an interview or deposition, or other discovery request by the defendant, the defendant’s attorney, or other person acting on behalf of the defendant.”

Ariz. Const. art. II, § 2.1(A)(5)

- This right “stems from ‘the desire to protect a victim’s privacy and minimize contact with the defendant’ prior to trial.” *State v. Riggs*, 942 P.2d 1159, 1162 (Ariz. 1997).
- **The victim retains this right in a parallel civil case.** *See State v. Lee*, 245 P.3d 919, 923-24 (Ariz. Ct. App. 2011).
- This right is not absolute. *State ex rel. Romley v. Superior Court (Roper)*, 836 P.2d 445, 450 (Ariz. Ct. App. 1992).

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| 6-91

See also State v. Nichols, 233 P.3d 1148, 1151 (Ariz. Ct. App. 2010) (“Since the adoption of the [Victims’ Bill of Rights], ‘the victim’s right to decline an interview has been considered absolute.’”). *But see Benton v. Superior Court*, 897 P.2d 1352, 1354 (Ariz. Ct. App. 1994) (concluding that [n]othing in the constitution or statutes indicates that a victim can impeded a criminal prosecution by refusing to release medical records necessary *for the prosecution*) (emphasis added).

The Victims' Right to Refuse Pretrial "Discovery": *A Caveat*

- ❑ In Arizona, a defendant's due process right to a fair trial and to present a defense may, under certain circumstances, trump the victim's right to refuse discovery.
 - See *State ex rel. Romley v. Superior Court (Roper)*, 836 P.2d 445 (Ariz. Ct. App. 1992).
- ❑ To the extent *Roper* purports to apply federal law, the analysis is flawed.
- ❑ But see *State v. Conner*, 161 P.3d 596 (Ariz. Ct. App. 2007) (declining to extend *Roper* and construing *Roper* to authorize a trial court to "weigh" competing rights only *after* defendant makes an adequate showing that a "reasonable possibility" exists that the requested information is one to which defendant is entitled as a matter of due process and/or to which the victim has arguably waived any applicable privileges).

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Examples of the *Roper* flaws:

Compare Roper, 836 P.2d at 453 (suggesting that a defendant's 6th Amendment confrontation right also includes a right to "*effectively cross-examine witnesses*") (emphasis in the original) (dictum) *with Ritchie*, 480 U.S. at 52-53 (explaining that "[t]he ability to question adverse witnesses [under the Confrontation Clause] does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. . . . [because] the Confrontation Clause only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way'" (emphasis in the original).

Compare Roper, 836 P.2d at 449-50 (declining to follow earlier Arizona court of appeal decisions in *Warner* and *O'Neil* whereby the courts observed that defendants have no state or federal constitutional right to pretrial discovery and citing *Pennsylvania v. Ritchie* for the proposition that a "criminal defendant has right to pretrial discovery pursuant to compulsory process clause of the Sixth Amendment") *with Ritchie* 480 U.S. at 58 (explicitly declining to hold that the Compulsory Process Clause guarantees a right to pretrial discovery because the applicability of the Compulsory Process Clause "to this type of case is unsettled," and adopting, instead, "a due process analysis for the purposes of this case").

Bases to Quash:
Relevance/Harassment

- No “fishing expeditions.”
- For privileged information:
 - No pre-trial disclosure, even upon a showing of relevance.

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| 6-93

See, e.g., State v. Hatton, 568 P.2d 1040, 1048 (1977) (“Discovery rules are not meant to be used for ‘fishing expeditions.’”).

See also State v. Pinder, 678 So.2d 410, 415 (Fla. Dist. Ct. App. 1996) (recognizing that “[e]ven in camera disclosure to the trial judge (and to court reporters, appellate courts and their staff) ‘intrudes on the rights of the victim and dilutes the statutory privilege’”); *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988) (noting that even *in camera* review “would seriously undermine the valuable, beneficial services of [rape crisis support services]”).

Bases to Quash Subpoenas: *Privacy*

- Privacy rights arising under the U.S. Constitution.
- Privacy rights arising under Arizona's constitution.
- Privacy rights arising under Arizona's statutes and rules.

Privacy Hypo # 2

Before trial, defendant Donna's attorney subpoenaed various record holders to obtain discovery of "any and all of [victim] Victor's medical treatment, counseling, psychological and/or psychiatric records." After the record holders refused to disclose, Donna files a motion to compel, arguing that the information "may be exculpatory and will likely solidify" her position that Victor was the initial aggressor.

- What arguments can be raised in support of Victor's parent's opposition?
- Who should prevail based on these facts?

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| 6-95

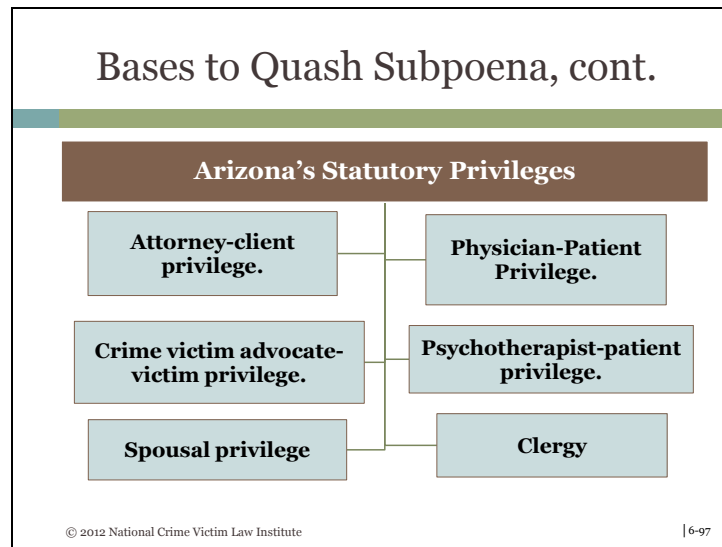
See State v. Connor, 161 P.3d at 601 (finding that defendant "presented no sufficiently specific basis to require that the victim provide medical records to the trial court for an *in camera* review" as he has made "no showing that the victim's physician-patient privilege may have been waived as to him[;] nor does he make any otherwise adequate showing that the information sought might contain materials necessary to fully present his justification defense or to the cross-examination of witnesses").

Bases to Quash Subpoena: *Privileges*

“The common law—as interpreted by Arizona courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: [] the United States or Arizona Constitution; [] an applicable statute; or [] rules prescribed by the Supreme Court.”

Ariz. R. Evid. 501

Slide 97



Attorney-Client: See A.R.S. § 13-4062(2) (regarding not being examined as a witness in a criminal proceeding); *see also* Ariz. R. Evid. 502.

Crime Victim Advocate: See A.R.S. § 13-4430(A); § 13-4401(5) (defining “crime victim advocate” to “mean[] a person who is employed or authorized by a public entity or a private entity that receives public funding primarily to provide counseling, treatment or other supportive assistance to crime victims”). *But see* A.R.S. § 13-4430(D) (“A defendant may make a motion for disclosure of privileged information. If the court finds there is reasonable cause to believe the material is exculpatory, the court shall hold a hearing in camera. Material that the court finds is exculpatory shall be disclosed to the defendant.”).

Physician-patient: See A.R.S. § 13-4062(4) (regarding not being examined as a witness in a criminal proceeding); A.R.S. § 12-2292 (regarding confidentiality of medical records); *see also* A.R.S. § 12-2291(6) (“‘Medical records’ means all communications related to a patient's physical or mental health or condition that are recorded in any form or medium and that are maintained for purposes of patient diagnosis or treatment . . .”).

Psychotherapist-patient: See A.R.S. § 12-2292 (regarding confidentiality of medical records); A.R.S. § 13-4062(4) (regarding “physician”-patient privilege of not being examined as a witness in a criminal proceeding); A.R.S. § 32-2085 (regarding psychologist-patient privilege).

Spousal: See A.R.S. § 13-4062(1).

Clergy: See A.R.S. § 13-4062(3) (regarding not being examined as a witness in a criminal proceeding).

Accountant-Client: See A.R.S. § 32-749.

Bases to Quash:
Other Statutory Protections

- Federal Educational Rights and Privacy Act (FERPA).
- Health Insurance Portability and Accountability Act (HIPPA).
- Violence Against Women Act (VAWA).

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| 6-98

Federal Educational Rights and Privacy Act: 20 U.S.C. § 1232g.

The Health Insurance Portability and Accountability Act: 42 U.S.C. § 201.

The Violence Against Women Act: 42 USC 13925(b).

See also Catrone v. Miles, 160 P.3d 1204, 1210 (Ariz. Ct. App. 2007) (stating that “Arizona law provides that ‘[t]he right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in the family educational and privacy rights act of 1974 (20 [U.S.C.] §§ 1232g, 1232h and 1232i), and federal regulations issued pursuant to such act”) (quoting A.R.S. § 15–141(A)).

Known Third Party Subpoenas

Practice Pointers: Preventative Measures

- ❑ Notify record holders that you represent the crime victim as soon as you undertake representation.
- ❑ Instruct record holders that they should not to disclose any information relating to the victim/client without the victim/client's consent.
- ❑ File motion for a protective order.

Third Party Subpoenas: *Rights to Notice and to be Heard*

“The victim shall be given notice of and the right to be heard at any proceeding involving a subpoena for records of the victim from a third party.”

A.R.S. § 13-4071

Unknown Third Party Subpoenas

**Practice
Pointers:
*Unknown
Third Party
Subpoenas***

What if you *do not know*
about the subpoena and the
requested records have
already been produced?

<i>Unknown</i> Third Party Subpoenas	
Court has records	Defense has records
<ul style="list-style-type: none">□ Move the court to return the records to the victim.□ Exclude evidence from the proceedings.□ Argue that in camera review is a privacy invasion (with privileged documents).	<ul style="list-style-type: none">□ Demand turn over of the documents to the victim.□ Exclude evidence from the proceedings.□ Remove defense attorney from case.□ Seek sanctions.□ Ethics violations.

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See also In re Taylor, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009) (granting motion to suppress both the school and DHS records on the ground that both had been improperly obtained and subjecting attorney to discipline).

Other Anticipated Privacy Issues

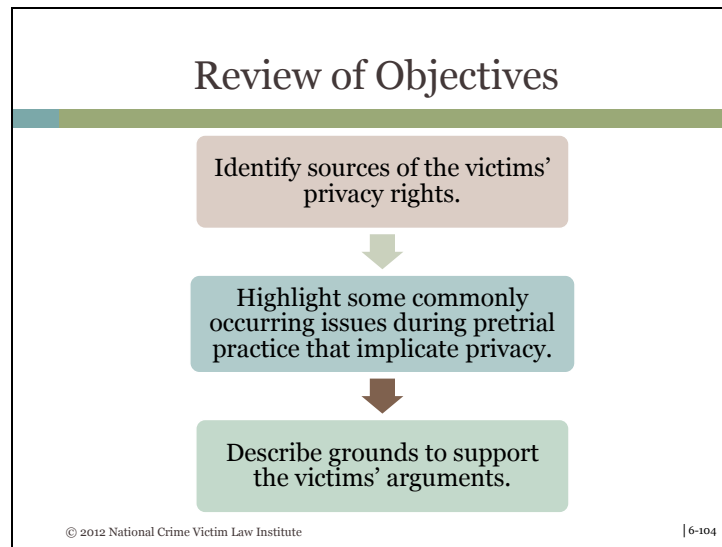
**Practice Pointers:
Motions in
Limine**

- Additional privacy issues that may be litigated pretrial include:
 - Introduction of evidence/testimony barred by privileges;
 - Introduction of evidence/testimony barred by the rape shield law;
 - Defense motion to compel psychological examination of the victim;
 - Defense motion to determine the victim's competency to testify; and
 - Others?
- Consider: strategic choice regarding whether to file a proactive pretrial motion or wait for trial.

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| 6-103

Rape Shield: *See* A.R.S. § 13-1421; *see also Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (recognizing that rape shield laws “represent a valid legislative determination that rape victims deserve heightened protection against *surprise, harassment, and unnecessary invasions of privacy*”) (emphasis added).



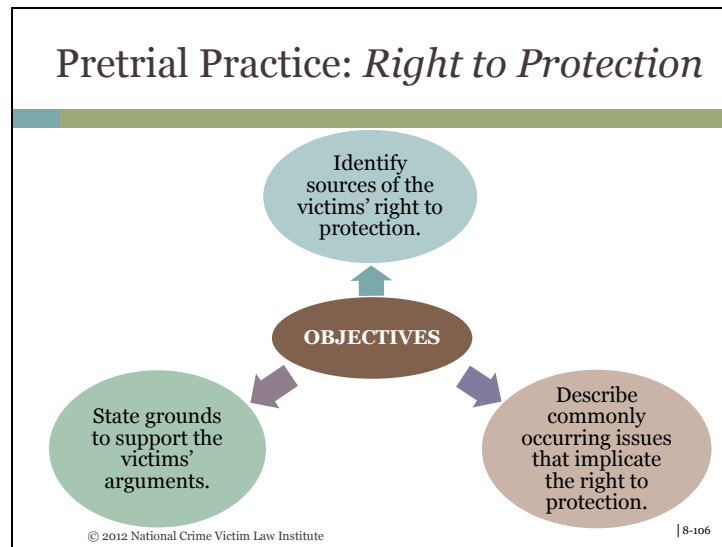
Slide 105

The slide features a central graphic with two horizontal bars. The top bar is olive green with the text "Pretrial Practice" in white. The bottom bar is brown with the text "Right to Protection" in white. The background of the slide is white with faint horizontal lines. At the bottom left, it says "© 2012 National Crime Victim Law Institute" and at the bottom right, it says "8-105".

Pretrial Practice

Right to Protection

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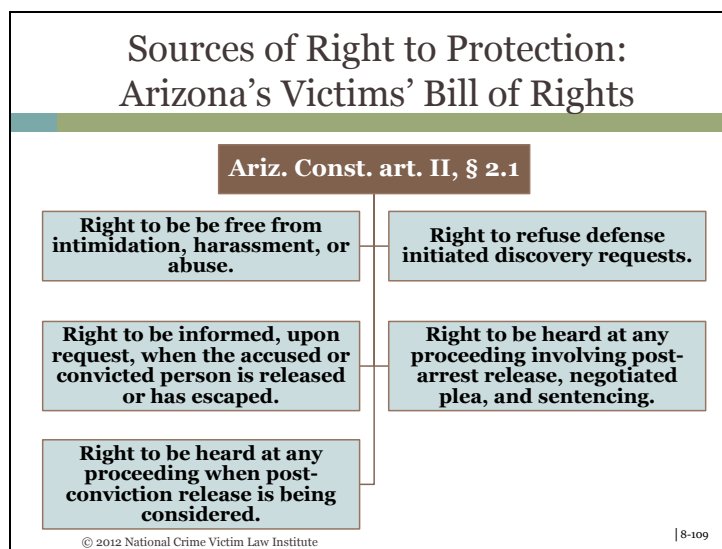


Right to Protection: *An Exercise*

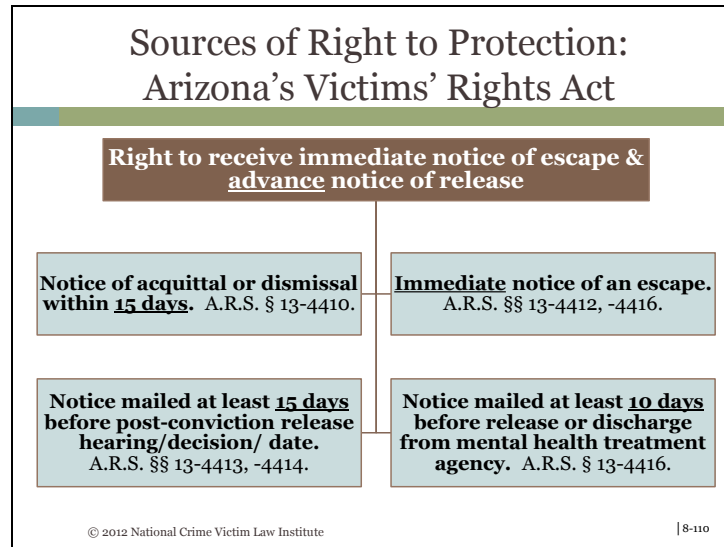
A crime victim's right to protection is
implicated when

Where to Find the Right to Protection

- No explicit reference to “protection” in –
 - The U.S. Constitution.
 - Arizona’s Victims Bill of Rights.
 - Arizona’s Victims’ Rights Act.
- So where?

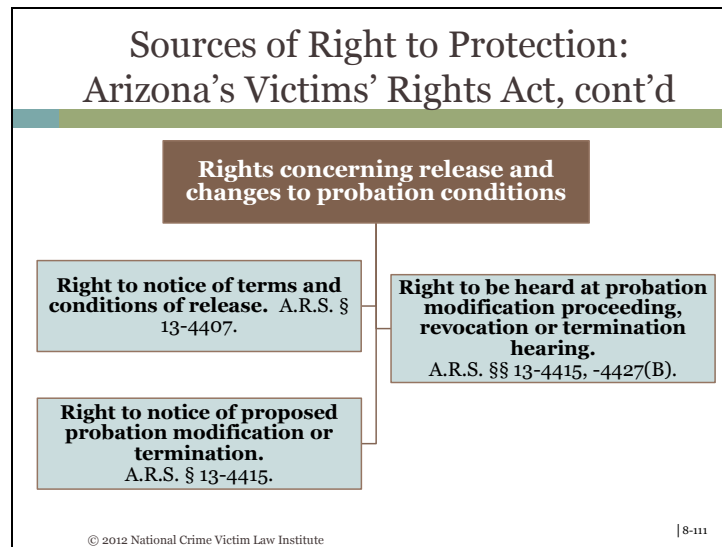


See also State v. Nichols, 233 P.3d at 1151 (recognizing that the Victims' Bill of Rights and the victims' rights statutes "were enacted to provide crime victims with basic rights of respect, *protection*, participation and healing of their ordeals") (citing 1991 Ariz. Sess. Laws, ch. 229, § 2) (emphasis added) (internal quotations omitted).

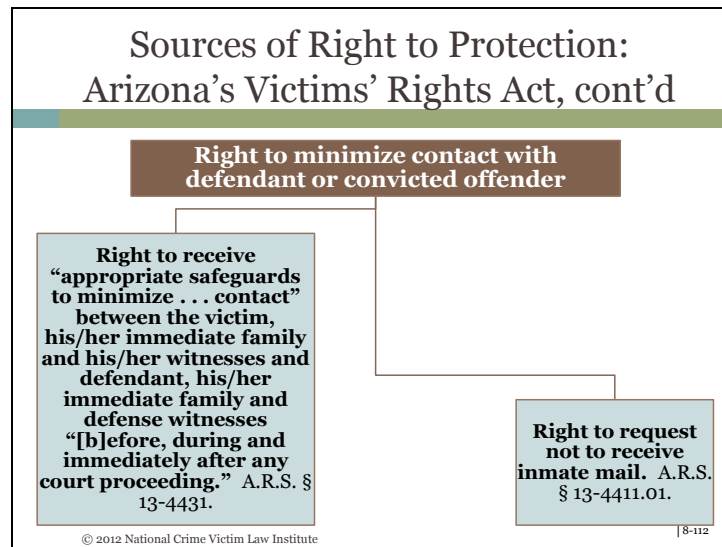


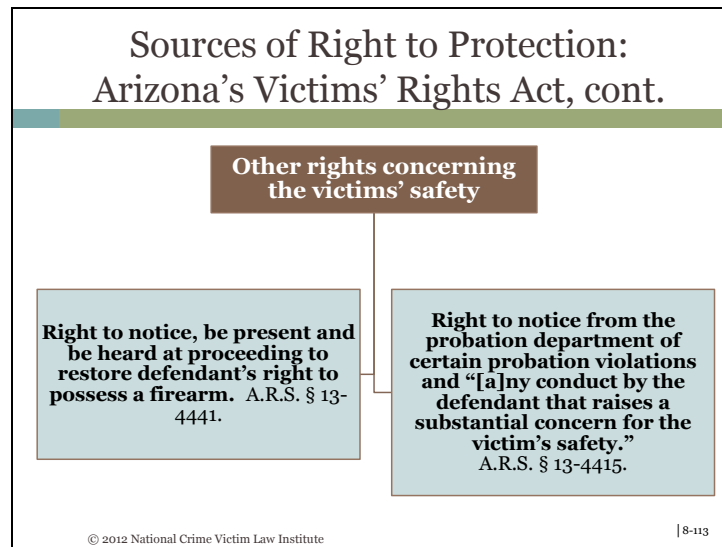
Re notice: *see also State ex rel. Hance v. Ariz. Bd. Of Pardons and Paroles*, 875 P.2d 824 (Ariz. Ct. App. 1993) (setting aside parole board's order releasing prisoner to home arrest and concluding that the victim's failure to request notice of release proceedings did not excuse the state from including her participation in those release proceedings because the state had failed to inform the victim of her right to request notice of and to participate in post-conviction release proceedings).

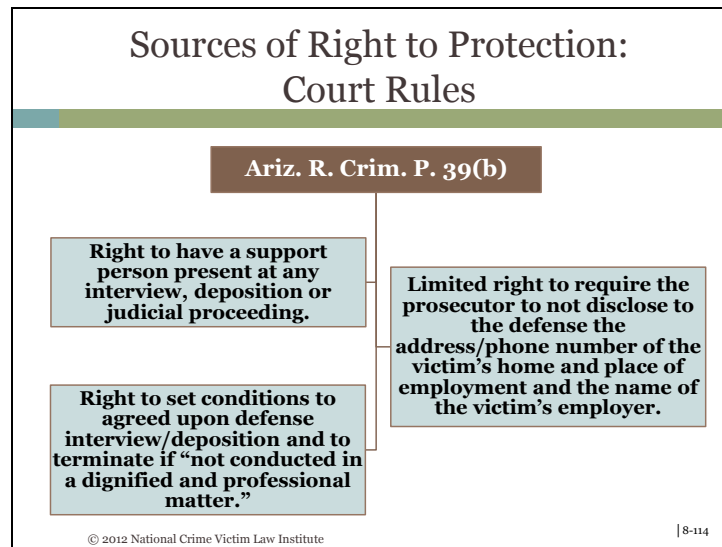
Slide 111



Slide 112







Securing Protective Orders and Pretrial Release Conditions

Practice Pointers:
Protective Orders and Pretrial Release Conditions

- Confer with the prosecutor and defense counsel.
- File motion for conditions of release/protective order.
- Ask the victim what she/he needs.
- Be creative!

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| 8-115

See, e.g., Ariz. Const. art. II, § 22(A) (providing that persons charged with certain crimes are non-bailable, and those crimes include “capital offenses [and] sexual assault” as well as “felony offenses” when certain factors are present), 22(B) (stating that “[t]he purposes of bail and any conditions of release that are set by a judicial officer include: 1. Assuring the appearance of the accused. 2. Protecting against the intimidation of witnesses. 3. Protecting the safety of the victim, any other person or the community”).

Protection Hypo

Dan was arrested for domestic violence offenses. Vicky, his estranged wife and victim, is terrified of Dan and wants him to remain in custody. A hearing is held 24 hours later without Vicky's knowledge or presence. The prosecutor informs the court that the victim is not present and that, to his knowledge, the victim did not request advance notice of the hearing or express a desire to be heard regarding release. The court proceeds and orders Dan released on \$20K bond without any other conditions. A week later, Vicky sees Dan at the grocery store. Panicked, Vicky runs home and calls the prosecutor. The prosecutor tells her he is sorry that Dan was released, but it wouldn't have made a difference if she had been there because he made a strong argument against release and informed the court that Dan was a threat to her safety.

- Did the prosecutor fulfill his duties?
- Which of Vicky's rights may have been violated?
- What can Vicky do?

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See A.R.S. § 13-4406 (providing that either “law enforcement agency shall inform the victim of” the “date, time and place of the initial appearance of the accused” or “the prosecutor’s office shall,” depending on whether the accused appeared in response to a summons, with no other qualifications).

See *also* Ariz. Const. art. II, § 2.1(A)(4) (granting right “[t]o be heard at any proceeding involving a post-arrest release decision” with no qualifications); A.R.S. §§ 13-4421 (granting the “right to be heard at the initial appearance of the person suspected of committing the criminal offense against the victim” with no qualification); 13-4422 (granting the right to be heard at “any proceeding in which the court considers . . . [t]he conditions of [a post-arrest] release” with no qualifications).

Re what Victim can do: See § 13-4436 (effect of failure to comply with rights).



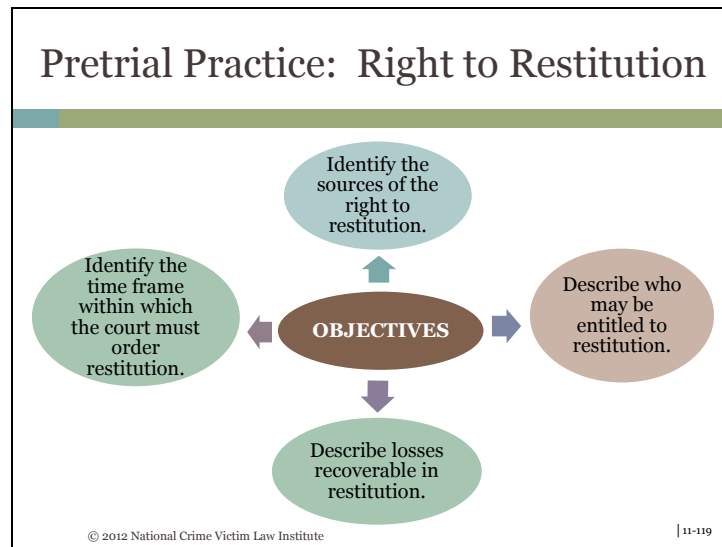
Slide 118

The slide features a central graphic with two horizontal bars. The top bar is olive green with the text "Pretrial Practice" in white. The bottom bar is brown with the text "Right to Restitution" in white. The slide is framed by a thin black border. At the bottom left, it says "© 2012 National Crime Victim Law Institute". At the bottom right, it says "| 11-118".

Restitution \neq compensation. *See generally* National Association of Crime Victim Compensation Boards, *available at* <http://www.nacvcb.org/> (last accessed Mar. 12, 2012).

See NCVLI, *Securing Restitution for Victims of the Viewing, Possession, and Distribution of Child Abuse Images* (2011), a copy of which is expected to be available online at www.ncvli.org in April/May 2012. (Please contact ncvli@lclark.edu if you need a copy of this bulletin before it is available online.)

Slide 119



Purposes of Restitution

- **Two purposes —**
 - Reparation: To make the victim whole.
 - Rehabilitation: To “force[] an offender ‘to recognize the specific consequences of his [or her] criminal activity and accept responsibility for those consequences.’”
 - *State v. Iniguez*, 821 P.2d 194, 197 (Ariz. Ct. App. 1991).
- **Not punishment.**
 - See *State v. Zaputil*, 207 P.3d 678, 681 (Ariz. Ct. App. 2008); see also *In re Estate of Vigliotto*, 870 P.2d 1163, 1165 (Ariz. Ct. App. 1993) (concluding that unlike criminal penalties, a restitution order survives defendant’s death because it is not punishment).

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| 11-120

Re “not punishment”: *But cf.* A.R.S. § 13–603(C) (providing that court-ordered restitution is criminal penalty for purposes of a federal bankruptcy).

Sources of the Right to Restitution

- A victim has the right “[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.”
Ariz. Const. art. II, § 2.1(A)(8)
- “If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss as determined by the court.”
A.R.S. § 13-603(C)

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See also State v. Lindsley, 953 P.2d 1248, 1250 (Ariz. Ct. App.1997) (“Restitution of full economic loss to a victim of crime is mandatory under our sentencing statutes.”).

The Legal “Victim” *Revisited*

The “victim,” as defined by law, is entitled to restitution.

- Under the victims’ rights provisions, the term “victim” means “a person against whom the criminal offense has been committed.”
 - Ariz. Const. art. II, § 2.1(C); A.R.S. § 13-4401(19).
- No separate statutory definition of victim in the sentencing statutes. Under the mandatory restitution provision, restitution shall be made “to the person who is the victim *of the crime*.”
 - A.R.S. § 13-603(C) (emphasis added).

Restitution Hypo #1

Dan, an employee of the Department of Corrections (DOC), helped an inmate escape. The inmate was subsequently found in Oregon. Pursuant to a guilty plea, Dan was convicted of attempted escape under an accomplice liability theory. The DOC sought over \$50,000 in restitution for the travel expenses, apprehension costs, and costs incurred in the search and capture of the escaped inmate. Dan objected to the restitution request, arguing, *inter alia*, that the DOC is not a victim entitled to restitution because the escape — essentially a criminal exit from a structure — is a “victimless” crime.

□ Assume that a “person” includes entities under the relevant statutes: Is the DOC a “victim” entitled to restitution?

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| 11-123

See *State v. Williams*, 90 P.3d 785, 789 (Ariz. Ct. App. 2004) (concluding that the Arizona Department of Corrections (ADOC) was a “victim” entitled to restitution to recover certain expenses even if the ADOC may not be “a victim under a literal reading of the victims’ rights provisions”).

The Legal “Victim” *Revisited*, cont.

In the context of restitution, “victim” may be broadly construed.

- ❑ *See, e.g., State v. Williams*, 90 P.3d 785, 789 (Ariz. Ct. App. 2004) (concluding that “even a so-called ‘victimless’ crime can result in a victim entitled to a restitution award”).
- ❑ *See also* A.R.S. § 13-804(A) (“Upon a defendant’s conviction for an offense causing economic loss to *any person*, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid . . . to *any person* who suffered an economic loss caused by the defendant’s conduct.”) (emphasis added).
- ❑ But not all who suffer economic loss as a result of a crime are “victims” entitled to restitution.

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| 11-124

See also Rebecca S.T. Khalil, “Protecting the Victims of ‘Victimless’ Crimes,” NCVLI Newsletter of Crime Victim Law (14th ed. 2011).

Re last bullet: *See, e.g., State v. French*, 801 P.2d 482 (Ariz. Ct. App. 1990) (concluding that the motel owner was not entitled to restitution – cleaning and repair costs incurred as a result of a sexual assault on the premises – on the ground that the motel owner is not the victim of the crime).

Recoverable Loss — *Statutory Definition*

- Mandatory restitution for the victim “in the full amount of the economic loss as determined by the court.”

A.R.S. § 13-603(C)
- “Economic loss” is defined to mean “any loss incurred by a person as a result of the commission of an offense.” It includes “lost interest, lost earnings and other losses that would not have been incurred but for the offense” but excludes “losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.”

A.R.S. § 13-105(16)
- Courts must “consider all losses caused by the criminal offense or offenses for which the defendant has been convicted.”

A.R.S. § 13-804(B)

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11-125

See also A.R.S. § 13-804(C) (providing that “[t]he court shall not consider the economic circumstances of the defendant in determining the amount of restitution”).

Restitution Hypo #2

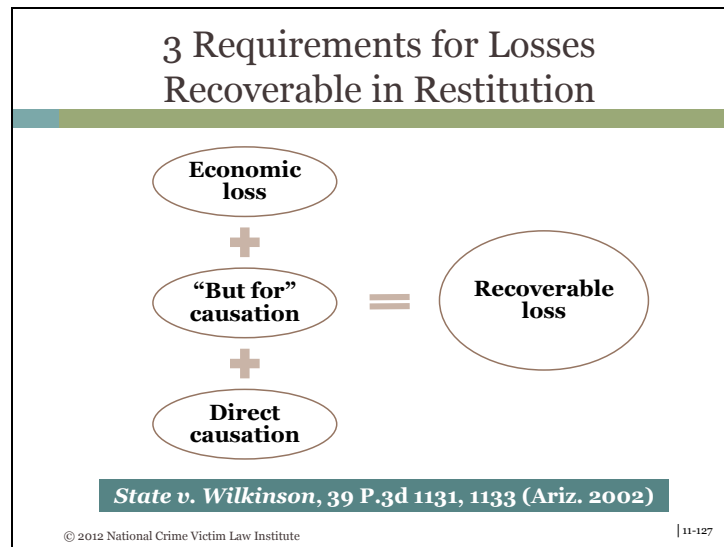
(Back to the hypo re the inmate escape.) David, the inmate who actually escaped from the Arizona prison, committed a number of crimes while he was hiding from authorities, including burglarizing two homes in one subdivision and stealing a van that was parked in the driveway of another home in the same subdivision. The van was later found damaged and abandoned in a ditch. After he was apprehended, David was charged with the theft of van, which was owned by the Vandervale family. Thereafter, the family installed new lighting on the property and an alarm system in the house to deter future crimes. The family seeks your help to determine whether they could recoup their expenses if David were convicted of the theft.

- Can the family recover the cost of the lighting and alarm system?

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See A.R.S. § 13-804(B) (“In ordering restitution for economic loss pursuant to § 13-603, subsection C or subsection A of this section, the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted.”).

Slide 127



State v. Williams, 90 P.3d at 790 (describing Arizona's standard for restitution as a "modified but for standard," where "but for" cause is a necessary but not a sufficient condition).

Examples of Recoverable Losses

Broad range of losses may be sought in restitution.

- ❑ Lost interest
- ❑ Lost income
- ❑ Value of property
- ❑ Cost of necessary medical, psychological and other related professional services
- ❑ Cost of necessary physical and occupational therapy and rehabilitation
- ❑ Cost of necessary funeral and related expenses
- ❑ Cost for necessary travel expenses
- ❑ Cost for necessary child care expenses

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See, e.g., State v. Madrid, 85 P.3d 1054 (Ariz. Ct. App. 2004) (allowing recovery of reasonable travel-related expenses incurred by the murder victim's children's attendance at trial, including the cost for lodging, meal, and incidental expenses); *State v. Lewis*, 214 P.3d 409 (Ariz. Ct. App. 2009) (allowing recovery of medical expenses); *In re Erika V.*, 983 P.2d 768 (Ariz. Ct. App. 1999) (allowing recovery of the child-victim's parents' lost wages incurred while they accompanied the child-victim to medical appointments and juvenile court hearings).

See also United States v. Serawop, 505 F.3d 1112 (10th Cir. 2007) (future lost income); *People v. Quevedo*, No. F049371, 2007 WL 520333 (Cal. Ct. App. Feb. 21, 2005) (affirming restitution order for installation of a block fence around the home where the murder victim's children live); *Commonwealth v. Casanova*, 843 N.E.2d 699, 704 (Mass. App. Ct. 2006) (noting in dicta that lost tuition could be compensable in a restitution order, provided proof of casual connection is demonstrated); *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005) (affirming restitution order for the victim's moving expenses, the charges incurred for the victim's early termination of his lease, and the victim's lost wages, where there was a specific outstanding threat against the victim).

For additional examples, see NCVLI, *Fundamentals of Victims' Rights: A Victim's Right to Restitution* (2010), a copy of which is expected to be available online at www.ncvli.org in April/May 2012. (Please contact ncvli@lclark.edu if you need a copy of this bulletin before it is available online.)

Must be Supported by Evidence

- ❑ Burden of proof:
 - The amount of loss sustained by the victim must be established by a preponderance of evidence.
- ❑ Types of proof:
 - Presentence report/victim impact statement.
 - Documentation (i.e., receipts).
 - Affidavits.
 - Testimony at hearing.

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Re burden of proof: *See State v. Lewis*, 214 P.3d at 414 (“The state has the burden of proving a restitution claim by a preponderance of the evidence.”); *In re Stephanie B.*, 65 P.3d 114, 118 (Ariz. Ct. App. 2003) (“The burden of proof applicable to restitution is proof by a preponderance of the evidence.”).

Re type of proof: *See, e.g., State v. Dixon*, 162 P.3d 657, 660 (Ariz. Ct. App. 2007) (concluding that the trial court, in determining restitution, may rely on information in the presentence report even where that information is uncorroborated by other evidence and observing that trial courts may also rely on victim impact statements); A.R.S. §§ 13-804(H) (providing the court may conduct a hearing and the state “may present evidence or information relevant to the issue of restitution.”), 13-804(I) (“The restitution order . . . may be supported by evidence or information introduced or submitted to the court before sentencing or any evidence previously heard by the judge during the proceedings.”).

Re calculation of personal property (not on slide): *See, e.g., State v. Ellis*, 838 P.2d 1310, 1311 (Ariz. Ct. App. 1992) (concluding that “in assessing restitution for a loss of personal property, the measure of the victim's full economic loss is the fair market value of the property at the time of the loss” but also noting that “[t]he judge has discretion to use other measures of economic loss when fair market value will not make the victim whole”).

Pretrial Practice: Timing

Practice Pointer:
When to Start Thinking About Restitution

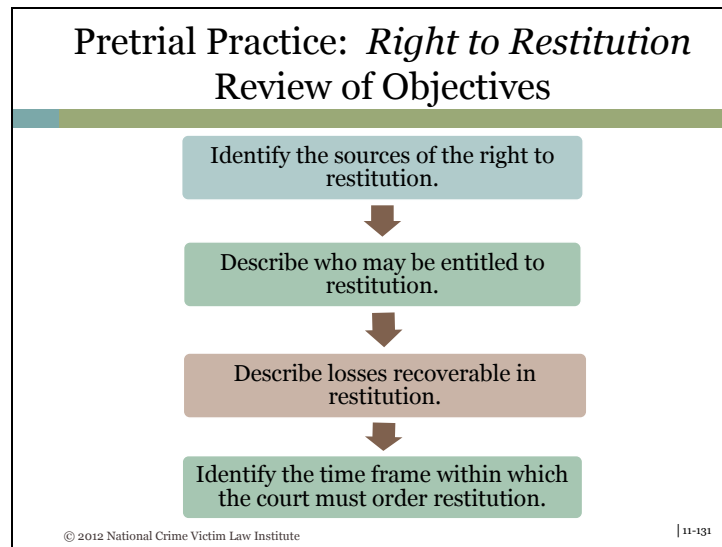
- Talk to clients early!
- Start identifying possibly recoverable expenses.
 - Remember to think broadly.
- Document expenses.
- Watch out for plea agreements.
- File within jurisdictional window.

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| 11-130

See A.R.S. § 13-4402.01(A) (providing that if a count is being dismissed as a result of a plea agreement, the victims of the offenses described in the dismissed counts, on request, may exercise all applicable rights of a crime victim throughout the criminal justice process “as though the count or counts involving the person had not been dismissed”).

Filing within jurisdictional window: *See, e.g., State v. Holguin*, 870 P.2d 407, 409-10 (Ariz. Ct. App. 1993) (observing that the Arizona restitution statute is silent as to when a restitution award must be determined, noting that restitution is “generally ordered at the time of sentencing,” but stating in dicta that a prison sentence not accompanied by a restitution order may be the subject of a motion to correct an illegal sentence).



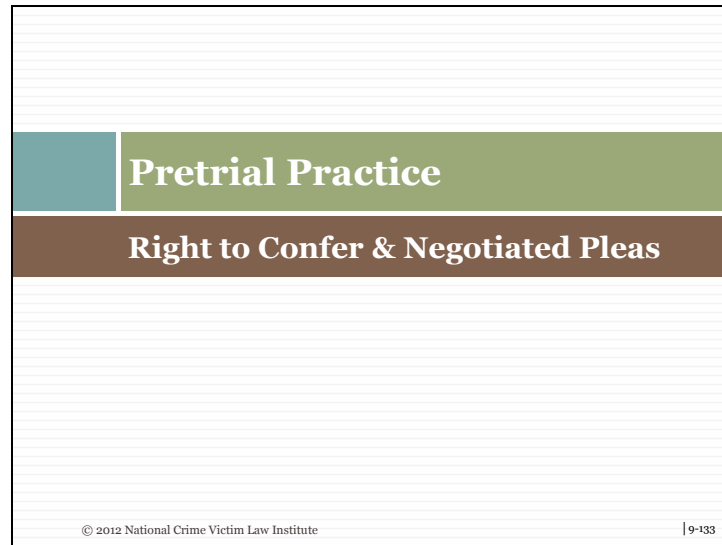
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BREAK
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Slide 133



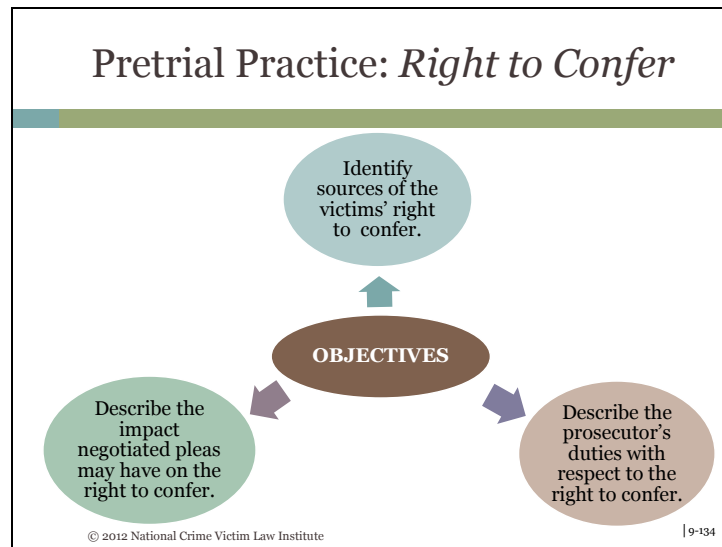
The slide features a title bar with a teal square on the left and a green bar on the right containing the text "Pretrial Practice". Below this is a brown bar with the text "Right to Confer & Negotiated Pleas". The main body of the slide is white with horizontal lines. At the bottom, there is a copyright notice on the left and a slide number on the right.

Pretrial Practice

Right to Confer & Negotiated Pleas

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Slide 134



Sources of Right to Confer

- A victim has “a right . . . [t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case.”
Ariz. Const. art. II, § 2.1(6)
- “On request of the victim, the prosecuting attorney shall confer with the victim about the disposition of a criminal offense, including the victim's views about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations and pretrial diversion programs.”
A.R.S. § 13-4419(A)
- “A victim shall have and be entitled to assert . . . [u]pon request, the right to confer with the prosecution . . . in connection with any decision involving the preconviction release of the defendant [and other events included in A.R.S. § 13-4419].”
Ariz. Crim. P. R. 39(b)(7)

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See also A.R.S. § 13-4423(B) (providing that “[t]he court shall not accept a plea agreement unless . . . [t]he prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer with the victim pursuant to § 13-4419”); *cf.* A.R.S. § 13-4432 (requiring the prosecutor to inform the victim of a decision to not move to “revoke the bond or personal recognizance of the defendant” and inform the victim that “the victim may petition the court to revoke the bond or personal recognizance of the defendant”), 13-4433(B) (requiring defendant to “initiate contact with the victim through the prosecutor’s office” and requiring the “[t]he prosecutor’s office” to inform the victim and advise the victim of the right to refuse an interview).

See also State v. O'Neil, 836 P.2d at 395 (concluding that the trial court’s order requiring the victims’ conversations with the prosecutor be recorded and a transcript made available to the defense also “substantially” “infringes on the victims’ rights to confer with the prosecutor” because the constitutional provisions that grant the right to be treated with “fairness, respect, and dignity, and to be free from intimidation” and the right to confer with the prosecutor — read together — lead one to “infer an intent that such conferences be conducted in an atmosphere that is unconstrained, certainly not intimidating, and one that encourages a victim to speak freely”).

Right to Confer & Negotiated Pleas

Given the high percentage of criminal cases that result in negotiated pleas, the right to confer can be one of the most meaningful rights.

- Plea discussions or the creation of a plea deal may implicate which rights?
 - To confer
 - To be present and heard
 - To be treated with fairness, dignity, and respect
 - To protection
 - To notice
 - To privacy
 - To restitution
- Protect the victims' rights in plea agreements.

But see A.R.S. § 13-4419(C) (making clear that the right to confer with the prosecutor “does not include the authority to direct the prosecution of the case”).

Right to Confer Hypo #1

A SUV driven by Denise hit and killed one pedestrian and two other drivers; and Denise was charged with three counts of homicide. Veronica, the mother of one victim, and Vince, the father of another victim, properly requested notice of all proceedings. Shortly before trial, Veronica told the prosecutor, "I'm mentally and physically exhausted. I don't need to participate anymore; I am okay with having a jury decide the outcome." Without conferring with Veronica, the prosecutor engaged in plea discussions with Denise. Days later, Denise pled guilty to one count of negligent homicide relating to the death of Veronica's son in exchange for a lenient sentencing recommendation. All other charges were dropped, the plea was accepted by the court, and Denise was sentenced. Veronica was furious when she learned of the plea.

- Did Veronica waive her rights?
- What remedy does Veronica have?

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Compare Ariz. Const. art. II, § 2.1(A)(6) (granting the right "[t]o confer with the prosecution" without requiring the victim to initiate a request to confer) *with* A.R.S. § 13-4419(A) ("*On request for the victim*, the prosecuting attorney shall confer with the victim . . .") (emphasis added). *See State v. Roscoe*, 912 P.2d at 1300-01 (concluding that statutory provisions and rules that restrict crime victims' constitutional rights are unconstitutional); *see also* A.R.S. 13-4423(B)(1) (requiring the prosecutor to "advise[] the court that before requesting the negotiated plea *reasonable efforts were made to confer with the victim*") (emphasis added).

Remedy: *See* A.R.S. § 13-4436.

Right to Confer & Negotiated Pleas: Duties of the Court and the Prosecutor

“The court shall not accept a plea agreement unless”:

- ❑ The prosecutor advises the court that reasonable efforts have been made to confer with the victim;
- ❑ Reasonable efforts have been made to give the victim notice of —
 - the plea proceeding; and
 - the rights to be present and to be heard; and
- ❑ The prosecutor —
 - Advises the court that, to the best of his/her knowledge, all notice requirements have been satisfied; and
 - Informs the court of the victim's position regarding the negotiated plea, if known.

A.R.S. § 13-4423(B)

Right to Confer Hypo #2

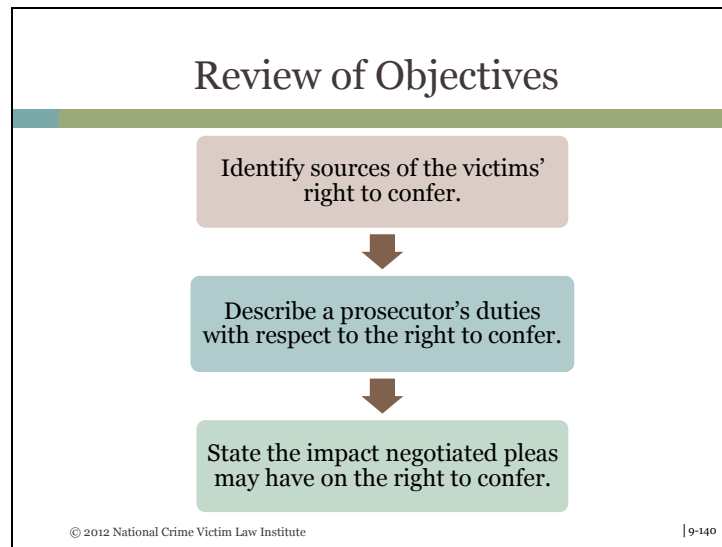
(Same hypo regarding Denise, the SUV driver.) Now assume the prosecutor did try to get in touch with Veronica about the plea. The prosecutor left a voicemail message for both Veronica and Vince the Friday before the Monday afternoon hearing. The voicemail mentioned that a plea deal has been reached and gave the date/time of the upcoming hearing. Vince attended the hearing. Because Veronica did not return the call and did not show up at the hearing, the prosecutor assumed Veronica really wanted nothing more to do with the case. At the hearing, the prosecutor informed the court that she had made reasonable efforts to comply with her duties and that she believes Veronica has no opinion about the plea deal. Denise pled guilty to one count of negligent homicide relating to the death of Veronica's son and all other charges were dropped.

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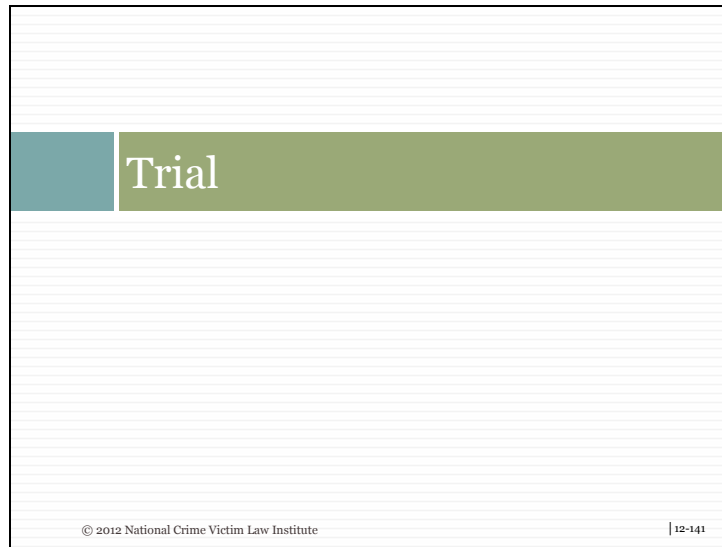
- Did the prosecutor satisfy her duties?
- Is Vince still a "victim" in the case who has rights such as the right to be heard at sentencing?

| 9-139

Re Vince: *See* A.R.S. § 13-4402.01(A).



Slide 141

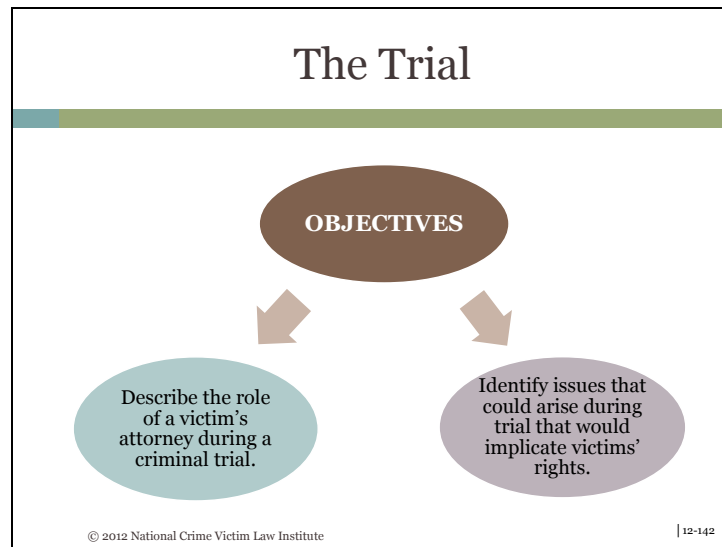


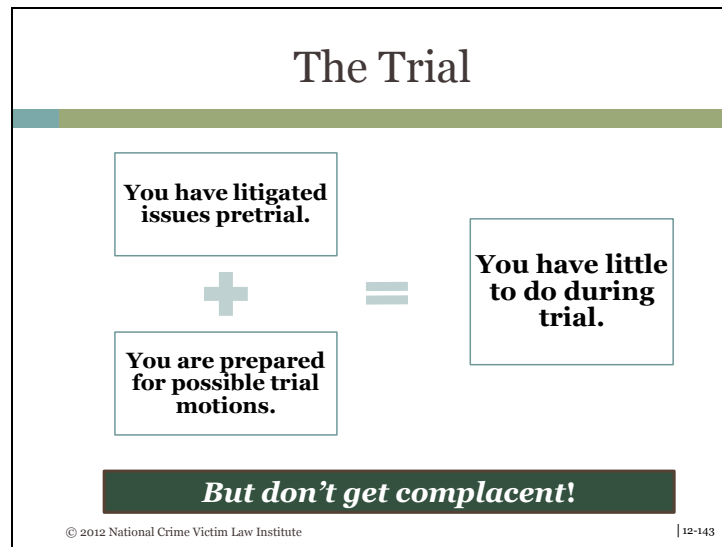
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Trial

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Slide 142





Communication with Persons Represented by Counsel

Arizona E.R. 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Ethics Hypo # 5

Vance, the victim of an assault, has been subpoenaed to testify at defendant's trial. Vance is represented by an attorney who filed a notice of appearance that was served on both the prosecutor and the defendant. Both Vance and his attorney attend the first morning of the trial. When court recesses for a lunch break, Vance and his attorney agree to meet after lunch to prepare for his testimony, which is scheduled for that afternoon. Shortly after his attorney left for lunch, defense counsel and the prosecutor approach Vance together and ask if he would be able to testify the next day instead of that afternoon because another witness who is scheduled to testify the next day has learned of a family emergency and needs to catch a flight that evening. Vance's schedule is flexible, and he says "no problem."

- Any ethical violation here?
- Does it matter which attorney approached Vance?
- What steps, if any, could Vance's attorney take?

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See Ariz. Rules of Prof'l Conduct R. 4.2 (referring to "a party"), 4.2 cmt. 3 ("This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.").

Testimonial Accommodations

- The court, on motion of the prosecution, may order that a child-victim (under 15) or a victim who has a “developmental disability” –
 - Be allowed to use closed circuit television to facilitate the minor-victim’s testimony.
 - Be allowed to have his/her testimony taken and recorded outside the courtroom for showing in the courtroom.

A.R.S. §§ 13-4251 to -4253.

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See also Maryland v. Craig, 497 U.S. 836 (1990) (concluding that the child-victims’ use of live one-way CCTV to provide testimony at trial did not violate the Confrontation Clause and setting forth the constitutional standard for allowing trial testimony outside the physical presence of the defendant).

See also NCVLI, *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology* (2011), a copy of which is expected to be available online at www.ncvli.org in April/May 2012. (Please contact ncvli@lclark.edu if you need a copy of this bulletin before it is available online.)

Testimonial Accommodations Hypo

Dan was arrested for attempting to murder Vicky, his estranged wife, and Victor, their son. Both victims suffered extensive injuries as a result of Dan's crime. The prosecutor plans to file a motion to allow Vicky and Victor to testify at trial via two-way closed circuit television. An expert will testify that both victims are terrified of Dan, and that testifying in Dan's presence would traumatize the son and could exacerbate Vicky's pre-existing heart condition. The expert will also testify that the son would likely be unable to communicate effectively if the testimony takes place in the courtroom with Dan. In the alternative, the prosecutor plans to request that Vicky's and the son's therapists sit with them – physically positioned between the witness stand and the side of the courtroom in which Dan is seated – during any courtroom testimony, and that the son be permitted to bring a therapy dog to the witness stand with him during testimony.

- Which of the victims' rights are implicated here?
- What arguments might Dan make?

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See also *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009) (upholding the use of live two-way video testimony for an ill adult victim and noting that “[n]owhere does *Craig* suggest that it is limited to child witnesses or that a ‘public policy’ basis for finding necessity must be codified”); *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007) (observing that “*Craig*’s references to ‘an important public policy’ and ‘an important state interest’ are reasonably read to suggest a general rule not limited to protecting child-victims of sexual offenses from trauma” for “it is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness’s inability to testify invokes the state’s interest in protecting the witness . . . from physical danger or suffering”). But see *State ex rel. Romley v. Superior Court In & For County of Maricopa*, 909 P.2d 418 (Ariz. Ct. App. 1995) (applying A.R.S. § 13-4253 before the 1996 amendment and making no reference to either *Maryland v. Craig* or crime victims’ rights) (holding that the statute conditionally allowing minors to testify by closed circuit television, with “minor” defined as person “under 15 years of age,” is limited to those children who are chronologically under age of 15 and concluding that the trial court lacked authority to extend the protection to persons outside the scope of the statutory definition).

When to File a Motion for Testimonial Accommodations

- Pretrial
 - Ideal, but not always possible.
- Mid-trial
 - Remedial.
 - No motion made pretrial (or pretrial motion denied) and the victim develops difficulty upon taking the stand or while testifying.

Other Potential Issues

- Admissibility of certain out-of-court “testimonial” evidence under *Crawford* line of cases.
 - Victims who cannot or will not testify.
 - Forfeiture by wrongdoing doctrine.
- What else might come up?



Slide 151

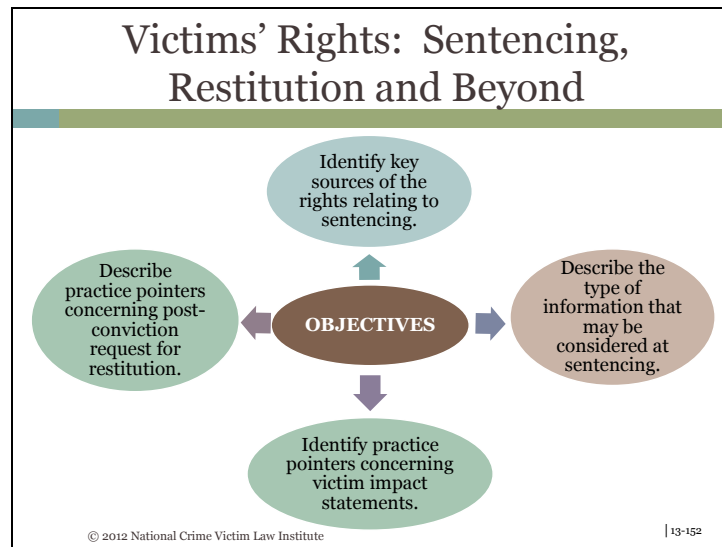


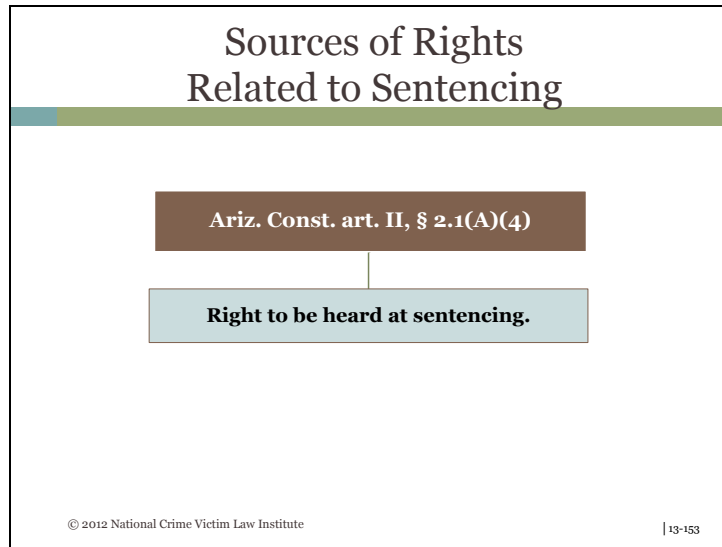
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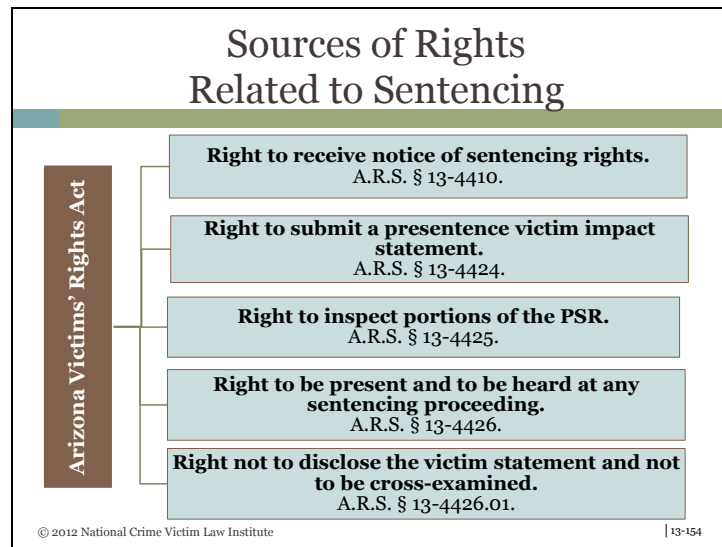
Sentencing, Restitution & Beyond

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Slide 152







See also A.R.S. § 13-701(G) (addressing sentencing in non-capital felony cases) (“The court in imposing a sentence shall consider the evidence and opinions presented by the victim or the victim's immediate family at any aggravation or mitigation proceeding or in the presentence report.”); § 13-752 (addressing sentencing in capital cases) (“At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.”).

Re § 13-4426: Note that there are two versions of § 13-4436 — the version we’re discussing was “conditionally repealed” by the legislature in 2003 and replaced by the other version; “however, the repeal will not become effective ‘unless on or before June 30, 2013 the Arizona Supreme Court or the [S]upreme [C]ourt of the United States rules that it is constitutional for a crime victim in a capital case to make a sentencing recommendation.’” *State ex rel. Thomas v. Foreman*, 118 P.3d 1117, 1119 n.4 (Ariz. Ct. App. 2005) (quoting 2003 Ariz. Sess. Laws, ch. 255, § 8).

Re right to not disclose statement and not be cross-examined: A.R.S. § 13-4426.01 (applying to “any proceeding in which the victim has the right to be heard pursuant to article II, § 2.1, Constitution of Arizona, or this chapter”).

Victim Impact Statement, *an Example*

My name is Susan Antrobus[.] I am the mother of Vanessa Quinn, who was murdered at Trolley Square Mall February 12, 2007. I am writing this letter to you in hopes that you can understand why I feel the need to give an impact statement on behalf of my daughter Vanessa. . . .

How has this affected my family[?] [T]o be honest I don't know yet, I can only tell you how it has affected us to this point in time. My Mom gave up her fight for life, 6 weeks after Vanessa was taken from us, and my youngest daughter Susanna had a miscarriage the same night my Mom passed away. My husband and I cry every day, we struggle to get through each and every day, you wake up with it, you carry it through your day and it goes to bed with you every night. All you can do is hope tomorrow will be a little easier [than] today. February 12 has never ended for us; it feels like one long continuous day that will never end. . . .

It cost us \$7,000 dollars to lay our daughter Vanessa to rest. . . .

I think I deserve to give an impact statement, since Vanessa is not here to speak for herself, I don't think 10 minutes is asking for much considering what we've lost for a life time. . . .

From Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611, 618-19 (2009)

Information/Opinions that May be Considered

- ❑ Non-capital cases —
 - Statements regarding the victim's personal characteristics;
 - Statements regarding the impact of the crime on the victims/victims' family/the community;
 - Statements regarding the crime, the defendant and the appropriate sentence.
- ❑ Capital cases —
 - Only those in the 1st two categories above. *See Lynn v. Reinstein*, 68 P.3d 412 (Ariz. 2003); *State v. Glassel*, 116 P.3d 1193 (Ariz. 2005).

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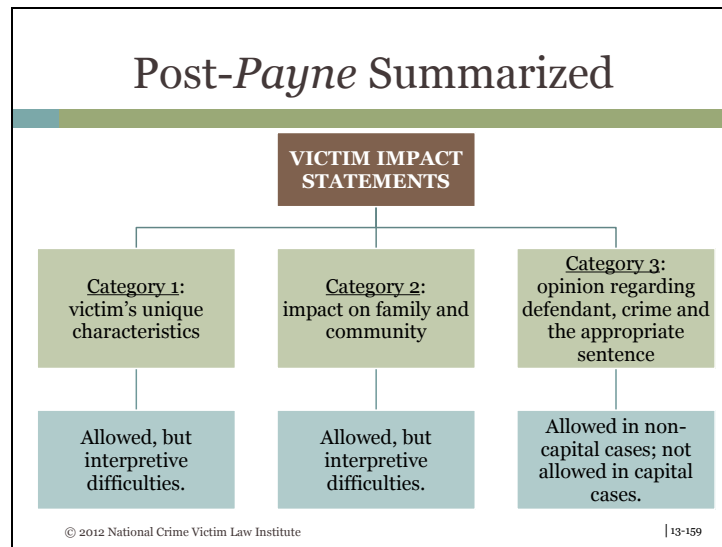
See A.R.S. § 13-4424 (providing that “[t]he probation officer shall consider the economic, physical and psychological impact that the criminal offense has had on the victim and the victim’s immediate family”) (emphasis added); A.R.S. § 13-4426(A) (“The victim may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any aggravation, mitigation, presentencing or sentencing proceeding.”).

Relevant Federal Precedent on Victim Impact & Capital Sentencing

- *Booth v. Maryland*, 482 U.S. 496 (1987).
- *South Carolina v. Gathers*, 490 U.S. 805 (1989).
- *Payne v. Tennessee*, 501 U.S. 808 (1991).

Post-Payne Arizona Law

- *Lynn v. Reinstein*, 68 P.3d 412 (Ariz. 2003).
- *State v. Glassel*, 116 P.3d 1193 (Ariz. 2005).



Ethics Hypo # 6: *Conflicts, Revisited*

A defendant is charged with capital murder. The parents of the victim have retained an attorney to represent them. Until the sentencing phase of the trial, the parents have agreed on all issues, including that the prosecutor should seek the death penalty. At sentencing, the parents are given the opportunity to testify on the stand about the impact the crime has had on their lives (and their attorney has cautioned that they cannot comment about the defendant or whether the death penalty should be imposed). The father decides that he has changed his mind and no longer believes defendant should be sentenced to death. This upsets the mother, as she strongly believes defendant should be sentenced to death. Both parents are concerned because the tone of their testimony will diverge significantly. The attorney has a call with the prosecutor next week, and the prosecutor needs to know if either of the parents are willing to testify.

- Is there a conflict here?
- Does the fact that the parents are testifying as opposed to exercising their right to be heard make a difference in your analysis?
- What should the attorney do?

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| 13-160

Notice problem with this hypo? See A.R.S. § 13-4426.01 (providing that “the victim’s right to be heard is exercised not as a witness . . .”). In Arizona, the parents would and should not be required to “testify on the stand.”

See Ariz. Rules of Prof’l Conduct R. 1.7.

Presentence Investigation Reports

**Practice Pointers:
Victim Impact Statement**

- Get to know the PSR writer
- Review the PSR and be prepare to raise objections
- Form — in person or in writing
- Content — capital v. non-capital
- File a separate sentencing memorandum.

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| 13-161

See A.R.S. § 13-4410(B) (providing victim with notice of various rights, including the right to make an impact statement and right to view portions of the PSR), § 12-253 (providing the probation department has responsibility to initiate contact with the victim concerning the victim's economic, physical, psychological or emotional harm for inclusion in the PSR)

Re form: *See also State v. Ellison*, 140 P.3d 899, 923-24 (Ariz. 2006) (affirming admission of in-life photo of the victims during the victim impact statement).

Post-Conviction: Restitution

**Practice Pointers:
Restitution**

- Think big!
- Collect information/documentation early.
- Include request for restitution in the written or oral victim impact statement to probation department for inclusion in the PSR. *See* A.R.S. § 13-4410.
- File a separate request for restitution — a restitution memorandum.
- If the requested amounts not included in order, seek reexamination under A.R.S. § 13-4436.
- Timing of restitution order.

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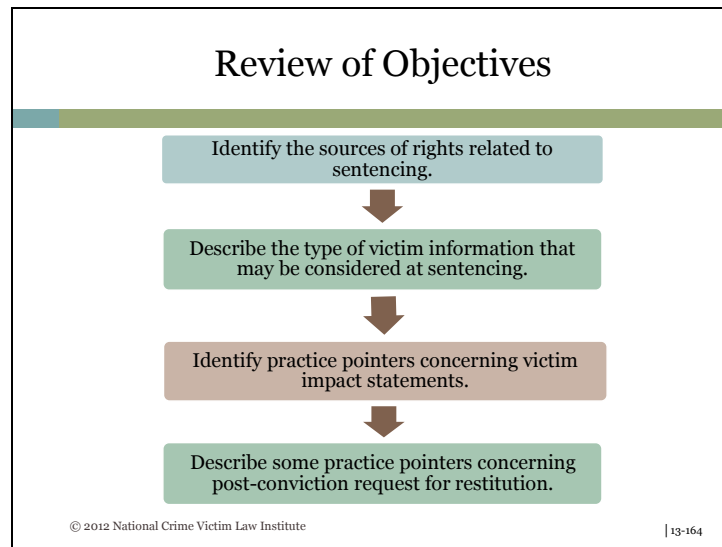
| 13-162

See also A.R.S. §§ 13-306(C) (providing that the victim is entitled to restitution “in the full amount of economic loss”), 13-4426(A) (providing right to present “evidence, information and opinions that concern the criminal offense, the defendant, the sentence *or the need for restitution* at any aggravation, mitigation, presentencing or sentencing proceeding”) (emphasis added).

Re timing: *See, e.g., State v. Holguin*, 870 P.2d at 409-10 (noting that restitution is “generally ordered at the time of sentencing,” but stating in dicta that a prison sentence not accompanied by a restitution order may be the subject of a motion to correct an illegal sentence); *State v. Zaputil*, 207 P.3d 678, 679-80 (Ariz. Ct. App. 2008) (affirming the trial court’s order of restitution made after defendant’s probation had been completed and his conviction had been set aside pursuant to A.R.S. § 13-907 where the victim had made a timely claim for restitution, defendant had agreed to pay restitution as part of his plea agreement, and the trial court expressly retained jurisdiction over the claim each time it reset the hearing on restitution).

Other Potential Issues

- ❑ Post-conviction release/parole.
- ❑ Post-conviction notice to the victim.
- ❑ Appeals
- ❑ Others?



Slide 165



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| 15-166

Slide 167

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