



**Legal Assistance
for Crime Victims**
An OVC Capacity Building Initiative

Military Justice 101 and Overview of Victims' Rights in the Military

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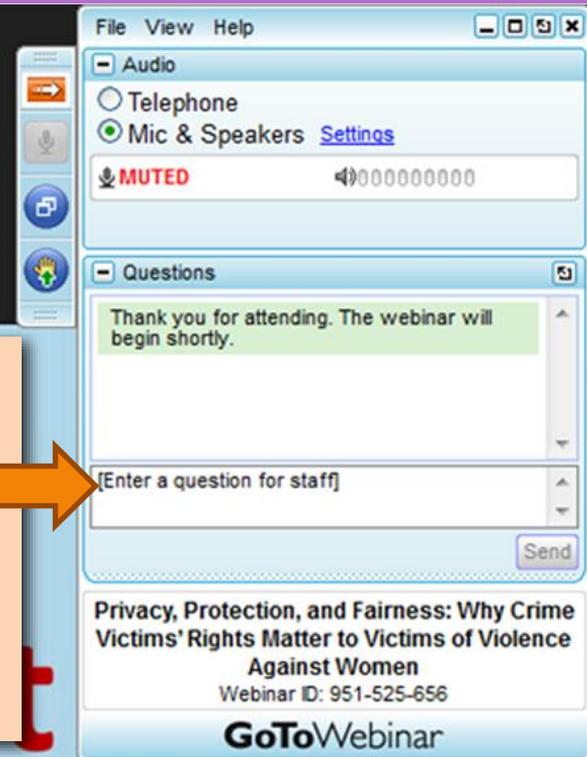


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Goals for the Session

- 1. Provide an overview of the military justice system**
- 2. Explain the scope and purpose of victim services in the military, including the Air Force's Special Victims' Counsel program**
- 3. Identify what victims' rights attach in the military justice system**
- 4. Identify open questions of law regarding the scope of victims' rights in the military**

Headquarters U.S. Air Force

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Military Justice 101 and Overview of Victims' Rights in the Military



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Why a Separate Justice System for Military Personnel?

**Are they not subject to the same laws and
protections as civilians?**

The answer is “YES”...

...and “NO”



Military vs. Civilian Communities

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- **In most civilian communities, individuals report crimes to their local police departments, which investigate and make decisions about charges**
- **In the military, Commanders are responsible for maintaining law and order in the communities over which they have authority, and for maintaining the discipline of the fighting force**



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The Military Justice Process

- **The civilian justice system varies from state to state**
- **The military justice process is the same for all military organizations**
- **Some issues are specific to victims and the military justice system**



Modern Military Justice System

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- **US Constitution**
 - Congress has power to make rules for governance of land and naval forces
 - President is Commander in Chief
- **The Uniform Code of Military Justice (UCMJ)**
 - Federal statute passed by Congress in 1950 and effective in 1951
 - Basic structure remains in place – several amendments over the years
 - **Goals of UCMJ:**
 - Good order and discipline
 - Rehabilitation
 - Deterrence
 - Accountability

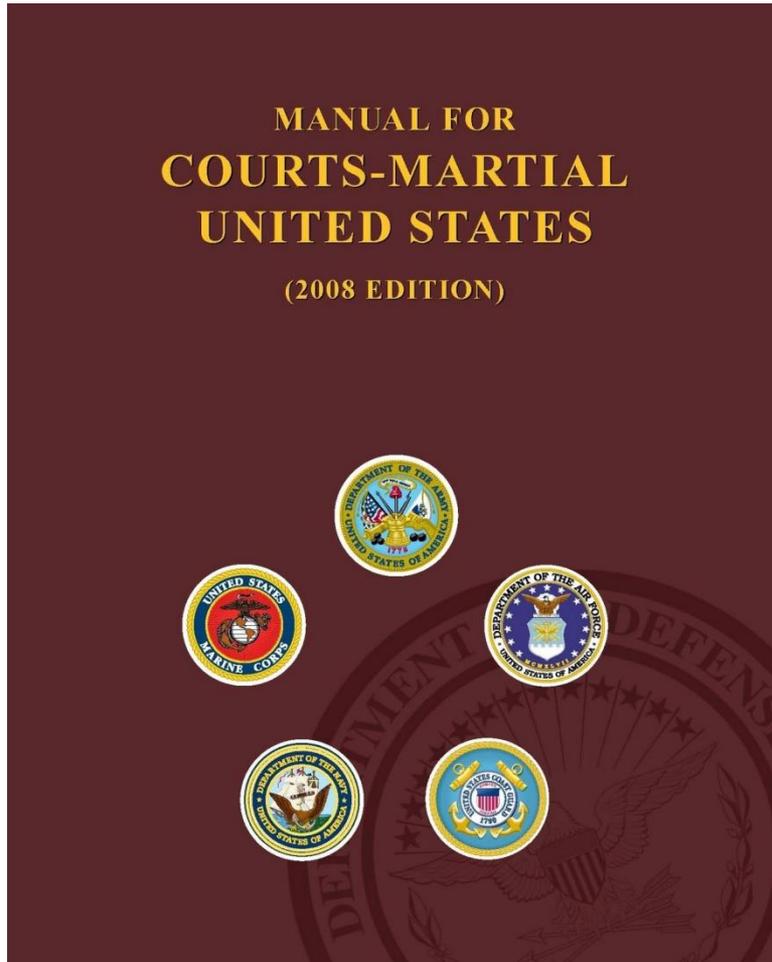


- **A complete set of criminal laws**
- **Same offenses as federal and state criminal codes (murder, rape, theft, etc.)**
- **BUT also unique military offenses**
 - **Desertion**
 - **Absence without leave**
 - **Failure to obey**
 - **Dereliction of duty**



Manual for Courts-Martial

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- Statutorily based
- Supplemented by Executive Order
- First MCM published in 1951
- Reviewed annually by Joint Service Committee on Military Justice



UCMJ Jurisdiction

- **Military members are subject to the UCMJ world-wide, on and off duty, on and off base**
- **Concurrent jurisdiction may still exist**
 - **Jurisdiction may be shared with state, federal, or foreign government**
 - **Typical considerations:**
 - **Location of crime**
 - **Duty status of accused**
 - **Victim's status**
 - **Type of offense - military specific**
 - **Status of Forces Agreements (SOFAs)**



UCMJ Jurisdiction

- **Special Cases – the Air Reserve Component (ARC)**
- **Air Force Reserve**
 - **Active Duty (AD) Tours**
 - **Inactive Duty For Training (IDT)**
- **Air National Guard (ANG)**
 - **State Status (Title 32) – belong to Governor of their state**
 - **Federal Status (Title 10) – attached to AD unit**
- **ARC Members Subject to UCMJ Jurisdiction**
 - **Air Force Reserve – AD or IDT**
 - **ANG – only in federal status**



Military Justice System

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- **Commander driven**
 - **Immediate unit commander**
 - **Court-martial convening authority**
 - **Commanders must administer military justice fairly and impartially, while maintaining good order and discipline**
 - **Requires positive involvement**
 - **Must ensure fair and open process**
 - **Must be even-handed**



Military Justice System

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- **Commanders are required to refer all sexual assault allegations to the Military Criminal Investigative Organizations (AFOSI, CID, NCIS), which conduct an independent investigation**
- **Staff judge advocate advises and executes decisions**
- **Individual judge advocates perform unique roles**



Unlawful Command Influence

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- **Commanders may not:**
 - **Attempt to control courts-martial**
 - **Attempt to influence testimony**
 - **Have a closed or inflexible mind about offenses**
 - **Punish court members for their judicial actions**
 - **Interfere with the military judge**



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Disciplinary Options

Federal

- Prosecute in Federal District Court – *felonies*
- Prosecute in Magistrate’s Court – *misdemeanors*
- No “lesser” options

Military

- Prosecute in GCM, SPCM, or SCM
- Article 15
 - Nonjudicial; minor offenses
- Administrative Measures
 - Verbal Counseling
 - LOR, LOC, LOA, UIF
 - Demotion Action
 - Discharge Action



Types of Courts-Martial

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- **Summary Court-Martial**
 - **One officer**
 - **Accused can refuse**
 - **Limited punishment (30 days confinement)**



Types of Courts-Martial

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- **Special Court-Martial**
 - **Military judge presides**
 - **Minimum of three officer panel members (enlisted accused can request enlisted members); accused can elect for the military judge to hear the case without members**
 - **Maximum punishment: bad conduct discharge; confinement for 1 year; forfeitures of 2/3 pay for 1 year; reduction to lowest enlisted grade**



Types of Courts-Martial

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- **General Court-Martial**
 - **Military judge presides**
 - **Minimum of five officer panel members (enlisted accused can request enlisted members); accused can elect for the military judge to hear the case without members**
 - **Preceded by Article 32 investigation**
 - **Maximum sentence authorized for offense**



Court-Martial Personnel

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- **Convening Authority – Convenes the Court**
- **Staff Judge Advocate – Legal advisor to the Convening Authority**
- **Trial Counsel – Prosecutor**
- **Defense Counsel – Counsel for the Accused**
- **Court Members – Jury**
- **Military Judge**



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Convening Authority

- **Commander**
- **Responsibilities**
 - **Decides the type of court and refers charges to trial**
 - **Appoints court members**
 - **Reviews the results and approves or disapproves findings and sentence (may not change findings of not guilty)**
 - **Considers whether clemency appropriate (may not increase sentence)**



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Staff Judge Advocate

- **Gives legal advice to Commanders, Convening Authorities, and MCIO investigators**
 - Is it “legal”?
 - Is it a good idea?

- **Advises and assists commanders with:**
 - Administrative disciplinary actions
 - Nonjudicial punishment
 - Prosecution of service members



■ Article 46, UCMJ

- “The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence”
- Rule for Courts-Martial 701
- Regulates disclosure by prosecution and defense
- Information not subject to disclosure if
 - Protected from disclosure by the Military Rules of Evidence
 - Attorney work-product
- Continuing duty to disclose
- Regulation of discovery
 - Time, place, and manner
 - Protective and modifying orders



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Pretrial Investigation

Federal

- **Grand Jury**
 - Secret proceedings
 - Defendant usually not present
 - Defense counsel not in grand jury room
 - No right to cross-examine witnesses
 - Indictment often sealed
 - No defense witnesses

Military

- **Article 32 Investigation**
 - Open proceedings
 - Accused present
 - Defense counsel present
 - Right to cross-examine witnesses / present evidence
 - Public record – accused gets copy
 - Defense witnesses, including experts, paid by government
 - Recent SecDef requirement that Art 32 Investigating Officers be JAGs



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Jury

Federal

- Randomly selected “jury of peers” chosen from entire community
- Multiple preemptory defense challenges
- Unlimited challenges for cause

Military

- Convening authority selects panel members based on age, education, training, experience, length of service, and judicial temperament
 - panel almost always more highly educated than civilian juries
 - officer/enlisted membership
- One preemptory defense challenge
- Unlimited challenges for cause
- May ask questions / call witnesses



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Appeals

Federal

- **No automatic appeals except death penalty cases**
- **Only one appellate level in most cases**
- **Almost always requires defendant to hire appellate specialist(s)**

Military

- **Automatic review by convening authority (likely changes in FY14 NDAA)**
- **Additional review by appellate courts (military and civilian) in most serious cases**
 - **Courts of Criminal Appeals (military)**
 - **Court of Appeals for the Armed Force (civilian)**
 - **United States Supreme Court**
- **Accused provided free appellate specialists**



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Typical Victim Participation

- **Pretrial**
 - Interviews with government and defense counsel
- **Article 32 Investigation**
- **Trial**
 - Direct
 - Cross-examination
- **Sentencing**
 - **Victim impact testimony**
 - Not exactly the same as a victim impact statement



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Typical Victim Issues

- **Victim's consent**
 - **Refuted with physical evidence and/or traumatic responses**
 - **Privacy issues associated with using trauma evidence**
- **Victim's sexual history**
 - **MRE 412 Rape Shield**
- **Victim's mental health history**
- **Collateral misconduct**



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Victim and Witness Assistance Program

VWAP Objectives

- **Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by USAF authorities**
- **Foster cooperation of victims and witnesses within the military criminal justice system**
- **Ensure best efforts are made to accord to victims of crime certain enumerated rights**



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Victim and Witness Assistance Program

- **Services must treat victims and witnesses with fairness and respect**
 - **Bases for program requirements: Federal statutes, Department of Defense implementing directives, Service instructions**
- **Applies in all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity**
- **Victim: A person who suffered direct physical, emotional, or financial harm as the result of an offense**



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Victim and Witness Assistance Program Guidance

- **AFI 51-201, Administration of Military Justice, Chapter 7**
- **Victim and Witness Protection Act of 1982 (42 U.S.C. §§ 10601-10605)**
- **Crime Victims' Rights Act (18 U.S.C. § 3771)**
- **DoD Directive 1030.1, Victim and Witness Assistance**
- **DoD Instruction 1030.2, Victim and Witness Assistance Procedures**



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Purpose of the Air Force Special Victim Counsel (SVC) Program

- **Provide advocacy: protect the rights afforded to victims in the military justice system**
- **Provide advice: develop victims' understanding of the investigatory and military justice processes**
- **Empower victims by removing barriers to their full participation in the military justice process**

Providing this service to victims will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay, nor infringing upon the rights of an accused.



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SVC Role

- **Advocacy to military justice actors, including commanders, convening authorities, investigators, trial counsel, and defense counsel**
 - **May attend interviews**
 - **May include in-court representation**
- **Advocacy to AF and DoD agencies/offices**
- **Advocacy to civilian prosecutors/agencies**
 - **May **NOT** represent victims in civilian courts**
 - **May not advocate to Department of Veterans Affairs**
- **Collateral misconduct**



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SVC Role in Military Justice Process

- **Advocacy to any actor in military justice process, including commanders, convening authorities, SJA, TC, ADC**
 - **Includes matters in which the Government is required to consult with the victim**
 - **e.g., decisions not to prefer charges, to dismiss charges, plea negotiations, pretrial confinement, and scheduling of judicial proceedings**
- **Advocacy to the military judge, to the extent authorized by the Manual for Courts-Martial**
 - **Rape shield hearing / mental health records**
 - **Assert rights under the CVRA**



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VWAP and SVC – Division of Responsibilities

Ensures Victims Are Afforded
Certain Enumerated Rights

Advocate for Victims' Rights

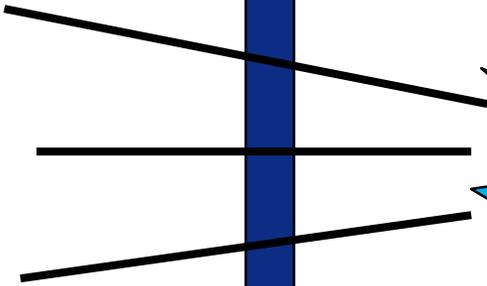
SJA

Trial Counsel

Victim Liaison

**VWAP
Coordinator**

Case Paralegal





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Which CVRA Rights Apply in the Military?

- 1. The right to be reasonably protected from the accused**
- 2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused**
- 3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding**
- 4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding**
- 5. The reasonable right to confer with the attorney for the Government in the case**
- 6. The right to full and timely restitution as provided in law**
- 7. The right to proceedings free from unreasonable delay**
- 8. The right to be treated with fairness and with respect for the victim's dignity and privacy**

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The right to be reasonably protected from the accused

VWAP Responsibility

- **Inform the victim about protection and report any intimidation, harassment, or similar conduct to military authorities**
 - **Restraining Orders or other similar protections (Military Protective Orders)**

SVC Role

- **Same!**
- **Expedited transfer**
- **Pretrial confinement**



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The right to reasonable, accurate, and timely notice ...

- (b) *Victims' Right to Notification of all Court-Martial Proceedings.* IAW AFI 51-201, para. 7.12.8, the government will provide the victim with the earliest possible notice of:
- i. The status of the investigation of the crime, to the extent it will not interfere with the investigation and is appropriate
 - ii. The accused's pretrial status and any subsequent change in that status, including, but not limited to, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement
 - iii. Preferral and referral of charges or a decision not to pursue prosecution
 - iv. A pretrial confinement hearing and/or Article 32 investigation
 - v. Notification of the scheduling, including changes and delays, of each court-martial proceeding the victim is entitled to or required to attend
 - vi. The acceptance of a guilty plea or announcement of findings
 - vii. The sentence imposed, including the date on which the accused becomes eligible for release from confinement, or parole, if applicable

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How Notice Is Provided

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- **DD Form 2701, Initial Information for Victim and Witnesses of Crime (AFOSI, SFOI)**
- **DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime (TC/Vic Liaison)**
- **DD Form 2703, Post Trial Information for Victims and Witnesses of Crime (TC/Vic Liaison)**
- **DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status (TC/Vic Liaison)**
- **DD Form 2705, Victim and Witness Notification of Inmate Status (Confinement Facility)**



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The reasonable right to confer with the attorney for the Government in the case

- (a) *Victims' Right to Consultation.* IAW AFI 51-201, para. 7.12.12, the government will consult with victims and obtain their views concerning:**
- i. Decisions not to prefer charges**
 - ii. Dismissal of charges**
 - iii. Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement**
 - iv. Pretrial agreement negotiations, including PTA terms**
 - v. Plea negotiations**
 - vi. Discharge or resignation in lieu of trial by court-martial**
 - vii. Scheduling of judicial proceedings where the victim is required or entitled to attend.**



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The reasonable right to confer with the attorney for the Government in the case

VWAP Responsibility

- **Consult and obtain the victim's view – BUT victim's opinion is not the final word...decision belongs to the appropriate official**

SVC Role

- **Discuss courses of action with victim**
- **Advocate for victim's choice**



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The right to full and timely restitution as provided in law

VWAP Responsibility

- **Inform victims of intra-familial abuse of the availability of limited transitional compensation benefits, waiver of mandatory forfeitures, and possible entitlement to a portion of the active duty member's retirement benefits**

SVC Role

- **Assist victim with transitional compensation and other restitution programs**
- **Advocate for waiver of forfeitures**



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The right to be treated with fairness and with respect for the victim's dignity and privacy

VWAP Responsibility

- **Protect victim's privacy interests (Privacy Act, need to know)**
- **Safeguard victim's property held as evidence and return to the victim as soon as possible**
- **During trial proceedings, provide victim with a waiting area removed from and out of sight and hearing of the accused and defense witnesses**

SVC Role

- **Same!**



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Victim Standing in Military Courts-Martial

■ **LRM v. Kastenberg**

- “A reasonable opportunity to be heard at a hearing [under MREs 412 and 513] includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel.”
- “It is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context of MRE 412 or 513 before a military judge, anymore than it is to allow a party to have a lawyer.”



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Victim Standing in Military Courts-Martial

■ **LRM v. Kastenberg**

- The right to be heard through counsel is not absolute. A military judge has discretion under RCM 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. If counsel indicates at a MRE 412 or 513 hearing that the victim's or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed.
- MREs 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel.
- MREs 412 and 513 do not create a right for the victim or patient to appeal an adverse evidentiary ruling.



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Status of Victims' Rights in Military

- **Does the Crime Victims' Rights Act apply to military courts-martial?**
 - **Air Force Court of Criminal Appeals said no**
 - **Court of Appeals for the Armed Forces did not address the issue in LRM v. Kastenberg**

Questions? Comments?



Contact Information

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**Are you working
on a case with a
victims' rights
issue?**

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practitioners
serving crime
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As part of the *Legal Assistance for Crime Victims: An OVC Capacity Building Initiative*, OVC is working to expand the availability of pro bono and no-cost legal assistance for victims of crime nationally. Part of that effort includes support for a series of free webinar trainings on victims' rights issues developed and delivered by the National Crime Victim Law Institute in collaboration with the OVC Training and Technical Assistance Center (TTAC).

For additional information about the Initiative and to register for upcoming Webinars, please visit:
<https://www.ovcttac.gov>.