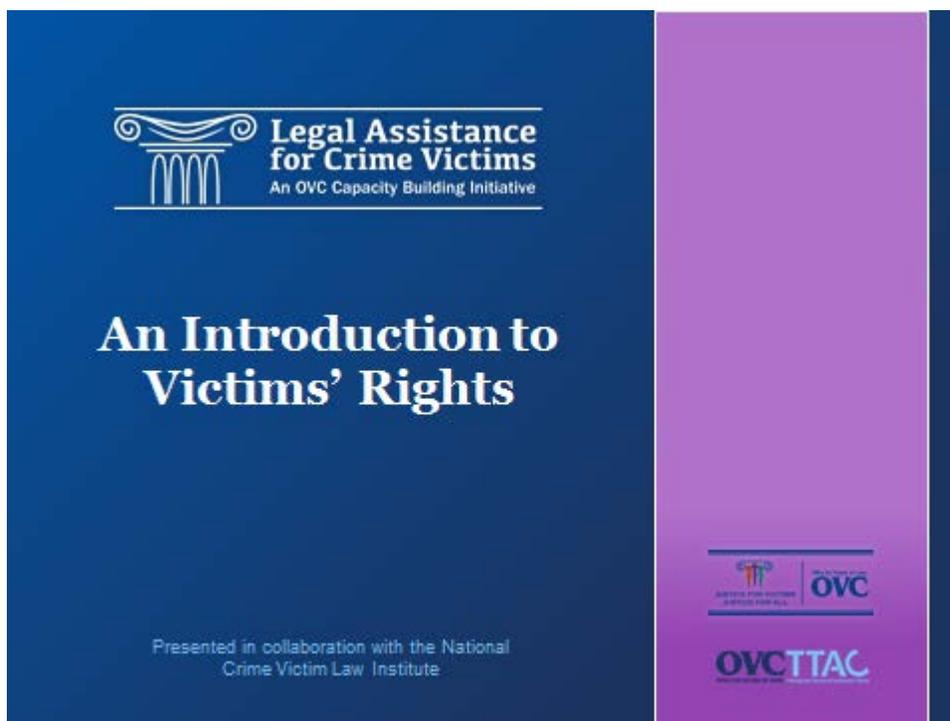




OVC
Webinar Transcript
An Introduction to Victims' Rights

June 25, 2013



Welcome

Meg Garvin: Good afternoon, everyone. This is Meg Garvin. I am the Executive Director of the National Crime Victim Law Institute (NCVLI). I am so excited to have you join us this afternoon. So we are so excited to have 120 registrants. Actually slightly more than that, I think. And already we have more than 50 percent of you on the lines. We are going to go ahead and get started because we have a lot of information to convey to you.

Meg Garvin: I want to start with just an announcement about how excited we are about this Webinar as well as a series of Webinars that we are fortunate enough to get to present through a collaboration with OVC TTAC. As you see on the screen in front of you, OVC has launched the Legal Assistance for Crime Victims Capacity Building Initiative. And NCVLI, in collaboration with OVC TTAC, is working to expand the availability of pro bono and no-cost legal assistance for victims of crime nationally. One piece of that collaboration is a series of Webinar trainings that will really result in almost two a month, I think, through the rest of the calendar year. It is really, really exciting for those of you who have been working in victims' rights for years, decades even, to see this step forward on legal services for victims. And we are really appreciative of the leadership of OVC in launching this Capacity Building Initiative, and we are just thrilled to be a part of it. So you will wonderfully see this logo that is at the top. I think you are just seeing it for the first time now but the excitement in our office and nationally is that legal services for victims are really being integrated into the victims' services more. And we are thrilled to be a part of it.

Meg Garvin: So to launch that initiative, or this component of the initiative, we are hosting two introductory Webinars this week. This one that you are on is *An Introduction to Victims' Rights*

for Attorneys. On Thursday of this week we will be doing *An Introduction to Victims' Rights for Advocates*. They contain essentially the same information but we are going to talk a little more legalese today than we will on Thursday.

Meg Garvin: Before we get formally started with the content I want to give you some housekeeping information. The Webinar is actually 75 minutes. I believe some of the materials said 90 minutes, but we are going to wrap up in 75 minutes. But we will still leave time for questions. So you will have time to do questions. If you have a question, over on the right-hand side of your screen, generally it is on the right-hand side of your screen, there is a box called Chat. And you can ask questions in there to the organizers, to Rebecca Khalil, or myself. And that is how we will get to your questions and we will hold them until the end and then answer them.

Meg Garvin: I just mentioned Rebecca Khalil's name. She is wonderfully my co-presenter on this Webinar. Rebecca is a lawyer here at NCVLI and has been with us for a number of years, having led our child victims' work for a couple of years, then an author on many of our amicus briefs, has done technical assistance for victims all across the country. So you really are lucky to have her as one of your presenters today. And she will also be presenting again on Thursday.

Meg Garvin: So last housekeeping things, turn off your cell phones, please, as that will cause some background. And I see we are having a few technical difficulties on the Webinar itself. But if that continues we will fix things on our end. If you end up having technical difficulties that do not seem to be from our screen, the number to dial is, and I am going to give it to you slowly, 800-263-6317. Again, 800-263-6317. That is Go To Webinar's technical support line. They are the techno folks. They are going to be able to help you more than we can. And I am going to leave it at that. We have some upcoming trainings and events again as part of the initiative. And you can check our Website, TTAC's Website, and OVC's Website for various information about those opportunities. So with that I am going to go ahead and launch into the content of this Webinar.

Overview and Learning Objectives

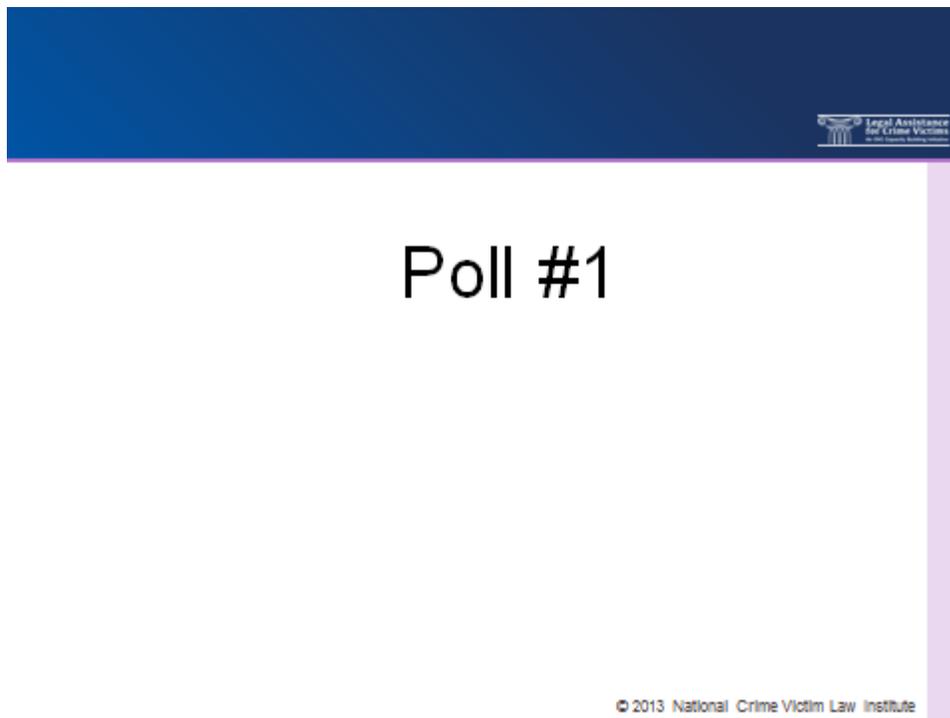


- Describe the history of victims' rights in the U.S.
- Discuss the difference between "compliance with" and "enforcement of" rights.
- Identify cultural and legal hurdles to rights enforcement.
- Relate case examples of rights enforcement.
- Identify 5 legal strategies for litigating victims' rights.

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Overview and Learning Objectives

Meg Garvin: Again, this is *An Introduction to Victims' Rights for Lawyers*. What is on your screen is the overview of the learning objectives we are going to cover today. Many of you—I see some of you joining us—who actually know some of this stuff. So I know there are some experts in the audience. I am going to encourage you to ask questions through chat. But the general overview is some of the history of victims' rights in the United States; a vocabulary lesson in the difference between “compliance with” rights and “enforcement of” rights; a brief identification of the cultural and legal hurdles to rights enforcement; some case examples of rights enforcement; and then at least five legal strategies. You are going to get more than that. But five legal strategies for litigating victims' rights. That is what we hope to achieve in the next 75 minutes, or now 70 minutes. I will cover the first three bullets and then Rebecca Khalil is going to come on to the end and cover the second half of the training which are those last two bullets. And that is where some of the really meaty how-to stuff comes in.



Legal Assistance
for Crime Victims

Poll #1

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Poll #1

Meg Garvin: So, with that, what I would like to do is have us take a poll so we really do know who is on the line. So if we could launch the first poll. And what we are going to ask you to do is really self-rate your own expertise in victims' rights enforcement. And in just a second that poll should be coming on your screen. And we are just going to take about 10 or 15 seconds for you all to vote about how familiar you are with rights enforcement.

(silence)

Meg Garvin: And we will just take another second or two here. Okay, why do not we go ahead and close the poll just so we get a general feel for who is on the line today. And again, over the course of the hour and a little bit, we are going to dig into the difference between enforcement and compliance. And, unfortunately, the results are not showing up on your screen. Oh, there they

are. Slightly familiar, so we have about 50 percent, almost 50 percent of you are slightly familiar, 16 percent not familiar, and 35 percent very familiar. So we have a pretty diverse audience on the line. And again, we have...I just checked the attendance list, 75 people are actually on the line right now. So those of you who are very familiar, jump in through the chat box and we will share your information, wrap it in. Those of you who are not familiar at all, ask questions as much as you can to gobble up information. And slightly familiar, you are obligated to do both things.

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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Brief History in the U.S.

Meg Garvin: So let us go back to the PowerPoint and I am going to launch into the history of victims’ rights. Many of you have heard myself or someone else in NCVLI present on victims’ rights 101, so you know some of this. And you also know our commitment to making sure that it is a part of the cultural knowledge of this country, because there are a lot of myths to debunk when it comes to victims’ rights. So in just a couple of minutes here we are going to take time to talk about the history of victims’ rights in the United States, from the founding until the present. And it is important to know it because it will help you overcome some of the cultural resistance to rights enforcement that you might encounter.

Meg Garvin: So the history of the country seems like a lot to cover in 3 minutes or 4 minutes, but we are going to do it because it is so foundational and also because it really has four themes in it, or three themes in it. At our founding, Anglo-Saxon founding--that is the only expertise that we at NCVLI have--at our founding in this country we were a victim-centered criminal justice system. And what we mean by that is that drawing from both the British and Dutch criminal justice systems, we established in Colonial times a system in which the victim was the center of things. The victim was the one who investigated his or her own crimes, brought prosecution, or chose not to bring prosecution. And then at the time of sentencing, asked for what he or she needed to be

made as whole as possible. So in that model, if you think about the courtroom—and I am just going to ask everyone to really visualize a courtroom for a second. And generally speaking, in a courtroom today you have the judge up front. And in the criminal courtroom you have the prosecution on one side and the defense attorney on the other side, each with a table. And then there is usually a little gate and a bunch of seats behind. And in today's system, very often the victim is behind that gate. They are in the back with the prosecution and defense up front. In Colonial times, it was the victim and the defendant, or the defense attorney, up front in front of the judge. There was no Office of the Public Prosecutor. So there was no prosecutor up there. It literally was the victim's voice saying, "Johnny, you hurt me." Or "Susie, you hurt me." So Johnny and Susie being the defendants. "You hurt me. I am going to prove it. Here is how I can prove it." And then at sentencing, "Johnny or Susie, here is what you need to do to make me whole." So it was a really victim-centered system, and victim-centered in that it still accommodated the defendant, but the focus of who got to speak in court were the two primarily interested persons, that is the victim and the defendant.

Meg Garvin: And then for a myriad of reasons that system changed. It changed because that system does not allow for the notion of social harm to be factored. Because a system that is so victim-centric has race, gender, class issues that prohibit or impede equal access to justice. So the system started to evolve and that is when the Office of the Public Prosecutor came into being. And as that system of public prosecution and concern about social harm started to exist, the victim's involvement really started to diminish.

Meg Garvin: So you can see, by the 1970s, this diminishment to the victim being a piece of evidence in the case. And on your screen in front of you are two moments that mark the high water marks of that victim exclusion model that we had moved towards. We are not going to spend time talking about those, except I will mention Rule 615 which was adopted in 1975, really is this crystal clear moment of the victim exclusion model. Because when Rule 615 was adopted in 1975, and every state followed suit, what you had was by rule it said, "Upon motion by either party"—and at that part it had become prosecutor or defense—"any witness could be excluded from the courtroom." So the presence of someone who was a witness could be controlled by the parties. Well, in a criminal case it was always the victim. They were always witness in the case. Their families were witnesses. So by 1975, by rule in this country, we had exclusion of victims.

The 1970s to the 1980s



- 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).
- Growing crime victims’ rights movement in the U.S.
- Changes to state constitutions, statutes, and rules, as well as federal statutes and rules, to define and afford explicit legal status to crime victims.

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The 1970s to the 1980s

Meg Garvin: So the response to that, you can find lots of literature on this on our Website. There is an oral history project that OVC has done. The response to this move to the victim exclusion model was the modern victims’ rights movement. People through a number of different social movements started to say, “Hey, wait a second. The criminal justice system should not treat victims as a piece of evidence. We need to change this.” And those social movements included the feminist movement, which is concerned about domestic violence and rape prosecutions and the diminished treatment of survivors in those moments. The law and order movement that was concerned about truth in sentencing. The civil rights movement which was concerned about how the African American community in this country was not getting access to justice at all, whether they were the defendant being assumed guilty, or whether they were a victim and not even having prosecution brought.

Are Laws Alone Enough?



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Are Laws Alone Enough?

Meg Garvin: So you have this amazing movement that resulted in passage of thousands, tens of thousands of laws. And the question becomes, so did the world change? Did the victim exclusion model of the 1970s in which victims were just a piece of evidence in the case miraculously disappear because we passed laws? And the answer is no, it did not disappear because we had just passed laws. The reason is actually pretty self-evident when you look at other social movements and legal movements. And the primary one being the defendants' rights movement.

Bottom Line of Any Right



Rights in the law books are mere words.

...

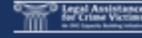
Meaning comes when people ask for their rights and
courts *enforce* them and when systems begin routinely
complying with them!

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Bottom Line of Any Right

Meg Garvin: It is really clear that in this country that laws, when you write them into the codes, when you write them into the books, they are just words. Laws alone do not tend to change practice. Instead, people have to demand their rights. They have to ask for them in the courts, and then they have to be enforced in order for there to be change. And the crystal clear example of this is we can all recite right now, if you were unmuted, I bet in mere synchronicity we would all be able to recite our Miranda rights. Like if I unmuted you all and said, “What are your Miranda rights,” you would all say, “I have the right to remain silent. I have the right to an attorney. If I cannot afford one...” We know it. We know our Miranda rights not because a law was passed that said, here are your Miranda rights. In fact, Miranda is based in the United States Constitution which has been in effect for 200 plus years. Instead, we know our Miranda rights because Miranda was a criminal defendant who demanded his rights when he was denied them and the case was appealed up to the Supreme Court. That is what makes laws have meaning.

What's the Difference?



Compliance

- When government actors fulfill legal responsibilities with respect to victims, they are in *compliance* with crime victims' rights.
- Efforts to reduce the willful, negligent, or inadvertent failure to fulfill those duties by making systemic changes are properly termed *compliance efforts*.

Enforcement

- Ability of a victim (pro se, through prosecutor, or through private attorney) to seek a judicial order that governmental personnel must comply with victims' rights laws or that provides a remedy for a violation of those laws.

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What is the Difference?

Meg Garvin: So then we are in this place of, all right, so how do we make victims' rights have meaning? For 30 years, we have had these laws on the books and we have been undergoing these compliance efforts. So now we are at a vocabulary moment. "Compliance with" rights and "enforcement of" rights. And it is really important to know the difference because they are both utterly critical to advancing victims' rights.

Meg Garvin: So compliance with victims' rights is when system actors, government actors who have legal obligations to afford rights work together to make sure the rights are afforded. So by law, in most jurisdictions, victims have the right to be notified of certain proceedings. This is just by way of example. Oftentimes they will say the prosecutor or the prosecutor's advocate must notify. Sometimes it is silent about who must notify the victim. Compliance efforts would say, well, let us figure out what is the best way to have notification happen, how do we do that, and let us come up with systems to make sure it helps. So efforts to reduce the willful negligent or inadvertent failure to fulfill rights, those are compliance efforts.

Meg Garvin: The flipside of that is enforcement. And enforcement is not about system actors coming up with best practices or promising practices. It is about an individual victim saying, "I have a right and I want it." And they say that to the court. So the victim can be pro se or pro per. That means through themselves. Or through the prosecutor in some jurisdictions. Or through a private attorney. And what they are saying is, "I want to enforce my rights."

The Difference (continued)



Compliance

Improves systematic affording of rights.

Future victims benefit.

Enforcement

This victim has redress right now.

Future victims and practitioners benefit because of legal precedent.

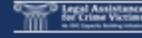
We will focus on this today.

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Meg Garvin: The difference that really matters is the outcomes of these two efforts. Compliance really results in systemic improvements, future victims benefit. So if we have got the notification process wrong this time, oops, we failed to notify Susie who had rights at this hearing. We forgot to let her know about the hearing. How can we fix that? Well, let us try e-mail notification next time, right? We are moving towards better and better compliance. Those are compliance efforts.

Meg Garvin: Enforcement, this victim today gets a remedy. And that is what we are going to spend the rest of the time talking about is the remedies available and what it really looks like to have enforceable rights.

What Relief is Available in Enforcement?



When seeking enforcement, what should you ask for?



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Meg Garvin: So in victims' rights enforcement—and again, now we have moved away from just compliance efforts—enforcement efforts through litigation or through legal practice, you are essentially asking for two things. So your prayer for relief and you are pleading on your demand letter. You can use lots of fancy legalese words, but the punch line is all of the remedies we ask for in enforcement boil down to these two things. Stop doing what you are doing because it would violate victims' rights. Or you violated my rights, so do it over. So in the “stop” moment you are either formally or informally asking for the equivalent of injunctive relief. And in the “do over” moment you are asking for reconsideration, right? Those are the two remedies that you ask for legally. And they come across in lots of different ways in the actual motion practice. And Rebecca will speak about some of those, but a traditional or common “stop” would be someone has subpoenaed my counseling records which are privileged and I have a state victims' right to privacy. The victim's attorney would file a motion to quash the subpoena. I have asked for a “stop”. A classic “do over” would be I have the right to be notified, present, and heard at a sentencing proceeding. And you forgot to notify me of the sentencing and I ask for a “do over”, right?

Meg Garvin: And you might say, “Wait a second, Meg, wait a second. You cannot do a ‘do over’ of a sentencing proceeding.” Well, what we are here to tell you is yes, in fact, actually you can. And we are going to give you some case examples of how powerful the “do over” in victims' rights enforcement really can be.

Limits on Relief



- May be explicit in jurisdiction's laws
 - *But read carefully; most limitations are not significant*

- Remedy cannot violate defendant's constitutional rights

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Limits on Relief

Meg Garvin: But first you do need to know, so what are the limits? How far can the “do over” go? How far can a “stop” go? You need to read your jurisdiction’s laws. And I would encourage you to ask for assistance while you are doing that. Find out what limitations might exist. We will tell you that most limitations that are perceived initially as huge hurdles to victims’ rights enforcement, things that say, for instance, there is no cause of action to enforce these rights. Lots of the 33 states that have Constitutional amendments say that. They say, oh, you have all these great rights and you have no cause of action. And so many practitioners in that jurisdiction would say, “Oh, I do not have any rights. I cannot do anything about it.” Well, that limitation actually is meaningless. All it means is I cannot sue for damages in tort. But you might not know that until you really dig in.

Meg Garvin: So you might have limits on relief in your jurisdiction, but it takes some really careful analysis to go through. The real fundamental limits on relief is that because the victims’ rights are based in state Constitution or federal statutes or state statutes. They cannot violate defendants’ Constitutional rights. Straight hierarchy of law tells us that when a defendant’s right is in the U.S. Constitution, it trumps other rights that are housed within lower levels of law. And state Constitutions are at a lower level of law. So are state statutes. Now, so that is the real limit on relief. But what you will see in some of our case examples is this is actually incredibly rare that defendants’ Constitutional rights are an issue.

Where Are the Hurdles?

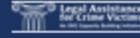


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Where Are the Hurdles?

Meg Garvin: So if victims' rights are enforceable, if these limits are really rare, if the "do over" is powerful, if defendants' rights really are not an issue that often, what is the hullabaloo? Why are there problems? What are the hurdles? What are the challenges? So we are going to cover in the next just couple of minutes, before I turn it over to Rebecca, the identification of the cultural resistance and the legal obstacles. And even though this is an attorney training, we are actually going to spend more time on the cultural resistance than the legal hurdles because when you peel back the layers, the legal hurdles do not exist. So we will get to that in just a second.

The Hurdles That Stand in the Way of Rights Enforcement



Cultural Resistance

Legal Obstacles

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The Hurdles That Stand in the Way of Rights Enforcement

Cultural Hurdle #1: *Misperception of History*



- ❑ Despite the fact that history reveals a victim-centric criminal justice system at the founding, people believe that a shift from the current two-interest system is a threat to the way it has “always been.”
- ❑ Recognizing the origins of our criminal justice system is useful in overcoming this first cultural resistance.

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Cultural Hurdle #1: Misperception of History

Meg Garvin: The common hurdles that you will face as an attorney if, let us say, a sexual assault victim walks through your door tomorrow and says—I will use a California example—minor sexual assault victim walks through your door and says, “Defendant has just subpoenaed my Facebook page, my Facebook messages, and my Google searches.” This is a live case. And you might say, “Oh gosh, I am not sure there is anything I can do, right? Is the prosecutor helping you?” That might be one reaction. And if you are an educated victims’ rights lawyer, you would actually say, “Yes, let me help you. I can do this. In California law you have the right to privacy. You have the federal Constitutional right to privacy. You have the state Constitutional right to refuse discovery. You have the right to protection. So let us use those rights and fight.” And the first thing you are going to come up against is prosecutors, defense attorneys, and judges all saying, “Whoa, whoa, whoa. Do not mess with the system. It has always been prosecutor versus defendant. Do not file your papers in my court.” As one South Carolina prosecutor said to one of our victims’ rights lawyers years ago, “Do not come fishing in my pond.” That is all grounded in this misperception of history, the idea that the system has never had the victim have enforceable rights or a voice in the system. And as we said kind of in the first 10 minutes of this training, that is fundamentally flawed and we are happy to provide you all the citations. But historically, victims have been in front of the bar speaking to the court.

Cultural Hurdle #2: *Misperception of Scope of Rights*



- Opponents who object to enforcement believe that victims' rights:
 - Infringe on prosecutorial discretion.
 - Convert the justice system into a system of personal vengeance.
- Fundamental flaws with this objection:
 - Victims' rights are predominately due process rights.
 - Victims' rights inject just one more interest into analysis.

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Cultural Hurdle #2: Misperception of Scope of Rights

Meg Garvin: So then what is the second cultural hurdle? The second cultural hurdle is misperception of scope of rights. And that is the idea that if I afford victims rights, that somehow defendant or others in the system lose their rights.

Cultural Hurdle #3: *Misperception That Rights are a Zero Sum Game*



- ❑ Opponents who object to enforcement believe affording a victim rights means taking a right from a defendant.
- ❑ Fundamental flaws with this objection:
 - More than one participant can have rights!
 - Judiciary is regularly tasked with affording multiple rights in same case.

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Cultural Hurdle #3: Misperception That Rights are a Zero Sum Game

Meg Garvin: The flaw here is the idea that the criminal justice system, or any justice system, is a zero sum game, that by affording someone rights, someone else has to lose them. That there is a limited pool of rights and once you take one, you have subtracted it from the pool. That is just simply not how rights work. We regularly see defendants having rights, the media having First Amendment rights, both operating in the same justice system, and both being afforded their rights. What happens is the judiciary is tasked with analyzing the situation and seeing, is there actually head-on conflict, right? Most times there is not a head-on conflict between rights. You can equally afford both. When there is head-on conflict, then in the moment, temporarily, whose right takes priority? So when the media asserts its First Amendment right, and it is up against the defendant's right to a fair trial, let us say, the court might say, "You know what? Media, you do have a First Amendment right and I am going to recognize it, but I am going to say you cannot have cameras in the courtroom. You can have a reporter but you cannot have cameras, right?" So that is how it is regularly balanced or weighed. And the same would be true of victims' rights. So it is not a zero sum game.

Meg Garvin: I am going to stop on that one because I skipped over the scope of rights a little too quickly which is the scope of rights really is about who has control in the system. And the idea that victims' rights would somehow diminish the prosecutor's control over the case is simply flawed because victims' rights actually facially say this does not diminish prosecutor's control over the case. So the prosecutor has control over the presentation of facts, the decision of whether the charge, whether to move forward, all of those things. What victims' rights are are predominantly due process rights, meaning that they have the right to be notified, present, and heard. And that is what are being enforced in the case. And they do not impede the presentation of evidence, the prosecutor's obligation to only go forward if they can have a fair and just trial. All of those things. So it is not a question of control. It is a question of voice for victims' rights.

Legal Obstacle #1: *Non-Party Status*



➤ *It's a red herring.*

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Legal Obstacle #1: Non-Party Status

Meg Garvin: So the first legal obstacle that we are just going to flag is that you have to be a party to participate in the case and exercise your rights. This is a total red herring. The party status has never been, is not now, and never will be, hopefully, a criteria for who has standing to assert a victim's rights, or any right.

THE REAL ISSUE IS STANDING!

“Does this victim have standing at this moment to do _____?” (Fill in the blank with the right and remedy the victim is seeking.)

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Standing (continued)

Answer can be explicit:

- “The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights.” 18 U.S.C. § 3771 (d)(1).
- “The district court shall take up and decide any motion asserting a victim’s right forthwith.” 18 U.S.C. § 3771 (d)(3).
- If denied, victim may file a writ of mandamus and “The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.” 18 U.S.C. § 3771 (d)(3).

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Standing (continued)



Or may require analysis of 3-part test:

The United States Supreme Court has explained that the question of standing:

- "is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy' as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

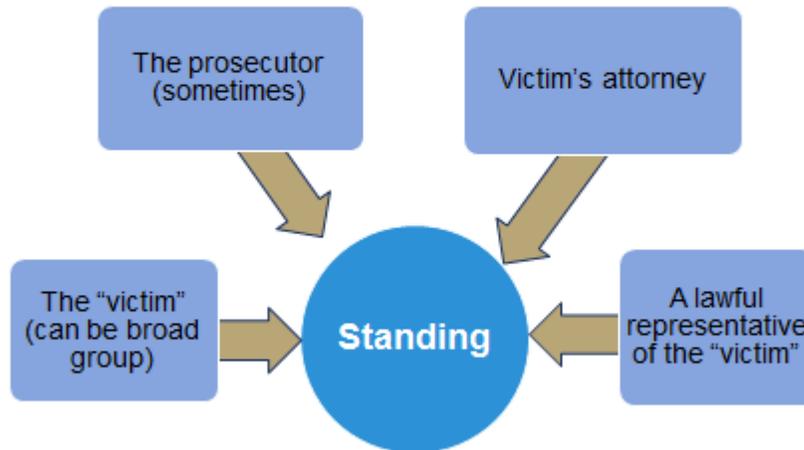
Test:

1. Injury
2. Causation
3. Redressability

The Real Issue is Standing!

Meg Garvin: The question on your screen is the question you have to ask yourself in order to figure out standing. And the way you answer it is you figure out, does your jurisdiction have explicit standing? The Crime Victims' Rights Act (CVRA), which is the federal law, does. So that is straightforward. If you do not have explicit standing, you are under what is the traditional three-part test. Is there injury? Is there causation? And is there redressability? So, I know all of us are having minor flashbacks to first year of law school when you had to learn the U.S. Supreme Court's three-part test for Article 3 courts. But it is still law. And while some states have articulated their own standing analysis, generally speaking, if you meet the three-part Article 3 standing test that is on the screen right now, you will have standing.

Who Has Standing (Generally)?



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Who Has Standing (Generally)?

Meg Garvin: So once you have standing, you get to participate in the case. And by law, victims' rights are generally afforded -- the folks who have standing to afford certain victims' rights are these groups: the victim, the prosecutor sometimes, the victim's attorney, and a lawful representative. So those folks can go into court and assert rights.

Meg Garvin: Actually, I am going to go back because someone has asked a question about Ohio's law, and the idea that there is no standing to appeal, or no right to appeal. Well, the standing analysis has to be done at the trial court level and the appellate court level. And I do not have Ohio's law in front of me right now, but a couple of things. One, you may have standing to assert things in trial court. Great. Then you have to figure out, do you have standing to seek appellate relief? If you are denied standing to seek an appeal, the word appeal is, as we know, a term of art. There are other appellate mechanisms including a variety of writs that can get you appellate review. So just because you might not have the right to appeal, do not think that you do not have standing to seek appellate relief.

Legal Obstacle #2: *Double Jeopardy*



- ❑ “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V

- ❑ *This is not really a bar 99% of time*

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Legal Obstacle #2: Double Jeopardy

Meg Garvin: The second legal obstacle, double jeopardy, I am just going to say if you think you have a double jeopardy problem, contact us. Because the bottom line is we can undo. The “do over” can be done in almost every moment. And I am going to say that again. The “do over” can be done in almost every moment except trial. That is it. So if you think you are running up against double jeopardy, do not be dissuaded. Contact us.

Legal Obstacle #3: *Mootness / Ripeness*



- *These just require attorneys thinking proactively – we'll talk about this later in the presentation.*

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Legal Obstacle #3: Mootness / Ripeness

Meg Garvin: And the last legal obstacle is the idea of mootness and ripeness. And I am just going to say, you are lawyers on the line, right? Mootness and ripeness are not obstacles. Those are strategic litigation moments. You need to know when to bring it and when not to bring it, right? So we can go through and analyze. Now, admittedly, victims' rights present unique hurdles to mootness and ripeness because the rights generally attach to criminal proceedings which can move really quickly. So you might be having to bring something through motion practice that seemingly is not ripe, and make an argument as to why in fact it is ripe. And that argument would include the idea that if it is not ripe now, it is going to be moot tomorrow. So there are some strategic moments around this legal obstacle, but it is really not an obstacle.

Meg Garvin: So that was a whirlwind foundation on victims' rights. The history of victims' rights, the idea that compliance efforts are great systemic movements forward. Enforcement, however, is about this victim having rights right now and seeking a remedy through motion practice. And then the idea of, so what are the hurdles? Who has standing? Who does not? Cultural hurdles, legal hurdles. And I am going to turn it over to Rebecca right after we do our second poll of the day, because as we move on to what does enforcement really look like, we are going to ask you this question.

Poll #2

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Poll #2

Meg Garvin: So we are going to launch this poll. And the question is: Have you ever filed a pleading asserting a victim's right in criminal court? And I want to really flag the "you" here. Have you filed a pleading in criminal court asserting a right? We are just going to take about 15 seconds.

(silence)

Meg Garvin: Okay, why do not we close that poll and I am going to look at the results before we turn over to Rebecca for the rest of the Webinar. Let us see what the results of that poll are. Okay, this is not surprising, that 17 percent of you have filed, which is awesome. I hope we are working with you regularly. That is terrific. 83 percent of you have not. And I think that is pretty common in the country. Lawyers still do not know what it looks like to assert a victim's right and are too often dissuaded by the cultural and perceived legal hurdles.

Meg Garvin: So Rebecca is going to take us into the, all right, what does it look like when you really do it? So I will turn it right over to you, Rebecca.

Enforceable Rights in Practice: *A Few Examples*



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Enforceable Rights in Practice: A Few Examples

Rebecca Khalil: All right, so as Meg phrased it, what does it look like when we really do it? Enforceable rights in practice. We are going to take a look at a few examples of how victims' rights play out and how courts have handled the question of enforcement of these rights. So before we begin, just a quick note. So the cases themselves, we are going to have a bunch of slides with sample statutes and then sample example cases of how these statutes are being interpreted. These cases, the actual decisions involving victims' rights in real scenarios, really are the evidence of how victims' rights are enforced in the real world. So we talk a lot about evidence-based practices and best practices. And in the context of victims' rights, case law and the decisions are, in a very real sense, documentation of evidence-based practice and how victims' rights are working, can work, and sort of what hurdles they continue to face in the real world. So as we go through these slides, they contain a lot of information. We are not going to read every word on every slide and cover every single example on every slide. A lot of this is included for your future use and future reference. So for the purposes of this Webinar what we are going to do is pick out a few examples to highlight in terms of rights and cases. And we have included the rest, and you will get a copy of these slides after the presentation ends so you can sort of review them at your leisure. And, of course, feel free to contact us if you have questions either about our examples or about things we do not cover in the examples. Because these are really just highlights of how victims' rights have been working.

Crime Victims' Rights Act 18 U.S.C. § 3771



Guarantees crime victims rights to—

- Be reasonably protected from the accused.
- Reasonable, accurate, and timely notice of public court proceedings.
- Not be excluded.
- Be reasonably heard at any public proceeding.
- Confer with the attorney for the government.
- Full and timely restitution.
- Proceedings free from unreasonable delay.
- Be treated with fairness and with respect for their dignity and privacy.

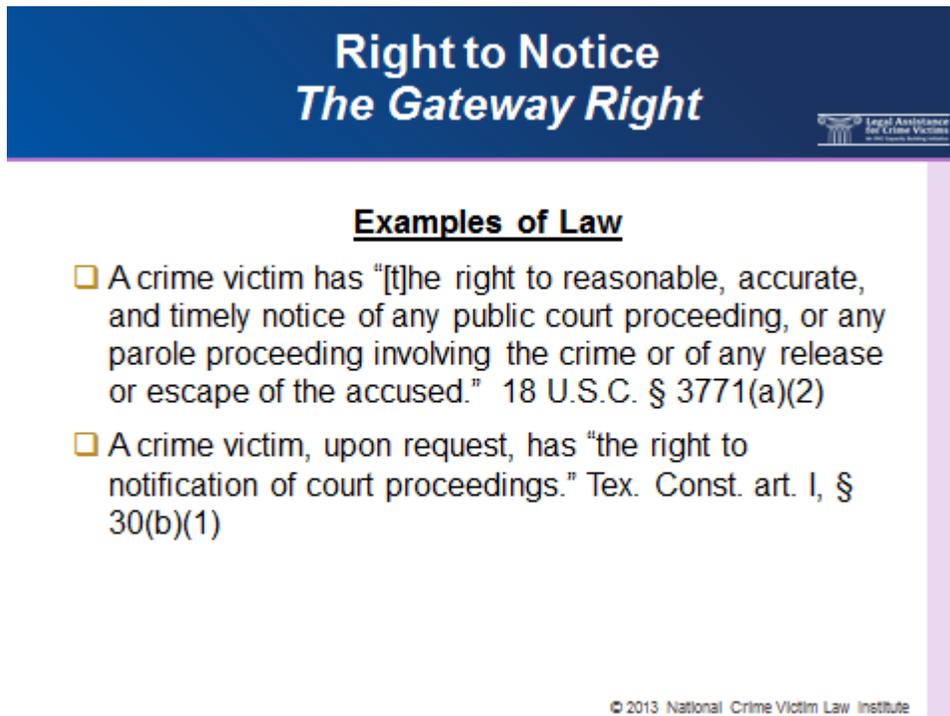
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Crime Victims' Rights Act

Rebecca Khalil: So before we start looking at the cases, we have got on the slide the federal Crime Victims' Rights Act. Now, we put up this slide because there is really good example language in here. These are the rights guaranteed by one provision in federal statute. And we have chosen this because it is a very good sample of sort of the core victims' rights. So you see rights up there. To be reasonably protected. Not excluded. Restitution. To be treated with fairness. Respect for dignity and privacy. These sorts of rights are the same sorts of rights that jurisdictions around the country have adopted to varying degrees and sort of in varying strengths. Some jurisdictions change the scope or the level of detail. They may not include some of these rights, or might limit the rights to certain types of offences. And some jurisdictions go further than these rights. They include extra rights. They may include, as you heard Meg mention earlier, a victim's right to refuse a defendant's discovery request, for example. And so this is just one example of what victims' rights look like. And for those of you who have a lot of experience with victims' rights already, this does not come as a surprise to you. And reading over it, the wording might be a little bit different, but a lot of these should seem very familiar. And for those who do not have a lot of experience yet, this is a really good snapshot of what victims' rights look like around the country.

Rebecca Khalil: And before I move on, one more note. Do not just look at a statute called the Victims' Rights Act, or a Constitutional amendment labeled explicitly Victims' Rights. Be sure to look elsewhere because there are statutes and rules and authority that can benefit victims beyond just a Victims' Rights Act. And so you want to be sure, especially in jurisdictions where these things are coming in piecemeal, some of these rights may have preexisted in a formal victims' rights amendment or victims' rights statute. So be sure to look outside of something with a title

saying Victims' Rights to make sure you are seeing the full scope of what you can use to benefit the victims you are working with. So let us look forward and take a look at a few examples.



Right to Notice
The Gateway Right

Legal Assistance
for Crime Victims
of the National Crime Victim Law Institute

Examples of Law

- ❑ A crime victim has “[t]he 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.” 18 U.S.C. § 3771(a)(2)
- ❑ A crime victim, upon request, has “the right to notification of court proceedings.” Tex. Const. art. I, § 30(b)(1)

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Right to Notice – The Gateway Right

Rebecca Khalil: So the Right to Notice is the first right we are going to take a look at. And we have a few examples of law on the screen, an example of the statute, the CVRA language, and then an example from the Texas Constitution as well. So notice is really the Gateway Right because without notice it is almost impossible for a victim to be able to exercise their other rights. And notice the language of the first one. We have got the Right to Notice that has to be reasonable, accurate, and timely. So notice really does have to be notice that actually does something. Because if a victim does not know if a proceeding is taking place and a victim has the right to be present and a right to be heard at that proceeding, they are not going to be able to exercise that right unless they know it is coming. So day-of notice is rarely of use to anybody. So it is one of those things where you have to make sure the notice is real notice and not just notice sort of done in a formalized sense where it does not provide the victim with the substantive opportunity to exercise their rights.

Right to Notice (continued) *The Gateway Right*



Examples of Enforcement

- ❑ *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472 (S.D. Ohio Feb. 18, 2009) (granting the victim's motion to unseal so he would have access to information to help him exercise his CVRA rights).
- ❑ *Edens v. Oregon Bd. of Parole Marion County*, Case Nos. 07C22594, 07C22595 (Or. Cir. Ct. Jan. 2008) (granting the victim's petition for writ of mandamus asking that the board be directed to vacate order reducing term after finding violations of the victim's rights).

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Rebecca Khalil: So we have got a few case examples on here, just issues of notice and sort of information. The first one is sort of an informational notice. You need more information to help exercise your rights. Almost a due process sort of sense of notice there. And then the second is an order that was issued because the victim did not have notice and an opportunity to be heard and present at a parole board hearing. So those are just a couple of examples for your future reference of how notice might play out in the real world.

Right not to be Excluded



Examples of Law

- ❑ A crime victim has “[t]he right to not 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.” 18 U.S.C. § 3771(a)(3)
- ❑ A crime victim, upon request, has “the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim’s testimony would be materially affected if the victim hears other testimony at the trial.” Tex. Const., art. I, § 30(b)(2)

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Right Not to be Excluded

Rebecca Khalil: The next right we are going to highlight is the Right Not to be Excluded. So the CVRA is a little unique because they phrase this as a Right Not to be Excluded. A number of other jurisdictions have chosen to phrase this in the affirmative as a Right to be Present. So here we use both phrases. Essentially, the right boils down to the same thing. Meg mentioned that Rule 615, the Exclusionary Rule. This is sort of the exact opposite of the Exclusionary Rule. This gives victims an affirmative right to be present during certain proceedings.

Right not to be Excluded



Examples of Enforcement

- ❑ *U.S. v. Edwards*, 526 F.3d 747 (11th Cir. 2008) (concluding criminal defendant has no constitutional right to exclude witnesses from the courtroom).
- ❑ *State v. Williams*, 960 A.2d 805 (N.J. Super. Ct. 2008) (rejecting defendant's argument that allowing the victim to remain in courtroom after testifying and be recalled to make in-court voice identification violated rights; court noted that defendant has no constitutional right to exclude witnesses, yet victim has a state constitutional right to be present).

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Rebecca Khalil: So let us look at a few examples of enforcement. And I will bring them right up together so you can take a look at them. So in contrast to a victim's right to be present which is explicitly there whether in statute or in Constitution, defendants have no Constitutional right to exclude the victims. At most, the defendant might have in some jurisdictions a rule-based right, so some vestige of that Rule 615, giving them an opportunity to exclude a victim who is also a witness. As Meg mentioned earlier and as I am sure you all already know, in the hierarchy of rights, when you have a rule-based opportunity to do something, and then a statutory or Constitutional entitlement, the statutory or Constitutional entitlement should win out. So these are two cases where that was actually the case and the court mentioned that defendants do not have this federal Constitutional right to exclude, whereas victims, in contrast, do have a right to be present.

Right to be Heard



Examples of Law

- ❑ A crime victim has “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” 18 U.S.C. § 3771(a)(4)
- ❑ A crime victim has the right “[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing” and “any proceeding when any post-conviction release from confinement is being considered.” Ariz. Const. art. II, § 2.1(A)(4), (9)

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Right to be Heard

Rebecca Khalil: So our next example is the Right to be Heard. So we have got our law examples on here. The right to be reasonably heard at the public proceedings. And these rights are phrased differently and, generally speaking, there is some kind of language in the Right saying that a victim has the right to be heard in certain proceedings. So let us see how that is playing out.

Right to be Heard



Examples of Enforcement

- ❑ *Kenna v. District Court*, 435 F.3d 1011 (9th Cir. 2006) (finding victim had indefeasible right to be heard at sentencing akin to defendant's right to allocution).
- ❑ *State v. Barrett*, 255 P.3d 472 (Or. 2011) (concluding that resentencing defendant as a remedy for violation for the victim's rights to advance notice of, to be present at, and to be heard at defendant's sentencing would not invalidate the conviction and would not violate double jeopardy).

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Rebecca Khalil: Examples of enforcement. These are two really, really excellent cases. The first case, the Kenna case in the Ninth Circuit, is a great example of a victim's right to be heard. And this case has language in it that I think is really interesting and speaks very directly to the way that victims' rights, the role the victims' rights need to play in a criminal proceeding. As the court in Kenna held, the system previously treated victims and expected that they should behave like—and this is the court's words—like good Victorian children; seen but not heard. And as the court continued on to say, the Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice proceedings. So if victims were expected to be seen and not heard—and I guess the more modern version of our history of victims' rights—sort of the cultural misconception of how victims' rights have been developed. This all was meant to be changed. This whole setup of excluding victims and putting them to the sideline or viewing them as simply a piece of evidence in connection with the prosecution. Victims' rights were meant to change that. And the Ninth Circuit really recognized that the right to be heard is a really key component of victims' rights.

Rebecca Khalil: In the second case that we have on here speaks both to the right to be heard and to issue of enforcement that Meg mentioned earlier. So she mentioned before the possibility of undoing a sentence. So in the Barrett case, the Oregon State Supreme Court heard an issue where a victim had the right to notice, to be present, and to be heard in connection with a sentencing proceeding. And for a number of different reasons, the victim did not get notice in time and the victim was not heard in connection with that proceeding. So the victim appealed. The victim wanted a remedy. And the remedy the victim sought was to undo the sentencing proceeding. And so this went all the way up to the Oregon State Supreme Court. The defendant was arguing, "This violates my double jeopardy rights. Having another sentencing proceeding would essentially put me in jeopardy twice and I do not want it to happen." And the Oregon Supreme Court looked at this in quite a bit of detail and concluded that no, this would not invalidate the conviction. It does

not violate double jeopardy, and that the victim could have the sentence undone and sent back down the trial court to redo it, which is exactly what happened. At the trial court level, the judge apologized to the victim that this had happened. And when the new sentence was imposed, this was ultimately a higher sentence that was imposed and the victim was able to participate and her voice was able to be heard.

Right to Privacy



Examples of Law

- ❑ A crime victim has “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.” 18 U.S.C. § 3771(a)(8)
- ❑ A crime victim has “the right to be treated with fairness and with respect for the victim’s dignity and privacy throughout the criminal justice process.” Tex. Const. art. I, § 30(a)(1)

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Right to Privacy

Rebecca Khalil: So the next example we are going to turn to is the Right to Privacy. On the screen you can see some language about how the Right to Privacy might appear in a statute or in the Constitution. So how does privacy come up in practice? So we have on the screen a couple of examples of how a victim’s name or identity or victim’s family name might be redacted or pseudonyms used in a criminal proceeding in order to preserve the victim’s privacy. And this is not uncommon. I am sure everyone who has practiced in criminal law has heard of situations generally involving child victims or sexual assault where, as a matter of course, victims are proceeding by pseudonym. So in a published opinion they will not refer to the victim by name, but they will use initials or they will use a John Doe or Jane Doe, or some other pseudonym that is designed to protect the victim. And the Right to Privacy is not limited to any particular subset of victim. So the Right to Privacy can be invoked to protect the privacy of victims if courts are getting pushback or if it just is not something that someone thought would be a problem at the outset. We have seen a case here at NCVLI involving a prosecution for a robbery—not a sexual assault, not a child victim—where the victim was able to proceed by a pseudonym, by initials, because the disclosure of her identity would have impacted her business in a very negative way. So these rights can be used to help victims in a context that maybe courts are not as familiar with. But practitioners are encouraged to think broadly about how they might be used because you might be surprised. And victims can benefit from privacy even outside the context of some of these more traditional cases.

Right to Privacy



Examples of Enforcement

- ❑ *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 CVRA guaranteeing the victim's right to be treated with respect for his or her dignity and privacy).
- ❑ *Dirden v. State*, No. 09-10-00200-CR, 2012 WL 983182, n. 2 (Tex. Ct. App. Mar. 2012) (not designated for publication) (using the pseudonym "Sandy Doe" at trial and on appeal "[t]o protect the minor's privacy in accordance with the state constitutional right to be treated with respect for the victim's dignity and privacy."

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Rebecca Khalil: So in addition to redaction and pseudonyms, the Right to Privacy comes up a lot in the context of subpoenas for victims' private information. So defendants primarily, although these requests can come from prosecution as well, they may subpoena a victim's diary, counseling records, school records, e-mail records. Meg had mentioned Facebook messages, wall posts, things of that nature. If it is out there, it has probably been requested, and a victim's right to privacy is an additional basis in which you can seek to quash that subpoena.

Some Practice Pointers



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Some Practice Pointers

Rebecca Khalil: So now that we have sort of an overview of the types of rights that are there, and the few that we have just highlighted, examples of how they have been enforced in practice, the question is how do we go about really doing this stuff. So now that you have these rights, and now that you have seen a little bit of case law showing how the courts are looking at victims' rights and how they have been putting them into the real world, how they have been using them. So you have a client, a victim who comes to you and who wants to exercise their right. The first question is, what, very practically speaking, do you do about this?

As You Enter the Case . . .

Legal Assistance for Crime Victims

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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As You Enter the Case . . .



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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As You Enter the Case . . .



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 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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As You Enter the Case

Rebecca Khalil: So as you enter the case, step one. This is going to sound very basic, but I am going to explain why it is not quite as simple as it seems. Identify the legal victims. So you might be the attorney in the case, having victims coming to you seeking representation. The statute or the Constitution that provides the victims' rights often provides a definition of who constitutes a victim. And that might not just be one person. There may be multiple persons who constitute victims in connection with a criminal proceeding. So if you are the attorney and you have parents, say you have a child victim coming in to you, both parents, mom and dad, might qualify under laws being victims entitled to assert their rights in addition to the child, him or herself. So you have to determine who is the victim and you have to think about conflicts. So this is not something you necessarily always think about in a very conscience sense when you have one person coming to you with one issue and one right they want to vindicate. But it is really important because conflicts can arise at any point in the proceeding and you have to know how many victims there are. You have to determine who you are representing. So if you have mom, dad, and child all coming to you wanting to assert their victims' rights, you have to determine, are you representing mom? Are you representing dad? Are you representing both parents? Are you representing the child? The child and the parent? Any combination of people could be your actual clients. So you have to figure out who the victims are, who has the rights, and then determine whether there are surmountable or insurmountable conflicts or hurdles sort of in your path to representing one or all of these folks.

Rebecca Khalil: So once you have done that, you want to look at the stage of the case. And this is really important for determining what rights have sort of kicked in, what rights are right for litigation, or what rights your victim needs to expect coming down the pike, and which ones you need to see sort of out there on the horizon. And it is not the case that victims' rights only apply once an information or an indictment has been filed. Many victims' rights apply in the pre-charging stages as well. So be sure and identify what stage of the case you are at so you can start thinking about what rights there are and which rights your victim might want to assert.

Rebecca Khalil: And similarly, you might want to take a look at what has already happened, what is going to be happening. Planning is really important when it comes to asserting victims' rights and enforcing victims' rights because there is a lot of strategy involved. Almost all of the rights are something that can be litigated at the pretrial stage. And in most situations, that is probably what you are going to want to do, because you do not want to find out on the eve of trial, for example, that all of a sudden the defendant has filed a motion to exclude your victim from the courtroom, because then your victim is faced with a choice. Your victim has a right to be present. The victim might also have an interest in getting the show on the road. Sometimes the trial process stretches out over a considerable period of time and you do not want a victim to be forced to choose between different rights and interests if you can avoid it. So oftentimes these things are best litigated in advance so that you have time to seek an appeal. Or if you do not have a statutory right to appeal, to seek a writ of mandate in advance for time for a decision from a higher court to come back down and be enforced before a trial goes forward. So planning is really important.

Rebecca Khalil: And you also want to take a look at whether there are time limits for challenging previous violations. So some jurisdictions put a time limit on bringing up a victim's rights. For example, they might say once a violation of a victim's rights is known by the victim, they have 30 days to go into court and assert that right and seek a remedy. So you will need to know when did the 30 days start? When did the victim find out about this violation? And where are you at now? And even if it is passed whatever appears to be your statutory time limit, if you have got one, you want to take a look back to the idea of notice. Did the victim know what was going on so they

even knew there was a violation? And would that 30-day clock have even started? So all these things are things you want to do at the very outset of a case.

Rebecca Khalil: And then as you go forward, this seems really straightforward, but ask the client which rights he or she wishes to assert. It can be easy for us when we are training on this to just assume for the sake of convenience that a victim wants to assert every single right to its utmost. But that is not always the case. And victims' rights at their heart are a matter of choice and a matter of autonomy. So the victim has a choice about what rights they want to assert and how strenuously or to what degree they want to assert them. So it is important to check with your victims and not assume that just because something has been subpoenaed that they necessarily want to fight tooth and nail to make sure a defendant does not get a hold of it, because that might not be the battle they want to fight and it might not be something that they feel to be that important. So just a reminder there.

Rebecca Khalil: And then identify whether violations have occurred and prepare for future assertion of rights. So a good example here is the Right to Restitution. The Right to Restitution is something that comes up sort of throughout the trial process, because while you are talking to the prosecutor and the prosecutor might be mentioning plea agreements, right there in a pre-conviction sort of moment is when restitution also becomes really important. What happens if a charge gets dropped as part of a plea agreement? What if that charge is the only charge relating to your victim? So ensure that your victim's right to restitution is kept intact you will need to work with that prosecutor to make sure that the restitution is written into the plea agreement. Another example relating to restitution is the collection of receipts and evidence and sort of listing of all the expenses related to a case, because it is hard to think at the end of a process, when you have got a conviction, when you are proceeding to sentencing, it is a lot harder to think then and try and document all the expenses associated that you have incurred as a result of a crime than it is to be documenting these things as you go along. And you want to think broadly. You do not want to wait until the end and then try to categorize this when there is a lot going on at the time of sentencing. You want to make sure that you are doing this the entire way along the process.

Rebecca Khalil: So once you are in, you want to introduce yourself to the defense counsel, the prosecutor, file a notice of appearance and assertion of rights. And filing a notice of appearance really facilitates the notice process. It puts everyone, even more than introducing yourself to defense counsel or prosecution, it puts everyone on formal notice that the victim is represented, that they are asserting their rights, and it also takes into effect all the ethical rules prohibiting contact with represented persons. So you want everybody to know that your client is represented so they are not contacting the client without your knowledge.

Rebecca Khalil: And you also need to make sure that you are filing any forms that are required to trigger notice obligations. So an example of where this comes up is in the post-conviction context very frequently. Often a different agency, once a defendant is incarcerated, a different agency is taking control of that defendant and will be responsible for giving notice of parole board hearings, of release, things of that nature. And if computer programs, if the computer systems do not speak to each other efficiently in different jurisdictions, they may require that an additional form be filed to make sure that the agency with custody is getting the information they need to give a victim notice on release.

Rebecca Khalil: And final strategy moment, as you are entering the case you may want to advise record holders that the victim is represented by counsel. So for example, a school or a doctor's office or a counseling service, that the victim is represented by counsel. So if they get a subpoena, they will be able to let you know if your notice fails, if you do not get notice of the subpoena the

way you are supposed to, hopefully they will be able to clue you in to that, and to let them know if you intend to fight that. And generally speaking, these entities have a process for opposing, particularly release of privileged information, but it is good to have a failsafe in there just to make sure you have an additional contact out there and that they know this stuff should not go out and that victims have rights and they have an attorney there protecting their rights.

When To Take Action



Practice
Pointer:
*Pretrial
Litigation
Strategies*

**Don't wait to take action
until your client's rights
have been violated.**

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Where To Take Action

Rebecca Khalil: So when do you take action? As we mentioned before, pretrial litigation is a really invaluable thing. It really helps to clarify rights in advance and helps avoid surprises and it can be really beneficial to victims, whether the victim has been through the system before or not. If the victim has experience with the criminal justice system, if they have been a victim of crime previously and perhaps their rights were not afforded, it can be really helpful for them to know that you are there, you are going to fight for their rights, and you are going to make sure that every step along the way you can give them as much clarity as possible. So do not wait to take action until the client's rights have already been violated. You may want to take proactive action such as filing a motion seeking the ability of the victim to be present during trial. The victim has the right to be present during trial, but it can be helpful to get clarity at the outset to make sure that things do not pop up on the eve of trial and that the victim is not put in a difficult position with not a lot of time left to litigate things.

Pretrial Litigation Strategies



Anticipate issues for motion practice

Prepare the victim for participating in court

Prepare to seek victim restitution

Know your appellate review options

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Pretrial Litigation Strategies

Rebecca Khalil: So pretrial litigation strategies. These are very generic sort of summaries of some of the things that we have already discussed. Anticipate issues for motion practice. You need to sort of be looking on the horizon to see what is out there so you can file motions in advance. And be prepared not only as the attorney, but prepare your client for what might happen. Clients might have no idea that defendants routinely try and subpoena medical records, for example, or mental health records. It can be a good thing for victims to be aware of that this might happen so it does not catch them coming from out of left field, and that they know you have a plan in place and you are ready to fight these things if they want to.

Rebecca Khalil: And prepare the victim for participation in court. So this preparation might include explaining procedures, explaining the way a courtroom is set up. For the example of children there are a lot of programs where they take kids into the courtroom and let them feel it out. So the courtroom is definitely not a comfortable place to be, especially if you are the victim of crime and especially if it is not a place you are every day. So just getting used to the players and what might happen and where do you sit, where do you go, where will the defendant's family be sitting, where will the defendant be. All these things are very practical things that victims often want to know and do not know and might not feel comfortable asking on their own. But preparing the victim for participating in court also includes ensuring that adequate support systems are in place to provide the victim the sort of sense of comfort and support because it can be really hard to go into these proceedings. And even if the victim thinks they are going to be okay, there may be some backlash afterwards that they need to have folks in place to help them deal with because it is often not a very comfortable experience.

Rebecca Khalil: And prepare to seek restitution. As we mentioned before, restitution is something that comes up, generally speaking, at the end of a criminal process, but it is something you need to be thinking about at the very beginning because so many cases are resolved by plea and because the plea process can help preserve a victim's right to restitution if charges are being dropped as part of a plea agreement.

Rebecca Khalil: And know your appellate review options. So as Meg mentioned earlier, the right to appeal is really a statutory creation, the ability to use the word "appeal" and get review that way. But there are other options out there. So you might have to seek a writ of mandate. Some jurisdictions call it a writ of mandamus. You may seek a writ of prohibition. So know that in addition to an explicit statutory right to appeal, you have other ways of getting appellate review to get your victim's rights enforced.

Legal Assistance for Crime Victims

Practice Pointer:
Don't do it alone

Victims need system-based advocates, community-based advocates, and attorneys to work together.

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Rebecca Khalil: And a very general practice pointer but one that is incredibly important, do not go it alone. This is not something that you want to have...It is great when a victim has a victims' rights attorney on their side. They are able to interact with a prosecutor. The victims' rights advocate with community resources. It is not a situation where a victim needs to be alone in the process. And there are so many resources with complementary skills and abilities that a victim really should be able to feel like they can turn anywhere and get the help that they need. It is important to know the resources in your area and know the victims' advocates, know the prosecutors, and know what is out there. Because attorneys cannot do everything for their victim. But when we are working with these other players in the system, we can make sure that victims are really getting the sorts of help that they need to support them throughout the process.

QUESTIONS?



Questions

Rebecca Khalil: So we are going to open it up for questions. And we have gotten a couple of really good ones as the Webinar has gone on. We have had a lot of folks write in. Meg already answered one of the questions about the right to appeal. And we do not have time to go over all of them so I will just cover a few. And if we do not get to everyone's question, or if you think of a question after the Webinar is over, feel free to send us an e-mail asking your question and we will be able to get back to you. And let me just give you the e-mail address very quickly. It is www.ncvli@lclark.edu. So if I do not get to your question or if you think of another question after the Webinar concludes, feel free to shoot us an e-mail and ask it.

Rebecca Khalil: So the first question we have says: If I want to file a motion to assert a right, will it not go better if I get the prosecutor to do it so I do not have to fight the standing battle? And this is a really good question because oftentimes prosecutors are on board with this stuff and oftentimes prosecutors are willing to file the motions and fight the battles on behalf of the victim. So from a client-control perspective, if this is something you are discussing with your victim who is your client and they really prefer that a prosecutor do it, and a prosecutor has standing to do it, that is definitely an option. We want to mention also that from a movement perspective, these rights, these victims' rights are really individual rights. Prosecutors cannot waive them. They belong to the victims themselves. And if a victim wants their attorney to fight these things, you are going to need to fight the standing battle. And in a very practical sense as well, you are not going to have standing on appeal if you do not file the papers. So if the prosecutor files a motion asserting the victim's rights and the ruling does not go the way you want, you are going to have to come in with a motion to reconsider in order to have argued the issues and preserve them so you

can seek appellate review later. So from a practical standpoint, it can be really valuable for the victim to have their own attorney, and from a victim-empowerment standpoint, all the research is clear that ownership over narrative matters and ownership over their rights matters. So having an attorney who can help a victim do this individually and express their voice and help express their position on these rights can have independent value aside from the ability to have the prosecutor do this, even if the prosecutor is willing to. So it may come down to case by case, but be careful that you do not lose your ability to seek appellate review by not weighing in on the issues at all.

Rebecca Khalil: All right, let us move to the next question. The next question we have is: In our jurisdiction the court does not accept entries of appearance, notices of appearance. What should we do? So this is a problem that NCVLI is experiencing, has experienced in various jurisdictions around the country. And we encourage you to contact us so that we can help you litigate the issue because this is the history of victims' rights. Every jurisdiction, even those jurisdictions where things work very smoothly now and notices of appearance are routinely accepted, every jurisdiction starts out with some form of non-acceptance, or at least surprise or shock. Sometimes outright rejection of a victim filing a notice of appearance, a victim's attorney. But as we litigate these issues we can help set up the appeal to preserve the right and establish it for later cases. So very general advice. If you have a jurisdiction that you think might not be particularly receptive to an attorney filing a notice of appeal on behalf of a victims' rights issue, we suggest that you do not file the notice of appeal until you have a specific right at issue. Because this helps setup the appeal and it makes sure that a victim is asserting a very specific right at a very specific point in time. So it kind of gets rid of the ripeness/mootness problems that happen to arise. It is not a general assertion of a right. It is a specific assertion of a specific right at a specific time in a specific case. So that can help. But if you are having problems with this, definitely contact us because NCVLI has worked with this issue in jurisdictions across the country and we are happy to help you out more.

Rebecca Khalil: Let us turn to one more question here because we only have a few more minutes left. So this is sort of a two-part question. So the first part: What happens if a victim wants to assert their rights and the assertion of their rights is 100 percent guaranteed to hurt the outcome of the prosecution? So it is going to hurt the prosecutor's case. The ultimate answer is these rights belong to the victim. They are personal to the victim and the victim has the ability to exercise those rights. And this problem does not always happen, but it occasionally does and it highlights the potential conflicts that can arise between a prosecutor's interests and a victim's interests. So NCVLI does a number of trainings on some of these ethical conflicts. I do not know who asked this question, but if a prosecutor is interested in a training on this, sort of boundaries of rights, let us know and we can help you out with that. But ultimately, the bottom line is these rights do belong to the victims and the victims have the ability to assert their rights. And sometimes the assertion of those rights are going to conflict with what the prosecutor might want to do, which is another reason why it can be really beneficial for a victim to have their own attorney because that creates an (unclear) conflict if the victim was hoping the prosecutor might be able to assert that right for them.

Rebecca Khalil: And so the second part of that question, of that two-part question was: Is not it best for my client if I work closely with the prosecution and ensure that the relationship is a good one rather than litigating too much? And the answer is definitely yes. We encourage folks to work closely with the prosecution, and a number of victims' rights attorneys, most of the people we work with have an excellent relationship with the prosecutors that they are interacting with. But as I mentioned before, sometimes conflicts arise and sometimes a victim needs their own attorney to press these issues. Sometimes positions diverge or a victim simply needs their individual voice to be heard separate from a position of the state. Even if those positions do seem to align fairly

closely, it can be really beneficial for a victim's own voice to be heard and a victims' rights attorney can help them do that.

Rebecca Khalil: So that brings us to the end of our time for the questions. Again, if we did not get to your question, let us know and send us an e-mail. Our e-mail is on this slide. So we have www.ncvli@lclark.edu. So shoot us an e-mail if we were not able to get to your question and we are happy to answer you.

Rebecca Khalil: So final thoughts. We have had a few folks request a certificate of completion for this. If you would like a certificate of completion, please send an e-mail to our e-mail address on the screen at www.ncvli@lclark.edu, and include the code on the screen. VR4ATTY2013. And once we receive your e-mail with the code, we can send you out a certificate of completion.

Rebecca Khalil: And one final note. There are two brief surveys that are going to follow the conclusion of this Webinar. One of them, when you X out of the Webinar, it will pop up automatically on your screen. I believe it has five short questions. It should take a few seconds to complete. That one will be right there. And the second survey we are going to send you a link to and an e-mail follow-up after the conclusion of the Webinar. So if you could take the time to please do both surveys. They ask different questions. They measure different things, and they are both very important to us. So please take the time to do both surveys and get the responses back to us.

Rebecca Khalil: And again, stay tuned. We have more Webinars coming up. We have the Webinar for advocates on Thursday. Later in July, we are going to have a second Webinar on pretrial privacy and motions to quash, which came up a lot as examples during this Webinar. So we will be addressing that directly, as well as a future Webinar on *Neurobiology of Trauma* at the end of July. So stay tuned for more. If you have additional questions, feel free to e-mail us or contact us on our Website and we are happy to help. Thank you for joining us today.